Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?

Peter A. Drucker[*]

I. INTRODUCTION

In *Amchem Products, Inc. v. Windsor*,[1] the United States Supreme Court ventured for the first time into the quagmire known as the mass tort class action. Although courts and scholars have been grappling with class actions and mass torts for years,[2] the Supreme Court had not entered the fray prior to *Amchem*, and then the Court decided only that product liability "settlement classes" must satisfy most of the same requirements for certification as a class that is to be litigated.[3] *Amchem* did not, however, present the more vexing ques-

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[*] Counsel to Porzio, Bromberg & Newman, P.C., in Morristown, New Jersey and New York, New York. A.B., Columbia University, 1985; J.D., Rutgers Law School - Newark, 1988.

[1] 117 S. Ct. 2231 (1997).

[2] While commentators disagree about precisely what a "mass tort" is, they generally agree that the concept began to gain attention in the 1980s, largely because of a sizable jump in new asbestos cases. *See generally* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1004 (1993) ("Asbestos litigation has become the mass tort that dwarfs all others."). The federal judiciary went into something of a crisis mode based on a fear that the sheer weight of these cases would crush the judiciary. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1363 (1995). Professor Coffee views with some skepticism the claim that mass torts are about to overwhelm the judiciary. *See id.* at 1351 n.23. He notes that state and federal courts nationwide resolve approximately 500,000 auto accident cases a year and yet we hear of no impending crisis. *See id.* Rather, he suggests that it is probably the concentration of large numbers of cases clogging certain courts, a problem that may result from the class action phenomenon itself, that has created the sense of urgency. *See id.*

[3] *See Amchem*, 117 S. Ct. at 2248. The Court noted:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see [FED. R. CIV. P. 23(b)(3)(D)], for the proposal is that there be no trial. But other specifications of the rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context.

tion of whether class action treatment is appropriate for nationwide product liability litigation, specifically claims that are scientifically suspect or legally untested.

The Court has not lacked opportunities to address the issue. Several circuit courts have held that where a product liability claim has not yet achieved some sort of track record, i.e., a record of success with juries, class action treatment for the purposes of litigating the cases is simply inappropriate.[4] The Supreme Court has repeatedly declined to review these rulings.

In 1996, the Advisory Committee on Civil Rules (Advisory Committee) proposed a rule change that would have forced courts to address the issue and might have finally enticed the Supreme Court to do the same.[5] Among the rule changes discussed by the

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Id.

[4] *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (reversing an order certifying a nationwide class of all nicotine-dependent cigarette smokers); *In re* American Med. Sys., Inc., 75 F.3d 1069, 1074 (6th Cir. 1996) (granting a petition for a writ of mandamus to decertify a class of persons alleging injury caused by defective penile implants); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir.) (granting a petition for a writ of mandamus to decertify a class of persons alleging that they were infected with the AIDS virus from defendants' blood products), *cert. denied*, 516 U.S. 867 (1995).

[5] *See* FED. R. CIV. P. 23 (West 1996). As last revised, Rule 23 provides in pertinent part:

> (a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .
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> . . . .
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

Advisory Committee was the addition of a "maturity factor" requiring courts to include in their analysis of predominance and superiority under Federal Rule of Civil Procedure 23(b)(3) "the extent, nature, and maturity of any related litigation involving class members."[6] Unfortunately, the Standing Committee on Rules of Practice and Procedure (Rules Committee) put this important amendment on hold indefinitely.[7]

A rule that requires courts to consider whether litigation has sufficiently "matured" so as to warrant class action treatment is long overdue.[8] Indeed, class action litigation may simply be inappropriate for product liability litigation. Product liability class actions usually serve as an effective case management tool only because they generally force defendants to settle or seek the protection of the bankruptcy laws. Where, however, scientific evidence has been carefully scrutinized, legal theories have been accepted, and juries have found liability, a mechanism that brings litigation to a close may be warranted. Where scientific evidence is questionable, legal theories are untested, and juries have yet to consider a plaintiff's claims or, worse still, have found those claims to be without merit, product manufacturers should not be compelled to bet their fate on a winner-take-all

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In March 1991, the Judicial Conference directed the Advisory Committee "to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." *See Memorandum from Judge Patrick E. Higginbotham, Chair, Advisory Committee of Civil Rules to Hon. Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Practice and Procedure* (May 17, 1996), *reprinted at* 167 F.R.D. 535, 536 (1996). The Advisory Committee took more than five years to recommend changes to the Standing Committee on Rules of Practice and Procedure.

[6] *Proposed Amendments to the Federal Rules of Civil Procedure: Rule 23 Class Actions*, 167 F.R.D. 559 (1996); *Civil Rules Advisory Committee, Draft Minutes*, 167 F.R.D. 540, 557 (1996).

[7] *See Class Action Lawsuits: Before the Subcommittee on Courts and Intellectual Property of the United States House of Representatives Committee on the Judiciary*, 105th Cong. (March 5, 1998) (statement of Judge Anthony J. Scirica, United States Circuit Court Judge, Court of Appeals for the Third Circuit). Instead, Chief Justice Rehnquist authorized the creation of a working group that is studying mass torts in the federal courts. All proposed rule changes that impact upon mass torts will be revisited by this working group. *See id.*

[8] *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989). The term "mature mass tort" as used here was defined in a 1989 article by Professor Francis McGovern, as one for which

> there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically, at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.

Id.

class action trial.[9] In other words, instead of merely authorizing courts to consider maturity in the mix of issues presented by an application for class certification, Rule 23 should be amended to forbid certification of "immature" tort claims.[10]

II. PRODUCT LIABILITY LITIGATION AND CLASS ACTIONS: A STRANGE BEGINNING

The marriage of mass torts and class actions had a most unusual start. In 1966, when the Advisory Committee proposed sweeping changes in the rule governing class actions, mass tort litigation, especially product liability litigation, was largely unknown.[11] Speaking

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[9] *See* MANUAL FOR COMPLEX LITIGATION (Third) § 33.26, at 360-61 (1997). Indeed, as the Manual for Complex Litigation states:

> Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units — even single-plaintiff, single-defendant trials — until general causation, typical injuries, and levels of damages become established. Thus 'mature' torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort case, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals.

Id.

