

Articles

REVISITING THE MONSTER: NEW MYTHS AND REALITIES OF CLASS ACTION AND OTHER LARGE SCALE LITIGATION

DEBORAH R. HENSLER*

I. INTRODUCTION

In 1979, Professor Arthur Miller published an article contrasting the myths and realities of class action litigation in the United States. To some, Professor Miller wrote, the class action lawsuit seemed a “Frankenstein monster,” while to others it appeared as a “knight in shining armor.” In truth, he argued, class action litigation neither posed the monstrous burdens and risks perceived by its opponents, nor did it offer the promise of achieving an ideal society in our time.¹

Professor Miller wrote during an era of high controversy in the United States about class action litigation. In 1966, the Civil Rules Advisory Committee had amended the federal class action rule—Rule 23—in important ways.² Although some members of the committee said their goal was to facilitate civil rights and other class actions aimed at social reform,³ to the business community it looked as if the as if the main effect had been to spur more and bigger

Copyright © 2001 by Deborah R. Hensler.

* Judge John W. Ford Professor of Dispute Resolution, Stanford Law School and Senior Fellow, RAND Institute for Civil Justice. This work was partially supported by funds from the RAND Institute for Civil Justice and RAND endowment funds. Research assistance was provided by Craig Coleman and Andrea Wendt.

1. See Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the ‘Class Action Problem,’* 92 HARV. L. REV. 664, 665 (1979).

2. On the adoption of the 1966 amendments, see Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967); Charles Joiner, *The New Civil Rules*, 40 F.R.D. 359 (1966).

3. Still others described the changes as purely “technical.” For a description of the purported objectives of the Civil Rules Advisory Committee in drafting Rule 23, see Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5; John Frank, *Response to the 1996 Circulation of Proposed Rule 23 on Class Actions*, in Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23 1997 [hereinafter Working Papers of the Advisory Committee], at 264, 266 (Administrative Office of the United States Courts, Vol. 2, 1997) (describing the era in which Rule 23 emerged as “the apogee of the

as if the main effect had been to spur more and bigger damage class actions against them.⁴

Today there is again a sense that monsters are loose in the land. Some believe that American courts are overrun with class litigation—a phenomenon that is about to inundate the courts of other countries as well. Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys. (Outside the United States, the characterization is “greedy *American* plaintiff attorneys.”) Many American legal scholars seem to think that mass tort litigation and its attendant challenges for courts are a result of certifying mass tort lawsuits as class actions. Many American journalists who have been following the litigation against tobacco companies, gun manufacturers, and managed care organizations (including class and non-class lawsuits) seem to think that using class actions to pursue social policy reform is a new idea. It is harder to find shining knights in popular and professional discourse defending class action litigation than it was twenty-five years ago.⁵ But today, as yesterday, there is a need to distinguish class action myth from class action reality.

For the past several years, with colleagues at the RAND Institute for Civil Justice, I have been studying class actions for money damages in the United States.⁶ In separate studies, my colleagues and I have also sought to understand the challenges to the legal system posed by mass torts.⁷ I have also become interested in the new social policy torts: suits against tobacco and gun manufacturers and against managed care organizations (“HMOs”). What follows is a synthetic analysis of the nature of class action and other large-scale litigation in

Great Society”); William T. Coleman, *Statement On the Proposed Amendments to Fed. R. Civ. P. 23 Before the Civil Rules Advisory Committee*, in Working Papers of the Advisory Committee at 449, 456 (Administrative Office of the United States Courts Vol. 4, 1997) (noting that some originally saw Rule 23 as a means of “deputizing all attorneys everywhere to enforce our laws”).

4. For discussion of the business community’s reaction to the 1966 amendments to Rule 23, see generally DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000) [hereinafter, CLASS ACTION DILEMMAS].

5. The shining knights do have a tendency to come riding out of the mists whenever significant changes in class action rules are proposed, as was vividly demonstrated in the late 1990s’ debate over the Civil Rules Advisory Committee’s proposed amendments to Rule 23. See CLASS ACTION DILEMMAS, *supra* note 4, at 25-31.

6. The written product of the RAND group’s research is contained in CLASS ACTION DILEMMAS, *supra* note 4.

7. See, e.g., DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

the United States at the beginning of the new millennium, drawing on these and other data,⁸ and informed by the theoretical scholarship of colleagues in the legal academy.⁹ Section II discusses varieties of large-scale litigation and presents some data on usage patterns. Section III discusses litigation practices in damage class actions. Section IV discusses litigation against tobacco and gun manufacturers and health care organizations, litigation partially intended to change public policies in the relevant domains. Section V closes with some comments on likely future trends.

II. ONE MONSTER, OR MANY?

The term “class action” is sometimes treated as if it were synonymous with “large scale litigation” or “mass torts.” By “large scale litigation,” I mean litigation comprising large numbers of like claims—hundreds, thousands, tens of thousands, or even more—pursued more or less collectively in what this conference’s organizers have termed “group litigation.”¹⁰ By “mass torts,” I mean large-scale

8. There is considerable empirical literature on class actions and a goodly number of case study investigations of mass torts. See, e.g., THOMAS WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES* (1996); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987); RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992); MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996). The extensive empirical literature on class actions published in the 1970s and 1980s is reviewed in CLASS ACTION DILEMMAS, *supra* note 4, at ch. 2.

9. There is a vast theoretical literature on class actions, and a somewhat sparser theoretical literature on mass torts. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1994). For a judge's view of issues posed by aggregating mass tort claims, see JACK WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

10. I exclude, for example, automobile accident claims, tens of thousands of which are filed annually in the United States, but most of which pertain to widely dispersed plaintiffs and defendants who are represented by large numbers of law firms acting independently of each other. Because of the numbers of claims involved, virtually all large-scale litigation is “complex,” by

personal injury or property damage litigation arising out of product use or exposure. In fact, in the United States, there are a variety of devices for pursuing large-scale litigation other than the class action, including multi-district litigation, formal consolidation, informal aggregation, and bankruptcy. Some of these devices have been established by statute, some by court rule, and some are the products of creative management by judges and lawyers.¹¹ For policy-makers considering calls for class action reform and for scholars seeking to contribute to the policy debate, it is important to understand the similarities as well as the differences among large-scale litigation, mass torts, and class actions. It is also useful to understand how plaintiffs, defendants, and judges have used these procedures.

A. Class Actions

Class actions permit one or more persons to bring a civil lawsuit on behalf of a large number of similarly situated people or entities. The resolution of the lawsuit, by trial or settlement, binds all members of the class, present and absent. In U.S. damage class actions (i.e., suits for money damages), class members who do not want to be bound by the outcome must be given an opportunity to *opt out*, so that they can pursue their claims individually if they so wish.¹²

Traditionally, class actions were understood to be representative litigation, pursued on behalf of absent parties. So, for example, a typical damage class action might arise when representative plaintiffs allege that a defendant acting illegally has imposed small losses on a large number of people or entities. No single individual would find it worthwhile to pursue a lawsuit independently, nor would someone wishing to act independently find it easy to obtain legal representation. But collectively, class members can—if the suit is successful—force the defendant to disgorge its ill-gotten gains. Hence, many see

comparison with ordinary money damage litigation. Not all complex litigation, however, is large-scale—*viz.* antitrust litigation against Microsoft.

11. With the exception of bankruptcy, which is a creature of federal law, there are both federal and state versions of each of these devices. The state versions differ somewhat from each other, but most are modeled after the federal devices, so it is convenient to focus on the latter.

