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# Unfinished Symphony: The Complex Litigation Project Rests

Linda S. Mullenix\*

## I. INTRODUCTION

The American Law Institute's (ALI) Complex Litigation Project,<sup>1</sup> approved at the May 1993 Annual Meeting, represents nothing so much as several fine movements of an otherwise unfinished symphony. Although the membership endorsed this final draft, it prematurely laid the Project to rest. Had the eminent composers been permitted to continue, Congress and the judicial system might have benefitted from a more polished, complete work. Instead, as the Reporters previewed each successive movement, it became apparent that the Reporters, as conductors, were having difficulty getting their distinguished orchestra to play their themes harmoniously.

Similar to the Institute's 1969 Study of the Division of Jurisdiction Between State and Federal Courts,<sup>2</sup> the Complex Litigation Project seems destined to represent a massive, engaging intellectual exercise rather than a pragmatic blueprint that Congress will enact for the conduct of complex litigation. Indeed, the ALI's 1969 study now seems prescient in its recommendation of a minimal diversity requirement for complex cases,<sup>3</sup> a jurisdictional recommendation that appeared in early drafts of the Complex Litigation Project but that subsequently disappeared.<sup>4</sup>

Moreover, since 1987 at least, Congress has been marching to its own drummer with regard to enacting procedural reforms concerning complex litigation.<sup>5</sup> For the past six years, each new legislative session has witnessed the reintroduction of yet another revised version of the Multiparty, Multiforum Jurisdiction Act.<sup>6</sup> While the House Judiciary Committee has not been oblivious

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1. American Law Institute, Complex Litigation Project, Proposed Final Draft (May 13, 1993) [hereinafter Proposed Final Draft]. The Reporter for the Project is Professor Arthur R. Miller, Harvard Law School, and the Associate Reporter is Professor May Kay Kane, University of California, Hastings College of Law.

2. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1969).

3. *Id.* §§ 2371, 2374.

4. See Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 Fordham L. Rev. 169, 181-91 (1990).

5. See Court Reform and Access to Justice Act of 1988, H.R. 3152, 100th Cong., 1st Sess. (1987); Multiparty, Multiforum Jurisdiction Act of 1989, H.R. 3406, 101st Cong., 1st Sess. (1989); Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. (1990); The Multiparty, Multiforum Jurisdiction Act of 1991, H.R. 2450, 102nd Cong., 1st Sess. (1991); Multiparty, Multiforum Jurisdiction Act of 1993, H.R. 1100, 103d Cong., 1st Sess. (1993).

6. See the various versions of the Multiparty, Multiforum Jurisdiction Act, *supra* note 5. *Id.*

to the American Law Institute's parallel efforts, the Judiciary Committee's legislative proposals have reflected more the handiwork of legislative lobbying and compromise than the work product of platonic proceduralists. Without being cynical about either the American Law Institute or Congress, it seems rather dubious that with the Complex Litigation Project now completed, Congress will actually adopt the ALI's Proposed Final Draft.

That the Complex Litigation Project's recommendations probably will not become law should not trouble academic proceduralists and should comfort those practicing lawyers who dislike many of the Project's recommendations. As with many ALI enterprises, the development of the Reporters' proposals served to heighten the different perspectives of the academic and practicing legal communities.<sup>7</sup> Throughout, the academicians approached the task of complex litigation reform with the mindset of the physics professor confronted with a cosmic problem. The academicians asked: "If I had to construct a set of ideal rules for the conduct of complex mass tort cases, what would they look like?" To answer their question, the academicians proceeded from a vantage of purist zeal to create platonic rules. The ALI's practicing members, however, brought to bear a pragmatic litigation experience tempered by the perceived interests of their clients. The predictable result of this clash of sensibilities is a mediated final draft that compromises or evades sticky points (state inter-system consolidation of cases),<sup>8</sup> offers amalgamated something-for-everyone solutions (choice-of-law rules),<sup>9</sup> or simply omits difficult problems (jurisdiction).<sup>10</sup>

Much has already been written about various proposals in the multiple drafts of the Complex Litigation Project,<sup>11</sup> and the purpose of this essay is not to

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§ 6. See generally Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 Tex. L. Rev. 1623 (1992); Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI's Proposed Choice Rule*, 56 Alb. L. Rev. 807 (1993).

7. This is not to suggest that the ALI membership divided tidily between its academic and practicing bar members. Indeed, many academicians and practitioners disagreed among themselves as to the appropriate nature of sound recommendations for dealing with complex litigation. But, in gross, the academics tended to approach the Complex Litigation Project with something of a different mind-set than the practicing members of the Institute.

8. See Proposed Final Draft, *supra* note 1, at Appendix B ("A Model System for State to State Transfer and Consolidation"). Because neither the American Law Institute nor Congress can require state-to-state transfer of mass tort cases, or of any other cases for that matter, the Institute could merely offer a suggested model for such transfer of cases.

9. *Id.* Ch. 6 (Choice of Law).

10. See *supra* note 4 and accompanying text.

11. See, e.g., Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. Ill. L. Rev. 105 (1989); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 Rev. Litig. 309 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457 (1991); Mullenix, *supra* note 6; Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm. & Mary L. Rev. 475 (1991); Linda S. Mullenix, *Problems in Complex Litigation*, 10 Rev. Litig. 213 (1991); Mullenix, *supra* note 4; Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597 (1991); Robert A. Sedler, *Interest Analysis, State Sovereignty, and Federally-Mandated Choice of Law in "Mass Tort" Cases*, 56 Alb. L. Rev. 855 (1993); Robert A.

revisit the debates surrounding the final formulations of the Project's recommendations. Rather, this essay explores the notion that the Complex Litigation Project is indeed an unfinished symphony that should be evaluated as much for what it does not say as for what it does say.

Efforts such as the Complex Litigation Project defy sweeping judgments concerning their success or failure. Obviously, if Congress or various states enact the Project's recommendations in whole or in part, and if these measures facilitate the conduct of complex mass tort cases, then the Project properly may be deemed a success. But this assessment is a long term prospect. From another perspective, the Complex Litigation Project was a smashing success as a pure academic exercise, having provided hearty grist for the academic scholarship and debate mills. The project was challenging, irksome, entertaining, and fun. Many in the academic community, no doubt, are sorry to see it go.

Yet from still another perspective, the Complex Litigation Project may be deemed a failure of will and imagination. At the outset the Institute and the Reporters deliberately limited the scope of the Project, and as a result, the Complex Litigation Project in the end simply failed to address the myriad problems that collectively characterize complex mass tort cases. The Reporters' and the Project's obsessive focus on the problems of jurisdiction, transfer, and applicable law reduced the phenomenon of complex litigation to a caricature of the actually-litigated mass tort case. Ultimately, the final draft fails to deal in a holistic fashion with the interrelated issues of complex cases.

This essay documents what the Reporters left out by design, inadvertence, or other unknowable reasons.<sup>12</sup> Although the Project began in 1986 and the Reporters issued their first Preliminary Study<sup>13</sup> in 1987, for many observers the

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Sedler and Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 Marq. L. Rev. 76 (1989); Weinberg, *supra* note 6; Jack B. Weinstein and Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. Ill. L. Rev. 269 (1992); Russell J. Weintraub, *Methods for Resolving Conflict-of-Law Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129 (1989).

12. It is difficult, if not impossible, to know in many instances why the Reporters made certain substantive and editorial decisions concerning the scope and details of the Project, unless the Reporters specifically indicated the reasons in the Reporter's Notes. Scholars should be cautioned, however, that the Reporter's Notes (although they now embody the official record of the ALI membership), may not reflect the entire legislative history of the Project. For example, some decisions, such as the decision to abandon a jurisdictional proposal, are not recorded in the final draft. Therefore, scholars studying the final draft will have few clues to the prior existence of such a proposal and its subsequent abandonment. Instead, this decision is memorialized in a memorandum to members of the ALI Council, meeting in November 1989, a memorandum that is not generally known or available to non-ALI members. See Mullenix, *supra* note 4, at 181 n.67. Scholars desiring to understand various proposals need to study the various redraftings of the Project for signposts to controversial issues. But beyond the drafts, certain debates over various recommendations exist as oral rather than written history, having been articulated at the various meetings of ALI constituencies, such as the Consultative Group, the Advisory Committee, and the Council.

