ARTICLE

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

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INTRODUCTION

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

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

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

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


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

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

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

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

I. ORIGINS

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

A. Early Reluctance

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

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6 I owe Bob Bone for this formulation.
7 See In re A.H. Robins Co., Inc., 880 F.2d 709, 725 (4th Cir. 1989) (distinguishing between two types of mass tort suits—those arising from a single accident, and those that are more diffuse).
8 See, e.g., Charles Alan Wright, Class Actions, 47 F.R.D. 169, 179 (1969) (suggesting that Rule 23 could prove useful for the management of mass accident litigation).
to use the new Rule 23. Concern that class actions might generate binding judgments for a large group of accident victims helped to derail an effort to revise Rule 23 in the early 1950s. When the revision process began in earnest in the early 1960s, the specter of a collusively litigated mass accident class action rigged to settle personal injury liability cheaply haunted the Advisory Committee. The committee ultimately agreed that “a very exceptional mass accident case could qualify” under Rule 23(b)(3), given class members’ rights to opt out. Some members found the mass accident class action a less discomfiting prospect. But the committee anticipated the use of other tools, not Rule 23, for the aggregate management of personal injury claims.

The judicial attitude toward Rule 23’s use for air crash cases and the like remained tentative and unsettled throughout the 1970s. Choice of law problems, the superiority of other mechanisms for case management, and the interest of individual litigants in personal control of valuable claims created obstacles to certification.

10 See, e.g., Judith Resnik, From “Cases” to “Litigation”, 54 LAW & CONTEMP. PROBS. 5, 9-17 (1991) (describing the Committee members’ views).
11 When Charles Clark introduced his revised Rule 23 to the Advisory Committee at a meeting in May 1953, the very first interruption came from Bill Moore, who wanted to know whether it could be used to dragoon tort victims into a particular case. Transcript, Advisory Committee on Federal Rules of Civil Procedure 111 (May 18, 1953), http://www.uscourts.gov. Clark’s response was “probably yes.” Id. Moore opposed the revamped Rule 23 for this reason. Transcript, Advisory Committee on Federal Rules of Civil Procedure 157-58 (Mar. 1955), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-535-55 (Cong. Info. Serv.).
12 See, e.g., John P. Frank, Advisory Committee on Civil Rules: Dissenting View of Committee Member 2 (May 28, 1965), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-7007-01 (Cong. Info. Serv.) (“The corruption potential of the binding spurious class action intimidates me. These cases are terribly easy to rig—a bright child could do it. I would not hold out the bait.”).
14 See, e.g., Transcript, Meeting of the Federal Rules Advisory Committee 13 (Oct. 31-Nov. 2, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-7104-53 (Cong. Info. Serv.) (comments of Charles Alan Wright) (insisting that “the mass accident” class action “doesn’t bother me a bit”).
judges in 1977 and asked whether “Rule 23 is capable of disposing efficiently of mass accident claims,” slightly more than half answered yes. In contrast, federal judges uniformly refused to certify dispersed mass tort classes until the very end of the 1970s.

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

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


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

22 The discussion in this paragraph is based on Marcus, Sturm und Drang, supra note 2, at 592-593.
courts could facilitate class certification, enable aggregate adjudication, and thereby ensure that the class action discharged its regulatory task.

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

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

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27 Decisions limiting the subject matter jurisdiction of the federal courts meant that most federal class actions litigated in the 1970s arose under federal law. Marcus, Sturm und Drang, supra note 2, at 627-28.
Americans and judges’ inability to keep frivolous or trivial claims off their dockets meant that courts attracted too many disputes. Relatedly, according to critics, an “imperial judiciary” had emerged by the mid-1970s, illegitimately claiming power over an ever-expanding array of social, political, and economic problems that had previously remained the province of the political branches.

