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MASS TORT CLASS ACTIONS IN THE NEW MILLENNIUM

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## I. Mass Tort Class Actions—Abuse on Both Sides of the “v”?

At present, mass torts seem to have become a fixture on the litigation landscape. The specialized mass tort plaintiffs’ bar that emerged during the 1980s has accumulated capital as a result of its success in litigating earlier mass claims, and is skillful and aggressive in identifying new investment opportunities. A mass tort defense bar has developed to counter these plaintiffs’ attorney efforts. An elite of trial judges has come forward, ready to set aside traditional case-at-a-time disposition procedures in favor of aggregative procedures for disposing of hundreds or even thousands of cases. A cottage industry of experts and special masters supports their efforts by designing complex procedures and crafting complex settlements. Appellate courts wrestle with collective disposition of mass claims. Lawyers, judges, and business executives no longer wonder whether or not there will be another mass tort, but rather what the next mass tort will be.<sup>1</sup>

A larger than usual “cast of characters” exists for the “public performance” entitled mass tort litigation.<sup>2</sup> This Article scrutinizes

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1. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 964 (1993) (footnotes omitted).

2. See generally Jack B. Weinstein, *An Introduction to Who’s Who in Mass Toxic Torts*, 80 CORNELL L. REV. 845, 850 (1995).

the state of this “fixture on the litigation landscape.”<sup>3</sup> Federal Rule of Civil Procedure 23 is its primary arsenal. In recent years, federal courts have used Rule 23 to authorize class actions<sup>4</sup> in a number of single-incident mass accident cases and a smaller number of mass exposure tort cases. Class certification of mass torts has emerged as a vehicle of choice despite the Advisory Committee’s notation that the class action device is “ordinarily not appropriate” for “[a] ‘mass accident’ resulting in injuries to numerous persons.”<sup>5</sup>

This admonition, first espoused in 1966 in Rule 23’s legislative history, has been heeded recently by some federal courts that have ruled that Rule 23 cannot be used in mass toxic tort cases on issues of liability, defenses to liability, causation, and damages.<sup>6</sup>

Courts charge the class action device with widespread abuse by attorneys on both sides of the “v.” This abuse includes unprofessional practices relating to attorneys’ fees, “sweetheart” settlement deals, dilatory motion practice, harassing discovery, and misrepresentations to judges. This alleged mass tort morass spawns unique ethical considerations for the attorneys and courts alike.

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3. Hensler & Peterson, *supra* note 1, at 964.

4. Federal Rule of Civil Procedure 23(a) requires that class actions meet four prerequisites, generally referred to as numerosity, commonality, typicality, and adequacy. If the mass tort situation does not involve a bankruptcy, a trust or estate administered by the court, or a limited fund, the prevailing rule is that absent members of the class must be provided both with reasonable notice of the class action and with an opportunity to exclude themselves from the class by opting out. Class actions under Rule 23(b)(3), often referred to as “non-mandatory” or “opt-out” class actions, may be maintained as a class action if the action satisfies the requirements of “predominance” and “superiority” contained in Rule 23(b)(3). FED. R. CIV. P. 23.

5. FED. R. CIV. P. 23(b)(3) advisory committee’s note. The note states:

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.

6. See generally *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (concerning decertification of nationwide tobacco class action); *Andrews v. AT&T Co.*, 95 F.3d 1014 (11th Cir. 1996) (involving decertification of class of “900-number” customers); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (pertaining to decertification of asbestos settlement class action), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (involving decertification of penile implant class).

This Article surveys mass tort litigation. Part II presents an overview of commentary, primarily by the media. Part III articulates selected basics of mass tort litigation, concluding that denial of class certification is again in vogue, reminiscent of earlier phases of mass tort litigation. Part IV explores the renewed opposition to the mass tort class action in selected cases in the Third, Fifth, and other circuits, as well as in the academic fora. Parts V and VI highlight the ethical tensions that mass tort litigation has engendered and the furor that has been created in the media, the academic community, the practicing bar, and the judiciary. They argue that although the queries appear rudimentary, the responses, if attainable, are less than simple. Parts VII and VIII conclude with a simple proposition. Viable mechanisms may exist within the courts to curtail any abuses that may surface in the mass tort class action arena.

## II. The Class Action “Controversy”—The Commentary

Commentary on mass tort litigation and class actions includes the following:

1. Typhoons of litigation like this one have come to be known as “mass torts,” and there is no more terrifying phrase in corporate law. It is well known, and largely accepted, that companies will often make a business judgment to settle lawsuits that have little merit, simply to be done with them. A mass tort is the ultimate abuse of this idea. The dynamics of a mass tort *demand* that companies try to settle litigation—regardless of the merits—if they want to continue in business. The volume of lawsuits, their oppressive weight, is what brings companies to their knees . . . .

Over the past decade, as mass torts have grown in size and scope and audacity, they’ve become a kind of beast that needs periodic feeding. More and more plaintiffs lawyers have come to see mass torts as an essential part of their business, and they are no longer willing to wait for such cases to land on their doorstep. There are now scores of lawyers—lawyers whose collective pockets are deeper than the companies they’re suing and who don’t blink twice at pushing a company into bankruptcy if it can’t meet their demands—who actively hunt for products they can build a mass tort around. Today it’s breast implants. Tomorrow it will be the contraceptive device Norplant. The day after, it will be something else . . . .

It’s not proof the plaintiffs lawyers need, it’s numbers. That’s the cruel calculation behind a mass tort.<sup>7</sup>

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7. Joseph Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60, 62.

2. A funny thing is happening on the way to the courthouse, as class-action lawyers and the insurance industry mop up some of the worst sales abuses heaped upon consumers in recent years.

While lawyers are walking away with upward of \$150 million in cold, hard cash for representing customers who said they had been duped into buying policies that may have been unnecessary or overrated, millions of policyholders are being offered something far less tangible to settle class action lawsuits . . . .

But the settlements may do more to help the insurance companies and class-action lawyers who created them.<sup>8</sup>

3. The \$49 million in legal fees and costs resulting from a tobacco litigation settlement today in which the plaintiffs received no money was criticized by some legal scholars . . . .

"It has all the earmarks of a settlement motivated by attorneys' fees rather than the members of the class bringing the suit."<sup>9</sup>

4. Just a few years ago, it seemed that judges could resolve even the most complicated mass-injury cases with a single stroke of the pen. Settlements covering thousands of people—known as class actions—and involving products ranging from pickup trucks to heart valves regularly grabbed headlines. It seemed so easy that, in a big asbestos case, one federal judge in Texas loaded the lawyers on both sides in a van, drove them to his house and plied them with food and drinks until they came to terms.

Today, the party is over. Courts are rethinking the whole idea of allowing big class-action injury cases to go forward, reflecting a concern that past deals have done more to enrich lawyers than give much to the injured. Defendants are starting to resist massive deals, while challenging suits on scientific and other grounds. The big spoiler came in June, when the U.S. Supreme Court, in a case known as 'Amchem,' threw out a supposedly model asbestos deal, saying it ran roughshod over the rights of thousands of alleged victims.<sup>10</sup>

5. In short, our answer to class action abuse is "sue the bastards." In more polite terms, . . . we hope to dispel any notion that the procedural law used to facilitate the settlement of class actions should somehow operate to cancel the substantive law designed to protect us all from the wrongful conduct of our supposed champions.<sup>11</sup>

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8. Reed Abelson, *For Plaintiffs, More of Same in Insurance Accords*, N.Y. TIMES, Aug. 28, 1997, at A1.

9. Neil A. Lewis, *First Thing We Do, Let's Pay All the Lawyers*, N.Y. TIMES, Oct. 11, 1997, at A8.

10. Richard B. Schmitt, *Thinning the Rank: Diet-Pill Litigation Finds Courts Frowning on Mass Settlements*, WALL ST. J., Jan. 8, 1998, at A1, A4.

11. Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1057 (1996).

The diversity of the sources is unprecedented. From *Fortune* magazine to the *New York Times* to the *Wall Street Journal* to the *Virginia Law Review*, the sentiment remains the same. Early critics of Rule 23 voiced a now oft-repeated theme: "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail."<sup>12</sup>

### III. Mass Torts—Selected Basics

Professor John C. Coffee, Jr. has cogently articulated four unique features of mass torts:

1. a predictable evolutionary cycle during which the value and volume of individual claims starts low and then spirals upward;
2. high case interdependency so that litigated outcomes in any mass tort area quickly impact on the settlement value of other pending cases in that same field;
3. a highly concentrated plaintiffs' bar, in which individual practitioners control exceptionally large inventories of cases, sometimes totaling in the tens of thousands; and
4. a capacity to place logistical pressure on individual courts that is simply unequaled by any other form of civil litigation.<sup>13</sup>

Each of these factors tends to undercut litigant autonomy and, as some commentators espouse, facilitate the creation of ethical quagmires. The balance of individual autonomy in a mass aggregate setting is at the crux of the professional responsibility conundrum.

As Professor Michael A. Perino recently stated, in each of the four phases of the evolution of mass tort class actions he identifies, the judiciary has sought "to employ aggregative techniques in mass tort litigation while still respecting individual autonomy."<sup>14</sup> Each

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12. Milton Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

13. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-59 (1995).

14. Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 90 (1997).

phase endeavors to resolve the tension differently. In the first phase, courts routinely denied class certification motions for fear that individual issues would overwhelm common ones.<sup>15</sup> In the second phase, courts sought to experiment with class certification techniques and relied on the opt-out mechanism to justify this aggregative technique.<sup>16</sup> In the third phase, courts began to realize that opt-outs often made efficient global resolution and settlement of class actions difficult and turned to Rule 23(b)(1) mandatory classes, only to discover that appellate courts often rejected such a resolution.<sup>17</sup> Finally, in the fourth phase, appellate courts have reasserted their significant concern regarding the appropriateness of the class action vehicle in mass tort cases.<sup>18</sup> As a result, denial of class certification is once again in vogue, highly reminiscent of the first phase of mass tort class actions.

#### IV. Recent "Class Action Consciousness"<sup>19</sup> in the Mass Tort Setting—Coupon Settlements, Future Claims, and No Automatic Right to Class Actions or Opt Outs

Proponents of the need for "class-action consciousness," which is, in essence, scrutiny of the class action as the conduit of choice in mass tort litigation, challenge coupon settlements similar to those in cases involving airline tickets and defective cars, challenge future or emergent claims in cases involving asbestos and toxic chemicals (to the extent they limit the legal recourse of those whose injuries or illnesses do not emerge until years later), as well as challenge the denial of the right to opt-out.

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Barry Meier, *Class-Action Consciousness*, N.Y. TIMES, Feb. 18, 1997, at D1 (discussing recent cases of abusive fees charged by plaintiffs' attorneys in class action litigation).



### A. *Coupon Settlements*

Recent experience with courts' scrutiny of class action settlements in mass tort cases evidences both the courts' and the public's concerns with the present state of class action practice. Albeit not in the mass tort realm, the lessons from a recent Third Circuit decision are noteworthy. In *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,<sup>20</sup> the Third Circuit set aside a national class action order approving a settlement, and directed the district court that further findings were required.<sup>21</sup> The settlement included GM truck owners across the nation who had purchased the allegedly defective GM trucks which had fuel tanks located in a place that made the trucks especially vulnerable to fuel fires in side collisions. The settlement provided, *inter alia*, that for each truck owned, every class member would receive a one thousand dollar coupon to be used to purchase any new GM truck or Chevrolet light duty truck. After individual notice to the registered owners of 5.7 million GM trucks and the recognition of objectors, the district court held a brief fairness hearing and subsequently issued an opinion confirming its provisional certification of the class and approving the settlement.<sup>22</sup>

The Third Circuit vacated and remanded.<sup>23</sup> The court articulated its concerns inherent in the settlement class action procedure, alluding to the difficulties in assessing the fairness of a settlement when the number of class members is uncertain.<sup>24</sup> "With less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses."<sup>25</sup> Finally, the Third Circuit affirmed "the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified,"<sup>26</sup> stating that in those

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20. 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1996).

21. *Id.* at 822.

22. *Id.* at 781.

23. *Id.* at 822.

24. *Id.* at 787.

25. *In re General Motors Corp.*, 55 F.3d at 787.

26. *Id.* at 805.

cases there must be strong “indications of sustained advocacy” by lawyers who purport to represent the inchoate class.<sup>27</sup>

### B. Future Claims

Last summer the United States Supreme Court affirmed the Third Circuit’s decision in *Georgine v. Amchem Products, Inc.*<sup>28</sup> *Amchem* arose from an attempt to reduce part of the massive asbestos litigation that began to inundate our federal and state courts in the 1960s. The named plaintiffs, as putative class representatives, asked the district court to certify a class consisting of, *inter alia*, all persons who “had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos . . . .”<sup>29</sup> A consortium of twenty major asbestos producers reached a global settlement covering all future asbestos personal injury claims with two plaintiffs’ law firms. Plaintiffs’ complaint, defendants’ answer, a joint motion seeking conditional class certification for purposes of settlement, and a stipulation of settlement (i.e., the parties’ settlement agreement) were all filed on the same day. In other words, the parties chose to forego preliminaries and presented a prepackaged settlement to the trial court.

The stipulation purported to settle all present and future claims of class members for asbestos-related personal injury or wrongful death and severely limited the number of claimants who could opt out

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27. *Id.* at 805-06. See also *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996) (stating that “[c]lass actions are extraordinary proceedings with extraordinary potential for abuse”). In *Bloyed*, the Texas Supreme Court found that the trial court acted within its discretion in approving the settlement providing for, *inter alia*, \$1,000 certificates for class members to purchase a new van or truck from the manufacturer. However, the court held that class members did not receive adequate notice of all material terms of the proposed settlement—most noticeably, the maximum amount of attorneys’ fees sought by class counsel and the proposed method of calculating such an award. *Bloyed*, 916 S.W.2d at 957.

28. 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

29. *Amchem*, 117 S. Ct. at 2239.

and pursue their claims in court.<sup>30</sup> After a number of hearings, the federal district court approved the stipulation of settlement and certified the settlement class.<sup>31</sup>

Parties objecting to the settlement appealed, and the Third Circuit reversed the district court, decertifying the class of present and future asbestos victims and holding that the requirements of Rule 23 “must be satisfied without taking into account the settlement . . . .”<sup>32</sup>

The Supreme Court affirmed, holding that although classes could be certified for settlement purposes only, settlement classes were generally subject to the same level of Rule 23 scrutiny as litigation classes.<sup>33</sup> But contrary to the Third Circuit’s opinion that the requirements of Rule 23 had to be met “without taking into account the settlement,”<sup>34</sup> the Court held that settlement is a relevant, but not deciding, factor.<sup>35</sup> Certification may be proper even if intractable management problems would result if the case were tried, because “the proposal is that there be no trial.”<sup>36</sup>

For a class to be certified, however, Rule 23’s requirements for the protection of absent class members must still be satisfied.<sup>37</sup> Because the Court agreed with the Third Circuit that all requirements were not met, it affirmed the Third Circuit’s order vacating certification.<sup>38</sup> Thus, consistent with the recent trend among the U.S. federal courts, the Supreme Court held that the trial court had committed

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30. *See id.* at 2237 (stating that the Eastern District certified class of plaintiffs with commonality of future or current asbestos related illnesses and enjoined class members from pursuing asbestos related personal injury suits in any other court pending issuance of final order in class settlement).

31. *See id.*

32. *Georgine*, 83 F.3d at 626.

33. *See Amchem*, 117 S. Ct. at 2249 (concluding that the Third Circuit’s holding was correct and that Rule 23 must be applied as written, but constraints of settlement should be factor in determining if class satisfies Rule 23).

34. *Georgine*, 83 F.3d at 626.

35. *See Amchem*, 117 S. Ct. at 2249 (stating that “[a]lthough [the Third Circuit] should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account.”).

36. *Id.* at 2248.

37. *See id.* (stating that “the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor’s foot kind—class certification dependent upon the court’s gestalt judgment or overreaching impression of the settlement’s fairness.”).

38. *Id.* at 2249.

reversible error by certifying for settlement purposes a class of plaintiffs that never could have been certified in a non-settlement context.

1. *Amchem commentary*.—According to Professor John C. Coffee, Jr., who testified as a pro-bono expert witness for the objectors in *Amchem*, “[t]he Supreme Court’s decision is at once broader and narrower” than the Third Circuit decision it affirmed “because the decision rests on two independent pillars: the predominance requirement of Rule 23(b)(3) and the adequacy-of-representation standard of Rule 23(a)(4).”<sup>39</sup>

Professor Coffee first notes that the majority of the Court agreed with the Third Circuit that the fairness and adequacy of the settlement are not pertinent to the predominance requirement of Rule 23(b)(3);<sup>40</sup> rather, predominance is determined by whether the “proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.”<sup>41</sup>

Professor Coffee views the Court’s decision as “stop[ping] slightly short of the Third Circuit’s insistence on the irrelevance of the settlement,”<sup>42</sup> because of the Court’s determination that settlement is a relevant factor in class certification decisions. He comments, however, that the Court’s findings on the issue of adequacy of representation went well beyond the holding of the Third Circuit:<sup>43</sup>

Although the Third Circuit found that the named representatives were inadequate and atypical, it said little about the plaintiffs’ attorneys. By contrast, the Supreme Court found that the broad continuum of injuries alleged (ranging from the currently injured to the exposure-only claimants) made subclasses and separate representation necessary in order to provide structural assurance of fair and adequate representation for the diverse groups and individuals affected.<sup>44</sup>

For Professor Coffee, *Amchem*’s greatest impact lies with this adequacy of representation issue, because the decision limits the

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39. John C. Coffee, Jr., *After the High Court Decision in ‘Amchem Products, Inc. v. Windsor,’ Can a Class Action Ever Be Certified Only For the Purpose of Settlement?*, NAT’L L.J., July 21, 1997, at B4, B6.

40. *Id.* (citing *Amchem*, 117 S. Ct. at 2248).

41. *Id.* at B4 (citing *Amchem*, 117 S. Ct. at 2248).

42. *Id.* at B4, B6.

43. *Id.* at B4.