13. American Law Institute, Report, Preliminary Study of Complex Litigation (March 31, 1987) [hereinafter Preliminary Study].

Complex Litigation Project seems to have been prematurely aborted in 1993 after seven years of work. Unexpectedly, the Complex Litigation Project ended; the ALI membership was informed of this Project *interruptus*. The Project's end left many of those unprepared for its unforeseeable demise wondering when the Reporters were going to deal with certain troubling issues. For some, the Project's abrupt termination left a sense of incompleteness: of music not written, of movements undone.

The pieces that were left out of the Complex Litigation Project are as important as the ones there, primarily because the Project does not solve the many problems of complex litigation, let alone mass tort litigation.<sup>14</sup> The Project really does only two things: it revamps the old multidistrict litigation statute (tinkers with, is perhaps a better concept) and offers an elaborate choice-of-law scheme. But that is all it does. The Reporters set out to compose *The Rite of Spring*, but then settled on scoring the flittings of two wood nymphs. We certainly are not the worse for this, but it is hard to say that we are the better.

## II. THE COMPLEX LITIGATION PROJECT: THE MISSING PIECES

It is, of course, well known that it is difficult if not impossible to prove a negative. It is equally difficult to document the missing, because the missing tends to leave scant record of itself. In this spirit, the final draft of the Complex Litigation Project is interesting for three categories of phantasma that haunt its pages: proposals that vanished mysteriously, problems that were omitted deliberately, and issues that were ignored inadvertently (perhaps). This is the story of the ghosts of the Complex Litigation Project.

### A. *Proposals Mysteriously Vanished*

Two crucial issues central to designing a procedural scheme for mass tort litigation concerned federal court jurisdiction over such cases, as well as the

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14. One of the many anomalies of the Complex Litigation Project is that its title is something of a misnomer; the Project really was designed and intended to deal with the then emerging problem of mass tort litigation, rather than any other type of complex litigation. The Project's main goal at the outset was to revise the multidistrict litigation statute, 28 U.S.C. § 1407 (1988) (Added Pub. L. No. 90-296, § 1, 82 Stat. 109 (1968)). As such, the Project ought to have been retitled the Complex Mass Tort Litigation Project. See Preliminary Study, *supra* note 13, at 1-6, 48-54.

This makes a difference because mass tort cases are different than other complex litigation in the federal courts. Most other complex litigation, such as securities, antitrust, or discrimination cases, are jurisdictionally based in federal substantive law. Mass tort litigation, on the contrary, typically originates as state tort law cases and therefore has presented vastly different issues for transfer, consolidation, and applicable law.

Through the final May 1993 meeting, the Reporters retained the working title of Complex Litigation Project. At that final meeting, Judge Jack Weinstein challenged the Project in its entirety for the Reporter's failure to narrowly define the scope of the Project's recommendations to mass tort cases. See 1993 Proceedings of the Annual Meeting of the American Law Institute (forthcoming).

relationship of federally consolidated cases to Rule 23 class action litigation. Recognizing the centrality of jurisdictional problems embodied in mass tort cases, the Reporters grappled with the jurisdictional issue in the early stages of the Project, only to abandon this effort. As for the relationship of consolidated mass tort cases to the Rule 23 federal class action, the Reporters repeatedly informed the ALI membership that this problem would be dealt with separately at a later time. Later never came. By May 1993, both federal jurisdiction and Rule 23 complications had, well, mysteriously vanished. The Reporters, in the end, did not deliver on either issue.

### *1. Original Federal Court Jurisdiction*

Although the Reporters recognized that mass tort cases are filed in both state and federal courts and the Project's final draft includes a model proposal for state-to-state consolidation of mass tort cases,<sup>15</sup> the Reporters' main focus was on the problem of transferring and consolidating mass tort cases within the federal system. Insofar as mass tort cases are not based in any federal substantive law providing federal question jurisdiction, these cases have presented jurisdictional complications arising from the nature of the typical mass tort cases—multiple parties from multiple states suing in multiple forums.

Thus, federal mass tort cases either originally have failed to meet the requirements of federal diversity jurisdiction or could not be transferred and consolidated because this procedure would also violate the complete diversity rule. The existing multidistrict litigation statute,<sup>16</sup> enacted with antitrust law in mind, failed to alleviate the problems raised by transfer of diversity-based federal cases.<sup>17</sup> The Reporters first approached their task of drafting a federal intersystem transfer-and-consolidation statute by beginning with this jurisdictional problem, their aim being to provide for federal subject matter jurisdiction for mass tort cases.<sup>18</sup>

As early as 1989 the Reporters offered a jurisdictional proposal (Section

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15. See *supra* note 8.

16. 28 U.S.C. § 1407 (1988).

17. See generally Thomas D. Rowe, Jr. and Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986) (proposing modification of the multidistrict litigation statute to require only minimal, as opposed to complete, diversity for diversity-based mass tort cases); see also Mullenix, *supra* note 4, at 174 (discussing this problem and proposal). The authors were the first to propose a minimal diversity modification to the multidistrict litigation statute, which had also been recommended in the 1969 ALI study. See *supra* notes 2-3. This minimal diversity proposal has been a central feature of each successive version of Congress' proposed Multiparty, Multiforum Jurisdiction legislation. See *supra* note 5, § 2 ("Jurisdiction of District Courts"), adding a new § 1367 to the United States Code ("The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single [event or accident] . . ." 28 U.S.C. § 1367 (1993)).

18. See Mullenix, *supra* note 4 (describing the history of draft provision § 5.01 and its subsequent withdrawal; criticizing the analytical basis for the proposed jurisdictional provision).

5.01) that represented an odd amalgamation of federal question and diversity elements. The proposed statute was an elaborate scheme of numerosity and amount-in-controversy requirements,<sup>19</sup> and this expansive federal jurisdiction was justified by lofty constitutional law principles.<sup>20</sup> For many good and documented reasons, this odd jurisdictional creation proved highly controversial, and at its October 1989 meeting, the Advisory Committee for the Complex Litigation Project rejected the Reporters' recommendation for expanded original jurisdiction, suggesting that the proposal be withdrawn and revised.<sup>21</sup> The Reporters informed the ALI Council of this recommendation in November, and the Reporters subsequently abandoned any further work on a jurisdictional proposal.<sup>22</sup>

The problem of jurisdiction for federally-based mass tort cases remains, and the Proposed Final Draft for the Project simply does not address this important issue that was so clear to all at the Project's outset. Instead, the Final Draft finesses the jurisdictional issue in federal mass tort cases by declaring that "[f]ederal subject-matter jurisdiction is provided by way of removal in §§ 5.01-5.02."<sup>23</sup> In this fashion the final version of Section 5.01 is a peculiar ghost of its ignominious precursor.<sup>24</sup> In the Proposed Final Draft, the Reporters have transmuted the problem of federal mass tort jurisdiction into one of removal of state-based cases into federal court; in short, the Reporters have merely solved a different collateral problem relating to the consolidation of all mass tort cases in a two-tier court system. And as the Reporters surely know, removal jurisdiction has nothing at all to do with mass tort cases that are initially filed in various federal district courts dispersed throughout the federal system.

Section 5.01 in the Proposed Final Draft, purporting to deal with federal subject matter jurisdiction, is itself a jurisdictional oddity. Under traditional hornbook rules, federal removal jurisdiction is derivative of valid federal subject matter jurisdiction; in other words, lacking either valid federal subject matter jurisdiction or valid diversity jurisdiction, a state-based case may not be removed to federal court and will be remanded back to state court for lack of federal court jurisdiction.<sup>25</sup> Section 5.01 instead formulates a new transactional test for removal and Section 3.02 creates a new Complex Litigation Panel that is to apply a multifactor test to determine whether "doing so offers a superior means of adjudicating the controversy."<sup>26</sup>

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19. See American Law Institute, Complex Litigation Project, Preliminary Draft No. 2 § 5.01 at 37-38 (Sept. 13, 1989); see also Mullenix, *supra* note 4, at 181-83.

