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NATIONAL ASBESTOS LITIGATION: PROCEDURAL PROBLEMS MUST BE SOLVED

Courts throughout the United States are struggling with the seemingly insurmountable number of asbestos-related personal injury claims. Although the thousands of claims filed each year create overwhelmingly backlogged court dockets,¹ the current handling of asbestos-related litigation has escalated to a "national scandal"² because courts have not been able to agree on a workable solution to dispose of the claims economically and fairly. This is not to suggest, however, that courts have not proposed innovative means of adjudication.³ The most commonly suggested solution is certification of a class action under Federal Rule of Civil Procedure 23(b)(3).⁴

Courts, although willing to allow certification of class actions under

1. See *infra* notes 21-23 and accompanying text. The thousands of personal injury asbestos lawsuits are concentrated primarily in coastal industrial areas. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *FORDHAM L. REV.* 37 (1983).

2. 205 N.Y.L.J., Nov. 20, 1990, at 1, col. 3.

3. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 475 (5th Cir. 1986) ("The task will not be easy;" there is a "need for innovative approaches"); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 348-52 (5th Cir. 1982) (sympathizing with caseload and encouraging trial court innovation); *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981) (calling for "new approaches to the national tragedy of asbestos-related disease"). See also *infra* notes 37-92 and accompanying text for a discussion of several innovative proposals.

4. Rule 23(b)(3) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

Rule 23(a) sets out general prerequisites to maintenance of a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (2) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Rule 23(b)(3) for property damage caused by asbestos,⁵ for personal injuries and property damage caused by contaminated water,⁶ and for Agent Orange plaintiffs,⁷ have refused to approve such certification for asbestos-related personal injuries.⁸

This Note examines the possibility of and problems with certifying a class of personal injury asbestos claimants under Rule 23(b)(3) and suggests what can and should be done to resolve the difficulties. Part I reviews the history of the commercial use of asbestos, the dangers associated with such use, and the resulting burden on court dockets. Part II discusses judicial attempts to address the increasing need for economical means to confront "toxic torts" to reduce backlogged dockets. Part III examines class certification requirements under Rule 23(b)(3) as applied to the characteristics of a typical "class" of asbestos claimants. Part IV, while concluding that class certification under Rule 23(b)(3), as it now reads, is inappropriate for asbestos plaintiffs, suggests that courts cannot continue to resolve the problem claim by claim. Accordingly, Part IV proposes that Congress enact a federal solution that would create different class action requirements specifically tailored for personal injuries arising from asbestos exposure.

I. THE COMMERCIAL USES AND DANGERS OF ASBESTOS AND THEIR IMPACT ON THE UNITED STATES COURT SYSTEM

Asbestos has been used for insulation since 1866.⁹ In 1874 it became available commercially.¹⁰ Although scientists did not publicize widely the dangers of asbestos until the 1960s, they recognized that it caused asbestosis as early as 1924.¹¹ However, even after manufacturers recognized the danger, they failed to warn adequately those in high-risk

5. See *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984). See also *infra* notes 115-18 and accompanying text.

6. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988). See also *infra* notes 143-47 and accompanying text.

7. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987); *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). See also *infra* notes 128-31, 135, 149-53 and accompanying text.

8. See *infra* notes 60-77, 121-27 and accompanying text.

9. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 n.3 (5th Cir. 1973) (medical testimony), *cert. denied*, 419 U.S. 869 (1974).

10. *Id.*

11. Note, *Who Will Compensate the Victims of Asbestos-Related Diseases?* *Manville's Chapter 11 Fuels the Fire*, 14 ENVTL. L. 465, 468 (1984).

fields.¹² Since 1940 more than twenty-one million Americans have been exposed to asbestos in the workplace.¹³ Each year, tens of thousands of people become ill or die from diseases related to asbestos.¹⁴

The three most common diseases that asbestos can cause are asbestosis,¹⁵ lung cancer,¹⁶ and mesothelioma.¹⁷ Asbestos-related lung diseases

12. *Id.* The federal government, the largest buyer of asbestos, knew of the dangers and, like the manufacturers, failed to provide warnings. *Id.* Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 193 n.114 (1983). Unlike the American government, the British government recognized and acted on the early studies regarding asbestos health hazards. In 1933, the British government restricted the amount of asbestos dust permissible in the workplace. *Id.* Consequently, Britain has experienced a far lower degree of asbestos-related disease than has the United States. *Id.*

The United States government may have failed to warn because it employed over four million people who were exposed to asbestos while working in naval shipyards during World War II. Note, *supra* note 11, at 468. See also *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 169 (1980) [hereinafter *Hearings on S. 2847*] (statement of Sen. Gary Hart). The United States government was a large buyer and user of asbestos; until 1969, it was the largest asbestos user in the country. Anderson, Warshaver & Coffin, *The Asbestos Health Hazards Compensation Act: A Legislative Solution to a Litigation Crisis*, 10 J. LEGIS. 25, 29, 38-39 (1983).

Although the Federal Government knew of the health hazards posed by asbestos use, it not only failed to warn, but actually established a requirement that all Navy ships use asbestos as an insulator. Comment, *supra*, at 194. According to one commentator, the only explanation the government provided was that the Navy wanted to avoid implementing any restriction on production rates. *Id.* at 195.

Not until the 1960s did the United States Government set forth regulations protecting American workers from asbestos. Comment, *Asbestos Litigation: The Dust has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 56 (1978). Although a step in the right direction, the standards established are directed towards asbestosis only; they provide insufficient protection against cancer. *Id.* at 56-57. See *infra* notes 15-17 for a discussion of the three most prevalent asbestos-related diseases.

13. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986). Environmental contact has exposed several million more people to this hazardous substance. Additionally, workers who have been in contact with asbestos have exposed their relatives to the dangerous fibers. *Id.*

14. Note, *supra* note 11, at 466-67. The Department of Health and Human Services estimates that, since the commencement of World War II, eight to eleven million workers have been exposed to asbestos. *Hearings on S.2847, supra* note 12, at 169. Four million workers have suffered "heav[y]" exposure to asbestos. *Id.* The Department of Health and Human Services expects that 35-45%, or 1.6 million, of those workers will die of asbestos-related diseases. *Id.* Another estimate predicts that as many as 2.15 million Americans will die from asbestos exposure. NATIONAL CANCER INSTITUTE AND NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS 1-2 (Draft Summary, 1978).

15. Inhaling asbestos dust causes asbestosis. Even minimal exposure in an industrial setting can cause the disease. Once individuals inhale asbestos fibers, the fibers settle in their lungs. This causes a progressive and apparently irreversible tissue reaction. Because asbestosis has a latency period of between 10-25 years, early detection or diagnosis is difficult. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (medical testimony), *cert. denied*, 419 U.S. 869 (1974). See also Note, *supra* note 11, at 466-68 (citing Selikoff, Chung & Hammond, *The Occurrence*

are different from most on-the-job injuries because they are not immediately detectable.¹⁸ The lengthy latency periods between exposure and detection make it extremely difficult to discern the asbestos source that caused a particular worker's disease.¹⁹

Since many of the victims seek legal redress for their injuries, the courts are experiencing an "avalanche"²⁰ of asbestos-related litigation. Asbestos has become the most frequent subject of products liability suits in the United States, surpassing litigation generated by Agent Orange, DES, and the Dalkon Shield.²¹ Currently, 29,466 federal cases and approximately 60,000 state cases are pending in the United States.²² The end is not in sight. Due to the diseases' lengthy latency periods, potential

of Asbestosis Among Insulation Workers in the United States, 132 ANN. N.Y. ACAD. SCI. 139 (1965)).

16. Inhaling asbestos fibers also can cause lung cancer, or bronchogenic carcinoma, which commences in the lung's upper areas, is more common among workers who smoke cigarettes, and, like asbestosis, has a long latency period. Note, *supra* note 11, at 468.

