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Deborah R. Hensler

Mark A. Peterson

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UNDERSTANDING MASS PERSONAL INJURY LITIGATION: A SOCIO-LEGAL ANALYSIS

Deborah R. Hensler*
Mark A. Peterson**

INTRODUCTION

The 1980s marked the era of mass personal injury litigation. Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances (see Figure 1).¹ In some parts of the country, mass tort claims threatened to overwhelm the civil justice system, accounting for more than one-quarter of the entire civil caseload in certain courts.² As a result of this wave of litigation, some businesses found that products once regarded as significant marketing successes now had the potential to drive them into bankruptcy. The specter of mass liability frightened insurers from some markets, and manufacturers from research and development in some product lines.³

* Senior Social Scientist and Director, RAND Institute for Civil Justice, and Professor of Social Science in Law, University of Southern California Law Center.

** Senior Social Scientist, RAND Institute for Civil Justice. An earlier version of this Article was presented at the Symposium on *Reinventing Civil Litigation: Evaluating Proposals for Change*, at Brooklyn Law School, May 1993, and at faculty workshops at the UCLA Law School and University of Southern California Law Center. Financial support for the project was provided by the Carnegie Commission on Science and Technology and by the RAND Institute for Civil Justice. Ingrid Causey assisted in preparing the case profiles.

¹ Hereinafter all references to "Figure 1" or "Figure 2," whether in text or footnotes, refer to diagrams appearing at the end of this Article.

² See DEBORAH HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 25-27 (1985) [hereinafter HENSLER ET AL., *ASBESTOS IN THE COURTS*]; Deborah Hensler, *Fashioning A National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1992 (1992) [hereinafter Hensler, *Fashioning a Resolution*]. By 1990, asbestos litigation accounted for three-quarters of all new federal product liability filings. See Deborah Hensler, *Reading the Tort Litigation Tea Leaves: What's Going On In the Civil Liability System?* 16 JUST. SYS. J. 137, 147 (1993) [hereinafter Hensler, *Reading the Tort Litigation Tea Leaves*].

³ STEVEN GARBER, *PRODUCTS LIABILITY AND THE ECONOMICS OF PHARMA-*

The mass litigation of the 1980s involved enormous stakes. Hundreds of thousands of plaintiffs received compensation for their injuries. Businesses and their insurers paid billions of dollars in indemnification. Plaintiffs', defense, and insurance lawyers received billions of dollars more.⁴ As a result of mass personal injury litigation, trusts that were established to pay asbestos claimants now effectively own the Manville Corporation and several other major asbestos manufacturers.⁵ Similarly, as a consequence of their mass litigation, the Dalkon Shield Claimants Trust received over seventy-five percent of the proceeds of the sale, in bankruptcy, of A.H. Robins, Co., the manufacturer of the Shield.⁶ Asbestos and other mass tort claimants soon may own a dozen other businesses that are in or face possible bankruptcy.⁷

Although there is disagreement about the causes and legitimacy of this litigation,⁸ almost all of those involved would agree that the civil justice system has not performed well in

CEUTICALS AND MEDICAL DEVICES (1993).

⁴ By 1982, a total of one billion dollars had been paid in compensation and transaction costs for asbestos worker injury litigation. See JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984). In 1991, the total value of all pending asbestos worker injury claims was estimated at between \$8 billion and \$14 billion, not including legal fees. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 931 (E. & S.D.N.Y. 1991). According to most estimates, for each dollar spent on indemnification of asbestos injury claims, more than two dollars are spent on legal fees and other transaction costs. See Hensler, *Fashioning a Resolution*, *supra* note 2, at 1977.

⁵ Trusts established to pay asbestos claimants were given the majority of stock in Manville, UNR Industries, and a major subsidiary of National Gypsum. Eagle-Picher, Inc. and the asbestos claimants have agreed to support a bankruptcy reorganization plan in which a claimants' trust would own all stock of that company. See Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 LAW & CONTEMP. PROBS. 27, 30 (1990). On the development of claims facilities operated by trusts as a mechanism for compensating mass tort claimants, see Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 LAW & CONTEMP. PROBS. 113 (1990).

⁶ Over \$2.3 billion dollars was placed in a trust to pay Dalkon Shield claimants by American Home Products, which bought A.H. Robins. See Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 103-04 (1990).

⁷ Hensler, *Fashioning a Resolution*, *supra* note 2, at 1972.

⁸ For an example of the diverse perspectives on the causes of mass tort litigation, see *Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, 13 CARDOZO L. REV. 1817 (1992) (presenting views of judges, plaintiffs' and defense attorneys, a labor union leader and scholars on asbestos litigation).

response to the challenge of mass torts. The litany of criticisms is long and familiar: cases take an inordinately long time to reach disposition, sometimes concluding long after a plaintiff's death; outcomes are highly variable, often seeming to have little relationship to plaintiffs' injuries or defendants' culpability; transaction costs are excessive, far outstripping the amounts paid out in compensation.⁹

Why the civil justice system has had such problems responding to mass personal injury litigation is itself a matter of some controversy. Some attribute these problems to a lack of fit between traditional civil procedure, with its reliance on individualized case treatment, and the demands imposed on courts by massive numbers of claims which, in practice, cannot be treated individually.¹⁰ This view has led to myriad proposals to facilitate aggregative treatment of mass tort claims, by amending Rule 23;¹¹ extending multidistricting to include trial as well as pretrial preparation and state as well as federal cases;¹² encouraging informal coordination between state and federal courts;¹³ creating a new "national disaster court,"¹⁴ or removing some or all mass torts from the court system entirely.¹⁵

⁹ See, e.g., HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2; JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, REPORT OF THE AD HOC COMMITTEE (1991).

¹⁰ For discussions of the issue of "fit," see Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 and PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986).

¹¹ JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO RULE 23 (Feb. 4, 1993).

¹² For example, in 1991, the Committee on the Judiciary of the United States House of Representatives recommended for action by the full House the Multiparty, Multiforum Jurisdiction Act of 1991, which would have created federal court jurisdiction for litigation involving 25 persons or more, arising out of mass accidents and other disasters. See H.R. REP. NO. 373, 102d Cong., 1st Sess. (1991). More recently, the American Law Institute ("ALI") Complex Litigation Project recommended expanding the scope of multidistricting by explicitly providing for trial, as well as pretrial preparation, within the multidistrict context and multidistricting across state jurisdictions. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Proposed Final Draft, Apr. 5, 1993).

¹³ William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

¹⁴ Ralph I. Lancaster & Catherine R. Connors, *Creation of a National Disaster Court: A Response to "Judicial Federalism in Action,"* 78 VA. L. REV. 1753 (1992).

¹⁵ See, e.g., Lester Brickman, *The Asbestos Claims Management Act of 1991: A*

At present, mass torts seem to have become a fixture on the litigation landscape. The specialized mass tort plaintiffs' bar that emerged during the 1980s has accumulated capital as a result of its success in litigating earlier mass claims, and is skillful and aggressive in identifying new investment opportunities. A mass tort defense bar has developed to counter these plaintiffs' attorney efforts. An elite of trial judges has come forward, ready to set aside traditional case-at-a-time disposition procedures in favor of aggregative procedures for disposing of hundreds or even thousands of cases.¹⁶ A cottage industry of experts and special masters supports their efforts by designing complex procedures and crafting complex settlements.¹⁷ Appellate courts wrestle with collective disposition of mass claims. Lawyers, judges, and business executives no longer wonder whether or not there will be another mass tort, but rather what the next mass tort will be.

What distinguishes mass personal injury torts from ordinary high volume civil litigation? What explains the emergence of this litigation in the 1980s? Why are mass personal injury torts so difficult to resolve? Can we devise methods for dealing with this litigation more equitably and more efficiently?

This article offers some answers to these questions. The analysis is based on structured conversations with some of the leading participants in recent mass personal injury litigations, an examination of the rich journalistic and scholarly literature on this litigation, our own previous research on asbestos and other mass torts and one of the author's experiences as an expert in mass tort litigation. The Article presents a way of thinking about the emergence and growth of mass torts, rather

Proposal to the United States Congress, 13 CARDOZO L. REV. 1891 (1992).

¹⁶ See Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 LAW & CONTEMP. PROBS., 227 (1991); Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5 (1991). Reflecting the special treatment courts accord mass claims, at least one trial court (the Philadelphia Court of Common Pleas) has formally established a "mass torts" calendar, administered by a special cadre of judges operating out of a specially equipped facility.

¹⁷ One of the most prominent of these mass tort masters, Professor Francis McGovern, has written widely about his experiences. See, e.g., *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61 (1990); *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989); *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

than a conclusive analysis of the phenomenon. With a better understanding of the dynamics of mass tort litigation, legislators can assess more realistically the consequences of proposed procedural reforms for future mass litigation, and courts can better understand how their actions may determine the growth or decline of mass tort cases and their outcomes.

We begin in Part I by defining mass torts, identifying the key factors that distinguish this litigation from other personal injury litigation involving large numbers of plaintiffs and claims. For those who are not already familiar with the facts of the major mass torts of the 1980s, Part II presents brief case histories of that litigation. Part III then identifies the social and legal factors that contributed to the emergence of mass personal injury litigation in the 1980s. Part IV next discusses the features of mass tort litigation that make it difficult to resolve efficiently and equitably. Finally, Part V reviews recent proposals to improve the management of mass torts, and suggests why they may fall short of the mark.

I. WHAT DISTINGUISHES MASS TORTS FROM ORDINARY HIGH VOLUME LITIGATION?

Three factors distinguish mass torts from ordinary personal injury litigation: the large number of claims associated with a single "litigation;"¹⁸ the commonality of issues and actors among claims within a litigation; and the interdependence of claim values. Numerosity is the primary defining characteristic of a mass tort litigation. The best known examples of mass litigation, such as asbestos workers' personal injury suits and the Dalkon Shield bankruptcy litigation, have involved hundreds of thousands of cases; the most recent examples of mass torts involve at least a thousand individual claims (see Figure 1). The high visibility of mass torts and the burdens they impose on courts and parties are direct consequences of the large numbers of claims in each litigation.

But numerosity, by itself, is not sufficient to distinguish mass tort litigation from ordinary tort litigation. The court system routinely disposes of half a million or so automobile

¹⁸ Judith Resnik has noted the shift in our paradigm for considering civil case processing, from individual cases to "litigation." See Resnik, *supra* note 16, at 5.

accident cases per year, far more than the number involved in any single mass tort.¹⁹ Mass torts are distinguished from automobile accident litigation and other ordinary, high-volume litigation by the commonality of issues and actors among individual mass tort claims. Mass torts involve a common set of injuries which are incurred in the same or similar circumstances. Most plaintiffs are represented by a relatively small number of law firms, each of which may represent hundreds or thousands of claimants. Claims are brought against one or a few defendants, and a relatively small number of law firms defend or at least control the defense of thousands of claims. In addition, mass tort litigation is usually concentrated in a few jurisdictions, either as a result of the circumstances of injury or as a result of court action.

For example, almost all asbestos personal injury cases involve claims of either respiratory or gastro-intestinal cancers or other respiratory injuries incurred in the course of handling asbestos in shipyards or maritime industries, petrochemical factories or other workplaces. Each asbestos case typically names about twenty of the same thirty to forty asbestos manufacturers and distributors as defendants. Most of the hundreds of thousands of claimants are represented by fewer than fifty plaintiffs' law firms that specialize in this litigation, and their law suits are concentrated in a dozen courts.²⁰ Similarly, most Dalkon Shield claimants alleged a few types of gynecological injuries due to pelvic inflammatory disease ("PID"), all attributed to a particular intrauterine device, which was manufactured by a single company, A.H. Robins Co. The majority of Dalkon Shield claimants were represented by thirty firms, and suits were concentrated in a few states, notably Minnesota, Maryland and California.

Because of their high degree of commonality, similar factual issues and legal questions will arise in all claims in a mass tort litigation, or at least in significant subsets of claims. The same injuries will involve similar causation issues. Liability issues will be similar among claims alleging similar exposures to a particular defendant's products. Because of the common

¹⁹ JAMES S. KAKALIK & NICHOLAS PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 14 (1986).

²⁰ See generally Hensler, *Fashioning a Resolution*, *supra* note 2.

legal representation within each side, even the litigation strategies will be similar among large groups of claims.

The contrast with ordinary tort litigation is sharp. In ordinary automobile accident litigation, claimants allege a vast array of disparate injuries to different parts of the body—ranging from soft tissue injuries to fractures to paraplegia—incurred under diverse circumstances. Causation, liability and damages issues differ from case to case. Most cases have one or, perhaps, two defendants, and there are as many or more different defendants involved in automobile litigation as there are cases. Tens of thousands of law firms represent automobile injury victims, whose claims are spread among every state court in the country.

Courts' attempts to manage mass torts efficiently often further increase the commonality among mass tort claims. Courts typically assign mass torts to one or a few judges for pretrial purposes, either through formal mechanisms, such as the federal multi-district litigation procedure, or through informal court assignment practices.²¹ As a result, a small number of judges may be responsible for critical decisions which affect hundreds or thousands of cases, adding another common factor to the litigation.²²

This commonality produces the third defining characteristic of mass tort litigation: the monetary values of mass tort claims are highly interdependent. In mass litigation, the likely amount that one plaintiff will receive for a claim depends upon the values of other claims. Indeed, the claims are so similar that the prospective value of many claims will rise or fall sharply with a large plaintiff award, a defense verdict or even a signal discovery event or evidentiary decision in a single case that is part of the mass of pending claims.

²¹ HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 78-80.

²² For example, as a result of the decision by the Judicial Panel on Multidistrict Litigation to transfer asbestos cases to the Eastern District of Pennsylvania, Judge Charles Wiener is now responsible for more than 30,000 of these cases. See *In re Asbestos Prod. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991). Judge Robert Mehrige of the Eastern District of Virginia presided over the A.H. Robins bankruptcy proceeding, which set the parameters for resolving some 195,000 Dalkon Shield Claims. See RICHARD B. SOBOL, *BENDING THE LAW* (1991). As a result of multidistricting and class action certification, Judge Jack B. Weinstein oversaw the settlement of more than 250,000 Agent Orange Claims. See SCHUCK, *supra* note 10.

Of course, the values of all tort claims are interdependent to some extent. In many large metropolitan trial court jurisdictions, personal injury attorneys regularly consult reports of recently tried cases to determine the "going rate" for particular types of injuries. But the determination of causation and liability in an ordinary tort claim is not dependent on outcomes of other claims: whether a particular driver was liable for a particular accident usually has nothing to do with the liability of another driver in a different accident. Although trends in average jury awards do influence settlement values of ordinary claims over time, the prospective value of ordinary claims does not rise or fall dramatically as the result of a single verdict on a similar claim.

The interdependence of values in mass tort claims is far more striking. No claim in a mass tort litigation will have value until plaintiffs are able to establish causation, liability and damages for at least a few representative claims. For example, asbestos claims became viable only after the United States Court of Appeals for the Fifth Circuit in *Borel v. Fibreboard Paper Products* held that asbestos manufacturers could be held strictly liable for workers' injuries.²³ Moreover, a large award in one case increases the value of other, similar mass tort claims. Following a \$7.3 million San Francisco jury award to a plaintiff claiming injuries from silicone breast implants,²⁴ every breast implant claim pending nationwide became much more valuable. Conversely the adverse disposition of some mass tort claims can sharply reduce the values of all other claims. For example, when jurors delivered a defense verdict in a consolidated trial of about 1000 Bendectin cases, thousands of Bendectin claims that were not directly involved in the trial lost their value.²⁵ Similarly, the several hundred pending claims for cigarette-related lung cancer still have little value because plaintiffs have not been able to win and sustain a significant verdict in any such case.²⁶

²³ 493 F.2d 1076 (5th Cir. 1973).

²⁴ See, e.g., Alison Frankel, *From Pioneers to Profits*, AM. LAW., June 1992, at 82; Sandra Torry, *The Race to Represent Breast-Implant Victims*, WASH. POST, Mar. 9, 1992, at F5.

²⁵ *In re Richardson-Merrell, "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212 (S.D. Oh. 1985).

²⁶ The only significant award in a cigarette smoker case is *Cipollone v. Liggett*

Critical events other than trial outcomes also can greatly change the value of all other claims in the same mass tort. For example, the discovery of the "Sumner-Simpson" papers, indicating knowledge among major defendants of asbestos' injurious effects, exposed these defendants to significant punitive damages. This increased the value of all asbestos claims against those defendants, not simply those claims directly involved in the relevant discovery. Similarly, the Food and Drug Administration's ("FDA") decision to prohibit silicone breast implantation under most circumstances likely increased the value of pending and future breast implantation claims and encouraged a large number of new claims.²⁷

The enormous social and financial consequences of mass torts derive from the combination of large numbers of claims and interdependency of case values. In ordinary litigation a major adverse outcome—a multi-million dollar plaintiff award or a defendant victory in a high stakes case—may be a significant blow to the parties. But such outcomes take on far greater significance when they are multiplied many times over through their impact on other mass claims. Numerosity and interdependency create incentives for plaintiffs' attorneys to seek out potential mass tort claims, for defendants to invest enormous sums in defending against these claims and for judges to devise strategies to arrive at global resolution of mass claims. We will consider these effects further in our discussion of the dynamics of mass tort litigation. But first we turn to a description of the mass tort litigations that provide the factual basis for our analysis.

