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MASS TORTS: *In re* Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged - A Proposal for the Use of Federal Common Law in Mass Tort Class Actions

Court Record

IN RE JOINT EASTERN AND SOUTHERN DISTRICT ASBESTOS LITIGATION:* BANKRUPT AND BACKLOGGED — A PROPOSAL FOR THE USE OF FEDERAL COMMON LAW IN MASS TORT CLASS ACTIONS

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* 129 B.R. 710 (E. & S.D.N.Y. 1991) (*In re* Johns-Manville Corp.) (Finley v. Blinken). Judge Burton R. Lifland, Chief Bankruptcy Judge for the Southern District of New York, concurred in the opinion. The appeal entered and argued in front of the Second Circuit challenging Judge Weinstein's opinion in this case was handed down on Friday, December 4, 1992. 1992 WL 356781 (2d Cir. Dec. 4 1992). *See infra* notes 335-56 and accompanying text.

> One point on which plaintiff's counsel, defense counsel, and the judiciary can agree is that the present way we have attempted to resolve asbestos cases has failed.[1]

> A fundamental debate remains about the suitability of the tort system for handling the tens of thousands of asbestos cases that remain on state and federal court dockets. The initial social benefits of tort litigation were impressive .... [b]ut to continue to process claims in the same fashion as the initial cases were handled despite the extensive body of experience and epidemiological data now accumulated appears intolerable as a matter of national policy.[2]

INTRODUCTION

It has become increasingly apparent in the last few years that the asbestos crisis facing the judicial system in the United States has reached epidemic proportions.[3] The sheer number of

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[1] Judicial Conference of the United States: Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, (March, 1991) (on file with the *Brooklyn Law Review*) [hereinafter *Ad Hoc Comm. Rep.*].

[2] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 750.

[3] *See* Stephen Labaton, *Business and the Law; Judicial Struggle in Asbestos Cases*, N.Y. TIMES, Aug. 6, 1990, at D2.

> Right now, [asbestos] cases are scattered throughout every Federal court and most state courts around the nation. In some areas, they are badly clogging the dockets. Asbestos personal-injury cases form the basis for the largest number of civil disputes around the nation, and some lawyers and scientists predict that they will increase dramatically in the coming years as injuries from decades of exposure become apparent.

Id.

Asbestos cases fall within a category of litigation that commentators and judges commonly refer to as "mass torts." Mass torts are further divided into two types: mass accidents and mass products liability suits. *See* Andrew C. Rose, *Federal Mass Tort Class Actions: A Step Towards Equity and Efficiency*, 47 ALB. L. REV. 1180, 1183 (1983).

> Essentially there are two types of mass torts. A mass accident takes place when persons are injured by a sudden, disastrous occurrence, such as a plane crash. In contrast, a mass products liability suit is likely to arise when a defectively designed product is marketed to the general public where it eventually causes widespread injury.

Id. Asbestos litigation falls within the category of mass products liability suits.

asbestos cases pending in the courts[4] has led to calls for congressional action by commentators,[5] district judges,[6] circuit court judges[7] and even by a judicial conference chaired by the Chief Justice of the United States Supreme Court.[8] Yet despite the increasingly desperate situation faced by courts,[9] Congress has consistently failed to adopt a national response to the crisis.[10] This lack of legislative resolve has left the judiciary in the unenviable position of attempting to fashion procedural and substantive measures to respond to the emergency, responses which are often struck down by higher courts or which later prove to be unworkable.[11]

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[4] Recent studies indicate that as many as 100,000 separate asbestos cases are pending on state and federal dockets across the country. Order to Show Cause, Judicial Panel on Multidistrict Litigation, No. 875 (1991).

[5] *See, e.g.*, Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Special Project, *An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 845 (1983).

[6] *See, e.g.*, Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 325 (1983); Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 5 (1986).

[7] *See* Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1325 (5th Cir. 1985).

[8] *See* Ad Hoc Comm. Rep., *supra* note 1, at n.1. *See also* Stephen Labaton, *Judges See a Crisis in Heavy Backlog of Asbestos Cases*, N.Y. TIMES, Mar. 6, 1991, at A1.

> The panel, appointed by Chief Justice William H. Rehnquist to study the role of the courts in resolving asbestos cases, urges in its report that Congress come up with a "national solution" to the glut of lawsuits, the delays in settlements and the depletion of the money available for victims by the large fees of lawyers.

Id.

[9] A number of studies indicate that the filing rate of asbestos-related lawsuits is steadily increasing. Between 1989 and 1990 the number of personal injury lawsuits filed in connection with asbestos injuries increased by approximately 66%. *See* Judicial Admin. Office, Asbestos Cases Filed, Terminated and Pending in United States District Courts (June 30, 1990) (in 1989, 8230 lawsuits were filed compared to 13,687 in 1990); *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 812 (E. & S.D.N.Y. 1991) ("Despite the large number of cases terminated in the last two years and extensive efforts to increase efficiency and devote substantial resources to asbestos cases, the number of unresolved cases continues to escalate.").

[10] There have been several bills introduced in Congress addressing the asbestos problem and proposing solutions. *See, e.g.*, Occupational Disease Health Act of 1985, H.R. 3090, 99th Cong., 1st Sess. (1985); Asbestos Workers Recovery Act of 1985, H.R. 1626, 99th Cong., 1st Sess. (1985). However, as of this date, none of the proposed asbestos relief bills has garnered sufficient support to be enacted into law.

[11] *See In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986) (decertifying a nationwide, mandatory class action on the issue of punitive damages for asbestos property damage claims); *In re* Joint Eastern & Southern Dist.

One of the most powerful tools that federal courts possess to alleviate the asbestos problem is the class action suit.[12] While class actions were originally considered to be inappropriate in mass tort litigation,[13] a number of district judges are turning to them as a potential answer to the "caseload" dilemma.[14] This was the course adopted by Judge Jack B. Weinstein of the Eastern District of New York in *In re Joint Eastern and Southern Dist. Asbestos Litig. ("Manville")*,[15] a case where the court used a mandatory class action to reach a settlement preserving the reorganization plan of the Johns-Manville Corporation.

The use of a class action in *Manville*, however, raised numerous difficulties. Since the class action was based on diversity jurisdiction,[16] the court was precluded from applying federal

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Asbestos Litig., 120 B.R. 648, 651-52 (E. & S.D.N.Y. 1990) (providing a concise summary of the original Manville reorganization Plan and the factors that led to its collapse).

[12] Class actions in federal courts are governed by Federal Rule of Civil Procedure 23.

[13] The reluctance of the judiciary to use class actions in the mass tort context can be traced to the advisory committee notes, which accompanied the 1966 revisions to Rule 23:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 amendment). While these comments tended to discourage the use of class actions in mass tort cases, they were the subject of considerable criticism by legal commentators. *See* Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L. REV. 561 (1987).

[14] Class actions enable a court with a heavy asbestos docket to move cases more quickly, more efficiently and with lower transaction costs. These benefits have led a number of judges to attempt to use class actions in the asbestos context. *See, e.g.*, Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990) (class certification of over 3000 asbestos cases pending in the district as of February 1, 1989); *In re* School Asbestos Litig., No. 83-0268 (E.D. Pa. filed Jan. 17, 1983) (nationwide class certification of over 35,000 asbestos property damage claims); *In re* Ohio Asbestos Litig., OAL Order No. 96 (N.D. Ohio July 16, 1990) (an attempt by Judge Thomas Lambros of the Northern District of Ohio to certify a mandatory, nationwide class for asbestos personal injury claims).

[15] *In re* Joint Eastern and Southern Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991).

[16] 28 U.S.C. § 1332 (1988) grants original jurisdiction to federal courts in any civil action where the matter in controversy exceeds $50,000 and the litigants are residents of

common law to the case and was required to apply the substantive rules of the various states under the *Erie* doctrine.[17] Strict adherence to the *Erie* doctrine, however, threatened to fragment the *Manville* class into separate groups and undermine the court's purpose in using the class action mechanism.[18]

The court's application of *Erie* and its failure to apply federal common law also adversely affected the settlement proposed by the parties as part of the class action proceedings.[19] This settlement included provisions that sought to apply uniform substantive rules to all of the class members in direct contravention of the *Erie* doctrine.[20] Since the substantive laws of the states varied widely on the issues implicated by these provisions, the court was forced to undertake an extensive conflicts of law analysis to determine which state's law applied to the case and if the settlement was permissible under the applicable law.[21] Despite these and other problems, Judge Weinstein eventually approved the Settlement under Federal Rule of Civil Procedure 23(e),[22] basing his decision largely on the urgent need for some type of final and fiscally sound solution to the flood of asbestos litigation.[23]

This Comment will examine the court's opinion in *In re*

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different states. This type of jurisdiction is commonly referred to as "diversity jurisdiction."

[17] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The *Erie* doctrine requires that a federal court sitting in diversity apply the substantive law of the state in which it is located, rather than federal common law. While this rule causes little difficulty in the traditional one-on-one tort case, it became a serious procedural impediment in the Manville litigation that involved over 130,000 litigants from all fifty states. *See infra* notes 164-97 and accompanying text.

[18] Because the *Manville* class included litigants from all fifty states and the substantive laws of the states varied widely on the issues implicated by the case, the court's adherence to *Erie* required that it apply different substantive law to the claims of class members depending upon in what state their claim originated. *See infra* notes 156-64 and accompanying text. Therefore the court could not treat all litigants in a uniform manner. This result, in turn, raised questions about whether the prospective class could meet the Rule 23(a)(3) prerequisite of typicality. *See infra* notes 129-33 and accompanying text.

[19] Had the court applied federal common law to the case, it would have been free to disregard the *Erie* doctrine and fashion a uniform remedy based exclusively on federal law.

[20] *See infra* note 156.

[21] *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 869-904. *See also infra* notes 179-86 and accompanying text.

[22] 129 B.R. at 911.

[23] *Id.* at 906.

Joint Eastern & Southern Dist. Asbestos Litig. as a paradigm for the management and settlement of asbestos and other mass tort cases in the mandatory class action context. Part I provides background information on the cause and effect of the asbestos crisis. Part II includes the procedural history of the *Manville* litigation and examines the court's opinion in the case. Particular attention is paid to the issues connected with certification of the class under Rule 23 and the conflicts of law questions that arose in connection with the proposed settlement. Part III addresses the policy considerations and practical concerns raised by a court's use of a mandatory class action in the asbestos context, both as a means to speed the disposition of cases and as a vehicle to settlement. Part III also proposes specific actions to minimize the procedural difficulties associated with class actions in the asbestos context, namely the creation of a federal common law for mass tort litigation. The Comment concludes that, in the absence of desperately needed congressional action, the mandatory class action represents one of the few practical solutions to the asbestos crisis.

I. BACKGROUND: THE ASBESTOS CRISIS

To analyze the court's opinion in *Manville*, it is vital to understand the parameters and the urgency of the asbestos crisis. While asbestos has been used for over 2000 years, its use only became widespread throughout society during the industrial revolution.[24] In the United States alone asbestos has been widely used in the building, shipping and construction industries, and in hundreds of products.[25] Asbestos has been used as an insulator around heating and cooling systems, as a noise absorber in acoustic ceiling tiles and walls, and as an ingredient in construction cement.[26] Asbestos has also been incorporated into such common products as ironing board covers, stove linings and table pads.[27] The end result of all this asbestos use has been a great deal of asbestos exposure. Estimates of the number of Americans exposed to significant amounts of asbestos range

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[24] *Id.* at 735-36; Rubin, *supra* note 7, at 429.
[25] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 736.
[26] *Id.*
[27] *Id.*

upwards of 21 million.[28]

Despite the prevalence of asbestos in modern society, its dangers have been recognized since ancient times.[29] Only in the twentieth century, however, did the full extent of the danger become apparent to the medical community.[30] Starting at the turn of the century, an increasing number of medical studies began to link asbestos exposure to various types of illness.[31] By the 1930s the medical and scientific communities had conclusively shown a cause-and-effect relationship between asbestos and some medical disorders.[32] Yet even with this new evidence, asbestos use continued to increase in the United States and abroad.[33]

One of the reasons for this apparently illogical trend was the lack of economical or readily available substitute materials.[34] The asbestos industry, however, also bears a significant portion of the blame for the escalating use of asbestos in the early part of this century. The companies that produced and marketed asbestos products, including Johns-Manville, actively suppressed or edited early studies to protect the profits that they derived from the material.[35] By delaying the release of these medical and scientific reports, the asbestos industry directly contributed to the exposure of untold numbers of people throughout the world.[36] By the early 1970s, however, the evidence had become

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[28] *Id.*

[29] Medical problems associated with asbestos date back to the Roman Empire and the time of Pliny the Elder. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 735 (citing BLARNEY CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 1 (2d ed. 1986)).

[30] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 737.

[31] *Id.*

[32] GEORGE A. PETERS & BARBARA J. PETERS, SOURCEBOOK IN ASBESTOS DISEASES: MEDICAL, LEGAL AND ENGINEERING ASPECTS (1980).

[33] From 1934 to 1964 the world's use of raw asbestos increased 500%. Irving J. Selikoff, M.D. et al., *Asbestos Exposure and Neoplasia*, 188 JAMA 22, 142 (1964).

[34] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 736.

[35] In 1936, Johns-Manville, and others, appear to have actively censored the information disseminated by the Saranac Laboratories, and they continued to prevent the Saranac scientists from promptly disclosing adverse scientific data. In the 1930's and 1940's, Saranac Laboratories conducted studies on cancer and asbestosis funded by the Asbestos Industry for the Study of Tuberculosis. Again the corporations manufacturing and distributing asbestos exercised editorial control over the publication of these studies.

Id. at 744 (citing B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 1 (2d ed. 1986)).

[36] *Id.* at 739.

so overwhelmingly persuasive that the federal government was forced to take steps and passed legislation prohibiting the continued use of asbestos in most products.[37]

Today asbestos has been conclusively linked to a variety of diseases, including asbestosis, pleural plaques, mesothelioma and cancer.[38] These diseases are progressive, incurable and, in a significant number of cases, fatal.[39] Asbestos-related illnesses frequently exhibit long latency periods, depending upon the extent of a person's exposure.[40] In general, the greater a person's exposure, the earlier he or she will exhibit signs of asbestos-related medical problems.[41] While earlier cases of asbestos diseases were predominantly limited to those who mined or worked closely with the mineral, modern cases have included people living in proximity to asbestos plants, workers exposed to asbestos only peripherally in their occupations and even the spouses and children of asbestos workers.[42]

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[37] Federal Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970).

[38] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 739-41 (E. & S.D.N.Y. 1991). Several types of diseases are caused by breathing airborne asbestos fibers into the lungs. Asbestosis is a disease that attacks and destroys the air sacs in the lungs, making it more difficult to breathe. It is also progressive and incurable, and may shorten a person's lifespan. Pleural plaques are a calcification of the tissue surrounding the lungs. While plaques are the least serious of the asbestos-related diseases, they have been linked to the onset of more serious types of illnesses. Mesothelioma is an uncommon cell disorder arising in the membranes that enclose the lungs, heart and abdomen. It is one of the most serious kinds of asbestos illnesses and, once manifested, is usually fatal within two years. Various types of cancer, such as gastrointestinal cancer and lung cancer, have also been linked to asbestos exposure. *Id.*

[39] It has been predicted that the eventual death toll from asbestos-related diseases may exceed 250,000. *Id.* at 746. Other experts have placed the figure closer to 500,000 deaths. IRVING J. SELIKOFF, M.D., DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1981).

[40] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 741.

[41] *Id.* ("Appearance of disease correlates with duration and intensity of exposure to asbestos fibers. The greater the exposure, the sooner the disease can be expected to appear; conversely, shorter or less intense exposure translates into a longer latency period.").

[42] *Id. See Family Wins Settlement in Indirect Asbestos Contamination*, U.P.I. BULL. (May 9, 1991) (family of woman who contracted mesothelioma from inhaling asbestos fibers off her father's clothing received a multi-million dollar settlement). Some of the more unusual asbestos cases have recently arisen in connection with the "Micronite" filters used in Kent cigarettes between 1952 and 1956. The filters, which were initially advertised as a new, revolutionary form of health protection for smokers, also, unfortunately, contained an extremely dangerous form of friable asbestos. *See* Myron Levin, *Smoking's Asbestos Episode*, L.A. TIMES, Oct. 17, 1991, at A1. A number of lawsuits for asbestos related injuries have ensued against the cigarette maker. *Id.*

During the twentieth century increasing numbers of asbestos victims turned to courts for compensation as the evidence linking asbestos to medical disorders continued to accumulate.[43] Initially these cases were unsuccessful. Over time, however, evidence was gathered through the discovery process of the harmful effects of asbestos and of the industry's foreknowledge of the danger. Moreover, legal theories evolved.[44] In 1973 a jury award in connection with an asbestos claim was upheld for the first time by the Fifth Circuit.[45] The race to the courthouse was on. Over the next eighteen years tens of thousands of cases flooded the state and federal systems. Estimates of the number of asbestos cases currently pending on state and federal dockets range as high as 100,000 and recent studies indicate that this number will probably only increase until the turn of the century.[46]

The growing trend of asbestos producers and distributors to seek Chapter 11 bankruptcy protection has added further pressure to the problem of overloaded dockets.[47] This shrinking pool of compensation capital leads, in turn, to incredible inequities in plaintiffs' recoveries; those who file claims first receive full compensation, while those who delay frequently end up with little or no compensation.[48] The number of companies involved in asbestos litigation has also increased, as defendants seek to spread their losses and plaintiffs search for new and previously untapped sources of compensation.[49] Naturally, each new defendant vigorously resists being pulled into the asbestos nightmare and

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[43] 129 B.R. at 745.

[44] *Id.*

[45] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). The *Borel* court allowed an asbestos plaintiff to hold 11 manufacturers jointly and severally liable for his injuries. Before this case asbestos plaintiffs had extreme difficulty succeeding in the tort system because they could not prove which specific asbestos manufacturer was responsible for their injuries.

[46] *See supra* note 4.

[47] Twelve out of the 25 major past manufacturers of asbestos have already declared bankruptcy due to liability in connection with asbestos claims. *See* Ad Hoc Comm. Rep., *supra* note 1, at 14.

[48] An example of this danger is evident in *Manville* where those plaintiffs who settled claims or obtained judgments before the company's 1982 bankruptcy filing received full compensation for their injuries. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 751 (at the time of its bankruptcy filing, Johns-Manville had already satisfied 3570 claims against it). In contrast, those asbestos victims who filed later or have yet to bring claims will only receive a portion of the value of their claims over an extended period of time.

[49] *Id.* at 747.

frequently adopts the defensive posture of litigating each and every case on an individual basis.[50] This philosophy among defendants and the common belief among plaintiffs that they can receive a larger award in an individual trial or settlement has only contributed to the burdens placed upon courts.

Asbestos litigation has also proven to be prohibitively expensive. Recent studies indicate that asbestos victims receive only about thirty-nine cents out of every dollar spent in connection with asbestos litigation.[51] Most of the money is consumed by transaction costs, such as attorneys' fees, court costs, insurance premiums and administrative expenses.[52] In addition, plaintiffs frequently face incredibly long delays in receiving their just compensation. While the majority of cases settle before trial,[53] most defendants will not even enter settlement negotiations until a plaintiff possesses a trial date. Because courts are so backlogged with asbestos cases, the fact is that many asbestos victims will die before receiving any compensation at all.

The fundamental debate that has raged over asbestos litigation is essentially one of idealism versus pragmatism. In a perfect world each and every asbestos victim would be entitled to his or her day in court and would receive full compensation for any injury.[54] In reality, however, courts simply cannot cope with asbestos litigation on an individual adjudicatory basis. In addition, the pool of capital available to compensate present and future plaintiffs frequently turns out to be exhausted before they

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[50] Cimino v. Raymark Indus., 751 F. Supp. 649, 651-52 (E.D. Tex. 1990) ("Defendants assert a right to individual trials in each case and assert the right to repeatedly contest in each case every contestable issue involving the same products, the same warnings, and the same conduct.").

[51] JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION, COMPENSATION AND EXPENSES 91 (1984). However, the *Manville* court believed that this figure overstated the amount of compensation victims actually received and placed the correct figure around thirty cents out of every dollar. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 749.

[52] *Id.*

[53] Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedures In Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 551 (1991) (noting that 79% of all asbestos litigation through 1989 has been resolved through settlement).

[54] For articles arguing that mass tort plaintiffs deserve their own day in court despite the difficulty of individual adjudication, see Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 [hereinafter *Mass Trials*]; Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985)[hereinafter *Mass Tort Joinder*].

even get into the courthouse.[55] When one considers the caseload dilemma, the bankruptcy filings, the transaction costs and the delays in compensating plaintiffs, the failure of the individual lawsuit model to deal adequately with the asbestos crisis is apparent.[56]

Recently the judiciary has taken aggressive steps to confront the crisis on its own. Courts have begun to make extensive use of special masters and court-appointed experts to speed the resolution of cases.[57] Consolidation of large numbers of cases for trial has also been successful in some asbestos litigation.[58] In addition, judges have begun to overcome their reluctance to use class actions in the mass tort context and have certified a number of asbestos cases for class action treatment.[59] The most

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[55] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 907-8.

[56] "One point on which plaintiff's counsel, defense counsel and the judiciary can agree is that the present way we have attempted to resolve asbestos cases has failed." Ad Hoc Comm. Rep., *supra* note 1, at 7.

[57] Federal courts are empowered to appoint special masters with or without the parties' consent under Federal Rule of Civil Procedure 53. In the past special masters were predominantly used to perform managerial tasks, such as accountings and damage calculations. *See* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394, 395-96 (1986). Recently some courts have expanded the duties of special masters to include gathering data to determine liability and negotiating settlements among the parties. *Id.* at 398.

