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Manuel L. Real

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WHAT EVIL HAVE WE WROUGHT: CLASS ACTION, MASS TORTS, AND SETTLEMENT

*Manuel L. Real**

Mass tort litigation is accurately characterized as one of the most complex forms of federal civil litigation. It is not unusual for such lawsuits to involve multiple claimants, varied damage awards, and complex evidentiary concerns. However, as Winston Churchill once said, "Out of intense complexities, intense simplicities emerge."¹ During my three decades on the bench, it has become clear to me that there are some very basic and fundamental tenets that judges can follow in their approaches to mass tort litigation. Two specific rules of the Federal Rules of Civil Procedure—Rule 1 and Rule 23—provide judges with remarkably straightforward guidance in answering the complex question of how to resolve mass tort litigation.

Rule 1 of the Federal Rules of Civil Procedure enunciates the basic goals for judges in the management of civil litigation, stating that the rules which govern procedure in the United States District Courts "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."² Rule 23 provides the tools and procedural framework to realize these goals in the context of mass torts.³

The origins of these rules and their relevance to the modern day judge in addressing settlement and resolution of mass tort litigation is discussed below. This Essay has three basic components. Part I

* United States District Judge, Central District of California.

1. Stewart I. Edelstein, *Bombast v. Cogent*, LITIG., Spring 1992, at 45, 46.

2. FED. R. CIV. P. 1.

3. See FED. R. CIV. P. 23. For instance, subsection (a) articulates the prerequisites to a class action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Subsection (b) further states the additional requirements necessary to maintain a class action. See FED. R. CIV. P. 23(b).

provides several historical observations on the development of mechanisms to deal with mass tort litigation and discusses some early mass tort cases. Part II explores the relevance of Rule 23 and Rule 1 to the trial judge in the mass tort context. Part III contains my reflections on the settlement process and includes some recommendations based upon my own experiences. Finally, the Essay concludes with a series of questions to judges and practitioners about the future direction of mass tort litigation.

I. HISTORICAL OVERVIEW

In the last twenty years, federal litigation has gone through a metamorphosis of procedural developments to cope with the increasing number of cases collectively known as "mass torts."

Beginning in 1961, federal judges confronted 25,623 separate antitrust claims in 1912 civil actions filed in 35 district courts throughout the country in what was known as the *Electrical Equipment Antitrust Cases*.⁴ Recognizing the problems inherent in such litigation, Congress enacted legislation in 1968 which created two vehicles to provide for the efficient processing of massive class actions and mass torts. The first vehicle set out the rules for Multidistrict Litigation under 28 U.S.C. § 1407.⁵ This Act allowed for cases filed throughout the federal system to be concentrated into one court where a single district judge would hear and supervise all pretrial matters involving a single common claim for damages in tort litigation.⁶ The second vehicle created the Federal Judicial Center to train federal judges to better handle what was becoming a flood of federal litigation.⁷

The Federal Judicial Center, with the impetus of its first director, retired Associate Supreme Court Justice, the Honorable Tom C. Clark, and a Board of Editors, created the *Manual for Complex and Multidistrict Litigation* that was designed to "[s]timulate the devising of procedures appropriate to new problems as they arise. It is intended to be a living document into which desirable techniques proved by experience will be incorporated in the future."⁸ In keeping

4. See *In re Equity Funding Corp. of America Sec. Litig.*, 375 F. Supp. 1378, 1389 (J.P.M.L. 1974) (Becker, J., concurring). For a more complete discussion of this litigation which involved antitrust claims against electrical equipment manufacturers, see Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

5. 28 U.S.C. § 1407 (1994).

6. See 28 U.S.C. § 1407(a)-(b).

7. 28 U.S.C. § 620 (1994).