17. Inhaling asbestos fibers also can cause mesothelioma. Either the lung lining or the pleural and peritoneal cavities, surrounding the gastrointestinal tract organ, suffers a malignant tumor. Although detection of mesothelioma usually is delayed, it can emerge only several months after exposure to the asbestos fibers. *Id.* at 468-69. See also *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 n.3 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

18. Note, *supra* note 11, at 468-69.

19. *Id.* at 467. Moreover, since the number of asbestos fibers inhaled directly affects the degree of harm suffered, it is sometimes difficult to discern the degree of risk individual products pose. Ingram, *Insurance Coverage Problems in Latent Disease and Injury Cases*, 12 ENVTL. L. 317, 325 (1982). At one end of the spectrum, bonded products such as linoleum do not pose a health hazard unless broken. *Id.* at 319. Spray asbestos insulators, which release numerous fibers into the air, are at the other end of the spectrum. *Id.* at 324. In the middle are thousands of products whose level of potential harm is unknown. Such uncertainty further hinders the determination of causation. *Id.* at 324-25. Another commentator concludes, however, that just a single exposure to asbestos could cause harm. 132 ANN. N.Y. ACAD. SCI., CANCER AND THE WORKER 34 (1977).

20. Note, *supra* note 11, at 468.

21. *Id.* See also *Hearings on S. 2847*, *supra* note 12, at 170.

22. See *In re National Asbestos Litig.*, Cleveland Div., No. 1-90 Cv 11,000 (Aug. 10, 1990). These figures reflect the Federal Judicial Center's findings. According to other figures, an estimated 175,000 asbestos cases currently fill court dockets. 12 Nat'l L.J., Sept. 3, 1990, at 3, col. 1. The cases are not, however, evenly distributed among the courts. There are approximately 10,000 cases each pending before Judges Weinstein of the Eastern District of New York, Lambros of the Northern District of Ohio, and Parker of the Eastern District of Texas. *Id.*

In *Jenkins v. Raymark Industries*, 782 F.2d 468 (5th Cir. 1986), the Fifth Circuit affirmed Judge Parker's class certification of approximately 900 asbestos claimants. *Id.* Some of the remaining 4,100 suits filed were settled, leaving approximately 3,031 personal injury cases in the Eastern District of Texas alone. 12 Nat'l L.J., Sept. 3, 1990, at 3, col. 1. Judge Parker concluded that if the cases in the Eastern District of Texas were tried in groups of 10, the litigation would fill the district court's docket for a full three years, leaving no time for any other matters. *In re Fibreboard Corp.*, 893 F.2d 706, 708 (5th Cir. 1990).

plaintiffs will continue to file claims at an alarming rate for years to come.²³

Claim-by-claim adjudication adversely affects not only the court dockets but the actual claimants as well.²⁴ Plaintiffs often are forced to wait for up to seven years to go to trial.²⁵ Once they get to court, the plaintiffs face inconsistent jury verdicts and awards that take on "aspects of a lottery."²⁶ Families experiencing profound difficulty, having established with near certainty a "substantial amount of fault,"²⁷ receive absolutely nothing, while other claimants who have not established as high a probability of liability recover large amounts.²⁸ In addition, the amount of physical pain suffered by different plaintiffs bears little relation, if any at all, to the size of the awards.²⁹

II. JUDICIAL ATTEMPTS TO SOLVE THE CRISIS OF INUNDATED COURT DOCKETS

In the last fifteen years mass tort litigation has inundated the courts.³⁰ Mass tort litigation encompasses both mass accidents and mass products liability.³¹ Distinguishing between the two is important because the Advisory Committee's Note to the 1966 Revision of Rule 23(b)(3) refers only to the former.³² The Advisory Committee warns that normally

23. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986). Plaintiffs will file an estimated 180,000 additional claims, excluding those for property damage, by 2010. *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir. 1986).

Other factors shed light on an increased litigation rate. As life expectancy rates increase, potential victims will have more time to discover the diseases. Furthermore, researchers may discover more diseases linked to asbestos exposure. The publicizing of high jury awards increases awareness and the likelihood that people will bring claims. Finally, the expansion of compensation eligibility to third parties, such as spouses, will add to the rate of claims filed. Zeman, *The Asbestos Crisis: Thoughts on Proposed Solutions*, 34 FIC. Q. 375, 377-78 (1984).

24. *Jenkins*, 782 F.2d at 470.

25. *Id.*

26. 205 N.Y.L.J., Jan. 25, 1991, at 1, col. 5 (quoting Judge Weinstein).

27. *Id.*

28. *Id.*

29. *Id.* Judge Weinstein observed that the 64 federal cases tried before him during a five month trial yielded unpredictable and inconsistent jury verdicts. The mesothelioma cases, involving high degrees of pain and incapacity, yielded lower verdicts than the pleural cases, which involved minimal incapacity. As another example of the inconsistencies plaguing the asbestos litigation, Judge Weinstein contrasted a Virgin Islands case that resulted in a \$26 million verdict with 20 defense verdicts returned by courts in the Southern District of New York. *Id.*

30. See *supra* notes 22-23 and accompanying text.

31. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 n.1 (1983).

32. *Id.* The Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) provides:

mass accidents are inappropriate for class action.³³ Although many courts remain hesitant to ignore the constraints suggested in the Advisory Committee's Note and consequently are reluctant to certify class actions for mass accidents,³⁴ several note that the Advisory Committee's Note neither mentions nor pertains to class certification of mass torts.³⁵ Thus, some courts have acknowledged the increasing need for economical means to confront the "toxic torts" to reduce the backlogged and repetitive dockets confronting the judicial system.³⁶ Courts have certified Rule 23(b)(3) classes, proposed innovative variations of class certification, grouped claims in a series of trials, and used reverse bifurcation.

The class action device is foremost among these "economical means."³⁷ As the disagreement between courts indicates, there are both positive and negative implications of the class action procedure in toxic tort cases.³⁸ The benefits of class action include increased court efficiency,³⁹ lower court costs,⁴⁰ and decreased judicial boredom from repet-

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

FED. R. CIV. P. 23(b)(3) advisory committee's note.

33. *Id.* Arguments against class certification for mass accidents include 10th amendment considerations, *Erie* Doctrine implications, and due process concerns. Williams, *supra* note 31, at 324 n.1.

34. See *In re Northern Dist. of Cal., Dalkon Shield, Etc.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *McDonnell Douglas Corp. v. U.S. Dist. Court for Central Dist. of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 435 U.S. 911 (1976); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980).

35. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986); *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3rd Cir. 1986); *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 861 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). See also Williams, *supra* note 31, at 324 n.1 (drawing a distinction between mass accidents and mass torts in the product liability context).

36. See *supra* note 22 and accompanying text.

37. See *infra* notes 93-157 for discussion of problems with certifying a class of asbestos claimants.

38. See *infra* notes 60-77, 115-53 and accompanying text for a discussion of district courts' innovative efforts being vacated on appeal.

39. Rule 23(b)(3) is "the fairest and most efficient method available to dispose of . . . claims." Williams, *supra* note 31, at 326. Certification under Rule 23(b)(3) and class action for single-issue adjudication under Rule 23(c)(4)(A) encourage settlement and, consequently, save both money and time. *Id.* at 328. To buttress his conclusion, Judge Williams requested that the Chief Clerk of the District Court for the Northern District of California prepare a report calculating the amount of judicial time and resources saved by settlements induced by class certification in a mass product liability tort action. The report disclosed that if 90% of the 1000 class members settled their cases—

itive litigation.⁴¹ The advantage for successful plaintiffs is that the procedure assures them compensation.⁴² Likewise, the procedure assures the defendant a final judgment and an ascertainable financial cost.⁴³ If litigation proceeds on an individual plaintiff-by-plaintiff basis, however, high punitive damage awards may force the defendant into bankruptcy.⁴⁴ If the defendant goes bankrupt, it is likely that the next plaintiff who seeks damages after the bankruptcy will go uncompensated.⁴⁵

the normal percentage of settlement—the parties would save \$26 million in court costs, and the court would save seven million dollars. *Id.*

40. *Id.*

41. Judge Williams rhetorically demands, "[i]s it effective or efficient use of limited judicial resources to subject a judge to the tedious and frustrating task of presiding over identical lawsuits?" Williams, *supra* note 31, at 325. Judge Williams certified a class of Dalkon Shield plaintiffs under Rule 23(b)(3). However, the court of appeals vacated his order. *In re Northern Dist. of Cal., Dalkon Shield, Etc.* 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

A judge forced by the system to face the boredom of repetitive case-by-case adjudication may become mechanical in his resolution of issues, frustrated with his job, and less productive and imaginative in carrying out his important duties.

