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PROCEDURAL AND SUBSTANTIVE PROBLEMS IN COMPLEX LITIGATION ARISING FROM DISASTERS*

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Procedural codes cannot by themselves assure justice to all, or a merits-oriented judicial system, or one that operates cheaply and swiftly. Too many other factors are at work, including the quality and quantity of judicial personnel, the morale of the bar and pressures from overcrowded dockets.

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Nevertheless procedure does have an important role to play. During the golden years of our federal judicial system since World War II the courts were opened wide to those who believed their substantive rights were violated. We approached, to an extent never before achieved on such a grand scale, true equality of justice.

Now efforts are being made to swing closed that federal courthouse door. Plaintiffs are being increasingly discouraged from bringing suits through Rule 11 sanctions,[1] limits on discovery,[2] tougher summary judgment standards,[3] stricter pleading requirements,[4] abolition of pendent jurisdiction in cases such as those challenging the abuse of patients in state institutions,[5] increased standing barriers,[6] and other substantive and procedural limitations.[7]

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1. FED. R. CIV. P. 11 (court may order that reasonable expenses of adversary be paid by attorney or party interposing pleadings or motions for improper purpose). A Third Circuit Committee estimates that Rule 11 sanctions are awarded almost three times as often against plaintiffs as against defendants, and nine times as often against civil rights plaintiffs as against civil rights defendants. REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (in progress 1988); *see also* Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

Despite the negative experience of the federal courts with this device, New York has adopted essentially the same approach, with some limits to ensure that it operates in a less Draconian fashion. *See Top State Court Adopts Sanction Rules*, N.Y.L.J., Oct. 26, 1988, at 1, col. 4.

2. *See, e.g.*, Weinstein, *After Fifty Years of Federal Rules of Civil Procedure Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. (forthcoming June 1989) [hereinafter *After Fifty Years*]; *cf.* Weinstein & Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 438-41 (1988).

3. *See* Risinger, *Another Step in the Counterrevolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988); *see also* Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987).

4. *See, e.g.*, Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

5. *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 121 (1984) (eleventh amendment bars the federal judiciary from hearing pendent state law claims alleging state officials violated state law).

6. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (U.S. Const. art. III case and controversy requirement mandates immediate and real harm for grant of injunctive relief); *see generally* Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

7. According to a report by the New York State Bar Association, abstention doctrines are frustrating classwide and institutional suits against state administrative systems violating federal rights. N.Y. STATE BAR ASS'N, REPORT OF THE COMMITTEE ON FEDERAL COURTS, THE ABSTENTION DOCTRINE: THE CONSEQUENCES OF FEDERAL COURT DEFERENCE TO STATE COURT PROCEEDINGS 22-28 (Aug. 30, 1988).

There is, too, a growing movement to abolish diversity jurisdiction.[8] In a state like New York this makes little sense, I suggest, since the burden will be shifted to New York courts already more pressured than even the federal courts. Undoubtedly some modification is in order, such as higher minimum amounts to reflect inflation,[9] and possibly the elimination of automotive and medical malpractice suits. These types of cases are increasingly subject to state administrative control and special procedural and substantive rules through such devices as no-fault and malpractice controls. I have elsewhere indicated reasons why abolition of diversity jurisdiction would be a profound mistake at this time.[10]

I will address only the adverse implications in the context of complex litigations. Whatever else is done at the federal level, there is one area of the law, it seems to me, that must continue to be adjudicated largely in the federal courts. I refer to what has been variously termed mass torts, complex litigation, catastrophic litigation, or toxic and other disasters. Coordination of such litigation, which usually sprawls across many states and even countries, needs some kind of federal control and jurisdiction. The states have a role, but they cannot handle many of these litigations without help from the federal system, including its courts.

It is my hope that the federal legislature will take some substantive and procedural action in this area. If it does not, the courts will have to continue to devise stop-gap methods of dealing with the problems. One very useful procedural approach to jurisdiction has been offered by Congressman Kastenmeier.[11] I shall comment on his proposals after outlining some of the problems and the techniques courts have developed to deal with this class of litigation.

Exhaustion and waiver doctrines are having a debilitating affect on habeas corpus cases. *See* Harris, *Law and Order Idealogues Threaten Writ of Habeas Corpus*, Manhattan Lawyer, Sept. 27 - Oct. 3, 1988, at 10, col. 2.

8. SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, HOUSE COMM. ON THE JUDICIARY, 100TH CONG., 1ST SESS., REPORT ON H.R. 3152, § 301, at 28 [hereinafter Report on H.R. 3152] (Comm. Print 1987) (abolishing diversity jurisdiction); *cf., e.g.*, Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977).

9. Pursuant to the 1988 Judicial Improvements and Access to Justice Act, effective May 18, 1989, the jurisdictional amount in controversy for diversity cases has been raised from $10,000 to $50,000. Pub. L. No. 100-702, 102 Stat. 4642, 4646 (1988) (to be codified at 28 U.S.C. § 1332).

10. Weinstein, *After Fifty Years*, *supra* note 2.

11. H.R. 4807, 100th Cong., 2d Sess., Title III, 134 CONG. REC. H7443, 7447 (daily ed. Sept. 13, 1988). *But see infra* note 55 and accompanying text.

Hardly a day goes by without a story in the newspapers about a condition that led to or might lead to huge congeries of litigation; asbestos in the workplace and in schools; radon in our homes; radium, wastes from atomic weapons plants and PCB's illegally stored in a variety of places; acid rain; air crashes; toxic wastes sent surreptitiously to West Africa; chemicals spilled on highways and in rivers, and the like. And forever etched in our national memory are names such as Three Mile Island, Bhopal, Love Canal, the Dalkon Shield, Agent Orange, Bendectin, DES, and others. These cases are typified by very large numbers of potential plaintiffs and often defendants as well, by contacts with many jurisdictions, and by huge potential liabilities.

