Class Actions and Mass Toxic Torts

I. Introduction

Throughout the Vietnam war, American soldiers were exposed to toxic defoliants, which are often grouped together in name as "Agent Orange."[1] Upon returning home, a significant number of veterans developed cancer and other severe disorders, leading some to link their diseases to the wartime exposure to Agent Orange. Many brought their complaints to court. By December, 1980, 3400 plaintiffs in 167 suits, filed against a variety of defendants and based on varying theories of liability and causation, were before the United States District Court for the Eastern District of New York.[2] The case presented complex questions concerning choice of law,[3] choice of defendant,[4] causation,[5] adequacy of representation,[6] and modern tort jurisprudence.[7] Despite these complications, the court, in *In re "Agent Orange" Product Liability Litigation*,[8] certified a class action,[9] stating:

> [T]he court has carefully and humbly considered the management problems presented by an action of this magnitude and complexity, and concluded that great as they are, the difficulties likely to be encountered by managing these actions as a class action are significantly outweighed by the truly overwhelming problems that would attend any other management device chosen.[10]

Use of the class action device in such a complicated case might imply that it is widely employed for adjudication of mass torts. In

1. *See generally* Whiteside, *A Reporter at Large: The Pendulum and the Toxic Cloud*, The New Yorker, July 25, 1977, at 30.
2. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).
3. Plaintiffs came from all 50 states and Australia. *Id.* at 783.
4. The complaints named numerous chemical companies with differing degrees of involvement. *Id.*
5. Individualized patterns of exposure complicated the issue whether the defoliant could ever cause the alleged injuries. *Id.*
6. Many thousands of potential claimants had refrained from bringing suit pending disposition of the class action. *Id.*
7. For example, enterprise liability theory is a possible basis for recovery. Questions of responsibility for latent effects are also raised. *Id.*
8. 506 F. Supp. 762 (E.D.N.Y. 1980).
9. *Id.* at 785.
10. *Id.* at 791.

fact, precisely the opposite is true. Though class actions have been used for mass accident[11] and pollution[12] cases, this is the exception and not the rule.[13] In fact, several prominent authorities maintain that mass torts are generally inappropriate for class action treatment. The Federal Rules Advisory Committee suggests that a class suit for personal injury claims would degenerate into separate lawsuits:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[14]

However, other commentators, including Professors Moore,[15] and

11. *See, e.g.*, Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (food poisioning aboard ship); *In re* Gabel, 350 F. Supp. 624 (C.D. Cal. 1972) (airplane crash); American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969) (massive fire).

12. *See, e.g.*, Ouellette v. International Paper Co., 86 F.R.D. 476 (D. Vt. 1980) (pollution of Lake Champlain); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980) (toxic pollution of Chesapeake Bay); Biechele v. Norfolk & W. Ry. Co., 309 F. Supp. 354 (N.D. Ohio 1969) (coal dust air pollution).

13. *See, e.g.*, McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975) (airplane crash); Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974) (exposure to workplace asbestos); Daye v. Pennsylvania, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973) (school bus crash); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970) (airplane crash).

14. FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 103 (1966). *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 469 (1960) (citations omitted):

> There are, however, serious objections to using class actions where an accident has resulted in injury to many persons. The economics of the contingent fee in tort litigation—and settlement practices of public insurers and self-insurers—today insures effective legal service for any injured person who wants a lawyer. Permitting a class action would create an unseemly rush to bring the first case and provide, through notice to all injured persons, a kind of legalized ambulance chasing. As a matter of practice, disasters usually do not result in a large number of separate trials. Cases are referred to specialist attorneys who represent a number of parties, actions are consolidated, and settlement negotiations dispose of most claims. Where insurance coverage and assets of the defendant are less than prospective recoveries, the pressure to cooperate in settlement negotiations is too great to resist. Both the plaintiff's bar and the defendant's bar in the negligence field are so closely knit that, as a practical matter, they can informally provide most of the advantages of class actions.

15. [A] mass accident seems peculiarly appropriate for class treatment. Indeed, the question of liability to all those injured in a plane or train crash is more likely to be

Wright and Miller,[16] maintain that class actions are particularly appropriate for disposing of the large number of cases arising from a single disaster.

It is difficult to distinguish between those mass tort cases which are appropriate for class action treatment and those which are not. One judge tried to describe "the paradigm situation in which such treatment would be appropriate"[17] in *Causey v. Pan American World Airways, Inc.*:[18]

> (1) [T]he class action is limited to the issue of liability; (2) the class members support the action; and (3) the choice of law problems are minimized by the accident occurring and/or substantially all plaintiffs residing within the same jurisdiction. Even under such circumstances, however, the action, to be maintainable as a class action, must meet the requirement of Rule 23(b)(3), Fed. R. Civ. P., that the "class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."[19]

While this approach tackles some of the complications which can make class actions unmanageable, it misses many others. For example, issues of causation and liability related to injuries sustained through extended exposure to toxic substances, perhaps even by various methods of exposure, may require individualized attention.[20] Multiple defendants may have independently acted alike, creating a class of similarly injured plaintiffs who cannot accurately identify which defendant is liable to which plaintiffs.[21] The personal injuries sustained may be so severe that many plaintiffs may want independent representation, making adequacy of representation a serious question.[22]

uniform than that of liability for manipulation of the price of securities; with the introduction of such large-scale public transportation facilities as the "jumbo jets," the ability to determine liability for an accident in one proceeding will be even more desirable. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.45[3], at 23-353 n.40 (2d ed. 1978).

16. "The argument for class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented." 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1783, at 117 (1972). *See also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1972) (softening his earlier stance).

17. Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 397 (E.D. Va. 1975).

18. 66 F.R.D. 392 (E.D. Va. 1975).

19. *Id.* at 397.

20. *See, e.g.*, Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974) (exposure to workplace asbestos).

21. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).

22. *See, e.g.*, Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970).

On the other hand, it is not necessary to have a simple case before class action will be permitted. For example, despite the presence of all these complications, Judge Pratt nevertheless certified the *Agent Orange* cases as a class action. In sum, only a case-by-case analysis can identify those mass toxic tort cases for which class action treatment is appropriate.

Occasionally, hostility towards class actions has been expressed by the federal bench[23] and by the bar.[24] This should not stand in the way of giving fair consideration to such actions in mass tort cases. Judge Weinstein addressed this prejudice in his talk before the Judicial Conference of the Fifth Judicial Circuit:[25]

> Most judges would agree that the class actions serve their intended function when they accomplish either of two purposes: when they prevent a multiplicity of suits or when they expedite the disposition of otherwise unredressable legally cognizable grievances. . . .
>
> It seems to me that this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce, while unwilling to grant a civil remedy against a corporation, which has benefited to the extent of many millions of dollars from collusive, illegal pricing of goods.[26]

This note examines the availability and practicality of the class action for victims of toxic torts. The dearth of case law on this subject requires that analogies be drawn from mass accident and environmental tort cases. Many of the complicating factors present in toxic tort litigation are also found in these cases, particularly the pollution cases. As will be seen, a class action based on common questions of law and fact is most likely to gain certification in toxic

23. *See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

24. *See* Weinstein, *supra* note 16 at 306.

25. Weinstein, *supra* note 16.

26. *Id.* at 300, 305.

tort cases. Unfortunately, jurisdictional requirements and a judge's subjective determination concerning the superiority of a class action as opposed to individual suits can present a significant obstacle to the use of any class action device for toxic tort litigation.

II. Prerequisites to a Federal Class Action

As a threshold matter, the court must ascertain whether plaintiffs have established the propriety of a class action under Rule 23[27] of the Federal Rules of Civil Procedure.[28] This determination must be restricted to the satisfaction or non-satisfaction of the requirements of Rule 23. Inquiry into the merits of the action, or into issues to reduce the size of the class to more manageable numbers, may be tempting but is not permitted.[29]

27. The federal class action rule is Fed. R. Civ. P. 23:

(a) Prerequisities to a Class Action. 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.

(b) Class Actions Maintainable. 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 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 litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

28. *See* Poindexter v. Tuebert, 462 F.2d 1096, 1097 (4th Cir. 1972).

29. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971).

A. *Initial Obstacles to Bringing a Class Action*

1. Notice

If class certification is to be granted, notice must be given to potential class members. "Rule 23, and possibly constitutional due process, ordinarily require that notices in class actions to absent class members whose address is ascertainable to [sic] be given by first class mail."[30] This notice requirement is not a problem for small classes or affluent representatives, but it can deter otherwise proper class actions for many small-claim, large-class cases.

After eight years of litigation, the question whether named plaintiffs must assume in advance the cost of this notice was finally resolved in 1974 in *Eisen v. Carlisle & Jacquelin.*[31] The Supreme Court determined that plaintiffs must supply funds for prepayment of notice to all potential claimants.[32] This constituted a "major disaster for advocates of maintenance of small claim federal question class actions. No longer, simply because he couldn't afford it, could a representative party of modest means maintain an otherwise suitable and desirable class action."[33]

This criticism holds equally true for toxic tort cases. For example, if the injury has a long latency period, victims of exposure may have long ago moved to other cities or states. While notice to remaining residents may be effectively and inexpensively accomplished through broadcast and print media,[34] location and notification of others may be prohibitively time-consuming and expensive. One possible solution to this problem was noted by Judge Pratt in the *Agent Orange* case: a mix of direct mail for those on Veteran's Administration mailing lists (presumably at the Agency's expense, as a service for which it was formed), news media notice and any other notice which counsel might suggest.[35] Perhaps, as news of injuries due to hazardous waste exposure percolates through soci-

30. Becker, *The Class Action Conflict: A 1976 Report,* 75 F.R.D. 167, 170 (1976) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

31. 417 U.S. 156 (1974).