44. Coffee, *supra* note 39, at B4 (citing *Amchem*, 117 S. Ct. at 2251).

plaintiffs' attorney's ability to allocate settlement decisions:<sup>45</sup> "[T]he message of *Amchem* is unmistakable: when the 'terms of the settlement reflect essential allocations decisions,' a single counsel cannot make these tradeoffs because to do so inevitably subordinates the interests of one subcategory of claimants to those of another."<sup>46</sup>

While "[t]he attempt to reach a global settlement proved fatal to the *Amchem* defendants," Professor Coffee suggests that "a less ambitious attempt to structure state-by-state settlement classes in federal court, covering a narrower spectrum of injuries and with special counsel for future claimants, remains possible."<sup>47</sup> Professor Coffee further opines that the *Amchem* decision is primarily concerned "with the requirements for a federal class action that is to be certified under Rule 23(b)(3)."<sup>48</sup> He indicates that two techniques to skirt *Amchem*'s decision readily emerge: (1) neither a "limited fund" class action under Rule 23(b)(1)(B) nor an equitable class action under Rule 23(b)(2) must satisfy the "predominance" requirement, which uniquely applies to Rule 23(b)(3); and (2) a race to state courts in which the requirements of Rule 23 may be read differently or be nonexistent.<sup>49</sup>

The commentary on *Amchem* appears to parrot two themes: first, the high court's ambiguity in its decision and second, the arduous task of certifying a class for settlement purposes only after *Amchem*. Perhaps, as a result, the trend of bringing nationwide class settlements in state courts will be accelerated. Of course, such practices raise constitutional concerns about whether one state's courts can bind claimants nationwide—concerns which incite inquiry by the Supreme Court.

2. *Amchem's aftermath*.—Although the holding in *Amchem* is consistent with the judicial tightening of Rule 23 in mass exposure torts, its effects are likely to mark a significant extension of that trend.

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45. *Id.*

46. *Id.* at B6 (citing *Amchem*, 117 S. Ct. at 2251).

47. *Id.*

48. *Id.*

49. See Coffee, *supra* note 39, at B6.

For instance, the *Amchem* decision may also affect the tobacco litigation pending in various state and federal courts. The Liggett settlement appears to have been one of the first mass tort class settlements to fall victim to the *Amchem* ruling. On March 20, 1997, Liggett Group, Inc., the smallest of the nation's major tobacco companies, settled lawsuits filed by twenty-two states and a group purporting to represent everyone in the United States seeking to recover for a smoking-related personal injury.<sup>50</sup> In accordance with the settlement terms, Liggett admitted, among other things, that smoking causes cancer and other diseases, that nicotine is an addictive drug, and that the industry had actively marketed tobacco products to minors. Liggett also agreed to pay a percentage of its pre-tax profits to the states for a period of twenty-five years. In return, the settlement purported to shield Liggett from any claims by the states or by individual plaintiffs claiming smoking-related illness.

In *Walker v. Liggett Group, Inc.*,<sup>51</sup> the Southern District of West Virginia vacated the Liggett Settlement in light of *Amchem*.<sup>52</sup> The court noted, "[t]he class is nothing short of enormous, including potentially tens of millions of Americans within its scope."<sup>53</sup> The court emphasized *Amchem*'s discussion of both predominance and adequacy of representation, stating: "The bedrock consideration for the Court in any certification decision is 'whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.'"<sup>54</sup>

In applying this rule to *Walker*, the court emphasized that the two named plaintiffs would not be able to adequately represent a class "numbering potentially in the millions or tens of millions."<sup>55</sup> The court continued that the proposed class included not only smokers whose habit had led to current illness, but also those who would only later begin smoking Liggett cigarettes, those who smoked different brands from those smoked by the named plaintiffs, and other plaintiff categories that shared little in common with the class representa-

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50. See Barry Meier, *Tobacco Deal Would Restrict Plaintiff's Claims*, N.Y. TIMES, Mar. 24, 1997, at A1.

51. 175 F.R.D. 226 (S.D. W. Va. 1997).

52. *Id.* at 228.

53. *Id.* at 229.

54. *Id.* at 231.

55. *Id.* at 232.

tives.<sup>56</sup> The finding of so many differences was sufficient to allow the court, which followed *Amchem* closely, to find a conflict of interest among plaintiffs.<sup>57</sup>

Albeit decided only a short time ago, the Supreme Court's *Amchem* decision promises to have a deliberate effect on the viability of class action certifications and settlements. Although scrutiny of each case decided subsequent to *Amchem* is beyond the parameters of this Article, the class action and mass tort cases decided within two months of *Amchem*, many of which cite to *Amchem* to support the decision reached, reflect that it has an impressive aftermath.<sup>58</sup>

### C. No Automatic Right to Class Actions

Faced with "what may be the largest class action ever attempted," the Fifth Circuit held in *Castano v. American Tobacco Co.*<sup>59</sup> that the Eastern District of Louisiana abused its discretion in certifying a class of nicotine-dependent persons and their heirs and survivors.<sup>60</sup> Nicotine-dependent persons included anyone diagnosed as such by a doctor as well as anyone who, although warned by a

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56. *Walker*, 175 F.R.D. at 232.

57. *Id.* at 233.

58. See generally *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332 (D.N.J. 1997) (denying motions for class certifications); *Jackson & Evans v. Motel 6 Multipurposes*, 175 F.R.D. 337, 344 (M.D. Fla. 1997) (granting motion for class certification because class addresses and fulfills policy behind Rule 23(b)(3) by recognizing "the rights of people who individually would be without effective strength to bring their opponents into court at all."); *In re Foundation for New Era Philanthropy Litig.*, 175 F.R.D. 202, 204 (E.D. Pa. 1997) (granting joint motion for final certification of mandatory settlement class and citing to *Amchem*'s holding that "settlement is relevant to a class certification."); *Robinson v. Metro-North Commuter R.R. Co.*, 175 F.R.D. 46 (S.D.N.Y. 1997) (denying motion for class certification); *Walker*, 175 F.R.D. at 228 (denying motion for class certification, granting intervenor's motion to vacate, and withdrawing preliminary approval and certification of settlement and settlement class, citing *Amchem* and stating that decision "counsels strongly" the district court's result); *In re Cincinnati Radiation Litig.*, 1997 U.S. Dist. LEXIS 12960, at \*1 (S.D. Ohio, Aug. 4, 1997) (denying joint motion to certify class and approve settlement, finding that "[a]fter the *Amchem Products* decision, no one can question that the Court must apply the requirements of Rule 23(a) and (b) of the Federal rules of Civil Procedure stringently in this case.").

59. 84 F.3d 734, 737 (5th Cir. 1996).

60. *Id.*

doctor about the danger of smoking cigarettes, did not or had not quit. The proposed class action, based largely on the “novel and wholly untested theory”<sup>61</sup> that the defendants manipulated levels of nicotine and fraudulently failed to inform consumers that nicotine is addictive, alleged a total of nine different causes of action: fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, negligence and negligent infliction of emotional distress, violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, strict liability, and redhibition pursuant to the Louisiana Civil Code.<sup>62</sup> As the Fifth Circuit noted, the elements and requirements of proof would differ for each of the nine causes of action, depending upon the relevant state law applicable.<sup>63</sup>

In considering whether to certify the class pursuant to Rule 23, the district court subdivided the action into four categories: (1) core liability; (2) injury-in-fact, proximate cause, reliance, and affirmative defenses; (3) compensatory damages; and (4) punitive damages.<sup>64</sup> It then tested each category separately under the predominance and superiority requirements of Rule 23(b)(3). Using its power to sever issues for certification purposes, it certified the class of core liability and punitive damages only, and certified the class conditionally pursuant to Rule 23(c)(1).<sup>65</sup> With respect to each certified category, the district court surmised that substantive state law variations would not be so great as to make individual issues predominate.<sup>66</sup> In any event, the court reasoned that a complete and thorough analysis of every state law applicable would be premature at the certification stage of litigation.<sup>67</sup>

The district court then determined that the class action would be the superior vehicle by which to try these claims, as any problems associated with managing the class action would be far outweighed by

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61. *Id.*

62. *Id.*

63. *Id.* at 741-44.

64. *Castano*, 84 F.3d at 739.

65. *Id.*

66. *Id.* at 742.

67. *Id.* at 739-40.



“the specter of thousands, if not millions, of similar trials of liability proceeding in thousands of courtrooms around the nation.”<sup>68</sup>

The Fifth Circuit disagreed on both counts. First, the court held that the district court should have thoroughly investigated how differences in state substantive law influenced predominance and superiority.<sup>69</sup> The district court’s predominance inquiry did not include consideration of how a trial on the merits would be conducted. The district court had abdicated this duty, instead choosing to rely on guesswork and conjecture in determining that the legal variations would not affect its inquiry. The Fifth Circuit chastised the district court for not taking the certification process more seriously:

Conditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of . . . Rule [23] have been substantially met. The purpose of conditional certification is to preserve the court’s power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent. But in this case the District Court seemed to brush aside one of the requirements of Rule 23(b)(3) by stating that at this time “analysis of the individual versus common questions would be for the court to act as a seer.” However difficult it may be for the District Court to decide whether common questions predominate over individual questions, it should not have sidestepped this preliminary requirement of the Rule by merely stating that the problem of individual questions “lies far beyond the horizon in the realm of speculation.”<sup>70</sup>

Second, the Fifth Circuit held that the district court should have considered more carefully how it would manage such an amorphous class action.<sup>71</sup> In formulating its decision, the district court failed to look beyond the pleadings to assess how the claims, defenses, relevant facts of, and law applicable to each case would impact proceedings at trial. The court just accepted, without serious thought, that a class action would be the superior vehicle. In so doing, the district court set itself up for a fall. The problem with the district court’s approach was that after the first phase of the class action, it might have found that subsequent issues had to be proven individu-

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68. *Id.* at 740 (quoting *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 555-56 (E.D. La. 1995)).