As these cases have made their way through the courts, we have become painfully aware of the limited ability of our judicial system to deal with them effectively. The costs of our failure are enormous, not only to the individual litigants but also to society as a whole. Plaintiffs suffer intolerable delays before receiving compensation for their injuries — compensation which in the end is too often either entirely inadequate or excessively generous. While the cases drag on those injured must bear the financial expenses associated with their injuries by themselves, or turn to already overburdened social welfare systems for support. The defendants, who are frequently some of our nation's largest corporations, find it all but impossible to plan their future business operations with the spectre of potentially bankrupting liability and unlimited punitive damages looming before them. This uncertainty undermines segments of our national economy and prevents vital products from entering the marketplace.[12] Finally, the inability of the courts to resolve these cases swiftly shakes our confidence in the judicial system as a whole.

The problems that surround disaster litigation arise for a variety of reasons. Some flow inevitably from the nature of catastrophic events themselves. Others arise from the manner in which, under present rules, disaster litigation is conducted.

Issues of causation can prove particularly intractable and are sometimes almost impossible to resolve. This is especially true with regard to substances that cause injury or disease of the sort found in the population at large.[13] In these cases whether a particular plain-

12. *See* Olsen, *Overdeterrence and the Problem of Comparative Risk*, 37 PROC. OF THE ACAD. OF POL. SCI. — NEW DIRECTIONS IN LIABILITY LAW 42 (1988); *see also* P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

13. *See generally* Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 859-68 (1987).

tiff's injuries were caused by the substance or instead would have occurred anyway is sometimes unknowable. Expensive epidemiological studies such as those now about to be conducted in the region of the Hanford Reservation plutonium plant are often required to obtain evidence necessary for litigation.[14] By way of example, I refer you to the cancers claimed to have been the result of radiation from the Army's above-ground nuclear testing in Utah many years ago.[15] Some plaintiffs were successful in establishing causation and others failed.[16] Ultimately all cases were dismissed on jurisdictional grounds.[17]

Other problems result from the numbers of victims that may be involved. Estimates of the plaintiff class in the Agent Orange litigation ran as high as 2.4 million people.[18] Just identifying all the potential claimants in an action of this size can be almost impossible. Problems of identification arise in the context of the defendant class as well. In the DES litigations it proved impossible to determine precisely which drug manufacturers had caused what harm.[19] As a result, the California courts developed a market share formula for liability that by now must be familiar to all first year torts students.[20] Even when defendants are known, their number and conflicting interests can pose problems for the litigation. In the action following the MGM Grand Hotel fire, for example, there were more than one hundred defendants, and the numerous crossclaims they brought against each other complicated the proceedings enormously.[21] Lurk-

14. Schneider, *U.S. Studies Health Problems Near Weapon Plant*, N.Y. Times, Oct. 17, 1988, at A1, col. 3; *see also, e.g.*, NATIONAL INST. OF HEALTH, REPORT OF THE NATIONAL INSTITUTE OF HEALTH AD HOC WORKING GROUP TO DEVELOP RADIOEPIDEMIOLOGICAL TABLES (1985); G. GOODMAN & W. ROWE, ENERGY RISK MANAGEMENT, *passim* (1979).

15. *See generally* Swartzman and Christoffel, *Allen v. The United States of America: The "Substantial" Connection Between Nuclear Fallout and Cancer*, 1 TOURO L. REV. 29 (1985).

16. Allen v. United States, 588 F. Supp. 247 (D. Utah 1984) (awarding recovery to some but not all civilian radiation plaintiffs), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988).

17. *Allen*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988).

18. *In re* "Agent Orange" Product Liab. Litig., 597 F. Supp. 740, 756 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 2899 (1988).

19. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

20. *Id.* at 612, 607 P.2d at 934-38, 163 Cal. Rptr. at 142-46; *see also In re* "Agent Orange," 597 F. Supp. at 819-33 (E.D.N.Y. 1984); Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 372-74, 380 (E.D.N.Y. 1972).

21. *In re* MGM Grand Hotel Fire Litig., 570 F. Supp. 913, 920-24 (D. Nev. 1983).

ing in the background of these cases, of course, is also a huge tangled skein of insurance issues.[22]

Another source of difficulty is that injuries may not become apparent until years after the harmful exposure. Such was the case in many of the disasters that I have just referred to.[23] This aspect makes problems of causation and party identity even more acute. A good example of the litigation problems arising from latent injury can be seen in the waves of asbestos-related claims that have been flooding the courts in recent years.[24]

As should be evident from these illustrations, many of the problems surrounding disaster litigation are unavoidable. Issues of causation and latent injury, difficulties of party identification, and other problems are the very features that serve to distinguish much of the mass tort litigation from other types of litigation. They would be faced in whatever procedural system we might devise.[25]

Other problems arise, however, because of the manner in which, under our present rules, these kinds of actions are litigated. The principal source of difficulty is the vast scale upon which many modern disasters occur. The number of potential victims injured by exposure to a single toxic substance can run into the millions, as the Agent Orange and asbestos litigations have demonstrated. Current procedural schemes are ill-equipped to accommodate these actions in any consolidated form. Much of our approach to litigation responds to the paradigm of two parties and one simple issue of fact or law. Consequently claimants most often end up litigating their claims on an individual basis, in thousands of related actions scattered all across the country in state and federal courts.

Difficulties of coordination between state and federal courts can arise when related cases are proceeding through both systems simultaneously. In the Kansas City, Missouri, Skywalk litigations for ex-

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22. *See, e.g.*, Uniroyal, Inc. v. The Home Ins. Co., No. CV-84-3999, slip op. (E.D.N.Y. Dec. 20, 1988) (manufacturer of Agent Orange sought reimbursement from insurance companies for the amount paid in settlement with veterans). S. BIRNBAUM & D. GROSS, SECOND ANNUAL INSURANCE LITIGATION INSTITUTE (1988).