[10] In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the Supreme Court stated that it could "find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* Courts have held that *Eisen* precludes them from examining a claim's track record, insisting that it would constitute a prohibited inquiry into whether a claim has merit. *See, e.g., In re* Copley Pharmaceuticals, Inc., 158 F.R.D. 485, 489 (D. Wyo. 1994). *But see* Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) ("[C]ourts are not likely to allow a class action if convinced that there is no realistic chance of success."). Other courts have taken a more flexible and seemingly sensible approach to the issue. In *Barnes v. American Tobacco Co.*, 176 F.R.D. 479 (E.D. Pa. 1997), for example, the court noted that the Supreme Court in *Eisen* had "explicitly warned that a court considering class certification may not conduct a preliminary inquiry into the merits of a suit. Nonetheless, the Supreme Court has also instructed that a court may look beyond the pleadings to determine whether the requirements of Rule 23 have been satisfied." *Id.* at 489 (citations omitted). Thus, the *Barnes* court astutely observed that it "must walk a thin line between the prohibition against examining the merits of the case and the obligation to examine the claims, defenses, relevant facts, and applicable substantive law to make a determination of the certification issues presented . . . ." *Id.* This article addresses the issue by advocating a rule change that would expressly allow a court to examine the merits of a claim as part of its certification analysis. *See* Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Should Include an Assessment of the Merits*, 168 F.R.D. 366, 397-98 (1996) (advocating a rule change that would permit class certification only if plaintiffs demonstrated a "substantial possibility" of success on the merits).

[11] *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 945 (1995). The Advisory Committee could not possibly have anticipated the scope of the litigation that would define the mass tort in the 1980s

of "mass accidents," by which it probably meant a number of individual claims arising out of a single event such as an airplane crash, the Advisory Committee suggested that a class action would be inappropriate:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate into multiple lawsuits separately tried.[12]

Thus, the mass tort class action was hatched in a committee that expressly disapproved of its use.[13]

For years, leading commentators have claimed that, in keeping with the recommendation of the Advisory Committee, courts have rarely certified litigation classes in mass torts.[14] This assessment is not entirely accurate, however, given that trial judges are in many in-

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and the 1990s: asbestos, Agent Orange, intrauterine devices, DES, Bendectin, breast implants, and tobacco. *See id.* at 945-946.

[12] *See Federal Rule of Civil Procedure 23 Advisory Committee Note*, 39 F.R.D. 69, 103 (1966). *See, e.g., In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) (involving the collapse of a portion of the Hyatt Regency Hotel in Kansas City), *cert. denied*, 459 U.S. 988 (1982).

[13] *See generally* Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988) (arguing that Rule 23 would have to be revised in order to certify mass tort class actions).

[14] *See, e.g.*, Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 488 (1996) ("[F]ederal courts remain reluctant to certify litigation (non-settlement) classes in mass tort cases."); Coffee, *supra* note 2, at 1345 n.2 ("[F]ederal courts remain largely unreceptive to mass tort class actions."). *See also In re* Chevron USA, Inc. 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., concurring) ("[T]he use of innovative judicial techniques particularly to resolve immature mass tort actions has been disfavored."). *But see* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2250 (1997) ("[D]istrict courts, since the late 1970s, have been certifying [mass tort] cases in increasing number."); *In re* A.H. Robins Co. Inc., 880 F.2d 709, 734 (4th Cir. 1989) ("It is obvious that there is a movement towards a more liberal use of Rule 23 in the mass tort context."). In fact, class actions generally (not just mass tort class actions) have fallen in and out of favor. In a 1979 article, Professor Miller described a somewhat typical 15-year period in the history of class actions. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"* 92 HARV. L. REV. 664 (1979). He observed that beginning in 1964, in anticipation of the adoption of the rule, and up through 1969, "the legal community exhibited considerable euphoria over the rule's potential." *Id.* at 678. "[F]rom 1969 to approximately 1973 or perhaps 1974, antipathy to the class action became palpable." *Id.* at 679. Then, "the pendulum . . . swung again . . ." *Id.* Professor Miller predicted "a period characterized by increasing sophistication, restraint, and stabilization in class action practice." *Id.* at 680.

stances all too willing to certify litigation classes of mind-boggling size and scope and would undoubtedly continue to do so were appellate courts not willing to resort to extraordinary measures to restrain them.[15] The prevalence of these appellate decisions suggests that trial judges have fallen victim to the superficial appeal of the class action device as a means of clearing overcrowded dockets.[16]

As recently as the Summer of 1997, one scholar observed that the "chilly reception of mass tort class actions in federal courts . . . has changed the focus to state courts, either for national or statewide classes."[17] Unfortunately, he may have spoken too soon. In at least some federal circuits, it appears that the pendulum is swinging back in favor of class actions, even where the case law strongly disapproves of class actions. The Ninth Circuit, for example, in its 1982 decision in *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*,[18] seemed to rule out the use of class actions in product liability litigation. Recently, however, the court distinguished its prior opinion and held that *Dalkon Shield* did not "create[] an absolute bar to such certification in this circuit."[19] Similarly, the Sixth

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[15] *See, e.g., In re* American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) (writ of mandamus to decertify a class of between 15,000 and 200,000 persons); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir.) (writ of mandamus to decertify a class of as many as 10,000 plaintiffs), *cert. denied*, 516 U.S. 867 (1995); *In re* Fibreboard Corp., 893 F.2d 706, 707 (5th Cir. 1990) (writ of mandamus to decertify a class of 3,000 asbestos plaintiffs); *In re* Bendectin Prod. Liab. Litig., 749 F.2d 300, 302 (6th Cir. 1984) (writ of mandamus to decertify class of more than 500 plaintiffs who filed suit in the Southern District of Ohio and claimed injury from the drug Bendectin). *See also* Amy S. Jones, Note, *The Use of Mandamus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U. L. REV. 232, 236 (1997) (arguing that mass tort class actions demand early appellate review that, until rule changes permit interlocutory review, can only be accomplished through the writ of mandamus). The rule change permitting interlocutory appeals was the only proposed rule change that was adopted by the Supreme Court. Unless Congress votes not to adopt the change, it will become effective on December 1, 1998. *See* FED. R. CIV. P. 23(f) (West Supp. 1998).

[16] *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995).

[17] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 602 (1997). Almost simultaneously, other commentators claimed that "the federal courts have recently expressed a greater tolerance, at least under some circumstances, for the use of class actions to address mass tort litigation than they did twenty years ago." Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L.J. 187, 191 (1997).