II. PROFILES OF MASS TORTS

Figure 1 lists the major mass personal injury claims that have been filed in the United States from 1960 through

Group, Inc., 112 S. Ct. 2608 (1992), which was reversed on appeal and remanded for retrial. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS & CULTURE* (Robert L. Rabin & Stephen D. Sugarman eds., 1993). The first case to reach verdict subsequent to *Cipollone* resulted in a defense verdict.

²⁷ Karen Riley, *Silicone Implants Given Limited OK*, WASH. TIMES, Apr. 17, 1992, at C1. The FDA limited future implantations to breast cancer victims who agree to participate in clinical trials.

1992.²⁸ In this section, we briefly describe each of these.

A. *Mass Accident Cases*

1. The Beverly Hills Supper Club Fire

On May 28, 1977, 162 people were killed and another 100 were injured in a fire at the Beverly Hills Supper Club, a nightclub in Southgate, Kentucky.²⁹ The fire was the second-worst nightclub fire in United States history and resulted in the first tort class action suit.³⁰ After the fire, suits claiming damages of \$2.7 billion were filed in state and federal court against 1100 defendants, represented by 225 law firms.³¹ The principal defendants were the club owners, insurers and aluminum wire manufacturers.

District Judge Carl Rubin certified a class of injured plaintiffs and permitted separate trials for various groups of defendants.³² The division of defendants encouraged settlement. In 1979, the club's owners settled for three million dollars.³³ In

²⁸ The litigation included in our analysis satisfies the definitional criteria of numerosity, commonality and interdependence of case values. We reviewed a large number of diverse cases, including all of the major mass toxic torts brought in the last couple of decades, but we did not attempt to conduct a census of mass torts. We did not include commercial airline litigation in our analysis because it generally involves scores or hundreds of claims and the litigation generally lacks a high degree of interdependence of case values. See JAMES S. KAKALIK ET AL., *COSTS AND COMPENSATION PAID IN AVIATION ACCIDENTS* (1988). Mass financial injury cases, such as shareholder derivative suits, are also not included in our analysis, which is limited to cases involving physical injury. Similarities between these two classes of mass injury merit a separate analysis.

Most of the litigation we reviewed involved 1000 or more claims. Some early litigation, such as the Beverly Hills Supper Club Fire litigation, involved fewer cases, but is included because it helped lay the groundwork for future mass torts. Although relatively few cases have been filed to date, some recent litigations, such as lead exposure and electro-magnetic radiation ("EMR") cases, are included because there is a potential for massive litigation if these early cases result in plaintiff verdicts.

²⁹ Peggy Lane, *159 Bodies Recovered in Club Fire*, WASH. POST, May 30, 1977, at A1.

³⁰ *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); see W. John More, "Master of Disaster" Builds Reputation for Mega-Settling, LEGAL TIMES, Apr. 1, 1985, at 1.

³¹ *High Court Paves Way for More Suits in Beverly Hills Fire*, UPI: WASH. NEWS, May 16, 1983, available in LEXIS, Nexis Library, UPI File.

³² *Id.*

³³ Andrew Wolfson, *After 8 years, a Complex Case Comes to an End*, NAT'L

1980, after a jury found that the polychloride wiring insulation in the club was not dangerous in itself, but that the manufacturers had a duty to warn about possible hazards when the insulation was heated, the manufacturers of the wiring insulation settled for \$1.9 million.³⁴ Soon afterward, Union Light, Heat and Power Co., the local utility company that supplied electricity to the club, settled for \$5.75 million, and the Insurance Services Organization, a consortium of more than 900 insurance carriers, settled for \$4.7 million.³⁵

By 1982, all of the cases in federal and state court had been settled or dismissed, except for a class action suit against electrical wiring companies.³⁶ In 1980, a federal jury had determined that faulty aluminum wiring was not the cause of the blaze, but the court of appeals overturned the verdict and ordered a new trial after a finding of juror misconduct.³⁷ In 1985, a jury found that out-dated aluminum wiring was the cause of the fire. Before the issue of liability reached the jury, the wire manufacturers settled the case for fourteen million dollars, and General Electric settled for ten million dollars.³⁸

L.J., Aug. 19, 1985, at 6.

³⁴ *Jury in Supper Club Case Faults Insulation Makers*, N.Y. TIMES, Aug. 20, 1980, at A16.

³⁵ Wolfson, *supra* note 33. Uniroyal, the manufacturer of Naugahyde, settled out of court for \$800,000. The suit against the insurance companies was pursued under a concert-of-action theory which alleged that the companies involved had negligently failed to properly inspect the club.

³⁶ *High Court Paves Way*, *supra* note 31. The manufacturer of the chairs in the club, Gasser, settled for \$400,000. Luxaire, which had manufactured the rubber latex used in the seats of the chairs paid \$850,000 in settlement; other producers of materials in the chairs paid \$450,000. *See Just One Defendant Left in Beverly Hills Fire Trial*, UPI, May 19, 1982, available in LEXIS, Nexis Library, UPI File; *see also* Wolfson, *supra* note 33. The class action suit against the electrical wiring companies was pursued under the legal theory of enterprise liability as the plaintiffs did not know who had manufactured the wiring in the club. Enterprise liability allows plaintiffs to pursue all members of an industry when the particular manufacturer of a product cannot be identified. This was one of the first cases to be pursued under an enterprise liability theory. The plaintiffs alleged that members of the industry acted in concert to use old-technology aluminum wiring, which they knew was dangerous.

³⁷ *High Court Paves Way*, *supra* note 31. A juror wrote to a local newspaper that he had conducted an experiment on the aluminum wiring and connection in his home. The juror said that his test contradicted evidence presented at trial that aluminum wiring was much more likely to overheat and cause fires than copper wiring, and that screws holding aluminum wiring tend to loosen over the years. He found nothing wrong with the aluminum wiring in his home. The juror had communicated his findings to at least six other jurors.

³⁸ UPI, July 18, 1985, available in LEXIS, Nexis Library, UPI File; *see also*

The settlements with the wire manufacturers brought the total compensation fund for fire victims to fifty million dollars.³⁹

2. The Hyatt Skywalk Collapse

On July 17, 1981, two skywalks in the lobby of the Hyatt Regency Hotel in Kansas City collapsed on a dance floor crowded with about 1400 people. The hotel owner and developer was Hallmark Cards, Inc. One hundred thirteen people were killed and another 186 were injured.⁴⁰ The National Bureau of Standards conducted an independent investigation of the collapse and determined that the connection beams of the skywalks were not designed to hold the weight of the thirty-five ton skywalks.⁴¹

Within one month, one hundred suits had been filed in state court against twenty defendants, including Hallmark, Hyatt Hotels, the building's architects, structural engineers and contractors and the city of Kansas City. All cases were assigned to Judge Timothy O'Leary, who effected a *de facto* consolidation through coordinated discovery, and by appointing a plaintiffs' management committee; he also persuaded plaintiffs' lawyers to limit their fees to twenty-five percent. Judge O'Leary further ordered that committee members would be compensated only through their fee arrangements with clients and not through fees for committee service. As a result of this judicial order, the state litigation was controlled by local lawyers, rather than "national" mass tort plaintiffs' lawyers.

Two nationally recognized class action experts then filed a mandatory class action in the federal court, claiming that defendants' exposure to punitive damages created a limited fund. These lawyers, Irving Younger and Professor Arthur Miller, were associated with Robert Gordon, a Kansas City lawyer, who represented four clients with minor Skywalk injuries. District Court Judge Scott O. Wright certified the manda-

GE Loses Lawsuit in Fatal Club Fire, CHI. TRIB., July 16, 1985, at 4. General Electric did not manufacture aluminum wiring but made devices that used it.

³⁹ L.A. TIMES, July 19, 1985, at 2 (untitled news abstract).

⁴⁰ *Lawsuits in Hyatt Tragedy Total at Least Eight*, UPI, July 23, 1981, available in LEXIS, Nexis Library, UPI File.

⁴¹ *Warning Signs Ignored in Hyatt Skywalk Collapse*, UPI, Oct. 3, 1982, available in LEXIS, Nexis Library, UPI File.

tory class in January 1982.⁴² State court plaintiffs and defendants responded by joining in a mandamus petition to the Eighth Circuit Court of Appeals. That court struck the mandatory class action, ruling that it violated the Federal Anti-Injunction Act,⁴³ which limits federal courts' injunctions against previously filed state court law suits.⁴⁴ Noting that half of the state suits had been settled prior to the federal class certification, the Eighth Circuit found that the federal class action was an intrusive interruption of individual litigation which had been proceeding in the state courts.⁴⁵

On remand, Judge Wright certified an opt-out, federal class action. Soon after, Judge O'Leary certified plaintiffs' motion for a state, opt-out class action that was coextensive with the federal class. Both classes settled, and plaintiffs had the option of participating in either or neither class settlement. Plaintiffs in the federal class action received a total of \$3.5 million for compensatory damages, plus a multiplier for punitive damages. Under the state court settlement, defendants agreed as to liability and plaintiffs retained the right to settle or try the amount of their compensatory damages. In lieu of punitive damages, defendants created a twenty million dollar fund, which was added to compensatory damages.

The settlement of the state court class included an innovative feature that has since become a staple of mass tort litigation—an offer to settle claims for small amounts quickly, based on only minimal supporting information from plaintiffs.⁴⁶ The Skywalk defendants paid \$1000 each to 1500 persons who claimed to have been at the hotel at the time of the accident and demonstrated some knowledge of the events of the acci-

⁴² *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982).

⁴³ 28 U.S.C. § 2283 (1989).

⁴⁴ *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

⁴⁵ The filing of the federal class action apparently encouraged settlement of state court cases as plaintiffs' lawyers sought to avoid inclusion in the federal class. More than 100 cases settled between filing and certification. Interview with Robert Sisk and John Townsend in New York (Jan. 19, 1989) (Notes on file with the authors).

⁴⁶ Expedited payment procedures have been included or proposed in bankruptcy reorganization plans for A.H. Robins (Dalkon Shield claims), UNARCO, National Gypsum Corporation, Eagle-Picher Industries, Inc. and H. K. Porter Inc., and class actions involving Fibreboard Industries and the Manville Personal Injury Settlement Trust (each for asbestos claims). Over 100,000 Dalkon Shield claims and most asbestos claims against UNR were settled through such expedited payments.

dent.⁴⁷ Most claimants opted out of the federal class, and either accepted the \$1000 payment or tried their claims for damages under the state class action.

Juries awarded substantial damages in the individual opt-out cases: \$4 million to a third-year law student crippled in the collapse,⁴⁸ and \$15 million to a woman who became a quadriplegic as a result of the accident.⁴⁹ By 1986, Hallmark Cards, Inc., had paid \$120 million in settlements in individual and class action cases, and all of the suits filed on behalf of the dead and injured had been resolved.⁵⁰

3. The MGM-Grand Hotel Fire

On the morning of November 21, 1980, faulty wiring in the kitchen of the MGM-Grand Hotel in Las Vegas started one of the worst hotel fires in history.⁵¹ Eighty-four people died, the majority of them from smoke inhalation, and over 500 people were injured.⁵²

The hotel and several other defendants faced substantial exposure for both compensatory and punitive damages. The hotel had no smoke alarms; sprinklers were located only on the casino level, in the money counting room, but not in the casino itself.⁵³ After the fire, safety specialists discovered significant building and fire code violations that may have contributed substantially to the fire.⁵⁴

⁴⁷ No payments were made to 800 others who had little knowledge of what happened at the time of the accident. Twenty of these rejected claimants appealed to a special master.

⁴⁸ UPI, Aug. 26, 1983, available in LEXIS, Nexis Library, UPI File. This plaintiff was able to walk only with the support of crutches.

⁴⁹ *High Court Upholds Multi-million Dollar Awards in Hyatt Skywalk Cases*, UPI, June 25, 1985, available in LEXIS, Nexis Library, OMNI File.

⁵⁰ *Id.* In July 1986, another class action suit was filed on behalf of 1,000 rescuers, including firefighters, paramedics, police officers, doctors and nurses. See *New Round in Hyatt Skywalks Disaster*, PR NEWSWIRE, July 3, 1986, available in LEXIS, Nexis Library, OMNI File. We have not been able to find any record of the outcome of this suit.

⁵¹ Pamela G. Hollie, *Hundreds Are Injured as Blaze Traps 3,500 on the Upper Floors*, N.Y. TIMES, Nov. 22, 1980, at A1.

⁵² *Id.*

⁵³ Robert Lindsey, *Spread of Las Vegas Fire Linked to Code Violations*, N.Y. TIMES, Dec. 20, 1980, at A1.

⁵⁴ *Id.* Investigators believed that the smoke and carbon monoxide from the fire could have been vented from the building if the violations had not existed.

More than 1000 wrongful death and personal injury claims were filed. Over 112 defendants were named, including the MGM-Grand Hotel, Clark County,⁵⁵ various subcontractors, construction companies, and suppliers and manufacturers of building materials, equipment and furnishings. MGM, which had only \$30 million in liability insurance at the time of the fire, purchased \$170 million in retroactive liability insurance for a \$35 million premium.⁵⁶

The hotel and other defendants quickly settled over 120 claims filed by one law firm that had substantial experience in fire litigation and that had quickly begun physical examination of the fire site. The remaining claims were "multidistricted" and assigned to Judge Bechtle, of the Eastern District of Pennsylvania. Judge Bechtle consolidated the cases, formed a plaintiffs' management committee and instituted separate discussions with plaintiffs' lawyers to establish damages, and with defendants' lawyers to establish liability shares.⁵⁷ Although the litigation was not pursued as a class action, the collective nature of Judge Bechtle's process was reinforced by MGM-Grand's position that it would settle none of the remaining claims unless all settled. In order to participate in this process, plaintiffs' lawyers filed duplicate federal lawsuits for claims that had already been filed in state courts.

In January 1983, MGM-Grand and forty-one other defendants settled all claims, providing \$138 million to the 1100 remaining personal injury and wrongful death claims and an additional \$2 million to property damage and business loss claimants. The defendants paid between \$30,000 and \$45,000 each to the majority of claimants who were exposed to smoke and trapped in their rooms for up to several hours. The largest settlement, over \$7 million, went to the orphaned children of one of several couples killed in the fire. MGM-Grand paid \$75 million of the settlement, while the heating and air conditioning contractor and electrical contractor each paid \$10.5 million. The settlement by the principle defendants placed great pres-

⁵⁵ Clark is the county in which Las Vegas is located. The plaintiffs claimed that lax fire and building codes may have contributed to the rapid spread of the fire.

⁵⁶ *MGM Hotel Fire Ignites Liability Insurance Sales*, WASH. POST, Feb. 21, 1981, at E6.

⁵⁷ *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983).

sure on the remaining defendants. They faced substantial joint and several liability, but would receive credits from the principle defendants that were limited to the amount of their settlements. The total amount paid in settlements increased to \$208 million over the next several years, as remaining defendants settled individually or in small groups. According to some reports, the plaintiffs eventually received more than they had demanded in their original meetings with Judge Bechtle.⁵⁸

4. The DuPont Plaza Hotel Fire

On December 31, 1986, three arsonists set fire to the DuPont Plaza Hotel, in San Juan, Puerto Rico, killing ninety-seven people and injuring several hundred others.⁵⁹ By the time the case went to trial in March 1989, more than 2300 plaintiffs had filed claims against more than 250 defendants.⁶⁰ The principal defendants were: the Sheraton Corporation, the builder and original owner of the hotel; William Lyon, Brian Corbell and William Eberle, individuals with financial interests in forty-three partnerships and corporations connected to the hotel; and Theodore Smyth, who had a twenty-five percent ownership interest in the hotel.⁶¹ However, as the hotel only had one million dollars in liability insurance at the time of the fire, almost everyone connected with the hotel was eventually named as a defendant in the suits, including the manufacturer of the hotel's fire alarm, furniture manufacturers and the manufacturer of the hotel casino slot machines.⁶²

All federal cases were transferred to District Court Judge Raymond Acosta, who consolidated the claims and divided them into seven groups for trials on different issues.⁶³ He also

⁵⁸ This account of settlement outcomes is based in part on Professor Peterson's discussions with attorneys involved in the litigation. See also *\$138 Million Awarded in Las Vegas Hotel Fire*, N.Y. TIMES, July 14, 1983, at A12; *Victims Get \$140 Million in Fire Settlement*, ENGINEERING NEWS-REC., May 19, 1983, at 20.

⁵⁹ Marcia Coyle, *A \$105 Million DuPont Solution*, NAT'L L.J., May 22, 1989, at 3.

⁶⁰ *Id.*

⁶¹ Peter Carbonara, *Taming a Mass Torts Monster*, AM. LAW., Sept. 1989, at 108-09.

⁶² Lawrence J. Tell, *United They Stand—at the Defense Table*, BUS. WK., May 30, 1988, at 102.

⁶³ *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 409 (D.P.R.

appointed Judge Bechtle, who had presided over the MGM Grand Hotel fire litigation, as settlement judge and divided the defendants into three categories: the hotel corporation, the products liability group and the services defendants.⁶⁴

The division of defendants into categories facilitated settlement of the claims. Sheraton, the builder and original owner of the hotel, settled in the spring of 1987 for \$36 million.⁶⁵ Theodore Smythe, part-owner of the hotel, also settled in the spring of 1987 for \$8 million.⁶⁶ Around the same time, the hotel's architects and some product manufacturers settled the claims against them for \$3 million.⁶⁷ After Judge Louis C. Bechtle interpreted the hotel's \$1 million *per occurrence* insurance policy as providing \$1 million for each set of discrete negligent acts in May 1989,⁶⁸ the hotel and its insurers settled the claims against them for \$105 million.⁶⁹ In June 1989, Bally Manufacturing Corporation, the manufacturer of the hotel's slot machines which, the plaintiffs claimed, had emitted toxic gas during the fire, settled for \$2.1 million.⁷⁰ The claims against the remaining eighty products and services defendants went to trial in late July 1989.