23. *See generally*, THE INSTITUTE FOR HEALTH POLICY ANALYSIS, GEORGETOWN UNIV. MEDICAL CENTER, CAUSATION AND FINANCIAL COMPENSATION FOR CLAIMS OF PERSONAL INJURY FROM TOXIC CHEMICAL EXPOSURE (1985).

24. *See* P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985); *see also* B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS (2d ed. 1986).

25. On complex litigation generally, *see* R. MARCUS & E. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCE CIVIL PROCEDURE (1985); *see also* RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS (S. Schreiber 3d ed. 1985) (excellent annual series of volumes for the American Law Institutes — American Bar Association post-graduate courses on litigation).

ample, conflict developed between lawyers with cases in the federal and state courts when the federal court certified a mandatory class and attempted to stay the state actions.[26]

Another danger is that different proceedings can yield inconsistent results.[27] When there are inconsistent verdicts, both claimants and defendants may be more (or less) willing to take their chances in future suits, and the likelihood of fair settlement may be reduced.

The risks of unfairness to the parties are also considerably higher. A defendant may face multiple punitive awards for the same conduct. A plaintiff may lose any chance of recovery if the defendant has been bankrupted by prior judgments. The delay, uncertainty, and expense of multiple proceedings causes harm to both sides.

The scattered litigation of related claims also raises vexing choice of law problems. It is often almost impossible to decide in any principled fashion that a single jurisdiction's law should govern, or even to determine what the content of that law might be. The task is compounded when a federal court sitting in diversity must apply state law. Judge Friendly, commenting on a particular case, once observed, "Our principal task [here] is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."[28]

Because in large part these problems are the product of limitations in our procedural system, it is to our procedural system we must first turn for solutions. In the long run, substantive modifications are more important then procedures. Later, I will describe some of the current mechanisms that have been developed to deal with these problems, and discuss some other possible solutions. First, however, I

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26. *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175, 1180 (8th Cir.) ("[T]he substantial effect of the order. . .enjoined the state plaintiffs from pursuing their pending state court actions."), *cert. denied sub nom.* Rau v. Stover, 459 U.S. 988 (1982); *see* Morris & See, *The Hyatt Skywalks Litigation: The Plaintiffs' Perspective*, 52 UMKC L. REV. 246, 259-60 (1984).

27. *See* Allen v. United States, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988). The Bendectin litigations have also produced inconsistent results. *Compare* Oxendine v. Merrell Dow Pharmaceuticals, 506 A.2d 1100, 1110, 1114 (D.C. 1986) (reinstating jury verdict that Bendectin had caused the plaintiff's birth defects, which had been set aside by the trial court's grant of a j.n.o.v. in favor of the defendant) *with* Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 826-27, 832-33 (D.C. Cir. 1988) (affirming the trial court's set aside, through a grant of a j.n.o.v. in favor of the defendant, of the jury's finding that Bendectin caused the plaintiff's birth defects) *and with In re* Richardson-Merrell, Inc., 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd in part, vacated in part, and remanded with directions sub nom. In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (jury's finding that Bendectin did not cause birth defects upheld).

28. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

would like to take a moment to explore the features that any solution should have if it is to be effective.

My own experience with the Agent Orange case, with a number of heart valve and air crash cases, with some of the asbestos litigation, and other large litigations convinces me that the most complex of these disasters requires that seven criteria be satisfied if judicial management is to be successful.[29] These criteria would, I believe, apply to any administrative solution as well.

1) To the greatest extent possible, there should be a *concentration of decisionmaking.* By this I mean that power to speak for each side in a mass tort dispute should be concentrated in the hands of one, or at most a few persons. The decisionmaker must have the power to make critical decisions, and to commit all those for whom he or she speaks to carrying out these decisions. This requirement would extend not only to the parties, but also to the court or other tribunal before whom the dispute is being adjudicated. Not only is this factor critical to preparation and trial, but it facilitates settlement — a matter vital in these complex cases.[30]

At the trial court level, the judge should shape the case to reduce intermediate appeals if the case is expected to settle. The inability to predict who will be on the court of appeals panel introduces a "wild card." Moreover, the litigation process is greatly slowed by non-final appeals, causing the loss of necessary momentum and sense of urgency.

2) There should be a *single forum* charged with the responsibility of resolving basic legal and factual issues. The choice of forum can be governed by such factors as the particular tribunal's experience in managing mass tort disputes and the resources and support systems upon which it can draw, its proximity to the disaster itself, its geographic convenience to the parties, its familiarity with the applicable law, and advantages of procedure that can lead to a more swift and efficient resolution.

3) As much as possible, a *single substantive law* should govern the dispute.[31] It should be one that is authoritative and easily deter-

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29. For a further discussion of these seven criteria, *see* Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters,* 11 COLUM. J. ENVTL. L. 1 (1986) [hereinafter *Preliminary Reflections*]; Weinstein, *The Role of the Court in Toxic Tort Litigation,* 73 GEO. L. J. 1389 (1985).

30. *See, e.g.,* W. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES (1988).

31. *See, e.g.,* Juenger, *Academic Workshop: Should We Continue to Distinguish Between Public and Private International Law?* 79 AM. SOC'Y. OF INT'L. LAW PROC. 353 (1985).

mined. The parties should know in advance what that law is and what it provides so that they can make informed decisions regarding litigation and settlement.