42. If the courts proceed with a trial-by-trial adjudication of the asbestos claims, the first 100 plaintiffs may be compensated for their injuries, but the 101st may be unable to recover if the defendant company no longer has sufficient funds. When Manville filed for bankruptcy, Judge Weinstein ordered the company to establish the Manville Personal Injury Settlement Trust to pay asbestos claimants. The trustees, however, administered the trust on a first-come, first-served basis and, consequently, the trust ran out of funds. Wall. St. J., Nov. 6, 1990, at B12, col. 2. The Manville Trust later announced a plan that provided for increased recovery. N.Y. Times, Nov. 20, 1990, at D1, col. 3. *See also infra* note 43.

43. For example, under the current Eagle-Pitcher class action settlement plan involving 65,000 asbestos cases before Judge Weinstein, the company is, in effect, receiving a "blanket guarantee" that litigation over the asbestos matter will cease and consequently, that the plan will protect the company from further adverse court actions. N.Y. Times, Nov. 12, 1990, at D2, col. 3.

The proposed Eagle-Pitcher plan separates asbestos victims into two categories. Level I victims are those with more serious illnesses such as mesothelioma. These claimants will receive compensation during the first two years of the plan, while level II claimants will begin to receive compensation in the third year. The plan will compensate the more serious level II claimants before those with minor injuries. *Id.* Such a plan benefits both the defendants and the plaintiffs. It assures the defendants a final judgment while it compensates the plaintiffs. However, the plaintiffs are dissatisfied with the 20 year, \$750 million plan, which would compensate both present and future claimants. On appeal, they are likely to challenge Judge Weinstein's authority to settle cases from other federal and state courts. Wall. St. J., Nov. 6, 1990, at B12, col. 2.

Class action suits also allow defendants to predict more precisely the results of a litigated matter so as to price products accordingly. McGovern, *Management of Multiple Toxic Tort Litigation: Case Law and Trends Affecting Management*, 19 FORUM 1, 8 (1983). This, in turn, like the Eagle-Pitcher solution, would benefit the company's shareholders. Wall. St. J., Nov. 9, 1990, at C2, col. 4.

44. On the other hand, like the Manville Corporation, the corporation may attempt to use the Bankruptcy Code as a shield from liability. Note, *supra* note 11, at 465.

45. *See supra* notes 42-43. The Wellington Facility provides an alternative remedy. Dean Wellington of the Yale University Law School created the facility, funded by asbestos producers, to resolve asbestos-related claims. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 n.7 (5th Cir. 1986).

Several factors, however, mitigate against the use of the class action as a means to resolve toxic torts. In a large case in which awards may be high, each plaintiff has an interest in controlling his own case⁴⁶ and in choosing his own representation.⁴⁷ Additionally, plaintiffs with different degrees and types of injuries, different medical backgrounds, and different types and durations of exposure often lack the Rule 23(b)(3) commonality requirement.⁴⁸

One innovative approach breaks the class action into four trial phases:⁴⁹ 1) a consolidated trial to try common defenses and punitive damages; 2) a determination both of how many plaintiffs were exposed to each defendant's products and the amount of actual damages; 3) an apportionment of damages; and 4) a distribution of damages. District Court Judge Robert Parker approved of this suggestion in *In re Fibreboard Corp.*⁵⁰

46. The plaintiffs' lawyers usually are the traditional opponents to class treatment for mass tort litigation. Williams, *supra* note 31, at 329. They argue that class action is appropriate for matters in which claimants, faced with either evidentiary problems or a small recovery, otherwise would not sue. They argue that because the asbestos litigation involves large sums of recovery, the class action device is inappropriate. However, this argument is weakened by the Rule 23 requirement that each member of the class have a claim for more than \$50,000. *Id.* See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (in diversity actions, "each plaintiff in [a] Rule 23(b)(3) class action must satisfy the jurisdictional amount"). Moreover, the primary purpose of Rule 23 is to promote judicial economy. See FED. R. CIV. P. 23 advisory committee's note.

47. Since the requirements for class certification include adequate representation, this argument is somewhat specious. Plaintiffs' attorneys usually make this argument as well as the argument that a plaintiff has a right to control his own case, see *supra* note 46. Williams, *supra* note 31, at 329.

48. See *infra* notes 105-36 and accompanying text.

49. In *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), Professor Jack Ratliff, as special master, recommended such a four-phase approach to tackle the asbestos litigation problem. See also *In re Fibreboard Corp.*, 893 F.2d 706, 708 (5th Cir. 1990).

Another variation of the class device consolidates the actions. In August 1990, Judge Parker of the Eastern District of Texas and Judge Lambros of the Northern District of Ohio signed an order calling for the consolidation of Texas and Ohio class actions with the New York cases before Judge Weinstein, the latter to the extent that courts could join fact finding and appoint experts. Eight other U.S. district court judges approved the order. *In re National Asbestos Litig.*, Cleveland Div., 1-90 Cv 11,000 (Aug. 10, 1990). However, the Sixth Circuit Court of Appeals immediately criticized Judge Lambros for attempting to exercise jurisdiction over cases from Texas. *In re Allied-Signal, Inc.*, 915 F.2d 190-191 (6th Cir. 1990). Subsequently, Judge Lambros vacated his earlier order. *In re Ohio Asbestos Litig.*, OAL Order No. 102 (Aug. 20, 1990).

50. 893 F.2d 706 (5th Cir. 1990) (referring to several pretrial orders by Judge Parker). However, in *Fibreboard*, the Fifth Circuit granted the defendant's petition for a writ of mandamus, finding that approving the use of Phase II was beyond the district court's power. *Id.* at 711.

Even while vacating Judge Parker's order for a Phase II trial, the Fifth Circuit sympathized with the difficulties the district court confronted and encouraged the court to "continue its imaginative and innovative efforts to confront these cases." *Id.* at 712.

Phase I consists of one consolidated trial, pursuant to Federal Rule of Civil Procedure 42(a),⁵¹ by which common defenses and punitive damages are tried.⁵² During this phase the jury determines many factual issues: which insulated products contained asbestos capable of causing harm; which of the defendants' products were marketed defectively; which of the defendants' products were unreasonably dangerous; when did each defendant know or have reason to know that workers and their families were at risk of sustaining an asbestos-related injury; and whether each defendant's marketing of such products amounted to gross negligence.⁵³

In Phase II, the jury determines the percentage of the plaintiffs exposed to each defendant's products and the percentage of the plaintiffs' claims barred by affirmative defenses such as statutes of limitation and adequate warnings.⁵⁴ In this phase the jury estimates the actual damages for each type of disease.⁵⁵ Judge Parker proposed having a complete trial with eleven class representatives for jury determination.⁵⁶ Furthermore, the parties could introduce evidence from thirty illustrative plaintiffs chosen by both the plaintiffs and the defendants.⁵⁷ From the forty-one plaintiffs' testimony and expert testimony introduced by both parties, the jury would determine the remaining class members' damages.⁵⁸ In Phases III and IV the court apportions and distributes damages.⁵⁹

In *In re Fibreboard Corp.*,⁶⁰ the Fifth Circuit refused to enlarge its prior decision in *Jenkins v. Raymark Industries, Inc.*⁶¹ In *Jenkins*, the court held that bifurcation to determine the punitive and actual damages was constitutional and fair to the defendants, as long as the court alerted the jury to the fact that the unnamed plaintiffs' claims were not actually

51. Rule 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

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

52. 893 F.2d at 708.

