ARTICLE

THE SHORT LIFE AND LONG AFTERLIFE OF THE MASS TORT CLASS ACTION

DAVID MARCUS†

† Professor of Law, University of Arizona Rogers College of Law. I owe thanks to Bob Bone, Steve Burbank, Deborah Hensler, Sam Issacharoff, Judith Resnik, and other participants at the *University of Pennsylvania Law Review*'s November 2016 symposium commemorating the fiftieth anniversary of the modern class action. I am particularly grateful to several of the participants in the *Amchem* drama who took time to speak with me about the litigation. Brent Rosenthal was especially generous with his time and expertise. Carlos Cardona (Eastern District of Pennsylvania) and Maureen Garmon (University of Arizona) provided invaluable research help.

INTRODUCTION

Modern class action litigation began in 1966, when the Federal Civil Rules Advisory Committee completed a revolutionary set of revisions to Rule 23 of the Federal Rules of Civil Procedure. Fifteen years of tumult followed, as the legal community struggled to test the new device's potential and identify its limits. The class action's waters then calmed, and by the end of the Reagan Administration, some viewed the Rule 23 experiment as nearing its end.[1] But the turbulence started again before the 1980s finished, and heated combat over class action law and policy has continued since then. The late 1980s and early 1990s were therefore a crucial period. During these years the class action moved onto the evolutionary course it continues to follow.

Several episodes triggered policymakers' reengagement with class action law during these years. But perhaps most consequential was the short but supercharged life of the mass tort class action. I tell this story here, as an installment in my series on the history of the modern class action.[2] My focus is the constellation of events that led to *Amchem*,[3] the stunning class settlement proposed in 1993 to resolve millions of asbestos-related claims. Although the story of the mass tort class action has several important chapters, the *Amchem* one is surely the first among equals, for the potential it had to remake the law of complex litigation, and for its pervasive and lasting influence on class action doctrine. Had Rule 23 proven able to encompass mass tort litigation, it would have shown its mettle in *Amchem*. The settlement's failure largely ended the mass tort class action experiment, at least for two decades.[4]

The mass tort class action's story has abundant intrinsic interest, but it is worth telling for other reasons as well. First, its short life began and ended at a key moment in litigation history. The modern class action debuted during an era when the institutional footprint of private civil litigation expanded considerably.[5] This development sparked a reaction, as critics faulted with

---

1 Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7 (noting that the number of class actions swelled in the 1970s but had fallen since then); Nicholas C. McBride, *Class-Action Suit Out of Fashion in Today's Law Cases. Court Rulings Make Lawsuits Filed by Group Less Attractive*, CHRISTIAN SCI. MONITOR, Feb. 4, 1988, at 19 (discussing a decline in class action filings from the 1970s to the 1980s).

2 *See generally* David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. (forthcoming 2018); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013) [hereinafter Marcus, *Sturm und Drang*]; David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

3 The *Amchem* case went through several names, including *Carlough* and *Georgine*.

4 *See infra* text accompanying note 275 (discussing NFL Concussion litigation).

5 *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 5–16 (2010) (observing that the rate of private litigation brought in federal courts "exploded" in the late 1960s).

increasing vehemence a perceived surfeit of judicial power exercised through the supervision of litigation. By the early 1990s, class action law and policy had become an important front in a larger war, fought over the right response to a basic query—how much weight can private civil litigation legitimately bear?[6] The failure of the mass tort class action, coinciding with other developments, provided a more restrictive answer. Second, the episode has had a long afterlife, one that has continued to influence the law of complex litigation. The mass tort class action contributed significantly to an important shift in the governing structure for the supervision of class action doctrine. This shift has ensured that a restrictive legal regime regulates Rule 23's administration.

Part I describes the origins of the mass tort class action in the path-breaking decisions of two judicial mavericks in the early 1980s. *Amchem*'s story comes in Part II. Part III documents the lasting influence the mass tort episode has had on the governance of class action doctrine.

I. ORIGINS

A proper understanding of the origins of the mass tort class action requires a simple conceptual distinction.[7] From the earliest days of the modern class action, judges and policymakers understood that Rule 23 might have relevance for mass accident litigation, or the litigation of multiple claims arising from a single, localized catastrophe like an airplane crash.[8] The possibility that Rule 23 would intersect with dispersed mass tort litigation—the litigation of personal injury claims arising from the diffuse exposure to injurious products or substances—seemed more remote. Even Rule 23's most ardent champions excluded it from their sense of the class action's domain. Only in the early 1980s, with decisions by two judicial mavericks, did the link between the class action and dispersed mass tort litigation really emerge.

A. *Early Reluctance*

The use of aggregative techniques to manage dispersed mass tort litigation only began in the early 1960s,[9] making the class action's relevance hard to imagine. But the members of the Advisory Committee that authored the 1966 rule certainly anticipated that mass accident litigators might attempt

6 I owe Bob Bone for this formulation.

7 *See In re* A.H. Robins Co., Inc., 880 F.2d 709, 725 (4th Cir. 1989) (distinguishing between two types of mass tort suits—those arising from a single accident, and those that are more diffuse).

8 *See, e.g.*, Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 179 (1969) (suggesting that Rule 23 could prove useful for the management of mass accident litigation).

9 Paul D. Rheingold, *MER/29: Looking Back at the First Mass Tort Drug Case*, TRIAL, Aug. 2014, at 26, 26. For a sense of the primitive procedural state of mass tort litigation in the early 1960s, see generally Note, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373 (1963).

to use the new Rule 23.[10] Concern that class actions might generate binding judgments for a large group of accident victims helped to derail an effort to revise Rule 23 in the early 1950s.[11] When the revision process began in earnest in the early 1960s, the specter of a collusively litigated mass accident class action rigged to settle personal injury liability cheaply haunted the Advisory Committee.[12] The committee ultimately agreed that "a very exceptional mass accident case could qualify" under Rule 23(b)(3), given class members' rights to opt out.[13] Some members found the mass accident class action a less discomfiting prospect.[14] But the committee anticipated the use of other tools, not Rule 23, for the aggregate management of personal injury claims.[15]

The judicial attitude toward Rule 23's use for air crash cases and the like remained tentative and unsettled throughout the 1970s.[16] Choice of law problems, the superiority of other mechanisms for case management, and the interest of individual litigants in personal control of valuable claims created obstacles to certification.[17] When the Advisory Committee surveyed federal

10 *See, e.g.*, Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 9-17 (1991) (describing the Committee members' views).

11 When Charles Clark introduced his revised Rule 23 to the Advisory Committee at a meeting in May 1953, the very first interruption came from Bill Moore, who wanted to know whether it could be used to dragoon tort victims into a particular case. Transcript, Advisory Committee on Federal Rules of Civil Procedure 111 (May 18, 1953), http://www.uscourts.gov. Clark's response was "probably yes." *Id.* Moore opposed the revamped Rule 23 for this reason. Transcript, Advisory Committee on Federal Rules of Civil Procedure 157-58 (Mar. 1955), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-523-55 (Cong. Info. Serv.).

12 *See, e.g.*, John P. Frank, Advisory Committee on Civil Rules: Dissenting View of Committee Member 2 (May 28, 1965), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7107-01 (Cong. Info. Serv.) ("The corruption potential of the binding spurious class action intimidates me. These cases are terribly easy to rig—a bright child could do it. I would not hold out the bait.").

13 Discussion of Responses to Memorandum of December 2, 1963 3 (Jan. 31, 1964), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.).

14 *See, e.g.*, Transcript, Meeting of the Federal Rules Advisory Committee 13 (Oct. 31-Nov. 2, 1963), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104-53 (Cong. Info. Serv.) (comments of Charles Alan Wright) (insisting that "the mass accident" class action "doesn't bother me a bit").

15 Andrew Bradt, *Something Less and Something More: MDL's Roots as a Class Action "Alternative"*, 165 U. PA. L. REV. 1715-17 (2017) (commenting on members' expectations that the soon-to-be-passed MDL statute, not Rule 23, would govern claim aggregation for mass torts).

16 *See, e.g.*, Vincent v. Hughes Air West, Inc., 557 F.2d 759, 767 (9th Cir. 1977) (describing contrasting views in relevant case law); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 397 (E.D. Va. 1975) (same).

17 For decisions denying class certification, see McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1087 (9th Cir. 1975); Marchesi v. E. Airlines, Inc., 68 F.R.D. 500, 501-02 (E.D.N.Y. 1975); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 84-85 (M.D. Pa. 1974); Daye v. Commonwealth of Pennsylvania, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972); Hobbs v. Ne. Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970). For decisions granting class certification, see Coburn v. 4-R Corp., 77 F.R.D. 43, 45 (E.D. Ky. 1977); Bentkowski v. Marfuerza Compania Martima, S.A., 70 F.R.D. 401, 405 (E.D. Pa. 1976); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 562 (S.D. Fla. 1973); Petition of Gabel, 350 F. Supp. 624, 629 (C.D. Cal. 1972); Am. Trading & Prod. Corp. v.

judges in 1977 and asked whether "Rule 23 is capable of disposing efficiently of mass accident claims," slightly more than half answered yes.[18] In contrast, federal judges uniformly refused to certify dispersed mass tort classes until the very end of the 1970s.[19]

This disinclination reflected the distance between the realities of personal injury litigation, on one hand, and the primary normative foundation for a powerful class action device that those who favored class litigation laid during Rule 23's first era, on the other. To the new rule's critics, class certification and the approval of class settlements required judges to wield extraordinary, arguably illegitimate, power. To find that common issues of law and fact predominate over individual ones, judges had to adjust the substantive law, to downplay individual legal and factual issues as marginally relevant to the adjudication of the defendant's liability, or to remake these issues into common ones.[20] To impose a class-wide judgment or approve a class-wide settlement, judges wrested control over claims from their individual owners.[21]

Proponents of an aggressive, powerful Rule 23 defended what I have called a "regulatory conception" of the device as a response to such concerns.[22] By their view, the class action's primary objective was not individual compensation but regulatory efficacy, or the successful alteration of defendants' behavior through the vindication of substantive liability regimes. A class action properly targeted the aggregate effects of the defendant's conduct as experienced by a group of undifferentiated regulatory beneficiaries. Without aggregation, claims would lie dormant, and regulatory regimes would go unenforced. For these reasons, supporters argued, judges could rightly downplay conflicts of interest among individual class members, overlook or deemphasize individual legal issues that differed from one class member's claim to the next, and soften due process protections for class members. By stressing common issues over individual ones,

---

Fischbach & Moore, Inc., 47 F.R.D. 155, 157 (N.D. Ill. 1969); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 337 (D.R.I. 1969).

18 Responses to Rule 23 Questionnaire (May 12, 1977), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6509-32 (Cong. Info. Serv.).

19 For decisions denying class certification for dispersed classes, see Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 234 (D.S.C. 1979); Van Harville v. Johns-Manville Prods. Corp., Civ. No. 78-642, 1979 U.S. Dist. LEXIS 9501, at *54 (S.D. Ala. Sept. 27, 1979); Yandle v. PPG Industries, Inc., 65 F.R.D. 566, 571-72 (E.D. Tex. 1974); Harrigan v. United States, 63 F.R.D. 402, 409 (E.D. Pa. 1974).