32. *Id.* at 178-79.

33. Becker, *supra* note 30, at 172.

34. *See, e.g.,* Biechele v. Norfolk & W. Ry. Co., 309 F. Supp. 354, 360-61 (N.D. Ohio 1969) (court's proposal for legal notice).

35. *In re* "Agent Orange" Prod. Liab. Litig. 506 F. Supp. at 791.

ety, the media might volunteer space for such legal notices as a public service.[36]

2. Jurisdictional Requirements

Jurisdictional requirements present further obstacles to class certification. First, diversity of state citizenship must be maintained between the defendants and the representatives of the plaintiff class.[37]

Second, the amount in controversy must exceed $10,000.[38] If claims could be aggregated to meet this amount, even small claims could be adjudicated in a class action. Without a class action, many small claims might never get litigated since legal costs could rise out of proportion to any anticipated judgment or settlement, especially if the defendant is an industrial concern with large resources to meet a legal challenge. In fact, plaintiffs achieved great success in aggregation[39] until 1969, when the Supreme Court decided in *Snyder v. Harris*[40] that each named plaintiff must independently claim more than $10,000 in damages. In 1974, the Court further restricted use of class actions for small claim diversity actions when it held in *Zahn v. International Paper Co.*[41] that each member of the class must assert a claim of $10,000. Moreover, the district court in *Zahn* also rejected plaintiffs' claim that the court had ancillary jurisdiction over non-qualifying members of the class by virtue of its jurisdiction over the qualifying named members.[42]

With such stiff jurisdictional requirements, class action diversity suits are severely restricted. Although many toxic tort plaintiffs may claim far more than $10,000 in damages, those who cannot will not benefit from the class action. Further, these small claimants are

36. *Id.* Designating such donations of space or time as a charitable gift would allow the media to take a deduction for lost commercial time and encourage its cooperation. Alternatively, the Federal Communications Commission could require media to provide time and space for such notices. For further thoughts on this subject, see Weinstein, *supra* note 16, at 302.

37. 28 U.S.C. § 1332 (1976). *See* Lloyd A. Fry Roofing Co. v. Textile Workers Union of Am., 149 F. Supp. 695 (E.D. Pa. 1957); Sanders v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 120 F. Supp. 390 (W.D. Ky. 1954).

38. 28 U.S.C. § 1332(a) (1976).

39. *See* Becker, *supra* note 30, at 168.

40. 394 U.S. 332 (1969).

41. 414 U.S. 291 (1973).

42. 53 F.R.D. 430, 432 (D.C. Vt. 1971), *aff'd*, 469 F.2d 1033 (1st Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

likely to forego individual litigation, because transaction costs will consume much of their recovery. While this will certainly reduce the burden on the courts, it denies a remedy to many aggrieved parties. These victims may benefit to some extent from the effect of a favorable class action judgment, but ultimately they may be left uncompensated.

One solution to this problem lies in legislative action to reduce the amount in controversy necessary in Rule 23 actions. Short of this, some courts have grappled with the question of meeting the $10,000 jurisdictional amount by including injuries that cannot be expressed in money damages alone. This approach was extensively discussed in *Boring v. Medusa Portland Cement Co.*[43] Plaintiffs were residents of York County, Pennsylvania, who sued for damages and an injunction against Delaware and Ohio corporations which allegedly released large amounts of pollution into the atmosphere over York, Pennsylvania. Two hundred twenty-one named plaintiffs claimed from about $100 to $34,000.[44] Only three of the named plaintiffs claimed more than $10,000, and the court was convinced that other unnamed plaintiffs had failed to meet the jurisdictional amount.[45] The court acknowledged, and plaintiffs implicitly conceded, that if the case were solely an action for damages it would be compelled to dismiss all but the three qualifying plaintiffs.[46] However, the prayer for an injunction as well as damages complicated the jurisdiction question.

Plaintiffs asserted that the request for an injunction brought the case within the holdings of *Illinois v. City of Milwaukee*[47] and *Pennsylvania Railroad Co. v. City of Girard.*[48] *City of Milwaukee* was an abatement action brought by Illinois against Milwaukee and others in an attempt to halt the pollution of Lake Michigan. When considering the question of whether the plaintiff had met the requirement for more than $10,000 in controversy,[49] the Court stated

43. 63 F.R.D. 78 (M.D. Pa.), *appeal dismissed mem.*, 505 F.2d 729 (3d Cir. 1974).

44. *Id.* at 80.

45. *Id.* at 80-81.

46. *Id.* at 81.

47. 406 U.S. 91 (1972).

48. 210 F.2d 437 (6th Cir. 1954).

49. The Court based its jurisdiction on 28 U.S.C. § 1331(a) (1976) (amended 1980), concluding that the matter of pollution of interstate or navigable waters fell within the category of "federal questions." Illinois v. City of Milwaukee, 406 U.S. at 99. At the time federal question jurisdiction, like diversity jurisdiction, required an amount in controversy in excess of $10,000.

that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount."[50] *City of Girard*, which involved a request for both damages and injunctive relief, held that it is not necessary for the $10,000 amount in controversy requirement to be met solely in the request for damages. "Jursidiction . . . depends 'not alone upon the pecuniary damage . . . but also upon the value of the rights which plaintiff seeks to have protected' [by injunction]."[51]

The *Boring* plaintiffs argued that under *City of Girard* it is proper to use the value of the rights to be protected by the injunction as a portion of the measure of the amount in controversy.[52] As *City of Milwaukee* had established the value of clean water to be in excess of $10,000, the plaintiffs concluded that their prayer for relief had met the necessary requirement for an amount in controversy. The court, however, did not agree:

> This court does not find the language in City of Milwaukee entirely persuasive in establishing the jurisdictional amount in the instant case. City of Milwaukee was exclusively an injunction action involving a single body of polluted water, a single plaintiff and but one defendant. The Court in City of Milwaukee did no more than value Lake Michigan in excess of $10,000. It did not conclude that everyone using the lake had a claim valued in excess of the jurisdictional amount.[53]

Biechele v. Norfolk & Western Railway Co.[54] is another pollution case in which a court grappled with the question of minimum damage claims. Plaintiffs in that case sought to enjoin coal storage that caused excessive coal dust air pollution. Damage claims accompanied the request for equitable relief. The rule of *Snyder v. Harris*, that each named plaintiff must claim more than $10,000, presented an obstacle. However, accepting the *City of Girard* rationale, the court stated that "the right of each member of the class to live in an environment free from excessive coal dust and conversely, the right of defendant to operate its coal loading facility are both in excess of

50. Illinois v. City of Milwaukee, 406 U.S. at 98.

51. *City of Girard*, 210 F.2d at 439 (quoting Wisconsin Elec. Co. v. Dumore Co., 35 F.2d 555, 556 (6th Cir. 1929), *cert. denied*, 282 U.S. 813 (1931)).

52. *Boring*, 63 F.R.D. at 81-82.

53. *Id.* at 82.

54. 309 F. Supp. 354 (N.D. Ohio 1969).

$10,000.00."[55] Unfortunately, the procedural stance of *Biechele* may relegate its statement to dictum.[56]

The applicability of *City of Girard* to class actions based on injunctions would seem to be without question. The crucial issue, however, is the value of the injunctive relief to each individual claimant,[57] as each individual in the class must claim harm in excess of $10,000.[58] Because the *Biechele* court's conclusion that a dust-free environment is worth more than $10,000 to an individual was not necessary to find jurisdiction to hear the case,[59] there is no holding squarely upon this question. While many toxic tort victims will easily be able to claim more than $10,000 for injuries, pain and suffering, and mental distress, including the fear of developing cancer,[60] many others will not.[61] Unfortunately for this latter group, the Supreme Court's jurisdictional obstacles, created by *Snyder* and *Zahn*, may bar federal class actions until the *Biechele* dictum is followed.

B. *Rule 23(a)*

Federal class actions must meet all the requirements of Rule 23(a) and, in addition, fit within one of the three categories of Rule 23(b).[62] Rule 23(a) requires that the class be so numerous that

55. *Id.* at 355.

56. The *Biechele* court certified the suit as a Rule 23(b)(2) class action for injunctive relief upon removal from the state court. Jurisdiction over the damage action was assumed under the removal statute, 28 U.S.C. § 1441(c) (1976): "Jurisdiction properly lies in this court under 28 U.S.C. § 1441(c). The claims are sufficiently separate to allow removal of the injunctive action alone. Therefore this Court, in the interest of judicial efficiency, will assume jurisdiction over the entire controversy." *Biechele*, 309 F. Supp. at 355. Under its removal power, the court assumed pendent jurisdiction over the class action. This action and other properly federal actions were then heard together.

57. *Boring*, 63 F.R.D. at 81-82.

58. Snyder v. Harris, 394 U.S. 332 (1969) (each named plaintiff must meet the $10,000 requirement); Zahn v. International Paper Co., 414 U.S. 291 (1973) (each unnamed plaintiff must also meet the $10,000 requirement).

59. *See supra* note 56.

60. If a toxic tort victim can show an injury which is in itself substantial and which can raise reasonable fears of an increased likelihood of developing cancer, damages may be awarded for the mental distress of waiting to see if the cancer will develop, as well as for the injury and any pain and suffering it may cause. Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958) (excessive dosage of x-rays, causing radiation burns, forms the basis of a reasonable and compensable fear of developing cancer).

61. *See, e.g.*, Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 570 (E.D. Tex. 1974).

62. *See supra* note 27.

joinder is impracticable, that there be questions of law and fact common to the plaintiff class, that the claims and defenses of the named plaintiffs be typical of those of the class, and that the representative parties fairly and adequately represent the class's interest.