53. *Id.*

54. *Id.* at 708-09.

55. *Id.*

56. *Id.* at 709.

57. *Id.*

58. *Id.* at 709. In *Fibreboard*, 2990 class members remained after settlements. *Id.*

59. *Id.* at 708. Neither Phase III nor Phase IV posed a problem for the *Fibreboard* court. *Id.*

60. *Id.* at 706.

61. 782 F.2d 468 (5th Cir. 1986).

proven and that, as a result, their injuries might differ from those of the illustrative plaintiffs.⁶²

The *Fibreboard* court held that Phase II of Judge Parker's proposed trial was an abuse of discretion that resulted in substantive changes in Texas state law, contrary to the *Erie* Doctrine,⁶³ and that it infringed upon the separation of powers between the judicial and legislative branches.⁶⁴

The *Fibreboard* court found that, in creating its products liability law, the Texas legislature had made its public policy choice.⁶⁵ Texas law dictated that a plaintiff, in order to sue successfully a manufacturer or supplier, must prove both causation and damage.⁶⁶ The court viewed these requirements as indicative of the legislature's intent that courts focus on individuals rather than on groups.⁶⁷ The court found that Judge Parker's scheme would determine the individual claims of 2,990 persons (excluding the forty-one individual cases tried) without the claims being presented to the jury.⁶⁸ Instead, the jury would determine these claims based on group consideration.⁶⁹ Thus, under such a scheme, manufacturers might face possible liability for 2,990 cases whose claims were not actually tried.⁷⁰

The court found that in addition to infringing on the state legislature's policy choices, such a procedure would result in a substantive change in the nature of the traditional trial, a result contrary to the *Erie* Doctrine.⁷¹ Recognizing that Phase II appears to propose procedural, rather than substantive innovations, the court stated that the use of expert testimony regarding the unnamed plaintiffs is a "change . . . in substantive duty . . . dressed as a change in procedure."⁷² Thus, the court concluded

62. *Id.* at 474. The bifurcation procedure employed by the *Jenkins* court was similar to Phase I proposed by Judge Parker in *In re Fibreboard*. See *supra* notes 51-53 and accompanying text.

63. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) (federal courts sitting in diversity must apply the laws of the state in which they are situated).

64. 893 F.2d at 711.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* To emphasize this point, the court noted previously observed changes in trial dynamics caused by expert testimony. *Id.* at 711. The court admitted that judges have "considerable" experience with mathematical constructs of trials. The court also noted that Phase II would reduce the trial to expert testimony regarding the claims of 2,990 plaintiffs. *Id.* at 710.

that although Phase II attempts to achieve "commonality" of causation and damages issues among the class,⁷³ it contradicts state law by focusing on general rather than individual causation.⁷⁴ The court, however, acknowledged the compelling argument that Phase II is the only realistic means of trying such a large number of cases, but suggested that the issue should be addressed by either congressional or state legislative action.⁷⁵

Finally, the court addressed the requirement of predominance of common questions of law or fact.⁷⁶ The court concluded that the plaintiffs' diseases, exposure periods, and lifestyles are too diverse to meet this requirement.⁷⁷

After the *Fibreboard* decision, Judge Parker continued his "courageous and innovative"⁷⁸ attempts to remedy the asbestos litigation crisis by adopting a different approach. He tried the claims of 147 plaintiffs in three different trials.⁷⁹ The first jury heard ten cases and returned a verdict establishing liability.⁸⁰ Three months later, in July 1990, two juries heard 160 randomly selected cases in groups of ten to twenty and determined in sealed verdicts damages for different categories of illnesses.⁸¹ In October 1990 the court unsealed the verdicts⁸² and the plaintiffs received \$122 million.⁸³ The court of appeals has not yet ruled on this trial method.

New York Supreme Court Justice Helen Freedman has employed re-

73. See *infra* notes 105-36.

74. 893 F.2d at 711-12. Rather than proving that defendant A's asbestos caused plaintiff A's disease, Phase II could only prove that, in most cases, defendant A's asbestos would have caused plaintiff A's injury. *Id.* at 712.

75. *Id.*

76. *Id.* See also *supra* note 4.

77. 893 F.2d at 712. The court failed, however, to observe that having trials with different phases can encourage settlement, thereby not only reducing the court's time and resources, but also assuring the plaintiffs of compensation and the defendants of a final lump sum owed. See *supra* notes 39-45 and accompanying text.

78. Wall St. J., Oct. 15, 1990, at B13, col. 2.

79. *Id.* (referring to Judge Parker's approach in *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* The court probably will reduce the \$122 million to take into account various settlements. However, the court may increase the figure by adding both prejudgment interest and punitive damages. The defense attorneys promise to appeal both the damages awarded and the procedures used to reach the damages. Henry Gerrard, counsel for Pittsburg Corning, one of the three remaining defendants, stated that "we believe there is no law anywhere that supports what he's doing." *Id.* The other two defendants are Celotex and Fibreboard. *Id.*

verse bifurcation, another innovative procedure, to handle approximately 190 Navy Yard asbestos cases.⁸⁴ The 190 cases consist only of those claims in which plaintiffs allege that 100% of their exposure to asbestos occurred at the Navy Yards.⁸⁵ In the first trial under this non-traditional structure, the plaintiffs must prove only that exposure to some asbestos product caused their injuries.⁸⁶ Based on this, the jury assesses damages.⁸⁷ The second trial, before the same jury, disposes of liability issues.⁸⁸ To minimize the time spent on the first trial, Judge Freedman ordered the plaintiffs to choose thirty-five representative cases.⁸⁹ This plan will induce settlement after the first trial because once the jury arrives at a damage figure, the parties will know what type of costs they confront.⁹⁰ If the jury returns a large damage award, the defendants will be more willing to settle.⁹¹ On the other hand, if the jury returns a low figure, this will encourage the plaintiffs to "cut their losses."⁹²

84. 205 N.Y.L.J., Jan. 25, 1991, at 1, col. 1. New York rules of civil procedure give judges broad discretion in establishing the "sequence" of trial issues to "achieve a speedy and unprejudiced disposition." N.Y. CIV. PRAC. L. & R. 4011 (Consol. 1978).

85. 204 N.Y.L.J., Oct. 15, 1990, at 3, col. 3. Judge Freedman handled only the state claims. In the meantime, Judge Weinstein, in a traditional trial, disposed of the federal claims of those plaintiffs claiming 100% exposure to asbestos from the Navy Yards. The remaining plaintiffs, with claims of 90% or less exposure from the Navy Yards, will litigate their claims later. *Id.* Judge Weinstein has called the handling of these 576 asbestos cases "the last great battle of World War II." N.Y. Times, Nov. 11, 1990, at D2, col. 4. In January 1991, after four weeks of deliberation, the jury returned a verdict of \$36 million for 52 federal plaintiffs. 205 N.Y.L.J., Jan. 25, 1991, at 1, col. 5.

Originally, in June 1990, the two judges announced their plan to adjudicate the cases in an unprecedented joint federal-state trial. This announcement resulted in 18 out of 24 defendants reaching settlements by early September. However, the judges abandoned this unorthodox idea. *Id.*

86. 204 N.Y.L.J., Oct. 15, 1990, at 3, col. 3.

87. *Id.*

88. *Id.*

89. *Id.* The court expects the first round of the reverse bifurcated procedure to last at least two months. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* One might query why the parties endure a two-month first trial when they expect to settle without going through the second trial. The largest impediment to settlement is the uncertainty of how a jury will view asbestos-related injuries. *Id.* Prior verdicts reveal that juries are unpredictable. See *supra* notes 28-29 and accompanying text. Such verdict disparity is apparent from the outcomes of the Navy Yard cases. The state verdicts averaged \$2 million per plaintiff, while the federal verdict averaged \$590,000. 205 N.Y.L.J., Jan. 25, 1991, at 1, col. 5.

