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Richard A. Nagareda

*University of Georgia School of Law*

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# TURNING FROM TORT TO ADMINISTRATION

Richard A. Nagareda\*

Settlements of tort suits ordinarily do not make front-page headlines. Two recent efforts to effect class action settlements for workers exposed to asbestos products<sup>1</sup> and recipients of silicone gel breast implants<sup>2</sup> are hardly ordinary, however, just as asbestos and breast implants are not the subjects of ordinary tort suits. Instead, litigation over these products exemplifies the phenomenon of mass torts: it involves conduct alleged to be tortious and to affect large numbers of people by means of a mass-marketed product — in particular, a product thought to give rise to recurring patterns of injury that may remain latent for years or even decades.<sup>3</sup>

The notion that tort claims might be resolved through settlement agreements is not new. The recent settlement agreements,

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\* Assistant Professor, University of Georgia School of Law. A.B. 1985, Stanford; J.D. 1988, University of Chicago. — Ed. During the period 1991-94, the author was an associate with the law firm of Shea & Gardner, which represented the Center for Claims Resolution in the *Georgine* asbestos settlement discussed herein. The Center is a nonprofit organization that coordinates the legal representation of some 20 companies formerly involved in the asbestos industry. The author did not take part personally in the *Georgine* proceedings, however, and the views expressed here do not necessarily reflect those of the Center. A grant from the University of Georgia School of Law provided financial support for this paper. John Duffy, Anne Dupre, Robert Hillman, Paul Kurtz, John McGinnis, John Mills, Mark Movsesian, Alex Passantino, Michael Wells, Christen Wheeler, and Rebecca White provided helpful comments.

1. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). This litigation originally was styled as *Carlough v. Amchem Prods., Inc.* As described in greater detail *infra*, the settlement approved by the court in *Georgine* reaches product liability claims of persons occupationally exposed to asbestos products from any of the 20 companies collectively represented by the Center for Claims Resolution. The settlement does not affect other members of the asbestos industry, such as Johns-Manville. Moreover, the settlement is limited to occupationally exposed persons who had not sued yet in tort as of January 15, 1993, the date on which the settling parties submitted their agreement to the court, see *Georgine*, 157 F.R.D. at 257; the agreement accordingly does not reach pending claims already on file at that time in any forum. For ease of reference, I cite throughout this paper not only to the pertinent page of the *Georgine* opinion but also, when possible, to the relevant numbered paragraph thereof.

2. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.), No. CV92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) [hereinafter *Lindsey* (Sept. 1, 1994)].

3. The same description applies to earlier mass torts, involving such products as the defoliant Agent Orange and the drug Bendectin. I use the locution "alleged to be" and similar language to clarify that at least some mass tort settlements may come at a time when issues of medical causation — whether the product in question actually caused injury under a preponderance standard — remain unresolved. See *infra* notes 96-101 and accompanying text.

however, are visionary in their substance. Each seeks to replace traditional tort litigation with a private administrative framework. Their goal is to provide timely compensation to mass tort plaintiffs by way of streamlined claim procedures while affording defendants greater certainty as to their potential tort liabilities. Repose, however, does not come cheaply. For defendants, the cost of a mass tort settlement can run into the billions of dollars.<sup>4</sup> On the plaintiffs' side, moreover, timely compensation entails the relinquishment of the right to sue in the common law tort system.

To bring about such a resolution, the recent settlements use the class action device in an unprecedented fashion. They are unlike conventional class action lawsuits in which settlement comes in the aftermath of discovery and other preparations for trial. Instead, class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure have served simply as the procedural device to embody the settlement in a judgment that will bind future claimants — namely, persons exposed to the product in question but who have yet to suffer any ill effects.<sup>5</sup> Specifically, class members who do not affirmatively opt out of the recent settlements as contemplated in Rule 23(b)(3) will be bound to the compensation terms set forth therein, at least for the duration of those agreements.

Although both of the settlements garnered approval at the district court level, their ultimate operation remains in the offing. Challenges to the asbestos settlement are likely to wind their way through the appellate courts for some time. In the case of the breast implant settlement, an unexpectedly high number of claims led to the demise of the original deal, which had posited a fixed sum for the payment of all compensation claims. Although renegotiation efforts have produced a second agreement that covers some manufacturers, the largest of them — Dow Corning — recently declared bankruptcy, with the result that tort claims against it are unlikely to be resolved soon in any manner.<sup>6</sup> Commentators

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4. In its original form, the breast implant settlement entailed the commitment of over \$4.2 billion by manufacturers toward compensation of product users. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*1.

5. Rule 23(b)(3) provides that a class action may be maintained upon a judicial finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3); cf. *infra* section III.C.2.a (discussing potential obstacles to class certification). Subsections (c)(2) and (c)(3) of Rule 23, in turn, afford members of the plaintiff class the opportunity to remove themselves — to opt out — from a (b)(3) class action.

6. See *supra* notes 1-2 (citing district court opinions approving the settlements for fairness). A collateral challenge to the jurisdiction of the *Georgine* court and to its certification of the plaintiff class is currently pending before the Third Circuit. See *Georgine v. Amchem*

nonetheless have been quick to recognize that, whatever the ultimate fate of these particular settlement agreements, the two stand as models for the future of mass torts. The transformation from tort to administration envisioned by such agreements involves what Peter Schuck has described aptly as "institutional evolutionism": the ad hoc, experimental development of alternatives to traditional tort litigation for the treatment of mass torts.<sup>7</sup> The notion is not to tinker at the margins with the common law tort system but, instead, to conceive of new institutions for whole categories of mass tort actions. As Judge Jack Weinstein recently has observed, "[n]onlitigation settlements giving effective help to those who think they have been injured, without destroying those believed to be at fault, are the wave of the future."<sup>8</sup> Indeed, with the increased attention devoted to such subjects as the Norplant contraceptive, nicotine in tobacco products, and repetitive stress injuries,<sup>9</sup> the potential field for application of mass tort settlements continues to expand rapidly.

That mass tort settlements have the potential to affect the lives and livelihoods of many on an unprecedented scale is indisputable. The principal architects of these settlements, however, have not

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Prods., Inc., Nos. 94-1925 et al. (3d Cir. filed Sept. 22, 1994); *infra* section III.C.2. In addition, direct appeal of the district court's fairness determination in *Georgine* remains to be had. On the problems leading to renegotiation of the breast implant settlement, see Barry Meier, *A Judge and a Deadline: The Breast Implant Case*, N.Y. TIMES, Sept. 29, 1995, at A8; Barry Meier, *3 Makers of Breast Implants Offer a Revised Settlement*, N.Y. TIMES, Oct. 3, 1995, at A1, A9 [hereinafter Meier, *Revised Settlement*]. Although Dow Corning has declared bankruptcy, see Barnaby J. Feder, *Dow Corning In Bankruptcy Over Lawsuits*, N.Y. TIMES, May 16, 1995, at A1, D6, its solvent parent — Dow Chemical — remains the subject of active litigation with respect to breast implants, see Barry Meier, *Dow Chemical Must Pay \$10 Million in Damages*, N.Y. TIMES, Oct. 31, 1995, at A8 (describing punitive damage verdict in individual tort action based upon, *inter alia*, the performance by Dow Chemical of studies on silicone for Dow Corning); see also Alison Frankel, *Dow Corning Goes For Broke*, AM. LAW., Jan./Feb. 1996, at 78-83; Barry Meier, *Dow Chemical in the Center of a Storm*, N.Y. TIMES, Nov. 1, 1995, at C2.

7. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 944 (1995).

8. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 4 (1995); see also Gina Kolata, *3 Companies in Landmark Accord on Lawsuits Over Breast Implants*, N.Y. TIMES, Mar. 24, 1994, at A1, B10 [hereinafter Kolata, *Landmark Accord*] (quoting observation of Geoffrey Miller that breast implant settlement will "be a model for future class-action litigation").

9. See, e.g., Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. TIMES, May 28, 1995, § 3, at 1 (describing tort liability issues surrounding the safety of Norplant); see also *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La.) (certifying class action against tobacco industry on behalf of all nicotine addicted persons in the United States), *appeal docketed*, No. 95-00117 (5th Cir. May 25, 1995); Steve Lohr, *Vigorous Defense Stalls Injury Claims On Repetitive Strain*, N.Y. TIMES, May 29, 1995, at 27 (noting that defendants have thus far succeeded in rebuffing suits for repetitive stress injuries).

been the courts, legislatures, or public administrative agencies, much less the legal academy. Instead, the key players have been private attorneys whose own entrepreneurial incentives potentially could conflict with the interests of the plaintiff class that they purport to represent.<sup>10</sup> It is this risk of agency costs — the concern that class counsel might be faithful to their own pocketbooks but unfaithful to the plaintiff class — that supports the requirement in Rule 23(e) that a court must pass upon the fairness of a class action settlement.<sup>11</sup> The idea is that judicial review may substitute for the direct monitoring of counsel by the client, as is typical in traditional litigation on behalf of an individual plaintiff.

My objective here is to challenge the notion that the recent mass tort settlements — for all their novel qualities in the mass tort area — are truly *sui generis* in the law. Rather, I contend that the rise of such settlements in tort mirrors the development of public administrative agencies earlier in this century — that, in both instances, powerful new institutions emerged outside preexisting channels of control to wield significant power over human lives and resources. I argue that courts usefully may draw upon familiar doctrines of judicial review in administrative law to form a conceptual framework for their analysis of mass tort settlements under Rule 23(e). In other words, not only should the law turn from tort to administration in terms of the compensation system for mass tort plaintiffs, it also should make a similar shift in perspective when it comes to

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10. See Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEXAS L. REV. 1587, 1620 (1995) (remarking that, in creating the recent mass tort settlements, “plaintiff and defense attorneys clearly have taken control of the dispute resolution process”).

Scholarship on entrepreneurial litigation by plaintiff class counsel has its roots in the context of corporate and securities litigation. 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) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; see also John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) [hereinafter Macey & Miller, *Plaintiffs' Attorney's Role*]. As discussed *infra*, these commentators recently have extended their respective analyses to mass tort settlements. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*]; John C. Coffee, Jr., *Summary, The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Jonathan R. Macey & Geoffrey P. Miller, *Comment, A Market Approach to Tort Reform Via Rule 23*, 80 CORNELL L. REV. 909 (1995) [hereinafter Macey & Miller, *Market Approach*].

11. The requirement of judicial approval extends to class actions generally, not merely to those involving mass torts. The case for judicial review of settlements in the mass tort area is especially strong, however, given the sweeping effect of such agreements. See *infra* section II.B (discussing the reasons for divergence between the interests of class counsel in a mass tort settlement and the interests of class members).

judicial review. Such an administrative perspective is not without its own limitations, however, and recognition of those constraints may point the way toward an agenda for further developments in public law.

In Part I, I set forth the distinctive characteristics of mass torts and their implications for the economic structure of the mass tort bar. I then relate the recent mass tort settlements to developments during the 1980s, from the recognition of innovative theories of tort liability and damages to the use of statistical methods to facilitate the disposition, in aggregate, of large numbers of tort actions. The recent settlements represent an attempt to overcome the inadequacies of these earlier innovations. Although there remains some degree of variation, one may discern an emerging pattern of attributes for mass tort settlements, and I enumerate them with attention to their institutional advantages and the prospects for their future application. Readers already familiar with the history of mass tort litigation and the structure of the recent settlements simply may peruse this Part.

Next, in Part II, I explore the implications of the class action device for judicial review of mass tort settlements. Specifically, I detail the need for review to safeguard the fairness of such settlements in the face of the agency cost problems engendered by the entrepreneurial incentives of class counsel. As I discuss, these problems stem from the possibility that counsel for the plaintiff class may wish to “reinvest” the fees gained from the class representation in the development of some new, uncharted field of mass tort litigation.

In Part III, I explain how doctrines developed for judicial review of rulemaking by public administrative agencies form a coherent framework for judicial review of mass tort settlements under Rule 23(e). Specifically, the courts should conceive of such review along the lines of the “hard look” doctrine, which demands that administrative agencies provide reasoned explanations for their actions in light of criticism from interested parties received through a notice-and-comment process. Indeed, current law contains the rudimentary elements of such a system, albeit without recognition of its administrative law roots.

I demonstrate how this administrative perspective responds to the major problems that other commentators — principally, Professor John Coffee — have identified with respect to the recent mass tort settlements. In Professor Coffee’s view, the courts should develop what amount to rigid, *per se* rules for the structure of mass

tort settlements and the selection of class counsel. As I show, that approach not only stems from erroneous premises regarding the recent settlements but also would represent a misguided and overbroad response to the problem of agency costs.

I then discuss the normative limitations of such an administrative perspective. Although a conception drawn from administrative law does make for a workable system of judicial review, such a perspective fails to legitimize the sweeping power that private counsel exercise through such agreements. Public administrative agencies derive their authority to effect binding regulation by virtue of rulemaking power delegated from Congress; no one, in contrast, has delegated comparable power to the mass tort bar. As a result, unresolved questions continue to surround mass tort settlements regarding the propriety of class certification and the basis for personal jurisdiction over future claimants within the plaintiff class.

To address this crisis of legitimacy, I offer in Part IV an agenda for public law — one that would preserve the advantages of private negotiation over the appropriate compensation terms for mass torts, but that would draw upon the unique regulatory authority of government to give binding force to those terms. Such a regime would not entail the creation of a vast new public bureaucracy. Rather, Congress should draw upon the Negotiated Rulemaking Act of 1990<sup>12</sup> as a model for a statutory framework in which public administrative agencies would act as the facilitators of private agreements to resolve mass torts and the courts would continue to safeguard mass tort plaintiffs against agency costs.

## I. TURNING FROM TORT

### A. *The Character of Mass Torts*

The recent class action settlements do not represent the first effort to deal with the challenges of mass torts, both as a matter of tort doctrine and as a problem of judicial administration. Rather, they simply are the latest stage in an ongoing effort to adapt legal institutions to the distinctive features of this phenomenon. Here, I discuss these features, with special emphasis upon their implications for the structure and economic incentives of the mass tort bar.

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12. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (1994).

### 1. *Breaking the Traditional Mold*

The classic tort cases of the common law stem from idiosyncratic events: an errant cricket ball konks Bessie Stone;<sup>13</sup> a railway scale becomes dislodged and strikes Helen Palsgraf when a nearby passenger drops a bundle of fireworks;<sup>14</sup> waitress Gladys Escola suffers lacerations to her hand from an exploding Coke bottle.<sup>15</sup> This is the stuff that introduces budding lawyers to the common law of tort. However extraordinary the facts of these cases may seem, their fundamental structure is both relatively simple and typical of traditional tort litigation: there is a single, identified plaintiff who claims to be hurt here and now by a specific defendant and the resolution of the plaintiff's claim — whether she receives damages and, if so, in what amount — has only an indirect bearing, at best, upon other pending tort suits.<sup>16</sup>

Mass torts diverge from this familiar pattern. They characteristically involve large numbers of persons who claim to suffer injuries that come in recurring patterns. The number of people involved and the recurring nature of their injuries are interrelated. Both stem from the uniform character of products in a modern industrial economy. Where manufacturers have marketed a product on a nationwide basis and that product later proves to be harmful, it is likely that adverse consequences will occur in patterns, given the fundamental similarities in human physiology from person to person. Thus, for example, the maladies of persons who inhaled asbestos fibers into their lungs come in a handful of distinctive types.<sup>17</sup> Likewise, one readily may place into a few discrete categories the afflictions that breast implant recipients assert.<sup>18</sup>

Sheer numbers, however, are not the defining feature of mass torts. Indeed, commentators use a different term — “mass accident” — to describe tortious conduct that happens to strike large numbers of people in similar ways. The most familiar torts of this variety consist of localized disasters associated with some physical

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13. *Bolton v. Stone*, 1951 App. Cas. 850.

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

15. *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

16. See PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 6-9 (enlarged ed. 1987) [hereinafter SCHUCK, AGENT ORANGE ON TRIAL]; Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1487-88 (1992).

17. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 269 (¶ 51) (E.D. Pa. 1994).

18. See Breast Implant Litigation Settlement Notice at exh. D, *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (*Lindsey v. Dow Corning Corp.*), No. CV92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994), at exh. D [hereinafter *Lindsey Notice*].



structure: a fire at a particular hotel, the crash of a particular airplane, and the like.<sup>19</sup> By contrast, mass torts add two further complications — one temporal, the other geographic.

The physical impairments typically produced by an errant cricket ball, a falling railway scale, a hotel fire, or a plane crash become apparent immediately after some discrete event. The consequences of mass torts, however, are insidious in nature: mass torts do not cause broken bones; instead, they characteristically produce cancer or nonmalignant conditions that do not strike immediately but develop quietly in the body over an extended period.<sup>20</sup> As a result, mass torts characteristically entail a latency period of many years or even decades between exposure to the harmful product and the onset of physical impairment.<sup>21</sup> To take but one pertinent illustration, medical experts consider the latency period for asbestos-related lung cancer to be approximately twelve years.<sup>22</sup> This waiting period gives rise to a macabre lottery: only some of those exposed to a harmful product ultimately will suffer impairment, whereas other exposed persons — perhaps even the majority — may suffer no impairment at all. In the meantime, however, all those exposed must watch and wait.

Exposed persons are not the only ones who must live with uncertainty. Defendants likewise cannot know the full extent of their liability because the impairments suffered by exposed persons are dispersed over time.<sup>23</sup> Until the relevant latency periods have run their course, the defendants' potential liability for damages in tort remains undetermined. At most, science can assign to exposed persons a relative risk factor — an estimate of the probability that they eventually will develop cancer, for example, relative to the risk of

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19. See David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 696 n.4, 716-17 (1989); see also WEINSTEIN, *supra* note 8, at 16-17.

20. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 852, 919 (1984).

21. I use the term "impairment" in a medical sense to refer to a clinically verifiable diminution in some bodily function — for instance, a reduction in lung capacity in a worker exposed to asbestos. "Impairment" thus is distinct from the legal concept of "injury." Tort plaintiffs may be regarded as injured in a legal sense based upon their exposure to a harmful substance, even though they have yet to suffer — and may never suffer — impairment. See *infra* note 113 (explaining that exposure alone may constitute injury in fact for purposes of standing).

22. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 275 (¶ 83) (E.D. Pa. 1994) (approving use of 12-year latency period as criterion for compensation under asbestos settlement agreement).

23. See Rosenberg, *supra* note 19, at 722-23.

that disease in an unexposed person.<sup>24</sup> Even those who initially suffer some degree of physical impairment may find that their condition worsens over time.

As if temporal dispersion were not enough of a problem, mass tort plaintiffs also are dispersed geographically.<sup>25</sup> The focus of litigation is not upon a particular place but, instead, upon the defendants' distribution of products throughout the national economy. Litigation against mass tortfeasors thus proceeds in both the federal courts and various state courts, in jurisdictions with generous juries and those without.

The large number of claimants, temporal dispersion, and geographic dispersion make for a devastating combination for the judicial system. The potential result is that thousands of individual lawsuits may proceed over the span of many years in many different fora, leading to lengthy delays. The asbestos litigation provides the most vivid and well-documented illustration of these problems, with plaintiffs having to wait nearly three years, on average, for resolution of their individual actions in tort.<sup>26</sup>

In the meantime, the recurring patterns that these individual claims exhibit lead, over time, to a kind of stock market. As Deborah Hensler and Mark Peterson have observed, the values of individual claims arising from a mass tort are interdependent: "[C]laims are so similar that the prospective value of many claims will rise or fall sharply with a large plaintiff award, a defense verdict or even a signal discovery event or evidentiary decision in a single case that is part of the mass of pending claims."<sup>27</sup> The implications of such a stock market become clear when one considers the mechanism by which mass tort claims are brought into the tort system for adjudication.

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24. See Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 234-37 (1993).

25. See Rosenberg, *supra* note 19, at 721-22.

26. See *Georgine*, 157 F.R.D. at 279 (¶ 105).

27. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 967 (1993); see also Coffee, *Class Wars*, *supra* note 10, at 1359; Hensler, *supra* note 10, at 1596. Thus, for example, the value of mass tort claims remains intimately linked to the debate in evidence law over the appropriate standards for admission of expert scientific testimony on novel theories of causation. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) (rejecting the view that admissibility of expert scientific testimony depends exclusively upon its acceptance within the scientific community); Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEXAS L. REV. 1, 2 (1995) (noting that *Daubert* "forces to the forefront . . . the problem of how to satisfactorily dispose of lawsuits involving thousands of plaintiffs in the face of genuine scientific uncertainty regarding the toxicity or safety of the litigated substance or product").

## 2. *The Mass Tort Bar*

On the plaintiffs' side, contingent fee arrangements have long served as the underwriting device for tort litigation.<sup>28</sup> The effect, of course, is to give plaintiffs' counsel a direct economic stake in the amount of compensation ultimately recovered by their clients.<sup>29</sup> For the plaintiffs' bar,<sup>30</sup> a successful mass tort claim — like any other tort action — turns upon proof of the familiar common law elements of duty, breach, causation, and damage. The first element is, by now, straightforward and essentially costless for a plaintiffs' law firm. Mass tort litigation typically stems from the contention that the defendants failed to warn persons exposed to their product of some hidden health risk about which the defendants knew or, at the very least, should have known. Workers, for example, point to the asbestos industry's failure to warn them about the risk of asbestos-related disease.<sup>31</sup> Breast implant recipients allege that manufacturers failed to disclose their product's potential to cause autoimmune disorders.<sup>32</sup> In the aftermath of the products liability revolution, there can be no doubt of the legal obligation to warn of such risks.<sup>33</sup>

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28. See JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 96 tbl. (1986) (showing that 96% of individual plaintiffs in tort litigation paid counsel on a contingent fee basis).

29. See Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

30. I use the term "plaintiffs' bar" to refer to law firms in the business of representing mass tort plaintiffs. That a given firm should ally itself with one particular side in case after case stems from at least two factors: the ethical limitations upon the representation of clients with conflicting interests, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1992), and the economies of scale in mass tort litigation, see *infra* notes 34-50 and accompanying text.

31. The leading case to recognize a duty to warn in the asbestos context remains *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). For a sample complaint centered upon the failure to warn and drafted by a leading asbestos litigator, see FREDERICK M. BARON, HANDLING OCCUPATIONAL DISEASE CASES § 8.14, at ¶¶ 17-20 (rev. ed. 1989).

32. See Hensler & Peterson, *supra* note 27, at 992-98 (discussing trials in early breast implant cases).

33. Section 402A of the Restatement (Second) of Torts imposes strict liability upon the seller of any product "in a defective condition unreasonably dangerous to the user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A (1964). Comment j to the same section clarifies that a defective condition may arise from the absence of a warning about unobvious health risks when the seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of . . . the danger." *Id.* § 402A cmt. j; see also 3 AMERICAN LAW OF PRODUCTS LIABILITY § 32:1 (3d ed. 1993) (same). The wisdom of such a standard of liability is a subject beyond the scope of this paper. For present purposes, I take as given the principles of product liability law that underlie the claims of mass tort plaintiffs.

