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COMMENT

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INTRODUCTION

A. Effects of Litigation: The Asbestos Dragon

Asbestos litigation has been a major factor in the "tort explosion" crowding the dockets of state and federal courts.[1] To date, more than 350,000 asbestos lawsuits have been filed and approximately 100,000 are currently on state and federal dockets.[2] For every suit settled or adjudicated, two more are filed.[3]

1. Andrew Blum, *Asbestos Confusion Continues*, NAT'L L.J., Mar. 9, 1992, at 32 (a total of 20,000 to 25,000 cases are currently pending in federal courts and 55,000 to 70,000 remain on the dockets of state courts). *See generally* Theodore Eisenberg, Jr. & James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 733-35 (1992) (discussing the tort reform movement).

2. Jack B. Weinstein & Eileen B. Hershenov, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 295 n.145 (1991).

3. Blum, *supra* note 1; Paul Hoversten, *Historic Asbestos Trial to Start*, USA TODAY, May 6, 1991, at 3A; Edward Frost, *Asbestos Suits Consolidated*, A.B.A. J.,

Cost estimates for asbestos litigation and compensation in personal injury cases may be as high as $87 billion.[4] Defendant asbestos manufacturers and named co-defendants have paid staggering sums as a result of the duplicative relitigation of these cases.[5] In 1990, the Johns-Manville Trust reported spending $1 million per week on outside counsel litigation defense costs alone.[6] At the time Eagle-Picher filed for bankruptcy, it reported paying claims that amounted to $2.3 million per week.[7] In addition to Johns-Manville and Eagle-Picher, several other manufacturers have filed for bankruptcy protection in an effort to reduce transaction costs and place a ceiling on liability.[8] One result of the bankruptcy filings by manufacturers is that plaintiffs have brought suit against distributors and other alternative defendants.[9] It has been suggested that this type of mass litigation has had a negative ef-

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Oct. 1991, at 16.

4. Briggs L. Tobin, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 457 (1989) [hereinafter *"Limited Generosity"*].

5. *Id.* (in addition to litigation and compensation in personal injury cases, estimates for property damage litigation and abatement costs are as much as $4 trillion with equally staggering estimates for potential punitive damages); *see also* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987) (discussing potential waste of judicial resources and possible inconsistent judgments from duplicative litigation).

6. *In re* Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 750 (Bankr. E. & S.D.N.Y. 1991), *vacated and remanded by*, 982 F.2d 721 (2d Cir. 1992) [hereinafter *Joint E. & S. Dist. Asbestos Litig.*]. *See also* Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Crisis*, 10 REV. LITIG. 419, 421 (1991) ("Since 1987, filings against Johns-Manville have averaged almost 20,000 per year.").

7. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 750.

8. *E.g.*, *In re* Forty-eight Insulations, Inc., 133 B.R. 973 (Bankr. N.D. Ill. 1991); *In re* UNR Indus., Inc., 45 B.R. 322 (Bankr. N.D. Ill. 1984); *In re* Amatex, 37 B.R. 613 (Bankr. E.D. Pa. 1983); *In re* Johns-Manville Corp, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), *aff'd sub nom.* Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940 (Bankr. S.D.N.Y. 1985). *See generally* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 848 (1984); Eagle-Picher Indus. v. Liberty Mutual Ins. Co., 829 F.2d 227 (1st Cir. 1987); Raytech Corp. v. White, Civ. No. B-89-623, 1991 U.S. Dist. LEXIS 19755 (D. Conn. Aug. 28, 1991).

9. Hoag Levins, *Asbestos Abatement Beyond '92: A Future Shaped by the Courts*, ECON, Dec. 1992, at 44 (courts are now adjudicating cases imputing to the distributor knowledge of the substance's harmful effects).

fect on the competitiveness of American business in general.[10]

Plaintiffs have fared no better than defendants in asbestos litigation. Judicial attempts to consolidate asbestos cases have been frustrated by choice of law principles which dictate that such issues as causation, damages and rights of contribution and indemnity be governed by appropriate state tort law.[11] Because of the variety of state law responses to products liability, courts have been unable to impose a uniform tort law on consolidated cases.[12] This has resulted in lengthy trials and delay in compensation for injured plaintiffs.[13] In fact, many plaintiffs die of asbestos-related disease without ever reaching trial or receiving the "justice" promised by our legal system.[14]

Additionally, the court must protect the interests of plaintiffs who have yet to manifest full-blown symptoms of asbestos-related disease to insure that funds will remain available to compensate successful plaintiffs in the future.[15] It has been predicted that, by the year 2015, as many as 265,000 people will have died of diseases associated with asbestos ex-

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10. *See* Burroughs v. Northern Telecom, Inc. (*In re* Repetitive Stress Injury Cases), 142 F.R.D. 584, 586 (E.D.N.Y. 1992) (noting that minimizing transaction costs in litigation is important to the viability of American industry); Ashley v. Abbott Labs., 789 F. Supp. 552, 575 (E.D.N.Y. 1992) (possible anti-competitive effects of limits on courts' jurisdiction over foreign defendants).

11. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941) (federal courts must apply the choice of law rules of the state in which they sit).

12. Andrew T. Berry, *Selected Current Issues in Product and Toxic Tort Liability and Mass Torts*, 491 A.L.I.-A.B.A. 577 (1990) (arguing that even when issues can be tried through evidence common to the consolidated cases, individual issues such as exposure, injury, and compensatory damages must be tried separately or by small groups of plaintiffs and, therefore, the theoretical benefits of consolidation may be lost).

13. Miller & Ainsworth, *supra* note 6, at 421 (Federal Judicial Center statistics reveal that "the average disposition time of an asbestos case terminated in federal court in 1989 was 995 days. . ."); *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 750.

14. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 759.

15. *See In re* Johns-Manville Corp., 36 B.R. 743, 745 (Bankr. S.D.N.Y. 1984), *aff'd sub nom.* Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940 (Bankr. S.D.N.Y. 1985) (Johns-Manville conducted several studies estimating liability that would result from future asbestos claims as the rationale for its reorganization under Chapter 11).

posure.[16] Since asbestos-related disease is both latent and progressive, this figure includes a large number of yet-to-be-identified future plaintiffs.[17] Asbestos fibers are resistant to degradation and, once inhaled, remain in the lungs where they cause the gradual destruction of lung tissue.[18] Significant decrease in lung capacity, or asbestosis, may not manifest itself for twenty years after initial exposure.[19] Asbestosis is inexorably followed by the eventual onset of malignant mesothelioma, a cancer of the lining of the lung, heart and abdomen.[20] Unless courts adjudicating consolidated asbestos cases protect the interests of those whose disease is now in the latent stage, it is likely that the costs of current litigation and associated damage awards will exhaust the corporate assets of defendant corporations, leaving no funds available to compensate future claimants.[21]

These statistics, and the tide of human suffering they represent, constitute the "asbestos dragon." Judges in state and federal courts across the country are currently jousting with a beast that refuses to be vanquished by available procedural mechanisms.

B. The Judiciary: Disillusioned Knights on Overburdened Chargers

Judges who are involved in adjudicating asbestos cases have assumed an increasingly aggressive managerial role in attempting to solve the asbestos crisis in the courts.[22] Judge

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16. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 746; *see also* Note, *Who Will Compensate the Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*, 14 ENVTL. L. 465, 466-67 (1984) (predicting that tens of thousands will become ill or die from asbestos-related diseases in years to come).

17. GEORGE A. PETERS & BARBARA J. PETERS, SOURCEBOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL & ENGINEERING ASPECTS, 53-65 (1980).

18. *Id.* at 7.

19. *Id.* at 120.

20. *See* BARRY I. CASTLEMAN, ASBESTOS: MEDICAL & LEGAL ASPECTS 37-103 (1984).

21. Roe, *supra* note 8 (discussing means of estimating future mass tort claims). *See also* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121, 1131 n.53 (1983).

22. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

Jack B. Weinstein, sitting in the Eastern District of New York, has identified three factors that have forced judges on both the state and federal level to engage in unprecedented creativity in managing mass tort cases: (1) the lack to date of an effective national administrative regulatory scheme capable of controlling undesirable conduct by manufacturers; (2) the absence of a comprehensive social welfare-medical scheme; and (3) the lack of adequate state or federal legislation controlling these cases.[23] In 1990, the Ad Hoc Committee on Asbestos Litigation, comprised of six federal judges appointed by Supreme Court Chief Justice Rehnquist,[24] called for legislation that would enable the courts to circumvent procedural and choice of law rules that currently cripple judicial attempts to resolve the crisis in a unified way.[25] However, legislation aimed at reforming the civil justice system to provide for centralized treatment of multi-district mass tort litigation has been repeatedly rejected by Congress.[26]

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23. Weinstein & Hershenov, *supra* note 2, at 270.

24. Miller & Ainsworth, *supra* note 6, at 431.

25. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44-45 (1990); Weinstein & Hershenov, *supra* note 2, at 270; Stacy Adler, *Judges Ask for Solution to Asbestos Case Jam*, BUS. INS., Mar. 18, 1991, at 3 (although the report of the U.S. Judicial Panel cites crowded dockets as well as delays and relitigation of the same issues, attorneys and judges involved with asbestos litigation do not believe that legislation will be forthcoming).

26. Linda Lipsen, *The Evolution of Product Liability as a Federal Policy Issue*, *in* TORT LAW AND THE PUBLIC INTEREST 247 (Peter H. Schuck ed. 1990). *But see* Andrew Blum, *Congress Next for Asbestos Mess?*, NAT'L L.J., Dec. 21, 1992, at 7 (overtures have been made to the Clinton administration proposing a national asbestos compensation bill that would streamline the compensation process); Weinstein & Hershenov, *supra* note 2, at 270 n.3.

See, e.g., Occupational Disease Compensation Act of 1985, H.R. 3090, 99th Cong., 1st Sess. (1985) (seeking to establish workers' compensation type program for asbestos and other toxin-related injuries); Asbestos Workers' Recovery Act, H.R. 1626 and S. 1265, 99th Cong., 1st Sess. (1985). A bill providing federal district courts with original jurisdiction in mass tort cases where at least 25 persons sustained injuries resulting in damages exceeding $ 50,000 per person, Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 CONG. REC. H3116-17 (1990) was passed by the House of Representatives, id. at H3119, but not adopted by the Senate. Congress did pass Senator Biden's Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), which attempts to address problems of case management in complex and other litigation. The Judicial Conference of

In the absence of federal legislation to resolve the crisis, the judiciary has turned to creative use of procedural devices to consolidate the cases, streamline trials and encourage settlement. The greatest promise for resolving large numbers of cases in a single forum are consolidation under the Multidistrict Litigation Act,[27] class action under Federal Rule 23,[28] and the exercise of bankruptcy jurisdiction in Chapter 11 reorganization.[29] However, despite creative judicial manage-

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the United States has drafted a 14 point plan for handling the problem of cost and delay in civil litigation. *See Judicial Conference Approves Plan to Improve Civil Case Management*, 22 THIRD BRANCH 1, 1-3 (May 1990) [hereinafter THIRD BRANCH]. In addition, the Federal Courts Study Committee chartered by Congress and consisting of members appointed by the Chief Justice recently issued a report in which it recommended that Congress amend the multi-district litigation legislation to enable consolidation for trial, as well as for pretrial proceedings and to make other changes that would enable related state and federal cases to be consolidated in the federal courts. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44 (1990). In September 1990 Chief Justice Rehnquist appointed an ad hoc committee composed of six federal district and appellate judges to recommend methods of addressing the asbestos mass tort backlog in the courts. *See* THIRD BRANCH, *supra*, at 1. Legal academics and judges also have advocated federal legislation. *See, e.g.*, AM. LAW INST., COMPLEX LITIGATION PROJECT, various drafts (1987-1990); Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. REV. 1 (1988) [hereinafter *Disasters*]; Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1 (1986) [hereinafter *Preliminary Reflections*]; Williams, *Mass Tort Class Actions: Going, Going, Gone*, 98 F.R.D. 323 (1983). *But see* Sedler & Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989) (opposing consolidation of mass tort litigation in single federal court on federalism and choice of law grounds). For a general discussion of the government's refusal to cooperate in mass tort litigation, see Feinberg, *In the Shadow of Fernald: Who Should Pay the Victims?*, BROOKINGS REV., Summer 1990, at 41.

Id.

27. Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (1988)); *see generally* John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

28. *See* FED. R. CIV. P. 23(b)(1)(B), 23(b)(3).

29. *See* Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2638 (1978) (codified at 11 U.S.C. § 1141(a) (1988)). *See* HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 20.01 at 578 (2d ed. 1985 & Supp. 1992).

ment,[30] and use of procedural devices, consolidated asbestos cases continue to evade resolution.[31]

C. Winning Some Battles While Losing the War: Problems with Consolidation Techniques

Section One of this article reviews the principles of federalism inherent in the rules of choice of law and various state responses to tort liability that continue to frustrate judicial attempts to create a global resolution to the asbestos crisis in the courts. Section Two discusses the principles and limitations inherent in consolidating asbestos cases under the Multidistrict Litigation Act,[32] Federal Rule 23 "limited fund" class action[33] and Chapter 11 bankruptcy proceedings.[34] The section also reviews exemplary cases which demonstrate the current trend toward judicial activism and procedural innovation. Section three concludes that the problems inherent in adjudicating mass tort cases are not so much procedural as constitutional. While changes in procedural rules would assist the courts in consolidating large numbers of cases for trial, such procedures would nevertheless infringe on constitutional principles of federalism and individual rights within the judicial system. Therefore, mass tort cases involving latent disease and multiple defendants should be handled outside the adversarial context of the judicial system. It would be more expeditious and cost-effective to resolve such cases through a national claims resolution center administered by the legislative branch of government.