The defendants, dissatisfied with the reverse bifurcation procedure, unsuccessfully appealed. The defendants argue that it is unfair to "force" a settlement based only on damage figures without having the plaintiffs prove causation. 204 N.Y.L.J., Oct. 15, 1990, at 1, col. 4. One defense attorney surmised that because the court resolved the issue of asbestos exposure in the first trial, the jury in the second trial will be unlikely to pay much attention to product identification because "they have already decided that someone's product has caused the injury." *Id.* Another defense attorney com-

III. THE PROBLEMS OF CERTIFYING A CLASS OF ASBESTOS CLAIMANTS PURSUANT TO RULE 23(B)(3)

The class action conserves "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion."⁹³ To ensure that the class action achieves this purpose, plaintiffs seeking certification must fulfill certain requirements established by Rule 23(a):⁹⁴ numerosity,⁹⁵ typicality,⁹⁶ adequacy of representation,⁹⁷ and the existence of questions of fact or law common to members of the class.⁹⁸ Once the plaintiffs meet these criteria, the "class" must meet two additional requirements to gain class certification under Rule 23(b)(3). First, questions of law or fact common to the class members must predominate over questions affecting individual members.⁹⁹ Second, a class action must be superior to other methods of adjudication.¹⁰⁰

In determining whether the class meets the latter two requirements, the courts consider four factors: 1) the plaintiffs' interest in individually controlling the litigation;¹⁰¹ 2) other pending litigation;¹⁰² 3) the desira-

plained that the first trial is pro-plaintiff because the jury hears "one tale of woe after another" without hearing any mitigating evidence. *Id.*

93. *General Tel. Co. v. Falcon*, 456 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

94. The party seeking class certification has the burden of proving that his case fulfills the requirements of Rule 23. *Id.* at 156. See *supra* note 4 for text of Rule 23(a).

95. FED. R. CIV. P. 23(a)(1).

96. FED. R. CIV. P. 23(a)(3). Typicality focuses more on the similarity of the legal and remedial theories underlying the plaintiffs' claims than on the strengths of the cases themselves. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986); *In re Asbestos School Litig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1984). Different fact patterns or damage amounts will not necessarily defeat typicality. See *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 640-41 (D. Col. 1986). See also *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494 (E.D. Pa. 1988); *In re Texas Int'l Sec. Litig.*, 114 F.R.D. 33, 44 (W.D. Okl. 1987).

97. FED. R. CIV. P. 23(a)(4). Both the class representatives and their counsel must be "adequate" representatives. The representative's stake in the litigation may not conflict with the unnamed class members' interests. See *Jenkins*, 782 F.2d at 472; *In re Asbestos School Litig.*, 104 F.R.D. at 431-32. Furthermore, the court will consider the attorney's past experience both in class actions and in the particular type of litigation under analysis. *Jenkins*, 782 F.2d at 472.

98. FED. R. CIV. P. 23(a)(2). "The threshold of commonality is not high." *Jenkins*, 782 F.2d at 472. In order to satisfy this requirement, the adjudication of the common questions must affect all, or a substantial portion of, the class members. *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982).

99. See *supra* note 4 for text of Rule 23.

100. *Id.*

101. FED. R. CIV. P. 23(b)(3)(A).

102. FED. R. CIV. P. 23(b)(3)(B).

bility of concentrating the litigation in a particular forum;¹⁰³ and 4) the difficulties which may emerge in managing the class action.¹⁰⁴

Normally, plaintiffs in toxic tort cases easily satisfy Rule 23(a)'s first three requirements. Rule 23(b)(3) and Rule 23(a)'s fourth requirement have generated the current problems and debate.

A. Commonality

Generally, "commonality" requires that the facts to be proven be common to all of the class members, rather than to all of the defendants.¹⁰⁵ The composition of a "typical" class of asbestos claimants makes meeting the standard commonality requirement very difficult.

The "class" might include insulation workers, construction workers, pipe-coverers, asbestos workers' survivors and household members¹⁰⁶ seeking monetary damages for asbestos-related injury, disease or death.¹⁰⁷ Usually, the class would consist of persons claiming to suffer from asbestosis (both pleural and pulmonary),¹⁰⁸ lung cancer¹⁰⁹ and mesothelioma¹¹⁰ due to varying periods of exposure to different products.¹¹¹ The dates that the plaintiffs knew or should have known of their exposure to asbestos products may vary.¹¹² Furthermore, for various reasons, not all plaintiffs may have legal claims against all defendants.¹¹³

103. FED. R. CIV. P. 23(b)(3)(C).

104. FED. R. CIV. P. 23(b)(3)(D).

105. FED. R. CIV. P. 23(b)(3) requires that a common question predominate. Merely having a claim against the same defendant will not suffice. *Id.*

106. For example, if a ship yard worker arrives home after having worked with asbestos products, his clothes almost certainly will contain asbestos dust. Anyone who comes into contact with the dust on the clothes will be exposed to the asbestos and may develop asbestos-related illnesses. Mehaffey, *Asbestos-Related Lung Disease*, 15 FORUM 341, 351 (1980).

107. *In re Fibreboard Corp.* 893 F.2d 706, 708 (5th Cir. 1990).

108. See *supra* note 15 and accompanying text.

109. See *supra* note 16 and accompanying text.

110. See *supra* note 17 and accompanying text.

111. 893 F.2d at 710. Moreover, certain unrelated substances can cause asbestos related diseases. For instance, in considering the causes of lung cancer, an individual's smoking, diet, and alcohol consumption must be factored in. Domopoulos, *Summary of Conference: Major Discussion Points and Societal Interrelationships*, 3 J. ENVTL. PATHOLOGY & TOXICOLOGY 42-74 (March 1983). Surprisingly, scientists reveal that tap water in many cities contains asbestos-type minerals. Craighead & Mossman, *Asbestos-Associated Disease*, 306 NEW ENG. J. MED. 1446 (1982). Such considerations further complicate the causation problem.

112. 893 F.2d at 710.

113. *Id.* Causation, though, will not necessarily present a problem for the plaintiff. In *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the Fifth Circuit held that an insulation worker who could pinpoint 11 asbestos manufacturers who

However, the commonality requirement does not inevitably defeat class certification. Courts vary in the degree of flexibility which they grant the "class" in meeting this requirement. Furthermore, in order to expedite litigation, some courts have certified class actions to determine a single issue under Rule 23(c)(4)(A).¹¹⁴

The Courts of Appeal for the Third, Fifth, Sixth, and D.C. Circuits have held that toxic torts are suitable for civil class action treatment. In *In re School Asbestos Litigation*,¹¹⁵ the Third Circuit, in affirming Rule 23(b)(3) certification, quickly acknowledged numerosity, typicality, and adequacy of representation, and focused on the requirement that questions of law or fact be common to the class.¹¹⁶ The court noted that asbestos cases involve almost identical evidence pertaining to the health hazards of asbestos, to the defendants' knowledge of those dangers, failure to warn or test, and to concert of action or conspiracy in both forming and following industry practices.¹¹⁷ The court acknowledged that the causation problems in a property damage case are more straightforward than in one involving personal injury.¹¹⁸ The court's reluctance to decertify the class, however, was due largely to the "highly unusual nature of asbestos litigation."¹¹⁹ The court was hesitant to foreclose a pos-

produced the products to which he was exposed could hold the manufacturers jointly and severally liable. *Id.* In other jurisdictions the plaintiff need not show cause-in-fact. The probability that a manufacturer caused exposure to a dangerous product may suffice for liability. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979). Given the nature both of asbestos and of the consequences of exposure to asbestos, other barriers to recovery exist. Due to the long manifestation period, a statute of limitations that begins at exposure rather than discovery may bar the suit. Comment, *supra* note 12, at 77. Defenses such as assumption of risk and contributory negligence also may bar recovery. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1096-98 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

In *In re Fibreboard*, for instance, the Fifth Circuit rejected certification of a class consisting of 907 plaintiffs suffering from pleural cases, 1184 from asbestosis, 219 from lung cancer, 92 from "other" cancers, and 33 from Mesothelioma. The court saw other potential problems in that some class members may have been barred from bringing claims against one of the defendants because of prior employment with the company, and some members may not have had legal claims against the defendants. Furthermore, not all of the plaintiffs suffered injuries by way of the act, omission, conduct, or fault of all the defendants. Finally, the members of the class had varying types of injury. *Fibreboard*, 893 F.2d at 710.