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

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

33 See, e.g., Chilling Impact, supra note 30, at 63.
35 Id. at 4-7.
36 See Nathan Glazer, Towards an Imperial Judiciary?, PUB. INT. Fall 1975, at 114-17 (describing the trend of growing judicial power); see also Donald L. Horowitz, The Courts and Social Policy 4 (1976) (discussing the expansion of judicial responsibility since the 1960s).
37 Chayes, Role, supra note 30.
38 Id. at 1282; see also Howard, supra note 30, at 102.
39 Chayes, Role, supra note 30, at 1283.
40 Id. at 1302.
41 Id. at 1304.
42 Id. at 1284.
44 Id. at 27; Chayes, Role, supra note 30, at 1314.
45 Chayes, Role, supra note 30, at 1284 (referencing employment discrimination, school desegregation, and other class actions).
litigation's big footprint (and the judicial power it implied), personal injury cases exemplified traditional, party-centered and party-controlled lawsuits.46

B. Two Judicial Mavericks

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

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

46 Id. at 1283.
47 Payton v. Abbott Labs, 83 F.R.D. 382, 385 (D. Mass. 1979); In Camera, 5 CLASS ACTION REP. 469, 469 (1978); Silbersweig, supra note 26, at 243-44.
50 For example, Judge Williams served as a class representative three times in suits against the federal government seeking raises for federal judges. See Terry Carter, Bucking for a Raise, 84 A.B.A. J. 32 (1998).
51 See, e.g., In re Consolidated Pre-Trial Proceedings in Memorex Security Cases, 61 F.R.D. 88, 97 & n.7 (N.D. Cal. 1973) (certifying a class in an innovative early securities fraud decision).
53 In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (observing that any attempt to try the cases individually would “bankrupt” a court’s calendar).
54 Id. at 897-98.
55 Id. at 902-03.
56 Id.
Jack Weinstein soon followed Williams’s lead. Although Weinstein had once denounced personal injury class actions as a form of “legalized ambulance chasing,” he put this youthful “indiscretion” behind him in 1983. He certified a mandatory national class in the famous Agent Orange litigation to litigate the defendants’ liability for punitive damages, and he certified everything else, including the defendants’ liability, under Rule 23(b)(3). Whereas Williams’s predominance analysis was cursory, Weinstein’s was fanciful. He infamously determined that a single “national substantive rule” would govern class members’ claims, thereby dodging the otherwise insuperable barrier to certification created by the simultaneous application of dozens of states’ tort law. Like Williams, Weinstein expected the parties to settle.

Weinstein and Williams exercised the sort of power that Chayes had observed in public law judges, with Weinstein’s debt to Chayes plain. Both judges seized control of litigation without regard for individual plaintiff preferences. Neither judge paid much heed to the constraints of the substantive law on procedural possibilities, ignoring or assuming away legal and factual differences among class members’ claims. Weinstein forthrightly assumed the legislative mantle with his “national substantive rule.” Williams did so as well, if less explicitly, with his intention to displace tort law remedies with an equitable, pro rata distribution from a limited fund, as Rule 23(b)(1)(B) contemplates. Under the guise of managing litigation, both judges...
took on sole responsibility for significant policy problems, with Weinstein explicit about his exercise of power as an alternative to legislative action.67

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

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

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


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


71 Id. at 325.


73 Id. at 725.

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

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

II. AMCHEM

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

Amchem involved a remarkable attempt to use a class action to settle claims not yet filed by people exposed to asbestos. Had the settlement succeeded, a right to claim compensation from a settlement trust fund would have replaced millions of tort claims, a transformation of substantive rights achieved...
through the exercise of judicial power. Versions of the Amchem story have several skillful tellings. A central theme in existing accounts involves the effort of powerful plaintiffs’ lawyers cooperating with defendants to enrich themselves at the expense of asbestos victims. Lost in these narratives of corruption and collusion, however, is a central part of this history. Amchem happened because the federal courts wanted a class action endgame. It was as much the exercise of public power as it was private dealmaking.