B. *Pharmaceutical Products and Medical Devices*

1. MER-29

A cholesterol-lowering drug, MER-29, was manufactured by Richardson-Merrell, Inc. The company withdrew the drug from the market in 1962, after its use was linked to irreversible cataracts and skin and hair problems in at least 5000 individuals.⁷¹ In 1963, officials of Richardson-Merrell pleaded

1989); *In re Fire Disaster at Dupont Plaza Hotel, San Juan, Puerto Rico*, on Dec. 31, 1986, 660 F. Supp. 982 (J.P.M.L. 1987).

⁶⁴ Carbonara, *supra* note 61, at 108; Coyle, *supra* note 59, at 24.

⁶⁵ Carbonara, *supra* note 61, at 111.

⁶⁶ *Id.*

⁶⁷ *Id.* at 112.

⁶⁸ *Id.*

⁶⁹ Coyle, *supra* note 59, at 3.

⁷⁰ Carbonara, *supra* note 61, at 113.

⁷¹ Morton Mintz, *Jail Terms Sought for Business Health, Environment Violators; Prison Terms Sought for Health and Environment Violators*, WASH. POST, Nov. 25, 1979, at A1.

nolo contendere to federal charges that Richardson had made false and misleading statements to FDA officials about the safety of the drug.⁷² The company was fined \$80,000 and the officials were placed on probation. Civil suits involving MER-29 eventually cost the company an estimated \$200 million.⁷³ MER-29 is said to be the first mass tort litigation in which a plaintiff's attorneys' litigation group was established to coordinate efforts against the defendant.⁷⁴

2. Bendectin

In 1956, the FDA approved Bendectin for the treatment of "morning sickness" (nausea and vomiting) during pregnancy.⁷⁵ Richardson-Merrell (subsequently Merrell Dow) manufactured and marketed the drug from 1956 to 1983. During that time period, more than thirty million pregnant women used Bendectin.⁷⁶ Litigation began with a 1977 Florida lawsuit claiming that the mother's use of Bendectin during pregnancy caused limb defects in a newborn infant.⁷⁷ A 1979 *National Enquirer* article describing the case stimulated subsequent claims and public concern about the drug.⁷⁸ The FDA responded to these concerns by convening its Advisory Committee on Fertility and Maternal Health to re-evaluate the safety of the drug.⁷⁹ The Committee concluded that there was no conclusive evidence that the drug was a teratogen (i.e., caused birth defects) and, therefore, decided that the drug should not be removed from the market.⁸⁰ Notwithstanding, the number of claims continued to rise⁸¹ and, in 1983, Merrell Dow ceased

⁷² Justice Department Investigating Lilly's Marketing of Oralflex, NAT'L L.J., May 23, 1983, at 3.

⁷³ *Id.*

⁷⁴ Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968); see also David Ranii, *How the Plaintiffs' Bar Shares Its Information*, NAT'L L.J., July 23, 1984, at 1.

⁷⁵ Mark D. Nosacka, *Bendectin, Birth Defects, and Brock: A Study in Appellate Review*, 13 J. PROD. LIAB. 231, 231 (1991).

⁷⁶ *Id.*

⁷⁷ *Mekdeci v. Merkle Nat'l Labs.*, 711 F.2d 1510 (11th Cir. 1983).

⁷⁸ *New Thalidomide-Type Scandal—Experts Reveal . . . Common Drug Causing Deformed Babies*, NAT'L ENQUIRER, Oct. 9, 1979, at 20.

⁷⁹ Nosacka, *supra* note 75, at 232.

⁸⁰ *Id.*

⁸¹ *Bendectin*, 2 INSIDE LITIG. 44 (1988).

manufacturing and marketing the drug.⁸²

In 1982, the Judicial Panel on Multidistrict Litigation transferred all Bendectin cases then pending in the federal courts to Judge Carl Rubin of the District Court for Southern District of Ohio.⁸³ Judge Rubin had previously managed the Beverly Hills Supper Club fire litigation. By 1985, more than 1100 Bendectin claims were before Judge Rubin.⁸⁴ The parties negotiated a settlement of all claims, which would have required Merrell Dow to pay \$120 million over twenty years. Because Merrell Dow insisted that the settlement bind all claims, both present and future, the settlement was implemented through a mandatory class action. Judge Rubin certified the class even though court-appointed experts could not estimate the number of future claims and the court had made no findings that Merrell Dow was a limited fund. The Sixth Circuit reversed the certification because of the absence of limited fund findings.

Judge Rubin then ordered a consolidated trial for February 1985, which ultimately and effectively ended Bendectin as a mass tort. Although the trial was mandatory only for lawsuits filed in Ohio, most plaintiffs chose to be included in the trial. Indeed, the number of filings, which had doubled every year between 1981 and 1984, increased greatly in the months before the consolidated trial as plaintiffs' lawyers chose to have their clients' cases determined at the trial.⁸⁵ The trial was trifurcated, with the issues of causation, liability and damages to be heard and decided separately, in sequence. After the jury ruled that plaintiffs had not established that use of Bendectin during pregnancy was a proximate cause of birth defects by a preponderance of the evidence,⁸⁶ the litigation dwindled away.

⁸² Nosacka, *supra* note 75, at 233.

⁸³ *In re Richardson-Merrel, "Bendectin" Prods. Liab. Litig.* (No. II), 533 F. Supp. 489 (J.P.M.L. 1982). Two cases reached a verdict prior to the J.P.M.L. transfer, one resulting in a defense verdict and the other a verdict for the plaintiff. See David Lauter, *Bendectin Pact Creating Furor: Revolt in the Plaintiffs' Bar*, NAT'L L.J., July 30, 1984, at 1.

⁸⁴ Nosacka, *supra* note 75, at 233.

⁸⁵ The number of filings in January and February 1985, alone, were almost as many as the 636 claims filed in all of 1984. Interview with Alfred E. Schretter, Special Staff Counsel, Merrell Dow (Nov. 21, 1988) (notes on file with the authors).

⁸⁶ *In re Richardson-Merrel, "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212

Over 1200 of the 1800 claims that had been filed by the time of the consolidated trial were resolved by that trial.⁸⁷ The defense verdict in the consolidated trial effectively settled many more claims. Many plaintiffs' lawyers concluded that the cases were unwinnable and dismissed their claims or stipulated to be bound by the defense verdict.⁸⁸ A few cases, however, continued to progress individually, in both state and federal courts. Most were decided in favor of defendants, often by summary judgment,⁸⁹ and the few plaintiff verdicts were successfully appealed in state and federal courts.⁹⁰

By 1993, courts generally had adopted the position that the plaintiffs' experts and their scientific evidence could not support a finding that Bendectin causes birth defects. However, given the conflict among the Circuits on the appropriateness of admitting the plaintiffs' evidence, the Supreme Court, in 1992, agreed to hear a Ninth Circuit case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which upheld the trial court's granting of summary judgment to Merrell Dow on the grounds that plaintiffs had insufficient evidence to establish causation.⁹¹ The Ninth Circuit held that the plaintiffs' metaanalysis of previous epidemiological studies⁹² was inadmissible, in part because it had not been published in "peer reviewed" journals.

Daubert became the vehicle for raising the fundamental question of standards of admissibility for scientific evidence before the Supreme Court. More than a dozen amici briefs were filed with the court, on behalf of nobel laureates, professional scientific journals, special commissions and professional

(S.D. Ohio 1985); see Nosacka, *supra* note 75, at 233.

⁸⁷ Interview with Alfred E. Schretter, *supra* note 85.

⁸⁸ Fifty-one plaintiffs stipulated to be bound by the trial after the defense verdict. *Id.*

⁸⁹ As of July 1988, 19 cases (including the consolidated trial of 1100 cases) had been tried, and all but four had resulted in defense verdicts. See *Bendectin*, *supra* note 81.

⁹⁰ For a detailed analysis of Bendectin litigation, see Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

⁹¹ *Daubert v. Merrell Dow Pharm., Inc.*, 711 F. Supp. 546 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 113 S. Ct. 2786 (1993).

⁹² Metaanalysis is an established scientific technique for analyzing the collected results of multiple independent studies. The *Daubert* court was apparently unfamiliar with this technique.

and trade associations, recommending diverse criteria for assessing scientific validity. In its ruling, the Court rejected formulaic approaches to assessing scientific evidence and laid the responsibility for deciding admissibility squarely on the trial judges' shoulders.⁹³

3. DES

Diethylstilbestrol ("DES"), a synthetic estrogen, was first produced in 1938, and was the first drug to be approved under the 1939 Food, Drug and Cosmetic Act.⁹⁴ A generic drug, DES was produced by several American drug manufacturers.⁹⁵ Originally approved by the FDA for the treatment of vaginitis, gonorrhea, menopausal symptoms and to suppress lactation,⁹⁶ it was eventually prescribed for a variety of other medical conditions as well, including the prevention of miscarriage and pregnancy complications.⁹⁷ An estimated four to six million Americans (mothers and their offspring) were exposed to DES during pregnancy.⁹⁸ Over 300 manufacturers produced the drug, with Eli Lilly & Co. capturing about 75% of the market.⁹⁹

In 1970, research by gynecologists at the Massachusetts General Hospital linked intrauterine exposure to DES to clear cell adenocarcinoma in young women, a rare form of malignant vaginal cancer that usually appears in women over fifty years old.¹⁰⁰ In 1971, the FDA required product-labeling of DES to state that DES was contra-indicated for use in the prevention

⁹³ *Daubert*, 113 S. Ct. at 2786.

⁹⁴ ROBERTA J. APFEL & SUSAN M. FISHER, TO DO NO HARM: DES AND THE DILEMMAS OF MODERN MEDICINE 215 (1984).

⁹⁵ ROBERT MEYERS, DES: THE BITTER PILL 226 (1983).

⁹⁶ *Id.* at 18.

⁹⁷ APFEL & FISHER, *supra* note 94, at 1. Between 1941 and 1947, DES was used during pregnancy without FDA approval. In 1947, several drug companies filed a New Drug Application to permit use of DES during pregnancy. In 1952, the FDA declared that DES was safe and no longer a new drug requiring annual approval. *Id.* at 19-20. In subsequent years, moreover, a series of studies investigating the effect of DES on the incidence of miscarriage reached contradictory conclusions. By the 1960s, six of the seven leading obstetrical textbooks had concluded that DES had no effect in preventing spontaneous abortions. *Id.* at 23-24.

⁹⁸ *Id.*

⁹⁹ Gail Appelton, *Record Drug Verdict Against Lilly May Spur Settlements*, REUTER BUS. REP., Oct. 18, 1991, available in LEXIS, Nexis Library, REUTERS File.

¹⁰⁰ APFEL & FISHER, *supra* note 94, at 23-24.

of miscarriages.¹⁰¹ Since then intrauterine exposure to DES has been associated with clear cell adenocarcinoma of the vagina, adenosis, anatomical anomalies of the cervix, subfertility, breast cancer and premature birth.¹⁰²

The first successful lawsuits by DES-exposed women were in 1979,¹⁰³ when one plaintiff was awarded \$800,000 from White Laboratories after a jury found that the company had manufactured the DES her mother had taken and that the DES had caused the plaintiff's clear-cell vaginal cancer.¹⁰⁴ In 1980, in *Sindell v. Abbott Laboratories*, the California Supreme Court held that DES-exposed plaintiffs could recover from drug manufacturers for their injuries even though the plaintiffs were unable to prove which drug manufacturer had produced the drug.¹⁰⁵ The *Sindell* decision introduced the legal concept of market-share liability, which allocates damage awards among drug manufacturers according to the manufacturer's share of the DES market. *Sindell* allowed plaintiffs who otherwise would not have been able to recover to pursue their claims by naming all drug manufacturers who had produced the drug from 1941-1971.

Jury awards continued to grow. In 1982, a jury ordered defendant E.R. Squibb & Sons to pay \$2.2 million to a woman whose mother had ingested DES; the woman had developed clear cell vaginal cancer and was infertile as a result of cancer treatments.¹⁰⁶ In 1983, Eli Lilly & Company paid \$250,000 in cash and \$30,000 per year for life to settle a suit brought by a twenty-one year-old woman who had been exposed to DES in the womb and had developed vaginal cancer.¹⁰⁷

By 1985, DES litigation had grown exponentially.¹⁰⁸ More than 600 lawsuits had been brought by over 6000 named plaintiffs.¹⁰⁹ In Connecticut, a class action was filed on behalf of 12,000 to 20,000 Connecticut women exposed to DES; the

¹⁰¹ *Id.*

¹⁰² *Id.* at 47.

¹⁰³ MEYERS, *supra* note 95, at 222.

¹⁰⁴ *Id.* at 223.

¹⁰⁵ *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980); see MEYERS, *supra* note 95, at 216.

¹⁰⁶ MEYERS, *supra* note 95, at 222.

¹⁰⁷ *Id.* at 221.

¹⁰⁸ *Id.* at 223.

¹⁰⁹ *Id.*

plaintiffs' claims ranged from emotional distress to wrongful death.¹¹⁰ In October 1991, a New York state jury awarded \$12.2 million to a DES victim, and an additional \$550,000 to her spouse. As the jury prepared to reconvene to consider whether punitive damages should be awarded, Lilly abruptly settled the case for an undisclosed amount. Attorneys for Eli Lilly estimated that there were then 1000 DES cases pending nationwide, 600 of which named Eli Lilly as defendant.¹¹¹

4. The Dalkon Shield

The litigation spawned by the Dalkon Shield is the largest medical products liability litigation in United States history. Over 190,000 people filed injury-related claims in the A.H. Robins, Inc., ("Robins") bankruptcy proceedings. Robins was the sole manufacturer of the Dalkon Shield. Approximately 15,000 personal injury claims were filed against Robins prior to the bankruptcy. In 1988, over a decade after the litigation began, a \$2.475 billion trust was established to compensate Shield claimants.

In January 1971, A.H. Robins, a 123-year-old, well-respected pharmaceutical company, began to market an intrauterine contraceptive device ("IUD") known as the Dalkon Shield ("the Shield"). Robins inaccurately claimed an extremely low pregnancy rate of 1.1 percent for the Shield, and the Shield quickly outsold its competitors.¹¹² More than four million Shields were distributed in over 80 countries, and at least 2.2 million American women were implanted with the device.¹¹³ In one record month, over 88,000 Shields were implanted.¹¹⁴ This runaway success generated gross revenues of \$11,240,611 and a gross profit of \$505,499 for Robins.¹¹⁵

By mid-1972, however, the Shield had a growing reputation among the medical community for higher-than-average

¹¹⁰ *Id.*

¹¹¹ Appelton, *supra* note 99.

¹¹² Catherine Breslin, *Day of Reckoning*, MS., June 1989, at 46.

¹¹³ MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD 3-5 (1985).

¹¹⁴ Breslin, *supra* note 112, at 46. The record month was April 1972.

¹¹⁵ MINTZ, *supra* note 113, at 5. The Shield cost only 25 cents to produce and was sold at well over a 1000% markup for \$4.35.

rates of failure. More importantly, facts began to surface that linked the Shield to Pelvic Inflammatory Disease ("PID"), and to rare and often fatal septic abortions. The high rate of PID was linked to the Shield's multifilamented tail string,¹¹⁶ which resulted in a phenomenon called "wicking"—a process by which bacteria from the vagina were drawn into the usually sterile uterus where they were insulated from the germ-fighting mucus in the cervix.¹¹⁷ Robins' researchers discovered the wicking in the Shield's tail, but company officials suppressed their findings. The use of any IUD increases the risk of PID, but the Shield-related risk was five times the risk associated with other IUDs.¹¹⁸

As doctors became concerned by the rate of infections, sales of the Shield began to slump. Robins responded by launching an aggressive advertising campaign aimed at women and physicians. Ads inaccurately touted a pregnancy rate of .05 percent and claimed that the Shield was easy and painless to insert.¹¹⁹ In reality, the Shield had a pregnancy rate of 5.5 percent and its crab-like fins made it both painful to insert and painful to remove.¹²⁰

On March 30, 1973, a thirty-year-old woman who had become pregnant while using the Shield died after her infected uterus spontaneously aborted a four-month old fetus.¹²¹ A subsequent FDA study found fourteen other septic abortions among women using the Shield. The study further revealed that of 287 septic abortions related to IUDs, 219 were in women using the Shield. At the request of the FDA, Robins suspended domestic sales in June 1974. But the company continued to market the Shield abroad in seventy-nine other countries. By the time Robins suspended sales, the company had

¹¹⁶ The tail string enabled a woman to make sure that the IUD was still in place and enabled a physician to remove the device by pulling on the string. The string ran between the germ-ridden vagina and the sterile uterus. All other IUDs on the market had tail strings with impervious monofilaments. Monofilament tail strings prevented bacteria on the outside of the string from getting inside the string and traveling into the uterus. *See id.* at 131.

¹¹⁷ RONALD BACIGAL, *THE LIMITS OF LITIGATION: THE DALCON SHIELD CONTROVERSY* 10 (1991).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 11.

