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Judicial Conference of the United States.
[Washington, D.C.? : Federal Judicial Center, 1999]

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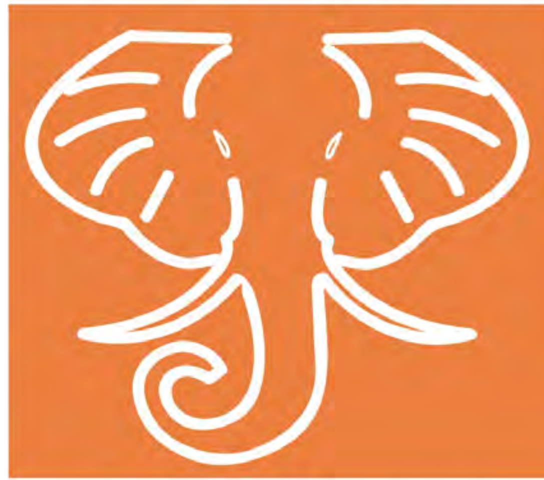

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Report on Mass Tort Litigation

February 15, 1999

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Report of the

Advisory Committee on Civil Rules

and the

Working Group on Mass Torts

to the

Chief Justice of the United States

and to the

Judicial Conference of the United States

February 15, 1999

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
(410) 962-4210
United States Circuit Judge
Fax (410) 962-2277

February 15, 1999

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Chief Justice:

For over seven years, the Civil Rules Advisory Committee has been studying class actions and, to the extent that they implicate class actions, mass torts. In August 1996, the Committee published proposed changes to Rule 23. The public hearings and comments persuaded the Committee that the proposals would not solve the most serious of the identified problems and might raise troubling collateral issues. It also became apparent that rulemaking might not be adequate to solve some of the more serious problems. During the same period, Congress, in reaction to an increasing interest in mass torts, began to conduct its own hearings. This activity increased to the point that the House was prepared to pass a bill to address some of the perceived problems before time ran out. Many believe that some final action may be taken by the current Congress.

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On occasion, representatives of the rules committees have testified before Congress on these subjects and have met with both House and Senate Judiciary Committee staffers. From these initial interchanges, we have concluded that a more comprehensive and sophisticated response to mass torts may be possible—one that coordinates Congress' substantive role with the Third Branch's rulemaking responsibilities—and that the judiciary committees of Congress might be receptive to a low-key, coordinated effort, which takes advantage of the knowledge and experience that the Civil Rules Advisory Committee and other Judicial Conference committees have accumulated.

Last year, we proposed a task force that would work across Judicial Conference committees to spearhead such a coordinated effort. At that stage, you authorized an informal one-year working group under the leadership of the Civil Rules Advisory Committee to review the problems of mass torts and to determine whether the matter should be studied formally by a task force. Accordingly, I designated Circuit Judge Anthony Scirica to chair an informal working group to collect the necessary information and report to the Civil Rules Advisory Committee. I invited participation by other committees of the Judicial Conference and the Judicial Panel on Multidistrict Litigation. The working group ultimately consisted of two additional Civil Rules Committee members, liaison members from four other Judicial Conference committees which expressed interest in participating, and a representative of the Judicial Panel on Multidistrict Litigation. It has been advised by Professors Edward Cooper, Francis McGovern, and Geoffrey Hazard, and has received substantial assistance from the Federal Judicial Center. I have met with the group, *ex officio.*

Following four geographically diverse meetings of lawyers, judges, and academics who are considered the most expert in the field of mass torts—a total of 81 persons—the working group prepared a draft report and presented its findings to the Civil Rules Advisory Committee at its November 1998 meeting. The Committee thereupon approved a report to you, which I am now pleased to present in final form.

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In the report, which is introduced by a summary, the Committee has explored the mass torts phenomenon and the problems and risks that it presents to existing judicial resolution mechanisms. The report includes a broad and general survey of some possible solutions, involving legislation, rules changes, changes to the *Manual for Complex Litigation*, case management, and education. And it concludes with a recommended protocol for further action. Under this protocol, it is recommended that you appoint an Ad Hoc Committee on Mass Torts and assign to it the responsibility (1) of recommending legislation to address mass torts problems to the Judicial Conference, after coordination with the interested Judicial Conference committees through liaison members of the Ad Hoc Committee, and for ultimate presentation to Congress; (2) to propose rules changes to be considered through the normal channels; and (3) to recommend case management ideas, practice changes, and education programs to the Multidistrict Litigation Panel, the Federal Judicial Center, and the appropriate Judicial Conference committees. We believe that the experience of the Ad Hoc Committee on Asbestos Litigation provides organizational guidance for the appointment of this Ad Hoc Committee on Mass Torts. The protocol also recommends a membership constituency.

As a personal judgment, I believe that if we are to meet the serious problems of mass torts through the employment of the traditional tools of judicial resolution, the best chance of success lies in an approach taken under the lead of the Third Branch with a sensitive interaction with Congress. The proposed course is concededly an ambitious one, and, of course, the effort can fail, particularly if it is allowed to fall into the traditional debate among interest groups. I would hope that we can minimize that tendency by employing a low-key technique aimed at what is right for the entire judicial system and not for any particular group.

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On behalf of the informal working group and the Civil Rules Advisory Committee, I express our appreciation for the opportunity to explore this subject and to present you with our report.

Sincerely yours,

Paul V. Niemeyer
Chair, Civil Rules
Advisory Committee

Enc.
cc: Honorable Anthony J. Scirica, Chair,
Working Group on Mass Torts
Honorable Wm. Terrell Hodges, Chair,
Executive Committee
Mr. Leonidas Ralph Mecham, Director
Ms. Karen K. Siegel, Executive Secretariat

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I. INTRODUCTION

In response to the Judicial Conference's interest in reviewing the mass torts phenomenon and the Civil Rules Advisory Committee's recommendation for a single effort working across the Conference committees' jurisdictional lines, the Chief Justice authorized the formation of an informal working group to study mass torts. The Working Group was organized under the leadership of the Civil Rules Advisory Committee and with the participation of liaison members from other interested Judicial Conference committees. The Working Group was given one year to study problems in mass tort litigation and submit a report on whether its work should be continued and whether the Chief Justice should appoint a committee of the Judicial Conference for that purpose.

Judge Paul Niemeyer, as chair of the Civil Rules Advisory Committee, appointed Civil Rules Committee member Judge Anthony Scirica as chair of the Working Group and Civil Rules Committee members Judge Lee Rosenthal and Sheila Birnbaum, Esquire, as members of the Working Group. Judge Niemeyer also invited the chairs of other interested Judicial Conference committees and the Chairman of the Judicial Panel on Multidistrict Litigation to designate liaison members. The Committee on the Administration of the Bankruptcy System designated Judge Joe Billy McDade; the Committee on the Administration of the Magistrate Judges System designated its chair, Judge

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Philip Pro; the Committee on Court Administration and Case Management designated Judge John Koeltl; the Committee on Federal-State Jurisdiction designated Judge Richard Stearns; and the Judicial Panel on Multidistrict Litigation designated its chair, Judge John Nangle. Judge Niemeyer also invited Professor Francis E. McGovern of Duke University to act as special reporter and consultant and to provide expert advice, along with Professor Edward H. Cooper, *ex officio* as reporter of the Civil Rules Advisory Committee, and Professor Geoffrey C. Hazard, Jr., of the University of Pennsylvania. Finally, Judge Niemeyer received additional support from John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, and from Thomas E. Willging of the Federal Judicial Center.

During the year, Judge Scirica and Professor McGovern convened four public meetings, in San Francisco, Philadelphia, and Washington, D.C. (twice), to which they invited lawyers, judges, and academics from among those who possess the most knowledge and expertise on the subject of mass torts. Eighty-one of these invitees (listed in Appendix A) attended the meetings, in addition to the members of the Working Group. The purpose of the meetings was to identify and catalog the most significant problems generated by the mass torts phenomenon and to consider the full range of potential solutions, whether

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through legislation, rules, case management, revised practices, or education. Reporters' notes of these meetings are included as Appendix B. The Working Group also engaged the Federal Judicial Center to collect data on mass torts and analyze mass tort policy issues as revealed in the literature and judicial commentary. Its reports are included as Appendices C, D, and E, respectively. Appendix F includes discussion models prepared to illustrate possible reforms as well as other recent legislative proposals.

In addition to the public meetings, the Working Group met several times to distill the information it had received and to develop this report and its recommendations.

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II. SUMMARY

Over the past quarter century, the mass torts phenomenon has evolved into a significant and pervasive part of the legal landscape. Because of their size and scope, mass torts lawsuits strain the limits of the traditional adversary system. Both plaintiffs and defendants are affected by the unique problems presented by mass torts litigation. For example, plaintiffs may encounter significant delay in recovering for injuries and are forced to compete for an often inadequate pool of assets. Defendants, on the other hand, are pressed to settle even relatively weak claims rather than face the enormous risks posed by the aggregation of numerous claims. Moreover, mass tort cases typically generate enormous attorney fees, often in the millions of dollars, which may cause the process to generate its own momentum.

The Working Group conducted a thorough analysis of mass torts involving more than 100 claims for personal injury or serious property damage. For many purposes, it has proved helpful to describe these mass torts as those that arise from single events or those that are more dispersed. The "single event" description aims at claims arising from a single incident concentrated in time, location, and injury. The "dispersed" label aims at claims that arise at different times, involve events in different places, and frequently present different types of harm. While single event mass torts—that is, disasters such

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as explosions or airplane crashes—pose problems, these problems are more susceptible of resolution through the improvement of familiar aggregation mechanisms and the enactment of legislation that has already been drafted. But the problems that arise from dispersed mass torts, which typically consist of exposure to substances such as asbestos, other contaminants, or pharmaceutical or consumer products, are more difficult to address. Exposure may occur over a period of years or even decades, and as a result, the manifestation of injury may similarly be dispersed. Claimants who have suffered exposure but whose injuries are not yet manifest are known as "futures" and present particularly difficult problems.

