

# The Administration of Justice in Commercial Disputes : Developments in the United States

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Over the last quarter-century, the United States civil justice system has undergone profound — and accelerating — changes. To be sure, a time-traveller from 1970, or even 1950, who walked into a federal or state courthouse would not immediately notice significant differences, and the Federal Rules of Civil Procedure, which govern the conduct of litigation in the federal courts, would look substantially similar.<sup>1</sup> But on closer examination our time-traveller would realize that civil dispute resolution in the United States is being transformed. And contrary to what one might expect, the changes have been most sweeping at the fundamental level, even as outward appearances have remained much the same.

In this paper I discuss four trends that are shaping civil dispute resolution in the United States, and conjecture about where these trends may be taking us and whether we should want to go there. The first trend is increased aggregation of claims to produce extremely large and complex cases involving enormous financial stakes that are processed through mass, rather than individual, treatment. The second is the case management movement, which has led, among other things, to a change in judges' self-perception of their roles from the traditional adjudicatory function to that of case managers whose primary goal is to promote resolution of cases by settlement rather than by adjudication. The third is the privatization of civil dispute resolution — the withdrawal of a significant portion of several important kinds of civil litigation, primarily involving commercial disputes, from the public courts and the creation of private institutions to hear them. Fourth and finally, Congress has recently taken a more active role in promulgating procedural rules for the federal courts; these efforts, ironically, have often led to decentralized rule-making and a lack of uniformity in the procedural rules of the federal courts.

## **I. CLASS ACTIONS AND OTHER AGGREGATIVE PROCEDURES**

It is no longer very illuminating to speak of class actions as though they were a monolithic category. There are several distinctive types of class actions, each with its own characteristic issues. Important recent developments have occurred in three such categories : securities, consumer, and mass torts.

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1. Rule 23, the class action rule which was adopted in essentially its present form in 1966, Rule 26(a), which provides for automatic disclosure of certain core information, Rule 11, which authorizes sanctions for attorney and party misconduct, and Rule 16, which has expanded the scope of pretrial conferences, are exceptions. Fed. R. Civ. Proc. 11, 16, 23, 26(a).

### A. Mass Tort Class Actions

By far the most controversial developments in class action litigation have concerned mass tort cases. Only a few years ago, this category of class actions was virtually nonexistent. The official comments to the 1966 amendments to Rule 23 that created the modern class action specifically stated that "[a] 'mass accident' [...] is ordinarily not appropriate for a class action" because individual issues "not only of damages but of liability and defenses" would predominate, making certification under section (b)(3) inappropriate. Early efforts by plaintiffs to have mass tort classes certified were denied.<sup>2</sup> The realities of modern commerce and technology, however, make it possible for commercial disputes to involve mass claims — similar injuries to many people caused by the same product or events. In turn, the courts must find ways to handle mass litigation, for gigantic litigations do not seem to lend themselves to "just, speedy, inexpensive"<sup>3</sup> and final resolution on an individual, case by case basis. This section summarizes developments in three mass litigations that have been much in the news in the past year : asbestos, tobacco, and breast implant litigation.

#### 1. Asbestos

Asbestos was the first huge mass tort litigation, and is still the most intractable. Individual asbestos cases flooded the courts and in some districts practically brought the trial-level courts to their knees. In the words of the 1990 report by a Judicial Conference committee appointed by the Chief Justice :

[This] is a tale of danger known in the 1930's, exposure inflicted upon millions of Americans in the 1940's and 1950's, injuries that began to take their toll in the 1960's, and a flood of lawsuits beginning in the 1970's.<sup>4</sup>

Between 13 and 21 million workers have been exposed to asbestos in the workplace. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015. Several hundred thousand lawsuits have been filed, and because the latency period is as long as 40 years, more cases continue to be filed than can be settled. In 1991, there were about 30,000 asbestos cases pending in the federal courts (about one-third the number of state court cases). At least seven defendants, including the largest, the Manville Corporation, have declared bankruptcy. Despite the fact that the role of asbestos in causing cancer, asbestosis, mesothelioma and other diseases is well known and every conceivable issue has been litigated repeatedly, transaction costs continue to consume 63 cents of every dollar spent on asbestos

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2. See *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (asbestos); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (vacating certification of a mandatory class in litigation over the collapse of two skywalks at a hotel in Kansas City); *In re Bendectin Prod.*, 749 F.2d 300 (6th Cir. 1984) (vacating (b)(1) "limited fund" certification order).

3. See Fed. R. Civ. Proc. 1.

4. *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997) (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991) [hereinafter *Amchem*]).

litigation.<sup>5</sup> The only real solution is legislation to establish a national asbestos dispute-resolution scheme.<sup>6</sup> There is no reasonable likelihood that this will ever happen, and the courts have been left to deal with the situation as best they can. Those efforts are a story of efforts to aggregate claims and cases to achieve efficiency and final resolution, in tension with the values of due process and individual justice.

In the 1970's, plaintiffs began to attempt to secure class action treatment for these claims, but certification was routinely denied on the ground that the individual issues of causation and damages predominated.<sup>7</sup> Efforts to consolidate the thousands of cases pending in federal courts into one court under the multidistrict litigation statute also failed, on six tries, for similar reasons.<sup>8</sup> As asbestos litigation continued and increased, courts and defendants began to despair of ever bringing the litigation to a conclusion. The Manville Corporation, the largest asbestos manufacturer, sought bankruptcy protection both because it faced liability greatly exceeding its assets and because bankruptcy proceedings seemed to be the only feasible way of consolidating the cases for resolution.<sup>9</sup>

Though the appellate courts had rebuffed attempts to certify mass tort classes, the claims were receiving mass treatment in other ways. Out of court, cases received mass treatment as lawyers maintained "inventories" of thousands of claimants, coordinated their efforts with other mass tort specialist lawyers, and negotiated with defendants on a wholesale basis rather than case by case. Mass treatment outside the court also occurred in the settlement context, where defendants and plaintiffs' lawyers negotiated wholesale settlements of claims, frequently by arrangements in which the defendants set aside an agreed sum for payment of settled claims, which were then allocated among claimants in out-of-court private adjudications following procedures set up by the settlement. Plaintiffs unwilling to accept the offered terms would continue to wait their turn for a court date.

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5. See J. S. Kakalik, *et al.*, *Costs of Asbestos Litigation* (Santa Monica, CA : RAND, Institute for Civil Justice, 1983).
  6. See *Amchem*, *supra* note 4 at 2237-38.
  7. Certification was sought under Rule 23(b)(3), which requires that common issues predominate over individual issues. Fed. R. Civ. Proc. 23(b)(3). See *Yandle*, *supra* note 2. This was a common pattern in mass tort cases. See *In Re Northern District of California "Dalkon Shield" IUD Prod.*, 521 F.Supp. 1188 (N.D.Cal. 1981); 526 F.Supp. 887 (N.D. Cal. 1981) (certifying nationwide punitive damages class and statewide liability class), rev'd, 693 F.2d 847 (9th Cir. 1982).
  8. See *In re Asbestos and Asbestos Insulation Material*, 431 F. Supp. 906 (Jdl. Panel on Multidistrict Litig. 1977); see also *In re A.H. Robins Co., "Dalkon Shield" IUD Prod. (No. II)*, 610 F. Supp. 1099 (Jdl. Panel on Multidist. Litig. 1985) (defendant's request for MDL transfer for purposes of negotiating settlement denied). In the 1970s and 1980s, both multidistrict treatment and class certification were commonly denied.
  9. See J.C. Coffee, Jr., "Class Wars : The Dilemma of the Mass Tort Class Action" (1995) Colum. L. Rev. 1343, 1386-88. In addition, bankruptcy proceedings would effectively remove the threat of punitive damages.

The volume of asbestos cases continued to increase, and by 1990 eight federal district judges from districts with especially heavy asbestos dockets took the unusual step of writing to the Judicial Panel on Multidistrict Litigation to request it to act on its own to consolidate the federal asbestos litigation in one court.<sup>10</sup> In 1991 the Panel ordered consolidation of over 26,000 asbestos cases pending in 87 federal district courts, stating that the sheer volume of asbestos cases "threatens to deny justice and compensation to many deserving claimants if each claim is handled individually."<sup>11</sup>

While the multidistrict procedure does increase efficiency by permitting consolidated treatment of pretrial motions and discovery, the statute does not authorize the compulsory global settlement or trial of all claims. Rather, it contemplates that the cases will be returned to their districts of origin for trial.<sup>12</sup> Additionally, cases pending in state courts cannot be consolidated into the federal multidistrict proceedings unless there is an independent basis for federal jurisdiction and the case is properly removed to federal court. Nevertheless, parties, judges, and other proponents generally agree that a major purpose of multidistrict treatment is to facilitate settlement on a mass basis.

Meanwhile, courts were beginning to recognize that some mass tort cases, such as airplane crashes and other "mass disasters" and cases involving economic rather than personal injury, were good candidates for class treatment.<sup>13</sup> Defendants, who had previously opposed class certification, began to press for class treatment, seeking a way to bring a final end to litigation. Additionally, experience with the difficulty of resolving mass tort litigation on an individual level led litigants and trial courts to try a new class action tactic : certification of a settlement class.

Efforts to certify mass tort classes have often foundered on the requirement that common issues predominate over individual issues. In mass tort cases, issues of causation, damages, and affirmative defenses are complex and individual. The problem is magnified by variations in the state tort laws that would apply to individual plaintiffs.<sup>14</sup> But most cases do not get as far as trial — especially most class actions. Thus, as a practical matter, the eventualities that defeat class treatment almost certainly will never come to pass. If a

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10. See 28 U.S.C. 1407.

11. *In re Asbestos Prod.*, 771 F.Supp. 415 (Jdl. Panel on Multidist. Litig. 1991).

12. This requirement has often been more honored in the breach than in the observance, for few transferred cases have returned to the court in which they were filed. Often cases are settled in the transferee district. In other cases, transferee judges have transferred cases to themselves for trial. This Term, after this speech was given held that a district court conducting consolidated pretrial proceedings in multidistrict litigation cannot transfer the case to itself for trial. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998). This decision does not affect the possibility of consolidated settlements in the transferee court.

13. See *In re School Asbestos*, 789 F.2d 996 (3d Cir. 1986) (approving certification of a nationwide opt-out class for asbestos property damages).

14. In the United States, tort law is made primarily by the states, not at the federal level. In a nationwide class, the claims of individual class members will likely be decided according to the tort law of the several states. Courts are not permitted to create a hypothetical "average" or "national" tort law, or to choose one state's law, to govern the claims of the entire class.

class is certified, the case can be settled for a lump sum and issues of causation and damages in particular cases shunted off to a private dispute resolution mechanism set up as part of the settlement.

Recognizing these realities, parties began to seek, and courts to grant, certification for settlement purposes only. Since no trial will occur, they reasoned, the problems of managing a single trial for the entire class can be disregarded, and common issues such as defendant's knowledge at relevant times, the general causation issue, an appropriate amount of aggregate damages, and the common interest in a prompt and fair settlement of claims can be found to predominate. If the parties cannot agree on a settlement, the case can revert to individual treatment for trial. If the parties do agree on a settlement, the court will have the settlement itself before it to judge whether it is fair and adequate and whether representation of the class was adequate. A number of courts have accepted this approach and certified settlement classes.<sup>15</sup>

After the federal court asbestos cases were consolidated in the Eastern District of Pennsylvania, plaintiffs and defendants formed steering committees that began to negotiate with each other to settle the consolidated cases. Eventually the defendants announced they would settle no more pending, or "inventory," claims without "protection for the future," and negotiations collapsed. The defendants then approached two lawyers who had headed the plaintiffs' steering committee and who represented about 20,000 plaintiffs with pending claims and invited them to begin discussions of a global resolution of future claims. (as no lawsuits had been filed on those claims, they were not part of the multidistrict litigation). These negotiations resulted in the filing of a class action on behalf of all persons who had been exposed to asbestos in the workplace and their families, who had not filed suit as of January 15, 1993. On the very same day, the defendants answered and the parties filed a proposed settlement agreement and a joint motion for class certification. At the same time, the defendants agreed to settle the class counsel's inventory claims for \$200 million.<sup>16</sup>

The class was a pure settlement class, impossible to litigate and never intended to be litigated. It was estimated that the settlement would pay \$1.3 billion to 100,000 claimants in the first ten years. All of the multi-district litigation plaintiffs were excluded from the class, but the settlement would preclude litigation by any present or future claimant who had not yet filed suit. Those claimants would go through an administrative procedure set out in detail in the settlement agreement, with schedules of payments for defined exposure levels and medical requirements, not adjustable for inflation. The most highly compensated category, mesothelioma claimants, would receive between \$20,000 and \$200,000, much less than such claimants had been receiving at trial or in individual settlements. Some categories of claims (such as claims for medical monitoring, increased risk of cancer, and lung plaques) would receive no compensation, and some categories that had not been receiving compensation in trial would receive compensation under the

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15. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (approving certification of settlement class); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *In re Bendectin*, 102 F.R.D. 239, 240, rev'd on other grounds, 749 F.2d 300 (6th Cir. 1984).

16. *Supra* note 4 at 2238-2239.

settlement. The settlement would cap the number of claims payable for each disease in any given year. The opportunity to opt out of the settlement was limited to a few claimants per year, and those claimants were to be foreclosed from asserting claims for punitive damages or increased risk of cancer. Claimants would be permanently bound by the settlement, but defendants would have the right to withdraw after ten years. The district court certified the class and approved the settlement. The Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals, though on different grounds.<sup>17</sup>

The *Amchem* settlement goes to the heart of the mass tort problem : How can we create techniques of aggregative litigation to permit the civil justice system to handle the challenge of mass torts while continuing to provide justice and due process to injured individuals, many of whom have very serious injuries? Some form of group treatment is clearly necessary to prevent the civil justice system from sinking under the number of cases. Further, at some point the cases will have to be settled rather than tried, because case by case adjudication of the individual issues of causation and damages would overwhelm the courts even if common questions, such as general causation, were decided on a class basis. Consolidation of cases under the multi-district litigation statute, even if nominally only for pretrial proceedings, can lead to the resolution of many cases, because negotiations can lead to a standardized settlement offer that each plaintiff accepts individually. But this procedure cannot finally free defendants from litigation where there will be future claimants, because there is no one to accept the offer. Future claims can only be settled in the present by representative litigation.