Beyond the finding of a legal duty, however, the building of a winning case becomes more difficult. Counsel must develop what one might call "generic assets" on the elements of breach and causation and "specific assets" in the form of clients who have suffered damage. As the nomenclature suggests, generic assets consist of evidence that can be used repeatedly in all cases involving a particular product or, at least, a substantial number of such cases. On the breach element, counsel must prove that a particular defendant failed to discharge its legal duty to warn — at the very least, by not disclosing some risk known in the medical literature to be present in the product<sup>34</sup> or perhaps even by affirmatively suppressing information on health risks or by taking part in a civil conspiracy with other industry members who engaged in such misconduct.<sup>35</sup> To make such a showing, as a practical matter, counsel must engage in a process of historical re-creation. Specifically, counsel will need to ascertain the state of the medical literature at the time of the client's exposure — a task likely to involve expert witnesses versed in the development of medical knowledge in the relevant field over time — and to determine, through civil discovery, precisely what the defendants knew about the product and when. Once assembled, however, such information forms a generic asset that can be deployed in all cases involving the defendant company.

In addition, evidence of general causation is also necessary. Counsel must be able to show that the product in question is capable of causing injury in at least some individuals,<sup>36</sup> and here, again, the involvement of medical experts will be crucial. Moreover, proof of causation also may entail what one might call "exposure matching" — the assembly of evidence through civil discovery to show that a particular plaintiff was exposed to a particular defendant's wares.<sup>37</sup> These efforts are likely to spill over to the cases of other plaintiffs where a common nexus of exposure exists: proof that one worker at a given factory was exposed to the asbestos products of a

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34. See *Borel*, 493 F.2d at 1089 ("[T]he manufacturer is held to the knowledge and skill of an expert. . . . [This] means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.").

35. See *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 468-70 (N.J. 1986) (awarding punitive damages for suppression of information on asbestos risks); see also *In re North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. 1087, 1096-97 (D.N.D. 1990) (finding a civil conspiracy to suppress information on asbestos risks among members of a trade association).

36. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) (distinguishing between general causation and specific causation); Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1227-28 (1987) (same).

37. See GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* 403-09 (1994) (discussing problem of indeterminate defendants).

given supplier, for example, will go a long way toward demonstrating that others at the same site were similarly exposed.

Quite simply, the development of generic assets takes money. Expert witnesses generally do not work for free — indeed, some may regard consultation as a major source of income — nor do law firm associates or paralegals tasked with the heavy lifting of civil discovery. Given the use of contingent fee arrangements, moreover, counsel will see no financial returns until the first plaintiff receives compensation in tort. In other words, counsel who wish to blaze a new path of mass tort litigation must incur the fixed costs of developing generic assets long before they obtain a favorable verdict or settlement. In fact, in order to deal with the cash flow problems that this phenomenon engenders, counsel in the Agent Orange litigation entered into a contractual agreement whereby multiple “investors” from within the plaintiffs’ bar shared the bill for litigation costs.<sup>38</sup> A similar arrangement supports current efforts to undertake sweeping discovery against the tobacco industry concerning the alleged manipulation of nicotine.<sup>39</sup>

Ultimate recovery in mass tort litigation, moreover, depends upon proof that the product in question has harmed some particular individual in some way — namely, that there has been both specific causation and damage.<sup>40</sup> Generic assets do counsel no good, in other words, without specific assets in the form of a client — preferably many clients. As a result, the members of the plaintiffs’ bar who have “invested” to develop a valuable array of generic assets likely will be eager to maximize their return by searching for additional clients with colorable mass tort claims. The goal is to spread the fixed costs of generic assets over ever more units and, in so doing, to take advantage of economies of scale.<sup>41</sup>

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38. See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 218 (2d Cir. 1987) (describing agreement whereby six passive investors contributed \$200,000 each “as a means of raising the capital necessary for the maintenance and continuation of the lawsuit”).

39. See Glenn Collins, *A Tobacco Case’s Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at D1 (“Close to 60 prominent law firms known for so-called toxic torts are contributing \$100,000 each to a consortium, filling an annual war chest of nearly \$6 million.”).

40. See *Sterling*, 855 F.2d at 1200 (Upon proof of general causation, “it became the responsibility of each individual plaintiff to show that his or her specific injuries or damages were proximately caused by ingestion or otherwise using the [water contaminated by defendants]. We cannot emphasize this point strongly enough because generalized proofs will not suffice to prove individual damages.”).

41. See Hensler & Peterson, *supra* note 27, at 1045. This is not to say, of course, that lawyers ordinarily have no incentive to drum up new business. One of the primary objectives of any litigation practice is the development of a body of expertise in a particular area that will lead, in turn, to future business. The point here is simply that the nature of generic assets in mass torts makes them especially transferable from one case to another — much more so

What little public information exists on mass tort plaintiffs' law firms tends to support these predictions from economics. The precise financial structure of the mass tort plaintiffs' bar remains shrouded in secrecy; law firms, after all, do not publish annual reports in the manner of publicly held corporations. There, nonetheless, is some public information. For example, through lengthy civil discovery, one of the pioneers in the asbestos litigation — Ronald Motley of the Barnwell, South Carolina firm of Ness, Motley, Loadholt, Richardson & Poole — succeeded in accumulating devastating evidence against the asbestos industry on the elements of breach and general causation. Upon doing so, Motley reached out to develop ties to other plaintiffs' firms in all fifty states that were able to come forward with streams of new asbestos clients.<sup>42</sup>

Specifically, Motley embarked upon the building of what amount to franchise arrangements: the Ness, Motley firm would handle proof of the defendant companies' liability; local firms — the suppliers of specific assets — would deal with proof of the particular plaintiffs' exposure histories and injuries; and the two firms would share the fees from successful claims.<sup>43</sup> The ingeniousness of this arrangement lies in the ability of Ness, Motley to spread the fixed costs associated with its early development of generic assets while, at the same time, placing upon local counsel — as the franchisee — much of the marginal cost needed to develop the claims of individual plaintiffs. Indeed, similar franchise arrangements have come to be used by Motley's longtime rival within the asbestos plaintiffs' bar, Frederick Baron of the Dallas law firm of Baron & Budd.<sup>44</sup>

These sorts of franchise arrangements are not the only device for cost spreading available to the mass tort plaintiffs' bar. Rather, the bar not only may rely upon its own efforts, it also may draw upon nonlawyer intermediaries such as labor unions and doctors who have ideological or business interests of their own in assisting with the identification of potential tort claimants. For example, la-

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than a generalized expertise in a particular field of litigation — and accentuates the incentive for cost spreading.

42. See Karen Dillon, *Only \$1.5 Million a Year*, AM. LAWYER, Oct. 1989, at 38, 40-41 (profiling Motley's emergence as the "asbestos king").

43. See *id.*

44. See Gary Taylor, *Outspoken Texan, Baron Establishes Toxic Tort Domain*, LEGAL TIMES, Nov. 21, 1983, at 1, 11 (discussing Baron's use of referrals from other plaintiffs' law firms after his early success in establishing the liability of asbestos companies). Ironically, as detailed later, Baron has come to be Motley's fiercest critic in connection with the *Georgine* asbestos settlement. See *infra* section III.B.2.b.ii (analyzing Baron's objections to the *Georgine* settlement).

bor unions joined forces with the plaintiffs' bar to conduct mass screenings of their members in order to identify new asbestos clients.<sup>45</sup> Likewise, at least some doctors have obtained lucrative fees by diagnosing illnesses in breast implant recipients.<sup>46</sup>

The distinctive features of mass torts not only influence the economic structure of plaintiffs' law firms, they also have consequences for the merits of cases brought into the tort system. In a world in which tort suits are largely one-shot deals, where assets developed for one case are not readily transferable to another, the rational strategy for a plaintiffs' law firm is to select those cases that offer the largest expected recoveries after subtracting litigation costs.<sup>47</sup> In the traditional tort world, "good" cases — individuals seriously harmed by conduct that counsel may readily show to be tortious — represent the ideal for the plaintiffs' lawyer. In the parlance of sports fishermen, the goal is to keep the big fish for frying and to throw the little ones back.<sup>48</sup>

Such a selective approach makes sense for relatively immature mass torts, where plaintiffs' counsel has incentive to put forward the most grievously injured and most sympathetic clients as a vehicle through which to establish favorable precedents on contested issues: for instance, on the details of how specific defendants breached their duty to warn and on principles of general causation. Over time, however, areas of successful mass tort litigation become mature: issues of breach and general causation are disputed less frequently as the harmful character of the product and the defendants' responsibility therefor become increasingly well established, and lawsuits tend to focus instead upon individualized questions of specific causation.<sup>49</sup> At this more advanced stage, when the basics of the defendants' liability have taken root, it should come as no

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45. See Hensler & Peterson, *supra* note 27, at 1023; Bill Richards & Barry Meier, *Widening Horizons: Lawyers Lead Hunt for New Groups of Asbestos Victims*, WALL ST. J., Feb. 18, 1987, at 1.

46. See Gina Kolata, *A Case of Justice, or a Total Travesty?*, N.Y. TIMES, June 13, 1995, at D1, D5; Gina Kolata & Barry Meier, *Implant Lawsuits Create A Medical Rush to Cash In*, N.Y. TIMES, Sept. 18, 1995, at A1, B8.

47. See generally Rosenberg, *supra* note 20, at 889-91 (discussing economics of conventional tort litigation on behalf of plaintiffs).

48. For a similar nomenclature describing the divergent strategies pursued by plaintiffs' law firms, see Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEXAS L. REV. 1821, 1827-32 (1995).

49. The concept of a "mature" mass tort is developed in McGovern, *supra* note 48, at 1841-43; and Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989). Cf. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 263 (¶ 16) (E.D. Pa. 1994) (noting that, by the mid-1980s, "[t]he fundamental legal theories and liability cases against various [asbestos] defendants had been established").

surprise that mass tort pioneers like Motley have put aside a traditional fisherman approach in favor of a high-volume, low-margin strategy explicable largely as a cost-spreading device — an “A&P approach as opposed to the Bergdorf Goodman approach.”<sup>50</sup>

When the defendants come to look like sitting ducks and when the cost of presenting additional claims lies simply in the identification of new clients — perhaps with the help of interested intermediaries — the incentive is to bring into the tort system increasingly marginal claims: not just those plaintiffs who are the most seriously impaired but anyone with a colorable claim for compensation. Though of minimal value on an individual basis, such claims have the potential to amount, in aggregate, to a significant vehicle for cost spreading by a plaintiffs’ firm laden with fixed costs. Indeed, apart from their substantive merit, such claims have a nuisance value because the mass tort plaintiffs’ bar ultimately can threaten to put defendants through the burden of trial in thousands of cases.<sup>51</sup>

The asbestos litigation offers a striking illustration of this phenomenon. Estimates indicate that pleural cases — claims of persons with minute changes in the tissue of their lungs, as revealed on x-rays, but who do not currently and who may never suffer impairment of their lung functions — constitute as much as one-half of newly filed asbestos claims.<sup>52</sup> Not surprisingly, as discussed in detail later, the handling of such cases has formed the principal point of contention between the asbestos plaintiffs’ bar and defense counsel.<sup>53</sup>

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50. Dillon, *supra* note 42, at 40 (quoting mass tort plaintiffs’ lawyer Stanley Levy’s characterization of the Ness, Motley firm); *see also* Coffee, *Class Wars*, *supra* note 10, at 1365 (contrasting “boutique firms” and “wholesalers”).

51. Writing on the economic structure of litigation generally, David Rosenberg and Steven Shavell describe a scenario “where the plaintiff’s case is meritorious but he would still be unwilling to go to trial because the costs of litigation would exceed the expected judgment.” David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INTL. REV. L. & ECON. 3, 5 (1985). As these commentators demonstrate, the plaintiff still will find it profitable to file such a suit when the potential defense costs from a trial exceed the plaintiff’s filing costs. From the plaintiff’s standpoint, the objective is to capture these defense costs in the form of a settlement. *See id.* In the mass tort context, the ability of plaintiff’s counsel to file thousands of such claims, if anything, increases their nuisance value.

52. *See* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 393 (1993).

53. *See Georgine*, 157 F.R.D. at 266 (¶ 32) (noting that treatment of pleural cases formed a major stumbling block for settlement negotiations); *infra* sections I.C.2.c (recognizing that a distinctive feature of mass tort settlements lies in their substitution of noncash benefits, primarily a kind of insurance policy against the risk of future impairment, in lieu of cash compensation for persons who are not presently impaired), III.B.2.b.ii (discussing the difference



As commentators have long recognized, large corporate defendants in traditional tort litigation have both the incentive and the financial resources to wear down plaintiffs through obstructionism.<sup>54</sup> In the mass tort context, the interdependence of claim values reinforces these preexisting disincentives to settle. Defendants cannot hope to pay settlements in cases of marginal merit in order to put the whole matter to rest. Instead, given the temporal dispersion of claims, such action carries the risk of increasing the value of similar claims in the relevant mass tort stock market. And that would only call forth more effort from plaintiffs' lawyers, at the margin, to identify such claims. From the defendants' standpoint, then, settlement is attractive only to the extent that it does not merely resolve pending cases but, in addition, provides assurance that such action will not result in a deluge of marginal cases.<sup>55</sup>

The strategy of mass marketers within the plaintiffs' bar and the fears of defendants make for a paralyzing combination. Given the investment necessary to develop generic assets, mass marketers have an especially powerful economic incentive to bring large numbers of claims into the tort litigation system, including marginal claims. At the same time, defendants have little incentive to resolve those claims expeditiously, at least in the absence of some assurance about the future. Indeed, the influx of marginal claims simply reinforces defendants' fears that any movement in the direction of compromise will spell disaster. In a world in which mass tort claims are numerous but in which courts are not, this is a prescription for deadlock within the judicial system.

### B. *Partial Solutions*

The challenge that mass torts pose certainly has not gone unnoticed by the courts. Quite the contrary, during the past decade, courts have sought to accommodate the common law tort system to some of the distinctive features of mass torts. Specifically, courts have effected changes in substantive theories of recovery to address the temporal dispersion of mass tort claims and have experimented with various techniques for consolidation and aggregation in order to deal with the sheer volume of claims. Although far from defini-

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in treatment between pleural cases within the *Georgine* settlement class and pleural cases left outside of the class).

54. See Rosenberg, *supra* note 20, at 904-05; *infra* section I.B.2 (discussing the deployment of such tactics by asbestos defendants in *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), *appeal argued*, No. 93-4452 (5th Cir. Feb. 8, 1995)).

55. See Hensler, *supra* note 10, at 1603.

tively solving the problem, these changes stand as the intellectual forerunners of the recent mass tort settlements.

### 1. *Risk-Based Theories*

Courts have developed risk-based theories of liability and damages designed to reconcile traditional tort litigation with the long latency periods characteristic of mass torts. These risk-based theories, in essence, seek to overcome problems of temporal dispersion by enabling persons exposed to a harmful product to sue immediately, based simply upon the fact of exposure, without the need to show the kind of physical impairment that may take years to manifest itself. Specifically, during the 1980s, common law courts recognized actions predicated upon the increased risk of some future impairment or upon the mental distress occasioned by the involuntary bearing of such risk — often described as “fear of cancer” claims.<sup>56</sup> The same era saw the development of the damage remedy of medical monitoring, whereby defendants could be required to pay the cost of affording exposed persons ongoing medical care to facilitate the early detection and treatment of any resulting impairment.<sup>57</sup>

Though helpful, risk-based theories remain only partial solutions. First, to guard against a flood of claims based upon the slightest increase in risk, some leading decisions have restricted increased risk and fear of cancer claims to situations in which the plaintiff can demonstrate a likelihood of future impairment.<sup>58</sup> The effect of this limitation is to restrict the applicability of these risk-based theories in the mass tort area, where the increase in risk — though substantial when distributed over large numbers of persons — may not be so great as to enable an individual plaintiff to satisfy a preponderance standard. Second, in at least some jurisdictions, statutes of limitation and claim-preclusion principles may combine to induce an unimpaired plaintiff to sue prematurely on a risk-based theory

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56. See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204-06 (6th Cir. 1988); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-15 (5th Cir.), cert. denied, 478 U.S. 1022 (1986); *Ayers v. Township of Jackson*, 525 A.2d 287, 294-97, 305-08 (N.J. 1987).

57. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849-52 (3d Cir. 1990); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 821-25 (Cal. 1993); *Ayers*, 525 A.2d at 308-15. Medical monitoring is useful, of course, only when early detection reduces the risk or severity of eventual impairment. Cf. U.S. PREVENTIVE SERVS. TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES: AN ASSESSMENT OF THE EFFECTIVENESS OF 169 INTERVENTIONS 67-70 (1989) (recommending against medical monitoring for lung cancer on the ground that early detection does not decrease mortality rates).

58. See, e.g., *Sterling*, 855 F.2d at 1204-05; *Potter*, 863 P.2d at 816.

but then prevent that plaintiff from bringing a subsequent lawsuit in the event that impairment actually occurs.<sup>59</sup>

The foregoing problems are not intrinsic to risk-based theories. One could hypothesize a legal system that recognizes such theories even absent a likelihood of impairment and that eases the interaction between such theories and other legal doctrines. There is, however, a more fundamental shortcoming of risk-based theories as a prescription for mass torts: they do nothing to address the sheer number of claims. Indeed, they exacerbate problems of judicial administration to the extent that they succeed in bringing into the tort system the claims of asymptomatic persons in addition to those predicated upon some actual, present-day impairment. Unrestricted recognition of risk-based theories would play neatly into the incentives for cost spreading by the mass marketers of the plaintiffs' bar. Such firms could spread their fixed costs more quickly by obtaining compensation for large numbers of claims based upon exposure alone, without having to wait years for some fraction of the exposed population to manifest impairment. This does not mean that risk-based theories are necessarily a bad idea. Instead, the point is that efforts to tinker with liability and damage principles within the framework of traditional tort litigation are not themselves enough to deal with the challenge that mass torts pose. Change must come in that framework itself.

## 2. *Judicial Consolidation and Aggregation*

In addition to new substantive theories, courts have experimented with procedural mechanisms to address the geographic dispersion of tort claims as well as their daunting numbers. Consolidation techniques speak to the former problem by seeking to gather mass tort claims in a single forum. In the case of an insolvent defendant, jurisdictional statutes in bankruptcy provide for the consolidation of all claims against the debtor in a single federal court to facilitate an orderly liquidation.<sup>60</sup> With respect to solvent defendants, the Judicial Panel on Multidistrict Litigation (MDL Panel) has authority to consolidate pending federal lawsuits in a

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59. See Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 984-87, 1002 (1988).

60. See 28 U.S.C. §§ 157, 1334 (1994). The bankruptcy context has seen the creation of administrative compensation schemes for persons injured by the asbestos products of Johns-Manville and those harmed by the Dalkon Shield. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (Bankr. E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *In re A.H. Robins Co.*, 85 B.R. 373 (Bankr. E.D. Va. 1988), *affid.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

single judicial district for purposes of discovery.<sup>61</sup> Seeking to build upon this example, the American Law Institute has recently proposed a system for consolidation of mass tort claims in the federal system through the mechanism of interdistrict transfers.<sup>62</sup>

Jurisdictional constraints limit these techniques of consolidation. Apart from the special case of bankruptcy, consolidation mechanisms like the MDL Panel can reach only litigation within the subject matter jurisdiction of the federal courts. As the duty to warn in tort has long been a creature of common law, federal jurisdiction in the area is limited to diversity cases. Claims that fail the jurisdictional requirement of complete diversity must proceed in state court, beyond the reach of the MDL Panel. More fundamentally, consolidation techniques are only the beginning of a solution, albeit an important one.<sup>63</sup> Even if the courts somehow could gather all pending litigation — both federal and state — into a single forum, the question would remain what to do with it once it is there.

One possibility involves judicial aggregation of mass tort claims. Traditional tort litigation — which tends to treat each lawsuit as a unique event — may be a costly form of overkill where claims fall into recurring patterns. Traditional tort litigation may serve a useful role in establishing a baseline for compensation, but such an elaborate method of dispute resolution need not be used to generalize the results to other, similar cases. Specifically, aggregative techniques can draw upon statistical principles to determine compensation levels for whole categories of medical conditions based upon the outcomes of trials in a limited sample of individual cases.

The leading decision to discuss this technique — *Cimino v. Raymark Industries*<sup>64</sup> — arose from the consolidation of thousands of individual asbestos suits brought in the Eastern District of Texas. In *Cimino*, several members of the asbestos industry had adopted what District Judge Parker described as a “fortress mentality,” asserting a right to individual trials in each case in order “to repeat-

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61. See 28 U.S.C. § 1407(a) (1994).

62. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.08 (1994). For a survey of this and other proposals for civil procedure reform in connection with mass torts, see William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEXAS L. REV. 1529 (1995).

63. As discussed *infra*, the MDL Panel's consolidation of pending mass tort claims may facilitate private negotiation. See *infra* section I.C.1.

64. 751 F. Supp. 649 (E.D. Tex. 1990), *appeal argued*, No. 93-4452 (5th Cir. Feb. 8, 1995).

edly contest . . . every contestable issue involving the same products, the same warnings, and the same conduct.”<sup>65</sup> In taking this stance, the defense drew support from an earlier appellate decision in the *Cimino* litigation, in which the Fifth Circuit had reaffirmed a principle from traditional tort litigation: namely, that defendants must be afforded the opportunity to contest specific issues of causation — whether each particular plaintiff was exposed to the defendants’ products and the extent of each plaintiff’s damages — before being held liable.<sup>66</sup>

Faced with the prospect of individualized trials on exposure and damages, Judge Parker lamented that, even if he “could somehow close thirty cases a month, it would take six and one-half years to try these cases,” not to mention the additional claims expected to be filed in the interim.<sup>67</sup> As an alternative to such protracted litigation, Judge Parker conducted two initial phases of a consolidated trial to resolve, respectively, the defectiveness of the defendants’ products and the extent to which the various work sites in question involved exposure to each defendant’s wares.<sup>68</sup> The major innovation took place at the third phase of trial, where Judge Parker divided the consolidated cases into five disease categories based upon the plaintiffs’ asserted injuries. Within each category, a random sample of cases received full-scale jury trials, whereupon the average verdict for each disease category was deemed to constitute the damage award for the remaining plaintiffs<sup>69</sup> — in effect, mass justice for a mass tort.

The Fifth Circuit has yet to decide whether Judge Parker’s scheme comports with the defendants’ right to individualized adjudications of causation and damage. In the meantime, both the validity of the aggregative technique used in *Cimino*, as a matter of statistical principles, and its normative implications have received close attention in the secondary literature.<sup>70</sup> In retrospect, however, one may best regard judicial aggregation of the type in *Cimino* as a provocative detour on the road to the kinds of privately negoti-

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65. 751 F. Supp. at 651-52.

66. See *In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990).

67. *Cimino*, 751 F. Supp. at 652.