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30. *See Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 792-840 (using both bankruptcy jurisdiction and class action joinder to preserve the solvency of the Johns-Manville Trust); *In re* Asbestos Prods. Liab. Litig. No. VI, 771 F. Supp. 415 (J.P.M.L. 1991) (transferring 26,639 cases to a single forum under the Multidistrict Litigation Act of 1968, 28 U.S.C. § 1407); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990) (utilizing innovative representative sampling method to create groupings of plaintiffs for trial of common issues).

31. Blum, *supra* note 1. *See also Asbestos Litigation Eludes Resolution*, NAT'L L.J., Dec. 28, 1992 - Jan. 4, 1993, at 6.

32. 28 U.S.C. § 1407 (1988).

33. FED. R. CIV. P. 23(b)(1)(B).

34. 11 U.S.C. §§ 1101-1179 (1979).

I. Federalism and the Mass Tort Case

A. Choice of Law: Of "Lex Loci Delecti," "The Better Rule" and "The Chancellor's Foot"

Even if a court succeeds in consolidating a large number of asbestos cases in one forum by using MDL transfer or a class action under the Federal Rules, major constitutional obstacles to adjudication remain.[35] In *Allstate Insurance Co. v. Hague*,[36] the Supreme Court held that the Full Faith and Credit Clause[37] and the Due Process Clause[38] of the Constitution mandate that when a court acts as the forum for litigation having multistate aspects or implications, it must respect the sovereignty of sister states and may not apply its own law to a multistate case if doing so would infringe on the interests of another state.[39] If the plaintiff lives in or was injured in a state other than the forum state, the domicilary state or the state where the injury occurred has a legitimate interest in the litigation.[40] Additionally, due process requires that the forum's choice of law decision must be fundamentally fair to both litigants based on the existence of significant contacts with the forum state.[41]

The asbestos cases involve geographically scattered plaintiffs and defendants. A state court, or a federal court exercising diversity jurisdiction, may use procedural rules to bring large numbers of cases together before a single forum. However, choice of law rules present a stumbling block to courts

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35. Additionally, bankruptcy cases involve special jurisdictional issues. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (the Bankruptcy Act of 1978 expanded the jurisdiction of bankruptcy courts, altering both the substantive and procedural bankruptcy law); The Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments), Pub. L. No. 98-353, 28 Stat. 335 (codified at 28 U.S.C. § 1411 (1988)) (codifying the *Marathon* holding and specifically preserving the jury trial right for personal injury or wrongful death claims against a bankrupt estate).

36. 449 U.S. 302 (1980).

37. U.S. CONST. art. VI, § 1.

38. U.S. CONST. amends. V, XIV.

39. *Allstate*, 449 U.S. at 313.

40. *Id.* at 312.

41. *Id.* at 313.

seeking to apply a uniform tort rule to consolidated cases.[42] Recent Supreme Court decisions have reaffirmed that choice of law considerations are grounded in the Constitution and that the concept of federalism forms part of the system of checks and balances in our government.[43] No state can create a law which operates to create rights or interests in another state and, conversely, a state must recognize the sovereignty of the laws of its sister states.[44]

Therefore, even when a court *can* exercise jurisdiction over a citizen of another state, the court must turn to its choice of law rules to determine whether it *may* constitutionally apply its own substantive law to the case before it.[45] Each state has created its own choice of law rules which guide not only the state courts, but also federal courts sitting in diversity actions within the state.[46]

However, choice of law decisions have been called "a veritable jungle," and a "reign of chaos dominated in each case by the judge's 'informed guess' as to what some other state than the one in which he sits would hold its law to be."[47] In a mass tort context, this problem is magnified, making it "more diffi-

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42. Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 955 n.39 (1981); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum v. Shutts, 96 YALE L.J. 1 (1986).

43. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985) (the issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum); *Allstate*, 449 U.S. at 312-13 (state must have a significant aggregation of contacts with the parties and the occurrence that forms the basis of the cause of action in order that the application of a state's law be neither arbitrary nor fundamentally unfair); U.S. CONST. art. IV, § 1 (full faith and credit clause) and U.S. CONST. amends. V, XIV (due process).

44. U.S. CONST. art. IV, § 1, amends. V, XIV; RESTATEMENT OF CONFLICT OF LAWS §1(1), §42 cmt. a (1934).

45. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73 (1938) (federal court in diversity must apply substantive law of the state in which the court is sitting). *See generally* Lynn Carson, *Choice of Law Issues in Mass Tort Litigation*, 56 J. AIR L. & COM. 199, 203 (1990).

46. *Klaxon*, 313 U.S. at 496.

47. *In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

cult or more burdensome to comply with constitutional limitations because of the large number of transactions which the state proposes to adjudicate and which have little connection with the forum."[48]

Eighteen states adhere to the traditional *lex loci* theory of choice of law.[49] This rule proposes to yield predictable results by requiring the application of the law of the place where the injury occurred in tort suits.[50] However, a victim may not be able to determine the place where those injuries occurred because of the latency of asbestos-related disease.[51] Further, commentators have called the *lex loci* rule "mechanistic in operation and myopic as to consequences" because it ignores the realities, in a modern industrialized society, of multistate interests in a dispute.[52]

Many states have discarded the "place of injury" rationale in their choice of law rules and, instead closely examine the policies underlying the laws of the conflicting forums. Two states have adopted a "governmental interest" approach in which the trial court is required to weigh the competing governmental interests in the dispute and determine which should have the controlling effect in the case.[53] Six other

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48. *Joint E & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 879 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985)).

49. Carson, *supra* note 45, at 207.

50. *E.g.*, Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581, 585 (Mass. 1983) (Massachusetts mother had heart attack upon hearing that son had died in a plane crash in Illinois. Court held that the place of injury was Massachusetts.). *See also* Carson, *supra* note 45, at 205-06; *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 881.

51. *See, e.g.*, Leonard v. Johns-Manville Sales Corp., 305 S.E.2d 528, 529 (N.C. 1983) (plaintiff was exposed to asbestos while working in several different states).

52. Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 948 (1981).

53. *E.g.*, Offshore Rental Co., Inc. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978)(California's interest in the application of its outmoded law requiring compensation for injury to a key executive is outweighed by Louisiana's more progressive law encouraging companies to insure executives by disallowing such claims); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (application for Colorado's guest statute was justified in an automobile accident, even though parties were domiciled in New York, because the host-guest relationship was formed in Colorado); B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Carson, *supra* note 45, at 213-14.

states combine the governmental interest approach with "the most significant relationship" test of the *Restatement (Second) of the Conflict of Laws*, weighing the justified expectations of the parties and the purposes and objectives of the competing states' laws.[54] Two states have adopted the "center of gravity" test which directs the court to examine where and how the parties' interests intersect.[55] The fact that a transferee court must apply the law of the court of origin of the case[56] creates a further complication for trial courts already overburdened by the asbestos litigation crisis.

Differing choice of law analyses lead to inconsistencies in results. In asbestos cases:

> some courts have determined that the plaintiff's last place of exposure to asbestos was the place where his injury occurred. Others, relying to some extent on the discovery rule statute of limitations, have concluded that the place of injury was the state in which the plaintiff's injury manifested itself and was diagnosed. Still other courts have held that the place of injury was that in which the injury came to light, was diagnosed, and was linked to exposure to asbestos products.[57]

Not surprisingly, there has been an outcry among the judiciary and legal scholars for a Congressionally mandated uni-

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54. Carson, *supra* note 45, at 215 (listing Hawaii, Louisiana, Massachusetts, Oregon, Pennsylvania, and Washington); *see generally* RESTATEMENT (SECOND) OF CHOICE OF LAWS § 6 (2d ed. 1971). When there is no directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *Id.*

55. Carson, *supra* note 45, at 219-20 (listing New York and North Dakota).

56. 28 U.S.C. § 1404(a) (1988); *see also* Van Dusen v. Barrack, 376 U.S. 612, 621 (1964) (where defendants seek transfer, the transferee district court is obligated to apply the state law that would have been applied if there had been no change of venue); Carson, *supra* note 45, at 261.

57. Carson, *supra* note 45, at 259.

form choice of law rule for mass tort cases.[58] Without federal legislation, vast discretion rests on the interpretation of the individual trial judge which may lead to an outcome determinative result.[59]

B. State Tort Law: Balancing the Sword and the Shield

1. The Sword of Justice: Expanding Theories of Recovery

From the 1960's through the mid-1980's, tort law experienced a pro-plaintiff trend, resulting in an expansion of theories of compensation.[60] Many states replaced the absolute bar to the recovery of a contributorily negligent plaintiff with comparative fault, allowing a plaintiff who was partially at fault for his own injuries to recover to the extent of the defendant's negligence.[61] The downfall of the privity requirement also serves to expand the number of defendants that a plaintiff could sue.[62] Finally, the modern theory of strict liability for dangerous or defective products greatly extends a plaintiff's ability to sue manufacturers and distributors. Under the strict liability theory, if a plaintiff can prove that a manufacturer produced the product, that the product caused the injury and that the product was defective, then the manufacturer will be held liable for damages regardless of whether or not the product was manufactured in a negligent manner.[63]

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58. *See* Linda S. Mullenix, *Beyond Consolidation: Postaggretive Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 519 (1991) (for a comprehensive listing of current legal scholarship).

59. Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 n.158 (1988) (citing Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 33 (1988)).

60. Henderson & Eisenberg, *supra* note 1, at 483; *see generally* Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987) (collecting cases).

61. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67 (4th ed. West 1971) (identifying pure comparative negligence, modified comparative negligence and the "slight-gross" system of comparative negligence as variations in state tort laws.) [hereinafter KEETON].

62. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 891.

63. RESTATEMENT (SECOND) OF TORTS § 402A; KEETON, *supra* note 61, at § 75, 534-38.

In several states, the "market share" theory allows a plaintiff who cannot identify which manufacturer produced the product which caused the injury to recover for his injury.[64] The plaintiff may sue one or all of the manufacturers of a generic product.[65] If the product is found to be the cause of plaintiff's injury, the plaintiff may recover from defendants according the percentage of the sales market they held at the time of injury.[66] A large number of courts also now recognize such injuries as increased risk of disease and diminution of "quality of life" as compensable in tort.[67]

These evolving theories of recovery have opened new doorways to compensate plaintiffs injured in our complex industrial society. They have also opened a floodgate of litigation in our courts.[68] There was a 758% increase in the number of products liability suits filed between 1975 and 1985.[69] The massive increase in filings was primarily attributable to the onslaught of asbestos,[70] Dalkon Shield, and Bendectin cases.[71] Large jury awards of punitive damages expressed the public's outrage at the transgressions of industry. The judiciary has regarded the tort system's primary function as a means to

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64. KEETON, *supra* note 61, at 655.

65. *Id.*

66. Abbott Lab. v. Sindell, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980); Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985); Weinstein & Hershenov, *supra* note 2, at 310; Berry, *Current Issues*, *supra* note 12, at 577 (noting that some courts have "either as a matter of policy or product-specific analysis, have refused" to apply the theory).

67. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1204-10 (6th Cir. 1988); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987) (upholding award of over $5 million where residents were deprived of running water because of chemical contamination of groundwater in the community).

68. Theresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 311 (1991-92); *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 891.

69. Schwartz, *supra* note 68, at 311 (citing TOXIC POLICY WORKING GROUP, U.S. DEP'T OF JUSTICE, REPORT OF THE TOXIC POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986)).

70. *See* Mark Galanter, *The Day after the Litigation Explosion*, 46 MD. L. REV. 3, 24-25 (1986).

71. Schwartz, *supra* note 68, at 311.

provide compensation to plaintiffs,[72] i.e. a method of allocating the costs of doing business in an industrial society to those who benefitted from the operation.[73]

2. The Shield: Backlash and Tort Reform Favoring Defendants

However, in the 1980's, the pro-plaintiff trend began to reverse as state legislatures responded to outcries from industry that damage awards laws were threatening the viability of American business.[74] The reformers argued that the expansion of tort recovery had turned "manufacturers and distributors into de facto insurers of their products."[75] Additionally, manufacturers claimed reluctance to market new products for fear that they might trigger a new onslaught of lawsuits.[76] In response, tort reform legislation was enacted by 42 states between 1985 and 1987 as part of the backlash against the large verdicts won by plaintiffs in products liability cases.[77]

In addition, there has been a growing reservation among members of the judiciary about the products liability system

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72. Weinstein & Hershenov, *supra* note 2, at 307. "The post-war role of the federal courts . . . has been to protect the injured who come before them against those who have caused . . . unjustified harm. This judicial role is particularly important in the absence of any alternative remedies emanating from the executive or legislative branches." *Id.* at 323.

73. KEETON, *supra* note 61, at § 101; *see generally* Weinstein & Hershonov, *supra* note 2, at 308-10.

74. Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980's Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 209-10 (State laws restricting claims and remedies in products liability suits have swept the country. Between 1985 and 1988, every state except Pennsylvania and Vermont had enacted tort reform legislation.); Henderson & Eisenberg, *supra* note 60, at 481 (quoting the Chairman of the Board of the National Association of manufacturers as saying that the expansion of products liability "[has] brought a blood bath for U.S. business."). *See generally* KEETON, *supra* note 61, at 1-9 (discussing tort reform statutes and listing statutory and case law reflecting the "backlash" against the expansion of plaintiff recovery).