¹²⁰ *Id.*

¹²¹ *Id.* at 12.

been sued by forty-seven Shield users.¹²²

In 1975, a jury awarded a Shield plaintiff \$10,000 in compensatory damages and \$75,000 in punitive damages.¹²³ By 1979, three thousand cases had been filed against Robins by women who had used the Shield. The majority of these early cases settled for an average cost of \$11,000.¹²⁴ The Dalkon Shield litigation involved a variety of aggregative legal procedures. Early in the litigation, federal suits were transferred to the Western District of Kansas for Multi-District Litigation ("MDL") processing. After substantial discovery, the MDL Judge transferred the cases back to the originating courts. This aspect of the Shield litigation contrasts with many other instances of mass torts, in which multidistricting for pretrial processes ultimately resulted in resolution of most or all claims.

Two efforts were made to establish class actions. In 1981, Judge Spencer Williams of the Northern District of California established two class actions, a mandatory, nationwide limited fund class for punitive damages and a voluntary class to decide liability for California claims.¹²⁵ A.H. Robins had moved for the punitive damage class, but opposed the voluntary, California class, as did virtually all plaintiffs' lawyers. The Ninth Circuit vacated the judge's order regarding both classes, holding that Judge Williams had not made a finding that Robins was a limited fund sufficient to support the mandatory, punitive damage class and that the voluntary, California class did not satisfy the typicality and adequate representation requirements of Federal Rule 23(a) and was not superior to other means of adjudication.¹²⁶

Four years later, A.H. Robins again tried to form a mandatory federal class action for punitive damage claims, an effort opposed by virtually every plaintiffs' lawyer. Judge Robert Mehrige of the Eastern District of Virginia denied class certifi-

¹²² Morton Mintz, *Questions Arose Early on Contraceptive's Safety*, WASH. POST, Apr. 7, 1985, at A1, A6.

¹²³ *Deemer v. A.H. Robins Co*, No. C-26420 (D. Sedgwick County, Kan., filed Oct. 1974).

¹²⁴ RICHARD SOBOL, *BENDING THE LAW* 14 (1991).

¹²⁵ *In re "Dalkon Shield" IUD Prods.*, 526 F. Supp. 887 (N.D. Cal. 1981).

¹²⁶ *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

cation, holding that Robins was collaterally estopped from relitigating the finding of the earlier California decision that the class did not meet the requirements of Rule 23(a).¹²⁷

During this period Robins faced sharply increasing numbers of claims and judgments and paid increasingly larger amounts to settle claims. Trial courts increasingly consolidated the cases for discovery and trial. Consolidated discovery for a large group of Minnesota claims proved particularly damaging to Robins and embarrassing to executives of the Company. In August 1985, after being held liable for two punitive damage awards of \$1.75 and \$7.5 million, respectively, and facing imminent trials for which it had neither human nor financial resources, Robins filed for Chapter 11 bankruptcy protection.¹²⁸ By this time, Robins had paid out \$378.3 million in damages and \$107.3 million in legal fees and over 5100 Shield suits were pending.¹²⁹ In order to limit its liability for Dalkon Shield claims, Robins launched a \$5 million world-wide advertising campaign to alert potential claimants of the bankruptcy bar date. As a result, 327,000 claims were filed by the April 30, 1986 deadline for filing claims with the bankruptcy court. Of these claims, 116,000 were eventually withdrawn or disqualified.¹³⁰

In 1988, under an agreement worked out during the course of the bankruptcy proceedings, Robins was purchased by American Home Products, with most of the proceeds going to a \$2.475 billion trust to compensate the Shield victims established under the reorganization plan. Judge Mehrige also certified a related mandatory class action against Robins' insurer, Aetna, executives of A.H. Robins and other defendants. These defendants, principally Aetna, provided additional funds to the trust and also to claimants who filed claims after the bar date. Claimants began to receive settlement payments in 1989.¹³¹

¹²⁷ *In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112 (E.D. Va. 1985).

¹²⁸ BACIGAL, *supra* note 117.

¹²⁹ *Id.* at 47.

¹³⁰ MINTZ, *supra* note 113, at 3-20.

¹³¹ Breslin, *supra* note 112, at 52.

5. Copper 7

An intrauterine device ("IUD") manufactured by G.D. Searle & Co ("Searle"), Copper 7 was a small piece of plastic shaped like the number 7 with a small thread of copper wound around its vertical arm. It was approved by the FDA and introduced in 1974. Copper 7 was used by one million women in the United States,¹³² and over seven million devices were sold world-wide. By 1985, 742 lawsuits were pending against Searle alleging that Copper 7 caused infertility, pelvic inflammatory disease, ectopic pregnancies and perforations of the uterus.¹³³ A *Business Week* article claimed that it possessed internal company documents showing that Searle had "understated warnings and overstated safety claims."¹³⁴ In 1985, the first Copper 7 case went before a jury but was dismissed by the judge after the jury was unable to agree on whether the device harmed the plaintiff.¹³⁵

In January 1986, Searle discontinued sales of Copper 7 and Tatum 7, a similar, but less popular IUD. By then, the company had been sued in 775 Copper 7 cases, ten of which had gone to trial. Searle had won eight trials and been found liable for a total of \$310,000 in the two trials it lost. One hundred seventy cases had been dismissed and 300 cases had settled at an average of \$6000 per case. Searle's costs to defend these claims were estimated to have exceeded \$10 million.¹³⁶

Searle won the next seven trials.¹³⁷ However, in March 1988 a federal judge unsealed hundreds of internal documents that suggested that Searle had been concerned about the safety of the Copper 7 before it marketed the device.¹³⁸ In apparent

¹³² Michael L. Millenson, *600 Lawsuits Target Searle's Copper Contraceptive*, CHI. TRIB., Oct. 5, 1985, at 3.

¹³³ William B. Glaberson, *Did Searle Close Its Eyes to a Health Hazard?*, BUS. WK., Oct. 14, 1985, at 120.

¹³⁴ *Id.*

¹³⁵ *Judge Declares a Mistrial in Searle Copper-7 Case*, WALL ST. J., Dec. 17, 1985, at 42.

¹³⁶ Robert Lowes, *Copper 7 Lawsuits May Have Cost G.D. Searle \$10 Million*, ST. LOUIS BUS. J., Mar. 10, 1986, at 6B. The U.S. sales of the two devices had generated \$11 million in sales for 1985. *Id.*

¹³⁷ *Law Journal: Copper 7 Battle Just Beginning*, PR NEWSWIRE, Nov. 4, 1987, available in LEXIS, Nexis Library, OMNI File.

¹³⁸ Tamar Lewin, *Searle Documents Unsealed; Early IUD Worry is Implied*, N.Y. TIMES, Mar. 15, 1988, at D1.

response, the FDA quickly announced that it had concluded that Searle had not withheld data on the risks associated with use of the Copper 7.¹³⁹ The unsealed documents were used by Robins, Kaplan, Ciresi and Miller, the law firm that had broken open the Dalkon Shield litigation, in a trial of a lawsuit brought by Esther Kociemba; Ms. Kociemba alleged that she had suffered infertility as a result of using Copper 7. In September 1988, the Kociemba jury decided that Searle had been negligent in testing the Copper 7, that the company had failed to warn users of the IUD's risks and that the Copper 7 caused Ms. Kociemba's infertility. The jury returned a verdict of \$1.75 million in compensatory damages and \$7 million in punitive damages.¹⁴⁰ Nine months later, during a California Copper 7 trial, Searle settled all of the 130 Copper 7 suits brought by Robins, Kaplan for an undisclosed amount.¹⁴¹

The settlement had the effect of removing Robins, Kaplan—which had been the most successful of the plaintiffs' law firms representing Copper 7 users—from the litigation. But, as part of this settlement, Robins, Kaplan made its documents available to lawyers representing the 350 remaining Copper 7 cases. As a result, Searle still faced potentially substantial liability. Searle greatly reduced this threat when it thwarted an attempt by one plaintiffs' law firm to collect many of the remaining cases from throughout the country for trials in one Maryland court, by obtaining a ruling that these cases should not have been filed in Maryland. Because no law firm could afford to prosecute the claims individually in different courts throughout the country, Searle thereby succeeded in ending mass litigation of Copper 7 cases.

¹³⁹ *U.S. Agency Satisfied with Data on Monsanto Contraceptive*, REUTERS, Mar. 18, 1988, available in LEXIS, Nexis Library, REUTERS File.

¹⁴⁰ Julia F. Siler, *Drug Maker Told to Pay \$8 Million Over Birth Device*, N.Y. TIMES, Sept. 10, 1988, at A1. In a letter to the district court judge who presided over the case, three jurors reported that they had been intimidated and harassed by the jury foreman and were unable to express their opinions. They also claimed that some jurors had ignored the judge's instructions about the case. See Julia F. Siler, *3 Jurors See Case Improperities*, N.Y. TIMES, Nov. 22, 1988, at D5.

¹⁴¹ *Searle to Settle 130 IUD Suits*, UPI, June 16, 1989, available in LEXIS, Nexis Library, UPI File.

6. The Shiley Heart Valve

Approved by FDA in 1979, the Bjork-Shiley Convexo/Concave heart valve was manufactured and distributed by Pfizer, Inc. between 1979 and 1986. More than 80,000 valves were implanted worldwide.¹⁴² By 1980, Shiley had begun to receive reports of valve failures, caused by fractures at the point where struts were welded to the valve rings. The valve has been linked to approximately 134 deaths worldwide.¹⁴³ Shiley withdrew the valve from the market in 1986.

In February 1990 the investigations sub-committee of the House Committee on Energy and Commerce (chaired by Representative John Dingell) released a report accusing the FDA of allowing Shiley to market faulty products even though the regulators and the company were aware of problems with the products.¹⁴⁴ The following day, Pfizer shareholders filed a class-action suit against the company, claiming that company executives withheld information about the impact of the valve on the financial health of the company.¹⁴⁵ In March 1990, Public Citizen, a non-profit consumer watchdog group filed a class action suit against Shiley, demanding that all valve recipients receive a prompt medical consultation and a warning about the possibility of valve fractures.¹⁴⁶ In December 1990, Shiley launched a nationwide recall campaign. Shiley sent letters to every cardiologist and cardiovascular surgeon registered with the American Medical Association asking that doctors warn patients implanted with the valve of its potential problems.¹⁴⁷

Litigation of claims involving actual failures of the Shiley valve was significant. Each of the estimated three hundred deaths and, perhaps, a similar number of failures that were corrected through emergency surgery, involved substantial compensatory damages. In addition, Shiley and Pfizer faced a

¹⁴² Malcolm Gladwell, *Pfizer Recalls Artificial Heart Valve*, WASH. POST, Dec. 11, 1990, at A3.

¹⁴³ Evan Roth, STATES NEWS SERV., May 25, 1988 (untitled news abstract).

¹⁴⁴ Robert W. Stewart, *Report Attacks Sale of Faulty Heart Devices*, L.A. TIMES, Feb. 26, 1990, at A3.

¹⁴⁵ *Shareholders Sue Maker of Heart Valve*, L.A. TIMES, Feb. 27, 1990, at D7.

¹⁴⁶ Catherine Gevertz, *Nader Group Sues Heart Valve Firm*, L.A. TIMES, Mar. 22, 1990, at A3. The suit was later dismissed. See Sonni Efron, *Heart Valve Firm, Plaintiffs Battle Under Tons of Paper*, L.A. TIMES, Sept. 8, 1991, at D5.

¹⁴⁷ Gladwell, *supra* note 142, at A3.

serious threat of punitive damages in these cases. Although there is no public information about the costs of this litigation, Shiley apparently had settled approximately 200 law suits for valve failures by 1990, with some settlements rumored to exceed \$1 million.¹⁴⁸

Although exposure for these claims was significant, even more threatening was the specter of massive litigation by persons whose valves had not yet failed. If the courts permitted these Shiley heart valve users to sue for damages, Shiley would face tens of thousands of smaller, but still substantial claims. Thus, the course of the Shiley heart valve litigation turned primarily on the treatment and representation of Shiley users whose valves had not failed, rather than on the wrongful death and serious injury claims associated with those who had already experienced valve failures.

A substantial amount of this litigation occurred in California, where courts ruled that residents of that state could sue for the emotional distress associated with being implanted with a valve that might fail. A California appellate court ruled in 1988 that persons implanted with the Shiley valve could receive damages for emotional distress, if they could show that Shiley withheld information about the defect.¹⁴⁹ Subsequent California decisions narrowed this ruling. Although Shiley was headquartered in California, courts there held that neither foreign nationals nor residents of other states could sue Shiley for emotional distress in California.¹⁵⁰

Much of the California litigation was carried forward by Robins, Kaplan, Ciresi and Miller, the leading plaintiffs' law firm in the Dalkon Shield and Copper 7 litigations. While that firm was proceeding with its cases individually, two class actions were filed in California courts. One, filed in January 1991 by a Miami, Florida law firm on behalf of all 55,000 United States recipients of the Convexo-Concave heart valve, was never certified as a class.¹⁵¹ In June 1991, Federal Judge Harry

¹⁴⁸ *Id.*

¹⁴⁹ Sonni Efron, *Heart Valve Maker Offered to Settle Lawsuits*, L.A. TIMES, Jan. 25, 1992, at A1.

¹⁵⁰ *Id.*; see also *Plaintiffs Lose Round in Shiley Valve Fight*, L.A. TIMES, Mar. 6, 1992, at D5. Shiley is located in Orange County, California.

¹⁵¹ Gregory Crouch, *Suit Alleges Pfizer, Shiley Tried to Hide Heart Valve Defects*, L.A. TIMES, Jan. 9, 1991, at D1. Although more than 80,000 valves had been

L. Hupp ruled in that case that class members with working valves who had never heard of the valve's problems had no cause of action.¹⁵² A second class action was filed in September 1981 for sixty-one plaintiffs implanted with the valve who claimed to have suffered emotional distress.¹⁵³ A third, voluntary nationwide class action was filed in federal court in Cincinnati by several lawyers including Stanley Chesley, a plaintiffs' lawyer noted for his class action practice.¹⁵⁴ Judge S. Arthur Spiegel (Southern District of Ohio) approved a settlement of this class action in August 1992. The settlement allows victims of fractured valves or their estates to receive up to \$2 million each and creates a \$75 million fund for research on procedures to detect defective valves in situ.¹⁵⁵ The settlement allows payments between \$2500 and \$4000 each to class members whose valves have not failed. The settlement is currently being appealed by members of the class who claim that it is inadequate because x-ray procedures cost more than the maximum of \$4000.

Approximately 850 claimants opted out of the class, many of them California plaintiffs. In November 1992, Pfizer paid \$35 million to settle with 333 of these plaintiffs, who were represented by Robins, Kaplan, Ciresi and Miller. Payments to these plaintiffs were reported to range between \$40,000 and \$300,000, with an average of \$103,000 each.¹⁵⁶ In September 1993, Pfizer settled another 256 California emotional distress claims under a formula reported to emulate the earlier Robins, Kaplan settlement and rumored to total around \$26 million.¹⁵⁷

If the settlement of the Cincinnati class action is sustained

implanted worldwide, by 1990, only 55,000 of those recipients were estimated to be alive. See Gladwell, *supra* note 142.

¹⁵² Bob Schwartz, *Class Action Denied by Court in Shiley Lawsuit*, L.A. TIMES, June 4, 1991, at D7.

¹⁵³ Efron, *supra* note 146, at D5.

¹⁵⁴ Alison Frankel, *Et tu, Stan?*, AM. LAW., Jan.-Feb. 1994, at 68.

¹⁵⁵ Ted Johnson, *\$215 Million Shiley Valve Settlement Approved*, L.A. TIMES, Aug. 20, 1992, at D1. The total value of the settlement is generally reported to be \$215 million. However, Chesley reportedly has valued the settlement at \$500 million, and he and other class counsel have requested fees totaling \$21 million, based on this valuation. See Frankel, *supra* note 154, at 68.

¹⁵⁶ Johnson, *supra* note 155, at D12; see also Frankel, *supra* note 154, at 70.

¹⁵⁷ James M. Gomez & Debora Vrana, *Judge OKs Settlement in Heart Valve Suit*, L.A. TIMES, Sept. 3, 1993, at D1.

on appeal, Pfizer will have effectively ended the Shiley litigation as a mass tort with its settlement of the two groups of California cases. Almost all present and future claims based on valve failure will be handled through the procedures of the Cincinnati settlement. At most, 250 opt-out claims remain to be settled. Most will involve claims of emotional distress which may not be legally cognizable outside of California. Those that involve valve failures can be tried as ordinary tort claims.

7. Silicone breast implants

First marketed by Dow Corning in 1963,¹⁵⁸ silicone breast implants were considered to be an improvement over liquid silicone injections, which 50,000 women had received to augment their breasts.¹⁵⁹ By 1992, an estimated two million women had silicone implants inserted, about twenty percent for reconstructive purposes, after mastectomies or to correct congenital deformities, and eighty percent for cosmetic reasons.¹⁶⁰

In 1977, a plaintiff who had suffered acute inflammation in her breast tissues after her implants ruptured was awarded \$170,000 in the first successful breast implant lawsuit against Dow Corning.¹⁶¹ Between 1982 and December 1991, six silicone gel implant cases went to trial; five resulted in plaintiff's verdicts.¹⁶²

When the silicone breast implants came on the market, the FDA lacked the authority to regulate medical devices. As a result, it did not evaluate silicone gel and saline breast implants for safety and effectiveness.¹⁶³ In 1976, Congress passed legislation that was aimed at closing the loophole in the Food, Drug and Cosmetic Safety Act that excluded medical devices from FDA regulation. Under the new legislation, however, implants were allowed to stay on the market while FDA con-

¹⁵⁸ Alison Frankel, *From Pioneers to Profits*, AM. LAW., June 1992, at 84.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Deborah Tedford, *Revelation Old News to Texas Woman*, HOUSTON CHRON., Feb. 11, 1992, at A6.

