

LITIGATE THE TORTS,  
NOT THE MASS:

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A MODEST PROPOSAL FOR REFORMING HOW  
MASS TORTS ARE ADJUDICATED

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*Foreword*  
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# FOREWORD

by  
Professor Richard A. Nagareda\*

One of the most persistent and difficult problems confronting our civil justice system concerns the handling of mass tort claims. In this timely Monograph, John Beisner and Jessica Miller of the prominent defense-side law firm of O'Melveny & Myers LLP sketch a series of reforms for the treatment of mass torts in our contemporary legal environment.

Looming over the many debates to which this Monograph speaks is the Supreme Court's 1997 decision in *Amchem Products, Inc. v. Windsor*. There, the Court overturned an ambitious effort to use a class action settlement as the vehicle to put into place prospectively a privatized, administrative compensation scheme as a substitute for ongoing tort litigation over asbestos. The upshot of *Amchem* has been to make class certification well-nigh unavailable, whether to coordinate the handling of mass tort claims (as the Monograph documents in footnote 90) or simply for the purpose of lending binding force to a settlement agreement designed to bring peace to a given area of mass tort litigation as a whole. In the decade since *Amchem*, however, efforts have continued apace to identify a viable method of litigation coordination and – by no means unrelated – a viable means to enforce the peace. With class actions essentially off the table for both of these enterprises, attention simply has gravitated to other vehicles. The need for coordination and for peace still remains. That need defines the terrain of the Monograph, just as it defined the challenges confronted by real-world lawyers and judges in the most widely-reported area of

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mass tort litigation in recent times – that over the prescription pain reliever Vioxx and related drugs.

When a mass tort emerges, there are basically two potential endgames: termination of the litigation, in practical effect, through dispositive pre-trial motions (say, for lack of general causation) or settlement on a comprehensive (or, at least, a broadly-encompassing) basis. Crucial to both endgame scenarios are procedural vehicles for coordination as well as tools to enable the civil justice system – to put the point indelicately – to distinguish the colorable claims from what may be a considerable mass of “junk.” Law is needed, in other words, to facilitate the ability of the parties to price the claims. As to coordination, the Monograph proceeds much in the animating spirit of a 1994 reporter’s study by the American Law Institute (ALI) that urged the development of enhanced procedural vehicles for the coordination of complex civil litigation generally. The Monograph then generalizes from the step recently taken in such a direction in the Class Action Fairness Act of 2005 by calling for the use of a “minimal diversity” standard for federal diversity jurisdiction over mass tort claims advanced through the conventional vehicle of individual lawsuits, not merely through proposed class actions.

With the possible endgames of termination or settlement again in the offing, the Monograph turns to the difficult job of defining the procedural environment in which the merits of mass tort claims are to be tested. This, in itself, marks a significant step away from much thinking during the 1980s and 90s. The major move of the Monograph in this regard is to underscore the need to avoid what one might call a “rush to settlement,” precipitated by little more than the sheer mass of claims on file. To put the point more formally, the Monograph sketches the procedural environment to govern the generation of information that will guide the design of any eventual settlement “grid.”

The main prescription here is actual examination of the merits of mass tort claims through trials in a representative sample of such

lawsuits. How shocking, how unheard of, that a sensible civil justice system actually should endeavor to test whether a given mass of claims really have merit, as defined by applicable substantive law – or, perhaps more accurately, which ones, if any, have a case on the merits. Only in the through-the-looking-glass world of mass tort litigation for the past several decades would a scholarly Monograph – and able jurists like U.S. District Judge Eldon Fallon, who oversaw the use of bellwether trials in the federal Vioxx litigation – be needed to advance such a commonsense notion. Who'da think that a just legal system should be one in which substantive merit – not just raw numbers of claims – should matter?

Appropriately enough, the mass tort area is an especially promising one for the notion of bellwether trials, for substantial numbers of claims may well be economically marketable for legal representation as individual lawsuits. The ongoing drafting work by the ALI on its *Principles of the Law of Aggregate Litigation* – for which I serve as an associate reporter – recognizes this option, urging courts to afford aggregate treatment of common issues in a given area of litigation only when such treatment would “drive the resolution of multiple civil claims by comparison to other realistic procedural alternatives.” In the mass tort area today, real trials in real individual cases are often the most obvious “realistic procedural alternatives” to a contested aggregation.

In its later sections, the Monograph turns to the challenging enterprise of closure at the back end – first, by seeking to define the universe of claims to be settled and, second, by speaking directly to the enforcement of the settlement. Here, the Monograph argues against what one might call reflexive or automatic application of the American Pipe doctrine, whereby the running of the applicable statute of limitations on a given mass tort claim is suspended during the pendency of a class action complaint. The Monograph concludes by pinpointing what is likely to be among the most important challenges for civil justice reform in the coming generation: the job of bringing our

inherited system of procedure and legal ethics into accord with the observed, on-the-ground reality of mass claims in a world of undifferentiated products sold in an integrated national – and, increasingly, international – marketplace. It should not surprise us that ethical strictures developed for the familiar world of one-on-one litigation should operate discordantly in a world of mass claiming. The Monograph pinpoints that the debate over the Vioxx settlement in this regard arises precisely because of the move in *Amchem* to take class actions off the table as a settlement-enforcing vehicle.

Like any timely Monograph, this one will inspire considerable debate. Whatever one's ultimate conclusions on the specifics, however, one cannot gainsay the contribution made here to frame an appropriate set of questions. Those center increasingly on how to craft the procedural environment to generate information for any resulting settlement and, crucially, how actually to achieve binding peace. One can label the context as a class action, an aggregate settlement, a contract with plaintiffs' law firms (as in the Vioxx deal), or even a reorganization proceeding in bankruptcy (as in the asbestos setting, post-*Amchem*). But those labels alone do not and will not answer the hard questions surrounding information-generation and actual delivery of closure. On those hard questions, the Monograph offers much food for thought.

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A news story breaks: a drug manufacturer has announced the surprising results of a recent study suggesting that a popular drug has a dangerous side-effect.

The study is halted. In tandem with the Food and Drug Administration, the manufacturer begins poring over all available data. In the aggregate, the data indicate that some problem exists, but they are inconclusive as to the number of people who may be at risk. Tens of thousands of patients have taken the drug for years, but it is unclear whether the effects extend to a handful of patients or a substantial percentage of the U.S. population. The company endeavors to decide what to do next.

Newspapers, television news programs, radio talk shows, and websites all trumpet the story for weeks, and speculation swirls about how many users might already have been affected. Congressional hearings are scheduled. The manufacturer dispatches representatives to various forums to discuss the implications of the data. Ultimately, the product is withdrawn from the market or is given new warning-laden labeling.

Within hours of the first news story, dozens of individual suits and numerous class actions have already been filed in jurisdictions nationwide. As the media coverage begins to taper off, lawyer advertisements continue the buzz. Lawyer-sponsored screening centers

spring up across the country to identify potential new clients.<sup>1</sup> By the time a month passes, thousands of lawsuits have been filed, with some law firms asserting upwards of a hundred new claims daily. Several weeks later, the Judicial Panel on Multidistrict Litigation establishes a multidistrict litigation (MDL) proceeding to handle the litigation onslaught. Coordinated proceedings soon follow in the manufacturer's home state and in several other state courts around the country.

A mass tort has begun.

By now, some level of manufacturer "guilt" is presumed based merely on the massive number of claims, even though no attempt has yet been made to test their merit. Alarmed by the explosive growth of their dockets, the courts charged with managing the new mass tort seek shortcuts for managing their caseloads, and due process is among the first casualties of the litigation. All options are considered – class actions, issues trials, multi-plaintiff trials. Courts order scorch-the-earth discovery from the defendant and require that selected cases (usually hand-picked by plaintiffs' counsel) be prepared for trial. The goal, of course, is to press the parties toward a global resolution, one that will make the mass tort proceeding look like a "success" and alleviate the burdens on judicial dockets. Millions of dollars are expended, and years pass before any resolution.

Is there a better way to litigate mass torts?

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<sup>1</sup>Medical screenings are generally organized by consortia of plaintiffs' lawyers who hire doctors, nurses, and x-ray technicians and set up widely-advertised "exams" at hotels, in parking lots, and in other non-medical settings. The advertisements for screenings, which may take forms ranging from late-night television commercials to billboards, often indicate the symptoms that the screening doctors will be seeking to identify. In many mass torts, the doctors will diagnose thousands of individuals after examinations lasting little more than five to fifteen minutes. These exams and the diagnoses they produce often bear little relation to accepted medical practices, result in unwarranted pressure on defendant companies to settle cases, and tie up courts for years, denying truly ill plaintiffs their day in court. Attorney-sponsored screenings have already been used to generate massive numbers of plaintiffs in the context of the silicosis, welding fume, asbestos, and diet drug litigations, and their use is growing.

This Monograph proposes four simple procedural reforms that would improve the way mass torts are litigated and resolved in U.S. courts:

- Expanding the diversity jurisdiction of federal courts to enable further concentration of claims before a minimal number of tribunals;
- Adopting standardized winnowing procedures to arrive more quickly at an understanding of the size and nature of the legitimate claims pool;
- Eliminating class action tolling of limitations periods to provide clearer guidance to the parties about when all viable claims must be filed; and
- Revising ethical rules to account for the unique problems posed by mass tort settlements.

## I.

### THE PROBLEM WITH MASS TORTS

At base, the problems posed by mass torts flow from the manner in which personal injury claims are developed and filed. Plaintiffs' attorneys have strong motivations to assert large numbers of claims, regardless of their individual merit. The more cases an attorney files, the more likely he is to get a big payout in the event of settlement, and in large mass tort litigation, plaintiffs' lawyers are rarely called upon to do any work on the vast majority of their cases or demonstrate that they have any merit.<sup>2</sup> Thus, the cost of filing more cases is minimal, and the potential payoff is quite large.

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<sup>2</sup> Recognizing this demand, legal consulting firms have begun offering services to plaintiffs' attorneys designed purely to pump up counsel's case inventory. One such

A larger inventory of claims also improves an attorney's position vis-à-vis other plaintiffs' lawyers. A lawyer with more claims is more likely to secure leadership positions in the litigation that would lead to greater personal compensation if and when there is a global settlement.

Because there are no "gatekeeping" requirements for filing cases, most mass torts include large amounts of "junk" – cases in which no significant injury occurred and cases in which the alleged injury most likely had an alternative cause. Indeed, there is evidence that many claimants are "rolodex" plaintiffs – persons whose counsel find a way to assert claims on their behalf in multiple, successive mass torts. This problem is compounded by the fact that many of the claims are not developed by the filing counsel – they effectively were "purchased" from other attorneys who advertised to attract claimants in their home markets with no intention of ever litigating the claims themselves.