4) Given the sheer magnitude of many of today's disaster related disputes, it is essential that the trier receive *adequate support facilities* and personnel. Speaking from my own experience, the use of magistrates and special masters, such as we have in the federal system, can contribute enormously to the efficiency of the litigation process. So, too, can effective clerks' offices, law clerks, and modern office equipment.[32]

5) *Reasonable fact finding procedures* are another essential requirement. Factual issues in disaster litigation can be highly technical and complex. While I am not suggesting that a lay jury has no role to play, there must be flexible rules governing the admissibility of evidence, especially where the use of experts and scientific evidence is concerned, and power in the court to control the obtaining and presentation of data and expert witness testimony. Authority to appoint "neutral" experts may also be needed.[33]

6) For large disasters, where potential liability can be enormous, there is probably a need for *a cap on the total cost to defendants.*[34] Additionally there must be a method of *allocating that cost among multiple defendants*, as well as a sure source of funds, so that the plaintiffs can rely on the availability of compensation.

7) Lastly, there must be a *single distribution plan*, one whose mechanism requires little or no further litigation. Punitive damages under such a plan should probably be eliminated as impractical, and extreme claims of pain and suffering would most likely result in ancillary litigation and therefore should be eliminated as well. The

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32. *See* Judge R. Acosta (D.P.R.), *The Courts Organization: A. The* Dupont *Team*, 6 CHAMBERS TO CHAMBERS 1 (Nov. 22, 1988).

33. *See, e.g.*, Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986); Weinstein, *Litigation and Statistics: Obtaining Assistance Without Abuse*, 1 B.N.A. TOXICS L. REP. 812 (1986); Address by Judge Jack B. Weinstein, at the Managing Mass Torts seminar of the American Bar Ass'n. Annual Meeting (Aug. 9, 1987) (rev. J. Weinstein, Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation (1987) (unpublished manuscript)).

34. A notable example of a federally imposed cap on liability is that contained in the Price-Anderson Act, 42 U.S.C. § 2210(e) (1982); the provision, in effect, probably limits aggregate liability for a single nuclear accident to $500 million. Liability limitations implicate due process and equal protection concerns, but have generally been upheld. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (upholding the Price-Anderson Act's liability limitation); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 175 Cal. Rptr. 177, *appeal dismissed*, 474 U.S. 892 (1985) (upholding recovery limitation in medical malpractice context); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971) (upholding recovery limitation in context of no fault automobile insurance scheme).

most easily administered plan might be one set up along the lines of a workers' compensation scheme, where a claimant need only produce evidence of injury in order to recover. Such a plan was the result of the Agent Orange litigation, and distribution of that fund is just getting under way.[35] Increasingly, in asbestos litigation, settlements are by formulae based on what is by now extensive experience in trials and settlements.

Current mechanisms for dealing with the problems of mass tort litigation leave much to be desired. They satisfy few of the seven criteria, and as a result the successful resolution of these complex actions is difficult.

The *class action* is a useful device for joining many parties together in a single binding litigation.[36] It has the important utility of permitting the common claims or defenses of an entire class to be finally adjudicated in a single proceeding. Another advantage is that the class tends to be represented by one attorney or a small group of counsel. Subclasses or conflicts among attorneys often complicate the problem, but the court has some control and can replace a class attorney if necessary, as in the Agent Orange case. In the current *Suffolk County v. Long Island Lighting Company*[37] case I found a conflict between Suffolk and other ratepayer plaintiffs. I severed the individual plaintiffs seeking to have a class certified when I found that the county was paying their counsel's fee. New counsel for the proposed class was required, but had insufficient time to prepare for the trial that was about to begin.

Severe ethical and tactical problems are presented by class actions, particularly where relations between clients and attorneys are implicated. In the Agent Orange case, for example, the veterans complained that the management committee had not consulted with them and did not reflect their views. There are, too, problems of client chasing, financing the litigation, and the like.

Most importantly, perhaps, constitutional and procedural limitations make the class action an imperfect vehicle for disaster litigation. Adjudicating the claims of a nation-wide class in state court can require trying the case under the substantive law of all fifty

35. *In re* "Agent Orange" Product Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 2899 (1988).

36. Class actions in federal courts are governed by FED. R. CIV. P. 23.

37. No. CV-87-646 (E.D.N.Y. 1987).

states simultaneously.[38] Use of a federal class action for mass tort litigation was specifically disapproved of by the advisory committee which framed the rule,[39] and courts have been generally hostile to this use. Moreover the requirements that members of the plaintiff class meet the newly increased $50,000 jurisdiction requirement[40] and that, in most class actions, every member have the right to opt out of the class[41] are further obstacles. Without significant revisions to the statutes and rules, it is unlikely that federal class actions can be a fully effective means of litigating mass tort claims.

One useful device is the *multidistrict litigation panel's transfer* of related cases from all federal courts to a single one for control of discovery and other pretrial matters.[42] Consolidation in this fashion has proven useful in many instances. A principal shortcoming of this mechanism is that generally cases must be returned to the transferor courts for trial. Another problem is created because of the ability of plaintiffs to prevent the multidistrict transfer of their case simply by filing suit in state court and joining a non-diverse defendant.

Another approach has been *voluntary cooperation between state and federal courts* when related cases are being tried simultaneously in both forums. Although sometimes this is not successful, as I noted earlier with regard to the Kansas City Skywalk case, an example of state and federal cooperation is under way right now here in New York.[43] Some 5,000 asbestos cases, representing all those filed in New York City and the Eastern and Southern Districts, have been assigned to two judges. Judge Charles Sifton of the Eastern District took the federal cases and State Supreme Court Justice Helen Freedman took the New York City filed state cases. Pursuant to a cooperative agreement worked out by state Administrative Judge Xavier Riccobono and by me as Chief Judge with Justice Freedman and Judge Sifton, these two trial judges have coordinated the litigation schedules of the cases, and have ordered joint discovery proceed-

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38. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). *See generally* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986).