¹⁶² Frankel, *supra* note 158, at 84.

¹⁶³ William Booth, *Breast Implants Allowed; Devices to Remain on Market Despite Lack of Safety Data*, WASH. POST, Nov. 15, 1991, at A1.

sidered their safety.¹⁶⁴ In 1982, the FDA proposed classifying the silicone gel implants as Class III devices. This classification would have required the manufacturer to prove the safety of the implants in order to keep them on the market.¹⁶⁵ However, the silicone implants were not classified as Class III until 1988. The decision to classify the implants as Class III devices was prompted by scientific data suggesting that silicone may migrate throughout the body of an implant recipient with unknown long-term effects.¹⁶⁶

In November 1988, the consumer group, "Public Citizen," called for a ban on silicone gel implants, citing internal documents from the FDA and Dow Corning, Inc., (the largest implant manufacturer with thirty percent of the market), that stated that the gel caused malignant cancers in twenty-three percent of the animals tested.¹⁶⁷ Public Citizen revealed that the FDA had been debating the safety of the implants for several months and leaked FDA memoranda suggesting that some FDA scientists considered the evidence alarming enough for the agency to issue a public warning and distribute informational leaflets to all past, current and future patients.¹⁶⁸ After unsuccessfully petitioning the FDA to ban the implants, Public Citizen filed a lawsuit under the Freedom of Information Act in 1989 to force the FDA to release the results of animal tests of silicone implants. In November 1990, a federal judge ordered the FDA to release the results of the tests.¹⁶⁹

One year later, in November 1991, an advisory panel of outside experts recommended to the FDA that the silicone gel

¹⁶⁴ Frankel, *supra* note 158, at 93.

¹⁶⁵ *Id.* The FDA was concerned about silicone gel "bleeding" from the implants and the possible long-term effects of silicone.

¹⁶⁶ *Id.*

¹⁶⁷ *Ban on Breast Implants Is Urged*, L.A. TIMES, Nov. 9, 1988, at 1.

¹⁶⁸ *Silicone Gel Found to Cause Cancer in Laboratory Rats; Citizens' Group Calls For Ban on Breast Implants*, WASH. POST, Nov. 10, 1988, at A3. The documents cited by Public Citizen revealed that between 20 and 26% of rats injected with silicone developed fibrosarcoma tumors, densely-packed tumors arising from the tough, fiber-producing cells of the body's connective tumor. Between 18 and 21% of the tumors became malignant and cancerous tumors developed throughout the animals bodies. Eighty-five percent of the animals with fibrosarcomas died. Dow Corning agreed that the injections caused sarcomas but claimed that it was a "purely rodent phenomenon."

¹⁶⁹ *FDA Ordered to Release Breast Implant Test*, WASH. TIMES, Nov. 28, 1990, at A2.

breast implants should stay on the market while the manufacturers conducted additional tests, even though there was an "appalling" lack of information about their safety.¹⁷⁰ A month later, in December 1991, a San Francisco federal jury awarded \$7.3 million to a woman who claimed that her implants had caused a permanent auto-immune disorder.¹⁷¹ The jury based its verdict on internal Dow Corning memoranda suggesting that the company had known since the early 1970's that there may be health problems associated with the silicone implants; the jury found that Dow had acted with fraud, oppression and malice.¹⁷²

Soon afterward, Dr. Norman Anderson, a member of the FDA General Devices and Plastic Surgery Devices panel stated in a letter to the FDA that the company had improperly withheld data about safety problems associated with the implants.¹⁷³ Dr. Anderson's charges were based upon information revealed during discovery in the San Francisco lawsuit. The documents were made available to the FDA but were not released to the general public because of a protective court order which sealed the documents.

On January 7, 1992, the FDA called for a forty-five day moratorium on the sale and implantation of silicone gel breast implants to allow time to review new data about the safety of the devices.¹⁷⁴ The FDA imposed the voluntary moratorium after reviewing internal memoranda in which Dow Corning personnel questioned the safety of the devices. Some of the sealed documents were leaked to the *New York Times*, which reported that the documents suggested that Dow Corning had conducted inadequate research.¹⁷⁵ Dow Corning responded that the memoranda represented an internal conversation about the safety of the implants and that although the company knew about the silicone leaks in the early 1970s it believed silicone

¹⁷⁰ *Id.* Several manufacturers ceased manufacturing implants to avoid compliance with the FDA approval process.

¹⁷¹ Marlene Cimons, *Breast Implant Maker Falsifies Data, FDA Says*, L.A. TIMES, Dec. 31, 1991, at A1.

¹⁷² *Briefly: Consumer Products*, L.A. TIMES, Dec. 25, 1991, at D2.

¹⁷³ *Id.*

¹⁷⁴ Karen Riley, *FDA Sets 45 day Hiatus For Implants*, WASH. TIMES, Jan. 7, 1992, at A1.

¹⁷⁵ Phillip Hilts, *Dow Delayed Implant Tests for a Decade*, HOUSTON CHRON., Jan. 13, 1992, at A1.

would not have any serious health effects.¹⁷⁶

Prohibited by law from releasing the contents of Dow Corning's internal memoranda, the FDA publicly requested that Dow release the documents to the public.¹⁷⁷ Dow Corning released the internal memoranda in February 1992.¹⁷⁸ The memoranda confirmed that the company had known for years that its silicone gel implants often ruptured and leaked silicone into women's bodies. Dow Corning replaced its CEO the same week.

A week later the FDA reported that new scientific evidence about the implants showed that they leaked more than was previously believed and that the gel may cause health problems.¹⁷⁹ The FDA advisory stated that it may take years for the leaks to begin and there is no way to determine how many women with implants and without symptoms may have suffered undetected leaks. The panel also stated that some evidence indicates that gel leaks may cause immune diseases and neurological disorders.¹⁸⁰ Rheumatologists also reported a possible link between silicone implants, lupus and connective tissue disorder. The advisory panel also stated that Dow Corning documents raised questions about the strength of silicone envelopes that contain the gel.¹⁸¹ The FDA report was based upon preliminary findings from five weeks of intensive inspections of four implant makers, Dow, Bioplasty, McGhan and Mentor.

On February 21, 1992, the advisory panel recommended that the use of silicone gel implants be substantially restricted. The panel reported that there was no conclusive evidence linking silicone with a particular disease but that time was needed to examine the evidence.¹⁸² In March, Dow Corning announced

¹⁷⁶ *Id.* at A3.

¹⁷⁷ *Id.* Meanwhile, the Los Angeles County District Attorney's Office commenced a criminal investigation into Dow's conduct to determine whether the company had sold the implants without fully disclosing information about their health hazards. See Robert Steinbrook & Henry Weinstein, *County Will Investigate Maker of Breast Implants*, L.A. TIMES, Jan. 31, 1992, at B1.

¹⁷⁸ Marlene Cmons, *Data Raises New Concerns on Breast Implant Safety*, L.A. TIMES, Feb. 11, 1992, at A1.

¹⁷⁹ *FDA: Implants Leak More Than Thought*, CHI. TRIB., Feb. 19, 1992, at 4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Phillip J. Hilts, *Implant Restrictions Urged*, HOUSTON CHRON., Feb. 21, 1992,

that it would no longer manufacture the implants.¹⁸³ In November 1992, Dow Corning disclosed in discussions with the FDA that an unknown number of silicone gel implant quality control records had been faked.¹⁸⁴

In April 1992, the FDA lifted the moratorium on gel implants but placed strict limitations on their use. All breast cancer patients and women with deformed or injured breasts were to have full access to the implants if they agree to participate in a research study. But only a few hundred women who desire implants for cosmetic reasons have been allowed to participate in the clinical trials.¹⁸⁵

In December 1992, a Texas state jury awarded a woman \$5 million in compensatory damages and \$20 million in punitive damages for injuries due to silicone breast implants. With an additional \$2 million award in attorney fees and \$1 million in prejudgment interest, the total verdict amounted to \$28 million.¹⁸⁶

By Spring 1993, there were approximately 1000 cases pending in federal court.¹⁸⁷ By order of the Judicial Panel on Multi-District Litigation, the federal cases have been assigned to Alabama federal Judge Sam C. Pointer Jr., for pretrial management.¹⁸⁸ About 12,000 suits had been filed in state and federal courts by spring, 1994, approximately 6800 against Dow Corning alone.¹⁸⁹ The most common injuries claimed by the plaintiffs are: acute inflammation, auto-immune disorders, lupus, scleroderma and chronic arthropathy.¹⁹⁰ Most suits are

at A1.

¹⁸³ Joel Kurtzman, *Dow Gives Up Implants*, N.Y. TIMES, Mar. 22, 1992, at C2.

¹⁸⁴ *Dow Corning, FDA Discussing Report*, STAR TRIB., Nov. 4, 1992, at D3.

¹⁸⁵ Karen Riley, *Silicone Implants Given Limited OK*, WASH. TIMES, Apr. 17, 1992, at C1.

¹⁸⁶ Margaret C. Fisk, *Products Liability, 1992's Largest Verdicts*, NAT'L L.J., Jan. 25, 1993, at S14.

¹⁸⁷ Sandra Torry, *The Race to Represent Breast-Implant Victims*, WASH. POST, Mar. 9, 1992, at F5.

¹⁸⁸ *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. 93-926, 1993 WL 199129 (J.P.M.L. May 4, 1993).

¹⁸⁹ Henry Weinstein, *Breast Implant Litigation Close to \$4 Billion Deal*, L.A. TIMES, Mar. 14, 1994, at A1, A20.

¹⁹⁰ Robert Steinbrook, *Link Between Implants, Immune Disease Seen*, L.A. TIMES, Jan. 20, 1992, at A1. Scleroderma is a rheumatic disease in which the skin hardens and organs deteriorate. Some breast implant recipients exhibit some symptoms of a scleroderma—the skin hardens but the organs do not deteriorate. "Chronic silicone arthropathy" is a disease that causes joint, muscle and nerve pains. *Id.*

against Dow Corning, Bioplasty, McGhan, Mentor, Bristol-Myers Squibb, General Electric and Baxter International Inc.¹⁹¹

In July 1993 Dow Corning and other implant manufacturers sued more than seventy insurance companies in California state court for failure to defend and indemnify them in breast implant litigation. The implant manufacturers asked that insurers be ordered to fund whatever amount breast implant claimants ultimately secure in settlement or at trial; they also requested compensatory damages and unspecified punitive damages for breach of contract and breach of the implied covenant of good faith and fair dealing.¹⁹²

In September 1993 Dow Corning proposed a \$4.75 billion settlement of all pending and future breast implant cases. Funds for the settlement would be provided by Dow Corning, other implant manufacturers and suppliers of the raw materials used to manufacture the implants, as well as doctors, hospitals and insurers. Exactly how costs would be allocated had not been decided at the time the settlement offer was announced; nor was it clear how many plaintiffs the settlement would cover. Plaintiff lawyers supporting the settlement in concept asserted that it would provide claimants amounts ranging between \$200,000 to \$2 million. Other attorneys, however, noting that one to two million women in the United States have had breast implants and that the latency period of claimed injuries may range up to twenty-five years, contended that the \$4.75 billion settlement offer would fall far short of the amount needed to compensate women.¹⁹³

The number of persons possibly injured by silicone implants may be beyond that covered by the proposed class action. For example, a study reported in January 1991 found health problems among children who had been nursed by mothers with silicone implants. In October 1993, newspaper

¹⁹¹ McGhan acquired its implant business from the 3M Corporation, which began making silicone breast implants in 1977. Barnaby J. Redir, *Millions Awarded in Implant Trial*, N.Y. TIMES, Mar. 4, 1994 at A7.

¹⁹² *Breast Implant Makers Sue Their Insurers*, L.A. DAILY J., July 6, 1993, at 1, 10.

¹⁹³ David R. Olmas, *Dow Proposes \$4.75 Billion to Settle Breast Implant Suits*, L.A. TIMES, Sept. 10, 1993, at D1. The final settlement was announced on March 23, 1994.

accounts questioned the safety of silicone penile implants,¹⁹⁴ and indicated that litigation involving male implantees is underway.¹⁹⁵ Approximately 28,000 men receive penile implants annually.¹⁹⁶

C. *Food and Diet Supplements*

1. *Salmonella*

In March and April 1985, one of the largest outbreaks of salmonella poisoning occurred when milk processed at the Hillfarm dairy in Illinois was accidentally contaminated with salmonella bacteria. Three separate batches of milk from the dairy with expiration dates a few weeks apart were found to be contaminated. The first outbreak was linked to milk with a March 29th expiration date.¹⁹⁷ On April 9, Jewel Food Stores, which owned the Hillfarm dairy, pulled dairy products from its grocery stores after there were more reports of salmonella poisoning.¹⁹⁸ Soon afterward, Hillfarm was identified as the source of the tainted milk.¹⁹⁹

Six people died as a result of salmonella poisoning caused by Hillfarm dairy products.²⁰⁰ Over 180,000 people in Illinois and surrounding states were affected by the milk, with the majority suffering from fevers, nausea, cramps, diarrhea and headaches.²⁰¹ Over the next three years, individuals filed nineteen thousand claims alleging injury from the tainted milk.²⁰² Although some of the suits named the manufacturer and distributor of the milk cartons as defendants, the principal defendant was Jewel Food Stores of Chicago.

¹⁹⁴ Shari Roan, *Silicone Implants: Men's Turn to Worry*, L.A. TIMES, Oct. 26, 1993, at E1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at E3.

¹⁹⁷ Christopher Drew & John Van, *Milk Plant Inspected for Clues to Epidemic*, CHI. TRIB., Apr. 11, 1985, at 1.

¹⁹⁸ John Van, *Jewel Closes Hillfarm Dairy Chain Recalls All Milk*, CHI. TRIB., Apr. 10, 1985, at 1.

¹⁹⁹ John Van, *Salmonella to Near Peak This Week; Dairy Produced More Tainted Milk Until Closing*, CHI. TRIB., Apr. 16, 1985, at 1.

²⁰⁰ William Mullen, *In U.S., Court Is Now First Resort*, CHI. TRIB., July 21, 1991, at 1.

²⁰¹ *Id.*

²⁰² *Id.*

In May 1985, all pending and future suits filed in Cook County were consolidated before one judge (who had previously overseen all asbestos-related proceedings in Cook County) for pretrial and discovery purposes. The court established a case management scheme which appointed coordinating plaintiffs' counsel, unified all pretrial motions and required the plaintiffs' attorney to file a consolidated complaint that incorporated all the liability theories pleaded in the 100 complaints then pending. In August 1985, a class of 18,000 claimants was certified over the defendants' objections. Three separate classes were certified, two for compensatory damages and one for punitive damages. Approximately 1400 plaintiffs opted out of these classes to pursue their claims individually.

In late 1986, prior to a trial on the issue of punitive damages, Jewel admitted liability for the outbreak and offered to pay compensatory damages, including medical expenses, to plaintiffs. The parties went to trial on the issue of punitive damages and, in January 1987, the jury returned a defense verdict. The verdict effectively ended the litigation as a mass tort. Because the majority of claims only alleged transitory, minor injuries, their value depended on the potential for punitive damages. With that potential removed, the costs to attorneys of proceeding outweighed the benefit. As a consequence, after the verdict, the plaintiffs and defense attorney developed a formula to determine the amount of compensatory damages each class member would receive.²⁰³

2. L-Tryptophan

An essential amino acid normally supplied by protein in the diet, L-Tryptophan is used by the body to synthesize the brain chemical serotonin, which is linked to sleep as well as to feelings of fullness and general emotional well-being.²⁰⁴ L-tryp-

²⁰³ See *Salmonella Outbreak Traced*, N.Y. TIMES, Apr. 17, 1985, at C6; *More Tainted Milk Discovered*, UPI, Apr. 16, 1985, available in LEXIS, Nexis Library, UPI File. Parts of this summary were drawn from an unpublished case study conducted by Mark Peterson (on file with the authors).

²⁰⁴ Sandy Rovner, *The Risks of Rapid Weight-Loss Programs*, WASH. POST, Apr. 3, 1990, at Z17. There are 19 lawsuits pending against Nutri-System filed by claimants in Florida who allege that the Nutri-System plan caused their gallbladder disease.

tophan was used as a dietary supplement, recommended to dieters on low-calorie or liquid protein diets and used in the products of weight-loss programs such as Nutri-System.²⁰⁵ It has also been used to treat insomnia, premenstrual syndrome, stress and depression,²⁰⁶ and was available without a prescription at most health foods stores.²⁰⁷ Over 380 companies manufactured L-tryptophan, the most prominent of which were Japanese corporations: Showa Denko, K.K; Ajinomoto Corp.; Kwoya Hakko Kogyo Co., Ltd.; Mitsui Toatsu Chemicals, Inc.; Nippon Kayaku Co. Ltd.; and Tanabe Seiyaku Co., Ltd.²⁰⁸

On November 11, 1989, the FDA issued a warning advising people to discontinue using L-Tryptophan.²⁰⁹ On November 17, the FDA announced its intention to seek a voluntary nationwide recall of products that contained enough L-Tryptophan to result in a daily intake of 100 milligrams or more of the dietary supplement.²¹⁰ The agency reported that it was investigating a possible link between ingestion of the supplement and at least 243 cases of eosinophilia-myalgia syndrome ("EMS"), a blood disorder that causes high fever, weakness, muscle aches, joint pain, rashes, pneumonia, shortness of breath and, in extreme cases, death.²¹¹ On November 22, Natural Alternatives International, Inc. ordered a recall of all L-Tryptophan products manufactured by the company within the previous twelve months.²¹² Two days later, the FDA announced that a study had conclusively linked EMS with ingestion of dietary supplements containing L-Tryptophan.