Although many plaintiffs' lawyers take little care in testing the details and fundamental legitimacy of their clients' mass tort claims, they take great care in determining where to file them. Inevitably, there is a federal multidistrict proceeding for all the cases pending in federal court. But many plaintiffs' lawyers avoid federal court in favor of more favored forums – usually state courts with elected judges who tend to favor plaintiffs, deny dispositive motions, and apply much looser requirements for admitting medical and scientific evidence at trial. Current jurisdictional law essentially allows a plaintiff to avoid federal court by simply suing a doctor, a pharmacy, a distributor, or some other peripheral defendant that resides in his or her state. (These defendants are routinely dropped before trial, and there is never any illusion as to

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company's website boasts that "[m]ore and more attorneys are using professional marketing services to grow their client base. ServicesToLawyers provides turn-key solutions that have proven effective in helping lawyers find potential plaintiffs and partners. We have been providing custom database solutions and marketing services for 10 years." See <http://servicestolawyers.com/home/aboutus.html> (last visited August 4, 2008). The company also claims that it "will work with you to design business development campaigns *suited to whatever client niche you are pursuing*." See *id.* (emphasis added). Among the tools the company utilizes are targeted voice- and e-mail "blasts," direct mailings, and websites and internet advertisements targeted at potential plaintiffs.

why they were joined in the first place.) The result is that instead of one organized mass tort proceeding in a federal court, there are pockets of cases in various courts around the country, where plaintiffs' lawyers attempt to extract more favorable discovery rulings and quick verdicts to increase their leverage over defendants.

Faced with hundreds (if not thousands) of cases, courts often look for a quick way out. There is a presumption that the parties cannot individually litigate so many cases and that resolution will require some short cut. As a result, courts often turn to "innovative" procedures to whittle down their dockets or pressure a settlement. Some courts propose issues trials in which allegedly "common" issues in the litigation will be resolved generally as to all plaintiffs – essentially giving plaintiffs the benefit of a class trial without needing to meet the strict elements for class certification contained in the applicable rules of civil procedure. Other courts have experimented with multi-plaintiff trials, allowing plaintiffs to present a single jury with multiple plaintiffs asserting the same causes of action against the defendant. That trial model gives plaintiffs the strong advantage of signaling to the jury that many persons are alleging similar injuries, and thereby suggesting that the claims must have some validity. These trials – which can last months, involve dozens of witnesses, and cost hundreds of thousands of dollars to try – are irreparably tainted with prejudice, to say nothing of the jury confusion that arises in trying to keep track of multiple claims each with individualized factual scenarios. In the end, vast resources are spent on judicial experiments that severely disadvantage defendants. Many of those experiments are obviously subject to reversal,<sup>3</sup> but the

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<sup>3</sup>See, e.g., *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (granting mandamus and vacating order consolidating repetitive stress injury claims from use of keyboards and other ergonomic devices); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 49 (Miss. 2004) (reversing identical jury verdicts entered on behalf of ten personal-injury plaintiffs in a consolidated trial against a pharmaceutical company on the ground that the joint trial was fundamentally unfair).

Plans for issues trials similarly have not withstood scrutiny. See, e.g., *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 488 (E.D. Pa. 1997) (rejecting issues trial on the question of general causation in tobacco cases); *In re Paxil Litig.*, 212 F.R.D. 539, 546-47 (C.D. Cal. 2003) (collecting cases and rejecting aggregated trial on general causation); *In re*

hope of proponents (often the courts and/or plaintiffs' counsel) is that one or more high-stakes trial losses will cause the defendant to settle, precluding appellate review. In short, these experiments do little to resolve the real validity of any individual claim; they are merely a drill to encourage settlement.

The longer a defendant battles mass tort litigation, the more it is deemed to be recalcitrant or uncooperative. After a few years, courts tire of mass torts, and they exert tremendous pressure on the defendants to settle pending claims, regardless of their merit. But settlement is also fraught with complications. For starters, plaintiffs often try to take advantage of so-called *American Pipe* tolling by filing expansive class actions at the start of a mass tort controversy. Unless courts act quickly to deny class certification (which they rarely do), the result is that there is no clarity about when the “door has closed” on a mass tort – the limitations period is arguably tolled for the entire period that the class action is allowed to remain pending. Thus, a defendant that creates a mass tort settlement program four or five years into the life of a mass tort could suddenly find itself faced with thousands of additional, newly filed cases it did not know were coming.

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*Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting trial court’s “bold and imaginative” plan to hold separate trial on common questions of law); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741, 746 (5th Cir. 1996) (rejecting proposed class issues trial on “core liability issues” because the aggregation of claims “magnifies and strengthens the number of unmeritorious claims”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (reversing class issues trial on general question of negligence; “the district court’s commendable desire to experiment with an innovative procedure for streamlining the adjudication of [a] ‘mass tort’” would exceed the “permissible bounds of discretion in the management of federal litigation”).

Trial courts sometimes experiment with aggregation devices anyway, confident they can avoid the same fate, only to report afterwards that their confidence was misplaced. *E.g., Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (“[D]espite all the precautionary measures taken by the court (e.g., juror notebooks, cautionary instructions before, during, and after the presentation of evidence, special interrogatory forms), the joint trial of such a large number of differing cases both confused and prejudiced the jury.”).

Even settlements of mass torts are fraught with difficulties under the current system. Class action settlements are no longer feasible in most mass torts given the Supreme Court's *Amchem* ruling. Thus, settlement programs are essentially opt-in – plaintiffs must decide individually whether to participate. If lawyers can pick or choose which clients participate in a “global” settlement, they have a strong incentive to sign up all of their weaker claims for a settlement while trying to hold back their high-value claims for later, individualized, higher-priced resolution. But if all the strong claimants hold out, a settlement offers no peace for a defendant and is therefore not worth agreeing to. As a result, defendants have begun insisting on provisions that require full participation in settlement programs. However, such provisions are sometimes attacked on ethical grounds with critics arguing that they create conflicts of interest.

In sum, every step of a mass tort proceeding from its birth to its death is characterized by inefficiencies and inequities that result from trying to apply standard case management provisions to gargantuan proceedings that involve hundreds or thousands of claims.

It doesn't have to be this way.

## II.

### MODEST MASS TORT PROCEDURAL REFORM: A FOUR-STEP METHOD

This Monograph proposes four simple procedural reforms that are specifically targeted to streamline the litigation and settlement of mass tort cases:

**First**, by expanding federal diversity jurisdiction to all tort cases for which an MDL proceeding has been created, and by encouraging federal and state court coordination, courts can vastly improve the efficiency and fairness of mass tort proceedings.

**Second**, courts can winnow and resolve mass torts much more efficiently through the use of case management tools, such as random case pool workup, bellwether trials, and *Lone Pine* orders that can reveal the merits of large numbers of cases.

**Third**, courts can more effectively close the door on mass tort actions through *American Pipe* reform.

**Finally**, courts can better encourage timely resolution of mass tort actions by clarifying the legal and ethical rules governing class action and other large-scale settlements.

These proposals constitute “court reform” – not “tort reform.” They would not tilt the playing field in anyone’s direction or modify any parties’ substantive rights;<sup>4</sup> they do not limit the potential recovery

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<sup>4</sup>In this respect, our proposal differs from various concepts that are currently being developed and debated by the members of The American Law Institute (“ALI”). Over the last few years, ALI has considered – and adopted in part – a document entitled Principles of the Law of Aggregate Litigation. That document attempts to address the problems posed by mass torts and other multiple-claimant litigation proceedings. See Principles of the Law of Aggregate Litigation, American Law Institute, Tentative Draft

for plaintiffs with legitimate claims against defendants; and they do not modify current attorneys' fees principles. They do not propose federal preemption or wholesale replacement of the existing tort system with some other model. In short, these proposals do not enter the hotly contested debates over the substantive rules that should govern tort law. Rather, they aim simply to streamline the process of litigating mass torts – which should be in everyone's interest, particularly any plaintiffs who have compelling claims.

## **A. Jurisdictional Reform/Improving Federal-State Coordination**

A primary impediment to the efficient resolution of mass torts in the United States stems from what, on its face, may appear to be a wholly unrelated topic: the subject matter jurisdiction of the federal district courts.

Whenever a new mass tort emerges, the first battleground almost always involves whether federal courts have jurisdiction over the controversy. Historically, plaintiffs' lawyers have sought to litigate their cases in state court, where they perceive certain litigation advantages. Defendants generally prefer to litigate in federal court and avail themselves of the MDL coordination procedure, which places all of the mass tort claims before a single, coordinating judge. The result of this jurisdictional battle normally is a patchwork of cases pending in numerous different state courts and sometimes multiple "coordinated"

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No. 1 (Apr. 2008) (the "ALI Principles"). To be sure, that ALI effort is focused on the right problems. As the Introduction to the ALI Principles document notes, "These largest cases . . . present significant management problems, entail significant costs and pose serious risks of underrepresentation." *Id.* at 1. However, while the authors agree that reforms are needed to address litigation abuse and inefficiency, they respectfully disagree with some of the solutions proposed in the current version of the ALI Principles. Of most concern, Chapter Two of the ALI Principles appears to endorse a loosening of standards for class certification and so-called "issues" trials that would compromise both plaintiffs' and defendants' due process rights to a fair trial. *Id.* at 93-224.

state court proceedings – all in addition to a federal MDL proceeding. Inefficiency thus prevails in the form of inconsistent pretrial rulings and duplicative discovery. Indeed, such inefficiency is often intentionally multiplied by plaintiffs, who take issues (particularly those relating to discovery and privilege) from court to court until they obtain what they deem to be a favorable ruling. For example, the fact that one court has found a set of documents to be privileged will not preclude another court from ordering their production. And although federal and state court judges are encouraged to work in tandem when dealing with mass torts, “[c]oordination becomes much more complex when cases are dispersed across a number of states, even where the federal cases are all centered in a single MDL transferee court.”<sup>5</sup>

A simple reform to the requirements of so-called “diversity jurisdiction” would go a long way toward eliminating the inefficiency and abuse that plague the current system. Diversity jurisdiction has developed over the past 200 years to require what has come to be known as “complete diversity” (*i.e.*, that all plaintiffs must be citizens of different states from all defendants), as well as a jurisdictional minimum amount in controversy (today \$75,000 per claimant). But the “complete diversity” requirement (like the amount-in-controversy minimum) is not a constitutional requirement – it is merely a creation of Congress intended to limit the jurisdiction of the federal courts. In the mass tort setting, the “complete diversity” requirement has worked all manner of mischief into the system – at great expense to consumers, taxpayers, and defendant companies. This is because plaintiffs’ attorneys, in an effort to keep their lawsuits in preferred state courts and away from the coordinating MDL court, seek to evade federal jurisdiction by joining their product liability or other claims against a primary defendant, such as a pharmaceutical manufacturer or automaker, with claims against any number of in-state defendants such as sales representatives, pharmacists, auto dealers, or other local retailers. But plaintiffs in such situations have no real intention of pursuing relief against the non-diverse defendants; rather, their presence is needed only to destroy diversity jurisdiction and keep the lawsuit out

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<sup>5</sup>MANUAL FOR COMPLEX LITIGATION, 4<sup>th</sup> § 20.311, at 231-32 (2004).

of federal court and, thus, beyond the reach of the federal MDL court. Invariably, once the one-year removal deadline has passed<sup>6</sup> and a court has ruled on the plaintiffs' motion for remand to state court, plaintiffs dismiss all of the non-diverse defendants from the lawsuit. This practice has come to be known as "fraudulent joinder."