114. Rule 23(c)(4)(A) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . ." FED. R. CIV. P. 23(c)(4)(A).

115. 789 F.2d 996 (3d Cir. 1986).

116. *Id.* at 1002.

117. *Id.* at 1009.

118. *Id.*

119. *Id.*

sibly workable method of disposing of the plaintiffs' claims.¹²⁰

The Third Circuit quoted ¹²¹ with approval the Fifth Circuit's decision in *Jenkins v. Raymark Industries, Inc.*¹²² In *Jenkins*, the Fifth Circuit affirmed Judge Parker's Rule 23(b)(3) certification of a "mass tort" class action involving many plaintiffs with diverse asbestos-related claims.¹²³ The court found commonality in the fact that the defendants planned to raise the "state of the art" defense against all of the plaintiffs.¹²⁴ Evidence concerning the defense-related issues would be both time consuming and similar for each plaintiff.¹²⁵ Noting that "[n]ecessity moves us to change and invent,"¹²⁶ the court was relatively flexible in holding that the plaintiffs crossed the "threshold of 'commonality' [which] is not high."¹²⁷

In contrast, the Second Circuit more stringently affirmed Rule 23(b)(3) certification in *In re Agent Orange Product Liability Litigation*.¹²⁸ *In re Agent Orange* involved the liability of several large chemical companies and the United States for injuries to the armed forces of several nations and their families allegedly caused by exposure to the herbicide while serving in Vietnam.¹²⁹ After finding commonality, the court held that class certification was appropriate.¹³⁰ The court was rather strict, however, in requiring that both the evidence and the issue pertaining to the government contractor defense be common to all class members.¹³¹

Even when the class lacks commonality as to all of the issues, the court may, pursuant to Rule 23(c)(4)(A), certify class action as to one or more issues for which commonality exists.¹³² This not only increases judicial

120. *Id.* at 1011.

121. *Id.* at 1010.

122. 782 F.2d 468 (5th Cir. 1986).

123. *Id.* at 472.

124. *Id.* The "state of the art" defense is a claim by the defendants that "at the relevant times they did not know, nor could have known, of the dangers of their products." *In re Asbestos Litig.*, 829 F.2d 1233, 1235 (3d Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

125. 782 F.2d at 472.

126. *Id.* at 473.

127. *Id.* at 472. "Judge Parker's plan is clearly superior to the alternative of repeating hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says 'days of the same witnesses, exhibits and issues from trial to trial.'" *Id.* at 473.

128. 818 F.2d 145 (2d Cir. 1987).

129. *Id.* at 148.

130. *Id.*

131. *Id.* See *infra* note 151 for an explanation of the government contract defense.

132. See *supra* note 114.

economy but may lead to a greater willingness to settle.¹³³ In *Jenkins*, the Fifth Circuit found the state of the art defense which the defendants would raise was common to all class members.¹³⁴ In *In re Agent Orange*, the Second Circuit affirmed certification of the class due to the government contractor defense, which, once raised, fulfilled the commonality requirement.¹³⁵ When class certification pertains to a single issue, the court disposes of the remaining issues peculiar to individual plaintiffs separately at subsequent trials.¹³⁶

B. Common Issue Predominance

Common issues that constitute a significant part of the individual cases satisfy the predominance requirement.¹³⁷ In the toxic tort area, the requirement that common issues predominate often is difficult for plaintiffs to meet. In *Brown v. Southeastern Pennsylvania Transportation Authority*,¹³⁸ a Pennsylvania district court denied class certification on this ground.¹³⁹ In *Brown*, the plaintiffs sought class certification for personal and economic injuries allegedly due to the defendants' handling, storage, and use of "PCBs"¹⁴⁰ at a Pennsylvania railyard.¹⁴¹ The court found that the causation issues were too individual to merit class action because the plaintiffs could not single out one set of operative facts to establish the defendants' liability, because the alleged injuries occurred over a ten-year period, and because the plaintiffs' circumstances, medical histories, and injuries varied.¹⁴² Thus, the individual questions predominated over the common question.

However, in *Sterling v. Velsicol Chemical Corp.*,¹⁴³ the plaintiffs sought class certification for personal injuries and property damage allegedly due to contaminated water from the defendant's chemical waste

133. Williams, *supra* note 31.

134. 782 F.2d at 709.

135. 818 F.2d at 678. See *infra* note 151 for an explanation of the government contractor defense.

136. Williams, *supra* note 31, at 327. Subsequent trials would dispose of individual issues concerning, *inter alia*, causation, compensatory damages, and other affirmative defenses. *Id.*

137. See *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985); *In re Asbestos School Litig.*, 104 F.R.D. 422, 431-32 (E.D. Pa. 1984).

138. 1987 WL 9273 (E.D. Pa.) (unpublished opinion).

139. *Id.*

140. Polychlorinate biphenyl. *Id.* at 2-3.

141. *Id.*

142. *Id.* at 25.

143. 855 F.2d 1188 (6th Cir. 1988).

burial site.¹⁴⁴ The Sixth Circuit affirmed class certification.¹⁴⁵ The court held that class action was appropriate because, despite their differing injuries, the causation issues would require the plaintiffs to present substantially the same evidence.¹⁴⁶ Consequently, the court found that common questions of fact predominated over the individual questions.¹⁴⁷

Similarly, the Second Circuit consistently has denied defendants' writs of mandamus in Agent Orange litigation, affirming district court Judge Weinstein's class certification.¹⁴⁸ In *In re Diamond Shamrock Chemicals Co.*,¹⁴⁹ the class at issue consisted of several hundred veterans who served in Vietnam from 1961-1972, their spouses, parents, and children.¹⁵⁰ Judge Weinstein had found that the common issues of general causation, failure to warn, and affirmative defenses predominated, thus satisfying the Rule 23(b)(3) requirements.¹⁵¹ The Second Circuit found many issues peculiar to individual plaintiffs: the nature of exposure, the causation of individual ailments, and the amount of monetary damages.¹⁵² Nonetheless, the court held that it could determine such issues either in further subclasses or in individual trials.¹⁵³

C. Class Action as a Superior Method of Adjudication

In cases such as *Brown v. Southeastern Pennsylvania Transportation Authority*,¹⁵⁴ once the court holds that the class fails to meet the predominance requirement, it usually holds that class action is not the superior

144. *Id.*

145. *Id.*

146. *Id.* at 1197.

147. *Id.*

148. See *infra* note 149 and accompanying text.

149. 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

150. *Id.* at 859.

151. *Id.* at 860. See *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983). The defendants used the government contract defense, claiming that they should be exempt from liability because the government, aware of Agent Orange's hazards, established the specifications for its use. The defendants argued that they merely were acting in accordance with government requirements. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 847 (E.D.N.Y. 1984).

152. 725 F.2d at 860.

153. *Id.* Differences in geography, degree, or time are also problems that generally plague class certification of mass torts. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1057 (1986). In *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983), the court ordered class certification under Rule 23(b)(3) for women born in Massachusetts who were exposed to DES in the state and were domiciled there when they received notice. The court later decertified the class when it became evident that common questions no longer predominated. 100 F.R.D. at 339.