Court-appointed expert witnesses, authorized by Federal Rule of Evidence 706, are used by federal courts to assist in accumulating and interpreting complex scientific and technological information. *See* Mullenix, *supra* note 53, at 545.

Both types of court personnel were used by Judge Weinstein in *Manville*. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 763-64.

[58] *See, e.g.*, Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990) (consolidating a number of asbestos cases for trial on common issues); *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 748 (listing various cases consolidated in New York).

Consolidation is authorized by Federal Rule Civil Procedure 42(a), which provides that where multiple actions before a district court involve common questions of law or fact, the cases can be consolidated at the court's discretion for trial. Consolidation typically entails trying all the related cases together; each case, however, retains its own separate identity. Richard A. Chesley & Kathleen Woods Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 503 (1985). While courts are given wide discretion under the rule as to when to order consolidation, the procedure is limited to cases pending in the same district, thereby limiting the effectiveness of consolidation in the mass tort context. *Id.* at 499-500.

[59] *See supra* note 14. A number of district judges led by Judge Robert E. Parker of the Eastern District of Texas and Judge Thomas Lambros of the Northern District of Ohio have even attempted to certify a mandatory class action consisting of all personal injury asbestos cases currently pending in the state and federal courts. *See In re* Ohio Asbestos Litig., OAL Order No. 96 (N.D. Ohio, July 16, 1990). Unfortunately, these at-

promising step, however, recently came from the Judicial Panel on Multidistrict Litigation.[60] On July 29, 1991 it transferred all federal asbestos cases involving personal injury or wrongful death claims to the Eastern District of Pennsylvania for consolidated pretrial proceedings.[61] While the Panel's order does not extend to the thousands of asbestos cases pending in state courts or allow the transferee court to consolidate federal cases for trial, it represents the strongest action to date by the judiciary to respond to the asbestos crisis.[62]

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tempts proved unsuccessful. *See* Christopher M. Placitella, *Paying the Price of Case Management Complacency*, N.J. L.J., Apr. 25, 1991, at 11 (describing the criticism that Judge Parker and Judge Lambros have received as a result of their attempts to solve the asbestos crisis through a nationwide, mandatory class action).

[60] The Judicial Panel on Multidistrict Litigation consists of seven circuit and district court judges designated by the Chief Justice of the United States. 28 U.S.C. § 1407(d) (1968).

[61] *In re* Asbestos Products Liability Litig. (No. VI), 771 F. Supp. 451 (J.P.M.L. 1991). The Panel's order, which affected 26,639 pending asbestos cases, was made under 28 U.S.C. § 1407(a). It provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

Id.

The Panel had previously denied transfer under the statute on five separate occasions since first considering such action in 1977. *See How To End A Long Legal War*, L.A. TIMES, Aug. 3, 1991, at B5 (editorial) [hereinafter *Legal War*]. By reversing itself, the Panel acknowledged the growing urgency of the asbestos crisis and signalled a new judicial resolve to find some type of comprehensive solution to the asbestos problem. *Id.*

Under section 1407(a) the transfer of cases to a single district is solely for the purpose of consolidated pretrial proceedings, such as discovery and pretrial motions, after which the cases are supposed to be remanded to their original jurisdictions for trial. Chesley & Kolodgy, *supra* note 58, at 509-10. In actuality, however, most cases are either settled or disposed of by the transferee court. *Id.* at 509 n.315. As of June 30, 1983 a total of 12,154 cases had been consolidated under 28 U.S.C. § 1407. Of that number, only 2187 cases had been remanded to their original courts at the close of pretrial proceedings. *Id.*

The greatest advantage that a transfer by the Multidistrict Panel enjoys over the consolidation procedures under Rule 42(a) is that the Panel can consolidate all federal cases involving common questions, while Rule 42(a) is limited to such similar cases pending in a single district.

[62] For articles discussing the Judicial Panel's order, see Stephen Labaton, *Judge's Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES, July 30, 1991,

II. *In re* Joint Eastern and Southern District Asbestos Litigation

A. *Facts and Procedural History*

The Johns-Manville Corporation was once the world's leading producer of asbestos products[63] and a member of the "Fortune 500."[64] In 1982, however, the company filed a voluntary petition for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code.[65] The impetus behind the Johns-Manville filing was the potentially unlimited liability the company faced due to asbestos-related lawsuits.[66] The ensuing bankruptcy proceedings have been described as the most complex ever attempted under Chapter 11.[67] In 1986, after extensive negotiations among the parties and the bankruptcy court, Johns-Manville proposed the Second Amended and Restated Plan of Reorganization ("the Plan" or "the Reorganization Plan").[68] The Plan was eventually approved by a majority of the creditors and the court after hearings, and following exhaustion of appeals, became operational on November 28, 1988.[69] In addition, the court simultaneously entered permanent injunctions to protect the company from any existing and future lawsuits.[70]

The central provision of the Plan was the establishment of two "evergreen" trusts that would assume all the asbestos liabilities of the reorganized and renamed Manville Corporation.[71]

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at A1; *Legal War*, *supra* note 61, at B5.

[63] *See In re* Johns-Manville Corp., 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).

[64] *Id.*

[65] Johns-Manville filed for Chapter 11 protection on August 26, 1982. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 120 B.R. 648, 651 (E. & S.D.N.Y. 1990).

[66] Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988). At the time of its bankruptcy filing Johns-Manville faced approximately 17,000 personal injury lawsuits, having already settled or tried 3570 suits at an average cost of $20,000 each. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 751 (E. & S.D.N.Y. 1991).

[67] *In re* Johns-Manville Corp., 78 B.R. 407, 409 (S.D.N.Y. 1987); *In re* Johns-Manville Corp., 97 B.R. at 176.

[68] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 120 B.R. at 651.

[69] *See In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.*, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

[70] *See In re* Johns-Manville Corp., 68 B.R. at 624-28. The injunctions were issued by the bankruptcy court in response to motions made by the reorganized Manville Corporation. *Id.*

[71] *Id.* at 621. The Asbestos Health Trust ("AH Trust") was the entity established to

The parties hoped that by channeling all of the asbestos claims to the trusts and protecting the reorganized debtor, the trusts would be assured of a continued source of financial support for as long as needed.[72] The Reorganization Plan, however, was premised upon estimates of a limited number of future lawsuits, estimates that have, over time, proven to be grossly optimistic.[73] Despite a significant amount of initial financing and provisions for continued financial contributions from the reorganized debtor, the Asbestos Health Trust ("AH Trust"), responsible for paying all personal injury claims, was running out of money within eighteen months of commencing operations.[74] Within six months the Property Damage Trust had also became insolvent.[75]

The instant case arose out of the insolvency of the AH Trust that had come to the attention of the Eastern and Southern District Courts of New York involved in the Brooklyn Navy

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resolve all claims involving personal injury by victims of asbestos-related diseases. *Id.* The assets of the Trust included $869 million from insurance and assignables, two bonds executed by the reorganized Manville Corporation in the face amount of $1.8 billion and an installment note executed by Manville for $50 million. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 752. The AH Trust also became the largest stockholder in the reorganized company with 50% of the outstanding common stock and preferred stock that was convertible to an additional 30% of the common stock. *Id.* Finally, the Trust could draw upon 20% of Manville's profits beginning in 1992 and continuing for as long as necessary to satisfy claims against it. *Id.* at 753.

The Property Damage Trust ("PD Trust") was a similar mechanism established to liquidate all asbestos-related property damage claims. *In re* Johns-Manville Corp., 68 B.R. at 622. This Trust was initially funded with $125 million and would receive any of the AH Trust's remaining assets upon its termination. *Id.*

[72] The Plan envisioned that the trusts would be able, over time, to liquidate fully all asbestos claims against Johns-Manville. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 752.

[73] The AH Trust originally estimated that it would face a total of approximately 35,000 claims. *Id.* at 755. By the time the Reorganization Plan was filed, however, projections of future lawsuits had increased to between 83,000 and 100,000. *Id.* Even this revision has proven to be optimistic. By March 31, 1990 the Trust had received 143,000 claims and by February 5, 1991 that number had soared to over 170,000. *Id.* at 758.

[74] *See supra* note 71. The inaccurate estimates of future lawsuits was not the only fatal flaw in the original Plan regarding the AH Trust. The Reorganization Plan also allowed the AH Trust to be impleaded into any ongoing asbestos litigation. Codefendants, who were responsible for Manville's share of the industry's liability during its six years in bankruptcy, quickly impleaded the Trust into numerous lawsuits as a codefendant. As a result the Trust found itself a party to thousands of new cases almost overnight. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 755. In addition, the Trust's personnel frequently settled lawsuits for $10,000 to $15,000 more than the original bankruptcy plan had envisioned. *Id.* at 757-58.

[75] *See In re* Johns-Manville Corp., 920 F.2d 121 (2d Cir. 1990) (approving a "temporary" 30-year suspension of payments by the Manville PD Trust).

Yard asbestos cases in the spring of 1990.[76] The district courts, together with the New York State courts involved in the Navy Yard actions, requested that the AH Trust make its financial condition known.[77] What the courts soon discovered was that the Trust was deeply insolvent. Based on that information the combined district courts issued a temporary stay on payments by the Trust pending revisions of the Plan.[78] On July 20, 1990 Judge Jack B. Weinstein of the Eastern District of New York was appointed to supervise the combined courts' handling of the Plan.[79]

One of Judge Weinstein's first acts was to direct the AH Trust to consider alternative payment procedures and refinancing possibilities.[80] In response, on September 19, 1990 the Trust filed a motion requesting that it be declared a limited fund under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure.[81] The court appointed a special master to investigate the

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[76] *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 762. The district courts first became aware of the Trust's financial condition in the Brooklyn Navy Yard asbestos cases when the Trust was unable to enter into meaningful settlement negotiations. *Id.*

[77] *Id.*

[78] *In re* Joint Eastern & Southern Dist. Asbestos Litig., NYAL BNY Index No. 4000 (E. & S.D.N.Y. July 9, 1990) (order granting preliminary injunction). The stay was apparently issued as part of the proceedings in the Brooklyn Navy Yard cases. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 762.

[79] *See* Order of James L. Oakes, Chief Judge, Second Circuit, dated July 20, 1990; Order of Charles L. Brieant, Chief Judge, United States District Court, Southern District of New York, dated July 20, 1990.

The jurisdictional basis for consolidating the *Manville* proceedings before Judge Weinstein is somewhat complicated. Under article X of Manville's 1988 Reorganization Plan, the bankruptcy court had continuing jurisdiction over the implementation of the Plan. 28 U.S.C. section 157(d) permits the withdrawal or referral of a bankruptcy proceeding, in whole or part, to a district court if resolution of the proceeding requires the consideration of other laws aside from title 11 of the Bankruptcy Code. On July 20, 1990 a partial withdrawal under section 157(d) occurred, allowing Judge Weinstein to take control of all proceedings involving the AH Trust. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 762.

[80] *Id.* at 763. Judge Weinstein also recognized the imperative need for accurate data on the number of future lawsuits that the Trust could expect to face. Without this information any scheme that the court and creditors implemented would face the same uncertainty as the original bankruptcy plan. To facilitate the collection of this data, the court appointed Brooklyn Law School Professor Margaret Berger as a court expert under Rule 706 of the Federal Rules of Evidence. *Id.* Professor Berger's duties included reporting to the court on the feasibility of obtaining accurate projections and assisting the court in selecting a group of experts to provide the necessary information. *Id.*

[81] *Id.* at 764. A limited fund exists where claims are made by numerous persons

Trust's motion and to hold hearings on the matter.[82] The special master's conclusion, based on four days of hearings in which a large number of interested parties participated,[83] was that there was "a substantial probability that the award of damages to earlier litigants [would] exhaust the Trust's available and projected assets."[84]

Intense negotiations among the parties ensued and plaintiffs filed a class action complaint against the trustees of the AH Trust on November 19, 1990.[85] The complaint sought to revise the Trust's obligations and payment procedures under the original bankruptcy Plan.[86] On the same day plaintiffs' representative counsel submitted a proposed settlement ("Settlement") of

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against a fund that is insufficient to satisfy all claims. FED. R. CIV. P. 23(b)(1)(B) advisory committee's notes. The rationale behind the Trust's motion for limited fund certification is not discussed in the opinion. However, it should be noted that most proposed class actions settle before the class is certified. J. Spencer Schuster, *Precertification Settlement of Class Actions: Will California Follow the Federal Lead?*, 40 HASTINGS L.J. 863, 863 n.1 (1989). It is safe to assume that the Trust hoped to encourage the divergent parties involved in the *Manville* litigation to enter into meaningful settlement negotiations.

[82] The court appointed the Honorable Marvin E. Frankel to hold hearings on the limited fund issue. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 764.

[83] The parties involved in the *Manville* litigation included individuals with personal injury claims, other asbestos manufacturers that had contribution claims against Manville, and distributors and users of Manville products that had indemnification claims. *See infra* notes 110-112 and accompanying text.

[84] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 120 B.R. 648, 661 (E. & S.D.N.Y. 1990). The special master based his conclusion on the finding that the Trust had assets of $2.1 to $2.7 billion while facing liabilities of approximately $6.5 billion. *Id.* at 667-68.

[85] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 767.

[86] *Id.* Ordinarily a court must comply with 11 U.S.C. § 1127(b) to modify a confirmed plan of reorganization. Section 1127(b) provides:

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of the plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of the title.

11 U.S.C. § 1127(b) (1978). Judge Weinstein avoided the procedural difficulties imposed by section 1127(b) by holding that the class action Settlement did not constitute a modification of Manville's original Plan of reorganization. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R at 840-42. Instead the court interpreted the Settlement as only modifying "plan-related documents" such as the original Trust Agreement and it held that such plan-related documents were not subject to section 1127(b) limitations. *Id.*

the class action.[87]

The Settlement completely revised the operational and payment procedures to be used by the AH Trust. First, the original payment plan was replaced by one that gave priority to the most seriously injured plaintiffs.[88] Second, separate provisions were made to insure that sufficient compensation existed for future claimants.[89] Third, the Settlement changed the litigation relationship among the parties by treating all claimants as plaintiffs under the new payment plan.[90] Finally, the Settlement required that the Manville Corporation take steps to provide immediate financial aid to the cash-poor AH Trust.[91] While the revisions to the Trust's procedures were extensive, the single most important aspect of the Settlement was the fact that it removed the Trust from the tort system.[92] To facilitate this removal, section H of

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[87] *Id.* at 767. The fact that a settlement of the class action was submitted on the same day as the complaint would seem to indicate that the parties and the court never intended the *Manville* case to proceed as a class action. This view is further supported by the fact that the proposed Settlement mandated discontinuance of the class action with prejudice upon a court finding that the Settlement complied with the fairness requirements of Rule 23(e).

[88] The AH Trust's original payment plan was based on the date that a person or corporation filed a claim with the Trust. Claims were processed and paid according to the order in which they were made. This first-in, first-out ("FIFO") payment plan contributed to the Trust's insolvency by encouraging all possible claimants to file as early as possible.

The revised payment plan established average and maximum values for different types of asbestos-related diseases. In addition, the new plan provided that the most seriously injured victims would be compensated first up to 45% of the value of their claim. Once that objective was reached, the Trust would pay the remaining claimants until they had received 45% of the value of their claims. Codefendants and third party defendants, who had paid a plaintiff's claim in full and sought either contribution or indemnification from the Trust, would be assigned the same priority in the distribution system that the compensated plaintiff would have been entitled to if he or she had brought a claim directly against the Trust. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 768-69 (E. & S.D.N.Y. 1991). Upon achieving a universal payment of 45% of all claims, the remaining claims would be paid on a *pro rata* basis over time. *Id.*

[89] An entirely separate fund was established to handle the Trust's liability to claimants who had not yet developed any type of asbestos-related disease. The purpose of this mechanism was to insure that the Trust would not expend all of its limited assets on present claimants, thereby depriving future claimants of any compensation at all. *Id.*

[90] While the *Manville* class was composed of personal injury plaintiffs, codefendants and third party defendants, the court chose to treat them all as plaintiffs for the purpose of the class action. *See infra* notes 110-13 and accompanying text.

[91] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 770.

[92] While resort to the tort system was not expressly prohibited, sufficient disincentives were built into the Settlement. Accordingly, although claimants retained the right to sue in either federal or state court, any judgment in excess of the maximum value

the Settlement[93] included certain provisions that altered the rights of the parties under state law.[94]

On November 23, 1990 Judge Weinstein heard arguments on the class action complaint and conditionally certified the class.[95] The court also appointed the named plaintiffs as class representatives and selected five attorneys from the asbestos plaintiffs' bar to act as class counsel.[96] Simultaneously, the court enjoined all proceedings nationwide against the Trust and approved a form of notice.[97] Following the court's conditional certification, fairness hearings were held throughout the country to respond to objections to the class action. On February 13, 1991, after hearing additional oral arguments, the court entered final orders certifying a non-opt-out class under Rule 23(b)(1)(B)[98] and enjoining the AH Trust from making any payments, except those for hardship reasons, until a final resolution of the litigation.[99]

On June 27, 1991 Judge Weinstein, acting for the combined district courts, entered a final judgment in the case. The court

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assigned by the Settlement to that type of disease, *see supra* note 88, would only be paid *after* all other claimants had received their full compensation. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 770.

[93] *See infra* note 156 and accompanying text.

[94] *See infra* notes 158-63 and accompanying text.

[95] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 773-74. The court's conditional decision to certify the class was made under Federal Rule of Civil Procedure 23(c)(1), which provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before a decision on the merits." FED. R. CIV. P. 23(c)(1).

[96] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 774. Separate class counsel was appointed for codefendants upon their motion. *Id.* at 823.

[97] *Id.* at 774. Individual notice was sent to all known claimant and codefendant counsel and to all federal or state courts involved in any manner in the *Manville* litigation. *Id.* Notice was also published in a number of national and regional newspapers. *Id.* at 775.

[98] Traditionally, class actions maintained under Rule 23(b)(1) or (2) do not allow class members to opt out of the class action. *See* Deborah Deitsch-Perez, *Mechanical & Constitutional Problems In The Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOK. L. REV. 517, 529-30 (1983). In contrast, class actions under Rule 23(b)(3) allow prospective class members to opt out of the class action and pursue their claims individually. *Id.* Moreover, in optional class actions notice must be provided on an individual basis to each prospective member of the class, while mandatory class actions give courts greater discretion to approve alternative forms of notice. *Id.*

[99] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 776.

order approved the proposed Settlement under Rule 23(e) and extended all previous stays relating to the class action.

B. *The District Court's Opinion*

Any analysis of the court's opinion in *Manville* must begin with the AH Trust's condition on July 20, 1990.[100] On that date the Trust was already deeply insolvent and faced a large number of unsettled claims.[101] Furthermore, the situation was deteriorating at an alarming rate as the Trust's financial condition became more acute.[102] It was obvious to the parties and the court that something radical had to be done to preserve the Trust and the pool of compensation capital it represented for hundreds of thousands of plaintiffs.[103] The difficulty was to decide exactly what to do and then to obtain the agreement of over 130,000 individual litigants to the solution.

The parties and the court eventually settled on the use of a mandatory class action under Rule 23(b)(1)(B).[104] This approach enabled the court to deal with the parties on a representative, rather than an individual, basis. This benefit, in itself, was a significant step in reducing the *Manville* litigation to a manageable level. The critical aspect of the *Manville* class action, however,

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[100] This is the date that Judge Weinstein was appointed to oversee the Manville proceedings. *See supra* note 79.

[101] *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 120 B.R. at 661-68 (special master's report on the Trust's grave financial condition).

[102] The sociology of the courts, long urged and habituated to dispose promptly of pending cases, increased disposition rates. Moreover, the courts themselves had developed efficient methods of discovery, docket control, multiple trials, use of special masters and the like that provided great potential for compounding the crisis. In this Alice in Wonderland world, they were running faster and faster yet moving backward, while codefendants were being carried along towards bankruptcy. As a result of escalating litigation and court pressures, the Trust's rapidly dwindling assets were increasingly consumed by transaction costs.

In re Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 762.

[103] *Id.*

[104] Admittedly, *Manville* was ripe for a class action resolution. While the injuries suffered as a result of exposure to asbestos products were themselves medically complex, asbestos cases had by this time become relatively routine product liability litigations. *Id.* at 746. Furthermore, it is illogical to allow individual cases to proceed independently when each case essentially repeats the same evidence and legal theories. *Id.* at 818. Finally, the Trust could not afford to attempt to resolve each and every case on an individual basis. The transaction costs associated with such a process were just too high. *Id.* at 750.

was that none of the parties could opt out of the proceedings[105] and thus any resolution reached in this single litigation would bind all parties. While the class action did allow the court to reach a final settlement of the case that bound all the parties, it also raised a myriad of procedural difficulties.[106] One of the more difficult of these procedural problems was whether the litigation could even qualify as a class action under Rule 23.

1. The Class Action Mechanism

To qualify for class action treatment under Federal Rule of Civil Procedure 23, a prospective class must meet the four prerequisites of subsection (a) of the rule: numerosity, commonality, typicality and adequate representation.[107] In addition, the party seeking class certification must show that the case qualifies as one of the four types of actions maintainable as class actions.[108] It is only when all of these standards are met that a

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[105] *See infra* notes 146-48 and accompanying text.

[106] Some of the other procedural issues raised by the use of a mandatory class action included whether the court had personal jurisdiction over absent parties, whether the class met the requirements for diversity jurisdiction under 28 U.S.C. section 1332 and whether the class action proceedings violated the Anti-Injunction Act. 29 U.S.C. §§ 101-15 (1992).

[107] Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (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).