Numerous courts around the country have observed the sham quality of this practice, recognizing that its sole purpose is to prevent removal at the expense of peripheral defendants. As the MDL court in the diet drug litigation observed, "there is a pattern of pharmacies being named in complaints, but never pursued to judgment, typically being voluntarily dismissed at some point after the defendants' ability to remove the case has expired."<sup>7</sup> This practice, the court noted, "can only be characterized as a sham, at the unfair expense not only of [the drug maker] but of many individuals and small enterprises that are being unfairly dragged into court simply to prevent the adjudication of lawsuits against [the drug maker], the real target, in a federal forum."<sup>8</sup>

Importantly, and as the MDL court in the diet drug litigation pointed out, this illegitimate practice can have serious consequences for the small parties that are forced to hire lawyers and purchase insurance to defend against these meritless claims:

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<sup>6</sup>See 28 U.S.C. § 1446(b) (stating that a case may not be removed under 28 U.S.C. § 1332 "more than 1 year after commencement of the action").

<sup>7</sup>*In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 424 (E.D. Pa. 2002).

<sup>8</sup>*Id.* at 425. The U.S. Court of Appeals for the Eleventh Circuit has also observed that the diet drug litigation alone spawned "dozens" of cases wherein district courts concluded that local sales representatives were fraudulently joined to defeat removal. *Legg v. Wyeth*, 428 F.3d 1317, 1320-21 (11th Cir. 2005) (collecting cases). As that court noted, "[a] common strategy employed by the plaintiffs in these cases is to name local parties, often Wyeth's local sales representatives, as defendants, thus defeating Wyeth's right to remove a case to federal court." *Id.* at 1320.

By way of flagrant example, there is the Bankston Drugstore, in Fayette, Mississippi. As the only pharmacy in Jefferson County, Mississippi, the store is named in hundreds of lawsuits involving the sale of allegedly defective drugs, including fen-phen . . . Hilda Bankston, the former owner of the pharmacy, testified that because of this ‘lawsuit frenzy’ she has had to spend innumerable hours retrieving information for potential plaintiffs, testifying in court, enduring the whispers and questions of customers and neighbors who wonder what the pharmacy did to end up in court so often, and worrying about whether her business would survive. Although she sold the pharmacy in January 2000, she remains deeply mired in the lawsuits, as is the successor owner. Although the pharmacy is usually dropped from the lawsuits at some point before trial, the costs of hiring lawyers and obtaining insurance can become prohibitive . . . As Ms. Bankston sees it, her ‘life’s work was merely a means to an end for trial lawyers seeking to cash in on lucrative class actions – a back door into the Jefferson County court system.’<sup>9</sup>

This practice ultimately results in duplicative lawsuits pending in numerous different state courts, where state court trial judges and the federal MDL judge simultaneously delve into the same discovery and trial preparation issues. The state court judges often issue pre-trial rulings that are inconsistent with their state and federal counterparts, and defendants are thus frequently burdened with duplicative discovery requests.

Congress could eliminate this entire scenario with a modest adjustment to the federal courts’ diversity jurisdiction authority. By requiring only “minimal diversity” for federal jurisdiction over mass torts in which there is an MDL proceeding (*i.e.*, that only one plaintiff need be diverse from one defendant in a mass tort), Congress could ensure that the vast majority of all mass tort filings are efficiently

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<sup>9</sup>*Diet Drugs*, 220 F. Supp. 2d at 424 (citations omitted).

coordinated in one federal court (and the one or two state courts where the defendant is a citizen).<sup>10</sup> Congress need look no further than the Class Action Fairness Act of 2005 (“CAFA”) to find both the rationale for, and the likely benefits of, such a reform.

Among other things, CAFA was intended to correct “a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevent[ed] most interstate class actions from being adjudicated in federal courts.”<sup>11</sup> That flaw was the requirement of complete diversity in class action lawsuits – prior to CAFA, plaintiffs’ lawyers in class actions employed numerous pleading devices to destroy complete diversity and keep their class claims in friendly state courts. But in enacting CAFA, Congress realized that “interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit;” thus, Congress concluded that “such cases properly belong in federal court.”<sup>12</sup> CAFA’s jurisdictional reforms have made it “harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction,” created “efficiencies in the judicial system by allowing overlapping and ‘copycat’ cases to be consolidated in a single federal court,” and placed “the determination of more interstate class action lawsuits in the proper forum – the federal courts.”<sup>13</sup>

The very same rationales for expanding federal court jurisdiction apply to the thousands of single-plaintiff filings that accompany the typical mass tort. Establishing broader federal jurisdiction over mass tort cases would eliminate many of the current abuses and inefficiencies from the system. Specifically, any time an MDL proceeding is created

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<sup>10</sup>Even if jurisdiction is expanded in the way we propose, Article III of the Constitution requires “minimal” diversity for federal jurisdiction over state law cases. Thus, cases brought by a plaintiff who is a citizen of the state in which a defendant is incorporated or based would not be subject to federal jurisdiction.

<sup>11</sup>Sen. Rep. 109-14 at 5, Feb. 28, 2005.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

pursuant to 28 U.S.C. § 1407, federal courts would have jurisdiction over all related claims as long as there is minimal diversity between the parties and the amount-in-controversy threshold is satisfied. Because such a proposal would not apply to cases brought by a citizen of the state where the defendant is based (insofar as those cases would not even satisfy minimal diversity), some state court filings in that particular jurisdiction(s) would remain in state court. But the result would be the gathering of virtually all claims in a mass tort before no more than three courts: the federal MDL court, the state court in which the defendant corporation has its principal place of business, and, if different, the state court in which the defendant is incorporated. Importantly, this reform would not result in more work for the federal courts, because it would only apply if an MDL has been established to oversee numerous overlapping claims. Once an MDL is created, additional cases do not substantially increase the MDL court's workload.

Notably, Judge Jack Weinstein, a senior federal judge who has overseen many mass tort proceedings over the years, has recently proposed a similar reform while lauding CAFA's effect of allowing similar claims to be adjudicated before a single, federal judge. After settlement of some eight thousand claims in the Zyprexa litigation, Judge Weinstein was faced with a motion to remand two thousand non-settling claims to state court.<sup>14</sup> Judge Weinstein observed that "there is a centrifugal force in a pharmaceutical quasi-class action driving some attorneys to bring new cases in many state courts and to remand federal cases in order to prevent effective national aggregation and consolidation."<sup>15</sup> As a result, Judge Weinstein opined, a legislative solution may be needed to ameliorate the "sprawling nature of the possible multifarious state actions" which, according to Judge

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<sup>14</sup>*In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539 (E.D.N.Y. 2006).

<sup>15</sup>*Id.* at 541.

Weinstein, constitute “a continuous hazard to useful conclusion of the litigation.”<sup>16</sup> Judge Weinstein specifically observed that:

[CAFA] is a good example of legislative efforts to allow mass national litigation to proceed on a consolidated basis in a single forum . . . Part of the legislative impetus for [CAFA] was the recognition that the resolution of some multi-state mass actions of national import was being hindered by concurrent adjudication in state and federal courts.<sup>17</sup>

With this example in mind, Judge Weinstein observed that similar legislative reform could aid the efficient, global resolution of similarly large mass tort actions:

It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions. As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes. Much the same concerns which animated CAFA’s preference for a single, federal forum apply to national MDL aggregate actions.<sup>18</sup>

In short, expansion of federal jurisdiction over the large number of factually similar cases filed in the typical mass tort will not only ensure that defendants’ right to defend such cases in a federal forum is vindicated, but will also result in significant efficiencies in handling, winnowing, and ultimately resolving the mountain of complaints that accompany the modern mass tort.

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 541-42.

<sup>18</sup>*Id.* at 542 (internal citation omitted).

## **B. Adopting Case Management Techniques to Winnow Cases**

As set forth above, once a “mass tort” gets its legs – usually as the result of the filing of a large number of cases – more claims keep flowing in. However, it is hard for a court to say, at first glance, whether any of these claims is well grounded. The inevitable result is an ever-increasing inventory of cases (sometimes tens of thousands) of unknown merit pending against the defendant.

At present, there is no standardized procedure contemplated by the Federal Rules of Civil Procedure or endorsed by the Judicial Panel on Multidistrict Litigation to deal with the inevitable mass tort claims logjam. By developing a standard protocol for winnowing claims, courts would have a mechanism for managing mass torts at the front end that does not require highly questionable issues trials or multi-plaintiff trials. At base, such a procedure would encourage early inquiry into the substance of individual claims and make counsel accountable for pursuing dubious claims. The components of such a case management program would include:

- Expanding the use of fact sheets and other early discovery initiatives;
- Requiring all claimants to comply with “*Lone Pine*” orders;
- Advancing discovery on randomly selected subsets of individual claims, followed by single-plaintiff bellwether trials from that pool; and
- Imposing fee-shifting on counsel who file meritless or fraudulent claims.

While some courts regularly use one or more of these case management provisions (often with variations), we are unaware of a court that has embraced the use of all four elements of this proposed program – and has done so at a relatively early juncture. What we

propose is that it become standard operating procedure for courts to utilize all four tools from the outset of mass tort litigation.

## **1. Increased Use of Fact Sheets and Collection of Medical and Employment Records**

The first element of our proposed case management protocol is early discovery of the merits of each plaintiff's claims through the expanded use of fact sheets and the collection of medical and employment records.

Fact sheets are court-approved standardized forms that seek basic information about plaintiffs' claims (*e.g.*, when they used the product, what injury they allege).<sup>19</sup> The use of fact sheets spares defendants the expense of tailoring thousands of sets of individual interrogatories, and allows plaintiffs' attorneys to fulfill early discovery obligations by completing standardized forms that mostly contain information that should be on their own intake forms. Fact sheets are to be answered as though they are standard discovery, and plaintiffs answer the forms under penalty of perjury to ensure that useful data are collected.

Fact sheets help provide an early, bird's eye view of the nature of the litigation, but they do not provide all of the information necessary to evaluate the merits of plaintiffs' claims. Some claimants provide false or incomplete answers, reasoning that among thousands of pending cases, their answers will never be scrutinized. Other claimants may simply decline to devote the time and effort needed to completely answer the questions.

Granting defendants access to plaintiffs' medical and employment histories is another straightforward way that MDL courts can "open the box" on individual mass tort claims early in the litigation. Defendants could use this information to verify fact sheet answers and investigate causation issues and contributory negligence defenses. Information about whether a plaintiff has sought treatment (and, if so, what kind)

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<sup>19</sup>MANUAL FOR COMPLEX LITIGATION, 4TH § 22.83 (2004).

would shed light on the extent of any injury. The timing of symptom development is relevant to establishing causation. Potential defenses may turn on whether a plaintiff abused drugs or was exposed to industrial toxins at a place of employment. Moreover, such a step would involve very little additional effort for plaintiffs – who should already have this information available.<sup>20</sup>

Another approach is to obtain the information through personal interviews. This idea was designed and utilized by Professor Francis McGovern to eliminate 2,500 claims from the 9,000 pending in a mass tort case involving exposure to DDT.<sup>21</sup> College students were trained to administer a survey questionnaire developed by the parties through negotiation.<sup>22</sup> Attorneys were banned from the interview sessions, but each side could send a non-lawyer to ensure there were no deviations from the mandated procedures.<sup>23</sup> This procedure was perceived to result in “higher quality” answers than the usual method of eliciting information through interrogatories or written questionnaires, in part because the answers were not filtered through an attorney.<sup>24</sup> Like the other discovery techniques proposed here, this approach has its drawbacks. Although much cheaper than depositions, administering

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<sup>20</sup>For example, the court in the *Orthopedic Bone Screw* litigation required plaintiffs to produce this type of fact discovery as a means of moving that litigation forward. All plaintiffs were required to “execute and deliver a number of authorizations appropriately tailored to the requirements of the plaintiff’s state having to do with the release of medical and employment related records.” *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1998 WL 118060 at \*6 (E.D. Pa. 1998).