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

A. The Failed Alternatives

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

1. The Failure of Informal Aggregation

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

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


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

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

85 Id. at 6; see also Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chic. L. Rev. 440, 480-90 (1986) (describing the implementation and ramifications of the Ohio Asbestos Litigation plan).
ordered that a single lawyer represent each asbestos company for all of its cases. Working with two special masters, Lambros developed form questionnaires designed to gather all essential information for settlement evaluation and had one filled out for each case. Short interviews replaced formal depositions.

The information gleaned from this expedited discovery went to the RAND Corporation, which generated proposed settlement amounts for each case based on extensive historical data on comparable claims.

Lambros scheduled multiple cases for a single half-day status conference and encouraged the parties to settle. At its peak, a single day’s work might produce 200-300 settlements, with more than $150 million changing hands.

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

Informal aggregation happened outside the courtroom as well. Plaintiffs’ lawyers began cooperating extensively as early as 1978, and by the mid-1980s leading firms had informally divided up the country, with each representing hundreds, even thousands, of clients in different regions. On the defense side, three years of negotiations pursued to replace the tort system with a “private administrative agency” produced the Asbestos Claims Facility (“ACF”) in 1985. The ACF resolved most of the 21,000 claims it settled.
through an ADR system designed to reduce transaction costs considerably. But the companies had disparate settlement preferences, and the ACF collapsed in 1988. Some of the companies tried again, forming the Center for Claims Resolution (“CCR”) to continue with a coordinated litigation strategy. But the pace of filings increased, and defendants found themselves paying to settle weaker and weaker claims.

2. The Failure of Formal Aggregation

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

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


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


103 Kane, 843 F.2d at 639; see generally Paul D. Rheingold, Litigating Mass Tort Cases § 11:11 (2016). Manville had badly misapprehended its asbestos liability. Shirley Hobbs Scheibla, Heat on Asbestos: Legislative, Legal Challenges to Producers Mount, BARRON’S, Mar. 5, 1979, at 4 (quoting Manville’s president’s rosy projections regarding the company’s future liability).


105 Id. at 754-58.

106 Id. at 758.


108 Hensler, supra note 83, at 1919.

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

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

He conditioned his approval on the lawyers’ willingness to agree to arbitrate

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


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

115 Fitzpatrick Testimony, supra note 102, at 387.


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

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

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

all claims not covered by the class settlement.\textsuperscript{123} Some observers celebrated
this innovation as the golden ticket out of the asbestos morass.\textsuperscript{124}

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

\textbf{B. The Institutional Commitment}

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

\textbf{1. Chaos}

By the end of the 1980s, an “air of judicial desperation” had set in.\textsuperscript{131}
Plaintiffs’ lawyers sensed that legislation,\textsuperscript{132} an onslaught of bankruptcies,\textsuperscript{133}
or some other dramatic alteration to asbestos litigation to that point was
inevitable. Even litigators who had previously championed “traditional forms

\begin{thebibliography}{13}
\bibitem{123} Mark A. Peterson \& Molly Selvin, Resolution of Mass Torts: Toward a
\bibitem{124} Arthurs, \textit{supra} note 122, at 6.
\bibitem{125} Peterson \& Selvin, \textit{supra} note 123, at 46 n.102.
\bibitem{128} Aldock Oral History, \textit{supra} note 99, at 157.
\bibitem{129} Nagareda, \textit{supra} note 127, at 69.
\bibitem{130} In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990).
\bibitem{131} Hanlon, \textit{supra} note 82, at 1297; John C. Coffee, Jr., \textit{Entrepreneurial Litigation}
100 (2015).
\bibitem{132} Alison Frankel, Traitor to His Class, \textit{Am. Law.}, Jan. 2000, at 55.
\bibitem{133} Rice Interview, \textit{supra} note 110, at 5; Gordon Hunter, Plaintiffs’ Bar at War Over Asbestos
Caseload; Tens of Millions in Fees at Stake, \textit{Tex. Law.}, Aug. 20, 1990, at 8.
\end{thebibliography}
of dispute resolution” for asbestos cases134 warmed to a class action strategy to bring asbestos litigation to a copacetic conclusion.135

