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CLASS CERTIFICATION FOR ENVIRONMENTAL AND TOXIC TORT CLAIMS

CHARLES W. SCHWARTZ*
LEWIS C. SUTHERLAND†

* Partner, Vinson & Elkins L.L.P., Houston, Texas, B.S. 1975, J.D. 1977, M.A. 1980 University of Texas; LL.M. 1980, Harvard University.

† Associate, Vinson & Elkins L.L.P., Houston, Texas, B.S. Chem. Eng. 1981, Rice University; J.D. 1993, University of Houston.

The opinions expressed in this Article are the authors'. The authors or other members of their firm have represented defendants in several cases discussed in this Article, including: Hayden v. Atochem North America, Inc., C.A. No. H-92-1054 (S.D. Tex. Jan. 31, 1994); Amerada Hess Corp. v. Garza, No. 13-95-554-CV (Tex. App.-Corpus Christi Aug. 22, 1996); *In re* Louisiana-Pacific Inner-Seal Siding Products Liab. Litig., No. 95-879-JE (D. Or. Apr. 26, 1996); and Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995), *aff'd sub nom. In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

I. INTRODUCTION

The basic form of Federal Rule of Civil Procedure 23, which authorizes certification of class actions, was established by the 1966 Amendments to the Federal Rules of Civil Procedure.[1] In the early 1960s, when the Advisory Committee drafted the new class action rule, its focus was not on mass torts, but rather on enabling litigation involving small claims with numerous claimants, such as: securities and antitrust claims, civil rights suits, and property disputes involving competing claims to insurance or some other limited fund.[2] Nevertheless, the

1. FED. R. CIV. P. 23.

2. *See* Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 922-23 (1995). Indeed, the class action rule has generally been very successful in enabling this type of litigation. *See, e.g.*, Thomas Willging, et al. *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 87-91 (1996). The authors reported on a 1994-95 study conducted by the Federal Judicial Center of all class certification motions terminated in four

drafters were not oblivious to the use of class actions for the aggregated adjudication of mass torts, but they chose instead to affirmatively exclude these types of claims from the rule.[3] Indeed, the Advisory Committee Notes to the 1966 Amendments stated:

> 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 to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[4]

Thus, the early view of the Advisory Committee was that for mass torts, individual issues would overwhelm class-wide issues, and as a result the utility and efficiency of the class device would be lost.[5]

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federal district courts between July 1, 1992 and June 30, 1994. *Id.* at 89. The authors concluded that securities and civil rights actions represented "easy" or "routine" applications of the class certification device. *Id.* The statistics from the four federal courts indicated that class certification was granted in securities cases in 94% to 100% of the cases where a motion or *sua sponte* order on certification was filed. *Id.* Similarly, the certification rate for civil rights class actions was 100% for the three federal district courts that addressed cases of this type. *Id.*

3. *See* Resnick, *supra* note 2, at 922-23. Ms. Resnik supports her conclusion that the advisory committee "decided, affirmatively, to keep the mass accidents out" based on correspondence between the various members of the committee. *Id.* at 923 n.20.

4. 39 F.R.D. 69, 103 (1966). The Advisory Committee note is specifically addressed to class actions certified under Rule 23(b)(3), which requires a demonstration that issues common to the class predominate over individual issues. As will be discussed later in this Article, plaintiffs' and defendants' attorneys have developed innovative approaches to certification under Rule 23(b)(1) and 23(b)(2) that sidestep this predominance issue.

5. This Advisory Committee note has not existed without controversy. Numerous commentators and litigants have assailed the note as outdated under current federal law. Perhaps this argument has been popularized to the greatest extent by Professor Newburg (*Newburg on Class Actions* (3d ed. 1992)) based on comments made by Professor Charles Allan Wright, a member of the Advisory Committee, while acting as an advocate in *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986). Professor Kaplan, however, appears to have been the primary author of the committee comments on Rule 23, and his explanation of the Advisory Committee Notes suggests that a district court should not ordinarily certify a mass tort class. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 386, 391-93 (1967). Moreover, as the Fifth Circuit recently noted in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), Professor Wright has since tempered his comments made in the *School Asbestos Litigation*:

> I certainly did not intend by that statement [made in the *School Asbestos Litigation*] to say that a class should be certified in all mass tort cases. I merely wanted to take the sting out of the statement in the Advisory Committee Note, and even that said only that a class action is "ordinarily not appropriate" in mass-tort cases. The class action is a complex device that must be used with discernment. I think for example that Judge Jones in Louisiana would be

Moreover, one of the apparent purposes of Rule 23 was to enable meritorious litigation (such as securities and civil rights actions) that would not otherwise occur due to the limited size of each individual claim.[6] This enabling function is less critical to tort claims; "tort plaintiffs [do] not need that extra boost because they already [have] access to legal services by way of contingency fee arrangements."[7]

Initial attempts to certify mass tort classes under the newly revised Rule 23 were rejected based on the concerns expressed in the Advisory Committee Notes.[8] Similarly, even when a trial court certified a mass tort class, the appellate courts usually reversed. For example, in 1981, a California district court certified the first Dalkon Shield class action, but was later reversed by the Ninth Circuit.[9] Similarly, also in 1981, a Missouri district court certified a class of all persons injured by the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, but this certification was later reversed by the Eighth Circuit.[10] The *Skywalk* case is a useful one to demonstrate the radical shift in the class action paradigm that has occurred within the last fifteen years. *Skywalk* involved a single discrete mass accident that affected at most a few hundred people.[11] Moreover, the alleged negligent conduct was focused on this one event.[12] In contrast, recent environmental tort class actions, such as *Cook v. Rockwell International Corp.*[13] and *Hayden v. Atochem North America, Inc.*,[14] include allegations that multiple defendants negligently discharged hazardous substances within the class area over decades, and the class definition may include residents and property

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> creating a Frankenstein's monster if he should allow certification of what purports to be a class action on behalf of everyone who has ever been addicted to nicotine.

Letter to N. Reid Neureiter, Williams & Connolly, Washington D.C. (Dec. 22, 1994), *quoted in Castano*, 84 F.3d at 745 n.19.

6. *See* FED. R. CIV. P. 23 Advisory Committee's Notes.

7. Resnik, *supra* note 2, at 924.

8. *See* Harrigan v. United States, 63 F.R.D. 402 (E.D. Pa. 1974) (rejecting class certification for class consisting of all paralyzed veterans injured by negligent urological surgery at Veterans Administration hospitals).

9. *See In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) (vacating district court decision to certify a class of all women injured as a result of the Dalkon Shield IUD).

10. *See In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo. 1982), *rev'd*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982).

11. *See id.* at 1177.

12. *See id.*

13. Cook v. Rockwell Int'l Corp., 151 F.R.D. 378 (D. Colo. 1993).

14. C.A. No. H-92-1052 (S.D. Tex.).

owners during more than a twenty-year span. The individual (nonclass) issues in these later cases exceed those in the *Skywalk* case by an order of magnitude or more.

Clearly, the federal courts have recently expressed a greater tolerance, at least under some circumstances, for the use of class actions to address mass tort litigation than they did twenty years ago. Five appellate court decisions reversing class certification in mass tort cases during the last year and a half[15] suggest, however, that this trend towards class certification in mass tort and environmental cases has peaked, and indeed district and appellate courts have begun a retreat towards the original class certification standards formulated by the drafters of Rule 23. This Article will examine these trends and attempt to define the specific areas where courts have been willing to stretch the traditional boundaries of Rule 23 for environmental claims. In addition, this Article will analyze the recent appellate court decisions in mass tort cases and describe the likely impact of this new judicial precedent on the certification of environmental and toxic tort claims. Finally, the Article will consider the changes to Rule 23 proposed by the rules advisory committee and other commentators, and offer suggestions for the amendment of Rule 23.

II. THE EMERGENCE OF MASS TORTS FORCE FITTED TO RULE 23: LITIGATION CLASSES

A. The Fundamental Stumbling Block: The Predominance of Individual Issues in Environmental and Toxic Tort Litigation

The early attempts to certify toxic tort and environmental class actions focused on class certification under Rule 23(b)(3).[16] In addition to the prerequisites of Rule 23(a),[17] this section has two basic requirements: (1) the class-wide common issues of fact and law must predominate over issues affecting only individual class members, and

15. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996); *In re* American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995).

16. Under the federal rules, a putative class must meet all four prerequisites in Rule 23(a) and any one of the three requirements in Rule 23(b).

17. Rule 23(a) provides that class actions will only be permitted where "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

(2) the proposed class action must be superior to other available methods for the fair and efficient adjudication of the controversy.[18] The Rule provides that factors relevant to these two requirements include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (D) the difficulties likely to be encountered in the management of a class action.[19]

The denial of class certification for mass tort cases, including those based on alleged environmental contamination, is usually based on a finding that individual issues will predominate.[20] Toxic tort and environmental claims almost always include allegations that plaintiffs and/or plaintiffs' property have been exposed and damaged by hazardous substances. The plaintiffs are usually dispersed both geographically and temporally (the time and duration of alleged exposure will vary). In

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18. *See* FED. R. CIV. P. 23(b)(3).

19. *See id.*

20. *See generally* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reversed district court certification of a tobacco smokers' fraud and medical monitoring class); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996) (reversed district court certification of an asbestos personal injury class); *In re* American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (reversed district court certification of a penile implant products liability class); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (reversed class certification of a nation-wide class of persons who took the drug Felbatol); Boughton v. Cotter Corp., 65 F.3d 823 (10th Cir. 1995) (affirming trial court denial of class certification in an environmental tort case); Blaz v. Galen Hosp. Ill., Inc., 168 F.R.D. 621, 624-25 (N.D. Ill. 1996) (alleged adverse health effects from exposure to x-rays); Harding v. Tambrands, Inc., 165 F.R.D. 623 (D. Kan. 1996) (medical products liability action); Schneck v. International Bus. Mach. Corp., No. 92-4370, 1996 U.S. Dist. LEXIS 10126 (D.N.J. June 21, 1996) (products liability based on repetitive stress injuries); *In re* Norplant Contraceptive Prod. Liab. Litig., No. 1038, 1996 U.S. Dist. LEXIS 7104 (E.D. Tex. May 17, 1996) (medical products liability); Hayes v. Playtex Family Prods. Corp., No. 95-1316-FGT, 1996 U.S. Dist. LEXIS 12401 (D. Kan. June 14, 1996); Hurd v. Monsanto Co., 164 F.R.D. 234 (S.D. Ind. 1995) (environmental tort and personal injury claims based on exposure to PCBs); Thomas v. Fag Bearings Corp., Inc., 846 F. Supp. 1400 (D. Mo. 1994) (environmental tort claims); McGuire v. International Paper Co., No. 1:92-CV-593, 1994 U.S. Dist. LEXIS 4783 (S.D. Miss. Feb. 18, 1994) (environmental tort claims); Dahlgren's Nursery, Inc. v. E.I. DuPont de Nemours and Co., No. 91-8709-CIV, 1994 U.S. Dist. LEXIS 17918 (S.D. Fla. June 9, 1994) (agricultural chemicals products liability); Hum v. Dericks, 162 F.R.D. 628 (D. Haw. 1995) (medical products liability action); Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (N.D. Ohio 1995) (same); Martin v. Dahlberg, Inc., 156 F.R.D. 207 (N.D. Cal. 1994) (same); Mattoon v. City of Pittsfield, 128 F.R.D. 17, 20 (D. Mass. 1989) (tort claims based on alleged water contamination); Kennedy v. Baxter Healthcare Corp., 50 Cal. Rptr. 736, 742-43 (Cal. App. 3d 1996) (products liability); Cordova v. Hughes Aircraft Co., C-284158, slip op. (Ariz. Sup. Ct., Pima County, July 10, 1996) (toxic tort); Dyer v. Monsanto Co., CV-93-250, slip op. (Ala. Cir. Ct. Aug. 4, 1995) (same); RSR Corp. v. Hayes, 673 S.W.2d 928 (Tex. App. 1984) (same).

addition, the conduct of defendants has usually changed over time. Many courts have concluded that a class action is not well suited for those cases in which no one set of operative facts will establish liability and no single proximate cause equally applies to each potential class member.[21]

Courts often combine the superiority analysis under Rule 23(b)(3) with the predominance analysis discussed above. This is because of the obvious inefficiency associated with litigating a class action that includes predominately individual issues, reflecting the Rule Advisory Committee comment that mass accident class actions would degenerate in practice into multiple lawsuits separately tried. Nevertheless, courts do occasionally conduct a separate superiority analysis based on the fairness of the class action device. In *In re Fibreboard Corp.*, the Fifth Circuit commented:

> A contemplated "trial" of the 2,990 class members without discrete focus can be no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury .... This is the inevitable consequence of treating discrete claims as fungible claims. Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings of actual causation and discrete injury.[22]

These fairness issues are also relevant to the current debate regarding settlement class actions that is discussed later in this Article.