<sup>21</sup>Wayne Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394, 403 (1986).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 403-04.

interviews still involves significant expense.<sup>25</sup> And requiring parties to answer questions without an attorney present raises potential ethical concerns.<sup>26</sup> Nevertheless, both sides in the DDT litigation liked the interview process enough to agree to extend it to new cases.<sup>27</sup>

## **2. Lone Pine Orders and/or Notices of Diagnosis**

Another important element of an effective case management plan in mass tort cases is the entry of a *Lone Pine* order requiring all plaintiffs to submit an affidavit from an independent physician in support of their causation theory.<sup>28</sup>

*Lone Pine* orders typically require plaintiffs to provide case-specific expert reports establishing a basis for plaintiffs' claims that their injuries were caused by the defendant's conduct, together with the scientific basis for the experts' opinions. "The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants, such as this one."<sup>29</sup> *Lone Pine* orders are increasingly being required in mass tort proceedings to ensure that there is a good-faith basis for plaintiffs' claims before requiring the parties to engage in time-

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<sup>25</sup>Among the expenses are wages for the survey administrators, who were paid \$4.15/hour to assist with the 1984 discovery. Professor McGovern's method was successful in part because defense counsel paid part of the cost. *Id.* at 404.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 403.

<sup>28</sup>*Lone Pine* orders are named after a New Jersey case that adopted this procedure. See *Lore v. Lone Pine Corp.*, No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Law Div. Nov. 18, 1986).

<sup>29</sup>*Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at \*2 (S.D. Ohio Jan. 30, 2007).

consuming and expensive discovery and pretrial proceedings. The propriety of such orders has been endorsed by numerous courts.<sup>30</sup>

Some plaintiffs have complained that *Lone Pine* orders constitute a “premature” summary judgment requirement prior to the close of discovery, but courts and commentators agree that such orders are effective tools for dealing with the numerous – often varied – lawsuits that accompany the typical mass tort. Indeed, some courts have reasoned that a *Lone Pine* order is merely an extension of the requirements of Rule 11 – *i.e.*, that the basic allegations underlying any claim must be investigated and verified *before* the suit is ever filed.<sup>31</sup>

In the *Acuna* case, for example, the court approved dismissal of plaintiffs’ claims for failure to comply with a *Lone Pine* order requiring plaintiffs to submit expert support for the details of each plaintiff’s claim.<sup>32</sup> The court noted that submission of such expert reports would only require plaintiffs to provide “information which plaintiffs should have obtained before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.”<sup>33</sup>

Remarkably, some plaintiffs have opposed *Lone Pine* orders even when they are issued several years into the litigation. In the *Vioxx*

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<sup>30</sup>See *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (“*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation.”); see also *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006); *Burns v. Universal Crop Prot. Alliance*, No. 4:07CV00535 SWW, 2007 U.S. Dist. LEXIS 71716, at \*10 (E.D. Ark. Sept. 25, 2007) (granting defendants’ motion for entry of *Lone Pine* order and observing that “a preliminary showing on causation is necessary for efficient case management”).

<sup>31</sup>*Acuna*, 200 F.3d at 341.

<sup>32</sup>*Id.* at 341.

<sup>33</sup>*Id.* at 340.

MDL proceeding, for example, the presiding federal judge issued an order *more than three years into the litigation* requiring plaintiffs to provide, *inter alia*, a case-specific expert report to support plaintiffs' claim that Vioxx caused them personal injury.<sup>34</sup> One group of plaintiffs' counsel complained, arguing that the order was "unfair and unilaterally slanted in favor of Merck, both in general and specific application."<sup>35</sup> The court disagreed. In its order, the court observed that it was "not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury."<sup>36</sup> The court reasoned that "[s]urely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief; after all this time it is reasonable to require Plaintiffs to come forward and show the basis for their beliefs and show some kind of basic evidence of specific causation."<sup>37</sup> Plaintiffs' resistance to the pretrial order – which merely required "a minimal showing . . . that there is some kind of scientific basis that Vioxx could cause the alleged injury,"<sup>38</sup> – fairly demonstrates that counsel had filed scores of cases without conducting a reasonably diligent investigation of the basis for the allegations in the suits.

Courts and legislatures have also successfully instituted other case management procedures that are similar to *Lone Pine* orders. For example, in the Baycol MDL, the court required plaintiffs to submit plaintiff-specific expert reports along with their fact sheets.<sup>39</sup> And the Texas legislature, undoubtedly spurred by the abuses revealed in the

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<sup>34</sup>*In re Vioxx Prods. Liab. Litig.*, --- F. Supp. 2d ---, 2008 WL 2229264 (E.D. La. May 30, 2008).

<sup>35</sup>*Id.* at \*2.

<sup>36</sup>*Id.* at \*2-3.

<sup>37</sup>*Id.* at \*3.

<sup>38</sup>*Id.*

<sup>39</sup>See Pretrial Order No. 149, *In re Baycol Prods. Liab. Litig.*, MDL No. 1431 (Oct. 31, 2006).

*Silica* litigation,<sup>40</sup> has enacted a law requiring new asbestos and silica litigants to attach a conforming diagnosis to their complaint. Plaintiffs must now obtain a report from a physician who examined the plaintiff, reviewed the plaintiff's occupational and medical history, and has concluded that the illness is "not more probably the result of causes other than silica exposure revealed by the exposed person's occupational, exposure, medical, and smoking history" before filing a silica claim.<sup>41</sup> The simple step of requiring plaintiffs to submit such evidence could dramatically reduce frivolous claims.

Similarly, in the ongoing welding fume litigation, *In re Welding Fume Products Liability Litigation*, the MDL judge has required all claimants with cases pending in the MDL to submit a formal "Notice of Diagnosis" certifying that the plaintiff had been diagnosed with a condition allegedly caused by exposure to welding fumes.<sup>42</sup> That requirement alone cut the number of pending cases in half. Later, the court selected random sub-sets of 100 cases for collection of medical records. After each selected plaintiff's medical records were collected, counsel was to interview the claimant and either certify that he intended to proceed to trial with the case, move to dismiss it, or withdraw his representation. This second step resulted in dismissal of even more cases. Of the first 179 cases selected for medical records discovery, 135 have been dismissed.

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<sup>40</sup>In the *Silica* litigation, thousands of silicosis lawsuits based on diagnoses from screenings run by plaintiffs' attorneys were found to be fraudulent and "manufactured for money." See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). As the federal judge overseeing that litigation noted, medical screenings are presently "about litigation rather than health care," and the diagnoses at these screenings are "driven by neither health nor justice: they [are] manufactured for money."

<sup>41</sup>TEX. CIV. PRAC. & REM. § 90.004.

<sup>42</sup>See Case Admin. Order at 4-5, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000 (N.D. Ohio Mar. 31, 2006).

In sum, *Lone Pine* orders (or similar, adjunct measures) can help focus the scientific and evidentiary issues at issue in a mass tort and eliminate meritless cases earlier in the litigation. Such orders are one more tool courts can use to shake the junk cases from the mass tort tree – and move legitimate cases (and the litigation itself) to a quick, successful resolution.

### **3. Advanced Discovery for Randomly Selected Subsets of Cases Followed by Single-Plaintiff Bellwether Trials**

Another element of an effective case management protocol is requiring more intensive discovery – basically a full case work-up for trial – with respect to a representative sample of randomly selected claimants, followed by single-plaintiff bellwether trials (*i.e.*, test trials) for a subset of cases in the sample.<sup>43</sup>

Bellwether trials are not intended to have a binding effect on other cases.<sup>44</sup> However, they should be designed to give both sides a sense of how their cases will be adjudicated and to inform any eventual settlement discussions. Bellwether trials are extremely important in resolving mass torts, allowing courts and parties to gain a better understanding of the litigation by trying representative cases early in the life of a mass tort. Bellwether trials:

- show the strengths and weaknesses of the various kinds of claims in the pool;
- streamline future trials through precedents set by early rulings on *Daubert* motions, motions in limine, and other pretrial motions; and

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<sup>43</sup>MANUAL FOR COMPLEX LITIGATION, 4TH § 22.81 (2004).

<sup>44</sup>*Cimino v. Raymark Indus.*, 151 F.3d 297, 319-21 (5th Cir. 1998) (finding the use of binding bellwether trials inconsistent with the Seventh Amendment right to jury).

- provide guidance on the “value” of the various kinds of cases in the pool for potential settlement negotiations.

The method used to select cases for bellwether trials is extremely important. Bellwether trial plaintiffs must be representative of the entire claimant pool or they will not educate courts and parties regarding the law, facts, science, or any other issues likely to recur in litigating individual cases. Only when a “representative . . . range of cases” is selected may “individual trials . . . produce reliable information about other mass tort cases.”<sup>45</sup>

The selection process for bellwether cases is one of the most contentious issues in mass tort proceedings (underlining the importance of the trial selection method). Typically, plaintiffs will argue that as the parties bringing the actions, they should have free rein to pick cases for trial. Plaintiffs’ view is that they should be allowed to advance their very best cases to trial first, while defendants’ view is typically that a more representative case should be tried first. But a bellwether trial case that is not broadly representative of all the claims in the pool will do little to advance the litigation as a whole.

Courts have employed a variety of approaches for selecting bellwether trial candidates, including allowing one party to pick all the cases, letting each party pick half the cases, having the court make the picks, and various combinations of these approaches (*e.g.*, parties nominate cases and court chooses bellwethers, parties nominate cases and are allowed to strike a specified number of the other party’s nominations). However, random selection from the entire case pool is the fairest and most efficient method of choosing cases for trial because it eliminates gamesmanship and ensures that representative cases are chosen.<sup>46</sup> For example, if 95% of plaintiffs allegedly suffer injury A,

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<sup>45</sup>MANUAL FOR COMPLEX LITIGATION, 4TH § 22.315.

<sup>46</sup>*See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (“A bellwether trial designed to achieve its value ascertainment function . . . has as a core element representativeness – that is, the sample must be a randomly selected one”).

while 5% allegedly suffer injury B, that difference presumably would be reflected in the sample.

The *Manual for Complex Litigation* endorses random selection as a means of identifying representative cases. According to the *Manual*:

If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases. Some judges permit the plaintiffs and defendants to choose which cases to try initially, but this information may skew the information that is produced. ***To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly*** or limit the selection to cases that the parties agree are typical of the mix of cases.<sup>47</sup>

Other legal commentators agree that “[f]or a bellwether case to be fair, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.”<sup>48</sup>

Indeed, several recent MDL proceedings have embraced this approach and adopted random selection methods for identifying test trial candidates. For example, in *In re Baycol Products Litigation*, the court’s selection program included all cases filed in the District of Minnesota involving Minnesota residents “plus a minimum of 200 additional cases selected at random from all MDL filed cases.”<sup>49</sup> The court also used random selection in the *In re Norplant Contraceptive*

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<sup>47</sup>MANUAL FOR COMPLEX LITIGATION, 4TH § 22.315 (emphasis added).

<sup>48</sup>James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD DRUG L.J. 325, 347 (1999).