Class treatment is troubling, though. Even when there are no future claims, class treatment sacrifices plaintiffs' individual control of their cases. This may not be of much concern in consumer class actions or cases involving purely economic loss, if only because the sums involved are usually relatively minor. But claims in mass tort cases are very large compared to the individual plaintiffs' assets and involve serious personal injuries that are of deep import to the plaintiffs. These are exactly the kinds of claims that traditionally have received the highest due process protection and that seem to deserve such protection. When future claims are added to the mix, representative treatment is even more problematic. Who can be a proper representative of persons who not only are not injured yet, but many of whom don't even know they have been exposed and thus may have claims in the future? How can they be given the due process protections of notice and an opportunity to be heard on the settlement? And most troubling of all, who shall guard the guardians?<sup>18</sup>

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17. *Ibid.* at 2239-2241.

18. See generally P. D. Carrington & D. P. Apanovitch, "The Constitutional Limits of Judicial Rulemaking : The Illegitimacy of Mass Tort Settlements negotiated under Federal Rule 23" (1997) 39 *Ariz. L. Rev.* 461; Coffee, *supra* note 9; S. P. Koniak, "Feasting While the Widow Weeps : *Georgine v. Amchem Products, Inc.*" (1995) 80 *Cornell L. Rev.* 1045; F. E. McGovern, "The Defensive Use of Federal Class Action in Mass Torts," (1997) 39 *Ariz L. Rev.* 595; J. Resnik, From "Cases" to "Litigation" (1991) 54 *Law and Contemp. Probs.* 5; J. Resnik, "Litigating and Settling Class Actions : The Prerequisites of Entry and Exit," (1997) 30 *U.C. Davis L. Rev.* 835; J. Resnik, D. E. Curtis & D. R. Hensler, "Individuals within the Aggregate : Relationships, Representation and Fees," (1996) 71 *N.Y.U.L. Rev.* 296.



The facts of *Amchem* demonstrate why we should be concerned. The risk of conflict of interest, both among the class and between the class and its lawyers, is plain. It was the defendants, not the plaintiffs, who first raised the possibility of filing the class action. The defendants chose the lawyers to represent the class. The settlement was signed, sealed and delivered on the very same day the complaint was filed, which means the settlement was negotiated before any finding that the class representatives were adequate. The lawyers for the class also represented present claimants, whose claims were settled simultaneously with the negotiation of the class settlement on terms that were more advantageous than the terms the future claimants received. The plaintiffs' lawyers received a contingency fee (probably about one-third of the recovery) from the \$200 million their present claimant clients recovered. They also were able instantly to corner the market on all future asbestos plaintiffs, and to recover a fee for the \$1.3 billion settlement on behalf of clients they didn't previously represent.<sup>19</sup>

The class was rife with conflicts. It included persons who presently had injuries, those who would develop injuries in the future, and those who would never develop injuries. It included persons in many different exposure categories, who would eventually fall into many different disease categories (including no disease at all), from which they would suffer in different degrees and be entitled to damages in different amounts, calculated under the tort laws of different states. Members of the class had conflicting interests in the allocation of settlement funds between present and future claimants and among disease and exposure categories.<sup>20</sup>

Most significantly, the members of the class were almost completely unable to protect themselves. Though a massive notice campaign was carried out, notice may not be very effective when the class member has no present symptoms and may not even be aware that he or she has been exposed. All class members (including those who did not receive actual notice of the settlement) would have been bound forever if they did not opt out within three months of the notice.<sup>21</sup>

The provision for court approval of the settlement does not really solve the problem, for it is difficult for the court to protect the interests of such a class. It is always difficult for a court to judge the fairness of a proposed settlement, because the settlement has the support of both sides, thus depriving the judge of an adversary presentation on the issue. When class counsel have a conflict of interest or there is collusion (conscious or unconscious) between the lawyers for the two sides, it is difficult for the court to be fully informed about the case. Asbestos is a "mature tort" in that cases have been litigated for many years, so there is more information available to guide the court in evaluating the settlement than there would be for future claimant settlement classes involving other torts. Still, it is difficult for the court to judge for itself the size of the class, the strength of the liability cases, the potential recovery at trial, the enforceability of a judgment, and the defendants' financial position. The court's dilemma is even greater because the court has its own self-interest: a settlement offers the possibility of relieving both this court and all

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19. *Supra* note 4 at 2238-2241.

20. *Ibid.* at 2250-2251.

21. *Ibid.* at 2252.

other courts of an enormous burden of litigation into the future, while allowing payments to suffering individuals to commence.

Perhaps we should not evaluate the desirability of future-claimant classes by looking so closely at the troubling facts of a particular case. What if the future claimants had gotten the same deal that present claimants were currently getting in settlements? What if there had been an adjustment for inflation? Or what if there had been a cogent accounting rationale for the differences? What if the lawyers for the class had not represented present claimants at the same time? Discussing the issue in this way would focus attention on the "pure" issues of whether representative litigation on behalf of future claimants can ever satisfy due process. But it does seem that where there are future-claimant classes these very issues seem to recur, and the "what-ifs" do not seem to appear. (For example, much of the factual pattern of the *Ahearn* settlement, discussed below, is similar to *Amchem*.) And that is no accident, for due process and conflict of interest protections were designed to guard against precisely these sorts of problems. One does not have to be a due process purist to suspect that the troubling issues regarding future-claimant classes will not go away.

The Supreme Court did not reach the question whether future-claimant classes could ever be certified, but the Court's reasoning casts substantial doubt on the viability of such classes. The Court was quite sensitive to the many conflicts within the class. The Court held that these differences prevented a finding that common issues predominated, and that the fair and adequate representation requirement could not be met without "structural assurance of fair and adequate representation for the diverse groups and individuals affected" — i.e., the creation of subclasses.<sup>22</sup> In a final section, the Court expressed doubt whether persons in the exposure-only category or their family members could possibly receive constitutionally adequate notice, since they might not even know of their exposure, or realize the extent of their possible harm, or have the "information or foresight" needed to decide whether to opt out. The Court did not reach this constitutional issue because it found that the class did not satisfy the requirements of Rule 23, but it dropped strong hints that exposure-only classes will not pass constitutional muster.<sup>23</sup>

The second major issue raised by *Amchem* is whether a case can be certified for settlement purposes only that could not have been certified as a litigation class. The Court treated this question as a matter of straight interpretation of Rule 23.<sup>24</sup> The Third Circuit

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22. *Ibid.* at 2251. See Fed. R. Civ. Proc. 23(c)(4).

23. *Ibid.* at 2252.

24. Rule 23 requires that a class must first meet the four "prerequisites" of Rule 23(a) : the class is so numerous that joinder is impracticable, there are questions of law or fact common to the class, the claims or defenses of the class representatives are typical of those of the class, and the class representatives will fairly and adequately protect the interests of the class. If the prerequisites are met, the class must meet the requirements of one of the three subsections of Rule 23(b). *Amchem* was certified as a (b)(3) class, the usual classification of a class seeking money damages. Rule 23(b)(3) requires that the common questions predominate over individual questions, and that a class action is superior to other available methods. Factors to be considered in making the superiority determination include, among others, difficulties that might be encountered in managing the class. Finally, Rule 23(e) provides that any settlement

had held that a class could never be certified under Rule 23 unless it could be certified as a litigation class. The District Court, on the other hand, held that the "adequate representation" requirement of Rule 23(a) could be satisfied by a determination under Rule 23(e) that the settlement was fair, and that the predominance inquiry under Rule 23(b)(3) need not consider the questions that would have to be determined at a trial, but could be satisfied by the common exposure to asbestos products and class members' common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system."<sup>25</sup> The Supreme Court rejected both of these views.

First the Court appeared to conclude that settlement classes were permissible, holding that "settlement is relevant to a class certification."<sup>26</sup> The way in which settlement is relevant, however, appears to be simply that the court is permitted to disregard the question whether a trial would be manageable. All of the other requirements of Rule 23(a) and (b) must still be met without regard to the settlement, and "demand undiluted, even heightened, attention in the settlement context," presumably because of the possibility of conflicts. Rules 23(a) and (b) "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."<sup>27</sup> These determinations are to be made without regard to the settlement. In particular, the purpose of the (b)(3) predominance requirement is to assure that the class is "sufficiently cohesive to warrant adjudication by representation."<sup>28</sup> The Rule 23(e) inquiry into the fairness of the settlement is an additional protection for the absent class members; it cannot be used as a substitute for the Rule 23(a) and (b) requirements.<sup>29</sup> So it may be difficult for settlement classes to sidestep the predominance inquiry as completely as some courts had thought. Moreover, settlement classes will have to meet the adequate representation requirement of Rule 23(a), which apparently means that subclasses will be required when class members have disparate interests.

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or dismissal of a class action requires court approval based on a determination that the settlement is fair and adequate.

25. *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 316 (E.D. Pa. 1994), rev'd, 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem*, *supra* note 4. (1997).

26. *Supra* note 4 at 2248.

27. *Ibid.*

28. *Ibid.* at 2249.

29. *Ibid.* at 2248.

The Court was also careful to include some comments which, though technically dicta, may indicate the direction it will go in the future.<sup>30</sup> First, the Court emphasized that courts considering requests for class certification are directed to consider the interests of individuals in conducting separate lawsuits. These interests, the Court noted, are relatively weak where the individual stakes are small, and relatively strong in claims for personal injury and death.<sup>31</sup> The Court went on to say :

*Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws [...] Even mass tort cases arising from a common cause or disaster may [...] satisfy the predominance requirement.*<sup>32</sup>

At the very end of the opinion, the Court characterized as sensible the view that "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure," but observed that Congress has neglected to provide one. The Court also noted with approval a suggestion for "less bold aggregation techniques, including more narrowly defined class certifications."<sup>33</sup> These comments appear to signal the lower courts to put the brakes on aggressive certifications.

The next case in the asbestos saga will likely come before the Supreme Court this term. In a lawsuit against the Fibreboard Corporation, a federal appeals court upheld the certification of a mandatory (no opt-out) settlement class for compensatory damages under Rule 23(b)(1)(B) — a provision that permits mandatory classes in "limited fund" cases where the claims exceed the defendant's ability to pay.<sup>34</sup> The aggregate claims of the asbestos plaintiffs exceeded Fibreboard's net worth. The company was simultaneously involved in litigation in California state court over whether its insurance policy covered the claims. If the policy applied, there would be essentially unlimited funds to pay any eventual judgment; if not, the company faced imminent bankruptcy. The trial court in the insurance case had held there was coverage,<sup>35</sup> but the case was on appeal and would be decided shortly. The insurance company had agreed to pay most of the settlement if it was approved before the decision of the coverage appeal.<sup>36</sup>

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30. Justice Ginsburg's majority opinion spoke for six justices; Justice Breyer, joined by Justice Stevens, concurred in part and dissented in part in an opinion more sympathetic to certification and more deferential to trial court findings; Justice O'Connor did not participate.

31. *Ibid.* at 2246.

32. *Ibid.* at 2250.

33. *Ibid.* at 2252.

34. Fed. R. Civ. Proc. 23(b)(1)(B); *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), vacated sub nom. *Flanagan v. Ahearn*, 117 S.Ct. 2503 (1997).

35. *Ibid.* at 968-969.

36. *Ibid.* at 969.

In these circumstances, the federal appeals court upheld the certification of a settlement class on the theory that there was a fleeting opportunity to secure funding for the settlement, and this, together with the imminent possibility of bankruptcy if coverage were denied, justified certification of a settlement class under the limited fund doctrine.<sup>37</sup> The dissent contended that the settlement did not really involve a limited fund, for Fibreboard actually contributed only \$10 million of its \$200 million net worth to the settlement. In fact, he wrote, the settlement class was a way for Fibreboard to achieve the effect of a reorganization in bankruptcy without providing the protections of the bankruptcy code. In this way the company was able to impose the entire cost of the bailout on its most vulnerable creditors, the asbestos plaintiffs, to the benefit of its shareholders. In a true bankruptcy proceeding, the shareholders would have been last in line, behind the asbestos claimants. As a result of the settlement, however, the shareholders made a nominal payment and the asbestos plaintiffs' claims were extinguished.<sup>38</sup>

The Supreme Court vacated the decision in *Ahearn* and remanded it for further consideration in light of *Amchem*.<sup>39</sup> If the Fifth Circuit reaffirms its holding,<sup>40</sup> the case could return to the Supreme Court as early as next term, where it could provide an opportunity for the Court to consider the constitutional issues surrounding mandatory "limited fund" classes certified under Rule 23(b)(1)(B) (the Fifth Circuit might conclude, however, that the "limited fund" doctrine is no longer plausible, as the insurance coverage litigation has been favourably involved and Fibreboard has been acquired by an unquestionably solvent corporation.)

Let me make a few final comments about settlement classes. *Amchem* says it is appropriate to "take settlement into account." Does that mean take a negotiated settlement agreement into account, or take the fact that certification is being requested only for purposes of exploring settlement into account? A rule that settlement classes are only permitted when agreement has been reached before certification is requested would encourage rather than discourage collusion and cheap settlements. Complex cases where causation is often a difficult issue should not be settled without an adequate opportunity to investigate the facts through discovery and to elucidate the factual and legal issues through pretrial motions and conferences.<sup>41</sup> If the case is to be settled on a mass basis before the claims have "matured" through a period of individual litigation, these preliminary stages should also be done on an aggregate basis.

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37. *Ibid.* at 982-986.

38. *Ibid.* at 993 (Smith, J., dissenting); J.C. Coffee, Jr., "The 5th Circuit's Approval of a No-Opt-Out Mass Tort Settlement that Forecloses the Rights of Future Claimants Raises Basic Due Process Issues" (1996) Nat'l L. J., at B4; see also *Keene Corp. v. Fiorelli* (In re Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 732 (2d Cir. 1993) (reversing certification of (b)(1)(B) settlement class).

39. *Flanagan v. Ahearn*, *supra* note 34.

40. *In re Asbestos Litigation*, *supra* note 34.

41. For a proposal for certifying classes for purposes of pretrial process, see J. Resnik, "Litigating and Settling Class Actions: The Prerequisites of Entry and Exit", *supra* note 18.