12. The opt-out provision applies to Rule 23(b)(3) class actions. Class actions under Rule 23(b)(1) and (b)(2) do not require notice to class members and opportunity to opt out. *See* FED. R. CIV. P. 23(b).

class actions as a powerful regulatory enforcement tool and view those who bring them as “private attorneys general.”¹³

Much of the recent controversy in the United States over class actions pertains to the use of class actions to resolve mass torts. These class actions differ from traditional representative litigation in that many class members have obtained individual legal representation and filed their own lawsuits prior to class certification. Mass tort class actions that are amalgams of individual claims and claims on behalf of absent parties pose particularly intense conflict of interest problems.¹⁴ The focus on mass tort class actions in recent U.S. scholarly and public policy debate may suggest to some that the availability of a class action device was a prerequisite for mass tort litigation. However, mass torts arose in the United States in an era when class certification generally was not deemed appropriate for such litigation.¹⁵ According to a study conducted by Fred Misko,¹⁶ from 1966 to 1997, the U.S. Supreme Court decided fifty-five cases in which class actions had been certified; just one of these pertained to a mass tort action. Less than ten percent of class action lawsuits decided by the U.S. Circuit Courts from 1990-1997 involved mass tort litigation.¹⁷ The single mass tort class action decided by the U.S. Supreme Court through 1997 was *Amchem v. Windsor*,¹⁸ the asbestos “futures” class action settlement. Asbestos personal injury and property damage suits accounted for fourteen of the forty circuit court mass tort opinions.¹⁹

13. This view of damage class actions has been sharply disputed in the United States in recent years. However, the historical record provides ample support for this view, as well as evidence of contrary perceptions. For an overview of the historical trends, see CLASS ACTION DILEMMAS, *supra* note 4, at 71-73.

14. For discussion of the special problems of mass tort class actions, see Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. REV. 296 (1996); see also Susan Koniak, *Feasting While the Widow Weeps: Geogine v. Amchem Products, Inc.*, 90 CORN. L. REV. 1045 (1995).

15. See Hensler & Peterson, *supra* note 7, at 1056-57.

16. See FRED MISKO, MANAGING COMPLEX LITIGATION: CLASS ACTIONS & MASS TORTS, (Law Office of Fred Misko, Jr.) (3rd ed., 1997) (from which the following data are calculated).

17. See *id.*

18. 521 U.S. 591 (1997). A second asbestos class action decision was handed down in 1999. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

19. Some of these opinions dealt with the same underlying case. For example, of the nine mass tort class action opinions handed down by the Third Circuit, five pertained to a single suit in which school districts sought compensation for property damage, and two pertained to the case that was decided by the U.S. Supreme Court in *Amchem*.

Despite concerns about the growth of class actions in the United States, no one knows how many such lawsuits are filed annually or are currently pending.²⁰ In 1995-1996, RAND analysts identified about 1000 reported judicial decisions pertaining to unique class actions. Most of these pertained to cases that had been in litigation for several or more years. Because many lawsuits do not result in reported decisions, RAND also searched other electronic databases for indications of class action activity. RAND found about 3200 references to unique class actions in a database comprising general print media, and identified about 300 cases from a business media database. Some of these reports pertained to newly filed lawsuits, some to key decisions in pending litigation, and some to case verdicts or settlements.²¹ The analysts estimated that about half of the litigation activity was taking place in state courts.²² To provide an interpretative context for these numbers, about 15.5 million civil lawsuits were filed in state and federal courts in the United States in 1998.²³

Although the actual number of class action lawsuits is almost certainly very small relative to the total civil caseload, most of the civil cases include only one or a few claimants, while many class action lawsuits involve thousands or even millions of class members. Moreover, based on data provided by lawyers and parties, RAND analysts concluded that the number of class action lawsuits likely surged during the 1990s, partially explaining the growing controversy over class litigation.

20. At least through the mid-1990s, administrative reports of class actions in the federal courts omitted a significant number of lawsuits. See WILLGING ET AL., *supra* note 8. State courts do not routinely report the number or progress of class actions. See CLASS ACTION DILEMMAS, *supra* note 4, at ch. 3 and App. B.

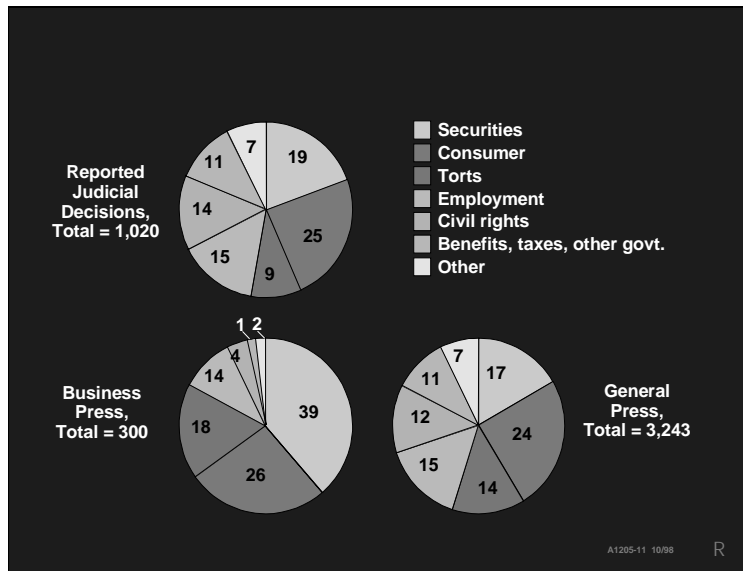
21. Some of the latter include cases resulting in reported decisions. Because the method of constructing the databases RAND searched differed, the analysts felt it was not appropriate to combine estimates from different sources. See CLASS ACTION DILEMMAS, *supra* note 4, at ch.3 and App. B.

22. See CLASS ACTION DILEMMAS, *supra* note 4, at ch. 3. A somewhat different distribution of case types was found by the Federal Judicial Center in its study of class action lawsuits terminated in 1992-1994 in four federal district courts. See WILLGING ET AL., *supra* note 8. RAND suggested that the difference is attributable to the inclusion of state litigation in its analysis, which appears to include a greater proportion of consumer class actions. See CLASS ACTION DILEMMAS, *supra* note 4, at App. B.

23. Statistics come from the Court Statistics Project, available at the National Center for State Courts website at <<http://www.ncsc.dni.us>>. For state courts, these figures include filings in limited jurisdiction courts, including small claims. In comparison, in the late 1980s, I estimated based on then-available data from state and federal courts that about 2.5 million tort and contract suits were filed annually in the United States. See Deborah Hensler, *Reading the Tort Litigation Tea-Leaves*, 16 JUST. SYS. J. 139 (1993).

RAND analysts estimated that traditional representative actions, such as securities cases and consumer cases (i.e., suits alleging financial loss as a result of deceptive advertising, unfair business practices, and the like) accounted for about half of class action litigation during the mid-1990s. Another fifteen percent of cases were brought by employees claiming violations of their rights. Other civil rights lawsuits, suits for government benefits, taxpayer suits, and other suits against the government accounted for another twenty to twenty-five percent of class litigation. RAND analysts estimated that somewhere between nine and eighteen percent of all class actions ongoing in 1995-1996 arose out of allegations of personal injury or property damage resulting from product use or exposure.²⁴ (See Figure 1.)

FIGURE 1
DISTRIBUTION OF CLASS ACTION ACTIVITY, BY TYPE (1995-1996)



B. Multi-district Litigation

A common feature of large-scale litigation in the United States is that it is dispersed across multiple federal and state courts. Multi-districting is a statutory-based procedure²⁵ that allows parties to re-

24. See CLASS ACTION DILEMMAS, *supra* note 4, at ch. 3.

25. See 28 U.S.C. §1407 (2000).

quest that the judiciary collect lawsuits arising out of the same or similar circumstances that have been filed in different federal district courts and transfer them to a single court and judge for purposes of pretrial preparation.²⁶ (In some instances, the transferred cases may include multiple competing class actions that were filed in different federal jurisdictions.) Under the statute, if the cases are not resolved during their pendency in the transferee court, they must be sent back to the court in which they were originally filed for trial.²⁷ However, collecting and transferring like claims to a single judge often encourages settlement of these claims, which may be the real goal of the parties requesting multi-districting. Transferring all pending federal claims to a single judge may also provide an occasion for that judge to certify a class action, encompassing not only the transferred claims but those filed in state courts and those of absent parties as well. Lawyers, parties, and judges may all cooperate to facilitate such “global” resolutions.

Since its inception in 1968, the Judicial Panel on Multi-district Litigation (JPMDL) has decided about 1300 motions for transfer. About 20% of the motions related to securities cases and about 15% to antitrust litigation.²⁸ About 10% of them related to mass torts, or mass product defect cases and cases arising out of catastrophic accidents.²⁹ The panel granted Multi-district Litigation transfer status to about two-thirds of all the motions it considered, and to a somewhat smaller fraction—59%—of the motions in mass torts.