<sup>49</sup>See Pretrial Order No. 89.

*Products Liability Litigation*.<sup>50</sup> In *In re Prempro*, 15 cases were “randomly dr[awn] from a hat.”<sup>51</sup>

Random selection can also help to separate potentially meritorious cases from meritless or fraudulent ones, an extremely important consideration in a mass tort litigation that defendants do not wish to settle. While some lawyers conscientiously investigate the claims that they put into the claims pool in large proceedings, others take a more wholesale approach. These wholesalers, either alone or working with other lawyers, advertise for claimants in an effort to generate large numbers of claims. These advertising and stockpiling efforts often do not include confirming that the claimants were actually injured or sustained injuries that are consistent with the plaintiffs’ causation theory. Many times, attorneys who file large numbers of such cases try to stay in the background during the litigation and only come forward if there is a broad settlement so that they can cash in without any real scrutiny of their clients’ claims. But mass tort litigation makes sense only if those claims are not allowed to hide; they must be subject to the kind of scrutiny that will encourage counsel to investigate their claims fully and assert only those that are well founded.

If trial candidates are randomly selected from the full claims pool, these claims will be exposed early in the litigation. If such plaintiffs are selected for bellwether trials, their counsel will likely dismiss their claims immediately or be forced to dismiss them when more intensive discovery reveals the claims for what they really are. Such dismissals would in many ways be as informative as bellwether trial results because they would provide a sense of the potential number of frivolous claims in the pool (or at least the percentage of claims that counsel do not believe worth taking to trial and therefore presumably not worth

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<sup>50</sup>See 1996 WL 571536, at \*1 (E.D. Tex. Aug 13, 1996) (“[f]ollowing random selection of the twenty-five bellwether plaintiffs . . .”).

<sup>51</sup>Order re Bellwether Trial Selection, *In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. June 20, 2005). Courts disinclined to use old-fashioned methods like a hat can make use of websites such as Research Randomizer, [www.randomizer.org](http://www.randomizer.org) (last visited June 9, 2008), that provide on-line randomizing services.

settling, at least from the defendant's perspective). For example, if half of the claims randomly selected for trial are dismissed before trial, that result would strongly suggest that the total claims number is misleading – that the litigation is not nearly as substantial as those numbers may suggest. The patterns of such dismissals may also suggest that certain categories of cases may not be worth a significant investment of the court's time. For example, if a particular counsel declines to proceed to trial each time one of his client's claims is selected, that may indicate that his claims inventory is suspect.

In some mass tort cases, there are clear, objectively identifiable categories of cases. In these cases, it may be beneficial to conduct random selections separately from each of those categories. Test trials selected this way will be more directly informative about a particular group of cases in the claims pool. In the *Prempro* MDL, for example, the court narrowed the pool of potential trial cases to plaintiffs meeting a certain set of criteria before drawing the 15 test trial cases from a hat.<sup>52</sup> Dividing cases in this way before random selection can help ensure that the bellwether trials are representative of all the types of cases in the proceeding. But such categories must be chosen carefully, and the court must be flexible about their significance to ensure that the cases chosen for bellwether trials are truly representative.

#### **4. Fee Shifting**

While bellwether trials and additional discovery are useful tools for winnowing the number of claims already filed, the real goal of courts handling mass tort cases should be making sure that baseless claims are never filed in the first place. Thus, the fourth element we propose is the use of sanctions to discourage frivolous filings. By requiring plaintiffs' attorneys to reimburse the court's and defendants' costs for cases that should never have been filed in the first place, courts can more effectively encourage plaintiffs' attorneys to evaluate the merits of their claims and refuse to proceed with cases that have no factual basis.

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<sup>52</sup>See Order re: Bellwether Trial Selection, *In re Prempro*.

One of the biggest problems with mass torts is the proliferation of “junk” cases. Such cases include claims brought by individuals who were never exposed to the allegedly defective product or dangerous event, claims by plaintiffs whose injury is faked, and claims by people whose injury was demonstrably caused by something wholly unrelated to the litigation. If it were not possible to hide such claims in the bulk of a mass tort, they would never be brought. But as the court in the *Silica* MDL noted, attorneys should not be allowed to file thousands of cases and then assert that they filed too many cases to discharge their duty to investigate each one.<sup>53</sup>

Examples of the “junk” case phenomenon abound. For example, in *In re Welding Fume Products Liability Litigation*, plaintiffs’ counsel ran a massive medico-legal “screening” program trolling for potential claimants at union halls and hotels across the country. Thousands of welders subsequently filed claims alleging that the fumes generated during the welding process had caused them neurological injury, but the overwhelming majority of these claimants had never been diagnosed with any neurological condition, let alone a condition caused by exposure to welding fumes. During the MDL court’s bellwether trial process, defendants learned – after expending substantial amounts of money on discovery and trial preparation – that several plaintiffs were faking their symptoms or had lied about their medical histories. In one instance, surveillance revealed that a man who claimed to be completely disabled could in fact engage in all manner of household tasks that he had testified in deposition that he was incapable of performing. In fact, out of the limited number of cases that have been set for trial in the welding fume litigation, four have been dropped by plaintiffs based on revelations of fraud.<sup>54</sup> Nonetheless, the MDL judge (who presided over three of those four cases) has thus far declined to impose sanctions

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<sup>53</sup>*Silica*, 398 F. Supp. 2d at 677.

<sup>54</sup>*Morgan v. Lincoln Elec. Co.*, No. 1:04-17251 (N.D. Ohio); *Landry v. Nichols Wire*, No. 1:03-17016 (N.D. Ohio); *Peabody v. Airco*, No. 1:05-17168 (N.D. Ohio); *Smith v. The BOC Group, Inc.*, No. 251-05-1082 (Cir. Ct., Hinds County, Miss.).

against plaintiffs' counsel for failure to conduct appropriate pre-filing scrutiny of their claims.<sup>55</sup>

The adoption of two fee shifting policies would discourage frivolous filings.

*First*, MDL courts should adopt case management orders that impose deadlines for dismissing cases that are subject to advanced discovery or trial workup. All discovery in cases dismissed by plaintiffs after those set deadlines should be subject to fee-shifting or substantial penalties (*e.g.*, \$50,000). In short, the rule should be that if your case is called for trial and you decide not to proceed, there will be substantial financial consequences.

While such a fee shifting threat may seem severe, it is critical to dissuade plaintiffs' lawyers from littering mass torts with cases they would never be willing to take to trial. Particularly given the burdens and abuse potential presented by mass tort litigation, the rigid principle for plaintiffs' counsel in that context should be that if you don't think a case would be worth taking to trial, don't file it. As discussed above, under the current system, filing additional cases has no real cost for plaintiffs' counsel; to the contrary, the more cases they file – junk or not – the bigger their perceived role in the litigation and the greater the presumption of “guilt” against the defendant. By contrast, the cost of frivolous claims for defendants (and for other plaintiffs waiting in line to have their claims heard) is substantial. Thus, courts need to send a clear message that lawyers should not be filing any claims that they are not willing to take to trial – and that if such cases are filed, they must be dismissed before defendants expend substantial resources defending against them. The goal should be to create an environment comparable to what exists when individual tort cases are filed – there should be an expectation that the claim will be scrutinized quickly and thoroughly and that counsel will face serious consequences if the claim was not properly investigated and found to be well grounded before filing.

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<sup>55</sup>See generally *In re Welding Fume Prods. Liab. Litig.*, Apr. 3, 2006 Order.

**Second**, courts should make better use of their authority to impose sanctions for the filing of unmeritorious claims under 28 U.S.C. § 1927. More than 50 years ago, Congress enacted 28 U.S.C. § 1927 to dissuade lawyers from asserting and maintaining frivolous claims and otherwise abusing the legal process. Under Section 1927, attorneys who “multiply the proceedings . . . unreasonably and vexatiously” can be held personally liable for the excess costs, expenses, and attorneys’ fees reasonably incurred by other parties as a result of their misconduct. But despite Section 1927’s scope, it has been underutilized by courts.

At least three types of substantial litigation abuse should implicate Section 1927, but rarely do in practice. In practice, attorneys are currently able to file and maintain suits without consequence, even if the attorney:

- knows or has reason to know that he is asserting claims that are fraudulent or wholly lacking in foundation;
- has failed to perform adequate diligence prior to filing the lawsuit to ensure that there was a good-faith basis for the claims being asserted; or
- fails to investigate evidence uncovered in the course of the litigation that indicated that the claims being asserted were fraudulent.

Prosecuting a lawsuit under any of those circumstances clearly constitutes unreasonably multiplying proceedings. But the imposition of Section 1927 liability on attorneys who pursue litigation in such circumstances is exceedingly rare. Greater reliance on Section 1927 as a tool to cabin litigation abuse would go a long way toward restoring fairness to mass tort litigation.

### **C. Closing the Door in Mass Tort Proceedings**

As discussed above, another common problem in mass tort litigation is the abuse by some plaintiffs’ lawyers of *American Pipe*

tolling, which often allows a mass tort to live on in near perpetuity, thwarting applicable statutes of limitations.

In *American Pipe & Construction Co. v. Utah*,<sup>56</sup> the Supreme Court held that a limitations period can be tolled for members of a putative class while it is pending, uncertified. The holding was intended to prevent duplicative, individual filings by class members who awaited certification while the limitations period on their individual claims ran out. Even though the Supreme Court decided *American Pipe* in an entirely different setting, many state courts (as well as federal courts applying state law) have accepted *American Pipe* tolling in the mass tort context. Thus, unless courts quickly reject certification of personal injury class actions, plaintiffs enjoy almost limitless tolling of statutes of limitations. The predictable result has been to turn the filing of essentially frivolous class actions in personal injury mass torts into a stock tool for some plaintiffs' lawyers to prolong limitations periods. This prolongation in turn impedes the ability of the parties to settle because it delays the date at which the door is finally shut to new claims and the defendant can accurately assess its potential settlement exposure.

The solution we propose is: (1) expedited briefing and rulings on personal injury class actions in mass tort proceedings; and (2) broad acceptance of the principle already recognized by California courts that *American Pipe* tolling should not apply in mass tort cases.

## **1. Mass Torts and the Discovery Rule**

Most states have adopted a discovery rule for personal injury cases. Under a typical discovery rule, a claim accrues and the limitations period begins ticking once a plaintiff is aware or reasonably should be aware that he has been injured and that the injury was caused by a tortious act of another.<sup>57</sup> As one case explains, the discovery rule has

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<sup>56</sup>414 U.S. 538 (1974).

<sup>57</sup>*See, e.g., Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn. 1982).

been deemed necessary because “no judicial remedy [i]s available to [a] plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty.”<sup>58</sup>

The discovery rule is consistent with the basic purposes of statutes of limitations. As the Supreme Court has explained, “[s]uch statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. . . . [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation.’”<sup>59</sup>

Enforcement of limitations periods serves institutional purposes as well. “[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.”<sup>60</sup> These purposes are not frustrated by the discovery rule because a plaintiff cannot fairly be accused of “sleeping on his rights” when he does not even know he has been injured or where it is truly impossible to determine that an injury had been caused by another’s negligence.