[18] 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

[19] Valentino v. Carter Wallace, Inc., 97 F.3d 1227, 1231 (9th Cir. 1996); *accord* Baxter Healthcare Corp. v. United States Dist. Court for the Cent. Dist. of Cal., No. 96-70243, 1997 U.S. App. LEXIS 21047, at *2 (9th Cir. Aug. 5, 1997) (denying a petition for a writ of mandamus, and stating that *Valentino* "significantly reshaped and clarified the law of this circuit regarding the appropriateness of class certifica-

Circuit may be reconsidering its position. In *In re Telectronics Pacing Systems, Inc.*,[20] the district court certified a nationwide class of persons alleging injury from defective pacemaker leads. In an unpublished order that may signal a move away from its prior holding in *In re American Medical Systems*[21], the Sixth Circuit denied a petition for a writ of mandamus to decertify the class.[22] Accordingly, in light of the conflict among the circuit courts, the Rules Committee should carefully rethink the role of class actions in product liability litigation.[23]

III. WHAT'S WRONG WITH MASS TORT CLASS ACTIONS?

In a nutshell, class actions unfairly stack the deck against defendants. For several reasons, class action treatment makes the risk of proceeding to trial so great that most defendants simply choose to settle, regardless of the strength of their defense on the merits. Where a plaintiff's claim has not yet been shown to have merit, or worse still, has been shown to be without merit, plaintiffs should not be afforded the use of a procedural device that effectively prevents the defendant from mounting a defense.

A. Class Actions Favor Plaintiffs.

1. Class Actions Increase the Number and Value of Plaintiffs' Claims.

Class actions can attract plaintiffs in numbers that are truly staggering.[24] For instance, when all federal breast implant cases were transferred by the Judicial Panel on Multidistrict Litigation in 1992, 5,000 cases were pending in state and federal court.[25] When a possible $4.25 billion settlement class action was announced in 1994,

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tion in cases involving multi-state plaintiffs asserting personal injury claims against manufacturers of drugs and medical devices.").

[20] 172 F.R.D. 271 (S.D. Ohio 1997).

[21] 75 F.3d 1069 (6th Cir. 1996).

[22] *See In re* Telectronics Pacing Sys., Inc., No. 97-3448 (6th Cir. June 11, 1997).

[23] *See* Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 298 (1996) ("[C]onflict [in the caselaw] provides additional impetus to reform efforts directed at Rule 23 itself and, more generally, to discussion of innovations in civil procedure that might improve mass tort litigation.").

[24] As one commentator has noted, when highways are constructed to ease traffic congestion on smaller local roads, the volume of traffic increases substantially and eventually the highway becomes just as congested, if not more so. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 17 (1996). "The same consequence flows from procedural devices that aggregate small claims into more convenient litigating units." *Id.*

[25] *See* McGovern, *supra* note 17, at 610.

10,000 lawsuits had been filed.[26] At the time that the settlement collapsed with the bankruptcy filing of Dow Corning, there were more than 400,000 claimants.[27]

Even if class certification does not attract new plaintiffs by aggregating claims, certification increases the amount awarded to the average plaintiff. Research on jury behavior has demonstrated that aggregating claims increases both the likelihood that a defendant will be found liable and the amount that a jury will award.[28] In other words, the judgment entered in favor of a class of fifty plaintiffs will likely exceed the sum of the judgments entered in favor of those same fifty plaintiffs tried individually. An individual plaintiff with a particularly strong case may be dragged down by a class of weaker plaintiffs,[29] but the presence of a severely injured plaintiff will increase the amount awarded to plaintiffs with less severe injuries and thereby increase the total award.[30]

2. Class Actions Mask Doubtful Scientific Proof.

A plaintiff alleging injury from a drug or toxic substance must establish that the product causes injury in the general population

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[26] *See id.*

[27] *See id.* at 611. Classes tend to attract substantial numbers of "parasitic" plaintiffs whose claims would be worthless were it not for the existence of the class. *See* John A. Siciliano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 994 (1995). Class actions that attract plaintiffs and create a mass tort should be distinguished from class actions that are used to manage a large volume of cases that have already been filed.

[28] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 9, at § 33.26 n.1056 (citing Kenneth S. Bordens & Irvin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989)); *see also* Kenneth S. Bordens & Irvin A. Horowitz, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209 (1988) [hereinafter *Outlier Presence*]. One court recently observed that class treatment can hide the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for the litigation." Broussard v. Meineke Discount Muffler Shops, Inc., 1998 U.S. App. LEXIS 20248, at *39 (4th Cir. Aug. 19, 1998).

[29] *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165-66 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). The court noted that

> [a]ll plaintiffs may not desire class certification, however, because those with a strong case may well be better off going it alone. The drum-beating that accompanies a well-publicized class action . . . may well attract excessive numbers of plaintiffs with weak to fanciful cases . . . . If plaintiffs with strong claims remain members of the class, they may see their claims diluted . . .

Id.

[30] *See* Bordens & Horowitz, *Outlier Presence*, *supra* note 28, at 211-12, 226.

(general causation) and that it caused his specific injuries (specific causation).[31] Expert testimony supported by sound epidemiological evidence is required in most instances.[32] Immature torts often lack a tangible scientific foundation, usually because the necessary epidemiological studies are either in their developmental stages or do not even exist.[33] Thus, it should come as no surprise that certain tort claims are litigated for years at tremendous expense to all parties yet ultimately prove to be scientifically unsupportable.[34]

At best, this sort of expert testimony is highly technical and, therefore, extremely difficult for juries to understand.[35] At worst, an

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[31] *See generally* DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 958 (3d Cir. 1990); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1200 (6th Cir. 1988).

[32] *See, e.g.*, Porter v. Whitehall Labs., Inc., 791 F. Supp. 1335, 1347 (S.D. Ind. 1992) ("A long series of federal cases supports the legal principle that an expert medical opinion must have an epidemiological or scientific foundation to support a reasonable finding of fact."), *aff'd*, 9 F.3d 607 (7th Cir. 1993).

[33] *See, e.g.*, Gassie v. SMH Swiss Corp., No. 97-3557 1998 U.S. Dist. LEXIS 4193, at *9 (E.D. La. March 26, 1998) (rejecting as "too vague and speculative" the class action plaintiffs' claim that radioactive tritium from the luminescent dials of Swatch watches caused "cell disruption"); Verb v. Motorola, Inc., 672 N.E.2d 1287, 1295 (Ill. App. Ct. 1996) (rejecting as "conjecture and speculation" the class action plaintiffs' claim that high frequency electromagnetic radio waves emitted by cellular phones cause the "breakdown of cells"). On the other hand, immature mass tort class actions may work to the disadvantage of class members who are represented by a plaintiff who has filed suit before the scientific community assembles the necessary proof. "[I]t may deny compensation to individual plaintiffs who, due to claim preclusion principles, cannot sue again if science should turn squarely in their favor at a later date." Nagareda, *supra* note 23, at 317.