The total number of motions considered by the panel rose significantly over time, from 379 in the 1970s to 473 in the 1990s (an increase of about 25%). The number of motions in mass tort cases increased by fully 100%. Across the decades, the proportion of total

26. The Judicial Panel on Multi-districting, appointed by the Chief Justice, has the power to grant MDL status and selects the judge to whom the cases will be transferred. The Panel may consider granting MDL status *sua sponte*, but usually acts in response to party requests.

27. See *Lexecon Inc. v. Milberg, et. al.*, 523 U.S. 26 (1998) (describing the application of §1407's provision for Multi-district Litigation).

28. Another 159 motions were withdrawn or the Panel declined to decide them because they had become moot. Note that each motion represents multiple lawsuits, since the prerequisite for collection and transfer of cases is the pendency of multiple cases. Some of the 1300 decided motions related to the same underlying litigation. For example, motions to transfer asbestos worker injury suits were twice denied by the Panel before it granted MDL status to federal asbestos personal injury lawsuits in 1991. MDL docket data were provided by the Clerk of the Panel. I am responsible for the tabulations and statistics presented here.

29. Another eleven percent related to litigation arising from air disasters. Generally in the United States, wrongful death cases arising out of air crashes are litigated by a highly specialized bar that overlaps only somewhat with the mass tort bar.

motions granted held steady. However, the proportion of motions granted in mass torts varied dramatically, even after taking into account the small numbers of pertinent motions. During the 1990s, the Panel granted almost three-quarters of the motions for transfer in mass torts that came before it. (See Table 1.)

TABLE 1
MDL ACTIONS, ALL CASES AND MASS TORTS ONLY

	1968-69	1978-79	1980-89	1990-99
All Case Types				
Total Motions	30	379	389	473
Number Granted	26	251	218	313
<i>% Granted</i>	87	66	56	66
Mass Torts*				
Total Motions	1	28	50	59
Number Granted	1	16	22	42
<i>% Granted</i>	100	57	44	71

* Includes mass product defect and catastrophic accident cases. Does not include aviation accident cases.

C. Consolidated Trials, Bankruptcy and Informal Aggregation

In mass tort litigation, lawyers frequently file multiple individual claims arising out of similar circumstances against one or a few defendants in a single court. That court may decide to assign all of these claims to a single judge. Then the judge may issue discovery and other orders that apply to all of the cases, and may schedule groups of like cases for settlement discussions, thereby streamlining case processing.

A judge who has multiple matters involving common questions of law and fact pending before her may consolidate them for trial.³⁰ Unlike the trial of a class action lawsuit, the outcome of a consoli-

30. See FED. R. CIV. P. 42(a). Normally, judges would consolidate a few cases under the rule, but some judges presiding over mass tort claims have consolidated hundreds or thousands of claims. See Hensler & Peterson, *supra* note 7; *Junbo Consolidation in Asbestos Litigation: Hearing on H.R. 1283, The Fairness in Asbestos Compensation Act, Before the House Comm. on the Judiciary* (July 1, 1999) (prepared statement of William Eskridge).

dated trial applies only to the claims that were tried, not to absent parties. However, a single consolidated trial may have important indirect effects on the course of litigation. By demonstrating the risk attendant in trial, the verdict influences the settlement value of other pending and future claims. A very large award may diminish the likelihood that other plaintiffs whose cases are further back in the queue will be able to obtain compensation for their losses. At the extreme, a huge verdict in a “mega-trial” could result in the bankruptcy of a defendant. To my knowledge, no one has yet assembled systematic information on the number of consolidated trials in large-scale litigation in the United States.

Tort claims against a defendant that has sought the protection of the bankruptcy courts may be liquidated by establishing a trust that will pay claimants who meet eligibility requirements by distributing amounts according to an agreed-upon schedule of damages. Sometimes, only those tort-creditors who have filed an eligibility statement before a date set by the court can collect from the trust; in other instances, claimants can come forward far into the future. More than a dozen corporations have sought the protection of the bankruptcy courts in asbestos litigation.³¹ Other mass torts that have ended in the bankruptcy courts include litigation arising out of the use of the Dalkon Shield³² and silicone breast implants.

Formal aggregation, bringing with it the disclosure of alleged harm to large numbers of people, the potential for dramatic trial verdicts, the likelihood that large amounts of money will change hands, and the possibility of bankruptcy, frequently attracts the attention of print and broadcast media. But in the background of large-scale litigation, there may be considerable informal aggregation. In mature mass torts,³³ where there may be a widely-shared understanding of the value of certain types of claims, thousands of lesser-value claims may be resolved en masse according to negotiated schedules of damages that pay little attention to individual claim differences and involve little adversarial litigation.

31. See Deborah Hensler, *Fashioning a Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, n.23 (1992).

32. See SOBOL, *BENDING THE LAW*, *supra* note 8, at 47.

33. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 BOSTON. U. L. REV. 659, 688-94 (1989).

D. Similarities and Differences Among Procedures

All of the devices just discussed provide means of aggregating large numbers of like claims, thereby allowing parties, lawyers, and judges to deal with large-scale litigation more efficiently. However, they also impose a variety of costs on plaintiffs and defendants. Importantly, for those concerned with class action reform, some of the costs attributed to class actions are also inherent in other forms of large-scale litigation.

For plaintiffs, aggregation—however it is accomplished—reduces opportunities for individualized process and custom-crafted outcomes. Plaintiffs are rarely present at the bargaining tables when aggregate settlements are negotiated:³⁴ lawyers who are settling large numbers of claims at a time are usually attracted to quasi-administrative schemes that do not require significant time or resources to determine damage payments.³⁵ By comparison with individual litigation, however, aggregate settlements and administrative compensation schemes may speed payments to plaintiffs. Some claimants may be able to obtain compensation even without legal representation. But aggregate settlements are not reached overnight, and many plaintiffs may believe that they need lawyers to help them negotiate administrative compensation processes. Lawyers who represent individual claimants may charge these claimants full freight, notwithstanding any economies of scale that the lawyers may realize as a result of aggregation. Aggregation may also lead to higher claiming rates,³⁶ meaning that larger numbers of plaintiffs come forward to obtain compensation. The value of individual claims may diminish, in turn, as the available funds must be shared with more people. Rather than claim values being reduced proportionately, stronger claims may be reduced more in order to satisfy the demands of a larger-than-anticipated claimant population. Finally, aggregation exacerbates the agency problems that are inherent in litigation. Plaintiffs have little control over their lawyer-agents. Many plaintiffs with conflicting interests may be represented by a single lawyer, who

34. See Deborah Hensler, *A Glass Half Full, A Glass Half Empty? The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1606 (1995).

35. See Frances E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61 (1990) (discussing claims resolution facilities and the mass settlement of mass torts).

36. About 300,000 claims were filed in response to the bankruptcy notice in the Dalkon Shield litigation, of which about 195,000 were subsequently judged valid. See SOBOL, BENDING THE LAW, *supra* note 8. More than 400,000 breast implant claimants came forward in response to the notice of a tentative class action settlement. See MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 22 (1997).

may find it attractive to compromise one client's claim in order to obtain payment for another's. Some lawyers may find it attractive to settle a large block of claims for less than full value and with a substantial fee, thereby freeing themselves to move on to the next set of cases. Even though they might be able to achieve a more generous settlement and higher fees for the first set of cases by investing additional time and resources in them, spreading their time and resources more broadly may yield more lucrative fees on their entire portfolio.

For defendants, aggregation should reduce transaction costs by comparison with litigating claims individually. Higher claiming rates, however, are likely to increase the total price of settlement beyond what it might have been if all the claims necessitated individual litigation. With larger amounts of money at stake, plaintiff attorneys may litigate more aggressively, leading to higher defense fees and expenses, and thereby eroding the transaction cost savings accrued from aggregation. Plaintiffs' access to jury trial and the availability of punitive damages are key factors in estimating the stakes. Even when liability is highly uncertain, the huge exposure associated with group trials of large numbers of claims enhances the settlement value of the claims. If the cases are tried, the potential for large verdicts against corporate defendants may drive stock prices lower. Conversely, by reducing or eliminating uncertainty about future exposure and reducing anticipated legal expenses, aggregate settlements may improve corporate defendants' stock market position. Defendants' interests in reducing their risk exposure may drive up the settlement value of large-scale litigation even further.