20. See Mullenix, *supra* note 4, at 183-91.

21. *Id.* at 181 n. 66.

22. *Id.*, n.67.

23. See Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, at 268.

24. See Preliminary Draft No. 2, *supra* note 19, § 5.01.

25. See 14A Charles A. Wright et al., Federal Practice and Procedure §§ 3721-3740 (1985) (removal jurisdiction).

26. See Proposed Final Draft, *supra* note 1, § 3.02 and § 5.01, cmt. a, at 274.

Again, although intriguing, the Proposed Final Draft fails to address whether a state-based case must also initially satisfy traditional federal subject matter jurisdictional requirements before the case may be removed, or whether the ALI's proposed Section 5.01 eliminates such federal niceties. The Reporters' Notes are not illuminating on this tricky point. In addition, if state-based cases do not have to satisfy traditional federal subject matter requirements to be removed under the new complex litigation regime, then the possible inconsistency exists of different jurisdictional prerequisites for state-filed and federal-filed mass tort cases. And, of course, the jurisdictional requirements for mass tort cases filed in federal court remain unstated; therefore, one must assume that the same old rules apply and that the existing jurisdictional problems remain.

What can possibly explain this disappointing treatment of the jurisdictional issues so central to the processing of mass tort cases? First, after the 1989 jurisdictional debacle, the Reporters clearly decided to abandon wholesale any attempt to create original jurisdiction in the federal district courts. Their reasons, however, remain unrecorded except for their communication to the Council concerning the controversy over their initial attempts to resolve this issue. Additionally, in redefining the jurisdiction problem as a removal problem, the Reporters made the conscious decision that the preferred route for mass tort cases is to have them percolate up from the state courts rather than boiling full steam in the federal system.<sup>27</sup>

This is an interesting development on the Reporters' part because it signals, not a failure of intellect, but an administrative desire to channel mass tort cases away from the federal system and into state courts.<sup>28</sup> The problem of mass tort cases, one begins to suspect, is not so much rooted in jurisdictional concerns, as it is in the burdens these cases impose on federal court resources. Thus, if a problem with enacting a sound federal jurisdictional statute for mass tort cases exists, then these cases should be filed in state court subject to possible discretionary removal after being approved by a panel of federal judges. This

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27. *Id.* § 5.01, Reporter's Note 1 to cmt. a, at 277. In a somewhat remarkable passage, the Reporters note:

The availability of original complex litigation subject-matter jurisdiction would mean that the parties need not first file in state court and then petition for removal, avoiding not only that step but the intrusion of transferring the case from the forum in which it began to another court. However, removal through the Panel allows that body to gain experience regarding how consolidated cases best can be handled and what cases are most suitable for such treatment. This should allow for closer scrutiny, as well as the development of uniform standards for identifying the cases that should be treated in this fashion. Further, it avoids the risk that the federal courts will be inundated with new cases because parties proceed directly to federal court in situations that might be handled better by the state courts. Thus, at least in the early stages of designing methods of processing multiparty, multiforum cases, removal jurisdiction is the more cautious choice. It may be that as more experience is gained, original jurisdiction also should be conferred on the federal courts.

*Id.*

28. *Id.*



approach may be justified, to boot, with academic rhetoric lauding the use of state courts as laboratories for the resolution of emerging legal issues.

However, two fundamental problems belie the notion, espoused by the Proposed Final Draft, that mass tort jurisdictional problems can be treated solely as a matter of removal jurisdiction. First, and most obviously, the Complex Litigation Project has failed to supply any original jurisdictional basis for mass tort cases that are initially filed in federal district court. Even the many tortured renditions of the Multiparty, Multiforum Jurisdiction Act accomplish this basic statutory groundwork.<sup>29</sup> But second, and more importantly, the Reporter's notion that mass tort cases ought to originate in state court and be subject to the removal largesse of federal judges, is wishful thinking. Notwithstanding the prestige and weight of ALI recommendations, litigants are still free to select their forum of choice and undoubtedly will continue to choose federal court for traditional strategic and practical reasons. In the end, that the Reporters and the Project abandoned its attempt to prescribe some form of original federal jurisdiction for mass tort cases seems paternalistic and, well, shirking.

## 2. *The Relationship to Rule 23*

At various meetings of the advisory and consultative groups of the Complex Litigation Project, invariably some member would question the Reporters concerning the relationship of a proposed recommendation to Rule 23 class action procedure. Just as invariably, the Reporters would respond that they intended to discuss the relationship of their recommendations to Rule 23 in some forthcoming portion of the Project. Although this prospect haunted the Project, the Reporters never offered this phantom analysis, and none appears in the Proposed Final Draft.

It is something of a malapropism to suggest, therefore, that the Project's announced discussion of Rule 23 mysteriously vanished; it simply never appeared. This omission is significant because many mass tort cases are initiated as class action suits.<sup>30</sup> It would have been useful, at a minimum, to discover how the Reporters envisioned their proposals interacting with class action mass tort cases. One can only assume, if Congress enacts the recommendations of the Complex Litigation Project, that federal and state courts are now left to their own devices to decipher the interrelationship between the Project and Rule 23.

This is not to suggest, however, that the Complex Litigation Project makes

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29. See *supra* note 17.

30. See, e.g., the "Agent Orange" litigation in the Eastern District of New York; *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *rev'd in part*, 789 F.2d 996 (3d Cir. 1986); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979). See also Proposed Final Draft, *supra* note 1, Reporter's Notes to Class Actions, at 38-43 (history of mass tort class actions with citations to cases and authorities); 2 American Law Institute, Reporter's Study, Enterprise Responsibility for Personal Injury 383-93 (April 15, 1991) [hereinafter Enterprise Responsibility] (same).

no mention of Rule 23 class action procedure. In the introductory section canvassing existing joinder possibilities under the current Federal Rules of Civil Procedure,<sup>31</sup> the Proposed Final Draft discusses Rule 23 class action procedure and the relatively recent history of mass tort litigation under this rule.<sup>32</sup> But from the outset, the Reporters decided not to pursue Rule 23 class action procedure as their preferred mechanism for consolidating and adjudicating mass tort cases,<sup>33</sup> a choice reaffirmed in the Proposed Final Draft.<sup>34</sup> Instead, the Reporters chose to massage and enhance the existing multidistrict litigation statute.<sup>35</sup>

Certainly the Reporters are not to be faulted for their choice, although the fans of Rule 23 class action procedure perhaps are disappointed that the Reporters did not take this route in formulating their recommendations.<sup>36</sup> Indeed, now that the Advisory Committee on Civil Rules of the Judicial Conference has undertaken the task of rewriting Rule 23 yet again,<sup>37</sup> it is hoped that this group of rule revisers will do so with an eye toward the special class action problems raised by mass tort cases. That the Advisory Committee on Civil Rules is undertaking a revision of the class action rule, however, complicates the procedural terrain because a more felicitous version of Rule 23 may provide a better vehicle for litigating mass tort cases.

Because the Proposed Final Draft of the Complex Litigation Project leaves much unsaid about the relationship of its recommendations to class action

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31. See Proposed Final Draft, *supra* note 1, Ch. 3, Intro. Note and Reporter's Notes, at 28-47, discussing the multidistrict litigation statute, joinder under Federal Rules of Civil Procedure 19 and 20, intervention under Federal Rule of Civil Procedure 24, class actions under Federal Rule of Civil Procedure 23, interpleader under Federal Rule of Civil Procedure 22 and the Federal Interpleader Act, 28 U.S.C. § 1335, and bankruptcy proceedings.

32. See *supra* note 30.

33. See, e.g., Preliminary Study, *supra* note 13, at 34-48, 95-105, 118-29; American Law Institute, Complex Litigation Project, Tentative Draft No. 1, at 36-44 (April 14, 1989).