1. Joinder

Impracticability of joinder[63] can hardly be considered a significant obstacle. Impossibility is not required;[64] a showing of difficulty or inconvenience often suffices.[65] Numbers alone do not determine impracticability of joinder,[66] and, in fact, classes with as few as twenty-five members have been recognized to avoid multiple trials of the same issues.[67] Geographical distribution of a proposed class can be of considerable importance.[68] Since most toxic torts affect hundreds of potential plaintiffs,[69] impracticability of joinder should not become a serious impediment to class action treatment.

2. Typicality of Claims and Defenses

The claims of the representative parties must be similar or identical to those of the class. For mass accident cases, this requirement rarely poses a problem. Usually, the factual issues will be identical, and all plaintiffs are likely to have sustained injuries of a similar nature as a result of the one event.[70] Toxic torts may present a different problem. Exposure may have occurred in various ways,

63. For a discussion of the relationship between the Rule 23(a) requirement that joinder be impracticable and the Rule 23(b)(3) requirement that joinder be an inferior method of adjudicating the rights of all plaintiffs, *see* Siegal v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967).

64. 7 C. WRIGHT & A. MILLER, *supra* note 13, § 1762, at 593-94.

65. *See, e.g.*, Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 339 (D. Minn. 1971).

66. *See, e.g.*, Ewh v. Monarch Wine Co., 73 F.R.D. 131 (E.D.N.Y. 1977).

67. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 463 (E.D. Pa. 1968).

68. *See, e.g.*, Glover v. McMurray, 361 F. Supp. 235, 241 (S.D.N.Y.) *rev'd and remanded on other grounds*, 487 F.2d 403 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 963 (1974).

69. *See, e.g.*, Mervak v. City of Niagara Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687 (1979) (class action motion denied despite the fact that the class consisted of 900 plaintiffs from the Love Canal area).

70. *See* Note, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1619 (1972).

for example, from drinking water,[71] physical contact[72] or inhalation of particulate matter.[73] The injuries sustained may range from skin rashes[74] to cancer.[75] The proof necessary to show a causal connection between exposure to the toxic substance and the various types of injury may vary sufficiently to make typicality a problem.[76] If the class of plaintiffs is very large, however, the court may select named plaintiffs whose injuries and manner of exposure reflect the range present in the class as a whole.[77]

3. Adequacy of Representation

Rule 23(a)(4) requires that the named plaintiffs fairly and adequately protect the interests of absent class members. Because those class members who do not "opt out" of a Rule 23(b)(3) action, and those included in a Rule 23(b)(1) or 23(b)(2) action, may be bound by the judgment,[78] such adequacy of representation is a due process requirement.[79] The court must be convinced that the suit is not collusive and that each of the named plaintiffs has a sufficient stake, resources and counsel to prosecute the case vigorously.[80] Resolution of this issue seems no different in mass accident or toxic tort cases than in any other proposed class action.[81]

71. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY-1980: THE ELEVENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 190 (1980).

72. *Id.*

73. *See, e.g.,* Yandle v. PPG Indus., Inc. 65 F.R.D. 566 (E.D. Tex. 1974); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974), *appeal dismissed mem.*, 505 F.2d 729 (3d Cir. 1974).

74. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 71, at 190.

75. *Id.*

76. *See id.* at 224.

77. "Although the named plaintiffs for the purposes of the class action are yet to be designated, the court is satisfied that out of the extremely large pool available representative plaintiffs can be named who will present claims typical of those of the class." *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 787.

78. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

79. *Id.*

80. American Trading & Prod. Corp. v. Fishbach & Moore, Inc., 47 F.R.D. 155, 156 (N.D. Ill. 1969) (court assumed plaintiffs would diligently pursue claims in excess of $200,000).

81. *See, e.g., id.* (holding that 12 mass accident victims properly represented class of 1200). *But c.f.* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 106 (E.D. Va. 1980) (court certified subclasses of Maryland and Virginia watermen, noting traditional animosity between the groups and expressing doubt whether named plaintiffs, overwhelmingly Virginians, would fairly represent Marylanders' interests).

C. *Rule 23(b)—Types of Class Actions*

In addition to fulfilling the four requirements of Rule 23(a), a federal class action must also fall within one of the three categories of class action presented in 23(b).[82] Rule 23(b)(1) permits class actions where individual suits create a risk of incompatible standards of conduct for parties opposing the class[83] or may result in judgments for some plaintiffs which as a practical matter may dispose of others' claims.[84] Rule 23(b)(2) permits class actions when plaintiffs seek equitable or declaratory relief from a defendant or defendants who refuse to act on grounds generally applicable to the class. However, there are reasons why Rules 23(b)(1) and 23(b)(2) are generally not appropriate for mass tort cases. Most frequently used is Rule 23(b)(3), which permits class actions when common questions of law and fact predominate and the device is superior to all other methods for adjudicating the rights of all plaintiffs.

1. Rule 23(b)(1)

Rule 23(b)(1) permits class actions whenever separate actions are likely to prejudice either the proposed class or the defendant(s). Rule 23(b)(1)(A) is designed to protect the interests of the party opposing the class from a series of judgments requiring him to comply with incompatible standards of conduct. Thus, the risk of finding incompatible standards of conduct for the defendant is not likely to support class action certification unless it is the defendant who seeks it.[85] By the same token, the possibility of the award of money damages to some plaintiffs but not to others does not necessarily constitute "incompatible standards of conduct."[86] As cessa-

82. *See supra* note 27.

83. FED. R. CIV. P. 23(b)(1)(A).

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

85. Chmieleski v. City Prods. Corp., 71 F.R.D. 118, 155 (W.D. Mo. 1976). *See also* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 106-07 (E.D. Va. 1980).

86. *See, e.g.*, Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 107 (E.D. Va. 1980); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 789 ("The risk of paying money [damages] to some and not others is not what the rule-makers intended by the words 'incompatible standards of conduct.' " (quoting A. Miller, An Overview of Federal Class Actions: Past, Present and Future 43 (Dec. 1977) (monograph printed by Federal Judicial Center); McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 398 (E.D. Va. 1975).

tion of the noxious activity is more easily accompolished by citizen suits under air,[87] water[88] or land pollution[89] legislation, tort actions are more likely to focus on damages, and Rule 23(b)(1)(A) is unlikely to apply.

Subsection 23(b)(1)(B) focuses on possible prejudice to plaintiffs who are not party to an early action. A federal court found this persuasive in its class certification of air-crash victims in *In re Gabel.*[90] It stated:

> [I]t is possible that adjudications with respect to individual suits by individual members of the class would, in case judgment went against that plaintiff, as a practical matter, be dispositive of the rights of other members of the class not party to the individual adjudication, so as to substantially impair or impede the ability of other members to protect their interests, by application of the doctrine of *res judicata.*[91]

The *Gabel* court, however, was wrong in its fears and misconstrued the purpose of Rule 23(b)(1)(B). Exoneration of one or all defendants in an earlier action does not foreclose subsequent suits by different plaintiffs. To do so would deny these later plaintiffs their day in court and therefore deny them due process of law.[92] As a practical matter, the stare decisis effect of an earlier decision may in fact create significant pressure on potential plaintiffs to settle on less than favorable terms. However, it is Rule 23(b)(3) which specifically addresses such situations.[93]

On the contrary, "[t]he paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual

87. Clean Air Act Amendments of 1977 § 304(a), 42 U.S.C. § 7604(a) (Supp. I 1977). *See generally* 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 2.03(5)(b), at 2-138.5 to -141 (1981).

88. Federal Water Pollution Control Act § 505(a), 33 U.S.C. § 1365(a) (1976). *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975). *See generally* F. GRAD, *supra* note 87, § 3.03(10)(b) at 3-167 to -174.

89. Resource Conservation and Recovery Act of 1976 § 7002(a), 42 U.S.C. § 6972(a) (1976). *See* 40 C.F.R. § 254 (1981) (prior notice of citizen suits). *See generally* F. GRAD, *supra* note 87, § 4.02(3)(b)(ii)(G) at 4-52.29 to -52.31.

90. 350 F. Supp. 624, 630 (C.D. Cal. 1972).

91. *Id.*

92. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found. 402 U.S. 313, 329 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969).

93. Rule 23(b)(3) allows certification where common questions of law and fact predominate. *See infra* text accompanying notes 104-196.

basis, those who sue first will deplete the fund and leave nothing for latecomers."[94] Both the drafters of the rule[95] and courts[96] using it have adopted this position, and *Gabel* stands as an anomaly.

In short then, mass toxic tort litigants will not usually choose Rule 23(b)(1) as a vehicle for class action certification, since potentially incompatible standards of conduct and limited fund situations are not usually present.

2. Rule 23(b)(2)

An action may be maintained as a class action under Rule 23(b)(2) if "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. . . ."[97] The drafters of the rule expressed this view of its reach:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and

94. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 789 (quoting A. Miller, An Overview of Federal Class Actions: Past, Present and Future 45 (1977)).

95. *See* FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 101 (1966).

96. *See* McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 106-07 (E.D. Va. 1980).

It should be noted that on June 25, 1981, Judge Williams of the United States District Court for the Northern District of California conditionally certified the Dalkon Shield litigation as a class action even though no plaintiff had requested this. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., No. C80-2213SW (June 25, 1981). Judge Williams founded the certification on Rule 23(b)(1)(B), stating that:

> This court specifically finds that separate actions inescapably will alter the substance of the rights of others having similar claims. . . .
>
> It is clear that the amount of punitive damages sought far exceeds the available net worth of the company. This fact poses two very real threats if actions on this issue continue on an individual basis: (1) The company will be unable to respond to claims for punitive damages due to actual or constructive bankruptcy; or (2) At some point in the future, courts could rule that the aggregate sum already assessed against the defendant company in punitive damages was such that as a matter of law the company had been sufficiently punished and therefore punitive damage claims would be dismissed as a matter of law. . . . In either event, the limited fund available to satisfy all claims for punitive damages merits certification of a nationwide class under Rule 23(b)(1)(B) in order to equitably distribute any such recovery from a general fund recoverable by any claimant who successfully pursues her claim on an appropriate theory before a jury or in settlement.