68. See 751 F. Supp. at 653.

69. See 751 F. Supp. at 653.

70. See, e.g., Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993) (criticizing the normative implications of *Cimino* for positing an arbitrary allocation of the opportunity to have one’s case tried in court); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992) (defending *Cimino* on grounds of statistical accuracy).

ated settlements established more recently for breast implants and for the asbestos claims covered in *Georgine*.<sup>71</sup>

The recent mass tort settlements demonstrate, in essence, that it is possible to achieve something superior to Judge Parker's aggregative solution without Judge Parker. Rather than depend upon some statistical sampling from random trials, members of the mass tort plaintiffs' bar and defense counsel may seek to hammer out mutually acceptable principles for compensation based upon experience in the relevant stock market for claims. The structure of such settlement agreements, their potential pitfalls, and how courts should deal with them are the subject of what follows.

### C. Mass Tort Settlements

Although the recent settlements for asbestos and breast implants contain some variations, one may discern from those agreements an emerging pattern for mass tort settlements.<sup>72</sup> The three salient features of this pattern concern the impetus and structure of settlement negotiations, the nature of the compensation system established thereby, and the use of opt-out class actions under Rule 23(b)(3) as the procedural mechanism to give binding effect to the settlement agreement. In detailing these features, I speak to their institutional advantages for the treatment of mass torts as well as to the prospects for application of similar techniques in the future.

#### 1. Settlement Negotiations

The genesis of mass tort settlements does not lie entirely with private attorneys; rather, consolidation by the MDL Panel has served as an important mechanism to focus the attention of counsel on both sides upon the possibility of a solution through private bargaining. The negotiations that produced the *Georgine* asbestos settlement, for instance, began in the aftermath of consolidation by the MDL Panel of all asbestos litigation pending throughout the federal courts.<sup>73</sup> Indeed, in so doing, the MDL Panel held out the hope that its action would serve as "a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with

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71. The cases consolidated in *Cimino* were pending prior to the settlement in *Georgine* and, hence, remain unaffected thereby. See *supra* note 1.

72. In addition to these two settlements, a third agreement concerns agricultural workers exposed to the pesticide Galecron. That agreement — though less widely known — also follows the pattern exhibited by its two, more famous cousins. See *Stipulation of Settlement, Price v. Ciba-Geigy Corp.*, No. 94-0647-CB-S (S.D. Ala. Aug. 26, 1994).

73. See *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991) (selecting the Eastern District of Pennsylvania as the forum for consolidated proceedings).

as little unnecessary expense as possible."<sup>74</sup> Likewise, MDL consolidation of federal breast implant litigation with Judge Sam Pointer of the Northern District of Alabama led to a process of private negotiation, facilitated at points by the judge himself.<sup>75</sup>

Although originally conceived solely to coordinate pretrial proceedings in related federal lawsuits,<sup>76</sup> MDL consolidation of mass tort claims has served as the springboard for more sweeping measures. The idea has not been to coordinate preparations for individual trials but, instead, to alleviate the need for trial. The principal focus of the recent settlements — indeed, in the case of the *Georgine* asbestos agreement, the exclusive focus — has not been upon pending litigation but, more broadly, upon the creation of private compensation regimes for future mass tort claims. In other words, although MDL consolidation brought the two sides to the bargaining table, such consolidation does not limit the reach of the resulting private negotiations.

Apart from the genesis of negotiations, there has been some variation in the manner in which particular plaintiffs' counsel have come to serve as negotiators. Some class counsel may take on this role as a spinoff from some larger committee of plaintiffs' lawyers. Upon MDL consolidation of the asbestos litigation, for example, all of the involved counsel on the plaintiffs' side formed a steering committee to bargain with their counterparts for the defense.<sup>77</sup> These negotiations ultimately ran aground, however, due to disputes within each camp over the acceptability of the other side's proposals.<sup>78</sup> The settlement that ultimately resulted did not reach all defendants but, instead, only the twenty asbestos companies collectively represented by the Center for Claims Resolution.<sup>79</sup> Moreover, their negotiating partners consisted not of the steering committee as a whole but, instead, the two plaintiffs' law firms that had originally been selected by their peers as co-leads of the steering committee — namely, the Ness, Motley firm and the Philadelphia firm of Greitzer & Locks.<sup>80</sup>

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74. 771 F. Supp. at 424.

75. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992); Henry Weinstein, *When Law, Tragedy Intersect*, L.A. TIMES, Mar. 26, 1994, at A1, A28-29 (describing implant settlement negotiations and the role of Judge Pointer therein).

76. See 28 U.S.C. § 1407(a) (1994) (noting that each of the actions so consolidated "shall be remanded by the [MDL Panel] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated").

77. See *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 265 (¶ 30) (E.D. Pa. 1994).

78. See 157 F.R.D. at 266 (¶¶ 32-35).

79. See 157 F.R.D. at 266 (¶ 35).

80. See 157 F.R.D. at 293-94 (¶¶ 178-84).

Other class counsel may come to the negotiating table as a kind of judicially selected bargaining unit. In reaching the breast implant settlement, for instance, counsel for the defendant manufacturers bargained with a steering committee selected by Judge Pointer, consisting of seventeen leading plaintiffs' lawyers involved in implant litigation.<sup>81</sup>

The precise way in which particular counsel come to represent the plaintiff class for purposes of settlement negotiations remains a subject of controversy, which I address later.<sup>82</sup> For present purposes, the main point is that the substantive terms of the recent mass tort settlements are the handiwork of private attorneys, albeit brought together through the impetus of MDL consolidation.

## 2. Compensation

In terms of their substantive content, the recent mass tort settlements seek, in effect, to replace mass tort litigation with a private administrative compensation scheme — a kind of miniature administrative agency, if you will. In the *Georgine* asbestos settlement, a nonprofit corporation established by the settling defendants will administer the compensation system, subject to oversight by class counsel and a major labor union.<sup>83</sup> The settling parties in the breast implant settlement took a slightly different approach, providing for court appointment of an independent claims administrator.<sup>84</sup> Under either variation, however, the salient attributes of these systems consist of a compensation “grid,” simplification of causation issues, and an insurance component.

a. *The Grid.* Much like Judge Parker in *Cimino*, mass tort settlements divide the claims of the plaintiff class into several distinct categories that correspond to the medical conditions thought to result from the product in question.<sup>85</sup> Indeed, much of the settlement consists of technical language, like the regulations of public administrative agencies, describing the precise medical evidence that a

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81. See Weinstein, *supra* note 75, at A28.

82. See *infra* section III.B.2.b.ii (discussing *Georgine* negotiations as an illustration of a holdout problem).

83. See *Georgine*, 157 F.R.D. at 257 n.3, 267 (¶ 38), 304 (¶¶ 235, 240).

84. See *Lindsey Notice*, *supra* note 18, at 10.

85. For instance, the asbestos settlement establishes four such categories: mesothelioma, a particularly deadly form of cancer in the lining of the lung; lung cancer; other forms of cancer; and nonmalignant conditions, such as asbestosis and thickening of the pleural tissue within the lung, at least when impairment of lung functions results. See *Georgine*, 157 F.R.D. at 269 (¶ 51). Similarly, the breast implant settlement established several categories for scleroderma or lupus, connective tissue diseases, and other autoimmune disorders, among several conditions. See *Lindsey Notice*, *supra* note 18, at 6 (schedule of benefits).



claimant must present in order to demonstrate the existence of a specified condition.<sup>86</sup> These medical criteria themselves may be the subject of considerable contention between the two sides.

The creation of disease categories and medical criteria enables counsel then to focus upon negotiation of compensation amounts within each category. On this question, there is room for tradeoffs between specificity and discretion. The breast implant settlement subdivided each disease category by both severity and the age of the claimant and then set a fixed compensation amount for each box of the resulting "grid."<sup>87</sup> The asbestos settlement, in contrast, simply sets a range of payments for each disease category. Claimants who meet the relevant medical criteria can receive the minimum amount with no further questions asked. Alternatively, claimants may request a more individualized evaluation of their medical condition and other considerations that bear upon the compensation calculus within the agreed-upon range, including not only personal characteristics like age and earning capacity but also factors that affect the expected level of their recovery in tort, such as the forum in which the claimant likely would have sued but for the binding force of the settlement.<sup>88</sup>

The generation of a compensation grid is not without limitations. In the absence of trials in a limited sampling of individual cases, as contemplated in *Cimino*, there must be some source of information on appropriate compensation levels for the various diseases. In the asbestos example, such information came into existence after literally years of protracted litigation in the traditional tort system. Asbestos is, after all, the paradigmatic example of a mature mass tort<sup>89</sup> and, by the time of the *Georgine* settlement negotiations, a well-developed stock market mechanism had emerged.

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86. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *Georgine*, 157 F.R.D. at 21-33; *Lindsey* (Sept. 1, 1994), *supra* note 2, at exh. E.

87. See *Lindsey Notice*, *supra* note 18, at 6 (schedule of benefits). The word "grid," by now, has become the common way in which commentators refer to such a compensation scheme. See, e.g., Hensler, *supra* note 10, at 1614; Judith Resnik, *Procedural Innovations, Slicing Over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEXAS L. REV. 1627, 1633 (1995).

88. See *Georgine*, 157 F.R.D. at 276-77 (¶¶ 91-92). The settlement further provides for a special panel selected by settling counsel to review a limited number of "extraordinary" claims — those by persons who believe they warrant compensation beyond the range specified in the settlement. See 157 F.R.D. at 276 (¶ 91).

89. See McGovern, *supra* note 49, at 659.

As a result, the settling parties could fashion their grid by reference to historical patterns of settlement.<sup>90</sup>

The use of historical data on recoveries in tort partakes of a recent proposal by Glen Robinson and Kenneth Abraham, in which they envision the development of "claim profiles . . . constructed from data derived from prior adjudications and settlements in the same or similar cases."<sup>91</sup> Again, the notion is that traditional tort litigation may be used to set a baseline for compensation, but that resolution of repetitious claims need not entail such elaborate procedures. The difference, however, is that Robinson and Abraham speak of the construction of claim profiles by courts, whereas the recent settlements suggest that the same technique may be used — perhaps with greater efficiency — by private attorneys experienced in the relevant mass tort stock market.

If repetition of the asbestos experience were the only way to reach a mass tort settlement, such devices would hold only limited attraction. The background to the breast implant settlement, however, suggests that such is not the case. There, only six individual cases had been litigated to verdicts in the tort system at the time of settlement negotiations.<sup>92</sup> In preparation for the negotiations, however, the plaintiffs' bar had invested several million dollars toward the collection and organization of documents bearing upon the defendant manufacturers' knowledge of potential product risks.<sup>93</sup> Their efforts paralleled the Food and Drug Administration's contemporaneous investigation into similar issues in connection with its moratorium on new implant sales.<sup>94</sup>

The point is that it does not necessarily take years of protracted tort litigation to afford an informational baseline for negotiation. Where experience in the tort system is limited, however, substantial uncertainty may remain on particular elements of the plaintiffs' claims. This expands the compensation range over which counsel must bargain and makes the fashioning of a negotiated compromise more difficult.

Moreover, regardless of how the compensation grid is created, its credibility will depend upon the availability of sufficient funds

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90. See *Georgine*, 157 F.R.D. at 277 (¶ 95).

91. Robinson & Abraham, *supra* note 16, at 1491.

92. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*2; Hensler & Peterson, *supra* note 27, at 992.

93. See Weinstein, *supra* note 75, at A26; see also Aaron M. Levine, *What Our Committee Accomplished*, WASH. POST, May 20, 1994, at A24 (letter to the editor).

94. See Hensler & Peterson, *supra* note 27, at 994.

for all who remain in the plaintiff class actually to receive the payments set forth. As discussed in greater detail below,<sup>95</sup> this issue will turn upon the accuracy of settling counsel's projections as to the number of claims under the settlement — another subject upon which historical experience in the tort system can be an invaluable guide. Indeed, inaccuracy in this regard is precisely what led to the collapse of the breast implant settlement in its original form.

*b. Causation.* Simplification of causation issues also adds to the streamlining of the compensation system. A claimant need only show exposure to a product of one of the settling defendants plus the existence of a disease that meets the specified medical criteria. Any remaining uncertainty over general causation is simply factored into the compensation calculus, and evidence of specific causation — proof of a link between the particular claimant's exposure and her medical condition — typically is not required.<sup>96</sup> That defendants in the asbestos settlement should have agreed, in effect, to concede the existence of causation hardly seems surprising. The existence of a link between asbestos and a host of diseases is, by now, virtually indisputable as a general matter,<sup>97</sup> so defendants give up little in the streamlining of causation issues. The same concession can be highly significant, however, for products like breast implants, for which general causation — the issue of whether the product causes autoimmune disorders in anyone — remains questionable, at best.<sup>98</sup>

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95. See *infra* section III.B.2.a.

96. See *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 268 (¶ 46) (E.D. Pa. 1994); *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*5.

97. See *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *appeal argued*, No. 93-4452 (5th Cir. Feb. 8, 1995) (“In the real world, the scientific community long ago resolved the issues that continue to be litigated by the courts. Every institution . . . that has investigated this remarkable natural mineral has concluded that it is inherently dangerous.”).

98. See Gina Kolata, *Proof of a Breast Implant Peril is Lacking, Rheumatologists Say*, N.Y. TIMES, Oct. 25, 1995, at B7 (noting that the American College of Rheumatology has concluded that “silicone implants expose patients to no demonstrable additional risk for connective tissue or rheumatic disease”). As one reporter has noted:

The most definitive study yet of the health effects of silicone breast implants has failed to find any association between the implants and connective tissue diseases. The new study is so compelling and its results so consistent with previous studies that some leading rheumatologists contend that the issue of whether implants cause these diseases can now be considered closed.

Gina Kolata, *New Study Finds No Link Between Implants and Illness*, N.Y. TIMES, June 22, 1995, at A18; see Kolata, *supra* note 46, at D5 (noting “the new and growing body of evidence from seven epidemiological studies, some commissioned by implant makers and some by the Federal Government, which have consistently failed to find links between implants and autoimmune diseases”); Gina Kolata, *Legal System and Science Come to Differing Conclusions on Silicone*, N.Y. TIMES, May 16, 1995, at C6 (same); see also Marcia Angell, *Are Breast Implants Actually OK?*, NEW REPUBLIC, Sept. 11, 1995, at 18, 20 (same). But see Feldman,

The observation that the breast implant agreement reached a resolution of the causation issue similar to that of the asbestos agreement belies the complaint raised by John Coffee that mass tort settlements will tend to come too early in the development cycle of mass torts, such that the plaintiff class will receive far less than they might otherwise obtain from a settlement at some later point.<sup>99</sup> Time is not always on the plaintiffs' side. For breast implants, the epidemiological studies completed thus far merely have added to skepticism over a causal link to autoimmune disorders.

This pattern is by no means unique. In the Agent Orange class action litigation, defendants agreed to establish a compensation program for exposed Vietnam veterans, but, when it came time to adjudicate the individual claims of those veterans who had opted out of the plaintiff class, the court ultimately rejected their causation case as inadequately grounded in science.<sup>100</sup> Likewise, massive epidemiological data ultimately belied the early success of plaintiffs in litigation over birth defects allegedly caused by the antinausea drug Bendectin.<sup>101</sup> If anything, these examples support the image of mass tort settlements as vehicles for genuine compromise by both plaintiffs and defendants in the face of scientific uncertainty, with plaintiffs sacrificing their chance at more money in the event of new causation evidence and defendants surrendering the prospect of stonewalling until such time, if ever, that the scientific evidence comes to rest squarely on their side.

The potential efficiency gains from such compromises are well-discussed in the mass tort literature. Specifically, the simplification of causation and the development of a compensation grid together carry the promise of substantial reductions in the transaction costs associated with the transfer of money from defendants to plain-

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*supra* note 27, at 25 (questioning the reliability of epidemiological studies thus far completed regarding implants).

One possible explanation for the willingness of implant manufacturers to enter into a settlement, notwithstanding the shakiness of the plaintiffs' case on general causation, may lie in fears that common law juries might be swayed unduly by evidence suggesting that manufacturers operated with a cavalier attitude toward potential health risks — even if such risks ultimately did not come to pass. See Hensler & Peterson, *supra* note 27, at 993-96 (summarizing the results of FDA investigations suggesting that manufacturers may have engaged in inadequate testing of implants and may have withheld test results that called into question product safety).

99. See Coffee, *Class Wars*, *supra* note 10, at 1360.

100. See *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd.*, 818 F.2d 187 (2d Cir. 1987).

101. See Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993).

tiffs.<sup>102</sup> In the asbestos litigation, for example, only thirty-seven to thirty-nine percent of the money expended by defendants actually goes toward compensation of plaintiffs, with the rest being consumed in the transfer process.<sup>103</sup> Empirical research in the future fruitfully might examine whether the recent settlements ultimately live up to their promise to reduce such deadweight loss.

c. *Insurance.* Finally, mass tort settlements characteristically contain an insurance component designed to overcome the temporal dispersion of mass tort claims. Specifically, the recent settlements provide minimal or no immediate cash compensation for those who have yet to become impaired, but they do afford such persons the opportunity to obtain compensation if impairment ultimately does result. Most notably, this principle applies to claimants who initially obtain compensation for a nonmalignant condition but who later develop cancer.<sup>104</sup>

In essence, the settlements provide an insurance policy funded by defendants. They address the phenomenon of temporal dispersion not by struggling to fit all exposed persons into the mold of traditional tort litigation for immediate injuries but rather by moving outside of that framework to accommodate the flow of claims over time. The effect is to focus the private compensation scheme upon those most in need of immediate help.<sup>105</sup>

### 3. *Binding Effect*

The use of streamlined compensation techniques is by no means unprecedented. Workers' compensation laws have existed for nearly a century to move entire categories of recurring claims from the tort litigation system into public administrative regimes.<sup>106</sup> Mass accident cases like the Kansas City Skywalk litigation have made use of plans to provide quick compensation payments to

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102. See Edley & Weiler, *supra* note 52, at 393.

103. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 263 (¶ 18) (E.D. Pa. 1994).

104. See 157 F.R.D. at 284 (¶ 129); *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*5-\*6. The breast implant settlement, however, does provide for payment of medical costs incurred by those who choose to have their implants removed, even if they have yet to suffer any ill effects. See *Lindsey Notice*, *supra* note 18, at 4-5 (discussing the "explantation" fund).

105. This attribute of the *Georgine* settlement builds upon earlier efforts to develop so-called pleural registries, whereby asbestos plaintiffs diagnosed with observable changes in the condition of their lungs but who had yet to suffer impairment of their lung functions could register with the court and thereby toll the applicable statute of limitations. See Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POLY. 541 (1992).

106. See WARREN FREEDMAN, *THE LAW AND OCCUPATIONAL INJURY, DISEASE, AND DEATH* 8 (1990) (discussing early workers' compensation legislation).

plaintiffs upon the presentation of minimal supporting evidence.<sup>107</sup> In the mass tort area, plans for the distribution of compensation to mass tort plaintiffs from bankrupt tortfeasors such as Johns-Manville and A.H. Robins, the maker of the Dalkon Shield, have used compensation "grids."<sup>108</sup> Moreover, the story of Judge Weinstein's successful effort to bring to a conclusion protracted class action litigation over Agent Orange by way of a settlement on the eve of trial is a mainstay of the mass tort literature.<sup>109</sup>

The recent mass tort settlements nonetheless depart significantly from these earlier models. As in the case of Agent Orange, the recent settlements have come as part of class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure — the so-called opt-out form of class action predicated upon the existence of legal or factual issues common to the class as a whole.<sup>110</sup> This form of class action is unique among those recognized under Rule 23 in that class members have the right to exclude themselves from the action and, thereby, any resulting settlement.<sup>111</sup>

The definition of the plaintiff class under Rule 23(b)(3) may include both current and future claimants or only the latter. In the breast implant settlement, the plaintiff class encompassed all persons, including those with pending tort actions, who received their implants prior to June 1993.<sup>112</sup> In contrast, the plaintiff class in the *Georgine* asbestos settlement consists of workers exposed on the job to asbestos products from any of the twenty settling defendants but who had not sued in the tort system as of the date the settlement was filed.<sup>113</sup> As I discuss later, this second approach to class

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107. See Hensler & Peterson, *supra* note 27, at 973.

108. See *supra* note 87; see also Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, LAW & CONTEMP. PROBS., Autumn 1990, at 113.

109. See SCHUCK, *AGENT ORANGE ON TRIAL*, *supra* note 16.

110. See *supra* note 5. For a discussion of the determination to certify a mass tort settlement class, see *infra* section III.C.2.a.

111. See FED. R. CIV. P. 23(c)(2). The prospect of bankruptcy amongst the settling defendants — and its occurrence after a settlement has been reached, as in the case of Dow Corning — can be a formidable obstacle to the operation of a mass tort settlement. Mass tort settlements nonetheless do not entail the use of subsection (b)(1)(B) of Rule 23 for class actions against a limited fund. I accordingly discuss the future prospects for such agreements upon the assumption that the settling defendants do not avail themselves of the limited fund concept. For a stimulating discussion of mass torts in the bankruptcy context, see Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994).

112. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*79.

113. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 257-58 (E.D. Pa. 1994). The courts have clarified that exposure to a harmful substance constitutes injury in fact sufficient to afford standing in federal court to future claimants who have been exposed but remain presently unimpaired. See, e.g., *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1454 (E.D. Pa. 1993) (class of future claimants in *Georgine* asbestos settlement); see also *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993) (veterans exposed to

definition raises special concerns where cases already pending in the tort system — so-called inventory cases — receive different compensation terms.<sup>114</sup>

Unlike the Agent Orange example, however, the recent settlements do not represent the denouement to class action litigation in the conventional sense. Instead, they use the class action simply to give binding effect to a settlement reached prior to judicial certification of a plaintiff class under Rule 23. Indeed, the settling parties in *Georgine* filed their agreement with the court simultaneously with the plaintiffs' class action complaint.<sup>115</sup>

By embodying the settlement agreement in the form of a judgment rendered in a class action, counsel seek to afford predictability to defendants. If valid, the judgment will obligate the members of the plaintiff class — at least those who do not affirmatively opt out — to pursue their demands for compensation through the settlement regime rather than through individual lawsuits in tort.<sup>116</sup> The *Georgine* asbestos settlement has an initial lifespan of ten years,

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Agent Orange); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 835-36 (Bankr. E. & S.D.N.Y. 1991) (persons exposed to asbestos products of Johns-Manville), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh.*, 993 F.2d 7 (2d Cir. 1993). Numerous other courts have reached the merits of cases involving exposed-but-unimpaired persons, without raising any doubt as to standing requirements. *See, e.g.*, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (prisoners exposed to second-hand smoke have cause of action for constitutional tort); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (PCBs); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (Dalkon Shield), *cert. denied*, 493 U.S. 959 (1989); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valve), *appeal dismissed without opinion*, 995 F.2d 1066 (6th Cir. 1993); *In re Fernald Litig.*, No. C-1-85-149, 1989 U.S. Dist. LEXIS 17764 (S.D. Ohio Sept. 29, 1992) (radiation from uranium processing plant).