34. See Proposed Final Draft, *supra* note 1, Ch. 3, Reporter's Notes 6-16 to Intro. Note, at 35-43.

35. According to the Reporters:

The preceding review of consolidation and joinder procedures reveals not only some of the limits of existing mechanisms, but also some excellent models on which to build. In particular, the experience under Section 1407 establishes a foundation on which to construct future improvements. This is true both because of the practical results that have been achieved in innumerable cases through its use and because of the innovation and creativity manifested by the federal judges who have served as transferee judges.

*Id.* at 46.

36. See, e.g., Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039 (1986); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561 (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849 (1984).

37. See Proposed Final Draft, *supra* note 1, Reporter's Note 11 to Class Actions, at 42 ("After more than a decade of inaction, the Advisory Committee has begun in 1993 to consider possible revisions to the Rule.").

procedure, many questions remain about how various procedural options are to function in a coordinated fashion. For example, the Reporters' proposal for enhancing the current multidistrict litigation statute<sup>38</sup> seems based on a model of individual tort cases filed either in state or federal court that are then removed, transferred, and consolidated in one federal forum. But many mass tort cases now begin as localized class actions, rather than as individual tort cases. How then are these localized mass tort class actions to be removed, transferred, and consolidated under the proposed new version of the multidistrict litigation statute? What about class certification issues? Will these cases lose their characterization as class actions through the new transfer and consolidation procedures?

Because many mass tort cases procedurally originate as class actions, do class action rules and procedures trump those incorporated in the Proposed Final Draft, or do Proposed Final Draft procedures supersede class action procedure?<sup>39</sup> The proposed new version of the multidistrict litigation statute vests vast powers in the transferee federal judge receiving complex cases certified by the Complex Litigation Panel. For instance, the transferee judge has the power to "certify classes either encompassing the entire litigation or for particular issues."<sup>40</sup> This kind of power, however, presupposes discrete rather than previously classed cases, and the Reporters give scant indication what the transferee judge is to do if the transferred litigation unit consists of preexisting state or federal class actions.

The Proposed Final Draft glosses over or fails to discuss the problems inherent in mass tort cases instituted as class actions, intimating that all mass tort cases may be easily assimilated into the revamped multidistrict litigation statute. That these methods of joinder and procedure are not inherently compatible or overlapping is suggested by another ALI project, Enterprise Responsibility for Personal Injury.<sup>41</sup> In discussing mass tort litigation, the Enterprise Responsibility Reporters suggest two possible class action avenues for consolidating and adjudicating mass tort cases: one based on the ALI Complex Litigation Project proposals, and a second model based on mandatory class action procedure.<sup>42</sup>

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38. 28 U.S.C. § 1407 (1988).

39. Proposed Final Draft, *supra* note 1, § 3.06, Reporter's Note 1 to cmt. a, at 136, suggesting, for example, that the transferee judge's discretion in deciding certification issues may indeed, under the new proposed procedures, supersede existing certification requirements under current Federal Rule of Civil Procedure 23.

40. *Id.* § 3.06(a), at 132-33.

41. See Enterprise Responsibility, *supra* note 30.

42. *Id.* at 412-19 (Model 1: Expanded Federal Consolidation) and 419-29 (Model 2: Augmented Collective Procedures for Mass Exposure Cases). The Reporters apparently saw a need to propose a second class action model because of perceived deficiencies with the ALI Complex Litigation Project recommendations for an enhanced multidistrict litigation statute. Thus they explained the reasons for their Model 2:

The expanded consolidation procedure provided by Model 1 will be effective in mass disaster cases in which the harmful effect is temporally and spatially proximate to the

The Reporters for the Enterprise Responsibility project, at least, recognized that mass tort class actions could not be easily subsumed by the Complex Litigation Project's proposed multidistrict procedure.

The Complex Litigation Project's failure to offer some guidance concerning the relationship of their recommendations to Rule 23 class action procedure lessens the effectiveness of the Project. Given the large amount of discretion vested in the Complex Litigation Panel and the transferee judges, undoubtedly issues of class action procedure will be resolved experientially. However, the relationship of class action procedure to the Reporter's proposals for enhanced multidistrict litigation procedure haunted the Project, and Rule 23 issues still hover unresolved in the background. Furthermore, if the Advisory Committee on Civil Rules promulgates a revised version of Rule 23 that more effectively addresses mass tort cases, then federal litigation will become more interesting, if not more confusing. One can only hope that this body proceeds with an eye toward the work of the Complex Litigation Project and makes some effort to relate Rule 23 class action procedure to the vision of mass tort litigation embodied in the Complex Litigation Project.

#### *B. Issues Deliberately Omitted*

In addition to proposals or analyses that mysteriously vanished from the Complex Litigation Project, the Project remains an unfinished symphony because the Institute and the Reporters deliberately omitted several issues from the Project. The Reporters should not be excoriated for their decision to limit the scope of their work, a choice that may have been dictated as much by politics, resources, or energy, as by intellectual concerns. An acknowledgment of these omissions is instead intended to highlight the Project's artificially constricted limitations.

The Reporters are, however, to be commended for their forthright statement of the subjects they chose to exclude from the Project. From the outset, the Reporters informed the Institute membership that the Complex Litigation Project would neither study nor consider several issues related to complex litigation: (1)

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tortious cause. Statutes of limitations will force most such mass disaster claims to be filed within a few years of the accident. Those claims can be efficiently brought within the jurisdiction of the consolidation court. But consolidation of pending actions will not succeed in aggregating the bulk of the mass exposure claims that are scattered over years or even over several decades.

Model 2 is proposed on the basis of our reflections on the tort lessons taught by the litigation crises of DES, asbestos, the Dalkon Shield, and Agent Orange. It provides augmented collective procedures designed to address large-scale mass disaster cases that cannot be resolved in a fair and efficient manner by the standard process. Specifically, in addition to mandatory class actions, Model 2 treats risk as accrued injury, authorizes insurance fund judgments to cover future loss from disease or traumatic harm, and schedules averaged damages for defined subclasses.

*Id.* at 419-20.

matters of substantive law, (2) problems of case management, (3) diversity jurisdiction, and (4) the right to trial by jury.<sup>43</sup> This list of exclusions and their rationales remained constant throughout the various drafts and has been incorporated in the Proposed Final Draft.<sup>44</sup>

Although the list of omissions is briefly stated, the issues deliberately excluded affect so many aspects of mass tort adjudication that ultimately this list undermines the seriousness of the Complex Litigation Project itself.

### 1. *Substantive Legal Issues Related to Complex Litigation*

In explaining their decision to limit the scope of the Complex Litigation Project to issues relating to "judicial dispute resolution and matters of procedure,"<sup>45</sup> the Reporters suggested that any substantive law issues implicated in complex cases were best left to other experts.<sup>46</sup> Proceduralists everywhere can certainly empathize with the reluctance of the Complex Litigation Project Reporters—fellow proceduralists—to grapple with the additional burdens of substantive law. But their stated rationale for this omission seems vague, overstated, evasive, and perhaps even misguided.<sup>47</sup>

First, it is disingenuous for the Reporters to suggest that the substantive law issues that arise in mass tort litigation are very similar to the substantive law issues "that play a significant role" in all other complex litigation. The substantive law issues in mass tort litigation are quite unlike substantive law issues in almost all other complex federal cases, which helps to make mass tort complex litigation unique and problematic among other kinds of federal complex litigation. The singular difference is that in most other federal complex cases—such as antitrust, securities, employment discrimination, or labor law—the relevant substantive law has been federalized either by statute or federal common law.<sup>48</sup> Thus, a ready-made body of federal substantive law exists to provide

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43. See Preliminary Study, *supra* note 13, at 6-10.

44. See Proposed Final Draft, *supra* note 1, Ch. 1, at 3-7.

45. *Id.* at 3.