The extent to which plaintiffs and defendants realize the benefits and costs of aggregation may differ by procedure. For example, class action rules require notifying plaintiffs of the pendency of litigation, providing them an opportunity to opt out and allowing them to participate in a court proceeding to voice their opinion of a proposed settlement. Tort creditors must vote on proposed bankruptcy agreements, including compensation plans. Such rules may mitigate somewhat the impairment of due process that derives from aggregation. Plaintiffs whose cases are tried together in a consolidated proceeding may be able to attend the trial. In contrast, there is no rule that requires plaintiff attorneys to inform their clients that they are litigating large numbers of individual claims *en masse*—information which might alert the clients that they need to pay special attention to the course of the litigation and the settlements that are being negotiated. Similarly, class action rules require judges to review and ap-

prove settlements, providing some protection against agency problems. Judges must also approve bankruptcy agreements. However, judges have no formal authority to review or deny approval of party-negotiated settlements in other aggregate contexts.³⁷ Under the common fund doctrine, judges award fees to class counsel, providing a potential barrier to collusion and self-dealing.³⁸ Judges do not play any role in setting fees in informally aggregated cases. Informal aggregation reduces the risk exposure of defendants by comparison with class actions and consolidated trials; unless the cases are formally consolidated, they cannot be tried jointly. The outcomes of non-class litigation do not directly affect the rights and remedies of absent parties; only class actions and bankruptcy have the potential to yield a truly global resolution of mass litigation.³⁹ (Figure 2 summarizes some of the key differences among procedures for plaintiffs and defendants.)

FIGURE 2
VARIATION IN AGGREGATION PROCEDURES

	Informal Aggregation	Multi-District Litigation	Consolidated Trials	Class Actions	Bankruptcy
Notice of aggregation to plaintiffs	NO	NO	YES	YES	YES
Opportunity to opt out	?	?	NO	YES	NO
Opportunity for participation	?	NO	YES	YES	YES
Judicial review of settlement	NO	NO	N/A	YES	YES
Judicial regulation of fees	NO	MAYBE	NO	YES	YES
Opportunity for global resolution	NO	LOW	MEDIUM	HIGH	HIGHEST

37. For a description of judicial responses to the challenges of aggregation, see WEINSTEIN, *supra* note 9.

38. See Judith Resnik et al., *supra* note 14, at 337.

39. Whether defendants can realize that potential is highly uncertain, in the wake of recent U.S. Supreme Court decisions rejecting class action settlements in two asbestos cases. See *Amchem v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

In practice, differences among procedures may be blurred as a result of differences in implementation. For example, a pro forma review and approval of a class action settlement may afford little more protection against agency problems than is accorded by an informal aggregation process that does not require judicial scrutiny of a party-negotiated settlement. Formal differences among procedures also may have less import in practice because a single litigation may involve multiple procedures, skillfully manipulated by the parties to achieve desired aims. Figure 3 presents summary data on the procedural course of selected mass torts, drawing on information collected by the Federal Judicial Center⁴⁰ and RAND. Although these data are not comprehensive, they do suggest that large-scale litigation at the end of the twentieth century in the United States was characterized by procedural variety. Whether any of these procedures is more “monstrous” than any other and whether the “monster” is large-scale, collective litigation, however it is pursued, are important questions for policy-makers. Without careful consideration of these questions, procedural reformers run the risk of slaying one monster, only to find that they are faced with others whose behavior may be more troubling.

40. The FJC data are drawn from Thomas Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group*, in Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts at App. D, iii-iv (Judicial Conference of the United States Working Group on Mass Torts) (1999). The RAND data are drawn from Hensler & Peterson, *supra* note 7, and from additional research for a project on mass torts that I am currently conducting.

FIGURE 3
VARIETIES OF AGGREGATE PROCEDURES IN MASS PERSONAL
INJURY TORTS

	# of Claimants	MDL Motion	Activity G'td	Class Alleg.	Action Cert.	Consol.	Bank.
<u>1960s</u>							
MER/29	1,500						
<u>1970s</u>							
Asbestos Worker Injury	400,000	✓	✓	✓	✓	✓	✓
DES	6,000	✓		✓			
Kepone	10,000			✓	P		✓
Swine Flu Vaccine	4,000	✓	✓	✓			
<u>1980s</u>							
Agent Orange	15,000	✓	✓	✓	✓	✓	
Bendectin	2,000	✓	✓	✓	✓		
Benzene	22,000	✓	✓	✓	O		
Blood Products	6,000	✓	✓	✓	✓		
Copper-7	1,300						
Dalkon Shield	195,000	✓	✓	✓	P	✓	✓
DDT/ Triana, Ala	11,000					✓	
DuPont Plaza Hotel Fire	2,000	✓	✓				
Hyatt Hotel Skywalk Collapse	2,000			✓	✓	✓	
L'Ambiance Plaza	44					✓	✓
L-tryptophan	1,000	✓	✓	✓		✓	
MGM Grand Hotel Fire	1,000	✓	✓				
Silicone Gel Breast Implants	400,000	✓	✓	✓	P	✓	✓

	# of Claimants	MDL Motion	Activity G'td	Class Alleg.	Action Cert.	Consol.	Bank.
Salmonella Contamination/ Milk	19,000			✓	✓	✓	
Tampons/TSS	<1000	✓		✓			
Temporal Mandibular Joint (TMJ)	2,300	✓	✓	✓	P		✓
Times Beach/ Dioxin	2,000					✓	✓
Toxic Chemical Factory/ New Orleans	6,000			✓			
1990s							
Albuterol	5,000	✓	✓	✓	✓		
Bone Screws	6,000	✓	✓	✓	P	✓	
Felbatol	235	✓		✓			
Fen-phen	3,000	✓	✓	✓	T	✓	
Latex	?????	✓	✓	✓		✓	
Norplant	50,000	✓	✓	✓		✓	
Penile Implants	?????	✓		✓			
Radiation/ Nuclear Sites	20,000			✓	P	✓	
Salmonella Contamination/ Ice Cream	28,000			✓	✓		
RSI/Computer Keyboards	3,000	✓					
Tobacco	?????			✓	P		

NOTES to Figure 3:

1. Number of Claimants: Properly describing the size of a mass tort is subject to debate. In some instances, millions of people have used or been exposed to the allegedly injurious product. Some global settlement agreements reflect estimates of such exposure, even though far fewer claimants may come forward ultimately. The figures here represent best estimates of the numbers of claimants (not lawsuits) anticipated, given the current posture of the litigation. In some instances, these figures are different from estimates made earlier in the litigation. Most numbers are rough approximations, rather than precise estimates.
2. Dates: Decade when the litigation grew into a mass tort. In some instances, individual suits were pursued in prior decades. Such suits often had mixed success.
3. Procedure: Multi-district litigation ("MDL") is indicated if a motion for collection and transfer was made; the subsequent column is checked when the motion was granted. Class action activity is indicated when the record shows that there were attempts by some parties to pro-

ceed in class form. The subsequent column is checked when a class action was certified. In many instances, some lawsuits were certified (and settled) as class actions, while others proceeded outside the class context.

KEY: “P”=Partial resolution by this mean; “T”=Tentative resolution not yet finalized; “O”=awaiting decision.

SOURCES: WILLGING ET AL., MASS TORT LITIGATION REPORT, *supra* note 40, at App. D; Hensler & Peterson, *supra* note 7; and data from Author’s ongoing study of mass torts.

III. THE NATURE OF THE BEAST

Consideration of the characteristics of large-scale litigation is limited by the fact that we know more about some types of litigation than others. In the United States, class actions have garnered the attention of academic theorists and empiricists, as well as policy makers.⁴¹ As a result, we have much more information about litigation practices in class actions than, for example, in multi-district litigation⁴² or informal aggregation.

For our study of contemporary litigation practices in damage class actions, my RAND colleagues and I interviewed practitioners on both the plaintiff and defense sides of the litigation. We also conducted case studies⁴³ of ten recently resolved class action lawsuits, six of which arose out of consumer transactions and four of which were mass tort class actions.⁴⁴ The ten case studies provided a concrete basis for considering the claims that are central to the current U.S. controversy over damage class actions. In brief, critics claim the following:

1. Damage class actions are solely the creatures of class action attorneys’ entrepreneurial incentives.

41. See *supra* notes 8 and 9.

42. For example, I have been able to find only one empirical analysis of multi-district litigation and one scholarly treatment of consolidated trials. See Susan M. Olson, *Federal Multidistrict Litigation: Its Impact on Litigants*, 13 JUST. SYS. J. 341 (1988-89) (for an empirical analysis). See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989) (for a scholarly treatment).

