REMARKS TO THE INSTITUTE FOR LAW AND ECONOMIC POLICY*

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The test for allowing a class action under former Equity Rule 38 was modestly stated to be satisfied when the question before the court was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[1] It's all that simple! While refinement and amplification of the rule followed with the adoption and subsequent modification of Rule 23, no one, even in 1966 when the current version of Rule 23 was adopted, fully anticipated the problems that face today's judicial system in applying Rule 23. Of course, I am talking about the mass tort.

Mass torts come with the current economic territory. As efficiency in production and manufacturing has increased, we have found that design errors are multiplied by factors measured in the millions. An ill conceived pill or a negligently designed fastener, costing but a few cents each, can place a large corporation at risk. At the same time, it can cause serious injury to individuals whose claims cannot be resolved, even in the near future, simply because of the numbers similarly injured. A schedule of individual trials for asbestos claims filed in the state courts of Baltimore City projected fifteen to twenty years into the future with available resources. Nationally, millions of citizens have been involved, knowingly or not, in mass tort litigation involving airline tickets, hotel telephone charges, intrauterine devices, heart valves, pacemakers, motor vehicle gas tanks, breast implants, Bendectin, DES, lead paint, asbestos, tobacco, Agent Orange, and more.

Our judicial policymakers, whomever we identify, have concluded, at least for now, that the aggregation of claims is the only course open to us as a practical matter, but aggregation at large levels brings nearly insurmountable problems in the context of our present laws. The sheer weight of aggregation in terms of people, time, and money distorts the traditional functioning of the judicial system. While would-be class members receive indecipherable class notices and wait years in hope of recovery, often receiving in the end a much diminished recovery, companies faced even with the threat of a class action settle as the only economic

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* Delivered Dec. 14, 1996.

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1. FED. R. CIV. P. 23 advisory committee note (1937).

alternative. The Third Circuit has called such settlements "legalized blackmail."[2]

The rules designed for the individual resolution of constitutional cases and controversies predictably are bent and misapplied by the weight of the problem of adjudging a dispute involving an entire segment of society. Judge Becker characterized the class action in *Georgine v. Amchem Products, Inc.*[3] as a case that "force[d] the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." Similarly, in *In re Rhone–Poulenc Rorer, Inc.*,[4] Judge Posner stated, in commenting on asbestos litigation: "The number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules." In addition to the distortion wreaked by class action mass, we are confronted with the most difficult legal problems in attempting to apply Rule 23 even to smaller mass tort cases. Consider these.

Mass torts typically are not limited by jurisdictional boundaries with the inevitable result that a single class of people injured by a singular event will have different legal consequences. From state to state the nature of the claims may differ, some states recognizing a particular claim that other states do not and requiring different elements of proof; the amount and nature of damages and limitations of damages may differ; and defenses to both claims and damages may differ.

The conflict-of-interest problems are also inherent in the class action process. Because groups of plaintiffs in large class actions will have competing claims to the limited dollars generally available from defendants, the attorneys representing a class that includes factually-dictated subclasses can face a myriad of conflicts of interest. This became particularly apparent in the asbestos class actions in the Eastern District of Pennsylvania (*Georgine*) and in the Eastern District of Texas (*Ahearn*) *In re Asbestos Litigation*,[5] where classes and subclasses included both plaintiffs who had already sustained injury and plaintiffs who were exposed to asbestos but had yet manifested no injury. Also, because of the large amounts of attorneys fees involved, competition among attorneys to represent even a homogeneous class can cause them to compromise their duties to their clients. For instance, an attorney may counsel his client, and the class of persons his client purportedly represents, to opt out of a case only to further the attorney's ability to be in charge and earn the large fee.