B. Erosion of the General Rule that Environmental and Toxic Tort Claims are Inappropriate for Class Certification: Categorizing the Exceptions

The trend since the mid-1980s, but prior to the five recent opinions by federal appellate courts overturning class certification, has been towards more expansive use of the class device for environmental

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21. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988); Mattoon v. City of Pittsfield, 128 F.R.D. at 20-21 (D. Mass. 1989).

22. *In re* Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990). Similarly, in *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974), the California Supreme Court considered whether a jury could fairly determine class-wide allegations of property damage caused by airport noise. The Court concluded: "The grouping and treating of a number of different parcels together ... necessarily diminishes the ability to evaluate the merits of each parcel. The superficial adjudications which class treatment here would entail could deprive either the defendants or the members of the class—or both—of a fair trial." *Id.*

and toxic tort claims. These newer cases are not entirely distinguishable from other toxic tort and environmental cases where class certification is denied. Nevertheless, as described below, the cases where class certification is approved do appear to fit loosely within a few categories. The discussion of one major category where class certification has been accepted by some courts, namely settlement class actions, is deferred until later in this Article because this topic raises different concerns than those relevant to the certification of a litigation class.

1. Discrete Incident Toxic Torts

In *Sterling v. Velsicol Chemical Corp.*, the Sixth Circuit approved the certification of a toxic tort class action in which plaintiffs alleged both property damages and personal injuries resulting from hazardous chemical releases from defendant's landfill.[23] In its opinion the Sixth Circuit cautioned:

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.[24]

Regardless, the Sixth Circuit affirmed the trial court's class certification order because it found that the cause of the particular "disaster" in this case was a single course of conduct which was equally applicable to all of the plaintiffs.[25] Each of the class members lived in the vicinity of the landfill and allegedly suffered damages from ingesting the same contaminated water.[26]

Similarly, in *Watson v. Shell Oil Co.*, the Fifth Circuit affirmed class certification by the trial court for property damages and personal injuries allegedly resulting from a single explosion at defendant's refinery.[27] The class certified in *Watson* was a limited-issues class under Rule 23(c)(4).[28] The trial plan included a class action trial of liability for

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23. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988).
24. *Id.* at 1197.
25. *Id.*
26. *See id.*
27. *See* Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). For a similar case, see *Richardson v. American Cyanamid Co.*, 672 So. 2d 1161 (La. App. 5th Cir. 1996).
28. *See Watson*, 979 F.2d at 1017.

plaintiffs' compensatory damage claims, and liability for plaintiffs' punitive damage claims.[29] If the jury found liability for punitive damages, it would also perform a phase II function where it would determine compensatory damages for twenty sample plaintiff cases. The jury would then use these sample cases to develop a mechanism for pro-rata distribution of the punitive damage award.[30] Assuming the class jury found defendants liable, compensatory damages for all but the twenty sample plaintiffs would be determined separately from the class proceeding.[31] The Fifth Circuit found that the limited issues class focused on predominately class issues.[32] The court cited *Sterling* for the proposition that a defendant's liability can properly be resolved on a class-wide basis where a single course of conduct identical for each plaintiff (in this case, the explosion) caused the disaster.[33]

A discrete incident, such as an explosion, is readily distinguishable from traditional toxic torts involving the alleged exposure to hazardous substances arising from historical releases to the air, water and soil surrounding an industrial facility or landfill. In these situations, the alleged wrongful conduct may extend over a forty year period, and no two plaintiffs will have an identical pattern of exposure. In *Hurd v. Monsanto Co.*, the district court considered toxic tort claims based on alleged exposure to polychlorinated biphenyls ("PCBs").[34] The Court echoed concerns raised in *Sterling* when it stated:

> Here, plaintiff has not shown that common issues will predominate over individual issues. Unlike airplane crash or hotel disaster cases, which usually involve a single set of operative facts used to establish liability, this case involves continuing exposure over as many as twenty years. Undeniably, some class members have been exposed to PCBs only for a few months at low levels, while others, for decades and at high levels . . . and even

29. *See id.*

30. *See id.*

31. *See id.* at 1018. Like most class actions, *Watson* settled after the plaintiff class was certified. As a result, we cannot make any judgments regarding the effectiveness of this trial plan. As discussed later in this paper, the authors have strong reservations regarding the utility of limited-issues class certifications generally and the class action trial of "generic causation" for personal injuries in a toxic tort matter specifically. Moreover, generic class-wide consideration of punitive damage issues is also problematic because the jury is arguably awarding punitive damages on a formulaic basis and not in relation to the harm done to individual plaintiffs.

32. *See id.* at 1022.

33. *See id.* at 1019 n.16.

34. *See* Hurd v. Monsanto Co., 164 F.R.D. 234 (S.D. Ind. 1995).

> if a jury could make a class-wide finding of fact regarding the general health risks posed by PCBs, resolution of liability issues would still require an individual inquiry into the circumstances involving each class member's exposure and susceptibility.[35]

It is important to note that, even in cases that arguably present a discrete incident, courts have rejected class certification based on their conclusion that individual issues predominate. For example, in *Puerto Rico v. the M/V Emily S.*, the district court considered whether to certify a class action for personal injuries allegedly caused by a fuel oil spill from a barge off the coast of Puerto Rico.[36] While the oil spill was clearly a discrete event, the court nevertheless concluded that individual issues of injury in fact and causation would predominate at trial, and that the discrete incident did not provide sufficient common class-wide issues to justify class certification.[37] Thus, the disparate ways that a mass disaster affects individuals can lead to a conclusion that individual issues predominate. Accordingly, although a discrete event removes several of the difficult individual issues that arise in a toxic tort case, one cannot say that there is a general rule that class certification is justified in all or even most such cases.

2. Medical Monitoring and Class Certification Under 23(b)(2)

As noted above, the early toxic tort class actions usually sought certification under Rule 23(b)(3), and the most challenging hurdle to these motions was demonstrating that class-wide issues would dominate.[38] During the last five years, however, plaintiffs in toxic tort cases have increasingly sought damages for medical monitoring. This new form of damages has also created a new basis for class certification under Rule 23. Rule 23(b)(2) provides that a lawsuit may be maintained as a class action if (1) the prerequisites of 23(a) are satisfied, and (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief

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35. *Id.* at 240 (citations omitted); *see also* Mattoon v. City of Pittsfield, 128 F.R.D. 17, 21 (D. Mass. 1989) (variations in length of exposure to contaminated water caused by beavers living in the city water reservoir precluded class certification); Brown v. Southeastern Pa. Transp. Auth., 1987 WL 9273, at *10 (E.D. Pa. April 9, 1987).

36. *See* Puerto Rico v. the M/V Emily S., 158 F.R.D. 9 (D.P.R. 1994).

37. *See id.* at 15.

38. *See supra* text accompanying notes 17-19.

or corresponding declaratory relief with the respect to the class as a whole.[39]

Several courts have concluded that a court-administered program to provide nonmonetary relief, such as a medical monitoring program, is injunctive or equitable relief under Rule 23(b)(2).[40] It is critical, however, that the medical monitoring program provide medical services related to the alleged injuries, and not simply monetary compensation.[41] The Advisory Committee Notes state: "[Rule 23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[42] Accordingly, the Court in *Gibbs v. E.I. Du Pont* held that

> [a] court-administered fund which goes beyond payment of costs of monitoring an individual plaintiff's health to establish pooled resources for the early detection and advances in treatment of the disease is injunctive in nature rather than "predominately" money damages and therefore is properly certified under Rule 23(b)(2).[43]

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39. *See* FED. R. CIV. P. 23(b)(2).

40. *See* Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475, 479 (W.D.N.Y. 1995); Day v. NLO, 851 F. Supp. 869, 886-87 (S.D. Ohio 1994); Craft v. Vanderbilt Univ., Toxic Chem. Litig. R. (July 27, 1994); Yslava v. Hughes Aircraft Co., 845 F. Supp. 705, 713 (D. Ariz. 1993); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378-87 (D. Colo. 1993); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991).

41. The seminal case establishing medical monitoring in toxic tort cases is probably *Ayers v. Jackson Township*, 525 A.2d 287, 313 (N.J. 1987). In this case, the New Jersey Supreme Court described five general factors that the court should use to evaluate a medical monitoring claim: (1) the significance and extent of exposure, (2) toxicity of the chemical(s), (3) the seriousness of the diseases for which the individuals are at risk, (4) the relative increase in the chance of onset of disease in those exposed, and (5) the value of early diagnosis via medical monitoring. *Id.* at 312. Similar tests have been developed by the Supreme Courts of California and Utah, and two United States Courts of Appeal. *See* Abuan v. General Elec. Co., 3 F.3d 329, 334 (9th Cir. 1993); *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990); Potter v. Firestone Tire and Rubber Co., 25 Cal. Rptr. 2d 550, 579-80 (Cal. 1993); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 982 (Utah 1993). Analysis of the basis for an award of medical monitoring suggests that the preferred remedy is an equitable program administered by the court, not an award of money damages. *See* George W.C. McCarter, *Medical Sue-Surveillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 255-56 (1993). Mr. McCarter notes that most people will not willingly undergo unnecessary medical examinations, even simple ones like providing a blood sample, because of the inconvenience, discomfort, and risk associated with many medical procedures. *Id.* This suggests two policy considerations relevant to medical monitoring: (1) a person will not lightly submit to medical procedures and so should not be compensated for them lightly, and (2) when procedures are medically necessary, the plaintiff class should be encouraged to undergo them by making the relief equitable as opposed to money damages. *See id.*

42. 39 F.R.D. 69, 102 (1966).

43. Gibbs v. E.I. DuPont de Nemours & Co., Inc., 876 F. Supp. 475, 481 (W.D.N.Y. 1995).

Importantly, there is no requirement to demonstrate the predominance of class-wide issues or the superiority of the class action device for a class certified under Rule 23(b)(2). As a result, a medical monitoring toxic tort case does not face the same difficult obstacles to class certification that a more traditional personal injury and property damage case encounters under Rule 23(b)(3).[44]

There is not universal agreement, however, that medical monitoring is equitable relief. Several courts have concluded that a claim for medical monitoring is really a claim for money damages, and that a medical monitoring class should not be certified under Rule 23(b)(2).[45] Medical monitoring claims usually do not survive analysis under the predominance of common class issues test of Rule 23(b)(3), because of the numerous individual issues associated with the development of disease based on exposure to toxic chemicals.[46] As a result, claims of this type are rarely certified except under Rule 23(b)(2).

3. Property Damage Cases

Proponents of class certification argue that property damage claims are another generally accepted category for class certification of environmental and toxic tort disputes. The most common argument is that property damage cases, as opposed to cases including personal injury claims, present fewer individual issues, and as a result are appropriate for class certification. A few courts have adopted this reasoning, and certified class actions for environmental and toxic tort property damage claims. For example, in *DeSario v. Industrial Excess Landfill, Inc.*, the Ohio appellate court affirmed the class certification of a case where plaintiffs alleged property damages caused by pollution from a nearby landfill.[47] The appellate court's analysis in this case, however, does not stand up to scrutiny under the class action rule requirements. Although

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44. *See id.*

45. *See* Boughton v. Cotter Corp., 65 F.3d 823, 827-828 (10th Cir. 1995); Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) (plaintiffs' claims for medical monitoring are primarily for money damages, not equitable relief); Thomas v. Fag Bearings Corp., 846 F. Supp. 1400, 1404 (D. Mo. 1994) (same); *see also* Werlein v. United States, 746 F. Supp. 887, 912 (D. Minn. 1990) (rejecting class certification of medical monitoring claims as not workable in the class action format). The district court in *Fried v. Sungard Recovery Services, Inc.*, 925 F. Supp. 372 (E.D. Pa. 1996), appeared to distinguish the situation where plaintiffs sought a monetary award from the situation where the court would administer a monitoring program much like the court in *Gibbs*. The court in *Fried* concluded that an award of money would characterize the relief sought as legal damages, and the establishment of a court administered monitoring program would characterize the relief as equitable or injunctive in nature. *See id.* at 374.

46. *See Thomas*, 846 F. Supp. at 1404.

47. DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454 (Ohio App. 1991).

the trial court opinion found that common class-wide issues would predominate for the property damage claims,[48] the appellate court's opinion articulates seven "prerequisites" for class certification, none of which addresses the most substantial impediment to certification: the need for predominance of common class issues.[49] Inexplicably, the appellate court analyzed defendants' objection that common issues did not predominate, not under Rule 23(b)(3), but under Rule 23(a)(2), which is the much less rigorous commonality standard applicable to all class actions.[50] Although *DeSario* is frequently cited by plaintiffs seeking class certification of environmental torts, this opinion is arguably of very little precedential value because the court failed to properly consider the need for a predominance of common class issues for classes certified under Rule 23(b)(3).