75. Weinstein & Hershenov, *supra* note 2, at 322.

76. *See* Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). *See, e.g.*, Barry Meier, *A Product Dead-Ended by Liability Fears*, N.Y. TIMES, May 19, 1990, at 50 (Monsanto refuses to produce a new product that could be used as an alternative to asbestos for fear of incurring costly litigation expenses).

77. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 891.

which has manifested itself in a "quiet revolution"[78] from the bench preventing further expansion of pro-plaintiff doctrines.[79]

The result has been a "patchwork" of rules affecting both procedures and limits on damage awards and attorney fees.[80] Each state has grown its own individualistic response to the conflicting needs of its citizen-plaintiffs for compensation and to the economic well-being of its industry. In effect, each state's tort system represents an interlocking web of rules that serve both the interest of plaintiffs in recovering for injury and the interest of business in economic survival.[81]

Most states now have legislation which allows contribution among joint tortfeasors.[82] Similarly, methods governing allocation of the burden of liability among codefendants vary from jurisdiction to jurisdiction. Under the pro tanto method, the judgment against a nonsettling defendant is reduced by the amount of any settlement with a codefendant. The nonsettling defendant pays the balance even if it exceeds any future judgment of its share of liability.[83] In contrast, the proportionate fault method of setoff seeks to "limit liability to the relative culpability" of each codefendant.[84] Under this method, a plaintiff may receive either more or less than full recovery depending on what he receives from the settling defendant and what he is awarded at trial as damages from the nonsettling defendant.[85] For instance, plaintiff could settle out of court with one defendant and then receive a large damage

78. Henderson & Eisenberg, *supra* note 60, at 481.

79. Schwartz, *supra* note 68, at 304.

80. *Id.*

81. Weinstein & Hershenov, *supra* note 2, at 273-74.

82. Irwin H. Warren & Darla C. Stuckey, *Recent Developments in Class Actions: Attorneys' Fees, Partial Settlements and Awards to Named Plaintiffs*, *in* CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1992 625, 655 (PLI Litig. & Admin. Practice Course Handbook Series No. 430 1992) (discussing split in the circuits regarding theories of contribution in securities litigation).

83. *See, e.g., In re* Jiffy Lube Secs. Litig., 927 F.2d 155, 160 n.3 (4th Cir. 1991); Franklin v. Kaypro Corp., 884 F.2d 1222, 1230 (9th Cir.), *cert. denied*, 498 U.S. 890 (1990).

84. *Franklin*, 884 F.2d at 1231.

85. Warren & Stuckey, *supra* note 82, at 647.

award against another defendant. Plaintiff's total compensation would therefore be larger than the damages that would have been awarded if all the parties had been before the court.[86] A final means of allocating the burden of liability among defendants is the pro rata method. Here, the judgment amount is divided by the total number of defendants found liable, both settling and nonsettling, without regard to fault.[87]

The legal patchwork interferes with the adjudication of consolidated cases from many states.[88] As discussed in the preceding choice of law section, a court adjudicating a mass tort case must abide by choice of law rules. These rules may often require the court to apply the tort laws of several different states to individual issues in the case to comport with principles of federalism even though procedural rules have permitted the geographical consolidation of the cases. The imposition of a uniform national tort law to govern mass tort cases presents one possible solution. However, the judiciary has expressed hesitancy to "cut the Gordian Knot presented by state tort law diversity using the sword of federal common law without congressional warrant."[89]

II. Judicial Activism and the Rules of Procedure

Despite the enumerated difficulties in adjudicating the mass tort case, the costs associated with case-by-case litiga-

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86. *See Franklin*, 884 F.2d at 1231.

87. *See In re* Jiffy Lube Secs. Litig., 927 F.2d at 161 n.3; *see also* Newberg, *supra* note 29, § 12.42A at 114.

88. *See* Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 98-100 (1989).

89. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 878; *see also* Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1327 (5th Cir. 1985) (Court of Appeals sitting *en banc* held that asbestos case was not appropriate for the creation of a federal common law because of the absence of a uniquely federal interest and the practical problems that would attend the displacement of state law); Miree v. DeKalb County, 433 U.S. 25, 28-29 (1977); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); *In re* Agent Orange Prod. Liab. Litig., 635 F.2d 987, 990 (2d Cir. 1980) ("Substantive federal rule should apply after considering the following factors: (1) the existence of a substantial federal interest in the outcome of the litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law.").

tion in the classic adversarial mode of our court system are unacceptable. Driven by the need to manage the growing number of asbestos cases crowding court dockets, many judges have turned to procedural rules to bring large numbers of cases together in the belief that judicial efficiency will also serve the needs of the parties.[90] The rationale for consolidation is that a unified proceeding not only reduces transaction costs for all the parties, but results in more consistency in awards to plaintiffs.[91]

However, as will be discussed below, the procedural devices available do not grant the courts broad enough jurisdictional powers to compel parties to join a consolidated action and, even when consolidation is achieved, parties may still protest that due process has been violated if their interests are not sufficiently represented before the court. Attempts to resolve the asbestos crisis through consolidation continue to be restricted by the limitations of the rules of procedure[92] and the constraints of the *Erie* doctrine.[93] In addition to constitutional problems and procedural inadequacies which continue to loom over efforts to speed large numbers of cases through the system, the role of the judiciary is also changing. Of necessity, judges are assuming the role of administrator/manager rather than passive adjudicator as they become more actively involved in pre-trial negotiation, settlement and distribution.[94]

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90. Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 495 (1991).

91. Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 237 (1991).

92. Kyle Brackin, *Salvaging the Wreckage: Multidistrict Litigation and Aviation*, 57 J. AIR L. & COM. 655, 659-60 (1992) (noting that the Federal Rules, promulgated in 1938, offer the courts only a limited ability to dispose of related cases simultaneously).

93. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1934) (mandating that a federal court apply the law of the state in which it is located to cases arising out of diversity jurisdiction). "Law" was interpreted by the Court to include the common law as well as the statutory law of the states. *Id.* The Court later expanded this doctrine in Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), to include the application of state choice of law rules by federal courts sitting in diversity.

94. Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 667 (1979).

A. Consolidation under the Multidistrict Litigation Act[95]

1. The Statutory Scheme

The Judicial Panel on Multidistrict Litigation consists of seven circuit and district court judges appointed by the Chief Justice of the Supreme Court of the United States.[96] Empowered by the Multidistrict Litigation Act,[97] the Panel conducts hearings to consider motions for consolidation and transfer of groups of related cases.[98] On the hearing record, the Panel decides whether to consolidate geographically scattered cases for pre-trial proceedings.[99] This broad grant of jurisdiction is one of the primary advantages of consolidation under § 1407.[100]

To be eligible for transfer, cases must be civil actions pending in different judicial districts of the federal court system.[101] As a prerequisite to consolidation, the Panel is required to consider whether consolidation would serve judicial efficiency and the convenience of the parties and to determine whether the cases share common questions of fact.[102] The primary factor influencing the Panel's decision to consolidate the cases is efficient judicial administration of the consolidated cases.[103] The Panel routinely assumes that grouping cases serves the parties and the judicial system by allowing pre-trial

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95. 28 U.S.C. § 1407 (1988).

96. *See* 28 U.S.C. § 1407(d) (1988).

97. 28 U.S.C. § 1407 (1988).

98. *See* 28 U.S.C. § 1407(c) (1988) (requiring findings of fact by the Panel).

99. 28 U.S.C. § 1407(a) (1988) ("When civil action involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."); *See generally* John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

100. 28 U.S.C. § 1407(a) (1988); *see* MANUAL FOR COMPLEX LITIGATION (SECOND) § 31.12 (2d ed. Clark-Boardman 1986).

101. 28 U.S.C. § 1407(a) (1988).

102. 28 U.S.C. § 1407(a) (1988); Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 721 (1991) (noting that the Panel has wide latitude to transfer cases that it feels may be beneficially handled through consolidated pretrial proceedings).

103. *See* H.R. REP. No. 1130, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 ("It is expected that such transfer is to be ordered only where significant economy and efficiency in judicial administration may be obtained.").

matters to be decided expeditiously and uniformly.[104] Once the cases are consolidated under a single judge, discovery can be coordinated on a national basis, enabling the parties to negotiate a trial plan.[105] The second factor, convenience of the parties, is largely ignored by the Panel despite Congressional mandate in the statute.[106] In practice, the Panel accords little weight to this consideration and may transfer cases over the protests of the parties.[107] This is so because the Panel considers the litigation collectively, and inconvenience imposed on some parties is not deemed to outweigh the advantages of consolidation to the group as a whole.[108] Finally, the Panel broadly interprets the factual similarity requirement; the cases are consolidated if judicial efficiency will be served.[109] Because the cases are viewed as a group, the Panel's decision on consolidation often equates judicial economy with the "collective good."

2. Application of the Statute

In addition to the broad grant of jurisdiction to transfer and consolidate cases for pre-trial discovery, the Multidistrict Litigation Act may also encourage the speedy conclusion of the cases. Consolidation may increase the likelihood that the parties will settle as a result of this global pre-trial discovery.[110] Additionally, the transferee judge may decide dispositive pretrial motions such as summary judgment, motions to dismiss and striking affirmative defenses.[111]

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104. *See* Rhodes, *supra* note 102, at 719-20.

105. Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 556 (1989).

106. S. REP. No. 454, 90th Cong., 1st Sess. 2 (1967).

107. *See In re* Aircrash Disaster at Stapleton Int'l Airport, 720 F. Supp 1505, 1513 (D. Colo. 1989) (transfer may take place over the objections of the parties).

108. *See* Rhodes, *supra* note 102, at 720 n.63 (citing *In re* Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.D.L. 1968)) (Panel must consider "multiple litigation as a whole and in light of the purposes of the law.").

109. Rhodes, *supra* note 102, at 719.

110. Weinstein & Hershenov, *supra* note 2, at 292.

111. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978); *see also* Rhodes, *supra* note 102, at 724; *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740

While these techniques may aid the speedy resolution of consolidated cases at the pre-trial stage, both judges and commentators agree that, in its current form, § 1407 procedure is still limited and fraught with problems.[112] First, although MDL allows consolidation across district lines, it is limited to the federal system and no formal method exists to include the huge number of cases concurrently pending in state courts; therefore, it does nothing to alleviate the huge backlog of asbestos cases in state courts.[113] Second, when pre-trial proceedings are complete, the Act requires the Panel to remand the cases back to their courts of origin.[114] Therefore, even though preliminary discovery issues may have been resolved in the consolidated proceeding, the cases return to the crowded dockets of the courts where they were originally filed for additional discovery and trial.[115] Finally, § 1407 does not resolve the issue of compensation for future plaintiffs. To be eligible for inclusion in consolidated proceedings under § 1407, the case must have already been filed in a district court. Obviously, many future plaintiffs have not manifested the symptoms of asbestos-related disease and have yet to bring suit.

(E.D.N.Y. 1984), *aff'd in part and rev'd in part*, 818 F.2d 226 (2d Cir. 1987) (granting summary judgment against all plaintiffs who opted out of the class certified following consolidation).

112. Weinstein & Hershenov, *supra* note 2, at 293-96.

113. *Id.* at 296. Note, however, that Judge Weinstein, as Chief Judge of the Eastern District of New York, arranged to provide cooperation between Judge Sifton in the Eastern District and Judge Freedman of the State Supreme Court of New York to consolidate pre-trial proceedings and discovery. The two courts also appointed the same person as special master under the Federal Rules and referee under the New York code. Both judges presided over joint pretrial and trial sessions. Attempts at settlement proved unsuccessful and, finally, the cases were severed for trial. However, a number of defendants settled and pretrial preparation was greatly expedited by the joint effort. Whatever the success of this innovative technique, it serves to demonstrate the inconvenience caused by MDL's limitation to federal cases and emphasizes the need for the ability to consolidate state cases as well.

114. 28 U.S.C. § 1407(a) (1988) (Panel Rule No. 14(a)):

> Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or another district under 28 U.S.C. § 1404(a) or 1406 . . . no further action of the Panel shall be necessary to authorize further proceedings including trial.

Id.

115. MANUAL FOR COMPLEX LITIGATION § 5.22 at 222-23 (Clark Boardman 1978).

These claimants are not precluded by the doctrine of res judicata from bringing their own claims in the future.[116] Therefore, an MDL court which cannot make provision for damage awards to parties not before the court, cannot provide final resolution and defendants will still be burdened with the costs of relitigation.

MDL judges have sometimes retained the non-settling cases for trial despite the limitations of the rule of remand in § 1407.[117] However, even when the cases are retained for trial, the latent effect of asbestos exposure creates problems with proving causation of injury.[118] Plaintiffs suffering from asbestosis or mesothelioma must identify the manufacturer of the particular asbestos product which caused the injury as well as the circumstances surrounding the exposure.[119] Because of the time lag between the exposure and the onset of disease, this is often impossible for the asbestos victim.[120] As a result, an MDL trial court is forced to hold a series of "mini-trials" on causation, applying the appropriate tort law to each cause of action, or to remand the cases to the appropriate district courts.[121] Therefore, even where the MDL judge can conduct a mass trial on some issues, individual claims still must be remanded or heard in "mini-trials that could drag out the process for years"[122] and also result in inconsistent decisions

116. Brackin, *supra* note 92, at 685-86.

117. *See* Hondorf, *supra* note 105, at 554.