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

Judicial pressure began to mount, and not just from a trigger-happy judge in Georgia. On June 25, 1990, the Federal Judicial Center convened a meeting at the Dolly Madison House in Washington, D.C., with several key litigators and the ten federal judges with the largest asbestos dockets in attendance.144 The attendees spitballed several solutions to the crisis145 and established an ad hoc committee to pursue further study.146 This step was modest, but it

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135 Rosenthal Interview Notes, supra note 96, at 3.
137 Rosenthal Interview Notes, supra note 96, at 3; Fitzpatrick Testimony, supra note 102, at 390-91.
138 Rosenthal Interview Notes, supra note 96, at 3.
139 In re Temple, 851 F.2d 1269, 1272 (11th Cir. 1988).
140 Rosenthal Interview Notes, supra note 96, at 3.
141 Guyon, supra note 135; Temple, 851 F.2d at 1269.
142 Rosenthal Interview Notes, supra note 96, at 4. So did the Fourth Circuit’s decision in In re A.H. Robins Co., Inc., 880 F.2d 709 (4th Cir. 1989), which approved a class settlement related to DES litigation. Rosenthal Interview Notes, supra note 96, at 4.
143 CCR’s president approached Motley in 1987 to begin these conversations. Transcript of Fairness Hearing Before the Honorable Lowell A. Reed, Jr. at 78, Georgine v. Amchem Prods., Inc. et al., Civ. No. 93-0215 (E.D. Pa. Feb. 22, 1994) (testimony of Lawrence Fitzpatrick) [hereinafter Fitzpatrick Hearing Testimony].
145 Aldock Interview Notes, supra note 100, at 2.
146 National Class Action Seen as Result of “Turf War”, 5-12 MEALEY’S LITIG. REP. ASB. 1, July 20, 1990.
came with a clear and important message from the judges to the litigators: end the chaos.147

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

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

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

147 Fitzpatrick Hearing Testimony, supra note 143, at 84; see also Aldock Interview Notes, supra note 100, at 2.
148 Fitzpatrick Testimony, supra note 102, at 392.
149 Stephen Labaton, The Bitter Fight Over the Manville Trust, N.Y. TIMES, July 8, 1990, at F1; see also In re Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 727 (2d Cir. 1992); “Turf War”, supra note 146.
150 Labaton, supra note 149, at F1.
153 Labaton, Judicial Struggle, supra note 152.
156 Id. at *2.
in Rust Belt cases, circulated a couple of memoranda describing a class action strategy and criteria for compensating claimants pursuant to a global settlement.158 One memo rallied support for Linscomb, a mandatory class action filed in the Eastern District of Texas.159 Motley supported Henderson. “If the parties don’t reach consensual agreement [on a settlement framework],” Motley warned, “the courts will decide it and we will not control our future.”160 Another attempt by Weinstein to seize control of a large tranche of asbestos litigation in December 1990161 only “bolstered the conviction” of the Linscomb lawyers “that some sort of mass resolution was inevitable.”162

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

2. Judicial Control

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

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160 Hunter, Plaintiffs’ Bar, supra note 133, at 8.
161 See Frankel, Traitor, supra note 132, at 55; Andrew Blum, A Routine Hearing Quickly Turns Less So, NAT’L L.J., Dec. 24, 1990, at 8; Fitzpatrick Hearing Testimony, supra note 143, at 90.
162 Rosenthal Interview Notes, supra note 96, at 4.
163 Frankel, Traitor, supra note 132, at 55.
164 Hunter, Plaintiffs’ Bar, supra note 133, at 8; Plaintiff Bar is a House Divided, 5-14 MEALEY’S LITIG. REP. ASB. 2, Aug. 17, 1990.
165 Rice Declaration, supra note 112, at 10.
166 Fitzpatrick Testimony, supra note 102, at 394, 285, 292; Scheibla, supra note 103, at 4.
167 Fitzpatrick Testimony, supra note 102, at 394.
168 Lambros Interview, supra note 84, at 11.
169 McGovern, Rethinking Cooperation, supra note 144, at 1862.
a substantial asbestos docket agrees that this litigation impasse cannot be broken except by aggregate or class proceedings," the report declared. It insisted that "class actions were devised for precisely these kinds of cases," an assertion that would have struck federal judges as silly a decade earlier. The committee recommended that Congress and the Advisory Committee explore legislation or rule changes to solve the asbestos crisis with a class action, should Congress not replace the tort system with some sort of compensation scheme. Responding to this request, the Federal Civil Rules Advisory Committee proposed an amendment to Rule 23 designed "to enlarge the opportunity for mass tort litigation."