46. *Id.* at 3-4. In explaining the reasons for this omission, the Reporters note:

Obviously, the substantive law in each of the areas in which complex litigation arises also plays a significant role in shaping the phenomenon. There are many problems associated with complex litigation that ultimately might be addressed best by reshaping existing legal theories or forms of relief, by recognizing new ones, or by developing administrative or social insurance models for delivering compensation, when appropriate. However, it is outside the scope of this Project to attempt to deal comprehensively with substantive law in addition to the many procedural aspects of the complex litigation problem. The specific substantive issues implicated vary from one context to the next and may be addressed most profitably by experts in each relevant field of substantive law, as was done by the Reporters' Study on Enterprise Responsibility for Personal Injury, presented to the Institute in 1991.

*Id.*

47. *Id.*

48. See Mullenix, *supra* note 6, at 1631-35; Mullenix, *Problems in Complex Litigation*, *supra*

both a legal theory of the case and an available remedy. In addition, in every other species of federal complex litigation, the same law that provides a substantive legal theory also typically provides a federal-question jurisdictional basis for filing in federal district court.

In mass tort cases, in contrast, Congress neither has enacted a federal substantive tort or products liability law nor has provided a federal subject matter jurisdictional base for garden-variety tort cases. In every case, whether filed in state or federal court, state substantive tort law supplies both the legal theory and the remedy for the alleged injury; if the case is filed in federal court, it must be on the basis of the court's diversity jurisdiction.<sup>49</sup> What makes substantive law issues in federal mass tort litigation so problematic is the very absence of federalized substantive tort law. Unable to rely on any federal tort law, state and federal judges are forced to ascertain and apply complicated choice-of-law rules to determine the applicable law in multiparty, multiforum mass tort cases. Thus, complex mass tort cases, since they present unique substantive law problems, simply cannot be amassed into the general category of other federal substantive complex cases.

Second, to suggest, as the Reporters do, that "specific substantive issues implicated vary from one context to the next and may be addressed most profitably by experts in each relevant field of substantive law,"<sup>50</sup> is misleading. If the Reporters mean the entire universe of complex litigation (antitrust, securities, discrimination, labor law, etc.), then their statement makes sense; however, according to this reading, their statement refers to issues that have been solved "by the experts" through federal enactment of substance-specific legislation. If the Reporters' statement refers to mass tort cases, then it makes little sense: the only substantive issues in mass tort cases relate to tort law and remedies, and these issues do not vary from one litigation context to the next. What varies instead is the complicated scheme of fifty different bodies of state tort law.

Third, the Reporters' glib dismissal of the implications of substantive law for complex mass tort cases is troublesome precisely because the intricate interrelationship of state tort law enmeshed in mass tort cases beckons for comprehensive treatment. It seems preposterous that the Reporters could, with any machete-like precision, slice away mass tort procedure from its underlying state tort law roots. Clearly the artificial banishment of substantive tort law haunts the Project. For example, the Proposed Final Draft requires a Complex Litigation Panel and transferee judges to make transactional determinations about common questions of law and fact.<sup>51</sup> The Reporters solve the issue of common facts by requiring "minimal commonality" of facts among cases,<sup>52</sup> but the

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note 11, at 223-25.

49. Mullenix, *Problems in Complex Litigation*, *supra* note 11, at 223-25.

50. Proposed Final Draft, *supra* note 1, Ch. 1, at 4.

51. See, e.g., Proposed Final Draft, *supra* note 1, § 301(a)(1).

52. *Id.* § 301, cmt. c, at 54-56.

Reporters never adequately suggest what determines common questions of law.<sup>53</sup> In a universe of fifty different state law systems, this obviously is a difficult, if not insolvable, problem.

In contrast, the Reporters for the ALI's Enterprise Responsibility project did a better job of recognizing the related substantive and procedural dimensions of mass tort cases,<sup>54</sup> and therefore approached mass tort litigation holistically. Instead of divorcing substance from procedure, these Reporters recognized that aggregate mass tort procedure could only be designed with a view toward the distinctive features of mass torts, *as torts*. For example, the Enterprise Responsibility Reporters noted that substantive tort problems such as causal indeterminacy and latent injury—features of many toxic mass torts—require special procedural mechanisms for aggregating claims and providing remedies to future claimants.<sup>55</sup> Thus, the Enterprise Responsibility Reporters call for new procedures based upon the unique substantive challenges of mass tort cases, rather than for procedures designed in a substantive-law vacuum.<sup>56</sup>

Finally, the Reporters erroneously failed to consider administrative or social insurance models for resolving mass tort cases and delivering compensation.<sup>57</sup> By characterizing these models as matters of extrajudicial dispute resolution (let alone substantive law), the Reporters removed them from the purview of the Complex Litigation Project; therefore, the Project did not assess any existing non-adjudicative experiments for resolving mass tort cases, such as the Asbestos Claims Facility,<sup>58</sup> the Center for Claims Resolution,<sup>59</sup> or the Manville Trust.<sup>60</sup> In a social and political environment that now encourages recourse to methods of alternative dispute resolution,<sup>61</sup> the Reporters prematurely excised from the

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53. *Id.* § 301, cmt. c, at 56, stating: "At the other extreme, consolidation based solely on common questions of law, when there are no overlapping facts tying the cases together, would be impermissible. . . . Rulings on abstract questions of law would not produce sufficient benefits to outweigh the disruption caused by transfer and consolidation under those circumstances."

54. See Enterprise Responsibility, *supra* note 30, at 383-439.

55. *Id.* at 385-86, 389-93.

56. By viewing the phenomenon of mass tort cases holistically, the Enterprise Responsibility Reporters at least discussed the need to consider other methods of resolving these cases, such as bankruptcy proceedings, settlement, test cases and pattern settlement, claim and issue preclusion, insurance funds, and damage scheduling. *Id.* at 402-29.

57. *Id.*

58. See Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, *supra* note 11, at 555 n.386; Mullenix, *Problems in Complex Litigation*, *supra* note 11, at 227-29.

59. Mullenix, *Problems in Complex Litigation*, *supra* note 11, at 228-29.

60. Valle S. Dutcher, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 Pace L. Rev. 955, 993-1004 (1993); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1981-83 (1992); Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, Law & Contemp. Probs., Autumn 1990, at 27, 27-34.

61. The President's Council on Competitiveness, A Report, Agenda For Civil Justice Reform in America (August, 1991).

Complex Litigation Project any consideration of non-litigated resolutions of these massive disputes. Thus, the Reporters donned litigation blinders early, to the detriment of the Complex Litigation Project.

## 2. *Problems of Complex Mass Tort Case Management*

The collection of problems omitted from the Complex Litigation Project, conveniently grouped under the heading of "case management," constitutes a significant understatement of the practical litigation problems that the Reporters simply chose to exclude from their study of complex litigation. The case management problems that the Reporters elected not to address include the scope and management of discovery; organization of counsel in multiparty actions; trial scheduling, preparation, and management; and the administration of relief.<sup>62</sup> The rationale for these exclusions rests on the Reporters' desire to "avoid duplicative analysis of matters that have been or are being addressed elsewhere,"<sup>63</sup> and the optimistic assertion that other Federal Rules of Civil Procedure and the Manual for Complex Litigation are adequate to these tasks.<sup>64</sup>

This list of exclusions is somewhat remarkable; the Reporters managed to write a 700 page study of complex litigation that does not confront the complexities of *litigation*. Surely litigation means something other than transfer and consolidation of cases—processes that merely are the prelude to litigation. And choice-of-law questions, the other major focus of the Complex Litigation Project, address the problem of which substantive law applies to a consolidated case once the case has been transferred to a single forum. Resolving the "applicable law" problem is therefore also a prelude to actual litigation and does not itself deal with case management issues. The Complex Litigation Project Reporters chose not to deal with any postaggregative procedural problems, a stunning omission in a work that purports to deal with recommending reforms for mass tort dispute resolution.

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62. See Proposed Final Draft, *supra* note 1, Ch. 1, at 4.