8. MANUAL FOR COMPLEX LITIGATION xii-xiii (1st ed. 1969).

with the philosophy of its origin that “[t]here are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management,”⁹ the Manual has seen two revisions.¹⁰ With each revision of the Manual comes the changing realization that “[a] functional definition of complex litigation recognizes that the need for . . . judicial management with the participation of counsel . . . does not simply arise from complexity, but is its defining characteristic: The greater the need for management, the more ‘complex’ is the litigation.”¹¹ Whether it be pretrial, trial or settlement, today’s massive class action and mass tort litigation clearly require management by a judge willing to forsake popularity to effect “the just, speedy, and inexpensive determination of every action” provided by Rule 1 of the Federal Rules of Civil Procedure.¹²

The full force of the congressional reforms, however, was not fully realized until the last two decades. Before then, innovative judges and trial attorneys had to figure out how to resolve mass tort cases expeditiously. The pioneers in this regard were the judges and practitioners in the late 1960s and early 1970s who took the mandate of Rule 1—the just, speedy, and inexpensive determination of every action—seriously and applied it in the context of mass tort litigation. One example of this innovation was the effort of federal courts to determine the common question of liability in air crash litigation.

Judge Peirson M. Hall was one of the first federal judges to deal with the common liability question effectively in this context. In response to the objection by defendants to the consolidation of 337 wrongful death claims for pretrial and trial in *In re Paris Air Crash of March 3, 1974*,¹³ Judge Hall observed:

The most important rule of all is the last sentence of F.R.Civ.P. 1, which provides that the Federal Rules of Civil Procedure ‘*shall be construed to secure the just, speedy, and inexpensive determination of every action.*’ It is this command that gives all the other rules life and meaning and

9. *Id.* at ii.

10. The MANUAL FOR COMPLEX LITIGATION (2d ed. 1985) was edited by the Honorable Sam C. Pointer, Jr., Chief Judge, Northern District of Alabama. The MANUAL FOR COMPLEX LITIGATION (3d ed. 1995) was edited by then Director of the Federal Judicial Center, the Honorable William W. Schwarzer, United States District Judge, Northern District of California.

11. MANUAL FOR COMPLEX LITIGATION § 10.1 (3d ed. 1995) [hereinafter MANUAL].

12. FED. R. CIV. P. 1.

13. 69 F.R.D. 310 (C.D. Cal. 1975).

timbre in the realist world of the trial court. It makes the rules useful tools for the trial of actual litigation instead of abstractions to be pontificated over in seminars by learned scholars of the law who have seen little or nothing of real litigation in the trial courts, where approximately 90 percent of all civil litigation is handled *and* terminated.¹⁴

Judge Hall was a realist and a superb trial judge. I had the honor of working with him in the *Paris Air Crash* cases. Under his guidance, we resolved all 337 claims.¹⁵ For all of the claims, we consolidated the issue of liability.¹⁶ With liability out of the way, only four or five trials on damages were necessary and the remainder of the cases settled. In retrospect, I believe it would have been easier and more efficient if we had used Rule 23 class action procedures rather than consolidating the cases under Rule 42(a).¹⁷ Today, appellate courts appear to be pushing trial judges in their search for justice and efficient handling of mass torts to forsake Rule 23 in the handling and settlement of mass tort litigation.¹⁸ Perhaps appellate courts should back-off and re-read Rule 1 of the Federal Rules of Civil Procedure.¹⁹

During the 1970s, courts used class actions to determine the common question of liability in air crash litigation, among other torts. For instance, early personal injury and antitrust cases involving numerous plaintiffs became class action mass torts rather routinely because they involved a small class of hundreds of individuals.²⁰ Where toxic substances or other products produced thousands of plaintiffs, however, the defense bar was opposed to using Rule 23 as a procedural framework for litigation. Critics cited the language of the Advisory Committee of the Federal Rules of Civil Procedure that "[a]

14. *Id.* at 318.

15. *See id.* at 323.

16. *See id.*

17. Rule 42(a) states in relevant part: "When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated." FED. R. CIV. P. 42(a).

18. *See, e.g.,* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997), *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), and *General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

19. For examples of early approaches to mass tort litigation in which the court certified a class action under Rule 23(b)(3), see *Bentowski v. Marfuerza Compania Maritima S. A.*, 70 F.R.D. 401 (E.D. Pa. 1976) and *In re Federal Skywalk Cases*, 95 F.R.D. 483 (W.D. Miss. 1982).

20. *See, e.g., In re Master Key Antitrust Litig.*, 528 F.2d 5 (2d Cir. 1975); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967).