[108] Federal Rule of Civil Procedure 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (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 or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of

court is justified in handling the case in a representative manner.

a. *The* Manville *Class*

Part of the court's difficulty in treating *Manville* as a class action was the size and composition of the proposed class. *Manville* involved over 130,000 litigants from all fifty states.[109] The dimensions of the class alone presented the court with a case management nightmare. Such a large number of litigants, however, is quite common among mass tort cases. The unique characteristic of the *Manville* class was not its size, but rather its composition.

The class action complaint and the Settlement defined the class as "all Beneficiaries of the Trust."[110] The beneficiaries, however, included a wide range of parties. The majority of class members were plaintiffs with personal injury claims; however, additional members of the class included other asbestos producers ("codefendants"), distributors of asbestos products ("third party defendants") and shipowners who used asbestos in their vessels ("third party defendants").[111] Since the plaintiffs in *Manville* frequently had claims against comembers of the class in other litigation, each group had different and sometimes conflicting goals in *Manville*.[112] Despite these internal class divi-

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the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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

[109] As of April 1, 1991 the Trust had 136,000 claims pending against it. In addition, 11,300 claims had been settled, but remained unpaid as of that date. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 771.

[110] *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 120 B.R. 648, 669 (E. & S.D.N.Y. 1990).

[111] These "other" members of the *Manville* class had different claims from the plaintiffs. The codefendants, who were considered joint tortfeasors under the doctrine of joint and several liability, had contribution claims against the Trust, while the distributors and shipowners had a mix of warranty, guarantee and indemnification claims. In addition, several of the distributors had reached separate settlements with the Trust during the bankruptcy proceedings and sought to protect these agreements in the class action proceedings. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 784-87.

[112] The *Manville* plaintiffs sought to maximize their recovery from the Trust, the codefendants and third party defendants. Since the Trust's assets were limited and finite, the only way to achieve this result was to shift as much of the Trust's liability as possible to the codefendants, distributors and shipowners. These parties naturally op-

sions, the court chose to treat the beneficiaries as a single group.[113] This approach prevented the fragmentation of the class and promoted a uniform resolution of the case.

b. *Future Claimants*

Because of the long latency period of asbestos-related diseases, the parties and the court in *Manville* also had to confront an undetermined number of future claims that would be made against the Trust.[114] The class action complaint and Settlement sought to address this complication by including these "future claimants" in the *Manville* class.[115] The United States Supreme Court, however, has held that absent parties cannot be bound by a judgment unless it is adequately represented by someone who

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posed this effort to shift liability. Their primary objective was to limit or reduce their own liability by shifting as much of it as possible to the Trust. Each side pursued its own interests throughout the *Manville* proceedings, frequently at the expense of the other. Accordingly, the *Manville* case was not a typical class action where each party shared similar interests and worked towards a common goal. In actuality the class never operated as a unified group, but rather as separate, discrete interest groups each intent on furthering their own goals.

[113] Although the issue was not addressed in Judge Weinstein's opinion, the court could have treated the codefendants and third party defendants as separate subclasses under Federal Rule of Civil Procedure 23(c)(4), which provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class my be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." FED. R. CIV. P. 23(c)(4).

By utilizing subclasses based on the litigation posture of the claimant, the court could have avoided the conflicting interests that characterized the single *Manville* class. The difficulty with this approach is that it would have prevented the uniform treatment of all claimants and would have further complicated already extremely complex litigation.

The court could have also subdivided the *Manville* class on the basis of the state law applicable to each claim. This would have effectively removed the conflicts of law issues that arose in the Settlement. Unfortunately, due to the geographic diversity of the *Manville* parties and the wide variances among the states' laws, the court would have been faced with so many subclasses that the use of a class action mechanism would have been practically impossible.

[114] The court estimated that as many as 170,000 additional claims may be brought against the Trust in the future. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 771.

[115] If the "future claimants" had not been included in the *Manville* class action, they would have been free to bring lawsuits directly against the Trust in the future. Thus, they would not have been bound by the payment procedures contained in the Settlement undermining its effectiveness.

is a party to the case and has the same interests.[116] In *Manville*, there was no party who could adequately represent the interests of future claimants. The parties who were physically present in the class action sought to maximize their own recoveries. To the extent that they were successful, less compensation would be available for future claimants because the Trust constituted a limited fund.[117] Thus the interests of the present and future claimants were in direct conflict on the basic issue of distribution of the Trust's funds.[118] Accordingly, no present claimant could serve as an adequate representative of future beneficiaries.[119] Judge Weinstein solved this problem by authorizing the appointment of separate counsel to represent the interests of the future claimants.[120]

c. *Rule 23 Requirements*

For the *Manville* court to certify the class action, the claimants had to demonstrate that the class would meet the four prerequisites of Rule 23(a): numerosity, commonality, typicality and adequate representation.[121] While some courts have held that mass torts, such as asbestos, do not meet these prerequisites,[122] Judge Weinstein ruled that the prospective *Manville* class met them all.[123]

The numerosity prerequisite requires that "the class [be] so

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[116] *See* Martin v. Wilks, 490 U.S. 755, *reh'g denied* 492 U.S. 932 (1989).

[117] Future claimants would want to limit the recoveries of those parties that were present and thus increase the amount of funds available to compensate them at a later date. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 772.

[118] *Id.*

[119] *Id.*

[120] The court based its authority to appoint such a representative counsel on bankruptcy law, trust law and the court's own equitable powers. *Id.* The court also cited the appointment of a similar representative for future claimants during the bankruptcy proceeding. The Second Circuit had expressly affirmed the appointment upon appeal. Kane v. Johns-Manville Corp., 843 F.2d 636, 644 (2d Cir. 1988).

[121] *See infra* notes 124-41 and accompanying text. *See also* Deitsch-Perez, *supra* note 98, at 524.

[122] *See* Deitsch-Perez, *supra* note 98, at 524-25. One of the more convincing arguments used by commentators and courts for finding that mass torts do not meet the prerequisites of Rule 23 is the nature of the claims themselves. *Id.* Tort claims are extremely fact specific as are defense strategies. Moreover, wide factual variations among class members' cases make it more difficult to treat them as a single class under Rule 23. *Id.*

[123] *See infra* notes 124-41 and accompanying text.

numerous that joinder of all members is impracticable."[124] Judge Weinstein found that the proposed *Manville* class easily met this standard since the joinder of tens of thousands of litigants in any form other than that of a representative class action would clearly be impractical.[125]

A class must also have "questions of law or fact common to the class" to meet the prerequisite of commonality.[126] The court disposed of this requirement by adopting a liberal approach to the commonality standard that requires only a minimum of one common issue among the class members.[127] The court then found a number of questions of law and fact that were common to the entire class.[128] Accordingly, the court held that the proposed *Manville* class met the commonality prerequisite.

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[124] FED. R. CIV. P. 23(a)(1).

[125] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 817 (E. & S.D.N.Y 1991). In fact the court considered a class action as the only possible way to handle this number of claims in a single proceeding. *Id.* The court cited several additional reasons aside from the size of the litigation for its ruling. First, the court noted that the prospective class included a category of persons "as yet unknown." *Id.* This statement referred to those victims who do not have symptoms of any asbestos-related disease, and consequently have not therefore brought claims against the Trust. The joinder of these future plaintiffs would be impossible in any manner other than a class action. The court also noted that joinder in any form other than that of a class action would place a severe burden on the national court system since class members were widely dispersed geographically. *Id.*

[126] FED. R. CIV. P. 23(a)(2).

[127] The court cited Jenkins v. Raymark Indus., 109 F.R.D. 269, 271, (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) and Port Authority Police Benevolent Ass'n v. Port Authority, 698 F.2d 150, 153-54 (2d Cir. 1983) as support for this approach. In *Port Authority*, the Second Circuit held that the commonality standard does not require that all members of the class bring identical claims, but only that some issues are common to the class as a whole.

The court also noted that the proposed Settlement would render many of the questions of fact or law that were uncommon to the class superfluous if it were approved. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 819. Determinations regarding individual causation and proportional liability among the codefendants would be resolved outside of the court system. *Id.*

[128] The court found that all class members shared the common question of whether the Trust's procedures should be changed to reflect its present condition. *Id.* at 818. The court also noted that the claims brought by the class shared a "common nucleus of operative facts" because the theories of liability and the factual evidence necessary to prove Manville's culpability were common to all the class members. *Id.* In addition, the court found that Manville would raise the same defense in all of the proceedings by claiming that it was unaware of the risks of asbestos at the time it produced such large quantities of the substance. Therefore, each plaintiff or defendant would have to overcome the same defense. *Id.* at 819. Finally, the court found that all the class members shared a significant interest in reaching an equitable and final resolution of the case. *Id.*

The court next turned to the question of whether the proposed class met the typicality prerequisite. Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[129] The codefendants objected that the proposed class did not meet this standard. Their argument focused on the fact that all the class representatives were plaintiffs with personal injury claims; since the codefendants' claims were for indemnification or contribution rather than personal injury compensation, they argued that the claims of the named representatives were not typical to that portion of the class made up of codefendants.[130] Judge Weinstein, however, rejected this argument. The court took the view that all the class members' claims were substantially similar since each class member sought compensation from the Trust for injuries caused by Manville's asbestos products "either directly as an injured person or indirectly as a third-party claimant with contribution or indemnification rights."[131] Furthermore, the court noted that all beneficiaries of the AH Trust were treated similarly under the Settlement's payment procedures.[132] By adopting this generalized view of the codefendants' claims, the court was able to hold that the typicality standard was met by the named representatives.[133]

The final prerequisite for certification of a proposed class is that "the representative parties will fairly and adequately protect the interests of the class."[134] The court interpreted adequate representation as imposing a dual standard on the named representatives. First, the claims by the class representatives could not be in conflict with the remainder of the class.[135] Second, the

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[129] FED. R. CIV. P. 23(a)(3).

[130] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 820. The codefendants also argued that because the plaintiffs and codefendants were on opposite sides of other asbestos cases, the claims of one group could not be typical of the other group in *Manville*. *Id.*

[131] *Id.*

[132] *Id.* Any claim for contribution or indemnification by a codefendant would be treated under the Settlement's new payment procedures as if the claim were being made by an injured plaintiff. Therefore, the court held that all the beneficiaries stood in the same position vis-a-vis the Trust regardless of whether they were plaintiffs or codefendants.

[133] *Id.*

[134] FED. R. CIV. P. 23(a)(4).

[135] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 820 (E. & S.D.N.Y 1991).

court had to be satisfied that the class counsel was qualified and able to handle the class litigation.[136] While there was little dispute over the qualifications of the class counsel, codefendants argued that the class was actually composed of two separate groups, one composed of the codefendants and one made up of plaintiffs. Moreover, the codefendants claimed that the interests of these two groups were antagonistic to one another.[137] Thus, the codefendants alleged that they were not adequately represented because none of the class representatives were codefendants.[138]

Judge Weinstein again took a broad view of the claims against the Trust in rejecting the codefendants' argument. He stressed the common interests of all of the beneficiaries in restructuring the Trust and insuring that funds remained for all beneficiaries.[139] In addition, he pointed to the uniform treatment of all claimants under the Trust's payment procedure as further evidence that the interests of the representatives and codefendants were not antagonistic to one another.[140] Finally, Judge Weinstein noted the extensive participation of the codefendants and court appointees in the reorganization and class action proceedings. According to the court this active involvement meant that all members of the class received adequate representation.[141]

After a prospective class meets all the prerequisites under Rule 23(a), the party seeking class certification must still show that the proceedings fall under one of the four situations in section (b) to justify the use of a class action. In *Manville* the plaintiffs moved for class certification under Rule 23(b)(1)(B), commonly referred to as the limited fund class.[142] A limited fund

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[136] *Id.* at 821.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* The court admitted that the interests of the plaintiffs and the defendants were "not aligned in all respects", however, the court held that both groups shared enough common ground in relation to the Trust to satisfy Rule 23 (a)(4). *Id.*

[141] *Id.* at 821-22.

[142] Federal Rule 23(b)(1)(B) permits a class action if the prerequisites of subsection (a) are met, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (B) adjudications with respect to individual members of the class which

exists where multiple claims are brought against a fund that is insufficient to satisfy all claims.[143] While the parties disagreed as to the current value of the Trust, no party disputed that it satisfied the limited fund standard.[144] Judge Weinstein, relying on the extensive evidence gathered through the courts' hearings and inquiries on the limited fund question, found that the Trust satisfied the Rule 23(b)(1)(B) standard beyond any possible doubt.[145] Accordingly, the court certified a mandatory class under that section of Rule 23.

d. *The Right to Opt Out?*

A number of parties responded to the court's certification of a class action by filing motions to opt out of the *Manville* class. While limited fund class actions have traditionally been viewed as not affording parties a right to opt out of the case, the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*[146] has caused some commentators to question the continued viability of mandatory class actions. In deciding that parties could not opt out of the *Manville* class, the court relied heavily on law

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> would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

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

[143] FED. R. CIV. P. 23(b)(1)(B), advisory committee notes (1966).

[144] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 765.

[145] *Id.* at 829. The court had appointed a special master to investigate and hold hearings on the limited fund issue. *Id.* at 764. His report indicated that the Trust had assets worth between $2.1 and $2.7 billion, while facing liabilities of approximately $7 billion. *Id.* at 829.

[146] 472 U.S. 797 (1985). The language that has led to a renewed debate over the continued viability of mandatory class actions provides:

> If the forum state wishes to bind an absent plaintiff concerning a claim for monetary relief or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, either in person or through counsel .... Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Id. at 811-12. Some commentators have construed this language as precluding mandatory class actions. *See, e.g.*, Bob Wenbourne, Note, *Phillips Petroleum Company v. Shutts: Procedural Due Process and Absent Class Members: Minimum Contacts Is Out - Is Individual Notice In?*, 13 HASTINGS CONST. L.Q. 817, 821 (1986); Rebecca K. Michalek, Note, *Phillips Petroleum Company v. Shutts: Multistate Plaintiff Class Actions: A Definite Forum, But Is It Proper?*, 19 J. MARSHALL L. REV. 483, 485 (1986).

review articles and recent cases that have concluded that mandatory class actions survive the Court's *Shutts* decision.[147] The court also construed the primary relief in *Manville* as being equitable rather than legal in nature and thus held that *Shutts* did not apply to the case.[148] Accordingly, the court denied the parties' motions to opt out of the *Manville* class.

2. Settlement and Conflicts of Law

On the same day that the plaintiffs' representative counsel filed a class action complaint against the AH Trust, they also submitted a proposed Settlement of the case.[149] However, many of the members of the *Manville* class—especially the codefendants and third party defendants—actively opposed the Settlement.[150] Under Rule 23(e) no class action can be dismissed or

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[147] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 830-33 (E. & S.D.N.Y. 1991). The *Manville* court cited a number of law review articles which concluded that mandatory class actions are still permissible. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986); Mark C. Weber, *Preclusions and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REF. 347, 349 (1988). The Court also cited several circuit court decisions upholding the use of mandatory, no-opt out classes. *See In re* A.H. Robbins Co., 880 F.2d 709, 744-46 (4th Cir. 1989), *cert. denied sub nom.*, Anderson v. Aetna Casualty & Sur. Co., 493 U.S. 959 (1989); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303 (2d Cir. 1990).

[148] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 832 ("By its language and holding, *Shutts* only addressed the right to due process and opt out in class actions primarily for money damages. The primary relief sought in the present class action is equitable.").

[149] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 767. It is important to note that the representative counsel and the court viewed the class action itself primarily as a step toward settlement of the entire litigation. Because of this approach, it is questionable whether *Manville* would have gone forward as a class action in the absence of the Settlement.

[150] The court found that a majority of the plaintiff members of the *Manville* class approved of the Settlement. In reaching this determination, however, the court included future claimants in its calculations. *Id.* at 783. Naturally, future claimants would favor any Settlement that set aside compensation for them since the original Reorganization Plan had contained no such provisions. Of the plaintiffs with current claims against the Trust, the approval rating of the Settlement was closer to 50% and may even have been lower. *Id.* at 776-83. The codefendants were the strongest advocates against approving the Settlement and were the only group unanimous in its opposition. *Id.* at 784. The primary reason that the codefendants contested the Settlement so heatedly was the effects of section H, which operated to shift much of Manville's asbestos liability to them. *See infra* notes 155-63 and accompanying text. The third party defendants, in large part, shared the codefendants' objections to the Settlement. *Id.* at 785-89. Finally, the Trust and Manville Corporation both favored the Settlement. *Id.* at 790-91.

compromised without the court's approval.[151] Generally approval is only appropriate if the settlement is reasonable in light of the risks and costs of continuing the litigation.[152] To determine if the proposed Settlement met this standard in *Manville*, the court had to address the objections raised by class members and resolve them in a satisfactory manner.

Like the decision to seek class action certification, the proposed Settlement resulted in numerous and wide-ranging objections from many class members.[153] However, the most vigorous objections and the ones that the court had the greatest difficulty resolving were raised in connection with section H of the Settlement.[154]

a. *Section H*

While the Settlement itself was complex, its primary objective was deceptively simple. The ultimate goal of the Settlement was to remove the Trust from the tort system.[155] To facilitate that objective, the settlement included provisions in section H[156]

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[151] Federal Rule 23(e) provides that: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." FED R. CIV. P. 23(e).

[152] Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972).

[153] Some of the issues raised by the proposed Settlement included whether the parties could approve an amendment to an existing Trust under New York law without the unanimous consent of all the beneficiaries, whether the Settlement was workable, and whether the Settlement complied with bankruptcy law. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 840, 843 & 855.

[154] *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 869-904.

[155] "At the heart of the Settlement is its effort to extricate the Trust from litigation. This must be accomplished in an equitable fashion that does not place unnecessary transaction costs on the Trust." *Id.* at 877. The Settlement did not remove the Trust entirely from the tort system since claimants still retained the right to sue the Trust. However, judgments in excess of the values set by the Settlement would only be paid after all other claims had been paid. By reducing the Trust's participation in the tort system, the court hoped to avoid most of the transaction costs that accompany asbestos litigation. This, in turn, would enable the Trust to devote more of its limited funds to compensating the beneficiaries.

[156] Section H of the stipulation of the Settlement provides, in pertinent part:

> In order to conserve the assets of the Trust, Trust beneficiaries - both plaintiffs and defendants - will be ordered to dismiss, without prejudice, all present cases, will be enjoined from filing future litigation against Manville or the Trust, and will be required to pursue their claims against the Trust only as provided in the Distribution Process. The injunction will extend to all issues involving the Trust including its status as a joint tortfeasor, its relative share

that governed the parties' activities in any other pending or future litigations between class members.[157] First, all class members were barred from impleading the Trust into any other asbestos litigation.[158] Second, no party could introduce any evidence regarding Manville's share of fault in causing a plaintiff's injury in any other case.[159] Finally, the Settlement contained uniform rules on the issues of joint and several liability and claims for contribution that were to be applied in other asbestos cases.[160] The latter two provisions resulted in strenuous

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> of fault, if any, or its liability or lack of liability for contribution. Except for appeals now pending, the Trust will make no appearances in any court, and no beneficiary will be permitted to proceed in any manner against the Trust or Manville in any State or federal court, except as provided in C above. In any litigation between beneficiaries of the Trust, all beneficiaries will be enjoined from asserting, or introducing, evidence to establish (a) that the Trust (in Manville's stead) is a joint and or several tortfeasor, (b) that the Trust is in any way responsible for any injury, or (c) that the Trust would have been responsible for any injury had it been made or remained a party in the case. All beneficiaries must pursue their claims—whether for asbestos disease, or for contribution or indemnification—within the Trust Distribution Process . . . .

In re Joint Eastern and Southern Dist. Asbestos Litig., 120 B.R. 648, 676 (E. & S.D.N.Y. 1990).

[157] In analyzing section H of the Settlement, it must be remembered that many of the plaintiffs and codefendants of the *Manville* class were opponents in other asbestos proceedings throughout the nation. *See supra* notes 110-12 and accompanying text. Furthermore, Manville was a prospective party to many of these actions. Plaintiffs or codefendants could, under the original Reorganization Plan, implead the Trust (in Manville's stead) into those cases. Thus, section H was part of the parties' efforts to reduce Manville's participation in these asbestos cases and thereby reduce the Trust's operational and legal costs.

[158] The impleader ban was the primary mechanism adopted in the Settlement to keep the Trust out of the tort system and resulted, in large part, from the parties' experience with the original Reorganization Plan. The 1988 Plan allowed the Trust to be impleaded into ongoing asbestos litigation and was one of the primary factors contributing to the Trust's insolvency. *In re* Joint Eastern & Southern Dist. Asbestos Lit., 129 B.R. 710, 758 (E. & S.D.N.Y. 1991).

[159] The evidence bar was intended to avoid the problems of "litigating with the empty chair." *Id.* at 903. In many cases involving multiple defendants, if one or more of the defendants are not present in the courtroom to protect their interests, these absent parties tend to have a disproportionate amount of any award assessed against them. *Id.* at 904. Since Manville was specifically prohibited from appearing in court by the Settlement, provisions had to be included to reduce the chances that Manville would suffer disproportionate judgments against it.

[160] The Settlement specifically adopted the doctrine of joint and several liability; it allowed joint tortfeasors to be held fully liable for any judgment against other joint tortfeasors. *Id.* at 869. The operative effect of this provision was to shift much of Manville's liability onto the shoulders of the codefendants and third-party defendants since Manville could only pay a portion of any judgment against it. Under joint and

objections from some of the members of the *Manville* class.[161]

The difficulty with section H, however, was that the substantive laws of the states varied widely on the issues governed by its provisions and, in some cases, the provisions directly conflicted with a particular state's law.[162] Moreover, section H also abrogated some of the class members' rights that arose independently under state law.[163] Since the *Manville* class included liti-

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several liability the non-Manville defendants would be liable for any shortfall. The Settlement also affected the codefendants' and third-party defendants' contribution claims by adopting a uniform method of calculating set-offs. *See infra* note 163 and accompanying text.