In *Cook v. Rockwell International Corp.*, the district court approved class certification of a plaintiff class alleging medical monitoring and property damages arising from historical chemical and radiation contamination at the Rocky Flats Arsenal.[51] The court stated as part of its predominance analysis under Rule 23(b)(3):

> plaintiffs have demonstrated that this case presents many common issues of law and fact, including whether the operation of Rocky Flats constitutes an ultrahazardous activity; whether defendants exercised reasonable care to prevent the release of hazardous radioactive and nonradioactive materials from Rocky Flats; what materials were released, in what quantities; what caused the releases; what precautions to avoid emissions were taken; whether the geographic dispersion of the releases in the surrounding environment was reasonably

48. *See id.* at 455.

49. *See id.*

50. The appellate court explained that the commonality requirement under Rule 23(a)(2) "requires only a single issue common to the class." *Id.* at 458 (quoting Wilson v. First Federal S.& L. Assn. Of Canton, No. CA-6481, 1985 WL 7183, at *3 (Feb. 11, 1985)). While this is the standard articulated by many courts for commonality under Rule 23(a)(2), defendants' objection was to the predominance of common class issues under Rule 23(b)(3). *Id.* at 456. The appellate court never analyzed the facts of the case under this more rigorous commonality standard. Note that the district court opinion, which does address predominance, is attached to the appellate court opinion as an appendix, but the appellate court did not expressly adopt any conclusions or holdings from the district court opinion.

51. Cook v. Rockwell Int'l Corp., 151 F.R.D. 378 (D. Colo. 1993).

> foreseeable; and whether defendants engaged in intentional, reckless, willful, or wanton conduct.[52]

The court concluded that the common class issues listed above "represent the core of plaintiffs' action against defendants."[53] Note, however, that the common class-wide issues cited by the court all focus on the defendants' alleged breach of duty, and none address the actual impact or damages to plaintiffs' property. A few other courts have reached similar decisions regarding the certification of property damage claims.[54]

Nevertheless, most courts have not recognized property damages claims as a generally accepted category for class certification of environmental torts.[55] Environmental property damages in a putative class action inevitably are based on allegations of negative "stigma,"[56] with the basic cause of action supported by negligence, trespass, and nuisance. Most states, however, do not allow purely economic damages for injuries to property under negligence without some accompanying physical impact on the property.[57] Similarly, for nuisance and trespass causes of action the primary issue is the physical impact of the contamination on the real property or on the owner's use and enjoyment of the property.[58] Physical impact of the contamination on plaintiffs

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52. *Id.* at 388-89.

53. *Id.* at 389.

54. *See* Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991); Amerada Hess Corp. v. Garza, No. 13-95-554-CV (Tex. App., August 22, 1996) *petition for writ of mandamus pending* (C.A. No. 96-1208); Hayden v. Atochem North America, Inc., C.A. No. H-92-1054, slip op. (S.D. Tex. Jan. 31, 1994).

55. *See* Boughton v. Cotter Corp., 65 F.3d 823, 827-28 (10th Cir. 1995); Thomas v. Fag Bearings Corp., 846 F. Supp. 1400, 1403 (D. Mo. 1994) (damage claims such as CERCLA response costs, diminution in property value, loss of use and enjoyment, and annoyance require predominately individual proof for the particular real property); McGuire v. International Paper Co., No. 1:92-CV-593, 1994 U.S. Dist. LEXIS 4783 (S.D. Miss. Feb. 18, 1994); Daigle v. Shell Oil Co., 133 F.R.D. 600, 602-03 (D. Colo. 1990); Brown v. Southeastern Pa. Transp. Auth. (SEPTA), No. 86-2229, 1987 U.S. Dist. LEXIS 5095 (E.D. Pa. April 9, 1987); Ouelette v. International Paper Co., 86 F.R.D. 476, 482-83 (D. Vt. 1980); Sherrill v. Amerada Hess Corp., C.A. 95-CVS-15754, slip op. (N.C. Sup. Ct. Nov. 7, 1996); Cordova v. Hughes Aircraft Co., C-284158, slip op. (Ariz. Sup. Ct. July 10, 1996); Dyer v. Monsanto Co., CV-93-250, slip op. (Ala. Cir. Ct. Aug. 4, 1995); RSR Corp. v. Hayes, 673 S.W.2d 928, 933 (Tex. App. 1984).

56. Typically, plaintiffs will seek recovery for property damages in toxic tort cases based on the alleged drop in market value of the property stemming from the negative stigma associated with locations adjacent to or near defendants' polluted property. Occasionally, plaintiffs will allege physical impact on their property that either may or may not require some remediation. Nevertheless, plaintiffs generally allege that damages still exist following any necessary remediation because the remediation does not fully alleviate the negative stigma.

57. *See, e.g.*, Adams v. Star Enter., 51 F.3d 417, 423 (4th Cir. 1995).

58. The question whether defendant's conduct must have actually resulted in pollution on plaintiff's property is still not entirely settled. Decisions from courts that have considered such claims suggest that stigma damages may be a proper element of property damages under either

property is unique to each plaintiff's property in much the same way that each individual plaintiff's exposure is unique in personal injury claims. The importance of the individual impact on each property substantially undercuts the *Cook* court's conclusion that issues related to defendants' breach of duty represented the "core of plaintiffs' cause of action."[59] A more logical conclusion is that property damage claims, like personal injury claims involve predominately individual issues focused on each plaintiff's property, and as a result are generally incompatible with class certification.

Some plaintiffs have also cited the Third Circuit's decision in *In re School Asbestos Litigation*[60] and subsequent decisions applying this precedent as authority that class certification is appropriate for property damage claims in an environmental tort case. In *In re School Asbestos Litigation* the Third Circuit affirmed the class certification of a plaintiff class of primary and secondary public schools for compensatory damages based on the presence of asbestos insulation and ceiling tiles within the school buildings.[61] The defendants in this case consisted of the primary

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trespass or nuisance in cases presenting substantial evidence that the property suffers from a permanent physical injury despite remediation efforts. *See* FDIC v. Jackson-Shaw Partners No. 46, Ltd., 850 F. Supp. 839, 842 (N.D. Cal. 1994); DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 457 (Ohio Ct. App. 1991). Courts have been cautious, however, because of the amorphous nature of public fears of contaminated land and the inherent uncertainty and speculativeness of the damage caused by the alleged stigma. Most courts have concluded that stigma damages are not recoverable absent evidence that the plaintiff's own property suffered some physical injury from the contamination, even if the injury was only temporary. *See Adams*, 51 F.3d at 422-25 (Under Virginia law, an underground oil spill that cannot be detected from plaintiffs' property does not make out a cause of action for nuisance); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 795-98 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995) (Under Pennsylvania law, plaintiffs may make out a case for stigma damages based on proof that "(1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs' demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land."); Berry v. Armstrong Rubber Co., 989 F.2d 822 (5th Cir. 1993); Leaf River Forest Prods., Inc. v. Ferguson, 662 So.2d 648, 662-65 (Miss. 1995); Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 725 (Mich. 1992) (diminution in property values based on unfounded fears of contamination on adjacent property would not support a nuisance action); O'Neal v. Department of Army, 852 F. Supp. 327, 336-37 (M.D. Pa. 1994); *see also* Stancill v. DuPont de Nemours and Co., Inc., No. 95-2560, 1996 U.S. App. LEXIS 11658 (4th Cir. May 21, 1996); Leaf River Forest Prods., Inc. v. Simmons, No. 91-CA-00380-SCT, 1996 Miss. LEXIS 682 (Miss. Dec. 12, 1996); Santa Fe Partnership v. Arco Prods. Co., 54 Cal. Rptr.2d 214 (Cal. App. 1996). *But see* DeSario, 587 N.E.2d at 461 (In the district court opinion attached to the appellate court decision as an appendix, the district court concludes plaintiffs may maintain a cause of action under nuisance for stigma property damages, and that proof of physical intrusion onto their land is unnecessary under this cause of action).

59. Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382 (D. Colo. 1993).

60. *See In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986).

61. *Id.* at 1011.

manufacturers of asbestos insulation products used in the United States.[62] While the Third Circuit affirmed the plaintiff property damage class, its opinion was hardly a ringing endorsement of property damage class actions generally. To the contrary, the court declared that "despite misgivings on manageability, [the court] will affirm the district court's conditional certification of a Rule 23(b)(3) opt-out class on compensatory damages."[63] The Third Circuit explained its reasoning as follows:

> We acknowledge that our reluctance to vacate the b(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.[64]

Thus, the Third Circuit saw the *In re School Asbestos Litigation* case as a novel experiment to deal with the asbestos litigation crisis, and grudgingly approved it.[65]

Commentators have argued that asbestos class action litigation is *sui generis* because of the unique pressures this litigation places on the judiciary, and as a result, asbestos decisions should only be applied to other kinds of mass tort and toxic tort disputes after careful consideration.[66] This analysis is supported by the Third and Fourth Circuits' obvious consideration of those unique pressures in affirming

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62. *See id.* at 996.

63. *Id.* at 998-99.

64. *Id.* at 1011.

65. The Fourth Circuit reluctantly affirmed the class certification of an asbestos property damage class involving universities for much the same reason, and with many of the same misgivings. *See* Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186 (4th Cir. 1993). The court explained that the class action had the potential to assist in resolving asbestos litigation nationwide. *Id.* While the "enormous undertaking is fraught with potential problems that may well offset the advantages that the class mechanism might afford," the Fourth Circuit affirmed the district court certification order because it saw some potential to solve the asbestos problem. *Id. See also* National Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621 (Tex. Ct. App. 1989).

The subsequent history of *In re School Asbestos Litigation* more than justifies the Third Circuit's original "misgivings" regarding manageability. This case was filed in 1983, but lingered for more than ten years until most parties settled. The original district court judge was forced to recuse himself because of the appearance of bias towards the plaintiffs. Continuing pretrial motions have resulted in numerous mandamus petitions to the Third Circuit. *See In re* School Asbestos Litig., 921 F.2d 1310 (3d Cir. 1990); *In re* School Asbestos Litig., 977 F.2d 764 (3d Cir. 1992).

66. *See, e.g.*, Richard Faulk and Kevin Colbert, *Reforming an Abusive System: Curtailing Class Certification in Toxic Tort Litigation*, 1996 Prod. Safety & Liab. Rep. (BNA) 999, 1001-02.

class certification of the asbestos property damage claims. Importantly, the primary issues in asbestos property damage cases are also fundamentally different from those in a typical toxic tort case. The gravamen of plaintiffs' allegations in the asbestos cases is an alleged breach of duty for selling a defective product, not damage to real property.[67] As noted above, proof of stigma damages[68] primarily involves consideration of the alleged injury to plaintiffs' property.

In conclusion, while plaintiffs have requested class certification in several property damage toxic tort actions, and in a few cases courts have certified these classes, there is not a general acceptance that these types of cases are suitable for class action treatment. Moreover, as discussed in greater detail later in this Article, a careful analysis of the class-wide and individual issues associated with a property damage claim suggests that these types of cases are inappropriate for class action proceedings.

C. Has the Tide Shifted Against Certification of Toxic Tort Claims? New Developments in Toxic Tort and Environmental Litigation Class Actions

During late 1995 and 1996, five different federal appellate courts reversed class certification in mass tort cases either during interlocutory appeals or as a result of mandamus proceedings.[69] Thus, with the possible exception of the emerging use of "settlement class actions," 1995 and 1996 provided a stunning reversal to the trend towards more expansive use of the class action device begun during the mid-1980s. In response to this series of appellate court opinions, at least one district court, in *In re Telectronics Pacing Systems, Inc.*, reversed itself and decertified a previously certified mass tort class action.[70] Strikingly, the district court judge who decertified the Telectronics class, The Honorable S. Arthur Spiegel, is the same judge who certified the class action in *Day*

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67. *See* Central Wesleyan, 6 F.3d at 187 n.3 ("Because asbestos property damage actions involve products liability claims, not claims to title or possession of real property, we believe that the claims here are transitory, not local, in nature. Even applying South Carolina law on transitory versus local claims, the gravamen of this complaint involves a breach of duty for selling a defective product, not damage to the land itself from any action under trespass.") (citations omitted).

68. *See supra* note 57.

69. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996); *In re* American Medical Sys., Inc.,75 F.3d 1069 (6th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d l293 (7th Cir. l995), *cert. denied*, 116 S. Ct. 184 (1995).