Thus it appears that toxic tort victims may indeed be able to use Rule 23(b)(1)(B) actions in the future if punitive damages seem likely and this decision is widely accepted.

97. FED. R. CIV. P. 23(b)(2).

> final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.[98]

Rule 23(b)(2) has traditionally been used in the civil rights field, in particular to secure injunctive relief from discrimination.[99] However, its applicability is not necessarily limited to this field: consumer actions to prevent illegal business practices may also fit the model.[100]

Toxic tort cases, which are likely to involve both injunctive relief and damages whenever the noxious activity has not ceased, do not fit neatly into this subdivision. The provision is clearly inappropriate for purely monetary actions. Even the formation of a fund for future compensation of exposure victims does not fall within the bounds of Rule 23(b)(2).[101] If an action involves both injunctive and monetary relief, the subsection will not be invoked unless injunctive relief is the primary aim of the litigation.[102] Thus, at best, Rule 23(b)(2) certification will be available for only some toxic tort cases. Even for those, the court may choose to certify the class for the equity claim only, leaving damage claims to individual actions[103] and thereby significantly undercutting the effectiveness of the class action.

III. THE RULE 23(b)(3) CLASS ACTION

Rule 23(b)(3) class actions are permitted only when common questions of law and fact predominate and the class action is superior to such other devices as joinder, consolidation and transfer, coordinated pre-trial, use of offensive collateral estoppel and test

98. FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 102 (1966).

99. *Id.*

100. *Id. See also* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 108 (E.D. Va. 1980).

101. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 790 n.35.

102. *Id.* at 790; Bichele v. Norfolk & W. Ry. Co., 309 F. Supp. 354 (N.D. Ohio 1969) (Rule 23(b)(2) class certification for plaintiffs seeking to enjoin coal storage causing coal dust air pollution).

103. *See* FED. R. CIV. P. 42(b).

cases, voluntary coordination within the negligence bar, and settlement. Rule 23(b)(3) also states that factors to be considered when determining whether to permit a class action include the interest plaintiffs may have in individual control of each action, the existence of related, pending litigation, the desirability of concentrating litigation in a single forum, and the difficulties of managing a class action.[104]

A. *Common Questions of Law and Fact*

Rule 23(b)(3)'s requirement that common questions of law and fact predominate can present a significant obstacle in mass tort cases. It was this issue which led the Rule's drafters explicitly to discourage its use for mass accidents.[105] However, most toxic tort cases can meet the requirement if the common trial is restricted to issues of liability, if choice of law rules do not require application of different laws to individual members of the class, and if questions of causation do not vary with the individual affected.

1. Class Action Restricted to Liability Issue

In mass accidents, such as airplane crashes, the factual and legal issues surrounding defendant's liability are often the same for all plaintiffs.[106] Under these circumstances, individual determinations of liability constitute great waste and duplication of effort. However, damage questions will be individual to each plaintiff. The solution to this problem lies in Rule 23(c)(4), which allows a class action to be maintained on some issues while those remaining are tried separately. Split trials are also permitted under Rule 42(b).[107] Despite the unquestioned economy of court resources achieved[108] when time is not spent proving damages in a case in which liability is not found, some courts have resisted split trials in negligence cases.[109] Without proof of damages, juries are less likely to find liability.[110] Thus, some have reasoned that split trials undercut the

104. *See supra* note 27 for text of Rule 23.

105. *See supra* text accompanying note 14.

106. *See* Note, *supra* note 70, at 1620.

107. FED. R. CIV. P. 42(b).

108. *See* Zeisal & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

109. *See, e.g.*, United Airlines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961).

110. *Id.* at 305.

right to jury trial.[111] Despite these problems, split trials are very useful, indeed necessary, for mass accident suits. Juries may guess the nature of the injuries sustained and consider these when determining liability. A finding of liability also provides a great incentive for defendant to settle, thus accomplishing two judicial aims—the amicable settlement of differences and the saving of court time and resources.

Several courts have employed the split trial successfully. In *Hernandez v. Motor Vessel Skyward*[112] the court tried only the issue of defendant's alleged negligence in food preparation as a class action. All other theories of liability—breach of contract, implied warranty of fitness and negligence in medical care—were tried separately. In *American Trading & Production Corp. v. Fischbach & Moore, Inc.*,[113] the court tried liability for a massive fire separately from damage claims. The court reasoned that class treatment was appropriate because identical evidence would be required to establish the origin of the fire and the parties responsible. Similarly, the court in *In re Gabel*[114] held that class action was suitable to determine the cause of an airplane crash but not to determine damages.

Other courts have declined to use the class action device combined with split trial. In *Hobbs v. Northeast Airlines, Inc.*[115] the court felt that because of the severity of injuries in air crashes, the plaintiffs might well want to press individualized suits, using various theories of liability and pre-trial or trial tactics. Similarly, litigation for a school bus crash in *Daye v. Pennsylvania*[116] was not certified as a class action because the court took special note of the Advisory Committee's comments to Rule 23.[117]

Toxic tort and other environmental cases present special problems for use of class actions solely to determine liability. The variety of damages alleged convinced the court in *Boring v. Medusa Portland Cement Co.*[118] that different evidence would be needed from

111. *Id.* at 304.

112. 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975).

113. 47 F.R.D. 155 (N.D. Ill. 1969).

114. 350 F. Supp. 624 (C.D. Cal. 1972).

115. 50 F.R.D. 76, 79 (E.D. Pa. 1970).

116. 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973).

117. *Id.* at 1342-43. *See supra* text accompanying note 14. *See also* Wright v. McMann, 321 F. Supp. 127, 137 (N.D.N.Y. 1970), *modified*, 460 F.2d 126 (2d Cir. 1972).

118. 63 F.R.D. 78 (M.D. Pa.), *appeal dismissed mem.*, 505 F.2d 729 (3d Cir. 1974).

each plaintiff to establish liability and prove injury. Damages in that case included aesthetic discomfort, property damage and personal injury allegedly sustained by exposure to emissions from two out-of-state cement plants:

> [E]ach resident, motorist or business is in a different proximity to the plants than the other class members. In effect, *each* plaintiff would have to separately establish what mixture of pollution caused him damage depending on the wind, location of the factories, etc. It is inconceivable that a single ratio of pollution by the two defendants could apply uniformly throughout the class. The plaintiffs would have to individually establish the liability of each defendant, then the respective roles of the defendants vis-a-vis each other.[119]

Other courts, considering the same problem, have followed a different analysis, stressing the number of common questions concerning liability which might be appropriate for separate class action adjudication. *Ouellette v. International Paper Co.*[120] concerned water and air pollution in and around Lake Champlain, Vermont. The court concluded that fact questions concerning the amount, quality and distribution of defendant's discharges were common to the class and crucial to determination of defendant's liability.[121] In addition, certain defenses would be common to the claims of all plaintiffs.[122]

The *Ouellette* court also generally addressed the use of class actions in environmental litigation while responding to defendant's argument that environmental torts are inherently unsuited for class action treatment.[123] Defendant contended that once pollutants leave their original source, they are thereafter dispersed by natural forces. Damages sustained by each property owner will vary depending upon proximity to the polluting source and the random effects of prevailing natural conditions, and thus each property owner will need to prove a pattern of dispersion unique to his property. Since patterns of dispersion and exposure form the crux of the proximate cause question, the defendant concluded that the named plaintiffs could not possibly typify the class or provide ade-

119. *Id.* at 84 (emphasis original).
120. 86 F.R.D. 476 (D. Vt. 1980).
121. *Id.* at 479.
122. *Id.*
123. *Id.* at 481.

quate representation to all claimants. The *Ouellette* court rejected the logical implication of the defendant's argument, *i.e.*, that a class action may never proceed against a polluter:

> As a theoretical matter, we find, for instance that it would be desirable from the standpoint of consistency and convenience to develop in a single proceeding the quantum, quality and dispersion pattern of a source's discharges. Time, effort and expense might be saved by such a procedure, even though all issues may not be resolvable at once. In separate trials, the questions of fact respecting defendant's discharges and their dispersion might be resolved inconsistently, contrary to sense and logic. Similar inconsistency could arise with separately determined questions of liability or defenses to liability, and this would be undesirable as a matter of "uniformity of decision as to persons similarly situated." In our opinion, the type of suit represented by this case is not the sort envisioned by the Advisory Committee as generally inappropriate for class treatment under subdivision(b)(3).[124]

In line with *Ouellette* are *Pruitt v. Allied Chemical Corp.*[125] and the *Agent Orange* litigation. The *Pruitt* court found that although common questions did not predominate throughout the class, subclasses could be formed which would present common theories of liability and anticipate common defenses.[126] In addition, the court believed that a separate trial on the liability question could entirely eliminate the need for mini-trials on the question of damages.[127] If the defendant was adjudged liable, the court was convinced that settlement was more likely than further litigation.[128]

The *Agent Orange* litigation presented an especially appropriate opportunity for separate trial of liability. All defendants were required to manufacture the offending defoliant to precise federal specifications. Thus, an initial "government contract"[129] defense,

124. *Id.*

125. 85 F.R.D. 100 (E.D. Va. 1980).

126. *Id.* at 116.

127. *Id.* at 117.