The Working Group finds that some mass torts have an "elastic" characteristic by which the very identification of a potential mass tort or the subsequent processes of aggregation generate claims that otherwise might not have been filed. Although many of these generated claims might be valid ones, some observers fear that unfounded claims may be generated as well. Consequently, any proposed reform will have to be scrutinized with attention to whether it will create desirable or undesirable claims-filing incentives.

Another salient characteristic of mass torts is their tendency to follow a dynamic cycle toward a "mature" stage if they are not aggregated prematurely. Maturity occurs when a sufficient number of cases has been disposed

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of—either individually or through small-scale aggregation—to produce knowledge, experience, and established bases for evaluating new claims and facilitating their resolution. But if the path to maturity is interrupted by premature aggregation of claims, then significant problems can arise, greatly increasing the difficulty of resolving claims quickly and equitably. Therefore, the Working Group believes that in evaluating reform proposals it is important to account for their likely effects on the maturation process.

The Working Group concludes that mass tort litigation has been accompanied by problems that may be amenable to solution. In the absence of reform, these problems are more likely to increase than to abate. Many believe that only the subtle exercise of discretion by knowledgeable and creative trial judges has protected the judicial process from more substantial problems resulting from mass tort litigation. Inevitably, observers have not reached a consensus on the full range of problems that mass torts pose. Nevertheless, Part IV identifies the phenomena most commonly described as problems, without attempting to judge whether each is in fact a problem or whether each real problem can be solved.

Although the obstacles are formidable, the Working Group believes there are solutions that can ameliorate several of the major problems mass torts create for the judicial system. These solutions involve a combination of

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legislation, rules, and case management. For instance, the duplication of judicial efforts, coupled with forum shopping and forum competition among both state and federal courts, suggests the creation of mechanisms to facilitate and perhaps in some cases compel coordination. Such mechanisms could be established through a variety of means, including federal or state legislation, the creation of a center for joint federal and state coordination, and education. Discussions of these potential solutions have paralleled the debate in Congress on bills actively being considered to address these same issues. To cite another example, the difficulty—and in some cases, impossibility—of bringing closure to mass tort litigation through settlement can be addressed through a range of legislative and rule-making approaches. Both plaintiffs and defendants have urged solutions to that problem.

Part V discusses a range of potential solutions involving legislation, amendments to rules, revisions to the *Manual for Complex Litigation*, and ideas for education on case management. It is important to note that the complex and multifaceted nature of mass torts will defeat the effort to advance a single comprehensive solution. The solution for one case may create a problem for another. Although the Working Group discusses these proposals in light of the information it has gathered, it has not yet undertaken the painstaking work required to develop specific models for legislation or revised

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Civil Rules. The Working Group believes specific recommendations would be the work of a Judicial Conference committee, if one were created. A new committee could draft and debate specific proposals for recommendation to the Judicial Conference, the Rules Committees of the Conference, the Judicial Panel for Multidistrict Litigation, and the Federal Judicial Center.

Part VI recommends the creation of a Judicial Conference Ad Hoc Committee on Mass Torts to continue the work proposed in this Report. The Working Group also recommends that the Chief Justice invite the chairmen of the United States Senate and House Judiciary Committees to designate representatives to this Ad Hoc Committee.

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III. THE MASS TORTS PHENOMENON

Mass tort litigation is not a temporary phenomenon. Although mass injuries caused by human acts have long been witnessed, the opportunities for mass injuries caused by a common course of conduct have substantially expanded with advances in modern technology, manufacturing, distribution, and marketing. The very wealth and scale of our society have brought more and more people into contact with injury-causing agents, whether at work, at play, or at rest. Increasingly sophisticated science and epidemiology have enabled us to trace—or at least to assert—chains of causation that earlier generations could not know. And in many ways the law itself has cast wider its net of protection. As Judge Paul Niemeyer has observed, "as efficiency and production in manufacturing have increased, . . . design errors are multiplied by factors measured in the millions. An ill-conceived pill or a negligently designed fastener, costing but a few cents each, can place a huge corporation at risk [and] cause serious injury to individuals whose claims cannot be resolved . . . simply because of the numbers similarly injured." Unless there is a dramatic change in substantive law or an equally dramatic change in our legal institutions, mass tort litigation is probably here to stay. Accordingly, it is important to understand mass torts as well as we can and to learn whether there is room to improve judicial responses.

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A. Working Definition of Mass Tort

Mass tort litigation emerges when an event or series of related events allegedly injure a large number of people or damage their property, giving rise to a large number of cases. The Working Group did not find it necessary to define precisely when a tort becomes a mass tort, but instead, it focused on litigation—whether separate cases, consolidated cases, or class actions—in which there were over 100 plaintiffs.[1] Moreover, the Working Group focused on torts that caused personal injury or large-scale property damage, not on violations of modern regulatory legislation. While consumer class actions often involve torts, they often have important attributes not common to the

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[1]The American Bar Association Commission on Mass Torts, reporting to the American Bar Association House of Delegates in 1989, chose to define "mass tort litigation" as involving "at least 100 civil tort actions arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of $50,000 for wrongful death, personal injury, or physical damage to or destruction of tangible property." American Bar Association, Commission on Mass Torts, *Report to the House of Delegates* 5 (1989). A dissenting member of the Commission argued for a definitional threshold of "10,000 present and reasonably to be expected cases," to distinguish between routine and problem-causing mass torts. For some of its analysis, the Working Group has focused on an array of 50 specific cases that fit the Commission's definition. *See Mass Tort Problems and Proposals—A Preliminary Report to the Mass Tort Working Group*, Thomas E. Willging, Federal Judicial Center, attached as Appendix C.

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personal injury and property damage mass tort cases studied by the Working Group.

B. The Ambiguous Distinction Between "Single-Event" and "Dispersed" Mass Torts

The underlying tort may involve a single catastrophic event causing harm to multiple but readily identified persons, such as an airplane crash or a building collapse. It may involve exposure to a product or substance that could cause injury years after the exposure, such as asbestos, toxic waste, or a pharmaceutical product. Or it may involve events that combine characteristics of these prototypes and share the greater manageability of single-event cases and the greater difficulties of dispersed cases. The common distinction between "single event" and "dispersed" mass torts identifies prototypes, not a neat division that separates mass torts into two tidy categories that can be managed by distinctive means. The distinction remains useful for expository purposes, however, and it will be used—with occasional reminders of the ambiguity—in this Report.

The number of persons injured in a prototypical single-event mass tort is often finite and their identities are usually easy to determine. Typically, plaintiffs in a single event mass tort share the common characteristics of time, place, and cause of injury. Liability is usually governed by the law of a single

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forum, although damages might not be. Issues of science are usually resolved with existing knowledge and with the kind of expert testimony conventionally employed in tort litigation. What is different from the ordinary two- or three-party tort is the number of people affected and the stakes involved, not the facts or the law.

Litigation of single-event mass torts has followed traditional methods of aggregation to avoid duplication of discovery and trials and to manage equitably the financial resources available for the payment of damages. Yet it may prove impossible to aggregate all claims for trial, resulting in duplication and a risk of inconsistent dispositions. The solutions are likely to be found in the adaptation of familiar procedures or the creation of new procedures that are not dramatic innovations.

Dispersed mass torts, in contrast, pose problems never anticipated by the present mechanisms for resolving torts. Consequently, dispersed mass torts strain existing procedural mechanisms and judicial capabilities. Because exposure may occur over many years, with injury often appearing years after exposure, and because causation may be uncertain, the number of persons who have been injured or who could claim injury is unknown and their identification is difficult. Ambiguities of causation and identification occur not only when conduct is repeated over time or a product is used by many

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consumers, but also when a single-event tort affects an uncertain number of victims—for example, when a nuclear power plant accident releases a harmful agent whose precise effects are difficult to detect over long periods of time and uncertain distances. The crucial point is not whether the underlying tort itself is a single event, but whether its consequences are dispersed.

Indefinite causation may signify the possibility of "futures" claimants—persons whose claims have not yet ripened because their injuries have not become manifest. Some futures claimants are aware of their exposure to the injury-causing agent, but not of their injury. Thus, we may know a person took a particular medicine that is suspected of causing injury, but often we do not yet know whether that person will suffer any actual injury. (In some states such future claimants are entitled to pursue claims for medical monitoring or fear of future injury. The availability of these remedies is a matter of continuing controversy.) Other futures claimants may not even be aware that they have been exposed to the injury-causing agent. For them, there is no effective present remedy. Claimants in this category present especially difficult questions of notice and representation.

Another layer of complexity is added when the science underlying the plaintiffs' theory of causation is disputed. For example, although exposure to asbestos has been shown to lead to asbestosis, the range of injuries that may be

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caused by exposure to silicone breast implants is heavily disputed by scientists. Other difficulties arise if the alleged injury is dose-related or depends on the amount or intensity of exposure, as may be the case with tobacco smoke, or where two or more agents may have a synergistic effect, as in the case of tobacco and asbestos.

If litigation arising from a single-event mass tort is dispersed among several court systems, it can pose problems similar to those arising from dispersed events. The single-event focus, however, makes it easier to resolve the problems through existing aggregation mechanisms or expansions of these mechanisms. Litigation arising from dispersed events presents additional conceptual and practical difficulties, and therefore must be discussed in greater detail.