[34] *See* McNeil & Fancsali, *supra* note 14, at 496. In August 1996, commentators recounted the history of the silicone breast implant class action, how it attracted hundreds of thousands of plaintiffs, and resulted in bankruptcy for Dow Corning. *See id.* They observed that newer studies had suggested that the implant manufacturers' causation defense was "stronger than originally thought" and argued that "[i]f the scientific evidence ultimately concludes that silicone gel implants have not caused the alleged injuries, the rush to aggregated judgment will surely be seen as both unwise and unfair." *Id.* By the end of that year, an Oregon federal judge had excluded the testimony of plaintiffs' experts, finding that the experts could not scientifically establish a causal link between breast implants and any systemic disease or syndrome. *See* Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1394 (D. Or. 1996); *accord In re* Joint S. & E. Dist. Breast Implant Cases, 942 F. Supp. 958, 960-61 (E. & S.D.N.Y. 1996) (stating that the scientific literature "supports the conclusion that the silicone implants at issue do not cause classical recognized diseases" and has left only a "scintilla of plausibility" that the implants may cause atypical diseases"). Likewise, Federal Drug Administration scientists had concluded that the epidemiological literature "tended to rule out large increases in risk for connective tissue disease." Barbara G. Silverman, et al., *Reported Complications of Silicone Gel Breast Implants: An Epidemiological Review*, 124 ANNALS OF INTERNAL MED. 744, 754 (1996).

[35] *See* Jane Goodman et al., *What Confuses Jurors in Complex Cases*, 21 TRIAL 65, 65-

expert's unsupported speculation can cause juries to reach conclusions at odds with those generally accepted in the relevant scientific community.[36]

There are a number of reasons why expert testimony in product liability litigation can mislead juries.[37] First, juries are overwhelmed by the expert witness' impressive credentials, and, because the testimony is so difficult to understand, the jury may simply follow the expert.[38] Second, juries are often faced with a choice between a large

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69 (Nov. 1985) (stating that surveys of judges indicate they believe that jurors find scientific and technical evidence to be the most confusing and juror surveys confirm those beliefs). Paradoxically, the Federal Rules of Evidence require expert testimony precisely because lay jurors would be unable to understand the scientific issues without it. *See* FED. R. EVID. 702. Unfortunately, by inviting "scientific" experts into the courtroom, judges may unwittingly reduce the likelihood that a "scientific" result will emerge. As one court recently observed,

> [s]cience coexists uneasily with litigation's adversary system, as the imperatives of partisan advocacy coupled with powerful economic incentives seem to overwhelm good science. Lawyers, judges, and forensic experts sometimes engage in what literature teachers call willful suspension of disbelief. Scientific propositions that would cause even laymen to gasp in disbelief are routinely argued in courts of law. Such are the dangers of a legal system allowing partisan expert testimony.

Reiff v. Convergent Techs., Inc., 957 F. Supp. 573, 584 (D.N.J. 1997).

[36] *See, e.g.*, Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 120 n.154 (1995) (describing how jurors can find in favor of plaintiffs alleging injury from exposure to Bendectin "[d]espite overwhelming scientific evidence showing no statistically significant correlation between prenatal exposure to Bendectin and the birth defects complained of"). Many commentators have argued that juries overlook weaknesses in scientific evidence on causation when plaintiffs present strong evidence of bad conduct on the part of the defendant, such as when a product manufacturer ignores or attempts to suppress early reports of a possible risk of injury. *See e.g.*, Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1168 (1998) ("Experimental research by cognitive psychologists indicates that mock juries tend to return more verdicts for plaintiffs when they consider close questions of scientific causation together with evidence of the defendant's fault, as compared to consideration of the causation issue alone.") This phenomenon may explain the plaintiffs' verdicts in the Bendectin and breast implant litigations. *See id.* at 1170.

[37] Some commentators have argued that the scientific issues presented by toxic tort litigation are simply too complicated for a lay jury to decide. *See, e.g.*, Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292, 294 (1989).

[38] *See* United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) ("[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen."); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (arguing that expert testimony takes on an "aura of special reliability and trustworthiness"). Professor Tribe has argued that the more complex and technical the evidence, the more a lay jury is apt to give that evidence more weight than it deserves. *See* Lawrence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1334 (1971).

corporation proffering complex scientific proofs on the one hand and a severely injured plaintiff on the other. Not surprisingly, sympathy may carry the day.[39]

These problems are, of course, inherent in a system that permits lay jurors to answer complex scientific questions. Since the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[40] federal courts have a greatly expanded role in ensuring the reliability of scientific testimony and, thereby, minimizing the risks that juries will be fooled by charlatans masquerading as scientists.[41] Procedural devices that aggregate claims necessarily undermine the effort to improve the quality of jury decisions in cases involving scientific proofs. Obviously, if sympathy can trump reason when the jury must decide one plaintiff's fate, then each and every additional plaintiff increases the likelihood that emotion will prevent rational decision making.

Moreover, a class of thousands of plaintiffs will make the scientific issues all the more confusing because the class itself mimics and amplifies the worst elements of junk science. An epidemiological study capable of proving that a drug or chemical causes disease can be performed a number of ways. In general, all such studies examine persons who are exposed to a substance and compare the rate of disease in the exposed population to the rate in an unexposed population.[42] If the rate of disease in the exposed population exceeds that

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[39] *See* DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 952 (3d Cir. 1990) (suggesting that concern over the abuses of scientific evidence are "naturally heightened when an expert is testifying on behalf of a plaintiff as sympathetic as a child crippled by serious birth defects"); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 832 (D.C. Cir. 1988) (stating that where plaintiff's injuries evoke sympathy it is "imperative that the court remain vigilant to ensure that neither emotion nor confusion has supplanted reason"), *cert. denied*, 493 U.S. 882 (1989); Lynch v. Merrell-National Labs., 830 F.2d 1190, 1196 (1st Cir. 1987) (maintaining that the emotion evoked by "the presence of handicapped youngsters could render a jury 'unable to arrive at an unbiased judgment'") (quoting *In re* Richardson-Merrell, Inc., Bendectin Prod. Liab. Litig., 624 F. Supp. 1212, 1224 (S.D. Ohio 1985)); *see also* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 768 (1991) ("[S]ympathy engendered by evidence of plaintiffs' injuries affects jurors' determinations of liability.").

[40] 509 U.S. 579 (1993).

[41] *See* United States v. Scheffer, 118 S. Ct. 1261, 1265 (1998) ("[T]he exclusion of unreliable evidence is a principal objective of many evidentiary rules."); General Elec. Co. v. Joiner, 118 S. Ct. 512 (1997) (holding that trial judges' rulings on the admissibility of scientific evidence are reviewed for abuse of discretion).

[42] *See generally* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 134-38 (1994); DAVID E. LILIENFELD & PAUL D. STOLLEY, FOUNDATIONS OF EPIDEMIOLOGY 198-99 (3d ed. 1994). In a "cohort study," a researcher assembles a group of persons exposed to a substance and a group of persons who have not been exposed. *See id.* at 198-99.

of the unexposed population, we can begin to draw conclusions on causation.