128. *Id.* The court cited with approval a passage from Shelter Realty Corp. v. Allied Maintenance Corp., 442 F. Supp. 1087, 1089 (S.D.N.Y. 1977), *dismissed*, 578 F.2d 1370 (2d Cir. 1978):

> [T]here is reason to believe that civilized litigants and attorneys find ways to settle individual claims where the questions of general application go against defendants. But, of course, that hope or possibility may not be realized. In the rare cases where this is so, it is more fitting that the work of adjudication be done than that the multiplicity of claimants be blocked at the threshold by denial of the class-action procedure designed to give them an effective day in court.

129. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 785.

common to all claims and defendants, could be tried. If this failed, the court intended to hold a second common trial addressing "liability questions such as negligence, product liability, and general causation, where a jury will be able to hear all of the evidence relating to the development, manufacture and use of Agent Orange. . . ."[130] Requiring the jury to return special verdicts on the questions would allow their easy use in future trials of liability if individual patterns of exposure were found to be significant to a finding of liability vis-à-vis each serviceman.[131]

Toxic tort victims in general could probably make very effective use of a combination of the approaches employed by the *Pruitt* and *Agent Orange* courts. For example, a class action could proceed initially with discovery and trial as to the defendant's manner of generating, transporting and disposing of toxics. The next stage of the litigation, focusing on the causal connection between the defendant's actions and the injuries sustained, could be handled with subclasses of plaintiffs grouped according to manner of exposure, nature of injury, or both. Finally damages could be ascertained by the continued use of subclasses, this time grouped according to the nature of the injury. While this scenario may seem complex, it is still simpler and more efficient than repeated individual trials.[132]

2. Choice of Law

Choice of law rules were, until recently, susceptible of easy statement: the law of the state in which the tort occurred applied.[133] However, since *Babcock v. Jackson*[134] and the modern Restatement,[135] this simple rule has given way to a complex balancing process.[136] For some mass accidents, the variety of state laws

130. *Id.* at 785-86.

131. *Id.* at 786.

132. In fact, just this approach was used by the court in Floyd v. Philadelphia (No. 2) 8 Pa. D. & C.3d 380 (1978). There, 194 plaintiffs had been exposed to chlorine gas in an accident. The court treated them as a single class for an initial trial of liability. It then divided them into subclasses based on the nature of the injury, particularly on the basis of whether a plaintiff's injury was personal or to property, and held a separate trial for each subclass to determine damages.

133. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

134. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969).

136. Conflicts law traditionally held that the law of the place where a tort occurred would apply to any litigation of the resulting cause of action. *See* D.F. CAVERS, THE CHOICE OF LAW

which may apply to various plaintiffs can cause significant difficulties. If relevant state laws differ, a case may fail to present common questions of law. A preliminary inquiry into complex choice of law issues may be lengthy enough to convince a court that the class action is not superior to other devices. Uncertainty regarding applicable law may inhibit settlement when maximum damages recoverable at trial depends on resolution of the conflicts question:[137]

> These considerations are of more than academic interest because state laws on accident liability and damages do differ. As to liability, they differ in plaintiff's burden of proof, the use of certain defenses, the availability of some theories of recovery, such as strict liability, and of some doctrines which aid the plaintiff, such as last clear chance and *res ipsa loquitur*. In wrongful death actions, the elements of damages vary with the theory on which the action was created. More importantly, a minority of jurisdictions limit the maximum amount of damages recoverable for wrongful death.[138]

Despite these difficulties, choice of law problems may not present a significant obstacle in toxic tort litigation. A state's interest in regu-

PROCESS 5-9 (1965). *See also* Alabama Great S. R.R. Co. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); *c.f.* Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958).

The more than occasional inanity of the results under this rule led to the development of "escape devices," such as, for example, basing the choice of law decision on whether an underlying issue was substantive or procedural, Noe v. United States Fidelity & Guar. Co., 406 S.W.2d 666 (Mo. 1960), on the nature of the action, Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), or on public policy considerations, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Throughout the 1950's and early 1960's scholars began groping for a choice of law rule which would focus on the interests of those parties concerned with what law would be applied. Those parties generally were the plaintiff, the defendant and the various states which had economic or social interests in the litigants or the events which led to the cause of action. *See, e.g.*, D.F. CAVERS, supra, Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Gorman, *The Law of Multi-State Problems*, 115 U. PA. L. REV. 288 (1966) (analyzing the Von Mehren and Trautman functional analysis).

The Second Restatement of Conflict of Laws, *supra* note 115, followed the line of cases interpreting *Babcock*. *Babcock* formalized in the case law a "center of gravity" approach which attempted to balance individual and state interests to reach a choice of law most responsive to the specific facts of a case. Thus, for example, a state would have a greater interest in seeing its local traffic laws control a dispute concerning highway negligence than it might in having its wrongful death statute applied when a citizen of another state was killed within the state's borders. For a recent application of *Babcock* and the Restatement, *see* Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

137. Note, *supra* note 70, at 1622.

138. *Id.* at 1622-23 (citations omitted).

lation of toxics use and storage on its land may suffice to justify use of that state's law on issues of liability.[139] A likely exception to this rationale might occur when an out-of-state corporation is responsible for the local concentration of toxics, whether through on-site use or disposal, or through dispersion across state lines. In such a case, the state of incorporation might also wish to see its laws applied. In either case, however, only one state's law will likely be applied to the liability issue. Damages might be apportioned to each plaintiff in accordance with the laws of his or her state of residence, but this apportionment could be accomplished through special trials for damages.[140] Special verdicts on the liability issue can aid in this process.[141]

3. Problems of Causation

A particularly thorny issue for all toxic tort cases is the question of proximate cause. The uncertain state of medical knowledge, particularly with respect to cancer, can create serious problems for plaintiffs who need to prove a direct link between exposure to a substance and a specific resultant injury. Where exposure is long-term and due to a variety of media, such as inhalation, ingestion and physical contact, questions of causation and liability may hinge on individual facts.[142] It was precisely this problem which convinced the court in *Yandle v. PPG Industries, Inc.*,[143] that the suit was not appropriate for class action. In that case, workers exposed to asbestos in the workplace sought to bring a class action against nine defendants, including their employer. The court concluded that common questions of law and fact did not predominate:

> As noted previously, the Pittsburgh Corning plant was in operation in Tyler for a ten year period, during which some 570 persons were employed for different periods of time. These employees worked in various positions at the plant, and some were exposed to greater concentrations of asbestos dust than were others. Of these employees it is only natural that some may have had occupational diseases when they entered their employment for Pittsburgh Corning. There are other issues that will be pecu-

139. *See supra* note 136.
140. *See, e.g.*, *In re* Gabel, 350 F. Supp. 624, 628 (C.D. Cal. 1972).
141. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 786.
142. *See supra* text accompanying notes 71-76.
143. 65 F.R.D. 566 (E.D. Tex. 1974).

> liar to each plaintiff and will predominate in this case, such as: The employee's knowledge and appreciation of the danger of breathing asbestos dust and further, whether the employee was given a respirator and whether he used it or refused to use it. . . . These are individual questions peculiar to each potential class member.[144]

In contrast, the *Agent Orange* litigation, which includes issues of proximate cause far exceeding these in complexity,[145] will still proceed as a class action on general questions of liability and defendant's conduct.[146] Individual trials using special verdicts from this adjudication may be employed when examining individual questions of proximate cause.[147] Questions of proximate cause may be thorny, but need not generically disqualify environmental or toxic tort litigation from class action certification.[148]

B. *Superiority of the Class Action Device*

The superiority requirement of Rule 23(b)(3) can pose the greatest challenge to plaintiffs seeking class action certification. Numerous alternative devices are available. Presented below is a discussion of the advantages and disadvantages of each of these alternatives, particularly in the context of toxic tort litigation.

1. Joinder

Impracticability of joinder,[149] a commonly mentioned alternative to class action,[150] is a prerequisite to certification.[151] However, since classes with as few as twenty-five members have been certified,[152] sheer numbers should not prove an obstacle. Requiring each plaintiff to show the commonality of interest necessary for join-

144. *Id.* at 570-71.

145. Not only is there question whether scientific evidence is sufficient to show a causal connection between Agent Orange and the servicemen's injuries, but the wide variations in manner and duration of exposure to the substance make proof of liability extremely difficult. *See In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 783.

146. *See supra* text accompanying notes 2-10.

147. *See supra* text accompanying notes 129-31.

148. *See supra* text accompanying note 124.

149. *See supra* FED. R. CIV. P. 20.

150. *See, e.g.*, Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 115 (E.D. Va. 1980).

151. FED. R. CIV. P. 23(a)(1). *See supra* note 27.

152. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 463 (E.D. Pa. 1968).

der[153] requires the same effort as proving the predominance of common questions for class action,[154] and represents no saving of judicial resources. The only true advantage to joinder lies in avoiding the costs of notice.

However, the savings in notice costs is often outweighed by the disadvantages of joinder. The need for complete diversity between plaintiffs and defendant(s)[155] may preclude the joinder of some potential plaintiffs. Where the defendant is not a corporation, numerous plaintiffs can make the selection of proper venue quite difficult.[156] If some plaintiffs may not join because their presence creates jurisdictional or venue defects, they will be compelled to file suit separately, perhaps even in a different court. This duplication of judicial effort is wasteful. Further, without the notice required in Rule 23 actions, many potential plaintiffs may remain unaware of the on-going litigation. Again, separate suits will result in a net loss of judicial time and create the risk of inconsistent judgments.