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

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

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Footnotes:

171 Id. at 403.
172 Id. at 409-20.
173 Minutes, Oct. 21-23, 1993, at 174, in 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, MAY 1, 1997 [hereinafter WORKING PAPERS].
174 Minutes, Advisory Committee on the Civil Rules, Nov. 29-Dec. 1, 1990, Meeting, at 162, in 1 WORKING PAPERS, supra note 173; see also Minutes, Advisory Committee on Civil Rules, Oct. 21-23, 1993, at 174-175, in 1 WORKING PAPERS, supra note 173.
176 Id. at 417.
177 Aldock Interview Notes, supra note 100, at 2.
180 Hensler, Time Goes By, supra note 83, at 1901; Locks Interview, supra note 99, at 7.
182 Coffee, supra note 82, at 1390 (quoting letter from Parker to Weiner); Staff of the Comm. on the Judiciary, supra note 170, at 28 (quoting Judge Joseph F. Weis Jr.).
183 Interview with Brent Rosenthal (Apr. 22, 2016), Transcript at 12 [hereinafter Rosenthal Interview].
of settlement, plaintiffs’ lawyers tried to free cases from Weiner’s chambers, variously described as a “dark hole” or a “plaintiffs’ Armageddon.” But the JPML rejected remand requests they made and instructed the parties to work with Weiner to settle everything.

3. Following Instructions

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

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

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184 Staff of the Comm. on the Judiciary, supra note 170, at 163 (testimony of William Schwarzer) [hereinafter Schwarzer Testimony].
185 Aldock Interview Notes, supra note 100, at 2; Henderson Accuses Two Committee Members of Side Deals, 7-17 MEALEY’S LITIG. REP. ASB. 2, Oct. 2, 1992.
189 Fitzpatrick Hearing Testimony, supra note 143, at 78; Fitzpatrick Testimony, supra note 102, at 389-90, 411. A lump sum offer to settle pending and future cases failed in 1991 because plaintiffs’ firms viewed their right to negotiate settlements individually as “sacred.” Rice Declaration, supra note 112, at 15; see also Fitzpatrick Testimony, supra note 102, at 409.
190 Aldock Interview Notes, supra note 100 at 2; Rice Interview, supra note 110, at 9-10.
191 Locks Interview, supra note 99 at 8; Hanlon, supra note 82 at 1299; Aldock Interview Notes, supra note 100 at 3.
192 Fitzpatrick Hearing Testimony, supra note 143, at 143.
194 Aldock Interview Notes, supra note 100, at 1.
195 Fitzpatrick Testimony, supra note 102, at 439.
this strategy’s wisdom by the time the JPML acted. In August 1992 it forced plaintiffs’ lawyers to accept a pleural registry for future claims in exchange for inventory settlements of then-pending cases in New England.

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

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

196 Id. at 608.
197 Fitzpatrick Hearing Testimony, supra note 143, at 8; id. at 14.
200 Aldock Interview Notes, supra note 100, at 1.
203 Aldock Interview Notes, supra note 100, at 2.
204 Baron Statement, supra note 198, at 158.
oppose.” Most, however, proved cooperative. CCR offered firms the same deal it gave Motley, Rice, and Locks: a lump sum to settle already-filed cases in exchange for an agreement to abstain from filing cases in the future that did not meet certain medical criteria. Many of these agreements were dated January 14, 1993. They provided that the class settlement, which incorporated the same medical criteria as conditions for claimant eligibility, would supersede their provisions with respect to future claims.