And another problem: As pointed out by Judge Posner in *Rhone–Poulenc*[6] and Judge Smith in *Castano v. American Tobacco Co.*,[7] traditional jurisprudence resolves individual disputes, creating an evolving case-by-case fabric of developing law with input from numerous juries and judges. A single mass tort class action, however, often involves a wide ranging and sometimes novel issue that would have

2. In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995).
3. 83 F.3d 610, 617 (3d Cir. 1996).
4. 51 F.3d 1293, 1304 (7th Cir. 1995).
5. 90 F.3d 963 (5th Cir. 1996).
6. 51 F.3d at 1300.
7. 84 F.3d 734, 748–50 (5th Cir. 1996).

to be resolved by one six-person jury, depriving the solution of either the democratic input of legislation or the developmental input of the common law.

And as an example of another problem, when parties resolve to settle class actions, they want to be able to protect the defendant from further litigation; a settling defendant wants peace at the end. But the underpinning and structure of Rule 23 cannot easily give them that peace since various plaintiffs can opt out and sue the same defendant later. In *Ahearn*, the district court and a divided appellate court approved a damage class action under Rule 23(b)(1)(B), which was traditionally limited to limited fund cases, arguing that limited resources as a practical matter are the equivalent of a limited fund.[8] By attempting to fit a group of unlimited liability claims into a structure designed to adjudicate a limited fund, the courts in *Ahearn* in effect precluded any class member the opportunity to opt out. As you know, the Supreme Court has granted certiorari in a similar case from Alabama to address the constitutionality of precluding opt-out rights in state-filed damage class actions.[9]

The defendants' need for peace has also caused settlements of class actions to include those class members not only injured, but those whose injury is merely foreseeable from exposure to the risk. Inclusion of these future claimants, however, raises independent problems about whether the future classes even involve justiciable claims. The Supreme Court has granted certiorari in *Georgine*, presumably to resolve also that problem.[10]

The potential for collusion or the appearance of collusion also presents a difficult problem in settling any class action. Judge Becker discussed the problem at length in his *General Motors Fuel Tank* class action case, observing that the settlement process bypasses many of the devices that are used to protect absent class members in litigated cases.[11]

And the public's complaint about the class action process arises principally from the following reality. In traditional litigation, the client has the predominate interest in the litigation, and certainly the client's financial interest exceeds that of the attorney. The attorney is, no doubt, motivated by a participatory portion of the client's recovery, but the client's interest nevertheless predominates. In a class action, on the other hand, the attorney's interest far exceeds that of any client. In many cases, the representative clients could care less, acting only to help the lawyers represent the class. When the client will receive a few hundred dollars, or less, with a complete victory, can that client have the interest necessary to be the leader of a massive, multi-million dollar class action? All of the criticism of contingent fees, appearing in the literature over the years, is magnified manyfold in the class action context.

This complaint is represented by the recent comment in a Wall Street Journal

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8. 90 F.3d at 982–86.

9. Adams v. Robertson, 676 So. 2d 1265 (Ala. 1995), *cert. granted*, 117 S. Ct. 37 (1996).

10. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir.), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

11. 55 F.3d 768, 788 (3d Cir. 1995).

editorial sent to me. The editorial observes: "There is no shortage of class action scams around the country that [Willie Sutton] would be proud of, but for sheer audacity it would be hard to top a settlement announced recently in Texas."[12]

The editorial then describes how plaintiffs alleged that two insurance companies overcharged Texas drivers through a practice known as "double rounding," resulting in a premium charge higher by about one to two dollars per semi-annual bill. Describing the settlement of the claim, the editorial continues:

> Each Texas driver insured by the two companies will be eligible for $5.50 in compensation—enough to buy a celebratory meal at McDonald's. The plaintiffs' counsel, meanwhile, are likely to get $10.3 million, or 28.9% of the $35.7 million total settlement.
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> Texas Insurance Commissioner Elton Bomer is so livid that he called us unsolicited to denounce the settlement. "I've got a message for consumer advocates: Class action lawsuits rarely help the consumer, but they always help the lawyer," he said.[13]

Noting that, except for the current year's policyholders, the members of the class will have to write in for this $5.50 refund, the editorial concludes: "It's hard to imagine a more compelling argument for radical reform of the class action device."[14]

Despite all of these seemingly insurmountable problems, the disputes involving a large number of persons injured from a single event must be resolved, and, as Federal Rule of Civil Procedure 1 provides, in the manner that secures the "just, speedy, and inexpensive determination" of the action.