114. *See infra* section III.B.2.b.ii.

115. *See Georgine*, 157 F.R.D. at 257. For jurisdictional purposes, the analogue would be a consent decree, in which a public administrative agency presents for judicial approval a prenegotiated settlement reached with a regulated entity in order to provide prospective relief. *See Carlough*, 834 F. Supp. at 1463-64 (citing authorities). That such a lawsuit constitutes a "case or controversy" sufficient to confer subject matter jurisdiction under Article III has long been settled. *See, e.g.*, *Swift & Co. v. United States*, 276 U.S. 311, 325-26 (1928); *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984).

116. The legitimacy of this application of the class action device remains controversial. As I discuss *infra*, debate has centered upon whether courts may certify a class under Rule 23 for purposes of settlement when that procedural device would be unwieldy for purposes of actual litigation. Likewise, uncertainty remains over the basis for personal jurisdiction over class members. *See infra* section III.C.2, Part IV (suggesting that Congress may bolster the legitimacy of mass tort settlements by replacing the class action as their binding mechanism with a statutory regime that would give effect to such agreements in a manner similar to negotiated rulemaking by public administrative agencies).

with future negotiations to cover subsequent periods;<sup>117</sup> the breast implant settlement would have had a thirty-year lifespan.<sup>118</sup>

Apart from repose for defendants, the use of the class action mechanism to bind future claimants has implications for both public awareness and procedural issues. As for the former, the recent settlements have drawn far more attention to their respective subjects — particularly among members of the general public outside of the legal profession — than otherwise would have occurred through protracted litigation in the tort system. To meet the requirement of Rule 23(c)(2) that class members receive “the best notice practicable under the circumstances” in order for them to exercise their opt-out rights, the recent mass tort settlements have involved massive efforts to reach exposed persons through individualized mailings, intermediaries such as unions and doctors, and at-large advertisements in the mass media.<sup>119</sup> Indeed, the sheer scope of the breast implant settlement made it front-page news in the general-interest press.<sup>120</sup> In short, an opt-out class action may well be more successful than the traditional tort system in placing the story of the plaintiff class before the public and focusing attention upon possible tortious conduct.

As for procedural issues, the recent settlements represent a private contractual solution to what otherwise would be unwieldy problems of judicial consolidation. For instance, settlement through the medium of Rule 23(b)(3) may bundle together claims that otherwise would be resistant to consolidation due to the jurisdictional limitations applicable to individual lawsuits. In a class action, there need only be complete diversity between the representative plaintiffs and all defendants; complete diversity over the entire plaintiff class is unnecessary.<sup>121</sup> The upshot is that future claims in state courts that otherwise would escape MDL consolidation now can be reached. This, in essence, is the response of the recent settlements to the geographic dispersion of mass tort claims.

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117. Counsel will renegotiate the compensation grid after the initial 10-year period of the settlement. Adjustments at that time may be no greater than 20%, and the settlement provides for dispute resolution procedures in the event that negotiations reach an impasse. See *Georgine*, 157 F.R.D. at 277 (¶ 93).

118. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*5.

119. See *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 320-23 (E.D. Pa. 1993); *Georgine*, 157 F.R.D. at 312 (¶ 290); *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (*Lindsey v. Dow Corning Corp.*), No. CV92-P-10000-S, 1994 WL 114580, at \*8-\*11 (N.D. Ala. Apr. 1, 1994) [hereinafter *Lindsey* (Apr. 1, 1994)].

120. See, e.g., Kolata, *Landmark Accord*, *supra* note 8, at A1; Henry Weinstein & David Olmos, *\$3.75-Billion Settlement of Implant Suits is OKd*, L.A. TIMES, Mar. 24, 1994, at A1.

121. See *Snyder v. Harris*, 394 U.S. 332, 340 (1969).



It would be a mistake, however, to regard the surmounting of jurisdictional limitations as a wholly desirable achievement. Those constraints exist for a purpose, after all — not the least of which is to command respect for the substantive rights embodied in the common law of tort in the various states.<sup>122</sup> The prospect of class members trading away those rights at the instigation of class counsel who may have their own entrepreneurial interests at heart and who act outside conventional channels of client control does not exactly leave one with a warm feeling of security. It is awfully hard, after all, to control an attorney you do not know, who is negotiating a settlement on your behalf in a class action that may not yet have appeared on the public docket. These concerns have led to exploration of the possibility that judicial review within the framework of Rule 23 might serve as a surrogate for client control, and it is to that enterprise that I next turn.

## II. JUDICIAL REVIEW AND AGENCY COSTS

### A. *The Framework of Rule 23*

The use of Rule 23 as the means to bind the plaintiff class to the settlement carries with it a requirement of judicial review. Subsection (e) of Rule 23 specifically provides that “[a] class action shall not be . . . compromised without the approval of the court.”<sup>123</sup> To give content to this requirement, the courts have asked whether a class action settlement is “fair, reasonable, and adequate”<sup>124</sup> and have made use of hearings to receive evidence and argument on whether this substantive standard has been met.<sup>125</sup>

The basic rationale for this judicial inquiry is straightforward: in traditional litigation amongst private parties, the adequacy of a settlement can safely be left for the parties themselves to assess, with each knowing what is best for itself and each possessing the ability to impress its preferences upon counsel. In this regard, the adequacy of a settlement in private litigation is akin to other questions, such as the adequacy of consideration to support a contract, that

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122. See *infra* section III.C.2.a (discussing choice of law problems).

123. FED. R. CIV. P. 23(e).

124. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.) (securities class action), *cert. denied*, 464 U.S. 818 (1983); *accord, e.g.*, *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), *cert. denied*, 472 U.S. 1138 (1986); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); 2 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 11.41, at 11-91 (3d ed. 1992).

125. See 2 NEWBERG & CONTE, *supra* note 124, § 11.56.

the law leaves largely in private hands.<sup>126</sup> The problem in the class action context is that “the negotiator on the plaintiffs’ side, that is, the lawyer for the class, is potentially an unreliable agent of his principals.”<sup>127</sup> This is, in other words, a classic illustration of an agency cost problem — namely, a situation in which reliance upon an agent for the exercise of discretion in accordance with some specialized expertise comes only at the cost that the agent, in practice, may exercise discretion in a manner at odds with his principals’ interests.

Where a settlement concludes active litigation in a class action format, this traditional justification for judicial review has considerable force, given the sequence in which class certification and settlement occur. Class certification takes place at the early stages of litigation; in fact, Rule 23(c)(1) calls for the court to determine whether class certification is warranted “[a]s soon as practicable after the commencement of [the] action.”<sup>128</sup> Absent the rare step of class decertification at some later stage, the members of a plaintiff class will become locked into representation by class counsel. By the time that a settlement comes to fruition, the period within which to opt out will have long passed, and the court accordingly must make certain that counsel have not sold out the interests of the class in the settlement agreement.

Where settlement occurs prior to judicial certification of an opt-out class, however, the justification for judicial review is less obvious. Where the members of the plaintiff class have the chance to consider the settlement terms at the same time that they must decide whether to opt out, there initially might seem little justification for an additional layer of judicial scrutiny under Rule 23(e). Although there may not have been client control at the time of the settlement negotiations, there is a degree of control *ex post*, through assertion of the right to opt out by the members of the plaintiff class.

In no instance, however, has a court intimated that the formation of a settlement prior to certification of an opt-out class somehow will suspend the requirement of Rule 23(e) for judicial review of the settlement terms. That would be difficult to do, given the

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126. See *Mars Steel v. Continental Ill. Natl. Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) (Posner, J.).

127. 834 F.2d at 681; see also, e.g., *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801-03 (3d Cir. 1995); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 10, at 680.

128. FED. R. CIV. P. 23(c)(1).

absence of any distinction along such lines in the text of Rule 23(e). In addition to positive law, moreover, there are sound policy reasons that support judicial review of prenegotiated class action settlements, especially in the mass tort area.

The persistence of judicial review under Rule 23(e) stands as a tacit recognition that the opt-out mechanism is an imperfect check upon class counsel. Particularly in the mass tort context, some class members may not learn of the opportunity to opt out, notwithstanding provision of the "best notice practicable" pursuant to a multimedia campaign under Rule 23(c)(2). In other words, mass torts are unlike, say, securities class actions where there typically are records of who bought what and when; rather, in the absence of data on exactly who was exposed to the product in question, there are bound to be at least some members of the plaintiff class who will remain unknown to class counsel. Depending upon the nature of the product in question, still others may not themselves be aware that they are within the class of exposed persons. Simply as a practical matter, then, not all members of the plaintiff class may be able to engage in ex post ratification of class counsel's handiwork.

More fundamentally, a mass tort settlement effected through the vehicle of a class action forces the members of the plaintiff class to choose between the tort system and a private compensation regime. Apart from the representative plaintiffs named in the class complaint, however, few class members will have agreed to be put to such a choice. The vast majority of class members do not authorize the negotiations by class counsel in their name; indeed, they may well be unaware that such negotiations are taking place. Moreover, by definition, prenegotiated settlements come into being prior to any judicial determination under Rule 23 that a class action is even an appropriate procedural vehicle or that those who hold themselves out as class counsel should be entitled to do so.<sup>129</sup> In this light, one may understand judicial review for fairness under Rule 23(e) as a means — albeit after the fact — to pass upon the process by which counsel have put the class of exposed persons to a choice between tort and administration.

Such review may be particularly valuable given the dynamics that can arise from the creation of a settlement. As Judge Posner has observed, "where notice of the class action is . . . sent simultaneously with the notice of the settlement itself, the class members are

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129. See *GMC Pick-Up Truck*, 55 F.3d at 787.

presented with what looks like a *fait accompli*.<sup>130</sup> The very existence of a multimillion-dollar settlement, in other words, may give rise to its own momentum, which individual class members may feel they cannot resist effectively. Again, judicial review over the settlement as a whole may act as a supplement for the imperfections of *ex post* review by class members on a person-by-person basis.

### B. Agency Costs in Mass Tort Settlements

If courts are to be on the lookout for agency costs in mass tort settlements, it would be helpful to have a more specific idea of the reasons why class counsel might accept unfair settlement terms. The problem of agency costs in the class action context stems from defendants' indifference between payments to the plaintiff class and payments to class counsel. When negotiating a settlement in a class action, counsel for the plaintiff class are in a position to entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class. A controversial recent example in consumer class action litigation is the phenomenon of so-called scrip settlements, whereby members of the plaintiff class receive certificates usable only for discounts toward the purchase of new products from the defendants, but class counsel receive substantial fees in cash.<sup>131</sup>

Such scrip settlements clearly would lie beyond the pale in the mass tort context, but the problem of agency costs may persist in more subtle forms. As noted earlier, a distinctive feature of mass tort settlements is an insurance component designed to respond to the temporal dispersion of claims by providing compensation to plaintiffs over many years in the future, as their impairments come to light. This feature of class action settlements in the mass tort context — arising from the peculiar nature of mass torts themselves — provides additional prospects for class counsel to earn fees beyond those available in ordinary class action litigation over injuries confined to the past.

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130. *Mars Steel*, 834 F.2d at 680-81; see also *GMC Pick-Up Truck*, 55 F.3d at 789.

131. Compare, e.g., *GMC Pick-Up Truck*, 55 F.3d at 768 (overturning district court's approval of class action settlement of breach of warranty claims in which purchasers of GMC trucks with gas tanks alleged to be susceptible to leakage upon side impact collision would have received certificates usable only toward purchases of new GMC trucks but class counsel would have received \$9.5 million in fees) with *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (approving settlement of class action against major airlines for price fixing in which consumers in the plaintiff class received discount coupons for future flights but class counsel received over \$14 million in fees). See Barry Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at C1 (describing controversy surrounding scrip settlements).

For class counsel, at least two fee sources exist: fees from the class action that results in creation of the settlement itself and contingent fees for the representation of compensation claims under the settlement.<sup>132</sup> The appropriate relationship between these two sorts of fees has yet to receive attention from the courts. What can be said at this early juncture is that the rationale behind a fee award for class counsel simply for the creation of a mass tort settlement is an unwieldy holdover from more traditional uses of the class action device in other areas of litigation. Where the claims of the plaintiff class are not temporally dispersed, the compensation described in the settlement can be paid immediately — to the victims of a price-fixing ring, to those who purchased a security based upon a misleading prospectus, and to the like. There is no need for further stages of legal representation. Instead, the court can award fees to class counsel based upon the total pot of damages obtained for the plaintiffs under the theory that counsel have produced a “common pool” of benefits for the class as a whole, upon calculation of a reasonable hourly rate for counsel’s time under the so-called lodestar method or some combination thereof.<sup>133</sup>

The recent mass tort settlements contemplate a fee award to counsel for the plaintiff class.<sup>134</sup> The asbestos settlement leaves the issue in the lap of the court by providing merely that the settling defendants agree to pay such fee award to class counsel as the court shall determine.<sup>135</sup> The breast implant settlement was only slightly more precise: it provided for a judicial determination of fees for plaintiff class counsel but made such fees payable from funds placed in a particular account, the size of which was specified in the settlement.<sup>136</sup>

After receiving a fee award for the creation of the settlement, however, class counsel have the opportunity to obtain a second series of fees based upon the filing of individual compensation claims at later times. Indeed, that is the whole point of the insurance component. Should class counsel wish to remain involved in the subject area the settlement covers, they will have a major opportunity to reduce their labor costs under a private administrative compensa-

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132. See Coffee, *Class Wars*, *supra* note 10, at 1375.

133. On the calculation of class counsel fees in traditional class action litigation, see Macey & Miller, *Plaintiffs’ Attorney’s Role*, *supra* note 10, at 22-23.

134. Defense counsel, of course, do not depend upon an award in order to obtain fees, as they are compensated by their corporate clients on the basis of hourly rates.

135. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 285 (¶ 136) (E.D. Pa. 1994).

136. See *Lindsey Notice*, *supra* note 18, at 9-10.

tion scheme. Specifically, counsel no longer need employ associates to represent clients in depositions, conduct settlement negotiations, appear in court, and undertake other tasks that only attorneys may perform.<sup>137</sup> Instead, they may switch to lower-priced paralegals to assemble the paperwork necessary to present an administrative claim for compensation. In this regard, the settlement simply would accentuate trends already observed in high-volume plaintiffs' law firms involved in mass tort litigation.<sup>138</sup> The settlement presents class counsel with the opportunity to become a Wal-Mart for legal services.

The success of such a cost-cutting effort remains somewhat constrained, however, to the extent that the settlement — like the recent ones — would permit compensation claims to be filed on a pro se basis.<sup>139</sup> This, however, is unlikely to make a huge dent in the market for counsel's services. Although empirical evidence is limited, the experience under the private compensation scheme established in bankruptcy for Dalkon Shield victims suggests that claimants will continue to make substantial use of lawyers, even for the filing of administrative compensation claims.<sup>140</sup> These results come as no surprise, given that — for the mass tort plaintiffs' bar — it is typically the lawyer who searches for the client rather than vice versa.<sup>141</sup>

A second constraint consists of limitations upon the contingent fees that class counsel may extract from represented claimants. The notion here is to adjust for the reduction in the risk to plaintiffs' counsel that flows from the existence of the settlement. The *Georgine* agreement, for example, caps at twenty-five percent the contingent fees that may be taken from compensation claims — a reduction from the thirty-three to forty percent typical for asbestos plaintiffs in the tort litigation system.<sup>142</sup> The breast implant settlement would have provided for judicial scrutiny of contingent fees

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137. See generally AMERICAN BAR ASSOCIATION, ANNOTATED RULES OF PROFESSIONAL CONDUCT 466 (1992) (stating that unauthorized practice may include activities that require knowledge of the law above that of the average lay person, that involve the giving of advice concerning legal rights, or that customarily are performed by lawyers); CHARLES W. WOLFMAN, MODERN LEGAL ETHICS § 15.1.3, at 835-36 (1986) (same).

138. See Dillon, *supra* note 42, at 42.

139. See *Georgine*, 157 F.R.D. at 285 (¶ 136); Breast Implant Litigation Settlement Agreement Questions and Answers at \*24, *Lindsey* (Sept. 1, 1994), *supra* note 2.

140. See Georgine M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617, 654-55 & nn.135-36 (1992).

141. See *supra* notes 41-44 and accompanying text.

142. See *Georgine*, 157 F.R.D. at 285 (¶¶ 136-37).

for compensation claims and would have taken such fees from the same separate account as the fees for service as class counsel.<sup>143</sup>

Finally, the success of a Wal-Mart strategy remains limited by the prospect that attorneys other than class counsel will seek to compete for clients in the aftermarket for compensation claims under the settlement. Class counsel, however, will have a strong basis upon which to promote themselves as the attorneys with the most extensive knowledge about the workings of the compensation regime. Indeed, to the extent that class counsel serve as monitors for the administration of the settlement, they could become privy to information about that system that may not be readily available to other lawyers.<sup>144</sup>

One might regard the prospect of any attorney obtaining contingent fees in the presence of very little contingency as unsavory at best.<sup>145</sup> The prospect of such fees in the aftermarket for compensation claims, however, does have the salutary effect of aligning the entrepreneurial interests of class counsel with the interests of the plaintiff class in maximizing its return under the settlement. The more compensation there is, the greater the contingent fees for counsel who represent claimants in the aftermarket.

The existence of two distinct sources of fees has the potential to play into the economic structure of the mass tort plaintiffs' bar in more disturbing ways. Although class counsel might want to remain in the subject area of the settlement, lowering their labor costs in the manner described, an award of fees simply for service as class counsel raises another tantalizing opportunity. Specifically, counsel may wish to cut and run — to leave the subject area entirely or, at least, in significant part. In particular, given the substantial costs that must be incurred to develop generic assets for budding areas of mass tort litigation, class counsel simply may want to take the fees generated from the formation of a settlement in one area and "reinvest" them in some other field of prospective mass tort litigation where expected returns might be greater over the long run. That

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143. See *Lindsey Notice*, *supra* note 18, at 9-10.

144. In approving the *Georgine* asbestos settlement, for example, the district court expressed concern that class counsel might acquire "inside information" in the course of "fulfilling their monitoring and supervisory duties." *Georgine*, 157 F.R.D. at 304 (¶ 237). The court accordingly held out the possibility that it might, in the future, "exercise its power to appoint additional class counsel who can fulfill the vital monitoring and supervisory responsibilities . . . and who would not represent individual class members who submit claims for compensation." 157 F.R.D. at 304 (¶ 238).

145. On the prevalence of contingent fees in situations where the risk to counsel is minimal, see Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989).

the fee award for service as class counsel comes in a lump sum and comes much sooner than the dribble of contingent fees for individual compensation claims over time simply adds to the attraction. Indeed, this risk is especially pronounced when the settlement covers an area of mature litigation, such as asbestos. Having won one fight, a pioneering firm might wish to position itself to achieve pre-eminence in yet another area of mass tort litigation.

That counsel for the plaintiff classes in the asbestos and breast implant settlements should be at the forefront of other, newly developing areas of mass tort litigation is consistent with this hypothesis. For example, fresh from the *Georgine* settlement, Ronald Motley has joined with other plaintiffs' lawyers who have agreed to contribute toward an annual budget of some six million dollars to fund class action litigation against the tobacco industry on behalf of nicotine-addicted persons.<sup>146</sup> Another prominent participant in this consortium of "investors" — Stanley Chesley of Waite, Schneider, Bayless & Chesley in Cincinnati — served on the plaintiffs' steering committee that negotiated the breast implant settlement.<sup>147</sup> Still other members of the steering committee, such as Elizabeth Cabraser of Lief, Cabraser & Heimann in San Francisco, have appeared on bar programs to explore the prospects for litigation against the makers of Norplant.<sup>148</sup>

This is not to say that fees for settlement creation are unwarranted. Where a mass tort settlement provides a more efficient and secure mechanism to get money into the hands of impaired persons, those who fashion that mechanism confer real benefit upon the plaintiff class over and above the compensation dollars that class members ultimately will receive. The prospect of a fee award for service as class counsel exacerbates the problem of agency costs, however, by reducing the correlation between class counsel's entrepreneurial interests and the interests of the plaintiff class in securing fair compensation. The possibility that class counsel might use their fees for cross-fertilization of mass tort litigation does not necessarily mean that the plaintiff class will suffer. It does, however, underscore the need for some external monitor to guard against that possibility.

One response to the foregoing problem might take the form of new substantive principles for fee awards. Specifically, courts could

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146. See Collins, *supra* note 39, at D1, D3.

147. See *id.* at D1; Lindsey, (Apr. 1, 1994), *supra* note 119, at \*3.

148. See Kolata, *supra* note 9, at 5. The connection here is that the delivery device used in the Norplant contraceptive contains silicone.



explore ways to bring the determination of class counsel's fees into greater alignment with the distinctive nature of compensation under a mass tort settlement. To the extent that a settlement spreads payments to class members over an extended time period as their impairments arise, so might the fees for service as class counsel be deferred over time. Not only would this undercut the phenomenon of an immediate lump sum award that encourages re-investment elsewhere, it also would tie the financial fate of class counsel to the workability of the settlement. In awarding fees to class counsel over time, a court might appropriately take into account whether the settlement has turned out to be a bad deal for the plaintiff class.

Such an approach would carry risks of its own. Specifically, it may leave the plaintiffs' bar with insufficient incentives to undertake the time-consuming negotiations necessary to fashion a large-scale settlement. The law, however, need not rely exclusively upon controls that require ongoing judicial supervision of fees. The calculation of fees is, after all, merely a proxy for that which the court is ultimately concerned with under Rule 23(e) — namely, the substantive fairness of the settlement terms for members of the plaintiff class. In addition to innovative thinking on fee awards, a complementary system of procedural controls might organize the way in which the courts review the fairness of mass tort settlement terms in order to detect the shortchanging of the plaintiff class. The workings of such a regime and its relationship to developments earlier in this century are the subject to which I now turn.

### III. AN ADMINISTRATIVE PERSPECTIVE ON FAIRNESS

The recent mass tort settlements hold the promise of a more systematized approach to compensation — one that may overcome the barriers in traditional litigation to consolidated disposition of claims in large numbers over time. Yet this promise remains dependant upon an elite group of private attorneys who possess formidable expertise in the subject area and who operate far removed from the usual channels of client control. Although the recent settlements represent a bold departure in the area of mass torts, the story of their rise has a curiously familiar ring. This is not the first time in which innovative new legal institutions have evolved to address problems that exceeded the capacities of the common law, only to give rise to new concerns over control. The emergence of private attorneys as the principal architects of mass tort settlements paral-

lels, in several salient respects, the rise of public administrative agencies earlier in this century.

One might say that the Motleys, Chesleys, and Cabrasers of today are, in this sense, the heirs of yesteryear's James Landis, Alfred Kahn, and Louis Brandeis — the "prophets of regulation" who oversaw the birth of modern administrative government.<sup>149</sup> To be sure, the former have accumulated power through the innovative — some might say diabolical — use of the class action device, whereas the latter received delegations of power from politically accountable institutions. This distinction is a significant one and forms the focus of later discussion.<sup>150</sup> For present purposes, I simply draw attention to the similarities in the circumstances that led to private compensation schemes for mass torts and those that underlie their counterparts in public regulation.