In February 1990, a plaintiff who was hospitalized with pneumonia-like symptoms after using L-Tryptophan filed a class-action suit against General Nutrition Corp., Union Sta-

²⁰⁵ *Id.*

²⁰⁶ Ken Sugar, *Tighter Regulation May Have Averted L-Tryptophan Problem*, UPI, May 17, 1990, available in LEXIS, Nexis Library, UPI File.

²⁰⁷ L-Tryptophan was classified as a food and, therefore, was not subject to the rigorous safety testing required of new drugs.

²⁰⁸ Sugar, *supra* note 206.

²⁰⁹ Lawrence K. Altman, *Officials Investigating Drugs' Role in Illness*, N.Y. TIMES, Nov. 17, 1989, at A26.

²¹⁰ *Id.*; see also Sugar, *supra* note 206.

²¹¹ Altman, *supra* note 209, at 26.

²¹² *Natural Alternatives International Inc. Recalls All Single Entity L-Tryptophan Products*, PR NEWswire, Nov. 22, 1989, available in LEXIS, Nexis Library, OMNI File.

tion Drugs, Inc. and Windmill Natural Vitamin Co., Inc., alleging that the companies failed to warn users of the medical risks associated with the supplement.²¹³ In March 1990, the FDA expanded the recall of L-Tryptophan to include all products that contained even trace amounts of the supplement and announced that use of the supplement had been linked to 19 deaths and 1411 cases of EMS to date.²¹⁴ That same month, a Seattle woman alleging that her health problems were caused by L-Tryptophan filed suit in federal court against six Japanese corporations.²¹⁵ In April 1990, Nutri-System voluntarily withdrew all its foods containing L-Tryptophan.²¹⁶ Later that month, researchers linked the cases of EMS to contaminated L-Tryptophan manufactured by a single Japanese chemical firm, Showa Denko K.K.²¹⁷

By August 1990, over 1500 cases of EMS and 27 deaths had been linked to use of L-Tryptophan.²¹⁸ On December 26, 1991 Showa Denko announced the payment of \$59.44 million to settle an undisclosed number of claims arising from the sale of contaminated L-Tryptophan in the United States.²¹⁹

D. *Chemicals and Toxic Substances*

1. Agent Orange

Used as a defoliant by U.S. forces in Vietnam, Agent Orange is an herbicide containing small amounts of dioxin as a

²¹³ *L-Tryptophan Distributors Must Freeze Records of Drug Use Sales*, UPI, Feb. 27, 1990, available in LEXIS, Nexis Library, UPI File.

²¹⁴ *Id.*

²¹⁵ Constantine Angelos, *Suit Filed by User of Diet Supplement L-Tryptophan*, SEATTLE TIMES, Mar. 23, 1990, at B4.

²¹⁶ Rovner, *supra* note 204, at Z17.

²¹⁷ *L-Tryptophan Malady Linked to Single Japanese Firm*, REUTERS, Apr. 27, 1990, available in LEXIS, Nexis Library, REUTERS File. The supplement manufactured by Showa Denko was contaminated with a chemical compound used to filter impurities from the supplement.

²¹⁸ Lawrence K. Altman, *Two Advances Are Cited in Tracing Mystery Disorder*, N.Y. TIMES, Aug. 31, 1990, at A20.

²¹⁹ *Showa Denki Pays \$59.44 Million in L-Tryptophan Claims*, A YOMIURI NEWS SERV., Dec. 26, 1991, available in LEXIS, Nexis Library, OMNI File. The settlement was reported pursuant to Japanese Securities regulations, which required Showa Denko to report the settlement as the payment exceeded the corporation's combined assets by one percent.

contaminating product. Agent Orange litigation arose when returning Vietnam veterans claimed that, as a result of exposure to dioxin-tainted Agent Orange they suffered a variety of injuries, including cancers, skin disorders and birth defects in children conceived after their return. From its inception, the litigation was entangled in the emotional and political controversies surrounding the Vietnam War.²²⁰

The first claim alleging personal injuries due to exposure to Agent Orange was filed in 1978. In 1979, the Judicial Panel on Multidistrict Litigation transferred the cases to Judge George Pratt of the Eastern District of New York. The case was subsequently passed to Judge Jack B. Weinstein, who certified a voluntary class to decide common issues of liability and causation and a mandatory class to decide punitive damages.²²¹ An estimated 250,000 claimants were included in the class.²²²

By all reports, Judge Weinstein exerted considerable pressure on the parties to reach a settlement of the case.²²³ On the eve of trial, in Spring 1984, the manufacturers agreed to pay \$180 million to resolve the case, the highest amount to that date for mass tort litigation. The defendants, however, continued to deny liability, and Judge Weinstein subsequently dismissed the claims of those who had opted-out of the class action settlement on the grounds that the government contractor's defense prevented liability and that there was insufficient evidence to establish a causal link between dioxin and the veterans' claimed injuries.²²⁴ After agreement was reached on the \$180 million settlement, a special master appointed by Judge Weinstein drew up an allocation scheme, establishing a schedule of damages. The court selected Aetna Insurance Company to process and pay the claims.²²⁵

Litigation over Agent Orange continued for several more

²²⁰ For a comprehensive discussion and analysis of Agent Orange litigation, see SCHUCK, *supra* note 10. This precis draws heavily on Schuck's work, and on MARK PETERSON & MOLLY SELVIN, *RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES* (1988).

²²¹ PETERSON & SELVIN, *supra* note 220, at 51.

²²² *Id.* at 50.

²²³ See SCHUCK, *supra* note 10, at 143-67.

²²⁴ *In re Agent Orange*, 603 F. Supp. 239 (E.D.N.Y. 1985).

²²⁵ Harvey Berman, *The Agent Orange Veteran Payment Program*, 53 *LAW & CONTEMP. PROBS.* 49, 50 (1990).

years, as virtually every decision of the trial judge—including the settlement plan, attorney fee awards and his granting summary judgment on the “opt-out” claims—was appealed.²²⁶ The first claim was not paid until 1989, a decade after the litigation began.²²⁷

In July 1993, a panel of experts convened by the Institute of Medicine concluded that there is sufficient evidence to link exposure to Agent Orange to Hodgkin’s disease and to a rare liver disorder. Immediately after the release of the panel’s findings, the Secretary of Veterans Affairs announced that Vietnam veterans suffering from these diseases would be eligible for special disability payments.²²⁸

2. Asbestos

One of the most effective insulation materials, asbestos was used for many years in numerous industrial settings, in ships, in schools, and in homes across the country.²²⁹ Consumption grew steadily in the United States through World War II, and peaked in 1974.²³⁰ It is now known that inhalation of asbestos fibers can cause asbestosis, lung cancer, and mesothelioma.²³¹ Estimates of the ultimate health effects of asbestos are highly controversial, but there is little doubt that exposure was widespread.²³²

Barred from suing their employers by the workers’ compensation exclusivity doctrine, asbestos workers turned to asbestos manufacturers to compensate them for their injuries. Successful product liability litigation against asbestos manufacturers is generally traced to the 1973 decision in *Borel v. Fibreboard Paper Products Corp.*, in which the Fifth Circuit ruled that manufacturers could be held strictly liable for inju-

²²⁶ PETERSON & SELVIN, *supra* note 220, at 53.

²²⁷ Berman, *supra* note 225, at 56.

²²⁸ Marlene Cimons, *VA Aid Ok'd for Two Diseases Tied to Agent Orange*, L.A. TIMES, July 28, 1993, at A18.

²²⁹ HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 1.

²³⁰ Hensler, *Fashioning a Resolution*, *supra* note 2, at 1973 (citing BARRY CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS (2d ed. 1986)).

²³¹ HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 13-14.

²³² Hensler, *Fashioning a Resolution*, *supra* note 1, at 1973 (citing W. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality, 1980-2030*, 3 AM. J. INDUST. MED. 259 (1982)).

ries caused by asbestos exposure.²³³ Filings grew steadily through the late 1970s, appeared to level off for a time, and then surged anew in the late 1980s. By 1992, an estimated 200,000 asbestos personal injury claims, naming one to a dozen defendants apiece, had been filed or were pending nationwide. As a result of the litigation, some dozen or so asbestos manufacturers have sought the protection of the bankruptcy courts.²³⁴ Asbestos litigation has become the mass tort that dwarfs all others.

Asbestos litigation has been concentrated in about one-quarter of the states, primarily those that are coastal. Initially, the courts in these states attempted to deal with asbestos cases on an individualized basis. But as caseloads mounted, courts turned increasingly to aggregative procedures, using an array of informal and formal mechanisms for dispositions. These efforts became more aggressive as courts used consolidation and class actions to group, and then dispose of, thousands of cases at a time in Texas, Virginia, Mississippi, West Virginia and Maryland.²³⁵

Until recently, no efforts were made to coordinate asbestos litigation across different courts. Attempts at collecting federal court cases under MDL were repeatedly rejected by the MDL panel until 1991, when the panel transferred all federal cases to Judge Charles Weiner of the Eastern District of Pennsylvania.²³⁶ In further efforts at coordination, state court judges have recently begun meeting together.²³⁷

Increasingly, asbestos claims have been coordinated through bankruptcy proceedings, which require valuation of present and future asbestos claims against a bankrupt defen-

²³³ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

²³⁴ Hensler, *Fashioning a Resolution*, *supra* note 2, at 1970-72.

²³⁵ In July 1993, after a trifurcated consolidated trial of 8500 cases against eight defendants, a Baltimore jury found all but one company liable for selling a defective product and awarded \$11.2 million in compensatory damages to two representative plaintiffs. In three other representative cases, the jury delivered defense verdicts. The jury established punitive damage multipliers ranging between .35 and 2.5 for the different defendants. The judge temporarily set aside the punitive damage awards until all compensatory claims could be resolved, and the defendants appealed the verdicts.

²³⁶ *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991).

²³⁷ Francis E. McGovern, *The Boundaries of Cooperation Among Judges in Mass Tort Litigation* (1991) (unpublished manuscript on file with the authors); see Schwarzer et al., *supra* note 13.

dant, along with all other claims, and then a reorganization plan to compensate equitably all claims from the defendant's assets. Typically these plans fund settlement trusts to resolve all asbestos claims while reducing involvement in the tort system. The first wave of bankruptcies in the early 1980s involved Manville, UNARCO and several smaller companies. Manville, the dominant asbestos manufacturer and primary defendant, was the first major defendant to seek bankruptcy protection because of its expected mass tort liabilities. Manville's filing stayed its asbestos litigation, disrupted all other asbestos litigation and created great controversy and indignation. The reorganization plan confirmed in 1986 created a \$2.5 billion trust that owned almost 90 percent of Manville Corporation and assured plaintiffs that they could continue to litigate their claims in the tort system and would receive the full value of their claims. These assurances quickly proved false about a year after the Trust began to pay claims.²³⁸ Judge Jack B. Weinstein stayed payments by the Manville Trust in July 1990 when it became apparent that the Trust would soon run out of money and could pay present and future claimants only ten percent of the value of their claims.²³⁹ Since November 1990 the Trust and its beneficiaries have struggled to restructure the Trust's distribution process. A second wave of bankruptcies occurred in the late 1980s and early 1990s as one defendant after another was driven to insolvency by increasing numbers of claims, the massive exposure associated with consolidated and class action claims and the requirement to make up for the by-then-insolvent Manville's share.

Some defendants who remained in the tort system formed defense consortia in attempts to reduce their litigation costs and to control their liabilities and access to insurance. The Center for Claims Resolution ("CCR"), a consortium of twenty small to moderate defendants has operated since 1988, following the break-up of a larger consortium, the Asbestos Claims Facility. In January 1993, the CCR agreed to settle a class

²³⁸ HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 52-67 & 94-109; Hensler, *Fashioning a Solution*, *supra* note 2, at 1974-76.

²³⁹ A recent expert panel appointed by Judge Weinstein estimated that as many as 450,000 additional asbestos claims might be filed in the future.

action of future claimants brought by several major asbestos plaintiffs' lawyers.²⁴⁰ CCR members and most of their insurers agreed to provide certain compensation for each of the next ten years under procedures that would limit the number and amount of payments each year, deny payments to claims that do not meet specified medical and exposure requirements and limit the number of future claimants who may enter the tort system. The proposed settlement, which is now pending in the Eastern District of Pennsylvania, has created angry divisions within the asbestos plaintiffs' bar.

3. DDT: Triana, Alabama²⁴¹

In 1979, approximately 1200 residents of Triana, Alabama, filed suit against the Olin Corporation ("Olin"). The residents alleged that Olin had dumped 400 tons of dichloro-diphenyl-trichloro-ethane ("DDT") into the Tennessee river. The DDT settled to the bottom of the riverbed and was ingested by bottom-feeding catfish, a staple of the Triana residents' diet. The plaintiffs claimed that they had suffered personal injury and property damage as a result of this exposure. In 1981, a settlement was reached when Olin agreed to pay each plaintiff \$10,000, establish a health facility for the plaintiffs and clean up the site over the next five years.

From January to December 1983, over 10,000 additional residents from the surrounding areas filed suit against Olin, the Tennessee Valley Authority and the U.S. Department of the Army. The actions were consolidated in federal court and a special master was appointed to manage pretrial discovery. In 1984, a discovery plan was implemented which divided the litigation into three separate pretrial tracks. The first track involved general discovery about the individual background and medical history of each plaintiff, the second track was an in-depth discovery of twenty randomly selected plaintiffs, and the third track was reserved for the adjudication of pretrial legal issues.

²⁴⁰ Frederick M. Baron, *An Asbestos Settlement With a Hidden Agenda*, WALL ST. J., May 6, 1993, at A11.

²⁴¹ This summary is based upon Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61 (1990).

In May 1986, one month before trial, the parties agreed to a \$15 million settlement to be paid over the next two years. By October 1986, the total settlement class numbered more than 13,000 residents. The \$15 million was placed in a settlement fund and was used to pay attorneys' fees, court costs, administrative costs and to compensate the plaintiff class members. The court appointed an administrator to oversee the fund distribution and a guardian *ad litem* to represent the interests of the plaintiff class. The settlement provided that compensation would be paid only to members of the settlement class who (1) had a high blood toxicity level of DDT; (2) manifested certain illnesses; (3) resided in close proximity to the Redstone Arsenal; and (4) sustained losses related to exposure to Olin DDT.

The fund paid for the requisite blood serum tests for the class members. The compensation schedule ranged from \$7500 for hypertension claims, to \$10,000 - \$60,000 for cancer claims (liver tumor, lung lymphoma, follicular cell and ovarian cancer). Plaintiffs received additional compensation for elevated levels of DDT and specific harms. Ultimately, 9415 plaintiffs were qualified to receive compensation from the fund.

4. Lead

Exposure to lead can stunt the growth of a child's brain and central nervous system. Lead-poisoned children are alleged to have attention-span deficits, to suffer from hyperactivity and to have problems with speech and language processing. Lead is present in old lead-based paint, plumbing, plaster, old furniture, toys, eating utensils, soldering fumes, soil and drinking water.²⁴²

Lead poisoning has been called the number one environmental threat to children, with accessible lead paint in up to forty-two million homes and apartments housing over twelve million children. In older Eastern cities such as New York, Boston and Philadelphia, an estimated sixty to eighty percent of housing units may be contaminated. Although most uses of lead-based paint were banned in 1977, lead water pipes and

²⁴² Cameron F. Kerry, *Lead Poisoning Claims, Awards Are Multiplying*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMTS. ED., Sept. 21, 1992, at 82.

solder were not restricted until 1986. The EPA estimates ten to twenty percent of lead poisoning is caused by drinking water. A 1988 report to Congress estimated that 17% or 2.4 million preschool children have more than 15 micrograms per deciliter of lead in their blood. The Center for Disease Control classifies lead poisoning as more than ten micrograms of lead per deciliter.²⁴³

Because lead poisoning occurs over long time periods and may be caused by many different environmental sources, a lead poisoned plaintiff may have difficulty pinpointing and proving the source(s) of the lead exposure.²⁴⁴ In Massachusetts, a lead paint statute subjects current owners of buildings with accessible lead-based materials to strict liability if a child tenant contracts lead poisoning.²⁴⁵

Suits alleging injuries to children due to lead paint have been brought against numerous municipal housing authorities. For example, in March 1991, a class action suit was filed on behalf of children in Newark, New Jersey against landlords, the City of Newark, and various city agencies.²⁴⁶ In addition, under the theories of enterprise and market share liability, municipal agencies, in turn, have brought paint manufacturers into such litigations. In May 1989, the Housing Authority of New Orleans and its insurance companies, facing 87 lawsuits on behalf of 105 children, successfully joined 17 lead-based pigment manufacturers as third-party defendants (pigment is the lead-containing substance in paint).²⁴⁷ The Housing Authority had previously settled one case for \$80,000, one for \$75,000, one for \$25,000 and 20 cases for \$1500 to \$15,000 each.²⁴⁸ In September 1992, the Louisiana Court of Appeal ruled that this suit could proceed and declined to take a posi-

²⁴³ Owen P. MacGowan, *Deflecting Liability in Lead-Poisoning Suits*, 93 BEST'S REVIEW: PROPERTY-CASUALTY INS. ED., Feb. 1993, at 62.