C. The Challenge of Numbers and Elasticity

The satisfactory resolution of mass torts is made difficult principally by the number of claims generated. The claimants may number in the millions, and the damages alleged may amount to billions of dollars. Tobacco claims will involve tens of millions of smokers; second-hand smoke claims would include virtually the entire population. And as seen below, the special dynamics of mass-tort litigation may increase the numbers of claimants who seek to join in some mass-tort actions.

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The impact of large numbers of claims may be seen from a variety of perspectives. One perspective examines the resulting burdens imposed on all the court systems that may become involved. Another examines the burdens that may be imposed on particular courts where large numbers of cases may be congregated, whether through formal aggregation devices or through independent filing decisions. Other perspectives consider the consequences of dispersed or concentrated litigation for the number of claims, the parties, and the outcomes.

One of the most dramatic perspectives focuses on how the means of processing related mass claims may increase the proportion of claims that are filed. It is widely believed that traditional institutions and procedures, designed for the disposition of unique disputes, may deter most people who have potentially valid claims from filing litigation. Those who do file encounter a familiar process of discovery and pretrial procedures that, through settlement and otherwise, winnows out all but a few cases without a trial.

Our state and federal judicial systems have evolved in ways that, for the most part, contemplate the individualized resolution of disputes. The Federal Rules of Civil Procedure establish a discrete process for discovery, pretrial management, and—when it proves necessary—trial. The litigation process and organization of the court system have been designed to accommodate an

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ordinary flow of cases. The ordinary flow of cases, however, is restrained by many factors that discourage potential plaintiffs from initiating litigation. For instance, those who wish to sue know that litigation is expensive and often slow. The plaintiffs' bar serves as an additional filter, screening out cases whose probability of success does not justify the costs and risks of litigation. Defendants can add to the barriers by adopting tactics that increase the costs plaintiffs must bear.

Mass torts alter this dynamic in several ways. Because they involve numerous similar cases, events in one case are magnified by their ramifications on others. Economies of scale reduce transaction costs so that plaintiffs can bring cases that otherwise might not be filed. Indeed, defendants, faced with company-threatening liability, may elect to settle cases earlier and faster and to pay a higher value than they would under the ordinary tort process, a tendency that creates additional incentives for filing cases. As a result, judges may press to resolve cases earlier and faster to reduce their case backlog.

While courts generally have aggregated mass tort cases for more efficient disposition, the very process of aggregation can generate additional cases. As noted, this phenomenon is referred to as "elasticity." Aggregation establishes the foundation for filing additional cases. The sardonic observation has been made—it is to be hoped with some exaggeration—that

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the aggregation process itself may induce claims representing not 20% of instances of actual liability, as is supposed to be the case with individualized tort claims, but 120%. A more neutral description is that "if you build a highway, you will have a traffic jam." The highway may, in many circumstances, provide lower-cost vindication of valid claims that otherwise might go unsatisfied. There is a risk, however, that satisfaction of relatively minor claims may exhaust assets that ought to be preserved for more serious claims. And some fear that the traffic jam may attract marginal or even sham claims, filed with the hope of participating in recovery where the greater number of cases encourages inattention to the merits of individual cases.

The increase in filing rates begins when potential claimants are encouraged by learning of the possibility of successful litigation. Knowledge is spread through judicial procedures, such as notices of class actions or bankruptcy proceedings, as well as through media coverage and attorney advertising. Early litigation success by some plaintiffs can encourage many additional prospective claimants to become involved.

Efficiencies of scale also provide incentives for mass tort claimants. A law firm's specialization in a particular tort can substantially increase the firm's knowledge of the issues. A high degree of specialization requires an intensive investment of time and expense that could not be supported by

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litigation on behalf of only a few clients, but can become worthwhile if many plaintiffs join the lawsuit. Accumulation of many clients for a particular tort, with its repetitive and familiar litigation, reduces the overall cost of litigation to the plaintiffs. Even the costs of settlement may be reduced. For example, aggregation by multidistrict litigation orders or by class certification may put a small number of lawyers in a position to dispose of thousands or tens of thousands of claims at a single stroke. Once established settlement terms are proffered, the number of claimants may mushroom beyond anyone's expectations.

The sheer number of potential claims creates another dynamic that accelerates mass tort filings. Potential plaintiffs may bring actions they would prefer to defer for fear that a defendant's assets will be exhausted by plaintiffs at the head of the queue. Thus, the aggregative process can accelerate the filing of claims, perhaps at the expense of adequately developing cases.

Defendants employ a variety of responses to the incentives that spur plaintiffs. In some cases, defendants may follow tactics designed to force delay and increase costs, offsetting the potential efficiencies of aggregated or parallel litigation and discouraging further filings. But defendants also may adopt tactics that encourage additional filings. The most encompassing tactics are those that seek consolidation, settlement, and "global peace." Even if a

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suitable procedural vehicle can be found for global settlement, judicial review of the settlement and administration of an approved settlement may be taxing. In the worst circumstances, aggregation for settlement can lead to competition among both attorneys and courts to obtain a settlement that may not best serve the plaintiffs' interests. Short of attempts at global settlement, moreover, defendants—spurred by company-threatening liability—may instead contribute to increased filings by settling cases more quickly and at higher values than they would if the cases were handled as individual tort claims.

All of these dynamics impose extraordinary demands on the judicial system, which currently does not possess all the mechanisms necessary to address them. For instance, at one point over 2,000 asbestos cases were pending before a single district court for the Eastern District of Texas, and new cases were being filed daily. The court observed that at a rate of 30 cases per month, it would take 6 ½ years to dispose of the 2,000 cases pending on its docket. Unfortunately, the court noted, 5,000 new cases would have been filed during that period. Using traditional methods, the district court was facing a 20-year backlog. Moreover, the court observed that over 400 claimants had died while waiting for their cases to be heard. A similar problem in Baltimore prompted the court, through an unusual transfer and consolidation process, to consolidate over 8,500 asbestos cases for trial on common issues.

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The challenges presented by large numbers of parallel claims or actions place strains on existing mechanisms to effect consolidation for discovery and pretrial management, common trial, or settlement. Federal multidistrict litigation procedures apply only to cases that reach the federal courts independently, and support consolidation only for discovery and pretrial procedures. The use of class actions to handle mass torts has also been explored, with mixed results.

Even if aggregation of most or all claims can be achieved in a single court, raising the prospect of coherent and unified disposition, aggregation on this scale can have pervasive consequences. The aggregated plaintiffs may acquire power that dispersed individual plaintiffs would lack, enhancing—and perhaps exaggerating—their underlying substantive rights. It is difficult to fault an enhanced ability to enforce rights. But aggregation often creates an "all or nothing" risk that defendants find unbearable. Defendants point out that in some cases the risk may threaten the very existence of a company, and that such a risk forces settlement even when the defendant believes—perhaps with good reason—that the class claim is weak or the settlement terms are otherwise unjustifiable.

Aggregation, either by formal procedures or by a single firm's accumulation of many clients, provides a further incentive to bring claims.

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Plaintiffs' attorney fees generally consist of a percentage of the aggregate recovery. Even when the percentage is less than the share typically charged in individual cases, the aggregate fees often amount to millions of dollars. Consequently, fee awards are one of the engines driving mass-tort litigation. There has been much public criticism directed at several well-publicized fees. This criticism has found echoes on the bench, at the bar, and in the academy.

These and other factors contribute to the phenomenon of elasticity in mass-tort filings. The extent of these effects is affected by the timing and purpose of the aggregation tools adopted. As noted, aggregation for consolidated discovery and pretrial proceedings has some tendency to increase the number of claims. Aggregation for settlement may increase the number of claims more dramatically, while aggregation for trial may produce an even greater increase. In considering aggregation for any of these different purposes, it is important to evaluate whether the tort has become mature for that purpose, a concept explored in the next section. In some cases, multidistrict consolidation for pretrial purposes may be appropriate even if the litigation has not matured to the point of supporting aggregation for settlement or trial by class action or other means.

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D. The Dynamics of a Mass Tort and the Concept of Maturity

A mass tort case begins with a single tortious incident or the first recognition of harm from exposure to a toxic substance or hazardous product. It then follows a chronological pattern during which the dynamics of case filings evolve. These dynamics are produced by changes during a mass tort's life-cycle as cases are tried, relevant scientific knowledge develops, a consensus for evaluation emerges, and assets from insurance and other sources are marshaled. When multiple cases of a mass tort are tried or settled individually or in small groups, experience and knowledge about the value of particular claims begin to develop, thus aiding the bench and the bar in disposing of the unresolved claims efficiently. At this point, there is little uncertainty concerning liability and the appropriate evaluation of damages, and the mass tort is said to be mature. Claims can then be resolved quickly and with relatively little dispute between the parties.

Allowing a maturation process to occur both establishes and eliminates mass torts. For example, the Bendectin litigation never emerged as a mass tort because early plaintiffs did not achieve the necessary level of success. In a § 1407 consolidation, there was a jury verdict denying general causation. In the repetitive stress claims, § 1407 consolidation was denied and the maturation process has continued in ordinary litigation.