20 *See, e.g.*, Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 861–67 (1974) (describing substantive law changes made to facilitate class certification); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 383-386 (1973) (arguing that courts change substantive law to facilitate class certification).

21 *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969) (Goldbold, J., concurring) (criticizing such actions in Title VII class actions).

22 The discussion in this paragraph is based on Marcus, *Sturm und Drang*, *supra* note 2, at 592-593.

courts could facilitate class certification, enable aggregate adjudication, and thereby ensure that the class action discharged its regulatory task.

Complaints about the illegitimate exercise of what amounted to law reform power through the supervision of litigation rang more hollow when cases really centered on defendants' undifferentiated treatment of all class members,[23] or when class members' claims had such marginal value that possibly no class member cared about losing control over their rights to sue.[24] But personal injury cases lacked these characteristics.[25] An alleged tortfeasor's liability often depends in large measure on proof of individual causation, an issue rarely amenable to aggregate adjudication.[26] Even issues that seemed common, like general causation, may not be so. Unlike other types of federal class actions in the 1970s,[27] mass tort litigation implicated multiple states' tort law and for that reason the prospect that different bodies of law would apply to different class members' claims. Also, tort victims often have valuable claims, so concern about judicial usurpation of their individual control cannot be dismissed as formalistic.[28] Finally, the principal justification for the regulatory conception, that regulatory efficacy requires the sort of claim mobilization that only aggregation can generate, misfired for mass torts, where claim value incentivized plenty of individual litigation.[29]

The class action figured importantly in a more general debate that raged in the 1970s about the legitimate size of litigation's institutional footprint.[30] What had begun in the 1960s as a technocratic concern over rising caseloads morphed the next decade into a darker narrative about a pathological "litigation explosion."[31] Critics of American civil justice lamented that excessive litigiousness among

---

23 U.S. Fidelity & Guaranty Co. v. Lord, 585 F.2d 860, 872 (8th Cir. 1978); Paddison v. Fidelity Bank, 60 F.R.D. 695, 700 (E.D. Pa. 1973).

24 Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 944 (1975).

25 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

26 Susan E. Silbersweig, Case Note, Payton v. Abbott Laboratories*: An Analysis of the Massachusetts DES Class Action Suit*, 6 AM. J.L. & MED. 243, 263 (1980) (quoting a 1977 decision denying class certification in a dispersed mass tort case).

27 Decisions limiting the subject matter jurisdiction of the federal courts meant that most federal class actions litigated in the 1970s arose under federal law. Marcus, *Sturm und Drang*, *supra* note 2, at 627-28.

28 *See, e.g.*, Hobbs v. Ne. Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970) (acknowledging the interests of claimants in litigating independently).

29 *See, e.g.*, Daye v. Commonwealth of Pennsylvania, 344 F. Supp. 1337, 1343 (E.D. Pa. 1972) (observing that a significant number of individual plaintiffs had already filed suit in a putative class action).

30 *See* A.E. Dick Howard, *A Litigation Society?*, WILSON Q., Summer 1981, at 98, 102; *see also The Chilling Impact of Litigation: Easier Access to the Courts Means Skyrocketing Costs and Interminable Delays*, BUS. WEEK, June 6, 1977, at 58, 63; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) [hereinafter Chayes, *Role*].

31 Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292-93 (2002).

Americans[32] and judges' inability to keep frivolous or trivial claims off their dockets[33] meant that courts attracted too many disputes.[34] Relatedly,[35] according to critics, an "imperial judiciary" had emerged by the mid-1970s, illegitimately claiming power over an ever-expanding array of social, political, and economic problems that had previously remained the province of the political branches.[36]

Abram Chayes offered the most important response to these charges.[37] He agreed with critics that "[i]n our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights."[38] Conceived thusly, "the process is party-initiated and party-controlled," with the judge a passive, neutral participant who acts only when the parties request it.[39] By the mid-1970s, however, litigation had evolved to include "sprawling and amorphous" endeavors "about the operation of public policy."[40] Chayes insisted that groups could and should make transformative changes to social or economic orders through lawsuits, with remedies designed for behavior and policy modification to benefit diffuse members of the public. Such litigation does not stand apart from political or administrative processes but functions as a different channel for the pursuit of the same ends.[41] The specific parties recede into the background, with the judge becoming "the dominant figure in organizing and guiding the case."[42]

Chayes articulated a version of the regulatory conception as his understanding of the class action.[43] Part of his defense of the surfeit of judicial power that public law litigation entailed drew on the conception's normative foundation: the exercise of this power enabled the vindication of substantive legal regimes that might otherwise go unenforced.[44] Chayes included all types of the 1970s-era class action as exemplars of public law litigation.[45] But mass tort litigation was not a species within his genus. To Chayes, the leading defender of

32 Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

33 *See, e.g.*, *Chilling Impact*, *supra* note 30, at 63.

34 JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 5 (1981).

35 *Id.* at 4-7.

36 *See* Nathan Glazer, *Towards an Imperial Judiciary?*, PUB. INT. Fall 1975, at 114-17 (describing the trend of growing judicial power); *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4 (1976) (discussing the expansion of judicial responsibility since the 1960s).

37 Chayes, *Role*, *supra* note 30.

38 *Id.* at 1282; *see also* Howard, *supra* note 30, at 102.

39 Chayes, *Role*, *supra* note 30, at 1283.

40 *Id.* at 1302.

41 *Id.* at 1304.

42 *Id.* at 1284.

43 Abram Chayes, *The Supreme Court 1981 Term*, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 26-27 (1982) (characterizing the class action device as an instrument for "reformist litigators" seeking to assert group interests).

44 *Id.* at 27; Chayes, *Role*, *supra* note 30, at 1314.

45 Chayes, *Role*, *supra* note 30, at 1284 (referencing employment discrimination, school desegregation, and other class actions).

litigation's big footprint (and the judicial power it implied), personal injury cases exemplified traditional, party-centered and party-controlled lawsuits.[46]

B. *Two Judicial Mavericks*

The first breach in the dam came in 1979, when a district judge certified a class of Massachusetts women exposed to diethylstilbestrol (DES), to litigate as a group a number of issues common to their increased risk of cancer claims.[47] This innovation proved short-lived. The judge decertified the class when the Massachusetts Supreme Judicial Court rejected the availability of enterprise liability for those plaintiffs who could not identify which specific company bore responsibility for their exposure.[48] Other courts refused to certify DES classes.[49]

The iconoclastic Spencer Williams,[50] the next federal judge to certify a dispersed mass tort class, pushed harder. Already a class action pioneer,[51] Williams turned to Rule 23 to address the escalating litigation disaster prompted by the 1972 recall of the Dalkon Shield intrauterine birth control device.[52] After spending nine weeks trying a single case,[53] Williams in 1982 certified a mandatory, non–opt-out national class of all *Dalkon Shield* plaintiffs under Rule 23(b)(1)(B) to litigate the issue of punitive damages.[54] He also certified a smaller, California-only class under Rule 23(b)(3) to litigate the issue of the defendant's liability.[55] Ruling sua sponte, Williams made only cursory predominance and superiority findings to support the (b)(3) certification, and vague limited fund findings for the (b)(1)(B) portion.[56] He clearly expected that his decision would prompt the parties to enter a global settlement.[57]

---

46 *Id.* at 1283.

47 Payton v. Abbott Labs, 83 F.R.D. 382, 385 (D. Mass. 1979); *In Camera*, 5 CLASS ACTION REP. 469, 469 (1978); Silbersweig, *supra* note 26, at 243-44.

48 Payton v. Abbott Labs, 100 F.R.D. 336, 338-39 (D. Mass. 1983).

49 *See* Mertens v. Abbott Laboratories, 99 F.R.D. 38, 42 (D.N.H. 1983); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875, 880 (D.S.D. 1982); Silbersweig, *supra* note 26, at 247 (describing one such decision in Illinois).

50 For example, Judge Williams served as a class representative three times in suits against the federal government seeking raises for federal judges. *See* Terry Carter, *Bucking for a Raise*, 84 A.B.A. J. 32 (1998).

51 *See, e.g.*, *In re* Consolidated Pre-Trial Proceedings in Memorex Security Cases, 61 F.R.D. 88, 97 & n.7 (N.D. Cal. 1973) (certifying a class in an innovative early securities fraud decision).

52 *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 985 (1993) (describing the Dalkon Shield litigation).

53 *In re* N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (observing that any attempt to try the cases individually would "bankrupt" a court's calendar).

54 *Id.* at 897-98.

55 *Id.* at 902-03.

56 *Id.*

57 *See* Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 22 JUDGES J. 8, 11 (1983).

Jack Weinstein soon followed Williams's lead.[58] Although Weinstein had once denounced personal injury class actions as a form of "legalized ambulance chasing,"[59] he put this youthful "indiscretion" behind him in 1983.[60] He certified a mandatory national class in the famous *Agent Orange* litigation to litigate the defendants' liability for punitive damages,[61] and he certified everything else, including the defendants' liability, under Rule 23(b)(3).[62] Whereas Williams's predominance analysis was cursory, Weinstein's was fanciful. He infamously determined that a single "national substantive rule" would govern class members' claims, thereby dodging the otherwise insuperable barrier to certification created by the simultaneous application of dozens of states' tort law.[63] Like Williams, Weinstein expected the parties to settle.[64]

Weinstein and Williams exercised the sort of power that Chayes had observed in public law judges, with Weinstein's debt to Chayes plain.[65] Both judges seized control of litigation without regard for individual plaintiff preferences.[66] Neither judge paid much heed to the constraints of the substantive law on procedural possibilities, ignoring or assuming away legal and factual differences among class members' claims. Weinstein forthrightly assumed the legislative mantle with his "national substantive rule." Williams did so as well, if less explicitly, with his intention to displace tort law remedies with an equitable, pro rata distribution from a limited fund, as Rule 23(b)(1)(B) contemplates. Under the guise of managing litigation, both judges

---

58 Judge Weinstein took over *Agent Orange* after the initial judge, George Pratt, was elevated to the Second Circuit. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 110 (1987). In an opinion giving barely cursory treatment to key issues like predominance, Judge Pratt agreed to certify an opt-out class in 1980, but never entered the order. *See id*. at 68-69, 80-81; *see also In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 791 (E.D.N.Y. 1980).

59 Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960).

60 Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 288.

61 *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 725-28 (E.D.N.Y. 1983) (certifying a class under Rule 23(b)(1)(B)).

62 *Id*. at 731-32.

63 *Id*. at 724. For criticism, see SCHUCK, *supra* note 58, at 128-31.

64 *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. at 723 (explaining this expectation).

65 *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 834-36 (E.D.N.Y. 1984) (citing Chayes); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 473 (1994) (drawing parallels between mass tort cases and other public law cases); *see also* Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 FORUM 1, 7 (1983) (citing Chayes and stating that some commentators see toxic substances litigation as a new form of public law litigation); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 908-16 (1984).