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<sup>58</sup>*Id.* Some states observe a stricter rule, under which a claim accrues upon discovery of injury, even if the identity of a tortfeasor is unknown. *E.g., Robinson v. Graves*, 456 So. 2d 793, 794-95 (Ala. 1984) (holding that tolling of statute of limitations in absence of a known defendant is only possible by filing a claim against a fictional defendant). A shrinking minority of states observe no general discovery rule at all. *E.g., Johnston v. Dow & Coulombe Inc.*, 686 A.2d 1064, 1065-66 (Me. 1996) (explaining discovery rule is recognized only in “three discrete areas: legal malpractice, foreign object, and negligent medical malpractice and asbestosis”); *see also Griffin v. Unocal Corp.*, No. 1061214, --- So. 2d ---- (Ala. Jan. 25, 2008) (adopting discovery rule for period during which a plaintiff is unaware of latent injury).

<sup>59</sup>*Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

<sup>60</sup>*Id.*

It is not uncommon for a news event to supply the critical information that gives rise to a mass tort. These news events are often cited by courts as putting plaintiffs on notice of their claims. One Pennsylvania court, for example, held in *Martin v. Dalkon Shield Claimants Trust* that events giving rise to extensive media coverage of a medical device triggered discovery as a matter of law because the coverage would have put anyone exercising “due diligence” on notice of his or her claims.<sup>61</sup> In *Martin*, the plaintiff brought a product liability lawsuit over an allegedly defective contraceptive device, and the defendant moved for summary judgment on the ground that the plaintiff’s claim was time-barred. In granting the defendant’s motion, the court observed that the plaintiff failed to make any inquiry regarding the cause of her injury in the face of, *inter alia*, “published news accounts, articles in medical journals and reports by the Food and Drug Administration” confirming a link between intrauterine devices and spontaneous abortions.<sup>62</sup> Accordingly, the court refused to apply the discovery rule, reasoning that where “a plaintiff fails to obtain information which is readily available, she has not acted with reasonable diligence.”<sup>63</sup>

Some courts have been careful to emphasize that the plaintiff need not have actually been aware of the news coverage. Because the discovery rule is an objective test, what is relevant is whether the coverage was so substantial as to put a *reasonable* plaintiff on notice.<sup>64</sup>

Thus, the same media event that precipitates a mass tort might also trigger accrual for statute-of-limitations purposes. But the statute-of-limitations inquiry usually will not stop there. Once a plaintiff files the first class action in a nascent mass tort – an event that not uncommonly

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<sup>61</sup>See *Martin v. Dalkon Shield Claimants Trust*, No. 93-2652, 1994 U.S. Dist. LEXIS 16395, at \*11-12 (E.D. Pa. Nov. 20, 1994).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at \*11.

<sup>64</sup>*E.g., Miller v. A.H Robins Co., Inc.*, 766 F.2d 1102, 1106 (7th Cir. 1985).

transpires within days of media coverage – a question of tolling arises. In mass tort personal injury cases, such tolling should not be available. But in order to explain why this is so, it is first necessary to explain the origin and application of the *American Pipe* doctrine.

## 2. The *American Pipe* Doctrine as Originally Conceived

In *American Pipe & Construction Co. v. Utah*,<sup>65</sup> the U.S. Supreme Court held that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”<sup>66</sup> Under the *American Pipe* rule, former members of a class can toll limitations periods to preserve their right to file suit in the event that their class is not certified.<sup>67</sup> The Court reached that conclusion after considering the purposes of statutes of limitations and of Rule 23, the federal class action rule.

Three primary considerations motivated the *American Pipe* ruling. **First**, the Court noted that Rule 23 was adopted to improve the efficiency of the class action device. According to the Court, Rule 23 was adopted in part “to avoid, rather than encourage” – as the old class action rule had done – “unnecessary filing of repetitious papers and motions.”<sup>68</sup> But because class certification decisions could often linger beyond the end of limitations periods – as had happened in the

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<sup>65</sup>414 U.S. 538.

<sup>66</sup>*Id.* at 554.

<sup>67</sup>Originally, *American Pipe*’s rule applied only to “purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status,” *id.* at 553, but the rule was later extended. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (“[t]he filing of a class action tolls the statute of limitations ‘as to all asserted members of the class,’ not just as to intervenors” (quoting *Am. Pipe*, 414 U.S. at 554)).

<sup>68</sup>*Am. Pipe*, 414 U.S. at 550.

*American Pipe* case itself – this efficiency purpose of Rule 23 would be undermined unless plaintiffs could count on the pendency of the action to toll their claims. Otherwise, “class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.”<sup>69</sup>

**Second**, the Court found it important that the class members had acted reasonably in relying upon the pendency of the class action. It explained that certification had been denied: (1) “not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy)”; (2) “not for lack of standing of the representative”; and (3) not “for reasons of bad faith or frivolity.”<sup>70</sup> Rather, class certification had been denied by the district court “solely because of failure to demonstrate that ‘the class is so numerous that joinder of all members is impracticable.’”<sup>71</sup> “[A]t least where class action status has been denied” on these grounds, the Court held, tolling is appropriate.<sup>72</sup> Otherwise, in cases “where the determination to disallow the class action [is] made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court’s docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.”<sup>73</sup>

**Third**, the Court noted that as applied in *American Pipe*, its tolling rule would not disturb the purposes of statutes of limitations. “The policies of ensuring essential fairness to defendants and barring a

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<sup>69</sup>*Id.* at 553.

<sup>70</sup>*Id.* (quoting *State v. Am. Pipe & Constr.*, 473 F.2d 580, 584 (1973)) (omitting footnote).

<sup>71</sup>*Id.* at 552.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 553-54.

plaintiff who ‘has slept on his rights’ . . . are satisfied when” the class action is such that it “notifies the defendants not only of the substantive claims being brought against them, but also the number and generic identities of the potential plaintiffs who may participate in the judgment.”<sup>74</sup> Thus, the Court was satisfied that such class actions provide defendants with “the essential information necessary to determine both the subject matter and size of the prospective litigation,” the primary concerns addressed by limitations rules.<sup>75</sup>

Justice Blackmun, joining the opinion and concurring in the judgment, nonetheless issued a word of caution. “Our decision . . . must not be regarded as an encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.”<sup>76</sup> He also noted that tolling would be limited to cases like the one before the Court, where the claims “invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit,”<sup>77</sup> a sentiment that would later be echoed by other Justices on the Court.<sup>78</sup>

### 3. Abuse of *American Pipe* in Mass Tort Cases

Most courts have assumed that *American Pipe* tolling principles apply to any pending class action, regardless of the nature of the

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<sup>74</sup>*Id.* at 554-55 (quoting *Burnett*, 380 U.S. at 428).

<sup>75</sup>*Id.* at 555.

<sup>76</sup>*Id.* at 561 (Blackmun, J., concurring).

<sup>77</sup>*Id.* at 562.

<sup>78</sup>*See Crown, Cork*, 462 U.S. at 355 (Powell, J., concurring) (“[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that ‘concern the same evidence, memories, and witness as the subject matter of the original class suit,’ so that ‘the defendant will not be prejudiced.’”) (quoting *Am. Pipe*, 414 U.S. at 562 (Blackmun, J., concurring)).

substantive claims it raises. This reading of *American Pipe* is too uncritical. Savvy plaintiffs' lawyers are aware of the benefits of this approach to the doctrine and have exploited it precisely to serve the purpose of extending limitations periods by filing class actions that in truth have no hope of certification.<sup>79</sup> The problem for both sides is that the often-successful attempt to expand limitation periods delays resolution of mass torts, to the detriment of plaintiffs who did file their suits in a timely manner and defendants who seek to put a mass tort behind them.

Extending the *American Pipe* doctrine to mass tort personal injury cases has encouraged plaintiffs' lawyers to file class actions merely to achieve an illegitimate tolling benefit for unnamed members of the purported class. They are thus precisely the kinds of cases Justices Blackmun and Powell warned about in their concurring opinions in *American Pipe* and *Crown, Cork*. In mass tort personal injury cases, tolling serves no efficiency purpose – the solitary virtue of *American Pipe* tolling – because the vast majority of plaintiffs file individual complaints notwithstanding the hypothetical availability of class action tolling. Moreover, in many cases *American Pipe* is all the more unnecessary in light of tolling agreements reached by parties, which waive limitations defenses for those plaintiffs who sign up before the time limits on their claims have run. By saving the courts from excess filings, plaintiffs who sign such agreements serve the purposes of *American Pipe*. It would thus be redundant at best and counterproductive at worst to apply *American Pipe* tolling in the mass tort context.

In addition, class action tolling in the context of mass tort proceedings also leads to injustice. If plaintiffs are allowed to slumber while others have pursued their claims in mass litigation, the parties – plaintiffs and defendants alike – cannot get a grasp of the size or scope

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<sup>79</sup>See Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 573 (1996) (“The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.”).

of the litigation until years after the deadlines contemplated by the applicable statutes of limitations. Without a grasp on the size or scope of the litigation, the parties are shackled in searching for ways to resolve the litigation, leaving the claims of individual plaintiffs, some of whom may be ill or elderly, languishing until the doors are deemed closed.

Importantly, the reasoning of the *American Pipe* decision does not translate well to the mass tort context. First, because mass tort cases are almost never certified as class actions, they are not the kinds of cases that present certification decisions that hinge on subtle distinctions. Parties on both sides can safely predict that certification will be denied; the only question is when. Reliance on a pending class is thus unreasonable in the mass tort arena. The case in *American Pipe*, in contrast, was one of a genre of cases whose prospects for certification entailed “considerations that may vary with . . . subtle factors” and thus made difficult “successful anticipation of the determination of the viability of the class,”<sup>80</sup> making reliance on the possibility of certification reasonable.

Furthermore, the individualized nature of personal injury claims is such that a defendant is not fairly put on notice of all the claims against it by the filing of a class action. Such cases typically involve widely varying facts with respect to the nature of the injury, the character and duration of exposure to the harmful product, family and medical history, the content of any warning available before or at the time of injury (and whether such a warning was read or heeded), and a host of other factors unique to each plaintiff. Not surprisingly, each case in a mass tort requires extensive individualized discovery, involving unique “evidence, memories, and witnesses,” including – by way of example – family members, treating physicians, pharmacists, and other witnesses and documents to which defendants cannot possibly have access without knowing the actual identity of each plaintiff. And defendants have no way of knowing the number of claims that would be encompassed by such an action, let alone the identities of the witnesses or their evidence. Personal injury suits in the mass tort context are thus

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<sup>80</sup>*Am. Pipe*, 414 U.S. at 553-54.

unlike the *American Pipe* case, in which the Court noted the “probability of common issues of law and fact,”<sup>81</sup> and in which there could be no doubt that individual claims “invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit.”<sup>82</sup>

#### 4. Curbing *American Pipe* Abuse in Mass Tort Litigation

In light of these abuses, courts and legislatures should consider two reform alternatives.<sup>83</sup> *First*, under existing doctrine, courts should direct parties to resolve class certification motions on an expedited basis as a matter of good case management practice. *Second*, courts should alternatively, or in addition, simply bar application of *American Pipe* tolling in mass torts altogether. In states where courts are not willing to go so far, state legislatures can step in and subject their class action tolling doctrines to statutory requirements that would exempt mass torts from tolling.

The first reform has several virtues. Most obviously, it would go a long way toward addressing the abuses made possible by *American Pipe* tolling by resolving class certifications early and thus minimizing the length of time during which limitations periods are tolled. Some time lapse is inevitable – class actions are usually filed even before an MDL proceeding is established, for example, and even after multidistrict proceedings begin, parties need time to brief and argue the

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<sup>81</sup>*Id.* at 553.