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The lawsuits involving asbestos provide an instructive model of a mature mass tort. The litigation was originally pursued through multiple individual actions. In the early stages of the litigation cycle, plaintiffs handled discovery independently and the defendant manufacturers were generally successful. Eventually, plaintiffs discovered liability documents and science revealed causation evidence that reversed the pattern of litigation, and plaintiffs started to win much more frequently, approaching a 50% victory rate. Ultimately, through repeated trials and settlements, an equilibrium was reached in which the plaintiffs and the defendants understood the limits of liability and the appropriate range of settlement. Maturity afforded the parties the luxury of predictability. Although disputes still persist regarding exposure, causation, and injury in individual cases, those experienced in asbestos litigation can measure the value of an individual claim by comparing it against the background of the earlier cases. Thus, the maturation process is capable of creating mass tort litigation, but also of reducing the cost and difficulty of resolving it. This is reflected in administrative methods for evaluating the caseload of federal judges: asbestos cases are assigned only one-fifth the weight of the average civil action. But even with a reduced burden per case, the sheer number of asbestos cases continues to impose burdens that distort the traditional process.

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As the number of mass torts has increased, aggregation mechanisms have been more vigorously pursued. Courts have employed master complaints and answers, instituted standard sets of interrogatories, allowed the use of depositions from other cases, and required document depositories. If permitted, some courts might attempt to consolidate all cases before one court for pretrial and trial.

Another facet of maturity is illustrated by the silicone gel breast implant litigation, in which some plaintiffs won sizable verdicts early in the litigation cycle. The federal claims were then consolidated for pretrial purposes and soon reached a total of some 10,000 claims. A proposed class settlement attracted still more claims, and the figure ballooned to approximately 300,000 plaintiffs. These events illustrate the differences between aggregation for pretrial purposes and aggregation for settlement. In the breast implant litigation, the movement toward aggregated settlement may have been premature. The aggregation and settlement efforts began before individual trials provided understanding of the nature of the tort, its causative effects, and the applicable science. As a result, there was no established basis for evaluating the thousands of claims. Some defense attorneys recommended undertaking more trials, but defendants faced massive potential liability and chose instead to make a $4.25 billion offer to settle the entire litigation. But

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the offer itself attracted so many claimants that it undermined the proposed settlement. Now the parties are breaking that mass tort into a combination of larger and smaller components for settlement or trial, developing a different type of maturation process through the repetition of smaller-scale settlements.

In summary, the maturation process is often crucial to determining the consequences of mass tort litigation. Many years may be required to develop reliable scientific information to answer the questions raised by exposure to a product or substance. Premature judicial attempts to determine whether injuries are caused by a product or substance can be so unreliable that the nature of the litigation is distorted dramatically.

It should be added that even maturity on all issues in a mass tort does not assure easy or prompt disposition. Substantial difficulties can arise when the defendant's assets, foreseeable revenues, insurance, and other rights of contribution or indemnification appear insufficient to meet its liabilities. Even when plaintiffs, defendants, insurers, and others agree on the value of the underlying claims, disposition may be thwarted by disagreement over who should pay, and in what amounts. These situations can spur a race for the assets in which competing groups strive to preempt the available funds, leaving nothing for others equally deserving.

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E. No Single Problem or Solution

The mass torts phenomenon is complex and multifaceted, and each mass tort presents a unique problem for resolution. The Working Group has considered the input of knowledgeable persons from all points in the political spectrum. It has also studied much of the existing literature on the mass tort phenomenon. *See, e.g.,* Appendix C. After extensive analysis of the problems and potential solutions, the Working Group recognizes that there is no single problem that is subject to a single comprehensive solution. Indeed, practices that prove beneficial for one type of mass tort may prove harmful for another. In addition, the Working Group believes the problems will not subside. On the contrary, the forces that have combined to create the mass torts phenomenon appear only to be increasing.

The difficulty of identifying specific problems arises not only from the multiplicity of events. Mass-tort litigation practices are themselves dynamic. The types of cases change, and the strategies of claim and defense evolve. The procedural vehicles and choices of forum are developed in an effort to avoid old problems or seize new opportunities. Each day's new illustration will be superseded by the next day's innovation.

The Working Group's approach in this Report is to identify commonly perceived problems in mass tort litigation and discuss potential solutions,

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without advocating any particular proposals at this time. If the work of the Working Group is continued, the next step would be to study and debate proposed solutions to determine whether to recommend them for adoption—not as a panacea, but as a collection of remedies to address discrete problems.

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IV. DISCRETE PROBLEMS OF MASS TORTS

Lawyers, judges, academics, and clients view mass torts from different perspectives. Some characterize as problems the procedures and consequences that others characterize as opportunities. Even a gargantuan number of claims may be seen as an opportunity to achieve justice rather than a problem. In addition, what constitutes a problem in one mass tort may not be a problem in another. The following categories identify a number of phenomena that have been viewed as problems by a significant number of experienced mass tort participants and observers. This catalog provides the framework for the description of suggested reforms in Part V.[2]

1. Number of Claims

The most fundamental potential problem is the sheer number of claims involved in mass tort cases. Often lawsuits are filed in several different federal and state courts, but the pattern is one of greater concentration than in purely individualized actions. The sheer number of cases creates pressure for further aggregation. Concentration increases the burdens on the target courts, but also may reduce the burdens on plaintiffs, defendants, and the judicial system as a whole. But it is important to note that lawyers and judges exercising common

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[2]The Working Group and Committee gratefully acknowledges the assistance of the Federal Judicial Center with this section.

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sense and discretion may find informal means to accomplish much of the good that is desired from more formal and coercive devices.

Judge Robert Parker concretely illustrates these problems in chronicling the first two decades of the "odyssey of asbestos litigation in the Eastern District of Texas." He reports that the class action trial over which he presided "consumed 133 days of trial time and produced 25,348 pages of transcript prepared as daily copy. The docket sheet . . . is 529 pages long. The court has entered 373 signed orders." Such cases illustrate the "pressures generated by mass tort litigation" that Judge William Schwarzer finds "are driving the justice system toward comprehensive aggregative procedures."

2. Inherent Subject-Matter Difficulties

Mass torts often present extraordinary substantive difficulties. There may be scientific uncertainty as to whether the activity in question actually caused the injuries claimed by the plaintiffs. In those cases where it is clear that the activity did cause injury, additional doubt may exist as to whether the activity was wrongful. Finally, even when causation and general liability seem clear, difficult issues may remain as to the specific cause and extent of injuries to any particular individual. These subject-matter difficulties are compounded by the potentially huge number of plaintiffs whose claims must be evaluated in any given case.

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3. Cost

There is every reason to believe that as a mass tort matures, substantial efficiencies should be achieved for the disposition of individual claims. The transaction costs of litigation for courts, parties, and counsel should be correspondingly reduced. Yet some evidence suggests the transaction costs often are staggeringly high. By far the most familiar illustration is the RAND study finding that in asbestos cases that closed between January 1, 1980 and August 26, 1982, far less than half of every dollar expended on the litigation was used to compensate asbestos victims. This figure, however, may not be representative of subsequent asbestos litigation or other mass torts. Asbestos litigation commonly involves many defendants in each action. A multiplicity of defendants increases transaction costs concerning each defendant's share of the overall liability. Moreover, the RAND data were derived from a period before asbestos litigation matured. Subsequent developments in the litigation may well have reduced transaction costs for all parties. For instance, defense ventures such as the Asbestos Claims Facility and the Center for Claims Resolution came into existence, well-established settlement values developed, and multidistrict proceedings were ordered for the federal cases. These factors, all of which developed with the maturity of the asbestos litigation, were not

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considered in the RAND study. Nevertheless, the cost of mass torts is a pressing issue that deserves continued attention.

4. Delay

Some degree of delay would seem inevitable when a massive number of claims are processed. However, the data on this issue are difficult to interpret. Asbestos cases, for example, raise legitimate concerns about whether some plaintiffs are de facto denied any meaningful access to court. Conversely, some argue that excessive attention is devoted to claimants who have no present physical impairment at the expense of those with a greater need for prompt compensation—relatively swift justice may be provided those who need it least, but denied those who need it most.

The length of the plaintiffs' queue in some proceedings raises significant questions of fairness and meaningful access to the courts, as illustrated by Judge Parker's due process analysis in the *Cimino* asbestos litigation[3]: "Unless this plan or some other procedure that permits damages to be adjudicated in the aggregate is approved, . . . plaintiffs are facing a 100% confidence level of being denied access to the courts." The human consequences of such delays can be dramatic: Judge Parker noted that "[f]our

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[3]*Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *reversed*, 151 F.3d 297 (5th Cir. 1998).

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hundred and forty-eight members of the [*Cimino*] class have died waiting for their cases to be heard."

It is important to keep alive the prospect of speedy relief for those who are seriously injured or whose dependents require immediate support. It also is important to achieve prompt disposition of enough individual cases on the merits to prompt the settlement of other cases. Balancing these two conflicting goals can be problematic in many cases.

5. Coordination

Coordination among courts can have many benefits. In some mass tort litigation, high levels of cooperation and coordination have been achieved among many courts. But even the successful experiences have been marred by the unwillingness of some courts to cooperate. Excessive discovery redundancy—the most easily avoided problem—is wasteful, especially if it extends to duplicating document depositories. Moreover, such duplication sometimes has the self-defeating effect of inducing conflicting privilege rulings. On the other hand, discovery redundancy has in some cases hastened the maturation process because different approaches flush out different bundles of information. Another problem involves conflicting scheduling orders, which can hinder a party's ability to proceed. When one of several codefendants initiates bankruptcy proceedings, there may be delays that work

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to benefit or harm other parties. Insurance-coverage disputes may be virtually immune to coordination and may hobble settlement of the underlying liabilities.