Certifying the case for treatment of common preliminary issues, or for purposes of exploring the possibility of settlement, is also problematic. To be credible, settlement negotiators must have the ability to threaten to go to trial if a satisfactory agreement cannot be reached.<sup>42</sup> The lawyers for a settlement class cannot make that threat, and economic theory suggests they would therefore have to settle at a discount. Moreover, if the case does not settle, the lawyers are out of a job except for the plaintiffs whom they represent individually. Even more to the point, if the case does not settle there will be no recovery from which to pay them for their work on the failed settlement. So there is a built-in incentive for lawyers for a settlement class to agree to settlement even if the class would be better off going to (individual) trials. To ignore this point, one must assume either that cases will settle for the same amount regardless of whether trial is an option and even if one side knows that the other side's lawyers will not get paid unless there is a settlement, or that it is so overridingly important to settle these large cases that some way must be found to permit them to settle even if the settlements will be systematically too small. Additionally, the negotiators may become committed to the idea that there must be a settlement; this commitment will make agreement more likely, but it may lead the negotiators to accept terms that they would otherwise find unacceptable. And class settlements inevitably increase the power of lawyers and decrease the power of individual claimants in negotiating the terms of settlement and in making the decision to settle.<sup>43</sup>

These reflections suggest that settlement classes may be most beneficial in mature torts, after the case has gone through the stages of individual litigation and consolidation or multi-district treatment. In these circumstances, discovery is complete, development and refinement of the issues has been done, benchmark judgments and settlements have already been reached, and lawyers who have developed extensive experience with the claims are already negotiating with each other. These lawyers may at some point see the possibility of a global resolution (of present claims, at least). Proposing a settlement class would then be logical, and the settlement class could be defined and structured so as to minimize conflicts and provide adequate representation. Settlement classes would be inappropriate in the earlier stages of mass tort litigation, before the groundwork of individual and consolidated litigation had been done. They would also be inappropriate, in my judgment, to bind future claimants in any circumstances.

## 2. Tobacco

The best-known current mass tort litigation is undoubtedly the amazing saga of tobacco litigation. Many years of dogged effort by plaintiffs' lawyers pursuing traditional personal injury litigation against the tobacco companies have resulted in only one case (and that only a year ago) in which a tobacco company had been ordered to pay a cent,

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42. See J.C. Coffee, Jr., "After the High Court Decision in *Amchem Products Inc. v. Windsor*, Can a Class Action Ever Be Certified for the Purpose of Settlement?" (1997) Nat'l L.J. B4; Coffee, *supra* note 9.

43. See, e.g., J. Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43 Stan. L. Rev. 497. One might argue, however, that individuals have little decision making power when a single lawyer settles 20,000 cases at one time for a lump sum.

despite the fact that each year over 400,000 persons die in the U.S. of tobacco-related illnesses.<sup>44</sup> The industry had been phenomenally successful in pursuing a scorched-earth litigation strategy, never paying to settle a case, maintaining air-tight industry solidarity on litigation strategy, and never admitting that smoking causes cancer. Plaintiffs had to pursue novel legal theories because courts had held that government-required warnings on tobacco packaging foreclosed a failure-to-warn theory, and defendants were consistently successful in persuading juries that smokers had assumed the risk of injury by choosing to smoke.

A consortium of plaintiffs' lawyers, including lawyers whose primary experience was in class actions in other fields such as securities and antitrust rather than in personal injury litigation, devised a new strategy. They brought a nationwide class action, *Castano v. American Tobacco Co.*, on behalf of all "nicotine dependent persons in the United States."<sup>45</sup> The complaint alleged that the tobacco industry failed to inform smokers that nicotine is addictive, and manipulated the level of nicotine in cigarette to "creat[e] and sustain[...] the addictive nature of cigarettes." The district court certified the class as to "core liability issues" and punitive damages.

While the appeal of the order certifying the class was pending before the Fifth Circuit, plaintiffs dropped a bombshell : Liggett & Myers, the smallest of the major tobacco companies, had agreed to settle the class action. Considered in isolation, the settlement was paltry. It obligated Liggett to pay 25 percent of its annual pretax income for 25 years; at the time of the settlement agreement, that would have amounted to about \$2.5 million, whereas its litigation expenses had been running at a rate of \$10 million per year. But the settlement had strategic value. It broke the decades-long united front put up by the industry; it wrung the admission from a major cigarette company that cigarettes cause cancer; and, potentially most important of all, Liggett agreed to cooperate with the plaintiffs in prosecuting their claims against other manufacturers, and to produce evidence of wrongful concerted activity by the other manufacturers.<sup>46</sup> The documents are described by those who have seen them as devastating. Not coincidentally, the Liggett settlement, the plaintiffs hoped, would demonstrate to the judges considering the certification motion that the class was manageable and that certification might lead to final resolution of the enormous litigation.

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44. Only one case has ever resulted in a final money judgment against a tobacco company. See *Carter v. Brown and Williamson Tobacco Co.*, 95-934-v-b Fla. Cir. Ct. (Duval County).

45. The class was defined as : "(a) all cigarette smokers who have been diagnosed by a medical practitioner as nicotine-dependent; and/or (b) all regular cigarette smokers who were or have been advised by a medical practitioner that smoking has had or will have adverse health consequences who thereafter do not or have not quit smoking [...]". *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

46. The settlement was also viewed as a step in Liggett's attempted takeover of the much larger RJR Nabisco, for it provided that a merger partner of Liggett, other than Philip Morris, would be entitled to the same terms.

Although the district court certified the gigantic class despite the presence of individual issues of causation and damages, the Fifth Circuit Court of Appeals decertified the class.<sup>47</sup> The consortium announced it would simply follow a strategy of filing state-wide class actions in every state, and proceeded to file many state-court class actions.

At this point another decisive event occurred. A number of state attorneys general, led by the Attorney General of Mississippi, Michael Moore, sued the tobacco companies to recover the sums the state had had to pay for the medical care of victims of tobacco-related disease. This novel theory had the potential to avoid the tobacco companies' most successful defense, assumption of the risk. The states had not chosen to run the risk of smoking tobacco; rather, they had been forced to care for the victims of smoking-related illnesses in their role as medical provider of last resort.<sup>48</sup> Eventually 37 states, as well as a number of counties and cities, filed similar suits and were coordinating their cases. Indeed, many of the government plaintiffs hired class-action lawyers as outside counsel on a contingent-fee basis, providing coordination with the class actions as well.

Negotiations between the tobacco companies and the state attorneys general intensified as the trial date for Mississippi's suit approached. In the spring of 1997 the tobacco companies and the attorneys general announced a tentative global settlement of the tobacco litigation for a mind-boggling \$368.5 billion, to be paid over 25 years. The settlement was crafted with *Amchem* firmly in mind. It called for legislation by Congress to ratify the settlement and extinguish future class action and punitive damage claims against the industry.

Initially, the general expectation was that Congress would swiftly approve the needed legislation, since both the tobacco companies and the class-action plaintiffs supported it. Indeed, the very fact that an agreement had been reached between the adversaries that would end tobacco litigation and require the industry to pay hundreds of billions of dollars seemed an accomplishment so vast and improbable that congressional ratification was at first viewed by many as a mere detail. After *Amchem*, however, the settlement of future claims would require federal legislation because the settlement would resolve the claims of persons who could not be represented in the litigation. It turned out that once the settlement was in Congress's court, it was out of the control of the parties.

The tobacco litigation is a prime example of what Lon Fuller called a polycentric dispute — a dispute with many centres like a spider web, in which many people with

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47. *Castano v. American Tobacco Co.*, *supra* note 45. The court held that the variation in state tort law would magnify the individual differences among class members concerning causation, reliance, and affirmative defenses, that the district court failed to give adequate thought to whether common issues would actually predominate at trial, and the lack of a "prior track record" of individual trials on the addiction theory on which the district court could base a judgment that class treatment would be superior.

48. Some state courts have accepted this theory, see *Minnesota v. Philip Morris*, 551 N.W.2d 490; others have held that the government plaintiffs are in effect assignees of the smokers' claims, that if the tobacco companies would not have been liable to the smoker they cannot be derivatively liable to the state, and that the states can recover only the cost of care for smokers who are proved to have valid claims themselves against the tobacco companies. See *City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130 (1997).



varying interests and perspectives are affected, where there is flexibility in the possible remedies, and any change in circumstances has repercussions in a complex pattern across the web.<sup>49</sup> Many of the interested groups, including public health advocates and individual plaintiffs and their lawyers, were not at the negotiating table and had not agreed to the terms. When the action shifted to Congress, an institution that is very good at entertaining the views of interest groups, the game was thrown wide open.

The settlement quickly came under attack. Public-health advocates, including Dr. David A. Kessler, former Commissioner of Food and Drugs, Dr. C. Everett Koop, former Surgeon General of the United States, and organizations such as the American Cancer Society, argued that the agreement did not go far enough to stop smoking or smoking by minors, that it took too much power away from the FDA (which had just won in court the right to regulate nicotine in cigarettes as a drug), and that it was morally reprehensible because it made payments to the victims of tobacco-related illness depend on the continued financial health of the tobacco companies for the next 25 years. These critics saw the tobacco litigation not as a means to obtain compensation for individuals injured by smoking, but as a means to regulate or extirpate the tobacco industry.

Others contended that the plaintiffs had settled too cheaply. Spread out over 25 years, the enormous-sounding sum amounted to only a fraction of the tobacco companies' expected profits, and it was inadequate either to compensate smoking victims or to punish the industry. Startlingly, the settlement did not provide for any payments at all directly to individual smokers. Although they would give up the right to claim punitive damages and to sue as a class, and total annual payments to individual plaintiffs would be capped, their benefits under the settlement would be limited to stop-smoking education (and better-financed Medicaid programs). Moreover, the payments to state and local governments would not be earmarked for the costs of medical care for smoking-related disease. Some states have already begun making plans to use the money for other purposes.

Another objection was that the settlement would permit the defendants to raise the prices of their products to cover the payments to the class. Critics argued that this provision amounted to authorization for the tobacco companies to levy a tax on smokers to pay for the settlement. Since cigarette prices historically rise faster than costs, the industry might even end up making a profit on the settlement. These objections focused on the possibility that the class action lawyers had traded individuals' claims for compensation for public health measures, subsidies to state and local governments, and attorneys' fees.

Still others, including the Federal Trade Commission, the government agency charged with enforcing the antitrust laws, decried the antitrust exemption contained in the proposed legislation. And members of Congress bristled at the expectation that Congress would simply rubber-stamp the privately-negotiated terms of the agreement.

In this midst of this onslaught of criticism, the tobacco companies committed a major public-relations blunder in the summer of 1997 by getting a provision inserted into the balanced-budget bill granting them a \$50 billion tax credit to help offset the costs of

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49. See L. L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353.

the settlement. The public was outraged and the tax credit was repealed. President Clinton, whose aides had participated in the negotiations that resulted in the proposed agreement, signalled that he would insist that the FDA's regulatory authority over tobacco be strengthened, that penalties for failing to reduce youth smoking by the agreed amounts be increased, and that the amount to be paid by the industry be increased.<sup>50</sup>

Meanwhile, trial dates for the state cases were fast approaching. Neither side could afford to risk losing a trial, but neither wanted to grant any concessions. Mississippi and Florida settled on the eve of trial, for more than their pro rata share of the global settlement.<sup>51</sup> Proponents of the settlement argued that Congress should seize the opportunity to wrap up the settlement. Opponents argued that the state-by-state settlements demonstrated that the normal litigation processes were adequate to resolve the problems.

Today, the fate of the global agreement is in doubt. It is still possible that the needed legislation will pass, though the settlement terms will be significantly changed. It is equally possible that no compromise will be reached that is acceptable to the class-action plaintiffs, the industry, Congress, and the courts.<sup>52</sup> In that event, much will depend on the resolution of cases that are approaching trial. Tobacco companies have said they are unwilling to settle any more state suits. Jury selection in the Texas suit was set to begin on September 29.<sup>53</sup> Minnesota's case is set for trial in January; state Attorney General Hubert H. Humphrey III, who opposes the national settlement, vows to go to trial.

Whether the tobacco settlement collapses or not, it is clear that a public health problem of such proportions cannot be solved by anything like the traditional forms of adjudication. There is truth in both sides of the debate over class-action certification. On the one hand, the court system simply does not have the capacity to process tens or hundreds of thousands of complex cases individually in time to compensate individual plaintiffs with fatal diseases, and the effort to do so might well close down the civil courts to other litigants. (As only one plaintiff has ever recovered a judgment against a tobacco company, the prospect of lawsuits clogging the courts seems only theoretical in the tobacco context. It is real in the asbestos cases, however — though many observers have warned of the dangers of making general policy on the basis of evidence from the asbestos debacle.) Moreover, litigating in the tort system is an extremely inefficient way to get money to victims, who receive only about a third of the money spent to resolve such cases.

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50. For an account of the efforts of the state attorneys general, the negotiation of the national settlement and the settlement agreement itself, see C. Mollenkamp, *et al.*, *The People v. Big Tobacco: How the States Took on the Cigarette Giants* (1998).

51. Mississippi settled for \$3.3 billion, and Florida for \$11.3 billion. See J. Mintz & C. Connolly, "Wounding the Giant" *Washington Post* (March 30, 1998).

52. Since this talk was given, Congress has held extensive hearings and negotiations over the tobacco settlement, and the proposal has been extensively amended, but Congress has not yet acted on it. Meanwhile, the tobacco companies, except for Liggett, have announced their withdrawal from the settlement because the Senate changes were too onerous. For terms of the Senate bills, see D.E. Rosenbaum, "Senators Say Tobacco Bill Won't Be Eased" *New York Times* (April 1<sup>st</sup>, 1998) A18.

53. After this talk was given, the Texas case settled for \$14.5 billion. See Mintz & Connolly, *supra* note 51.

On the other hand, attempting to solve the problem through settlement classes may pose an unacceptable risk that conflicts among the class itself, between the class and its lawyers, and among the groups of lawyers involved will result in a resolution that is neither just nor fair.<sup>54</sup>

One response to the dilemma is illustrated by the tobacco case : recognize that complete resolution of this type of problem is beyond the competence of the courts and requires a legislative solution. But it is yet to be demonstrated that this approach is feasible. There have been other incorrigible mass tort situations, and Congress has not been eager to fashion or pay for a compensation scheme.<sup>55</sup> Perhaps the interests that would have to be accommodated in order to pass legislation are simply too disparate and legislative action will turn out to be impossible (or at least not forthcoming).

More importantly, the tobacco litigation has undergone a radical and perhaps inevitable transformation during this saga. What began as individual smokers' suits for damages passed through a class action phase, followed and essentially replaced by the state attorneys general suits for Medicaid reimbursement and a settlement that would give no money at all to injured smokers, but would cut off their litigation rights in exchange for block payments to the states. When the settlement got to Congress, it was transformed again into a public health issue in which the main concern became to raise the price of cigarettes to discourage smoking, particularly youth smoking, and yet again into a budget matter as federal legislators vied for the revenues that could come from a legislated settlement. Individual claimants' quest for compensation has become entirely irrelevant.