66 Elizabeth Joan Cabraser, *Mandatory Certification of Settlement Classes*, 10 CLASS ACT. REP. 151, 152 (1987).

took on sole responsibility for significant policy problems, with Weinstein explicit about his exercise of power as an alternative to legislative action.[67]

But in neither *Dalkon Shield* nor *Agent Orange* could claim-mobilization, the regulatory conception's normative pillar, justify an aggressive administration of Rule 23 and with it such a robust exercise of judicial power.[68] Williams certified the *Dalkon Shield* class to manage an avalanche of claims, not to trigger one. Thirty-four hundred individual plaintiffs filed suit before the class certification motion in *Agent Orange*.[69] Rather, the mavericks invoked judicial economy and distributional equity to justify class certification. Williams explained that the "tedious and frustrating task of presiding over identical lawsuits" might "bankrupt both the state and federal court systems."[70] Also, payouts determined by individuals' race to judgment might leave "later plaintiffs . . . without practical means of redress" as the defendants' funds run dry.[71] Although his findings as to the likelihood that claims would exceed the defendants' assets were more thorough and careful than Williams's,[72] Weinstein ultimately based his decision to certify a mandatory *Agent Orange* class on a distributional concern. The law of punitive damages might cap the defendants' liability, and thus the first plaintiffs to win punitive damages judgments would unfairly reap all the spoils.[73]

To critics, decisions like *Agent Orange* proved the pathological status of American civil justice,[74] and judicial colleagues of Williams and Weinstein remained mostly skeptical of the mass tort class action.[75] For example,

---

67 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983) (stating that a class action is the best means of demanding that "the government assume responsibility for the harm caused our soldiers and their families by its use of Agent Orange").

68 *See, e.g.*, Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 424-31 (1999) (enumerating the ways that mass tort litigation does not fit within Chayes' public law model).

69 *In Camera*, 6 CLASS ACTION REP. 273, 273 (1980).

70 Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324-25 (1983).

71 *Id.* at 325.

72 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 725-28 (E.D.N.Y. 1983).

73 *Id.* at 725.

74 *See, e.g.*, *Tort Reform*, WALL ST. J., Apr. 7, 1986, at 22 (criticizing the Agent Orange settlement); *Contempt of Justice*, WALL ST. J., May 14, 1985, at 28 (using the Agent Orange settlement as evidence of problems with the American civil justice system); *Is Suing the Only Way?*, N.Y. TIMES, Apr. 1, 1985, at A20 (offering similar criticism).

75 Delaney v. Borden, Inc., 99 F.R.D. 44, 44 (E.D. Pa. 1983) (noting that class certification is inappropriate in mass tort actions); *see also In re* Tetracycline Cases, 107 F.R.D. 719, 721 (W.D. Mo. 1985) (confirming denial of class certification); Walsh v. Ford Motor Co., 612 F. Supp. 983 (D.D.C. 1985); Pearl v. Allied Corp., 102 F.R.D. 921, 924 (E.D. Pa. 1984) (denying class certification); Mertens v. Abbott Labs., 99 F.R.D. 38, 41-42 (D.N.H. 1983) (expressing skepticism of class certification); Sanders v. Tailored Chem. Corp., 570 F. Supp. 1543, 1543 (E.D. Pa. 1983) (discussing prior cases that have generally denied class certification in mass tort actions); Ruland v. Gen. Elec. Co., 94 F.R.D. 164, 165 (D. Conn. 1982) (denying class certification); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875, 877 (D.S.D. 1982) (denying class certification); David Berger, *Litigation of a Class*

Weinstein's decision withstood appellate review, but the Second Circuit noted its expectation that his order would not "'encourage the use of similar procedures by . . . district courts in the future.'"[76] The Ninth Circuit made short work of Williams's decision when 165 of the 166 plaintiffs' lawyers with cases affected by the grant of class certification sought interlocutory review.[77] When Carl Rubin, yet another maverick, certified a mandatory class of persons exposed in utero to a pregnancy drug in 1984, the Sixth Circuit swiftly granted the writ of mandamus that several plaintiffs' lawyers requested.[78] While Rubin's decision may have been "commendable" "[o]n pure policy grounds," the Sixth Circuit explained, it was "clearly erroneous as a matter of law."[79]

II. *AMCHEM*

Within a decade, the federal judiciary committed as an institution to Rule 23's use to resolve dispersed mass tort litigation. A fear of total institutional breakdown,[80] prompted chiefly by asbestos litigation,[81] moved the class action from the periphery to the center of the mass tort stage. As their asbestos dockets ballooned, judges watched with dismay as traditional litigation and other processes proved unable to render accurate, timely, and nonarbitrary determinations of claimants' rights to recover. The *Amchem* settlement resulted.

Amchem involved a remarkable attempt to use a class action to settle claims not yet filed by people exposed to asbestos. Had the settlement succeeded, a right to claim compensation from a settlement trust fund would have replaced millions of tort claims, a transformation of substantive rights achieved

Action, 18 FORUM 335, 339 (1982–83) (acknowledging reluctance of courts to certify classes in mass tort claims).

76 *In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 860 (2d Cir. 1984) (quoting United States v. Dooling, 406 F.2d 192, 199 (2d Cir. 1969)); *see also In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 151, 167-71 (2d Cir. 1987) (upholding the *Agent Orange* settlement and stressing its "nuisance" value).

77 *In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856-57 (9th Cir. 1982); *see also* Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 58 (1989) (describing plaintiffs' lawyers' reactions).

78 *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 307 (6th Cir. 1984).

79 *Id.* at 306.

80 *See, e.g.*, *In re* A.H. Robins Co., Inc., 880 F.2d 709, 731 (4th Cir. 1989) (emphasizing the need to use class action in order to cope with problems mass tort litigation created for the judiciary); Irving R. M. Panzer & Thomas Earl Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 TORT & INS. L.J. 560, 568 (1985-86) (describing a fear that mass tort litigation is threatening to undermine the judicial system).

81 Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986); *In re* School Asbestos Litig., 789 F.2d 996, 1000 (3d Cir. 1986). The *School Asbestos* case did not involve personal injury claims. Rather, it required a very different sort of analysis that arguably made class certification easier and thus does not figure as a central chapter in this story. *E.g.*, Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 496-97 (1991).

through the exercise of judicial power. Versions of the *Amchem* story have several skillful tellings.[82] A central theme in existing accounts involves the effort of powerful plaintiffs' lawyers cooperating with defendants to enrich themselves at the expense of asbestos victims. Lost in these narratives of corruption and collusion, however, is a central part of this history. *Amchem* happened because the federal courts wanted a class action endgame. It was as much the exercise of public power as it was private dealmaking.

By 1993, Rule 23's use for mass tort litigation was no longer a maverick's frolic but the institutional preference of the federal courts. It nonetheless failed. The surfeit of judicial power it required lacked a sufficient justification or limiting principle.

A. *The Failed Alternatives*

The one-by-one litigation of asbestos cases, with an emphasis on individual control over claims, was "largely a myth" by the time the asbestos drama turned to Rule 23.[83] The rising tide of asbestos filings pushed judges to exhaust various aggregative techniques but also to pioneer a number of case management strategies, which were all steps toward the sort of judicial power Chayes had celebrated and Weinstein and Williams had exercised. Features of the *Amchem* deal reflected both these years of futility and the innovations they spawned.

1. The Failure of Informal Aggregation

In the early 1980s, Thomas Lambros of the Northern District of Ohio noticed that several dozen lawyers would appear every time he held a case management conference in one of his asbestos cases. Even worse, these lawyers, mostly representing the many defendants joined in each case, sandwiched his conference in between ones elsewhere in the courthouse. The hours they billed offended Lambros, as did the "endless stream of procedural activity" these cases produced.[84]

To respond, Lambros came up with his "Ohio Asbestos Litigation" system.[85] He took over all of the asbestos cases pending in his district and

---

82 *E.g.*, Patrick M. Hanlon, *An Experiment in Law Reform:* Amchem Products v. Windsor, 46 U. MICH. J.L. REFORM 1279, 1279 (2013); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384-99 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1046 (1995).

83 Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1913 (2002) [hereinafter Hensler, *Time Goes By*]; *see also* Hanlon, *supra* note 82, at 1287.

84 Interview with Thomas Lambros (Mar. 23, 2016), Transcript at 4 [hereinafter Lambros Interview].

85 *Id.* at 6; *see also* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 480-90 (1986) (describing the implementation and ramifications of the Ohio Asbestos Litigation plan).

ordered that a single lawyer represent each asbestos company for all of its cases. Working with two special masters, Lambros developed form questionnaires designed to gather all essential information for settlement evaluation and had one filled out for each case. Short interviews replaced formal depositions.[86] The information gleaned from this expedited discovery went to the RAND Corporation, which generated proposed settlement amounts for each case based on extensive historical data on comparable claims.[87] Lambros scheduled multiple cases for a single half-day status conference and encouraged the parties to settle.[88] At its peak, a single day's work might produce 200-300 settlements, with more than $150 million changing hands.[89]

Several other judges designed similar strategies, notably Robert Parker in the Eastern District of Texas.[90] Eventually, Lambros estimates, this group supervised about eighty percent of the country's asbestos docket.[91] But the asbestos tide swallowed their efforts.[92] By 1988, Parker remarked, his attempt to manage his way out of the asbestos morass reminded him of "the classical tragedies."[93] The "lamentable state of affairs" had "seen two-thirds of total dollars spent in asbestos litigation going to the coffers of lawyers and witnesses," he bemoaned, while victims died uncompensated.[94]

Informal aggregation happened outside the courtroom as well. Plaintiffs' lawyers began cooperating extensively as early as 1978,[95] and by the mid-1980s leading firms had informally divided up the country, with each representing hundreds, even thousands, of clients in different regions.[96] On the defense side, three years of negotiations pursued to replace the tort system with a "private administrative agency" produced the Asbestos Claims Facility ("ACF") in 1985.[97] The ACF resolved most of the 21,000 claims it settled

86 Lambros Interview, *supra* note 84, at 7-8.

87 *Id.* at 9; McGovern, *supra* note 85, at 488.

88 Lambros Interview, *supra* note 84, at 9.

89 *Id.*

90 *See* Judge Robert M. Parker, Memorandum to the Study Committee for the Efficient Disposition of Asbestos-Related Cases, Jan. 22, 1982, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 348 (5th Cir. 1982) (proposing standard procedures for handling asbestos-related cases).

91 Lambros Interview, *supra* note 84, at 10.

92 *See* Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 271 (E.D. Tex. 1985) (noting that courts have become so overwhelmed as to risk denying justice in asbestos-related cases).

93 *Id.* at 270.

94 *Id.* at 287.

95 Robin Reisig, *The Man Who Took on Manville*, AM. LAW., Feb. 1983, at 65, 66.

96 E-mail from Brent Rosenthal, Partner, Rosenthal Weiner (Apr. 21, 2016), Attachment at 2 [hereinafter Rosenthal Interview Notes]; Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 263-64 (2005-06) (describing the percentages of all asbestos cases filed that were represented by ten law firms in the 1980s).