70. *See In re* Teletronics Pacing Sys., Inc., 168 F.R.D. 203 (S.D. Ohio 1996).

v. NLO, Inc.[71] and *In re Fernald Litigation*,[72] two frequently cited opinions granting class certification for environmental torts. Judge Spiegel is also widely regarded as an ardent advocate of expansive use of the class action device.[73] While Judge Spiegel reiterated his personal support for the use of class actions, he nevertheless recognized the watershed change in the appellate court's acceptance of mass tort class actions.[74]

The two primary concerns raised by the appellate courts in these five opinions are (1) the failure to show that common class-wide issues will predominate over issues unique to individual class members;[75] and (2) the failure to prove that the class action is indeed a superior way to litigate the dispute.[76] Regarding the second point, the Fifth and Seventh Circuits suggested that, if plaintiffs' cause of action has very little chance to succeed on the merits, then this conclusion should weigh against class certification.[77] While none of the appellate court decisions involved an environmental contamination case,[78] the general analysis regarding the use of class actions in mass tort litigation will reshape the debate regarding the use of class actions for environmental and toxic tort disputes. Discussion of specific issues relevant to environmental and toxic tort cases follows below.

1. Is the Likelihood of Success on the Merits a Legitimate Consideration in the Decision Whether to Certify a Class?

In *Eisen v. Carlisle & Jacquelin*, the Supreme Court held "nothing in either the language or history of Rule 23 . . . gives a court any

71. 144 F.R.D. 330 (S.D. Ohio 1992).

72. No. C-1-85-149, 1986 WL 81380 (S.D. Ohio Sept. 18, 1986).

73. In addition to *Day v. NLO*, Judge Spiegel also authored the widely cited district court opinion approving the class settlement in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (class settlement of a medical products liability action).

74. *See Teletronics*, 168 F.R.D. at 206, 208-12.

75. *See Georgine*, 83 F.3d at 625. This concern is particularly acute in those cases involving alleged personal injuries.

76. Note that all of these class actions, like mass tort class actions generally, involve a motion to certify the plaintiff class under Rule 23(b)(3), and as a result, the predominance and superiority analyses are relevant.

77. *See* Castano v. American Tobacco Co., 84 F.3d 734, 746-47 (5th Cir. 1996); *In re* Rhone-Poulenc Roper, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995).

78. *Castano* involved fraud allegations based on injuries sustained due to cigarette smoking. *See Castano*, 84 F.3d at 737. *Georgine* is an asbestos personal injury class action settlement. *See Georgine*, 83 F.3d at 617. *American Medical Systems*, *Valentino*, and *Rhone Poulenc* are all medical products liability cases involving personal injuries. *See Medical Systems*, 75 F.3d at 1074; *Valentino*, 97 F.3d at 1228; *Rhone-Poulenc*, 51 F.3d at 1294.

authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[79] This comment led most courts to conclude that inquiries into the merits of plaintiffs' claims are inappropriate as part of the class certification process.[80] Nevertheless, in *In re Rhone-Poulenc Rosen Inc.*, the Seventh Circuit recently reversed a trial court's class certification in a medical products liability action.[81] The Seventh Circuit expressed concern that the plaintiffs were using class certification as a tool to leverage the settlement value of a lawsuit that had little chance to succeed on the merits, and reversed the class certification largely on this basis.[82]

Rhone-Poulenc involved claims by a putative class of 300 hemophiliacs based on their contraction of the AIDS virus from blood solids supplied by the defendant drug companies.[83] In general, plaintiffs alleged that during the early 1980s, defendants should have instituted various measures to protect the blood supply from infection with Hepatitis B and that these protective measures would have also prevented the spread of AIDS.[84] The Court noted that in 13 individual actions tried to date, defendants had been found not liable in 12 cases.[85] Nevertheless, the Seventh Circuit felt that an adverse judgment in the class action could result in a $25 billion liability, and although plaintiffs' prospect for success was low, this potential liability would put defendants under intense pressure (following class certification) to consider a sizable settlement.[86] Ultimately, the Court compared settlements induced by a small probability of an immense judgment to "blackmail," and stated that courts have a legitimate interest in preventing this misuse of the class action device.[87]

The Fifth Circuit in *Castano v. American Tobacco Co.*[88] recently expressed similar concerns that class certification of a group of

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79. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974).

80. *See* Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 383 (D. Colo. 1993); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 60 (S.D. Ohio 1991).

81. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

82. *See id.* at 1298-99.

83. *See id.* at 1294.

84. *See id.* at 1296.

85. *See id.* at 1298.

86. *See id.*

87. *See id.* at 1298-99; but see Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996) (rejecting the analysis in *Rhone-Poulenc* related to consideration of the merits as part of the class certification analysis).

88. 84 F.3d 734 (5th Cir. 1996) (*Castano* involved claims based on fraud by a putative class of persons addicted to cigarette smoking because of the nicotine content).

unmeritorious or marginal tort claims unfairly skews the outcome of a trial against defendants, and forces settlements that are inflated far above the actual value of the plaintiffs' claims:

> In the context of a mass tort class action, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of adverse judgment is low. These settlements have been referred to as judicial blackmail.[89]

Proponents of class certification inevitably argue that class certification serves a legitimate judicial purpose in this context, because the settlements forced by class certification promote "judicial efficiency." Nevertheless, courts and commentators alike have begun to be wary.[90] The Texas Supreme Court recently cautioned regarding class actions generally: "[because class] attorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities."[91]

An example illustrates the concern. A recent article in the American Lawyer described a $150 million settlement paid by General Chemical Company and its insurers to a class of persons allegedly injured

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89. *Id.* at 746 (citations omitted). Indeed, the *Manual for Complex Litigation* (3d ed. 1995) states that "[e]mpirical research suggests that decisions to consolidate or bifurcate trials may affect jury decisions about liability and damages." *Id.* at § 33.26 n.1056. The Manual cites a study in which sixty-six juries were presented with identical evidence under four conditions: one plaintiff only, four plaintiffs, and four plaintiffs representing hundreds of others. The study's authors found that as the number of absent plaintiffs represented by the plaintiffs at trial increased, juries were more likely to blame the defendant for the alleged injuries. *See id.*; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989).

90. *See* Faulk & Colbert, *supra* note 65, at 1001-02. The authors cite several appellate court decisions in primarily asbestos cases, that grant class certification based on the resulting "judicial efficiency," and then argue that misapplication of these asbestos decisions to toxic torts has caused unwarranted class certification. The authors argue that the court should not consider judicial efficiency, but rather should return to the basic enabling function of Rule 23(b)(3) for the aggregation of numerous, homogenous small claims that would not otherwise be prosecuted without the class action device. *Id.* The results of this change in focus would obviously include many fewer classes certified for mass tort disputes.

91. General Motors Corp. v. Bloyed, 916 S.W.2d 949, 953 (Tex. 1996).

by a release of sulfuric acid from the company's Richmond, California chemical plant.[92] The article characterizes the sulfuric acid release as a "false disaster," and sharply criticizes many of the plaintiffs' claims as "bogus."[93] Nevertheless, defendants settled.[94] The article explains defendants' reasoning as follows:

> "It's not at all that outlandish to think that if we had taken this to the jury, they [plaintiffs] would each get $15,000 plus lawyers' fees" [defense counsel] Baker notes. Multiply that by tens of thousands of claimants, he says, and "the mere math" suggests that settling was "the sensible thing to do."[95]

Similarly, counsel for defendants' insurers noted that there appeared to be a lot of questionable claims, but litigating the case would have been staggeringly expensive and carried large risks for the company.[96] The American Lawyer article describes severe criticism by attorneys, medical professionals, and area residents that portray the General Chemical settlement as a windfall for opportunistic plaintiffs and class counsel attorneys.[97]

In response to similar concerns, the Advisory Committee is considering changes to Rule 23 that would add a new subparagraph to Rule 23(b)(3). This new paragraph would allow courts to consider whether "the probable relief to individual class members [justifies] the costs and burdens of [class] litigation."[98] Addition of this provision would presumably allow the district court to preview the merits of the case as part of its analysis of the "probable relief."

There is no question that class certification dramatically increases the settlement value of the plaintiff's case in toxic tort litigation. As noted above by General Chemical's counsel, this result is simply an outcome of the math—even a small recovery for individual class members translates into a large sum of money when multiplied by several thousand plaintiffs. Furthermore, because Rule 23 is clearly designed to

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92. *See* Susan Hansen, *Money for Nothing?*, 1996 AM. LAW. 60.

93. *See* Hansen, *supra* note 92, at 64.

94. *Id.*

95. *Id.* at 66; *see also* Lillian Hayden v. Atochem North America; C.A. No. H-92-1052, slip op. At 3-4 (S.D. Tex. Sept. 7, 1995) (where plaintiffs' counsel, following class certification, leveraged a settlement including substantial injunctive relief as well as more than $55 million based on limited evidence of property damage and personal injuries).

96. *See* Hansen, *supra* note 92, at 66.

97. *Id.* at 66-68.

98. Henry J. Raske, *Making Class Distinctions*, A.B.A. J., Jan. 1997, at 22.

enable small claims litigation, the Advisory Committee's intent presumably was that class certification would increase the value of plaintiffs' case in these situations. The issue addressed by the Seventh Circuit in *Rhone-Poulenc* and the Fifth Circuit in *Castano* is not this inevitable settlement value enhancement that follows class certification, but rather whether this value enhancement should occur independent from any analysis of the merits of the underlying dispute.[99] The Seventh and Fifth Circuits concluded that, at least under some circumstances, the refusal to address the merits of the dispute is fundamentally unfair to defendants.

In an effort to evaluate the effectiveness of Rule 23, a group of class action experts recently compiled a study of class action proceedings over a two-year period in four federal district courts.[100] Based on the disposition of these cases, one of the conclusions of this report was that class certification does not coerce settlements of frivolous or near frivolous claims—or so called "strike suits."[101] The authors conclude that, because independent mechanisms are available to address merits issues (primarily motions for summary judgment and motions to dismiss), and because the empirical evidence suggests that courts will rule on these motions prior to trial, there is no coercion to settle.[102] As a result, the authors suggest consideration of the merits is unnecessary as part of the class certification analysis.[103]

Arguably, this analysis begs the question. A defendant's decision whether to settle a case always involves an analysis of the future risk posed by continued litigation. As noted by the defendants and insurers in the *GCC Richmond Works* litigation, the aggregation of thousands of claims enhances the risk of litigation regardless of how much the claims may lack merit.[104] Proceeding with a motion for summary judgment after class certification entails additional risk because there are no "sure things" in toxic tort litigation. If the defendant is successful and claims are dismissed or denied, then its risk is reduced. If, however, the motion fails, the risk is increased, and the value of the plaintiffs' case is enhanced further. The existence of other mechanisms that may substantially influence the parties settlement analysis does not suggest that these

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99. *See In re* Rhone-Poulenc Rover, Inc., 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

100. *See* Willging et al., *supra* note 2.

101. *See id.* at 109.

102. *See id.* at 142-49.

103. *See id.* at 176.

104. *See* Hansen, *supra* note 92, at 66.

mechanisms replace the value enhancement that occurs after class certification. Moreover, if aggregation of claims not only multiplies the number of claims but also enhances the viability of those claims,[105] then this enhancement occurs before the motion for summary judgment is even filed. Finally, as a general rule class action discovery and motion practice is substantially more expensive than similar proceedings in individual litigation, and as a result, potential transaction cost savings associated with settlement increase when the class is certified. Thus, the value enhancement of the plaintiffs' case occurs before the court considers the motion for summary judgment. The analysis of the Fifth and Seventh Circuits is sound.

While *Eisen v. Carlisle & Jacqueline*[106] clearly discourages examination of the merits as part of class certification process, parties citing this precedent rarely articulate any unfairness that might flow from analysis of the merits. Clearly, courts have authority to consider merits issues prior to trial, and courts have ample precedent under law governing motions to dismiss and motions for summary judgment to analyze evidence in this context. One wonders if the oft-repeated mantra that "a court must not consider the merits in a motion for class certification" is simply an empty statement that has outgrown the Supreme Court's original analysis and that lacks justification based on modern use of the class action rule.

2. The Court Must Determine How the Class Action Will Be Tried: New Recognition of Individual Issues

All five of the recent appellate court decisions addressed the importance and difficulties associated with demonstrating that there is a predominance of common class issues prior to certification of a mass tort class action. Perhaps most importantly, these courts provided a guidepost for this analysis that had been lacking: in the predominance of common class-wide issues analysis district courts must focus on how the litigation would actually be tried and attempt to foresee the predominant issues in that proceeding. The Fifth Circuit explained:

> The district court erred . . . [because] its predominance inquiry did not include consideration of how a trial on the merits would be conducted. . . . Absent knowledge of how addiction-as-injury cases would actually be tried . . .

105. *See* Bordens & Horowitz, *supra* note 89, at 26.
106. 417 U.S. 156, 177-78 (1974).