The Civil Rules Advisory Committee has conducted numerous conferences over the last several years, hearing from plaintiffs' lawyers, defendants' lawyers, business representatives, academics, and even legislative assistants to identify the problems and to receive solutions. The Committee has considered a wide ranging array of proposed changes. Under one proposal, for example, all Rule 23(b) classifications of classes would have been collapsed into a single classification, and opt-out rights would have been determined on some undefined case-by-case basis—maybe a historical one. One question raised in the discussion of that proposal was whether judges would have a sufficient background to apply the historical bases of the various class actions. The Committee also considered, in connection with class action certification hearings, allowing the court to take a peek at the merits to determine whether the substantive claims made in the case would justify the cost of class action procedures. Interest in that change, however, quickly evaporated. Numerous other changes were considered and are, of course, of public record.

In the end, the Committee has proposed five changes that were published in August 1996 and on which we are now holding public hearings. The first hearing

12. Editorial, *Taken for a Ride*, WALL ST. J., Oct. 23, 1996, at A22.
13. *Id.*
14. *Id.*

was held in Philadelphia on November 22, 1996, where thirty-five people testified over the course of a full day, making telling points. The second hearing will be held two days from now in Dallas, and the last is scheduled to take place in San Francisco on January 17, 1997. While the five proposed changes were intended to be modest, some have already provoked controversy. Let me review these changes and some of the issues that have so far been raised.

The first change would add factors for consideration to those already stated in determining whether a Rule 23(b)(3) class action is *superior* to other methods of proceeding. The Committee added three factors which are intended to broaden the district court's inquiry on that subject: (1) whether individualized class members could, as a *practical* matter, bring individual suits;[15] (2) whether issues involved in the class action are "mature," i.e. have been resolved or developed earlier in science or law;[16] and (3) whether relief to individual class members justifies the costs and burdens of the class action process.[17] The response from comments and testimony to date has revealed particular concern with the third proposed factor. The contention most frequently made is that (b)(3) class actions were designed to address cases where the amount of recovery would make individual suits financially impracticable. To allow a court to consider the proposed factor of relative costs would allow it to refuse to certify virtually every class action. On the other side of this issue, we heard the argument that this third factor was a workable effort to preclude class actions that would appear to be meaningless to the clients but would provide large fees to the class' self-appointed attorneys. The commentary on each side of this problem raises legitimate points and presents the challenge—how does one preclude the class action brought solely as a fee generator and yet allow class actions in which the clients have a real, albeit individually small, interest in the proceeding. That is a serious, and maybe impossible, drafting problem for the Committee.

The second proposed change added subdivision 23(b)(4) which would allow for settlement classes "even though the requirement of subdivision (b)(3) might not have been met *for purposes of trial.*" This change has attracted the most comments, pointing strongly in two different policy directions. One group argues forcefully that if a case, that cannot be tried, is settled, the constraint provided by the *potential* adversarial process is removed and settlements will more often than not fail to serve the clients' interests. Moreover, such settlements would appear to be collusive even if they were not. These commentors argue that the lawyers for both sides of such a class settlement will be inclined to package a deal that favors large fees for the plaintiffs' lawyers and universal peace for the defendants, a situation that easily can breed collusion. On the other hand, other commentors have argued that in the real world such settlements do not and cannot involve a collusive conspiracy, particularly when courts are looking so closely at the settlements during the approval process. Moreover, objecting class members almost always appear during the approval process to preserve the benefit of the adversarial process. To add interest to this debate, I would note that the circuits are split on