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

C. The Collapse

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

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


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


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

211 Id. at 12.


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

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

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

\textsuperscript{215} Id. at 315-16.
\textsuperscript{219} See \textit{NAGAREDA}, supra note 127, at 35.
\textsuperscript{220} \textit{In re Rhone-Poulenc Rorer Inc.}, 51 F.3d 1293 (7th Cir. 1995).
\textsuperscript{221} \textit{Georgine v. Amchem Prods., Inc.}, 83 F.3d 610 (3d Cir. 1996).
\textsuperscript{222} \textit{Castano v. Am. Tobacco Co.}, 84 F.3d 734 (5th Cir. 1996).
\textsuperscript{223} See \textit{Amchem Prods. Inc. v. Windsor}, 521 U.S. 591, 628 (1997). In \textit{Ortiz v. Fibreboard Corp.}, 527 U.S. 815 (1999), the Supreme Court again refused an attempt to resolve asbestos liability through a class settlement.
\textsuperscript{224} See, e.g., \textit{Flanagan v. Ahearn}, 134 F.3d 668, 669 (4th Cir. 1998) (2-1 per curiam) ("After oral argument and reconsideration, we can find nothing in the \textit{Amchem} opinion that changes our prior decision [to certify the mass tort class action settlement]. We again affirm.")
D. The Weight Litigation Can Bear

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

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

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

As much as the mass tort class action involved private dealmaking, so too did it implicate judicial power.

225 Weinstein, one of the original judicial mavericks, also persisted the longest. He tried to certify a class of smokers in 2002. In re Simon II Litig., 211 F.R.D. 86, 99 (E.D.N.Y. 2002), vacated and remanded by In re Simon II Litig., 407 F.3d 125 (2d Cir. 2005).
227 Amchem, 521 U.S. at 629.
228 NAGAREDA, supra note 127, at 220.
229 Id. at 76, 220.
230 Id. at 83.
231 Chayes, Role, supra note 30, at 1284.
But Nagareda’s basic point, slightly altered, remains apt: something other than litigation’s outcome must legitimate the power the judge wields as she supervises the process. To proponents of a muscular Rule 23 in the 1970s, its regulatory efficacy provided the class action with crucial justification. The class action’s effectiveness came from its power to mobilize claims and thereby vindicate regulatory regimes often designed for private enforcement. The class action’s regulatory conception provided the extensive judicial power Rule 23 blessed with its normative foundation, but it also suggested an important limit: if claimants can vindicate regulatory regimes without aggregation, then its use triggers concerns of illegitimacy.

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

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

232 Farhang, supra note 5, at 5-16.
233 The plaintiffs in the Blood Factor class action made the following self-contradictory argument in favor of class certification: “Here, the class action device could . . . provide[e] the majority of victims their best, and perhaps only, chance of obtaining redress for their injuries. And, what is the certain alternative? Likely thousands of cases in the state and federal courts.” Plaintiffs’ Memorandum in Further Support of Their Motion for Class Certification at 14-15, In re Factor Concentrate Litigation, MDL No. 986 (N.D. Ill. 1994).
The firms that struck inventory deals in anticipation of Amchem helped to pioneer what has become a norm, however dubious, for mass tort litigation—a settlement agreement that effectively pays the firm to stop filing cases.

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

Likewise, if the danger of distributional inequity, the second justification, could have provided an administrable limit on judicial power, it would have done so in asbestos. The litigation and settlement of tens of thousands of claims offered a rich data set upon which courts could judge just how unequally claimants had fared, how much money went to something other than their compensation, and how much better they would fare under a class action settlement regime. Even here, however, judgment proved impossibly subjective. The Amchem class members would have received less than what Motley, Rice, and Locks obtained for their inventory clients through the side deals, and what they had obtained historically for their clients.