To the untrained eye, a class of thousands of injured persons looks like an appropriate study population. The jury is likely to reason that if thousands of plaintiffs were exposed to a substance and all have contracted a disease, then the exposure must have caused the disease. In fact, that type of logic, undoubtedly irresistible to jurors, stands the proper scientific method on its head. The presence of thousands of persons who were exposed to a substance and allegedly contracted a disease says absolutely nothing about causation because it lacks any controls. This "study" tells the jury nothing about the persons who were exposed to the substance but did not contract the disease. Likewise, it ignores persons who were not exposed to the substance and nonetheless contracted the disease.[43]

Where scientific testimony has survived proper judicial screening and juries have ruled in favor of plaintiffs based on that testimony, class action treatment may be warranted. Where, on the other hand, no such track record has been established, class actions create too great a risk that speculation and sympathy will supplant scientific reasoning.[44]

The two groups are followed for a predetermined period of time, at which point rates of disease are measured. *See id.* at 199. If the substance is associated with disease, then the study should find that the rate of disease is higher in the exposed group. *See id.* A "case-control study" is similar, but works backwards. *See id.* at 226. A group of persons with a disease is compared to a group without the disease by looking back in time to determine rates of exposure. *See id.*

[43] *See generally,* MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996). The silicone breast implant litigation illustrates the phenomenon. Having read in the popular press about the substantial number of persons claiming injury, a lay person would no doubt conclude that there must be some relationship between breast implants and disease. But as Dr. Marcia Angell points out, there are 100 million women in the United States, ten million of whom (1 in 10) have breast implants and ten million (1 in 10) who suffer from an autoimmune disease. *See id.* at 111-12. We would therefore expect 10,000 women to have both. *See id.* While the lay person would probably attribute scientific significance to proof that 10,000 women who have breast implants contracted an autoimmune disease, in fact, that rate of disease is merely the product of chance.

[44] *See, e.g.,* Tijerina v. Phillip Morris Inc., No. 95-CV-120-J, 1996 U.S. Dist. LEXIS 20915, at *15-16 (N.D. Tex. Oct. 8, 1996) (denying class certification, in part, because the existing scientific evidence did not support the plaintiffs' causation theory).

3. Class Actions Force Defendants to Settle.

Mass tort class actions are rarely tried,[45] probably because defendants usually cannot win them. As discussed above, class action treatment substantially improves the plaintiffs' chance of winning a judgment and increases the amount of that judgment. Nonetheless, even where the probability of a judgment remains low, defendants cannot risk trial because the sheer size of a potential judgment would likely destroy the company.[46] Plaintiffs are acutely aware of this "bet-the-company" phenomenon and seek to certify classes precisely because of their power to coerce settlements.[47]

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[45] *See* Schuck, *supra* note 11, at 958 & n.85 (describing an important conference on class actions at which "none of the large group of knowledgeable participants could think of a single nationwide products liability or property damage class action that had gone to trial."); *see also In re* Ford Motor Co. Ignition Switch Prod. Liab. Litig., 174 F.R.D. 332, 349 (D.N.J. 1997) ("[T]he parties agreed at the time of oral argument on [the class certification] motion that no federal court had tried a class action which would require the application of the laws of fifty-one jurisdictions.").

[46] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *accord* Miller, *supra* note 14, at 679 n.63 ("[T]he specter of crushing liability increases a case's settlement value and as a result may encourage plaintiff's counsel to seek class action status."); McGuire, *supra* note 10, at 373 n.26 (collecting studies on securities class actions that find that they "are often settled for amounts that do not reflect the merits of the cases"). *But see* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 145, 146 (1996) (reporting the results of an empirical study by the Federal Judicial Center that failed to demonstrate a relationship between the timing of class certification and settlement). As some courts have noted, any procedure that aggregates cases can create settlement pressure if improperly used. *See, e.g., In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J. concurring) (a poorly designed bellwether trial resulting in a plaintiffs' verdict can "create enormous momentum for settlement"); *In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (opining that improper consolidation of cases can force settlement by requiring defendants to participate in extensive proceedings that do not concern them); *see also* Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 787 (1998) (noting that because of a substantial risk of an unjust resolution of the claims, courts should exercise caution when applying "creative judicial solutions" to immature torts).

[47] Not long after the 1966 revisions to Rule 23, commentators began using variations on the term "blackmail" to describe a class action's power to coerce a settlement. *See* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) ("legalized blackmail"); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) ("blackmail settlements"). More recently, variations on the term have appeared in many judicial opinions. *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("judicial blackmail"); *In re* General Motors Corp., Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir.) ("legalized blackmail"), *cert. denied*, 516 U.S. 824 (1995). Courts and commentators have not hesitated to use disparaging terms to describe class actions. In *Eisen v. Carlisle &*

In *In re Rhone-Poulenc Rorer, Inc.*,[48] defendants petitioned for a writ of mandamus to decertify a Rule 23(c)(4)(A) class of as many as 10,000 hemophiliacs who had become infected with the AIDS virus, allegedly from using defendants' blood products.[49] At the time the class action order was entered by the district court, defendants faced approximately 300 suits involving about 400 plaintiffs, of which thirteen suits had been tried with defendants winning twelve (92.3%).[50] The court posited that "if class-action treatment [were] denied," and the defendants continued to enjoy the same rate of success for all 300 trials, the defendants' worst-case exposure to damage awards should be no more than $125 million.[51] Yet, if only 5,000 of the total pool of 10,000 class members were able to proceed as a class to trial, defendants would face potential exposure of $25 billion, in other words, certain financial ruin.[52] Rather than face that risk, defendants would certainly settle.

The Seventh Circuit held that the certification order was interlocutory and thus technically unappealable.[53] But because the certification order was, like all mass tort class certifications, certain to force a settlement, the court found that it was effectively unreviewable on appeal and therefore appropriate for review by mandamus.[54] After deriding class actions in rather strong terms, the court then issued a somewhat unconvincing disclaimer:

Jacquelin, 391 F.2d 555 (2d Cir. 1968), for example, Chief Judge Lumbard described the class action at issue in that case as a "Frankenstein Monster," *id.* at 572 (Lumbard, C.J., dissenting), a term that was later used to describe class actions generally. *See* San Antonio Tel. Co. v. American Tel. & Tel. Co., 68 F.R.D. 435, 436 (W.D. Tex. 1975).

[48] 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

[49] *See id.* at 1294.

[50] *See id.* at 1296.