Assuming that Congress does not resolve potential individual claims for damages, what are the courts to do? They could take the approach of the trial courts in *Castano*, *Amchem*, and others and stretch the class action doctrine to permit certification of settlement classes (if federal legislation does not bar class actions). So long as the class does not include future claimants, this approach is not foreclosed by *Amchem*, though courts will have to tread with caution. This approach still seems to pose a very high risk that the class will not be adequately protected from conflicts of interest. If many individual cases are filed, however, the alternative is to continue to plug along with dockets clogged with individual cases, in the knowledge that no matter how bad the situation gets, Congress is not going to step in and resolve it. This also does not seem to serve the interests of the injured persons or the defendants. I will leave resolution of how Canada should resolve this thorny issue to the program later on our agenda.

### 3. Breast Implant Litigation

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54. For example, Ron Motley, one of the lawyers who negotiated the *Amchem* settlement, also was a key player in the tobacco settlement negotiations, is on the trial team of 30 of the state attorneys general cases, and represents individual plaintiffs whose claims would be extinguished by the proposed tobacco settlement. See B. Van Voris, "Tobacco Negotiations Created Sharp Client Conflicts, (1997)" Nat'l L.J. A8 col. 1.

55. The exception has been the 1960's legislation to compensate coal miners for black lung disease.

Just as girls once stitched samplers to demonstrate their mastery of various needlework techniques, so the silicone breast implant litigation in its decade of existence has become a kind of sampler of mass tort aggregation techniques. The largest manufacturer of silicone breast implants, Dow Corning, filed for bankruptcy protection in 1995 as a result of thousands of claims filed against it alleging that the implants caused autoimmune disease. In August 1997 Dow Corning offered a \$2.4 billion settlement of the 300,000 claims against it. Under the proposal, claimants would receive between \$650 and \$200,000. Federal class action suits against Bristol-Myers Squibb, 3M Corp. and Baxter International have been consolidated in the Northern District of Alabama under the multidistrict litigation statute. Individual lawsuits continue to be litigated in the state and federal courts. In August 1997 a Louisiana jury found that Dow Chemical, the parent of Dow Corning, can be held liable for knowingly deceiving recipients about the health risks of implants; the causation and damages phases remain.

The breast implant litigation illustrates how difficult it can be to reach a global settlement. In 1994, a \$4.25 billion settlement was agreed on that would have paid claimants as much as \$1 million each. The settlement collapsed almost immediately, however, under the weight of an unexpected number of claims. Over 400,000 persons filed claims, reducing the potential payments to as little as five percent of the scheduled amount, and 11,000 persons opted out of the class, creating a substantial risk of additional liability for defendants. In retrospect, the settlement was too generous in its definition of compensable injury, allowing individuals to receive payment from the fund for minor illnesses that were not widely recognized by the medical community as valid diagnoses.

Shortly after negotiations recommenced, Dow Corning filed for bankruptcy protection and ceased to be part of the class action settlement negotiations. The remaining parties reached a new agreement in 1995, which was approved by the court. This plan eliminated or reduced benefits in a number of areas, most importantly by tightening the disease definitions for most claimants to include only medically accepted diagnoses. The maximum benefit under the second plan was reduced to \$250,000 — less than the proposed figures under the first plan, but much higher than the expected payments given the number of claimants. The plaintiffs' steering committee, however, did not endorse the settlement.

The size of the proposed settlements in the breast implant cases is mind-boggling, given that there is substantial doubt whether breast implants even cause autoimmune disease. In the early period of breast implant litigation, plaintiffs won a number of large awards — in one case for \$25 million. Since then, more than 20 scientific studies have failed to find evidence that silicone breast implants cause autoimmune disease, and defendants have been winning 80 percent of recent cases.

The central current issue in the breast implant cases thus is how to resolve science issues in the courts. Mainstream scientists and epidemiologists are in apparent agreement that the syndrome plaintiffs complain of does not exist, and perforce is not caused by the implants.<sup>56</sup> Plaintiffs, however, have experts who testify to causation. The question is whether plaintiffs' evidence meets the federal standard for admissibility. Several federal district courts had relied on court-appointed experts to hold that it did not. The dispute raises questions of whether plaintiffs' evidence amounts to "junk science" that should not be allowed and the role of statistical and clinical evidence as proof of individual causation in trials to lay juries.

The National Plaintiffs' Steering Committee requested that Judge Sam Pointer, the multidistrict litigation judge in charge of federal breast implant cases, appoint a panel of national experts. Over the defendants' objections, Judge Pointer agreed and appointed a National Science Panel consisting of experts in epidemiology, immunology, rheumatology, and toxicology. The panel is now considering the material submitted. They will write reports and findings on individual topics as they are completed. After the findings are released, the parties will be able to take discovery depositions of the panellists and then videotaped "trial" depositions for use at trial. Additionally, the findings may be used to assist trial judges in ruling on the admissibility of plaintiff and defense expert witnesses for individual trials.

This is the first time that a court in mass tort litigation has attempted to resolve disputed science issues by such a detailed, formal method involving court-appointed experts. Such a procedure is a giant step away from the traditional way of approaching scientific evidence — that is, by considering the admissibility issue afresh in each individual litigation, permitting the two sides to present duelling experts and leaving it to the jury to decide between them, subject to fairly loose control by the judge over admissibility. The National Science Panel is an attempt to come up with a set of court-appointed scientific experts whose prestige and neutrality will make their conclusions de facto binding in all breast implant litigation. The findings will strongly influence every trial judge in making admissibility determinations, as each court will not have to rely on the adversarial parties or undertake an expensive and time-consuming court-appointed process itself, and the findings can be used in trials as expert evidence. Surprisingly, the plaintiffs were the ones to request this procedure (probably because their recent lack of success at trial led them to want to raise the acceptability of their scientific evidence, and they were convinced they would do better before a panel of scientists than lay juries), but both sides say they support the science panel. If the science panel works well in the breast implant cases it could become a widely used tool in mass tort cases where scientific issues are central to liability.

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56. The symptoms may be the result of fibromyalgia rather than " 'atypical' autoimmune disease." Fibromyalgia occurs in women who have not received implants as well as those who have, and physicians to whom plaintiffs' lawyers refer implant recipients may misdiagnose fibromyalgia or other conditions as atypical autoimmune disease.

#### 4. Proposed Amendments to Rule 23

The Advisory Committee on the Civil Rules<sup>57</sup> has been considering major revisions to Rule 23, which governs federal procedure in class actions. This would be the first significant revision of Rule 23 since 1966, when amendments to Rule 23 invented the modern class action. The most controversial of the proposed changes would permit certification of a settlement class even though the requirements for a litigation class are not met. This proposal generated an enormous amount of controversy. At its May 1997 meeting, the Advisory Committee decided to take no action on the proposal pending a decision in *Amchem*, which raised questions about the constitutional validity of settlement classes as well as whether settlement classes could be certified under the existing Rule 23. *Amchem*, however, was decided on narrow grounds of the proper interpretation of Rule 23, avoiding the constitutional issues. Moreover, *Amchem* left open the possibility that settlement classes could be approved under the existing Rule 23.

It is unclear whether the Advisory Committee will proceed with the proposed revisions in the wake of *Amchem*. Possibly the committee will conclude that *Amchem* permits courts to continue to certify settlement classes, and that in light of the controversy over the proposed revision, it would be best to allow the issue to percolate through the courts before recommending a possibly unnecessary revision. Moreover, the committee has indicated some interest in pursuing revisions that would require opt-in, rather than opt-out, classes in certain circumstances.<sup>58</sup>

#### B. Securities Class Actions

Securities class actions are the paradigm case of large-scale class actions over purely economic claims. Usually involving publicly-traded companies,<sup>59</sup> these cases involve purely economic harms affecting thousands or even millions of people, all of whom were harmed in the same way by the same conduct of defendants, all with claims too small to make litigation of their individual claims economically feasible but with

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57. A committee of the Judicial Conference of the United States, this is the body that considers and drafts revisions to the Federal Rules of Civil Procedure for action by the Judicial Conference and the United States Supreme Court.

58. After this talk was given, the Advisory Committee withdrew all of the proposed changes except for an uncontroversial provision permitting interlocutory appeals of class certification orders. The Committee is still studying the possibility of revisions to Rule 23 or other methods of handling mass torts.

59. The bulk of the dollar value claimed and recovered in securities class actions involves disclosures concerning the common stock of publicly-traded corporations. Private enforcement of securities violations by small-capitalization companies, private placements and limited partnerships is an important but much smaller subgroup; it does not share the structural characteristics I discuss in the text, and has not been the subject of much recent controversy. One could wish that reform efforts would be carefully targeted to the abuses they aim to correct, and in particular that reforms aimed at curbing perceived class action abuses would be restricted to class actions, and not extended to all securities cases where they may have unforeseen consequences in individual lawsuits over private placements or face-to-face transactions.

aggregate potential damages in the millions, hundreds of millions, or, occasionally, billions of dollars.<sup>60</sup> A combination of substantive law rules, procedural rules, and economic relationships among the players creates structural economic incentives that tend to lead the cases to settle for amounts that may not reflect the merits of the claim.<sup>61</sup>

On the plaintiffs' side, precisely the characteristics that make these cases suitable for class treatment also create a serious potential conflict of interest between the class and its attorneys. The class is diffuse, numerous, and has nothing in common but the purchase of this particular stock during the relevant time; the claims are too small to justify the costs of bringing and monitoring litigation; class members are not kept informed of the progress of the lawsuit and in most instances do not even know of its existence. Thus, control of the case rests solely with the attorney for the class, with no meaningful monitoring or control by class members of the attorney's conduct of the litigation. At the same time, the complexity of the case and the size of the potential aggregate recovery mean that the attorney for the class has the largest financial stake in the litigation, in the form of the potential fee award. The attorney works under a contingent fee arrangement in which the only source of payment of fees and expenses is the class recovery. Out of pocket expenses of hundreds of thousands of dollars, and thousands of hours worked on the case, are standard. The class's attorney thus has a strong incentive to avoid trial at all costs, because a defense verdict would mean a huge personal financial loss. On the other hand, if there is a settlement the attorney is assured of a fee within a predictable range. Additionally, the class's interest is in the maximum total recovery for the class, while the attorney's interest is in the maximum fee recovery per unit of work done on the case; these interests may not perfectly coincide.

On the defendants' side, the principal incentive is risk aversion and the important factors the role of insurance and the possibility of personal liability. Plaintiffs are careful to sue individuals as well as the issuer and other entities such as accountants and investment bankers. Individuals are risk averse, and these defendants do not want to risk ruinous personal liability by going to trial. As the individual defendants frequently continue to control the entity defendants, and as they are the key to accessing insurance coverage under directors' and officers' liability policies, their desire to settle the case is likely to prevail.

Approximately 70 percent of the average securities class action settlement is paid by insurance.<sup>62</sup> While insurance is available to fund settlements, however, it may not be

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60. Or so the theory goes. In fact, institutional investors now own most publicly-traded shares of U.S. companies, and their holdings may be quite large enough to justify litigation. See J. Cooper Alexander, "Rethinking Damages in Securities Class Actions" (1996) 48 *Stan. L. Rev.* 1487.

61. This argument is developed at greater length in Alexander, *supra* note 43.

62. See F.C. Dunbar, V.M. Juneja, & D.N. Martin, *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* (Nat'l Econ. Research Assocs., 1995).

available if plaintiffs prevail at trial.<sup>63</sup> Thus insurance provides a powerful incentive to settle. It allows defendants to get rid of the case using someone else's money, and for the plaintiffs it provides another, functionally independent, source of funds for settlement.

All of these factors tend to distort the settlement process, and may lead to settlements that do not reflect the merits of the case. This could mean that some plaintiffs with weak claims are overcompensated, while others with strong claims are undercompensated. Additionally, we are beginning to recognize that the traditional view of securities class actions as involving identical claims of essentially interchangeable class members with no conflicts of interest is incorrect.<sup>64</sup> Class recoveries amount to payments from current shareholders to persons who were shareholders in the past. Class members who sold their shares thus have interests that may diverge sharply from the interests of class members who continued to hold their shares, or who also own shares that are not in the class. This is by no means a far-fetched possibility. Institutional investors now own the majority of publicly-traded common stock in the United States. Many institutions — index funds are the prime example — follow a buy-and-hold policy and, indeed, may not rely on information concerning the company's prospects at all in making their investment decisions. Other intra-class conflicts are possible as well, such as between institutional investors and individuals. Additionally, while both plaintiffs' lawyers and defendants seem to prefer broad settlement classes — plaintiffs to maximize the size of the recovery and defendants to obtain the greatest possible preclusive effect for the judgment — only persons who bought or sold stock during the period of nondisclosure of material information have legally valid claims. When the class period is very broad, the class may include persons who do not actually have valid claims. Payments to investors without a valid claim reduce the money available to compensate those who do have such a claim, and create another possible conflict of interest.

Recent developments in securities class actions include powerful measures intended to reduce the number of lawsuits as well as the amount of settlements and attorneys' fees. There is considerable hostility to these cases in the current conservative Congress, which has enacted important procedural changes for the purpose of discouraging securities class actions.<sup>65</sup> These measures are not likely to improve matters, because for the most part they were not directed toward correcting the distorted incentives that are the real causes of the problem. Rather, Congress took a blunderbuss approach to make it harder to bring and win securities class actions generally. These include requiring securities class actions to meet a stricter pleading standard than other federal court cases, including other types of class actions; providing for an automatic stay of all discovery when a motion to dismiss is filed; establishing mechanisms intended to encourage

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63. This is because if defendants are found liable for securities violations, a policy exclusion (for intentional acts) or coverage defense (for fraud in the application for not revealing the existence of the violation when applying for the policy) may apply. See Alexander, *supra* note 43.

64. For a more detailed discussion, see Alexander, *supra* note 60.

65. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).



institutional investors to take control of cases away from established plaintiffs' firms; and creating the possibility that plaintiffs' lawyers will have to pay the defendants' legal fees.