43. Case study research calls for selecting a few examples of a phenomenon of interest and then intensively investigating the characteristics of those examples (‘cases’). By closely examining a relatively small number of cases and comparing and contrasting them, the researcher learns about the significant features of the phenomenon and how it varies under different circumstances. Case study research is particularly well suited to investigating processes. See generally ROBERT YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* (2d ed. 1994).

44. For a description of the case study methodology, including criteria for case selection, see CLASS ACTION DILEMMAS, *supra* note 4, at ch. 4 and App. D. Five of these cases were settled in federal court, and the other half were settled in state court. In 6 of the 10 cases, either the settling lawyers or other lawyers filed similar class action lawsuits in other jurisdictions.

2. It is easy to detect non-meritorious class actions—and most suits are non-meritorious.
3. The benefits of class actions accrue primarily to the lawyers who bring them.
4. Transaction costs far outweigh benefits to the class and society.
5. Existing rules are not adequate to insure that class actions serve their public goals.

This section summarizes the findings from the RAND case studies pertinent to these claims.⁴⁵ The findings paint a more complex and more nuanced picture of damage class actions than generally is found in media reports, political commentary, and scholarly writing. Damage class actions are clearly powerful beasts. While they may appear to be “monsters” to those who must defend themselves against them, they seem more like stalwart—although sometimes wayward—protectors to consumer advocates and public interest attorneys. Whether the powers of the “monsters” are directed at doing social good rather than harm depends substantially on how well judges control the litigation process. In U.S. courts today, it appears as though wrestling with the monster is more than some judges are willing to take on.

A. Class Actions Are the Products of Multiple Actors

The image of class action lawyers as “bounty hunters” pervades the debate over damage class actions. Without greedy lawyers to search them out, the argument goes, there would be few, if any, such lawsuits. The RAND case studies tell a more textured tale of how damage class actions arise and obtain certification.

In the ten lawsuits my colleagues and I studied closely, class action lawyers played myriad roles. Some class actions arose after extensive individual litigation or efforts to deal with consumer complaints outside the courts; others were the first and only form of litigation resulting from a perceived problem. Sometimes class action lawyers uncovered an allegedly illegal practice on their own. Sometimes angry consumers (or their lawyers) contacted the class action lawyers. Sometimes the class action lawyers first found out about a potential case from regulators or the media. Sometimes they jumped onto a litigation bandwagon that had been constructed by other class action lawyers. When they came later to the process, class action at-

45. For details of the case study findings, see CLASS ACTION DILEMMAS, *supra* note 4, at chs. 5-14.

torneys sometimes brought resources and expertise that helped conclude the case successfully for the class, though sometimes they seemingly arrived simply to claim a share of the spoils.

Defendants' responses to the class actions varied from case to case. In seven of the ten cases, they opposed class litigation vigorously, not only seeking to have the case dismissed on substantive legal grounds but also contesting certification, sometimes all the way up to the highest appellate courts. Once they lost the initial battle(s) over certification, however, these defendants joined with plaintiff attorneys in pursuing certification of a settlement class. In the remaining three cases, from the moment of filing, defendants seemed about as eager as plaintiff attorneys to settle the litigation by means of a class action, often after extensive individual litigation, previous class actions, or both. Once defendants decided to support class action treatment of the litigation, they (not surprisingly) favored as broad a definition of the class as possible. Some defendants also sought to bind class members definitively, by seeking certification of non-opt-out classes or subclasses.

B. It Is Often Difficult to Judge the Merits of Damage Class Actions

A central theme of the current controversy over damage class actions in the United States is that a large fraction of such lawsuits are non-meritorious because the alleged damages to class members are "trivial," "technical," or just plain make-believe. In its recent effort to reform the class action rule, the Civil Rules Advisory Committee devoted considerable energy to attempting to frame rule revisions that would screen out such cases.⁴⁶

In the policy debate, questions about lawsuits' merits, which pertain to the facts and law, are often confused with criticism of their outcomes, which are a product of the incentives that drive settlement as well as the merits of the underlying claims. In the RAND case studies, to assess the seriousness of the claims underlying the class actions, we looked at the claims themselves and the allegations that parties made about practices and products, rather than at the way the claims were settled.

Although many of these class action lawsuits were vigorously contested, at the time of settlement there was still considerable uncertainty about defendants' culpability and plaintiff class members' dam-

46. For a discussion of the recent reform efforts, see CLASS ACTION DILEMMAS, *supra* note 4, at ch. 2.

ages. To the RAND research team, it was unclear which, if any, of the ten class actions were non-meritorious and which were worthy of litigation. In each lawsuit, viewed from one perspective, the claims appeared meritorious and the behavior of the defendant blameworthy; viewed from another perspective, the claims appeared trivial or even trumped up, and the defendant's behavior seemed proper. Moreover, we have found that different readers' assessments of the merits of the cases often are diametrically opposed.

Among the ten class actions, the alleged losses to individuals varied enormously. Among consumer suits, the alleged individual dollar losses ranged from an average of \$3.83 to an average of \$4550; in five of the six cases the average was probably less than \$1000.⁴⁷ It is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense. By comparison with the consumer cases, the individual losses alleged in the mass tort class actions varied more in character and quantity, ranging from losses of less than \$5000, to allegations of death in one of the mass personal injury lawsuits. In the latter case, had plaintiff attorneys been confident that they could prevail on liability, individuals would have been able to secure legal representation on a contingency-fee basis. In cases like the other three mass tort class actions, however, where losses were comparatively small, securing individual legal representation on a contingency-fee basis would have been more problematic unless plaintiff attorneys were prepared to pursue individual claims in a mass, but non-class, litigation.⁴⁸

The defendants' practices that led to the consumer class actions ranged from modest overcharges on individual transactions to sales practices that were allegedly calculated to deceive. Depending on how one told the story of what defendants did, they appeared more or less culpable. Whether defendants' practices violated applicable statutes, regulations, and case law was the most contentious issue in the consumer class actions we studied—an issue that was never fully resolved because none of these cases went to trial.

Three of the mass tort class actions alleged manufacturing defects, and the fourth concerned disposal of toxic factory waste products. In three of the four mass tort class actions my colleagues and I studied, defendants did not contest plaintiffs' assertions that the products involved were defective, although defendants did contest

47. Information on losses was not available in all cases.

48. In one instance, thousands of claims had, in fact, been informally aggregated. The lawyers who represented clients in this litigation opposed class certification.

their liability for these defects. The battles over scientific evidence that have characterized many high-profile mass tort class actions—battles that go to the heart of the question of their merit—were largely absent from these cases. However, had one of the mass personal injury class actions reached trial, the question of scientific causation would have been key to the outcome.

C. Assessing Benefits and Costs Is Also Difficult

The notion that class action attorneys are the prime beneficiaries of damage class actions is widespread. Tales abound of lawsuits in which class members receive checks for a few dollars—or even a few cents—while lawyers reap millions in fees. The “aroma of gross profiteering”⁴⁹ that many perceive rising from damage class actions troubles even those who support continuance of damage class actions and fuels the controversy over them.

Among the damage class actions my RAND colleagues and I studied, we found enormous variety in the amounts of money that class members received and in the suits’ non-monetary consequences. Class action attorneys received substantial fees in all of the suits, but both the amount of their fees and their share of the monetary funds created as a result of the settlements varied dramatically.

The wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion’s share of settlements. But what we learned about the process of reaching these outcomes suggests that class counsel were sometimes simply interested in finding a settlement price that defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions. Moreover, among the class actions we studied, some settlements appeared at first reading to provide more for class members and consumers than they actually did, and class action attorneys’ financial rewards sometimes were based on the settlements’ apparent value rather than on the real outcomes of the cases.

49. John Frank, a member of the 1966 Civil Rules Advisory Committee that drafted Rule 23(b)(3) has written: “The great big question [about damage class actions] is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system.” *Whither Rule 23: Memorandum to the Honorable Patrick Higgenbotham* (Apr. 28, 1995) (on file with the Advisory Committee).