[51] *See id.* at 1298-99. The court's calculation of total damage awards based on individual trials probably overestimates defendants' potential liability. The court appears to have assumed that, despite a success rate of less than one victory per 10 trials, plaintiffs would nonetheless go forward with trial in all 300 cases. Given the substantial cost of litigating suits of this complexity, it is hard to believe that plaintiffs would continue to try the cases absent a dramatic improvement in their rate of success. *See* Nagareda, *supra* note 23, at 303 ("The failure of plaintiffs to prevail in a number of individual trials will make the particular subject matter sufficiently unattractive that prospective plaintiffs — and attorneys who might seek out such persons for representation on a contingency fee basis — will be unlikely to incur the burden of additional suits."). Indeed, the timing of the class certification motion in *Rhone-Poulenc* may have been motivated by this realization.

[52] *See Rhone-Poulenc*, 51 F.3d at 1298.

[53] *See id.* at 1294.

[54] *See id.* at 1299.

> We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. We have yet to consider the balance. All that our discussion to this point has shown is that the first condition for the grant of mandamus — that the challenged ruling not be effectively reviewable at the end of the case — is fulfilled.[55]

Having suggested that the pressure to settle would not figure in its decision on the merits of class certification, the court immediately returned to the issue.[56] The court expressed a "concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of bankruptcy to settle even if they have no legal liability" particularly where "the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class."[57]

The Seventh Circuit did not address squarely the question of whether the blood products litigation might become suitable for class action treatment if future trials began to go the plaintiffs' way. Similarly, the court declined to suggest precisely how many plaintiffs' verdicts would be required before certification might be permitted.[58]

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[55] *Id.*

[56] Notably, the dissenting opinion was largely based on the argument that the economic forces unleashed by certification of a large class are simply a by-product of a rule that the court was obliged to follow. Indeed, consistent with the position taken here, Judge Rovner stated that a "preference for avoiding a class trial and for submitting the negligence issue 'to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers' is a rationale for amending the rule, not for avoiding its application in a specific case." *Id.* at 1308 (Rovner, J., dissenting) (citations omitted).

[57] *Id.* at 1299.

[58] The *Castano* court has been similarly criticized for failing "to provide a workable definition of tort maturity." *See Recent Case, Fifth Circuit Decertifies Nationwide Tobacco Class* — Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), 110 HARV. L. REV. 977, 979 (1997). It was not, however, necessary for either the *Castano* or *Rhone-Poulenc* courts to reach that issue. In *Castano*, plaintiffs alleged that defendants wrongfully caused them to become addicted to tobacco, a theory that had never before been tested at trial. *See Castano*, 84 F.3d at 749. Indeed, the tobacco companies have a long and unbroken record of defeating these claims on the merits. *See* Henry J. Reske, *Tobacco Suit: Round II: Plaintiffs' Lawyers Pledge to File Class Actions in All 50 States*, 82 A.B.A. J. 18 (July 1996) (stating that the tobacco companies are "fond of pointing out [that] they have never ultimately lost a case in 40 years of litigation"). In *Rhone-Poulenc*, plaintiffs' unusual theory of liability had been tested in only a few jurisdictions and had failed 12 of 13 times. *See Rhone-Poulenc*, 51 F.3d at 1296.

Instead, the court only held that it would not allow the plaintiffs to use class certification to reverse the direction of the litigation.[59]

B. *Mass Tort Class Actions Do Not Present Common Questions of Fact or Law Nor Do Those Questions Predominate Over Issues Affecting Individual Plaintiffs.*

A mass tort litigation class may only be certified if the plaintiffs establish that the class meets the relevant requirements of Rule 23.[60] Plaintiffs must show, among other things, that there are "questions of law or fact common to the class,"[61] that those common questions "predominate over any questions affecting only individual members,"[62] and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[63]

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[59] One commentator has argued that a maturity test that requires several trials and success on the merits may simply enhance defendants' institutional advantage in the early stages of mass tort litigation. *See Fifth Circuit Decertifies Nationwide Tobacco Class, supra* note 58, at 982 n.49 (delaying class certification until a significant number of plaintiffs succeed at trial would create "a high threshold given that defendants' informational and strategic advantages lead to a high success rate in the early stages of a tort's maturation"). This argument is rooted in an outdated model of the relationship between mass tort plaintiffs and defendants in which defendants had far superior resources with which to fight tort claims. Today, the plaintiffs' bar can amass resources that certainly level the playing field and may actually give plaintiffs an advantage if a diverse group of defendants does not coordinate litigation strategies. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 76 (1995) ("[T]he success of the mass tort plaintiffs' bar, particularly in the asbestos cases, has furnished it with so much capital, managerial skills, and expertise that it can quickly move into new fields of opportunity."). Moreover, a maturity rule could also prevent plaintiffs from wasting resources by pursuing a claim the strength of which they may have misjudged. *See* Maxwell M. Blecher, *Is the Class Action Rule Doing the Job?*, 55 F.R.D. 365, 370-71 (1972) (advocating a hearing on the merits of plaintiffs' claims prior to certification to avoid the "sheer waste" of litigating a class action that cannot succeed). Professor Coffee describes a hypothetical litigation in which a class is certified before the scientific community has established the validity of the claim. *See* Coffee, *supra* note 2 at 1439. Summary judgment is granted and the class action is dismissed. *See id.* Sufficient scientific evidence is later found, but the class members (including future claimants) may be barred from litigating their claims. *See id.* "Delaying the certification of the class action until the scientific evidence clearly supports plaintiffs (if indeed that is the outcome) thus may benefit future claimants over the long run." *Id.*

[60] *See Castano*, 84 F.3d at 740; *In re* American Med. Sys., 75 F.3d 1069, 1086 (6th Cir. 1996).

[61] FED. R. CIV. P. 23(a)(2). Since Rules 23(b)(1) and (b)(2) are generally inapplicable to mass tort class actions, the class must meet the requirements of Rule 23(a) and the additional requirements of Rule 23(b)(3).

[62] FED. R. CIV. P. 23 (b)(3).

[63] *Id.* Indeed, the Advisory Committee for the 1966 rule amendments recognized that in Rule 23(b)(3) situations, "class-action treatment is not as clearly called

All mass tort class actions suffer from two flaws. First, the issue of whether a product caused a particular plaintiff's disease differs for each plaintiff, affected by the plaintiff's predisposition to the disease, exposure to other substances that may cause the disease, and different levels of exposure to the product at issue over different periods of time.[64] Second, because of the difficulties encountered in determining which state's law applies to the claims and then analyzing the law of each state, it is nearly impossible to show that common questions of law will predominate and that a class action will be superior to some other form of adjudication.[65] Immature tort class actions magnify these inherent flaws.