97 Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375, 375 (1985); *see also* Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 13 (1990).

through an ADR system designed to reduce transaction costs considerably.[98] But the companies had disparate settlement preferences, and the ACF collapsed in 1988.[99] Some of the companies tried again, forming the Center for Claims Resolution ("CCR") to continue with a coordinated litigation strategy.[100] But the pace of filings increased, and defendants found themselves paying to settle weaker and weaker claims.[101]

2. The Failure of Formal Aggregation

Johns-Manville's decade-long struggle with bankruptcy fueled the asbestos fire. "The General Motors of the asbestos industry,"[102] Manville petitioned for Chapter 11 reorganization in 1982 when relentless filings made a future of inexhaustible liability inevitable.[103] Six years of negotiations and appeals followed before the Second Circuit in 1988 finally approved a reorganization plan that steered all asbestos liability to a Manville-funded trust.[104] Within months of paying its first claim, however, the Manville trust began to run dramatically low on funds,[105] producing a mad scramble by plaintiffs' lawyers eager to get their claims paid before all the money was gone.[106] Manville quickly had to inject an additional $520 million to keep the trust solvent,[107] and the trust's pledge to pay claims in full, based on their value in the tort system,[108] soon proved farcical.[109]

---

98 Fitzpatrick, *supra* note 97, at 14; Cynthia F. Mitchell & Paul M. Barrett, *Trial and Error: Novel Effort to Settle Asbestos Claims Fails as Lawsuits Multiply*, WALL ST. J., June 7, 1988, at 1, 29.

99 Historical Society of the District of Columbia Circuit, Oral History of John Aldock, Fifth Interview, May 16, 2010, at 154-55, http://dcchs.org/JohnDAldock/051610.pdf [https://perma.cc/9BCQ-VEKN] [hereinafter Aldock Oral History]; *see also* Interview with Gene Locks, Founding Partner, Locks Law Firm (Apr. 19, 2016), Transcript at 5 [hereinafter Locks Interview].

100 Fitzpatrick, *supra* note 97, at 17; Interview with John Aldock, Retired Partner, Goodwin Procter (Apr. 19, 2016), Notes at 1 [hereinafter Aldock Interview Notes].

101 Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1744 (2002).

102 Joint Appendix at 388, Amchem Prods., Inc. v. Windsor, No. 96-270 (U.S. Sup. Ct. Dec. 16, 1996) (testimony of Lawrence Fitzpatrick) [hereinafter Fitzpatrick Testimony]; *see also* Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988).

103 *Kane*, 843 F.2d at 639; s*ee generally* PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 11:11 (2016). Manville had badly misapprehended its asbestos liability. Shirley Hobbs Scheibla, *Heat on Asbestos: Legislative, Legal Challenges to Producers Mount*, BARRON'S, Mar. 5, 1979, at 4 (quoting Manville's president's rosy projections regarding the company's future liability).

104 *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 752 (E.D.N.Y. 1991).

105 *Id.* at 754-58.

106 *Id.* at 758.

107 *In re* Joint E. & S. Dist. Asbestos Litig., 120 B.R. 648, 653 (E.D.N.Y. 1990).

108 Hensler, *supra* note 83, at 1919.

109 *Id.*

Manville's bankruptcy was a "game-changer."[110] Other companies noted the difficulty Manville had faced in estimating its future liability.[111] Plaintiffs' lawyers expected that their clients would have to take haircuts and thus predicted "devastation to the asbestos personal injury victims."[112] Their primary target gone, these lawyers developed cases against a broader array of defendants,[113] looking harder for cases in a race to get ahead of more bankruptcies.[114] Consequently, filings exploded,[115] with many of the newer cases alleging marginal injuries or nothing at all.[116] Some defendants responded by refusing to settle claims en masse. They insisted on taking cases to trial, worsening the backlog further.[117]

Parker's *Jenkins* and *Cimino* experiments were another failed effort at formal aggregation. Convinced that creative case management could not staunch the asbestos bleeding,[118] Parker certified an opt-out class of Eastern District of Texas claimants (the *Jenkins* class) in 1985 to resolve issues involving asbestos companies' knowledge of their products' dangerousness and their liability for punitive damages.[119] Individual plaintiffs would then litigate individual causation and comparative fault issues in subsequent "mini-trials."[120] The Fifth Circuit upheld Parker's plan against efforts by the defendants to scuttle it, remarking that "[n]ecessity moves us to change and invent."[121] The effort seemed to work. Five weeks into the class trial, the parties struck a $110 million deal and wiped Parker's docket nearly clean.[122] He conditioned his approval on the lawyers' willingness to agree to arbitrate

110 Hanlon, *supra* note 82, at 1285; *see also* Interview with Joseph Rice, Founding Member, MotleyRice (Apr. 25, 2016), Transcript at 4 [hereinafter Rice Interview].

111 STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 66 (2005).

112 Plaintiffs' Proffer on Preliminary Evaluation of Fairness at 3, Carlough et al. v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. June 25, 1993) (declaration of Joseph F. Rice) [hereinafter Rice Declaration].

113 Hanlon, *supra* note 82, at 1285-86; JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM 40 (2011).

114 *SEE* CARROLL ET AL., *supra* note 111, at 23; *see also* Fitzpatrick Testimony, *supra* note 102, at 388; Joint Appendix at 603, Amchem Prods., Inc. v. Windsor, No. 96-270 (U.S. Sup. Ct. Dec. 16, 1996) (testimony of Robert Hatten) [hereinafter Hatten Testimony].

115 Fitzpatrick Testimony, *supra* note 102, at 387.

116 *Asbestos Claims/Claims Court Reference: Hearing Before the H.R. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 100th Cong., 2d Sess. 55 (Aug. 10, 1988) (testimony of John L. Baldwin); Michael Bates, *Suit Alleges Asbestos Claims Were Fraudulent*, NAT'L L.J., Feb. 22, 1988, at 21.

117 Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651-52 (E.D. Tex. 1990) (noting defendants' strategy); Rice Interview, *supra* note 110, at 4.

118 Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 270 (E.D. Tex. 1985).

119 *Id.* at 281-82; Mullenix, *supra* note 81, at 488-95.

120 *Jenkins*, 109 F.R.D at 279.

121 Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

122 Rich Arthurs, *Texas Judge Rides Herd on Asbestos Suits*, LEGAL TIMES, May 19, 1986, at 6.

all claims not covered by the class settlement.[123] Some observers celebrated this innovation as the golden ticket out of the asbestos morass.[124]

But *Jenkins* quickly fell apart. Filings outpaced ADR dispositions by a considerable measure,[125] and some defendants refused to settle cases as the plan had anticipated.[126] In response, Parker certified another Eastern District of Texas class (the *Cimino* class) and ordered a multiphase, classwide trial to resolve all elements of members' claims. Trials on liability and damages for a representative sample of plaintiffs would proceed. From these sample verdicts Parker would extrapolate the defendants' total liability, as well as determine how much claimants in different injury categories would receive.[127] Defendants—who distrusted Parker and disliked his district—detested this plan,[128] especially after it produced anomalously high values for certain disease categories.[129] They successfully petitioned the Fifth Circuit for a writ of mandamus.[130]

B. *The Institutional Commitment*

Lambros and Parker, along with other colleagues, had tried to seize control of asbestos litigation. But their efforts fell short, even as they normalized dramatic departures from litigation in the mold of the "received tradition" that Chayes had described. What came next was an institutional commitment to the path they and their maverick predecessors had blazed.

1. Chaos

By the end of the 1980s, an "air of judicial desperation" had set in.[131] Plaintiffs' lawyers sensed that legislation,[132] an onslaught of bankruptcies,[133] or some other dramatic alteration to asbestos litigation to that point was inevitable. Even litigators who had previously championed "traditional forms

123 MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 42 (1988).

124 Arthurs, *supra* note 122, at 6.

125 PETERSON & SELVIN, *supra* note 123, at 46 n.102.

126 Cimino v. Raymark Indust., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990).

127 RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 67-70 (2007).

128 Aldock Oral History, *supra* note 99, at 157.

129 NAGAREDA, *supra* note 127, at 69.

130 *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990).

131 Hanlon, *supra* note 82, at 1297; JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 100 (2015).

132 Alison Frankel, *Traitor to His Class*, AM. LAW., Jan. 2000, at 55.

133 Rice Interview, *supra* note 110, at 5; Gordon Hunter, *Plaintiffs' Bar at War Over Asbestos Caseload; Tens of Millions in Fees at Stake*, TEX. LAW., Aug. 20, 1990, at 8.

of dispute resolution" for asbestos cases[134] warmed to a class action strategy to bring asbestos litigation to a copacetic conclusion.[135]

In the late 1980s, Raymark Industries, drowning in new claims,[136] announced that it would no longer offer anything but a nuisance value settlement, no matter a case's strength, unless a trial date—a very rare commodity—approached.[137] Worried that other companies would adopt this "scorched earth" strategy, a plaintiffs' lawyer agreed to move jointly with Raymark for the certification of a mandatory class in an Atlanta federal court.[138] The district judge immediately granted the motion and enjoined all other litigation against Raymark, without affording other lawyers a chance to weigh in.[139] "Panic ensued" among plaintiffs' lawyers, who had suddenly lost control over their cases.[140] They sought relief from the Eleventh Circuit, which vacated the certification order within a month.[141] But this "hasty, sloppy experiment" nonetheless convinced some lawyers that a better-crafted class action strategy might work.[142] These converts included Ron Motley, the country's most powerful asbestos lawyer, who had already begun global settlement discussions with defendants.[143]

Judicial pressure began to mount, and not just from a trigger-happy judge in Georgia. On June 25, 1990, the Federal Judicial Center convened a meeting at the Dolly Madison House in Washington, D.C., with several key litigators and the ten federal judges with the largest asbestos dockets in attendance.[144] The attendees spitballed several solutions to the crisis[145] and established an ad hoc committee to pursue further study.[146] This step was modest, but it

134 Gene Locks, *Asbestos-Related Disease Litigation: Can the Beast be Tamed?*, 28 VILL. L. REV. 1184, 1193 (1982-83).

135 Rosenthal Interview Notes, *supra* note 96, at 3.

136 *See* Cynthia F. Mitchell, *Class-Action Status of Asbestos Lawsuits Against Raymark Industries Overturned*, WALL ST. J., July 22, 1988, at 1; *see also* Janet Guyon, *U.S. Judge Consolidates Asbestos Cases Against Raymark Into Class-Action Suit*, WALL ST. J., June 13, 1988, at 6.

137 Rosenthal Interview Notes, *supra* note 96, at 3; Fitzpatrick Testimony, *supra* note 102, at 390-91.

138 Rosenthal Interview Notes, *supra* note 96, at 3.

139 *In re* Temple, 851 F.2d 1269, 1272 (11th Cir. 1988).