Were historical averages or the side settlement figures the right baseline? In light of the Manville example, could the negotiating parties rightly insist on some parsimony to ensure sufficient assets in the future? Did the exclusion of unimpaired claimants from recovery better reflect their value in a litigation system increasingly inclined toward pleural registries? If after more than a decade of experimentation a court could not answer such questions objectively for asbestos litigation, the likelihood it could do so with confidence for less well-litigated claims was low.

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

237 Interview with Paul Rheingold, Founder, Rheingold, Giuffra, Ruffo & Plotkin (July 6, 2016), Transcript at 6, 7.
239 Cf. John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. REV. 990, 997 (1995) (“Unless we are confronting a systemic emergency that requires some form of legal triage, it is hard to justify tilting this equilibrium radically in the direction of collective adjudication.”).
240 Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996); see also In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995).
242 E.g., Coffee, supra note 82, at 1397-98.
domains. Concerns over a litigation explosion and the rise of an imperial judiciary had become gospel for successive presidential administrations,243 and such criticisms of American civil justice fueled Congress’s litigation agenda after the mid-term elections of 1994.244 Chayes’s celebratory story about litigation, with the fulsome judicial power it included, faded, to be replaced by one markedly more suspicious of the process’s aggressive deployment.245 Legislated limits to securities fraud and civil rights class actions in the mid-1990s reflected this new restrictive spirit, as did a package of Rule 23 amendments the Advisory Committee considered in 1996.246

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

III. THE AFTERLIFE OF THE MASS TORT CLASS ACTION

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


245 E.g., Coffee, supra note 131.


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

248 E.g., Barnes, supra note 113.

249 E.g., Horowitz, supra note 36, at 8.

250 According to Westlaw, Amchem was cited in twenty-seven federal court opinions in December 2016 alone. Ortiz was cited nearly fifty times in 2016.
jurisprudence continues to owe a great deal to the episode. John Coffee drew extensively on asbestos and other mass torts to develop his influential entrepreneurial litigation model.\(^\text{251}\) His and others’ concern with agency costs arising in profit-seeking aggregate litigation cast the class action in a different light from what proponents of the regulatory conception celebrated in the 1970s.\(^\text{252}\) To these proponents, the judge played a leading, heroic role, remaking social and economic orders through litigation while exercising broad, nearly unbound power. Viewed through an entrepreneurial litigation lens, the judge acts more as an observer trying to keep lawyers, now at center stage, from harming class members.

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

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

\(^{251}\) COFFEE, supra note 131, at 95-118.

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


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

\(^{255}\) See Marcus, Litigation and Legitimacy, supra note 2, at 6-9.

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

\(^{257}\) E.g., Arthur Young & Co. v. U.S. District Court, 549 F.2d 686, 691 (9th Cir. 1977) (describing various conditions to the issuance of a writ of mandamus to review class certification orders); see also Michael E. Solimine & Christine Oliver Hines, Deciding to Decide: Class Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 WM. & MARY L. REV. 1531, 1555-57 (2000) (describing doctrines used to achieve interlocutory review of class action certification decisions).
class required, and review of the certification of mass tort classes became common.\textsuperscript{258} By the mid-1990s, the mass tort class action had reinvigorated appellate input into the design of class action doctrine.

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

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

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

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


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

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

\textsuperscript{266} E.g., Blair v. Equifax Check Servs., Inc., 81 F.3d 832, 835 (7th Cir. 1999); Nagareda, supra note 265, at 104-05.