The precise origins of the administrative state remain a subject of considerable debate among historians, and I do not purport to settle the score here. Indeed, one may accept a prescription for judicial review of mass tort settlements along the lines of administrative law on purely pragmatic grounds — as the most coherent judicial safeguard against unfair settlement terms — without believing that the two phenomena share comparable historical roots. That several striking similarities exist, however, seems beyond dispute.

In the early years of this century, the rise of large corporate structures operating on a national scale was as dauntingly new as the phenomenon of mass torts to the present day. As historian Stephen Skowronek has put it: "Industrialism, in all its dimensions, exposed severe limitations in the mode of governmental operations that had evolved over the nineteenth century . . . . Providing the national institutional capacities commensurate with the demands of an industrial society required nothing less than building a different kind of [governmental] organization."<sup>151</sup> Indeed, the familiar economic justifications for regulation of industrial activity — control of monopoly power, cost internalization to account for externalities, and the like — flow from this singular historical development.<sup>152</sup>

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149. See THOMAS K. McCRAW, *PROPHETS OF REGULATION* (1984) (profiling these and other pioneers in public administrative regulation).

150. See *infra* section III.C.2.

151. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920*, at 13 (1982).

152. See generally STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 15-35 (1982).

Lawsuits within the common law system of the nineteenth century provided only slow, sporadic means to achieve these regulatory ends. Like their present-day descendants in the mass tort area, common law courts proved institutionally incapable of handling the large number of recurring cases needed to achieve coherent economic regulation.<sup>153</sup> The problems that industrial activity on a national scale posed, instead, demanded ongoing oversight on a long-term basis.<sup>154</sup> The response ultimately was not to tinker with the common law but to empower new institutions: namely, public administrative agencies acting upon delegations of power from a national Congress.

The evolution of streamlined solutions to regulatory problems did not stop with the creation of administrative agencies. Over the course of this century, agencies themselves have moved increasingly away from ad hoc, individualized adjudications — typically, enforcement proceedings against particular entities — as the primary means for setting regulatory policy. Instead, with the blessing of the courts,<sup>155</sup> agencies have embraced the procedure of informal rulemaking, through which they promulgate detailed regulations that set policy on a prospective basis over a range of conduct.<sup>156</sup> Indeed, the shift from retrospective enforcement to prospective specification of conduct parallels the shift in the recent mass tort settlements from retrospective adjudication of individual tort claims to the development of prospective compensation regimes for future claimants.<sup>157</sup>

In more recent years, rulemaking by public administrative agencies itself has become a way to dispose of recurring kinds of disputes without the need for repeated adjudication. In *Heckler v. Campbell*,<sup>158</sup> for example, the Supreme Court upheld the efforts of the Social Security Administration (SSA) to curtail sharply the need for individualized adjudications of disability benefit claims by

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153. See BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* 28 (1980).

154. See *id.* (cataloging the deficiencies of common law principles for purposes of regulation).

155. That blessing came relatively early, in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), where the Supreme Court held that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.” 332 U.S. at 203.

156. On the shift from adjudication to informal rulemaking, see Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375-82.

157. Cf. MITNICK, *supra* note 153, at 31 (“[T]he rise in administrative regulation has seen a shift from regulation ‘after’ to regulation ‘before,’ and has seen a rise in affirmative and active, as against passive, means of regulation.”).

158. 461 U.S. 458 (1983).

developing a grid through rulemaking procedures.<sup>159</sup> Much like the compensation grids established by the recent mass tort settlements, the SSA's rule sets forth various recurring combinations of claimant traits and then specifies the agency's finding as to the availability of jobs for such individuals in the national economy — a crucial variable in the agency's ultimate determination of eligibility for disability benefits.<sup>160</sup> Outside the context of government benefits, agencies have similarly drawn upon rulemaking to reduce the need for individualized adjudication over matters of economic regulation.<sup>161</sup>

Like the recent mass tort settlements, the modern administrative state comes with the risk that agencies may act in furtherance of their own bureaucratic agenda rather than in the faithful execution of their statutory mandate — for example, to endear themselves to those they are supposed to regulate or, perhaps, to a White House with political goals different from those embodied in regulatory statutes. This risk is simply another manifestation of the more general problem of agency costs.<sup>162</sup> In response, the central enterprise of administrative law has been to develop ways in which to guard against the arbitrary exercise of agency power without cramping the agencies' deployment of expertise in pursuit of their delegated duties — not to put the genie back into the bottle but to make sure that he does not run amuck.<sup>163</sup> Administrative law thus may offer an informative perspective to the analogous problems associated with mass tort settlements.

### A. *Lessons From Administrative Law*

Over the last generation, the federal courts have developed what is by now a well-delineated framework for judicial review of

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159. See 461 U.S. at 470.

160. This similarity has not gone unnoticed in the secondary literature. See Edley & Weiler, *supra* note 52, at 398 n.27; Robinson & Abraham, *supra* note 16, at 1500 n.58.

161. See, e.g., *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964) (FPC limitations on certain price terms in natural gas contracts); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (FCC limitations on multiple ownership of radio and television stations).

162. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L., ECON. & ORG. 243, 246-48 (1987).

163. Putting the genie back into the bottle no longer seems an available option. The Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), upholding the constitutionality of the independent counsel statute, purports to sound the death knell for efforts to roll back the modern administrative state on separation of powers grounds. The wisdom of *Morrison*, however, does remain the subject of lively debate. Compare, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1208-15 (1992) (criticizing *Morrison* on originalist grounds) with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 106-18 (1994) (defending *Morrison* on the same grounds).

rulemaking by administrative agencies. In large part, the current framework represents the outgrowth of debate during the 1970s over the role that judges should play in the review of complex regulatory decisions — whether judges themselves should develop technical expertise in order to scrutinize the factual premises of regulatory actions or, alternatively, whether the comparative lack of technical expertise on the bench counsels, instead, for a focus upon the decisionmaking process within the agency. The pointed exchanges in this period between the legendary D.C. Circuit Judges Harold Leventhal, taking the former view, and David Bazelon, advocating the latter, typified this discussion.<sup>164</sup> By and large, it is the Bazelon view that comes closest to the current state of the law, although some flickering embers of the Leventhal approach still remain. The prevailing orthodoxy in administrative law is that courts need not become experts in the technical underpinnings of regulation but, instead, should insist that rulemaking agencies employ a decisionmaking process that involves the searching and reasoned consideration of complex regulatory problems.<sup>165</sup>

The “hard look” doctrine encapsulates this approach to judicial review. The notion is that the agency must think seriously about the plausible approaches that the information at hand might support and then must explain the reasoning behind its selection of a particular course of action. In this way, courts have given meaning to the command of the Administrative Procedure Act (APA) to set aside agency action that is “arbitrary.”<sup>166</sup> As one leading source has put it:

This approach to review of discretion is one that emphasizes process. The agency ultimately employs discretion to choose among relevant alternatives not foreclosed by statute. But it must develop fully rele-

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164. Compare *Ethyl Corp. v. EPA*, 541 F.2d 1, 66-67 (D.C. Cir. 1975) (Bazelon, J., concurring) with 541 F.2d at 68-69 (Leventhal, J., concurring); *Friends of Earth v. Atomic Energy Commn.*, 485 F.2d 1031, 1033-34 (D.C. Cir. 1973) (separate statement of Bazelon, J.) with 485 F.2d at 1034-35 (separate statement of Leventhal, J.).

165. The leading paper to recognize this transformation in perspective remains Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

166. See 5 U.S.C. § 706(2)(A) (1994). Before asking whether the agency acted arbitrarily, of course, a reviewing court in administrative law must ascertain whether the agency's action passes muster under the now-familiar framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) — specifically, whether the agency acted within the bounds of the rulemaking authority conferred by Congress. The notion is to link agency action to some delegation of authority from the legislature and, ultimately, to some source of federal regulatory power in Article I of the Constitution. In the context of mass torts, however, there is no obvious analogue to *Chevron* review; no one has delegated to the mass tort bar the authority to effect settlements of future claims through the vehicle of a class action. The absence of a *Chevron* analogue in itself raises significant questions about the legitimacy of mass tort settlements — a topic that I explore *infra* in section III.C.2.

vant information concerning the effects of these various alternatives and the relevant considerations and interests involved in choosing among them. It must also explain and justify the alternative chosen in light of such information and considerations.<sup>167</sup>

Where the agency provides such an explanation, the Supreme Court has noted that "the ultimate standard of review is a narrow one," such that "[t]he court is not empowered to substitute its judgment for that of the agency."<sup>168</sup>

The driving force behind this decisionmaking process lies in the participatory framework established by the APA for informal rulemaking. Specifically, the agency must publish a notice of proposed rulemaking (NPRM) to apprise interested members of the public of its contemplated course of action.<sup>169</sup> The agency then must afford all interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments," and the agency must issue "a concise general statement" of the "basis and purpose" for its rule in light of these comments.<sup>170</sup> In short, the agency must call forth information and arguments that may undercut the premises of its proposed rule, and the agency then must address those criticisms.

The Supreme Court's most famous application of hard look review in *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*<sup>171</sup> illustrates the point. The litigation arose from the agency's decision to rescind a rule that would have mandated the inclusion of passive restraints in new cars of the then-coming model year on the ground that its safety benefits did not justify its compliance costs to industry.<sup>172</sup> The agency took such action after years of wrangling under several different presidents, culminating with the Reagan administration's decision to rescind the rule as part of its agenda for regulatory relief.<sup>173</sup>

In *State Farm*, the Court overturned the agency's action as arbitrary. The Court pointed out that the agency had failed to explain

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167. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 363 (3d ed. 1992).

168. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

169. *See* 5 U.S.C. § 553(b) (1994).

170. 5 U.S.C. § 553(c) (1994).

171. 463 U.S. 29 (1983).

172. *See* 463 U.S. at 38-39.

173. *See* 463 U.S. at 34-39 (describing the history of the passive-restraint rule); *see also* 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party" that considers "public resistance and uncertainties to be more important than [did] . . . a previous administration.").

why it had decided to scrap the passive-restraint rule in its entirety when studies in the rulemaking record called into question the safety benefits of only one kind of passive restraint: automatic seatbelts, which the agency feared would be detached frequently by drivers. The Court went further, however, to clarify that the hard look calls not only for simple consideration of such alternatives but also for an explanation of the factual premises of the agency's action. On this score, the Court observed that — wholly apart from the possibility of relying upon other kinds of passive restraints, such as airbags or nondetachable automatic belts — the agency had failed to explain how the rulemaking record supported the crucial factual premise upon which it had based its action: namely, the fear that detachable automatic belts, in fact, would be detached in droves.<sup>174</sup>

The Court underscored that its demand was not for certainty where none could be had, given that the rule in question had yet to be implemented in the real world. Rather, the Court clarified that:

Rescission of the passive restraint requirement would not be arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion. It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. . . . [T]he agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made."<sup>175</sup>

The kind of agency rationality the hard look envisions is not desirable simply for its own sake. Rather, the hard look embodies an implicit recognition that agencies seldom act arbitrarily in the sense of determining their course of action by a roll of the dice; instead, in seeking to advance their own bureaucratic agenda, agencies may take action that undervalues considerations that Congress meant to carry weight in administrative decisionmaking. In the underlying statute at issue in *State Farm*, for example, "Congress intended safety to be the pre-eminent factor" in the agency's choice of stan-

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174. The Court observed that the agency itself had accounted for the low rate for usage of existing manual seatbelts by reference to inertia — the need for drivers to buckle up in order for manual belts to enhance safety. The Court pointed out, however, that this same factor of inertia "works in favor of, not against, the use of" automatic seatbelts, which require an affirmative act on the part of the driver to disable them. 463 U.S. at 54.

175. 463 U.S. at 52 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

dards for automobile design.<sup>176</sup> By examining whether the agency has offered a “rational connection between the facts found and choice made,” the courts may detect when the agency has skewed its analysis of information in the rulemaking record in such a way as to give less weight to “pre-eminent” considerations, such as safety, and more to other factors, such as the plight of the auto industry.<sup>177</sup> Indeed, one may understand the emphasis upon safety in the rulemaking statute in *State Farm* as a way for the prevailing political coalition in Congress to ensure fidelity by the rulemaking agency — in short, to “create pressures on [the] agenc[y] that replicate the political pressures applied when the relevant legislation was enacted” and, in so doing, “to enhance the durability of the bargain struck among members of the coalition.”<sup>178</sup> In this way, judicial demands for reasoned decisionmaking serve to guard against precisely the kinds of infidelities that lie at the core of the agency cost problem in administrative law.

### B. *Application to Review of Mass Tort Settlements*

In evaluating the fairness of a mass tort settlement under Rule 23(e), courts should draw upon the foregoing framework for judicial review in administrative law. In other words, courts should analyze the creation of private administrative regimes for mass torts in a manner similar to that already developed for scrutiny of their public regulatory counterparts. Here, I discuss the operation of such a system of review, first in a general overview and then with reference to both particular problems observed in the recent mass tort settlements and the prescriptions offered by other commentators.

The sorts of agency cost problems that may arise with respect to mass tort settlements are amenable to an approach that turns upon a reasoned explanation of the settlement terms in light of information on the expected results of litigation in the tort system.<sup>179</sup> In particular, judicial review of mass tort settlements should employ a kind of notice-and-comment process to focus the attention of the settling parties and ultimately the court upon information that

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176. 463 U.S. at 55 (citing the legislative history).

177. 463 U.S. at 52, 55; see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 557 (1985).

178. McCubbins et al., *supra* note 162, at 255; see also Garland, *supra* note 177, at 586-91 (understanding *State Farm* as reinforcing norms of agency fidelity).

179. I use the word “expected” in the economic sense of expected value, to encompass an adjustment for the uncertainty of recovery.



sheds doubt upon the fairness of the settlement terms. It would be far more difficult for class counsel to advance their own interests at the expense of the class if counsel knew that in order to obtain judicial approval they must explain their decisions in light of contrary information.

### 1. *Overview*

Courts already have begun to touch upon the rudiments of such an approach, but they have done so without apparent recognition of its pedigree or exploration of its implications. Even before the advent of mass torts, courts confronted with settlements of class actions in more familiar settings — most prominently, corporate, securities, antitrust, and consumer litigation — spoke of their review for fairness under Rule 23(e) as involving both a “substantive inquiry into the terms of the settlement relative to the likely rewards of litigation” and a “procedural inquiry into the negotiation process” by which the settlement was reached.<sup>180</sup>

A particular derivative action, securities fraud case, antitrust claim, or consumer class action is not like the others of its kind. In these areas, inquiry into the “likely rewards of litigation” must necessarily center upon the progress of the particular class action in question prior to consummation of the settlement. The extent of discovery — into the merits of the plaintiff class’s allegations and the potential obstacles to recovery in the form of legal defenses, for example — will be crucial where the class action in question is a unique event. In the mass tort context, by contrast, the class action is not a one-shot deal; rather, its objective is to resolve multitudes of future claims that come in recurring patterns.

Courts should understand the first aspect of their review under Rule 23(e) to center upon the expected terms of compensation in the traditional tort litigation system — what the plaintiff class would sacrifice under a settlement. In contrast to conventional class actions, information on expected compensation terms need not be generated exclusively or even primarily through discovery in the class action itself but, rather, may stem from a preexisting body of experience — however slim — with the treatment of similar claims in the relevant mass tort stock market.

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180. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995); *see also, e.g., Mars Steel v. Continental Ill. Natl. Bank & Trust*, 834 F.2d 677, 682 (7th Cir. 1987); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

Comparison of the settlement terms to tort recoveries does not turn simply upon the dollar amounts in the compensation grid, although that is certainly a significant issue. The inquiry also should extend, for example, to the medical criteria applied to claims under the settlement as well as to the noncash components of the compensation scheme — such as the insurance provided to unimpaired persons, limitations upon contingent fees for compensation claims, and so forth.

This is not to say that judicial review will ascertain with clarity the outcomes that the tort system will produce. In the case of a settlement for a relatively mature mass tort like asbestos, courts may look — as did the district court in *Georgine* — to data on the levels of compensation that individual plaintiffs historically have obtained in tort litigation within the relevant disease categories.<sup>181</sup> In the case of a relatively immature tort like breast implants, historical experience in the tort system is, by definition, limited, and the range of plausible compensation levels may be quite wide due to uncertainty over the merits of the plaintiffs' case.

The existence of a reference point in tort thus will not necessarily yield clear answers, just as a judge faced with a settlement of a conventional class action “cannot really make a substantive judgment on the issues in the case without conducting some sort of trial on the merits, exactly what the settlement is intended to avoid.”<sup>182</sup> That substantial uncertainty may remain over how the settlement compares with outcomes in the tort system, however, does not mean that class counsel have carte blanche, just as an administrative agency does not slip its leash merely by “recit[ing] the terms ‘substantial uncertainty’ as a justification for its actions.”<sup>183</sup> Rather, courts should view the second component of judicial review under Rule 23(e) — review into the negotiation process that produced the settlement — as centering upon the manner by which counsel resolved such uncertainties.<sup>184</sup> The oft-repeated truism is that settlements that result from “arms-length negotiations” should be presumed to vindicate the interests of the plaintiff class.<sup>185</sup> The

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181. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 277 (¶ 95) (E.D. Pa. 1994).

182. *GMC Pick-Up Truck*, 55 F.3d at 796; see also *Weinberger*, 698 F.2d at 74 (observing that Rule 23(e) cannot mean “that, in order to avoid a trial, the judge must in effect conduct one”).

183. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

184. Cf. *Weinberger*, 698 F.2d at 74 (noting that the second component of review has arisen “[i]n order to supplement the . . . necessarily limited examination of the settlement’s substantive terms” due to uncertainty over the outcome of the litigation).

185. See *Weinberger*, 698 F.2d at 74; see also, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 (S.D. Ohio 1992).

more difficult question is how courts should go about determining whether “arms-length negotiations” have occurred.

Hard look review in administrative law offers an elegant solution to this problem. Specifically, courts should use participatory rights akin to the process of notice-and-comment rulemaking to call forth information and argumentation contrary to the settling parties’ agreement, to highlight uncertainties in the available information and to elicit a reasoned explanation for the settling parties’ choice of settlement terms. In this way, a conception of Rule 23(e) in the mass tort context along the lines of administrative law can tie together the two review components of which courts previously have spoken. When understood from the standpoint of hard look review, these two components are mutually reinforcing: the notice-and-comment process that serves as the check upon the settling parties’ negotiation process also may act as the mechanism to bring before the court information that bears upon the substantive terms of compensation in the tort system. The inquiries into substance and procedure thus are simply aspects of a broader enterprise to ensure quality and fidelity in the decisionmaking that leads to a mass tort settlement.

Moreover, such a process is particularly well suited to deal with concerns that go beyond the level and form of compensation. Other significant issues in mass tort settlements may center upon matters of claim projection, risk allocation, and disparate treatment. Claim-projection issues go to whether enough money will be on hand actually to provide class members with compensation at the levels set forth in the grid. Questions of risk allocation raise related concerns over who bears the risk of error in these projections and the steps, if any, taken in the settlement to account for such risk. Issues of disparate treatment pertain to whether the settlement makes arbitrary distinctions between members of the plaintiff class or, conversely, whether certain members of the class may have suffered from a failure to draw such distinctions.

These sorts of questions are similar, at their core, to the types of regulatory decisions for which the courts have developed the hard look. They inherently involve decisionmaking based upon projections — perhaps simply educated guesses — of what the world would look like were a given action taken and about how such action should be organized to achieve a desired result. To borrow the words of the *State Farm* Court, there may be “no direct evidence” on the matters in question; instead, they may call for the exercise of

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“judgment in moving from the facts and probabilities on the record to a policy conclusion.”<sup>186</sup> The goal is not for the reviewing court to demand mathematical precision where none is possible; rather, the point is for the court to insist that the settling parties grapple seriously with the inevitable tradeoffs and uncertainties and that they offer a “rational connection” between the uncertainties they face and choices they have made in the settlement.

Pieces of such a system already exist. The task for courts is to pull them together within the overarching framework of hard look review:

(1) Courts should conceive of the requirement in Rule 23(c)(2) for the “best notice practicable” to the plaintiff class as the rough equivalent of an NPRM under section 553 of the APA.<sup>187</sup> Specifically, courts should understand the content of such notice to include not only a description of the settlement terms but also an explanation — akin to the preamble to a proposed rule — of the basic rationale and supporting information behind the selection of those terms. The goal should be to enable those with initial suspicions about the settlement to have an informational base for more detailed evaluation of the settling parties’ reasoning.

Courts should not understand this preamble as a replacement for the kind of descriptions, written in plain language understandable to nonlawyers, used in the asbestos and breast implant settlements. Quite to the contrary, in the interest of effective communication with actual class members, descriptions in plain language should continue to be part of the “best practicable notice” under Rule 23(c)(2).

The point is that courts should regard the target recipients of a detailed preamble to be interest groups concerned with the plight of class members. The notice campaigns for the recent settlements point in this direction by seeking to bring the settlement to the attention of not only those individuals potentially within the class but

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186. *State Farm*, 463 U.S. at 52.

187. Compare FED. R. CIV. P. 23(c)(2) with Administrative Procedure Act, 5 U.S.C. § 553(b) (1994). The notion that private negotiations can give rise to regimes akin to those established through rulemaking by administrative agencies is not confined to the context of mass tort settlements. Several scholars have made similar observations with respect to consent decrees under Title VII. See, e.g., John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1521, 1526-27 (1994); Maimon Schwartzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 934. See generally Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 361-63 (1988).

also labor and medical organizations.<sup>188</sup> In building upon this experience, courts should seek to draw upon the organizational skills, legal expertise, and fervor of interest groups as a way to overcome what otherwise might be barriers to collective action on the part of individual class members.<sup>189</sup>

In administrative law, environmental and consumer groups long have played an indispensable role on behalf of regulatory beneficiaries by exposing faulty reasoning by administrative agencies.<sup>190</sup> Indeed, such groups — already up and running — have begun to turn their attention to the distinctive problems that may arise when plaintiffs' lawyers enter into class action settlements on behalf of mass tort victims. For instance, Public Citizen Litigation Group — a mainstay of environmental and consumer litigation in the administrative context — has been among the most vocal opponents of the recent settlements.<sup>191</sup>

Mass torts often will implicate the concerns of existing interest groups due to the manner in which class members are exposed. The *Georgine* asbestos settlement has garnered the attention of labor unions due to its focus upon occupational exposure of industrial workers.<sup>192</sup> One may expect the same for other mass torts that touch upon organized labor's longstanding concern with worker health. Another familiar example — albeit, one that did not in-

188. See *supra* notes 45-46 and accompanying text.

189. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 11, 15-16 (1965) (providing an analysis of collective action problems).