The statute has been in effect for less than two years, so it is too early to draw firm conclusions about its effects. Two comprehensive empirical studies, however, suggest that the legislation has not accomplished its primary goals, and has had important unintended results.<sup>66</sup> Securities class action filings have not decreased, though the allegations of complaints have changed somewhat. In the first year after enactment, there seemed to be a substantial movement of cases from federal to state court (or for cases to be filed in both courts simultaneously). The apparent explanation is that plaintiffs wanted to avoid the automatic stay of discovery, and perhaps to hedge against the possibility that the pleading standard would be very strictly interpreted. In the second year, however, cases appear to have returned to federal court, so that the universe of securities class litigation is little changed.<sup>67</sup> Courts appear to be split over the interpretation of the heightened pleading requirement, with one lower court in California having recently interpreted the standard so strictly that it appears to have changed not just the pleading requirements, but the substantive standard of liability as well.<sup>68</sup>

Perhaps the most fascinating development is the effect of the "lead-plaintiff" provision. This section provided that in determining the lead plaintiff, the plaintiff or group of plaintiffs with the largest financial stake in the litigation should be presumed (possibly conclusively) to be the "most adequate plaintiff" and should be appointed lead plaintiff. The purpose of the provision was to encourage institutional investors to take control of securities class actions. For some, institutional investors seemed the most likely candidates to undertake independent monitoring of the class counsel because their private economic interests in honest disclosure and minimizing nonmeritorious suits were perfectly aligned with the public interest.<sup>69</sup> Others apparently hoped that institutions would be less aggressive about pursuing suit, and might even take over some suits in order to dismiss them. The lead plaintiff presumption, however, turns out to be largely a non-starter. Only a few suits have actually been taken over by institutional investors. Outside of a few large public pension funds, institutions have shown a notable lack of interest in getting involved.<sup>70</sup>

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66. J.A. Grundfest & M.A. Perino, *Securities Litigation Reform : The First Year's Experience* (J.M. Olin program in Law and Economics, Stanford Law School, 1997); U.S. Securities and Exchange Comm. Office of General Counsel, Report to the President and the Congress on the First year of Practice Under the Private Securities Litigation Reform Act (Apr. 1997) (hereinafter SEC Report).

67. Of course, securities litigation is heavily influenced by economic and business conditions; the empirical studies performed to date have not attempted to compensate for such factors.

68. See *In re Silicon Graphics, Inc.*, 1996 U.S. Dist. Lexis 16989, Fed. Sec. L. Rep. (CCH) para. 99, 325 (N.D. Cal., 1996).

69. See Alexander, *supra* note 60; E.J. Weiss & J.S. Beckerman, "Let the Money Do the Monitoring : How Institutional Investors Can Reduce Agency Costs in Securities Class Actions" (1995) 104 Yale L.J. 2053.

70. See SEC Report, *supra* note 66. Institutions have been somewhat more ready to object to fee awards.



Why did this happen? Those of us (including myself) who advocated encouraging institutional investors to become lead plaintiffs ought to have foreseen that the plan was unlikely to work. As Yogi Berra observed, "If the fans don't want to come to the ball park, you can't stop them." It was not necessary to amend the law to make it possible for institutions to bring class actions; they already had that ability, but they almost never exercised it. Reasons for this reluctance are not far to seek : monitoring litigation is costly in time and money, and institutions are not set up to do it; the fiduciary obligations of a class representative may conflict with the institution's fiduciary duties to its beneficiaries; taking an active role in litigation would expose funds to discovery about their investment practices; expenses of the litigation might not be chargeable to the fund, but would have to be paid out of the fund manager's pocket; the marginal benefit to the fund of increased efficiency in shareholder litigation might well be less than the expense of being lead plaintiff, particularly since litigation recoveries are a tiny fraction of the institution's revenues; it may be more cost-effective to divest or pursue corporate governance strategies than to sue — and a strategy of suing companies may detract from the ability to engage firms on governance issues.

Nevertheless, even though institutions have not sought to be named lead plaintiffs, the lead plaintiff rules are still in operation. Their effect has been, not an increased role for institutional investors, but a practice of aggregating a number of small investors (either through one firm representing multiple plaintiffs, or by several firms filing jointly) to increase the total stake of the group. The established plaintiffs' firms have been better able to follow this strategy, and the result so far of the lead plaintiff provisions has been the exact opposite of the intended effect : the market share (appearance ratio) of the leading plaintiffs' firm has doubled, going from 31 percent to 59 percent.<sup>71</sup> So the result has been a trend not toward increased competition, but toward increasing the market share of the firms that were already dominant.

### C. Consumer Class Actions

As efforts have been made to restrict securities class actions, plaintiffs-side securities class action lawyers have been diversifying into consumer and mass tort class actions, and have brought their technical skills and distinctive approach to these cases. Consumer class actions present the purest example of the potential conflicts between the class and its attorney. The value of individual claims tends to be quite small and monitoring by the class nonexistent. Settlements often bear indicia of collusion : for example, the class receives a non-monetary benefit which may require recipients to make additional purchases from the defendant, such as a coupon for a discount on future purchases; the defendants agree to a substantial cash attorneys' fee; and the fee application is supported by wildly optimistic expert testimony as to the value of the non-cash settlement.

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71. See Grundfest & Perino, *supra* note 66 at iii, 25-27 (figures indicate percentage of cases in which Milberg Weiss Bershad Hynes & Lerach entered an appearance).

A prime example is the notorious coupon settlements in the airline price-fixing cases, in which class members were to receive coupons toward future air travel. For purposes of determining an appropriate fee award (to be paid in cash), plaintiffs' lawyers' experts valued the coupons at face value or close to it, although the terms of the agreement seemed to guarantee that most of the coupons would go unused.<sup>72</sup> In the proposed settlement of the General Motors pick-up truck class action, class members were to receive a coupon for \$1000 off the purchase of another GM truck.<sup>73</sup> Suits against insurance companies for sales abuses were settled for discounts on future premiums or an opportunity to go to arbitration for the chance of getting a cash award.<sup>74</sup> In some cases, it is doubtful whether the settlement provides any significant benefit to the class. For example, a class action alleging that the rear door latches on Chrysler mini-vans would spring open while the vehicle was in use was settled with an agreement that the defendant would repair the latches and make efforts to assure that a significant number of the vans were brought in for repair — actions the defendant had already been obligated to take by government regulators. The settlement called for a cash payment of over \$4 million to the class's lawyers.<sup>75</sup>

Another concern is the possibility that some consumer class actions are filed when litigation is unnecessary to correct the problem, or seek to impose liability for corporate conduct which is actually in consumers' interest. Some have argued that a class action against Intel over the defective Pentium chip was an example of the former possibility, because market forces would have compelled the defendant to replace the defective chips even without litigation.<sup>76</sup>

Consumer class actions have not as yet been the focus of organized reform efforts. Some relatively simple reforms could, however, go a considerable way toward realigning incentives to lessen these problems. These would include requiring the recovery for the class to be negotiated before any discussion of fees; forbidding the parties to negotiate about fees before the class recovery receives final approval; requiring attorneys' fees to be paid directly by the defendant to the class attorney rather than from the class recovery; postponing the hearing on the fee award until after the period for filing claims

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72. See *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Cal. 1993).

73. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prod.*, *supra* note 15 (reversing settlement approved by district court, in part on the issue of the adequacy of the settlement), cert. denied, 116 S.Ct. 88 (1995).

74. See *In re The Prudential Ins. Co. of America*, 962 F. Supp. 450, 490-491 (1997) (approving settlement; the case is under appeal).

75. See N.M. Christian, *Chrysler Pact Could Block Minivan Suits*, (September 28, 1995) B3.

76. Others respond that the pendency of the litigation was one of the primary reasons why Intel announced its replacement policy, that the settlement obtained significant improvements in the terms of the corrective action, and that the settlement legally obligated the defendant to implement the replacement policy, where otherwise it would have been free to discontinue or change the policy.

has expired, and basing the fee award on the value of the claims actually filed rather than on experts' prospective testimony about the benefit conferred on the class.<sup>77</sup>

## II. THE CASE MANAGEMENT MOVEMENT

In the almost sixty years since the promulgation of the Federal Rules of Civil Procedure, both the business of the courts and the self-perception of both federal and state judges have undergone dramatic change. While trial was once viewed as the primary function of the courts, a trial judge can now say, "A trial is a failure," with the expectation that he is uttering a truism. Until 1983 the word "settlement" did not even appear in the Federal Rules, which were drafted with the paradigm of adjudication as the means of resolving cases in mind.<sup>78</sup> In 1938, twenty percent of civil cases were resolved by trial. Today, only about four percent of civil cases are tried. Approximately sixty to seventy percent of civil cases are settled. While about a third of civil cases are resolved by adjudication, nearly 90 percent of those dispositive adjudications are by pretrial motions rather than by trial. More of judges' time is taken up with non-dispositive decision making, such as disputes over discovery and pretrial and settlement conferences.<sup>79</sup>

The case management movement can be understood as the view that the role of a judge is not simply to be a passive umpire of disputes calendared by the parties in a largely party-controlled and party-directed contest of litigation. A good judge, under this view, takes a higher profile role in managing the pretrial stages of the case, moulding the scope and content of discovery and shaping the issues and factual development by pretrial motions, conferences, and settlement conferences. In particular, the judge takes an active role in settlement. As this view of the judicial role has become dominant, formal mechanisms have emerged for facilitating settlement within the authority of the court (as opposed to private, informal methods agreed to by the parties). These methods include reference to magistrate judges and special masters, increased use of settlement conferences, early neutral evaluation programs, and court-annexed mediation and arbitration procedures.

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77. See Report of the Third Circuit Task Force, *Court Awarded Attorney's Fees*, 108 F.R.D. 237 (1985); Alexander, *supra* note 60.

78. In this discussion I refer to the federal courts as the case management movement has been the strongest there and the Civil Justice Reform Act and the RAND study of its implementation apply to the federal courts. The case management movement has also affected the state courts, however.

79. For an excellent discussion of this trend, see S.C. Yeazell, "The Misunderstood Consequences of Modern Civil Process" (1994) *Wis. L. Rev.* 631, from which the statistics in the text are taken. The seminal articles in the field, written from opposite perspectives, are J. Resnik, "Managerial Judges" (1982-83) 96 *Harv. L. Rev.* 374; R.F. Peckham, "The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition" (1981) 69 *Calif. L.Rev.* 770.

There has been an extensive debate whether the move to case management has been a good thing. I will not join that discussion here. Case management is the reality, and it will continue to be so. It may have been historically inevitable, given the changes in the nature of the caseload and even the adoption of the Federal Rules themselves, which by opening up a space for and emphasizing discovery and pretrial motions may have preordained an increased role for settlement at the expense of trial.<sup>80</sup>

In 1990 Congress enacted the Civil Justice Reform Act<sup>81</sup> to reduce costs and delay in the federal courts. The Act required each federal district court to develop a civil justice expense and delay reduction plan, and directed the courts to consider implementing a variety of litigation management techniques, including :

- differential case management : systematic differential treatment of civil cases on the basis of case complexity, amount of time required to prepare for trial, and judicial resources needed to prepare for trial;
- early active judicial management of the pretrial process through control of discovery, assessing the progress of the case, and setting an early and firm trial date;
- judicial management of discovery through conferences to establish presumptive time limits for completion of discovery, consider bifurcation of issues and explore the possibility of settlement;
- voluntary exchange of information instead of formal discovery;
- non-binding alternative dispute resolution programs.

Ten "pilot districts" were selected and required to include such principles in their plans. Congress also directed that an empirical study be done of the reforms undertaken under the CJRA. The RAND Institute for Civil Justice conducted a five-year study of the 10 pilot districts and 10 comparison districts.<sup>82</sup> Reflecting the statute's goals of reducing costs and delay, the study measured the effects of case management policies on time to disposition, legal costs and costs of judge work time, and participants' satisfaction with the process and their views of its fairness.

The results of the study were and continue to be controversial, because they seem to contradict what everyone thought we knew about case management and ADR. In brief, they found the pilot programs had no significant effects on time to disposition, lawyer

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80. See *Yeazell*, *supra* note 79.

81. *Civil Justice Reform Act* of 1990, 28 U.S.C. s. 471-482 (1994).

82. See J.S. Kakalik *et al.*, *RAND Inst. for Civil Justice, An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996) (hereinafter *RAND Evaluation (Mediation)*); J.S. Kakalik *et al.*, *RAND Inst. for Civil Justice, Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996) (hereinafter *RAND Evaluation (Case Management)*).

work hours, or satisfaction of lawyers or litigants. Judges did not spend more time on civil cases, and 85 percent said they were not managing cases differently after the CJRA. The only aspect of the case management provisions that had any significant effect was the requirement for early judicial management. Early judicial management without setting a trial date reduced median time to disposition by about 1.5 months, or 10 percent, but raised lawyer work hours and costs. Apparently, judges managed the cases to disposition more quickly, but attorneys did the same amount of work (perhaps less efficiently) in the shortened time. Setting a trial date early reduced the median time to disposition by an additional 1.5 to 2 months, with no effect on costs. Shortening the median time to discovery cutoff from six to four months reduced time to disposition by 1.5 months, or 10 percent, and reduced lawyer work hours by 20 percent. None of these changes affected lawyer satisfaction or views of fairness. Early disclosure and discovery plans had little effect on time, cost, or satisfaction.

The study concluded that case management reforms did not significantly reduce costs, except for setting an early discovery cutoff. A combination of early judicial management, early setting of a trial date, and reducing the time to discovery cutoff would speed cases by about 20 percent, without affecting litigation costs or satisfaction.

How should we interpret the findings that case management reforms did not significantly reduce costs and delays? One reading is that while simple measures that impose discipline on lawyers by setting firm deadline can reduce delays, intensive judicial involvement simply creates more work for lawyers, offsetting any potential cost reductions. Another is that the statute gave the districts too much freedom to design their own programs, making it impossible to isolate the effect of good programs. Indeed, it appears that the reforms were less sweeping than Congress may have intended. Most districts did not fully implement the differential case management tracks,<sup>83</sup> and 85 percent of judges said that they had not changed the way they managed cases. If the courts did not really change, one would not expect to see very big results.

Why were the reforms not sweeping? One explanation is that the judges viewed the statute as infringing on judicial independence (the Judicial Conference opposed the bill), or believed that the statute emphasized speed and efficiency at the expense of justice, and accordingly dragged their feet. (Judges express indignation at the notion that they would refuse to obey a federal law.)<sup>84</sup> A less inflammatory version is that the statutory guidelines were vague and were left to be implemented by local committees composed of lawyers and judges in each district. One would not expect radical reforms to emerge from such a drafting process. Another explanation is that there were no effective mechanisms for ensuring that the provisions of the Act were carried out. The explanation that seems more plausible to me is that the case management movement has been a continuing fact

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83. This is putting it mildly. Of the ten pilot districts, six adopted plans on the track model, while four chose the judicial discretion model (that is, the status quo); but only one district actually implemented substantial tracking. See RAND Evaluation (Case Management), *supra* note 82 at 12.