<sup>82</sup>*Id.* at 562 (Blackmun, J., concurring).

<sup>83</sup>Unfortunately, although the *American Pipe* tolling problem was created by the United States Supreme Court, that Court is unlikely to have the opportunity to fashion limitations on the doctrine in the context of mass torts because tolling questions in mass tort cases almost always arise under state (not federal) law. Federal courts that have addressed the question have thus focused on whether a particular state has adopted or would adopt a related doctrine, rather than whether federal policy dictates that such a doctrine should apply in the mass tort setting.

issue to the court. But this could be done relatively quickly. Although courts may be tempted to think that resolution of class certification motions is not realistic until they have educated themselves about the issues presented in the litigation, delay is not necessary. In practice, it is a truly rare mass tort that is certifiable, as the annotations to Federal Rule 23 themselves explain,<sup>84</sup> and as practice bears out.<sup>85</sup> The burden

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<sup>84</sup>See Fed. R. Civ. P. 23 notes of advisory comm. on 1966 amends. (“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.”).

<sup>85</sup>As one commentator put it, “the United States Supreme Court, the federal courts of appeals . . . , and several federal district courts have evinced solidarity in declining to certify class actions in products liability cases because the predominance requirement, made even more confined by the qualities of superiority, was not satisfied.” Martin L.C. Feldman, *Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?*, 74 TUL. L. REV. 1621, 1625 (2000). Judge Barbara Rothstein (now the director of the Federal Judicial Center) catalogued some of the individualized issues that preclude certification of pharmaceutical mass tort class actions in striking the class allegations in the PPA litigation: an individual’s family and medical history; age; gender; diet; lifestyle, including the use of alcohol, tobacco, and other legal or illegal drugs; . . . the amount of PPA, if any, contained within th[e] product [used]; the timing of ingestion of the product; whether the individual followed the directions accompanying the product, exceeded the recommended dosage, or combined the product with other products and the effect of that combination; whether that individual suffered an injury, when the injury occurred, the type of injury suffered, and the number of occurrences of injury; the likelihood of injury; and/or the foundation as to whether a justifiable fear of injury exists. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 631-32 (W.D. Wash. 2002) (footnotes omitted); see also, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 609-10 (1997) (asbestos) (rejecting certification where class members had different exposures, different histories and different risk factors; “[t]he number of uncommon issues in this humongous class action[]’ . . . barred a determination, under existing tort law, that common questions predominated”); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 146 (3d Cir. 1998) (tobacco) (numerous individual issues precluded certification of smoker class); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (tobacco) (“historically, certification of mass tort litigation classes has been disfavored”; collecting cases); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (penile implant) (“a number of other courts have denied class certifications in drug or medical product liability actions” because of lack of

should be on plaintiffs to justify the unlikely conclusion that their class action is different.

This approach has the additional virtue of working within existing rules and doctrines with little innovation. Rule 23, for example, expressly directs that “the court **must** determine by order whether to certify the action as a class action” at “an **early** practicable time after”

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predominance and superiority); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1304 (blood transfusion) (“[m]ost federal courts . . . refuse to permit the use of the class-action device in mass-tort cases” and “[t]hose courts that have permitted it have been criticized”); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982) (contraceptive device) (“In products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability.”); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 567 (E.D. Ark. 2005) (hormone replacement therapy) (“As in many cases before them, Plaintiffs have attempted to frame the ‘predominant’ issues broadly to compensate for variations in the class members’ claims. But they suffer the same fate. Individual issues abound and are magnified by the necessity of applying diverse state laws, making certification under 23(b)(3) inappropriate.” (internal quotation marks omitted); *Zehel-Miller v. AstraZeneca Pharms., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) (antipsychotic drug) (certification of personal injury damages claims “would be indisputably inappropriate, since individual issues would overwhelm any common questions”); *In re Baycol Prods. Liab. Litig.*, 218 F.R.D. 197, 204 (D. Minn. 2003) (cholesterol drug) (“[N]o [federal] Court of Appeals decision has approved class certification of an action involving prescription drugs.”); *In re Paxil Litig.*, 212 F.R.D. at 551 (antidepressant) (“[I]ndividual questions of fact regarding causation . . . subvert any benefits to be gained through a class action proceeding.”); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 144-45 (E.D. La. 2002) (prescription drug) (“In the present case the monetary claims are dependent in a significant way on differences of each class member’s circumstances. They will require additional hearings to resolve the disparate merits of each individual’s case.” (internal quotation marks omitted)); *Mertens v. Abbott Labs.*, 99 F.R.D. 38, 41 (D.N.H. 1983) (prescription drug DES) (resolving common issue of a drug’s capacity to cause injury would do “substantially nothing” to advance the litigation “[i]n light of the varied degrees of use, exposure and harm in each Plaintiff’s case”); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 233 (D.S.C. 1979) (synthetic estrogen) (“A class situation is simply not efficient when so much in the way of individual proof by each of the class members will obviously be required.”).

the class action is filed. Fed. R. Civ. P. 23(c)(1)(A) (emphases added).<sup>86</sup> In the context of the mass tort, where the daily burden of coordinating the litigation threatens to be extended by each day that the court does not resolve class motions, this directive is all the more forceful and it is well within the court's discretion to carry out. Indeed, at least one state supreme court has ruled that *American Pipe* tolling should not be available when plaintiffs do not expeditiously prosecute the certification issue.<sup>87</sup> Other courts should follow suit by adopting, as one of their first acts as the coordinating venue, an expedited schedule for resolution of class certification motions.

Because some tolling would still obtain even under an expedited schedule, however, the second, more comprehensive reform is ultimately the better one. Several jurisdictions have already declined to apply *American Pipe* tolling to mass tort personal injury cases. These courts have looked to the purposes of *American Pipe* and found them to be ill-served by applying the doctrine to such cases, particularly because mass tort personal injury cases are widely recognized as usually uncertifiable and because the varying nature of personal injury claims is such that the details of one plaintiff's case do not generally put a defendant on notice of the claims of nameless class members. On the basis of these considerations, the more carefully reasoned opinions on the issue have uniformly rejected tolling.<sup>88</sup>

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<sup>86</sup>Many state class action rules contain similar language.

<sup>87</sup>*Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 35 (Tenn. 2007) (denying tolling because “[t]he burden upon plaintiffs seeking class certification includes the burden to seek class certification ‘as soon as practicable after the commencement of the action brought as a class action’” (quoting Tenn. R. Civ. P. 23.03(1))).

<sup>88</sup>*See, e.g., Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 937-38 (Cal. 1988) (admonishing that personal injury plaintiffs “would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. *The presumption, rather, should be to the contrary . . .*” (emphasis added)); *see also Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 358-60 (Md. 2006) (expressing support for *Jolly*'s presumption against tolling in the mass tort context); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, 2005 WL 26867, at \*3 (S.D.N.Y. Jan. 5, 2005) (noting that the

Some courts have considered such limitations on the *American Pipe* doctrine but declined to adopt them.<sup>89</sup> Legislatures in states where courts continue to apply *American Pipe* tolling blindly in mass tort cases can take matters into their own hands and adopt statutory criteria for the application of such tolling as a matter of tort reform. Such statutes could make clear that limitations periods should not be tolled on account of pending class actions brought on behalf of mass tort personal injury classes.

## D. Promoting Fair Settlements

The final problem with the way we litigate mass torts is how they end.

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“wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable”); *Barela v. Showa Denko K.K.*, No. 93-1469 LH/RLP, 1996 U.S. Dist. LEXIS 7830, at \*16 (D.N.M. Feb. 28, 1996) (expressing doubt about whether a federal court should adopt *American Pipe* tolling for a state that had not adopted the doctrine in a mass tort personal injury case in light of the fact that “most federal courts . . . refuse to permit the use of the class-action device in mass-tort cases” (citation and internal quotation marks omitted)).

Other courts have limited the application of *American Pipe* but have thus far refused to discard it entirely in the mass tort context. In New Jersey, for example, an appellate court held that *American Pipe* should be available in mass tort litigation but strongly suggested that such tolling should be available only where a plaintiff seeking to avail himself of its tolling benefit could prove that he actually relied upon a pending class action. See *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. Ct. App. Div. 1989). Other states have limited *American Pipe* tolling to class actions that were filed in courts within the same state, refusing to allow “cross-jurisdictional” tolling. See, e.g., *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1103, 1105 (Ill. 1998). These rulings constrain the application of *American Pipe* tolling in the mass tort context, but they all proceed from the unexamined premise that such tolling should be available in the first place.

<sup>89</sup>See, e.g., *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 907 n.3 (E.D. La. 2007) (“[U]ntil such a uniform rule prohibiting certification of personal injury class actions is announced, the Court will faithfully apply *American Pipe*.”).

As noted above, courts often place undue pressure on defendants to settle mass tort litigation because they have not alternative, realistic plan for moving the claims to resolution. Our hope is that by implementing the case management procedures set forth above, courts will no longer feel that settlement is the “only way out” of a mass tort thicket.

Nonetheless, even with improved procedures for litigating mass torts, there will still come a point in some controversies where a defendant feels that the claims have been narrowed down to a legitimate core and the time has come to settle those that remain. But changes must be made in this area as well because under current class action laws and ethical rules, it is very difficult for a defendant that does want to settle to achieve a meaningful resolution that compensates plaintiffs fairly while buying “peace” for the defendants.

In order to understand the problems affecting mass tort settlements, it is important to first understand the goals driving a mass tort settlement. When the time comes to settle a mass tort, parties on both sides of the litigation have often spent significant time and money, over a period of years, on the discovery process, bellwether trials, and the day-to-day organization and management of litigation involving hundreds (if not thousands) of claimants. In addition, the court system has also spent countless hours working to resolve these court-clogging actions. One of the motivations underlying any settlement agreement is to reduce this burden on all of the parties. Thus, when the time comes at which the parties are actually able to reach an agreement and resolve the massive action, a settlement needs to do just that – ***actually resolve the litigation***. Entering into a settlement agreement that leaves a large percentage of claims pending really does very little in the way of resolution for defendants and/or the court system. While “resolving the litigation” sounds like an obvious result of any settlement agreement, in practice, achieving this goal in the mass tort context is nearly impossible.

## **1. The Problem**

When considering ways of settling any type of aggregate litigation, the first option that usually comes to mind is a class action settlement.

These procedural devices allow courts and the parties to come to a resolution that members of the class and the defendants agree upon as fair and equitable to the class as a whole. However, class settlements are no longer an option for mass torts in light of the Supreme Court's ruling in *Amchem Products v. Windsor*.<sup>90</sup> There, the Court held that global settlements of mass tort personal injury classes contravene the strict predominance requirements set forth in Rule 23 of the Federal Rules of Civil Procedure. This finding is due to the fact that personal injury claims involve a host of individualized issues – including complicated causation-related questions – that cannot be resolved fairly in an aggregated manner. Therefore, resolution as a “class action” is not a realistic resolution option for parties to mass torts.