Finally, for those plaintiffs who know not to or who cannot join, separate litigation may not be a viable option. Since many toxic injuries have long latency periods, many people will not realize the need to join the action. Even with the stare decisis advantage of an earlier, favorable judgment and the possible advantage of offensive collateral estoppel, many plaintiffs may find the costs of litigation exceed any expected recovery. Failure to press their claims through litigation is "a result which would obviously conserve judicial resources, but would do little to enhance justice."[157] In the interests of finally and completely determining the rights and liabilities of all toxic tort litigants, class action affords a better opportunity for efficient and equitable disposition than joinder.

153. FED. R. CIV. P. 20.

154. Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 115 (E.D. Va. 1980).

155. *See* 28 U.S.C. § 1332 (1976).

156. In an action based only on diversity, the action may be brought in any district where all plaintiffs or all defendants reside or in which the claim arose. 28 U.S.C. § 1391(a) (1976). If plaintiffs reside in many different districts and the places where the claims arose (usually, the place where the injuries occurred) are scattered about the plaintiffs' districts, then venue can be easily maintained only in a district of which all defendants are residents. Unlike natural persons, corporations are considered residents of all the districts in the state of incorporation, and probably of all the districts in other states in which it is licensed to do business or actually "doing business." *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3811 (1976).

157. Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 115 (E.D. Va. 1980).

2. Consolidation and Transfer

Rule 42(a)[158] permits a joint trial or consolidation of any or all issues in actions involving common questions of law or fact, provided all cases are pending before the same court. The numerous common questions in mass accident cases often lead to consolidation in federal courts.[159] Split trials, with liability issues consolidated and damage claims handled singly, can reduce complexity and preserve the advantages of consolidation.[160] When actions are initiated in several districts, however, consolidation must be preceded by statutory transfer.[161] However, as such transfer is limited to districts where the action "might have been brought,"[162] jurisdiction over the defendant and venue for all plaintiffs may become a problem. In contrast, class actions require that only named plaintiffs satisfy venue, diversity and jurisdictional requirements.[163]

Consolidation shares with joinder the additional problem of lack of notice to all potential claimants. Without this notice, an unnecessary drain on court resources is possible: future actions are not forestalled, and pending actions in other districts may proceed without knowledge of the transfer and consolidation.[164]

Even if all actions are already in the same district and most of all of the potential claimants are aware of the action, consolidation may still be an inferior option, both generally and for toxic tort actions. "[C]lass actions are a better means of binding cases together. . . . Whereas a class action would 'consolidate' all claims arising from a mass accident, excepting those of plaintiffs who withdrew, 42(a) consolidation merely provides for a joint trial binding only those present and only for trial."[165]

3. Transfer for Coordinated Pretrial

Related civil actions may be transferred to one district for coordinated pretrial proceedings.[166] However, unlike transfer that pre-

158. FED. R. CIV. P. 42(a).

159. *See* Note, *supra* note 70 at 1625. *See also* Comment, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373 (1963).

160. *See, e.g.*, Klager v. Inland Power & Light Co., 1 F.R.D. 114 (W.D. Wash. 1939).

161. 28 U.S.C. § 1404(a) (1976).

162. *Id.*

163. *See supra* note 37 and accompanying text.

164. *See* Note, *supra* note 70, at 1626.

165. *Id.* at 1625. The author notes that this presumably includes a separate right to appeal. *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 581-82 (D. Minn. 1968).

166. 28 U.S.C. § 1407 (1976).

cedes consolidation,[167] this transfer can be to any federal district court. Coordinated pretrial procedures eliminate duplication of the extensive discovery work necessary for mass accident cases. For toxic tort cases in particular, this is particularly attractive, as industry records pertaining to its own perception of the dangers stemming from its activities will be very important in all cases not based on a strict liability theory.[168]

Pretrial coordination, however, is not as efficient as class action. For example, Judge Pratt considered and discarded coordinated pretrial for the *Agent Orange* litigation:

> This technique would require separate trials of each action in the transferor courts, a technique that would be repetitious and wasteful with respect to the issues that are common to all actions. Although testimony of key expert witnesses might be made available to each of the transferor courts through use of videotape so that the need for those witnesses to personally appear at each trial would thereby be eliminated, the opportunity to cross-examine the experts on special problems that relate to the individual plaintiffs would still be lost. The greatest disadvantage of this method is that it would place unnecessary burdens on each of the transferor judges, each of whom would have to struggle with identical legal and factual issues, and it would thus fail to reach the level of judicial efficiency and economy that MDL [multi-district litigation] procedures were designed to achieve.[169]

4. Offensive Use of Collateral Estoppel

Collateral estoppel is asserted offensively when a prior judgment against the defendant is held to be conclusive for the same issues raised in a later suit between a similarly situated plaintiff and that defendant.[170] This use of collateral estoppel was first allowed in *Bernhard v. Bank of America,*[171] which abolished the doctrine of mutuality of estoppel[172] as used in California. As long as a defendant is aware that an adverse judgment may bind him in numerous

167. 28 U.S.C. § 1404 (1976). *See supra* text accompanying notes 161-62.

168. Foreseeability of the harm is a common element of a negligence action. *See* W. PROSSER, LAW OF TORTS § 43 (4th ed. 1971).

169. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 784.

170. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.16 at 563 (2d ed. 1977).

171. 19 Cal. 2d 807, 122 P.2d 892 (1942).

172. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912). *See also* RESTATEMENT OF JUDGMENTS § 93(b) (1942).

future suits, no real unfairness is present. Unfortunately, offensive use of collateral estoppel encourages claimants to wait for a favorable judgment before bringing suit.[173] This places an unfair burden on the initial plaintiff, who must bear the cost of discovery and the uncertainty of litigation. It also subjects the defendant to numerous suits, as successive plaintiffs attempt to achieve a favorable judgment. If earlier litigation results in judgment for defendant, judicial goals of efficiency and finality can be defeated as these plaintiffs continue to litigate the same issues. Since toxic tort cases require analysis of complex questions of causation, which may be resolved differently by various courts, the problem is particularly acute in this area.

Furthermore, offensive collateral estoppel has received at best a mixed reaction from courts trying mass accident cases.[174] The reason is the potential full faith and credit problem created when a judgment handed down in a state which allows the offensive use of collateral estoppel is pleaded as conclusive in another state which has not embraced the doctrine.[175] Because use of this doctrine is at best chancy, it does not yet seem a superior option to class action litigation. Perhaps that is why, as yet, no toxic tort judgments have rested on offensive use of collateral estoppel.

5. Test Cases

Test cases are a subset of offensive collateral estoppel cases. In essence, a test case is a private consensual class action in which a single plaintiff tries the issue of liability on behalf of the entire class. A favorable judgment for plaintiff binds the defendant with respect to all members of the class, while an adverse judgment has no more than a stare decisis effect.[176]

173. *See* Currie,*Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). *See also* Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

174. For cases permitting offensive use of collateral estoppel, *see* Maryland *ex rel.* Gliedman v. Capitol Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967) (dictum); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); Hart v. American Airlines, Inc., 61 Misc.2d. 41, 304 N.Y.S.2d 810 (1969). For cases not permitting offensive use of collateral estoppel, *see* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1968); Montgomery v. Taylor-Green Gas Co., 306 Ky. 256, 206 S.W.2d. 919 (1947). *See generally* Note, *supra* note 70, at 1628-30.

175. Note, *supra* note 70, at 1629. The converse situation raises the same problem. *See also* Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590, 1590-96 (1968).

176. *See* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 116 (E.D. Va. 1980).

The test case doctrine was used in *Katz v. Carte Blanche Corp.*[177] The case involved an extremely large number of proposed class members, each a credit card holder with an exceedingly small claim under the Truth in Lending Act.[178] Defendant expressed fear that giving the notice required in a class action suit might damage its business. The court therefore allowed a test case; if the plaintiff prevailed, a class action would ensue. This use of the test case doctrine is quite unorthodox, however.

> The *Katz* decision seems contrary to paragraph (c)(1) of rule 23 which requires a class determination as soon as practicable. Under ordinary circumstances, in the absence of consent by the defendant, a determination of the merits of a plaintiff's claim prior to ruling on a motion for class determination precludes the district court from certifying a class action.[179]

Use of the test case without a subsequent class action fails to achieve any greater efficiency or certainty than a class action suit. It also fails to provide the advantages of class action: a single determination of plaintiffs' claims and defendants' defenses, mandatory notice, assurance of adequate representation and supervision of settlement procedures. However, test cases may be useful for classes which encompass large numbers of plaintiffs that fail to meet the $10,000 jurisdictional minimum for federal suit. A favorable decision for the first plaintiff could be used by other claimants as res judicata in state court proceedings. For toxic tort victims who are as yet asymptomatic or who have sustained only rashes and other minor injuries, test cases could prove quite valuable.

6. Voluntary Coordination of the Negligence Bar

Plaintiffs' groups have formed for litigation against seven birth control pill manufacturers, against Chevrolet for motor mount fail-

177. 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

178. 15 U.S.C. §§ 1601-44, 1665a, 1666f, 1666j, 1667-67e, 1671-77 (1976).

179. Becker, *supra* note 30, at 173 (citing Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975)). Becker continues by adding that:

> An illustration of the unintended collateral consequences of a determination of the merits before class certification is found in *Roberts v. American Airlines, Inc.*, 526 F.2d 757 (7th Cir. 1975), in which *res judicata* effect of a judgment in favor of the defendant was denied in respect to unnamed class members in subsequent actions brought by the unnamed class members.