84. See T.P. Griesa, "Comment: One Court's Experience with the CJRA" (1997) 49 Ala. L. Rev. 261 (adapted from remarks by Chief Judge Griesa at the American Bar Association Conference on the CJRA in Tuscaloosa, Alabama, March 22, 1997).

of the federal courts for about 30 years; it should not be surprising if, when courts are directed to implement case management techniques after 30 years of doing so, one does not see transformational change over a four-year period.<sup>85</sup> In fact, it may be that the entire exercise was a sort of turf war over who got to take credit for case management, Congress or the judiciary.<sup>86</sup>

Two conclusions thus emerge from the case management portion of the study. First, a streamlined package of simple reforms appears to hold promise in reducing delays.<sup>87</sup> Second, if Congress wishes to implement significant changes in the civil justice system, it should provide precise, uniform standards rather than vague guidelines and decentralized implementation.<sup>88</sup>

The ADR portion of the study was more controversial. Here too, the study found that the reforms had no detectable effects. Time, costs, and satisfaction were not significantly affected by mandatory arbitration, mediation, or early neutral evaluation. The study did find that money was more likely to change hands when ADR is involved, possibly indicating that ADR leads to compromise resolutions. Without ADR, cases are more likely to be dropped or decided by the judge on motions. And participants declared that they were satisfied with ADR.<sup>89</sup>

These findings are remarkable. Courts have invested much time, money and psychic energy in developing ADR procedures within the courts. An entire industry has grown up of ADR providers, and many of these derive their livelihood from court-ordered ADR. Many others provide private ADR in connection with litigation. Can it be true that these procedures have no effect?

There are, again, a number of possible alternative explanations. It is possible that the federal courts are dragging their feet, and are responsible for poor implementation of ADR procedures. Though judges and lawyers profess satisfaction with ADR, in most districts only about five percent of filings were referred to ADR.<sup>90</sup> These low referral rates were possible because most districts, rather than implementing mandatory or random assignment to ADR, left it to judicial discretion or party choice. Another possibility is that the study is methodologically flawed. Still another is related to the finding that cases that do not go to ADR are more likely to be voluntarily dismissed or decided on motions. Anecdotally, judges confirm that they purposely defer decision of dispositive motions until after scheduled ADR, to give the parties a chance to resolve the case themselves. This increases the cost and delay over cases without mediation, where the judge would have gone ahead and decided the dispositive motion, terminating the case by adjudication

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85. See generally J. Resnik, "Changing Practices, Changing Rules : Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging" (1997) 49 Ala. L. Rev. 138.

86. *Ibid.*

87. See RAND Evaluation (Case Management), *supra* note 82 at 26-28.

88. See *ibid.* at 30.

89. See *ibid.* at 17-20.

90. See *ibid.* at 18.



earlier and with less expense. Additionally, one might suppose that the kinds of disputes that typically go to court ADR programs -- relatively small, purely economic claims that already have been sufficiently intractable to lead to litigation -- are not the most promising subjects for mediation techniques.

I would like to focus on a few interesting explanations. When one discusses the RAND study with ADR proponents, they often say, "What they do in the courts isn't really mediation".<sup>91</sup> By this they mean that mediation in the courts is almost always evaluative mediation, in which the mediator tells the parties his or her opinion of the settlement value of the case. Additionally, court-based mediation frequently takes much less time than ADR proponents recommend -- there may be only one or two sessions of an hour or two, as opposed to the lengthy discussions taught by ADR theorists. Moreover, many of the court-based mediators have little if any formal training in mediation techniques.

It seems to me that this response captures something true about most court-based mediation programs. They are not like the theorists' model of mediation; rather, they look very much like settlement conferences. Is that because in bringing mediation "inside," courts just got it wrong? If true, this would be a story about the difficulty of changing an institution by bringing in a new idea. Unless the idea has, at least initially, some strong institutional protections, it is likely to be co-opted and itself transformed into something familiar to the institution. On the other hand, it could be that there was no real meeting of the minds among ADR practitioners and theorists, Congress, judges, and lawyers as to what "alternative methods" were to be, why they were needed, and what objective they were expected to achieve. Judges and lawyers may have good reason for wanting more of something that looks like a settlement conference, but that does not have to be staffed by judges. They may not have intended to adopt lengthy interest-based mediations, either because they truly do not need them, or because they did not know enough about them to realize that they do.

Another explanation for the results is that the real value of mediation and other alternatives to adjudication may not be in reducing costs and delay. Proponents (and the authors of the RAND study) contend that cases settle "because of" mediation. The evidence for this assertion is that the cases settle shortly after mediation. I find this argument unpersuasive. Most cases settle; among the perennial problems of negotiation are knowing when both sides are ready to negotiate seriously, and making concessions without signalling weakness. It is helpful to have some outside event to signal the start of serious negotiations and to relieve the parties of the responsibility for making concessions. The settlement conference has come to fill that function. Where there is court-ordered ADR it probably does so as well. Thus cases may well settle right around the mediation because the mediation is the accepted signal that serious negotiations can begin. Mediation may not be the cause of the settlement, but just the dinner bell.

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91. For a thoughtful analysis of this critique in light of available empirical evidence, and suggestions for further empirical research, see D. Hensler, *In Search of Good Mediation* (unpublished manuscript, on file with author).

Causing cases to settle may not even be a very important goal of ADR in the courts. Only about four percent of cases go to trial. We are unlikely to reduce the trial rate much below this, and doing so at the cost of requiring universal mediation seems questionable. About another 25 percent of cases are adjudicated before trial.<sup>92</sup> But the standards for pretrial adjudication are so strict (for example, summary judgment is permitted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law)<sup>93</sup> that there seems no real need to resolve these cases by mediation instead of adjudication. What is the point, then, of reducing the adjudication rate?

A more promising justification for ADR in the courts is the claim that the real value of ADR is that it improves the quality of outcomes, and thus is justified regardless of its effect on costs or time to disposition. Here ADR proponents may have made a tactical error initially. The best, perhaps the only, way to achieve procedural reforms is to claim that they will reduce costs and delays. If they don't really do so, there may be a reckoning down the line. Making this argument persuasively will require more than hand-waving and treating beliefs as evidence. Specifically, some way must be found of judging quality of outcome, other than by surveying parties' subjective reports of satisfaction. It will be a challenge to devise an empirical measure to evaluate claims that settlements are "better" as a result of ADR.

### III. PRIVATIZING THE RESOLUTION OF CIVIL DISPUTES

Today a significant number of cases that would traditionally have been litigated in the courts is being processed through institutions created and operated not by government but by private parties; indeed, private parties in certain circumstances are even permitted to exercise the authority of the civil courts. Public policy is said to favour arbitration.<sup>94</sup> Yet there is a dark side to the privatization of justice.<sup>95</sup>

Arbitration clauses have become ubiquitous in many settings. They are often found in contracts between corporations, especially those involving international transactions. Recently, they have also become standard in many types of contracts between corporations and individuals — for example, contracts for medical services, financial services such as consumer banking and stock brokerage accounts, transportation services (such as airline, passenger ship and package tour tickets), the purchase of goods and

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92. See *Yeazell*, *supra* note 79.

93. Fed. R. Civ. Proc. 56.

94. See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 103 S.Ct. 927 U.S. 1 (1983). This policy is derived from the Federal Arbitration Act, 9 U.S.C. s. 1 *et seq.*, which has been broadly construed.

95. For a thorough and thoughtful analysis of the history and implications of the move to arbitration clauses in consumer contexts, see K. Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act* (1997) (unpublished manuscript, on file with author); see also K. Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's," (1996) 73 *Denv. U.L. Rev.* 1017.

services, and contracts of employment. Arbitration allows the parties to avoid the public courts by holding the investigation, hearing, and decision phases in a private forum, but to obtain a binding judgment from the public court to enforce the arbitrator's decision. Parties may select custom-tailored arbitration procedures designed specifically for the particular agreement, or "ready-to-wear" procedures such as those followed by arbitrators for the American Arbitration Association.

Other means of opting out of the court system exist as well. For example, in California the parties may consent to have the case heard, privately, by a retired judge even when no pre-filing contractual agreement existed.<sup>96</sup> This procedure is known by the sobriquet "rent-a-judge." Decisions in "rent-a-judge" cases have the same effect as decisions by a sitting judge, including the right to appellate review.

Private justice is a large and growing industry in the United States. The American Arbitration Association and its largest rival, JAMS/Endispute, have combined annual revenues of over \$100 million. Indeed, these competitors to the public courts have become so successful that the courts have begun to develop their own "private justice" alternatives.

#### **A. The Benefits of Private Justice**

What benefits do parties seek when they choose private justice over the public courts? We can identify several.

##### **1. Reduced costs and delays**

By paying for a private decision maker and private facilities, and by adopting streamlined procedures such as less broad-ranging discovery and modified evidentiary rules, the parties hope to obtain a cheaper and faster resolution.<sup>97</sup> These concerns can be very substantial when dockets are severely overcrowded and thus delays are lengthy, as they are in many state courts.

##### **2. Greater Predictability**

Private justice might increase predictability in several ways. One is the selection of the decisionmaker. Some parties choose private justice to avoid the possibility of a jury trial — it is widely believed by U.S. corporate executives and their lawyers that juries are unpredictable, even irrational, are more likely than judges or arbitrators to decide on the basis of sympathy or prejudice, tend to be hostile to corporations, and are prone to return excessively large verdicts. These beliefs persist even though they are largely

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96. Cal. Code Civ. P. s. 638-645 (West 1991).

97. When complex or high-stakes disputes are referred to arbitration, however, procedures often begin to look more like the full due-process model of the court system. Even with streamlined procedures, some have argued that costs and delays are not significantly less for arbitration than for litigation.

unsubstantiated by the empirical evidence. Others believe they can obtain a higher-quality decisionmaker in a private system, either because they can specify that the decisionmaker have specific technical or legal expertise, or because the higher fees commanded by private judges produce a more competent pool of potential decision makers and the parties' greater voice in selecting the decisionmaker in private dispute resolution systems will give them additional control over the quality of the decision maker. Still others want a procedure that combines expertise with a "representative" decision making body, as in agreements that permit each side to select one arbitrator with a third chosen by the first two.

Another factor increasing predictability is the perception that while adjudication tends to produce "all-or-nothing" results, arbitration and similar proceedings tend to produce "split-the-difference" awards. This tendency may be explained in part because at least one party is likely to be a repeat player and the arbitrator hopes to be chosen again.<sup>98</sup> It is in the arbitrator's interest not to displease anyone who might be in a position to veto a return engagement, so the arbitrator tries to give something to everybody. Whatever the cause, arbitration is perceived as having a smaller risk of an extreme (all-or-nothing) result, and as tending toward results that are somewhere in the middle of the range of possible outcomes. Moreover, the risk of very large awards is seen as smaller in arbitration than in adjudication.<sup>99</sup> This quality is attractive to potential defendants.

### 3. Ability to Choose the Substantive Law

This factor may also increase predictability. Of course, contracting parties can include a choice of law clause that will normally be enforced by courts. Private justice, however, not only eliminates the possibility that a court will find the provision unenforceable, but also allows parties to create their own "court system" that can make its own law. A private justice system can develop a specialized "law of the relationship" (for example, arbitration procedures under labour contracts). Private institutions can assure that the decision maker is intimately familiar with not only the subject matter area, but also the relationship between the particular parties, its history and the history and resolution of previous disputes. Such a system could also provide for the application of precedents developed in previous cases.

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98. For the seminal discussion of repeat players' structural advantage in litigation, see M. Galanter, "Why the "Haves" Come Out Ahead : Speculations on the Limits of Legal Change" (1974-75) 9 Law & Soc. Rev. 95.

99. One would expect this result if arbitrators are less susceptible to emotional decisionmaking and more prone to split the difference. Additionally, punitive damages traditionally have not been considered available in arbitrations. Though the Supreme Court recently held that punitive damages can be awarded in arbitrations, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212 (1995) (the award was upheld even though the arbitration agreement specified that New York law, which does not permit arbitrators to award punitive damages, would apply), many arbitration agreements expressly preclude punitive damages and the courts are split as to the enforceability of such clauses.

On the other hand, the parties might prefer a system in which precedent does not apply — where each dispute is resolved on its own, without attempting to develop a cohesive, unified law of the relationship.<sup>100</sup>

#### 4. Avoid Judicial Procedures

Private dispute resolution need not observe formal procedural requirements, such as extensive discovery or the formal rules of evidence.<sup>101</sup>

#### 5. Confidentiality

Unlike the public courts, whose records and proceedings are open to the public except in exceptional circumstances, private justice is just that — private and confidential. The public has no right to attend or to know what went on in the proceedings, and the participants, including decision makers, can be bound to strict confidentiality agreements designed by the parties, not by a judge. Private justice may thus be very attractive to parties seeking to avoid the competitive disadvantage, embarrassment, or additional litigation that might result from public proceedings.

#### 6. Higher Quality Outcome

A major objective of many private-justice arrangements is to resolve disputes by the consent of the parties, through the facilitation or mediation of a trained and experienced third party. Consensual resolutions may be both objectively and morally superior to coerced resolutions, and may be especially attractive to parties who both desire to continue a mutually-beneficial relationship within which the current dispute has arisen. Unlike court proceedings where decision makers are constrained by the law and the evidence and where available remedies are determined and limited by substantive law, private consensual resolutions may provide opportunities for "win-win" or "enlarge the pie" resolutions.

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100. See *Ferguson v. Writers Guild of America, West Inc.*, 277 Cal. Rptr. 450 (Cal. App. 2 dist 1991).

101. An extreme example is found in *Writers Guild, id.*, which upheld an arbitration agreement in which three arbitrators, whose identities were unknown to the parties and to each other, acted without holding a hearing or joint deliberations, on the basis of documentary evidence and the confidential statements of each party (which were not provided to the other parties), reached their decisions alone, and then notified an official who informed the parties what the majority had voted.

## B. The Public Costs of Private Justice

By removing cases from the public courts, private parties who choose alternative dispute resolution institutions lighten the burden on overworked public courts, thereby conserving public resources and thus creating a public benefit as well. Perhaps there is no reason why the public should subsidize the costs of resolving commercial disputes among parties who can afford to pay. Rather, dispute resolution should be regarded as a cost of doing business and the costs should be internalized by the business. This is not a significant hardship, as the parties are already choosing voluntarily to pay for private resolution. But there are significant public costs to private justice.