²⁴⁴ *Id.* In 1977, Congress passed the Lead-Based Paint Poisoning Act which requires lead removal from buildings subject to federal control and notice to tenants about possible dangers. Many states and cities have passed similar laws which apply to private landlords. *Id.*

²⁴⁵ *Id.*

²⁴⁶ See Andrew Blum, *Lead Paint Litigation Mushrooms*, NAT'L L.J., Nov. 4, 1991, at 3 (citing case).

²⁴⁷ See Andrew Blum, *Suit Targets Paint Manufacturers; New Orleans Case a Message?*, NAT'L L.J., May 8, 1989, at 17.

²⁴⁸ *Id.*

tion on the applicability of the market share theory of liability.²⁴⁹

Other classes of plaintiffs have sued paint manufacturers directly. For example, in July 1991, a class-action suit was filed in the Eastern District of Pennsylvania on behalf of 21,000 painters.²⁵⁰ The suit named nineteen defendants, including the Lead Industries Association, manufacturers of lead pigment and paint producers.²⁵¹

To date, parties generally have not been successful in pursuing lead pigment and paint manufacturers under the enterprise liability theory. In *Santiago v. Sherwin-Williams*,²⁵² a district court judge held that a plaintiff who was injured by ingesting lead paint and who could not identify the responsible paint manufacturer may not recover damages for negligent design, failure to warn, breach of warranty or concert of action from paint manufacturers based on a market share or enterprise theory of liability.²⁵³ Similarly, in *City of Philadelphia v. Lead Industries Association*,²⁵⁴ another district court judge ruled that a market share theory of liability was not available under Pennsylvania law.²⁵⁵ Philadelphia had sought class-action status on behalf of cities with populations over 100,000 and argued that lead paint manufacturers should be held liable based upon their market share as there is no way to determine which manufacturer supplied the paint for most public buildings.²⁵⁶ This decision was followed in *Hurt v. Philadelphia Housing Authority*,²⁵⁷ where District Judge James Giles refused to allow the plaintiffs to pursue claims against lead pigment manufacturers under a market

²⁴⁹ *New Orleans Lead Paint Case Can Proceed*, ASBESTOS ABATEMENT REP., Sept. 25, 1992, at 5.

²⁵⁰ David Prinzinsky, *Lead Paint Makers Face Mounting Litigation*, UMI DATA COURIER, July 15, 1991, at 1.

²⁵¹ *Swartzbauer v. Lead Indus. Ass'n*, No. 91-3948 (E.D. Pa. July 9, 1992).

²⁵² 794 F. Supp. 29 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1993); see *The Most Important Opinions of 1992; Products Liability*, MASS. LAW. WKLY., Jan. 18, 1993, at S11.

²⁵³ *Santiago*, 794 F. Supp. at 33-34.

²⁵⁴ No. CIV.A.90-7064, 1992 WL 98482 (E.D. Pa. Apr. 23, 1992), *aff'd*, 994 F.2d 112 (3d Cir. 1993).

²⁵⁵ *Philadelphia Judge Dismisses Lawsuit Against Lead Paint Pigment Makers*, ASBESTOS ABATEMENT REP., May 28, 1992.

²⁵⁶ *Lead Paint Makers Not Liable*, BUS. INS., May 4, 1992, at 50.

²⁵⁷ 806 F. Supp. 515 (E.D. Pa. 1992).

share or other collective liability theory.²⁵⁸

Finally, in *Swartzbauer v. Lead Industries Association*,²⁵⁹ the District Court for the Eastern District of Pennsylvania held that a class action suit by painters and their spouses against lead pigment manufacturers and paint makers, and the Lead Industry Association could proceed only under traditional tort theories.²⁶⁰ The court refused to allow the plaintiffs to proceed under the theories of enterprise liability, alternative liability or market share. The court found that these three theories of collective liability are not applicable in circumstances where the identity of the product manufacturer is not at issue.²⁶¹

E. *Electro-Magnetic Radiation* ("EMR")

Claims that non-ionizing, electro-magnetic radiation may be a health hazard have been made for some time. Studies conducted in the 1960s in the Soviet Union reportedly showed a statistical link between electric fields and chronic disorders such as headaches, fatigue, nausea and loss of sexual appetite. Since 1979, other studies have claimed to show a link between magnetic fields from local power lines and childhood cancer. Although these claims have been received with skepticism in Europe, the electricity industry in the United States has taken them seriously and major domestic utilities have committed \$30 million to a five-year research project to determine the effects of EMR. The Edison Electrical Institute ("EEI"), the trade association that represents privately-owned utilities, rates future liability issues raised by EMR as the top concern for its chief executives. In 1991, the majority of the scientific community believed that there were only marginal health risks associated with exposure to EMR. In 1989, however, the Congressional Office of Technology ("OTA") reported that EMR effects on human health could not be dismissed entirely and recommended "prudent avoidance" of EMR to minimize possible health risks.²⁶²

²⁵⁸ *Good News for Lead Industry is Bad News for Public Housing*, PR NEWSWIRE, Aug. 28, 1992, available in LEXIS, Nexis Library, WIRES File.

²⁵⁹ No. 91-3948, 1992 U.S. Dist. LEXIS 4868 (E.D. Pa. July 9, 1992).

²⁶⁰ *Product Safety and Liability*, 61 U.S.L.W. 2080 (Aug. 11, 1992).

²⁶¹ *Id.*

²⁶² *See EMF: A Major Headache*, FIN. TIMES ENERGY ECONOMIST, June 1991.

As a result of this uncertainty, legislators in nine states (California, Washington, Oregon, Illinois, Michigan, Tennessee, Massachusetts, Rhode Island and Connecticut) have introduced EMR bills, recommending further research funded by utilities, safety measures and moratoria on new transmission lines. Moreover, there has been growing opposition to the building of new transmission lines from the public.²⁶³ In addition, computer manufacturers are now advertising "low radiation" equipment.²⁶⁴

A number of EMR lawsuits have been filed, many involving police officers who claim to have contracted cancer from the use of radar guns. In 1990, Boeing settled a personal injury suit for \$500,000 in which the plaintiff claimed to have been treated as a human guinea pig and to have contracted leukemia from exposure to electro-magnetic pulse ("EMP") radiation at the Lovelace Biomedical and Environmental Research Institute in Albuquerque, New Mexico. Boeing agreed to pay \$200,000 to fund 10 years of independent medical monitoring for the plaintiff and the 700 other employees who had been exposed to the radiation. Although the EMP radiation involved in the suit differs from the EMR fields generated by appliances and power lines, plaintiffs' attorneys viewed the settlement as a ground-breaking case.²⁶⁵

In March 1992, the National Radiological Protection Board reported that it had found no link between disease and low level EMR from television sets, microwave ovens and computer screens. The Board stressed, however, that more research is needed into the effects of low level EMR from electrical equipment, including mobile phones and short-wave radios.²⁶⁶ In

This report coincided with a series of *New Yorker* articles by Paul Brodeur (author of an earlier investigatory report on asbestos), entitled "Annals of Radiation," in which he argued that the health risks were real and that there has been a systematic government cover-up.

²⁶³ In response to such concerns, the utility companies usually send out "representatives to measure fields in people's homes" and to show them that the fields generated by home appliances are generally higher than those generated by high voltage transmission lines. A representative from the Office of Radiation Programs at the Environmental Protection Agency says that public concern about EMR has "spread . . . faster than any other issue he has seen." *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Amanda Brown, *Radiation Report Limits Cancer Threat*, PRESS ASS'N NEWSFILE, Mar. 31, 1992, available in LEXIS, Nexis Library, PANEWS File.

October 1992, a Danish cancer board study found that there was an apparent level of higher lymphatic cancer among children living twenty-five to fifty meters from power lines but that there was not a higher incidence of leukemia or brain tumors among these children.²⁶⁷ In August 5, 1992, the National Radiological Protection Board announced that it is managing a three-year project to examine EMR effects of mobile telephones.²⁶⁸ In November 1992, the Institute of Environmental Medicine of the Karolinska Institute in Stockholm reported that a study had found an increased incidence of some types of cancer in people who live near high voltage electricity lines. The study followed 436,500 people who had lived within 300 meters of high voltage lines for at least a year and reported an increased rate of rare childhood leukemia.²⁶⁹

In January 1993, a man who appeared on CNN's *Larry King Live* television show claimed that his thirty-three year old wife had contracted brain cancer from using a cellular phone. Within a week, the stock price of Motorola, Inc., the biggest maker of cellular phones dropped twenty percent and several newspaper articles discussed the suspected link between cellular phones and brain tumors.²⁷⁰ On January 30, 1993, the Cellular Telecommunications Industry Association announced that it will spend over one million dollars for new research into the safety of the phones. The industry group asked three federal government agencies—the Federal Communications Commission, the Environmental Protection Agency and the Department of Health and Human Services—to appoint a panel of scientists to investigate the safety of the phones.²⁷¹ There are more than ten million cellular phone subscribers in the United States.²⁷² On February 3, 1993, the Food and Drug Administration ("FDA") announced to Congress that it would soon issue an advisory on cellular phones and the effects of low-level

²⁶⁷ *Cable Fears Erupt in Denmark*, FIN. TIMES LTD., Oct. 16, 1992.

²⁶⁸ *Mobile Phone Radiation Check*, PRESS ASS'N NEWSFILE, Aug. 5, 1992, available in LEXIS, Nexis Library, PANEWS File.

²⁶⁹ *Study Reports Increased Incidence of Cancer Near High Voltage Lines*, FIN. TIMES LTD., Nov. 6, 1992.

²⁷⁰ Howard Fineman, *The Power of Talk*, NEWSWEEK, Feb. 8, 1993, at 24.

²⁷¹ Carla Lazzareschi, *Call for Concern: Cellular Group Endorses New Research on Phone Radiation*, L.A. TIMES, Jan. 30, 1993, at 1.

²⁷² *Id.*

EMR. The FDA stated that the advisory will caution customers against excessive use of cellular phones and unnecessary exposure to the devices' antennas.²⁷³ Mays Swycord, the chief of the FDA's radiation biology branch told a House energy and commerce subcommittee that there is no proven cancer threat from the phones but that preliminary research suggests a link between cancer and microwave radiation. The same day, users of cellular phones filed a class-action suit against Motorola Inc., and Mitsubishi Electronics Corp., alleging that the manufacturers failed to test the phones for potentially dangerous radio waves and failed to warn phone users that they might be exposed to harmful or lethal doses of radio waves.²⁷⁴

III. WHAT EXPLAINS THE EMERGENCE OF MASS INJURY LITIGATION IN THE 1980S?

The emergence of mass personal injury litigation in the 1980s was a consequence of the interaction of diverse social and legal trends. Mass marketing of products increased the population's exposure to potentially injurious products and substances. Mass injuries created a need for compensation for medical expense and work loss, which is not universally available in the United States.²⁷⁵ Medical researchers became more adept at detecting links between injury and product use or exposure to chemical substances. Mass media became more attentive to consumer and environmental safety issues and more prone to publicizing alleged links between products and injuries. Plaintiffs' lawyers gained permission to advertise their availability to represent claims and became more assertive in seeking out potential victims of mass injuries. More importantly, legal rules and procedures became more favorable to plaintiffs seeking compensation from product manufacturers.

Many of these trends began decades ago, but the pace of change seemed to quicken after 1960.²⁷⁶ Now, multiple as-

²⁷³ Carla Lazzareschi, *FDA to Call for Cautious Cellular Use*, L.A. TIMES, Feb. 3, 1993, at 1.

²⁷⁴ *Id.*

²⁷⁵ See, e.g., DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURY IN THE UNITED STATES (1991).

²⁷⁶ In his article considering the possible end of the expansion of modern tort doctrine, Gary Schwartz argues that changes in products liability doctrine were, in

pects of American culture and the legal system combine to create a high potential for continuing mass personal injury litigation. In this section, we discuss the factors that contribute to mass injuries, the social forces that encourage mass injury victims to pursue legal claims for compensation and the substantive and procedural rules that facilitate mass tort litigation.

A. *Factors Contributing to Mass Injuries*

Catastrophic events provide the most vivid examples of mass injuries that can result in mass tort litigation. The Beverly Hills Supper Club fire, the Hyatt Skywalk building collapse and the MGM-Grand Hotel and DuPont Plaza Hotel fires all resulted in many serious or fatal injuries, followed by mass litigation.²⁷⁷ But, as a practical matter, mass personal injury litigation resulting from these sorts of catastrophes is inherently limited, because it cannot expand too far beyond persons who were present at the time of the event. As shown in Figure 1, mass injury litigation resulting from past catastrophic events has rarely involved more than a thousand claims and more typically has been limited to a few hundred claims or less. As a result, many mass tort practitioners regard such litigation as less problematic than the much more massive litigation that has resulted from widespread use of defective products.²⁷⁸

part, a consequence of changes in social and political attitudes, including the rise of the consumer and environmental movements. See generally Gary T. Schwartz, *The Beginning and the Possible End of The Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605-20 (1992).

²⁷⁷ See *supra* notes 29-70 and accompanying text.

²⁷⁸ However, as societies gain the ability to build and equip structures for ever more intensive use, we can expect future structural catastrophes to involve even greater numbers of victims. For example, the World Trade Center in New York, site of a recent terrorist bombing, is said to house about 50,000 workers, with an additional 50,000 visitors passing through on a typical day. Subsequent to the bombing, a class action suit was filed against the building owners and operators.

Moreover, the future may well hold more environmental catastrophes, such as the accident that occurred at Bhopal, nuclear power plant accidents and oil spills. Congress has established an administrative compensation scheme to deal with the eventuality of a nuclear power plant disaster. To date, United States courts have not had to deal with massive personal injury litigation as a result of these sorts of disasters. The Exxon Valdez oil spill has resulted in massive litigation, but the civil claims allege financial injury, rather than physical harm.

The largest mass tort litigations have been those arising from product use or exposure to a toxic substance (see Figure 1). Our modern economy rewards manufacturers for capturing large market shares, thereby creating a potential for exposing millions of persons to products, some of which are found to be dangerous after they are put on the market. More than thirty million pregnant women used Bendectin.²⁷⁹ An estimated four to six million Americans (women and their offspring) were exposed to DES during pregnancy.²⁸⁰ Over four million Dalkon Shields were distributed worldwide, and at least 2.2 million American women used them.²⁸¹ More than two million women have silicone breast implants.²⁸² Tens of millions of American workers were exposed to asbestos on their jobs.²⁸³ When so many persons are exposed, even very rare injuries can produce thousands of claims.

Few types of products, however, have such a potential for mass liability. Particularly in a consumer-conscious society with a vigilant press, if a product causes obvious and significant harm to even a few of its users, the manufacturer will quickly take it off the market in order to protect its brand name and reputation. For example, when several fatalities occurred as a result of product tampering, Johnson & Johnson promptly removed Tylenol capsules from the market and redesigned the packaging for all of its products.²⁸⁴ In the more typical examples of food contamination, companies or public health agencies move swiftly when harm is detected, removing a suspect product from shelves. Regulators quickly contained the food poisoning from salmonella in milk distributed by Jewel Foods in Chicago²⁸⁵ and, more recently, from e-coli contam-

²⁷⁹ Nosacka, *supra* note 75, at 231.

²⁸⁰ See *supra* notes 94-99 and accompanying text.

²⁸¹ MINTZ, *supra* note 113, at 5.

²⁸² Frankel, *supra* note 158, at 85.

²⁸³ CASTLEMAN, *supra* note 230.

²⁸⁴ Survivors of victims of the product tampering sued Johnson & Johnson claiming that the manufacturer should have taken measures to prevent the tampering. A New York wrongful death case resulted in a summary judgment for the defendants, and an Illinois case involving 22 claimants was settled for more than \$35 million. See Andrew Blum, *Headache Lingers: Tylenol Death Litigation Still Lacks an Antidote*, NAT'L L.J., July 30, 1990, at 1; P. Davis Szymczak, *Settlement Reached in Tylenol Suit*, CHI. TRIB., May 14, 1991, at 1.

²⁸⁵ *Salmonella Outbreak Traced*, N.Y. TIMES, Apr. 17, 1993, at C6.

inated hamburgers sold by Jack-in-the-Box,²⁸⁶ by withdrawing the contaminated products after the risks were publicized. The Chicago salmonella contamination resulted in mass litigation, but the number of claims against Jack-in-the-Box was limited to the relatively few consumers who were exposed to the product before the harm was detected.

The potential for truly massive product liability litigation occurs only when the harm is not obvious and goes undetected or unreported for long periods, even years, while the exposed population continues to expand. There are a number of reasons why this might occur. First, as with asbestos-related injuries, the injury may be latent with no manifestation for years after initial exposure. Also, the rate of injury may be relatively modest, affecting only a small percentage of users. Under such circumstances, the link between exposure and injury will become apparent only after many individuals have been exposed—and then only if the requisite clinical research is undertaken. For most of the products that have spawned mass litigation to date, the plaintiffs charge that the products have heightened the risk of one or more diseases, but not that there exists a one-to-one relationship between use or exposure and injury.

Another factor resulting in undetected harm is that the injury linked to exposure may have other alternative explanations that obscure the relationship between the product and the diseases it allegedly causes. For example, lung cancer caused by asbestos exposure cannot be distinguished from lung cancer caused by smoking and a variety of other environmental exposures. Similarly, the increased incidence of pelvic inflammatory disease caused by the Dalkon Shield was obscured by the general increase in the disease as sexual practices changed in the 1970s.