Id. at 173.

ure and for the MER/29 drug cases.[180] Perhaps the most noted example of cooperation among parties to a mass tort case can be found in the litigation surrounding the Dalkon Shield, an intrauterine device for birth control.[181] The Dalkon Shield Group was formed in 1974, and nearly 500 plaintiffs participated.[182] Members of the Dalkon Shield Group paid $200 each to receive "a background package of data containing sample pleadings, answered interrogations, medical articles, and governmental publications. They also received periodic newsletters covering trials, settlements, new medical and administrative developments, group dealings with defense counsel, and the availability of experts."[183] Although trials are to be separate and theories of liability vary widely, discovery was coordinated so that only one set of depositions was necessary. Material developed in the coordinated discovery was shared by all group members, including those joining late, and costs were apportioned among all plaintiffs.[184]

Voluntary coordination is less efficient than class action, but does provide a device for plaintiffs who fail to obtain class action certification, regardless of whether the difficulty is choice of law problems, a lack of plaintiffs with injuries valued at $10,000, highly individualized proximate cause questions, or a lack of named plaintiffs sufficiently funded to manage the cost of notice.[185] Thus, voluntary coordination may prove the best alternative to class action litigation for toxic tort victims.

C. *Other Factors Pertinent to a Rule 23(b)(3) Class Action*

Rule 23(b)(3) sets forth criteria to aid a court's task of evaluating the relative merits of a class action. These criteria include an individual's interest in controlling his own litigation, the desirability of concentrating litigation in a single forum, the extent and nature of related litigation and difficulties with managing a class action.

180. *See* Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, LITIGATION, Spring, 1977, at 18. MER/29 is an antibiotic.

On June 25, 1981, the Dalkon Shield Litigation was conditionally certified as a class action. *See supra* note 96.

181. Rheingold, *supra* note 180, at 18.

182. *Id.*

183. *Id.*

184. *Id.* at 19.

185. *See* Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

1. The Individual's Interest in Controlling His Litigation

The drafters of Rule 23 thought class action may be less appropriate where each plaintiff has a large claim.[186] When claims also have a high psychological value, as, for example, claims for the wrongful death of a family member, this factor may become even more important.[187] If plaintiffs are scattered among typically low- and high-award districts, control of their litigation will certainly be attractive to the claimants in the latter districts.

This factor need not be definitive, however, because any plaintiff may withdraw from the class action to prosecute his claim separately.[188] Such plaintiffs will at least retain the stare decisis, and perhaps, res judicata benefits of a favorable judgment in the class action. In addition, separate litigation of the damages, handled in accordance with the laws of plaintiff's residence,[189] will remove the incentive for plaintiffs with larger claims or from high-award districts to withdraw.

2. The Extent and Nature of Related Pending Litigation

The existence of well-developed parallel lawsuits will certainly make other options, particularly transfer and consolidation, more attractive than class action. Such suits do not, however, preclude maintenance of a class action. If related actions are transferred to a single district, a class action may be maintained there. A court to which pretrial proceedings are transferred[190] may also hear class action motions.[191] Finally, if numerous claimants are not yet involved in the related litigation, a class action may be maintained by them.[192]

3. The Desirability of Concentrating the Litigation in a Single Forum

Whenever evidence, plaintiffs' or defendants', is located primarily in a single district, concentrating litigation in that forum is

186. FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 104 (1966).

187. *See, e.g.*, Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970). *See also* Note, *supra* note 70, at 1634.

188. FED. R. CIV. P. 23(c)(2).

189. *See, e.g.*, *In re* Gabel, 350 F. Supp. 624, 628 (C.D. Cal. 1972).

190. *See supra* text accompanying notes 166-67.

191. *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 493-94 (J.P.M.D.L. 1968), *cited in* Note, *supra* note 70, at 1636 n.148.

192. Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 624-25 (S.D.N.Y. 1967).

advantageous. This situation occurs frequently in mass accidents, whether they result from an airplane crash or exposure to a hazardous dumpsite. The forum so situated may find it is under an unusual burden to manage such extensive litigation, but this concentration is still far superior to spreading the burden of duplicative discovery and trial among numerous courts.

4. Class Action Management Difficulties

Unlike cases involving securities fraud or consumer deception, mass accident cases are likely to involve a manageable number of plaintiffs who are relatively easy to identify. If the tort involves long-term exposure, location of relocated victims may be difficult, but a majority probably still reside in the same vicinity where the original exposure occurred.[193]

However, other difficulties specific to toxic torts may require innovative solutions. Various methods of exposure may require extensive use of subclasses.[194] Separate trials for liability and damages may also be called for.[195] If damages vary widely, a special master may need to be appointed to determine compensation.[196] Close supervision of settlement proceedings may be necessary. Compared to the time and cost of separate trials, such management techniques are certainly worth the extra effort.

IV. STATE CLASS ACTION SUITS

Most large-scale wrongs are interstate in nature and thus many if not a majority of class actions are eligible for adjudication in federal court. Given a choice of state and federal forums, counsel is most likely to find the federal forum more advantageous, primarily because it presents fewer jurisdictional and procedural limitations. In addition, the federal bench has more experience and consistent precedent for use of class actions.

Litigants ineligible for federal adjudication will find that state class action rules differ widely, reflecting in full the genesis of the

193. *See, e.g.*, the facts surrounding the plaintiff class in the Love Canal area. Mervak v. City of Niagara Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687 (1979).

194. *See, e.g.*, Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 109-13 (E.D. Va. 1980) (subclasses based on theories of liability proposed).

195. *See supra* text accompanying notes 105-48.

196. *See, e.g.*, Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 117 (E.D. Va. 1980); Biechele v. Norfolk & W. Ry. Co., 309 F. Supp. 354, 359 (N.D. Ohio 1969).

present Rule 23. State rules may be modelled on federal equity rules at common law,[197] the Field Code of 1848,[198] the 1938 Federal Rule 23,[199] as well as the currently worded Rule 23. Other states have no statutory provision and continue to certify classes on a case-by-case basis as at common law.[200]

A. *Advantages and Limitations of State Class Actions*

The current Rule 23 is more liberal than any of its predecessors.[201] Therefore, the federal forum is usually superior in those states still adhering to an earlier federal model. Even when the state law reflects the modern Rule 23, federal forums offer jurisdictional and procedural advantages. However, failure to meet federal jurisdictional requirements or merely tactical considerations may lead counsel to choose state court.

From the plaintiff's point of view, federal courts offer many advantages. The liberal 1966 Rule 23 governs a federal action, even when a more restrictive rule applies in that state's courts.[202] Federal courts have wider jurisdiction and venue, while state courts suffer from territorial limits on jurisdiction.[203] Federal courts provide broader service of process and wider pretrial discovery than many state courts.[204] In addition, federal judges generally have more experience and clearer precedent to guide them through class action litigation than state judges, especially since the amendment of Rule 23 in 1966.[205] A wider range of substantive rights may be available in fields where federal courts have exclusive jurisdiction over certain actions.[206] Finally, attorney's fees are awarded more

197. Fed. Equity R. 48, 42 U.S. (1 How.) lvi (1842).

198. Field Code of 1848, 1848 N.Y. Laws, c. 379, *amended*, 1849 N.Y. Laws, c. 438, § 119.

199. Fed. R. Civ. P. 23, 308 U.S. 689 (1937).

200. *See supra* note 178 and accompanying text.

201. *See* 1 H. Newberg, Class Actions § 1205, at 295 (1977).

202. Hanna v. Plumer, 380 U.S. 460 (1965); Briskin v. Glickman, 267 F. Supp. 600 (S.D.N.Y. 1967).

203. Although a court need not obtain personal jurisdiction over absent class members, there is debate whether the usual territorial limits on state judicial power apply to class actions. *See* Comment *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U.C.L.A. L. Rev. 1002, 1008-12 (1971).

204. Fed. R. Civ. P. 4, 26-37. *See* H. Newberg, *supra* note 201, § 1205a, at 296.

205. *See* note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L.J. 1123 (1974), *cited in* H. Newberg, *supra* note 201, § 1205a, at 296.

206. For example, trademark, patent and securities law.

liberally in federal courts, both because they are expressly allowed more often in federal than state legislation[207] and because there appears to be a trend in the federal bench to exercise such equity powers in appropriate cases.[208] The federal courts do, however, have significant jurisdictional limitations which may force plaintiffs to seek a state forum.[209]

Tactical considerations may militate either for or against a state forum. For example, where local public opinion strongly supports the action, or the issues involved are primarily local and a local jury is likely to be sympathetic, resort to state court may be preferable.[210] This could be a particularly important consideration for toxic tort victims, who tend to be grouped in a discrete area surrounding a waste site or manufacturing plant. The jury, if local, is likely to share the same fears of latent injury of which the plaintiffs complain. Where determination and distribution of damages is likely to involve local authorities, cooperation between local state judges and these officials may facilitate plaintiffs' recovery.[211]

On the other hand, federal jury awards are usually larger and federal juries are somewhat more isolated from adverse local opinion.[212] Federal courts may be more receptive to the class action and may have the experience and personnel, for example, special masters, to properly manage a class action.[213] Federal judges are also more remote from local political pressures when relief is sought against an important local industry.[214] This factor may be crucial to toxic tort plaintiffs if the corporate defendant occupies an important position in the local economy. The defendant may assert that the large recovery sought will lead to loss of jobs or closing the plant altogether. A more remote judge and jury is then crucial to plaintiffs' success. Finally, when multidistrict litigation transfer is likely

207. *See, e.g., Proposed Federal Legislation to Protect Consumers, Including Consumer Class Actions*, 26 REC. A.B. CITY N.Y. 601, 613 n.7 (1971), *quoted in* H. NEWBERG, *supra* note 201, § 1205, at 297 n.20.

208. *See generally* National Institute for Consumer Justice, Staff Studies on State and Federal Regulatory Agencies and Miscellaneous Redress Mechanisms, app. A at 593-98 (1973).

209. *See supra* text accompanying footnotes 37-61.