154. 1987 WL 9273 (E.D. Pa.) (unpublished opinion).

means of adjudication.¹⁵⁵ In *Brown*, the court found that consolidated discovery, coordinated motion practices, and the possibility of joint trials on some of the claims might provide a resolution preferable to class certification.¹⁵⁶ In contrast, when courts hold common questions of law or fact predominant over individual ones, they sometimes find class action to be the best means of adjudication in order to avoid a duplication of evidence and witnesses and to conserve judicial time.¹⁵⁷

IV. CONGRESS MUST ACT

Although the arguments in favor of mass tort class actions are persuasive in terms of necessity, public policy, and judicial economy, they cannot stand in light of Rule 23(b)(3)'s express commonality requirement.¹⁵⁸ Try as they might to manage the asbestos litigation overload through class action, the courts cannot ignore the facts.¹⁵⁹

It often seems that when judges face difficult decisions or close calls they "cop out" and, leaving the issue unresolved, call for the legislature to act. However, the asbestos crisis truly is an area that Congress or the state legislatures need to address.¹⁶⁰

A federal solution is preferable. At a minimum, Congress must provide procedural legislation to bring some predictability, control, and efficiency to the asbestos arena. Congress should tailor class action procedures to meet the modern crisis.¹⁶¹

155. *Id.*

156. *Id.*

157. 3B J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* 23.45[2],[3] (2d ed. 1991).

158. See *supra* notes 101-32.

159. As one authority aptly noted: "[A]ttempts to force nonconforming mass-tort cases into Rule 23 categories succeed only in a tortured, Procrustean fashion. . . . [A]dvocating the class action treatment of mass-tort cases under Rule 23 proves intellectually untidy, and judicial certification in mass-tort cases amounts to little more than grudging concession to pragmatism." Mullenix, *supra* note 153, at 1060 (quoting Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 909 (1984)).

160. "The arguments [for class certification] are compelling, but they are better addressed to the representative branches—Congress and the State Legislature." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990). In an earlier decision, the Fifth Circuit stated:

There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation. Congress' silence on the matter, however, hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act.

Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1327 (5th Cir. 1985) (en banc).

161. See Mullenix, *supra* note 153. Congress has been aware of the need for action to solve at least one facet of the asbestos litigation problem. Members of Congress have made three proposals—

Such legislation would relax, if not abolish, the commonality requirement.¹⁶² Admittedly an imperfect solution, such a "relaxation" clearly would be effective. While de-emphasizing commonality might permit some undeserving plaintiffs to slip through the cracks and recover damages, the advantages of compensating the many deserving plaintiffs in a more timely manner outweigh the drawbacks.

Proposing that Congress act in such a manner may seem extraordinary, but extraordinary means are necessary and not unprecedented. Twice before Congress has tailored Rule 23 to meet specific situations. Congress enacted Rule 23.1¹⁶³ to provide for a shareholder derivative action and Rule 23.2¹⁶⁴ to deal with actions relating to unincorporated

none of which passed Congress—to solve the problems that arise when defendants have insufficient funds to compensate asbestos victims. First, Senator Hart (D-Colo.) proposed a solution in 1980. *Hearings on S. 2847, supra* note 12. Hart's proposal would have established a commission to set minimum standards for state workers' compensation programs regarding asbestos injuries. Under the proposal, if the state did not fulfill the requirements, a fund would compensate the claimant. Asbestos manufacturers, the United States Government, and employers would contribute to this fund. *Id.*

A year later Representative Fenwick (R-N.J.) proposed a second bill to establish a fund to which certain individuals and entities would contribute. H.R. 5224, 97th Cong., 1st Sess., 127 CONG. REC. H-9670 (daily ed. Dec. 15, 1981). Because other non-asbestos substances such as tobacco can cause lung cancer, one of the three most prevalent asbestos-related diseases, the bill required the tobacco industry to contribute to the compensation fund as well. 127 CONG. REC. 31639 (daily ed. Dec. 15, 1981) (remarks by Representative Fenwick). *See also supra* note 16 and accompanying text for a discussion of lung cancer. Additionally, the bill required manufacturers and importers of asbestos products to contribute to the fund, although the federal government would not be so required. *Id.*

Finally, Representative Miller (D-Cal.) proposed a bill to create a similar fund, requiring contributions from asbestos manufacturers, importers, and employees, but not from the federal government. H.R. 3175, 98th Cong., 1st Sess., 129 CONG. REC. H-3430 (daily ed. 1983). This bill included compensation not only for asbestos victims, but also for victims of mining diseases. *Id.* Section 6(c) of H.R. 3175 would have established three presumptions to enable asbestos claimants to avoid the problems of establishing causation:

- (1) Mesothelioma of the pleura or peritoneum shall be irrebutably presumed to have resulted from exposure to asbestos.
- (2) Asbestosis shall be irrebutably presumed to have resulted from exposure to asbestos.
- (3) Cancer of the lung shall be presumed to have resulted from exposure to asbestos. In any case in which radiological or histological evidence is produced of asbestotic changes to the lung or pleura, the presumption that the lung cancer resulted from exposure to asbestos shall be irrebuttable.

Id.

Because some medical evidence contradicts these presumptions, many people have criticized them as a means to facilitate litigation. Some studies even suggest that, because of the latency period, no connection exists between exposure to asbestos and mesothelioma and lung cancer. Craighead & Mossman, *supra* note 111. *But see supra* notes 15-19 and accompanying text.

162. *See supra* notes 105-36 and accompanying text.

163. FED. R. CIV. P. 23.1.

164. FED. R. CIV. P. 23.2.

associations. Just as a shareholder's derivative action contains distinctive elements which made a new rule appropriate,¹⁶⁵ so, too, does asbestos litigation.¹⁶⁶

Congress must address three basic problems. First, what law should govern? Second, how should the large class be broken down to create a minimum level of commonality? Finally, how can a court ensure that the defendant will be solvent in order to compensate even the last plaintiff?

A. Governing Law

As the *Fibreboard* court¹⁶⁷ aptly noted, federal class actions involve *Erie* Doctrine complications because of different states' liability standards.¹⁶⁸ Choice of law problems not only increase the complexity of asbestos litigation, but they drive up the cost and duration, as well.¹⁶⁹ Uncertainty over which law to apply may also chill prospective settlements.¹⁷⁰ In order to fairly, efficiently, and uniformly dispose of the thousands of personal injury asbestos cases, Congress must authorize the creation of federal common law.¹⁷¹ Because the asbestos litigation has

165. See FED. R. CIV. P. 23.1 advisory committee's note. As Judge Williams has noted: "Despite cosmetic differences in appearance and differences in methods of assessing damages, securities fraud and mass tort actions are indistinguishable in both scope and effect, making the vastly different fate of the class action in each incongruous." Williams, *supra* note 31, at 330. Judge Williams certified a nationwide class of Dalkon Shield plaintiffs under Rule 23(b)(1) to determine punitive damages and a state-wide class under Rule 23(b)(3) to determine common issues of liability. *In re Northern Dist. of Cal., Dalkon Shield, Etc.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The Ninth Circuit reversed. *Id.*

166. See *supra* notes 15-19, 23, 106-13 and accompanying text.

167. *In re Fibreboard*, 893 F.2d 707 (5th Cir. 1990).

168. See Mullenix, *supra* note 153, at 1075-79; Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1214 (1983) (several commentators have proposed the creation of mass tort procedural law to resolve conflict-of-law problems).

169. Mullenix, *supra* note 153, at 1076. Before proceeding to the merits, a federal court must spend a significant amount of time deciding how to apply state or federal rules. In the worst case scenario, a court certifies specific issues to the state supreme court, which then takes years to resolve the issue. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327-29 (5th Cir. 1985) (*en banc*) (certifying issues concerning damages to the Mississippi Supreme Court).

170. Mullenix, *supra* note 153, at 1076. See also *supra* notes 39-45 for a discussion of the effects of case settlement.