69. *Castano*, 84 F.3d at 741-42.

70. *Id.* at 741 (citing *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974)).

71. *Id.* at 743.

ally. The court would then be faced with the decision of whether to decertify the class and waste judicial resources, or continue the class action even though it now knew that predominance was lacking. The Fifth Circuit viewed either alternative as unacceptable.<sup>72</sup>

Finally, the court admonished the district court for not using more care in the certification process, especially one involving a mass tort.<sup>73</sup> This proposed class, according to the Fifth Circuit, independently failed the superiority requirement of Rule 23(b)(3).<sup>74</sup> Noting that certification of mass tort classes is generally disfavored, the court explained that in such cases, the defendant bears enormous risk: "Class certification magnifies and strengthens the number of unmeritorious claims"; "[a]ggregation of claims . . . makes it more likely that [the] defendant will be found liable and results in significantly higher damage awards; . . . [and] class certification [also] creates insurmountable pressure on [the] defendants to settle."<sup>75</sup>

The Fifth Circuit, therefore, reversed the district court's certification decision and remanded with instructions to dismiss the proposed class action.<sup>76</sup> The court's mandate to dismiss was based on its conclusion that a class action would not be the superior way to try thousands of legally novel lawsuits or immature torts involving numerous issues unique to the individual.<sup>77</sup> According to the court, "[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry, or indeed, the fate of a class of millions, to a single jury."<sup>78</sup>

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72. *Id.* at 744-45.

73. *See id.* at 746 (explaining the high stakes involved for defendants in class action certification).

74. *Castano*, 84 F.3d at 746.

75. *Id.*

76. *Id.* at 752.

77. *Id.* at 749.

78. *Id.* at 752.

*D. No Automatic Right to Opt Outs*

In a case of national significance, *Flanagan v. Ahearn* (In re *Asbestos Litigation*),<sup>79</sup> a divided panel of the Fifth Circuit affirmed the decision of the Eastern District of Texas to certify a non-opt-out class of future asbestos claimants and to approve a far-reaching settlement of their claims.<sup>80</sup> To date, *Ahearn* appears to be one of the only (if not the only) mandatory, non-opt-out class action of future-only plaintiffs in a mass personal injury tort case.

The action arose, in part, from a struggle between Fibreboard Corporation, an asbestos manufacturer, and its insurers, Continental Casualty Company and Pacific Indemnity Company.<sup>81</sup> The class of future claimants included all persons with personal injury claims against Fibreboard for asbestos exposure whose claims had not been brought in a lawsuit, settled, or included in a settlement agreement before August 27, 1993. This group became known as the "Global Health Claimant Class," and the settlement between them, Fibreboard, and its insurers became known as the "Global Settlement Agreement."<sup>82</sup>

After a settlement was reached, the Global Health Claimant Class initiated the *Ahearn* class action against Fibreboard.<sup>83</sup> Fibreboard's insurers intervened. The class action was provisionally certified, but a restraining order against any separate litigation was also issued. The terms of the Global Settlement Agreement and the Trilateral Agreement—an understanding that Fibreboard and its insurers would formulate an insurance coverage agreement—were then finalized, and notice of the proposed settlements was distributed. After a comprehensive fairness hearing, the Eastern District of Texas approved the Global Settlement Agreement and certified the *Ahearn* classes pursuant to Rule 23.<sup>84</sup>

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79. 90 F.3d 963 (5th Cir. 1996), *vacated and remanded in light of* Amchem, 117 S. Ct. 2503 (1997), *aff'd* 134 F.3d 668 (5th Cir. 1998) (per curiam).

80. *Ahearn*, 90 F.3d at 963.

81. *Id.* at 968.

82. *Id.* at 972.

83. *Id.*

84. *Id.* at 974.

Meanwhile, in a separate but related action, the insurers sought a declaratory judgment proclaiming the fairness of the settlement, as well as injunctive relief.<sup>85</sup> The named defendant classes consented to the relief sought and the court certified them as non-opt-out defendant classes. This proceeding became known as the *Rudd* proceeding.<sup>86</sup>

On appeal, several groups of the Global Health Claimants Class challenged the class certifications.<sup>87</sup> One group, the Ortiz intervenors, challenged the *Ahearn* certifications and the judicial approval of the Global Settlement Agreement. Another group, the Flanagan intervenors, also challenged the *Ahearn* class certification and objected to the *Rudd* proceeding. All claims were consolidated on appeal.<sup>88</sup>

The Fifth Circuit turned to the requirements of Rule 23, but it used the settlement itself, rather than the complaint, to find them satisfied.<sup>89</sup> Conceding numerosity, the intervenors challenged the elements of commonality, typicality, and adequacy of representation. The intervenors also charged that the district court unlawfully allowed the settlement to influence its certification decisions. The Fifth Circuit rejected this argument. Purportedly following, *inter alia*, *In re Corrugated Container Antitrust Litigation*,<sup>90</sup> a case Susman Godfrey handled, the court concluded that settlements and surrounding events may influence the district court's inquiry—even, perhaps, to the point of effectively serving as a substitute for the Rule 23 requirements.<sup>91</sup> The Fifth Circuit noted that the Third Circuit in *Georgine v. Amchem Products, Inc.*<sup>92</sup> refused to look at the settlement prior to deciding class certification issues, albeit admitting that taking into account the settlement may be “the better policy.”<sup>93</sup>

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85. *Ahearn*, 90 F.3d. at 974.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 975.

90. 643 F.2d 195 (5th Cir. 1981).

91. *Ahearn*, 90 F.3d at 975.

92. 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct 2231 (1997). For a discussion of the *Georgine* case, see *supra* text accompanying notes 28-58.

93. *Ahearn*, 90 F.3d at 975.

Regarding commonality, the court found that the members of the Global Health Claimant Class had several issues in common—primarily their interest in avoiding the risk of loss in the coverage litigation.<sup>94</sup> The intervenors unsuccessfully argued that the district court wrongly drew these common issues from the settlement negotiations rather than the complaint.

The court similarly determined that the typicality requirement was met.<sup>95</sup> According to the court, the criterion “typically focuses on the similarity between the named plaintiffs’ legal and remedial theories and the legal and remedial theories of those whom they purport to represent.”<sup>96</sup> Again, using the settlement itself as a substitute for the Rule 23 requirement, the circuit court found that the facts of *Ahearn* met this standard because all members of the Global Health Claimant Class based their claims on exposure to Fibreboard’s asbestos and wanted to avoid the risk of loss of insurance coverage.<sup>97</sup>

Alleging conflicts of interest caused by concurrent representation of present and future claimants, and of purported conflicting subgroups within the class, the intervenors also challenged the adequacy of representation by class counsel.<sup>98</sup> Such conflicts, if found to exist, would have rendered representation of the class inadequate. Addressing this issue, the Fifth Circuit focused on the expert testimony presented at the fairness hearing. Deeming the testimony of the settling parties’ expert to be more persuasive, the panel, over vigorous dissent, accepted this expert’s assessment and held that no conflicts existed.<sup>99</sup>

In its opinion, the court also addressed the considerations raised by Rule 23(b)(1)(B).<sup>100</sup> Rule 23(b)(1)(B) recommends class action in cases where the prosecution of separate actions by members of the class would create a risk of dispositive results for other members of the class not parties to the separate actions or substantially hinder their ability to protect their interests.<sup>101</sup> The Fifth Circuit found this

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94. *Id.* at 975.

95. *Id.* at 976.

96. *Id.*

97. *Id.*

98. *Ahearn*, 90 F.3d at 976.

99. *Id.* at 977-78.

100. *Id.* at 982.

101. *Id.*

to be the case in *Ahearn*. The majority held that separate actions would inherently impede the ability of all persons harmed to recover for their damages—both due to the number of claimants and the limited financial resources of Fibreboard.<sup>102</sup> Although the intervenors argued that the settlement was merely an attempt to circumvent potential bankruptcy proceedings and bankruptcy's absolute priority rule, the court determined that the potential insolvency of a defendant may create a limited fund and does not preclude class certification.<sup>103</sup> The court emphasized the unique forces at play in the case, including the insurance coverage disputes and the pending California action, and considered the plain language of Rule 23 as well as bankruptcy alternatives.<sup>104</sup> Ultimately, the court determined that certification of the *Ahearn* class was not only defensible, but also desirable.<sup>105</sup> Class certification, in light of the settlement, proved to be the fairest and most equitable way to attempt to recognize the claims of every person damaged.<sup>106</sup>

Relying on *Phillips Petroleum Co. v. Shutts*,<sup>107</sup> the intervenors further challenged the settlement on due process grounds and argued that due process requires that claimants seeking monetary damages be allowed to opt-out of a class action.<sup>108</sup> The *Ahearn* majority held, however, that this action was equitable in nature, and that *Shutts* stands only for the proposition that in monetary damages cases, absent class members may choose not to be bound by the class judgment and must be given the right to opt-out.<sup>109</sup> *Shutts* "intimate[d] no view concerning other types of class actions such as those seeking equitable relief."<sup>110</sup>

According to the Fifth Circuit, Rule 23(b)(1)(B) actions have always been equitable in nature:

The traditional limited-fund class action is an equitable and unitary disposition of a fund too small to satisfy all claims. . . . Unitary adjudication of a

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102. *Id.*

103. *Ahearn*, 90 F.3d at 985-86.