[161] The objections to the evidence bar were raised by some plaintiff class members, the codefendants and the third party defendants because all three groups used Manville evidence. *Id.* at 902-03. Plaintiffs rely on such evidence to prove industry knowledge of the hazards of asbestos, while defendants typically use Manville-related evidence to show that Manville products, rather than their own products, caused the plaintiffs' injuries. *Id.* The objections to the uniform rules on joint liability and contribution claims came primarily from the codefendants and third party defendants. They claimed that it shifted much of Manville's asbestos liability to them. *See infra* notes 162-63 and accompanying text.

[162] The Settlement's adoption of joint and several liability was in direct conflict with the majority of states that have either abolished this doctrine entirely or severely restricted its use. 129 B.R. at 892-93. In addition, the evidence bar was contrary to the substantive laws of several states in which asbestos litigation among the class members was pending. *Id.* at 904.

[163] The clearest example of the Settlement affecting parties' independent rights was in connection with contribution claims by the codefendants and third party defendants. The laws of the states vary widely in regard to contribution claims in the settlement context. In 43 states, the non-settling tortfeasor is entitled to some form of set-off to reflect the plaintiff's settlement with a joint tortfeasor. *Id.* at 893. There are three types of set-offs applied by the different states: the *pro tanto* method, the *pro rata* method, and the equitable share method.

The *pro tanto* rule, which is employed by the majority of jurisdictions, subtracts the actual amount received by the plaintiff through settlement from any subsequent recovery from the non-settling joint tortfeasor. *See, e.g.*, CAL. CODE CIV. PROC. § 877 (1987). While this rule may result in the non-settling tortfeasor being responsible for more than its appropriate share, it serves to encourage settlement among the parties through that very threat.

The *pro rata* rule subtracts an equally apportioned amount from any judgment received against non-settling tortfeasors. Under this rule, if the plaintiff settles with one of four joint tortfeasors, the non-settling defendants are entitled to a 25% reduction in any judgment against them. This rule serves to discourage settlement since the plaintiff runs the risk of not obtaining a complete recovery if the plaintiff settles with any defendant for less than the *pro rata* share. *Id.* at 894.

The final type of set-off rules applied by one-fifth of the jurisdictions is the equitable share method. This rule subtracts the settling defendants' share of liability from any judgments against non-settling tortfeasors. *See, e.g.*, IOWA CODE § 668.7 (1984). The *Manville* court also found that this rule discouraged settlement since a settling plaintiff would not receive full compensation if the plaintiff settled for less than a defendant's

gants from all fifty states, the court had to determine if the provisions of section H were permissible in light of the conflicting laws of the states.

b. *Federal Common Law*

The court first considered whether it could apply uniform, federal common law to the case and thus dispose entirely of the conflicts of law issues.[164] In considering the possibility of applying federal law, the court was constrained by the *Erie* doctrine, which requires a federal court sitting in diversity to apply the substantive laws of the states.[165] This rule has been specifically extended by the Supreme Court to nationwide class actions.[166] However, there are a number of limited exceptions where a court is justified in applying federal common law to a case. In the absence of statutory authority, federal common law has been applied to cases involving the rights and duties of the United States,[167] conflicts among the states,[168] international affairs[169] and "unique federal interests."[170] Since the only possible predi-

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equitable share. *Id.*

Since codefendants and third party defendants were involved in asbestos litigations in all fifty states, they had different set-off rights depending upon the rule adopted by the forum in which the case was brought. The *Manville* court, however, interpreted section H of the Settlement as adopting the *pro tanto* method of calculating set-offs. *Id.* at 893. What this interpretation meant was that codefendants and third party defendants in those jurisdictions that utilized the *pro rata* and equitable share set-offs would lose those rights under the Settlement and would be forced to use the less favorable *pro tanto* rule. Naturally, the affected parties objected heatedly to the court's decision on this issue. *Id.* at 785.

[164] If the court had found that federal common law could be applied to the case, the conflicts between section H's provisions and the laws of the various states would have become irrelevant. When a case involves federal common law, the court and the parties are free to ignore the substantive laws of the state and fashion a form of relief based exclusively on federal law. *See* Georgene M. Vairo, *Multi-Tort Cases: Cause For More Darkness On The Subject, Or A New Role For Federal Common Law?*, 54 FORDHAM L. REV. 167, 190 (1985).

[165] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[166] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[167] Clearfield Trust Co. v. United States, 318 U.S. 365 (1943).

[168] Hinderlider State Eng'r v. La Plata and Cherry Creek Ditch Co., 304 U.S. 92 (1938).

[169] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[170] The Fifth Circuit provided a clear definition of what constituted unique federal interests in Jackson v. Johns-Manville, 750 F.2d 1314, 1325 (5th Cir. 1985) (en banc) ("[T]o be 'uniquely federal' and thus a sufficient predicate for the imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly

cate for the imposition of federal common law in *Manville* was the federal interests exception, the court first analyzed the case to determine if sufficiently unique federal interests existed.

While the court found several unique federal interests present in the *Manville* litigation,[171] it eventually concluded that the application of federal common law would be inappropriate.[172] In reaching that decision, Judge Weinstein was heavily influenced by the Fifth Circuit's opinion in *Jackson v. Johns-Manville*.[173] In that case, the district court had attempted to apply federal common law to punitive damage claims in an asbestos class action.[174] The Fifth Circuit reversed and held that in the absence of congressional action in connection with asbestos, federal courts remained constrained by the substantive laws of states.[175]

Judge Weinstein also noted that the strong federalism concerns implicated by the asbestos debate militated against applying federal common law to *Manville*.[176] While most states have recently revised their tort laws, Congress has repeatedly failed to

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implicate the authority and duties of the United States as sovereign.").

[171] The court identified two separate interests in *Manville* that could justify the imposition of federal common law. First, the court found that there was a unique federal interest in preserving the bankruptcy plan of a major corporation. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 875 (E. & S.D.N.Y. 1991). In addition, the court held that the preservation of a settlement in a difficult class action affecting 160,000 claimants was also a uniquely federal interest. *Id.* at 877. However, despite these two interests, the court eventually concluded that applying federal common law in the instant case would be inappropriate. *Id.* at 877-78.

[172] *Id.*

[173] Jackson v. Johns-Manville, 750 F.2d 1314 (5th Cir. 1985).

[174] The district court had premised its application of federal common law on three perceived unique federal interests in the case. First, the court analogized the conflict among states over the limited pool of asbestos capital to disputes that arise between states over water rights and natural resources. *Id.* at 1324. *See also* Hinderlider State Eng'r v. La Plata and Cherry Creek Ditch Co., 304 U.S. 92 (1938). The Fifth Circuit, however, rejected this analogy. The Fifth Circuit also rejected the district court's finding that the preservation of major government suppliers represented a unique federal interest. *Jackson*, 750 F.2d at 1324-25. Finally, the circuit court rejected the lower court's holding that there was a unique federal interest in ensuring the equitable resolution of asbestos mass tort cases as too all-encompassing. *Id.* at 1326.

[175] *Id.* at 1327. In reaching its decision not to apply federal common law, the Fifth Circuit seemed to feel that any court-imposed solution would essentially be legislative in nature and thus inappropriate. *Id.* ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation. Congress' silence on the matter, however, hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what are essentially legislative solutions.").

[176] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 878.

enact any national legislation addressing the issue.[177] Since states have recently acted in the tort area and Congress has not, the court felt compelled to give priority to state law in *Manville*. Accordingly, Judge Weinstein concluded that federal common law could not be applied in *Manville*.[178]

c. *Conflicts of Law*

Having concluded that federal common law could not be applied to the case, the court had to determine if section H was permissible in light of applicable state law. Since the provisions in section H conflicted with the substantive laws of some states, the court was forced to undertake a conflicts of law analysis to determine which state's law applied.[179] Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*[180] a federal court sitting in diversity is required to use the conflicts of law rules of the state in which it is located. Thus, under *Klaxon* the *Manville* court had to use the New York conflicts of law rules.[181]

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[177] *Id.*

[178] *Id.* ("We are loath to cut the Gordian knot presented by state tort law diversity using the sword of federal common law without congressional warrant.").

[179] Black's Law Dictionary defines conflict of laws as:

> Inconsistency or difference between the laws of different states or countries, arising in the case of persons who have acquired rights, incurred obligations, injuries or damages, or made contracts, within the territory of two or more jurisdictions. Hence, that branch of jurisprudence, arising from the diversity of the laws of the different nations, states or jurisdictions, in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of another jurisdiction, (the acts or rights in question having arisen under it) either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable to the case at point.

BLACK'S LAW DICTIONARY 299-300 (6th ed. 1990).

[180] 313 U.S. 487 (1941).

[181] The court was also constrained in its choice of which state's substantive laws would apply under the Fifth Amendment's Due Process Clause. Due process limits a federal court's choice of substantive law in diversity cases to the laws of a state that has significant interests in the litigations. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) ("For a State's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (extending the holding of *Allstate* to federal class actions).

The court determined that it would be able to apply New York substantive law since New York had numerous contacts with the *Manville* litigation. The Trust was initially created in New York, its assets were located there and it was based in that state. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 883. Many of the plaintiffs

Application of New York conflicts of law rules, however, proved to be fruitless.[182] A conflicts of law analysis by a federal court is essentially a two step process. First, the judge must determine what action the courts in the state in which the federal court sits would take in the same situation. Second, it must make this determination in light of the various state laws implicated in the litigation.[183] The primary difficulty in the instant case lay with the second step. Since *Manville* encompassed a large number of litigants from all fifty states, the second step would effectively require the court to examine the tort laws of every state.[184] In addition, many of these states have recently adopted tort reform statutes and have yet to define adequately their precise scope or effect.[185] The combination of these two factors led the court to conclude that New York conflicts of law rules did not clearly lead to the imposition of a single forum's law in *Manville*.[186]

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were residents of New York and key codefendants were either incorporated in that state or had their principal place of business there. *Id.* Finally, the court found that many of the sites where plaintiffs had been injured were also located in New York. *Id.* Accordingly, the court determined that the choice of New York's substantive law was constitutionally permissible. *Id.*

Despite this determination, the court was eventually precluded from applying New York substantive law because the New York choice of law rules did not permit the court to do so. *See infra* notes 182-86 and accompanying text.

[182] The court first attempted to apply New York contractual choice of law rules on the premise that the Settlement represented a contract among the parties. *Id.* at 895. This theory, however, could not be sustained in connection with the codefendants since they had never consented to the Settlement and had, in fact, unanimously opposed it. *Id.* at 886. The court then turned to New York tort choice of law rules. *Id.* This too eventually proved useless because of the uncertainty of the states' various tort laws. *Id.* at 889.

[183] Judge Friendly of the Second Circuit succinctly summed up the difficulties that a federal court often faces in any choice of law analysis. The task as he defined it was "to determine what the New York courts would think the California courts would think on an issue about which neither had thought." Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), *vacated and remanded*, 365 U.S. 293, *on remand*, 290 F.2d 904 (2d Cir.), *cert. denied*, 368 U.S. 901 (1961).

[184] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 884 (E. & S.D.N.Y. 1991).

[185] *Id.*

[186] *Id.* at 889 ("Given the confused national tort law scene, it requires abandonment of every shred of skepticism to believe that New York would project a single rule of tort law on all the states. We cannot say with confidence that New York's rule of conflicts can be interpreted as leading to the results reached in section H of the Settlement.").

d. *Resolution of Conflicts Issues*

The court's failure to reach a decision on what law applied to the instant case had serious ramifications on the Settlement. The conflicts created by the provisions in section H could not be adequately resolved by the court and no conclusion could be reached regarding their permissibility without determining which state law applied.[187] Accordingly, the court held that those provisions in section H that conflicted with laws of some of the states were not binding in other pending or future asbestos actions.[188] The ultimate determination regarding the permissibility of these uniform rules would be made by courts handling a case in which the issue arose.[189] The court did, however, stress that no court could force the Trust to take part in any litigation.[190] To enforce this prohibition, the court upheld the im-

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[187] Mindful of *Erie* and comity considerations, the courts cannot disregard the contents of the recently enacted tort reform statutes in many states .... Variations in laws respecting joint and several liability, contribution and indemnification rights, and set offs must be considered. This exercise convinces the courts that the ultimate resolution of the applicable law in pending state and federal asbestos cases must be determined by the court hearing the case at the time the issue is presented.

Id.

[188] *Id.* The court did, however, encourage other courts to follow the rules adopted in Section H as much as possible. *Id.* at 878.

This is not to say that other state and federal courts ought not follow the rules adopted in the Settlement in the interest of consistent and equitable treatment of all beneficiaries to the extent that it does not violate a state's public policy. Emphatically, they should do so. But, when the state's public policy and the dictates of *Erie* prevent this sensible result, they cannot be compelled by the federal courts to do so.

Id.

As part of its effort to encourage other courts to adhere to the provisions of section H, the court attempted to provide some guidance on applying the rules contained in that section. The court provided estimates of the appropriate set-offs to apply in other asbestos litigations, concluding that Manville's share of liability was 15% of the value of a claim involving a serious disease and 7.5% for less serious types of diseases. *Id.* at 894. These estimates, however, were only intended to be temporary and would be reexamined once the court had more definite information in connection with Manville's correct share of fault. *Id.* at 895.

[189] *Id.* at 894. Thus under the court's holding the codefendants and third party defendants could contest the application of the section H provisions in other asbestos cases. Whether they would be held to the rules in section H in those cases would be decided by the court hearing the case at the time.

[190] *Id.* ("The courts interpret the Settlement as permitting the parties to exercise their evidence and substantive law policies to regulate the relationship between plaintiffs and codefendants so long as the method of recovery from the Trust is not affected and

pleader bar contained in section H that precluded the impleading of the Trust into any other asbestos case.[191]

Despite the problems and uncertainties created by the provisions in section H, the court eventually concluded that the Settlement met the fairness requirements of Rule 23(e).[192] In reaching that result, the court reviewed the entire Settlement in light of available alternatives and concluded that no "appealing" alternative existed.[193] The court also considered whether section H prejudiced the rights of certain parties to such an extent that the entire Settlement had to be rejected.[194] It concluded that the Settlement did not.[195] Finally, the court identified a number of public policy reasons for approving the Settlement despite the ambiguities in section H.[196] The court eventually went on to ap-

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the Trust is not required to participate in any way in any litigation.").

[191] *Id.* at 904.

[192] *Id.* at 895 ("[T]he courts find that as construed section H meets Rule 23(e)'s fairness standard. Much of the section's language is precatory; its precise contours will be defined by the courts and parties in asbestos litigation beyond the scope of this class action. The courts conclude that its inclusion in the Settlement does not warrant abandonment of an otherwise laudable compromise."). In determining that section H met Rule 23(e)'s fairness standard, the court rejected the class members' objections to the evidence bar and adoption of the *pro tanto* method of calculating set-offs. *Id.*

In connection with the evidence bar, the court concluded that the exclusion of evidence regarding Manville would have little effect on the plaintiffs or defendants in other asbestos litigation. *Id.* Plaintiffs could still prove industry knowledge from a variety of different sources and codefendants could introduce evidence regarding the presence of other manufacturer's products without identifying the other company. *Id.* at 902. The court also found that the Settlement's adoption of the *pro tanto* set-off rule was reasonable since it was the most common type utilized by the states; thus adoption of the *pro tanto* rule would minimize *Erie* and comity questions. *Id.* at 898. In addition, the court found that the *pro tanto* rule best served the central goal of the tort system which it interpreted as full compensation of injured victims. *Id.* at 897. Finally, the court found that *pro tanto* set-offs would reduce the Trust's transaction cost by minimizing litigation over set-off calculations. *Id.* at 898.

[193] *Id.* at 895.

[194] *See* Robertson v. National Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977) (The fact that a settlement may have some unfavorable results does not warrant rejection of the entire settlement if, on the whole, it is fair and equitable.).

[195] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 897.

[196] First, the court found that most asbestos cases settle before trial. *See* Mullenix, *supra* note 53, at 551. The effects of this propensity to settle will be to limit section H's inclusion of joint and several liability since that doctrine only applies when a case goes to trial. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 897.

In addition, the court noted that adoption of the *pro tanto* rule of calculating set-offs would encourage the parties to settle and thus reduce transaction costs. *Id.* Finally, the court noted that many of the tort reforms adopting other methods aside from the *pro tanto* rule had only been enacted within the last five years, so that many of the claims

prove the Settlement in its entirety under Rule 23(e).[197]

III. ANALYSIS

The history of the *Manville* litigation, from the company's 1982 bankruptcy filing to Judge Weinstein's latest installment in the *Manville* saga in *In re Joint Eastern and Southern Dist. Asbestos Litigation*, reveals in stark detail the inadequacy of the tort system as a means of dealing with the asbestos crisis.[198] The traditional tort system, in connection with asbestos litigation, has been marked by high transaction costs,[199] excessive delays in providing compensation to injured plaintiffs,[200] unequal recoveries among identically injured victims,[201] litigious parties[202] and a judicial system clogged by an avalanche of cases.[203] All of these problems clearly indicate that something must be done and that the traditional approach to tort cases has failed in the asbestos context. The real issue, however, is not whether some type of reform is needed, but rather what form such corrective action should take.

Commentators and judges alike agree that the optimal strategy would be to foster some type of global or comprehensive solution to the entire crisis.[204] This explains, in part, why calls for legislative action still persist in the face of continued failures

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would still be controlled by pre-reform laws. *Id.*

[197] *Id.* at 911.

[198] The asbestos crisis provides one of the more extreme examples of the mass tort epidemic that has inundated our judicial system in the last few decades. While other mass tort litigation does not have the urgency or immediacy that is apparent in the asbestos context, the points in this Comment regarding the beneficial use of class actions apply with varying weight to other types of mass tort litigation.

[199] *See supra* Parts I and II.

[200] In *Manville* none of the parties received any compensation from the Trust during the six-year bankruptcy proceeding. Moreover, payments by the Trust have been stayed during the class action litigation and will not be resumed until all appeals are exhausted. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 751.

[201] *Id.* at 749.

[202] *See supra* note 50.

[203] *See supra* note 4.

[204] The clearest example of this movement is the frequency of calls for a national legislative solution. *See supra* notes 5-8 and accompanying text. Even those commentators who propose alternative solutions to direct legislative action admit that meaningful reform can only come about as part of a wider legislative effort to deal with the asbestos crisis. *See, e.g.*, Chesley & Kolodgy, *supra* note 58, at 539-42 (proposing legislative expansion of the MDL's power under a new mass tort statute, giving the Panel the authority to consolidate cases for trial and appeal as well as for pretrial proceedings).

by Congress to address the asbestos issue in any meaningful fashion. Despite these attempts to spur congressional action, however, the possibility of a legislative solution remains unlikely.[205] Accordingly, courts and legal commentators must focus on what can be done within the current tort system to minimize many of the procedural and substantive problems that arise in asbestos litigation.

The Multidistrict Litigation ("MDL") Panel's consolidation of all personal injury asbestos cases pending in federal court as of July 29, 1991 is an important first step in addressing the asbestos crisis.[206] However, it must be recognized that the MDL action is only that, a first step.[207] While there are some tangible benefits to the consolidation of all federal cases in a single district,[208] the MDL action falls far short of the comprehensive global solution needed to resolve adequately the asbestos crisis. First, the Panel only has the statutory authority to consolidate cases for pretrial purposes.[209] While it is true that most MDL cases, in the past, have been disposed of in one way or another by the transferee court, there is no guarantee that the success of the MDL procedure will continue in the asbestos context.[210] Sec-

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[205] *See supra* note 10 and accompanying text.

[206] *See supra* notes 60-62 and accompanying text.

[207] In fact, the MDL Panel itself recognized that consolidation alone would not be enough to solve the entire asbestos crisis. "[T]he panel also found that while its decision had become necessary, it might not make a quick difference for most plaintiffs and defendants. The judges said they were 'under no illusion that centralization will, of itself, markedly relieve the critical asbestos situation.' They added,'it offers no panacea.' " *See* Labaton, *supra* note 62, at A1.

[208] The most apparent benefit of the MDL transfer is that the majority of cases, most of which have been subject to transfer in the past, have been either settled or dismissed by the transferee court. *See* Chesley & Kolodgy, *supra* note 58, at 521-22 (noting that only five percent of the cases transferred under the MDL statute are ever remanded to the original courts for trial). Another benefit provided by the MDL statute is the consolidation of all pretrial proceedings; thus under 28 U.S.C. section 1407 the transferee court is given wide discretion over pretrial matters, such as discovery and motions for summary judgment. *Id.* at 522. The pretrial benefits, however, may be somewhat limited in the asbestos context because the main concern of discovery—proving liability—has already been largely established. *See* Gordon Hunter, *Asbestos Supercase Is Born; Multidistrict Move One of Several*, TEX. LAW., Feb. 25, 1991 at 1 (noting that MDL is usually used to discover common issues of liability that are no longer in question in the asbestos context).

[209] *See* 28 U.S.C. § 1407 (1992).