140 Rosenthal Interview Notes, *supra* note 96, at 3.

141 Guyon, *supra* note 136; *Temple*, 851 F.2d at 1269.

142 Rosenthal Interview Notes, *supra* note 96, at 4. So did the Fourth Circuit's decision in *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989), which approved a class settlement related to DES litigation. Rosenthal Interview Notes, *supra* note 96, at 4.

143 CCR's president approached Motley in 1987 to begin these conversations. Transcript of Fairness Hearing Before the Honorable Lowell A. Reed, Jr. at 78, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 22, 1994) (testimony of Lawrence Fitzpatrick) [hereinafter Fitzpatrick Hearing Testimony].

144 Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1861-62 (1997).

145 Aldock Interview Notes, *supra* note 100, at 2.

146 *National Class Action Seen as Result of "Turf War"*, 5-12 MEALEY'S LITIG. REP. ASB. 1, July 20, 1990.

came with a clear and important message from the judges to the litigators: end the chaos.[147]

Events confirmed litigators' impression that "business as usual was [not] going to be acceptable in the minds of the judges" any longer.[148] Supervising the mismanaged Manville Trust, Weinstein insisted that "the time is now ripe for a Rule 23(b)(1)(B) global settlement" for asbestos litigation. If the parties did not take action, he would.[149] This prospect discomfited plaintiffs' lawyers, who remembered how Weinstein had slashed counsel fees in *Agent Orange*.[150] But Lambros acted first, certifying a mandatory class of all present and future claimants nationwide. Ostensibly, he did so to preserve the status quo "until the ad hoc committee of judges and lawyers have the opportunity to formulate a universal and multi-jurisdictional" solution.[151] No one was happy.[152] Indeed, four federal judges in Louisiana ordered lawyers to ignore Lambros's order.[153]

As a leading plaintiffs' lawyer put it, things then got "stranger and stranger."[154] The Dolly Madison House judges signed a joint order superseding Lambros's with a plan to join asbestos litigation into one consolidated proceeding they designated *In re: National Asbestos Class Action*.[155] Lambros would supervise a nationwide Rule 23(b)(3) settlement class action. Parker would preside over a nationwide Rule 23(b)(1)(B) class action for all non-settling defendants. Claims against six defendants with diminished assets would go to Weinstein.[156]

This blatant end-run around the MDL process foundered in the Sixth Circuit,[157] but it gave plaintiffs' lawyers more reason to worry that the federal judiciary would soon take control of asbestos litigation away from them. At a July 1990 meeting of leading asbestos lawyers, Thomas Henderson, a big player

147 Fitzpatrick Hearing Testimony, *supra* note 143, at 84; *see also* Aldock Interview Notes, *supra* note 100, at 2.

148 Fitzpatrick Testimony, *supra* note 102, at 392.

149 Stephen Labaton, *The Bitter Fight Over the Manville Trust*, N.Y. TIMES, July 8, 1990, at F1; *see also In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 727 (2d Cir. 1992); *"Turf War"*, *supra* note 146.

150 Labaton, *supra* note 149, at F1.

151 *In re* Ohio Asbestos Litig., 1990 U.S. Dist. LEXIS 15032, at *4 (N.D. Ohio July 16, 1990); *see also* Stephen Labaton, *Asbestos Suits Converted Into National Class Action*, N.Y. TIMES, July 17, 1990, at D1.

152 *See Doubt Cast Upon Judges' Plan for Class Actions*, 5-14 MEALEY'S LITIG. REP. ASB. 1, Aug. 17, 1990; Stephen Labaton, *Business and the Law; Judicial Struggle in Asbestos Cases*, N.Y. TIMES (Aug. 6, 1990), http://www.nytimes.com/1990/08/06/business/business-and-the-law-judicial-struggle-in-asbestos-cases.html [https://perma.cc/2Y2Z-ZT6T].

153 Labaton, *Judicial Struggle*, *supra* note 152.

154 Don J. DeBenedictis, *Asbestos Class Action Struck Down*, 76 A.B.A. J. 14, 16 (1990) (quoting Steven Kazan).

155 *In re* Nat'l Asbestos Litig., Nos. 1-90-CV 11,000, 1-90-CV-5000, 1990 WL 135758, at *1 (N.D. Ohio & E.D. Tex. Aug. 10, 1990).

156 *Id.* at *2.

157 *In re* Allied-Signal, Inc., 915 F.2d 190, 191-92 (6th Cir. 1990).

in Rust Belt cases, circulated a couple of memoranda describing a class action strategy and criteria for compensating claimants pursuant to a global settlement.[158] One memo rallied support for *Linscomb*, a mandatory class action filed in the Eastern District of Texas.[159] Motley supported Henderson. "If the parties don't reach consensual agreement [on a settlement framework]," Motley warned, "the courts will decide it and we will not control our future."[160] Another attempt by Weinstein to seize control of a large tranche of asbestos litigation in December 1990[161] only "bolstered the conviction" of the *Linscomb* lawyers "that some sort of mass resolution was inevitable."[162]

Leading asbestos attorney Fred Baron had filed the very first asbestos class action in the early 1970s, as a longhaired civil rights lawyer "into the idea of freedom and justice."[163] Ironically, he now led the fight against the class action strategy, opposing the *Linscomb* tactic bitterly.[164] But most asbestos lawyers now accepted a class action solution.[165] In contrast, asbestos companies hated the Eastern District of Texas and long resisted a class action strategy.[166] They refused to bargain with the *Linscomb* "sword of Damocles" hanging over their heads.[167]

2. Judicial Control

By early 1991, a judicial takeover of asbestos litigation through a class action had become the institutional preference of the federal courts. After Lambros's failed effort to create a "mini MDL,"[168] Chief Justice Rehnquist appointed an ad hoc committee to study the asbestos litigation crisis.[169] Its March 1991 report described a "situation" of "critical dimensions" that "is getting worse."[170] "[V]irtually every federal judge who has tried to cope with

158 Transcript of Hearing Before the Honorable Lowell Reed at 88, Carlough et al. v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. May 28, 1993) (Statement of Gene Locks).

159 *See* Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 431-32 (1991).

160 Hunter, *Plaintiffs' Bar*, *supra* note 133, at 8.

161 *See* Frankel, *Traitor*, *supra* note 132, at 55; Andrew Blum, *A Routine Hearing Quickly Turns Less So*, NAT'L L.J., Dec. 24, 1990, at 8; Fitzpatrick Hearing Testimony, *supra* note 143, at 90.

162 Rosenthal Interview Notes, *supra* note 96, at 4.

163 Frankel, *Traitor*, *supra* note 132, at 55.

164 Hunter, *Plaintiffs' Bar*, *supra* note 133, at 8; *Plaintiff Bar is a House Divided*, 5-14 MEALEY'S LITIG. REP. ASB. 2, Aug. 17, 1990.

165 Rice Declaration, *supra* note 112, at 10.

166 Fitzpatrick Testimony, *supra* note 102, at 394, 285, 292; Scheibla, *supra* note 103, at 4.

167 Fitzpatrick Testimony, *supra* note 102, at 394.

168 Lambros Interview, *supra* note 84, at 11.

169 McGovern, *Rethinking Cooperation*, *supra* note 144, at 1862.

170 Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, Mar. 1991, *in Asbestos Litig. Crisis in Fed. and State Courts, Hearings Before the H.R. Subcomm. on Intellectual Prop.*

a substantial asbestos docket agrees that this litigation impasse cannot be broken except by aggregate or class proceedings," the report declared. It insisted that "class actions were devised for precisely these kinds of cases,"[171] an assertion that would have struck federal judges as silly a decade earlier. The committee recommended that Congress and the Advisory Committee explore legislation or rule changes to solve the asbestos crisis with a class action, should Congress not replace the tort system with some sort of compensation scheme.[172] Responding to this request,[173] the Federal Civil Rules Advisory Committee proposed an amendment to Rule 23 designed "to enlarge the opportunity for mass tort litigation."[174]

Meanwhile, eight of the Dolly Madison House judges asked the Judicial Panel on Multidistrict Litigation (JPML) to consolidate all federal asbestos litigation.[175] The JPML had previously denied such requests five times.[176] But the institutional preference of the federal judiciary for consolidation was clear, and the JPML could not refuse again.[177] Hoping that the transferee court would "solv[e] the 'asbestos mess,'" the JPML sent the cases to Charles Weiner in the Eastern District of Pennsylvania.[178] Tens of thousands of cases traveled to Philadelphia with most observers' expectation that they would never return.[179]

Weiner had a reputation as a "master settler,"[180] with a well-known "preference for a negotiated resolution of asbestos claims, rather than litigation . . . ."[181] In keeping with his judicial colleagues' desires,[182] Weiner halted almost all litigation and waited for the parties to propose a resolution.[183] Because an inability to get trial dates diminished the likelihood

and Judicial Admin. of the Comm. on the Judiciary at 383, 102nd Cong., 1st and 2d Sess., Oct. 24, 1991, Feb. 26 and 27, 1992.

171 *Id.* at 403.

172 *Id.* at 409-20.

173 Minutes, Oct. 21-23, 1993, at 174, *in* 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, MAY 1, 1997 [hereinafter WORKING PAPERS].

174 Minutes, Advisory Committee on the Civil Rules, Nov. 29-Dec. 1, 1990, Meeting, at 162, *in* 1 WORKING PAPERS, *supra* note 173; *see also* Minutes, Advisory Committee on Civil Rules, Oct. 21-23, 1993, at 174-175, *in* 1 WORKING PAPERS, *supra* note 173.

175 *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991).

176 *Id.* at 417.

177 Aldock Interview Notes, *supra* note 100, at 2.

178 *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. at 424.

179 CARROLL ET AL., *supra* note 111, at 47; *Federal Asbestos Cases Stayed, Transferred to Philadelphia*, 6-13 MEALEY'S LITIG. REP. ASB. 3, Aug. 2, 1991.

180 Hensler, *Time Goes By*, *supra* note 83, at 1901; Locks Interview, *supra* note 99, at 7.

181 Docket 292: Memorandum and Order at 16, Carlough et al. v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. April 15, 1993).

182 Coffee, *supra* note 82, at 1390 (quoting letter from Parker to Weiner); Staff of the Comm. on the Judiciary, *supra* note 170, at 28 (quoting Judge Joseph F. Weis Jr.).

183 Interview with Brent Rosenthal (Apr. 22, 2016), Transcript at 12 [hereinafter Rosenthal Interview].

of settlement,[184] plaintiffs' lawyers tried to free cases from Weiner's chambers, variously described as a "dark hole" or a "plaintiffs' Armageddon."[185] But the JPML rejected remand requests they made and instructed the parties to work with Weiner to settle everything.[186]

3. Following Instructions

To the "extremely disappointed" Motley,[187] Weiner had "transformed what could have been a global resolution of the asbestos cases into a surreal farce."[188] He and his colleague Joseph Rice nonetheless continued settlement discussions, which CCR chose to pursue after earlier negotiations with a larger set of lawyers had failed.[189] Motley and Rice were the "biggest dogs," and any deal required their buy-in.[190] The parties also brought in Gene Locks, a prominent Philadelphia lawyer with a sizeable asbestos inventory.[191]

By this point, a growing backlog had convinced CCR to replace what had been a liberal settlement practice[192] with a "deferral registry" strategy.[193] To discourage filings by unimpaired claimants,[194] CCR refused to settle any case without an impending trial date unless the firm representing the claimant put future unimpaired clients it might represent on a court's inactive docket. Only if the future client met certain medical criteria would his claim come off this deferral registry.[195] CCR made some progress convincing courts of

184 Staff of the Comm. on the Judiciary, *supra* note 170, at 163 (testimony of William Schwarzer) [hereinafter Schwartzer Testimony].