1. Without a History of Trials, Courts Cannot Determine Whether Common Factual Issues Predominate.

Class actions conserve judicial resources by allowing a court to avoid needlessly trying and retrying the issues common to all class members.[66] Where, however, the court is asked first to conduct a trial on the common issues to be followed by hundreds of separate trials on individual issues, "the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff."[67]

In product liability litigation, causation necessarily turns on facts that differ with each plaintiff. Thus, the Third Circuit Court of

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for as in [Rule 23(b)1 and (b)2]." *Proposed Amendments to the Federal Rules of Civil Procedure: Rule 23 Class Actions*, 39 F.R.D. 69, 102 (1966). Thus, the additional prerequisites set forth in 23(b)(3) were intended to insure that classes were certified only where they "would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 102-03.

[64] *See* Hurd v. Monsanto Co., 164 F.R.D. 234, 240 (S.D. Ind. 1995).

[65] *See Castano*, 84 F.3d at 747 (The "certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication."); Arch v. American Tobacco Co., 175 F.R.D. 469, 494 (E.D. Pa. 1997) ("[T]he lack of a prior track record of trials in these types of cases makes it practically impossible to draw information necessary to make the superiority analysis.").

[66] *See* Sterling v. Velsicol Chem. Corp. 855 F.2d 1188, 1196 (Rule 23(b)(3) classes are designed primarily "to achieve the economies of time, effort and expense.").

[67] *In re* American Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996). A few courts have used Rule 23(c)(4)(A) subclasses to address this problem, but none have actually established that this approach is workable at trial. *See, e.g., In re* Telectronics Pacing Systems, Inc. 164 F.R.D. 222, 230 (S.D. Ohio 1995); *In re* Copley Pharmaceutical, Inc. 161 F.R.D. 456, 465-66 (D. Wyo. 1995). Others have observed that an approach "whereby subclasses of plaintiffs are created and only certain elements of some causes of action are heard, seems inherently complicated and incredibly inefficient." Haley v. Medtronic, Inc., 169 F.R.D. 643, 656 (C.D. Cal. 1996).

Appeals' observations about an asbestos settlement class action are applicable to almost any product liability class action:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma — a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.[68]

It is quite possible that a series of trials will show that the differences between plaintiffs are of little significance.[69] Likewise, following a series of trials, a district court could conclude that the efficiency of future trials would be greatly advanced by a class trial on a particular issue or issues followed by individual trials. Where, however, tort claims lack such a record of trials, the court cannot possibly know whether the common issues predominate over the individual issues or whether resolution of the common issues will result in more efficient individual trials.[70]

2. Immature Mass Tort Class Actions Present Unmanageable Choice of Law Problems.

A product liability action in federal court is governed by state substantive law.[71] To determine which state's law to apply, the district court must apply the choice of law rules of the jurisdiction in which it sits,[72] except if the action was transferred, in which case the court

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[68] Georgine v. Amchem Prods, Inc., 83 F.3d 610, 626 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997); *accord American Med. Sys.*, 75 F.3d at 1081 ("Proofs . . . will also vary from plaintiff to plaintiff because complications with an AMS device may be due to a variety of factors, including surgical error, improper use of the device, anatomical incompatibility, infection, device malfunction, or psychological problems."); *Haley*, 169 F.R.D. at 654 ("Given the fact that approximately 66,000 individuals had these leads implanted, there are potentially 66,000 different instances that the Court would have to examine to determine if defendant's conduct was the real cause of injury for each potential plaintiff.").

[69] *See* Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) ("[T]o 'predominate,' common issues must constitute a significant part of the individual cases.").

[70] *See Castano*, 84 F.3d at 745 ("Absent knowledge of how addiction-as-injury cases would actually be tried, however, it would be impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials.").

[71] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

[72] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

must apply the transferor court's choice of law rules.[73] Class actions are no different since such choice of law determinations are constitutionally mandated.[74] A court deciding whether to certify a class "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'"[75] Rather, it must "apply an individualized choice of law analysis" for each plaintiff.[76]

Once it determines which state's law applies to a particular plaintiff's claim, the court must analyze that state's law and determine whether it is the same or at least substantially similar to the state law that will apply to other class members.[77] This analysis is necessary because variations in state law may either defeat predominance[78] or may simply present so many case management problems as to defeat superiority.[79]

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[73] *See* Ferens v. John Deere Co., 494 U.S. 516, 532 (1990); *see also In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 348 (D.N.J. 1997) (holding that a court must apply the transferor court's choice of law rules to claims transferred by the Judicial Panel on Multidistrict Litigation).

[74] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-23 (1985).

[75] *Id.* at 821 (citations omitted); *accord In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995) ("The diversity jurisdiction of the federal courts is, after *Erie*, designed merely to provide an alternative forum for the litigation of state law claims, not an alternative system of substantive law for diversity cases."); *In re* School Asbestos Litig., 789 F.2d 996, 1007 (3d Cir.) ("[T]he dictates of state law may not be buried under the vast expanse of a federal class action."), *cert. denied*, 479 U.S. 852 (1986).

[76] Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997); *accord* Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1024 (11th Cir. 1996) (suggesting that scrutinizing plaintiffs' claim "under the provisions of fifty jurisdictions complicates matters exponentially"). Even where the class is defined as citizens of a single state, a court may nonetheless face choice of law problems because plaintiffs were exposed to the product when they lived in other states. *See, e.g.*, Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (claims of class members who smoked in other states and then moved to Missouri would probably be governed by other states' law).

[77] *See* Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."). Vague assurances that there are no differences between state laws will not suffice. *See* Walsh v. Ford Motor Co., 807 F.2d 1000, 1012 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *accord* Peoples v. American Fidelity Life Ins. Co., 176 F.R.D. 637 (N.D. Fla. 1998); Tylka v. Gerber Prods. Co., 178 F.R.D. 493, 498 (N.D. Ill. 1998) (plaintiffs' "overly simplistic" description of four subclasses to manage state consumer fraud claims was insufficient to establish that common questions predominate).

[78] *See Castano*, 84 F.3d at 741 ("A requirement that a court know which law will apply before making a predominance determination is especially important when

Immature mass torts often present novel legal issues that magnify the problems created by variations in state law. A federal court sitting in diversity must decide state law issues as the highest court of the state would decide them.[80] Where the law is unclear, as it often is in product liability litigation, the federal court must predict how the state's highest court would rule.[81] This is a task for which federal judges admit they are ill-suited.[82] They likewise admit that their predictions are all too often incorrect.[83]

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there may be differences in state law."); *Georgine*, 83 F.3d at 618.

[79] *See In re American Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); *School Asbestos Litig.*, 789 F.2d at 1011 (noting management problems created by application of different state laws); Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) ("[I]nstructing the jury in a manner that is both legally sound and understandable to a jury of laypersons would be a herculean task."). Courts must be wary of plaintiffs who propose to jettison unmanageable claims rather than present a plan to address the case management problems created by those claims. Such plaintiffs probably cannot adequately represent the class. *See, e.g.*, Arch v. American Tobacco Co., 175 F.R.D. 469, 480 (E.D. Pa. 1997) ("[A] willingness to gerrymander claims precluded a finding that the named plaintiffs were fit to represent the class . . . Indeed, named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class."); Pearl v. Allied Corp., 102 F.R.D. 921, 923 (E.D. Pa. 1984) ("[P]laintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives.").