> it was impossible for the court to know whether the common issues would be a "significant" portion of the individual trials. The court just assumed that because the common issues would play a part in every trial, they must be significant. The court's synthesis of *Jenkins* and *Eisen* would write the predominance requirement out of the rule, and any common issue would predominate if it were common to all the individual trials.[107]

The Fifth Circuit specifically rejected the "lazy" approach adopted by some district courts, where the court errs in favor of class certification without fully developing the predominance of common issues requirement.[108] In *In re American Medical Systems, Inc.*, the Sixth Circuit considered the district court's class certification of medical products liability claims based on alleged defects in penile implants manufactured by the defendant.[109] The court cited *Sterling v. Velsicol Chemical Corp.* for the proposition that class certification in mass tort cases is only appropriate when there is a single accident or single course of conduct uniting the claims.[110] The Sixth Circuit then rejected the cursory analysis of predominance conducted by the trial court, and held that both individual issues of fact and individual choice of law issues overwhelmed any common class-wide issues.[111] In *Georgine v. Amchem Products Inc.*, a proposed asbestos personal injury class action settlement, the Third Circuit reached the same conclusion:

> Turning to predominance, we hold that the limited common issues identified, primarily the single question of the harmfulness of asbestos, cannot satisfy the predominance requirement of this case. Indeed, it does not even come close. . . . While . . . mass torts involving a

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107. Castano v. American Tobacco Co., 84 F.3d 734, 740, 745 (5th Cir. 1996).

108. *See id.* at 741. In considering potential differences in state law regarding plaintiffs' fraud claims, the Fifth Circuit commented:

> [c]onditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of the Rule have been substantially met. . . . However difficult it may have been 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."

Id. In re Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974).

109. *See In re* American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

110. *Id.* at 1084 (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988)).

111. *Id.* at 1084-85.

> single accident are sometimes susceptible to Rule 23(b)(3) class action treatment, the individualized issues can become overwhelming in actions involving long-term mass torts.[112]

Finally, in *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit rejected a medical products liability class action for alleged personal injuries caused by the drug Felbatol.[113] While the Ninth Circuit was reluctant to "close the door" on mass tort class actions generally, the court nevertheless placed the burden on the plaintiff to show how a class trial could be conducted and how common class-wide issues would predominate at that trial.[114] The common theme in these five appellate court decisions is that predominance or common class-wide issues is a difficult hurdle for class certification of a mass tort case. More importantly, district courts cannot side step this issue via reliance on the conditional nature of a class certification order or an overly restrictive application of Rule 23(c)(4).[115] Instead, plaintiffs must show and the court must determine how the class claims will be tried, and, following this analysis, the court must conclude that common class issues will predominate.

Application of these recent decisions to environmental and toxic tort claims leads to the conclusion that, with the possible exception of proposed (b)(2) class actions for medical monitoring, environmental torts are generally incompatible with the class action device. A few recent decisions by district courts regarding environmental claims illustrate this point.

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112. Georgine v. Amchem Prods. Inc., 83 F.3d 610, 627-28 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996). One commentator has described the predominance of common class-wide issues in tort cases as a continuum with single event cases such as airplane crashes on one end of the scale and with toxic tort claims on the other. *See* William Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1257 (1996).

113. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996).

114. *Id.* at 1234.

115. *See* Castano v. American Tobacco Co., 84 F.3d 734, 745-46 n.21 (1996). The court noted that

> [s]evering the defendants' conduct from reliance under rule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.

Id.

In *Cordova v. Hughes Aircraft Co.*, the Arizona district court rejected class certification of the named plaintiffs' claims that tetrachloroethylene contamination originating from defendants' facilities caused plaintiffs' alleged property damages and personal injuries.[116] Named plaintiffs proposed separate classes for (1) personal injuries, (2) medical monitoring, (3) property damages, and (4) economic loss.[117] Unlike *Watson v. Shell Oil and Sterling v. Velsicol Chemical Corp.*, plaintiffs' alleged damages did not arise from a single incident or course of conduct, but rather were based on over forty years of alleged historical releases from seven different defendants with facilities in the Tucson International Airport area.[118] The district court's opinion extensively described many of the individual issues that appear in most toxic tort cases that involve historical contamination occurring over many years.

Regarding the personal injury claims, the plaintiffs argued that a limited issues class certification under Rule 23(c)(4) should allow the court to address generic causation issues in the class action (*i.e.*, is tetrachloroethylene capable of causing certain classes of injuries given a representative exposure), and reserve specific causation for each class member's injury and damages for individual adjudication.[119] The court concluded, however, that certification of "generic causation" for class treatment "would be contrary to accepted procedures in the medical profession" because standard diagnosis procedures require individual consideration of six factors:

> (1) determine the exact disease, if any, from which the person suffers; (2) determine the extent of exposure to the environmental toxin(s) of concern, including route of exposure, daily dose of contaminants, and duration of exposure, (3) determine the temporal relationship between the exposure to the contaminant of concern and any disease alleged to result from such exposure; (4) determine known or potential causes and/or risk factors for the disease, (5) consider other exposures to the contaminant(s) of concern that are unrelated to the defendant's releases; and (6) review the literature for well-designed and well-performed scientific and epidemiological studies that both pertain to the individual

116. Cordova v. Hughes Aircraft Co., C-284158, slip op. at 50 (Ariz. Sup. Ct. July 10, 1996) (order denying class certification).

117. *See id.* at 3.

118. *See id.* at 4-5.

119. *See id.* at 18.

> in question and address causal relationships between exposure to the contaminants and the specific disease from which the patient suffers.[120]

Class litigation of toxic tort personal injury or even medical monitoring claims necessarily requires analysis of generic causation.[121] The major difficulty in litigating generic causation as part of a separate class proceeding, however, is that trial on this issue includes an implicit assumption that the exposure and dose received by the plaintiff population is uniform. Thus, generic causation is meaningful and useful only if the trier of fact can assume a certain level of exposure to the hazardous substance, and can then assume that the level of exposure is consistent among all, or substantially all, of the proposed class members.[122] This, however, is almost never the case for environmental and toxic tort litigation where plaintiffs have been exposed to varying concentrations through different media over different periods of time.

The *Cordova* district court next considered certification of the plaintiffs' medical monitoring class. The court identified three issues necessary to evaluate the effectiveness of a potential medical monitoring program: (1) the effectiveness of the proposed medical monitoring tests and the risks of subsequent evaluation; (2) the expected prevalence of, and/or increased risk for, the target condition in the population monitored; and (3) the natural history of the disease condition and the attendant evidence for an improved clinical outcome as a result of medical monitoring for each specific condition.[123] The court focused on the need to identify a reasonable target population for monitoring that was related to significant exposure, and the design of a monitoring program that would have some utility to the monitored population.[124] The court concluded

> "monitoring is appropriate for a group only when the population (1) was subject to similar levels of exposure, (2) has similar backgrounds, (3) is at a high risk of developing the disease that is monitored for, and (4) there is a high prevalence of the disease. Plaintiffs have not met their burden that these recognized requirements can be litigated here on a class-wide basis. To the contrary,

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120. *See id.* at 19-20.

121. *See In re* Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990).

122. *See* James Henderson et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1685 (1995).

123. *See Cordova*, C-284158, slip op. at 26.

124. *Id.*

> the evidence suggests a lack of commonality among plaintiffs which would preclude a group-wide decision concerning medical monitoring."[125]

Much like its personal injury analysis, the court believed the generic causation implicit in the plaintiffs' medical monitoring claims was inappropriate given the uncontested substantial variations in each plaintiff's exposure and susceptibility to disease.

Finally, the court rejected plaintiffs' arguments that the court could consider area-wide property damages based upon a model of the impact caused by negative stigma to the class area property values.[126] The court was concerned that plaintiffs' property damages model did not accurately identify the cause of any depressed property values.[127] Moreover, the court concluded that defendants could raise individual factors, such as the condition of the home or the location in a high crime area, as defenses to plaintiffs' allegation that the reduced value was due to stigma from the nearby environmental pollution.[128]

The fundamental change created by the recent opinions from the federal appellate courts is the emphasis on understanding how the class action will be tried as part of the class certification analysis. This analysis requires examining the elements of the cause of action and the contested elements that will dominate the dispute at trial. For most environmental torts, the duty and breach of duty elements of a negligence cause of action are usually not the most contentious or difficult elements. Instead, the battle lines are drawn around proof of causation and damages. If, as the district court determined in *Cordova*, generic causation does not apply to plaintiffs' personal injury or medical monitoring claims, then these claims

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125. *Id.* at 27.

126. *Id.* at 28.

127. *Id.*

128. *Id.* at 29. Other recent district court opinions have reached similar conclusions regarding generic stigma damages for environmental contamination. *See, e.g.*, Sherrill v. Amerada Hess Corp., C.A. No. 95-CVS-15754, slip op. at 3 (N.C. Sup. Ct. Nov. 7, 1996). The court states that

> [t]he record evidence indicates that the proof of any lost use and enjoyment or diminution in value of real property requires an individualized proof of facts that will be peculiar to each plaintiff and putative class member. Defendants will be entitled to inquire into the past and present uses of each property to determine the individual factors that may have caused any changes in use or diminution of the value of a plaintiff's or putative class member's property.

Dyer v. Monsanto Co., C.A. No. CV-93-250, slip op. at 16-17 (Ala. Cir. Ct. Aug. 4, 1995) (Property damages due to alleged releases of PCBs to several creeks and a lake downstream of Monsanto's industrial plant were too individualized for class treatment. Diminution in value for each specific tract could be due to multiple causes and will entail individual proof).

will almost certainly predominately involve issues related to individual causation and damages. Accordingly, class certification is not appropriate. Similarly, if plaintiffs' property damage claims will raise issues primarily focused on the individual impact of defendants' wrongful conduct on each plaintiff's property, then these claims also are not appropriate for class certification.

III. RULE 23 AS TORT REFORM: GLOBAL SETTLEMENTS OF MASS TORT LIABILITY

A. A Relaxed Standard for Certification of a Settlement Class

One of the most controversial current topics in federal civil procedure is the use of the class action device to effect global settlements of mass tort liability. Two recent asbestos liability class settlements[129] and an insurance class action dispute involving the mandatory class settlement of fraud claims[130] have caused a flurry of commentary regarding the applicability of Rule 23 to the settlement of mass tort liability.[131] Global class action settlements are not new. In the mid-1980s, class actions were first used to settle asbestos liability[132] and the "Agent Orange" litigation.[133] Moreover, products liability actions involving defective heart valves,[134] silicone breast implants,[135] and the

129. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), *rev'd* 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods. Inc. v. Windsor, 117 S. Ct. 379 (1996); Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) *aff'd sub nom. In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

130. *See* Adams v. Robertson, 117 S. Ct. 37 (1996).

131. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995); Richard L. Marcus, *They Can't Do that, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.,* 80 CORNELL L. REV. 1045 (1995); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996). Indeed, even the United States Congress has entered the debate. Late last year, Senators Nunn and Cohen introduced proposed legislation that would require notification of the Department of Justice and State Attorneys General at least 120 days prior to the settlement of any class action. S. 1501, 104th Cong., (1995).

132. Jenkins v. Raymark Indus. Inc., 782 F.2d 468 (5th Cir. 1986).

133. *In re* "Agent Orange" Prods. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

134. Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992).

135. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. l, 1994).

Dalkon Shield IUD[136] used the class action device to effect global settlements. Nevertheless, use of "settlement classes" is arguably growing, and this phenomena clearly causes substantial tension within the plaintiffs' bar between class action plaintiffs' attorneys and plaintiffs' attorneys who traditionally prosecute individual actions.

Several features distinguish these global settlement class actions from the environmental and toxic tort litigation class actions discussed above. The most important of these distinctions is that the defendant in the settlement cases willingly participates in the class certification process, usually negotiating both the scope of the class and the size of the settlement with class counsel simultaneously. These classes are almost never litigation classes, because the sole purpose of class certification is to effect a global settlement. Indeed, several courts have concluded that the elements for class certification are more readily satisfied where the parties have agreed to a settlement, because the issues left for the court's resolution are much more limited than in the litigation context.[137] The apparent rationale behind loosening the class certification requirements where parties have agreed to a settlement is to encourage settlements of complex disputes that would otherwise severely tax the resources of all parties and the court.[138] Indeed, several courts have approved settlement classes while at the same time stating that a similar class might not be appropriate for litigation purposes.[139] Finally, the Advisory Committee is considering changes to Rule 23 that would explicitly create a relaxed certification standard for settlement class actions.[140]

Nevertheless, the Third Circuit and arguably the Texas Supreme Court have rejected the application of relaxed class certification standards to settlement classes.[141] The Third Circuit explained that the standards of

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136. *In re* A.H. Robins Co. Inc., 880 F.2d 709 (4th Cir. 1988), *cert. denied*, 493 U.S. 959 (1989).