[210] Given the litigious nature of the parties involved in asbestos litigation, it is not unreasonable to assume that settlement or dismissal through the MDL procedure will be vigorously resisted.

ond, even if the past levels of successful disposition are achieved, some cases will have to be remanded to their original courts for trial.[211] In addition, there is a very real fear among the participants involved in asbestos litigation that the MDL transfer will cause even greater delay in providing compensation to injured plaintiffs.[212] The final and potentially greatest problem with the MDL decision, however, is the limited scope of the order.[213] Under 28 U.S.C. section 1407 the Panel only has the statutory authority to consolidate currently pending federal cases; suits filed in state court remain unaffected by any MDL action.[214] This limitation on the Panel's authority is a serious flaw in the asbestos context because the majority of asbestos cases to date have been filed in state courts.[215] Thus, the effectiveness of the MDL order is somewhat questionable since it does not even apply to the majority of asbestos cases. Moreover, there is a real danger that plaintiffs who have already filed cases in federal courts will attempt to remove or voluntarily dismiss those cases

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[211] Based on the MDL's past success rate, five percent of the transferred cases will have to be remanded to their original courts for trial. *See supra* note 208. Given the large number of cases that are affected by the MDL decision, the five percent failure margin would translate into over 1300 individual cases.

[212] There is no doubt that in the short run litigants are correct in arguing that the MDL order will only increase the delay in disposing of asbestos cases. The immediate effect of the Panel's order was to halt much of the litigation in federal courts as the parties waited to find out how Judge Weiner would address the problem. "The immediate effect [of the MDL order] is to halt all personal-injury cases that have not reached trial in Federal courts. The victims, defendants and lawyers must now await a proposed solution from Federal District Judge Charles R. Weiner of Philadelphia, to whom the panel assigned the cases." Labaton, *supra* note 62, at A1; *see also* Stephen Labaton, *Asbestos Cases Pose Test For Court Ringmaster*, N.Y. TIMES, Aug. 16, 1991, at B16 ("[M]any plaintiffs' lawyers fear that the panel's order will only further delay things by setting up another level of bureaucracy. Some defense lawyers have already backed out of settlement talks in a number of cases around the country on the theory that it would be cheaper to just wait and see what Judge Weiner has to say about all the cases rather than continue with a piecemeal approach.").

[213] Not only does the MDL order fail to reach any cases filed in state courts, *see infra* notes 215-16 and accompanying text, it also exempts all federal cases that have already reached the trial stage. *See* Daniel Wise, *Asbestos Cases Already Filed Will Stay Here; Consolidation Order Seen Not Affecting Claims*, N.Y. L.J., Aug. 1, 1991, at 1.

[214] Commentators who have proposed expanding the statutory power of the MDL Panel in the mass tort context have also ignored this critical shortcoming. *See* Chesley & Kolodgy, *supra* note 58.

[215] As of June 6, 1991 approximately 100,000 asbestos personal injury cases were pending in state courts nationwide compared with the 31,500 pending federal cases. *See* Tracy Schroth, *Plan Would Consolidate Federal Asbestos Cases: Panel Seeks To Streamline Process*, N.J. L.J., June 6, 1991, at 5.

and then refile them in state courts to avoid inclusion in the Panel's order.[216] In addition, individuals will probably favor filing future actions in state courts for the same reason, thereby further increasing the strain on state judicial resources.[217] Finally, the jurisdiction of state courts is much more limited than that of federal courts, so that large consolidations of asbestos cases for trial and settlement will be far more difficult.[218] All of these shortcomings indicate that the MDL order, while effective in a limited sense, does not achieve the comprehensive solution needed in the asbestos context.[219]

Given the inability of Congress to enact any substantive or procedural reform that would enable courts to approach the asbestos problem from a new angle, the question then becomes what can be done within the existing system to overcome the difficulties inherent in asbestos litigation. As Judge Weinstein recognized in *Manville*, the most promising procedural device for avoiding these difficulties currently available to federal courts is the class action.

Class actions enable a court to consolidate all claims against an individual asbestos manufacturer into a single case. Moreover, they provide a cost-effective and equitable means of reaching settlements in these complex cases. This does not mean, however, that all types of class actions are appropriate in the asbestos context. Admittedly, "common question" class actions under Rule 23(b)(3)[220] may be precluded by the 1966 advisory

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[216] "Judges in the state courts, which have even more asbestos cases—two thirds of the total filed—are also nervous about the multidistrict litigation panel's decision to transfer the cases to Philadelphia. They are concerned that the plaintiffs, fearing delay, will now remove their cases and further swamp the state courts, which are already overwhelmed." *See* Labaton, *supra* note 212, at B16.

[217] Commentators already worry that those plaintiffs who have filed actions in both systems will drop their federal cases in favor of proceeding in the state court system. *See* Wise, *supra* note 213, at 1 ("Because plaintiffs have filed actions in both federal and state courts . . . there is 'no question' some plaintiffs will now withdraw their federal actions and proceed only in state court.").

[218] *See* Jerold S. Solovy et al., *Class Action Controversies* 431 PLI/LIT 7 (1992) (comparing the limitations of state class actions as opposed to similar proceedings brought in federal court).

[219] This is not to trivialize the effect of the MDL action. If nothing else, the MDL Panel's transfer is clear evidence of a growing awareness among the federal judiciary that actions must be taken to deal with the asbestos crisis immediately. "The ruling provides official recognition of a growing view among judges and lawyers that many federal courts are facing a crisis in asbestos litigation." Labaton, SUPRA note 62, at A1.

[220] Federal Rule 23(b)(3) allows class actions when

committee's notes and the judicial reluctance to employ them in the mass tort context.[221] These objections, however, do not apply with equal force to the use of "limited fund" mandatory class actions in asbestos litigation.

A. *Traditional Objections to Class Actions*

Much of the judicial reluctance to employ class actions in the asbestos context can be traced to the advisory committee's notes that accompanied the 1966 amendments to Rule 23.[222] These comments, however, were made in connection with "common fund" class actions under subsection (b)(3) of the Rule and were not meant to apply to limited fund situations, which are governed by subsection (b)(1).[223] The narrow interpretation of the advisory committee's comments makes sense when one considers that (b)(3) class actions require common questions of fact or law to predominate. Obviously, the advisory committee believed that individual questions would always outweigh any common questions in mass accident cases. This conclusion, however, in no way affects the use of class actions under Rule 23(b)(1) or (b)(2). Moreover, the advisory committee notes specifically refer to "mass accident" cases that most commentators recognize as being different in many respects from mass products liability

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(3) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings 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; (D) the difficulties likely to be encountered in the management of a class action.

FED R. CIV. P. 23(b)(3). Commentators and courts typically refer to Rule 23(b)(3) class actions as "common question" class actions.

[221] *See* Chesley & Kolodgy, *supra* note 58, at 485-86 ("The Advisory Committee to the amendment, however, opposed the use of class actions in 'mass accidents,' and the federal courts have followed this mandate in generally refusing to apply Rule 23 to actions arising from mass exposure torts.").

[222] *See supra* note 13.

[223] *See* FED. R. CIV. P. 23 advisory committee notes ("Subdivision (b)(3) . . . 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.").

cases.[224] Asbestos litigation falls into the latter category.[225] Finally, the 1966 committee notes explicitly recognize the existence of "limited fund" class actions under subsection (b)(1) of the Rule.[226] Courts have had difficulty in using limited fund class actions in the mass tort context by focusing incorrectly on the size of the case. The fact that an asbestos defendant's assets constitute a limited fund should not be ignored simply because that defendant is facing a hundred thousand lawsuits instead of a relatively smaller number. Indeed a mass tort limited fund situation would seem to provide stronger support for the use of a class action since the limited fund must be divided among a larger class of victims and thus there is greater potential that some victims will be left uncompensated in the absence of such action.

A number of judges and legal commentators have also objected to the use of class actions because of the loss of independent control that individuals experience over their claims when they are forced to participate in a large mass tort class.[227] This

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[224] Commentators have typically recognized the difference between these two types of mass tort litigation. *See* Rose, *supra* note 3, at 1183 (stating that there are two types of mass tort litigation, mass accidents and mass product liability suits); Williams, *supra* note 6, at 324 n.1 ("Mass tort litigation can be further divided into two kinds: mass accident and mass products liability.").

[225] *See* Williams, *supra* note 6, at 324 n.1 ("A careful examination reveals that, although "a 'mass accident' resulting in injuries to numerous persons is *ordinarily* not appropriate for class action . . . there is no similar caveat regarding its application to the product liability context.").

While this argument may be technically correct, it is admittedly weakened by the nature of mass accidents and mass product liability suits. Mass accidents involve sudden, disastrous occurrences where all the victims are injured in the same place and at the same time. Thus, they would seem to share a great deal in common with respect to damages and liability. Victims of product defects, however, are geographically dispersed and suffer injuries over a much wider range of time.

[226] *See* FED. R. CIV. P. 23 advisory committee notes (1966).

> This clause takes in situations where the judgment in a non class action by or against an individual member of the class, while not technically concluding [sic] the other members, might do so as a practical matter . . . . In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interest of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.

Id.

[227] *See Mass Trials*, *supra* note 54; *Mass-Tort Joinder*, *supra* note 54; Judith Resnick, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989).

argument, however, largely ignores the reality of mass tort litigation where individual attorneys often represent hundreds and sometimes thousands of individual plaintiffs.[228] Moreover, mass tort attorneys frequently negotiate and settle hundreds of cases at one time.[229] In light of the actual practices employed by plaintiffs' counsel in asbestos litigation, it is obvious that most plaintiffs never have any individual control over their claims even within the traditional tort system.[230] Moreover, even the most consistent advocates of the traditional individual method of adjudication recognize that limited fund situations represent special circumstances in which the loss of individual control is justified.[231] When a limited fund exists, the individual's interest in controlling his or her claim is outweighed by the interest of each class member in receiving an equitable share of the limited funds available.[232]

B. *The Benefits of Class Action Treatment*

The advantages of using class actions in the mass tort context are too numerous to recite in their entirety. However, a quick analysis of the potential benefits should suffice to prove their potential utility to asbestos litigation. The primary advantage of the class action device is that it allows courts to process

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[228] *See* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-97 (finding that the majority of mass tort plaintiffs felt that they had little or no control over the handling of their cases).

[229] In *Manville* 175 law firms represented more than 100 plaintiffs and 32 firms represented over 1000. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 966-69 (E. & S.D.N.Y. 1991). In addition, group settlements of individual cases were not uncommon under the Trust's previous FIFO payment procedures. *Id.* at 756.

[230] *See* Williams, *supra* note 6, at 330 n.23 ("Almost everyone who has had contact with plaintiffs of tort litigation at the trial level would admit that, ultimately, everyone and everything but the injured plaintiff controls the litigation.").

[231] Rarely will the available assets and insurance proceeds of all plausible [mass tort] defendants fall short of the total provable damage claims of the plaintiff group. In the exceptional case where these conditions actually exist, consolidation of all the plaintiff claims in a single venue for trial may be necessary to prevent an inequitable distribution of this limited fund of assets available to pay the plaintiff group.

Mass Trials, *supra* note 54, at 77.

[232] *Mass Tort Joinder*, *supra* note 54, at 815 ("In those few cases where a limited fund class action is proper, however, the court should certify a class action. Otherwise, there is a reasonable likelihood that plaintiffs losing the 'race to the courthouse' will be unable to obtain fair compensation for their injuries.").

large numbers of claims in a representative manner.[233] Thus a single case can, in effect, bind thousands of additional class members who otherwise would have litigated their claims on an individual basis. This aggregative effect is even more pronounced in mandatory class actions since potential class members are not given the alternative of opting out of the class.[234] The wholesale adjudication of asbestos cases in this manner enables courts to dispose of these cases more quickly and more efficiently,[235] thereby reducing the strain on the judicial system from overloaded dockets.[236]

In addition, class actions are particularly effective at avoiding much of the duplicative litigation that arises in asbestos and other types of mass tort cases.[237] By avoiding most of this repeti-

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[233] By definition, class actions are representative. "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." FED. R. CIV. P. 23.

[234] Class actions maintained under subsections (b)(1) and (b)(2) of Rule 23 are typically referred to as "mandatory" class actions because prospective members are not given the right to opt out of the litigation. *See* Edward F. Sherman, *Class Action and Duplicative Litigation*, 62 IND. L.J. 507, 510 (1987) ("The rules . . . . do not extend a right to be excluded. Thus, unless the judge exercises discretion to exclude, class members are saddled with having their claims resolved by the class action. Because of the absence of an opt-out right, (b)(1) and (2) class actions are referred to as 'mandatory.' "). In contrast, members of a class action brought under subsection (b)(3) must be given the right to opt out of the class suit so that they can pursue their claims on an individual basis. *Id.* at 511.

[235] *Id.*

[236] *See Mass Trials*, *supra* note 54, at 76 (noting that the principle justification for using class actions in mass tort litigation was to conserve scarce judicial resources). The ability to clear large numbers of cases from court dockets should not be underestimated. In the mass tort context some commentators have estimated that resolving cases on an individual basis would take hundreds of years, even if all the cases were consolidated in a single forum. "Judge Rubin justified ordering a mass trial in the Bendectin litigation by asserting that trying the hundreds of cases separately would occupy one trial judge for 105 years." *Id.* at 77.

This concern exposes another weakness in the Multidistrict Panel's consolidation order. Each case transferred under 28 U.S.C. section 1407(a) must be dealt with on an individual basis, either in the transferee court or in the court from which the case originated. The class action mechanism, in contrast, allows a court to use a single case or a limited number of cases in a representative manner. Once judgments are obtained in these cases, the figures are then applied to the remaining claims of the class members, effectively disposing of hundreds or thousands of claims through a single trial.

[237] *See* Sherman, *supra* note 234, at 510 (identifying the benefits of class actions as the preservation of party and judicial resources, the prevention of inconsistent verdicts, and the increased economic viability of comparably small lawsuits); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563-64 (1987) (noting that the case-by-case method of adjudicating mass torts requires each victim to "reinvent the wheel" by proving his or her claim *de novo*, despite

tive and wasteful litigation, mandatory class actions significantly reduce the parties' costs in bringing and defending these claims and thus provide more available capital to compensate injured parties.[238] Indeed the threat of this type of duplicative litigation is one of the main justifications of the existence and use of mandatory class actions.[239]

Another tangible benefit of using mandatory class actions is that they encourage settlement among the parties.[240] A class action achieves this objective in two ways. First, it applies pressure on both sides of the litigation to enter meaningful settlement negotiations.[241] Second, it allows the parties to negotiate toward and achieve a comprehensive global settlement of the litigation.[242] Class actions contribute to such mass tort settlements by bringing together large numbers of the parties with an interest

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the fact that the major issues of liability have already been determined in other trials).

[238] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 710, 802 (E. & S.D.N.Y. 1991) ("Adjudication on a classwide basis enables the court to reduce transaction costs, particularly attorneys' fees, thereby maximizing available resources to compensate injured claimants."). A frequently overlooked advantage of the class action device is that it enables courts to control and limit attorneys' fees as part of the class proceedings. *See* Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881, 884 (2d Cir. 1983), *cert. denied*, 466 U.S. 944 (1984) (holding that part of the court's power to supervise class action proceedings includes the power to review attorneys' fees). The need for such judicial scrutiny of attorneys' fees, unfortunately, is quite pronounced in the asbestos context, which has been marked not only by high and perhaps unreasonable contingency fee arrangements, but also by allegations of outright attorney fraud. *See* Todd Woody, *As Stemple Sued, Defendants Retreated: California's Asbestos King Could Count on Industry to Settle his Massive Suits; Critics Say the Truly Sick Suffered*, THE RECORDER, Sept. 12, 1991, at 1 (recounting the large number of questionable claims brought by a single asbestos attorney in California that led an asbestos manufacturer to file a fraud and racketeering suit in 1987).

[239] *See* Sherman, *supra* note 234, at 510 ("The threat of duplicative litigation is central to the certification decision in (b)(1) and (2) situations, and that concern is answered by the rules' failure to provide a right to opt-out.").

[240] *See* Bryant G. Garth, *Studying Civil Litigation Through Class Action*, 62 IND. L.J. 497 (1987) (noting that class certification represents a turning point in class actions after which the parties frequently concentrate on settling the case).

[241] Defendants are under increased pressure to settle possible class actions because of the sudden expansion in their potential liability. Before certification, an individual judgment would only apply to that case. Once certification is approved, however, defendants suddenly face a situation where an adverse verdict could determine their liability in hundreds or thousands of additional cases as well. *Id.* at 502 ("Class certification makes such a difference in the settlement value of the case that defendants will not take plaintiffs' claims seriously until certification is achieved."). Plaintiffs are also motivated to settle once class certification is achieved for fear of losing individual control of their own cases.

[242] *See Mass Tort Joinder*, *supra* note 54, at 835-36.

in the litigation, by enabling those parties to deal with future claims brought by absent plaintiffs and by providing the defendants with a means of adequately settling possible indemnity and cross-claims against them.[243] All of these factors contribute to making class actions an effective and efficient way to encourage global settlements.

The final benefit of mandatory class actions in the asbestos context is due to the particular nature of asbestos litigation itself. Despite the vigorous attempts of plaintiffs' attorneys to expand the number of companies subject to asbestos liability,[244] the pool of compensation capital available to asbestos plaintiffs is steadily shrinking.[245] A large number of manufacturers and producers of asbestos products have already filed voluntary bankruptcy petitions under Chapter 11 of the Bankruptcy Code.[246] Given the steadily expanding number of asbestos claims being filed in the court system, the diminishing pool of compensation capital and the increasing trend of asbestos-related bankruptcy filings, it is not unreasonable to assume that a large number of future asbestos cases will take place in the context of limited fund situations.[247] The only type of procedural device that can efficiently and equitably handle these situations are mandatory class actions under Rule 23(b)(1).[248] Only limited

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[243] *Id.*

[244] *See In re* Joint Eastern and Southern Dist. Asbestos Litig., 129 B.R. 710, 747 (E. & S.D.N.Y. 1991).

[245] *Id.* ("The sustained success of plaintiffs in establishing liability . . . helped usher in a new stage of asbestos litigation in which the burden of jury awards threatens the viability of many former manufacturers and producers of asbestos products.").

[246] *See supra* note 47.

[247] As Appendix C, attached, suggests, there is strong reason to believe that unless changes are made in the treatment of asbestos litigation, many if not most current defendants will be in a limited fund situation. They do not have, and they probably will not have, assets to pay for their current and contingent asbestos liabilities given the present mode of disposing of asbestos claims.

In re Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 907.

[248] MDL action will not be able to address these limited fund situations on a comprehensive basis since the majority of pertinent cases will probably be filed in the state court system and thus be beyond the reach of the MDL Panel's authority. *See supra* note 212 and accompanying text. Accordingly, the transferee court would be able to bind all federal plaintiffs to a *pro rata* share in the limited fund, but state court plaintiffs would still be free to bring individual claims and deplete scarce compensation resources at the expense of other victims. Common question class actions under Rule 23(b)(2) are effective, not only because of the traditional reluctance of the judiciary to make use of them in the mass tort context, but because they fail to provide global settlement, since plaintiffs are free to opt out of the class action.

fund class actions provide courts with the mandatory, aggregative procedures required to ensure that the fund is fairly and evenly distributed among deserving claimants and is not wasted through duplicative and unnecessary transaction costs.[249]

C. *Mechanical Problems With Asbestos Mandatory Class Actions*

All the potential benefits of class actions in the asbestos context, however, matter little if asbestos cases do not fit within the class action rules. A number of courts and commentators have made that very claim not only in connection with asbestos litigation, but also for all mass tort cases.[250] While most courts and commentators agree that asbestos cases and other mass torts meet the prerequisites of Rule 23(a),[251] criticism of mass

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[249] In the absence of a mandatory aggregative procedural device, most parties would pursue their own individual interests. The result of this advocatory zeal in the limited fund situation, however, is to encourage a race to the courthouse as plaintiffs attempt to obtain individual compensation before the common fund is completely exhausted.

> The need for protection of the substantive right to damages arises where the plaintiffs' individual monetary claims are so high that, collectively, they exceed the assets of the defendants. It is in this 'limited fund' situation that judgments awarded to plaintiffs who have sued earlier than other plaintiffs might exhaust a defendant's resources, thus effectively depriving subsequent plaintiffs of their right to compensation.

Rose, *supra* note 3, at 1182-83 n.10.

> In such [limited fund] cases, if each plaintiff pursued an individual action, the available funds might be depleted by the first few plaintiffs to win substantial awards. This result might not be unfair to losers who failed to litigate diligently, but it certainly would be unfair those delayed by uncontrollable factors, such as crowded court dockets.

Note, *Class Certification In Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1145 (1983) [hereinafter *Mass Accident Cases*]. In addition, courts have discretionary power in the class action context to limit the transaction costs of asbestos litigation including attorneys' fees, thereby preserving more of the limited fund for compensatory purposes. *See supra* note 238.

[250] *See In re* School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986); *In re* Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984); *In re* Northern Dist. of Cal., Dalkon Shield, Etc., 693 F.2d 847 (9th Cir. 1982); Mullenix, *supra* note 5, at 1049 (describing the imperfect fit between the class action rules and mass tort litigation).

[251] *See* Deitsch-Perez, *supra* note 98, at 524 ("Because tort litigation often involves very individualized claims and defenses it is frequently asserted that most of [the Rule 23(a)] prerequisites cannot be met. These assertions are incorrect."); Mullenix, *supra* note 5, at 1050 ("[C]ourts rarely, if ever, refuse to certify a mass-tort case because the proposed class fails to meet Rule 23(a) requirements."); Jenkins v. Raymark Indust., Inc., 782 F.2d 468 (5th Cir. 1986)(finding that a district-wide common question asbestos class met the prerequisites of Rule 23(a)).

tort class actions have focused on the requirements of Rule 23(b).[252] Typically certification of mass tort classes is sought under Rule 23(b)(1) or (b)(3).[253] The reluctance of the judiciary to certify class actions under Rule 23(b)(3) is understandable given the 1966 advisory committee notes,[254] but the hesitation in making wider use of limited fund class actions is more difficult to justify.