190. See PETER S. MENELL & RICHARD B. STEWART, *ENVIRONMENTAL LAW AND POLICY* (1994).

Beginning in the 1960s, courts permitted additional categories of persons affected by administrative action to challenge its legality in court, including consumers, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (viewers' standing to challenge broadcast license renewal) and environmental groups, e.g., [*Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965)]. . . . [T]he courts' rationale for these expanded rules of standing was that the relevant substantive statute reflected an implicit purpose to protect the interests of these litigants, and that this statutorily-protected interest was a basis for standing on par with traditional liberty and property interests.

*Id.* at 810-11.

191. For an account of Public Citizen's role by two leaders of that organization, see Alan B. Morrison & Brian Wolfman, *Representing the Unrepresented in Class Actions Seeking Monetary Relief* (Apr. 22, 1995) (Paper presented before the Institute of Judicial Administration, New York University School of Law, Research Conference on Class Actions and Related Issues in Complex Litigation).

192. In fact, the representative plaintiff who gives the *Georgine* litigation its name — Robert Georgine — is the president of the Building Construction Trades Department of the AFL-CIO. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 261 (¶ 4) (E.D. Pa. 1994). For examples of unions in opposition to the *Georgine* settlement, see the listing of parties and their counsel in *Georgine v. Amchem Prods., Inc.*, No. 93-0215, 1995 U.S. Dist. LEXIS 2532, at \*3-\*6 (E.D. Pa. 1995). (This listing is omitted from the opinion as reported in 160 F.R.D. 478 (E.D. Pa. 1995)).

volve a settlement like that for asbestos or breast implants — is the active role played by Vietnam veterans' organizations in the Agent Orange litigation.<sup>193</sup>

Moreover, apart from existing interest groups, a mass tort itself may give rise to the formation of organizations dedicated specifically to that subject. For example, the controversy surrounding breast implants has led to the founding of various groups to safeguard the rights of recipients, in addition, of course, to the many existing organizations concerned with the health of women.<sup>194</sup> Litigation over the Dalkon Shield contraceptive device spawned the same phenomenon of tort-specific group formation.<sup>195</sup>

Finally, a public interest law group funded by the plaintiffs' bar itself — Trial Lawyers for Public Justice — recently has announced efforts to fight class action settlements that it considers unfair.<sup>196</sup>

(2) As a corollary to the foregoing point, courts should afford participatory rights in fairness hearings under Rule 23(e) comparable to those available to interested persons in informal rulemaking. In the fairness hearing on the breast implant settlement, for example, the district court afforded the opportunity to participate to all persons who wished to comment upon the settlement, "regardless of whether they had legal standing to be heard."<sup>197</sup> Similarly, the district court in the *Georgine* asbestos settlement "granted *all* objecting class members full rights to participate in all aspects of [the] proceedings, including 'the right to appear through counsel, participate in the fairness hearing and conduct discovery.'"<sup>198</sup>

(3) Courts should understand the fairness hearing under Rule 23(e) to be a forum for examination of the settling parties' justification for the settlement terms in light of comments from interested

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193. See SCHUCK, *AGENT ORANGE ON TRIAL*, *supra* note 16, at 25-26, 37-57.

194. See Don Lee et al., *Twice Distressed*, L.A. TIMES, May 16, 1995, at D1 (discussing the rise of organizations for breast implant recipients); *Dow Corning Created the Tort Monster*, WALL ST. J., June 8, 1995, at A13 (reprinting a letter on implant risks from Coalition of Silicone Survivors).

195. For an account by the founder of one such organization, see KAREN M. HICKS, *SURVIVING THE DALKON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY* 73-96, 119-26, 142-53 (1994). See also RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 232-35 (1991) (describing the activities of the International Dalkon Shield Victims' Education Association); Hensler & Peterson, *supra* note 27, at 1024 n.314 (identifying two additional groups specifically for Dalkon Shield plaintiffs); Vairo, *supra* note 140, at 618-19 n.6 (describing the Dalkon Shield Information Network as "perhaps the largest support group for unrepresented Dalkon Shield claimants").

196. See Wade Lambert, *Public-Interest Law Group Fights Some Class Settlements As Unfair*, WALL ST. J., Aug. 17, 1995, at B4.

197. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*1.

198. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 258 (E.D. Pa. 1994) (quoting earlier order affording such rights).

persons. In the asbestos settlement, for example, the court heard “the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of five weeks,” including testimony from persons who had participated in the settlement negotiations, medical experts, financial experts, and several legal academics.<sup>199</sup> Pursuit of an administrative law vision of Rule 23(e) does not, however, necessarily require extended trial-type proceedings. In a world where courts reconceive of the settlement notice under Rule 23(c)(2) along the lines of an NPRM, there may be less need for lengthy courtroom proceedings to explore the factual justification for the settlement terms and any dissenting views. Instead, such matters might be dealt with primarily upon written submissions in response to the “preamble” of the NPRM, albeit with supplementation as needed through trial-type procedures involving witness testimony and examination. Here, courts might draw an analogy to so-called hybrid rulemaking in administrative law — that is, situations in which Congress has required agency rulemaking to follow a combination of procedures involving both written submissions and selected trial-type elements.<sup>200</sup>

## 2. *Particular Problems*

With this basic framework in mind, I turn to two broad categories of problems raised by commentators in connection with the recent mass tort settlements to illustrate the virtues of judicial review on the foregoing model. First, I discuss the special challenges for hard look review in the face of uncertainty concerning the number of future claims, such as may arise with respect to settlements of relatively immature mass torts. Second, I address the selection of counsel for the plaintiff class. Specifically, I analyze the merits of hard look review as compared to alternatives proposed by two sets of commentators who envision greater judicial supervision of the manner by which certain attorneys come to represent the plaintiff class.

*a. Claim Projection.* The settlement of a relatively immature mass tort can represent a genuine compromise over questions of general causation, with both plaintiffs and defendants hedging against the possibility that science will subsequently turn against them.<sup>201</sup> Developments in scientific knowledge may make the set-

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199. 157 F.R.D. at 260; *see* 157 F.R.D. at 296-303 (¶¶ 201-33), 306 (¶¶ 249-51).

200. For general background on hybrid rulemaking, *see* BREYER & STEWART, *supra* note 167, at 579-82 (citing statutory examples).

201. *See supra* section I.C.2.b.

tlement seem like a good deal for one side or the other when viewed in retrospect, but they do not hold the prospect of precipitating the alteration of compensation terms. For an immature mass tort, however, uncertainty is not confined simply to the element of causation but may extend as well to the number of claims that will be submitted under the settlement. Absent a substantial body of experience, it simply may be difficult to tell how many exposed persons exist and when the latency periods for the relevant diseases will run. Uncertainty over claim projection — unlike questions of general causation — has the potential to wreak havoc with the compensation terms originally set in the settlement. An agreement to pay compensation at levels specified in a grid is meaningful, after all, only to the extent that enough money is available for the specified payments to be made to all who meet the medical criteria. Here, I briefly discuss how the problem of claim projection relates to the more general phenomenon of agency costs in class action settlements. I then explain how the collapse of the breast implant settlement due to claim projection problems illustrates the soundness of an approach to judicial review drawn from administrative law.

The distribution of compensation within the plaintiff class — whether any particular claimant actually will receive what is promised in the grid — will be of little concern to class counsel who wish simply to obtain a fee award based upon the aggregate benefit to the class as a whole, the hours worked by class counsel, or a combination of both.<sup>202</sup> These variables remain constant regardless of how many claimants ultimately share in the settlement pot. Even when counsel also wish to undertake the representation of clients in the aftermarket for claims under the settlement, reductions in the compensation paid to each individual claimant might be overcome through representation of more claims. In short, the focus upon fees, in whatever form, is unlikely to make class counsel sensitive, of their own accord, to uncertainty in claim projection.

Judicial review along the lines of the hard look is especially well suited to deal with this problem. As an initial matter, the courts should draw upon the notice-and-comment process and participatory rights in the fairness hearing to bring to light such information as may exist to facilitate claim projection. The objective of this process is not necessarily to arrive at some definitive answer where there is none to be found but, more importantly, to provide

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202. See *supra* note 133 and accompanying text (discussing methods for calculation of class counsel fees).



an indication of the degree of uncertainty on the subject. The more significant component of hard look review should lie in a further demand that the settling parties provide a reasoned explanation for the way in which they have accounted for such uncertainty in their agreement.

One approach, taken in *Georgine*, simply would provide that the defendants remain obligated to pay all claims that qualify for compensation under the medical criteria described in the settlement.<sup>203</sup> The question then will turn upon the prospective solvency of the defendants over the period covered by the agreement — a matter verified by the *Georgine* court with the aid of testimony from financial experts.<sup>204</sup> Under this approach, plaintiffs will be no worse off than they would be in the event of continued litigation in the tort system; indeed, they might be better off to the extent that a resolution of tort liability in the form of a settlement may enhance the ability of the defendants to draw upon the capital markets to facilitate productive enterprises in the future.<sup>205</sup>

Defendants may be unwilling to assent to such an approach when the risk of error in claim projection is relatively high, as is likely to be the case for an immature mass tort. There nonetheless are other devices available to deal with uncertainty. Specifically, counsel might use the settlement agreement itself to generate better information about the number of claims while, at the same time, taking steps to afford flexibility to the plaintiff class in the event of precipitous reductions in compensation.

The unraveling of the breast implant settlement, if anything, illustrates the soundness of such an approach. Unlike the asbestos defendants who committed themselves to pay all claims that meet certain medical criteria, breast implant manufacturers originally agreed merely to provide a fixed sum of \$4.2 billion to fund a settlement.<sup>206</sup> The use of a fixed-sum device accentuates the problem of claim projection, however, as the distribution of that sum in accordance with the compensation grid is dependent upon the accuracy of such estimates. Indeed, the implant settlement provided for across-the-board reductions in compensation levels — a technique known as “ratcheting” — in the event that the number of claims filed

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203. See *Georgine*, 157 F.R.D. at 278 (¶ 101).

204. See 157 F.R.D. at 286-91 (¶¶ 142-70).

205. See 157 F.R.D. at 291 (¶ 169) (citing expert testimony that the *Georgine* settlement will “significantly enhance the financial condition and prospects of” the settling defendants by removing “‘uncertainty, which adversely affects these companies’ ability to access the capital markets, to raise debt in equity, or to attract people’”).

206. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*1.

within a specified time period would make it impossible to pay compensation in amounts anywhere near the levels set forth in the grid.<sup>207</sup> Standing alone, then, a fixed-sum settlement in the face of uncertainty over claim projection carries huge risks for the plaintiff class.

Based upon comments raised in the course of the fairness hearing, the district court in the breast implant settlement focused its attention upon this problem.<sup>208</sup> Judge Pointer initially noted that “no one has reliable data” with which to project the number of claims; indeed, the judge candidly acknowledged that he could not “even hazard a guess” in that regard.<sup>209</sup> Judge Pointer nonetheless approved the settlement upon consideration of the manner in which the settling parties had addressed such uncertainty. Specifically, he noted that the settlement afforded class members a second opportunity to opt out in the event of a ratcheting down of compensation levels.<sup>210</sup> In other words, the settling parties in their private negotiations were able to go outside the single opt-out framework of Rule 23(b)(3) to develop a procedure through which they could begin “to obtain the missing information [on the number of claims]” while protecting the interests of the class.<sup>211</sup>

The importance of this innovation cannot be gainsaid. Shortly after announcement of the breast implant settlement, it became readily apparent that the claim projections underlying the agreement were highly inaccurate, — so much so that the downward ratcheting of compensation would have left some members of the plaintiff class with as little as five percent of the amounts originally promised.<sup>212</sup> To forestall the possibility of massive defections from the class through the second opt out, negotiations ensued to increase the fixed sum committed by defendants, but the unexpected bankruptcy of Dow Corning derailed these efforts.<sup>213</sup> Ultimately, several of the remaining, solvent defendants joined together to of-

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207. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*22; *Lindsey Notice*, *supra* note 18, at 7. This process is not unique to mass tort settlements; inaccurate claim projections also have necessitated the repeated reorganization of the trust established in bankruptcy for persons injured by the asbestos products of Johns-Manville. See *Findley v. Falise*, 878 F. Supp. 473, 477-88 (E. & S.D.N.Y. 1995) (tracing the tortured history of the Manville trust).

208. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*20 (noting that “many [who challenged the adequacy of the settlement] are concerned that the defendants’ contributions . . . will not be sufficient to pay benefits at the levels shown in the [grid]”).

209. *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*21-\*22.

210. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*22-\*23.

211. *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*23.

212. See *Money Shortage Looms in Breast Implant Case*, N.Y. TIMES, June 17, 1995, at 8.

213. See *supra* note 6.

fer a modified settlement that, at least, would provide a framework for compensation of women who received implants manufactured by those particular firms. Not surprisingly, this more narrow settlement abandons the fixed-sum approach and, instead, would obligate the defendants to pay specific amounts of compensation to all women who meet certain medical criteria — albeit, lower levels of compensation and more stringent medical criteria than under the original settlement.<sup>214</sup> Such changes in the terms of compensation are understandable, however, in light of newly published epidemiological studies that cast increasing doubt upon the causation element of the plaintiffs' case.<sup>215</sup>

Commenting upon the breast implant example, John Coffee draws the odd lesson that courts should insist upon the inclusion of a second opportunity to opt out in mass tort settlements — essentially, as a matter of course.<sup>216</sup> This prescription confuses results with process. The objective is not for the court — without experience in the subject matter — to demand the inclusion of particular settlement terms. Instead, the breast implant example illustrates the way in which a court may structure a decisionmaking process such that settling counsel must grapple seriously with issues of claim projection.

The beauty of the hard look is that it can guard against the shortchanging of the plaintiff class through erroneous claim projections while, at the same time, affording room for counsel to exercise creativity and innovation in the development of means to address the problem. A second opt out may be mutually acceptable in some situations; the fixed-criteria approach in *Georgine* may work elsewhere; as-yet-unseen techniques may be appropriate in other areas. The point is not so much how the problem is addressed but that it either gets addressed in a reasoned manner tailored to the subject area involved or prevents a mass tort settlement from going forward at all.

In this manner, the hard look has the incidental benefit of guarding against the prospect of settlements that come too early in

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214. See Meier, *Revised Settlement*, *supra* note 6, at A9 (“Under the new proposal, women can qualify for awards of \$75,000 to \$500,000 if they meet more stringent medical criteria. To do so, they would have to submit more medical documentation than required by the first settlement and could have to undergo new tests.”). The manufacturers involved in this revised settlement are Bristol-Myers Squibb, Baxter Healthcare, and 3M. See *id.* In late December 1995, Judge Pointer approved this revised agreement. See *Judge Approves Implant Accord*, N.Y. TIMES, Dec. 28, 1995, at C2.

215. See *supra* note 98.

216. See Coffee, *Class Wars*, *supra* note 10, at 1448-49, 1465.

the development cycle of mass torts. When issues of claim projection are so amorphous as to confound the negotiating skills of counsel to fashion a solution that protects the plaintiff class while affording a modicum of repose to defendants, it is probably just as well to stick with the traditional tort system until more is known. The point is that these tradeoffs can be made by counsel, mindful that they will have to defend the reasoning behind any solution they might fashion in light of critical commentary.

*b. Class Counsel.* Apart from problems of claim projection, commentators also have focused upon the way in which counsel come to represent the plaintiff class. They argue that courts might seek to address agency cost problems not merely through ex post review of the settlement terms but also by becoming involved ex ante in the selection of class counsel. Indeed, one approach implies that courts may avoid entirely the need for review of settlements by using an auction-based system to align the incentives of class counsel and the plaintiff class before negotiations take place with defendants.<sup>217</sup> A second strand of commentary calls for courts to exercise control over the selection of counsel for the plaintiff class in order to prevent defendants from choosing as their negotiating partners some subsegment of the plaintiffs' bar that is willing — indeed, whom defendants might induce — to sell out future claimants.<sup>218</sup>

*i. Auctions.* The most imaginative of these approaches, developed by Jonathan Macey and Geoffrey Miller, envisions the auctioning of the right to represent the plaintiff class. Macey and Miller first developed their auction-based approach in the context of corporate and securities class actions and recently have explored the possibility of its extension to the mass tort area as well.<sup>219</sup> They posit that a court might accept bids from various law firms — potentially, even from the defendants themselves — for the right to represent the plaintiff class. The amount of the winning bid would go to the class and the winning bidder would receive, in exchange, the class members' rights of action against the defendants.<sup>220</sup>

Such an approach would have the considerable benefit of aligning completely the interests of the plaintiff class in maximizing their

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217. See *infra* section III.B.2.b.i.

218. See *infra* section III.B.2.b.ii.

219. See Macey & Miller, *Plaintiffs' Attorney's Role*, *supra* note 10; see also Macey & Miller, *Market Approach*, *supra* note 10.

220. See Macey & Miller, *Plaintiffs' Attorney's Role*, *supra* note 10, at 106-08; Macey & Miller, *Market Approach*, *supra* note 10, at 912-17.

recovery with the financial interests of class counsel — namely, the winning bidder who would now own the plaintiffs' rights of action. Indeed, such alignment prior to the commencement of settlement negotiations between the winning bidder and defense counsel — if viable — would tend to alleviate the need for judicial scrutiny of the resulting settlement terms.

As a practical matter, however, an auction-based approach would not be workable in the mass tort context. First, the sheer amount of money involved likely would exceed the ability of even a consortium of plaintiffs' law firms to form a plausible bid — at least, absent revolutionary changes in legal ethics. The implant settlement, for instance, posits the transfer of over \$4.2 billion in compensation to the plaintiff class,<sup>221</sup> and even that amount ultimately proved too little. The *Georgine* court estimated that compensation under the asbestos settlement will run to over \$1.2 billion.<sup>222</sup> These amounts are several orders of magnitude greater than the sums that the plaintiffs' bar thus far has proven able to raise for purposes of defraying the fixed costs of mass tort litigation.<sup>223</sup>

In the face of such amounts, prospective bidders might seek to raise money through the sale of equity interests — in essence, shares of stock — in the lawsuit that the winning bidder would be entitled to bring against the defendant companies upon acquisition of the plaintiffs' rights of action. Such a device, however, would entail sweeping changes in ethical principles that prevent the marketing of financial interests in a lawsuit<sup>224</sup> — far more sweeping than would be occasioned by Macey and Miller's original suggestion that class counsel acquire such an interest because the equities here would have to be marketed to nonlawyer investors as well.

Likewise, a prospective bidder from within the plaintiffs' bar might seek to borrow the necessary funds from lending institutions. In exchange, the lender would have to adjust the interest rate to account for the risk that the bidder ultimately might prove unsuccessful in litigation against the relevant mass tort defendants.<sup>225</sup>

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221. See *Lindsey* (Sept. 1, 1994), *supra* note 2, at \*1.

222. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 334 (E.D. Pa. 1994).

223. Cf. *supra* notes 38-39 and accompanying text (discussing agreements to fund the development of generic assets).

224. See generally Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 330-34 (1987) (discussing longstanding ethical barriers to the marketing of claims).

225. In the commercial context, of course, an alternative to adjustment of the interest rate would be the retention by the lender of a security interest in some form of asset in the hands of the debtor, such as accounts receivable, industrial equipment, or valuable patents. By contrast, the assets of the mass tort plaintiffs' bar are unlikely to be amenable to such

The interest rate might be modest for a loan in connection with a class action over a mature mass tort, where the prospects for success in litigation against the defendants may well be high. For an immature mass tort, the prospects for successful litigation would remain clouded with uncertainty, such that the lender would have to insist upon an unusually high rate of interest — in essence, a junk bond.<sup>226</sup> The effect, once again, would be for nonlawyers to retain a financial interest in the law practice of the plaintiffs' bar — here, a financial interest in such alternative areas of practice as the debtor firm might pursue in order to pay off the loan, should litigation on behalf of the mass tort plaintiff class prove unsuccessful.

Macey and Miller make a valuable contribution by questioning the ethical constraints on the financing of litigation. But, in an age of increasing distrust of the legal profession, it seems highly unlikely that any change in legal ethics that realistically might occur in the near future would result in less constraint rather than more. Absent the ability of the plaintiffs' bar to tap the resources of nonlawyers, the winning bidder likely would be the defendant — either directly or possibly through the financing of a bid by a particular plaintiffs' law firm of its choice.

Even if a plaintiffs' firm could manage to assemble the requisite cash, formidable disincentives would remain to participation in the bidding process. A plausible bid still would have to set forth some mechanism to distribute the funds to the plaintiff class. Given the temporal dispersion of mass tort claims, this surely is not a simple task, unlike the typical derivative action where the bid simply would be deposited into the corporate treasury or securities litigation where the bid would be distributed in short order amongst the affected shareholders, as identified through brokerage records. Formulation of a compensation regime takes information about the various medical issues involved, the expected number of claims, and so forth — the kind of expertise likely to be built up only at a substantial fixed cost. The consequence could be that no one will bid, for fear that any effort to develop the requisite compensation regime will be supplanted by other bidders who simply could pledge more money to increase funding across the board for any compen-

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treatment. Apart from office equipment and the like, the assets of the plaintiffs' bar are largely reputational; they consist primarily of the ability to obtain new clients on the strength of victories for prior clients.

226. The use of junk bonds as a financing device for bids would raise the ironic prospect of mass tort litigation resulting in bankruptcy to plaintiffs' law firms.

sation regime that might be put forward.<sup>227</sup> Alternatively, the winning bidder simply might be one who already has achieved a dominant position in the subject area through previous efforts to develop the requisite information for purposes of tort litigation — precisely the sorts of plaintiffs' law firms with whom defendants have bargained in the recent settlements.

The upshot is that, in the mass tort context, an auction-based approach is unlikely to do more than re-create what private negotiations already have achieved, if that.

*ii. Reverse Auctions.* A second line of commentary also focuses upon the problem of class counsel selection and draws, once again, upon the image of an auction, of sorts. In separate papers, John Coffee and Susan Koniak decry what they see as the ability of defendants to select as their negotiating partners the members of the plaintiffs' bar who are willing to enter into the cheapest mass tort settlement.<sup>228</sup> As Professor Coffee vividly summarizes the point: "At its worst, this process can develop into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant."<sup>229</sup> Both Coffee and Koniak take as their example the *Georgine* asbestos settlement. In their view, the settling defendants not only selected class counsel in order to cut the cheapest possible deal, defendants also provided special benefits to class counsel for doing so.

As noted earlier, the plaintiff class in *Georgine* consisted exclusively of future claimants — namely, persons exposed to asbestos products from the defendant companies who had yet to sue in tort at the time of the settlement agreement.<sup>230</sup> Persons who had sued by that date but whose cases had yet to be resolved — so-called inventory cases — did not come within the class definition and, accordingly, were not bound to the compensation terms in the settlement. Coffee and Koniak correctly observe that the defendants effected settlements of the inventory cases represented by class counsel in a manner separate from the class action settlement and under different terms of compensation.