104. *Id.* at 983.

105. *Id.* at 985.

106. *Id.* at 982-86.

107. 472 U.S. 797 (1985).

108. *Ahearn*, 90 F.3d at 986.

109. *Id.*

110. *Id.* (citing *Shutts*, 472 U.S. at 811 n.3).

limited fund is crucial because allowing plaintiffs to sue individually would make the litigation "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest. . . . Thus, th[ese] [actions] sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive."<sup>111</sup>

In equitable cases, the court determined, due process requires only that the interests of absent parties be adequately represented.<sup>112</sup> Because the court had already found this to be the case in *Ahearn*, it affirmed the class certification and settlement approval, including its prohibition against opt-outs.<sup>113</sup>

Judge Smith wrote a comprehensive and vigorous dissent.<sup>114</sup> The Fifth Circuit denied en banc rehearing, again, not without controversy. "The result of this litigation . . . is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved."<sup>115</sup> Such issues are "worthy of consideration beyond the level of circuit panel review."<sup>116</sup>

Two days after deciding *Amchem*, the Supreme Court vacated and remanded *Flanagan v. Ahearn*<sup>117</sup> in light of *Amchem*. Nonetheless, on remand, the Fifth Circuit upheld for the second time the \$1.5 billion class settlement of future asbestos claims against Fibreboard Corporation, finding its earlier ruling unaffected by *Amchem*'s decision.<sup>118</sup>

In a five-paragraph opinion, the Fifth Circuit found two controlling differences between the Fibreboard and *Amchem* settlements. First, the Supreme Court struck down *Amchem* because common issues did not predominate over individual ones and the named parties did not fairly represent the class. The Fifth Circuit stressed the *Amchem* accord was certified under Rule 23(b)(3), which requires

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111. *Id.* (citations omitted).

112. *Id.*

113. *Ahearn*, 90 F.3d at 986-87.

114. *Id.* at 993.

115. *Flanagan v. Ahearn (In re Asbestos Litig.)*, 101 F.3d 368, 369 (1996) (J. Smith, dissenting to denial of rehearing for 90 F.3d 963 (1996)).

116. *Id.*

117. 117 S. Ct. 2503, 2503 (1997).

118. *Flanagan v. Ahearn (In re Asbestos Litig.)*, 134 F.3d 668, 668 (5th Cir. 1998).

proof of the dominance of common issues.<sup>119</sup> In contrast, the Fibreboard settlement was certified as a limited fund under Rule 23(b)(1)(B), which does not require a predominance showing. According to the Fifth Circuit, “None of the uncommon questions, abounding in *Amchem*, exist in this case.”<sup>120</sup>

Second, unlike *Amchem*, the Fibreboard settlement contemplated no allocation or difference in award according to the nature or severity of injury.<sup>121</sup> In Fibreboard, all class members—those who had not sued by August 27, 1993—were treated alike, with each individual proceeding through a claims resolution process.

Once again, Judge Smith dissented, berating the “majority’s terse per curiam treatment.”<sup>122</sup> Judge Smith added that “[t]he panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements.”<sup>123</sup>

Albeit rare, cases such as *Ahearn* deny plaintiffs the opportunity to opt-out, making a class action suit mandatory in order to avoid depletion of a “limited fund”—that is, when overhanging tort liabilities threaten a corporation with insolvency.<sup>124</sup>

## V. Individual v. Group Justice—The Jurisprudential Debate

Recent jurisprudence of the U.S. Supreme Court in *Georgine*,<sup>125</sup> of the Fifth Circuit Court of Appeals in *Ahearn*,<sup>126</sup> and of the Texas

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119. *Id.* at 671.

120. *Id.* at 668.

121. *Id.*

122. *Id.* at 670.

123. *Flanagan*, 134 F.3d at 683.

124. *See, e.g.*, Meier, *supra* note 50, at A1, A9 (questioning constitutionality of Alabama state court’s ruling that would bind officials, insurers, and individuals nationwide to plan with no opt-out provision; according to one attorney, alternative to deal is that Liggett goes bankrupt).

125. *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

126. *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded in light of Amchem*, 117 S. Ct. 2503 (1997), *aff’d* 134 F.3d 668 (5th Cir. 1998) (per curiam).



Court of Appeals in *Arce v. Burrow*<sup>127</sup> highlights tensions in the settlements of mass torts. These ethical issues have engendered furor in the media,<sup>128</sup> the academic community, the practicing bar, and the judiciary.

The queries appear so rudimentary.

Do ethics matter in mass tort class actions? Which legal ethics rules should apply? The same ethical rules that constrain lawyers in non-class actions? If the same, why? If different, why? What is distinctive about a massive class action that makes the general ethical rules ill suited? Are they equally ill suited for defense lawyers as for plaintiffs' lawyers?<sup>129</sup>

The responses, however, if any even exist, are not readily attainable. The answers are not so simple.

Our general code of legal ethics assumes a Lincolnesque lawyer strongly bonded to an individual client.<sup>130</sup> In mass torts, the facts do not fit this conceptual framework.<sup>131</sup> The jurisprudential debate—litigant autonomy versus aggregative justice—reaches its pinnacle in the realm of mass tort litigation. As one academic noted, “The model of individualized justice posits that each claimant should make all relevant decisions with respect to her claim.”<sup>132</sup> The characteristics of mass exposure torts produce pressures that result in efforts at aggregative or collective justice. Such justice departs from the traditional lawyer-client relationship in which the client makes decisions concerning objectives and the lawyer makes tactical and procedural decisions. But is this really the case? Have we romanticized the traditional bipolar tort case and the attorney-client relationship? Isn't the quintessential feature of mass tort litigation by definition aggregate litigation, and therefore, by nature representa-

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127. *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

128. See *supra* Part II (describing critical media commentary).

129. See Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228, 1228 (1995).

130. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481 (1994).

131. See *id.*

132. Roger C. Cramton, *Individualized Justice, Mass Torts and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 817 (1995).

tional litigation?<sup>133</sup> Thus, the ascent into unprecedented popularity of the class action.

## VI. The Ethical Dilemmas in Mass Tort Litigation

Judge Jack B. Weinstein's 1994 *Northwestern University Law Review* article serves as the foundation for any analysis on the ethical issues which may arise in complex mass tort litigation.<sup>134</sup> These include problems in client solicitation, client loyalty, fee arrangements, financing litigation, discovery and disclosure, privileges and immunities, conflicts of interest, judicial surrogates, representational litigation, and a myriad of other professional responsibility issues.<sup>135</sup> Using his hands-on exposure to the *In re Agent Orange Product Liability Litigation*<sup>136</sup> and asbestos mass tort cases, Judge Weinstein contends that mass tort litigation raises distinctive ethical problems that conventional professional responsibility codes do not address adequately, and thus are problems that need to be addressed by law reform bodies.<sup>137</sup> His contention is not universally accepted. Others, such as Professor Linda S. Mullenix, posit that mass tort ethical problems are no different from those found in other cases.<sup>138</sup> She queries, "[W]hy [do] these cases have a special claim for special rules?"<sup>139</sup> Commentators question whether mass tort actions necessitate different legal ethics rules, what characteristics of massive class actions make the general ethics rules ill-suited, and whether the

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133. See Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 586-87 (1994).

134. Weinstein, *supra* note 130, *passim*.

135. See *id.*

136. 611 F. Supp. 1296 (E.D.N.Y. 1985), *partially rev'd by* 818 F.2d 226 (2d Cir. 1987).

137. Weinstein, *supra* note 130, at 471.

138. Mullenix, *supra* note 133, at 588.

139. *Id.* at 589.

general ethical rules are equally as ill-suited for attorneys on both sides of the "v."<sup>140</sup>

Regardless of the applicable ethical standard, mass tort class action settlements raise a host of ethical issues for both the practitioners and the judiciary.<sup>141</sup> Resolving mass tort litigation may present plaintiffs' counsel with conflicts of interests and the defense counsel with prisoners' dilemmas over shared information, fee conflicts, and potential charges of "collusion" by their settling partners.<sup>142</sup> Judges who are asked to approve mass tort settlements under Rule 23(e) must decide, often with little guidance, the extent to which he or she should encourage or facilitate a settlement, issues of adequacy of counsel, and the fairness of the negotiated settlement.<sup>143</sup> The adequacy of the class counsel to represent the classes of litigants<sup>144</sup> under Rule 23(a)(4) has been raised in recent mass tort class action settlements. The objections have been based on ethical issues such as conflicts of interests, aggregate settlement without client consent, and collusion with the opposition.<sup>145</sup> The following endeavors to identify, albeit rather perfunctorily, the ethical quagmires which have emerged in recent mass tort class action litigation.