63. *Id.*

64. *Id.* at 4-5. In explaining their lack of treatment of these subjects, the Reporters suggest:

Case management difficulties, although certainly "complexities" in the litigation process, are elements of a phenomenon more global than multiparty, multiforum lawsuits—the problem of protracted litigation. Although complex litigation often involves case management problems, protraction is by no means limited to this category of cases. Some of the most notorious protracted cases have been structurally simple two-party lawsuits. The *Manual for Complex Litigation* sets forth techniques for managing protracted litigation that have been used successfully in the past and currently are available to federal judges. These devices have been reinforced by the 1983 amendments to Federal Rules of Civil Procedure 7, 11, 16, and 26, and the growing number of cost and delay reduction plans being adopted by district courts under the Civil Justice Reform Act of 1990. Accordingly, the Project does not pursue additional practice revisions aimed at the general problem of protracted litigation. Rather, continued improvement in this area may occur as the Manual, the new Federal Rules, and the local plans gain wider acceptance, and as further experimentation with their techniques is undertaken.

*Id.*



Moreover, the Reporters' reasons for excluding case management issues from their purview seem at once both disingenuous and peculiarly naive. It is disingenuous for the Reporters to suggest that they chose not to grapple with postaggregative procedure in order to avoid duplicative efforts by other bodies.<sup>65</sup> That Congress,<sup>66</sup> the American Bar Association,<sup>67</sup> and other groups such as the Federal Courts Study Committee<sup>68</sup> simultaneously addressed the issues of multiparty, multiforum jurisdiction and choice-of-law did not deter the Complex Litigation Project Reporters from studying these issues and making essentially duplicative (but not precisely overlapping) recommendations. Indeed, since these other law reform groups primarily focused their attention on the same issues of jurisdiction, transfer, and choice-of-law as it relates to mass tort cases, and did not address issues of postaggregative procedure, it now appears all the more compelling that the Reporters should have studied case management problems.

The Reporters' assertion that other rules adequately deal with mass tort case management is simply naive. Both the Manual for Complex Litigation and the Federal Rules of Civil Procedure, especially those rules relating to discovery and case management, have been regularly revised during the last half-dozen years. One can only assume that revisions are necessary because the existing rules have proven inadequate to the tasks of governing both simple and complex civil litigation. In addition, the Reporters' suggestion that the case management problems of mass tort cases are similar to those of other complex cases seems as misguided as their suggestion that the substantive law problems of mass tort cases are the same as other complex cases.<sup>69</sup>

If we have learned anything from the few mass tort cases that have progressed to the point of postaggregative adjudication, it is that these cases present novel issues of postaggregative procedure relating precisely to the list of problems the Complex Litigation Project Reporters chose to ignore: discovery, organization of counsel, trial scheduling, preparation and management, and administration of forms of relief.<sup>70</sup> The lessons of the *Cimino*<sup>71</sup> and *School Asbestos Litigation*<sup>72</sup> instruct that ordinary procedural rules, even augmented by suggestions from the Complex Litigation Manual, do not adequately meet the

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65. *Id.*

66. See the various versions of the Multiparty, Multiforum Jurisdiction Act, *supra* note 5.

67. Report to the House of Delegates, 1989 A.B.A. Comm'n on Mass Torts, Rep. 126 (1989).

68. Report of the Federal Courts Study Committee (April 2, 1990); see also Committee on Federal Courts of the New York State Bar Association, *Improving Jury Comprehension in Complex Civil Litigation*, 62 St. John's L. Rev. 549 (1988).

69. See *supra* note 64.

70. See generally Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, *supra* note 11; Mullenix, *Problems in Complex Litigation*, *supra* note 11, at 225-27.

71. *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990).

72. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *rev'd in part*, 789 F.2d 996 (3d Cir. 1986).

complicated tasks of case management where courts have joined essentially individualized tort injury cases into an aggregate mass tort litigation.<sup>73</sup>

In the absence of case management rules tailored to the special problems of mass torts, federal judges have been creating case management techniques as they go along, frequently over the objections of plaintiff and defense counsel. Mass tort cases, as opposed to other federal litigation, present a tension between the desire for individualized proof of tort injury and the judicial system's desire for efficient processing of claims. To mediate these conflicting goals, federal judges who have handled mass tort cases have resorted to creative compromise measures.

In *Cimino v. Raymark*, for example, Judge Parker agreed to individual depositions and physical examinations of more than three thousand plaintiffs, but subjected this discovery to severe time, place, and manner restrictions.<sup>74</sup> Judge Parker attempted to bridge the gap between individualized and aggregate procedure and to mediate the competing demands of the litigants' right to individualized adjudication and the system's desire for efficient case management. Similarly, in the *School Asbestos Litigation*, Judge Kelly imposed restrictive scheduling limitations on the depositions of expert witnesses.<sup>75</sup> In both instances, the judges' creative discovery measures were challenged by both plaintiff and defense counsel.<sup>76</sup>

Mass tort discovery presents different case management problems beyond ordinary time, place, and manner restrictions. Judge Jack Weinstein, who has overseen both the *Agent Orange Litigation* and the Brooklyn Navy Shipyard asbestos cases, has suggested that the entire subject of protective orders should be revisited in the context of mass tort litigation.<sup>77</sup> Based on a communitarian legal philosophy, Judge Weinstein controversially suggests that the public's right to learn of information disclosed in mass tort discovery should outweigh traditional litigant rights to privilege and immunity from disclosure.<sup>78</sup>

Finally, the entire subject of discovery is currently in procedural disarray, and ongoing reform efforts may be inadequate if not counterproductive to the conduct of mass tort litigation. For the last half-dozen years, the Advisory Committee on Civil Rules has been revising the entire package of Federal Rules of Civil Procedure relating to civil discovery.<sup>79</sup> The two key features of these reforms are

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73. See Mullenix, *Beyond Consolidation: Postaggregate Procedure in Asbestos Mass Tort Litigation*, *supra* note 11 (discussing postaggregate procedure in the *Cimino* and *School Asbestos Litigation*).

74. *Id.* at 531-34.

75. *Id.* at 534-37.

76. *Id.* at 531-37.

77. Hon. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 516 (1994).

78. *Id.* at 513.

79. See Amendments to Federal Rules of Civil Procedure (effective Dec. 1, 1993), *reprinted* in 146 F.R.D. 401 (1993). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795 (1991); Randall Samborn,

a provision for mandatory exchange of information at the outset of a lawsuit, and severe limitations on formal discovery devices such as depositions and interrogatories.<sup>80</sup> Although the Advisory Committee's proposed discovery reforms were passed by the Judicial Conference, transmitted by the Supreme Court to Congress, and subsequently enacted into law, these discovery reforms were accompanied by great debate and legislative jockeying. The final word on civil discovery reform has not yet been written, with intimations that Congress may yet undertake its own set of civil discovery reforms during the spring session of 1994.<sup>81</sup>

Nonetheless, these reforms of the basic discovery rules seem totally inapt for complex cases, let alone complex mass tort cases. To imagine that both sides will simply hand over the bulk of their discovery information—information that neither side is likely to possess at the outset of a complex mass tort case—within the severely constricted period mandated by the Federal Rules, borders the fantastic. Moreover, the equally severe limitations on depositions and interrogatories are ludicrous given the context of complex multiparty, multiforum mass tort litigation.

Recourse, of course, probably will continue to be found in the vague and aspirational suggestions of the Manual for Complex Litigation,<sup>82</sup> a Manual drafted in response to an earlier era of federalized complex litigation, not mass tort cases.<sup>83</sup> Moreover, the litigation landscape is now additionally cluttered by discovery reforms that have been recommended by each federal district court under the 1990 Civil Justice Reform Act.<sup>84</sup> Pursuant to this legislation, each federal district court shall issue a report and plan for civil justice reform by the end of 1993, plans which are to include recommendations, measures, and rules of the conduct of discovery.<sup>85</sup> Whether individual district courts will provide separate discovery rules for complex or mass tort cases will vary from district to district, as will the discovery rules themselves.<sup>86</sup>

A mass tort litigant, under the transfer and consolidation regime provided by the Complex Litigation Project, is left adrift with regard to post-consolidation

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*Derailing the Rules*, Nat'l L.J., May 24, 1993, at 1; Randall Samborn, *U.S. Civil Procedure Revisited*, Nat'l L.J., May 4, 1992, at 1; Carl Tobias, *Congress and the 1993 Civil Rules Proposals*, 148 F.R.D. 383 (1993); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993).