210. D. JONES & C. WELDON, LAWYER'S READY REFERENCE TO CLASS ACTIONS, 60, 70-71 (1972).

211. H. NEWBERG, *supra* note 201, § 1205a, at 298.

212. *Id.* at 298-99.

213. *Id.* at 298.

214. *Id.*

to occur, with a federal forum the most likely transferee district,[215] it may be preferable to file initially in federal court, lest a state action fail or be stayed to coordinate with the other federal actions.[216]

B. *Types of State Class Action Rules*

State class action rules typically are modelled after federal law. However, not all states have tracked the entire evolution of Rule 23, and thus state rules now reflect its predecessors as well. Federal class actions passed through four stages: (1) they were permitted in equity or at common law on a case-by-case basis; (2) they were first permitted by statute in the New York Field Code of 1848; (3) they were more liberally permitted after the adoption of Federal Rule of Civil Procedure 23 in 1938; and (4) they were even more liberally permitted with the 1966 amendments to Rule 23.[217] By January, 1981, thirty-two states had adopted or modified the current rule 23.[218] The 1938 rule is used verbatim or as a model by ten states[219] and the Field Code provision is retained by five states.[220] Three states have no statutory class action procedure and permit them only to the extent authorized by state common law.[221]

The obvious disadvantage to class action suits in states with no statutory procedure is the great uncertainty surrounding certification.[222] Given the uncertainty surrounding proximate cause issues

215. *See* 28 U.S.C. § 1407 (1976).

216. *See id.* § 2283.

217. H. Newberg, *supra* note 201, § 1210a, at 304.

218. Alabama; Arizona; Arkansas (modified); Colorado; Delaware; Florida (modified); Hawaii; Idaho; Illinois (modified); Indiana; Kansas (modified); Kentucky; Maryland (modified); Massachusetts (modified); Minnesota; Missouri; Montana; Nevada; New Jersey (modified); New York (modified); North Dakota (modified) (adopted Uniform Class Action Rule); Ohio (modified); Oklahoma (modified); Oregon (modified); Pennsylvania (modified); South Dakota; Tennessee; Texas (modified); Utah; Vermont; Washington; Wyoming. *Id.* § 1210b (Supp. 1982). In addition, Rule 23 has been judicially utilized as a model in California (which has a Field Code provision) and is directly applicable in the District of Columbia, Puerto Rico and the Virgin Islands. *Id.* § 1210b, at 305 (1977).

219. Alaska; Georgia; Iowa, Louisiana; Maine; Michigan; New Mexico; North Carolina; Rhode Island; West Virginia. *Id.* § 1210b (Supp. 1980).

220. California; Connecticut; Nebraska; South Carolina; Wisconsin. *Id.* § 1210b (Supp. 1982).

221. Mississippi; New Hampshire; Virginia. *Id.* § 1210b, at 309 (1977).

222. *Compare* Evans v. Progressive Casualty Ins. Co., 300 So.2d 149 (Miss. 1974) (class denied), *with* Town of Hampton v. Palmer, 99 N.H. 143, 106 A.2d 397 (1954) (class upheld). *See also* Morrissey v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979) (Under

in toxic tort actions, this added pre-trial burden may be a decisive factor in prompting resort to the federal forum. Class actions in states which follow the New York Field Code of 1848 provision suffer from the rule's historic deficiencies. The most serious defect arises from the language of the 1849 amendment to the section requiring joinder of parties "united in interest."[223] The drafters added to this section the provision that "when the question is one of a common or general interest of many persons . . . one or more may sue or defend for the benefit of the whole."[224] Analysis of judicial interpretations of this phrase reveals that:

> they represent an expression of the ill-defined concept of privity. . . . In the absence of that connection, class actions usually fail unless the subject matter of the controversy is a limited fund or specific property, or the relief sought is common to the class in the sense that satisfaction of the individual claims before the court also automatically satisfies the claims of all other class members.[225]

As a result, class actions in Field Code states can be severely restricted, especially for environmental and toxic tort cases.[226]

As written in 1938, Rule 23 divided class actions into three categories: "true," when the right was joint, common or derivative; "hybrid," when the right was joint and a specific property was involved; and "spurious," when the right was several and common questions of law and fact predominated. While true class actions bound all members and hybrid class actions bound all members with respect to the res, spurious class actions were scarcely more than liberal joinders binding only the parties present before the court.[227] Because the 1938 rule failed to distinguish adequately

Illinois's common law approach to class action certification, the trial judge was within his discretionary power to deny certification for DES victims, stating that Illinois disfavors mass accident class actions).

223. 1848 N.Y. Laws, c.379.

224. 1849 N.Y. Laws. c.438, § 119.

225. Homberger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 616 (1971).

226. *See, e.g.*, the mixed results in California under its Field Code-type provisions: *compare* Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972) (class action upheld on behalf of 700 property owners aggrieved by noise, fumes and vibrations from city airport) *with* Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971) (class action certification denied residents of Los Angeles in action against numerous defendants for smog and pollution).

227. *See, e.g.*, Oakwood Homeowners Ass'n v. Ford Motor Co., 77 Mich. App. 197, 258 N.W.2d 475 (1977) (holding that a spurious class action was maintainable for damages from air pollution since a spurious action is no more than permissive joinder).

among these categories and thereby caused confusion over the binding effect of the judgment, federal forums are preferable in states that follow this provision.[228] The disadvantages of the 1938 rule, moreover, are generic and are not any less severe for toxic tort victims.

Even where the choice is between a federal court and a state court following the modern rule, the plaintiff is apt to choose the former, for reasons discussed above.[229] The Uniform Class Action rule, adopted in 1976 by the National Conference of Commissioners on Uniform State Laws, attempts to meet these problems.[230] So far, however, only one state has adopted the rule,[231] and the provision is still subject to much academic debate.[232] For the moment, it is generally true that federal courts provide a better environment for class action suits in which the jurisdictional requirements can be met.

V. Conclusion

Liberally granted class actions on the federal level could provide the most satisfactory opportunity for judicial relief to individuals exposed to toxic materials. The long latency periods associated with many injuries necessitate extensive discovery, delving into defendant's actions as far back as forty years. Current scientific uncertainty over the causal connection between exposure and specific resultant injuries requires expensive and time-consuming preparation if plaintiffs are to satisfy current legal standards of proximate cause, and thus, liability. These factors militate heavily toward some sort of consolidation of effort. Moreover, the need for a single definitive resolution of these issues argues forcefully for a procedural device which will bind all plaintiffs and defendants embroiled in the aftermath of a toxic tort.

Although other devices are available, none offer all the advantages of a class action. Individualized litigation duplicates effort and drains judicial resources. In addition, the expense of preparing a toxic tort case may lead many plaintiffs to conclude that the expected recovery is not worth the effort of litigation. Joinder is no

228. *See* Fed. R. Civ. P. 23 advisory committee note, 39 F.R.D. 69, 98-99 (1966).

229. *See supra* text accompanying note 204.

230. *See* Alpert, *The Uniform Class Actions Act: Some Promise and Some Problems*, 16 Harv. J. on Legisl. 583 (1979).

231. N.D. Cent. Code R. Civ. P. 23 (Supp. 1981).

232. *See, e.g.*, Alpert, *supra* note 230.

easier to achieve than class action certification, and its only advantage, avoidance of notice costs, has serious disadvantages of its own. Consolidation of trial does not bind plaintiffs absent from the court, and thus opens the door to continued litigation; since questions concerning causation are capable of many different resolutions, the spectre of inconsistent judgments for similarly situated plaintiffs looms large. Coordinated pre-trial adds some efficiency to the litigation, but still permits inconsistent results and also burdens a number of judges with the difficult task of assessing uncertain and contradictory scientific evidence. Offensive use of collateral estoppel and test cases have not yet gained wide acceptance in the courts. Considering the large uncertainties surrounding the substantive aspects of toxic tort litigation, the added burden of procedural confusion is heavy indeed. Voluntary coordination of the bar suffers from the same deficiencies as transfer for coordinated pre-trial, but may provide the best informal procedure for streamlining toxic tort actions ineligible for certification.

Federal class actions can provide an answer to the problems of toxic tort litigation if the procedural obstacles in Rule 23 can be overcome. Plaintiffs must be able to meet the $10,000 jurisdictional requirements and be capable of bearing the possibly mammoth costs of providing notice. Moreover, plaintiffs must convince the court that common questions of law and fact predominate. Absent significant choice of law complications, this task may be aided by the judicious use of class management techniques. Split trials and consolidated discovery can allow resolution of factual questions concerning the defendant's conduct that is binding on the entire class. Trials on causation and liability can be held for subclasses grouped according to manner of exposure. Subclasses grouped by the nature of the injury sustained can simplify the task of setting damage awards.

State class action suits are available for plaintiffs unable to meet federal jurisdictional requirements. However, these actions suffer from disadvantages which are not unique to toxic tort litigation. Furthermore, competing considerations peculiar to toxic torts may make the choice of forum difficult. As victims are often concentrated in a relatively small area, local jurors are apt to be sympathetic. Moreover, due to the long latency periods of many toxic injuries, these jurors may share the same fears which motivated the plaintiffs to sue. On the other hand, toxic tort defendants are apt to be large industrial concerns important to the local economy. Local

juries may be afraid to find liability lest a huge class judgment lead the defendant to close down or cut back on its operations. In addition, the unusually complex nature of toxic tort class actions, requiring innovative class management techniques, may be beyond the expertise of state judges who have far less experience in this area than the federal bench.

Overall, the federal class action provides the best solution for toxic tort victims who can overcome procedural and jurisdictional obstacles to the use of Rule 23. For those who cannot, voluntary coordination of the plaintiffs' bar or state class actions may provide an alternative, albeit inadequate, to wasteful and difficult individual litigation.

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