'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood [of] significant questions, not only of damages but of liability and defenses [to] liability."²¹

Unfortunately, the defense bar relied on the language in the advisory notes in a somewhat piecemeal fashion. In stressing the language of the advisory notes, which warns against the potential harm to individual claimants in class actions, critics overlooked relevant language. The very same notes encouraged judges, with the help of innovative lawyers, to use class action procedures in appropriate circumstances: "[T]he court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy . . . [and decide whether or not a class action] is 'superior' to the others in the particular circumstances."²²

Federal judges found that the class action procedure was a "superior" method of handling mass tort litigation and thus began relying on Rule 23 in cases involving bendectin,²³ Agent Orange,²⁴ asbestos,²⁵ gypsum,²⁶ human rights,²⁷ breast implants,²⁸ and DES,²⁹ to name but a few. In many of these cases, judges have applied Rule 23 liberally to reflect the due process requirements of *Hansberry v. Lee*,³⁰ and *Mullane v. Central Hanover Bank & Trust Co.*,³¹ as was similarly done with Equity Rule 38 (Representative of Class), the predecessor to Rule 23. A common thread in all of these cases was the court's effort to obviate the problem of inconsistent results due to multiple jurisdictions, the threat of multiple punitive damage awards for a single tortious act, and the inability of recovery for persons with smaller claims. Thus, the class action in mass torts is a more effective method of addressing these concerns—concerns that would otherwise

21. FED. R. CIV. P. 23 advisory committee's note.

22. *Id.*

23. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio 1984).

24. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987).

25. *See, e.g., Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 408, 473 (5th Cir. 1986).

26. *See, e.g., In re Gypsum Antitrust Cases*, 565 F.2d 1123 (9th Cir. 1977).

27. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

28. *See, e.g., In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997); *In re Breast Implant Cases*, 942 F. Supp. 958 (E. & S.D.N.Y. 1996).

29. *See, e.g., Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979).

30. 311 U.S. 32 (1940).

31. 339 U.S. 306 (1950).

require more cumbersome and difficult consolidation if handled through Rule 42.

II. RELEVANCE OF RULE 1 AND RULE 23 TO THE TRIAL JUDGE

As mentioned before, Rule 1 and Rule 23 constitute a basic framework for judges handling mass tort litigation. Rule 1 lays out the overarching goals of ensuring justice and efficiency in civil litigation. Rule 23 provides the tools and procedural framework to realize these goals in the context of mass tort litigation.

Many have debated and disagreed about the use of Rule 23's class action procedure for handling mass torts.³² In my opinion, a class action is the paradigm of mass tort resolution. As I read Rule 23, it provides the trial judge with most, if not all, of the tools to handle the multitude of problems that could arise in the most complicated of mass torts. I believe we have come to a point in massive civil litigation where we may now consider Rule 23 action treatment because of its versatility in handling discrete issues in mass torts, such as diversity of citizenship or federal question jurisdiction cases through the vehicle of 28 U.S.C. § 1407 Multidistrict Litigation. Rule 23 is an essential tool for judges. Two sections of the Rule form the bedrock of its value to courts. First, Rule 23(b) allows judges to aggregate claims and to handle common questions of fact and law among claimants. It is an invaluable mechanism for avoiding multiple trials and inconsistent outcomes among plaintiffs. Second, Rule 23(e) "requires approval of the court . . . for the dismissal or compromise of any class action."³³ This rule is the foundation for much of the judge's power to persuade and facilitate fairness in settlement.

Those opposed to the use of Rule 23 in mass tort litigation maintain that all plaintiffs in personal injury litigation are entitled to their own lawyer and jury verdict. As the Third Circuit has pointed out:

Settlement classes, which constitute ad hoc adjustments to the carefully designed class action framework constructed by Rule 23, lack the regulatory mechanisms that ordinarily check this improper behavior: "There is in fact little or no individual client consultation and no judicial oversight of a

32. See, e.g., Robert T. Krebs, *Castano v. American Tobacco Co.: Class Treatment of Mass Torts is Going up in Smoke* 24 N. KY. L. REV. 673 (1997); Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295 (1996); William W. Schwarzer, *Structuring Multiclient Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250 (1996).