80. Amendments to Federal Rules of Civil Procedure, *supra* note 79, at 430-41.

81. See Linda S. Mullenix, *Podium: Should Congress Decide Civil Rules*, Nat'l L.J., November 22, 1993, at 15-16; Randall Samborn, *New Discovery Rules Take Effect*, Nat'l L.J., December 6, 1993, at 3; see also Civil Rules Amendments Act of 1993, H.R. 2814, 103d Cong., 1st Sess. (1993).

82. Manual for Complex Litigation (Second) (1985).

83. Manual for Complex Litigation ix (1978). The Manual was written in response to the wave of federal antitrust prosecutions of the manufacturers of electronic equipment in the 1960s.

84. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

85. See generally Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 Minn. L. Rev. 375 (1992) (describing the Civil Justice Reform Act and its legislative history); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992); Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

86. See *Courts and Procedure, New Discovery Rules*, 62 U.S.L.W. 2449, 2450 (Jan. 25, 1994) (reporting that 28 of 94 federal district courts have announced they will not follow mandatory disclosure rules).

discovery rules. Will such cases be subject to the Manual for Complex Litigation, the discovery rules of some particular federal district court or another, or whatever the transferee judge elects to create, impose, or improvise? Since under the Civil Justice Reform Act we can now expect balkanized rather than uniform civil discovery rules,<sup>87</sup> may we now expect litigant forum-shopping for preferred discovery provisions in mass tort cases? Might we have been better if the Reporters had chosen, despite the possibility of duplicative efforts, to have offered some suggested guidelines for discovery and other case management techniques, rather than leaving these issues for "experimentation" in the ninety-four federal district courts?

The other case management issues that the Reporters declined to consider are also vexing in mass tort cases, and these issues are not usefully ignored by suggesting they are akin to the same issues in other complex cases. Mass tort cases have presented unique issues of counsel organization and financing, as Judge Weinstein experienced in the *Agent Orange Litigation*.<sup>88</sup> Trial scheduling, preparation, and management in mass tort cases have also raised issues concerning the use of special masters and polyfurcated trials that are dissimilar to other complex cases.<sup>89</sup> Finally, the *Cimino* case, the *Agent Orange Litigation*, and the Manville Asbestos Trust, all have raised difficult and unique issues relating to relief administration, including novel issues of damage sampling and scheduling.<sup>90</sup> Yet these issues failed to rouse the attention of the Complex Litigation Project Reporters. Since most of these issues are not being addressed by other law reform groups, the Project's Reporters have left a vast procedural chasm concerning some of the most difficult issues of actually processing consolidated mass tort cases.

### 3. Diversity Jurisdiction and Mass Tort Litigation

At the outset of the Complex Litigation Project, the Project's Reporters also indicated they would not address the relationship of complex litigation to any

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87. See Mullenix, *supra* note 85, at 380-82; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 *Ariz. St. L.J.* 1393 (1992); see also *Courts and Procedure, New Discovery Rules*, *supra* note 86.

88. See generally Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1986).

89. See Mullenix, *Beyond Consolidation*, *supra* note 11, at 540-50 (role of court adjuncts such as special masters and court-appointed expert witnesses); 557-68 (trial staging and polyfurcated trials).

90. See, e.g., *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990) (damage scheduling in over 3000 consolidated asbestos claims); *In re Johns-Manville Corp.*, 36 B.R. 743 (S.D.N.Y. 1984) (appointing class representatives for asbestos tort victims with claims not-yet ripened). See also Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815 (1992); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. Pa. L. Rev.* 1147 (1992); *Symposium on Problems in Disposition of Mass Related Cases and Proposals for Change*, 10 *Rev. Litig.* 209 (1991).

possible revision of federal diversity jurisdiction.<sup>91</sup> Not much needs be said about this decision, other than to reaffirm the Reporters' wisdom in adopting this course. The Proposed Final Draft is neither the better nor the worse for this omission.

What is peculiar, however, is that the Reporters deliberately mentioned this omission in the Proposed Final Draft. In a Project that otherwise has eliminated any discussion, analysis, or recommendations concerning federal subject matter jurisdiction (other than its removal jurisdiction),<sup>92</sup> why did the Reporters single out the tired diversity debate as unworthy of inclusion in the Project?

One suspects that this particular exclusion was introduced in the original 1987 Preliminary Study<sup>93</sup> at a time when the Reporters fully intended to draft a new subject matter jurisdictional statute for mass tort cases.<sup>94</sup> Recognizing at that time that all federal mass tort cases were filed in federal court under its diversity jurisdiction, the Reporters anticipated that any statute they drafted might in some way modify the court's diversity jurisdiction. However, also recognizing the historical attempts to eliminate diversity jurisdiction, the Reporters no doubt issued this preemptive cautionary note to the Institute's membership to forestall, if not prevent, a highly charged political debate over the desirability of the federal court's diversity jurisdiction.

As events developed, the Reporters subsequently issued, withdrew, and finally abandoned a subject matter jurisdictional proposal that looked very much like a modified diversity statute. What remains of that effort, in the Proposed Final Draft, is an odd defensive note concerning a chimerical problem. When the Reporters have not given us a federal subject matter jurisdictional statute, why should we care that they consciously chose not to revisit the old diversity debate?

#### 4. *The Right to Trial By Jury*

The fourth broad category of issues that the Reporters chose to exclude from their Project was the right to trial by jury.<sup>95</sup> For the Reporters, the relationship of

91. See Proposed Final Draft, *supra* note 1, Ch. 1, at 6. The Reporters offered a rather succinct reason for their avoidance of this issue:

When considering various options it should be recognized that some aspects of the law that affect complex litigation may not be feasible targets for reformation. A good example is the oft-repeated call to scale back diversity jurisdiction. This issue has continued to be debated, often acrimoniously, by various segments of the profession. The 1988 legislation increasing the jurisdictional amount requirement to \$50,000 in diversity cases, see 28 U.S.C. § 1332(a), may reduce the decible level of that controversy for the foreseeable future. Nonetheless, the acceptability of the proposals developed by this Complex Litigation Project should not be tied to the outcome of that debate. The diversity issue should be left for separate resolution in the political arena.

*Id.*

92. See discussion *supra* at II. A. 1. and accompanying notes.

93. See Preliminary Study, *supra* note 13, at 8-9.

94. See *supra* note 92.

95. See Proposed Final Draft, *supra* note 1, Ch. 1, at 6-7. The Reporters' statement of this exclusion is rather brief:

this right to complex litigation centers on the suitability of lay juries in complex cases.<sup>96</sup> The Reporters chose to omit any analysis of Seventh Amendment issues, declaring the right to be "largely immutable and [of a] constitutional nature"<sup>97</sup> and therefore not suitable for inclusion in the Project.

It is difficult to know what to make of this rationale for excluding jury-trial issues from the Project, and what it means to declare an issue "immutable and constitutional." Certainly the Reporters were not chary of dealing with other constitutional issues, as they amply demonstrated throughout their successive draftings of jurisdictional proposals relating either to the original or supplemental jurisdiction of the federal courts.<sup>98</sup>

Moreover, the Reporters' exclusive characterization of the Seventh Amendment issue as one of jury comprehension only, fails to capture the multiple possibilities for Seventh Amendment challenges that already have arisen in many mass tort cases. Indeed, in most instances where federal judges have attempted creative innovations in mass tort litigation, aggrieved litigants have suggested that certain case management procedures (rather than the presentation of evidence) have denied them a right to trial by jury. For example, decisions to aggregate cases either under Rule 23 or 42 have been challenged on Seventh Amendment grounds,<sup>99</sup> as have decisions to use special masters,<sup>100</sup> to conduct discovery in a certain fashion,<sup>101</sup> to polyfurcate the stages of a trial,<sup>102</sup> and to use damage sampling techniques.<sup>103</sup> Moreover, Seventh Amendment challenges to innovative trial procedure typically have been accompanied by Due Process challenges.<sup>104</sup>

Certainly the problem of jury comprehension in complex cases presents a Seventh Amendment issue, but the Project's Reporters seem cognizant of this problem only as it arose in pre-mass tort cases such as antitrust and securities

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Another source of controversy in the complex litigation context is the right to trial by jury. A number of observers have argued forcefully that some extraordinarily complex lawsuits present factual issues that are beyond the commentary of lay juries to decide. Nevertheless, the largely immutable and constitutional nature of the jury trial right, together with the political volatility of any attempt to alter it, suggest that the Institute would accomplish little by advocating any broad changes in the role played by juries in complex cases.