137. *See In re* A.H. Robins Co. Inc., 85 B.R. 373, 378 (E.D. Va. 1988) ("[T]he requirements of Rule 23 may be more easily satisfied in the settlement context than in the more complex litigation context.") *aff'd*, 880 F.2d 709 (4th Cir. 1989); Newberg & Conte, Newberg on Class Actions (3d Ed.) § 11.28 (citing cases and describing circumstances that make certification of a litigation class more difficult).

138. *See* White v. National Football League, 822 F. Supp. 1389, 1402 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *Bowling*, 143 F.R.D. at 158.

139. *See In re* A.H. Robins Co., 880 F.2d at 709.

140. *See* Raske, *supra* note 98, at 22; *see also* Memorandum from the Honorable Patrick Higginbotham to the Honorable Alicemaire Stotler, dated May 17, 1996.

141. *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996); General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996); *In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).

Rule 23 were designed to protect the rights of absent class members by ensuring that any class certified would include class representatives with interests closely similar to the absent members.[142] As a result, where a proposed class met the requirements of Rule 23, the court could be confident that the class representatives would protect the interests of the rest of the class. While the Third Circuit recognized the importance of settlement, it saw no justification for abridgment of the protections of the absent class members in the settlement context. The Court concluded

> In effect, settlement classes can, depending how they are used, evade the processes intended to protect the rights of absentees. Indeed, the draft of the MCL (Third), although considerably more receptive to settlement classes than earlier editions of the Manual, explains that "[t]he problem presented by these requests is not the lack of sufficient information and scrutiny, but rather the possibility that fiduciary responsibilities of class counsel or class representatives may have been compromised."[143]

In *General Motors Corp. v. Bloyed*, the Texas Supreme Court reversed the certification of a settlement class under Texas Rule 42(b)(4).[144] The Texas Supreme Court relied substantially on the *In re GMC* opinion to support its holding that the district court must determine that the requirements of Rule 42 have been scrupulously met, independent of the fairness of the proposed settlement.[145] Thus, the apparent trend in both Texas and federal courts is to scrutinize settlement classes much more closely.

Nevertheless, the Fifth Circuit in *In re Asbestos Litigation* (*Ahearn v. Fibreboard Corp.* or *Ahearn*) specifically rejected the Third Circuit's conclusions and held that the district court may consider the existence of the class settlement in determining whether the certification prerequisites of Rule 23 are satisfied.[146] The Fifth Circuit's opinion also

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142. *See Georgine*, 83 F.3d at 624-25.

143. *In re* General Motors Corp., 55 F.3d at 788 (citing MANUAL FOR COMPLEX LITIGATION (3d ed. 1995)).

144. *See Bloyed*, 916 S.W. 2d 949.

145. *See id.* at 955. One disadvantage of certifying a settlement class based upon a scrupulous application of the Rule 42 standards (rather than a relaxed settlement class standard) is that, if the settlement fails, it is much more difficult for the defendant to reverse the initial class certification order. Also note that the Texas Supreme Court adopted other federal case law precedent in holding notice of a class settlement under Rule 42(e) must disclose the amount (or requested amount) of class counsel's attorney's fees.

146. *See In re* Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996) (*citing In re* Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981)).

included a lengthy dissenting opinion by Judge Jerry Smith that mirrors many of the arguments made by the Third Circuit in *Georgine*.[147] Although pure settlement class actions (i.e., those in which no litigation class was ever certified) are more common in asbestos and products liability actions, they do occur occasionally in toxic and environmental tort litigation. Perhaps more frequently, an environmental tort class, originally certified as a litigation class, is broadened to include additional class members or causes of action as part of a settlement. Defendants have an obvious interest in a broad class definition once a settlement has been negotiated because a broad definition expands the res judicata effect of the court's judgment.[148] Thus, while the heated debate over settlement class actions is probably more important to products liability law, it is also of substantial importance in the toxic tort context as well.

The Supreme Court has accepted certiorari in *Georgine*,[149] and it seems likely that the Court will comment on both the certification standards applicable to a settlement class and the due process concerns applicable to resolution of the absent class members' claims. In addition, the Advisory Committee is considering proposed revisions to Rule 23 that would explicitly authorize the certification of class actions for settlement purposes only. This is a rapidly evolving area of the law that will likely see substantial change within the next two years.

B. Understanding the Motives of the Players: Who Wants a Class Certified and Why?

One commentator has described the use of settlement classes as tort reform via Rule 23.[150] Clearly, the global settlement of mass tort liabilities via a class action holds substantial advantages for defendants under some circumstances. The most obvious advantage is that a class action settlement compromises all outstanding claims (except for opt-outs

147. *See id.* at 997-1026.

148. Another potential scenario for a toxic tort class settlement occurs when plaintiffs file several overlapping class petitions in several jurisdictions. While defendants need to defeat all motions for class certification, plaintiffs need to win only one. This situation may force defendants to consider settling in the most favorable forum even before certification of a litigation class. This example was recently played out in a products liability action: *In re* Louisiana-Pacific Inner-Seal Siding Products Liab. Litig., slip op. No. 95-879-JO (D. Or. Apr. 26, 1996).

149. *See* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

150. *See* Marcus, *supra* note 131, at 859. ("[T]he class action has landed like a 600-pound gorilla in the arena of tort reform, where there has of late been increasing interest in replacing tort litigation with scheduled benefits like those provided in these class action settlements.").

from b(3) classes), and essentially buys defendants peace.[151] Other benefits to defendants include: potentially lower legal fees and other transaction costs, and the resolution of punitive damage issues that can otherwise distort decision making in individual litigation. In theory, class settlements also hold substantial advantages for the plaintiff class. For example, a settlement guarantees a recovery, as opposed to the uncertainty of litigation. In addition, a class settlement requires a class-wide protocol to equitably distribute the settlement fund. This system encourages consistent and fair determinations of individual damages, as opposed to the wide fluctuations that one normally sees between the litigation of similar individual cases. Moreover, creation of a settlement fund provides reasonable assurance that all class members will receive some compensation, as opposed to individual lawsuits where the first plaintiffs may deplete defendants' resources. Finally, plaintiffs may also benefit from reduced transaction costs. Class counsel fees awarded by the court are generally a smaller percentage of the total settlement than a standard personal injury contingency fee, and defendants may transfer a portion of their transaction cost savings to plaintiffs during the settlement negotiation.

Of course, the primary concern for the plaintiff class is that the settlement may substantially undervalue the class claims. This is the lesson of *In re GMC Pick-up Trucks*.[152] If the class is not properly certified, class counsel may sell-out the class and compromise the class claims below their actual value.

The clear losers with a global class settlement, regardless of whether the settlement is fair, are the attorneys who represent individual plaintiffs. Judge Parker put it bluntly in his opinion approving the asbestos class settlement in *Ahearn v. Fibreboard Corp.*:

> The only real loser under the Global Settlement is the asbestos litigation industry—the army of lawyers, consultants, and experts of every stripe—which has historically consumed the lion's share of the funds expended by asbestos defendants and their insurers in dealing with their asbestos liabilities.[153]

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151. Attempts to maximize this benefit by settling "future claims" have caused one of the more lively controversies in the settlement class debate. This issue is discussed in greater detail later in this paper.

152. 55 F.3d 768 (3d Cir. 1995).

153. Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 508 (E.D. Tex. 1995), *aff'd sub nom. In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

Most tort settlement classes are certified under Rule 23(b)(3), and as a result, the plaintiffs have an opportunity to opt-out of the settlement. Nevertheless, the decision whether to opt-out belongs to the plaintiff, and the settlement may benefit the plaintiff more than his or her attorney.[154] Furthermore, if the proposed class settlement will settle all future claims, the plaintiffs' attorney will lose a substantial source of future income.

C. Putting the Cart Before the Horse: Settlement Before the Lawsuit

As noted above, the approval by the district court of class settlements in *Georgine v. Amchem Prods., Inc.*[155] and *Ahearn v. Fibreboard Corp.*[156] sparked a huge debate regarding the propriety of settlement class actions. *Georgine* and *Ahearn* have features that make them unique from other class settlements and simultaneously accentuate problems that critics allege permeate all class settlements to some degree. The settlement in both cases was negotiated before plaintiffs even filed their complaint. When plaintiffs finally filed their complaint, the parties simultaneously filed defendants' answer, plaintiffs' motion for class certification, and requested preliminary approval of the class settlement.[157] Thus, these two cases were arguably over before they began. Moreover, critics of the *Georgine* settlement allege that defendants bid this case to the plaintiffs' bar, and that a packaged class settlement, including a hefty class counsel fee, was awarded to the low bidder.[158] Regardless of the merit of these criticisms, the utility and dangers of class settlements can be more easily understood by examining the facts of these two controversial cases.

1. Judicial Economy Versus Due Process Rights to Litigate Individual Claims

Mass tort litigation and particularly asbestos litigation matured during the 1980s. Several hundred thousand individual asbestos personal injury claims or lawsuits were filed during this decade, and several

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154. *See id.* at 516 (noting that plaintiffs attorneys objected because individual attorney fee awards would be limited to 25% of plaintiffs total recovery); *see also* Coffee, *supra* note 131, at 1419-20. The administrative cost provisions in the silicone breast implant settlement limited costs including attorneys fees to 24% of the settlement fund. *Id.* Professor Coffee suggests that these provisions may have led opportunistic opting-out by self-interested plaintiffs attorneys. *Id.*

155. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 334 (E.D. Pa. 1994), *rev'd* 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

156. *Ahearn*, 162 F.R.D. at 530.

157. *See* Coffee, *supra* note 131, at 1393.

158. *See* Koniak, *supra* note 131, at 1054.

hundred thousand more are projected to occur between now and the middle of the next century.[159] Mass tort claims, including asbestos personal injury claims, are characterized by complex scientific evidence of causation and damages that precludes rapid treatment of these cases in the judiciary. Both state and federal courts were ill prepared to handle the asbestos personal injury explosion, and plaintiffs, defendants, and the judiciary are increasingly dissatisfied with the status quo.[160] Against this backdrop, *Georgine* and *Ahearn* offer the promise of efficient resolution of asbestos claims.[161] Both settlements simplify causation and damage analyses by identifying the major diseases associated with asbestos exposure and providing schedules for the payment of damages for each disease. The settlement protocols offer quicker and more efficient analysis of claims, and a more equitable process (than litigation) to distribute funds to the injured plaintiffs.[162]

Nevertheless, critics argue that these settlements improperly compromise the individual plaintiff's right to litigate his or her claim, and that judicial economy is not a sufficient justification to override this fundamental right.[163] These critics distinguish class actions involving thousands of small individual claims (such as securities and civil rights actions), where Rule 23 allows aggregation of claims, from tort lawsuits

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159. *See* Coffee, *supra* note 131, at 1361 n.58. Professor Coffee cites various statistics that estimate future claims against the Mannville trust. These estimates range from as low as 125,000 to as high as 600,000. *See id.*

160. *See generally* REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991), *reported in* Asbestos Litig. Rep. 22698 (March 14, 1991).

161. *See Georgine*, 157 F.R.D. at 334-35.

> Unlike the tort system, the [*Georgine*] settlement provides certain and prompt cash compensation to all class members who have suffered impairment or death as a result of their exposure to asbestos. . . . The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. . . . The plan which this Court approves today will correct that unfair result for the class members and the CCR defendants.

Id.

162. This analysis does not address the more basic question raised in *GMC Trucks*: does the settlement as a whole under-value plaintiff's claims? *See In re* General Motor Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 808, 810 (3d Cir. 1995). Equitable distribution among the class members is meaningless if everyone is getting less than they deserve. This issue was argued extensively in both *Georgine* and *Ahearn* with both district courts ultimately concluding that the level of compensation was reasonable and adequate. Unlike *GMC Trucks*, the adequacy of the settlement fund was not a significant issue in the Third Circuit's reversal of *Georgine*.

163. *See* Cramton, *supra* note 131, at 824.

where each individual claim would justify independent action. Accordingly, they argue that due process requirements are greater in the tort context, and are generally incompatible with the class action device.

2. The Risk of Conflicts of Interest and Collusion

As the Third Circuit warned in *In re GMC Pick-up Trucks* and re-emphasized in its reversal of *Georgine*, settlement classes create a greater potential for collusion and the breach of fiduciary duties by class counsel. Several commentators have argued that this danger increases when, like *Georgine* and *Ahearn*, the class settlement is negotiated before the complaint is even filed.[164] Under these circumstances, defendants can theoretically test out settlement terms with several different groups of plaintiffs' attorneys and choose the best deal. Critics argue that this is a no lose proposition for defendants. If defendants obtain an advantageous settlement, it advances their interests; and if the settlement falls through, they are no worse off and can object to class certification if plaintiffs' counsel proceeds with filing a complaint. More importantly, putative class counsel is always aware that, if an agreement is not reached, defendants can move on to another group of plaintiffs' attorneys. Indeed, critics argue that putative class counsel has little more than a right of first refusal on the terms offered by defendants, but acceptance brings a substantial fee as class counsel. Furthermore, this potential fee award represents too big a temptation, and defendants are eventually able to find self-interested plaintiffs' counsel who are willing to compromise the interests of the absent class members.[165]

The original drafters of Rule 23 recognized the potential for collusive settlements that compromise the interests of absent class members, and this is the primary reason that Rule 23(e) requires court approval for all class action settlements. While federal courts have been willing to forego rigorous analysis of all the class certification elements for settlement classes (Rule 23(a) and (b)), there is no evidence that courts do not take their responsibilities to assess the fairness of the

164. *See* Coffee, *supra* note 131, at 1378-80.