1. The Limited Fund Standard

Part of the problem with the use of limited fund class actions stems from the fact that courts have evolved different tests to determine if a limited fund exists and have imposed varying burdens of proof on parties seeking limited fund certification.[255] The Second Circuit has affirmed several cases imposing a "substantial probability" test.[256] Under this standard a party seeking a limited fund class certification must show that there is a substantial probability that claims would exceed the assets of the common fund.[257] The Ninth Circuit, in contrast, has restricted limited fund certification to those cases where the moving party can prove "inescapably" that the common fund is inadequate to satisfy all the claims against it.[258] This test has proven to be much harsher in operation since it is extremely difficult to meet such a high standard in connection with the limited fund question.[259] This problem is exacerbated by the fact that class certification is frequently sought at an early point in asbestos cases before a great deal of discovery has been undertaken by the

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[252] *See* Mullenix, *supra* note 5, at 1051 ("[C]lass certification is most often denied in mass-tort cases for failure of the proposed class to meet the requirements of Rule 23(b).").

[253] *See* Rose, *supra* note 3, at 1196.

[254] *See supra* note 13 and accompanying text.

[255] *Compare In re* Northern Dist. of Cal., Dalkon Shield Etc., 693 F.2d 847 (9th Cir. 1982) *with In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

[256] *See* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

[257] *County of Suffolk*, 710 F. Supp. at 1418.

[258] *In re* Northern Dist. of Cal., Dalkon Shield IUD Products Liability Litig. v. A.H. Robins Company, 693 F.2d 847 (9th Cir. 1982).

[259] Williams, *supra* note 6.

parties.[260]

For several reasons, the proper test to apply in the asbestos context is the Second Circuit's more relaxed standard. First, by imposing a lower standard, asbestos litigation would qualify more quickly for class certification and thus allow courts to dispose of the backlog of cases faster. Second, a lower threshold for limited fund status would enable asbestos defendants to obtain comprehensive judgments without filing for bankruptcy protection.[261] Given a choice between a bankruptcy proceeding or a class action under Rule 23 (b)(1)(B), asbestos defendants would almost invariably choose to pursue the limited fund status because of its less disruptive effect on the company's general operations.[262] Keeping asbestos manufacturers out of bankruptcy proceedings would encourage quicker resolution of asbestos

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[260] *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 851 (E. & S.D.N.Y. 1991).

[261] Bankruptcy proceedings are another way that asbestos defendants can obtain global solutions to their potential liability. In bankruptcy proceedings asbestos plaintiffs are considered creditors by the court and take part in formulating the reorganization plan of the debtor corporation. *See* Note, *Relief From Tort Liability Through Reorganization*, 131 U. PA. L. REV. 1227 (1983) [hereinafter *Relief From Tort Liability*].

The use of Chapter 11 by asbestos defendants has not been without its critics. *See* Lee Ann Flyer, Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability*, 54 TEMP. L.Q. 539 (1983); Susan S. Ford, Note, *Who Will Compensate The Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*, 14 ENVTL. L. 465 (1984).

[262] Given the way courts are currently handling mass tort cases, it is clear that some corporations defending against mass tort claims have decided to file for bankruptcy in an effort to limit their liability. At first glance, one might conclude that those corporations opted for the bankruptcy process in order to cut out a potential morass of tort claimants. A more detailed inquiry reveals that most corporations who filed for bankruptcy did so because the court failed to provide a more efficient means of handling their mass tort claims: namely, the court failed to certify a class action.

Kevin H. Hudson, Comment, *Catch 23(b)(1)(B): The Dilemma of Using the Mandatory Class Action To Resolve The Problem of the Mass Tort Case*, 40 EMORY L.J. 665, 689 (1991). The corporate preference for class action treatment over bankruptcy makes perfect sense when one considers the potential drawbacks to a bankruptcy filing.

> [A]s a practical matter the decision to file for bankruptcy is not made lightly. First, in bankruptcy the debtor must conform to restrictions on corporate disbursements and activities, as well as witness the inevitable drop in the value of its stock. Second, the debtor may be confronted with the loss of day-to-day control to an appointed bankruptcy trustee. Consequently, as the threat of mass tort liability becomes more pervasive, corporations will continue to look to the mandatory class action before resorting to bankruptcy.

Id. at 690.

claims and reduce transaction costs.[263]

2. Conflicts of Law

Even if the Second Circuit's substantial probability standard is adopted nationwide to determine limited fund status, courts still face yet another significant obstacle in making full use of mandatory class actions. The lack of any uniform substantive law applicable to mass litigation compels courts either to refuse to certify class actions[264] or to undertake extensive conflicts of law analyses.[265] While a number of proposals have been submitted by legal commentators to solve this problem[266] and some judges have attempted to deal with the conflicts issue on

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[263] The immediate effect of a bankruptcy filing is to stay automatically almost all pending legal actions against the debtor. 11 U.S.C. § 362 (1978). *See Relief From Tort Liability*, *supra* note 259, at 1233. Thus asbestos plaintiffs' cases are stayed, new actions against the bankrupt defendant are precluded and judgments cannot be recovered. *Id.* In *Manville* the company was in bankruptcy proceedings for over six years. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 751.

It is important to remember that during the bankruptcy proceedings, transaction costs such as attorneys' fees continue to accrue, thereby reducing the amount of money available to compensate injured victims. Hudson, *supra* note 262, at 690 (noting that over $100 million in legal and professional fees were paid during the six years of the Manville bankruptcy proceedings).

[264] *See Mass Accident Cases*, *supra* note 249, at 1146 n.10 (noting that conflicts of law problems may make aggregative litigation "infeasible"); Zandman v. Joseph, 102 F.R.D. 924, 929 (N.D. Ind. 1984); *In re* United States Fin. Sec. Litig., 64 F.R.D. 443, 455 (S.D. Cal. 1974).

[265] Courts are presently compelled to undertake conflicts of law analyses in any mass tort class action because members of the class tend to be geographically dispersed throughout a large number of states. Moreover, states' substantive laws differ on such key issues as what standard of liability should be imposed, when the cause of action accrues and whether punitive damages are permissible. Vairo, *supra* note 164, at 171. It is important to recognize that conflicts of law problems also arise in the settlement of mass tort class action. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 869 (E. & S.D.N.Y. 1991). This makes a satisfactory solution to the conflicts problem all the more necessary.

[266] The difficulty of dealing with conflicts of law analyses in the mass tort context has been a fertile ground for legal commentary. *See* Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105 (proposing a new conflicts of law rule for multistate products liability claims); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129 (advocating the adoption of either a uniform liability law that would remove conflicts of law problems from mass torts or a uniform conflicts of law rule); Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1987) (favoring a congressionally adopted uniform conflicts of law rule); Vairo, *supra* note 164, at 167 (advocating the application of federal common law to avoid conflicts of law problems in mass tort cases).

their own,[267] to date no court has succeeded in adequately responding to this problem. The *Manville* class action is another example of how conflicts of law issues prevent courts and mass tort litigants from reaping the full benefits that the use of limited fund class actions should provide.[268]

The simple and most effective solution to the conflicts problem is for courts to create a federal common law for asbestos and other mass tort cases.[269] Federal common law is the easiest answer to the conflicts dilemma because it requires no legislative action to implement.[270] Given the historical reluctance of Congress to act in this field,[271] the courts' ability to accomplish this on their own is a significant advantage. Furthermore, the creation of a governing federal common law would do away entirely with the conflicts of law problems because it would enable courts to fashion new uniform substantive rules on a national basis.

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[267] *See In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984) (creating and applying a "national consensus" law in the Agent Orange mass tort case); *see also* Aaron D. Twerski, *With Liberty and Justice For All: An Essay on Agent Orange and Choice of Law*, 52 BROOK. L. REV. 341 (1986) (examining why Judge Weinstein was forced to fashion a national consensus law in the Agent Orange action).

[268] The conflicts of law problems in *Manville* arose in an unusual way. Rather than the court addressing this issue before resolving the dispute between the parties, the court addressed the conflicts of law issue before the settlement of the trust. In *Manville* the parties adopted a settlement that included uniform rules; unfortunately, these rules conflicted with many of the states' substantive laws. The court was eventually forced to undergo a conflicts of law analysis to determine whether the inclusion of these uniform rules was permissible. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. at 869-904.

[269] *See* Twerski, *supra* note 267, at 366 ("In short the only way to resolve the conflicts problem in [the Agent Orange] case was to create a federal common law."); Vairo, *supra* note 164, at 201 ("Federal courts must be allowed to consider whether to develop and apply federal common law to [mass tort] issues."); Mullenix, *supra* note 5, at 1077 ("To better accomplish mass-tort class action litigation, mass torts should be adjudicated on the basis of federal common law.").

[270] Many of the solutions to mass tort conflicts of law problems proposed in the past, *see supra* note 266, can only be accomplished if some form of federal legislation is enacted. However, given the present political climate, the chances of Congress addressing the asbestos crisis seems unlikely. Of course there is always the chance that the situation will become so desperate that Congress will be forced to change its attitude. The problem with this thinking, however, is twofold. First, Congress may continue to ignore the problem indefinitely. Second, something must be done now. The legal profession no longer has the luxury of proposing ideal, hypothetical solutions and waiting to see if they will be adopted. Unless serious and wide-ranging steps are taken immediately to address the asbestos problem, the inequities and uncertainties that have plagued the current system will only increase as more and more asbestos cases flood the courts.

[271] *See supra* note 10 and accompanying text.

Thus it would, in effect, remove one of the greatest impediments to using limited fund class actions in the asbestos context. It must, however, be conceded that the creation of federal common law in the mass tort context is not as simple as it sounds. For courts actually to accomplish this, they must somehow harmonize the use of federal common law in the mass tort context with the dictates of the *Erie* doctrine.[272]

a. *Application of* Erie *to Asbestos Litigation*

The *Erie* doctrine stands for the proposition that state substantive laws must be applied in diversity cases in the absence of some type of controlling federal law.[273] Since there is no current federal mass tort law, *Erie* mandates that federal courts apply the substantive laws of the state in asbestos class actions. The difficulty with this directive, however, lies in determining which state law governs the case. Moreover, since mass torts typically involve injuries to victims in all fifty states and the laws of the states vary on key issues in the litigation, the court is forced to become embroiled in the conflicts of law dilemma. A close analysis of *Erie*, however, reveals that strict application of state law to diversity-based asbestos cases actually thwarts the underlying aims of the *Erie* doctrine.

The primary reasons identified by Justice Brandeis for his decision in *Erie* were to promote uniformity of laws, to prevent forum shopping by plaintiffs and to achieve fundamental fairness.[274] The application of this doctrine to mass asbestos cases, however, results in the very ills that Justice Brandeis sought to avoid in *Erie*. First, the strict application of state substantive law certainly does not lead to uniform application of laws in the asbestos context.[275] Under the current approach similarly situ-

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[272] The key cases that compose the *Erie* Doctrine are Erie R.R. v. Tompkins, 304 U.S. 64 (1938), Guaranty Trust Co. v. York, 326 U.S. 99 (1945), Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) and Hanna v. Plumer, 380 U.S. 460 (1965). *See* Vairo, *supra* note 164, at 172 n.17.

[273] *Id.*

[274] Vairo, *supra* note 164, at 174 (identifying the underlying policies of *Erie* as "avoidance of private party forum shopping, and the achievement of fundamental fairness"); Mullenix, *supra* note 5, at 1076 n.197 ("The Supreme Court has characterized the twin aims of the *Erie* rule as 'discouragement of forum-shopping and avoidance of unequal administration of the laws.' ") (citing Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[275] A clear example of this lack of uniformity can be seen in *Manville*. Since the court could not successfully choose a single law to govern the case, the applicability of

ated plaintiffs in different states are subject to different rules even though their claims result from the same harm.[276] Moreover, defendants are subject to varying rules regarding potential defenses and theories of liability for the same action depending upon which state the lawsuit is brought in.[277]

Second, applying state law permits plaintiffs to engage in wholesale state-to-state forum shopping.[278] Under current law there must be complete diversity between parties in litigation.[279] The problem is that notions of personal jurisdiction have greatly expanded in the last fifty years fueled, in part, by the popularity of state long-arm statutes.[280] Since mass tort defendants can be sued in a number of states, plaintiffs will frequently be able to choose the state most favorable to their cause of action.[281] More-

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the uniform rules in section H of the Settlement will be decided by the federal and state courts handling the cases. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 889 (E. & S.D.N.Y. 1991). But allowing courts to apply different state laws will cause different results among similarly situated litigants. Thus state A that utilizes a *pro rata* set-off rule and permits the introduction of *Manville* evidence will be able to circumvent the uniform rules and evidence bar in section H of the Settlement for litigants from state A. In contrast state B that uses the *pro tanto* method of calculating set-offs and allows the exclusion of *Manville* evidence will have to adhere to section H's provisions to state B's litigants' own detriment or benefit.

[276] This hypothetical, of course, assumes that the states' substantive laws conflict with one another.

[277] The uncertainty surrounding which state's law governs the case increases the complexity of the litigation and inhibits settlement because the parties cannot accurately predict the value of potential claims. Note, *Mass Accident Class Actions*, 60 CAL. L. REV. 1615, 1622 (1972).

[278] *See* Vairo, *supra* note 164, at 179-80.

[279] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (interpreting diversity jurisdiction as requiring complete diversity between all plaintiffs and all defendants). In class actions there must be complete diversity only between the defendant and the named class representative. Snyder v. Harris, 394 U.S. 332 (1969).

[280] *See* Vairo, *supra* note 164, at 179 n.60 ("The number of possible forums in which a defendant will be amenable to suit has expanded since the Supreme Court announced the 'minimum contacts' test . . . . This approach has led to the development of long-arm statutes greatly expanding the reach of state court jurisdiction.").

[281] *Id.* at 179 ("Because plaintiffs can choose a federal court by structuring the case to insure complete diversity, *Erie* permits litigants to engage in state-to-state forum shopping."). Admittedly, this state-to-state or horizontal forum shopping is not the type of forum shopping that the *Erie* doctrine seeks to prevent. *Erie* addresses the problem of vertical forum shopping, that is, the choice given a litigant when federal courts enforce one type of substantive rule and state courts enforce another, even though both courts are located in the same state. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies Erie R.R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."). While

over, since federal courts must apply the state substantive law, plaintiffs can pursue their case in either the federal or state system depending upon which one is procedurally favorable.[282] Finally, strict application of the *Erie* doctrine does not serve to achieve fundamental fairness in either the asbestos or mass tort context; if anything, *Erie* only serves to delay and hinder it.[283] Since the underlying justifications for *Erie* are actually thwarted by its application in the mass tort context, *Erie* should not operate as a limitation on federal courts in asbestos litigation.

b. *Bases for Creation of Federal Common Law*

Even if one accepts continued application of the *Erie* doctrine to mass torts, there are other arguments to support the creation of a federal common law in asbestos cases.[284] Each state

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allowing federal courts to create and apply their own mass tort law would, in effect, create vertical forum shopping problems, this concern can be practically eliminated. If federal common law is applied to mass torts, defendants would be able to remove most state actions to the federal courts under 28 U.S.C. section 1441(b). It provides:

> Any civil action of which the district court shall have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (1948). With the creation of a federal common law of mass torts most defendants would qualify for removal, unless the defendant was a resident of the state where the suit was brought. Not allowing a resident defendant to remove the case to federal court, however, should not result in any undue unfairness because the defendant would already be aware that it was subject to that state's laws. Moreover, the fact that removal is impossible in some cases should not deprive the majority of litigants from enjoying the benefits of a federal rule. *See* Vairo, *supra* note 164, at 180 n.63 ("Other litigants should not be denied the opportunity to argue for a federal rule simply because removal is sometimes impossible.").

[282] When applied to multi-tort litigation, the *Erie* doctrine's advantage of promoting uniformity in the administration of the law of a particular state may be illusory because it may at the same time contribute to state-to-state forum shopping, which leads to a lack of uniformity. Indeed, federal litigants may thwart whatever interest State A may have had in applying its law by suing in State B that would choose to apply either its own law, or the law of yet another state .... It is not the choice of a federal forum, but rather the choice of a court in State B that creates the equal administration problem.

Vairo, *supra* note 164, at 179-80.

[283] Mullenix, *supra* note 5, at 1076-77 ("The *Erie* doctrine has repeatedly proven to be a major impediment to the fair adjudication of mass-tort claims, a problem that has captured the attention of federal courts enmeshed in *Erie* considerations.").

[284] Generally instances in which the imposition of federal common law is justifiable

involved in asbestos litigation has an interest in promoting the full recovery of its citizens since any shortfall may force the state to take steps to care for the injured parties.[285] In asbestos cases, however, the parties and the states are competing for a finite resource, namely the limited funds available from asbestos defendants. State conflicts over limited resources have long been recognized as a sufficient predicate for the imposition of federal common law.[286] While these cases dealt with the partitioning of water rights among several states, the underlying rationale of using federal common law when state law will not resolve the conflict is just as valid in the asbestos context.[287]

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are "few and restricted." Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

[285] Jackson v. Johns-Manville, 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, J., dissenting).

[286] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (reasoning that the apportionment of a finite resource between states is a matter of federal common law when the state laws would conflict with one another); Kansas v. Colorado, 206 U.S. 46 (1906) (holding that conflicting state interests over water rights were appropriate subjects for federal common law since the conflicts could not be resolved by resort to state law).

[287] Jackson v. Johns-Manville Sales Corporation, 750 F.2d at 1331-32 (Clark, J., dissenting) ("The finite pool of assets available to satisfy an infinite number of claimants is an identical value to the limited water available to serve many riparian owners.").

It should be noted that the *Jackson* majority rejected the water rights analogy on the grounds that the "essential conflict [in these cases] was between states as quasi-sovereign bodies over shared resources." *Id.* at 1324. In contrast, the majority held asbestos cases did not involve the rights and duties of states as discrete political entities. *Id.* In addition, the court held that asbestos cases were different because the conflict for the finite resource was not merely between plaintiffs in different states, but also plaintiffs in the same state and past, present and future plaintiffs.

The majority's first assertion, however, is clearly incorrect. The leading case of Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938), which was decided on the same day as *Erie*, was an action to enforce the private rights of a Colorado corporation. The majority's claim that the dividing line is whether the states themselves are involved in the litigation is unsupported by precedent. Moreover, the majority misreads the argument used to support the application of federal common law to asbestos claims. The conflict is not one among private parties, but rather among the states as quasi-sovereigns, because a failure to secure compensation for some injured victims will force states to make up any shortfall.

The majority's second point is even more tenuous. Surely the court did not mean to imply that a case involving a conflict over a common body of water would be inappropriate for treatment under federal common law simply because there are multiple plaintiffs within one or more of the states. If *Hinderlider* had involved two Colorado corporations and a New Mexico official instead of a single corporation from Colorado, it is difficult to imagine the Supreme Court treating the case differently. The underlying justification for the decision involves "the equitable division of any scarce resource between citizens of different states where conflicting state interests make the use of either state law inappropriate." *Jackson*, 750 F.2d at 1331 (Clark, J., dissenting). The argument that the situa-

Federal common law has also been applied where "the interstate . . . nature of the controversy makes it inappropriate for state law to control."[288] Asbestos litigation clearly falls within this holding. Asbestos cases are not limited to any one state—they are truly a national and interstate phenomena. As of 1991 asbestos cases were pending in eighty-seven separate federal district courts.[289] Moreover, the adjudication of an asbestos case in one state will affect litigants in every other state in the nation.[290] The interstate nature of asbestos cases is especially relevant since the sources of compensation capital for asbestos injuries is finite and will probably prove insufficient to pay all present and potential claims.[291] Accordingly, the national scope and effect of asbestos cases should make them appropriate candidates for the application of federal common law under the Supreme Court's holding in *Texas Industries Inc. v. Radcliff Material Inc.*.[292]

Finally, asbestos litigation can be viewed as implicating sufficiently unique federal interests to justify the creation of a federal common law.[293] The majority in *Jackson v. Johns-*

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tion is somehow different because one state also has multiple parties within the state contesting the same right borders on the ludicrous.

[288] Texas Indust. v. Radcliffe Materials, 451 U.S. 630, 641 (1981).

[289] *See Panel Consolidates Asbestos Cases to Resolve Judicial 'Mess'*, REUTERS, July 30, 1991 ("A panel of federal judges upset by the judicial chaos spawned by a flood of litigation over the health effects of asbestos, has consolidated more than 26,000 asbestos-related cases in a single courtroom . . . . The cases are now pending in 87 district courts stretching from Maine, where 39 cases are affected, to Hawaii, where 105 cases were ordered shifted."). No estimates were available for state courts although given the fact that over two-thirds of asbestos cases are filed in the state judicial system, it is safe to assume that cases are currently pending in all fifty states. *See supra* note 215.

[290] *See* Mullenix, *supra* note 5, at 1077 ("Jurists and commentators now recognize that mass-tort lawsuits are nationwide in scope and effect.").

> The majority labels this a "Mississippi diversity case." While this is literally accurate, it is misleading. *Jackson* is a seminal case that will control the rights of untold thousands of litigants in this court . . . . The number of claims is already legion and increasing at a geometric rate. Compensation for these actions, most of which are founded on the concept of liability without fault, must be paid by a finite and indeed limited group of business entities and insurers. These facts prevent the consideration of James Leroy Jackson's case in isolation.

Jackson, 750 F.2d at 1329 (Clark, C.J., dissenting).

[291] *See supra* note 47 and accompanying text.

[292] 451 U.S. 630, 641 (1981) (recognizing that the interstate nature of a controversy may provide a sufficient basis for applying federal common law).