185 Aldock Interview Notes, *supra* note 100, at 2; *Henderson Accuses Two Committee Members of Side Deals*, 7-17 MEALEY'S LITIG. REP. ASB. 2, Oct. 2, 1992.

186 *Plaintiffs' Chances for MDL Remand Questionable*, 7-17 MEALEY'S LITIG. REP. ASB. 1, Oct. 2, 1992.

187 Transcript of Fairness Hearing Before the Honorable Lowell A. Reed, Jr. at 158, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 25, 1994) (statement of Fred Baron, quoting letter from Motley); *see also Federal Asbestos Cases Stayed, Transferred to Philadelphia*, 6-13 MEALEY'S LITIG. REP. ASB. 3, Aug. 2, 1991.

188 Transcript of Fairness Hearing Before the Honorable Lowell A. Reed, Jr. at 41, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 22, 1994) (statement of Fred Baron, quoting letter from Motley).

189 Fitzpatrick Hearing Testimony, *supra* note 143, at 78; Fitzpatrick Testimony, *supra* note 102, at 389-90, 411. A lump sum offer to settle pending and future cases failed in 1991 because plaintiffs' firms viewed their right to negotiate settlements individually as "sacred." Rice Declaration, *supra* note 112, at 15; *see also* Fitzpatrick Testimony, *supra* note 102, at 409.

190 Aldock Interview Notes, *supra* note 100 at 2; Rice Interview, *supra* note 110, at 9-10.

191 Locks Interview, *supra* note 99 at 8; Hanlon, *supra* note 82 at 1299; Aldock Interview Notes, *supra* note 100 at 3.

192 Fitzpatrick Hearing Testimony, *supra* note 143, at 143.

193 *See generally* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (arguing that courts with large asbestos mandates should mandate deferral registries).

194 Aldock Interview Notes, *supra* note 100, at 1.

195 Fitzpatrick Testimony, *supra* note 102, at 439.

this strategy's wisdom by the time the JPML acted.[196] In August 1992 it forced plaintiffs' lawyers to accept a pleural registry for future claims in exchange for inventory settlements of then-pending cases in New England.[197]

Motley feared that the New England settlement would offer a "blueprint" to Weiner for how to resolve the MDL,[198] and gridlock in the Eastern District of Pennsylvania gave the defendants additional leverage. But the plaintiffs had leverage too. They increasingly filed cases in state courts to avoid the MDL's reach.[199] "Worse than unfriendly" to defendants,[200] some state judges scheduled mass consolidated trials as a response to CCR's deferral registry strategy.[201] A mass trial of 8,500 claims in a Maryland state court, for example, produced a huge plaintiff's verdict in July 1992.[202] A federal class action was attractive to CCR because it would bring all future claims under Weiner's supervision and beyond state courts' reach.[203]

Almost all of the major players now supported a class action strategy. Each plaintiffs' firm would settle its existing inventories of claims in side deals, then agree to the class settlement requiring all future asbestos claimants (the class members) to seek compensation from a settlement fund. By Fall 1992 rumors of this deal started flying, especially after Motley urged plaintiffs' lawyers "to serve and file as many of your unfiled claims as soon as possible" lest they be treated as future claims subject to the class settlement's reach.[204] Some colleagues reacted indignantly. "This [is] not another chicken little, sky is falling cry," two plaintiffs' lawyers wrote to the asbestos bar. They urged "decisiv[e]" action to thwart "the futures class action which we have vowed to

196 *Id.* at 608.

197 Fitzpatrick Hearing Testimony, *supra* note 143, at 8; *id.* at 14.

198 Transcript of Fairness Hearing Before the Honorable Lowell A. Reed, Jr. at 158, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 25, 1994) (statement of Fred Baron, quoting Aug. 21, 1992, memorandum from Motley to "all asbestos personal injury co-counsel") [hereinafter Baron Statement].

199 *E.g.*, Schwarzer Testimony, *supra* note 184, at 163; CARROLL ET AL., *supra* note 111, at 61; Hensler, *Time Goes By*, *supra* note 83, at 269; *4 Companies Agree to Settle Asbestos Case in Maryland*, N.Y. TIMES (July 6, 1992), http://www.nytimes.com/1992/07/06/business/4-companies-agree-to-settle-asbestos-case-in-maryland.html [https://perma.cc/F45P-TUBC].

200 Aldock Interview Notes, *supra* note 100, at 1.

201 Paul D. Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 594 (2007); *see also* CARROLL ET AL., *supra* note 111, at 33.

202 *4 Firms Must Pay Punitive Damages in Asbestos Case, Jury Rules*, L.A. TIMES (Aug. 11, 1992), http://articles.latimes.com/1992-08-11/news/mn-5294_1_punitive-damages; Liz Spayd, *Baltimore Jury Finds for Workers in Largest Asbestos Liability Trial*, WASH. POST (July 14, 1992), https://www.washingtonpost.com/archive/politics/1992/07/14/baltimore-jury-finds-for-workers-in-largest-asbestos-liability-trial/2cf0224c-7a42-45af-899804a99ce56c13/?utm_term=.a54284084158 [https://perma.cc/V26R-29PJ].

203 Aldock Interview Notes, *supra* note 100, at 2.

204 Baron Statement, *supra* note 198, at 158..

oppose."[205] Most, however, proved cooperative.[206] CCR offered firms the same deal it gave Motley, Rice, and Locks: a lump sum to settle already-filed cases in exchange for an agreement to abstain from filing cases in the future that did not meet certain medical criteria.[207] Many of these agreements were dated January 14, 1993. They provided that the class settlement, which incorporated the same medical criteria as conditions for claimant eligibility, would supersede their provisions with respect to future claims.[208]

Motley, Rice, and Locks filed the class action complaint on January 15, 1993. Weiner certified the class on January 29, "mandat[ing] the parties to move [the] matter to final resolution."[209] To opponents of the class action, "opposition appeared to be hopeless."[210] Now established as an institutional reality, supported by significant stakeholders, the mass tort class action seemed to have triumphed.

C. *The Collapse*

The rest of the story is familiar. Fred Baron led a renegade crew of objectors in bitter legal combat against the settling parties.[211] After more than a year of litigation and a two-month fairness hearing,[212] the district court approved the class settlement.[213] The court formally certified a Rule 23(b)(3) class but did not go through the rule's analytical steps.[214] Instead of evaluating the balance of common and individual issues, for instance, the court simply pronounced the class members' interest in prompt, adequate payments as

---

205 Letter to Fellow Asbestos Litigators from Donald I. Marlin and Mark H. Iola, Independent Asbestos Litigation Council, Oct. 26, 1992, at 2, 4, *at* Docket 807: Memorandum in Support of the Settling Parties' Joint Motion for an Order Establishing a Second Notice and Opt-Out Period for Class Members Who Have Requested Exclusion From the Class, in Order to Remedy Improper Communications by Counsel Opposing the Settlement, Exhibit 18, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 22, 1994).

206 Hatten Testimony, *supra* note 114, at 600; Rosenthal Interview Notes, *supra* note 96, at 8.

207 Exhibit to Motion to Declassify Certain Documents As Confidential at 3, Carlough et al. v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Jan. 10, 1994); Joint Appendix at 520, Amchem Prods., Inc. v. Windsor, No. 96-270 (U.S. Sup. Ct. Dec. 16, 1996) (testimony of Michael Rooney); *id.* at 523-24.

208 Exhibit to Motion to Declassify Certain Documents, *supra* note 207.

209 Docket Entry 517: Order at 4, Carlough et al. v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Oct. 29, 1993).

210 Rosenthal Interview Notes, *supra* note 96, at 8.

211 *Id.* at 12.

212 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 260-61 (E.D. Pa. 1994) (describing an "extensive and protracted" fairness hearing that "involve[d] the testimony of some twenty-nine witnesses . . . during 18 hearing days over a period of over five weeks").

213 *Id.* at 334. Lowell Reed managed almost all of the litigation. Weiner referred the class certification and settlement approval motion to him for a report and recommendation. One participant believes that upon referring the case, Weiner was "confident that Judge Reed would fulfill what Judge Weiner understood to be his mission as related by the [JPML]." Rosenthal Interview, *supra* note 183, at 11.

214 *Georgine*, 157 F.R.D. at 334.

sufficient to meet the predominance requirement.[215] This was Rule 23's administration at its most extreme, even more so than what Weinstein and Williams had done a decade earlier, and well beyond what proponents of the class action's regulatory conception had urged in the 1970s. The practice also spread, and district courts in the early 1990s certified a number of mass tort classes.[216] By 1996, the Advisory Committee proposed amendments to Rule 23 to facilitate the resolution of mass torts through class settlements.[217]

But the wheels quickly fell off. The *Breast Implants* class settlement, heralded in 1994 as a model for mass tort litigation management,[218] collapsed in 1995 under the weight of tens of thousands of questionable claims.[219] The same year the Seventh Circuit decertified the blood factor class in *Rhone-Poulenc*.[220] The *Amchem* deal drew intense critical fire for alleged collusion between class counsel and CCR, as the former were accused of accepting huge fees to sign off on a deal that seemed to benefit the defendants while selling out asbestos victims. In 1996, the Third Circuit vacated the *Amchem* class,[221] and the Fifth Circuit vacated the *Castano* tobacco class.[222] When the Supreme Court confirmed the demise of the *Amchem* settlement in 1997, it hammered the penultimate nail in the mass tort class action's coffin.[223] After a few last gasps,[224] this litigation seemed destined for its grave.

---

215 *Id.* at 315-16.

216 *E.g.*, Castano v. Am. Tobacco Co., 160 F.R.D. 544, 544 (E.D. La. 1995); Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 410 (N.D. Ill. 1994); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 837 F. Supp. 1128, 1128 (N.D. Ala. 1993); Bowling v. Pfizer, Inc., 143 F.R.D. 138, 141 (S.D. Ohio 1992); Cent. Wesleyan Coll. v. W.R. Grace & Co., 143 F.R.D. 628, 630 (D.S.C. 1992); Dante v. Dow Corning Corp., 143 F.R.D. 136, 136 (S.D. Ohio 1992); *In re* Cordis Corp. Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992 WL 754061, at *16 (S.D. Ohio 1992).

217 *See* Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23: Class Actions (Aug. 1996), *in* 1 WORKING PAPERS, *supra* note 173, at 143-47.

218 Sheila L. Birnbaum & J. Rusell Jackson, *Recent Multibillion-Dollar Settlements Could Serve As Models for the Resolution of Mass Products Liability and Toxic Tort Litigation*, NAT'L L.J., Sept. 19, 1994, at 14.