\textsuperscript{267} Cf. Regents of the Univ. of California v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 380 (5th Cir. 2007) (overturning class certification in a securities class action).
Not only has a regime developed, it has developed to constrain district court power to certify classes. For most of Rule 23(f)’s existence, conservatives have dominated the courts of appeals, with predictable results for class action doctrine. But permanent structural features of appellate review unrelated to ideology have also generated this retrenchment. One of these features is attitudinal and relational. An appellate judge who votes to reverse the denial of class certification increases the likelihood that the district court would feel obliged to certify the class on remand. The district court, supposed to have “wide discretion” over the class certification decision, is now saddled with a time-consuming case it had already judged as unmanageable. A decision vacating a grant of class certification, in contrast, frees the district court of this burden, even if it is a welcome one. Also, plaintiffs’ lawyers file significantly fewer Rule 23(f) petitions than defendants’. Parties’ and lawyers’ incentives, another structural feature, readily explains this reality. It only stands to reason that case law will tend to drift to favor the side that sets the appellate agenda.

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


273 A sophisticated plaintiffs’ lawyer should be significantly more disinclined than a defendant to seek Rule 23(f) review. The likelihood that a company will be sued in multiple securities fraud class actions is very low, for example. E.g., Dr. Renzo Comolli & Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, NERA ECON. CONSULTING, Jan. 20, 2015, at 4, http://www.nera.com/content/dam/nera/publications/2015/Full-Year_Trends_2014_0115.pdf [https://perma.cc/WZC4-9R6Y] (providing data on the number of securities class actions filed against publicly listed companies from 1996 to 2014). In contrast, a class action firm specializing in securities fraud litigation brings securities fraud class actions constantly. A company with a 50% chance of winning a Rule 23(f) appeal may take the gamble. Adverse precedent will not likely harm the company in the future, given the low likelihood that the company will be sued again. But an adverse appellate decision for a plaintiffs’ firm negatively impacts the dozens of future securities fraud class actions the firm plans to litigate. A significant portion of the comparatively few plaintiff-filed Rule 23(f) petitions should therefore come either from plaintiffs’ lawyers with little experience litigating class actions, or from unsophisticated plaintiffs’ lawyers.

CODA?

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

If mass tort litigation had great significance for the class action, the class action was never more than a “sideshow” for mass tort litigation.276 Amchem didn’t stop litigators from making Amchem-like deals to resolve mass tort liability. They continue to do so, just without Rule 23.277 The most notorious example involves the so-called “all-or-nothing” settlement. Defendants offer huge sums to settle, but they fund the deal only if a supermajority of individual plaintiffs agree to its terms. A plaintiffs’ lawyer who stands to receive a third of each client’s payout has an overwhelming incentive to convince her hundreds of individually retained clients to acquiesce. Moreover, she stops filing cases; doing so only increases the denominator and thus makes the defendants’ threshold all the more difficult to meet.

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

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

276 Interview with Paul Rheingold, supra note 237, Transcript at 4.
277 Id. at 6; Paul D. Rheingold, Mass Torts—Maturation of Law and Practice, at 15-16 (Jan. 2016) (unpublished manuscript) (on file with author).
279 E.g., Howard M. Erichson, The Trouble With All-or-Nothing Settlements, 58 U. KAN. L. REV. 979, 1006-22 (2010).
280 In his concurring opinion in Sullivan v. DB Investments, Inc., Anthony Scirica, a leading judicial authority on aggregate litigation, compared nonclass settlements unfavorably to class action deals because of the power judges enjoy over the latter. 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring). See also Samuel Issacharoff & D. Theodore Rave, The BP Oil Spill Settlement and the Paradox of Public Litigation, 74 LA. L. REV. 397, 430 (2014) (describing courts’ differing views on the merits of the class action mechanism).
believed that a class action could perform better than an overtaxed tort system struggling to render equitable justice efficiently. But such utilitarianism was insufficient in the 1990s to legitimate Rule 23’s foray into the personal injury domain. Perhaps the move back to Rule 23 that the NFL Concussion settlement heralds will ultimately demonstrate that the federal judiciary had it right all along when it committed to the class action as a path out of the asbestos morass. Or perhaps this episode will be but a coda and prove the old saw right: those who forget the past are doomed to repeat it.