6. Forum Shopping

A basic pattern, familiar in general practice but more visible in mass torts, involves selection of a court that has proved beneficial to the party choosing the forum. Some lawyers, particularly defense lawyers, believe a relatively small number of courts have demonstrated such a pro-plaintiff bias that many plaintiffs' lawyers select them solely for forum-shopping purposes. Different plaintiffs' lawyers may even compete against each other in the same litigation by choosing conflicting forums. For their part, plaintiffs' lawyers who represent individuals rather than class plaintiffs have argued that current forum selection practices benefit lawyers who represent large aggregations of plaintiffs in class actions or multidistrict proceedings, and that in some cases plaintiff and defense counsel agree to select a cooperative court that will bless a settlement undercutting the true interests of the plaintiffs. A variation on this practice is known as the "reverse auction," in which a defendant plays off competing plaintiffs' lawyers to finally settle with the one whose terms are most favorable to the defendant, and then finds a court that will approve the

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deal. In addition to enabling this type of collusive settlement, forum shopping can aggravate choice-of-law problems.

7. Fraudulent Joinder

Some plaintiffs may join marginal defendants to defeat federal diversity jurisdiction and keep cases in state court. Defendants argue that more rigorous enforcement or sophisticated development of the "fraudulent joinder" rules could eliminate this abusive means of defeating removal.

8. Future Claimants

Particularly troublesome problems arise from injuries that may not become manifest until many years after exposure to the causal event. Injuries from exposure to asbestos, for example, may not occur until decades have passed. The resulting substantive law issues include whether remedies should be awarded to "exposure-only" victims for medical monitoring, fear of future injury, and risk of future injury. A related problem is that statutes of limitations may force plaintiffs to file claims before the fact or extent of injury can be known, substantially expanding the number of claims filed. These accelerated filings lead to the problem, already noted, of finding methods to defer consideration of plaintiffs with no present needs in favor of those who have serious present injuries.

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The mirror image of these questions arises from the desire of defendants to achieve closure—to buy "global peace"—by resolving all present and future claims at once. Any procedure that would purport to bind future claimants would have to provide them with adequate representation and at least some form of notice. Representation problems arise partly from the difficulty of finding lawyers who are experienced, capable of vigorously litigating the claims, and free from disabling conflicts between present and future claimants. It also is difficult, if not impossible, to provide meaningful notice to people who may not even be aware of their past exposure. It has been suggested that one means of addressing this problem might be to follow the approach of Rule 23(b)(3) class actions by providing future claimants an opportunity to opt out of a settlement or even a litigated judgment after they become aware of actual injury. But such opt-out provisions raise questions of their own, and could discourage settlement by making global peace difficult, if not impossible, for defendants to obtain.

Another concern arises when there is a perceptible risk that a defendant lacks sufficient assets to compensate fully all present and future claimants. Inclusion of future claimants becomes a question not merely of achieving peace for the defendant but also of ensuring that future claimants have an opportunity for compensation reasonably equal to that of present claimants.

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9. Discovery

An exclusive focus on the results of trials obscures another important aspect of maturity: the maturation of discovery. In complex mass torts, discovery may require some degree of repetition to ensure that all important information has been uncovered. Premature consolidation may foreclose a desirable series of attempts to uncover information by differently conceived means. On the other hand, redundancy in discovery can lead to waste and inconsistent rulings on questions of privilege and admissibility.

10. Uncertain Liability and Causation and Aggregation

Mass torts frequently involve uncertain evidence of liability and causation. Aggregation that induces a sharp increase in the number of claims may so augment the consequences of losing to weak but admissible scientific evidence that defendants feel coerced to settle. Defendants in this position typically believe they are victims of unfair procedures. On the other hand, plaintiffs may sell peace to the defendant by settling at a price below the level that would be supported by better-developed science or better discovery.

Accordingly, aggregation before liability and causation information is developed through litigation can generate undue pressures on both sides. Recognizing the need for demonstrated outcomes in the maturation process, many courts have selected "representative" cases for trial as a prelude to

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attempts to dispatch large numbers of claims on a more aggregated basis. These efforts have met with mixed success.

11. Science Issues

Judicial determination of scientific issues raises special problems. Plaintiffs in mass exposure cases may display injuries indistinguishable from those suffered by people who have not been exposed. There may be no identifiable physical causal chain but only a correlation based on solid statistical information or less rigorous projections. When large populations have experienced the exposure, it is possible, at considerable expense and usually after a lengthy period of time, to develop reliable epidemiological evidence to support or refute the causal claim. Otherwise, competing studies are likely to prove inconclusive or, as some have claimed, to favor the arguments of their sponsors. Legal rules demand a level of certainty that science cannot deliver immediately and often cannot deliver at all.

Attempted solutions have included court-appointed experts, establishment of "scientific panels," and postponement of proceedings to await the gathering of new scientific evidence. More sweeping proposals would establish blue-ribbon juries of scientific experts, or some form of a "bill of peace" initiated by a defendant to establish a single resolution binding on all parties in all courts. While these procedures might alleviate somewhat

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defendants' fears of being made victims of "junk science," plaintiffs respond that defendants are seeking to hide behind a smokescreen of hypercautious "scientific method." Moreover, there remains the prospect that court-appointed experts or scientific panels in different cases may reach inconsistent conclusions.

12. Class Actions

When Civil Rule 23 was revised in 1966, it was thought that even the opt-out class established by new subdivision (b)(3) would seldom if ever be suitable for single-event mass accidents. There was no thought that the mandatory class provision of subdivision (b)(1) might be used, and no thought that dispersed mass torts might be fit into the class-action mold. The pressures to dispose of large-scale claims have led to attempts to adapt Rule 23 to these unforeseen uses. These attempts have met with varying acceptance, and increasingly have been criticized as undermining traditional values of individual representation and participation. The criticisms question the adequacy of notice and representation, insist that the ability to opt out is essential, and doubt the ability to participate meaningfully in hearings to measure the fairness of proposed settlements. At the same time, others maintain that class actions, including judicial review of the terms and distribution of settlements, provide more adequate representation for individual

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claimants than may result from formally individual attorney-client relationships. Class actions also are offered as the only hope for achieving global resolution, with arguments that the *Amchem* decision has raised undesirable barriers to certification and settlement.

13. Premature/Delayed Aggregation

The need to measure the maturity required to support aggregation for any particular purpose is a theme that pervades many of the discrete problems described in this catalog. Some cases may be aggregated too soon for discovery, settlement, or trial. Other cases may be aggregated too late. In either circumstance, plaintiffs and defendants may suffer as a result.

Premature aggregation may cause plaintiffs to lose the benefits of independent discovery efforts and may force resolution on an aggregated basis—usually by settlement—before it can be known whether discovery is complete. Similarly, plaintiffs who desire individual trials may lose their day in court because of a global settlement, class action, or consolidated trial. In addition, plaintiffs in a prematurely aggregated mass tort may be denied appropriate compensation.

On the other hand, premature aggregation can sometimes create an unfair advantage for plaintiffs by raising the stakes of the litigation to such a high level that defendants feel compelled to settle, even if plaintiffs' claims are

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baseless or inflated. To do otherwise is to risk a "bet your company" trial. The pressure to settle is particularly acute—and seems especially unfair—when difficult scientific issues of causation have not been tested through the maturation process.

There also are risks associated with delayed aggregation. Without some degree of consolidation, parties on both sides may face excessive and duplicative discovery, competing forums for case resolutions, questionable attorneys' fees, and conflicting evaluations of scientific evidence. Ideally, procedural reform would create mechanisms to obtain full and fair adjudication without the excesses of redundant legal process.

14. Limited Funds

Occasionally, defendants lack sufficient funds to compensate all claimants or even to defend themselves adequately against the avalanche of claims. The problem of limited funds is exacerbated by the potential for excessive transaction costs and the presence of "future" claimants. For some defendants, the only option is bankruptcy, which raises additional problems of venue, transaction costs, delay, and administration. Others have attempted to use the Rule 23(b)(1)(B) limited fund class action, with mixed results.

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15. Closure

It is often difficult to achieve closure in a mass torts case. While defendants are typically prepared to pay a premium to obtain global peace, certifying and settling a large class action under Rule 23(b)(3) for global peace may be more difficult after *Amchem* and may be unachievable for future claimants. Other obstacles to global resolution include separate representation for subclasses that hinder negotiation, the existence of opt-out plaintiffs, and the depletion of funds by individual plaintiffs. Certification and settlement of a mandatory class under Rule 23(b)(1)(B) or (b)(2) may also be difficult to achieve.

16. Choice of Law

Choice-of-law problems are likely whenever a common course of activity affects people in multiple jurisdictions. These problems are aggravated when the activity itself was pursued in several different states. Although the resulting difficulties are similar in some respects to ordinary tort choice-of-law problems, the multiplication of dispersed injuries and lawsuits increases the likelihood that different laws will be applied to the same conduct, yielding inconsistent results. The applicability of up to fifty different bodies of common and statutory law has made it difficult to resolve all the cases in a mass tort under one legal standard. Highly visible inconsistencies raise serious

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questions about equal treatment, which is an inevitable consequence of state lawmaking independence.

Given the problems of contemporary choice-of-law methodologies, it seems unlikely that a single set of choice-of-law rules will govern mass torts unless federal legislation is enacted. Aggregated proceedings have witnessed several brief but unsuccessful attempts to develop a federal common law or "consensus law." Arguably, such attempts infringe traditional policies of federalism and individual autonomy. In some class actions, certification has been denied when different governing laws defeat commonality. So far, the only truly effective approach has been the use of settlements that are thought to obviate the need to choose the law of a particular state, thus circumventing the choice-of-law problem.