118. *Id.* at 555 (arguing that MDL judge may bring pending state cases under the court's jurisdiction through removal under 28 U.S.C. § 1441); *but see* Weinstein & Hershenov, *supra* note 2, at 282 n.61 (arguing that there is "no formal way to consolidate cases pending in two or more state courts" since removal must be on motion of the defendant, and such action would be defendant's choice and not at the discretion of the MDL judge).

119. Jeffery S. Brenner, *Alternatives to Litigation*, 20 RUTGERS L.J. 779, 788 (1989) (describing similar problem in the class action context).

120. *Id.*

121. Hondorf, *supra* note 105, at 557 (advocating retaining the cases by certifying the plaintiffs as a class under Federal Rule of Civil Procedure 23); Brenner, *supra* note 119, at 781 (courts are not equipped to manage the distinct factual situations presented by toxic tort victims on this mass scale without legislative help).

122. Hoversten, *supra* note 3, at 3A (quoting a steel worker who filed suit in 1986 as saying, "We're all going to be dead by the time anything's settled."); Hondorf, *supra* note 105, at 557 (noting that the goal of uniformity in MDL action is defeated when cases are remanded after transfer and that the danger of inconsistent verdicts is

where the cases are remanded to courts following diverse tort laws.[123]

Additionally, since a product may have caused injury to thousands of individuals, it is almost certain that the funds available from the defendant will be exhausted before all those injured have been compensated.[124] Because tort law requires that injury be proved to a reasonable medical certainty, those who have not yet become ill or those who have asbestosis but have not yet exhibited symptoms of cancer have no way to represent their interests before the court.[125] Therefore, MDL has no mechanism for providing for the "unknown" plaintiffs or for insuring their future recovery against the ever-diminishing assets of the defendant corporations.

Finally, because MDL does not provide for judicial control of attorney fees, plaintiff's counsel still receive massive contingency fees and defendant corporations continue to crumble under the costs of litigation.[126]

3. In re: Asbestos Products Liability Litigation[127]

When the Judicial Panel on Multidistrict Litigation broke its fourteen year precedent of refusing to consolidate asbestos cases under § 1407,[128] the decision was hailed as a major step toward a final resolution of the asbestos crisis in the courts.[129] The Panel transferred 26,000 asbestos cases from 87 federal districts to Judge Weiner in Philadelphia for pre-trial proceedings in July 1991. However, lawyers familiar

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inherent in multiple simultaneous trials).

123. *Id.*

124. Weinstein & Hershenov, *supra* note 2, at 294 (noting that MDL still poses due process problems because future plaintiffs cannot be bound or precluded by the judgement when cases are consolidated by transfer and, therefore, finality cannot be achieved by the technique).

125. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 857 (1984).

126. Weinstein & Hershenov, *supra* note 2, at 294.

127. *See In re* Asbestos Prods. Liab. Litig. No. VI, 771 F. Supp. 415 (J.P.M.L. 1991) (transferring 26,639 cases to a single forum under the Multidistrict Litigation Act of 1968, 28 U.S.C. § 1407).

128. *Id.* at 417.

129. *Id.* at 418.

with asbestos litigation saw potential problems with the administration of the cases. First, the consolidated cases represented only one-third of the asbestos cases before the courts since 60,000 to 70,000 state actions involving asbestos were not covered by the MDL consolidation.[130] Second, plaintiff's counsel worried that the consolidation order would only cause additional delays and that complainants would simply withdraw from the consolidation and refile in state court.[131]

By Spring of 1992, progress reports from the Philadelphia court indicated that only eleven cases had been remanded and settled.[132] Lawyers representing plaintiffs complained that the defendants were purposefully using the MDL process to create delay.[133] The Plaintiff's Steering Committee, displeased with the delays and Judge Weiner's handling of the case, moved to dissolve the proceedings and requested remand back to the districts from which they had been transferred.[134]

In an effort to further streamline proceedings, Judge Weiner has also requested that the Panel conduct a hearing on the issue of whether all asbestos bankruptcy proceedings should be consolidated.[135] The Panel has agreed to schedule hearings on both motions.[136] These early indications show that consolidation of asbestos cases under MDL will not end the delays associated with mass tort adjudication. Additionally, the parties have expressed dissatisfaction with the strong managerial stance taken by Judge Weiner.[137]

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130. *See State Courts: The Unknown Asbestos Factor*, NAT'L L.J., Aug. 12, 1991, at 6.

131. *Id.*

132. Blum, *supra* note 1, at 32.

133. *Id.* (quoting a plaintiff's attorney as saying that "the defense likes the MDL because they are making money on money they're not paying us. They will string out the process as long as they can.").

134. Andrew Blum, *Asbestos Group Asks for Halt to MDL Process*, NAT'L L.J., July 13, 1992, at 7 [hereinafter *Halt to MDL Process*].

135. *Id.*

136. *See* Andrew Blum, *An Asbestos Judge Pushes to Combine Bankruptcy Cases*, NAT'L L.J., Sept. 21, 1992, at 15, 18.

137. *Halt to MDL*, *supra* note 134, at 7.

B. Class Action under Fed. R. Civ. P. 23

1. The Structure of the Rule

Increasingly, scholars and legal commentators have urged an expanded use of class action under Federal Rule of Civil Procedure 23 to resolve mass tort cases.[138] Under Rule 23, the common claims and defenses of parties in a class action are unified in one representational lawsuit.[139] Therefore, judicial management of a class action is more efficient than consolidation under MDL where the consolidated cases retain their status as individual actions. Class action also facilitates judicial management because the class will be represented by a small group of attorneys, making settlement negotiations, control of fees and communication between the judge and the parties more efficient.[140] Finally, Rule 23 provides a technique for final adjudication of the common claims of the entire group of similarly situated plaintiffs.[141] As previously discussed, MDL consolidation is limited to pre-trial procedure.[142]

Fed. R. Civ. P. 23(a) sets forth the general prerequisites for class certification. These initial requirements protect the due process right of class members[143] by requiring a showing that (1) the number of plaintiffs is so numerous that joinder is impracticable by other procedural means, (2) that there are common issues of law or fact that would make a class action the most efficient way to resolve the dispute, (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class as a whole and (4) that the representative parties will fairly and adequately protect the interests of the class.[144]

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138. *E.g.*, Sherman, *supra* note 5, at 550-52; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 593-96 (1987).

139. *See* Silver, *supra* note 90, at 497-98 (distinguishing class actions from consolidations).

140. Weinstein & Hershenov, *supra* note 2, at 288.

141. Silver, *supra* note 90, at 497-98.

142. *See* discussion, *supra*, Part II.A.

143. *See* FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69, 99 (1966); *see also* Sherman, *supra* note 91, at 266-67.

144. FED. R. CIV. P. 23(a).

If these threshold factors are satisfied, the action must still fall into the parameters of one of the categories described in Rule 23(b). In the context of mass tort litigation, certifications of class actions have been upheld under Rule 23(b)(1)(B) and 23(b)(3).[145] Rule 23(b)(1)(B), also known as the "limited fund" class action, applies when adjudications "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[146] In contrast, a Rule 23(b)(3) class is appropriate where "questions of law or fact common to members of the class predominate [and a] class action is superior to other available methods [of] adjudication."[147] Before certifying a 23(b)(3) class, the court must examine the interest of the class members in individually controlling the prosecution or defense of separate actions, the nature and extent of litigation already commenced, whether it is desirable to concentrate the litigation in a particular forum, and additionally, the likelihood that the class will present management difficulties.[148]

2. Appellate Resistance to Class Action

Despite repeated attempts to bring asbestos victims into one forum under Rule 23, appellate courts have typically refused to certify such a class.[149] Stumbling blocks to certification of asbestos cases are inherent in the rule itself.

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145. Marjorie H. Mintzer & Yasmin Daley-Duncan, *Why Class Actions Are Not the Answer*, 22 A.B.A. THE BRIEF 25, 25 (1992).

146. FED. R. CIV. P. 23(b)(1)(B); *see* FED. R. CIV. P. 23 advisory committee's note, *supra* note 143, at 101.

147. FED. R. CIV. P. 23(b)(3).

148. FED. R. CIV. P. 23(b)(3)(A)-(D); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 16.2 (West Publishing 1985).

149. *See, e.g.*, Williams, *Mass Tort Actions: Going, Going Gone?*, 98 F.R.D. 323, 329 (1983); Tobin, *"Limited Generosity"*, *supra* note 4, at 459 n.11, 474-77; Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974) (not proper for class certification because common questions did not predominate over individual questions of fact and law). Additionally, the named plaintiffs could not adequately represent the unnamed plaintiffs because of varying questions of causation of the injuries suffered. *Id.* at 572. *See also In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (vacating certification of a class of 2990 asbestos plaintiffs).

The threshold requirements of Rule 23(a) serve to protect the due process rights of class members. Certification is not appropriate if the class does not meet the Rule 23(a) requirements of typicality, commonality and adequacy of representation.[150] These requirements are hard to satisfy in asbestos litigation. Asbestos plaintiffs present distinct factual differences in causation as well as damages and defenses.[151] Additionally, because of the progressive nature of asbestos-related disease, different plaintiffs will present different stages and types of injury when suit is brought.[152] However, trial courts tend to equate the "benefit to be derived from" mass adjudication with the commonality requirement of the Rule.[153] Judicial emphasis at the trial court level is on procedural mechanisms based on the assumption that what is efficient for the court serves "the common good" of the parties.

Nevertheless, Advisory Committee comments to Rule 23 plainly state that class action is not appropriate for "mass accident" cases because, in practice, the unified case may degenerate into multiple lawsuits on causation and damages.[154] Therefore, appellate courts have denied certification in cases where members' claims are governed by the laws of various states and would require individualized adjudication under state tort law.[155] In the context of asbestos litigation, due process concerns are implicated. It has been held that named plaintiffs could not adequately represent the interests of the class as a whole where choice of law rules directed the court to

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150. FED. R. CIV. P. 23(a); *see supra* note 141 and accompanying text.

151. *See* Brenner, *supra* note 119, at 781.

152. *Id.* at 784-87.

153. *See In re* Diamond Shamrock Chem. Co., 725 F.2d 858, 861 (2d Cir. 1984).

154. FED. R. CIV. P. 23 advisory committee's note, *supra* note 143, at 103; *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 750. *But cf.* Weinstein & Hershenov, *supra* note 2, at 288 n.98. Judge Weinstein refers to his earlier agreement with the committee's opinion as "an indiscretion" which he "has been forced to ignore when faced with the practicalities of mass tort litigation." *Id.* Complexity of asbestos cases makes them expensive to litigate: costs are exacerbated when each individual has to prove his or her claim *de novo*. *See id.*

155. *See, e.g., In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983) (affirming denial of certification where 50 states' various laws on punitive damages would be involved).

apply the law of each plaintiff's state to questions of causation, liability and damages.[156]

Under Rule 23(b)(3), a class may be certified if a common "question of law or fact predominates over any questions affecting only individual class members" and it is determined that class action is superior to other methods of adjudicating the claims presented.[157] Therefore, if case management is complicated by choice of law problems and a multiplicity of issues, the use of 23(b)(3) is inappropriate.[158] Additionally, the Rule imposes a significant burden by requiring class counsel to provide notice to every member of the class.[159]

The major shortcoming of a Rule 23(b)(3) class is that it does not create a mandatory class.[160] Members can opt-out, thereby defeating the purpose of bringing a "global solution" to the dispute.[161] The opt-out provision can prove fatal to maintaining a class action. For example, in the Dalkon Shield litigation, plaintiffs' counsel indicated that, if class certification were upheld on appeal, they would recommend that their clients opt-out of the class.[162] The day before settlement was reached in the Agent Orange litigation, more than 2,000 class members chose to opt-out and therefore were not bound by the hard-won settlement agreement.[163] To date, only two

156. Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 571 (E.D. Tex. 1974) (certification denied because named plaintiffs did not adequately represent unnamed plaintiffs because of varying questions of causation); *see also* Mintzer & Daley-Duncan, *supra* note 145, at 26; *see* Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 103 (1966).

157. FED. R. CIV. P. 23(b)(3).

158. *See In re* N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d at 853 (holding that the complexity of the litigation was inappropriate for class action and that individual trials resulting in verdicts might be "equally efficacious" in promoting settlement).

159. FED R. CIV. P. 23(c)(2) ("[The] court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."). *See also* Weinstein & Hershenov, *supra* note 2, at 288.

160. FED R. CIV. P. 23(c)(2)(B) (judgment of 23(b)(3) class action only binds those members who have not requested exclusion from the class).

161. FED. R. CIV. P. 23(c)(2)(A) (requiring notice and opportunity for a class member's exclusion; the "opt-out" option).

162. *See* Mintzer & Daley-Duncan, *supra* note 145, at 27.