In one of the ten class actions, there was no public record of the total amount the defendant had agreed to pay class members, although there was a record of the attorney fee award. In the nine remaining cases, the total compensation defendants offered class members ranged from just under \$1 million to more than \$800 million. One of these cases included a substantial “coupon” component; depending on how one valued these coupons, the settlement was worth close to \$70 million, or just about \$35 million.

When reviewing class action settlements, judges must consider whether they are “fair, adequate and reasonable.”⁵⁰ Comparing a proposed settlement amount to the estimated class losses provides one basis for such an assessment. However, in seven of the ten class actions we studied, the attorneys never offered a public estimate of these losses.

In three cases, by the time of the RAND study, class members had claimed all or almost all of the money set aside for compensation. In three other cases, it appeared that all or almost all of the funds committed by the defendants for class compensation would ultimately be claimed. However, in another three cases, class members claimed one-third or less of the funds set aside for compensation.⁵¹ In the remaining case, although the total compensation made available to the class was not reported to the court, we believe that less than half of the settlement was claimed.

The total amount of compensation dollars collected or projected to be collected by class members in the cases RAND studied ranged from about \$270 thousand to about \$840 million. Average payments to individual class members ranged from about \$6.00 to \$1500 in consumer suits, and from about \$6400 to \$100,000 in mass tort suits. (See Table 2)

50. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975).

51. In one of these cases, our calculation is based on estimates from public financial data rather than courts records, as the judge did not require the parties to report disbursement information to him.

TABLE 2
TOTAL COMPENSATION OFFERED AND COLLECTED BY
CLASS MEMBERS, AND AVERAGE CASH PAYMENTS

	Total Amount Defendants Agreed to Pay in Compensation (\$M)	Total Amount Collected By Class Members (\$M)	Average Cash Payment (\$)
<u>Consumer Class Actions</u>			
<i>Roberts v. Bausch & Lomb</i>	\$33.500,plus \$33.500 coupons	\$9.175 ¹	Unknown
<i>Pinney v. Great Western Bank</i>	\$11.232	\$11.232	\$1478.89
<i>Graham v. Security Pacific Housing Services, Inc.</i>	\$7.868	\$7.868 ¹	\$130.71
<i>Selnick v. Sacramento Cable</i>	\$0.929	\$0.271	\$35.58
<i>Inman v. Heilig-Meyers</i>	Unknown	\$0.272 ²	\$45.79 ²
<i>Martinez v. Allstate/ Sendejo v. Farmers</i>	\$25.235	\$8.914	\$5.75
<u>Mass Tort Actions</u>			
<i>In re Factor VIII or IX Blood Products</i>	\$650.000	\$620.000 ³	\$100,000.00
<i>Atkins v. Harcros</i>	\$25.175	\$25.175	\$6404.22
<i>In re Louisiana-Pacific Siding Litigation</i>	\$470.054	\$470.054 ³	\$4367.27 ⁴
<i>Cox et al. v. Shell et al.</i>	\$838.000	\$838.000 ³	\$1433.29 ⁴

NOTES:

¹ Estimated from financial reports and other documents.² Information not from public records.³ Projected.⁴ to June 1998.

In all six consumer cases, the litigation was associated with changes in the defendants' business practices. In four of the six cases, the evidence strongly suggests that the litigation, directly or indi-

rectly, produced the changes in practice. In the two other lawsuits, the evidence on whether the instant class action led to the change is more ambiguous. Three of the consumer cases also led to changes in state consumer law, although in one case, the revision was arguably pro-business. In three of the mass tort cases, the class litigation *followed* removal of the product from the market or change in the product. In the fourth, the manufacturer changed the product (which is still marketed) after state attorneys general investigations and litigation commenced.

Awards to class action attorneys for fees and expenses ranged from about half a million dollars to \$75 million.⁵² Under law, judges award class counsel fees, calculated either as a share of the total monetary value of the settlement, or by adding hours, assigning an hourly rate (sometimes adjusted by a factor to reflect the quality of the work) and adding in expenses.⁵³ In practice, the total monetary value of the settlement generally is defined as including money made available for compensation to class members, payments to other beneficiaries, and all of the costs required to administer the settlement. In all ten of the RAND case studies, judges used the percentage-of-fund (“POF”) method. In the nine cases for which we know both the total amount of the settlement and the total amount awarded or set aside for class counsel, class counsel fee-and-expense awards ranged from five percent to about fifty percent of the total settlement value. In eight of the nine cases, class counsel received one-third or less of the total settlement value.⁵⁴

In damage class actions, not all class members come forward to claim the full amount defendants make available for compensation. The actual value of a settlement is determined by the amount that is ultimately claimed by class members, which is determined by how many class members come forward, and sometimes by their eligibility for differing levels of payment. Class counsel received one-third or less of the *actual* settlement value in six of the ten cases RAND stud-

52. We could not obtain data on how much defense attorneys earned from these lawsuits because these fees were not a matter of public record and most defendants were unwilling to share the information with us.

53. For a discussion of fee doctrine in common fund cases, see Resnik et al., *supra* note 38.

54. In the tenth case, it does not appear that the judge was provided with any means for comparing the fee request with this benchmark, because there was no public estimate of the aggregate common benefit.

ied;⁵⁵ in the remaining four cases, class counsel's share of the actual settlement value was about one-half. In three of the mass tort cases, class counsel were awarded *less than ten percent of the actual settlement value*, but the absolute dollar amount was very large because these settlements were huge.

Critics often use yet a third benchmark to assess plaintiff class action attorney fees: the amount the attorneys are awarded, compared to the amount class members receive. Because class counsel are paid for what they accomplish for the class as a whole, their fee awards will almost certainly be greater than any individual class member's award, even in a mass tort class action where class members sometimes receive substantial settlements. But in three of the cases we studied, class counsel received more than class members received *altogether*. (See Table 3)

55. Although we do not know the total negotiated settlement value in one case, the defendant did share information with us on its actual value. Hence, we can compute these shares for all ten cases.

TABLE 3
TOTAL AWARDED TO CLASS COUNSEL, COMPARED TO
TOTAL PAID TO CLASS

	Class Counsel Award for Fees & Expenses (\$M)	Total Cash Payment to Class Members (\$M)
<u>Consumer Class Actions</u>		
<i>Roberts v. Bausch & Lomb</i>	\$8.500	\$9.175 ²
<i>Pinney v. Great Western Bank</i>	\$5.223	\$11.232
<i>Graham v. Security Pacific Housing Services, Inc.</i>	\$1.920	\$7.583
<i>Selnick v. Sacramento Cable</i>	\$0.511	\$0.271
<i>Inman v. Heilig-Meyers</i>	\$0.580	\$0.272 ³
<i>Martinez v. Allstate/Sendejo v. Farmers</i>	\$11.288	\$8.914
<u>Mass Tort Class Actions</u>		
<i>In re Factor VIII or IX Blood Products</i>	\$36.500 ¹	\$620.000 ¹
<i>Atkins v. Harcross</i>	\$24.900	\$25.175
<i>In re Louisiana-Pacific Siding Litigation</i>	\$25.200	\$470.054 ¹
<i>Cox et al. v. Shell et al.</i>	\$75.000	\$838.000 ¹

NOTES:

¹ Projected.² Estimated from financial reports and other documents.³ Information not from public records.

D. Deciding Whether the Benefits Are Worth the Costs Requires a Political Judgment

Class actions are costly. My RAND colleagues and I estimated that total costs in the ten cases we studied, excluding defendants' own legal expenses, ranged from about \$1 million to over \$1 billion. Eight of the ten cases cost more than \$10 million; four of the ten cost more than \$50 million; three cost more than half a billion dollars.