17. Attorney Appointment and Conduct

An intense rivalry exists between attorneys who represent individual clients and those who seek aggregation. Individual-client attorneys accuse the aggregation attorneys of disregarding the interests of claimants with whom they have no relationship. They also object that the same few attorneys are repeatedly appointed to managing committees, leading to a repetition of settlements without trial. In response, aggregation attorneys contend there is no real relationship when an "individual client" is represented by an attorney

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who has an inventory of thousands of clients. They criticize attorneys who settle claims of many clients on an administrative-like grid schedule but charge contingent fees as if there were a serious contingency. Attorneys on all sides complain of conflicts of interest, whether because a class is defined too broadly, members of a multidistrict management committee represent too few clients, or individual-client lawyers proceed simultaneously on behalf of too many clients. Another source of controversy is the method by which plaintiffs' lawyers distribute group settlement funds to individual claimants.

18. Attorney Compensation

Some mass torts have generated significant fees for plaintiffs' attorneys; all have generated large volumes of lucrative work for defense attorneys. Some observers have expressed concern over the huge sums generated in plaintiffs' attorney fees, arguing that after a mass tort has matured, the fees recovered bear no reasonable relationship to either the risks incurred or the effort expended. A share of a common-fund recovery that seems low in comparison to the contingent-fee percentages of individual litigation may nonetheless generate astonishing sums. Similarly, the collection of individual-client contingent fees at an ordinary tort rate even after there is no realistic contingency, at a time when each client represents an assured recovery for generally minimal effort, can produce seemingly excessive fees. The impulse

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to distribute more of this money to the tort victims themselves is readily understandable. But any system addressing these issues must recognize that matters stand differently at the outset of a potential mass tort. In some cases, plaintiffs' lawyers invest large sums in developing the common case and are genuinely at risk of losing millions of dollars if the putative tort never matures. Low-level electromagnetic radiation and repetitive-stress injury cases, for example, have not become mass torts. Other investments succeed and repay the costs of the losing ventures.

Concerns also have been voiced with respect to defendants' attorney fees. Some believe that agency problems tempt some defense lawyers to defer resolution of mass-tort litigation in order to augment hourly fees.

A related attorney-fee problem arises from aggregation of claims. Large aggregations, including multidistrict proceedings and class actions, ordinarily result in appointment of management or steering committees to control the large numbers of competing lawyers. A multidistrict discovery program, for example, may require the investment of millions of dollars by a steering committee to conduct discovery in the expectation that the common effort will benefit all claimants. One means of compensation has been to impose a "tax" on individual recoveries, whether by litigation or settlement,

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payable to the discovery lawyers. Efforts at consolidation or coordination should address the need to finance such centralized activities.

19. Plaintiff and Defense Strategies

One defense tactic, often fueled by realistic fear of a devastating defeat, is "scorched earth" litigation in which defendants expend enormous resources litigating early cases. The cost of such a defense is so high that it can be justified only by its impact on other, prospective cases. This strategy, plaintiffs argue, is designed to intimidate them and exhaust their resources. Defendants respond that plaintiffs engage in a similarly disingenuous "piling on" strategy in which thousands of claims, many of them of marginal validity, are filed solely to increase the defendants' transaction costs and coerce settlement.

20. Disputes Among Defendants and Insurers

Insurance coverage disputes add another dimension to the litigation of mass torts. Contribution actions, the complexities of releases, assignment of comparative responsibility, and adequacy of settlement are all prominent problems. Furthermore, conflicts often develop between defendants and their insurers or among multiple insurers of the same defendant. Frequently, these disputes are more contentious than the original plaintiff-defendant controversy.

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21. Statutes of Limitations

Because state law controls, plaintiffs alleging injury from the same underlying tort may face varying statutes of limitations and statutes of repose in different jurisdictions. As a result, plaintiffs may be required to file claims prematurely in some jurisdictions. The need to file prematurely is aggravated in mass torts involving latent diseases, where plaintiffs' conditions may become manifest at widely disparate times.

22. Damages

Variations in compensatory damages sometimes result from differences in state law on such issues as whether to permit damages for medical monitoring in the absence of current harm, for the risk of future harm, and for the fear of future harm. Other variations are the inevitable consequence of conducting individualized proceedings. For instance, it is not unusual for one judge or jury to award more money to a person who has little present injury but emphasizes the fear of future harm, while another judge or jury awards less money to a person with a more serious current condition.

23. Punitive Damages

Punitive damages generally are governed by the substantive laws of the different states. Dispersed mass torts aggravate the problems of multiple awards and choice of law. But an even more pressing issue is the risk that

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punitive damages awarded in a small portion of the cases may deplete funds available for compensatory damages for many other victims.

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V. POTENTIAL SOLUTIONS FOR CONSIDERATION

A. Competing Views and Possible Approaches

There is good reason to pursue opportunities to improve our handling of mass torts. But this recommendation does not rest on a confident conclusion that the time has come for deliberate and centralized reform. The most thoughtful participants in recent mass tort litigation have emerged with quite different views on the need or lack of need for reform. There are four competing views to recognize before turning to a description of the proposals that seem the most promising.

The first view is that if anything, there has been too much "reform" already. Proponents of this view believe traditional litigation on an individual-plaintiff basis remains the best means of achieving justice for all parties. Judicial efforts to achieve aggregated disposition have at times impeded just and speedy remedies for the tort victims who have the strongest claims. This view would discourage continued resort to procedures that bring unwilling claimants into a single proceeding.

The second view is that our judicial systems are now engaged in a desirable process of common-law evolution. With the aid of a growing corps of experienced mass-tort litigators, state and federal courts continue to experiment with existing procedures and allocations of jurisdiction. The

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underlying problems are so complex, and the differences that distinguish each successive mass tort are so great, that neither rulemakers nor legislators can advance the process. The time has not yet come to identify the most successful practices and generalize them by rule or statute.

The third view is the most critical of present practices. This view despairs of addressing mass torts through adversary litigation in court. Reform must come through adoption of new substantive principles and procedures to supplement a tort system that was designed primarily for individual litigation. According to this position, administration of the new substantive principles might be confided to agencies quite different from courts. The Working Group believes that although there may be some merit to such proposals, they should be pursued through legislative processes alone. Reform on this scale is not the province of Third Branch agencies.

The fourth view, which the Working Group recommends, is that further study is desirable to determine whether it is possible to improve the ways in which courts respond to mass torts. The approaches to improvement may be incremental and discrete. Given our present court structure, individualized adjudication of individual claims might not be a realistic possibility in some mass torts. The impossibility of individualized adjudication can often shape the terms of the settlements that dispose of most claims and can alter the form

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and outcome of any attempted consolidation. One goal would be to reduce the transaction costs of determining whether there has been a tort and of providing remedies to victims when a tort is demonstrated. Such an approach would maximize the possibility of achieving consistent outcomes, both with respect to liability issues and with respect to levels of compensation for comparable injuries. In addition, further study might develop better ways to achieve closure and to ensure fair allocation of limited funds among deserving plaintiffs. And all those involved, plaintiffs and defendants, would be protected against procedures creating pressure for premature settlement.

The following discussion is premised on the view that further study is warranted. This view does not rest on a Pollyanna-like denial of the difficulty, perhaps even intransigence, of the problems mass torts pose. Nor does it rest on a firm conclusion that in the end any changes should be made by legislation or rules amendments. It expresses only the faith that the game is worth the candle—that the possibility of finding improvements justifies the risk of failure.

Many proposals for reform have been advanced during the Working Group's hearings and deliberations. Rough drafts and outlines have been prepared to illustrate possible approaches to many of the most frequently identified problems. Appendix F contains these materials, which have not

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been developed to a point that would support present recommendations. Other, more developed proposals have been introduced as bills in Congress or as drafts for consideration in the rulemaking process. All of these proposals should remain open for consideration in any further study, along with any new proposals that may emerge. But the Working Group believes it could be profitable to identify some of the proposals that may best repay further study in the near and intermediate terms. These proposals are loosely grouped around several topics in the following pages.

The topic groups do not always respond to obvious allocations between legislative and rulemaking processes. The underlying problems interdependently affect substantive law, federal and state jurisdiction, and procedure. Satisfactory development of workable solutions may require new means of coordination between Congress and the Rules Enabling Act process, with sympathetic cooperation from state institutions as well.

B. Multidistrict Litigation Statute Proposals

Judges and lawyers have accumulated many years of experience practicing under 28 U.S.C. § 1407, the multidistrict litigation statute allowing consolidation of cases in the federal courts for pretrial proceedings. This experience constitutes the foundation for a variety of reform proposals.

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The Judicial Conference has already approved two distinct proposals to amend § 1407. In September 1998, the Judicial Conference recommended that § 1407 be amended to establish judicial authority to transfer for trial as well as for pretrial proceedings. This legislation would empower a transferee judge to order consolidation of an MDL proceeding for trial, free from the "where it might have been brought" limitation of 28 U.S.C. § 1404. In addition, the Judicial Conference has recommended approval of a multiparty-multiforum litigation statute that has been considered by Congress in several successive forms. The statute would facilitate consolidation in federal court of all actions arising out of a "single event" mass tort. There is no need for any Judicial Conference Committee to study these proposals further, except as part of the framework for studying related proposals.

Another possible § 1407 amendment would allow appointment of an MDL transferee judge as a judge of any district to manage bankruptcy proceedings involving a party to the MDL proceedings. The MDL judge could coordinate the bankruptcy proceedings with other proceedings without altering the operation of the bankruptcy venue rules.

Section 1407 also could be amended to recognize explicitly the transferee judge's authority to invite cooperation of state courts in coordinated discovery proceedings. The amendment could expressly authorize

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appointment of a special master to assist in coordinating discovery in all courts. The amendment also might provide means to support state courts that want to admit into evidence the coordinated discovery materials as if the discovery had been obtained under state rules.