33. FED. R. CIV. P. 23(e) advisory committee's note.

hidden process of wheeling and dealing to maximize overall recovery and fees for hundreds and thousands of massed cases."³⁴

The opponents neglect to mention, however, that the majority of individual claims would not be economically viable if brought independently.³⁵ In the absence of the class action mechanism, tortfeasors may avoid liability. Furthermore, matters of liability are more often than not common issues in mass torts.³⁶ An example of what class action mass tort litigation can accomplish is found in *In re Estate of Ferdinand Marcos Human Rights Litigation*,³⁷ a large Multidistrict Litigation ("MDL") that came before me in the late 1980s. The case involved 23 individual plaintiffs and a class of 9539 human rights victims. The torts occurred at the hands of Ferdinand E. Marcos when he was president of the Philippines from 1972 to 1986. The Alien Tort Claims Act served as the basis of jurisdiction. We tried the case in Hawaii because Ferdinand E. Marcos lived and was served there after his overthrow as president of the Philippines in February 1986.³⁸

The Ninth Circuit certified and approved the class in *Hilao v. Estate of Ferdinand Marcos* as "[a]ll current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries, who between 1972 and 1986 were tortured, summarily executed or disappeared while in the custody of military or paramilitary groups."³⁹ The litigation resulted in a finding of liability: exemplary damages of \$1.2 billion and compensatory damages of \$766 million.

Given the vast number of plaintiffs and the complexities involved in determining compensatory and exemplary damages, this litigation could have been unwieldy. Instead, the *Marcos* court was able to employ Rule 23 in a way that greatly facilitated disposition of the case. As a class action, the court aggregated the claims, addressed common issues of fact and law, and trifurcated the litigation into three discrete trials for liability, compensatory, and exemplary damages.⁴⁰ Looking back, I believe that this process was efficient, accorded due process to the parties, and resulted in a fair assessment of damages for the plaintiffs.

34. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995).

35. *See In re A.H. Robins Co.*, 880 F.2d 709, 732-33 (4th Cir. 1989).

36. *See id.* at 732.

37. 25 F.3d 1467 (9th Cir. 1994).

38. *See id.* at 1469.

39. 103 F.3d 767, 774 (9th Cir. 1996).

40. *See id.* at 782.

More recently, as evidenced in the General Motors fuel tank litigation, what has concerned appellate courts in Rule 23 disposition of cases is that:

the possibility of pre-certification negotiation and settlement may facilitate the filing of strike suits. Since settlement classes can involve a settlement achieved either before or after the filing of class claims, recognition of the settlement class device allows plaintiffs to file as class actions cases that counsel never intended to have certified, but instead only to settle the claims individually.⁴¹

Attempting to meet the criticism hurled at settlement classes, the Judicial Conference's Standing Committee on Rules of Practice and Procedure is considering an amendment to Rule 23(b) which covers certification and settlement in a single proceeding.⁴² Applied to settlement classes, proposed Rule 23(b) would provide:

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the 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. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

(B) class members' interests in maintaining or defending separate actions;

(C) the extent, nature, and maturity of any related litigation involving class members;

41. *In re General Motors*, 55 F.3d at 789.

42. See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 21-22 (2d ed. 1992 & Supp. 1997).

(D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(E) the difficulties likely to be encountered in the management of a class action, *and*

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions conducted partially as Class Actions.

(1) *When* practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without *hearing and* the approval of the court, and after notice of the proposed dismissal or compromise *has been* given to all members of the class in such manner as the court directs.⁴³

(f) Appeals. *A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.*

43. *Id.*

An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The italicized material is the language that the Standing Committee added to 23(b) to address those matters that appellate courts have criticized in a trial court's consideration of mass tort class action settlements. Although only subsection (f) has been approved by the Judicial Conference and passed onto Congress for its appeal, whatever other provisions will ultimately be adopted is in the hands of the Civil Rules Committee.