165. Note that many of these problems are less acute in the more frequent toxic tort context, where a litigation class already exists prior to the start of settlement negotiations. As noted previously, usually the issue under these circumstances is a proposed expansion of the class definition. Because a litigation class has been certified, class counsel is not competing with other potential class counsel and, if defendants ask too much, class counsel can presumably stand up from the settlement table, shout "I'll see you in court!" and slam the door on the way out.

settlement under Rule 23(e) seriously.[166] For example in *Ahearn*, the court appointed an *ad litem* attorney to represent the absent class members, and to specifically address concerns related to conflicts of interest.[167] The *ad litem* attorney analyzed the fairness of the proposed class settlement and ultimately submitted a 92-page report supporting the settlement.[168]

Detailed analysis of the *Georgine* opinion leads to a similar conclusion. Critics of the *Georgine* settlement argued that the proposed class settlement was collusive and that class counsel had a conflict of interest because they also represented 14,000 individual asbestos plaintiffs with presently manifested injuries.[169] As evidence of collusion, critics pointed to a separate settlement negotiated (contemporaneously with the class settlement) by class counsel for its inventory of existing individual asbestos personal injury cases. Objectors to the settlement argued that the individual action settlements provided more money than the class action distribution formulae for the same asbestos related diseases.[170] Moreover, the individual settlements included payments for pleural thickening (a physical condition caused by asbestos that does not result in a substantial physical impairment), whereas *Georgine* class members were not eligible for compensation based solely upon pleural thickening.[171] Objectors to the *Georgine* settlement argued that the individual and class action settlements were part of the same deal,[172] and that class counsel maximized the recovery of its individual clients (and its contingent fee) at the expense of the absent class members.

The *Georgine* court, however, appears to have taken its responsibilities under Rule 23(e) seriously. In a 92-page opinion approving the class settlement, the court rejected arguments that there

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166. A few commentators have suggested that federal courts are not neutral parties in any analysis of the fairness of the settlement. These commentators argue that, because the court has such a strong interest in clearing its docket of mass tort cases, it has a bias towards approval of the settlement. *See* Koniak, *supra* note 131, at 1115.

167. *See In re* Asbestos Litig., 90 F.3d 963, 981-82 (5th Cir. 1996).

168. *Id.* at 982.

169. *See* Koniak, *supra* note 131, at 1051-57.

170. *Id.* at 1064-67.

171. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 272 (E.D. Pa. 1994), *rev'd* 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

172. Indeed, the Court cited testimony that the *Georgine* defendants refused to negotiate block settlements of existing individual cases without some mechanism to limit future claims. As a result, the Court accepted that the class action settlement was designed to meet the defendants precondition for limitations on future claims and the two deals were linked. *See Georgine*, 157 F.R.D. at 295-96.

was a conflict of interest between the absent class members and the individual plaintiffs represented by class counsel in *Georgine*.[173] Furthermore, the court found that the terms of the class action settlement were fair when compared to the individual settlements.[174] The only substantial compensation difference noted by the court was the payment of individual plaintiffs based on pleural thickening.[175] The court noted, however, that under the class settlement claimants were essentially insured against development of future asbestos-related impairment.[176] In contrast, even though individual plaintiffs with pleural thickening were compensated, those payments were heavily discounted based on a relatively modest risk that they would ultimately develop an asbestos-related disease.[177] Moreover, the individual plaintiffs released any claim to additional compensation if they later develop a more serious asbestos-related disease.[178] The court concluded that insurance against catastrophic illness is a reasonable alternative to discounted present payments based on that same risk.[179]

While the Third Circuit's opinion in *Georgine* expressed substantial concern regarding the potential for collusion in the settlement,[180] the court did not reverse the district court on this basis. The Third Circuit concluded "[the district court] resolved this issue in favor of class counsel largely on the basis of fact findings that the objectors have not challenged."[181] The Fifth Circuit in the *Ahearn* appeal, however, carefully analyzed the collusion and conflict of interest arguments.[182] Like the Third Circuit, the Fifth Circuit analyzed this issue as a very case specific, factual inquiry. Relying on the requirements of

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173. The Fifth Circuit also rejected the contention of objectors that there was an inherent conflict of interest associated with the simultaneous representation of both plaintiffs with presently manifested injuries and future claimants. *In re* Asbestos Litig., 90 F.3d at 978-82.

174. *See Georgine*, 157 F.R.D. at 320-21.

175. *See id.* at 272.

176. *See id.*

177. *See id.* at 273.

178. *See id.* at 272.

179. *See id.* at 298-99.

180. *See Georgine*, 83. F.3d at 630.

> [O]bjectors have forcefully argued that class counsel cannot adequately represent the class because of a conflict of interest. In the eyes of the objectors, class counsel have brought a collusive action on behalf of the CCR defendants after having been paid over $200 million to settle their inventory of previously filed cases. The objectors also adduce evidence that class counsel, as part of the settlement, have abjured any intention to litigate the claims of any future plaintiffs. These allegations are, of course, rife with ethical overtones. . . .

181. *Id.*

182. *See In re* Asbestos Litig., 90 F.3d at 976-82.

ABA Model Rule of Professional Conduct l.7, the court ultimately concluded that the simultaneous representation of both individual asbestos personal injury clients and the class of future injury claimants did not create a conflict of interest that precluded class certification.[183]

3. The Compromise of Future Claims

Another common element in *Georgine* and *Ahearn* is that both settlements seek to resolve claims for personal injuries where the exposure to the toxic substance (asbestos) occurred in the past, but the claimant has yet to demonstrate any presently manifested personal injury.[184] Objectors to these settlements have complained that neither Rule 23 nor due process permits approval of a settlement that releases unaccrued future claims of absent class members. Objectors cite three basic objections to the release of future claims in a class settlement: (1) the named class representatives are incapable of representing the absent class members for future claims because unaccrued claims cannot properly be part of a complaint, and a settlement must have a sufficient nexus to claims properly alleged in the complaint;[185] (2) notice to the absent class members under Rule 23 cannot satisfy the requirements of due process because sufficient information is not yet available for persons with unaccrued injuries to make a meaningful decision whether to accept or oppose the class settlement;[186] and, (3) future claimants have an inherent conflict of interest with present claimants because these two groups are competing for finite funds available under the proposed class settlement.

As noted earlier, the potential conflict of interest between present and future claimants is one of the bases relied upon by the Third Circuit to reverse class certification in *Georgine*.[187] Other federal courts that have considered these arguments in the mass tort context, however, have

183. *See id.*

184. Indeed these are the only claims included in *Georgine*.

185. *See* National Super Spuds, Inc., v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981) (Second Circuit reversed approval of a class action settlement that released claims not arising out of the facts pled. *But see* Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873 (1996) (a state class action settlement is entitled to full faith and credit even though the state class action settlement released claims solely within federal jurisdiction).

186. *See* MANUAL FOR COMPLEX LITIGATION, § 30.45 at 244 (3d ed. 1995) (expressing concern that because future claimants cannot be given meaningful notice, the court must be vigilant regarding potential prejudice to these absent class members).

187. *See Georgine*, 83 F.3d at 630-31.

rejected them.[188] While holding that the class settlement could properly address future personal injury claims, the district court in *Ahearn* explained that courts have properly invoked their equitable power in class actions and other cases involving multiple claimants where members of the class are unknown, unborn, or incompetent, so long as those members are adequately represented.[189] In addressing the argument that notice can never be adequate to absent class members with future claims, the *Ahearn* Court stated:

> The Court rejects the Ortiz Intervenors' contention that presently uninjured future claimants can never be adequately notified under any circumstances. Every court to have considered this argument has rejected it, as does this Court for the reasons set forth by those authorities.[190]

4. Use of the Mandatory Class and Other Mechanisms to Limit Opt-Outs

As noted above, the primary benefit to defendants from a class settlement is that the res judicata effect of the class judgment bars all claims by the absent class members that fall within the class definition.[191] Thus, the class judgment buys the defendant peace. For (b)(3) class actions, however, absent class members can opt-out if they do not wish to participate in the class settlement. Moreover, the class members most likely to opt-out are those with the most valuable individual claims, because these are the claims that are viable as a separate individual cause of action. As a result, if a large number of class members opt-out of a proposed class settlement, defendants may be left with a class judgment that only precludes the small and weak claims, and may face a second generation of individual lawsuits filed by the opt-outs.[192]

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188. *See generally In re* "Agent Orange" Prod. Liab. Litig. ("Agent Orange II"), 996 F.2d 1425 (2d Cir. 1993) (approving settlement of present and future claims arising from Vietnam veteran exposure to Agent Orange); Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995), *aff'd sub nom. In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996) (approving mandatory class certification and settlement of present and future claims based on asbestos exposure); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994), *appeal pending* No. 94-6853 (11th Cir.) (approving Rule 23(b)(3) class certification and settlement of present and future breast implant claims).

189. *See* Ahearn v. Fibreboard Corp., No. 6:93cv526, 1995 U.S. Dist. LEXIS 11523, at *33 (E.D. Tex. July 27, 1995) (citing Klugh v. United States, 818 F.2d 294, 301 (4th Cir. 1987)).

190. *Id.* at *47.

191. *See supra* Part III.A.

192. It has also been the authors' experience that, following notice of a large class action settlement, entrepreneurial attorneys will organize opt-out campaigns that directly contact absent class members and encourage them to opt-out from the class settlement and sign individual

In response, the settling parties have sought mechanisms to limit opt-outs from a proposed class settlement. In at least three recent settlement agreements of mass tort class actions, the settling parties have used innovative applications of Rule 23 to certify a mandatory class (no opt-outs). In *Ahearn*, the settling parties demonstrated that because of existing and future asbestos personal injury liabilities, there was a limited fund available for satisfaction of these claims.[193] Accordingly, the Court certified a mandatory class under Rule 23(b)(1)(B).[194] In *Hayden v. Atochem North America, Inc.*, the settling parties certified a mandatory class under Rule 23(b)(2) for a settlement including both injunctive relief and monetary damages.[195]

Perhaps the most important mandatory class action case is *Adams v. Robertson*, because the United States Supreme Court recently granted certiorari.[196] In this litigation, the Alabama Supreme Court affirmed the class settlement of a dispute between Liberty National Life Insurance Company and the holders of cancer insurance policies.[197] Between 1986 and 1993, the company allegedly fraudulently convinced policyholders to exchange existing cancer policies for new, less valuable policies.[198] The class settlement primarily consists of injunctive relief that reforms the plaintiffs' insurance policies to restore benefits lost as part of the exchange program, and compensation for any medical payments made by

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representation contracts with the attorney. Often these campaigns are conducted in ways that do not comply with either the ABA Model Rules of Professional Conduct or state barratry statutes. Nevertheless, these campaigns are often very successful, and can substantially disrupt a proposed class settlement.

193. *See Ahearn*, 162 F.R.D. at 526.

194. *See id.* at 527.

195. *See* Hayden v. Atochem North America, H-92-1054, slip op. at 2 (S.D. Tex. Sept. 19, 1995). An interesting variation in class action law under the *Texas Rules of Civil Procedure*, Rule 42, suggests another basis for mandatory class certification. Both Federal Rule 23(b)(1)(A) and Texas Rule 42(b)(1)(A) provide that a class may be certified when "inconsistent or varying adjudications . . . would establish incompatible standards of conduct for the party opposing the class." Under federal law, however, courts have generally refused to certify a class action simply because some class members might win individual actions while others might lose. *See In re* Bendectin Prod. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984). Texas appellate courts have nevertheless reached the opposite result, holding the potential for inconsistent outcomes in individual litigation supports certification. *See* Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 368 (Tex. Ct. App. 1994); Adams v. Reagan, 791 S.W.2d 284, 292-93 (Tex. Ct. App. 1990). *But see* St. Louis S.W. Ry. Voluntary Purchasing Groups, 929 S.W.2d 25, 32 (Tex. Ct. App. 1996) (following analysis in *In re Bendectin*). This Texas precedent has been applied to certify at least one mandatory environmental tort class action settlement. *See* De Los Santos v. Occidental Chem. Corp., 925 S.W.2d 62 (Tex. Ct. App. 1966), *rev'd on other grounds* 933 S.W.2d 493 (1996).