163. *Id.* at 29.

courts have created 23(b)(3) asbestos class actions that survived appeal. Both of these actions were limited by the "opt-out" provision for 23(b)(3) actions.[164]

In contrast, Rule 23(b)(1)(B) creates a mandatory class with no opt-out provision.[165] A Rule 23(b)(1)(B) action may be certified if there is proof that individual suits will alter the rights of others not present before the court.[166] If a defendant, such as an asbestos manufacturer, is sued by numerous plaintiffs in separate forums for compensatory and punitive damages, there is a danger that the defendant's resources will be exhausted before all potential plaintiffs are compensated.[167] Proponents of the "limited fund" class action reason that corporations faced with mass tort claims possess finite assets and that the first plaintiffs to recover will compromise the recovery of later claimants.[168]

However, appellate courts have insisted that movants prove the existence of liability that exceeds the funds available from the defendant.[169] This requires the court to look beyond the confines of the cases before it and consider cases pending in other courts, both state and federal, and, finally, to

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164. *In re* School Asbestos Litig., 104 F.R.D. 422 (E.D. Pa. 1984) (certifying a 23(b)(3) nationwide class seeking compensation for costs of asbestos abatement in school buildings); Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269 (E.D. Tex. 1985) (certifying plaintiff recovery for personal injury suffered because of exposure to asbestos and for certain limited issues - state of the art defense, product identification, product defect, negligence and punitive damages); *see* FED. R. CIV. P. 23(c)(2) (class member who so requests may opt out). *See also* Kevin Hudson, *Catch 23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 EMORY L.J. 665, 666 n.4 (1991) (discussing the hesitancy of appellate courts to uphold attempts at certification because of the "proliferation of issues" in the mass tort case).

165. FED. R. CIV. P. 23(b)(1)(B).

166. FED. R. CIV. P. 23(b)(1)(B); *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 826 (discussing the "limited fund" class action).

167. *See* Mintzer & Duncan-Daley, *supra* note 145, at 47.

168. Tobin, *"Limited Generosity"*, *supra* note 4, at 464, 471, 474-77.

169. *In re* School Asbestos Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984) (vacating certification of 23(b)(1)(B) class); Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 277 (E.D. Tex. 1985) (finding failure "to establish the substantial probability of the existence of a limited fund from which to compensate deserving class members"); *see also* Tobin, *"Limited Generosity"*, *supra* note 4, at 466-69, 477-79 (advocating class creation based not on the size of the assets of the defendant, but on the number of claims by plaintiffs and the need to create uniform and limited recovery).

estimate the defendant's present and future liability in all forums.[170] In the past, this has been held to be both too speculative,[171] and also violative of due process where all the claimants were not before the court.[172]

Representing the interests of future plaintiffs is a particular problem in the asbestos cases. Because asbestosis is a progressive disease, the court faces an impediment to identifying a defendant's total liability as there is no way to ascertain with certainty just how many people were injured or even who they are.[173] Additionally, even though these plaintiffs and their injuries are unknown, the Rule requires that their interests be represented in the action.[174]

Finally, the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*[175] has been interpreted by some courts as an impediment to personal jurisdiction over plaintiffs in a mandatory class action.[176] In *Shutts*, the Supreme Court held that a court trying a class action case could exercise personal jurisdiction over plaintiffs even where they did not have the "minimum contacts" historically mandated by the rule of *International Shoe*.[177] However, the holding was limited to those classes where members received notice and had the choice of opting-out.[178] The Court construed the presence of the opt-out right to mean that plaintiffs who chose to remain

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170. Tobin, *"Limited Generosity"*, *supra* note 4, at 478-79.

171. *E.g.*, *In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983); McDonnell Douglas Corp. v. United States Dist. Ct., Cent. Dist. Cal., 523 F.2d 1083 (9th Cir. 1975).

172. *See In re* School Asbestos Litig., 104 F.R.D. at 422 (inappropriate to proceed with 23 (b)(1)(B) class certification because there was no firm evidence that awards of punitive damages in individual cases would impede the ability of future claimants to obtain compensation and that not all claimants to the "fund" were before the court because the "non-school" plaintiffs were not before the court).

173. *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 746.

174. *See In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd in part and rev'd in part*, 818 F.2d 226 (2d Cir. 1987) (setting up a registry and compensation system for future claimants).

175. 472 U.S. 797 (1985).

176. Hudson, *supra* note 164, at 709-13.

177. *Phillips Petroleum*, 472 U.S. at 808-14 (citing, *inter alia*, International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

178. *Id.* at 812.

in the action by not exercising their right had implicitly given their consent to the trial court's jurisdiction.[179]

Some courts have interpreted the *Shutts* rationale to mean that the there can be no jurisdiction over the class member unless each class member has given consent to jurisdiction or has sufficient contacts with the forum to satisfy the due process standards of *International Shoe*. Since a "limited fund" class has no opt-out provision to provide the vehicle for implied consent, as was required by *Shutts*, it has been held that courts may not exercise jurisdiction over a 23(b)(1)(B) class action in the absence of minimum contacts between each member of the putative class and the forum.[180] Therefore, the final judgment in a Rule 23(b)(1)(B) mandatory class action could not bind plaintiffs with insufficient contacts with the forum.[181] This would, of course, severely limit the size of the class and defeat any attempt for large scale resolution of the litigation.

3. *Cimino v. Raymark Indus., Inc.*[182]

Once the initial hurdles to class certification have been surmounted, there is a great potential for class action judges to manipulate procedure in the interest of judicial economy even though, in actual practice, mass trials may add to complications, delays and increased costs to litigants.[183] Judge Parker, in the Eastern District of Texas, has been experi-

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179. *Id.* at 813-14.

180. *See, e.g.*, Waldron v. Raymark Indus., Inc., 124 F.R.D. 235, 237 (N.D. Ga. 1989) (the lack of opt-out provision in Fed. R. Civ. P. 23(b)(1)(B) interpreted to mean that consent is not possible and therefore the court cannot impose personal jurisdiction on plaintiffs lacking in contacts with the forum).

181. Hudson, *supra* note 164, at 710; Miller & Crump, *supra* note 42, at 52-57. However, other courts and commentators have used the "limited fund" theory to justify jurisdiction over class members. Under this theory, if there is proof that claims exceed the defendant corporation's assets, the state where the assets are located can exert *in rem* jurisdiction over plaintiffs' claims' to those assets. *Id.* at 52; *Joint E. & S. Dist. Asbestos Litig.*, *supra* note 6, 129 B.R. at 798-800.

182. 751 F. Supp. 649 (E.D. Tex. 1990).

183. *See* Robert H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78 (1989) [hereinafter *Mass Trials*]; *see also* Sherman, *supra* note 91, at 261-66.

menting with creative procedural methods of dealing with asbestos cases since 1980.[184] His aggressive management of large scale asbestos cases, typical of the new judicial activism, has sparked considerable controversy among legal commentators.[185]

In late 1986, more than one thousand asbestos cases were pending on the dockets of the Eastern District of Texas and 150 to 250 new cases were being filed each month.[186] Judge Parker initiated a Rule 23(b)(1)(B) class of more than 2,000 plaintiffs in an attempt to dispose of all the claims in the district in one mass trial.[187] Parker's plan called for the adjudication to take place in three phases. Phase One would try the issues of product defect, common defenses and punitive damages.[188] The Phase Two trial would determine market share liability of the defendants by determining the time and place that each plaintiff had been exposed to the defendants' products.[189] The Phase Three trial proposed to adjudicate actual damages in order to reach an aggregate award for the class as a whole.[190] The defendants strongly objected to the class certification and to the strict limits Parker imposed on discovery.[191] Parker overruled their objections and denied their re-

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184. *See, e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986) (certification of 23(b)(3) class for the resolution of common defense issues and liability for punitive damages, but, defendants settled after only 16 days of trial); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1361-63 (E.D. Tex. 1981), *rev'd in part* 681 F.2d 334 (5th Cir. 1982) (consolidation of 30 cases with a small number of cases set for "test" trials implemented to give defendant a "preview" of liability and damages, resulting in a settlement of $12.4 million following jury verdicts of $2 million per plaintiff in the test cases); *see also* Mullenix, *supra* note 58, at 488 (giving a history of innovative techniques utilized by Judge Parker).

185. *See, e.g.*, Robert H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 816-48 (1985) [hereinafter *Joinder*]; Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of the Courts*, 54 LAW & CONTEMP. PROBS. 229, 231 (1991); Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213 (1991).

186. Mullenix, *supra* note 58, at 490.

187. Sherman, *supra* note 91, at 262.

188. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990); Miller & Ainsworth, *supra* note 6, at 428.

189. *Cimino*, 751 F. Supp. at 653.

190. *Id.*

191. Mullenix, *supra* note 58, at 494.

quest for interlocutory appeal, hoping to "impel certain 'hold-out' defendants to settle."[192]

The defendants petitioned the Fifth Circuit for a writ of mandamus and the appellate court not only granted the writ but vacated the class certification for the Phase II trial plan.[193] Even though certification was confined to a single district and only one state's tort law, ironically, it was choice of law problems that led the Fifth Circuit to vacate the Phase II plan.[194] The appellate court held that the Phase II plan:

> "while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority. It infringes upon the dictates of *Erie* that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches."[195]

In spite of the appellate ruling, Judge Parker kept the cases together by consolidating them under Fed. R. Civ. P. 42(a).[196] He attempted to meet the individual causation requirement by grouping plaintiffs by worksite to adjudicate their exposure in Phase II and he grouped plaintiffs by disease category for the Phase III damages portion of the trial.[197] When the parties appealed the plan for review, the appellate court denied the appeal without opinion.[198]

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192. *Id.*

193. *See In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990); Mullenix, *supra* note 58, at 494-95.

194. Mullenix, *supra* note 58, at 520. The author also noted that Special Master Jack Ratcliff had hoped that certification would succeed as only one law would apply to the class because the class was confined to the district. *Id.* at 519.

195. *In re* Fibreboard Corp., 893 F.2d at 711 (Texas tort law required individualized proof of causation and that the "test case" method of adjudication allowed a general causation, contrary to Texas law. As to the Phase III plan, the court held that there were too many disparities among the various plaintiffs for their common concerns to predominate.).

196. FED. R. CIV. P. 42(a) (allowing joint trial "[w]hen actions involving a common questions of law or fact are pending before the court. . .").

197. Mullenix, *supra* note 58, at 503 (citing Memorandum and Order at 5-7, Cimino v. Raymark Indus., Inc., No. B-86-0456-CA, Docket at 58 (E.D. Tex. Oct. 26, 1989)).

198. *Id.* at 504 (citing *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).

When the trial finally began, Judge Parker again used the reverse bifurcation technique to encourage settlement by the parties.[199] First, he tried the common affirmative defenses, punitive damages and gross negligence issues in Phase I.[200] Then he tried damages before reaching inquiry into the issue of exposure to asbestos.[201] Parker again used the representative sampling method in the Phase III portion of the trial. Two juries heard 160 "sample" cases before two judges.[202] The entire trial lasted for more than four months.[203] Prior to the trial, the parties answered 1,885 sets of interrogatories and took 2,345 depositions.[204] One thousand four hundred plaintiffs underwent medical examinations.[205] At trial, 271 expert witnesses and 292 fact witnesses testified.[206] Fifty-eight lawyers presented more than 6,000 exhibits constituting more than half a million pages of documents.[207]

Since a Rule 42 consolidation lacks the procedural protections of a class action,[208] the fairness to litigants in the Phase III trial is questionable. Additionally, the sheer mass of evidence and testimony creates complications and costs that would not have existed if the claims had been tried individually.[209]

Through Judge Parker's aggressive and creative management techniques, the consolidated cases were completely adjudicated by the end of 1990.[210] However, the fact that choice of law considerations had such a serious impact on a class certification within a single district demonstrates the serious problems facing mass trials of asbestos cases.[211] As the Fifth

199. *Id.* at 564.
200. *Id.*
201. *Id.*
202. *Id.* at 565.
203. Mintzer & Duncan-Daley, *supra* note 145, at 29.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See* Silver, *supra* note 90, at 497-98.
209. Transgrud, *Mass Trials*, *supra* note 183, at 78.
210. Mullenix, *supra* note 58, at 495.
211. *See* Sedler & Twerski, *supra* note 88, at 98-99 (arguing that conflicts of law

Circuit made clear, procedural innovations should not allow the judiciary to infringe on the legislature's role as lawmaker by creating the "best" law for the case at hand.[212]

C. Defensive Collectivization Under Chapter 11[213]

1. Reorganization under Chapter 11

Chapter 11[214] of the Bankruptcy Code[215] enables a financially distressed company to petition the bankruptcy court for protective relief.[216] Instead of going out of business and liquidating its assets, a company in Chapter 11 remains a "debtor in possession"[217] while it develops a plan that will enable it to remain a going concern while also addressing its debt.[218] The plan is then submitted to the court and creditors of the company for approval.[219] If the plan is approved, pre-petition debt and equity interests are discharged[220] and the company emerges with a fresh chance at financial success.[221]

The Bankruptcy Code provides protection for both the debtor company and its creditors in the Chapter 11 process. During reorganization, the debtor company is shielded by the automatic stay provisions of Chapter 11 which give the company respite from such actions as lien enforcement, foreclosures, tax collections and entry of judgments in either state or federal courts.[222] Additionally, because the reorganization

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principles prohibit mass adjudication of tort cases).

212. Mullenix, *supra* note 58, at 560.

213. Bankruptcy Code, 11 U.S.C. §§ 1101-1146 (1988).

214. *Id.*

215. 11 U.S.C. §§ 101-1330 (1988).

216. *See* 11 U.S.C. § 541 (1988); *see generally* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984).

217. *See* 11 U.S.C. § 1107(a) (1988).

218. *See* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Bankruptcy*, 71 TEX. L. REV. 51, 79 (1992).

219. 11 U.S.C. § 1129(b)(2)(A) (1988).