39. FED. R. CIV. P. 23 advisory committee note (1966).

40. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973) (each plaintiff must meet the jurisdictional amount in controversy).

41. FED. R. CIV. P. 23(b)(3). In the context of multistate class action suits in state court, the Supreme Court has suggested that the right to opt out is constitutionally required as a matter of procedural due process. *Phillips Petroleum*, 472 U.S. at 810-12.

42. Transfer is accomplished pursuant to 28 U.S.C. § 1407 (1982).

43. *See* Pinsley, *2 Judges Push Tort Cases to Trial*, Manhattan Lawyer, Oct. 4 - Oct. 10, 1988, at 1, col. 2.

ings for some 1,300 of them. The reaction by the parties has been, for the most part, favorable. Many of the cases are now being settled or tried in our court. The attorneys for both sides have been most cooperative in discovery and settlement.

Such interforum judicial assistance seems relatively rare. It requires open lines of communication between the state and federal systems, and, most importantly, lawyers and judges who are willing to use it.

Cooperation among attorneys has been another useful mechanism. The Dalkon Shield litigation is a particularly successful example of this approach.[44] A plaintiffs' group was formed, consisting of some 250 lawyers and law firms, representing some 500 plaintiffs in claims filed all over the country. The group has since served as an information clearinghouse for plaintiffs' attorneys. With the agreement and aid of the defendant manufacturer, it has coordinated discovery and other pretrial matters on a national scale. Air crashes and many other types of cases are conducted with mutual help among counsel, one or more of whom take the laboring oar. Cooperation such as this among attorneys is a prerequisite if there is to be any effective shepherding of one of these cases through the courts.

The evolution in recent years of *the managerial judge* has also helped resolve some of the difficulties of mass tort litigation. Judges are increasingly being called upon to take an active role in the conduct of litigation. Their ability to shape the course of the action by defining the issues to be litigated, controlling discovery, and through other pretrial and trial devices has been enhanced by recent amendments to Rule 16.[45] While the potential for abuse is always present, and there is currently a debate among proceduralists on the desirability of this approach,[46] a judge who is actively engaged in the management of the litigation can be of assistance in bringing about the swifter and more effective resolution of mass tort claims. An excel-

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44. Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, 3 Litigation 18 (1977). *See also, e.g.*, Blum, *Plaintiffs' Bar: Strength in Numbers*, Nat'l L.J. Nov. 21, 1988, at 1, col. 1; Kahalik, King, Traynor, Ebener & Pincus, *Costs and Compensation Paid in Aviation Accident Litigation*, in ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS (RAND Inst. for Civil Justice 1988).

45. FED. R. CIV. P. 16 (1983 amendments). *See* Shapiro, *Rule 16: A Case Study in the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. (forthcoming, June 9, 1989) (discussing the 1983 amendments and their subsequent interpretation and implementation by the courts).

46. *See* Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Story Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 264-65 (1985); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

lent example of what can be accomplished is the settlement of the Bridgeport L'Ambiance Plaza building collapse case.[47] The judge, of course, must operate within the constraints of our procedural system. There are limits to what can — or should — be accomplished by even the most activist judge.

A recent report by the Second Circuit's Standing Committee on the Improvement of Civil Litigation recommends more use by judges of aggressive settlement techniques and alternative dispute resolution devices such as mini trials.[48] Some academics criticize this trend as counterproductive and corrosive of our basic adversarial system.[49] I stand somewhere between these two groups — willing to try new techniques, but reluctant to force litigants to give up the right to traditional forms of litigation.

Federal courts in particular have increased their ability to manage disaster litigation through the use of *support personnel.* Masters and magistrates supervise discovery and other pre-trial proceedings, as well as decrees and settlements.[50] Special court-appointed experts may be called in to assist in various technical and scientific matters. Although generally welcomed by judges, critics have warned that the use of non-judicial personnel as a substitute for judicial control, instead of as a closely supervised adjunct to judicial control, can lead to an unaccountable judicial bureaucracy and inefficiency.[51] While such dangers may exist, I believe that reasonable reliance upon masters and magistrates can be extremely helpful, especially in complex disaster litigation.

Various other procedural devices exist as well. Equitable actions such as *bankruptcy* have been employed with varying degrees of success. Most lawyers are familiar with the attempts of such corporations as Johns-Manville[52] and A.H. Robbins[53] to seek bankruptcy protection when faced with enormous potential liability from asbestos and Dalkon Shield claims respectively.

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47. Verhovek, *Pact Reached in Collapse of Building*, N.Y. Times, Nov. 16, 1988, at B1, col. 2 (discussing R. Zampano, Interim Report, L'Ambiance Plaza Mediation Report (Nov. 15, 1988)).

48. *See* N.Y.L.J., Oct. 18, 1988, at 2, col. 3.

49. *See* Resnik, *supra* note 46, at 417-31 & *passim*; *see also* Nat'l L.J., Oct. 17, 1988, at 8, col. 1.

50. *See* Weinstein & Wiener, *supra* note 2 (describing magistrates' supervision of discovery in the Eastern District of New York).

51. *See* Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

52. *In re* Johns-Manville Corp., 801 F.2d 60 (Bankr. S.D.N.Y. 1988).

53. *In re* A.H. Robbins Co., 89 Bankr. 555 (E.D. Va. 1988).

The doctrines of *pendent* and *ancillary subject matter jurisdiction* permit the joinder of related claims. *Party joinder, statutory interpleader* and *intervention* rules may allow additional parties to be joined in the action as well.