[293] Miree v. DeKalb County, 433 U.S. 25 (1977) ("[In] deciding whether rules of

Manville[294] found that the federal courts' interest in "doing justice" was too all-encompassing and abstract an interest to constitute a unique federal interest. Essentially the court was concerned that recognition of such a broad federal interest as a basis for the application of federal common law would force federal courts to create a substantive federal tort law.[295] What this concern ignores, however, is the ease with which the court could have limited its ruling to mass tort cases, such as asbestos, where federal courts were in real and imminent danger of being overwhelmed by case filings.[296] An additional argument for the

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federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.").

[294] Jackson v. Johns-Manville, 750 F.2d 1314, 1325-26 (5th Cir. 1985). The court also found that adoption of this reasoning as a basis for federal common law would "eviscerate *Erie*." *Id.* at 1326. This concern, however, is misplaced in asbestos litigation since the policies espoused by *Erie* do not support the application of state law. *See supra* notes 272-83 and accompanying text.

[295] [W]e are unable to discern any governing principle of easy application for the imposition of federal common law in the asbestos context . . . . The simple fact is that, once the need to limit plaintiffs' recoveries is used to justify the creation of federal substantive rules . . . there would be no principled means of restricting the application of federal common law to other matters, either in the context of asbestos litigation or in similar legal problems. As a consequence, federal courts would become increasingly responsible for establishing a federal tort law in a manner we think is inconsistent with the teachings of *Erie* and the logic behind our federal system.

Jackson, 750 F.2d at 1326-27.

The majority based its holding largely on the Supreme Court's decision in Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945), which rejected the argument that the equitable powers of federal courts constituted an exception to the *Erie* doctrine.

But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the state.

Id.

[296] The dissent in *Jackson* focused on the unique circumstances of asbestos litigation as setting it apart from other types of cases and warranting imposition of a federal common law.

In sum, the asbestos-related litigation presents a flood of interrelated actions which cannot properly be decided as individual actions or under the legal rules of any single state. Unless the dependent rights of all present and future claimants are considered by the only forum capable of devising a single appropriate response to basic issues that affect the economic vitality of the compensation fund, disparate awards to early claimants can destroy the courts' ability to do justice. The asbestos litigation presents one of the few and restricted instances where the formulation of federal common law is justified under the strictures

creation of a federal common law is based on the unique federal interest embodied in regulating interstate commerce and in insuring the solvency of asbestos defendants who are frequently companies of national and international stature.[297]

The second prong for the imposition of federal common law is that there must be a conflict between the federal interest and the use of state law.[298] State law clearly does conflict with the interest of federal courts in achieving justice in asbestos litigation. Defendants are subject to a variety of governing laws on substantive issues, similarly situated plaintiffs are subject to unequal recoveries and there is a real danger of some victims being left uncompensated.[299]

At the very least the question of whether state or federal law should apply to asbestos cases should be certified to the Supreme Court as the dissenters in *Jackson* suggested.[300] The Supreme Court, alone, has the power to answer authoritatively the issue of federal common law once and for all. Moreover, recent developments in connection with asbestos litigation, such as Chief Justice Rehnquist's approval of the Ad Hoc Committee's Report,[301] indicate that there is a growing awareness by Court members of the national scope of the asbestos crisis and the ur-

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defined by existing precedent.

Jackson, 750 F.2d at 1335 (Clark, C.J., dissenting).

[297] *See* Vairo, *supra* note 164, at 203 ("In the context of multi-tort cases, the commerce clause, the federal regulatory statutes, and the equal protection clause provide the basis for Congress and the federal courts to find sufficient federal interest to support the application of federal law."). Under this argument, federal statutes regulating interstate commerce provide sufficient evidence of a federal interest sufficient to impose a federal common law in the mass tort context. *Id.* at 206. Thus, whenever an interstate harm is caused by a product subject to such regulation, courts could apply federal common law. *Id.*

[298] *See* Miree v. Dekalb County, 433 U.S. 25 (1977).

[299] *See supra* notes 199-204.

[300] 750 F.2d at 1330 (Clark C.J., dissenting). Certification of questions of law to the Supreme Court is authorized by 28 U.S.C. section 1254(2) which provides:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . .
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Id.

[301] *See supra* note 8 and accompanying text.

gent need for some type of immediate remedial action.[302]

D. *Settlement of Limited Fund Class Actions*

The treatment of asbestos litigation through a mandatory class action device also raises concerns about the ability of judges to cope with such complex litigation. While the proper role of judges in handling civil litigation and the controversy that has arisen over "managerial judging" is beyond the scope of this Comment,[303] the policy considerations implicated by settlements of mass tort class actions present particular problems that must be addressed.

It is widely accepted that most civil litigations settle before trial[304] and this general trend has been mirrored in asbestos litigation.[305] Yet there is a substantial difference between the settlement of a mass tort class action and the settlement of a traditional tort case. First, mass tort cases themselves force courts to undertake different approaches to settlement. Under the traditional model, settlement is typically reached by the parties with little or no judicial involvement.[306] In mass tort class actions, however, the litigation can be much more complex, involve uncertain legal issues, require the evaluation of extensive amounts of technical information and involve multiple parties as plain-

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[302] Although Judge Weinstein's decision that federal common law was inappropriate in the *Manville* class action was understandable in light of past decisions in Jackson v. Johns-Manville, 750 F.2d 1314 (5th Cir. 1985) and *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980), the court should have attempted to apply federal common law. Even if the Second Circuit reversed Judge Weinstein on this issue, the parties would have had an opportunity to appeal to the Supreme Court and thus conclusively resolve the issue. The difficulty with this course of action for Judge Weinstein was that delay in compensating the injured parties would have been lengthened.

[303] The controversy over managerial judging has engendered a considerable amount of commentary both pro and con. In 1986 the University of Chicago sponsored a symposium on litigation management that resulted in several articles on the subject. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Francis E. McGovern, *Towards a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

[304] *See* Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

[305] *See supra* note 53.

[306] Rule 16 allows federal courts to hold, at its discretion, pretrial conferences for a variety of reasons, including facilitating the settlement of the case. *See* FED R. CIV. P. 16(a)(5) & (c)(7).

tiffs and defendants.[307] To help cope with all these management difficulties, courts frequently employ special masters,[308] court-appointed experts,[309] federal magistrates and a host of other staff personnel.[310] The court itself may also become intimately involved in the settlement negotiations.[311]

Second, Rule 23(e) requires federal courts to approve any settlement of a class action.[312] This requirement has been interpreted as compelling federal courts to review and to insure that the settlement is fair, adequate and reasonable.[313] No such review power exists in the traditional model.

Finally, the nature of the settlement and the parties reactions to it differ greatly. In a traditional tort case settlement is achieved by a consensual agreement among the parties. In the class action context, however, there are frequently members of the class who oppose the settlement and yet are still bound by it.[314] This possibility raises questions of whether it is fundamen-

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[307] *Manville* is one of the best examples of this type of case. It presents the court not only with difficult legal issues, a morass of relevant data to be digested and a multiplicity of parties, but also presents these logistical nightmares in the context of the larger national judicial crisis of asbestos litigation.

[308] *See supra* note 57.

[309] *Id.*

[310] To manage the Agent Orange case effectively, Judge Weinstein was forced to expand his own chambers' staff and to bring in a number of outside consultants and attorneys to act as special masters.

> In order to manage the case, Judge Weinstein found it necessary to create a special bureaucracy within his own chambers. In addition to hiring extra law clerks and paralegals and assigning a federal magistrate to the case, he appointed no fewer than seven special masters (four or five of them working simultaneously) to assist him—and the masters themselves sometimes turned to paid consultants for help.

Schuck, *supra* note 304, at 342.

[311] *Id.* at 351-59 (describing the extensive efforts undertaken by Judge Weinstein in the settlement of the Agent Orange litigation).

[312] *See supra* note 151.

[313] *See* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990) ("In order to protect the interests of the class members, the court must 'closely and carefully scrutinize the . . . settlement proposal to make sure that it [is] fair, adequate and reasonable . . . .'" (citing Plummer v. Chemical Bank, 668 F.2d 654, 658 (2d Cir. 1982)).

[314] This problem is even more pronounced when the case involves a mandatory class action because the parties do not have the right to opt out. Thus they cannot be considered as having waived their right to object to the settlement of the action.

In contrast, class actions under Rule 23(b)(3) allow parties to opt out of the litigation at their discretion. Some courts have interpreted a plaintiff's failure to exercise the opt out right as an implied consent to any subsequent judgment or settlement of the

tally unfair to enforce a settlement against a party who never consented to it. When these three factors are considered together, the danger of improper, non-neutral behavior by the supervising court becomes a real possibility. One legal commentator has created three labels to represent the risks imposed by active judicial involvement in the settlement of complex cases: judicial over-reaching, judicial over-commitment and procedural unfairness.[315]

"Judicial over-reaching" occurs when judges use their power over the issues in the litigation or their potential power over the attorneys in the current or subsequent cases, to coerce the parties into settlement.[316] The danger of such improper judicial be-

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action. *See* Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).

This problem was clearly evident in *Manville* where entire categories of class members adamantly opposed the settlement throughout the proceedings and at least 50% of the class members who had current claims against the Trust also opposed the settlement. *See supra* note 150 and accompanying text.

[315] *See* Schuck, *supra* note 304, at 359.

[316] [J]udges control inducements that they can manipulate in order to influence lawyers' behavior. Even if judges scrupulously avoid rewarding or punishing lawyers who do or do not cooperate in effecting settlement, the danger remains that the lawyers will interpret judicial involvement as thinly-veiled coercion or will conform their behavior to what they believe the judge is demanding rather than to the needs of their clients.

Id. at 359-60. Professor Schuck provides a fascinating example of this problem in the *Agent Orange* case where at least one attorney claimed that Judge Weinstein pressured him or, at least, gave the impression of pressuring him into settlement. *Id.* at 360.

[J]udicial zeal for settlement is a problem. Judges make many decisions after the pretrial settlement conference. The temptation to reward lawyers who cooperate and punish lawyers who do not cooperate is always present. The stronger the commitment of the judge to settlement, the greater the temptation. Even if judges do not use settlement acts as a basis for reward or punishment, lawyers will fear the possibility in the present case or in future cases.

Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 771-72 (1989).

Due to the particular nature of asbestos litigation, it should be noted that the power of coercion runs both ways. Attorneys or law firms frequently can be involved in a number of asbestos suits at one time. This gives them a measure of retaliatory power if a judge oversteps or is perceived to have overstepped his or her bounds in one of the cases. Judge Weinstein has had first-hand experience with this type of party coercion when plaintiffs' attorney in the Eagle-Pitcher asbestos litigation threatened to stall settlement negotiations in *Manville* unless an unfavorable ruling was reversed.

By all accounts the battle has now become one between Judge Weinstein and the plaintiffs' lawyers. In his moves to slash legal fees and temporarily freeze payments by asbestos defendants to lawyers and their clients, the judge has achieved something that had been considered impossible. He has unified what was a highly divided plaintiff's bar, which is now together in its enmity for him. So enraged were they last week about his rulings in one big asbestos

havior is exacerbated by the fact that settlement negotiations take place "behind closed doors in a highly-charged emotional environment" where the threat of misunderstandings between parties is much higher.[317] The second risk identified as "judicial over-commitment" concerns the neutrality of the court in approving the settlement as fair, adequate and reasonable under Rule 23(e).[318] The more time and resources that a judge contributes toward the creation of a settlement the more the judge may become committed to approving the settlement regardless of whether it meets the standards of Rule 23.[319] The final concern is "procedural unfairness"; it involves the mandates of the Due Process Clause and the nature of the settlement negotiations themselves.[320] Settlement negotiations are, due to their very nature, secretive and relatively informal functions that are "ill-suited to the conventional forms of procedural due process."[321] Thus, for example, numerous *ex parte* communications may take place between some of the attorneys and the judge or the judge's staff that might violate normal procedural safeguards.[322]

> case—the proposed class action of Eagle-Pitcher Industries—that they threatened to break off negotiations in a different case, which involves the restructuring of the ailing trust set up two years ago by the Manville Corporation .... Now, Judge Weinstein is preparing to pull back from his ruling in Eagle-Pitcher. He is expected at a hearing today to effectively rescind an order that had blocked the company from making payments on the asbestos cases.

Labaton, *supra* note 3, at D2.

[317] *See* Schuck, *supra* note 304, at 360.

[318] *Id.* at 361.

[319] In effect Professor Schuck argues that there is a danger that judges will compromise their neutrality in the settlement process because they are so intimately involved in the creation and negotiation of settlement itself. *Id.* Schuck also identifies another possible factor contributing to the loss of judicial neutrality in approval of settlements; namely, the fact that the judge may have "staked his reputation and authority on his ability to craft a settlement that would terminate the dispute." *Id.* at 362. *See also* Tornquist, *supra* note 316, at 760-61 ("A judge who helps fashion a settlement is not in a good position to evaluate the fairness of that settlement. As a judge becomes more active in creating the settlement, the judge is less likely to be objective in reviewing the settlement.").

[320] Schuck, *supra* note 304, at 362-63.

[321] *Id.* at 362.

[322] *Id.* at 363 (describing the *ex parte* communications which took place between Judge Weinstein, his staff and the lawyers in the case). Canon 3A(4) of the A.B.A. Code of Judicial Conduct provides: "A judge should . . . except as authorized by the law, neither initiate nor consider ex parte or other communications concerning a pending . . . proceeding." *Id.* The purpose of this provision is to assure that all parties know what others have told the judge and to allow an opportunity for rebuttal. That policy seems applicable in settlement conferences with trial judges, especially if the judge is going to

The end result of this procedural unfairness is only to exacerbate the danger of judicial overreaching and over-commitment to settlement.[323]

Having identified the potential danger areas, the question then becomes what can be done to minimize them. Just admitting that there are drawbacks to judicial involvement in the settlement process is an important first step. By outlining the possible hazards, legal commentators will make judges more aware of their power in settlement negotiations and the potential abuses of such power.[324] Commentators, however, have also proposed specific procedural remedies to guard against the dangers of judicial impropriety.[325] One proposal is that one judge should be used for the settlement portion of the litigation and another for the trial on the merits.[326] In addition, the proposal precludes judges involved in settlement negotiations from ruling on the fairness of the settlement under Rule 23(e).[327]

While the proposals have merit, their potential drawbacks seem to outweigh any possible utility, especially in complex mass tort cases. First, these remedies would impose a serious, additional strain on scarce judicial resources.[328] Moreover, by re-

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hear the case. *See* Tornquist, *supra* note 316, at 758-59.

[323] *See* Schuck, *supra* note 304, at 362 ("The risk of procedural unfairness—the threat to procedural values such as accuracy, individual dignity, participation, openness of decision making, and the like—magnifies the risks of judicial overreaching and overcommitment."). The use of Professor Schuck's three risk categories in connection with active judicial involvement in the settlement process is not meant to imply that they are the only concerns to which such situations give rise. Other commentators have identified a number of other potential problem areas as well. *See, e.g.*, Tornquist, *supra* note 316 (identifying 11 different concerns with judicial participation in pretrial settlement). Professor Schuck's approach, however, provides a sufficiently in-depth introduction to familiarize the reader with the possible dangers of judicial involvement in settlements.

[324] *See* Schuck, *supra* note 304, at 365.

[325] *Id.* at 364-65; Tornquist, *supra* note 316, at 773-74.

[326] Schuck, *supra* note 304, at 364; Tornquist, *supra* note 316, at 773. Both professors, however, concede that this approach may not eliminate the problem since the risk of overcommitment may simply shift from the "merit" judge to the "settlement" judge. *Id.* Moreover, this approach would place even greater demands on the system for scarce judicial resources. Schuck, *supra* note 304, at 364.

[327] Schuck, *supra* note 304, at 364-65; Tornquist, *supra* note 316, at 773. Professor Schuck, however, concedes that it may be difficult to draw the distinction between judges who take an active part in the settlement process and those who are only peripherally involved. Schuck, *supra* note 304, at 364.

[328] *See supra* note 326. The difficulty caused by the drain on judicial resources should not be dismissed lightly. Given the complexity and size of the typical mass tort

moving the "settlement" judge's power over the merits of the case or the approval of the settlement, his or her capacity to induce settlement among the parties is diminished.[329] Finally, it is questionable that the separation of judges into different spheres would succeed in limiting overreaching or over-commitment because the judges would, most likely, work closely together on the case.[330] Reaction to these proposals depends, in

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litigation, barring "settlement" judges from taking part in the "merit" portion of the trial or ruling on the fairness of the settlement would entail not only familiarizing two judges with the intricacies of the litigation; it would also require the creation of two separate bureaucracies because each judge would need additional staff and consultants to provide support in handling his or her aspect of the case. *See* Schuck, *supra* note 304, at 342-43 (describing the host of assistants, staff and consultants needed by Judge Weinstein to adequately deal with the complexity of the Agent Orange case).

Separate staff would be required because of the real, albeit subtle, influence of court personnel on judicial decisions. Thus, if there is a shared staff and part of their job is to facilitate settlement, they will be able to influence the merit or approval judge's decisions. Essentially, with a common staff, one runs the risk of replacing judicial overcommitment to settlement with staff overcommitment.

[329] As Professor Schuck pointed out, a judge's power to make preliminary rulings on the issues and to indicate or signal how he or she would rule on other relevant questions can play a large role in inducing the parties to settle the litigation. *See* Schuck, *supra* note 304, at 351-52. The motivation behind depriving a judge involved in the settlement process of the power to rule on substantive issues appears to be an attempt to restrict instances of judicial overreaching. *Id.* at 359-60.

While this goal is laudable, it is difficult to see how a "settlement" judge would differ in any significant respects from a special master appointed to facilitate settlement among the parties. In *Agent Orange* Judge Weinstein employed special masters to draft and negotiate settlement plans. *Id.* at 344. Similar special masters also took part in the negotiation process in *Manville*. *See In re* Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 849 (E. & S.D.N.Y. 1991) ("The courts were fortunate to have the skilled services of Leon Silverman, advisor to the bankruptcy court [and the limited fund special master] and his partner Matthew Gluck, who provided extraordinary assistance to the parties during settlement negotiations."). By depriving judges of a good deal of their power over the substantive issues in the case, their status as negotiators is effectively reduced to that of just another special master.

It must be conceded, however, that "settlement" judges do have one coercive power that special masters lack; they can still threaten to retaliate against uncooperative attorneys in other cases in which the attorneys might appear before the judge.

> The essential, unvarnished fact is this: The lawyers know —and the judge knows the lawyers know—that the judge is in position to make many decisions of vital concern to them and their clients in the future, both in this case and in subsequent cases in which they will appear before that judge.

Schuck, *supra* note 304, at 358.

Thus the use of separate "settlement" judges goes both too far and, at the same time, does not go far enough. The judges are deprived, to a large extent, of their power to induce settlement and yet retain means of applying significant amounts of coercion.

[330] Although neither Professor Schuck nor Professor Tornquist address the issue, there remains the possibility that settlement and merit judges would work so closely with

large part, on the attitude one takes towards active judges on the whole and whether they really contribute to the settlement process. It is significant, however, that most attorneys believe that active judicial involvement in settlement negotiations is both effective and desirable.[331] Since attorneys and their clients are the ones most at risk from judicial misconduct in the settlement process, the fact that they favor such involvement suggests that it would be best to follow an old maxim on the issue of procedural reform—"if it ain't broke, don't fix it." Nevertheless, because the danger is real, judges and other members of the legal profession should be aware of the possibility of judicial impropriety and, if it becomes a serious problem, should not hesitate to take corrective action.[332]

CONCLUSION

Essentially this Comment proposes two steps to help alleviate the asbestos crisis. The first is to make wider use of mandatory class actions under Rule 23(b)(1)(B). The second step, which is largely an effort to facilitate the use of such class actions, contemplates the creation of a federal common law for mass torts. It must be conceded that these "reforms" are anything but simple. The widespread use of class actions goes directly against the traditional belief in our society that each per-

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one another that they would give attorneys the impression that failure to cooperate with one would result in retaliation by the other. Moreover, if the judges did work closely with one another, which is only to be expected in complex cases, they may, in fact, influence one another in their rulings. Thus if the settlement judge was having difficulty with a particular party, he or she may discuss the problem with the merit judge, if only informally, and by doing so subtly influence the other judge's perception of that party. As a result, the merit judge may give less leeway or "retaliate" against that party in later stages of the trial.

[331] Eighty-five percent of 1886 lawyers responding to an ABA questionnaire agreed that "involvement by federal judges in settlement discussions [is] likely to significantly improve the prospects for achieving settlement." Nearly three of every four lawyers polled in the survey endorsed the view that a settlement conference hosted by a judge should be mandatory.

Tornquist, *supra* note 316, at 768-69.

[332] Professor Schuck admirably summarized this approach:

> More important, we must seek to strengthen the normative and institutional safeguards upon which any judicial system must principally rely: the self-consciousness of judges, the vigilance and assertiveness of advocates, the probing suspicion of journalists, and the fastidious carping of scholars.

Schuck, *supra* note 304, at 365.

son deserves his or her day in court. The creation of a federal common law of torts, no matter how limited, goes directly against the teachings of *Erie* and our federalist system. Why then should we take such drastic actions? The most obvious response is because the current system is just not working and something must be done. The question then becomes whether these two steps are the appropriate response.

There should be no illusions surrounding the use of mandatory class actions in the asbestos and mass tort context. By expanding the use of class actions courts will deprive litigants of much control over their individual cases. The litigation will become more complex; it will take longer to resolve than individual cases; and it will require active judicial involvement in all aspects of the case.