*Id.* (footnote omitted).

96. *Id.*

97. *Id.*

98. See Mullenix, *supra* note 4, at 206-23.

99. See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).

100. See Mullenix, *Beyond Consolidation*, *supra* note 11, at 543 (discussing defendants' objections to use of special masters in *Cimino v. Raymark*).

101. *Fiberboard Corp.*, 893 F.2d at 709 (refusing to consider constitutional challenge to discovery limitations imposed by district Judge Parker).

102. See Mullenix, *Beyond Consolidation*, *supra* note 11, at 557 (discussing Seventh Amendment objections to polyfurcated trial plans).

103. See Saks & Blanck, *supra* note 90.

104. See, e.g., *Fiberboard Corp.*, 893 F.2d 706.

litigation.<sup>105</sup> If the Complex Litigation Project is intended to deal with mass tort litigation as it has manifested itself since the mid-1980s, then the Reporters' vision of Seventh Amendment problems raised by these cases is peculiarly narrow and uniformed by the actual experience of mass tort cases.

In the new universe of complex mass tort litigation, judges, lawyers, and litigants ought to have some sense of which aggregate procedure is constitutionally permissible and which innovative procedure is not. To eliminate analysis of such fundamental litigation rights by characterizing the issues as "immutable, constitutional, and political," seems an inexcusable evasion and omission.

### C. Problems Inadvertently Ignored

Having chronicled those proposals that mysteriously vanished from the Complex Litigation Project and those that were deliberately omitted, it seems rather gratuitous to add that the Reporters also inadvertently ignored another vista of mass tort litigation. I refer here to the ethical or professional responsibility issues raised by these cases, a set of problems largely ignored in the academic literature and by the ALI in all three of its projects dealing with Complex Litigation, Enterprise Responsibility, and the Restatement of the Law Governing Lawyers.<sup>106</sup> That the ethical dimensions of mass tort litigation were not included in the Reporter's Preliminary Study is neither surprising nor faulty. One may forgive the Complex Litigation Reporters for this oversight because, at the time the Project began in 1986, many of the ethical problems that Judge Jack Weinstein has now so ably catalogued<sup>107</sup> had not yet been witnessed.

Judge Jack Weinstein has now completed a yeoman's job of describing the ethical issues experienced in complex mass tort litigation, a discussion that ranges over problems in client solicitation, client loyalty, fee arrangements, financing litigation, discovery and disclosure, privileges and immunities, conflicts-of-interest, judicial surrogates, representational litigation, and myriad other professional responsibility issues.<sup>108</sup> Through his hands-on exposure to the *Agent Orange* and asbestos mass tort litigations, Judge Weinstein contends that mass tort cases raise distinctive ethical problems that conventional

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105. See Mullenix, *Beyond Consolidation*, *supra* note 11, at 565-66 (discussing jury comprehension issues).

106. See American Law Institute, *Restatement of the Law Governing Lawyers* (forthcoming). This author is an Associate Reporter on the Restatement and, as I have disclosed elsewhere, was chastised by Judge Jack Weinstein at the May 1993 ALI Annual Meeting for my failure to include any discussion of ethical issues relating to mass tort cases in my sections of this Restatement. Judge Weinstein is indeed correct that the Restatement of the Law Governing Lawyers does not deal with ethical issues peculiar to the class of mass tort cases; see Weinstein, *supra* note 77, and Linda S. Mullenix, *Mass Torts As Public Interest Law: Paradigm Misplaced*, 88 Nw. U. L. Rev. 579 n.\* (1994).

107. Weinstein, *supra* note 77.

108. *Id.*

professional responsibility codes do not address adequately and that need to be addressed by law reform bodies.<sup>109</sup>

Whether one agrees with Judge Weinstein's diagnosis of the problems or his prescriptions for reform,<sup>110</sup> his article highlights a dimension of mass tort litigation that has been completely overlooked and neglected by law reformers. Meanwhile, these ethical problems surface in every new mass tort litigation filed in state and federal courts; judges, lawyers, and litigants have scarce or, at best, inapt guideposts to professionally responsible conduct in mass tort cases. One hopes that while the Restatement of the Law Governing Lawyers progresses, the Reporters for that project will heed Judge Weinstein's suggestion that that project address the ethical problems involved in mass tort cases. Unfortunately, the Complex Litigation Project's swan song at the May 1993 Annual Meeting did not include a chorus discussing the ethical problems of complex litigation.

### III. CONCLUSION

What should we make of an American Law Institute effort that styles itself the Complex Litigation Project but fails to deal with complex litigation? In the end, the 700 pages of this Project may be reduced to this: The Reporters have enhanced the old multidistrict litigation statute and have offered an elaborate choice-of-law scheme largely modeled on the Restatement (Second) of Conflicts of Law. Well, Congress also has been working on these two items for the past seven years, only their work product is 680 pages shorter. Will either serve us better?

From the beginning, the Complex Litigation Project suffered from a peculiar identity crisis (identity complex?) exemplified by its persistence in calling itself the Complex Litigation Project, rather than the Mass Tort Litigation Project. The Project was not really intended to deal with complex federal cases, but with one species of complex cases that began to present idiosyncratic problems in the mid-1980s: the mass tort litigation.

Mass tort litigation is unlike other federal complex litigation, and the Project's failure to delineate these distinctions muddied the Institute's effort to provide a model for fair and efficient mass tort procedure. The Reporters mistakenly tried to assimilate mass tort cases into a generalized complex litigation model, while simultaneously trying to prescribe special procedures

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109. *Id.* In addition to identifying ethical problems raised in mass tort cases, Judge Weinstein also makes numerous recommendations concerning how he believes these ethical problems ought to be handled, based on a communitarian legal philosophy.

110. *See, e.g.,* Mullenix, *supra* note 106 (disagreeing that the ethical problems Judge Weinstein identifies are peculiar to mass tort cases and questioning whether ethics reform need be based on a theory of communitarian ethics); *see also* Geoffrey C. Hazard, Jr., *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 569 (1994); Thomas W. Henderson & Tybe A. Brett, *A Trial Lawyer's Commentary on One Jurist's Musing of the Legal Occult: A Response to Judge Weinstein*, 88 Nw. L. Rev. 592 (1994).



tailored for mass tort cases. Ultimately, this tension resulted in a cautionary, politically compromised solution to an ill-defined set of problems that is a mere enhancement of existing procedure.

And oh—what they left out! First, the Complex Litigation Project divorced itself from substantive tort law and decided to prescribe procedure in a substantive vacuum. Then, the Complex Litigation Project failed to discuss or analyze federal subject matter jurisdiction, the relationship of its consolidation procedures to class actions and other federal consolidation devices; any aspect of postaggregative procedure and case management, including but not limited to discovery, organization of counsel, trial staging, and forms of relief. The Complex Litigation Project left out discussion of methods of alternative dispute resolution, administrative and extrajudicial auspices for claim processing, bankruptcy proceedings, and the use of court surrogates, such as special masters. The Complex Litigation Project left out analysis of the constitutional due process and jury trial issues. And the Complex Litigation Project left out discussion of the ethical implications raised by mass tort cases. In short, the Complex Litigation Project told us virtually nothing about complex mass tort litigation.

Surely something admirable may be found amid this dour commentary, and it is this: For all its faults and omissions, the Complex Litigation Project is a scholar's work and a scholar's monument. Like the two movements of Franz Schubert's Unfinished Symphony in B minor, perhaps the Proposed Final Draft will inspire other scholars to compose those movements that remain unwritten.