Finally, such former adjudication principles as *res judicata* and *collateral estoppel* have been used successfully by later claimants in the disaster litigation context. Up to now these doctrines have been of greater help to plaintiffs than defendants.[54]

In the final analysis none of these or other procedural mechanisms, alone or in combination, has proven fully effective in dealing with the problems posed by disaster litigation. For the most part they have evolved independently, for different purposes, and fit only imperfectly in the mass tort context. Although I am not suggesting that they cannot be useful, what is needed, I believe, is some overarching solutions that can combine existing techniques with new mechanisms in some coherent fashion.

It seems clear that the effective resolution of many of the problems surrounding disaster litigation can be achieved only through federal legislation. One possibility is creating special federal jurisdiction for disaster litigation. Various procedural reforms suggested by Congressman Kastenmeier include a proposal along these lines. His suggestions appeared in Title III of a bill known as the Court Reform and Access to Justice Act of 1988,[55] modeled on a draft by Professors Rowe, Jr., and Sibley in their article *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction.*[56] The House of Representatives passed the bill but the Senate rejected Title III and it was omitted from the version of the Act.[57]

One provision, which survived in both the House and Senate versions, raises the threshold amount for diversity cases from $10,000 to

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54. Since the abandonment of the "mutuality" requirement, plaintiffs not a party to an earlier suit in which the liability of a defendant manufacturer was established may invoke that prior determination against the manufacturer in a subsequent action. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). A defendant manufacturer who was found not liable in a prior adjudication, however, may not invoke that finding in a subsequent action against a different plaintiff. Rule 11 of the Federal Rules of Civil Procedure may, however, provide some protection to defendants against repeated unsuccessful suits.

55. H.R. 4807, *supra* note 11. In the Senate the bill was amended, renamed The 1988 Judicial Improvements and Access to Justice Act. The Senate passed the amended bill on October 14, 1988, effective May 18, 1989; *see supra* note 9. For an analysis of the bill, see *Judicial Improvements Bill Raises Diversity Amount, Creates Court Study Committee*, 20 THE THIRD BRANCH 1 (Nov. 1988).

56. 135 U. PA. L. REV. 7 (1986).

57. *See supra* note 55 and accompanying text.

$50,000.[58] This amendment seems hardly controversial to me. The figure has not been changed since 1958,[59] and while the proposed threshold is somewhat more than what would be required merely to offset the last three decades of inflation, an upward revision is in order. I would not expect it to have any serious consequences for litigation that seeks to enforce substantive federal rights, except that it may have a significant effect on the use of class actions founded on diversity of citizenship. In some consumer litigation it would be very difficult to form a class of only those claimants with a claim for $50,000 or more.

The provision in the Kastenmeier bill which is most pertinent to our present discussion is the one that was entitled "Multiparty, Multiforum Jurisdiction."[60] It was an attempt to resolve some of the procedural difficulties that surround mass tort litigation. Although the provision was approved by the House, it did not survive in the Senate.[61] Nonetheless it is important as the most recent congressional effort to legislate in this area, and we can expect that future legislative initiatives will have similar appearance.

The Kastenmeier proposal would have created a new scheme of federal subject matter jurisdiction specifically aimed at permitting the more efficient litigation of mass tort claims. Jurisdiction would have been invocable when three conditions were met:[62] first, minimal diversity of citizenship — namely at least one plaintiff and one defendant must be citizens of different states; second, a single event causing at least 25 people to have either died or suffered damages in excess of $50,000 each in physical injury or property damage; and third, residence of some of the defendants in different states or in a state different from that in which the event occurred.[63]

The proposal differed from current procedural mechanisms in a number of important respects. It had more liberal venue, removal, intervention, and joinder provisions so as to permit the easy consolidation of related claims in a single federal district.[64] It had a choice of law provision under which the substantive law of a single jurisdiction was generally to be applied to all of the claims in the consoli-

58. *See supra* note 9.

59. Act of July 25, 1958, Pub. L. No. 85-554(a), 72 Stat. 415 (codified at 28 U.S.C. § 1332 (a) (1982)).

60. H.R. 4807, *supra* note 11, at Title III, Subtitle A.

61. *See supra* notes 55-57 and accompanying text.

62. H.R. 4807, *supra* note 11, § 301.

63. *Id.*

64. *Id.* §§ 301-304.

dated proceeding; the decision of which jurisdiction's law should govern was left to the discretion of the trial court, but various factors were enumerated.[65] It authorized the court to try the action from beginning to end, although for claims that had been removed from state court there was a presumption in favor of a remand for the determination of damages.[66] And, importantly, it provided for nationwide service of process and subpoenas in order to facilitate the exercise of this new jurisdiction.[67]

Although this approach does not embrace all the management criteria that I believe are desirable, it includes some of the most essential ones. It concentrates judicial decisionmaking in a single forum. The consolidation of claims in a single action would almost certainly lead to greater cooperation among the parties on either side, and thus increases the likelihood that each side might speak with a single voice. It greatly simplifies the litigation process by providing for the designation of a single substantive law to govern the entire action. It permits the trial court to act with a fair degree of discretion, particularly where choice of law and remand are concerned, and thus procedural determinations can be flexibly adapted to the exigencies of particular situations.

I have one major criticism of this form of the Kastenmeier draft, however. In my opinion it did not go far enough. Under the language of the provision, jurisdiction would have arisen only when harm was the result of a "single event or occurrence."[68] Although these words are somewhat ambiguous, the accompanying House report made it abundantly clear that only discrete events such as airplane crashes and hotel fires were intended to be covered.[69] Many of today's most complex and difficult disaster litigations are not the result of any such single discrete event. The asbestos cases, the Agent Orange and Dalkon Shield actions and many others would all have been excluded under the House bill. Because of the enormous number and dispersion of claims, these are the very litigations that most require some sort of special procedural treatment. Excluded from the bill's scope were the complex actions which have proven most difficult to deal with effectively in our present system.