15. Proposed FED. R. CIV. P. 23(b)(3)A).
16. Proposed FED. R. CIV. P. 23(b)(3)(C).
17. Proposed FED. R. CIV. P. 23(b)(3)(F).

whether a court should approve settlements of a class action that cannot be tried. And the Supreme Court recently granted certiorari in the *Georgine* case from the Third Circuit which held, among other things, that a settlement class must be triable to be approvable for settlement. Professor John Coffee of Columbia University and Professor Judith Resnick, visiting professor at New York University, have advanced some attractive compromise language for this proposed change that they believe should mollify both camps. The Committee, of course, will consider their suggestions, along with the others, in the yet-to-come difficult discussions on this proposed change.

Change three, which would provide greater freedom to trial judges in deciding when to determine class action status, changes the language in Rule 23(c), prescribing the decision time, from "as soon as practicable" to "when practicable." This proposal has received very little comment. While there are reasons for early determination of class actions—such as reliance by absent class members on the pendency of the class action—the reality is that the circumstances of each case best determine when the class action decision should be made.

The fourth change, which would amend Rule 23(e) and mandate a hearing in every class action settlement, has received a fair amount of comment, not in opposition, but with the criticism that it does not go far enough. The criticism is coupled with comments made in opposition to the settlement class change. One judge, however, questioned interestingly whether the mandatory hearing will allow prisoners, who allege class actions, to come to court for the furlough they so cleverly try to obtain at every opportunity.

Finally, the fifth change would add to Rule 23 a new section (f) providing for a certiorari type of appellate review of class action decisions. We have received repeated comments expressing fear that such a change would add delay and cost to the proceeding. But I can say, at least for me personally, that I have not yet heard a persuasive argument why it would not be appropriate to provide for such an interlocutory appeal in the special circumstance where the rights of thousands of nonparties may be affected. Because the process mimics a 28 U.S.C. § 1292(b) type of procedure, it would not be expensive to obtain an answer from a court of appeals to the question of whether it will take the case. More often than not the court will deny permission. But in those few cases where permission for interlocutory appeal is granted, I believe the parties will probably agree that the benefits will exceed the burdens. Moreover, through this facility we might expect development of greater uniformity in the law of this quickly evolving jurisprudence.

Those are the five changes on the table. While we have not proposed any change to Rule 23's notice provisions, we have received suggestions that they also should be amended to require greater clarity.

After we receive the testimony at the last hearing in San Francisco, the Committee will meet to digest all of the comments and testimony and determine whether further changes are either necessary or prudent. While the next meeting on this is scheduled for April 1997, we will undoubtedly have to defer any final decisions if we have not then heard from the Supreme Court on the cases it has taken from Alabama and the Third Circuit.

Let me be candid about the Committee's efforts, however. Most of the tools necessary to address mass tort class actions are beyond the scope of rule-making authority. An efficient class action law or rule enacted to address mass torts would have to provide nationwide service of process; would have to include a mechanism for addressing the most difficult conflict-of-law problems; would have to provide a single forum to which all potential claimants could be compelled to present their claims; would have to afford the parties the ability to give defendants peace from a settlement, including peace from future claims based on a past erroneous design; would have to control the almost irresistible temptation of attorneys to take more in fees than what is appropriate; would have to increase the protection of absent class members whose interests differ from the representative class parties and attorneys managing the case; and would have to give some relief from the bet-it-all-on-one-verdict problem. While there may be political reasons for Congress to refrain from entering this political-interest quagmire, let me leave you with my modest proposal for a solution through congressional action. The proposal introduces the notion of a *product* bankruptcy, similar in character to a corporate bankruptcy, but limited to a single product.