### 1. Undermining Democratic Ideals and Institutions

If significant numbers of civil disputants opt out of the public justice system, the result may be two systems of justice — one for the rich (that is to say, for corporations) and one for the poor. Under the present system, corporations and the wealthy have a stake in maintaining the public courts. Thus there is a political constituency with voice and influence that will insist on some minimum level of public justice. If these players no longer use the public courts, they will have less interest in assuring adequate funding and competent staffing for the courts. A crucial component of public support for the public justice system will be jeopardized. Those who cannot withdraw may be left with an underfunded, subpar system. Court funding has been of increasing concern in the administration of justice in the United States, both at the federal and at the state level. Indeed, a short time ago some courts had to cease scheduling trials near the end of a fiscal year for lack of funding.

The development of alternative institutions of civil justice may also undermine the quality of the public judiciary. In the United States, there has been a continuing debate over whether judges should be generalists or specialists. With only a few exceptions in technical areas such as tax, patent and copyright law, we have opted for a generalist judiciary. In part this is because we think judges do a better job of judging if they have broad experience in deciding many different kinds of disputes. In part, it is because we recognize that we can attract higher quality judicial candidates by offering them a broad range of cases to decide. In recent years judges and court observers have complained that criminal trial dockets have expanded greatly, especially for drug cases. The causes can be traced largely to Congress, which has recognized new crimes, has federalized many crimes that previously were brought in state court, and has enacted draconian sentencing laws that provide harsh mandatory minimum sentences and severely limit or prohibit plea bargaining. Because of statutory and constitutional speedy trial requirements, criminal trials take precedence over civil trials, putting pressure on the number of civil trials that can be accommodated in federal court.<sup>102</sup> Many highly qualified judicial candidates view

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102. Though this story is widely told by judges, it may not be entirely supported empirically. The trial rate is much higher for criminal trials, which account for 43% of the trials in federal courts (though they are only 18% of the caseload), but most federal court trials are still civil cases, though the trial rate for civil cases is only about 4%. See *Yeazell*, *supra* note 79 at 633-634. Nevertheless, as *Yeazell* observes, if 43% of trials in federal court are criminal trials and

the opportunity to handle complex or interesting civil cases as one of the more attractive aspects of judging. Additionally, many judges find sentencing under the harsh new criminal laws distasteful because the statutes have eliminated much of their traditional ability to fashion a sentence appropriate to the individual case. Indeed, many senior judges, who have the choice to decline cases, have opted out of deciding criminal cases altogether as a result of the new laws. This development means that newly-appointed judges will have an even higher proportion of criminal cases.

The delays caused by pressures from the criminal docket are one reason why civil litigants are opting out of the public courts and into private dispute resolution institutions. If large numbers of complex civil cases leave the public courts, however, it could become more difficult to attract highly-qualified judicial candidates. Less-qualified judges in the public system would, of course, be a social cost to other civil litigants, criminal defendants, and the public generally. The resulting decline in the quality of public dispute resolution could, in turn, chase more civil cases out of the public system.

The growth of private institutions can have a more direct impact on the quality of the public judiciary. My state of California, often a bellwether, has seen a significant outflow of experienced judges from the public courts to private dispute resolution organizations. In private practice, they can earn much more money, work only on cases of their own choice, control their own time, and engage in other types of legal work as well while continuing to be called "Judge" and receiving the full amount of their pensions from their service in the state or federal judiciary. This effect has been especially noticeable among California Supreme Court justices, including the former Chief Justice (and former United States District Judge) Malcolm Lucas. In recent years, a number of judges appointed to the California Supreme Court have remained in office only a short time before resigning to join one of the private judging organizations. The resulting lack of continuity has further eroded the quality of a court that once was considered the finest state court in the country.

Diverting large numbers of civil cases to private judging where they are decided in secret, by decision makers who are not publicly accountable, and without access to the control mechanisms of judicial review by an independent judiciary may undermine public confidence in the administration of justice. When the arbitration agreement is contained in a consumer form contract that is not the product of negotiation, this effect is magnified. Additionally, the decisions of private dispute resolution practitioners are not insulated from public criticism by the reservoir of public confidence in the independence and integrity of the public courts. When disputes that go to private dispute resolution organizations affect or interest the public, the lack of a public perception of institutional integrity may lead to a loss of confidence that was not predicted when private justice was chosen.

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judges are spending a large part of their time managing the pretrial process by deciding pretrial motions, holding pretrial conferences and settlement conferences, and managing discovery, the time available for civil trials will be extremely limited.

Moreover, the U.S. constitutional right to a civil jury trial<sup>103</sup> not only reflects a view about the most accurate system of dispute resolution, but also provides an important way for citizens to participate actively and meaningfully in their democratic government. The jury is the smallest governmental unit of the United States. The exodus of civil cases from the system could ultimately impair the democratic process.<sup>104</sup> Parties need not even give up the opportunity for a jury trial when they leave the public courts; private judging organizations have even begun to offer jury trials, with paid jurors drawn from the same sources as public juries.<sup>105</sup>

## 2. Undermining Effective Enforcement of the Law

Litigation and adjudication are not solely methods of private dispute resolution. They also play an essential role in the enforcement of the law — both the common law and statutory law. That is, the courts are not simply dispute resolution machines that determine the proper amount of compensation for legal claims; they are also a primary mechanism for getting people to conform their conduct to legal norms. These deterrent or law enforcement effects are obtained through decision of cases on the merits (rather than simply through private agreement);<sup>106</sup> in proceedings whose outcomes, at least, are publicly available; where outcomes are determined by reasoned application of legal principles to facts established by evidence; and through the operation of precedent (which is a public good produced by the courts).

When civil disputes move into private dispute resolution, these law enforcement effects are jeopardized. The loss of due process protections discussed above, and the corresponding probable loss of accuracy, is not the only effect on deterrence. On a more fundamental level, the underlying assumption in private justice is that the dispute is private, the business of the parties rather than the public's business. Thus, private justice may move away from principled application of legal norms to other decisional rules (such as split the difference, rough justice, compensation formulas, or whatever the parties agree to). Whereas the goal of mediation and other alternative dispute resolution processes is

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103. U.S. Cons., Amend. VII (applies to cases where a jury would have been available at common law).

104. There will continue to be criminal trials and most of them will be heard by juries, but the loss of a significant number of civil trials would still affect the operation and public perception of the constitutional scheme.

105. See E. Apgar, "Paid Juries : Catching On, But What About Jersey?" (1997) N.J. Law at 5.

106. If consensual resolutions are made "in the shadow of the law," which means based on the parties' expectations of what would happen if the case went to trial (a special type of precedent), negotiated outcomes will tend to approximate the expected outcomes of adjudication and settlements, too, will further deterrent or behavior modification purposes. See W.M. Landes & R.A. Posner, "Adjudication as a Private Good" (1979) 8 J. Legal. Stud. 235 at 267-274; R.H. Mnookin & L. Kornhauser, "Bargaining in the Shadow of the Law : The Case of Divorce" (1978-79) 88 Yale L.J. 950; R.D. Cooter & D.L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution" (1989) 27 J. Econ. Literature 1967. The more broadly such negotiated outcomes are known, the greater their precedential or deterrent effect.



simply for the parties to agree, optimal deterrence requires the outcome to be "accurate." The further private procedures move from the due process adjudicatory model toward informality, party control, and negotiated decision making (such as in mediation), the less accurate the outcome is likely to be. Even when private process attempts to render a principled decision on the merits, the absence of appellate review by the public courts removes an essential control on the decision maker's understanding and application of legal rules.

Private justice also can allow the parties to keep both the proceedings and the outcome confidential. Whatever public interest there may be in public proceedings and public trials (for example, to increase available information about health and safety, corporate conduct, the financial condition of publicly-traded companies, the rate of compliance with the law, or the effectiveness and fairness of resolution of claims of unlawful conduct) is regarded as irrelevant in a private justice system. Information about the proceedings or the conduct that is the subject of those proceedings is not viewed as a public good, but is the property of private parties, to dispose of as they wish.

In the long run, if large numbers of civil cases exit from the public courts, the result may be to undermine both effective enforcement of the substantive laws and public confidence in the just and equal administration of the law.

### 3. The Possibility of Abuse<sup>107</sup>

When private dispute resolution procedures are chosen through explicit negotiations between parties of roughly equal bargaining power, there is no need for much concern about abuse. This will normally be true in individually negotiated contracts between corporations. Arbitration clauses have proliferated, however, in consumer contracts that are not the product of negotiation, but that are drafted by the party with superior bargaining power and imposed on consumers in a take it or leave it (or more often, ignore it or don't even discuss it)<sup>108</sup> "bargaining" process. Courts, especially the federal courts, have enforced these contracts in the name of a national policy favouring arbitration even when they bear indicia of coercion and abuse. If an arbitration clause is enforceable, there is very little opportunity for judicial review of the arbitrators' decision, even if it is clearly wrong on the law.

Moreover, private dispute resolution arrangements may be stacked against the weaker party. For example, an HMO member may find her dispute adjudicated in a forum designed by the HMO, not through a standard procedure of a neutral organization such as the American Arbitration Association.<sup>109</sup> The dispute may be decided by an arbitrator

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107. See generally Stone, *supra* note 95; see also T. Grillo, "The Mediation Alternative : Process Dangers for Women," (1990-91) 100 Yale L.J. 1545.

108. Some contracts incorporate by reference arbitration provisions that are not readily available even if consumers were interested in them at the time of contracting.

109. For a more extended analysis of such a hypothetical case, based on *Hill v. Gateway 2000 Corp.*, 105 F.3d 1147 (7th Cir. 1995), see Stone, *Rustic Justice : Community and Coercion Under the Federal Arbitration Act (1997)*, *supra* note 95.

or panel of arbitrators who have long-standing ties with the HMO, such as retired hospital administrators. Even if the consumer has the right to participate in selecting the arbitrator, the selection may be from a panel of persons with loyalties to the HMO. The HMO, moreover, is a repeat player who will continue to be involved in every dispute handled in the private system, while consumers will be one-shot players. The HMO thus will have superior information about the candidates for selection, and those candidates will have incentives to avoid displeasing the HMO in order to be selected in the future, but no incentives to avoid displeasing the consumer. This incentive structure can be ameliorated somewhat if the consumer is represented by a specialist lawyer; but both explicit rules and the size of the stakes of such claims may restrict the consumer's access to legal representation. Consumers' power is further diminished because contractual arbitration does not permit aggregation of individual claims into class actions. The Supreme Court has upheld arbitration of even statutory anti-discrimination rights,<sup>110</sup> and some lower courts have upheld employment agreements that prescribe mandatory arbitration of statutory discrimination claims and preclude statutory remedies such as injunctive relief, attorneys fees, and punitive damages.<sup>111</sup>

Thus the ability to include private dispute resolution provisions in consumer contracts allows businesses to divert consumer claims from the courts (where they would be heard by an independent, generalist judiciary whose institutional loyalty is to the government or the public rather than to private parties, and in many cases by a jury) to private decision makers who may be beholden to the parties — or to a single party.

#### 4. The Loss of Due Process Values

Courts in the United States have given extraordinary deference to the procedures and results of contractual private dispute resolution institutions. They have found a high degree of deference appropriate even when the contract is a form contract drafted by one party, not subject to negotiation, and where the provision is standard in the industry so that the consumer has no opportunity to choose or even negotiate for access to the public courts. In essence, the only way to avoid an arbitration clause is to prove fraud in the inducement of the agreement to arbitrate. Contractual provisions substituting private dispute resolution procedures for access to the public courts have become standard in many commonplace transactions and relationships.<sup>112</sup>

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110. *Gilmer v. Interstate/Johnson Lane Corp.*, III S.Ct. 1647 (1991) (claim under Age Discrimination in Employment Act). Other courts have interpreted *Gilmer* to permit mandatory arbitration of Title VII employment discrimination claims, see *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), and other statutory claims. The Equal Employment Opportunity Commission, however, the government agency charged with enforcing anti-discrimination laws, opposes mandatory arbitration of such claims. M.A. Jacobs & P. McGeehan, "Wall Street's Forced Arbitration of Bias Claims Set Back by EEOC" (1997) Wall St. J. at B19 col.1.

111. *DeGaetano v. Smith Barney*, 95 Civ. 1613, 1996 WL 44226 (S.D.N.Y. February 5, 1996).

112. See generally Stone, *supra* note 95.

There are grounds for concern over these developments. Even when the private procedures appear to be fair, the deck may be stacked. For example, a provision allowing the parties alternate strikes from a panel of possible arbitrators may appear fair and even-handed, but if the panel is drawn from the ranks of retired industry executives the decision maker will be neither independent nor unbiased. Frequently the consumer is discouraged from seeking legal representation, while the representatives of the corporation are trained in how to handle such cases. The corporation may have a greater role in selection of the arbitrators, including supposedly neutral arbitrators.<sup>113</sup> In these circumstances, fundamental due process values embodied in court procedures are sacrificed in the name of speed, informality, and cost-efficiency. It is true that due process is costly — the more process, generally the higher the cost. It usually does, however, improve the quality of decision making. If due process protections are eliminated from large numbers of cases affecting certain vulnerable classes of litigants, we should at least assure ourselves that the cost savings are worth it — and worth it to those vulnerable litigants.

Even when there is no cause for concern about coercion because the contractual provisions are freely negotiated between parties of equal sophistication and bargaining power, we lose something important when we sacrifice due process. Regular procedures, the right to representation, adversary proceedings before an independent and impartial fact finder who is insulated from political pressure and from influence by the parties, decisions made according to the rule of law and governed by precedent, and institutionalized controls over the fact finder provide legitimacy to the results of public court processes and generate public confidence in and voluntary compliance with the results.<sup>114</sup>

Of course alternatives to full-blown adjudication are frequently beneficial to the parties and conserve public resources as well. All of the potential benefits of private justice can be realized in at least some cases, and the potential costs of private justice do not outweigh the social benefits in every case. Moreover, the perception of the benefits of private justice is so widespread that it would be senseless to urge a return to traditional adjudication (which itself was never the only way to resolve lawsuits). With the advantage of hindsight, however, one might wish that private dispute resolution had developed with more process safeguards, such as substantive standards for enforcement of arbitration clauses in contracts of adhesion or between parties of unequal bargaining power, limited review of arbitration awards, and limits on parties ability to combine enforceable court judgments with confidential proceedings and outcomes.

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113. *Engalla v. Permanente Medical Group, Inc.* 64 Cal.Rptr.2d 843 (Cal. 1997) (HMO had greater role in selecting neutral arbitrator than was revealed, and though patients were told arbitrators would be selected within 60 days, selection was actually delayed for 2 years or more; California Supreme Court remanded for further consideration of claims of fraud in the inducement).