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140. See Wolfram, *supra* note 129, at 1228 (discussing debate over class action litigation ethics); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1188 (1995) (exploring applicability of ethics rules to special circumstances of class action suits); Mullenix, *supra* note 133, at 588-89 (arguing that many debated ethical dilemmas are not actually unique to mass tort litigation).

141. See Menkel-Meadow, *supra* note 140, at 1188 (noting that attorneys and judges face unique issues in class action suits); Marc Z. Edell, *Resolution of Mass Tort Litigation: A Practitioner's Guide to Existing Methods and Emerging Trends*, C949 ALI-ABA 37, 39 (1994) (discussing role of counsel and courts in class action ethical dilemmas).

142. See Menkel-Meadow, *supra* note 140, at 1181-83.

143. See *id.* at 1183-84.

144. The classes of litigants have included, among others, present clients, potential future claimants, domestic claimants, and foreign claimants. See *id.* at 1167.

145. See *id.*

### A. *Communication*

The ethical rules require effective communication between attorneys and their clients.<sup>146</sup> An attorney is required to inform the client about the case and its progress so that the client has sufficient information to participate intelligently in decisions regarding the representation.<sup>147</sup> Texas Disciplinary Rules of Professional Conduct (hereinafter "Texas Disciplinary Rules") Rule 1.03 provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>148</sup>

In mass tort class actions, this affirmative duty to communicate with the client is complicated by the numerosity and geographic diversity of the clients.<sup>149</sup> In many of these cases, the attorney's communication with the client, although technically in compliance with the ethical rules, may not satisfy the clients.<sup>150</sup>

### B. *Conflicts of Interest*

Attorneys representing classes of clients face many potential conflicts of interests that compromise their loyalty to the clients.

*1. Lawyer-client.*—An attorney's interest during the representation of a plaintiff class may diverge from the class members'

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146. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9) (requiring that lawyer keep client "reasonably informed," respond "promptly" to client's request for information, and provide client with enough information so client can make "informed decisions").

147. *Id.* cmt.1.

148. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03.

149. See Weinstein, *supra* note 130, at 495-96.

150. See *id.* at 497. An example of this dissatisfaction appears in *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. filed), in which the clients complained about an alleged mere twenty-minute meeting with their attorneys to discuss their recommended settlement. *Arce*, 958 S.W.2d at 243.

interests.<sup>151</sup> This potential conflict of interest is the most severe and is more likely to appear in the settlements of the class actions.<sup>152</sup> In the context of settlement of a class action, an attorney with a large financial stake in the litigation has more incentive to settle the case than any class member.<sup>153</sup> The attorney's interest to settle the case quickly may be in complete opposition with interests of class members.<sup>154</sup> While this conflict exists in many contingency cases, the mass tort cases differ because with so many clients, the obligation to follow the client's directions does not readily hold the adverse interest conflict in check.<sup>155</sup> Texas Disciplinary Rule 1.06(b)(2) provides that "a lawyer shall not represent a person if the representation of that person . . . (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."<sup>156</sup>

2. *Client-client*.—In the mass tort class action context, class members will necessarily have different goals or interests which may create a conflict for the class counsel whose representation of one client is materially limited by the same representation of another client. Many class members who are more seriously injured will have interests opposed to other class members with less serious injuries.<sup>157</sup> Although an attorney representing such a class may reach "some approximation of the objectives of the group as a whole," breaking

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151. See Weinstein, *supra* note 130, at 503.

152. See *id.* at 502-03.

153. See *id.* at 503.

154. See Edell, *supra* note 141, at 55.

155. See Weinstein, *supra* note 130, at 504.

156. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2).

157. See Edell, *supra* note 141, at 55. In *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2236 (1997), the Supreme Court noted that "[i]n significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." The Court, however, did not address the adequacy of counsel or conflict of interest issues in light of its decision that the class could not be certified because "the named plaintiffs [could] not adequately represent the interests of th[e] enormous class." *Id.* at 2251 n.20. The district court, however, reaching these issues, held that the "Class Counsel's representation of the *Georgine* class was not materially limited by their representation of present clients with pending claims against CCR defendants." *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246, 327 (E.D. Pa. 1994).

the class into subgroups sharing common interests is an approach used by attorneys.<sup>158</sup> Formal subclasses pursuant to Rule 23(c)(4) may be required when conflicts between the class members are apparent.<sup>159</sup>

3. *Present claimants v. future claimants.*—Many mass tort cases present a conflict between the present litigants and future claimants who are not yet represented or who may not have even discovered an injury.<sup>160</sup> The future claimants may require protection against the attorney's present clients from depleting the defendant's limited funds.<sup>161</sup>

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158. See Weinstein, *supra* note 130, at 506.

159. See Edell, *supra* note 141, at 55. The Court in *Amchem* stated:

Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.

*Amchem*, 117 S. Ct. at 2251 (quoting *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993)).

160. See Weinstein, *supra* note 130, at 507-08. This conflict of interest was raised in the district court in *Georgine*; however, the court held: "Class Counsel did not have an inherent conflict of interest in seeking to negotiate a futures settlement while concurrently settling their present inventory of cases with CCR provided they, as experienced asbestos litigators, reasonably believed the settlements were fair, reasonable and in the best interests of both the putative class and their present clients." *Georgine*, 157 F.R.D. at 328 (concluding that class counsel made reasoned judgments and settled reasonably), *rev'd on other grounds*, 83 F.3d 610, 630 (3d Cir. 1996) (refusing to resolve issue of whether class counsel could adequately represent class based on conflicts of interests and collusive actions because objectors had not challenged district court's resolution), *aff'd sub nom. Amchem*, 117 S. Ct. at 2251 n.20 ("declin[ing] to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.").

161. See Edell, *supra* note 141, at 55 (pointing out that interests of present clients are often at odds with those of future claimants, particularly in case of limited funds); *Georgine*, 157 F.R.D. at 329 (stating that "[n]o such conflict is presented in this case where present and future claimants are both seeking compensation for their injuries from the defendants, but there is no limited fund from which this compensation is to be paid.").

### C. Collusion

Allegations of collusion with the defense counsel to reach a settlement in the mass tort class action is among the objections raised to class counsel's representation.<sup>162</sup> Collusion is defined as:

An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. *It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.* A secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose.<sup>163</sup>

Although no specific ethical rule is attached to collusion, the claim implicates an attorney's violation of the duty to represent a client zealously under Rule 1.3 of the Model Rules of Professional Responsibility (hereinafter "Model Rules").<sup>164</sup> Model Rule 1.3 requires that "a lawyer shall act with reasonable diligence and promptness in representing a client"<sup>165</sup> and the comments specify that

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162. See Menkel-Meadow, *supra* note 140, at 1167. See, e.g., *Georgine*, 157 F.R.D. at 331 (rejecting objector's contention that settlement was product of collusion), *rev'd on other grounds*, 83 F.3d at 630 (refusing to resolve issue of whether class counsel could adequately represent class based on conflicts of interests and collusive actions because objectors had not challenged district court's resolution), *aff'd sub nom. Amchem*, 117 S. Ct. at 2251 n.20 ("declin[ing] to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.").

163. *Georgine*, 157 F.R.D. at 331. The district court concluded that the *Georgine* settlement was not the product of collusion because:

Class Counsel did not receive a premium in settling their inventory cases, nor did they 'sell out' the *Georgine* class. Also, there is no evidence that Class Counsel or CCR attempted to keep the fact of their negotiations secret. The terms of the *Georgine* settlement, including the definition of the class, compensation ranges, medical criteria, cash flow provisions, and eligibility criteria reflect neither 'improper' nor 'fraudulent' conduct on behalf of Class Counsel or CCR . . . . [T]he fact that the lawsuit and settlement were filed simultaneously, or the fact that defendant CCR members were searching for a global solution . . . does not support the conclusion that the *Georgine* settlement was the product of collusion.

*Id.*

164. See Menkel-Meadow, *supra* note 140, at 1198.

165. MODEL RULES OF PROFESSIONAL CONDUCT 1.3 (1998).

"[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>166</sup>

#### *D. Aggregate Settlement*

In mass litigation, plaintiffs' counsel routinely accept settlements conditioned upon all class members accepting the offer.<sup>167</sup> Defendants prefer global settlements because of the transaction cost savings and judges encourage settlements to clear their dockets.<sup>168</sup> Texas Disciplinary Rule 1.08(f) prohibits an attorney who represents two or more clients from participating in an aggregate settlement "unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement."<sup>169</sup> Clients, as one of their many objections to class counsel's actions, complain that their former attorneys enter into an "aggregate settlement" without their consent.<sup>170</sup> Agreements providing for acceptance of settlements by majority vote between the class counsel and the class are impermissible because each client's consent is required.<sup>171</sup> If the lawyer receives consent and accepts the aggregate sum, he or she must then distribute the settlement figure among the class members.<sup>172</sup> Distribution is performed using such methods as determinations by the lawyer's conscience, or to avoid favoritism, by a judge in charge to mediate division issues, or by retainment of the services of special masters.<sup>173</sup> If there are holdouts among some class

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166. *Id.* cmt. 1.

167. *See* Weinstein, *supra* note 130, at 521.

168. *See id.* at 521-22.

169. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f).