Although I find little need for such an amendment to Rule 23, recent cases have given trial judges pause to stop and think about their settlement approval practices, particularly in those cases involving the settlement of class action mass torts.⁴⁴

Justice Breyer, who concurred and dissented in *Amchem Products v. Windsor*,⁴⁵ gives solace to trial judges—assuming he can convince other justices—in stating that we are not alone in the search to provide fair settlements for small claimants who would have no way to recover for injuries resulting from a mass tort other than the class action litigation procedures provided in Rule 23.⁴⁶ *Amchem* makes it clear that pending any amendment to Rule 23(b), certain procedures and findings are required of trial judges.⁴⁷ Moreover, the proposed rule must withstand a tortuous process through the Standing Committee, Supreme Court, and Congress before achieving final acceptance.⁴⁸ Sanguinity in this process is at best a fond hope or perhaps an evanescent dream.

III. SETTLEMENT AND RECOMMENDATIONS

The paradigm mass tort or complex case contemplated by the *Manual on Complex Litigation* leaves little role for the judge to play in the settlement process other than to “serve as a catalyst for settlement discussions, create an atmosphere conducive to compromise, and make suggestions helpful to the litigants.”⁴⁹ Setting a firm trial

44. See *In re General Motors*, 55 F.3d at 768; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

45. 117 S. Ct. 2231, 2252 (1997).

46. See *id.* at 2256-58.

47. See *id.* at 2248.

48. See *id.*

49. MANUAL, *supra* note 11, § 23.11.

date is another technique judges can implement to promote settlement.⁵⁰ Indeed, it is generally the most effective means to motivate parties to settle.⁵¹

The Central District of California also encourages settlement. Local Rule 23 Mandatory Settlement Procedures requires parties to opt for one of the four suggested settlement procedures provided under Rule 23.5.⁵² Those discussions must be undertaken at least forty-five days before the final pretrial unless exempted by the trial judge.⁵³ Requiring settlement discussions was intended to remove attorneys' reluctance to suggest or engage in the settlement process since a willingness to talk about compromise would no longer represent weaknesses in a case.⁵⁴

The parties and the judge should rarely approach settlement discussions without the required presence of the person—party, counsel, insurer—with the full authority to settle the litigation. Often the settlement process can be expedited, by consent of the parties, with the judge removed from the direct process of negotiations and the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure⁵⁵ or referral to a magistrate judge who has the time to devote to the prolonged negotiations usually required in mass tort or class action settlements.⁵⁶ Bifurcating issues in mass tort cases can settle issues of liability that often stand in the way of settlement discussions and place the judge in the position of nurturing the settlement process.⁵⁷

The use of a special master places the settlement process in the most neutral situation and provides for candid discussion of the strengths and weaknesses of a party's position without the strictures and formalities that inevitably attend discussions with the trial judge.⁵⁸ The requirement that the parties compensate the special master has rarely created any problem.⁵⁹ However, while the use of a

50. *See id.* § 23.13.

51. *See id.*

52. *See* United States District Court, Central District of California, Local Rules of Practice 23.2, 23.5 (1997).

53. *See id.* 23.2, 23.3.

54. *See* MANUAL, *supra* note 11, § 23.11.

55. FED. R. CIV. P. 53. Rule 53(a) states in relevant part: "The court in which any action is pending may appoint a special master therein." *Id.*

56. *See* MANUAL, *supra* note 11, § 20.14.

57. *See id.* § 23.13.

58. *See id.*

59. Nonetheless, the appointment of a special master may substantially increase the cost of litigation, thereby offsetting any potential savings. Thus, par-

special master can provide for innovative and mutually beneficial arrangements, this may, because of the need to try or otherwise dispose of the case if settlement negotiations fail, compromise the judge's neutrality, or at least the appearance of neutrality, in the case. As required by Rule 23(e), the trial judge must be the final arbiter of the fairness of the settlement to absent persons whose interest the court has a duty to protect.⁶⁰

Commentators note that Rule 23 imposes very liberal guidelines or requirements upon judges in their consideration of settlements in class action mass tort cases.⁶¹ It may be true that there are no specifics guidelines or requirements in Rule 23(e) other than: "A class action shall not be dismissed or compromised without the approval of the court."⁶² Nonetheless, Rule 23(e)'s requirement of court approval is a broad admonition to judges to use all the available tools of Rule 23 to fairly judge any proposed settlement. The fact that judges have not utilized all those tools does not invalidate the principle that class action procedures can and should be used in processing mass tort litigation through trial or settlement.