220. C. Albert Parente, *Chapter 11 Reorganization: A Valid Alternative to Going Out of Business*, 65 N.Y.S. BAR J., Feb. 1993, at 53.

221. *Id.* at 45 (noting that Johns-Manville emerged from bankruptcy proceeding "a revitalized, healthier company free of the asbestos logistic nightmare").

222. 11 U.S.C. § 362(a) (1988); A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1002-04 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *see generally* Parente, *supra* note 220, at 44-45.

plan is binding on all the company's creditors,[223] the company has the opportunity to resolve all pending claims against its assets within the single bankruptcy proceeding. The company gets a final resolution of its financial problems and emerges revitalized, with a clean slate.

Chapter 11 provisions also protect the interests of claimants to the bankrupt's assets by providing for the creation of creditor's committees to represent the interests of both secured and unsecured creditors.[224] When the reorganization plan proposes to settle with creditors for less than the total value claimed against the bankrupt estate, the court cannot approve the plan unless the impaired creditors vote to accept its terms.[225] Additionally, the Code gives a bottom-line protection to claimants who do not accept the plan by providing that the debtor's plan cannot give dissenting claimants less than the amount they would have received if the company had been totally liquidated.[226] Finally, the Code protects the Due Process rights of creditors who have tort claims against the debtor by preserving the right to jury trial for these claimants.[227]

2. Use of Chapter 11 in the Context of Mass Tort

Because bankruptcy procedure promises a financially troubled company substantial relief of indebtedness, it encourages the company to face all of its creditors at once.[228]

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223. 11 U.S.C. § 1141(a) (1988).

224. 11 U.S.C. §§ 705(a), 1102 (1988); *id.* § 1123(a)(1) (dividing the creditors into classes); *id.* § 1122(a) (requiring that claims represented within each class be "substantially similar"); *id.* § 1322(b)(1) (requiring no unfair discrimination against any class). *See In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (Bankr. S.D.N.Y. 1985) (subdividing tort claimants committee into subclasses such as property damage and personal injury damage claimants); *see generally* Newberg, *supra* note 29, § 20.04 at 596.

225. 11 U.S.C. § 1129 (1988).

226. 11 U.S.C. § 1129(a)(7)(A)(i), (ii) (1988) (unless a creditor has accepted the plan, the creditors in that class must receive not less than if the debtor were liquidated).

227. *See* 28 U.S.C. § 157(b)(2)(O) (1988) (personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy cases is pending).

228. Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL.

When a company faces massive tort liability in multiple forums, filing for bankruptcy has the additional advantage of centralizing the litigation[229] since the bankruptcy court has the power to fix the venue of pending tort cases against the debtor in the district court in which the bankruptcy case is pending.[230] Once the tort claimant has a judgment against the debtor, the legal claim against the debtor's assets is converted into an equitable claim for a pro rata share of the res in bankruptcy.[231] Finally, a global settlement of pending claims is made possible in bankruptcy because the court's subject matter jurisdiction includes "all civil proceedings arising under title 11 or arising in or related to cases under title 11".[232]

The Code specifically allows for the certification of a class of creditors under Fed. R. Civ. P. 23.[233] The bankruptcy court may appoint a guardian ad litem to represent the interests of unknown future plaintiffs.[234] Outside the bankruptcy context, a class action is subject to the opt-out requirements mandated by *Shutts*.[235] However, the essential difficulties with class certification discussed in the preceding section are not present when the class is certified pursuant to a bankruptcy proceeding. Since the bankruptcy proceeding is characterized as an in rem action,[236] a class certified to deal with common creditor issues in bankruptcy is not subject to an opt-out right.[237]

Despite the fact that Chapter 11 proceedings avoid many of the pitfalls of other forms of procedural consolidation of mass tort cases, problems remain. When an asbestos manufac-

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L. REV. 43, 64 (1989).

229. Kenneth R. Feinberg, *Claims Resolution Facilities and the Mass Settlement of Mass Torts: The Dalkon Shield Claimants Trust*, LAW & CONTEMP. PROBS., Autumn 1990, at 79, 87.

230. 28 U.S.C. § 157(b)(5) (1988).

231. Newberg, *supra* note 29, § 20.14 at 620.

232. 28 U.S.C. § 1334(b) (1988); *see generally* Steven J. Parent, *Judicial Creativity in Dealing with Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381, 387 (1990).

233. BANKR. R. 7023.

234. *See* Newberg, *supra* note 29, § 20.09 at 596.

235. 472 U.S. 797 (1985); *see also* Newberg, *supra* note 29, § 20.09 at 597.

236. *See, e.g., Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992), *vacating and remanding*, 129 B.R. 710 (Bankr. E. & S.D.N.Y. 1991).

237. *See* Newberg, *supra* note 29, § 20.23 at 620.

turer files for Chapter 11, the basis of the filing is that, without the court's protection, future tort claims will drive the corporation into insolvency.[238] Therefore, future plaintiffs must be included in, and bound by, the reorganization plan. Because of the latent effects of asbestos exposure, the number and value of potential claims are unknown.[239] If the bankruptcy court is unable to determine what the aggregate liability of the corporation is, it will be unable to provide for future plaintiffs in the bankruptcy plan.[240] The result is circular. The Chapter 11 filing and its success in salvaging the debtor corporation are both based on quantifying the unknowable value of future claims. Further, circuit courts are split on the issue of whether class proofs of claim are permissible under the Code.[241] Therefore, the propriety of class certification becomes intertwined with the allowability of class proofs of claim.[242]

Like other forms of consolidated proceedings, bankruptcy also faces jurisdictional limitations that interfere with efficient resolution of mass tort cases. The bankruptcy court has jurisdiction to adjudicate "core" proceedings arising in the context of the bankruptcy case.[243] A cause of action is a "core" proceeding if it is "created by title 11 or . . . is concerned with what are called matters concerning the administration of the

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238. Feinberg, *supra* note 229, at 88; *see also* Kaighn Smith, Jr., *Beyond the Equity Power of Bankruptcy Courts: Toxic Tort Liabilities in Chapter 11 Cases*, 38 ME. L. REV. 391 (1986).

239. *See* Feinberg, *supra* note 229, at 89.

240. *See* discussion of the failure of the Trust established for plaintiff compensation by Johns-Manville in Chapter 11 proceedings, *infra* Section II(C)(3).

241. *Compare* Sheftelman v. Standard Metals Corp. (*In re* Standard Metals Corp.), 817 F.2d 625 (10th Cir. 1987), *rev'd on other grounds*, 839 F.2d 1383 (10th Cir. 1987) (holding that class proof of claim is not permitted in bankruptcy as a matter of law) *with In re* American Reserve Corp., 840 F.2d 487 (7th Cir. 1988) (by allowing for certification of class, the Code implicitly allows class proofs of claim); *see generally* Michael J. Guyerson & Darrell M. Daley, *Propriety of Class Proofs of Claim in Bankruptcy*, 63 AM. BANKR. L.J. 249, 250 (1989).

242. Guyerson & Daley, *supra* note 241, at 253.

243. *See* 28 U.S.C. 157(b)(2) (1988); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S.C.C.A.N. (98 Stat.) 333 (distinguishing between "core" proceedings, in which the bankruptcy court is empowered to enter a final judgment and "related" proceedings which must be submitted to the district court for review).

estate."[244] In contrast, the bankruptcy court may not adjudicate proceedings that are merely "related" to the bankruptcy case.[245] The Code not only reserves the right to jury trial for tort claimants against the bankrupt estate,[246] but also excludes personal injury tort and wrongful death actions from its definition of "core proceedings."[247]

Bankruptcy proceedings are not a panacea for the problems of expensive duplicative litigation and delays in compensation to successful plaintiffs. Since the bankruptcy court does not have the power to hear personal injury and wrongful death cases, it must transfer them to the district court. Even if the bankruptcy court establishes an alternate dispute mechanism for settling tort cases out of court, the Code seems to require that a dissatisfied plaintiff still have recourse to a jury trial, where, of course, state law would apply. The successful plaintiff would then recover his judgment in the bankruptcy proceeding.[248] Bankruptcy is not, therefore, a more efficient method of dealing with mass tort cases as compared with any of the other previously discussed methods of consolidation.[249]

Finally, when there are multiple defendants in a mass tort case, the bankruptcy of one defendant seriously impacts the overall litigation.[250] The bankruptcy of a key defendant increases pressures on the remaining codefendants and widens the scope of litigation as plaintiffs seek compensation from alternative, solvent defendants.[251] In asbestos litigation, the

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244. H.R. Rep No. 595, 95th Cong., 2d Sess. 445 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6400-01.

245. 28 U.S.C. § 157(b)(2) (1988).

246. *See* 28 U.S.C. § 157(b)(2)(O) (1988) (personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy cases are pending).

247. *Id.*

248. *See generally* Newberg, *supra* note 29, § 20.23 at 628-29 (describing need for courts and counsel to consider inevitable delay and loss of independent control by counsel when determining most efficient method of resolving mass tort claims).

249. *Id.*

250. Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1978 (1992).

251. *Id.* at 1984; Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster*

bankruptcy of some defendants has removed them from the mainstream. The remaining manufacturers bring their claims for contribution to the meager pickings at the bankruptcy "table" joined by newer defendants that have been brought in by plaintiffs looking for the "justice" promised by our judicial system. Instead of providing a solution for the asbestos crisis, bankruptcy merely serves to exacerbate it.

3. *In re Joint Eastern and Southern District Asbestos Litigation (Findley v. Blinken)*[252]

In August of 1982, Johns-Manville, the nation's largest manufacturer of asbestos products, filed for bankruptcy under Chapter 11.[253] The company based its filing on the projected future claims of asbestos victims and a potential liability of approximately two billion dollars.[254] Public reaction to the bankruptcy announcement ranged from shock to outrage because of the "nebulous" nature of Manville's claim of insolvency.[255] From 1982 to 1986, claimants, codefendants and

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Devour Next, FORBES, Feb. 18, 1991, at 75.

252. 129 B.R. 710, 750 (Bankr. E. & S.D.N.Y. 1991), *vacated and remanded by*, 982 F.2d 721 (2d Cir. 1992) (highlights of the complex procedural history of this case may be found at footnote 253).

253. *In re* Johns-Manville Corp., 36 B.R. 727 (S.D.N.Y. 1984) (Johns-Manville bankruptcy filing upheld on appeal against claims of fraud and abuse of the bankruptcy system by tort litigants); *In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984), *aff'd sub nom.* Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940 (Bankr. S.D.N.Y. 1985) (motion for appointment of legal representative for asbestos-exposed future claimants); *In re* Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) (affirming original bankruptcy plan establishing settlement trust fund against challenge by personal injury claimants); *Joint E. & S. Asbestos Litig.*, 120 B.R. 648 (Bankr. E. & S.D.N.Y. 1990) (Trustees of Manville personal injury trust reported to the court that the assets of the personal injury trust were insufficient to meet projected claims. In order to protect the trust from further depletion, the court held that a mandatory class action would be certified to include all claimants to the trust and that all state and federal cases pending against the trust would be stayed.); *Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, *supra* note 6, (certifying the class action and modifying terms of original bankruptcy reorganization); *Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (vacating the judgment on the grounds that district court did not comply with FED. R. CIV. P. 23 or the Bankruptcy Code in modifying the original bankruptcy plan).

254. *In re* Johns-Manville Corp., 843 F.2d at 639.

255. *See* Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 283 (1985) (litigants accused the company of filing to avoid "the constitutionally pro-

Manville's representatives attempted to negotiate a reorganization plan.[256] After two years of appeals, the plan was finally consummated in 1988. The plan included an injunction insulating Manville Corp. from further suits, and provisions for a Trust Fund that would assume exclusive liability for pending and future claims by asbestos victims.[257] The court retained jurisdiction over the Plan and the Trust was made responsible for administering a Claims Resolution Facility (CRF) to compensate plaintiffs.[258] Claimants to the Trust could either arbitrate their claims with the CRF or pursue individual tort actions for compensatory damages in the state courts.[259]

The Trust was doomed before it even went into operation. During the six year period while the Plan was being negotiated and appealed, 50,000 new claims were brought against the company.[260] The bankruptcy, instead of providing an orderly method of compensating victims, produced a "litigation panic."[261] Plaintiffs' attorneys found that they could accelerate the Trust's payment of their clients' claims by obtaining a trial date.[262] Codefendants, hungry after six years of bearing the entire brunt of asbestos liability, impleaded the Trust in an effort to secure financial assets and recoup some of their losses.[263]

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tected rights of present and future victims. . ." *Id.* at 286); *The Manville Bankruptcy supra* note 73 at 1 n.10 (citing N.Y. TIMES, Aug. 27, 1982, at 1, col. 6 (Manville ranked 181st in the Fortune 500 at time of filing for bankruptcy)).

256. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 751.

257. *Id.* at 751-52. The Trust is funded by insurance proceeds ($869 million), bonds (face values of $1.8 billion and $50 million) and 80% of the stock in the reorganized Manville Corp. *Id.* at 752-53. Additionally, beginning in 1992, Manville was to begin making payments to the Trust of up to 20% of its annual profits. *Id.*

258. *Id.* at 753.

259. *Id.* at 753-54.

260. *Id.* at 754.