As we well know, a corporate bankruptcy permits the corporation to reorganize its assets and to concentrate claims in one court and defer payout; it involves nationwide service of process; and it precludes litigation, state or federal, outside of the selected forum. In the end, the corporation is given a new start, a result that may serve positively its stockholders, its employees, and the consumers who want its products. As we witnessed in the *A.H. Robins*[18] bankruptcy in Richmond, the bankruptcy mechanism can adequately handle a large number of claims efficiently and with some sense of fairness. As I understand it, the trust in Richmond, after having paid out almost all the claims, still has almost $1 billion left which will provide another distribution to the claimants. The difficulty with the corporate bankruptcy alternative, however, is that the entire vitality of a large corporation with, say fifty products, is put at risk because of a mistake it made with respect to one product. To avoid this draconian result, I would propose that a corporation be able to put a single product into bankruptcy so as to be able to continue in peace with the manufacture and sale of its other products. The limited liability in this context is reminiscent of the limitation of liability procedure available in admiralty where the ship owner puts the value of his ship into court as a stake against which all claimants must assert their claims.[19]

Under the product bankruptcy as I would envision it, a manufacturer would be allowed to file a petition for "Product Disassociation" in which it would say: (1) we designed and manufactured an allegedly defective product that we no longer wish to manufacture; (2) claims have been made against the company in respect to the product that are numerous and put the company's continued vitality at risk; (3) we tender to the court the manufacturing plant and the related assets of the product; (4) in addition, to compensate reasonably for our alleged error, we tender $1.5 billion to resolve all claims arising from the product; (5) we ask the court to receive the product assets and accept the tendered amount as an additional corpus or, in the

18. *In re* A.H. Robins, 880 F.2d 709 (4th Cir. 1989).

19. FED. R. CIV. P., Supp. Rules for Certain Admiralty and Maritime Claims, Rule F.

alternative, to determine the appropriate size of the corpus based on the amount and size of claims and our other corporate activities and assets; (6) we request the court to compel all claimants asserting claims by reason of a product to sue the corpus in the bankruptcy court; and (7) we pray for an injunction precluding claimants from suing us further to permit us to continue with our other operations.

The respondents to this interpleader-bankruptcy type of petition would be a class consisting of all claimants, and the action would be administered by the bankruptcy court with its preemptive equity powers, nationwide service of process, and administrative capabilities. The bankruptcy court could organize the claimants into classes and appoint counsel, requiring them to address the petition in the first instance by responding whether the amount of the corpus is adequate. Once the amount of the corpus is established by the bankruptcy court, then the bankruptcy court would proceed with the administrative task of managing the corpus and apportioning it to the claims made, much as was done in *A.H. Robins*. In addition to releasing the corporation of its liability for the product, including future claims, this procedure would have a significant benefit of permitting the bankruptcy court to reserve a portion of the corpus for future claims.

I have been unable, as a result of the many meetings on Rule 23 that I have attended, to discover any mechanism that comes closer to solving the major problems we face from mass torts. Obviously, however, any such a solution would have to be championed by one or more of you. And if you were to present something of this kind to Congress, I would recommend your using the language of Professor Linda Mullenix as written recently in an editorial appearing in *The National Law Journal*, to raise the Supreme Court into action:

> The court's irresolution invites cynicism about the judiciary's ability to render justice in mass tort cases. Exasperated federal judges push the boundaries of established constitutional, statutory, and doctrinal law. Plaintiffs' claims go unresolved, or are devalued through settlements and corporate bankruptcies. Defendants seek salvation in business restructurings, while severely curtailing research and development. Transaction costs run rampant, while mass tort lawyers become astonishingly wealthy.[20]

Since Professor Mullenix wrote those words, the Supreme Court has taken the *Georgine* case and a class action case from Alabama. Maybe her words would also be adequate to persuade Congress to take a look.

At bottom, conferences like these are the necessary beginning. I congratulate its organizers and urge that they continue with the effort.

Thank you for permitting me to address you today.

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20. Linda Mullenix, *High Court Should Review Mass Torts*, NAT'L L.J., Oct. 7, 1996, at A19.