[80] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) ("If there be no decision by that Court then federal authorities must apply what they find to be the state law giving 'proper regard' to relevant rulings of other courts of the state.").

[81] *See, e.g.*, Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 55 (1st Cir. 1998) (stating that if the Supreme Court of Puerto Rico has not decided an issue, the federal court must look to "analogous state court decisions, persuasive adjudications by courts of the states, learned treatises, and public policy considerations identified in state decisional law in order to make an informed prophecy of how the Puerto Rico Supreme Court would rule"); Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 293 (3d Cir. 1995) ("We are relegated to predicting what the Supreme Court of New Jersey would do if it were confronted with this question."). *See also In re* "Norplant" Contraceptive Prods. Liab. Litig., 955 F. Supp. 700 (E.D. Tex. 1997) (predicting that state court would apply the learned intermediary doctrine to bar claims that manufacturer failed to provide warnings directly to patients); Dennis v. Pertec Computer Corp., 927 F. Supp. 156, 162 (D.N.J. 1996) (predicting that in "repetitive stress injury litigation" New Jersey law would not require a computer keyboard manufacturer to warn of the risk of injury from repetitive use), *aff'd*, 135 F.3d 764 (3d Cir. 1997).

[82] *See, e.g.*, Sargent v. Columbia Forest Prods., Inc., 75 F.3d 86, 89-90 (2d Cir. 1996) (noting that Vermont has no certification statute and, therefore, courts are required to guess, often incorrectly, as to the law of Vermont); *Hakimoglu*, 70 F.3d at 302 (Becker, J., dissenting) ("Especially in cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel.

If predicting state law in an individual action unnecessarily burdens federal judges, then a class action presenting novel legal issues increases that burden one-hundred fold.[84] The federal judge must undertake the arduous task of predicting the law of the state in which he sits and with which he is probably most familiar, and then he must proceed to predict the law of states with which he probably has had little or no experience.[85] If federal judges often incorrectly predict the law of the jurisdiction in which they sit, they cannot possibly be expected accurately to predict the law of fifty states.[86] If they cannot predict the law of the states in the jurisdictions that will govern the plaintiffs' claims, courts cannot even begin to determine

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Meanwhile, federal judges, by no means a high-rolling bunch, are put in the uncomfortable position of making a choice."); McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 661-62 (3d Cir.) ("Although some have characterized this assignment as speculative crystal-ball gazing, nonetheless it is a task we may not decline."), *cert. denied*, 449 U.S. 976 (1980). In these cases, the courts decried the task of predicting state law on the full record submitted in support of a motion for summary judgment. On a motion to certify a class, the district judge is presented with a far more sparse record.

[83] *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679-80 (1992) (describing several instances in which the Third Circuit Court of Appeals incorrectly predicted how the New Jersey or Pennsylvania Supreme Courts would rule). In *Hakimoglu*, Judge Becker asked New Jersey to adopt a certification procedure, noting that "forty-three state supreme courts, the court of last resort in Puerto Rico, and the Court of Appeals of the District of Columbia can answer certified questions of law from federal circuit courts." *Hakimoglu*, 70 F.3d at 303. This procedure obviously provides no help to district judges who must predict state law to resolve motions to certify nationwide class actions. *See* T. Dean Malone, Comment, Castano v. American Tobacco Co. *and Beyond: The Propriety of Certifying Nationwide Mass-Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit is a "Novel" Claim or Injury*, 49 BAYLOR L. REV. 817, 844 (1997).

[84] *See* Malone, *supra* note 83, at 844 ("[A] court may have to certify the same question to all fifty states, each of which may give a different answer.").

[85] *See* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (Judges addressing another state's law are "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.").

[86] *See* Malone, *supra* note 83, at 820 ("[I]f a plaintiff class alleges a 'novel' injury, or one that a state court has never developed, then the certifying federal court has no law to apply."). The author argues that "[i]f the entire *Castano* plaintiff class included only domiciliaries of a single state and plaintiffs filed the action in their state court system, little concern would exist about the propriety of a state court determining the viability of a new or 'novel' injury." *Id.* at 819. He cites as an example a Florida court that refused to certify a nationwide class of plaintiffs seeking compensation for tobacco addiction, but certified a statewide class of the same description. *Id.* at 819 n.20 (citing R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40-42 (Fla. Dist. Ct. App. 1996)). This was, of course, a state court. A federal district judge, on the other hand, faces the additional hurdle of trying to divine state law on a bare record.

whether common questions of law or fact predominate or whether a class will be superior to other methods of litigating the claims.[87]

IV. CONCLUSION

Mass tort class actions are often inefficient and unfair to defendants. The addition of an "immature" claim to the equation simply exacerbates everything that is wrong with mass tort classes and tips the balance against certification. Accordingly, Rule 23 should be amended to forbid certification of immature tort class actions.

Various formulations have been proposed for determining when a tort has sufficiently matured so as to permit certification. Complete discovery, careful scrutiny of scientific expert testimony, acceptance of plaintiff's theories under relevant state law by trial (and perhaps appellate) judges, and several plaintiff's jury verdicts are probably minimum requirements. A precise definition of maturity is unnecessary and a determination of whether a tort has sufficiently matured would be better left to the reasonable discretion of the trial judge. An immature tort, on the other hand, is easily defined as one that is wholly lacking in any of these prerequisites. Immature torts are unsuitable for class action treatment.

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[87] *See* Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996) ("The primary procedural difficulty created by immature torts is the inherent difficulty a district court will have in determining whether the requirements of rule 23 have been met."); *In re* Stucco Litig., 175 F.R.D. 210, 214 (E.D.N.C. 1997) ("There is no history of litigation . . . to help crystallize the issues . . ."); *In re* "Norplant" Contraceptive Prods. Liab. Litig., 168 F.R.D. 577, 578 (E.D. Tex. 1996) (explaining that in the absence of several individual trials, the court could not make predominance and superiority determinations and therefore plaintiffs' motion to certify a class was denied as "premature"). Because of the problems created by variations in state law, district courts in the Fifth Circuit have held that they are effectively prohibited from certifying nationwide classes where plaintiffs' tort claims arise under state law. *See* Borskey v. Medtronics, Inc., No. 94-2302, 1998 U.S. Dist. LEXIS 3732, at *8 (E.D. La. March 18, 1998); *In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 421 (E.D. La. 1997).