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227. Cf. WEINSTEIN, *supra* note 8, at 263 n.159 (quoting a letter from John Coffee raising similar difficulties with an auction-based approach); Macey & Miller, *Market Approach*, *supra* note 10, at 916 (acknowledging that "it would be necessary for a court to establish some type of claims facility with appropriate staffing and technical support").

228. See Coffee, *Class Wars*, *supra* note 10; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

229. Coffee, *Class Wars*, *supra* note 10, at 1354.

230. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 257-58 (E.D. Pa. 1994).

Specifically, Coffee and Koniak note that, with respect to the inventory cases represented by class counsel, defendants afforded cash payments to persons who had yet to suffer impairment — precisely what the class action settlement does not provide.<sup>231</sup> Overall, the inventory cases represented by one of the firms that served as class counsel, for example, received a total of over \$138 million in compensation — fifty-four percent more in dollar terms than the roughly \$89 million that the same cases would have received, by Professor Coffee's estimate, had they come within the class action settlement.<sup>232</sup> Based upon this observation, Professor Coffee goes on to recommend, in effect, a per se rule against mass tort settlements that define the plaintiff class to include only future claimants, not inventory cases pending in the tort system.<sup>233</sup> In addition, he calls upon courts to exercise control over the selection of class counsel by establishing a steering committee — representative of the various plaintiffs' firms involved in the subject area — to conduct settlement negotiations with defendants.<sup>234</sup>

The Coffee-Koniak critique is a challenging one. Indeed, the possibility that defendants might provide class counsel with lucrative compensation terms for their inventory cases would mesh neatly with a cut-and-run strategy on the part of those firms.<sup>235</sup> The potential for such abuse and its effectuation are two different

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231. See Coffee, *Class Wars*, *supra* note 10, at 1394; Koniak, *supra* note 228, at 1064-65.

232. See Coffee, *Class Wars*, *supra* note 10, at 1397; see also Koniak, *supra* note 228, at 1067 & n.104. In addition to comparing the *Georgine* settlement terms with those afforded to the inventory cases of class counsel, Professor Coffee recently has made a second observation: that the compensation payments set forth in the *Georgine* settlement grid are markedly less than those in a seemingly similar grid developed in a separate proceeding for purposes of the Johns-Manville bankruptcy trust. See Coffee, *Class Wars*, *supra* note 10, at 1395-96. Thus, for instance, Professor Coffee asserts that, upon “[c]omparing the two [grids], one sees that, in the ordinary case, a disabled victim of asbestosis will receive \$50,000 under the Johns-Manville [bankruptcy] settlement but only between \$5800 and \$7500 under *Georgine*.” *Id.* at 1396.

That is simply untrue. The claims of all persons injured by the asbestos products of Johns-Manville are subject to *pro rata* reduction to account for the limited funds available in the bankruptcy trust. See *Findley v. Falise*, 878 F. Supp. 473, 495 (E. & S.D.N.Y. 1995) (prefacing the compensation grid with the caveat that claims are “subject to *pro rata* reduction”). As a result, the tort victims of Johns-Manville will receive only about 13.6% of the amounts indicated on the grid. See 878 F. Supp. at 484. Moreover, even if one ignores these *pro rata* reductions, the comparison to Johns-Manville in no way undercuts the point that the compensation levels in the *Georgine* grid accurately reflect the experience in the tort system of the particular asbestos defendants who are parties to that settlement — defendants whom Professor Coffee acknowledges to be differently situated than Johns-Manville. See Coffee, *Class Wars*, *supra* note 10, at 1396.

233. See Coffee, *Class Wars*, *supra* note 10, at 1455.

234. See *id.* at 1454.

235. See *supra* section II.B (discussing cut-and-run strategy).



things, however,<sup>236</sup> and the task of discerning between the two is one readily amenable to judicial review along the lines of the hard look. In particular, Coffee and Koniak's image of a reverse auction underestimates the constraints that flow from an open, participatory process for review of mass tort settlements.

At its core, the image of a reverse auction means that there must be losers — namely, counsel who would have some plausible claim to represent the plaintiff class based upon experience in the litigation at hand but whom defendants do not select as their negotiating partners. The attraction of an approach to judicial review rooted in notice-and-comment rulemaking lies in its ability to draw upon the rivalries *within* the mass tort plaintiffs' bar to safeguard the interests of class members. Such an approach enables the "losing" plaintiffs' firms to bring to light exactly the sorts of sweetheart deals for class counsel that a reverse auction might engender. In fact, the losing firms will have a powerful incentive to highlight unfair compensation terms given that they, unlike class counsel, will obtain no fee award whatsoever as representatives of the plaintiff class and, hence, will not have the opportunity to cut and run; instead, they — like future claimants themselves — face the prospect of life in the aftermarket for compensation claims under the settlement.

The mere possibility of opposition by rival members of the plaintiffs' bar, ironically enough, may well deter defendants from pursuing a reverse auction strategy in the first place, as such opposition will increase the barriers to judicial approval of any resulting agreement. An attempt to engage in a reverse auction, in other words, will sow the seeds of its own destruction where counsel excluded from the negotiating table remain free to object.

The very example that Coffee and Koniak seize upon illustrates the operation of this mechanism. Here, details are significant, as they serve to illuminate the erroneous premises from which this line of criticism has proceeded. In the *Georgine* fairness hearing, Frederick Baron of the Dallas law firm of Baron & Budd led the charge against the settlement.<sup>237</sup> The objectors even went so far as

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236. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 306 (¶ 252) (E.D. Pa. 1994) ("The opportunity to collude is not enough for a finding of collusion . . . especially given this Court's thorough analysis of the fairness of the terms of the class action settlement pursuant to Fed.R.Civ.P. 23.").

237. Like class counsel, Baron too came to the proceedings as a "giant in the cause of asbestos plaintiffs," with two decades of experience in the litigation. Dale Russakoff, *Asbestos Pact: Legal Model or Monster?*, WASH. POST, May 11, 1994, at A12. For an informal history of Baron's rise as an asbestos litigator, see Taylor, *supra* note 44, at 1, 9-11. In fact, "[i]n the 1970s, Baron and [Ronald] Motley, then in their twenties, separately unearthed

“to solicit opt outs all over the United States” through what the district court described as a “massive campaign” of “misleading” communications concerning the terms of the *Georgine* settlement.<sup>238</sup> Indeed, the court ultimately considered it necessary to invalidate the opt outs believed to have resulted from this campaign and to take the unprecedented further step of affording the affected class members a new opportunity to make their opt-out decisions, this time based upon a court-approved description of the settlement terms.<sup>239</sup>

Though certainly a vivid confirmation of the objectors’ intensity, such misconduct is not essential to the operation of an administrative model for judicial review. Wholly apart from the campaign to induce opt outs,<sup>240</sup> Baron set forth in the *Georgine* fairness hearing precisely the reverse auction allegations described here, drawing upon testimony from no less than Professor Coffee himself, who appeared as an expert witness on a pro bono basis.<sup>241</sup>

The fundamental problem with Coffee and Koniak’s comparison of the dollar amounts of compensation lies in its failure to account for the noncash elements characteristic of mass tort settlements like that in *Georgine*: principally, the twenty-five percent cap on contingency fees, the time value of money from speedier payment of compensation, and the insurance afforded to as-yet-unimpaired persons. The question is not simply whether the inventory cases got more money; they should have. Instead, the question is whether the difference in the cash compensation received by the inventory cases over and above what they would have received under the *Georgine* settlement bears a reasoned connection to the other benefits afforded in lieu of cash.

To answer this question, the district court took two approaches — both of which closely resemble *State Farm*’s demand for the articulation of a “rational connection between the facts found and the

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proof that key asbestos makers systematically hid the fact that their product was harmful.” Russakoff, *supra*, at A12.

238. *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 498 (E.D. Pa. 1995).

239. *See* 160 F.R.D. at 518.

240. There is no indication of involvement by any member of the legal academy in the objecting parties’ campaign to induce opt outs based upon misleading descriptions of the settlement.

241. *See Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 310-11 (¶¶ 278-82) (E.D. Pa. 1994) (rejecting Coffee’s testimony). Professor Koniak also testified, challenging class counsel’s conduct on ethical grounds, but the court rejected that line of attack as well. *See* 157 F.R.D. at 302-03 (¶¶ 229-33). On the nature of the testimony from both witnesses, see Coffee, *Class Wars*, *supra* note 10, at 1343 n.\* (pro bono); Koniak, *supra* note 228, at 1045 n.† (paid).

choice made."<sup>242</sup> First, the court called upon counsel who fashioned the class action settlement to come forward with data on the amounts historically paid by the defendants for cases represented by class counsel in the tort system.<sup>243</sup> The court then appointed its own special master to compare these data to the amounts of compensation afforded to the inventory cases — an analysis that revealed the two to be comparable.<sup>244</sup> In short, the court used the historical data on defendants' settlements with class counsel in the tort system to ascertain that the inventory cases resolved in tandem with the class action had not received an unduly lucrative deal — specifically, that they had not received a cash premium over and above that which the tort system historically provided in lieu of the noncash benefits afforded under the class action settlement.

Second, the court drew upon findings earlier in its opinion — again, based upon information developed during the fairness hearing — to conclude that the nature of the noncash benefits under the class action settlement reasonably could account for the higher level of cash compensation paid to the inventory cases.<sup>245</sup> Specifically, the court observed that compensation under the class action settlement would involve “considerably lower transaction costs, including attorneys’ fees.”<sup>246</sup> The reduction in attorneys’ fees alone — from thirty-three to forty percent in asbestos litigation to a maximum of twenty-five percent under the settlement<sup>247</sup> — would necessitate that cash compensation for the inventory cases be set some twelve to twenty-five percent higher for all disease categories simply to equalize the money the plaintiffs actually will receive.<sup>248</sup> One reasonably may account for the remaining difference between the

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242. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

243. See *Georgine*, 157 F.R.D. at 307 (¶ 254).

244. See 157 F.R.D. at 307-08 (¶¶ 254, 259-63). The court's approach did not follow an administrative model in all its features, however, as the court did not make available these historical data to the objecting parties. See 157 F.R.D. at 307 (¶ 254) (noting that settling parties provided such data to the special master on a “confidential” basis). The court appears to have regarded its appointment of a special master as a substitute for adversarial review of the data.

245. See 157 F.R.D. at 310-11 (¶ 281).

246. 157 F.R.D. at 310-11 (¶ 281).

247. See 157 F.R.D. at 285 (¶¶ 136-37).

248. This estimate results from the following equation:

$$(C_i) \times (1 - F_i) = (C_s) \times (1 - F_s)$$

where:  $C_i$  = compensation for inventory case

$C_s$  = compensation for same case under class action settlement

$F_i$  = contingency fee applicable to inventory case (33-40%)

$F_s$  = contingency fee applicable to same case under class action settlement (25%).

cash compensation paid to the inventory cases and that afforded to the plaintiff class by reference to the insurance component of the class action settlement — a feature that the district court found to be absent from the terms afforded to the inventory cases.<sup>249</sup>

Beyond the details of *Georgine*, the broader lesson is that hard look review — judicial insistence that proponents provide a reasoned explanation for the distinctions drawn in a mass tort settlement — is capable of detecting the sorts of agency costs that may arise from the entrepreneurial interests of counsel. In particular, review on an administrative model provides appropriate incentives for settling counsel faced with a choice between pursuit of an early settlement, when little historical data may be available but where liberalization of causation requirements may be highly significant, and resolution at a more advanced stage, when the opposite may be true. Had the settling parties in *Georgine* been unable to draw upon historical experience in the tort system to support the reasonability of their inventory settlements, for example, a reviewing court might well have been unable to discern a basis for the differences in treatment afforded to those cases. Conversely, counsel may enjoy greater flexibility in the manner in which they structure a settlement when a body of historical data exists against which to check their handiwork. The point of the hard look is to leave the inevitable tradeoffs between structure and timing — in the first instance — to those most intimately familiar with the nature of the litigation at hand.

One potential response to this argument might be that Professor Coffee's call for judicial selection of a committee to conduct negotiations on behalf of the plaintiff class nonetheless may serve as a useful measure to prevent abuse. Why rely on post hoc review, in other words, if one might prevent infidelities from occurring by fashioning a suitable "bargaining unit" at the outset? The problem

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249. See *Georgine*, 157 F.R.D. at 311 (¶ 281) (noting that the insurance component — the prospect that "claimants with non-malignant conditions will be able to receive additional compensation if and when they contract cancer" — distinguishes the class action settlement from the terms offered to the inventory cases). Even if one had to account for the entire difference in cash compensation by reference to this insurance component, the allocation of \$48 million amongst the 9777 nonmalignant cases in *Ness, Motley's* inventory — those in need of insurance to guard against the risk of cancer — would leave each such case with \$4909 in cash. See Coffee, *Class Wars*, *supra* note 10, at 1397 (difference in cash compensation is approximately \$48 million); Koniak, *supra* note 228, at 1067 n.104 (chart depicting *Ness, Motley* inventory cases). That figure is not markedly out of line with the \$3995 that the average American business pays annually to provide health insurance to an individual employee, see U.S. CHAMBER RESEARCH CTR., EMPLOYEE BENEFITS 1994 EDITION: SURVEY DATA FROM BENEFIT YEAR 1993, at 17 (1994) — an employee, of course, with comparatively minimal exposure to asbestos and, hence, a lower risk of cancer than the typical inventory case.

with such a view is that it overlooks the reasons why a settlement class limited to future claimants may be affirmatively desirable.

Both Coffee and Koniak neglect to note that, upon MDL consolidation of federal asbestos litigation, considerable negotiation, in fact, did take place between a judicially approved steering committee representative of the asbestos plaintiffs' bar and their counterparts in the defense bar.<sup>250</sup> Indeed, Frederick Baron — the eventual leader of the objectors in *Georgine* — was a member of the committee.<sup>251</sup> The problem, as the *Georgine* court aptly put it, was that neither side could "get beyond the lowest common denominator" within its own ranks.<sup>252</sup> In the parlance of economics, this is a classic illustration of a holdout problem — a situation in which some subset of those involved in a collective negotiation are in a position to scuttle any genuine compromise that does not give them everything they want.<sup>253</sup> Understood in this light, an inflexible requirement that mass tort settlement negotiations be conducted, if at all, by a broadly representative steering committee of plaintiffs' lawyers would form a blueprint for holdouts.

What actually happened in *Georgine* points the way out of this morass. Rather than consign everyone to more asbestos litigation in the tort system, the members of each camp who were willing to negotiate toward the creation of an alternative administrative regime — the two plaintiffs' firms who came to serve as class counsel and twenty of the asbestos defendants — broke off from the holdouts.<sup>254</sup> Such behavior certainly creates the risk of the reverse auction phenomenon that Coffee and Koniak quite properly fear, but it also gives rise to the prospect of a genuine compromise that may leave the plaintiff class better off than under the tort system — albeit, not to the full extent that every member of the plaintiffs' bar might like. Compromise is just that; it does not mean getting everything that you want.

One may best understand the decision to define the *Georgine* class to exclude pending asbestos cases as a way for the settling par-

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250. See *Georgine*, 157 F.R.D. at 265-67 (¶¶ 30-36); *supra* section I.C.1.

251. See Andrew Blum, *Asbestos Counsel*, NATL. L.J., Oct. 21, 1991, at 2.

252. *Georgine*, 157 F.R.D. at 266 (¶ 35).

253. For allusions to the possibility of holdouts in class action settlement negotiations, see *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) ("[T]hree-cornered negotiations are clumsy at best, especially when one of the corners . . . adopts an obdurate negotiating position."); and *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 156 (S.D. Ohio 1992) ("[I]f this Court had required Class Counsel and the Defendants to include in their negotiations all attorneys representing absent class members, the negotiations probably would have deteriorated into a cacophonous clamor of voices.").

254. See *Georgine*, 157 F.R.D. at 266 (¶ 35).

ties to solve the holdout problem. Such pending cases must have had legal representation in order to have been filed. Accordingly, had the class included all pending cases, class counsel would have had to include in the negotiations their holdout colleagues within the plaintiffs' bar, lest class counsel be guilty of "poaching" upon the lawyer-client relationships those rival firms had previously established. It is one thing to effect a settlement of claims for future claimants; it is quite another — indeed, it probably would be tortious<sup>255</sup> — for class counsel to settle the claims of persons already represented by another law firm.

The alternative that the settling parties in *Georgine* pursued was to exclude all inventory claims from the class action but to afford them a cash premium in lieu of the noncash benefits conferred by the settlement. Most notably, not only did the defendants afford such treatment to the inventory cases represented by class counsel, they also resolved, on similar terms, an equal number of inventory cases represented by firms *unaffiliated* with class counsel.<sup>256</sup> This singular fact — not mentioned by either Coffee or Koniak — further undercuts the suggestion of a sweetheart deal to induce the support of class counsel for the *Georgine* settlement; quite to the contrary, it is consistent with an understanding of the proceedings as a solution to a holdout problem.

All of this is to say that hard look review — albeit *ex post* in character — offers a superior method to control the phenomenon of a reverse auction while, at the same time, preserving flexibility for those who are willing to fashion a genuine compromise free from the problem of holdouts. Those who might otherwise have scuttled a collective negotiation may serve a valuable role as critics in a notice-and-comment process, without being empowered to spoil all chances for a settlement agreement that may benefit the plaintiff class.

### C. *The Limits of an Administrative Perspective*

Although judicial review on an administrative model represents a plausible response to the recent phenomenon of mass tort settlements, the model is not without limitations. Here, I discuss the two

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255. Many courts have recognized a cause of action for tortious interference by a third party with an ongoing lawyer-client relationship. *See, e.g.*, *Cross v. American Country Ins. Co.*, 875 F.2d 625 (7th Cir. 1989) (Illinois law); *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Terrlink & Bell*, 138 Cal. Rptr. 670 (Ct. App. 1977); *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 511 A.2d 492 (Md. 1986).

256. *See Georgine*, 157 F.R.D. at 295-96 (¶¶ 193, 196).

most prominent of these limits, which go to the interests of the reviewing court itself and to questions of legitimacy.

### 1. *Institutional Bias*

One significant difference between judicial review of rulemaking by an administrative agency and review of a mass tort settlement lies in the institutional interests of the reviewing court. In administrative law, the court can act as a neutral umpire, resolving disputes between the rulemaking agency and its critics. In the mass tort context, however, the prospect of a settlement that would remove future claims from the judicial system — and perhaps thousands of pending cases as well — has obvious institutional implications for the court itself. In the extreme, a court exercising review under Rule 23(e) may have an incentive to rubber stamp a mass tort settlement simply to rid itself of such meddlesome claims.<sup>257</sup>

This concern has some merit, although its impact easily may be exaggerated. First, if ever there were a case in which one might expect an institutional bias in favor of approval to be overwhelming, it would be a mass tort settlement in the asbestos area. The burdens of this particular litigation upon the dockets at all levels of the judicial system were well known prior to the negotiations that produced the *Georgine* settlement. A special committee of the Judicial Conference of the United States, convened at the request of Chief Justice Rehnquist, painted an alarming picture in this regard.<sup>258</sup> Indeed, a cynic might see the Rehnquist Committee's report and the MDL Panel's subsequent references to the prospects for settlement upon consolidation of the federal asbestos litigation<sup>259</sup> as lending a degree of respectability to judicial bias in favor of settlement approval. Nonetheless, when properly understood, the fairness determination of the district court in *Georgine* was hardly a rubber stamp.<sup>260</sup>

Second, to the extent that institutional bias in favor of approval can surmount judicial norms of self restraint, such bias is likely to arise at the appellate level to a far lesser degree than in the lower courts. The federal courts of appeals simply do not bear the brunt

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257. See Macey & Miller, *Plaintiffs' Attorney's Role*, *supra* note 10, at 45-46.

258. See REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 7-10 (1991) [hereinafter REHNQUIST COMMITTEE REPORT].

259. See *supra* note 74 and accompanying text.

260. *But cf. infra* section III.C.2.a (discussing criticism of the *Georgine* court's analysis of class certification under Rule 23).

of mass tort litigation in the same way as the district courts,<sup>261</sup> and that is all to the good when it comes to appellate review of decisions to approve mass tort settlements. The hardness of hard look review, in other words, is a matter susceptible to correction by the courts of appeals, and the mere threat of reversal — with the possibility that the whole matter will be thrown back into the lap of the district judge — can act as a deterrent to dereliction at the district court level.

## 2. *Legitimacy*

Were the risk of institutional bias by the reviewing court the only potential shortcoming of an administrative model, further developments probably would be unnecessary. The more troubling limitation of an administrative perspective, however, lies not in the inclinations of courts but in the central role that private attorneys play as settlement architects. Private attorneys may have expertise in a specific area of mass tort litigation akin to that of a public administrative agency in a given field of regulation, but private attorneys simply do not have the same political legitimacy. The authority of an administrative agency to engage in rulemaking stems from a delegation of power from Congress which, in turn, traces its regulatory authority to Article I of the Constitution. In contrast, no one delegated to Ronald Motley and his cohorts the power to resolve mass tort litigation on a prospective basis.<sup>262</sup>

The absence of such delegated power is precisely what has forced the mass tort bar to resort to the class action mechanism of Rule 23 in order to give binding effect to the settlements they have fashioned. The application of Rule 23, however, has not proven smooth. A crisis of legitimacy has manifested itself in two interrelated ways: first, in concern over the use of the class action device to effect a mass tort settlement when class certification might not have been warranted for purposes of actual litigation; and second, in lingering uncertainty over the basis for personal jurisdiction over

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261. The *Cimino* litigation offers a vivid illustration of the difference in perspective between circuit courts and district courts in this regard. District Judge Parker decried what he perceived as the Fifth Circuit's resistance to his efforts to streamline the disposition of the asbestos cases in his court through the use of aggregative techniques; indeed, he went so far as to remark blithely that he "should have caused thirty to forty identical appeals to have been processed in order to enhance the awareness level of the Court of Appeals." *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 651 (E.D. Tex. 1990), *appeal argued*, No. 93-4452 (5th Cir. Feb. 8, 1995).

262. See *supra* note 166 (discussing the absence of an analogue to the *Chevron* inquiry in administrative law, which asks whether the agency has acted within the bounds of its delegated authority).



class members. These issues remain unsettled, with only a handful of courts speaking directly to either question thus far. My purpose here is not so much to resolve these issues but to explain how their very existence sheds light upon the limitations of an administrative model for mass tort settlements. In so doing, I seek to frame the terms for debate over the solution that I offer in Part IV as a way to alleviate such concerns.