261. *Joint E. and S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 755 (Final Order of Judges Weinstein and Lifland regarding modification of Johns-Manville bankruptcy plan); *see also Joint E. and S. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 663 (Memorandum on Stays) (describing procedural history of Johns-Manville bankruptcy). "As against the maximum of $2.351 billion in assets, the Trust compute[d] its liabilities for asbestos claims at over $7 billion" and estimated 47,000 future claims valued at $1.840 billion. *Id.*

262. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 755.

263. *Id.* (noting that this "necessitated retaining local counsel in nearly every

The Trust, therefore, became subject to a "seeming paradox."[264] It was responsible for litigating suits against alleged victims in an attempt to preserve adequate funds for future claimants while fulfilling its fiduciary duty under the reorganization plan to "fairly and equitably" compensate claimants.[265] "In this Alice in Wonderland world, the Trust was running faster and faster yet moving backward, while codefendants were being carried along, toward bankruptcy."[266] Not surprisingly, only a year and nine months after "opening for business," the Trust was "effectively out of funds" and the Eastern and Southern District courts entered a stay order pending revision of the reorganization plan for the operation of the Trust.[267]

In September 1990, the Trust moved to be considered as a limited fund under Fed. R. Civ. P. 23(b)(1)(B).[268] The court concluded that the Trust was, indeed, "deeply insolvent."[269] The court appointed representative counsel to evolve a modified Settlement Plan.[270] The class was conditionally certified by District Judge Weinstein and Bankruptcy Judge Lifland in November of 1990.[271]

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state, participating in pretrial discovery and preparing tens of thousands of cases for trial rather than merely evaluating them for settlement").

264. *Id.* at 760.

265. *Id. See also Joint S. & E. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 665 (noting that "average payments to claimants by the Trust have more than doubled those prior to the Chapter 11 filing" and contrasting the present role of the Trust in providing "fair and equitable treatment of beneficiaries" with Manville's former role as "the hard-bargaining defendant in tort cases").

266. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 762. The court noted the codefendants' concern because the "rates of judgments and court pressured settlements accelerated their own cash outflow problems, driving more and more of them toward bankruptcy as the insurance coverage was exhausted. . . . The asbestos bonanza led to an increased search for more clients through unions and independent solicitation and increased filings." *Id.* at 761.

267. *Id.* at 762.

268. *Id.* at 764. *See also Joint E. & S. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 653-54 (describing Special Master's Report, *In re* Johns-Manville Corp., Nos. B 11656 (BRL) through 82 B 11676 (BRL), at 20-21 (E.D.N.Y. Nov. 3, 1990)).

269. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 765.

270. *Joint E. & S. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 668-70 (Appendix C, Stipulation of Settlement).

271. *Id.*

Fairness Hearings to negotiate the proposed modifications of the Settlement, held pursuant to Fed. R. Civ. P. 23(e), involved bitter disputes between plaintiffs, the Trust and codefendants.[272] Despite the fact that codefendants were strongly opposed to many aspects of the modified Plan, Judge Weinstein certified the class and took strong action to protect the Trust's ability to fulfill what he described as its primary role, compensation of victims of asbestos-related disease.[273] The coupling of the 23(b)(1)(B) class with the broad powers of the bankruptcy court served to provide the widest jurisdictional power available.[274] The "limited fund" rationale underlying the class certification gave the court jurisdiction over all parties with an interest in the Manville Trust analogous to an *in rem* action.[275] Since the 23(b)(1)(B) class is mandatory, the parties could not refuse to participate in the class action.[276] Additionally, avoiding the limitations of MDL, Judge Weinstein was able to include pending state as well as federal cases in the class by invoking the broad powers of the Bankruptcy Code and the All Writs Act.[277]

To further protect the Trust from being diminished by the costs of "satellite" litigation, the modified Settlement "provide[d] mechanisms which remove[d] the Trust from the tort system."[278] Potential claims on the trust were divided

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272. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 766-71 (outlining positions of the parties on the Settlement).

273. *Id.* at 897. *See* Judge Weinstein's rationale for the settlement. *Id.* at 860.

274. *Joint E. & S. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 654-59.

275. *Id.* at 656.

276. *Id.* at 654-55.

277. *Id.* The Anti-Injunction Act, 28 U.S.C. § 2283 (1988), prohibiting a federal court from staying existing proceedings in state courts except "as expressly authorized by Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgements." *Id.* However, Judge Weinstein found that the court's action in consolidating state and federal cases falls under the "aid to jurisdiction" and judgment protection exceptions to the Act. *Id.* Additionally, Judge Weinstein cited the Bankruptcy Code, 11 U.S.C. § 105(a) (1988), which gives the court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* As a final authorization for the exercise of nationwide jurisdiction, Judge Weinstein cited the All Writs Act, 28 U.S.C. § 1651 (1988), empowering a federal court to issue "all writs necessary or appropriate in aide of their respective jurisdictions." *Id.* at 657.

278. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 902.

into disease categories which were assigned value ranges.[279] Both plaintiffs and defendants who claimed indemnity or contribution rights against Manville were limited to making their claims through the CRF procedures outlined in the Plan.[280] Absolutely no litigation could be filed against the Trust on any issue, including "status or lack of status as a joint tortfeasor or relative share of fault. . . ." [281] Further, the modified settlement provided that "the trust will make no appearance in court."[282] Rather, a defendant who paid a judgment could only recover from Manville by submitting a proof of claim to the Trust.[283] The claims resolution facility would then determine whether Manville was liable in contribution or in indemnity.[284] If liability was found, the CRF was charged with assigning a value to the claim according to the disease category of the claim.[285]

Judge Weinstein, even as he certified the class and the modifications, expressed reservations concerning the power of the court to "approve a Settlement that modifies litigation relationships between claimants and codefendants and others."[286] The evidence bar effectively removed codefendants' ability to raise the classic products liability defense that it was Manville's product, not the defendant's, which caused the plaintiff's harm. Since Manville was the major producer of asbestos products, other asbestos defendants have used evidence of Manville's knowledge of the dangers of asbestos and its large market-share to rebut plaintiff's claim for liability

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279. *Id.* at 858-86. *See id.* at 912-26 (Appendix A to Trust Distribution Process; description of Level I and Level II Categories).

280. *Id.* at 902.

281. *Joint E. & S. Dist. Asbestos Litig., supra* note 253, 120 B.R. at 676.

282. *Id.* The order includes an evidence ban that "all beneficiaries will be enjoined from asserting or introducing evidence to establish (a) that the Trust is a joint tortfeasor, (b) that the Trust is in any way responsible for any injury, or (c) that the Trust would have been responsible for any injury had it been made or remained a party to the case." *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *See Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 878.

and causation of their injuries.[287]

Judge Weinstein also noted that Manville's absence from court might "skew the results" in jury trials against other manufacturers and distributors.[288] Codefendants argued that juries might shift "a larger than expected share" of the liability to them when Manville was no longer present in the courtroom.[289]

The impleader bar served to prevent distributors and others from impleading the Trust or from bringing actions for contribution or indemnity.[290] Codefendants, distributors and others who are sued by asbestos plaintiffs claimed that the bar, coupled with the set-off provisions mandated by the Settlement will cause them to bear a disproportionate share of the liability for these claims.[291]

The pro tanto rule was chosen because it did not compromise plaintiffs' ability to get full recovery from codefendants and therefore encouraged early settlement with the Trust.[292] Under both of the other theories of contribution, "pro-rata" and equitable share, a plaintiff could potentially receive less than the full value of the judgment when one of the defendants is insolvent because the total judgment is allocated among the total number of defendants.[293] The pro-tanto rule instead requires that only the amount actually received by the

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287. *Id.* at 902-03. Similarly, "[t]he plaintiffs will not be able to tar the co-defendants with the abundant proof of Manville's pre-1982 wrongdoing." *Id.* at 902. Additionally, the court notes that the availability of statistical information through the Asbestos Information Act of 1988 "reduces the need to establish who were the other parties manufacturing asbestos-containing material as long as the party-defendant can show what a small percentage of total sales it contributed." *Id.* at 903.

288. *Id.* at 839.

289. *Id.* at 904. The court noted that just such a phenomenon took place in the Brooklyn Navy Yard cases but also postulated that the opposite effect could hold true. *Id.* Noting that Manville is part of "the vivid history of asbestos litigation in this country" and expressing "mindful[ness] of federalism and comity concerns," the court nevertheless instructed trial courts to "exempt the Trust [itself] from any appearances." *Id.*

290. *Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 905.

291. *Id.*; *Id.* at 871 ("There is little doubt that Section H (contribution rights), at a minimum, presents substantial risk of altering constitutional and state law rights of certain parties if read literally and expansively.").

292. *Id.* at 905; *see generally* KEETON, *supra* note 6, § 67 at 470-79.

293. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 893-94.

plaintiff from another defendant be subtracted from the total judgment against the non-settling defendant.[294] Therefore, plaintiffs would be free to collect from the Trust first and then pursue litigation against other potentially liable parties.

At the Fairness Hearings, the codefendants argued that the Settlement's prohibitions would "effectively repeal state tort reform statutes of joint and several liability" by preventing them from impleading the Trust or presenting evidence that would prove its liability.[295] Additionally, codefendants argued the modified Plan suggested a downward adjustment in the share of responsibility to be borne by Manville relative to the codefendants, which, under the pro tanto rule, would shift an even greater economic burden from Manville to the other defendants.[296]

Judge Weinstein examined several alternative rationales for the application of a uniform choice of law to contribution rights of the codefendants. First, he examined the possibility of applying federal common law to the case.[297] Even though the parties' interest in the limited fund created conflict, this interest was not "uniquely federal," and therefore, "in the absence of Congressional action in the area of asbestos, the federal courts remain circumscribed by state law."[298]

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294. *Id.* at 893; *see, e.g., Gallin v. Owens-Illinois* 760 F. Supp. 33 (E.D.N.Y. 1991) (where, after Manville's share was subtracted from the judgment, defendant was left with no judgment owing despite finding of liability).

295. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 871 (noting that state provisions relating to joint and several liability vary markedly from jurisdiction to jurisdiction); *see generally id.* at 893 (noting that some states have other set-off rules).

296. *Id.* at 894. Codefendants claimed that Manville's traditional share of liability was 40%; the Trust estimated that claimants will most likely receive 15% for Level One claims and 7.5% for Level Two claims. *Id.* The codefendants argued that different allowances according to various state contribution laws would be "appropriate." *Id.* at 895.

297. *Id.* at 872 (applying factors from *Miree v. DeKalb County* 433 U.S. 25 (1977); *see* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966)("(1) the existence of a substantial federal interest in the outcome of the litigation; (2) the effect on this federal interest should state law be applied and (3) the effect on state interests should state law be displace by federal common law.").

298. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 873 (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)) (federal law should apply only when the authority and duties of the United States as sovereign

Noting the "strong federalism context of the issue [due to the] great attention to tort reform [by the states] in recent years,"[299] the court turned to choice of law rules to see if they offered a justification for the imposition of the uniform rule.[300] New York's choice of law rules require the court to consider each of the policies underlying the tort law of each state having an interest in the action before deciding whether a single rule of contribution could be applied to the consolidated cases.[301] Because of the requirement that the courts be "mindful of Erie and comity considerations, the courts cannot disregard the contents of recently enacted tort reform statutes in many states." [302] The district court therefore concluded that "the ultimate resolution of the applicable law in pending state and federal asbestos cases must be determined by the court hearing the case at the time the issue is presented."[303]

Next the court turned to whether the Settlement Plan itself could provide the basis for a uniform rule.[304] However, the court found that the uniform rule incorporated in the modified Plan could not be imposed on the codefendants because they "did not draft it, they did not consent to it and

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are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control). *See also id.* (citing Silkwood v. Kerr McGee Corp., 464 U.S. 238 (1984)) ("[T]raditional principles of state tort law would apply with full force unless they were expressly supplanted.").

299. *Id.* at 878.

300. *Id.* at 878-94 (discussing the evolution of choice of law theories).

301. *Id.* at 883-85. The court noted that:

> The Trust was created in New York. Its assets are in New York. . . . Many of those injured are New York residents. Some of the key codefendant manufacturers either were incorporated in New York or have their principle place of business in New York. New York has had a preeminent role in resolving the conflicts problem.

Id. at 883. While this reinforced the use of New York choice of law rules by the court, there were still an "expansive number of jurisdictions with an interest in the present litigation" where class members lived, worked and were injured in other states. *Id.*

302. *Id.* at 884.

303. *Id.*

304. *Id. See also In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 843 (E.D.N.Y. 1984) (Weinstein, J.) (finding constitutional the application of a uniform tort law because the chemical which caused plaintiffs' injuries was supplied under a government contract and the plaintiffs were serving abroad at the time of injury and, thus, state tort law was not implicated).

they are emphatic in their insistence that it is anathema to them. It would twist the facts beyond recognition to say that the codefendants contracted to apply the tort rule embodied. . .[in the] Settlement."[305]

Nevertheless, the court held that the Settlement Plan met the fairness requirements of Fed. R. Civ. P. 23(e).[306] The court found that the codefendants' rights were not extinguished because the Plan provides "uniform treatment for all parties seeking contribution and indemnification from the Trust." [307] Because the "Trust was created primarily as an entity to compensate plaintiffs,"[308] the court found that the allocation of the burden of insuring full recovery to codefendants, distributors and others was reasonable.[309] The court urged other courts to apply the recommended percentages of liability calculated by the Trust to asbestos cases before them "to the extent feasible and consistent with public policy."[310] Because the Settlement modification took place in the context of a mandatory class action, the due process rights of the distributors and other co-defendants were a significant component of the court's analysis of the fairness of any ruling that imposed a uniform law and affected their rights to litigate.[311] Ultimately, the court had to find that, even though it could strongly urge other courts to apply the uniform rule of the Settlement, "the applicable law in pending state and federal asbestos cases must be determined by the court hearing the case at the time the issue is presented."[312]

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305. *Joint E. & S. Dist. Asbestos Litig., supra* note 6, 129 B.R. at 886.