Despite this, however, it is clear that the benefits of using mandatory class actions outweigh the drawbacks. Class actions will speed the resolution of mass tort litigations and thus relieve a great deal of the pressure on the state and federal court systems. Nor are the justifications for the expanded use of class actions limited to utility and convenience. By more efficiently using scarce judicial resources by aggregating cases for trial, mandatory class actions will limit the parties' transaction costs that will, in turn, preserve a larger amount of capital to compensate victims of asbestos. Moreover, class actions enable the parties to reach comprehensive, global settlements in a single litigation instead of endlessly repeating essentially the same case over and over. Finally, given the fact that the capital available to compensate asbestos victims is so limited, class actions represent one of the few ways to ensure that these funds are equitably distributed among deserving claimants. All of these factors mean that class actions allow courts to achieve justice more quickly, more comprehensively and more definitely.

The problem, however, is that the first step of making wider use of class actions in the asbestos and mass tort context is practically impossible unless the second step—establishing a federal common law of mass torts—is also taken. *Manville* is a prime example of the difficulty of using class actions under current law. As it now stands there is no single uniform law that courts can apply to resolve disputes which arise in litigation even when those disputes arise as part of a settlement agreement, as in *Manville*. Current law is a crazy patchwork of state standards

where one rule applies to some litigants and different rules to others. Courts just cannot effectively use class actions without a single uniform standard that will apply to all parties in the case, regardless of what state their claim arose in or where the party is domiciled. Moreover, there are only a limited number of ways that a single governing law can be established. The simplest answer to the "applicable law" dilemma appears to be some form of national legislation. It is clear, however, that such action is so highly improbable at the current time as to be all but dismissed as a viable possibility. The reality of the situation is that federal and state courts are facing a crisis and, apparently, only the courts have both the ability and the resolve to deal adequately with it.

To achieve some sort of solution to the asbestos epidemic, courts should simply create a federal common law of mass torts. That course of action represents the most effective answer to the applicable law dilemma. Unfortunately, it is not simply a matter of changing the way courts approach these cases. To accomplish this vital second step, federal courts will have to deviate from the long-standing policy of *Erie*, which requires them to avoid creating a federal common law of torts. It should be recognized, however, that a deviation is justified by the unique circumstances surrounding asbestos litigation. The traditional arguments that militate against the creation of a federal common law of torts simply do not apply to the mass tort context. Forum shopping by plaintiffs is already widespread in the existing system, uniformity of applicable law is impossible in all but the smallest cases and justice is, at best, delayed and, more frequently, circumvented altogether. It is obvious to all but the most ardent traditionalists that *Erie* and the current system do not work in the asbestos litigation context. Moreover, the creation of a federal mass tort law will do just what *Erie* seeks to do in the traditional tort case; it will discourage forum shopping, promote the uniform application of the laws and effectuate justice for victims.

Critics of this approach raise the concern that by allowing the creation of a federal mass tort law, courts will find themselves on a slippery slope, leading inevitably to the creation of a federal law for all tort litigation. This concern, while legitimate, ignores the unique characteristics of mass tort litigation. These cases are national in scope and nature. They involve enormous

numbers of parties with different and often conflicting rights. A simple one-on-one tort case is an entirely different creature. Certainly there is no danger in confusing a two party tort lawsuit between motorists in New York City with mass tort litigation of *Manville*'s magnitude. A federal law of torts could easily be limited to mass tort situations, such as the one involving Manville.

Finally, the *Erie* prohibition against the creation of a federal common law of torts was first announced over fifty years ago. It may have been the correct course for courts to follow at that time, but our society and economy have undergone enormous transformations since 1938. Today we live in a society where most goods are mass produced and mass marketed. It is inevitable that some of these goods will be defective or harmful and that large numbers of people will be injured as a result. Asbestos may be the most urgent example right now, but there will be others in the future whether they are a defective drug like DES[333] or a harmful product like Agent Orange.[334] Courts must find a way to deal with this kind of litigation in an equitable manner and the class action device represents one of the most potent answers in the federal arsenal. To make wider use of class actions, though, courts must also change the law. This is not a step to be taken lightly. The law, however, is not a static entity; it too must change to reflect the realities that confront our society. The reality of asbestos litigation is that thousands of victims remain uncompensated and thousands more are in danger of losing any chance at being compensated at all. The reality is that the traditional tort system simply does not work and Congress seems to lack the will or resolve to initiate the necessary legislation. The reality is that something must be done and courts, as the final forum for thousands of asbestos victims, should not hesitate to step into the breach and fashion their own reforms.

Steven L. Schultz

AUTHOR'S NOTE

On December 4, 1992 the Second Circuit, in a lengthy opinion authored by Judge Jon O. Newman, vacated and remanded

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[333] Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979).

[334] *In re* "Agent Orange" Product Liability Litig., 635 F.2d 987 (2d Cir. 1980).

the trial courts' decision in *Manville*.[335] Although the parties had raised no less than eleven separate objections to the use of the limited fund class action and the Settlement itself on appeal,[336] the Second Circuit based its vacatur on only two grounds. First, the court found that the inclusion of all the parties in a single comprehensive class violated the dictates of Rule 23 (a)(3) and (4).[337] In addition, the court held that the Settle-

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[335] *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781 (2d Cir. Dec. 4, 1992). Judge Newman's 73-page majority decision was joined by Judge Winter. Judge Feinberg filed a separate 18 page opinion, concurring in part and dissenting in part. *Id.* at *32.

Throughout the Second Circuit's decision, the district court and bankruptcy court are collectively referred to as "the Trial Courts." *See id.* at *5. To avoid any unnecessary confusion, those terms have been adopted in this postscript.

[336] The most compelling objections to Judge Weinstein's approval of the Settlement came from the codefendants who had raised two issues on appeal. First, they claimed that the class definition had improperly grouped them together with the health claimants and in so doing, disregarded the fundamental adversity of interests between the two groups. *Id.* at *10. In addition, the codefendants attacked section H of the Settlement as unlawfully impairing their state law rights and being fatally imprecise. *Id.*

The health claimants, those parties with personal injury or wrongful death claims, raised nine separate grounds on appeal including claims that:

> (1) the Manville court had acted beyond its judicial authority in developing and engineering the adoption of a legislative solution to the financial difficulties of the Trust.
>
> (2) the court exceeded its subject matter jurisdiction.
>
> (3) the court lacked personal jurisdiction over absent asbestos disease plaintiffs.
>
> (4) the Settlement violated the Bankruptcy Code by modifying a confirmed and substantially consummated plan of Reorganization in violation of 11 U.S.C. section 1127(b).
>
> (5) even if the court had authority to modify the reorganization plan, the Settlement violated specific provisions of the code, notably the requirement that members of each class receive the same treatment under 11 U.S.C. section 1123(a)(4).
>
> (6) the Settlement denied health claimants their right to procedural Due Process and violated the requirements of Fed. R. Civ. P. 23 because of defects in class notice, lack of an adequate opportunity to be heard, lack of appropriate subclasses and lack of an opportunity to opt out of the class. (7) the Settlement was unfair.
>
> (8) the orders respecting state court actions violated the Anti-injunction Act, 28 U.S.C. section 2283, and exceeded the court's authority under the All-Writs Act, 28 U.S.C. section 1651.
>
> (9) the court had erred in denying the fee application of the firm of Henderson and Goldberg.

Id. at *10-11.

[337] Rule 23 (a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3); *see supra* notes 129-33 and accompanying text.

ment of the class action had improperly modified a confirmed and substantially consummated plan of reorganization in violation of section 1127(b) of the Bankruptcy Code.[338] At the same time the Second Circuit declined to decide a number of relevant issues, including the validity of the uniform provisions contained in section H of the Settlement.[339] Moreover, the failure of the Second Circuit to address this central issue was compounded by its more generalized failure to provide any real substantive guidance to the district court on remand.[340] In the final analysis, the

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Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see supra* notes 134-38 and accompanying text.

[338] *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *30. While the interaction between bankruptcy law and the use of class actions was of paramount importance in *Manville*, this article focuses exclusively on the implications of the Second Circuit's decision on the use of class actions in asbestos and mass tort litigation.

[339] *Id.* at *20 ("Since we hold that the inclusion of both groups [codefendants and health claim plaintiffs] within a single class violates the requirements of Rule 23, we need not consider the related issue on the merits of whether the provisions of Section H improperly impair[ed] state law rights.").

Other issues left open by the Second Circuit on remand included whether the district court could lawfully alter the rights of beneficiaries under New York trust law, *id.* at *25, and whether the division of health claimants into differently treated subgroups complied with section 1123(a)(4) of the Bankruptcy Code. *Id.* at *30.

[340] Responding to that lack of direction, Judge Weinstein issued a Memorandum and Order on December 7, 1992 advising the parties to consider a number of questions that the Second Circuit's opinion had raised, but failed to answer. *See In re* Joint Eastern and Southern Dist. Asbestos Litig., No. CV-90-3973 (order advising parties about the Second Circuit decision). The list of questions spanned some five pages of text. *Id.* at 5-9.

On the isolated issue of whether a Rule 23(b)(1)(B) class action was an appropriate mechanism for handling the Manville case, Judge Weinstein directed the parties to consider the following issues:

> (1) Is Rule 23(b)(1)(B) a viable option for settlement?
>
> (2) How many and what subclasses of health claimants should be certified in a non-opt out class action?
>
> (3) Since all attorneys represent many claimants in all proposed subclasses, is it possible for any knowledgeable attorney to represent a subclass without unacceptable conflicts of interest?
>
> (4) [If there is an] inherent conflict because some less seriously injured persons will ultimately suffer from serious cancers in view of the latency problem and some will prefer to leave more money in the Trust for more serious diseases rather than to collect now for current less serious impairments.
>
> (5) [Whether] the ethical problems posed by the opinion preclude use of 23(b)(1)(B) even though the opinion "skeptically". . . and reluctantly agrees . . . that a 23(b)(1)(B) class action is appropriate in the Second Circuit?
>
> (6) Should there be a separate subclass or subclasses for future claimants?
>
> (7) Who shall represent the future claims subclass or subclasses?

Second Circuit's opinion ultimately raises more questions than it answers.

Despite the vacatur of the *Manville* Settlement, the court's decision did represent an important initial step in asbestos litigation. For the first time, the Second Circuit explicitly approved the use of mandatory class actions in the asbestos context,[341] and by doing so, opened the way for federal judges to make wider use of such mechanisms to deal with the asbestos crisis. Thus, under the appellate court's decision, judges can use "limited fund" class actions to speed the resolution of asbestos cases, control spiraling transaction costs and insure a more equitable distribution of limited compensation capital.[342] Moreover, the potentially positive effects of the court's decision are not merely limited to the asbestos context; all types of mass tort litigation may qualify for and benefit from similar class action treatment.

Unfortunately, the Second Circuit's determination that the original *Manville* class violated the typicality and adequacy of representation requirements of Rule 23(a) poses a substantial

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(8) What other classes are required in addition to the codefendant manufacturers. . .and others such as the MacArthur Company. . . a distributor?
(9) Who shall represent them?
(10) What is the validity of Section H provisions covering these classes or subclasses as to which the opinion refrained from "intimating any views with respect to substantive validity?"
(11) Shall a special master or advisor be appointed to assist the parties in resolving differences?
(12) How can further delays on appeal and in the trial court be avoided?
(13) How can the work of the Trust in settling cases under the Settlement be utilized without waste of more than a year's effort by the Trust and claimants?

Id. at 5-7.

[341] While the Second Circuit ultimately approved the use of a limited fund class action in *Manville*, its approval could only be characterized as reluctant. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *16 (describing the court's hesitancy in permitting the use of a mandatory non-opt out class in the *Manville* proceedings).

Surprisingly, the appellate court appeared to be primarily concerned with the possibility that courts would use the settlement of asbestos class actions to circumvent the protections afforded by bankruptcy law. *Id.* at *24. Thus, the court stressed that the *Manville* case did not present the classic instance of a limited fund, because the "AH" Trust was an insolvent entity to which bankruptcy law would normally apply. *Id.* at *14. Despite this distinction, however, Judge Newman felt that the court was bound by Second Circuit precedent which allowed the use of mandatory class actions in an insolvency context. *Id.* at *18; *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992).

[342] For a more general discussion of the potential benefits of using mandatory class actions in the asbestos context, see *supra* notes 233-48 and accompanying text.

impediment to the effective use of the class action device. By mandating that different subclasses be established for codefendants,[343] third party defendants[344] and four separate groups of health claimants,[345] the court may have fragmented the

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[343] In determining that a separate subclass was required for the codefendants, the appellate court found that the codefendants and health claim plaintiffs had a number of adverse interests which prevented the class representatives from meeting the typicality and adequate representation requirements under Rule 23(a). *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *19; *see supra* notes 128-40 and accompanying text. Those adverse interest included a long history of antagonism between the two groups in asbestos litigation, *see supra* note 130, as well as an "overwhelming" conflict in connection with the uniform provisions of section H of the Settlement. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *19.

[344] The court also required that a separate subclass be established for at least one third party defendant, the MacArthur Company, a former distributor of Manville asbestos products. *Id.* at *21. The court found that the codefendants had asserted the position in various lawsuits that the MacArthur Company, as opposed to the codefendants, was responsible for Manville's share of liability to asbestos victims. *Id.* Accordingly, the court held that there was an adversity of interests that prevented any of the codefendant's subclass counsel from adequately representing the former distributor on remand. *Id.* Thus, a separate subclass for the MacArthur Company itself was required.

The appellate court, however, did not address whether similar subclasses would be required in connection with other former distributors or users of Manville products.

[345] The court found that no less than four separate subclasses were required among the health claimants to insure adequate representation in a class action context.

First, the court identified two distinct groups under the payment procedure of the original reorganization plan. According to the court, those plaintiffs who were accorded a high priority under the Trust's 1986 first-in, first-out ("FIFO") distribution plan had directly conflicting interests with those plaintiffs who had later filing dates and were thus exposed to a substantial risk of non-payment. *Id.* at *22. In short, the court found that the first group would prefer to preserve the FIFO order of payments, while latter filing plaintiffs would prefer the new distribution process contained in the class action settlement. The court held that this adversity of interest was sufficient to warrant the creation of distinct subclasses. *Id.* at *21 ("Plainly, the members of each of these subgroups have sharply conflicting interests with respect to the maintenance of the order-of-filing priority."). *Id.*

In addition, the court found that the Settlement's new distribution process created identifiable subgroups that also required the further division of the subclasses. *Id.* Under the Settlement, health claimants were divided into two groups; those with serious or fatal diseases were placed in Level One, while claimants with less critical illnesses were placed in Level Two. *Id.* at *7; *see supra* note 88. Generally, Level One claimants were to be given priority in the distribution of the Trust's limited assets. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 1992 WL 356781, at *7. Thus, under the Settlement, Level One claimants would begin receiving compensation two years before the less seriously injured claimants in Level Two. The court found that this two year delay, and the attendant risk that level two claimants may receive a reduced amount of the value of their claims, provided sufficiently conflicting interests to justify treating each group as a separate subclass. *Id.* at *21.

Thus, the court required that the trial courts establish no fewer than four separate subclasses among the health claimants on remand.

Manville class to such an extent that a single, comprehensive solution to the litigation is no longer possible.[346] At the least, the practical difficulties raised by the Second Circuit's insistence on a minimum of six separate subclasses are daunting and may eventually prove only to make the resolution of the *Manville* case both more difficult and more expensive.[347] While it is obvious that some groups within the *Manville* class had sufficiently adverse interest so as to justify the imposition of subclasses,[348] the Second Circuit failed to provide any adequate standard for the trial courts to use in making that determination on remand.[349] By imposing subclasses as a procedural prerequisite to

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> Initially the health claimants must be divided into subclasses comprising those whose priority under the original payment procedures would have entitled them to full payment and those whose later priority would have resulted in no payments at all, because of the insufficiency of the Trust's resources .... Once the health claimants have been divided into two priority-of-payment subclasses, a further sub-division of each subclass is required to reflect the Settlement's division of health claimants between Level One and Level Two.

Id. at *24. Judge Feinberg dissented from that portion of the majority opinion requiring the establishment of subclasses among the health claimants. *Id.* at *38.

[346] Indeed, it was this very fear that led the trial courts to decline using subclasses in the original class action proceeding and settlement. *See supra* note 113.

[347] Barbara Franklin, *Class Action Confusion: Remand of Manville Plan Leaves Issues Unresolved*, N.Y. L.J., Dec. 10, 1992, at 5 ("[T]he appellate court's suggestion for breaking into at least six different sub-classes the class of health claimants and co-defendant asbestos manufacturers raises practical problems for the lower court and is expected to make the ultimate solution even more costly.").

[348] Given the prejudicial effect of section H on the substantive rights of the codefendants, the appellate court's determination that a separate subclass was required for those parties is difficult to take issue with.

> The co-defendant manufacturers assert that the effect of Section H is to shift hundreds of millions of dollars of Manville asbestos liability to the co-defendants. Whether or not that adjustment is "fair" and whether or not it can be made in disregard of applicable state law, it surely cannot be made in a settlement on behalf of a single class that includes both the health claimants and the co-defendant manufacturers. The conflict is overwhelming.

In re Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *19.

[349] The Second Circuit held that "[n]o members of a significant subclass can be mandatorily bound by the consent of 'representatives' in the context of this litigation unless those representatives have undivided loyalty only to subclass members." *Id.* at *24. The difficulty with this pronouncement is defining exactly what adverse interests require the establishment of appropriate subclasses. For example, section H of the Settlement adopts the *pro tanto* method of calculating set-offs and contributions rights in all Manville-related litigation. *See supra* note 163. While some codefendants may not be prejudiced by that provision, other members of the subclass, specifically those entitled under state law to using the *pro rata* or equitable share method to calculate set-offs, certainly will be. *See supra* note 163. Thus, codefendants whose rights are not being compromised may favor the adoption of the *pro tanto* method, while other codefendants

asbestos class actions and then failing to identify adequately when such treatment is appropriate, the Second Circuit has only further impeded the full and efficient use of mandatory class actions in the mass tort context.

The Second Circuit also refused to address one of the most pressing problems presented by the *Manville* case, namely the lack of any single uniform law applicable to all the parties.[350] While the validity of section H of the Settlement had been raised on appeal, the court expressly declined to decide whether that provision unlawfully impaired the parties' state law rights by imposing uniform rules on the *Manville* class.[351] Accordingly, it is still unclear whether courts may use either a single state's law or federal common law to facilitate the use of limited fund class actions in asbestos litigation.[352] Without such a determination, courts will continue to confront extensive, and in some cases impossible, conflicts of law problems similar to those encountered by the trial courts in *Manville*.[353] Moreover, asbestos class actions will continue to present the courts with a crazy

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may contest it. Unfortunately, the Second Circuit has failed to provide any guidance as to whether such a conflict of interest would require the creation of additional subclasses among the codefendants.

[350] *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *20. By failing to do so, the Second Circuit called into question the validity of the uniform provisions contained in section H of the Manville Settlement. *See supra* notes 156-64 and accompanying text.

The appellate court could have established a single uniform law applicable to all the class members in two ways. First, the Second Circuit could have undertaken an extensive conflict of laws analysis to determine if a single state's law could lawfully be applied to all the litigants. *See supra* notes 182-86 and accompanying text. In addition, the court could have avoided this complex procedural step by simply adopting federal common law for all asbestos class actions, a course of action advocated by this Comment. *See supra* notes 269-72 and accompanying text.

Instead, the Second Circuit ignored this crucial issue and provided absolutely no guidance to the trial courts as to what law to apply on remand. Ironically, the Second Circuit did "caution" the trial courts against merely interpreting the provisions of section H of the Settlement instead of spelling them out in operative terms. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *20. Such a step, however, is impossible without first determining which law applies to the case. Thus, the Second Circuit criticized the trial courts for failing to resolve the applicable law issue, even though the appellate court had declined to take any steps to accomplish that very same goal on appeal!

[351] *Id.* at *20.

[352] *See supra* notes 264-72 and accompanying text. For a discussion of the possible bases justifying the imposition of federal common law in the asbestos context, see *supra* notes 284-302 and accompanying text.

[353] *See supra* notes 264-72 and accompanying text.

patchwork of applicable law, with class members having different substantive rights depending upon the state in which their claim originated. By not adequately addressing this crucial issue, the Second Circuit missed an excellent opportunity to clarify or perhaps even solve the applicable law dilemma in mass tort litigation.

The ultimate losers in the Second Circuit's decision were neither judges, court-appointed experts nor legal commentators; the ultimate losers in *Manville* are the parties to the litigation itself. The *Manville* proceedings continue to defy resolution. It has been ten years since the Johns-Manville Corporation filed for bankruptcy.[354] It has been over two years since the AH Trust has made any substantial payments to claimants.[355] For ten months, the parties have awaited the Second Circuit's decision.[356] Unfortunately, that opinion only foreshadows further delays as the trial courts struggle to understand and implement the Second Circuit's mandate.

It is obvious that the law must change and adapt to deal effectively with the asbestos crisis. The Second Circuit's approval of a limited fund class action in *Manville* is an important first step in accomplishing that transformation. Ultimately, however, the Second Circuit's imposition of subclasses and its failure, as well as that of the district court, to apply federal common law, ignores the judiciary's obligation to fashion an equitable solution to the asbestos crisis.

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[354] The Johns-Manville Corporation filed for bankruptcy protection on August 26, 1982. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *1.

[355] Judge Weinstein stayed all payments by the AH Trust as of July 9, 1990. *Id.* at *3. That stay was reaffirmed by Judge Weinstein following the Second Circuit's vacatur of the *Manville* Settlement. *See In re* Joint Eastern and Southern Dist. Asbestos Litig., No. 90-3973, slip op. at 3 (E.D.N.Y. Dec. 7, 1992) (on file at *Brooklyn Law Review*).

[356] The trial courts approved the Manville settlement on June 27, 1991. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 1992 WL 356781, at *6. The appeal was argued before the Second Circuit on February 4, 1992. *Id.* at 356781. The appellate court, however, did not issue its opinion until December 4, 1992, some ten months later. *Id.*