The Supreme Court's statement in *Amchem* that "[f]ederal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper,"⁶³ is much like the Advisory Committee note on the use of Rule 23 in mass torts.⁶⁴ Experience in the trenches tells us that fairness of the settlement to all parties—plaintiffs and defendants—should be the first consideration when approving settlements. Without fairness, no criteria can be applied to the Rule 23(e) requirement of court approval of a settlement.

The determination of fairness may now require that a judge know the details of how a settlement has been reached.⁶⁵ The judge must look to familiarity with the subject matter of the settlement or may require consultation with independent experts—available under

ties should keep in mind whether they can afford the cost of a special master. *See id.* § 21.42.

60. *See* FED. R. CIV. P. 23(e).

61. *See, e.g.,* Richard A. Chesley & Kathleen W. Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 485 (1985); Steven L. Schultz, *In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 613 (1992).

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

63. *Amchem*, 117 S. Ct. at 2249.

64. *See* FED. R. CIV. P. 23 advisory committee's note.

65. *See* MANUAL, *supra* note 11 § 23.14.

Rule 706 of the Federal Rules of Evidence—who have knowledge of the business or industry that gave rise to the injury or damages a plaintiff now seeks from a defendant.⁶⁶

Relief the settlement proposes to provide to plaintiffs—present or absent—as well as the ability of a defendant or insurer to respond, must be scrutinized. A settlement without the ability to fulfill the obligations undertaken either in terms of money, action or inaction, cannot be approved by a judge since it can be viewed as a money tree for counsel from which clients get only the ground nuts.⁶⁷

Amchem also appears to require a determination and explanation that the claims of the beneficiaries of a settlement are justiciable in federal courts as required by Article III cases or controversy considerations.⁶⁸ What is left for explanation is whether *Amchem* and the expansive view of *Georgine* have at last fallen into the camp of the opponents to class actions in general and mass tort class actions in particular. Judge Lowell A. Reed, Jr., working with Judge Charles Weiner of the Eastern District of Pennsylvania in the gigantic asbestos litigation, had extensive hearings and made findings on the need and the fairness of the proposed mass tort class action settlement considered in *Georgine*. All his efforts were nullified by the *Georgine* and *Amchem* opinions. What is left is the wounded and dead.

IV. CONCLUSION

Whether it be pretrial, trial, or settlement, today's massive class action and mass tort litigation clearly require management by a judge willing to forsake popularity to effect the mandate of Rule 1 by fully utilizing the procedural framework of Rule 23. In terms of an action plan for judges to implement this procedural framework, a distillation of the Third Circuit's opinions in recent mass tort litigation is instructive. Trial judges should actively oversee the settlement process and should try to accomplish the following:

- Ensure absent class members are properly represented, notified, and accorded due process;
- Prevent collusion between counsel for the class and defendant during the settlement process;
- Evaluate the effects of res judicata and collateral estop-

66. *See id.*

67. *See id.* § 30.41.

68. *See Amchem*, 117 S. Ct. at 2244.

pel on the proposed settlement and record objections to settlement on the record;

- Assess fairness and reasonableness of the settlement to all class members, and make findings as to the value to each individual plaintiff.

Finally, in the Talmudic tradition which can be so helpful in the analysis of modern issues of law, I leave several further questions for review and reflection on the issue of settlement in mass tort litigation.

1. Are we on the brink of making justice the slave of procedure?
2. Assuming subject matter jurisdiction and a duty of the court to find the settlement fair and equitable, are the reasons for the desire to settle a claim by the parties of any concern to the courts?
3. Assuming subject matter jurisdiction—case or controversy—is justiciability of a settlement really a separate concern?
4. Should the court be very concerned about the self-interested motives of the parties in settling given the fact that plaintiffs obtain some recovery and defendants gain the protection of *res judicata*?
5. Is it time for creativity—i.e., federal common law?