*a. Class Certification.* By its terms, Rule 23(b)(3) authorizes the certification of an opt-out class action upon a finding that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>263</sup> The problem in the mass tort context is that such questions as may be common to the class are also likely to be bound up with differences in the common law of tort from state to state — differences that tend to undercut the superiority of a class action as a device for adjudication. Indeed, the choice of substantive law to apply over large numbers of geographically dispersed claims is a question that has long plagued judicial efforts to resolve mass torts through active class action litigation. Some judges have sought to solve the problem by purporting to glean a consensus from the common law of the various states, but such efforts quite properly have met with skepticism.<sup>264</sup> As Judge Posner has observed, any attempt by a federal court to apply “a legal standard that does not actually exist anywhere in the world” smacks of exactly the kind of general common law that the Supreme Court in *Erie Railroad v. Tompkins* held to be beyond the power of the federal courts in diversity cases.<sup>265</sup>

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263. FED. R. CIV. P. 23(b)(3). This requirement of subsection (b)(3) accords with the general requirement in subsection (a)(2) that a federal court may certify a class action in any form “only if . . . there are questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2).

264. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995) (issuing mandamus to decertify class action where district judge had envisioned trial of nationwide products liability class action under a single negligence instruction); SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 16, at 128-31 (criticizing the concept of consensus law, one of several bases asserted by Judge Weinstein for class certification in Agent Orange litigation).

265. See *Rhone-Poulenc*, 51 F.3d at 1300 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938)). But see Macey & Miller, *Market Approach*, *supra* note 10, at 911 (“Federal courts should jettison the unworkable *Erie* rule in the mass tort context and replace it with a rational approach that recognizes the necessity of federal common law in this area.” (footnote omitted)).

An alternative approach that avoids the need to generate some “brooding omnipresence” of federal common law<sup>266</sup> — albeit one that reduces the efficiency of the class action — is that taken in litigation over asbestos in the nation’s school buildings. There, the Third Circuit upheld certification of a class action for litigation purposes upon ascertaining that the relevant tort claims were reducible to four basic patterns,<sup>267</sup> such as would make them amenable to trial through a series of special verdicts.

At first glance, the use of Rule 23 purely for purposes of giving effect to a settlement, rather than as a device to organize active class action litigation, would seem to offer a way out of these difficulties. Under this view — endorsed by the leading treatise on class actions and explicitly adopted by the district court in *Georgine* — the element of commonality may be satisfied more readily in the settlement context; as the *Georgine* court put it, the question of whether the settlement is fair may, in itself, serve as the “predomina[nt]” issue common to the members of the plaintiff class as a whole.<sup>268</sup> Judge Pointer appears to have taken a similar view in the breast implant settlement. There, he certified the plaintiff class only provisionally, pending approval of the class action settlement.<sup>269</sup> Again, the suggestion seems to be that the settlement itself provides the requisite common issue — indeed, that the class action format might not work for actual litigation of breast implant suits.

Such a view, however, begs the question whether the settlement should be before a federal court at all.<sup>270</sup> The element of commonality is not simply a requirement for the convenience of the court — one that goes merely to the workability of a class action trial and that may be more easily satisfied when a trial is not in the offing. It also implicates the justification for displacement of litigation in state fora by a federal class action — one capable of roping in non-diverse claims as long as complete diversity exists merely between

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266. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”).

267. See *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986).

268. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (¶ 7) (E.D. Pa. 1994); see also *In re A.H. Robins Co.*, 880 F.2d 709, 738-40 (4th Cir. 1989); 2 NEWBERG & CONTE, *supra* note 124, § 11.28, at 11-57 to 11-58.

269. See *Lindsey* (Apr. 1, 1994), *supra* note 119, at \*3.

270. Cf. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995) (“To state that class members were united in the interest of maximizing over-all recovery begs the question.”).

the representative plaintiffs and the defendants.<sup>271</sup> As Judge Edward Becker recently phrased the point outside of the mass tort context, the risk is that the class action device will “convert[ ] a federal court into a mediation forum for cases that belong elsewhere, usually in state court.”<sup>272</sup> Under this second view, the appropriate stance is for courts to safeguard the federalism aspect of Rule 23 by insisting that “actions certified as settlement classes must meet the same requirements under Rule 23 as litigation classes.”<sup>273</sup> In other words, mass tort settlements could not be effected for classes that would not pass muster under Rule 23 for purposes of actual litigation in a class action format.

This second, more stringent view would not foreclose the use of the class action as a binding device for mass tort settlements, at least where the court can discern a manageable number of patterns in the applicable common law, such as would make viable a hypothetical trial.<sup>274</sup> Even this limitation, however, may not be enough to keep the federal courts from edging distressingly close to “mediation for[a].” It would be temptingly easy to conclude that a trial of a nationwide mass tort class action would be workable when one would not actually have to conduct such a proceeding.

In short, reliance upon private counsel as the architects of mass tort settlements necessitates the use of a procedural mechanism that could, in some situations, threaten institutional values that go beyond the tort system. One, however, need not contort the jurisprudence of Rule 23 to effect a resolution of these questions.<sup>275</sup> If anything, the foregoing observations highlight the need for an alternative mechanism with which to give binding effect to mass tort settlements — specifically, a device that can draw upon the benefits of private negotiations between experienced counsel but that does not depend upon the invocation of Rule 23.

*b. Personal Jurisdiction.* Similar considerations also lie behind the debate over the basis for personal jurisdiction in mass tort settlements.<sup>276</sup> The debate centers upon the steps necessary as a matter of constitutional due process to bind the members of the

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271. See *supra* note 121 and accompanying text.

272. *GMC Pick-Up Truck*, 55 F.3d at 799.

273. 55 F.3d at 799; see also *Coffee, Class Wars*, *supra* note 10, at 1456.

274. See *GMC Pick-Up Truck*, 55 F.3d at 799 (leaving open this possibility).

275. One possible statutory response would be for Congress to revise Rule 23 in order to give explicit recognition to a lower legal standard for certification of settlement class actions.

276. No court has turned away a mass tort settlement on grounds of subject matter jurisdiction. See *supra* notes 113 (exposed but presently unimpaired persons have standing), 115 (prenegotiated settlement sufficient to constitute “case or controversy”).

plaintiff class to a privately generated regime — or, to put the point conversely, the procedural limitations upon the extinguishment of such persons' rights of action in tort through a judgment embodying the class action settlement. Challenges along these lines tend to arise not in the fairness hearing itself but afterward, when individual members of the plaintiff class who did not opt out under Rule 23(b)(3) seek to sue the settling defendants in tort. The basic pattern is for the district court to enjoin these state court tort actions to protect its earlier judgment affording binding force to the settlement. The plaintiffs then challenge the injunction by arguing that the court lacked personal jurisdiction over them in entering the settlement — specifically, that they lack minimum contacts with the forum in which the court sits and that they did not otherwise consent to the court's jurisdiction. Indeed, such a challenge is currently pending before the Third Circuit with respect to an injunction of asbestos actions in state court brought against the defendants in the *Georgine* settlement.<sup>277</sup>

Under current law, one confidently may say that such a collateral attack is not available to persons who had reason to be aware of their past exposure and who received actual notice of the opportunity to opt out of the plaintiff class. In *Phillips Petroleum Co. v. Shutts*,<sup>278</sup> the Supreme Court squarely held that, at least with respect to known members of a plaintiff class, those who receive actual notice but who do not opt out will be considered to have consented implicitly to the jurisdiction of the court over their persons.<sup>279</sup> The affording of such notice will provide all the process that is due as a constitutional matter.<sup>280</sup> The open question today concerns the extent to which *Shutts* applies beyond the parameters of that case. The plaintiff class in *Shutts* consisted entirely of known plaintiffs — identified persons who owned certain royalty rights against the defendant oil company.<sup>281</sup> In finding implied consent in that situation, the Court expressly declined to intimate a view about personal jurisdiction in other types of class actions.<sup>282</sup>

By definition, unknown plaintiffs cannot be afforded the kind of individualized mailing used to notify the royalty owners in *Shutts*.

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277. See *supra* note 6.

278. 472 U.S. 797 (1985).

279. See 472 U.S. at 811-14. The notion of implied consent in *Shutts* is not without its critics. See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 16-19 (1986).

280. See 472 U.S. at 812.

281. See 472 U.S. at 799.

282. See 472 U.S. at 811 n.3.

Nor are settling counsel likely to be in a position to prove conclusively that such persons received notice through other means, such as the mass media, unions, or other intermediaries; indeed, as discussed earlier, one may best understand those devices to be directed more toward the generation of information in a notice-and-comment process than toward the affording of actual notice to individual class members. In addition, some commentators have doubted the propriety of drawing an inference of consent when exposed persons — even if they receive actual notice — have yet to ascertain whether they actually will become impaired.<sup>283</sup> Finally, it is conceivable that a plaintiff class in a mass tort settlement might include at least some persons who do not even know that they have been exposed to the substance at issue. Such is obviously not the case with respect to breast implant recipients and probably not for persons with occupational exposure to asbestos sufficiently extensive to cause an increased risk of future injury,<sup>284</sup> but one nonetheless cannot exclude the possibility that the members of some future plaintiff class may be unaware of their exposure.

The one decision to have addressed in any detail the applicability of *Shutts* to unknown mass tort plaintiffs — *In re "Agent Orange" Product Liability Litigation (Ivy v. Diamond Shamrock Chemicals Co.)*<sup>285</sup> — involved a collateral attack upon the settlement that concluded active class action litigation over Agent Orange. There, the Second Circuit observed that “there was no easily accessible list of veterans’ ” exposed to Agent Orange during the Vietnam War, unlike the situation of the royalty holders in *Shutts*.<sup>286</sup> Accordingly, as in the more recent agreements, notice of the Agent Orange settlement “was provided to class members by mail where feasible and by advertisements in the print and broadcast media.”<sup>287</sup> Nearly a decade after the settlement had received judicial approval, however, certain veterans — who apparently had not received individualized notice — sued in tort for injuries that they alleged “did not manifest themselves or were not discovered”

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283. See Koniak, *supra* note 228, at 1086-87.

284. See *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 334 (E.D. Pa. 1993) (finding that “after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure”).

285. 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

286. 996 F.2d at 1435 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987)).

287. 996 F.2d at 1429.

until after the settlement date.<sup>288</sup> *Ivy*, in short, presents the difficult case of unknown plaintiffs with subsequently manifested injuries.

The Second Circuit recognized that the implied consent theory of *Shutts* was inapplicable to these plaintiffs' collateral attack, but the court nonetheless declined to limit the settlement only to those veterans who had received individualized notice. Rather, the court reasoned that:

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be[ ] made available to these claimants," . . . and by ensuring that they receive vigorous and faithful vicarious representation.<sup>289</sup>

Under this view, *Shutts* represents a rule of preference: for those class members who can be identified, due process demands individualized notice. But this does not mean that the Due Process Clause is violated when a court binds unknown plaintiffs to a settlement in the absence of such notice. Rather, the process due to the latter category of plaintiffs lies not in affording them the opportunity to consent when they may not be in a position to make such a decision but, instead, in judicial review of the settlement terms and the process by which those terms were reached.

Although the Second Circuit thus purported to avoid reliance upon the notion of implied consent in *Shutts*, the court's understanding of due process nonetheless involves the implication of consent in a deeper sense. The unarticulated subtext of *Ivy* seems to be that, even when one cannot reliably draw an inference of consent based upon inaction on the part of each individual class member à la *Shutts*, one nonetheless may infer consent of a broader, Rawlsian sort: if only it were possible for everyone to bargain in advance of a mass tort — without anyone knowing his or her ultimate status as a mass tort victim, a mass tortfeasor, or neither — then everyone would consent to a system in which mass tort settlements could resolve the rights of unknown class members, with the assurance that the courts will act as a check upon abuse by class counsel.<sup>290</sup> *Ivy*, in other words, rests upon a notion of implied consent not to a partic-

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288. 996 F.2d at 1430.

289. 996 F.2d at 1435 (quoting 1 NEWBERG & CONTE, *supra* note 124, § 1.23, at 1-56).

290. Cf. JOHN RAWLS, A THEORY OF JUSTICE 11-22 (1971) (positing such bargaining from "the original position" as a criterion for justice).

ular settlement but, instead, to a broader framework by which settlements may be reached in the mass tort area generally.

Whether this theory of consent ultimately would be enough to satisfy constitutional due process is a matter I leave to others. My point here is that the viability of mass tort settlements in the future need not await the resolution of this question, just as it need not await a solution to problems of class certification under Rule 23. Rather than rely upon a court's guess about how people would bargain behind the proverbial veil of ignorance, there is a more reliable means by which to approximate what such bargaining would produce: specifically, Congress should consider the possibility of building upon recent experience by developing a statutory regime for mass tort settlement negotiations that is independent from Rule 23 but that provides for judicial review of any resulting agreements. As a starting point for such discussions, I sketch a few suggestions to guide this next step in the transformation from tort to administration.

#### IV. AN AGENDA FOR PUBLIC LAW

To say that Congress should develop a statutory regime for mass tort settlements does not mean that it must replace private administrative compensation systems with a large scale public bureaucracy. The rise of mass tort settlements, if anything, should serve as a rejoinder to claims that big problems in the law necessarily require big government. Indeed, one of the significant attractions of private compensation systems designed on a tort-by-tort basis is that they are less likely than public agencies to linger on for years after accomplishment of their basic mission. Instead, the statutory regime that I envision would place the government not in the capacity of dictating solutions to mass torts but, instead, in a role of facilitating private agreements to address such problems. The key is simply to replace the binding device of a Rule 23 class action with Article I regulatory authority.

Here, Congress should draw upon insights from the Negotiated Rulemaking Act of 1990.<sup>291</sup> The notion behind the Act is to provide an alternative to the conventional rulemaking process for pub-

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291. 5 U.S.C. §§ 561-70 (1994). The Act developed from both academic commentary and experimentation by rulemaking agencies. See Philip J. Harter, *Negotiating Regulations: A Cure For Malaise*, 71 GEO. L.J. 1 (1982) (offering the earliest and most complete articulation of the case for negotiated rulemaking); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) (describing experimentation by EPA). For general background on the operation of the Act, see ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK (1990).

lic administrative agencies. Specifically, the Act establishes a framework for the formulation of agency rules through a process of negotiation amongst those who would be affected thereby — both regulated interests and regulatory beneficiaries — in order to avoid the prospect of “expensive and time-consuming litigation” in court over the validity of the final rule.<sup>292</sup> In this regard, the Act is part of the broader movement toward alternative dispute resolution in the law as a whole — one that reflects the same sorts of dissatisfactions with traditional litigation as have become painfully evident in the mass tort context.

For present purposes, the central concept of the Act is that an administrative agency may discharge its rulemaking responsibilities by focusing upon areas in which a “limited number of identifiable interests” will be affected by a rule, by convening a committee of persons who represent those interests, and by using the results of the committee negotiations as the basis for issuance of an agency rule for notice and comment.<sup>293</sup> In its final form, a rule formulated through negotiated rulemaking remains subject to judicial review in the same manner as if it had resulted from conventional rulemaking procedures under the APA.<sup>294</sup>

A similar approach in the mass tort area holds the promise of retaining the benefits of private negotiation — experience in the subject area and ready access to information on claim values in the relevant mass tort stock market — while, at the same time, surmounting concerns of class certification and personal jurisdiction. Specifically, a government agency might draw upon the results of private negotiations — much like those that occurred over asbestos and breast implants — to promulgate regulations that would establish a compensation program funded by defendants for persons injured by a particular mass tort.

Such a solution modeled after negotiated rulemaking need not displace the status quo, wherein those who effect a mass tort settlement must deal with the doctrinal uncertainties of Rule 23. To the contrary, the prospect that a government agency might find the compensation terms formulated by private counsel to be unfair —

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292. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, §§ 2(2), (4), 104 Stat. 4969, 4969 (congressional findings).

293. *See* 5 U.S.C. § 563(a) (1994). The agency, of course, may draw upon the results of the committee’s negotiations only “to the maximum extent possible consistent with [its] legal obligations.” 5 U.S.C. § 563(a)(7) (1994).

294. *See* 5 U.S.C. § 570 (1994) (providing that the negotiated rule “shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures”).



such that counsel would be consigned to pursue their deal, if at all, through the more shaky device of Rule 23 — can serve to enhance the constraints upon such counsel. If they want the additional “bang” afforded by imprimatur of a regulatory agency, they will need to persuade the agency about the virtues of the deal they have wrought. And that would be all to the good.

To create such a framework, Congress would need to assert a federal regulatory interest under the Commerce Clause over the disposition of mass tort claims — even those that would not otherwise come within the diversity jurisdiction of the federal courts. A number of commentators previously have identified the need for some form of national legislation to deal specifically with asbestos litigation, without expressing any doubts about the legal basis for such legislation.<sup>295</sup> Moreover, pending bills that would impose federal statutory limitations upon product liability claims at common law suggest that such federal intervention is no longer taboo as a policy matter.<sup>296</sup> If anything, the federal interest in mass torts is significantly stronger: the barriers to consolidation of geographically dispersed claims for orderly resolution in a single proceeding fairly cry out for a solution at the national level in much the same way as the problems of interstate corporate activity demanded a coordinated, national response earlier in this century. Indeed, the assertion of federal authority that I envision would be tailored precisely to the federal interest in question: nondiverse tort cases in the state courts would be affected only when necessary to facilitate a binding national solution to a particular mass tort problem. In short, the assertion of a federal regulatory interest over mass torts would not implicate the current debate over the application of the Commerce Clause to activities that do not substantially affect interstate commerce.<sup>297</sup>

As to the allocation of regulatory authority within the federal government, Congress would be best served by preserving a degree of flexibility. A mass tort centered upon a medical device like breast implants appropriately might come within the expertise of the FDA — the agency that originally licensed that product —

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295. See REHNQUIST COMMITTEE REPORT, *supra* note 258, at 27-35; Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891 (1992); Edley & Weiler, *supra* note 52, at 397-401.

296. See H.R. 956, 104th Cong., 1st Sess. (1995) (proposed Product Liability Fairness Act of 1995), reprinted in 141 CONG. REC. S6407 (daily ed. May 10, 1995).

297. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (striking down a federal statute criminalizing handgun possession within a school zone on the grounds that it was outside the scope of the Commerce Clause).

whereas a mass tort focused primarily upon the occupational setting, like asbestos, might call for the Department of Labor. To allow such matchmaking on a tort-by-tort basis, Congress might simply delegate regulatory authority to the President, who in turn could pass the baton to the appropriate agency as the circumstances warrant.<sup>298</sup>

In addition, Congress would need to delineate a mechanism for identification of mass torts that are potentially amenable to a negotiated solution at the national level. One possible solution would be to draw upon recent experience with the MDL Panel — specifically, to predicate federal regulatory authority upon the existence of a determination by that Panel to consolidate federal litigation over a particular mass tort in a single forum. In essence, the MDL Panel's determination would serve as an appropriate indication that mass tort litigation in a particular area has progressed to a sufficient degree to warrant consideration of a solution through the regulatory equivalent of a mass tort settlement. MDL consolidation thus would form a necessary condition for agency action but would not give rise to an affirmative requirement for the agency to convene a negotiating committee. Rather, the agency still might exercise discretion as to whether displacement of tort litigation would be premature — for instance, due to problems of claim projection.

The prospect that a public agency will serve as the facilitator for private negotiations can serve as a supplemental check upon agency cost problems — one that remains free from the kinds of institutional self-interest to which courts might be susceptible. As under the Negotiated Rulemaking Act, the agency would have initial authority to select the negotiators to represent the various affected interests. In the event of an impasse, the agency then could determine whether to press forward with some reconstituted subset of the committee in order to surmount a holdout problem or, alternatively, to regard the particular impasse as a safeguard against a reverse auction. The task of distinguishing between the two situations is a matter that might rest with the discretion of the agency on a tort-by-tort basis.

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298. The statutory scheme that I envision would not contravene the strictures of the nondelegation doctrine upon the conferring of regulatory authority upon private parties. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936) (striking down statute authorizing coal companies and workers to set wage and hour regulations for their industry). As in the Negotiated Rulemaking Act, the relevant public administrative agency would retain the ultimate power to determine whether to issue as a binding regulation the compensation scheme developed by the negotiating committee. See Harter, *supra* note 291, at 107-09.

Even when negotiations do bear fruit, the agency might make use of the regulatory equivalent of a Rule 23(b)(3) opt-out procedure. In this way, the prospect of continued litigation in the tort system — in the event that large numbers of exposed persons regard the compensation terms in the negotiated rule as too stingy and, accordingly, exercise their option to opt out — still can serve as an important check upon the negotiation process fostered by the agency in much the same way as it has done in the class action context.

In framing the standards for judicial review of the resulting regulation, Congress might borrow the existing “arbitrary or capricious” standard of the APA, understood in light of hard look jurisprudence. In this way, Congress simply would build upon existing law, albeit with an explicit grounding in principles of administrative law rather than the current incorporation of hard look principles into Rule 23(e) *sub silentio*.

To say that an agency should issue regulations to create a compensation regime for particular mass torts is not to say that the agency itself must also take on the day-to-day administration of that regime. Rather, one might understand the agency regulations simply as defining a set of federal property rights for mass tort victims as against mass tortfeasors — or, more accurately, of substituting such rights, as defined in the regulations generated by the negotiating committee, for the plaintiffs’ common law rights of action in tort.<sup>299</sup> Having detailed the compensation to be paid for particular medical conditions, the agency need not involve itself in the adjudication of claims invoking those rights, at least as an initial matter. Rather, the agency might retain oversight authority regarding the compensation regime in the manner of an auditor, but it may leave the routine administration of individual compensation claims in private hands, as in the asbestos and breast implant examples.

In short, future debate should not frame the issues for public lawmakers in terms of a stark choice between litigation-based solutions, on the one hand — whether of the traditional tort variety or based upon Rule 23 class actions — and reliance entirely upon governmental solutions, on the other. Rather, Congress may build upon the lessons of the recent mass tort settlements to fashion a middle option, one that may capture the benefits of a privately negotiated and administered compensation regime but that relies

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299. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (noting that “a chose in action is a constitutionally recognized property interest”).

upon the regulatory authority of government for its binding force and upon judicial review to guard against the problem of agency costs. The objective, in other words, is to draw forth the unique strengths of several different institutions — the private bar, public agencies, and the courts — to fashion, in tandem with each other, fair and workable solutions to mass torts.

### CONCLUSION

The recent settlements for asbestos and breast implants represent a marked departure from previous efforts to adapt the common law litigation system to the phenomenon of mass torts. Rather than tinker with the common law at the margins, the recent settlements posit the creation of distinctive new institutions to address the equally distinctive features of mass torts. Though undoubtedly novel in the area of tort law, these institutions bear striking similarities to public administrative agencies, both in their streamlined approach to compensation and in the agency cost problems that they may engender.

In the immediate future, courts should organize their analysis of mass tort settlements under Rule 23(e) along the lines of judicial review in administrative law. Specifically, by insisting upon reasoned justification for the features of such settlements in the manner of hard look review over notice-and-comment rulemaking, the courts can act as a check upon the agency costs that may arise from the entrepreneurial interests of class counsel. In particular, hard look review offers a solution superior to the regime of *per se* rules suggested by commentators such as Professor Coffee.

More broadly, the recent settlements should serve as a predicate for future elaboration by Congress in the form of a general statutory framework for the resolution of mass torts modeled upon the Negotiated Rulemaking Act. In this way, Congress may take the next step in the transformation from tort to administration.