Transaction costs in class action lawsuits include not only the plaintiff class action attorneys' and defense attorneys' fees and expenses, but also the costs of notice and settlement administration, which can be substantial. Because most defendants declined to share data on their own legal expenses, my colleagues and I could not cal-

culate a transaction cost ratio that took into account all dollars spent on these lawsuits. As a share of the total bill—excluding defendants’ legal fees and expenses but including plaintiff attorneys’ fees and expenses and administrative costs—transaction costs were lowest in three of the four mass tort class actions, and highest in the consumer class actions. But because mass tort cases are likely to impose large defense costs, these differences may be illusory. My colleagues and I did not estimate the public costs associated with the cases we studied. However, the Federal Judicial Center has estimated that damage class actions take about five times as much judicial time as comparable non-class suits.⁵⁶

Determining whether the benefits of Rule 23 damage class actions outweigh their costs—even in only ten lawsuits—turned out to be enormously difficult. Whether the corporate behaviors that consumer class actions sought to change were worth changing, whether the dollars that plaintiff class action attorneys sought to obtain for consumer class members were worth recouping, and whether the changes in corporate behavior that were achieved and the amounts of compensation consumers collected were significant are, to a considerable extent, matters of judgment. Whether the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters of judgment.

How one assesses the cost-benefit ratio of these class actions depends in part on how one assesses the merits of the underlying claims, the value of the settlements to class members, the deterrence value of the litigation, and the democratic value of providing access to the justice system. It also depends on one’s confidence in other institutions’ capacity to identify wrongdoing and to seek remedies for those who are harmed and penalties for those who erred. Answering these questions ultimately requires political judgments.

E. The Rules in Practice Do Not Provide Sufficient Protection Against the Self-Interests That Pervade Class Actions

In the United States, rules and case law set guidelines that are intended to protect against the powerful incentives for self-dealing that

56. See WILLGING ET AL., *supra* note 8.

inhere in representative litigation.⁵⁷ The RAND case studies, as well as the research teams' interviews with class action lawyers, defendants, public interest lawyers, judges, and others, persuaded my colleagues and me that these protective mechanisms too often fail. In the ten class actions we studied, we found considerable variation in what judges required of attorneys and parties. From a societal perspective, the balance of benefits and costs was more salutary when judges did the following:

- required notifying class members about the purposes, progress, and likely outcomes of the litigation;
- closely scrutinized the details of proposals to resolve the litigation by negotiated settlements;
- invited the participation of outsiders, who offered alternative perspectives on settlement proposals;
- took responsibility for determining attorneys' fees, so as to preclude collusion between class attorneys and defendants;
- determined fees in relation to the actual benefits created by the lawsuit to insure that class attorneys were not offered improper incentives for bringing weak suits; and
- monitored the distribution of compensation funds post-settlement.

However, exercising their authority to demand or carry out these tasks requires substantial resources that are often not available to judges and may also require managerial and extra-legal expertise that is beyond the reach of some judges. A nation or other jurisdiction that chooses to provide a private litigation vehicle for achieving social goals such as regulatory enforcement and mass compensation ought not to venture into this territory unless it has both the means and the will to invest the resources necessary to regulate the litigation.

IV. NEW MONSTERS?

In the past few years, the spotlight of controversy over class actions in the United States has shifted from securities, consumer, and mass tort class actions to large-scale litigation against tobacco manufacturers, gun manufacturers, and health care management and insurance corporations ("managed care organizations"). This new litigation comprises a mix of private personal injury claims pursued collectively (that is, mass torts) and public actions brought by state at-

57. For a discussion of these rules and their practical applications, see CLASS ACTION DILEMMAS, *supra* note 4, at ch. 3.

torneys general and other public officials. The public actions typically seek reimbursement of government expenditures allegedly incurred as a result of injuries due to the manufacturers' practices. Some of these actions have proceeded individually, but some—such as the tobacco lawsuits by state attorneys general—have been litigated in a coordinated fashion. In addition to seeking monetary compensation for individuals and public entities, the new litigation seeks the kind of industry-wide changes in corporate products and practices that advocates have pursued, without much success, in state and federal legislatures. Because of these special goals, I call these new lawsuits “social policy torts.”

Public officials and private attorneys are collaborating on this litigation, which also has the support of advocacy groups such as public health organizations, gun control advocates, and consumer health care advocates. Because of their objectives and the configuration of parties on the plaintiff side, these lawsuits have a political dimension that is not generally present in other damage class actions. Indeed, these lawsuits bear more resemblance to the “social impact” litigation that some 1966 Civil Rules Advisory Committee members said they wanted to facilitate than do the consumer class actions and mass tort class actions that RAND investigated.⁵⁸ But unlike the attorneys who traditionally litigated social impact class actions—who accepted less than full-market wages in order to pursue their policy agenda—the attorneys in these cases expect to reap large financial rewards if they are successful. These new suits have attracted particular attention for at least three reasons: (1) the suits take on powerful industries that have previously been able to prevent or limit regulation of their products or practices; (2) they seek industry-wide changes that many consider the exclusive purview of federal and state legislatures; and (3) they ask for billions of dollars in damages.

A. Tobacco

For decades, tobacco companies successfully defended themselves against personal injury litigation by adopting a policy of investing whatever resources were necessary to avoid paying plaintiffs. The companies well understood that settling with any smokers would inevitably lead to the filing of more lawsuits. No individual plaintiff law firm had the resources to match those of the tobacco companies.

58. Interestingly, few of the journalists covering this litigation and few of the political commentators seem to know that there is a long history of using class actions as a tool for social policy change.

By the 1980s, some mass tort plaintiff firms had acquired sufficient resources and experience litigating mass claims to be ready to take on the tobacco companies. But when they tried to use the techniques that had proved successful in other mass tort litigation against the tobacco companies, they too met with little success.⁵⁹ The first class action certified against tobacco manufacturers⁶⁰ was also unsuccessful. It was only when the state attorneys general and private class action attorneys joined forces to pursue litigation (in a non-class form) on behalf of state governments seeking reimbursement for the costs of providing medical care to smokers that the manufacturers shifted their strategy. In exchange for protection against punitive damages and future class actions the companies put billions of dollars on the table and agreed to extensive changes in marketing practices.⁶¹ Although the broad nationwide settlement envisaged by the attorneys and the companies never came to pass, the manufacturers ultimately settled with all of the states for a total of more than \$240 billion.⁶² The \$3.5 billion settlement negotiated with the companies by Mississippi Attorney General Mike Moore was the first payment by the industry to compensate for tobacco-related injuries.⁶³

The private lawyers who represented the states were hired by state attorneys general under contingency-fee contracts that promised fees ranging from ten to twenty five percent.⁶⁴ Critics claimed that the

59. See Robert Rabin, *Institutional and Historical Perspectives in Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE* (1993); Gary Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE*, at 131.

60. See *Castano v. American Tobacco Co.* 160 F.R.D. 544 (E.D. La. 1995). The certification was withdrawn the following year. See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

61. See CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE TOBACCO GIANTS* (1998). The settlement at the center of Mollenkamp et al.'s tale was not adopted by Congress. Ultimately, the states negotiated their own settlements with the tobacco manufacturers. A key factor in the success of recent litigation was the release of documents indicating that tobacco manufacturers understood the health consequences of smoking. See RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNASHED TRIUMPH OF PHILLIP MORRIS*, (1996). See also Paul Barrett, *Jumping the Gun: Where Tobacco and Firearms Diverge*, WALL ST. J., Mar. 12, 1999, at 1 (citing conversations with Lawrence Tribe and David Kessler about the role of whistle-blowers and bad documents in the successful litigation against tobacco manufacturers).

62. See Barrett, *supra* note 61.

63. See Profile of Mike Moore, <<http://www.msnbc.com>>. After Moore filed Mississippi's lawsuit against the tobacco companies, Governor Kirk Fordice sued the attorney general to prevent the suit from going forward.

64. See Barry Meier, *Lawyers in Tobacco Case Will Receive \$8.2 Billion*, N.Y. TIMES, Dec. 12, 1998, at 1.

attorneys general selected these attorneys because they had contributed to the elected officials' campaigns,⁶⁵ but in fact the litigation teams comprised the nation's leading mass tort and class action lawyers. The lawyers who represented the first states to settle were awarded \$8.2 billion in fees by a panel of arbitrators.⁶⁶

B. Guns

The attorneys pursuing litigation against the gun manufacturers have said their efforts are modeled on the litigation against the tobacco manufacturers.⁶⁷ Although some of the class action attorneys who played prominent roles in the tobacco litigation have not joined the litigation against gun manufacturers,⁶⁸ the group of plaintiff attorneys that filed the *Castano*⁶⁹ class action in the mid 1990s, led by Wendell Gauthier of New Orleans, is a key participant. Some anti-smoking advocates also have offered their support. While noting that his group expected to win substantial fees if successful, Gauthier argued that as a result of the litigation the gun manufacturers would be forced to agree to regulations on manufacturing and marketing that they have previously resisted.⁷⁰ The suits against gun manufacturers filed on behalf of municipalities variously seek changes in practice and damages to cover public costs associated with gun violence, such as police protection and emergency medical services, and some are grounded on novel legal theories.⁷¹

The gun litigation demonstrates the power of large-scale litigation, whether or not pursued within a class action context, to capture the attention of the public, the press, and decision-makers. The suits are a mix of cases filed by individual plaintiffs (e.g. victims of gun violence or their families) and cases filed by cities and other public entities. Many of the suits brought by public entities are represented by the same attorneys (e.g. the Center to Prevent Hand-Gun Vio-

65. *See id.* (quoting Professor John Coffee of Columbia Law School).