Still farther-reaching § 1407 models also have been advanced, two of which are set out in Appendix F. One, prepared by Judge William Schwarzer, would amend § 1407 to allow the Judicial Panel on Multidistrict Litigation to remove state actions for consolidation with federal cases being consolidated under § 1407. Such removal would be for discovery only; if the federal court were to seek final pretrial disposition of a claim or defense, it would have to remand the question to state court for a ruling on that issue. The second model would establish a new § 1407A allowing the Judicial Panel on Multidistrict Litigation to consolidate discovery proceedings in either a federal or a state court, and addressing other issues such as applicable discovery rules, use of discovery information in evidence, and assessment of expenses.

C. Forum Competition Proposals

A common event or series of related events often gives rise to simultaneous litigation in several forums, including both state and federal courts. Although a variety of procedural rules have been devised to address parallel litigation, the full arsenal of weapons may not be entirely satisfactory

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even for small-scale duplication. The problems may be magnified when litigants in parallel proceedings seek large-scale aggregation of multiple claims. One response has been certification of a nationwide class action designed to achieve a single, coherent disposition of all claims. Both state and federal courts have certified nationwide classes, raising doubts whether it is appropriate for a single state to undertake disposition of litigation predominantly involving events, victims, defendants, and law in other states. Congress has begun to deliberate bills designed to limit state-court class actions to matters that primarily affect the forum state. These bills implicate highly sensitive concerns of federalism but deserve careful study and development.

In some cases, outright competition among courts may result when a class action is aggregated into a multistate, national, or even international class of plaintiffs. It is problematic enough if a litigant, disappointed by the refusal of one court to approve an aggregation, seeks to persuade a second or third court to approve substantially the same aggregation. It is worse if two or more courts enter a race to be first to achieve a disposition binding on all courts—the risk is considerable that speedy justice may be converted into speedy injustice. This risk is aggravated by the "reverse auction" scenario discussed previously, in which a defendant may play would-be class representatives off against each

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other, bidding down the terms of settlement to the lowest level that can win approval by the most complaisant available court.

Relatively modest measures have been proposed to reduce competition among class-action courts. For example, a limited proposal would address the "reverse-auction" problem by prohibiting defendants from asking a second court to approve a settlement substantially similar to a settlement rejected by a first court. A more comprehensive measure would treat a federal class as a res within federal jurisdiction and prohibit interference with the res by certification of an overlapping class in another state or federal court. This approach could be extended to preclude any court from certifying a class substantially similar to a class that a federal or state court has previously refused to certify. More elaborate arrangements also might be devised. Most or all of these proposals are likely to be more suitable for legislation than for rulemaking.

The problem of forum competition could also be addressed by legislation or procedural rules forbidding the pursuit of overlapping actions and attempting to ensure common control in one court of all claims arising from a particular mass tort. If this approach were considered, it would be crucial to ensure that common control did not undermine a "natural" development of maturity through the resolution of individual claims, perhaps in different courts. It also would be important that federal courts not be used as a magnet

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to attract more mass torts litigation than their resources can handle effectively. The price to be paid for effective control could be high, as illustrated by the model in Appendix F.

A different approach could recognize that state courts might be superior to federal courts as fora for some mass-tort actions. Most mass-tort issues are governed by state law. State courts also have far more judges than the federal judiciary, better enabling them to resolve the individual issues that affect particular claimants. A simple model for a state transfer statute, perhaps along the lines of the Uniform Transfer of Litigation Act, could prove useful. A more ambitious model is exemplified by the American Law Institute Complex Litigation Project.

D. Class Action Proposals

Class actions remain the focus of many reform proposals. The class action device is a powerful form of aggregation requiring special attention to problems of maturity. Conscious of this fact, the Civil Rules Advisory Committee has developed and continues to consider a draft Rule 23 amendment that would emphasize the need to consider maturity as a class-certification factor. Among other models developed by the Advisory Committee, three may be offered to represent the many approaches that have been considered.

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One approach consists of an opt-in class provision that might help resolve mass torts. The draft proposal would establish a means of permissive plaintiff joinder that builds upon the familiarity of class-action procedure. It is unclear whether the incentives of greater efficiency would encourage lawyers representing individual mass-tort claimants to take advantage of joinder by these means. Defendants assert that settlement of opt-in class claims would be impossible because each successive settlement would establish a floor that must be exceeded to obtain the next settlement.

One of the two most contentious developments in class-action practice has been the persistence of attempts to certify mass-tort classes solely for the purpose of settlement, with or without the right to opt out of the class. Many of the issues presented by such "settlement-only" classes extend beyond mass-tort classes to reach general class-action practice. In addition, there has been some evidence suggesting that beneficial settlement efforts have been chilled by reaction to the problems arising from attempted settlements of mass-tort classes. The Advisory Committee is studying the possibility of amending Rule 23 to permit certification of a class for settlement without regard to whether the same class could be certified for trial. It also is evaluating additional proposals, such as establishing specific criteria for reviewing proposed settlements, supporting objections by class members, and building

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safeguards into the settlement-negotiation process. The determination whether to propose prompt amendments will be influenced by continued assessment of district and appellate court reactions to the *Amchem* decision.

Even greater difficulties are presented by the issue of certifying a class of plaintiffs who will experience injury only in the future. Although the Advisory Committee has held resolution of these problems in abeyance, it is likely that realistic, workable answers will be found only through a combination of legislation and implementing procedural rules. A sketch of the possibilities is provided in Appendix F.

E. Bankruptcy Proposals

The National Bankruptcy Review Commission has proposed a model for resolving in bankruptcy mass-tort claims in general, and future mass-tort claims in particular. Under this proposal, a reorganization proceeding could be initiated without a showing of insolvency. The proposal is presented largely as a means of establishing more satisfactory answers to questions that have divided courts in current practice, including the appointment of a mass-future-claims representative and the use of a channeling injunction. The most difficult unanswered question is how to find a means to achieve reasonably reliable estimations of the number, severity, and value of future claims. Caution would have to be exercised to ensure that reorganization does not

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become a means of "resolving" mass tort claims prematurely, and without occasion for reorganization apart from the difficult-to-estimate prospect of potentially crippling tort liability. The relevant portion of the Review Commission's report is set out in Appendix F.

The possible emergence of "prepackaged" bankruptcy reorganizations also warrants consideration. In the purest form adaptable to mass torts, a reorganization could "pass through" all other obligations while resolving—and establishing outer liability limits for—only a mass-tort obligation. This procedure could achieve the same effects as a mandatory, no-opt-out settlement class. An important point for study will be a comparison between bankruptcy procedures and the procedures that now apply, or that might be developed, to regulate class-action practice.

The bankruptcy authority also might support other approaches. One model, outlined in Appendix F, would exercise the bankruptcy authority to establish a mechanism that does not fall under the heading "bankruptcy" and is not administered in the bankruptcy courts. This alternative would authorize district courts to exercise, in a civil action, such familiar bankruptcy procedures and remedies as single-court control of all claims through injunctions against rival proceedings and centralized disposition of common issues. But it would still permit individual proceedings—often in other tribunals—on individual

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issues. A variation on this approach might be to rely on the bankruptcy authority as additional support for legislative adoption of a mandatory class action procedure.

F. Science Issue Proposals

There remains considerable cause for dissatisfaction with existing methods of resolving scientific uncertainty in adversary litigation. The dissatisfaction grows in mass tort cases, which may involve repeated trials of complex scientific issues, replete with conflicting testimony—more accurately described as advocacy—by expert witnesses, and inconsistent outcomes. Fundamental restructuring of expert-witness procedures in state and federal courts is not likely to happen soon, nor is it a matter of peculiar concern for mass tort litigation. But practice continues to evolve, spurred in part by formal Evidence Rules amendments and continuing study by Judicial Conference Committees. There is room in this process to study the unique problems posed by mass torts. Ongoing efforts to develop court-appointed panels of neutral experts, whose findings would be admissible in all actions growing out of a common mass tort, may pave the way to more formal rules. Another proposal that has been made is to develop an "issue class action" that resolves common scientific issues for all victims of a putative mass tort. More imaginative approaches, such as the "bill of peace" proposal, are described in Appendix F.

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G. Attorney Selection, Compensation, and Ethics Proposals

It has been suggested that courts should assert greater control over the selection of the attorneys who represent aggregated plaintiffs, particularly in class actions. Increased control over attorney fees might also be desirable, not only for class action representation but for other aspects of aggregated representation as well. Rough models of class-action attorney selection and regulation are included in Appendix F.

The rules of professional responsibility have been framed primarily against the model in which a single attorney represents a single client. There is no indication that these rules have been shirked by attorneys who have taken on representation of multiple clients by any of the means that have developed in mass tort litigation. But serious questions persist. The American Bar Association should be encouraged to launch a study of the ethics of representing aggregated clients, either as part of its Ethics 2000 project or as an independent project. The study could include class actions, consolidated multidistrict proceedings, and representation of multiple individual clients.

The study of class actions might explore such issues as the fiduciary obligations owed by class counsel to class members who do not participate as class representatives, to class members whose interests diverge from those of other class members, and to class members who object to a particular course of

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action or to a settlement. Exploration of these and related issues could provide invaluable assistance to further consideration of Rule 23 in the ongoing rulemaking process.

Simultaneous representation of two or three clients in related matters has been studied extensively. Study of mass tort litigation, however, could extend consideration to the rules of professional responsibility that should govern representation of thousands or even tens of thousands of clients by a single firm.