Moreover, even if class settlements were an option, Rule 23 currently allows class members the opportunity to easily “opt-out” of a class settlement agreement. This becomes highly problematic very quickly in the mass tort context. As discussed previously, plaintiffs’ attorneys often represent hundreds of plaintiffs in the same mass tort. While this has its obvious benefits to the plaintiffs and the attorneys, it can present problems when it comes time to settle. Allowing “opt-outs” from a settlement agreement presents an opportunity for plaintiffs’ lawyers to pick out their best claims and urge those clients not to participate in the settlement, in the hopes of obtaining more money. In addition, individual plaintiffs may misjudge the value of their claims and decide to hold out for what they hope will be more money (regardless of the advice of their attorneys). For example, in the *Fen-Phen* litigation, such a large portion of the class members opted out of the class settlement that the settlement became inefficient and the goals of resolution failed completely.

Finally, mass tort settlements are complicated by the constrictions of the ethical rules governing attorney conduct. A strict reading of the ethical rules presents mass tort parties with very few options for an “ethical” settlement. For example, as discussed previously, the notion of plaintiff “cherry-picking” is a very real problem in a mass tort settlement. Thus, it is essential that anti-cherry-picking provisions be

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<sup>90</sup>521 U.S. at 609-10.

built into any mass tort settlement agreement in order for it to have a chance of accomplishing the goals of the parties and the court.

To address the cherry-picking problem, settling mass tort defendants often demand inclusion of a requirement that plaintiffs' attorneys will recommend the settlement to 100% of their clients. This type of recommendation provision has become a common requirement in aggregate litigation settlements to help prevent plaintiffs' attorneys from engaging in strategic participation in the settlement program. For example, the global Zyprexa settlement contained a requirement that each participating law firm "warrant[] and represent[] that it w[ould] recommend to each of its Participating Claimants that they participate in the settlement process to be jointly established by the Participating Law Firms and Special Settlement Masters."<sup>91</sup> Likewise, the Propulsid settlement agreement contained a provision requiring counsel for plaintiffs to *enroll* 100% of the plaintiffs they represented – a more stringent provision than mere recommendation.<sup>92</sup>

In addition to these recommendation provisions, mass tort settlement agreements may include a provision requiring that participating plaintiffs' counsel withdraw from representing any client who does not agree to enroll in the settlement program, further encouraging plaintiffs' counsel not to cherry pick. While these

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<sup>91</sup>Zyprexa Settlement Agreement § IV.A.

<sup>92</sup>Propulsid Term Sheet § 3D. Settlements outside of the product liability arena have also contained similar provisions. For example, in the Aetna class action settlement in the managed care litigation, which was approved by Judge Federico Moreno of the Southern District of Florida, the agreement required class counsel and the signatory medical societies to "make every reasonable effort to encourage class members to participate and not opt-out." Aetna Provider Track Settlement Agreement § 3 (approved in *Managed Care Litig. Class Plaintiffs v. Aetna, Inc. (In re Managed Care Litig.)*, No. 00-1334-MD, 2003 U.S. Dist. LEXIS 27228 (S.D. Fla. Oct. 24, 2003).) Similarly, in *Thomas v. Christopher*, a Title VII class action, the U.S. District Court for the District of Columbia approved a settlement in which counsel for the plaintiff class agreed to recommend the settlement to the approximately 360 class members. 169 F.R.D. 224, 230 (D.D.C. 1996) (overruled on other grounds by *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998)).

provisions are necessary to ensure that lawyers do not use profit motivations to make wholly strategic decisions about which cases to settle and which to continue litigating, they often prompt questions and criticism regarding plaintiffs' attorneys obligations to their individual clients that are not adequately addressed under the current ethical rules.

This seeming disconnect between the ethical rules and the realities of mass tort settlements is due to the fact that the current ethical rules are based on the traditional "one lawyer, one client" model – a model that is rarely observed in modern mass tort proceedings. Most plaintiffs' counsel involved have numerous clients. The current ethical rules simply do not take account of this reality in mass tort proceedings.

For example, ABA Model Rule of Professional Conduct 1.8 currently requires the informed consent of each and every individual claimant before a lump sum aggregate settlement can be entered into by the parties. While the goal of Model Rule 1.8 is clear – to protect the individual rights of plaintiffs in joint representation situations – this goal becomes muddled in the context of aggregate litigation. To illustrate, assume that a law firm represents 100 plaintiffs in a drug-related mass tort proceeding. Further assume that the drug manufacturer offers a lump sum settlement of \$10 million, with the amount each claimant receives to be determined based on the type of injury and damages suffered. Under the current strict requirements of Model Rule 1.8, if even one of the law firm's clients decides that he does not want to participate in the settlement, the entire settlement is jeopardized. Obviously this notion can be extremely detrimental to those other 99 plaintiffs who *do* want the settlement, because a single dissenter may block their recovery.

Allowing only one claimant to veto a settlement for an entire group of plaintiffs, many of whom may have stronger claims, highlights the problem with the current ethical rules. They allow attorneys to take on large groups of claims in a mass tort proceeding, even though they are widely varying in merit. Allowing counsel to take on these claims on a mass basis is what gives counsel the leverage to obtain a settlement for the group. But when it comes time to settle, the ethics rules ignore the

fact that because the leverage is on a group basis, the settlement should be on a group basis.

Model Rule 5.6(b) is similarly problematic when applied to mass torts. One of the mechanisms parties have developed to prevent cherry-picking in mass tort cases is a requirement that attorneys withdraw from representation of clients who do not choose to participate in the settlement agreement. However, Rule 5.6(b) currently states that “[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of a settlement of a client controversy.” The comments to the rule state that Rule 5.6(b) prohibits “a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.” Therefore, under Rule 5.6, a lawyer should not withdraw from a representation if there would be a “material adverse effect” on the client’s interests unless he or she can demonstrate “other good cause.” However, the Rule does not clarify what, exactly, would constitute “good cause.”

Rule 5.6 makes it complicated for settling plaintiffs’ attorneys to withdraw from the representation of those of their clients who do not agree to participate in a group settlement agreement. This is true despite the fact that, inevitably, in these large proceedings, there would be competent counsel fully familiar with the mass tort ready and waiting to take on the claim of a non-settling plaintiff whose attorney has withdrawn. This could create serious conflicts by forcing plaintiffs’ attorneys to betray those of their clients who desire a settlement by continuing to represent other plaintiffs who refuse to participate in the settlement resolution program.

Ethical concerns have also been raised regarding provisions requiring plaintiffs’ counsel to recommend settlements to all of their clients (or none of them), essentially a 100% recommendation provision. As discussed above, these provisions are critical to achieving meaningful settlement. But, some have charged that they can deprive plaintiffs of their right to independent advice of their counsel or create a conflict of interest between the plaintiffs’ attorneys and their many clients.

For example, the recent Vioxx settlement agreement contained both of these types of provisions: on its face, the agreement required plaintiffs' firms to recommend the settlement to 100% of their clients, and if a client chose not to participate in the settlement agreement, to withdraw from representation of that client. This sparked certain commentators to raise the possibility that the settlement agreement violated the ethical rules. Indeed, within a couple of months of issuance of the settlement agreement, certain plaintiffs' attorneys had already filed suit to strike these provisions of the settlement as unethical in Connecticut, arguing that the Connecticut Rules of Professional Conduct "prohibit 'all or nothing' recommendations in Rule 5-6" and that "[w]ithout an adjudication of their ethical responsibilities, the plaintiffs and their clients will have their rights compromised if less than all of the claims are enrolled[.]"<sup>93</sup>

## **2. Action Needed**

With the enactment of only a few changes, successful mass tort settlements will become less of a pipe dream and more of a reality.

To start, Rule 23 should be revised to loosen the rules for certification of settlement classes. The Supreme Court's decision in *Amchem* mandated that potential settlement classes must meet the same strict predominance requirements of Rule 23(b)(3) as potential classes desiring certification for trial. This requirement is illogical, given the differences between settlement classes and trial classes. For example, a court certifying a class that will potentially go to trial must meticulously analyze whether class members' claims can be tried on a classwide basis to ensure that certification would not violate defendants' due process rights or the Rules Enabling Act – that is, they must make certain that trying the case as a class action does not fundamentally change the nature of what the plaintiffs must prove to succeed on their claims.

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<sup>93</sup>See *Stratton Faxon v. Merck, Inc.*, 07CV1776 (D. Conn. Dec. 3, 2007), Complaint for Declaratory Judgment at 3.

By contrast, settlement classes are not purporting to be able to *try* or *prove* their entitlement to damages on a classwide basis like those classes seeking trial certification. Rather, these classes have already negotiated with the defendants to reach a settlement that they believe is fair on behalf of the class as a whole. These settlement classes and agreements will likely take into account many of the individual differences that the Supreme Court was concerned with in *Amchem* through subclasses built into the settlement agreement. In other words, unlike trial of a class action, a settlement agreement is not a situation in which the plaintiffs either “win” or “lose” as a class. Rather, an aggregate settlement normally takes into account differences among plaintiffs’ claims to allow recovery at different levels for plaintiffs with differing strengths of claims – something that does *not* happen when a trial class is certified.

While changing Rule 23 to loosen the predominance requirement for settlement classes is necessary for facilitating meaningful mass tort settlements, it is not sufficient. As already discussed, there needs to be a mechanism built into mass tort class settlements that makes it more difficult for individual plaintiffs to strategically “opt out” of a settlement, whether it is a class settlement or an “opt-in” resolution program. To that end, ethical rules should be clarified to assure parties and the court system that necessary settlement provisions encouraging participation – and discouraging cherry-picking – normally do not conflict with attorneys’ obligations to their clients.

Most importantly, the Rules should be clarified to confirm the appropriateness of 100% recommendation provisions and attorney withdrawals in certain situations. While these provisions may be inappropriate in certain, run-of-the-mill single-plaintiff cases, they are necessary to achieve full and fair settlements in the mass tort context.

In addition, plaintiffs’ attorneys should be required to disclose the potential conflicts posed by multiple representations in mass tort cases at the start of such litigation. Specifically, clients should be warned when they first retain an attorney that the attorney is, in effect, acting in their interests on an aggregate basis and that the individual client’s interests may not always be at the forefront. Application of the ethical

rules only at the time of settlement ignores the conflicts that pervade such litigation and is contrary to the interests of plaintiffs and defendants alike.<sup>94</sup>

## CONCLUSION

Mass torts present an enormous challenge to the U.S. court system because there is no standardized approach to deal expeditiously with the overwhelming number of cases that are filed after a product recall or other controversy. The four proposals set forth above seek to streamline and expedite the litigation of mass torts without infringing the substantive rights of plaintiffs or defendants. These procedures would winnow out the frivolous claims that often clutter mass tort proceedings, while at the same time helping to ensure that legitimate claims are compensated fairly and more quickly than they are in the current system.

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<sup>94</sup>The current draft of the ALI Principles also proposes a solution to the problem of achieving meaningful aggregate settlements. The ALI proposal addresses some of the difficulties of mass settlements on the front-end of the litigation – that is, at the moment that the plaintiffs sign their retainer agreement with counsel. Under the proposal, a lawyer representing multiple plaintiffs in a mass tort could include in the initial retainer agreement a provision that each client agrees to be bound by a potential settlement agreement if it is approved by a majority vote of the claimants. *See Principles of the Law of Aggregate Litigation*, American Law Institute, Tentative Draft No. 1 § 3.15 (Apr. 2008). This provision would apply to cases involving 40 or more claimants and aggregated claims valued at greater than \$5 million.

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