66. *See id.*

67. *See* Barrett, *supra* note 61.

68. For example, as of 1999, Richard Scruggs had declined to become involved. Among his reasons, according to a Wall St. Journal reporter who interviewed him, was a feeling that guns are not wholly bad and uncertainty about whether "there's so much money at the end of the day" for a potential settlement. The reporter noted that whereas cigarette manufacturers' annual revenues are about \$45 billion, gun manufacturer sales total only about \$1.4 billion annually. *Id.*

69. 160 F.R.D. 544 (E.D. La. 1995).

70. *See* Barrett, *supra* note 61.

71. *See* John Gibeaut, *Gunning for Change*, 86 A.B.A. J. 48 (2000).

lence),⁷² and the litigation is apparently being coordinated by public officials, public interest lawyers, and private attorneys. Reports on the gun litigation virtually always link it to the tobacco litigation,⁷³ focusing on the nationwide character of each, the attempts to shape industry practices where legislation has failed, and the connections among lawyers in both sets of lawsuits. Judges⁷⁴ responses to the litigation also reflects these perceived connections.

The gun litigation also powerfully demonstrates the links between the new social policy torts and politics. When the state of Georgia passed legislation banning suits by municipalities against gun manufacturers, the National Rifle Association's Institute for Legislative Action predicted "in the next year, [we] think we can probably get 25 or 30 more states to do the same thing."⁷⁵ By the spring of 1999 bills were being introduced in the U.S. Congress intended variously to facilitate and oppose suits against the gun industry.⁷⁶ When New York City decided to join the gun litigation in spring 2000, reporters speculated that Mayor Giuliani's withdrawal from his state's U.S. Senate race had freed him to oppose the powerful industry and its allies.

C. Managed Care

More than a dozen class action lawsuits have been filed against managed care organizations,⁷⁷ representing some fifty million persons in the United States whose care is provided by health maintenance

72. *See id.*

73. For example, a report of a New York jury's verdict against gun manufacturers moves quickly from a description of the instant case and the jury's decision to interviews with commentators about the ability of the industry to withstand nationwide litigation. *See* Derrick Jackson, *A Wound to the Gun Makers*, LOS ANGELES DAILY J., Feb. 19, 1999, at 6.

74. Rejecting Bridgeport, Connecticut's complaint against the gun manufacturers, Judge Robert McWeeny wrote: "When conceiving the complaint in this case, the plaintiffs must have envisioned such settlements as the dawning of a new age of litigation during which the gun industry, liquor industry and purveyors of junk food would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation." *Ganim v. Smith & Wesson*, No. X06-CV-99-0153198S (Dec. 10, 1999) (*quoted in* Gibeaut, *supra* note 71).

75. Jackson, *supra* note 73. By December 1999, at least 10 other states had followed Georgia's lead. *See* Tom Schoenberg, *District's Gun Suit A Long Shot*, LEGAL TIMES, Dec. 1, 1999, at 1.

76. *See* Doug Morgan, *What in the Wide, Wide World of Torts is going On? First Tobacco, Now Gun: An Examination of Hamilton v. ACCU-TEK and the Critics' Lawsuits Against the Gun Industry*, 69 MISS. L.J. 521, n. 5 (1999). *See also* Schoenberg, *supra* note 75.

77. *See* Milt Freudenheim, *HMOs, Under Attack, Face Supreme Court Test*, N.Y. TIMES, Jan. 4, 2000, at A1.

organizations.⁷⁸ Suits have been filed both by private attorneys and state attorneys general. Among the private attorneys are Ron Motley, a leading asbestos mass tort attorney, and Richard Scruggs, who played a prominent role in the suits against tobacco companies in 1997 and 1998.⁷⁹ Mr. Scruggs has described his role in the litigation as an effort to force changes in health care policy that Congress has so far not adopted.⁸⁰ The class action lawsuits generally argue that health care plans have breached their fiduciary duties to plan enrollees by adopting various cost-control mechanisms. The U.S. Supreme Court's recent decision in *Pegram v. Herdich*,⁸¹ holding that managed care organizations cannot be sued for imposing such constraints, is widely regarded as placing a major roadblock in the path of these suits,⁸² but the future of the litigation remains uncertain.

* * *

The involvement of wealthy private class action attorneys has encouraged some media and political critics to portray the new social policy torts as examples of plaintiff attorney greed. But the key question raised by this litigation is the appropriateness of using litigation as a governance tool. Whatever the failures of the legislative process, it generally operates in a public spotlight and provides regular opportunities for the electorate to hold their representatives accountable. Interest groups with different perspectives may present their views on the problems under debate and the evidence that supports those views, and offer their preferred policy solutions. Although the political compromises that emerge from the legislative process distribute costs and benefits to various interests—and reflect the relative power of these interests—those who negotiate these compromises do not have a direct financial interest in the outcomes. When the goals of litigation include policy-making—as plaintiffs have claimed with regard to litigation against tobacco and gun manufacturers and managed care organizations—it is appropriate to ask how well litigation

78. See David Savage, *Cost-Cutting Consequences: An HMO liability case is being closely watched by the lawyers who targeted tobacco companies*, A.B.A. J. 30 (2000).

79. An article published in February 2000 opined: "If Herdich wins, HMO's may replace the big tobacco companies as the prime target of the nation's trial lawyers." *Id.*

80. *See id.*

81. 120 S.Ct. 2143 (2000).

82. See Edward Walsh & Amy Goldstein, *High Court Hands HMOs A Victory*, WASH. POST, June 13, 2000, at A1.

conforms to our expectations of how policy ought to be made in a democratic society.

V. IMPLICATIONS FOR THE FUTURE

Today in the United States and in some other countries as well, it has become popular to rail against the excesses of the civil justice system. Large-scale litigation is the new “monster,” portrayed as a product of entrepreneurial lawyers and greedy citizens, intent on securing financial rewards for questionable claims. In the United States, many see the class action rule as the key to opening the monster’s cage and setting it free. But large-scale litigation is the consequence of socio-economic trends, *not* the cause of these trends. If there is a new “monster” at large, it is the rise of multi-national corporations and the development of a global economy that bring with them the potential for large-scale injuries resulting from worldwide product consumption. If there is a key that has unlocked the monster’s cage, it is the information science revolution and the development of the Internet, which have provided the means for people to become informed about such injuries and the tools for individuals, organizations, and attorneys to organize to secure remedies. The question is not *whether* governments need to respond to such socio-economic changes, but *how*.

The great question facing civil justice regimes in the United States and elsewhere is what the role of the judiciary should be in responding to large-scale harms. In the United States, where we have historically relied on private solutions to social problems, it is highly likely that we will continue to rely on the courts and private litigation to resolve disputes arising out of personal injury and property damage. Traditional civil procedures, with their emphasis on individual due process and individually crafted outcomes, were well suited to personal injury and property damage litigation alleging particularistic harms to diverse individuals. Large-scale litigation challenges the individual values that lie at the heart of this traditional system. The challenge for courts is to develop tools for managing and resolving large-scale litigation efficiently and fairly.

Judges, other public policy makers, and scholars are unlikely to find the best means of developing these tools in normative discourse that is ungrounded in the empirical realities of mass litigation. To choose appropriate procedures for managing and resolving large-scale litigation, we need to consider carefully the practical consequences of alternative procedures, including representative class ac-

tions, bankruptcy, consolidation, and other forms of aggregation. There is little hope that a knight in shining armor will emerge as a result of such study. But we may learn how to harness the power of the large-scale litigation monster to do more good than harm.