114. See D. Luban, *Settlements and the Erosion of the Public Realm* (1995).

#### IV. CONGRESSIONAL RULE-MAKING AND THE FRAGMENTATION OF FEDERAL PROCEDURE

For nearly sixty years, procedure in the federal courts has been governed by the Federal Rules of Civil Procedure, first promulgated in 1938.<sup>115</sup> Among the fundamental tenets of the Federal Rules have been the principles that federal procedural rules should be uniform, and that they should be trans-substantive — that is, the same procedural rules should apply to all cases, regardless of the substantive law they invoke or the remedy they seek.

The procedures for amending or adding to the Federal Rules are set forth by statute.<sup>116</sup> The Judicial Conference of the United States<sup>117</sup> appoints a standing committee on rules of practice and a number of advisory committee (consisting of trial and appellate judges, practising lawyers, and academics), including the Advisory Committee on the Civil Rules. The Advisory Committee meets regularly to consider proposals for amendments, circulate copies of proposed amendments to judges and lawyers, hold hearings on proposed amendments, and ultimately make recommendations to the Standing Committee on Practice and Procedure. The standing committee reports to the Judicial Conference. If the Judicial Conference agrees on the proposed amendment, it recommends the change to the United States Supreme Court. The Court then officially promulgates the proposed rule by May 1 of the year in which it is to take effect.<sup>118</sup> Congress then has an opportunity to prevent the rule from taking effect; if it does not act by December 1<sup>st</sup>, the amendment goes into effect.<sup>119</sup>

These many-layered deliberative processes, staffed by judges, senior practitioners and academics, grind very slowly. The process of consideration by the Advisory Committee at its relatively infrequent meetings until agreement is reached on a draft, circulating the draft, the public hearing process, redrafting the proposed amendment in light of the public comments and recirculating it for further comment, detailed consideration by the Standing Committee and then by the Judicial Conference (which

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115. Under the terms of the Rules Enabling Act, the Federal Rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. s. 2072. Procedural rules that may do so, or that alter the jurisdiction of the federal courts, must be adopted through legislation. An example of such procedural innovation is 28 U.S.C. s. 1407, the multidistrict litigation statute which permits cases pending in several judicial districts to be consolidated for pretrial treatment.

116. 28 U.S.C. s. 2072-2074.

117. The Judicial Conference, presided over by the Chief Justice of the United States, consists of the chief judge of each federal circuit (of which there currently are thirteen), the chief judge of the court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. s. 331.

118. Although the *Rules Enabling Act*, 28 U.S.C. s. 2072, vests the authority to promulgate the Rules in the Supreme Court, the Court has viewed its role as primarily ministerial and has normally transmitted the rules recommended by the Judicial Conference to Congress without change.

119. 28 U.S.C. s. 2074. Rules creating, abolishing or modifying an evidentiary privilege must be affirmatively approved by Congress before taking effect. 28 U.S.C. s. 2074(b).

normally meets once a year) means that significant revisions are rare, are usually incremental in nature, and have been adopted by several relatively conservative (in the sense of not lightly changing the status quo) deliberative bodies after numerous opportunities for comment by all interested persons. The process is not readily susceptible to partisan politics or special-interest lobbying : many of the members of the various committees are life-tenured federal judges and the political branches have no role in the appointment of the committees or the deliberations leading to the promulgation of the proposed new rules,<sup>120</sup> until the proposed rule is sent to Congress at the end of the process. The members of the deliberative bodies are all practising experts in civil procedure and the institutions of the courts. It is a process that is resistant to sudden or radical change and to political influence.

Congress for the most part has allowed the statutory rule-making process to operate without legislative intervention.<sup>121</sup> Recently, however, Congress has shown a much greater willingness to legislate procedural rules without regard to the rule-making process. Two examples illustrate the tendency of such congressional action to undermine the principles of uniform and trans-substantive procedural rules, and the superiority of the rule-making process under the Rules Enabling Act to legislative action.

The first example is the Civil Justice Reform Act of 1990,<sup>122</sup> discussed in Part II. The statute — partly as a result of legislative compromises — creates a decentralized system of rule-making that encourages experimentation and local variation. The statute sets forth broad guidelines, but adoption of any of the enumerated reforms was voluntary except in the ten pilot districts, and the details of the plans and their implementation were left to local option. Under such an authorizing statute, procedures will be certain to vary from district to district. This structure is contrary to the spirit of the Rules Enabling Act,<sup>123</sup> which envisions uniform procedural rules, but also to 28 U.S.C. section 2071, which authorizes each court to fashion its own "local rules" applicable only in its courts but requires that local rules "shall be consistent with" federal statutes and the Federal Rules of Civil Procedure.<sup>124</sup> The CJRA not only permitted but encouraged and decreed the development of a multitude of procedures, varying from court to court — a statutory "let a thousand flowers blossom" approach to federal rule-making. In response to the CJRA's command, district courts adopted widely varying rules about subjects such as what ADR procedures were provided by the court, when they were required or permitted, and whether parties were required to make "initial disclosures" of relevant information in advance of formal discovery requests. In so doing, the CJRA turned away from the ideal

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120. The government and representatives of interest groups may, of course, submit materials to the committee, testify at hearings, and attend public meetings of the committee.

121. A notable exception was the 1972 proposal of the Federal Rules of Evidence, which led to great controversy in which the proposed rules were rejected and a provision was added to 28 U.S.C. s. 2072 requiring the affirmative approval of Congress to any change in the rules of evidentiary privilege.

122. *Civil Justice Reform Act* of 1990, 28 U.S.C. s. 471-482 (1994).

123. 28 U.S.C. s. 2072.

124. See also Fed. R. Civ. Proc. 83. In candor it must be acknowledged that local rules have not always complied with this command.

that a lawyer could practice in any federal court in the country under uniform rules, and opened the door to the old problem of local variation in procedural rules.

The decentralized rule-making process prescribed by the CJRA has even affected centralized rule making under the Rules Enabling Act. In 1993, Rule 26, the general discovery rule, was revised to provide for an automatic exchange of "initial disclosures" of information relevant to disputed facts at the very beginning of the case. This amendment reflected a basic change in the philosophy of discovery that had held sway for 50 years. The previous regime of responsive discovery was relentlessly adversarial, while automatic disclosure reflects a philosophy of cooperation. Critics of responsive discovery argue that it encourages gamesmanship and concealment; critics of automatic disclosure argue that it is fundamentally inconsistent with the adversary system.<sup>125</sup> Plainly, the choice between responsive and automatic initial disclosure strongly affects the philosophy and shape of discovery. As a result of local experimentation with mandatory initial disclosure under the CJRA, however, courts were already operating under both rules. To accommodate the various discovery regimes that had been adopted under the CJRA (and bowing to widespread opposition to the automatic disclosure provision), the revised rule was written to permit courts to opt out of the automatic disclosure rule, either by local rule applicable to a judicial district, by order of an individual judge, or by agreement of the parties in a particular case. Fully half of the districts have opted out of the automatic disclosure regime. The result is a hodgepodge of contradictory rules to govern a crucially important stage in pretrial litigation.

A more troubling instance of Congressional activity in making procedural rules was the Private Securities Litigation Reform Act of 1995.<sup>126</sup> This statute contained a number of important procedural provisions that apply only to securities cases and that vary substantially from the Federal Rules. For example, the pleading standard for securities cases was made much stricter than the pleading standards of the Rules,<sup>127</sup> even though liberal, trans-substantive pleading standards are one of the signature reforms of the Rules. In securities cases, unlike all other cases, a defendant is entitled to an automatic stay of

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125. Responsive disclosure puts the burden on the requesting party to propound a request that encompasses the desired discovery and to follow up on the request. Critics argue that it is too adversarial, turning disclosure into a game in which parties have incentives to read discovery requests narrowly and technically in order to hide relevant information. Automatic disclosure places the burden of disclosure on the producing party to determine what documents are relevant and to produce them voluntarily, subject to sanctions if it turns out that relevant material was not voluntarily produced. The rule attempts to encourage disclosure by eliminating the possibility of reading requests narrowly. It has been criticized as inconsistent with the adversarial system because it would require lawyers to become advocates for their opponents and use their confidential knowledge of the client's information to disclose information that the opponents might never have thought of. It has also been criticized as naive in an adversarial system, because producing parties may read the disclosure criteria narrowly and continue to produce as little as possible; their opponents lose the initial opportunity to craft a watertight discovery request and may have fewer clues that information has been concealed than in a responsive disclosure system.

126. Pub. L. No. 104-67, 109 Stat.737 (codified in scattered sections of 15 U.S.C.).

127. See SEC Report, *supra* note 66 at 13-14 (citing 1934 Act s. 21 D(b)(2))

discovery while a motion to dismiss is pending.<sup>128</sup> Procedures for certification of a class and the naming of the class representative and class counsel are set forth in detail, and differ significantly from the procedures of Rule 23 that otherwise apply generally to class actions.<sup>129</sup>

The procedural provisions of the PSLRA were intended to achieve substantive ends : to make it more difficult to bring securities cases, to make it more likely that different kinds of persons would be named class representatives (namely, institutional investors, who were thought more likely to be "reasonable"), and to make it more difficult for established plaintiffs' law firms to be named lead counsel.<sup>130</sup> In general, it is unwise to try to accomplish substantive goals through procedural rules. Procedural rules cannot be perfectly tailored to the substantive goal, and there is a great risk of adversely affecting other parts of the interrelated procedural system. Moreover, the law of unintended consequences is sure to have much to say about the operation of procedural rules changes. In the case of the PSLRA, for example, the discovery stay provision appeared to play a role in diverting cases from federal to state courts for the first year the statute was in effect,<sup>131</sup> and the lead-plaintiff provisions, rather than resulting in institutional investors being named class representatives, appear to have led to increased concentration in the market for plaintiffs' counsel.<sup>132</sup>

Moreover, the legislative process by which the statute was enacted is cause for concern. The legislation, which was part of the Contract with America on which Republican candidates ran in the 1994 congressional elections, was largely drafted by lobbyists for the securities and accounting industries and in its initial form consisted almost entirely of an accountants' and investment bankers' wish list for getting rid of securities litigation. When the Republicans gained control of the Congress in those elections, the provisions of the Contract with America, including securities litigation reform, were put on a fast track to enactment, as the Republican party had pledged to enact the Contract within 100 days. The bill, drafted by lobbyists who appeared to lack an appreciation for the goals, philosophy and interrelatedness of the federal procedural system, was crude and poorly written. Some provisions, for example, were plainly unconstitutional, such as an initial proposal to authorize the Securities and Exchange Commission to promulgate rules governing the standards by which the federal courts would grant summary judgment, a clear violation of the separation of powers doctrine. During the hearings on the bill, legislators and their staff were not very interested in hearing about problems with the bill, because they were under pressure to fulfil their campaign promises to enact a stunning volume of radical legislation within a very short

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128. *Ibid.* at 14-15 (citing 1933 Act s. 27(b)(1); 1934 Act s. 21 D(b)(3)(B)).

129. *Ibid.* at 15 (citing 1933 Act s. 27(a)(3); 1934 Act s. 21 D(a)(3)).

130. In addition to lead-plaintiff rules intended to favor large investors who presumably would either have their own counsel or would shop more widely for representation, the Act contains a "professional plaintiff" provision that limits the number of cases any particular plaintiff could bring.

131. See *Grundfest & Perino*, *supra* note 66 (stating that "about 26% of litigation activity has moved from federal to state court"); SEC Report, *supra* note 66.

132. See SEC Report, *supra* note 66 at 51.

time frame. Lobbyists and the mass media, many of which kept scorecards on the progress of the various provisions of the Contract with America, kept up the pressure. Moreover, many legislators, particularly the newly-elected members who had been swept into office on the Republican tidal wave, appeared impatient with procedural "quibbles."

The PSLRA has been in effect for almost two years, and the empirical results are beginning to come in. These results, and reflection on the process by which the legislation was adopted, suggest a number of interesting conclusions about that process. With the exception of a brief initial decline in filings, the statute does not appear to have closed off the pipeline of securities filings. The discovery stay initially seemed to result in driving securities cases from federal into state court; but that trend seems to have been reversed. Far from decreasing the power and influence of established plaintiffs' law firms, various provisions intended to make it more difficult for them to do business as usual have actually helped them to increase their market share and may have suppressed rather than encouraged competition in the plaintiffs' bar.

Most importantly, the securities reform legislation provided an example of why Congress is institutionally ill-suited to make procedural rules. The legislative process was dominated by well-financed lobbying groups, who mostly represented groups of potential securities defendants. These lobbyists were permitted to carry the labouring oar in drafting the language of the statute. While the plaintiffs' bar also mounted an expensive but largely unsuccessful lobbying campaign, other interested groups were not sufficiently organized to be represented, and Congress did not appear to be particularly interested in seeking out or heeding the views of others, such as judges. Although the legislative process did winnow out many of the more extreme provisions of the initial proposed legislation, it was not particularly attuned to the subtleties of procedural systems and court institutions.

The PSLRA experience vividly illustrated that Congress focuses only sporadically on issues such as procedural reform, and is spurred to action by a perception of urgency which is often created by interest groups. It is more difficult for Congress than for the bureaucratic rule-making procedure under the Rules Enabling Act to hold consistently to a long-term philosophy of procedure, to draft and re-draft, and to be responsive to views that do not reflect interest-group positions.<sup>133</sup> The legislative process is less receptive to extended consideration and redrafting, as there is pressure to act within the two-year period of a congressional session, and once a bill is enacted it is difficult to get Congress to focus on tinkering to fix problems that may be the result of hasty action.

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133. To be fair, the Judicial Conference rule-making process is not very responsive to lay public opinion or, indeed, to non-expert opinion.



## CONCLUSION

This paper has briefly reviewed some recent developments that reflect fundamental changes in the formal court process of resolving civil disputes in the United States. These developments — mass treatment of mass claims, the case management movement, privatization of commercial dispute resolution, and congressional intervention in procedural rule-making (which is primarily motivated by complaints over the volume, cost and alleged lack of merit of civil litigation) — are interrelated and mutually reinforcing. They are moving the U.S. civil justice system farther and farther from the traditional adjudicative model around which our procedural rules are still organized. The challenge in such a period of change is to step back and evaluate critically what is happening to the institutions of civil justice, in order to assure that the enduring values and goals of the procedural system are preserved while embracing changes that are necessary to do justice in a changing world.