219 *See* NAGAREDA, *supra* note 127, at 35.

220 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

221 Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).

222 Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

223 *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 628 (1997). In Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), the Supreme Court again refused an attempt to resolve asbestos liability through a class settlement.

224 *See, e.g.*, Flanagan v. Ahearn, 134 F.3d 668, 669 (5th Cir. 1998) (2-1 per curiam) ("After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision [to certify the mass tort class action settlement]. We again affirm.")

D. *The Weight Litigation Can Bear*

The Dolly Madison House judges, the ad hoc committee, and the JPML all favored a class settlement as the solution to the asbestos crisis. The Advisory Committee proposed to generalize this preference for other mass torts.[225] Defendants had come around as well, as had powerful plaintiffs' lawyers. But the Third Circuit opinion upholding the *Amchem* deal "just wouldn't write."[226] The success of the mass tort class action would have suggested that, under certain circumstances, judges can exercise remarkable powers of law reform, subject to limits that resist principled administration. But as the Supreme Court ultimately concluded, "Rule 23 . . . cannot carry the large load . . . heaped upon it."[227]

In his magisterial treatment of mass torts, Richard Nagareda described the endpoint of this litigation, a global settlement, as a type of "privatized law reform."[228] The lawyers negotiating the deal would aim to replace claimants' preexisting rights to sue in tort with a right to seek compensation from a settlement fund, or what Nagareda called a "private administrative regime."[229] Nagareda interpreted the Supreme Court's *Amchem* opinion to express a straightforward idea: this exercise of what amounts to legislative power requires something other than what the settlement purports to accomplish to legitimate it.[230]

Nagareda's emphasis on the dealmaking attorneys as the prime movers—hence the "private" in "private administrative regime"—seems incomplete in light of the path asbestos litigation followed to the *Amchem* deal. To a significant extent, the lawyers responded to judicial pressure. The episode fits Chayes' description of judging quite well; indeed, given the institutional commitment of the federal judiciary to the class action strategy, it is arguably the apotheosis of public law litigation. The *Amchem* settlement, to Nagareda a privatized compensation scheme, nicely fits Chayes' description of a public law remedy. This is one where "the trial judge . . . become[s] the . . . manager of complex forms of ongoing relief," with "widespread effects on persons not before the court," and with the judge's "continuing involvement in administration and implementation."[231] As much as the mass tort class action involved private dealmaking, so too did it implicate judicial power.

---

225 Weinstein, one of the original judicial mavericks, also persisted the longest. He tried to certify a class of smokers in 2002. *In re* Simon II Litig., 211 F.R.D. 86, 99 (E.D.N.Y. 2002), *vacated and remanded by In re* Simon II Litig., 407 F.3d 125 (2d Cir. 2005).

226 Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 603 (1997) (internal quotation marks omitted) (quoting Judge Becker).

227 *Amchem*, 521 U.S. at 629.

228 NAGAREDA, *supra* note 127, at 220.

229 *Id.* at 76, 220.

230 *Id.* at 83.

231 Chayes, *Role*, *supra* note 30, at 1284.

But Nagareda's basic point, slightly altered, remains apt: something other than litigation's outcome must legitimate the power the judge wields as she supervises the process. To proponents of a muscular Rule 23 in the 1970s, its regulatory efficacy provided the class action with crucial justification. The class action's effectiveness came from its power to mobilize claims and thereby vindicate regulatory regimes often designed for private enforcement.[232] The class action's regulatory conception provided the extensive judicial power Rule 23 blessed with its normative foundation, but it also suggested an important limit: if claimants can vindicate regulatory regimes without aggregation, then its use triggers concerns of illegitimacy.

Some advocates tried to defend the mass tort class action in regulatory conception terms, but the obvious disconnect between the onslaught of individually filed DES, Dalkon Shield, asbestos, and other such claims that had motivated the episode in the first place and the claim mobilization justification rendered such efforts incoherent.[233] The more plausible justifications were what Weinstein and Williams, the original mavericks, had first identified—judicial economy and distributional equity.[234] But *Amchem* suggested that neither judicial economy nor distributional equity could provide administrable limits on judicial power.

Whether massive numbers of filings threaten to overwhelm the federal courts, a key to the judicial economy rationale, requires an empirical determination. If ever the federal courts could make this judgment correctly, asbestos litigation provided the best opportunity. But even here judgments about some threshold threat of judicial gridlock failed due to the continual evolution of the asbestos litigation system. The state of the asbestos world in January 1993 illustrates this. The MDL order had pushed filings into state courts, relieving federal colleagues of an increasing share of the litigation. Pleural registries had begun to spread.[235] The Manville trust drew congressional attention and would soon prompt the enactment of § 524(g) to the Bankruptcy

---

232 FARHANG, *supra* note 5, at 5-16.

233 The plaintiffs in the *Blood Factor* class action made the following self-contradictory argument in favor of class certification: "Here, the class action device could . . . provid[e] the majority of victims their best, and perhaps only, chance of obtaining redress for their injuries. And, what is the certain alternative? Likely thousands of cases in the state and federal courts." Plaintiffs' Memorandum in Further Support of Their Motion for Class Certification at 14-15, *In re* Factor Concentrate Litigation, MDL No. 986 (N.D. Ill. 1994).

234 *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196 (6th Cir. 1988); *see also In re* A.H. Robins Co., Inc., 880 F.2d 709, 726 (4th Cir. 1989); American Bar Ass'n, Revised Final Report and Recommendations of the Commission on Mass Torts, Nov. 1989, Separate Statement of Paul D. Rheingold, at 1e; Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 469 (1991).

235 Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1, 13-16 (2001).

Code.[236] The firms that struck inventory deals in anticipation of *Amchem* helped to pioneer what has become a norm, however dubious, for mass tort litigation—a settlement agreement that effectively pays the firm to stop filing cases.[237]

If mass torts "have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures,"[238] then the determination of when the threat of gridlock crosses a threshold to justify the sort of power a mass tort class action licenses is almost impossible to make.[239] If this was so for a mass tort with asbestos's extensive track record, an attempt to determine the gridlock threshold amounted to "pure speculation" in other contexts.[240]

Likewise, if the danger of distributional inequity, the second justification, could have provided an administrable limit on judicial power, it would have done so in asbestos. The litigation and settlement of tens of thousands of claims offered a rich data set upon which courts could judge just how unequally claimants had fared, how much money went to something other than their compensation, and how much better they would fare under a class action settlement regime.[241] Even here, however, judgment proved impossibly subjective. The *Amchem* class members would have received less than what Motley, Rice, and Locks obtained for their inventory clients through the side deals, and what they had obtained historically for their clients.[242] Were historical averages or the side settlement figures the right baseline? In light of the Manville example, could the negotiating parties rightly insist on some parsimony to ensure sufficient assets in the future? Did the exclusion of unimpaired claimants from recovery better reflect their value in a litigation system increasingly inclined toward pleural registries? If after more than a decade of experimentation a court could not answer such questions objectively for asbestos litigation, the likelihood it could do so with confidence for less well-litigated claims was low.

In hindsight, the failure of the mass tort class action seems all but inevitable. In the early 1990s, litigation's institutional footprint shrank in a number of

236 *E.g.*, Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 275-80 (2006).

237 Interview with Paul Rheingold, Founder, Rheingold, Giuffra, Ruffo & Plotkin (July 6, 2016), Transcript at 6, 7.

238 Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1573 (2004).

239 *Cf.* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 997 (1995) ("Unless we are confronting a systemic emergency that requires some form of legal triage, it is hard to justify tilting this equilibrium radically in the direction of collective adjudication.").

240 Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996); *see also In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995).

241 Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 966 (1995).

242 *E.g.*, Coffee, *supra* note 82, at 1397-98.

domains. Concerns over a litigation explosion and the rise of an imperial judiciary had become gospel for successive presidential administrations,[243] and such criticisms of American civil justice fueled Congress's litigation agenda after the mid-term elections of 1994.[244] Chayes's celebratory story about litigation, with the fulsome judicial power it included, faded, to be replaced by one markedly more suspicious of the process's aggressive deployment.[245] Legislated limits to securities fraud and civil rights class actions in the mid-1990s reflected this new restrictive spirit, as did a package of Rule 23 amendments the Advisory Committee considered in 1996.[246]

To one participant in the *Amchem* episode, the settlement's approval came from the judge's "need to act . . . in a legislative manner."[247] The class action strategy emerged after a decade of other failures, including Congress's repeated inability to replace the embattled tort system with an alternative compensation regime.[248] The sense that courts had assumed too much prerogative belonging to other branches fueled the reaction to judicial power in the 1970s, one that ultimately bore policy fruit in the 1990s.[249] Had litigation unbound in the guise of the mass tort class action endured in this time of retrenchment, its success would have proven a striking anomaly.

III. THE AFTERLIFE OF THE MASS TORT CLASS ACTION

The mass tort experiment has had a long and powerful afterlife for the class action. Its doctrinal influence remains potent, as decisions like *Amchem* and *Ortiz* continue to govern Rule 23's administration.[250] Class action

243 *See, e.g.*, STUART M. GERSON ET AL., A PLAN TO IMPROVE AMERICA'S SYSTEM OF CIVIL JUSTICE FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS (1992); U.S. DEPT. OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986).

244 The Contract With America Congress enacted securities fraud class action reform, and it passed legislation prohibiting lawyers funded by the Legal Services Corporation from litigating class actions. *E.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 386 (2016) (describing proposals to "stem the endless tide of litigation"); Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CTR. FOR LAW & SOC. POLICY 36-37 (2013) (describing Congressional and internal efforts to weaken the Legal Services Corporation), http://www.clasp.org/resources-and-publications/publication-1/Securing-Equal-Justice-for-All-2013-Revision.pdf [https://perma.cc/62K3-J4ZJ].

245 *E.g.*, COFFEE, *supra* note 131.

246 Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23: Class Actions, *in* 1 WORKING PAPERS, *supra* note 173, at 143-47.

247 Interview with Brian Wolfman, Associate Professor of Law, Georgetown University Law Center (Apr. 14, 2016), Transcript at 11.

248 *E.g.*, BARNES, *supra* note 113.

249 *E.g.*, HOROWITZ, *supra* note 36, at 8.

250 According to Westlaw, *Amchem* was cited in twenty-seven federal court opinions in December 2016 alone. *Ortiz* was cited nearly fifty times in 2016.

jurisprudence continues to owe a great deal to the episode. John Coffee drew extensively on asbestos and other mass torts to develop his influential entrepreneurial litigation model.[251] His and others' concern with agency costs arising in profit-seeking aggregate litigation cast the class action in a different light from what proponents of the regulatory conception celebrated in the 1970s.[252] To these proponents, the judge played a leading, heroic role, remaking social and economic orders through litigation while exercising broad, nearly unbound power. Viewed through an entrepreneurial litigation lens, the judge acts more as an observer trying to keep lawyers, now at center stage, from harming class members.