The leaking of toxic wastes or fumes over a long continuous period might, I suppose, be treated as an "event" for purposes of this bill.

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65. *Id.* § 305.
66. *Id.* §§ 303-304.
67. *Id.* § 306.
68. *Id.* § 301.
69. H.R. REP. No. 889, 100th Cong., 2d Sess., Title III, at 38, 44.

The issue should be addressed since the House of Representatives Committee on the Judiciary Report said that a single disaster "spatially and temporally limited" is what was intended to be covered.[70] The Rowe-Sibley draft is more acceptable because it uses the phrase "arising out of the same transaction, occurrence, or series of related transactions or occurrences . . . ."[71]

The proposal could be improved in other respects as well. Its jurisdictional premise appears to have been article III's grant of diversity jurisdiction; there was no indication that the provisions would be enacted pursuant to any additional congressional authority. This might have caused difficulties when it came to implementing the scheme's choice of law and national service of process provisions. The Supreme Court has held that *Erie*[72] problems are implicated when a diversity court disregards the choice of law rules of the state in which it sits.[73] Whether Congress may alter this rule on a diversity theory is not clear. The ability of a federal court sitting in diversity to exercise nationwide service of process may also be questionable. The extra-territorial reach of state courts is severely circumscribed,[74] and it is arguable that the reach of a federal diversity court would be similarly limited. While it is true that nationwide service of process is presently available in such contexts as statutory interpleader,[75] there due process concerns are not as great because of the circumscribed nature of the action.

These difficulties can easily be ameliorated. I would frame the choice of law and service of process provisions as exercises of some specific congressional power such as that conferred by the commerce clause.[76] This power, in the context of actions that have the ability to affect interstate commerce, has been broadly interpreted to permit Congress far-ranging remedial measures.[77] A declaration that these provisions are necessary in light of the strong federal interests that are implicated in the adjudication of mass torts is easily supportable.

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70. *Id.* at 44.

71. Rowe & Sibley, *supra* note 56, at 49.

72. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

73. Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487 (1941).

74. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

75. 28 U.S.C. § 2361 (1982).

76. U.S. CONST. art. I, § 8, cl. 3. *See, e.g.*, the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78 (1982). The Act begins with a statement describing the need for federal regulation of the securities industry, including among the reasons the burdens upon interstate commerce that result from an unregulated industry. *Id.* § 78b.(4). This supports the Act's nationwide service of process provision. *Id.* at § 78aa.

77. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555 (1985) (only the political process restrains Congress' power under the commerce clause to displace state law).

Nevertheless the Kastenmeier proposal to expand federal jurisdiction would be a useful beginning. It would permit the consolidation of claims that otherwise might not — and in some instances could not — be heard together. It could demonstrate the usefulness of such a system, and clear the way for an expanded version that would include litigation arising from broader and more diffuse disasters.

As eminently sensible as I believe some sort of mass tort jurisdictional approach to be, there are those who oppose it.[78] They raise the spectre of a vast flood tide of personal injury cases flowing out of state courts, where they are presently tried, and sweeping into an already overburdened federal system with disastrous consequences.

In my opinion fears about overburdening federal courts have little basis. Disaster litigations, in myriads of bits and pieces, are already in our federal system. Individual claims by the thousands, arising out of exposure to a single harmful product, find their way into district courts all over the country. For instance at one point in 1984 there were more than 500 Bendectin related claims pending in the Southern District of Ohio alone,[79] and in 1986 there were some 700 asbestos claims awaiting trial in the Eastern District of Texas.[80] It is our failure to effectively consolidate related claims that in fact contributes to overcrowded federal dockets. The costs in time and money are enormous. After the Dalkon Shield litigations it was estimated that a limited class action could have saved approximately eight years of trial time, $26 million in litigation expenses, and $7 million in court costs.[81]

In the face of figures such as these, the argument that a federal mass tort jurisdictional scheme would overwhelm the federal system is untenable. Nonetheless it is an argument that has many adherents. Consequently it has been suggested, as a sort of quid pro quo for the establishment of a federal mass tort jurisdiction, that diversity juris-

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78. *See* Letter from the Hon. Pierre N. Leval, District Judge, Southern District of New York, to Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, Feb. 16, 1988, at 1 (the bill will add "vast numbers of state law personal injury claims to the federal docket."); Testimony of Stephen J. Markham, Assistant Attorney General, Office of Legal Policy, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Oct. 14, 1987, at 15 [hereinafter Markham Testimony] (mass tort jurisdiction provision "could well be criticized for adding to the judicial workload.").

79. *In re* "Bendectin" Prods. Liab. Litig., 102 F.R.D. 239, 240 (S.D. Ohio), *appeal dismissed sub nom.* Schreier v. Merrell Dow Pharmaceutical, 745 F.2d 58 (6th Cir.), *mandamus to vacate certification*, 749 F.2d 300 (6th Cir. 1984).

80. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 434 (1986).

81. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 328 (1983).

diction otherwise be completely abolished.[82] Congressman Kastenmeier's proposals, in their original form, in fact contained just such a provision.[83]

Hostility to diversity jurisdiction is neither new in Congress nor a momentary aberration. In 1978 a bill completely abolishing the jurisdiction passed in the House.[84] Fortunately, in my view, it was not adopted by the Senate. The overwhelming majority of attorneys and, I believe, district court judges, oppose abolition of diversity jurisdiction. Excising diversity jurisdiction would be truly radical surgery. Not only is it unnecessary as an adjunct to any mass tort jurisdictional scheme, but it goes far beyond what is required by current caseloads.[85] As Professor David L. Shapiro has pointed out, national abolition of diversity jurisdiction might have highly adverse effects in individual districts.[86]

A federal jurisdiction scheme for disaster litigation, similar to that proposed by Congressman Kastenmeier, but broader in scope, is probably an essential component of any large scale attempt to resolve the problems that exist in this area. But such a change cannot do the job by itself. Inevitably we will have to develop other procedural devices (as well as changes in substantive law).[87]

One possibility is the creation of a specialized federal national disaster court. Judges with interest and expertise in this type of litigation could be assigned to it on a temporary basis as needed. An action that was especially complex could even be handled by several judges simultaneously working in close cooperation. Specially trained support personnel could be made available to provide scientific and technical expertise and assistance. Implemented in conjunction with a mass tort jurisdiction scheme of the sort discussed above, a na-

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82. Markham Testimony, *supra* note 78, at 15-16 (noting that the Department of Justice supports a mass tort jurisdiction scheme only if accompanied by "substantial reductions in diversity jurisdiction").