Consolidated multidistrict proceedings may generate still more complex problems of professional responsibility. Counsel appointed to a steering committee commonly represent individual clients, but become responsible for the litigation of clients who are represented by other attorneys. Here too, it is important to learn whether adherence to present concepts of professional responsibility provides adequate guidance.

H. Limitations Proposals

Mass-tort claims generally are governed by state law, including state statutes of limitations. As noted, it is widely believed that the limitations statutes of many states encourage or require the premature filing of claims that would better be deferred pending greater maturity. There have been suggestions to study, and possibly reform, state limitations doctrine.

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Development of model state statute provisions might be a possible form of encouragement.

Some have asserted that federal answers also deserve study, although the difficulties may prove insurmountable. There is little reason to advocate federal preemption of limitations law for all tort claims. But if federal legislation were limited to mass torts, it would be necessary to define the circumstances that establish a "mass tort," ousting state law and bringing federal law to bear. Many other difficulties would have be overcome as well if this approach were to be pursued.

A more drastic departure from familiar models has been proposed to establish a formal registry system that would enable potential claimants to identify themselves, thus tolling the limitations period, without actually filing suit. Such an approach could yield significant benefits in cases that hinge on exposure to a product or contaminant that does not injure all of those exposed. Registration could identify the universe of potential claimants and enable a better-informed comparison of the number of claims to the amount of assets available for compensation. Full realization of these benefits, however, might require the parallel development of structured remedies delaying full compensation for those presently injured until such a comparison could be made.

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I. Punitive Damage Proposals

Punitive damages, by definition, are intended to punish and deter wrongdoers rather than to compensate victims. Some have suggested that it is possible to achieve a rational measure of punitive damages in civil litigation among private parties only if all relevant factors are considered in one proceeding that leads to a single award. The present system, which allows multiple awards in the seemingly random assessment of many different actions in many different court systems, is not well equipped to encourage a comprehensive punitive damages award.

Punitive damages reform could come in many forms. Reform legislation has been introduced in Congress. A congressional bill and other proposals are included in Appendix F to illustrate some of the approaches that might be followed.

J. Choice of Law Proposals

As noted, mass-tort claims generally are governed by state law. In all but the most singularly concentrated events, different states are involved and different laws may be chosen to govern the same tort. A federal court is bound to struggle with the frequently vague choice-of-law methods of the state in which it sits. Even if all claims arising from a mass tort are brought before a single court, the court may have to apply the laws of several different states or

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do violence to the governing choice-of-law rules. In this setting, a federal choice-of-law statute has been proposed to reduce the uncertainties faced by parties, attorneys, and judges.

One proposal would be to regularize the methods used by state and federal courts to choose governing law, with the hope of reducing the extent to which choice of forum controls choice of law. A different approach would be to facilitate aggregation—and particularly class actions—by reducing the variations of substantive law that undermine commonality. The most ambitious proposal would be to provide a mechanism to choose a single, coherent body of law to govern all tort claims and defenses arising out of a common course of conduct. Any proposal so ambitious would be highly controversial, both as to the means of choosing and the basic notion that one law should be chosen. The debate would be whether it is better to recognize the traditional and still-precious freedom of different states to provide different answers to the same tort-law questions, or whether it would be better to treat alike all those whose rights are affected by the same multistate course of conduct. Possible choice-of-law models are set out in Appendix F.

K. Court Management Proposals

Many judges, lawyers, and law professors have suggested that mass-tort practice would be aided by further development of the *Manual for Complex*

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Litigation. A Board of Editors has been appointed to update the *Manual.* If the Board sees fit, it would be helpful to devote particular attention to the proper timing for different methods of aggregation, the methods for determining the maturity of claims for multidistrict consolidation, and the problems raised by class-action treatment, "global peace" settlements, and other devices.

L. State-Court Coordination Proposals

Some states have adopted measures facilitating intrastate consolidation of related litigation. The California and New Jersey schemes are set out in Appendix F. Consideration of similar reforms by all states should be studied. If such schemes are wisely administered and avoid the risks of premature consolidation, their widespread adoption might ease coordination of mass-tort litigation among state courts and federal courts.

Consideration also should be given to federal legislation to fund mass-tort coordination undertakings by the State Justice Institute. The Institute has been an effective force in this area and could provide assistance to state courts in ways that would also reduce the burdens imposed on federal courts.

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VI. PROTOCOL FOR FURTHER ACTION

As a result of its work, the Working Group believes the problems generated by the mass torts phenomenon are far-reaching. If these problems are to be studied at all, they should be addressed in a coordinated effort by Congress, the Judicial Conference, the Judicial Panel on Multidistrict Litigation, and the Federal Judicial Center. The Working Group believes that its members and the Civil Rules Advisory Committee represent the best source of experience and expertise to coordinate this effort. The Working Group further believes that additional study is worth undertaking, even if the ultimate conclusion may be that no immediate reform is called for.

For these reasons, the Working Group recommends that the Chief Justice appoint an Ad Hoc Committee on Mass Torts to continue the work of the Working Group and to spearhead a coordinated effort to address the problems with specific recommendations for (1) legislation; (2) rules; (3) guidance through additions to the *Manual for Complex Litigation* as well as through other media; and (4) education. Because the effort must be coordinated, efficiency suggests that the Ad Hoc Committee be given authority as follows:

(1) On proposed legislation addressing mass torts problems, to draft the proposals, consulting with congressional committees and receiving

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input from the interested Judicial Conference committees through liaison members of the Ad Hoc Committee, and to present the proposals directly to the Judicial Conference for review and approval for presentation to the responsible committees of Congress.

(2) On proposed rules, to present recommendations to the appropriate rules advisory committee for processing in the normal course and forwarding to the Standing Committee, the Judicial Conference, the Supreme Court, and Congress for approval.

(3) On Rules of Procedure of the Judicial Panel on Multidistrict Litigation, to make recommendations directly to the Panel for its consideration in the normal course of rulemaking.

(4) And finally, on recommendations for additions to the *Manual for Complex Litigation* and for the education and training of judges, to make proposals directly to the groups and persons involved.

In addition, the Ad Hoc Committee on Mass Torts would, before each meeting of the Judicial Conference, report to the Conference on its work as it progresses, recognizing that the Chief Justice might elect to end the Ad Hoc Committee's work at any time. It is believed that a package of proposals could be completed in relatively short order, but that the process of implementation would surely take longer.

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Regarding the membership of the Ad Hoc Committee, the Working Group recommends that the Chief Justice consider continuing with many of those who formed the Working Group, with minor additions to provide for additional knowledge and experience. The Working Group thus recommends that the Ad Hoc Committee include:

1. Two members of the Civil Rules Advisory Committee and its chair who, *ex officio*, might also chair the Ad Hoc Committee;

2. The chair of the Committee on Rules of Practice and Procedure or his designee;

3. The chair of the Committee on the Administration of the Bankruptcy System or his designee;

4. The chair of the Committee on the Administration of the Magistrate Judges System or his designee;

5. The chair of the Committee on Court Administration and Case Management or his designee;

6. The chair of the Committee on Federal-State Jurisdiction or his designee;

7. The chair of the Judicial Panel on Multidistrict Litigation or his designee and one other judge who has had extensive multidistrict litigation experience;

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8. A representative from the Conference of Chief Justices;

9. Three additional lawyers, one experienced in prosecuting mass tort cases individually, one experienced in prosecuting class actions, and one experienced in mass torts from the defendants' point of view, as well as one additional experienced trial judge.

The Working Group would expect that the Ad Hoc Committee will request the support, as needed, of the chairs and reporters of the Advisory Committees on Bankruptcy Rules, Civil Rules, and Evidence Rules, and would expect that it will request that the Administrative Office of the United States Courts provide the Ad Hoc Committee with a reporter dedicated to the Ad Hoc Committee's work.

Finally, the informal working group recommends that the Chief Justice formally extend an invitation to the Chairman of the Senate Judiciary Committee and the Chairman of the House Judiciary Committee to designate representatives to attend meetings of the Ad Hoc Committee on Mass Torts and otherwise to provide input and advice.

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Respectfully submitted,

Advisory Committee on Civil Rules

Hon. Paul V. Niemeyer, chair
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Phillip A. Wittmann, Esq.*
Sheila L. Birnbaum, Esq.
Myles V. Lynk, Esq.**
Andrew M. Scherffius, Esq.**
Hon. Frank W. Hunger, *ex officio*,
Assistant Attorney General for
the Civil Division
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Working Group on Mass Torts

Hon. Anthony J. Scirica, chair
Hon. Lee H. Rosenthal
Sheila L. Birnbaum, Esq.
Hon. Joe Billy McDade, liaison, Committee on the Administration of the Bankruptcy System
Hon. Philip M. Pro, chair and liaison, Committee on the Administration of the Magistrate Judges System*
Hon. John G. Koeltl, liaison, Committee on Court Administration and Case Management
Hon. Richard G. Stearns, liaison, Committee on Federal-State Jurisdiction
Hon. John F. Nangle, chair and liaison, Judicial Panel on Multidistrict Litigation
Hon. Paul V. Niemeyer, *ex officio*, chair, Civil Rules Advisory Committee

Prof. Francis E. McGovern, special reporter and consultant
Prof. Geoffrey C. Hazard, Jr., consultant
Thomas E. Willging, consultant, Federal Judicial Center
Prof. Edward H. Cooper, *ex officio*, reporter, Civil Rules Advisory Committee
John K. Rabiej, Chief of the Rules Support Office of the Administrative Office of the United States Courts

* term ended Sept. 30, 1998
** term commenced Oct. 1, 1998

February 15, 1999

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