170. *See* Menkel-Meadow, *supra* note 140, at 1168-69. *See, e.g.,* Arce v. Burrow, 958 S.W.2d 239, 244-45 (Tex. App.—Houston [14th Dist.] 1997, pet. filed) (holding that attorney forfeits some or all of his fee if clients showed that he breached fiduciary duty in reaching aggregate settlement).

171. *See* Edell, *supra* note 141, at 57.

172. Weinstein, *supra* note 130, at 522.

173. *Id.*



members, it is unclear if it is ethically permissible to withdraw as to the holdout plaintiffs only.<sup>174</sup>

### *E. Financing Litigation*

In the mass tort class action, the contingency fee arrangement is used; thus, the lawyer acquires a large financial stake in the litigation.<sup>175</sup> The ABA Model Code of Professional Responsibility DR 5-103 allows the attorney to advance the costs of litigation, “but the client must remain ultimately liable for such costs.”<sup>176</sup> Plaintiffs’ attorneys frequently do not require repayment of such costs if the mass tort claim is unsuccessful.<sup>177</sup> Both Texas Disciplinary Rule 1.08(d)(1) and Model Rule 1.8(e)(1) allow an attorney to advance court costs and expenses of litigation with the repayment of such expenses contingent upon the matter’s outcome.<sup>178</sup> The Texas Disciplinary Rules go even further, allowing an attorney to also advance the costs or “reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter.”<sup>179</sup> This financing of mass tort litigation may serve as the conflict of interest, pressuring attorneys to accept lower offers and quicker settlements, possibly against their clients’ interests.<sup>180</sup>

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174. *See id.* at 523 (arguing that theoretically, individual clients should decide whether to join settlement, but that, in practice, plaintiffs take their attorney’s advice to settle claims); Edell, *supra* note 141, at 57 (suggesting that it is unclear whether it is ethically permissible to withdraw as counsel to holdout plaintiffs only).

175. *See* Weinstein, *supra* note 130, at 524.

176. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103 (1983).

177. *See* Weinstein, *supra* note 130, at 524.

178. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(d)(1); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1) (1983).

179. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(d)(1).

180. *See* Edell, *supra* note 141, at 57 (arguing that high cost of litigation results in attorneys’ large investment in case, thereby exacerbating ethical concerns in mass tort).

*F. Fees*

The lawyer's total fee in a mass tort case will generally exceed any single class member's individual payment because the lawyer's stake in the litigation is greater than any individual client's.<sup>181</sup> Unreasonable fees, however, violate an attorney's ethical obligations under Texas Disciplinary Rule 1.04(a)<sup>182</sup> and Model Rule 1.5(a).<sup>183</sup> Although class members complain about high attorney fees,<sup>184</sup> society tolerates the disproportionate fees made by the class counsel to encourage litigation that might benefit society.<sup>185</sup>

*G. Restrictions on the Right to Practice: Buyouts*

The ethical duty to maximize a client's benefit is limited by the ethical rule not to restrict an attorney's right to practice.<sup>186</sup> In settling mass tort class actions, lawyers are prohibited from promising as part of the settlement terms not to represent or solicit future clients in any

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181. Weinstein, *supra* note 130, at 524-27.

182. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a) provides that "[a] lawyer shall not enter into an arrangement for, charge, or collect an illegal fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."

183. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995) provides that: "[a] lawyer's fees shall be reasonable."

184. *See, e.g.,* Arce v. Burrow, 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. filed) (alleging that parties' former attorneys "skimmed-off" sixty million dollars).

185. Weinstein, *supra* note 130, at 527.

186. *See id.* at 519.

more cases against the defendant.<sup>187</sup> Texas Disciplinary Rule 5.06(b) provides that:

A lawyer shall not participate in offering or making . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceedings against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.<sup>188</sup>

It appears that plaintiffs' counsel not only has a duty to avoid entering into unethical settlement provisions, but also a duty to report defense counsel if such an offer is received.<sup>189</sup>

### H. Secrecy

Secrecy agreements are frequently employed in mass tort settlements. These agreements raise ethical tensions between an

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187. See Menkel-Meadow, *supra* note 140, at 1199. The district court in *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 330 (1994), rejected the settlement objector's contention that the futures provisions in the settlement violated the prohibition on restricting a lawyer's right to practice as part of a settlement between private parties in Model Rule 5.6(b). Rather, the court found that:

[T]he provisions represent a good faith commitment on the part of Class Counsel to recommend the *Georgine* medical criteria to their clients while retaining their independence to conclude otherwise in an appropriate case . . . . This Court need not decide, however, whether or not a state bar disciplinary board would conclude that these provisions technically violated Rule 5.6, since that issue is not before this Court in determining the adequacy of counsel.

*Id.*

188. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.06(b). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993), stating:

A restriction on the right of plaintiff's counsel to represent present clients and future claimants against a defendant as part of a global settlement of some of counsel's existing clients' claims against that same defendant represents an impermissible restriction on the right to practice which may not be demanded or accepted without violating Model Rule 5.6(b).

189. See Edell, *supra* note 141, at 56 (arguing that because ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993) decided that demanding or accepting offer to settle conditioned upon promise not to bring similar claims against defendant in future violates Model Rule 5.6, receiving such offer may obligate the plaintiffs' attorney to report the defendants' attorney).

attorney's duty to maintain client confidences and to maximize the client's benefit and the impact maintaining secrecy has upon the interests of third parties and society.<sup>190</sup> The promise to maintain the confidentiality of "smoking gun" documents, which reveal the defendant's knowledge of danger or defect or which relate to the merits of the dispute, are typically accepted by courts, but opened if the public's right to know trumps the need for confidentiality.<sup>191</sup> An agreement to keep settlement amounts confidential is reasonable to avoid an influx of future claims based on the public's misperceived valuation of the merits of the case.<sup>192</sup> Ethical problems are implicated when a higher settlement is conditioned upon secrecy and the secrecy prevents notice of the danger at issue in the case.<sup>193</sup> In addition, ethical issues are presented when the withdrawal of a judicial opinion is a condition of the settlement where such information could benefit other courts and claimants.<sup>194</sup> Texas Disciplinary Rule 3.04(a) provides that: "[a] lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act."<sup>195</sup> The question remains whether such secrecy agreements in mass tort settlements are ethical and if the potentially compromised rights of third parties and society should be considered.

### *I. Fair Settlements*

Rule 23(e) requires a fair, adequate, and reasonable settlement. Whether this Rule requires a "fair process" or a "fair outcome" is a question for judges in their review of mass tort settlements.<sup>196</sup> In mass tort cases where ascertaining the consent of parties to an

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190. *See id.* at 55.

191. *See id.*

192. *See* Weinstein, *supra* note 130, at 517.

193. *See* Edell, *supra* note 141, at 56.

194. *See id.*; Weinstein, *supra* note 130, at 519.

195. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(a).

196. *See* Menkel-Meadow, *supra* note 140, at 1208-09 (suggesting principles to use in assessing settlements under increased court scrutiny).

outcome is difficult, procedural protections may need to be employed.<sup>197</sup> “If procedural protections prove impracticable in particular cases, as they may in cases of unknowing claimants, then we will have to more fully scrutinize outcomes.”<sup>198</sup>

## VII. Is It Rhetoric or A True Crisis? Our Challenges Ahead

Although to our knowledge a comprehensive study does not exist regarding the true facts about mass tort class actions, we may consider the facts about securities fraud class actions as indicia. Like securities fraud cases, it is doubtful that mass torts are settled regardless of the merits and that plaintiffs’ lawyers receive most of the benefit. Yes, aberrations do exist; in such scenarios, former clients in mass tort cases increasingly emerge as plaintiffs in malpractice litigation.

### A. *Kamilewicz v. Bank of Boston Corp.*<sup>199</sup>

Albeit not in the mass tort arena, the Bank of Boston nationwide class action, involving 715,000 members and the alleged mishandling of mortgage customers’ escrow accounts, will live in infamy. One of the original plaintiffs in this litigation sued the plaintiffs’ attorneys, accusing them of malpractice by structuring a settlement intended to enrich the attorneys and not to protect the clients’ interests.<sup>200</sup> Mr.

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197. *See id.* at 1209.

198. *Id.* at 1210 (noting that this appears to be approach used by court and critics in *Georgine*). The district court in *Georgine* stated:

“It is, ultimately, in the settlement terms that the class representatives’ judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.”

*Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 328 (E.D. Pa. 1994) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981)).

199. 92 F.3d 506 (7th Cir. 1996).

200. *Id.* at 509.

Kamilewicz alleged that as a member of the class he received \$2.19 in interest, and a legal bill for \$91.33, while his attorneys received \$8.5 million in fees. An opinion from a panel of Seventh Circuit judges who dissented from the denial of rehearing *en banc* in *Kamilewicz* is instructive regarding the current judicial climate of class action settlements.

Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information. This possibility, a staple of the literature about class actions, enjoys judicial recognition. Recall that even the active opposition of class members does not automatically block the settlement, which therefore rests on the *lawyers'* consent, not the litigants' agreement or the legal decision of a court.<sup>201</sup>

*B. Arce v. Burrow*<sup>202</sup>

While clearly distinguishable from *Kamilewicz*, some of the original plaintiffs in litigation emerging from the Texas Phillips 66 plant explosion also sued their attorneys. In *Arce*, the former clients appealed from a summary judgment in favor of their former lawyers in a suit for breach of fiduciary duty, fraud, negligence, and breach of contract. The Texas Fourteenth Court of Appeals recognized fee forfeiture as a viable remedy when an attorney breaches a fiduciary duty to a client, even if causation or damages are not proved.<sup>203</sup>

The appellants in *Arce* originally hired the appellees to file suit against Phillips for a chemical plant explosion that caused personal injuries and wrongful deaths.<sup>204</sup> The clients and attorneys executed contingent-fee agreements. According to the clients, their former lawyers reached an aggregate settlement with the chemical company

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201. *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1997) (dissenting opinion) (citations omitted).

202. 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

203. *Id.* at 251.

204. *Id.* at 243.

without the clients' authority or approval.<sup>205</sup> The clients claimed that the attorneys intimidated them into accepting the settlement and made over sixty million dollars in fees. The appellees contend that no aggregate settlement existed and that the settlements were adequate and fair.

The trial court found sufficient evidence of an aggregate settlement to create a fact issue.<sup>206</sup> Nevertheless, the trial court granted the appellees' motion for summary judgment finding that the "summary judgment proof established that appellants suffered no damages as a result of any breach of duty [by the appellees] . . ." and that "fee forfeiture is not an element of damages, but a legal remedy that a court may apply only after a jury has found a breach of duty with resulting actual damages."<sup>207</sup>

The court of appeals reversed and remanded in part and affirmed in part holding that the trial court erred in determining that proof of causation and damages is a prerequisite to fee forfeiture.<sup>208</sup> Although Texas cases have not specifically addressed fee forfeiture as a remedy for breaches of fiduciary duty in the attorney-client relationship, the Fourteenth Court of Appeals acknowledged that Texas has long recognized fee forfeiture as a remedy for a breach of fiduciary duty in the principal-agent relationship.<sup>209</sup> Discerning "no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship," the court held that fee forfeiture is a recognized remedy for breaches of an attorney's fiduciary duty to his or her client.<sup>210</sup> The court determined that requiring a client to only prove breach was consistent with Texas principal-agent case law and more appropriate because the nature of the harm sustained is difficult to measure and often intangible.<sup>211</sup> The court also supported its holding by focusing

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205. An aggregate settlement is a settlement where an attorney representing more than one client settles the case on behalf of his clients without individual negotiations on each client's behalf. *Id.* at 243.

206. *Id.* at 244.

207. *Arce*, 958 S.W.2d at 244.

208. *Id.* at 248.

209. *Id.* at 246.

210. *Id.*

211. *Id.* at 248-49. The court gave examples of intangible harms "such as a client's loss of loyalty in the attorney and faith in the legal system itself." *Id.* at 249.

on other jurisdictions that require fee forfeiture in the fiduciary context and specifically in the attorney-client relationship.<sup>212</sup>

[O]ne who claims a breach of fiduciary relationship need only prove the existence of a breach to be entitled to fee forfeiture. . . . Fee forfeiture provides the injured client with a remedy, but it also punishes the attorney for the breach of fiduciary duty and deters further lapses in professional conduct. . . . That there may be no causation and no damage as a matter of law is irrelevant to the availability of the remedy of fee forfeiture; proof of breach is enough.<sup>213</sup>

Although recognizing that Texas courts allow complete and automatic forfeiture upon proof of a breach in the general principal-agent relationship, the court refused to apply total forfeiture in the context of the attorney-client relationship.<sup>214</sup> Distinguishing the attorney-client relationship from the typical agency relationship, the court determined that forfeiture of an attorney's entire fee would be unfair because the attorney performed valuable services benefitting the client before any breach of fiduciary duty occurred.<sup>215</sup> The judge, and not a jury, will determine the amount of fee forfeited based on the following factors:

1. the nature of the wrong committed by the attorney or law firm;
2. the character of the attorney's or firm's conduct;
3. the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence;
4. the situation and sensibilities of all parties, including any threatened or actual harm to the client;
5. the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety; and
6. the adequacy of other available remedies.<sup>216</sup>

The Fourteenth Court of Appeals, recognizing that a fact issue remained as to whether the attorneys' breached their fiduciary duty by obtaining an aggregate settlement, noted that on remand, the only issue remaining was whether there was a breach of fiduciary duty,

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212. *Arce*, 958 S.W.2d at 248-49.

213. *Id.* at 248, 251.

214. *Id.* at 249.

215. *Id.*

216. *Id.* at 250.



and the amount, if any, of fee forfeiture.<sup>217</sup> Again, albeit not in the nature of a class action, the alleged use of an aggregate settlement without proper consent has arguably created new law in Texas through the Fourteenth Court of Appeals in Houston; and has set the stage for a heated debate should this case reach the Texas Supreme Court.

### C. Challenges Ahead

Perhaps even more daunting are the views articulated, for instance, in a recent *Virginia Law Review* article entitled *Under Cloak of Settlement*, which advocate the novel idea of antitrust suits (in contrast to malpractice suits) against class action attorneys.<sup>218</sup> The authors argue that subsequent suits against class counsel are necessary to deter class action misconduct.<sup>219</sup> According to the authors, in earlier days, lawyers were “professionals,” not “businessmen” competing in a market. However, the simpler times have vanished. “Because of the increased use of the class action device, especially on mass tort cases, as well as the evolution of antitrust law, the once unthinkable is now thinkable.”<sup>220</sup>

The authors conclude that three practices connected to the settlement of class action suits raise serious questions under the antitrust laws: (1) agreements among plaintiffs’ lawyers to support each other’s bid to be class counsel in a particular suit;<sup>221</sup> (2) agreements to set up a dispute resolution system administered by private parties for the purpose of processing the individual claims of class members;<sup>222</sup> and (3) agreements which include provisions that exclude competitors from the market for representing claimants post-settlement in the private administrative system.<sup>223</sup>

Although disconcerting, litigation, such as by former clients (the plaintiffs in the mass tort cases), and public interest firms, for

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217. *Arce*, 958 S.W.2d at 251.

218. Koniak & Cohen, *supra* note 11, *passim*.

219. *Id.* at 1102.

220. *Id.* at 1090.

221. *Id.* at 1091.

222. *Id.* at 1097.

223. Koniak & Cohen, *supra* note 11, at 1100.

instance, Trial Lawyers for Public Justice,<sup>224</sup> emphasizes that viable mechanisms to remedy abuses may exist within the court system, again demonstrating our judiciary's proper and sufficiently deterrent function.

### VIII. The "Public Performance" Continues

Abuses exist in the mass tort class action arena. But mechanisms in existence, intelligently employed by able judiciary and counsel, suffice to curb these abuses. Perhaps the father of mass torts, Jack Weinstein, says it best. There is a larger than usual "cast of characters, the *dramatis personae* for this public performance we call mass torts litigation."<sup>225</sup> As the drama unfolds, perhaps all *personae* deserve some criticism and some praise.<sup>226</sup>

On balance, taking a global view of mass torts, there is reason to criticize and praise everyone involved in these cases. The defendant corporations have not, with respect to many products, adequately tested and warned. Their executives often have delayed taking protective action. Their lawyers often have stonewalled and built up a huge discovery system to fund large defense firms and to break the financial backs of plaintiffs' attorneys. Plaintiffs' counsel often have been greedy for fees, have not connected emotionally with their clients, and have not adequately screened their cases. Judges often have failed to expand their capacities to deal with the huge flood of cases. The scientific community often has been less than helpful. Regulatory agencies often have not adequately protected the public against dangerous substances and processes. The legislative and executive branches have avoided the issues. And the public itself often has overestimated the capacity of the legal, medical, scientific, political and managerial systems to protect against and compensate for every possible hazard of life.<sup>227</sup>

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224. Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent setting and socially significant civil litigation. As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. See Brief of *Amicus Curiae* Trial Lawyers for Public Justice, P.C., in Support of Respondents, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct 2231 (1997) (No. 96-270) (describing the mission of TLPJ).

225. See Weinstein, *supra* note 2, at 850 (describing roles of plaintiffs, defendants, lawyers, judges, scientists, legislators, academicians, and media in realm of mass tort litigation).

226. See *id.*

227. Weinstein, *supra* note 130, at 472.

Nonetheless,

[w]hat is equally clear, now, is that mass tort litigation is not likely to go away: in our unending quest to improve life, we have demonstrated our unending ability to poison our environment, spill our food supply, and manufacture toxic and defective products that cause injury on an unprecedented and unimaginable scale.<sup>228</sup>

Thus, as Professor Leubsdorf cogently stated, “[t]hose of us who see the class action as a tool for equal justice under law will have to struggle to implement that vision.”<sup>229</sup> That vision may be implemented effectively, promoting justice and ethics along the way.

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228. LINDA S. MULLENIX, *MASS TORT LITIGATION* v (1996).

229. John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1227 (1995). *See also* Weinstein, *supra* note 130, at 476:

Nevertheless, mass tort litigations often have an underlying, if less focused, purpose which goes beyond mere transfers of wealth—the health and sense of security of many individuals and the viability of major economic institutions. As one wise scholar told me, “Mass torts are public interest cases.” He confirmed what I see in the courts.

(footnote omitted).