196. *See* Adams v. Robertson, 117 S. Ct. 37 (1996).

197. Adams v. Robertson, 676 So. 2d 1265 (Ala. 1996).

198. *See id.* at 1267.

the policyholders that would have been covered by the old policies.[199] Because of the predominately injunctive nature of the relief provided by the settlement, the district court certified the class as a mandatory class under Alabama Rule of Civil Procedure 23(b)(2) (modeled on Federal Rule 23(b)(2)).[200] Significantly, the class settlement also releases, without compensation, purely monetary damage claims based on alleged overcharges for the new (exchanged) policies and punitive damages.[201] The primary complaint raised by objectors is that these monetary damage claims cannot be released via a class settlement unless the court provides absent class members with notice and an opportunity to opt-out.

In all three of the cases described above, objections to the use of a mandatory class have focused on alleged due process violations. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection."[202] Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."[203] In *Ahearn*, the Fifth Circuit distinguished *Shutts* because *Shutts* only applies to cases predominately for monetary damages, and litigation involving a limited fund is equitable in nature, not predominately a monetary judgment.[204] Furthermore, federal courts have generally concluded that there is no due process right to opt-out of a properly certified mandatory class, even if the class claims include monetary damages, because the class members have been (1) adequately represented by the named plaintiffs, (2) adequately represented by capable and experienced counsel, (3) provided with adequate notice of the proposed settlement, (4) given an opportunity to object to the settlement, (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate.[205]

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199. *See id.* at 1270.
200. *See id.* at 1270-71.
201. *See id.* at 1270.
202. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985).
203. *Id.* at 812.
204. *In re* Asbestos Litig., 90 F.3d 963, 986 (5th Cir. 1996).
205. *See* Kincade v. General Tire & Rubber Co., 635 F.2d 501, 507-08 (5th Cir. 1981); Robertson v. National Basketball Ass'n, 556 F.2d 682, 685-86 (2d Cir. 1977); White v. National Football League, 836 F. Supp. 1458, 1472-73 (D. Minn. 1993).

The Fifth Circuit summarized:

> The rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by *Shutts*. Subsequent decisions have made clear that, consistent with due process, absent parties can be bound by a judgment where they were adequately represented in a prior action.[206]

In his dissenting opinion, Judge Smith suggested that *Ahearn* was anything but a traditional mandatory class, and that the majority's gloss based on inapplicable precedent trampled on the absent class members' due process rights.[207]

Regardless, the majority in the *Ahearn* appeal concluded that the threshold criteria for class certification are sufficient to meet the requirements of due process, and an opt-out right is not necessary.[208] In *Adams*, the Supreme Court will obviously have an opportunity to clarify its intent regarding minimum due process when a class action adjudicates monetary damage claims.

The outburst of indignation from the plaintiffs' bar and civil procedure purists occasioned by the *Georgine*, *Ahearn*, and *Adams* decisions should not be surprising. Indeed, these settlement class actions clearly utilize Rule 23 for a purpose not envisioned by the original drafters. The rule was drafted to enable the litigation of numerous, small claims, but class actions filed after they are settled are litigated in only the broadest sense. Instead, Rule 23 is really being used to provide judicial enforcement of the settlement's terms, terms that were negotiated largely

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206. *In re* Asbestos Litig., 90 F.3d at 986. *But see* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (holding that absent class members were not bound by the damages portion of a mandatory class judgment because the court did not provide an opt-out right consistent with due process), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).

207. *See In re* Asbestos Litig., 90 F.3d at 1001-06 (Judge Smith dissenting).

208. One commentator has postulated that the notice and opt-out provisions of Rule 23 are not closely aligned with the actual needs of the absent class members for protection of their substantive rights. George Rutherglen, *Better Later Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996). Professor Rutherglen suggests that the procedural opt-out protections for Rule 23(b)(3) class actions are under some circumstances overly restrictive, while Rule 23(b)(1) and (b)(2) occasionally provide insufficient protection in this regard. Professor Rutherglen makes this distinction based upon whether the absent class plaintiff has an individual cause of action that is viable independent from the class action. Thus, if a b(2) class action settlement includes both injunctive and monetary relief, then the class action rule should provide for notice and opt-out to class members with individually viable monetary claims. In contrast, if a (b)(3) class action consists of aggregated claims that are not viable on their own, then the right to opt-out has very little practical worth to the absent plaintiff. As a result, Professor Rutherglen suggests opt-out can be dispensed with under these circumstances. *Id*. at 288-89.

without input from the absent class members, and that have received only the most cursory review and approval by those persons.[209] The interesting result in these cases is, however, that the response provided by the objectors has arguably resulted in a thorough adversarial review of the fairness of the proposed settlement. Thus, the raw material is present for the district court to rule on the fairness of the agreement.

In contrast, in modern mass tort litigation, where a single attorney frequently represents several hundred claimants, the individual litigant, like the absent class member, has very little control over the prosecution and settlement of his cause of action. Following the settlement of a group of several hundred or thousand individual claims, however, there is no fairness review by an independent entity like the court, and each individual litigant is largely at the mercy of his or her attorney. Adverse results from global settlement negotiations, such as trade-offs between individual litigants, the release of additional claims, and the source and amount of the attorney's total compensation, may remain largely invisible to the individual client. Thus, the potential for substantial conflict of interest problems exists for aggregated individual claims as well. The point is that, while the potential for collusion in a class settlement is real, the gulf between class and aggregated individual litigation can be exaggerated.

IV. DENIAL OF CLASS CERTIFICATION AND THE LACK OF PRECLUSIVE EFFECT ON OTHER CLASS ACTIONS RAISING SIMILAR ALLEGATIONS

A proposed class action settlement between purchasers of GM trucks and General Motors Corporation has been shopped around to the federal courts in the Third Circuit,[210] a state court in Texas,[211] and now a state court in Louisiana.[212] As noted previously in this Article, the Third Circuit denied class certification for the proposed settlement for a

209. Judge Schwarzer makes the point that the original drafters of the 1966 Rule sought to accomplish two purposes: (1) to enable litigation by creating an enforcement mechanism for civil rights claims under Rule 23(b)(2) and by facilitating prosecution of numerous small claims under Rule 23(b)(3), but (2) to avoid encouraging collusive actions and settlements under the Rule. Schwarzer, supra note 111, at 1250, 1251-55.

210. *See In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F. 3d 768 (3d Cir. 1995).

211. *See* General Motors Corp. v. Bloyed, 916 S.W. 2d 949 (Tex. 1996).

212. *See* Gabriella Stern, *GM Weighs Appeal of Fees Set by Judge in Truck Pact*, WALL ST. J. Dec. 27, 1996, at A3.

nationwide class in 1995.[213] The Texas Supreme Court then overruled the certification of a similar Texas class and approval of the class settlement in l996.[214] Nevertheless, the same proposed class action settlement was refiled during mid-1996 in Louisiana state court, and was recently approved by the district court.[215] The Louisiana settlement increases class counsel attorneys' fees from $9 million in the Third Circuit case to $28 million in the Louisiana case, apparently to accommodate the various objectors to the prior settlements who are now included as class counsel.[216] The settlement, however, only provides essentially the same benefits to the putative class members as the previous deals rejected in the Third Circuit and Texas. The primary relief still consists of $l,000 coupons towards the purchase of new GM vehicles. Thus, the parties have apparently done very little to cure the defects in the adequacy of consideration identified by the Third Circuit.[217] A Louisiana district court has now approved this twice rejected settlement, and it now remains to be seen whether this approval will stand up on appeal.

Because statutes of limitations do not run while class allegations are pending,[218] and because all court rulings as to named class members do not apply to putative absent class members until a class is certified,[219] and because class certification denial is an interlocutory order that provides no res judicata or issue preclusion effect,[220] GM and class counsel could theoretically keep filing this same class settlement in various jurisdictions until they finally find one that is willing to approve it and uphold it on appeal. While the GM Trucks dispute is a proposed class settlement, this problem is not confined to class settlements. When a court denies class certification, class counsel is also free to find new class representatives and refile the same case in another jurisdiction. As noted previously, most courts and parties recognize that class certification

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213. *See In re* General Motors Corp. 55 F.3d at 800 (finding that record did not adequately support class certification).

214. *See Bloyed*, 916 S.W.2d 949.

215. *See* Stern, *supra* note 212.

216. *See id.*

217. The Third Circuit noted: (1) "the certificate settlement might be little more than a sales promotion for GM;" and (2) "the adequacy of the certificate settlement is particularly dubious in light of the claims alleged and the relief requested in the original complaint. The coupons offered by GM simply do not address the safety defect that formed the central basis of the amended complaint." *In re* General Motors Corp., 55 F.3d at 808, 810.

218. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353 (1983).

219. *See* Wright v. Schock, 742 F.2d 541, 544-45 (9th Cir. 1984).

220. *See* J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996).

greatly enhances the settlement value of the plaintiffs' case.[221] Under the present law, however, class attorneys are essentially free to relitigate the same dispute until they either run out of money or finally win. Under these circumstances, the defendant has very little incentive to fight a hopeless situation, but rather is forced to seek the best settlement. This result is grossly unfair to parties opposing class certification, whether they are defendants opposing a litigation class or objectors opposing a class settlement. As described below, Rule 23 should be changed to give an order denying class certification preclusive effect on subsequent similar class certification motions.

V. CONCLUSION

Like the preceding discussion, our conclusions regarding desirable changes to Rule 23 are broken down into two categories, toxic tort litigation classes and mass tort settlement classes. First, we believe the class action device is generally not applicable to litigation classes involving traditional environmental tort claims. Experience has demonstrated that these kinds of cases involve too many complex individual issues, and certification has little utility except to class counsel by boosting the settlement value of his or her case. Courts guided by the recent decisions from the federal courts of appeal should reach the same conclusion. Where plaintiffs' likelihood of success on the merits is low, however, class certification causes unjustifiable mischief in the economics of settlement. In this regard, the reforms necessary to Rule 23 are relatively simple:

(1) Proposed new subparagraph (F) to Rule 23(b)(3) would allow courts to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." Under appropriate circumstances, a district court should consider whether litigation as a class action is fair and equitable to the parties. As part of the court's analysis, it should consider whether the plaintiffs' claims have more than a remote chance of success on the merits.

(2) While we do not advocate change to the language of 23(c)(4), the advisory committee notes should be amended to clarify that cases should be certified as class actions;[222] that is, the class complaint must encompass all elements of proof of liability. Separation of damages issues would be acceptable, but there would be no certification of

221. *See supra* text accompanying note 95.

222. *See* Castano v. American Tobacco Co., 84 F.3d 734, 745-46 n.21 (5th Cir. 1996).

"issues" classes that do not encompass all of the primary disputes regarding liability.

(3) Finally, while preclusion of state court action by the federal courts is problematic, at the very least the federal rule should state that when one court with jurisdiction properly refuses to certify a class, that decision precludes any federal court from certifying the same class. Similarly, a certification is also binding on all other federal courts.

Settlement classes are more problematic. These kinds of settlements offer enormous potential to reach efficient, fair solutions to our most vexing problems. Nevertheless, one cannot deny the potential for abuse. Currently, there are two gatekeepers to protect the integrity of these settlements: (l) the class must meet the requirements of Rule 23, and (2) the court must conduct a thorough analysis of the fairness of the settlement. The current proposal to modify Rule 23 includes the addition of a new (b)(4) subdivision that would permit certification for purposes of settlement "even though the requirements of Subdivision (b)(3) might not be met for purposes of trial."[223] Importantly, the proposal would not abridge the prerequisites of Rule 23(a), including the requirement of adequate representation. As the Third Circuit concluded in *In re GMC*, the requirements of Rule 23 were designed to ensure that the absent class members are adequately represented.[224] This protection is as important in the settlement context as it is in the litigation context, and should not be abridged by federal courts simply to facilitate settlement. Moreover, courts must recognize that plaintiffs' counsel has an irreconcilable conflict of interest with the class members in the settlement context. This means that in many situations the court should appoint an ad litem to negotiate whose fee may not be contingent on the class recovery.

In light of the substantial debate regarding the propriety of settlement class actions and the ability of federal courts to judge the fairness of these settlements, the Supreme Court has accepted certiorari in both *Georgine*[225] and *Adams*.[226] It seems likely that very soon after this Article is published we will know much more regarding the law applicable to the use of class actions to aggregate and settle sometimes vexatious toxic tort disputes.

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223. *See Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23, Class Actions*, 23(b)(4), 117 S. Ct., CLIV (1996).

224. *In re General Motors Corp.*, 55 F.3d 768.

225. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

226. Adams v. Robertson, 117 S. Ct. 37 (1996).