Perhaps most importantly, the mass tort class action contributed significantly to an institutional shift in the structure of class action governance. This shift, which reinvigorated appellate control over the elaboration of class action doctrine, ensures that Rule 23 and the judicial power it licenses remain confined within strict limits. The courts of appeals actively policed class action doctrine in the early 1970s.[253] By 1978, however, avenues for appellate review of class certification decisions narrowed significantly.[254] The 1980s passed with a remarkable dearth of appellate guidance on controverted issues.[255] The district courts had wide discretion for Rule 23's administration, an allocation of authority between court levels that facilitated the broad exercise of judicial power within relaxed legal constraints.

The mass tort class action drew appellate courts back into class action administration in at least two ways. First, parties fighting the certification of mass tort classes petitioned for extraordinary appellate relief with particular success.[256] In other contexts, courts of appeals in the 1970s and 1980s had to surmount high barriers to review class certification orders.[257] But appellate courts could not ignore the largesse of judicial power that the certification of a mass tort

---

251 COFFEE, *supra* note 131, at 95-118.

252 *E.g.*, *id*. at 117; *see also* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (1999); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013).

253 *Cf.* William H. Becker, *The Class Action Conflict: A 1976 Report*, 75 F.R.D. 167, 174–87 (1976) (describing the various ways parties could appeal class certification decisions).

254 *See generally* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1802 (1986) (discussing doctrine related to the appealability of class certification decisions).

255 *See* Marcus, *Litigation and Legitimacy*, *supra* note 2, at 6-9.

256 By one calculation, 42% of interlocutory appeals or petitions for mandamus that produced appellate orders from 1987 to 1997 came in mass torts cases. Statement of Brian C. Anderson, *in* 4 WORKING PAPERS, *supra* note 173, at 687-90.

257 *E.g.*, Arthur Young & Co. v. U.S. District Court, 549 F.2d 686, 691 (9th Cir. 1977) (describing various conditions to the issuance of a writ of mandamus to review class certification orders); *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1555-57 (2000) (describing doctrines used to achieve interlocutory review of class action certification decisions).

class required, and review of the certification of mass tort classes became common.[258] By the mid-1990s, the mass tort class action had reinvigorated appellate input into the design of class action doctrine.

Second, the mass tort class action prompted a round of rulemaking in the 1990s that ultimately led to Rule 23(f). Proposals to facilitate interlocutory review of class certification orders had surfaced in the 1970s and 1980s.[259] But it took the mass tort class action to convince the Advisory Committee to end its "moratorium" on the consideration of Rule 23 amendments in 1991.[260] This round of rulemaking produced Rule 23(f), itself importantly connected to the circuit-level mass tort decisions.[261] The committee considered a wide range of potentially transformative proposals, prompting deep conflict and prolonged debate.[262] But renewed appellate engagement with Rule 23 led the committee to cede the prerogative for more important adjustments to class action doctrine to the federal courts.[263] The committee expected that the courts of appeals would play an important supervisory role for the class action going forward.[264]

Rule 23(f) has effectively entrenched and expanded appellate engagement with class action doctrine in domains well beyond mass tort litigation, resulting in the elaboration of a legal regime for the governance of the class action.[265] To a district judge like Lambros or Weiner, the class certification decision was a discretionary exercise in case management. To a court of appeals, a Rule 23(f) appeal is an invitation to draw legal boundaries.[266] As these boundaries have proliferated, a district court's range of discretion narrows.[267]

---

258 As discussed in Parts I(B) and II(A) (2), courts of appeals reviewed almost every significant district court decision certifying a mass tort class in the 1980s.

259 *See, e.g.*, A.B.A. Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements 10 (Sept. 25, 1985), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-8410-94-1984 (Cong. Info. Serv.).

260 Report of the Committee on Rules of Practice and Procedure, May 17, 1993, at 1.

261 *E.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 739 (2013); Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market*, 48 U.C. DAVIS L. REV. 1207, 1229-31 (2015).

262 The records of the committee's deliberations fill four volumes of working papers. *See FJC Studies and Related Publications*, U.S. COURTS, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/fjc-studies-and-related-publications [https://perma.cc/5WYY-8843].

263 Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1515-16 (2017).

264 Civil Rules Committee Minutes, Nov. 9 & 10, 1995, *in* 1 WORKING PAPERS, *supra* note 173, at 234.

265 *E.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 170 (2009); *see also* Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, ANDREWS AUTO. LITIG. REP., June 1, 2004, at 3.

266 *E.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 835 (7th Cir. 1999); Nagareda, *supra* note 265, at 104-05.

267 *Cf.* Regents of the Univ. of California v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 380 (5th Cir. 2007) (overturning class certification in a securities class action).

Not only has a regime developed, it has developed to constrain district court power to certify classes.[268] For most of Rule 23(f)'s existence, conservatives have dominated the courts of appeals, with predictable results for class action doctrine.[269] But permanent structural features of appellate review unrelated to ideology have also generated this retrenchment. One of these features is attitudinal and relational. An appellate judge who votes to reverse the denial of class certification increases the likelihood that the district court would feel obliged to certify the class on remand. The district court, supposed to have "wide discretion" over the class certification decision,[270] is now saddled with a time-consuming case it had already judged as unmanageable.[271] A decision vacating a grant of class certification, in contrast, frees the district court of this burden, even if it is a welcome one. Also, plaintiffs' lawyers file significantly fewer Rule 23(f) petitions than defendants'.[272] Parties' and lawyers' incentives, another structural feature, readily explains this reality.[273] It only stands to reason that case law will tend to drift to favor the side that sets the appellate agenda.[274]

---

268 *See* Thomas E. Willging & Emery G. Lee, III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 784 (2010) ("In practice, Rule 23(f) has almost certainly contributed to the restriction in class certification during the past decade."); *see also* William Kolasky & Kevin Stemp, *Antitrust Class Actions: More Rigor, Fewer Shortcuts*, 30 CLASS ACTION REP., Nov.–Dec. 2009, at 3. Bob Klonoff reports that, of the 144 appeals by defendants that courts of appeals accepted between 1998 and 2012, defendants prevailed in 101 of them. In contrast, plaintiffs won only 26 out of 65 cases they had appealed during this period. Klonoff, *supra* note 261, at 741.

269 *See* Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS (Dec. 30, 2013), http://www.brookings.edu/blogs/fixgov/posts/2013/12/30-staffing-federal-judiciary-2013-no-breakthrough-year [https://perma.cc/Q2SP-485E]; *see also* Burbank & Farhang, *supra* note 263.

270 Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010).

271 For a dated empirical study of the time class actions require of district courts, see THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 23 (1996).

272 *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 (2008) (documenting 198 plaintiff petitions and 278 defendant petitions in the circuits between 1998 and 2006).

273 A sophisticated plaintiffs' lawyer should be significantly more disinclined than a defendant to seek Rule 23(f) review. The likelihood that a company will be sued in multiple securities fraud class actions is very low, for example. *E.g.*, Dr. Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review*, NERA ECON. CONSULTING, Jan. 20, 2015, at 4, http://www.nera.com/content/dam/nera/publications/2015/Full_Year_Trends_2014_0115.pdf [https://perma.cc/WZC4-9R6Y] (providing data on the number of securities class actions filed against publicly listed companies from 1996 to 2014). In contrast, a class action firm specializing in securities fraud litigation brings securities fraud class actions constantly. A company with a 50% chance of winning a Rule 23(f) appeal may take the gamble. Adverse precedent will not likely harm the company in the future, given the low likelihood that the company will be sued again. But an adverse appellate decision for a plaintiffs' firm negatively impacts the dozens of future securities fraud class actions the firm plans to litigate. A significant portion of the comparatively few plaintiff-filed Rule 23(f) petitions should therefore come either from plaintiffs' lawyers with little experience litigating class actions, or from unsophisticated plaintiffs' lawyers.

274 *E.g.*, Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 655-58 (2015); *see also* Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 474 (2011).

CODA?

In April 2016, the Third Circuit upheld a massive class settlement resolving 20,000 concussion-related tort claims against the National Football League, ending Rule 23's near-total exile from mass tort litigation.[275] *Amchem* all but killed the mass tort class action for nearly two decades. Whence its reincarnation?

If mass tort litigation had great significance for the class action, the class action was never more than a "sideshow" for mass tort litigation.[276] *Amchem* didn't stop litigators from making *Amchem*-like deals to resolve mass tort liability. They continue to do so, just without Rule 23.[277] The most notorious example involves the so-called "all-or-nothing" settlement. Defendants offer huge sums to settle, but they fund the deal only if a supermajority of individual plaintiffs agree to its terms. A plaintiffs' lawyer who stands to receive a third of each client's payout has an overwhelming incentive to convince her hundreds of individually retained clients to acquiesce. Moreover, she stops filing cases; doing so only increases the denominator and thus makes the defendants' threshold all the more difficult to meet.

Such settlements truly create Nagareda's "private administrative regimes." Judges have no more explicit authority to intervene in what are effectively thousands of individual contracts negotiated between defendants and plaintiffs than they would have to scuttle a settlement in an ordinary individual action.[278] Perhaps for this reason, and perhaps because endemic conflicts of interest give these non-class settlements such a seamy underbelly,[279] the class action holds some appeal.[280] If litigators will find a way to the same result anyway, why not bring litigation under Rule 23's aegis and ensure that judges have some say over what deals get struck?

This question smacks of similar logic that supported the mass tort class action experiment in the first instance. Weinstein, Williams, and others

---

275 *In re* Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016); *see also* Alison Frankel, *In NFL Concussion Case, 3rd Circuit Reopens Door for Personal Injury Class Actions*, REUTERS (Apr. 19, 2016), http://blogs.reuters.com/alison-frankel/2016/04/19/in-nfl-concussion-case-3rd-circuit-reopens-door-for-personal-injury-class-actions/ [https://perma.cc/YX52-CHWH].

276 Interview with Paul Rheingold, *supra* note 237, Transcript at 4.

277 *Id*. at 6; Paul D. Rheingold, Mass Torts—Maturation of Law and Practice, at 15-16 (Jan. 2016) (unpublished manuscript) (on file with author).

278 *E.g.*, Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 416-26 (2011).

279 *E.g.*, Howard M. Erichson, *The Trouble With All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1006-22 (2010).

280 In his concurring opinion in *Sullivan v. DB Investments, Inc.*, Anthony Scirica, a leading judicial authority on aggregate litigation, compared nonclass settlements unfavorably to class action deals because of the power judges enjoy over the latter. 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring). *See also* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 430 (2014) (describing courts' differing views on the merits of the class action mechanism).

believed that a class action could perform better than an overtaxed tort system struggling to render equitable justice efficiently. But such utilitarianism was insufficient in the 1990s to legitimate Rule 23's foray into the personal injury domain. Perhaps the move back to Rule 23 that the NFL Concussion settlement heralds will ultimately demonstrate that the federal judiciary had it right all along when it committed to the class action as a path out of the asbestos morass. Or perhaps this episode will be but a coda and prove the old saw right: those who forget the past are doomed to repeat it.

* * * * *