171. Mullenix, *supra* note 153, at 1077. But see *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d at 1326, in which the court was doubtful about establishing a federal common law:

[W]e note the impracticalities of fashioning a federal common law in the context of asbestos litigation. First, any decision by this court to displace state law would be effective only within our geographical jurisdiction. While it is of course possible that other circuits would in time follow our lead, at least one circuit has already expressly refused to apply

taken on a national scope and dimension, "the interstate judicial system [has an] interest in obtaining the most efficient resolution of controversies."¹⁷² Developing a federal common law that addresses the asbestos crisis is the most effective means of furthering this goal.¹⁷³

The proposed legislation would facilitate not only the adjudication of the current 29,466 federal claims, but also that of the 60,000 state claims currently pending.¹⁷⁴ Such an enactment would eliminate both the *Erie* Doctrine complications¹⁷⁵ and the state law barriers to uniform and efficient resolution of the asbestos claims.¹⁷⁶ Uniform adjudication would enable the parties to a suit to predict the outcomes and would, consequently, lead to more out-of-court settlements.

Certainly, such settlements are advantageous for all involved. The courts would become more effective in allocating their time. The plaintiffs would receive compensation, and the defendant companies would be able to both budget their expenditures and save costly attorneys' fees.

Although the best means of coping with the asbestos crisis, establishment of federal common law is not without its drawbacks. Until the Supreme Court addresses the substance of such federal common law, its creation would be left to individual circuits.¹⁷⁷ Unless the Supreme Court spoke quickly, asbestos claimants might be tempted to forum shop.¹⁷⁸ Congressional enactment of substantive provisions to accompany these recommended procedural guidelines could go a long way towards preventing such initial forum shopping.¹⁷⁹

federal common law in these circumstances. Unless and until the Supreme Court imposes a similar federal common law on the country as a whole, any federal substantive rules fashioned by us would only exacerbate the alleged inequities among claimants, with punitive and certain types of compensatory damages being available outside the circuit but not within. Such a result, in turn, would encourage a massive effort at forum shopping to bring suits outside this circuit.

Id.

172. *In re Northern Dist. of Cal., Dalkon Shield, Etc.*, 526 F. Supp. 887, 909 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

173. *See supra* note 171.

174. Mullenix, *supra* note 153, at 1079.

175. *See supra* note 63 for a discussion of the *Erie* doctrine.

176. *See supra* notes 65-67.

177. *See supra* note 140.

178. Mullenix, *supra* note 153, at 1079.

179. *Id.* Of course, to the extent Congress did enact such provisions, the law would not be federal "common law."

B. The Creation of Minimum Commonality Among Class Members

Since classes in asbestos litigation can become extremely large,¹⁸⁰ Congress must provide guidelines to break classes into more manageable numbers. Judge Weinstein's method of handling the Navy Yard cases is both viable and innovative.¹⁸¹ Congress could allow courts to break classes down in several different ways: classes could be created on the basis of illness, by the percentage of injury the plaintiff claims a particular defendant caused,¹⁸² or by the plaintiff's nature as a person directly exposed to asbestos or that person's relative.¹⁸³ Courts could determine which plaintiffs fall into each category by providing the plaintiffs with identical interrogatories. To promote uniformity and fairness, Congress should set specific guidelines for the questions to be asked.

In addition to subclassing plaintiffs, Congress must provide for class certification for limited issues and purposes including: settlement, pre-trial proceedings, liability ascertainment, and punitive damage assessment.¹⁸⁴ By providing for subclasses based on different factors, a potential class member will not be forced to give up individual interests that may entitle him to more than a fellow class member.¹⁸⁵

C. Defendant Solvency

To ensure that the defendant remains solvent and capable of compensating each deserving plaintiff, Congress must draft its bill to exclude opting out and, in the case of probable insolvency, to exclude punitive damages until after a determination that the defendant has compensated all present and likely future plaintiffs.

In her legislative proposal, Professor Mullenix provides for an "opt-in/opt-out" device.¹⁸⁶ However, a decision by many plaintiffs to pursue individual causes of action will frustrate the fostering of judicial economy

180. In *In re Fibreboard Corp.* 893 F.2d 706 (5th Cir. 1990), the class would have included 3,031 plaintiffs. See *supra* notes 50-77 and accompanying text.

181. See *supra* notes 42-43 and accompanying text.

182. *Id.*

183. A typical class includes the actual victims of direct exposure to asbestos as well as those who came into contact with the initial victim's asbestos-laden clothes. See *supra* notes 106-13 and accompanying text.

184. Mullenix, *supra* note 153, at 1074.

185. *Id.* at 1075.

186. *Id.* at 1070-72. She believes that such a provision strikes an effective balance between judicial economy and the individual plaintiff's interest in controlling his own case. *Id.* See *supra* notes 46-47 and accompanying text for a discussion of the validity of such concerns.

and uniformity. Professor Mullenix acknowledges this problem and provides that "opt out relief should be granted only in extraordinary cases."¹⁸⁷ However, Congress must act in a clear and definite manner to address and curb the national asbestos litigation crisis. Drawing lines on the basis of "extraordinary cases" undermines the needed clarity that the proposed uniform guidelines will provide. What is an "extraordinary case" to one court may be ordinary to another. In light of the pressing need for clarity and as much uniformity as possible,¹⁸⁸ such line-drawing should not be permitted.

To further ensure that the defendant is able to compensate even the last deserving plaintiff, Congress must circumscribe punitive damages awards. Once a class succeeds on the merits, punitive damages may be assessed, but the court should distribute actual and compensatory damages first. Distribution should be on a pro rata basis with plaintiffs suffering from more serious illnesses receiving their share first.¹⁸⁹ Second, elderly class members should be compensated to ensure that they enjoy some remuneration during their lifetimes. Finally, the class members suffering from less serious injuries should recover their share. Congress must provide for the establishment of trusts to take into account future plaintiffs.¹⁹⁰ It is only once the defendant compensates all present and ascertainable future plaintiffs that the plaintiffs should receive punitive damages. Otherwise, earlier plaintiffs may receive substantially more than equally deserving later class members.

V. CONCLUSION

"Asbestos litigation has become the classic example of civil cases that cost too much and take too long."¹⁹¹ It is inundating our courts, making prompt adjudication increasingly difficult. Although several district court judges have devised innovative means to curb the crisis, they are invariably reversed on appeal. No one questions the dire need for some way to adjudicate asbestos claims effectively and fairly. However, nothing seems to work. Even class action under Rule 23(b)(3), although at-

187. Mullenix, *supra* note 153, at 1073. She believes that Congress can discourage opting out by requiring court permission to do so and by structuring lawyer's fees to encourage joinder. *Id.*

188. *See supra* note 177 and accompanying text.

189. *See supra* notes 42-43.

190. Due to the latent nature of asbestos-related illnesses, potential plaintiffs might not discover their illnesses prior to adjudication. *See supra* notes 15-17, 23 and accompanying text.

191. *In re National Asbestos Litig.*, Cleveland Div., 1-90 Cv 11,000 (Aug. 10, 1990).

tractive, is inappropriate because the typical asbestos class cannot meet the commonality requirement.

In order to relieve our overly-burdened courts, Congress, acting in a clear and precise manner, must provide for a class action device geared solely towards asbestos litigation. To promote judicial economy, uniformity, and predictability, Congress must authorize federal common law. To ensure manageability, Congress must mandate the creation of specific subclasses according to injury, percentage of injury, or the type of potential class members involved. Finally, to ensure adequate compensation to successful class litigants, Congress must reject an opt out device while structuring a hierarchy of compensation, providing for the most seriously injured first and reserving punitive damages awards until the court is fairly certain that the defendant has compensated the last plaintiff.

For years, courts have been crying out for Congressional action. Now is the time for Congress to heed these cries and to put an end to the national asbestos litigation crisis.

Patricia Zimand