306. *Id.* at 902.

307. *Id.* The court noted that:

[T]o the extent that these objections raise questions concerning the protections distributors might be entitled to under recently enacted tort reform statutes or court decisions, they are beyond the scope of the instant case. Such unsettled areas of law ought to be resolved by the state courts or federal courts with appropriate venue which will be more familiar with the statutory provisions and their legal history as well as facts of the particular case.

Id.

308. *Id.* at 898.

309. *Id.*

310. *Id.*

311. *Id.* at 895.

312. *Id.* at 884.

In effect, the Settlement utilized a mandatory class action to "cram down" the modification of the original Chapter 11 plan established by the Trust, not through the use of bankruptcy rules, but in the context of a mandatory class action that purported to bind all beneficiaries of the Trust. Co-defendants and health claimant members of the Fed. R. 23(b)(1)(B) class appealed on the grounds that the trial court had violated not only the Bankruptcy Code but the requirements of Fed. R. 23. In December 1992, the Second Circuit Court of Appeals vacated the judgment and set aside the Settlement agreement.[313]

The Court of Appeals noted that the district court did not relate its rulings specifically to the exercise of its diversity jurisdiction or its jurisdiction as a bankruptcy court.[314] In its analysis, however, the Second Circuit was careful to delineate the due process protections under the requirements of Rule 23 and the procedural protections afforded to creditors under the Bankruptcy Code.[315]

The court affirmed that, as a bankruptcy court, the court below had authority to adjust the rights of creditors in relation to the Trust.[316] However, any alteration of rights was limited by the constraints of state law and the Constitution.[317] The court noted that Rule 23 provided less elaborate protections to class members than bankruptcy procedures because, under Rule 23, class representatives could bind class members without their vote or consent.[318] In bankruptcy, a plan of reorganization could only be "crammed down" over the objection of a dissenting class of creditors if strict fairness standards were met.[319] The court was therefore "wary of any class action settlement that accomplished more than a liquidation and pro

313. *Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 751 (2d Cir. 1992), *vacating and remanding*, 129 B.R. 710 (Bankr. E. & S.D.N.Y. 1991).

314. *Id.* at 735.

315. *Id.* at 740.

316. *Id.* at 745.

317. *Id.*

318. *Id.* at 736.

319. *Id.* (citing 11 U.S.C. §§ 1126 (voting rights of creditors), 1129(b)(1) (fairness standards) and 1129(a)(7) (plan may not be "crammed down" against consent of impaired class that would fare better under liquidation).

rata reduction of the claims of a group of creditors and risked circumvention of Bankruptcy Code protections."[320]

Although the procedures of bankruptcy law provide the normal vehicle governing the adjustment of creditors' rights vis-a-vis each other to ensure fair distribution of the assets of an insolvent corporation, the Second Circuit approved the use of the Rule 23(b)(1)(B) class to serve as the representative mechanism for creditors within the Manville bankruptcy proceedings.[321] The court relied on its previous decision in *In re Drexel Burnham Lambert Group, Inc.*[322] In that case, the court had allowed the use of a mandatory non-opt-out 23(b)(1)(B) class to effect a readjustment of security holders' rights to a payment fund established by a bankrupt brokerage firm. [323] In *Drexel*, the creditors' rights were affected without the protections of bankruptcy law, but the claimants' rights to due process were protected by the division of the class into subclasses representing the conflicting interests of the various creditor groups.[324] Consistent with the *Drexel* holding, the circuit court held that the 23(b)(1)(B) class in the Manville action would meet constitutional standards for due process if, on remand, the district court provided for appropriate subclasses to reflect the differing interests within the overall class of creditors.[325]

The Court of Appeals specifically directed that subclasses be formed to represent the interests of co-defendants[326] and

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320. *Id.* at 737; *see In re* Shulman Transp. Enters., Inc., 21 B.R. 548, 551 (Bankr. S.D.N.Y. 1982), *aff'd* 33 B.R. 383 (S.D.N.Y. 1983), *aff'd* 744 F.2d 293 (2d Cir. 1984) (bankruptcy court must consider the fact that in most instances class action principles are antithetical to those in bankruptcy).

321. *Joint E. & S. Dist. Asbestos Litig., supra* note 252, 982 F.2d at 721.

322. 960 F.2d 285 (2d Cir. 1992), *cert. dismissed sub nom.* Hart Holding Co., Inc. v. Drexel Burnham Lambert Group, Inc., 113 S. Ct. 1070 (1993).

323. *See Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 290; *but see* Newberg, *supra* note 29, § 20.26 at 631, § 20.30 at 641, § 20.31 at 647 (recommending class action settlements if class members have the opportunity to vote for acceptance or rejection of the reorganization plan).

324. *See Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292-93; *Joint E. & S. Dist. Asbestos Litig., supra* note 252, 982 F.2d at 738.

325. *Joint E. & S. Dist. Asbestos Litig., supra* note 252, 982 F.2d at 739.

326. *Id.* While directing the trial court to clarify its interpretation of Section H, the court withheld any ruling on its validity so that it would not influence with nego-

health claimants by categories according to filing date of claim and seriousness of illness.[327] In the absence of such detailed subgrouping, the court questioned whether a settlement could be binding in a 23(b)(1)(B) no-opt-out class action.[328] Significantly, the Second Circuit left open the question of whether the trial courts could, on remand, establish a state law basis for revising the beneficiaries' rights vis-a-vis each other. In the absence of such a basis, the Settlement could not be effected by a class action, even if subclasses were formed.

Finally, the court addressed the issue of whether the Bankruptcy Code empowered the district court to modify the original Trust agreement. The court held that §1127(b) prohibited the modification since the plan had been "confirmed and substantially consummated."[329] Originally, the Second Circuit reasoned that the health claimants had bargained for their rights to payment before voting to confirm the original Trust agreement, consequently those rights could not be modified post-confirmation.[330] However, on rehearing, the court found the right of early filing claimants to receive priority of payment was not intended to create enforceable legal rights.[330.1] Therefore, the Second Circuit reversed its ruling mandating subclassing of health claimants by filing date.[330.2]

The court suggested that the way out of the legal morass might well lie in a Chapter 11 proceeding for the Trust itself or a second bankruptcy proceeding for Johns-Manville.[331] In insisting on strict compliance with the requirements of the Bankruptcy Code and Rule 23, the court stated that the trial court could not "invent remedies that overstep statutory limitations . . . ."[332]

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tiations between the parties on remand. *Id.* at 740.

327. *Id.* at 742.

328. *Id.* at 745.

329. *Id.* at 747.

330. *Id.* at 748.

330.1. *In re* Joint E. & S. Dist. Asbestos Litig., ___ F.2d ___, 1993 WL 141533, *2 (N.Y.2d Cir. May 5, 1993).

330.2. *Id.* at 4.

331. *Id.* at 751.

332. *Id.*

III. The Ramifications of Creative Judicial Management of Asbestos Cases

A. Elements of the Asbestos Crisis: The Dragon

Individualistic judicial solutions to choice of law problems and imposition of a uniform tort rule in consolidated asbestos cases conflict with interests of federalism and comity mandated by the Constitution and recent Supreme Court decisions. The tort systems of each state have evolved in highly individualistic ways. The goals expressed in the tort law of the various states have interlocking components. Contrary to the feelings of many in the judiciary, the primary goal of these systems is not "to compensate plaintiffs." Rather, state tort laws reflect a balancing of the need to compensate plaintiffs with the desire of states to protect their economic well-being by insulating business within their borders from overwhelming liability.

Congressional silence in response to the call for federal laws governing choice of law and tort is appropriate where the states are situated to respond with particularity to the economic problems inherent in the tension between the need to compensate those injured and the need to protect industry. However, the Constitution's protection of the states' interest in balancing compensation and deterrence conflicts with the need for global management of interstate mass tort cases, particularly those with multiple corporate defendants. As the asbestos cases demonstrate, the effects of defective and dangerous products is a phenomenon with national economic consequences. Yet, without legislative intervention, there is no procedural mechanism which can provide a single forum to adjudicate the rights of all possible defendants and all possible plaintiffs, present and future. Even if it were possible to bring all asbestos cases in the nation into a single forum, principles of federalism prevent the application of a single rule of law.

In the absence of congressional action to solve the problems facing the courts in dealing with mass tort cases, the role of the judiciary is changing. The costs and delays of case-by-case adjudication frustrate the court's attempt to dispense

justice. In response, the judiciary has become, by necessity, more administrative and less "judicial" in the classical sense. As the asbestos crisis in the courts has dragged on, judges on the "firing line" in the trial courts have sought ways to handle more cases at once. As previously noted, efficient procedural management has become a judicial synonym for "the common good." However, courts adjudicating mass tort claims tend to dispense bureaucratic justice at the expense of party control of the action and attention to the individual merits of each claim.

Certainly, there is a great potential for abuse of choice of law rules when a court faces the daunting task of reaching equitable and efficient resolution of asbestos cases under a class action or other method of consolidation. Judges are necessarily frustrated by the constraints inherent in choice of law rules which reinforce the principles of federalism. If a judge managing a mass tort case obeys the constitutional mandates of the Full Faith and Credit and Due Process Clauses, the case must fragment, to follow the dictates of individual state law, into a myriad of mini-trials on the issues of causation, liability, indemnity and contribution. This, as we have seen, results in inconsistent judgments, delay, expense and crisis in the courts. The growing tendency is for judges managing large numbers of mass tort cases to impose their own conceptions of good policy and to assume huge long-term administrative burdens.

The rules of civil procedure delineate the boundaries of due process. When the boundaries of procedural devices are stretched, constitutional rights are compromised. When choice of law rules are circumvented, principles of federalism are affronted. However, many judges involved in adjudicating asbestos cases have advocated bending these rules as a means of clearing dockets and dispensing "justice" on a mass scale. Despite the fact that appellate courts have frequently overturned the rulings of creative judges, asbestos litigation has gradually created its own body of law. As precedent, "asbestos law" serves to dilute the importance of the delicate balancing of economic interests inherent in state tort laws and the requirement that each case be heard on its own merits.

B. The Adversarial Model and Theories for Resolution of the Asbestos Crisis

Essentially, there are three possible responses to the dilemmas presented by asbestos litigation. First, do nothing. It could be argued that judicial creativity at the trial court level is balanced by the appellate courts which stand as a bastion protecting against infringement on constitutional rights and principles. However, in "the rush to conquer case loads," judges have assumed expanded managerial roles. They are active in pre-trial management and settlement negotiations. During these informal sessions, judges are exposed to "information that would be considered inadmissible in courtroom proceedings." Not only do the management techniques give the individual judge more power over the case, but they necessarily interfere with objectivity and the "blind justice, traditionally associated with the judicial role. Because of the lack of structure in these situations, the resulting solutions are necessarily very individualistic. Further, equitable resolution of tort cases should not be the result of strong-arm tactics by the trial court judge, but a product of law.

Second, Congress could pass legislation that would codify the judicial philosophy that broader jurisdictional power and a single tort law would solve the problems inherent in adjudicating the mass tort case. However, if the courts are to leap into the breach and assume long-term administrative responsibility for the settlements they engineer, this will affect the needs of that system for additional staff to fulfill these obligations. The ramifications of this trend are far-reaching in terms of increased costs and expansion of administrative responsibilities extending far beyond the actual resolution of the dispute which spawned the case. The question remains whether mass tort cases with far-reaching economic consequences belong in the adversarial system of the judicial branch of government.

The third response would be to remove multiple defendant mass tort litigation from the judicial system. Congress could provide for a "safety valve" arbitration panel designed to deal with products liability when it grows to a certain pre-

ordained proportion. A system could be designed where products liability cases were monitored on a national scale. When a certain number of cases regarding a particular product or a specific class of manufacturers had been filed nationwide, Congress could mandate the removal of these cases to an arbitration board created under the auspices of the legislative branch. Therefore, the administrative burden in terms of both costs and personnel would be shifted from the judiciary, freeing it to perform its function in the constitutional scheme.

Removal of asbestos litigation from the adversarial context of the courts would serve the national interest in compensation and deterrence in a way that the judiciary has been unable to do. Costs would be reduced because claims would be arbitrated, not battled for in the courtroom. Overdeterrence and business failure could be avoided by national assessment of liability and provision for a reasonable method of compensation. Finally, questions of liability of codefendants and their rights of indemnity or contribution from the producer of the product could be considered.

Only if all the injured and all of those who might be found liable are present in one arena is it possible to actually assess the total economic ramifications of a mass tort suit. The task is primarily administrative and is not suited to the adversarial methodologies of the judicial system. When the final result in many recent mass tort cases has been judicially mandated trust funds and ADR systems, why not remove the burden from the judiciary and allow for the same mechanism under the legislative branch? The questions raised by the history of asbestos litigation are: Do we want our judges to become administrators? Do we want our court systems to be involved in long-term commitments to managing and supervising mass settlement agreements? And finally, what are the constitutional ramifications of the choice of law decisions being made by this creative judiciary faced with the crisis in mass tort litigation?