83. *See* Report on H.R. 3152, *supra* note 8, § 301.

84. H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. 5008-09 (1978).

85. *See* Weinstein, *After Fifty Years*, *supra* note 2; *see also*, D. Hensler, M. Vaiana, J. Kakalik, & M. Peterson, *Special Report Trends in Tort Litigation: The Story Behind the Statistics* 6 (RAND Inst. for Civil Justice 1987) (demonstrating that the total "amount" of tort litigation nationwide is growing relatively slowly."); U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (Jan. 1988).

86. Shapiro, *Federal Diversity Jurisdiction: A Survey And A Proposal*, 91 HARV L. REV. 317 (1977).

87. Our inability to effectively resolve the problems posed by mass torts has also resulted in a growing pressure for substantive reforms in tort and insurance law. For a useful overview of the problems and possible solutions, see the articles contained in 37 PROC. OF THE ACAD. OF POL. SCI. — NEW DIRECTIONS IN LIABILITY LAW (1988). *See also* P. Huber, *supra* note 12.

tional disaster court could have considerable success in dealing with these complicated litigations. Parts of the case could be handled by the disaster court and other parts, such as individual damages, tried in a local venue.[88]

The disaster court might also be given authority to develop and apply a federal common law to govern these cases. While the desirability of federalizing tort law as a general matter is certainly debatable, it seems to me that in this limited context no great harm will be done if the concerns of states' rights are trumped by the necessity of resolving these litigations more swiftly, efficiently, and fairly.

Another possibility is to formalize in some fashion the methods of state and federal judicial cooperation that have already begun to develop on an informal and ad hoc basis. Perhaps a special interforum litigation panel could be established by each state. Its task might be to identify overlapping and related litigation that could benefit from cooperative efforts, and then assist in implementing them. The present state-federal councils might have a useful role.[89] Pre-trial schedules could be coordinated, and numerous preliminary matters could be taken care of jointly. The panel could serve as a liason not only between federal and state courts, but between the courts of different states as well.

Various of the procedural mechanisms already in use can be modified to function more effectively in the context of disaster litigation. The procedural requirements of class action suits can be altered to make this device more useful for mass tort litigants; a greater use of subclasses might be possible for different stages of a proceeding, and more frequent class treatment of only certain issues might also be desirable. The high minimum jurisdictional sums in diversity based class actions need reconsideration. Former adjudication doctrines can be more readily applied by obtaining special verdicts from juries, or by requiring trial judges to specify the critical issues necessarily decided and to describe their possible preclusive effects.

Many other possibilities exist. Within constitutional constraints, we are limited only by our imaginations and our willingness to implement whatever we might devise. My last observation, then, is simply to note that as members of the legal community we have a responsibility to confront problems in our legal system and to seek improvement. If we lawyers do not take the initiative, who will?

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88. For further discussion of the possibility of creating a National Disaster Court, see *Preliminary Reflections, supra* note 29, at 44-47.

89. Weinstein, *Coordination of State and Federal Judicial Systems*, 57 ST. JOHN'S L. REV. 1, 10-12 (1982).

Where the problems of disaster litigation are concerned, this obligation is being met by both the American Bar Association and the American Law Institute, where major studies in this area are currently underway.[90] Efforts such as these should be supported and encouraged. The legal community has an enormous collective experience and knowledge, and it should be drawn upon to insure that our legal system is continually evolving to meet new problems and changing needs.

It is altogether fitting that in this fiftieth anniversary year of the adoption of the Federal Rules of Civil Procedure we should be looking at the rules with an eye to discovering the shortcomings that the past fifty years have revealed. When the rules were drafted, mass disaster litigations lay far in the future. Over the years we have attempted to bend various existing procedural devices to accommodate these huge and complex actions, with only limited success. It is time to employ more drastic and far-reaching measures.

Few would dispute that some sort of unitary litigation mechanism is desirable. The disagreement is over how best to accomplish desirable change. State court systems, because of personal jurisdiction limitations, choice of law requirements, lack of resources and other problems are unable to accommodate claim consolidation on the scale that I believe is necessary. Under these circumstances, the federal system has a duty to supply a forum that otherwise would not exist.

Where federal procedure is concerned, from time to time change on a bold scale is in order. Piecemeal adaptation and stop-gap repair can work for only so long. Slowly the procedural system becomes overwhelmed by an ever-expanding web of additions, amendments, and reinterpretations. The rules lose their flexibility and ambiguity — so necessary if judges are to continue to apply them effectively to the vast spectrum of human drama that daily fills our courtrooms.

The problems surrounding disaster litigation require legislative solutions. There is a growing impetus for change in this area. Let us not squander the urge to improve on less than effective reform.

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90. *See* AMERICAN LAW INSTITUTE, REPORT — PRELIMINARY STUDY OF COMPLEX LITIGATION (1987). The report provides a very useful overview to the problems and some possible solutions in the area of complex litigation. *See also* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Council Draft No. 1) (Nov. 23, 1988).