In addition, the attention of medical researchers and lawyers may not be engaged if injuries caused by a product are not extraordinarily serious. The dangers of asbestos and the Dalkon Shield were first identified not through the great numbers of breathing impairments or pelvic infections that they caused, but only after the medical community became concerned about life-threatening cancers associated with asbestos

²⁸⁶ *Jack in Box Parent Posts Record Profit*, L.A. TIMES, Feb. 9, 1993, at D1.

exposure²⁸⁷ and about septic abortions associated with the Shield.²⁸⁸ Moreover, for many products there is no mechanism for comprehensive, ongoing monitoring of product safety. Even for drugs, which are subjected to the most stringent monitoring of marketed products, it is clinicians who ordinarily detect the link between the harm and product usage. Such harms may not be recognized until many people have been exposed. Manufacturers may contribute to the problem as well. The history of mass torts has shown that manufacturers may doubt or at times even suppress information about potential product-related dangers, allowing products to remain on the market until their dangers are obvious and many people have been placed at risk.²⁸⁹

Finally, weaknesses in the regulatory process have contributed to the incidence of mass injuries, particularly those associated with medical devices and occupational hazards. As shown in Figure 1, medical devices are well represented in mass tort litigation. This is not surprising. Medical products that are widely used and that remain in the bodies of many users for long periods of time have a particularly great risk of resulting in substantial numbers of injuries. But, until recently, medical devices were subject to little review for safety by the FDA.²⁹⁰

Indeed, the new drug application procedure that existed in the early 1970s played a crucial role in Robins' ill-fated decision to market the Dalkon Shield. Although the law required a

²⁸⁷ Irving Selikoff et al., *Asbestos Exposure and Neoplasia*, 188 JAMA 22 (1964).

²⁸⁸ Mintz, *supra* note 71.

²⁸⁹ Failure to report product problems and to withdraw allegedly faulty products from the market were at the heart of the Dalkon Shield and Shiley Heart Valve litigations. See MINTZ, *supra* note 113; Stewart, *supra* note 144, at A3 (citing report of the U.S. House Oversight and Investigation Subcommittee finding that Shiley had failed to report critical heart valve failures during early marketing to the FDA, and later delayed giving safety-related information to the FDA).

²⁹⁰ Although the FDA regulates pharmaceutical safety, prior to 1976, it did not regulate medical devices. Under the 1976 amendments to the Food, Drug and Cosmetics Act, all new medical devices became subject to review, but reviews of devices already on the market were permitted to be phased in as the FDA was able to conduct them. In 1990, the U.S. House Oversight and Investigation Subcommittee found that the FDA's regulation of the Shiley Heart Valve had raised "serious questions about the FDA's willingness and ability . . . to protect public health when faced with companies that profit from the manufacture and sale of medical devices." See Stewart, *supra* note 144, at A3.

manufacturer who desired to market a new prescription drug to file a new drug application documenting that the safety of the product had been established through animal and clinical testing, there was no testing requirement for a medical device such as the Dalkon Shield. Under the law, the FDA could halt sales of a device only after the product had caused injury or death. Accordingly, Robins placed the Dalkon Shield on the market without testing it for safety in either animals or clinical studies. Hugh Davis, inventor and part owner of the Shield, had studied its safety and effectiveness, but during the course of the Shield litigation, it was revealed that Davis had falsified the results of his study, including the 1.1% pregnancy rate that Robins touted in its advertisements for the Shield. If Robins had been required to go through the same procedure for the Shield as required for a new prescription drug, Robins would have been required to monitor 1500 to 2000 users for two years. The FDA then would have decided whether the Shield was a safe product after studying the results. Instead, the medical device loophole in the law allowed Robins to put an untested product on the market.²⁹¹

Asbestos litigation is another example of the costs of failing to regulate exposure to dangerous substances. The risks of asbestos had been known for many years, but because of opposition from asbestos manufacturers, strict regulations of workplace exposure to asbestos were not imposed until the 1960s.²⁹² Similarly, applying aircraft flame retardance standards to public structures such as hotels might have lessened the extent of injuries and the scope of litigation in the MGM Grand and DuPont Plaza Hotel fires.²⁹³

²⁹¹ MINTZ, *supra* note 113, at 115. Spurred by the Dalkon Shield litigation, Congress adopted the Medical Device Amendments in 1976, which closed this loophole.

²⁹² PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

²⁹³ Strengthening regulatory standards and implementation, of course, would not eliminate mass injuries. Some latent injury risks may, indeed, be unknowable at the time a product is marketed, so that no degree of regulation would eliminate risk of injury, short of not marketing the product at all. But the failure to market any product that *might* cause latent injury would keep many socially beneficial products off the market. In addition, the direct and indirect costs of such over-regulation would be debilitatingly high.

Litigation and regulation represent alternative strategies for enhancing the safety of products. Ideally, litigation should impose costs only on dangerous prod-

While this discussion has considered the many factors contributing to undetected harm, the converse phenomenon is also possible: large numbers of injuries may occur and *appear* to be linked to product use or exposure when an exposed population is subject to injuries from other sources. Many regarded the litigation that arose over Bendectin, the anti-nausea drug marketed to pregnant women,²⁹⁴ as a classic example of this "false positive" problem.

B. *Factors Facilitating Claiming*

Mass injuries, by themselves, do not produce mass tort litigation. For litigation to arise, injured individuals must: (1) believe that their injuries were caused by either their presence at a catastrophic event or their product use or exposure—or at least that the courts can be persuaded that this is the case; (2) believe that someone associated with the catastrophe or product can and should be held responsible for compensating them for their losses; and (3) know how to obtain legal representation and succeed in doing so. Contrary to contemporary portrayals of Americans as overly litigious, only a small fraction of injured individuals move through all three of these steps.

A recent Institute for Civil Justice study found that fewer than one in five injured Americans even considered the possibility of obtaining compensation from others for their accidental injuries. Only one in ten took any action to attempt to obtain such compensation. Only about one third of these or less than three percent of all injured persons filed a liability lawsuit.²⁹⁵ A primary factor explaining these low rates of claiming is an individuals' tendency to attribute causation and blame for their injuries to themselves or natural forces.²⁹⁶

A variety of economic and social factors influence whether or not an injured person will file a lawsuit: the availability of other sources of compensation, media and advertising, the experience and recommendations of friends, suggestions by unions and health care providers and the ability to locate legal

ucts, while regulation imposes costs on all products.

²⁹⁴ See *supra* notes 75-93 and accompanying text.

²⁹⁵ HENSLER ET AL., *supra* note 275, at 122.

²⁹⁶ *Id.* at 163-64.

counsel. In recent years these social influences have facilitated the filing of mass tort claims.

1. Mass media

Although there has been widespread speculation that increased media coverage of health-related risks has led to increased risk aversion on the part of Americans, a new empirical analysis of print and broadcast media suggests that the absolute number of news stories about health hazards and hazardous events is no higher now than in the 1960s.²⁹⁷ But the stories themselves have changed. Over the past twenty-five years, there has been a dramatic shift in news media attention, from accidents, such as airplane crashes, train derailments and fires to product-related risks, especially environmental exposure to harmful chemicals.²⁹⁸ The mass media are particularly likely to report harms involving multiple deaths from a single "event." Moreover, news stories about product and substance-related hazards are more likely now than in the past to attribute blame for such hazards to business and industry.²⁹⁹ Finally, the percentage of stories about product and substance-related hazards that mention litigation is now much higher than in the past.³⁰⁰ In sum, by compari-

²⁹⁷ ELEANOR SINGER & PHYLLIS ENDRENY, REPORTING ON RISK: HOW THE MEDIA PORTRAY ACCIDENTS, DISEASES, DISASTERS, AND OTHER HAZARDS (1993).

²⁹⁸ *Id.* at 47. In their systematic analysis of newspaper and broadcast media coverage of "hazards," Singer and Endreny found that, whereas in 1960, 63% of such stories dealt with accidents and 6% with nuclear energy, chemicals, asbestos and other "materials" hazards, by 1984, the proportion of stories on accidents had dropped to 33%, and the proportion of stories related to materials hazards had increased to 28%. They concluded:

The huge shift from concern over [accidents], which pose immediate risks to their victims, to concern over materials hazards, especially contamination of the environment by chemical pollutants that do much of their damage over the long run . . . does represent a long-term societal trend. The big news about hazards in the eighties was news about environmental hazards assumed to be capable of causing illness and death in the future

Id.

²⁹⁹ *Id.* at 110. In 1960, only 56% of such stories attributed blame to business and industry, compared to 73% in 1984. During the same period, the rate of blaming industry for transportation accidents rose from 4% to 41%.

³⁰⁰ *Id.* at 123. The percentage of stories mentioning litigation rose from 4% in 1960 to 41% in 1984. The percentage of such stories mentioning regulation 38%

son with twenty-five years ago, Americans are now more likely to be exposed to information through the mass media that suggests or establishes causal links between injuries and product use or exposure, attributes blame for such hazards to business or industry and provides information about the potential for litigation—all of which are critical to establishing a claim. As a result, individuals injured in “mass injury” circumstances may receive more support for claiming than in the past.

Indeed, the mass media have played a key role in several of the mass torts profiled above, both by informing injured individuals of possible causal links between their injuries and product use or exposure and by informing them of the existence and course of litigation. For example, the early development of the Bendectin litigation followed an article in the *National Enquirer*. In addition, the Dalkon Shield litigation arose after much media exposure. Articles in womens' magazines informed readers first of concerns and, then later, of verification of the dangers of the Dalkon Shield.³⁰¹ An April 1981 segment of *60 Minutes* on the “disaster of the Dalkon Shield” may have informed a significant number of women both that the Shield was a potentially deadly device and also that they might have a claim against Robins for any injuries resulting from its use. Another *60 Minutes* segment in 1984 criticized Robins for its failure to recall the Dalkon Shield. And within a month, in September 1984, there were news reports of three additional deaths related to the Dalkon Shield. Finally, Robins began an advertising campaign to urge women to remove the Shield and offered to pay for the cost of removal. The number of Dalkon Shield claims rose during this period of media attention. Although Robins acknowledged no direct link between the removal campaign and the negative publicity generated by the *60 Minutes* segment, arguably the decision to begin a removal campaign may have been spurred by negative press and a desire to salvage what was left of its once enviable reputation.³⁰²

As the Dalkon Shield events illustrate, advertising may

was unchanged between the two time periods.

³⁰¹ Elizabeth Newman & Laura Fry, *The Dalkon Shield and Women's Litigation* (1990) (unpublished student paper on file with the authors).

³⁰² SOBOL, *supra* note 22, at 22-23.

also play a significant role in mass tort litigation. The bankruptcy court recognized the power of the media when it required Robins to provide notice of the bankruptcy bar date to Shield users in eighty countries.³⁰³ Robins complied with the order by launching a world-wide advertising campaign which resulted in over 300,000 claims being filed against Robins.³⁰⁴

There are other examples as well. Print and electronic media in the early 1980s widely reported apparent dangers from Agent Orange and its contaminant, dioxin, and their relation to Vietnam veterans' physical and emotional problems. Injuries from the esoteric health food supplement L-tryptophan received sustained national news coverage. More recently, widespread publicity about successful litigation and regulatory action concerning silicone breast implants have contributed to a surge of breast implant litigation nationwide.³⁰⁵

Once begun, litigation events generate their own publicity, which can affect the course of the litigation. Media reports of substantial plaintiffs' verdicts can generate additional claims, as seen in the National Enquirer articles on the first Bendectin trial or news coverage of a \$7.3 million verdict in a breast implant trial.³⁰⁶ On the other hand, news of defense victories, such as in two, well-publicized cigarette lung cancer claims,³⁰⁷ can suppress claims by others. At times the media seems to be the battle ground on which the course of a mass tort is fought. For example, General Motors blunted adverse publicity from a \$105.2 million verdict in a truck fire case³⁰⁸ by undertaking a highly publicized attack on a misleading

³⁰³ BACIGAL, *supra* note 117, at 36.

³⁰⁴ *Id.* at 99. Of the 300,000 claims filed, about one-third were deemed ineligible.

³⁰⁵ Frankel, *supra* note 158, reports that Marianne Hopkins, who was awarded \$7.3 million by a San Francisco jury for injuries associated with silicone breast implants, discovered the link between implants and her injuries from watching local news coverage of the FDA panel review of implant safety. According to Frankel, "[t]o Hopkins, it was a revelation. 'I thought I was the only person that had problems with my implants,' she said." *Id.* at 84; see also Josephine Marcotty, *Implant Lawsuits: Flood of Litigation Possible Because of Health Problems with Silicone Gel*, MINN. STAR TRIB., Jan. 30, 1992, at 1D.

³⁰⁶ Marcotty, *supra* note 305, at 1D.

³⁰⁷ For a discussion of recent tobacco litigation, see Gary Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE* (Robert Robin & Stephen Sugarman eds., 1993).

³⁰⁸ *Moseley v. General Motors Corp.*, No. 90-V-6276 (Fulton Co. Ga. 1993).

television news story showing fires in GM trucks.³⁰⁹ The substantial monetary award could have increased similar claims, but GM's aggressive counterattack directed media attention away from the verdict, possibly limiting its damage.

2. Social networks

Organizations and social contacts also play key roles in leading injured persons to participate in mass litigation, by informing them of possible compensation, directing them to lawyers and encouraging and facilitating their claims. Existing social organizations, such as labor unions, may become catalysts for litigation, if they believe that their members have been wrongfully injured. Ad hoc organizations of self-identified victims may spring up after litigation has been initiated by individuals, to serve as support groups for litigants and conduits for information.

Labor unions have been critical to developing mass tort litigation arising from work place injuries. Both local and national unions worked with medical researchers to develop information about the link between asbestos exposure and malignant and nonmalignant respiratory diseases.³¹⁰ As the asbestos litigation continued, unions participated in programs to screen members for disease and referred members to experienced plaintiffs' lawyers.³¹¹ Vietnam veterans' groups similarly played a key role in initiating the Agent Orange litigation and in encouraging veterans to participate. These groups vigorously pursued arguments that illnesses among returning servicemen were linked to exposure to Agent Orange, informed veterans of possible links between exposure to Agent Orange and their health problems and sought out lawyers to represent veterans.³¹² Women's groups appear to have played a less im-

³⁰⁹ James C. Goodale, *The Libel Suit That Never Was*, NAT'L L.J., Mar. 8, 1993, at 17-19; see also James B. Treece et al., *Now the Court of Public Opinion Has GM Worried*, BUS. WK., Feb. 22, 1993, at 38.

³¹⁰ The epidemiological studies conducted by Irving Selikoff, which were critical to establishing causation, were supported by the insulation workers' union. See Selikoff et al., *supra* note 287, at 22; Irving Selikoff et al., *The Occurrence of Asbestosis among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. OF SCI. 139 (1965).

³¹¹ HENSLER ET AL, ASBESTOS IN THE COURTS, *supra* note 2, at 92.

³¹² SCHUCK, *supra* note 10, at 37-57.

portant role in the various products-related litigations associated with injuries to women—Dalkon Shield, DES, Silicone Breast Implants—than unions and veterans groups, although media targeted at women did play a role in conveying information about possible product-related risks.³¹³

Ad hoc groups, such as the Asbestos Victims of America, the Dalkon Shield victims organizations³¹⁴ and the Silicone Breast Implant organizations have played a more modest role in mass personal injury litigation than pre-existing social organizations. Generally, ad hoc groups have provided both information about the course of the litigation and emotional support to actual and potential claimants, and they have written and spoken out on the claimants' behalf. Although, to date, such victims' groups have not played a significant role in shaping the litigation, they may facilitate the growth of mass litigation by continuing to direct media attention to the injuries underlying the litigation and to the litigation itself.

3. Physician contacts

Physicians are potentially important sources of information for injury victims about possible links between victims' injuries and product use or exposure. Physicians also may inform their patients about the possibility of suing for damages, and even direct their patients to attorneys who can assist with their cases. In the RAND study of accidental injuries, twenty-nine percent of those who claimed damages from some other person or entity, cited their physician as their most important source of advice on whether to claim.³¹⁵ But historically, physicians do not appear to have played a key role in facilitating mass personal injury litigation. Perhaps because of their scientific training, or because they are reluctant to believe that a product they prescribed could be harmful, or even because they are concerned about possible malpractice claims against them, physicians have been slow to accept evidence of

³¹³ See generally Newman & Fry, *supra* note 301.

³¹⁴ There were four Dalkon Shield victims' groups, the Dalkon Shield Information Network, the Dalkon Shield Women's Support Group, the International Dalkon Victims' Education Association and the Dalkon Shield Victims' Association. *Id.* at 16-34.

³¹⁵ HENSLER ET AL., *supra* note 275, at 168.

causal links between patients' complaints and product use. For example, before the Dalkon Shield's dangers became widely known, many physicians either failed to diagnose clear symptoms of pelvic inflammatory disease among Dalkon Shield users or discounted the possibility that infections were associated with patients' use of the IUD. Plastic surgeons have also been reluctant to accept that women's complaints of ill health might be linked to silicone breast implants.

Moreover, industrial physicians employed by manufacturers have been criticized for deliberately withholding information from workers about links between occupational exposure to toxic substances and disease.³¹⁶ Evidence introduced in asbestos litigation shows that for years medical researchers and medical journals suppressed information about the relationship between asbestos exposure and workers' respiratory diseases. Other evidence indicates that some company physicians deliberately withheld from diseased workers information about the link between their respiratory diseases and their asbestos exposure.³¹⁷

4. Plaintiff law firms

While mass media, social networks and physicians may encourage individuals to identify links between product use or exposure and their injuries and to attribute blame for injury to product manufacturers, litigation requires linking injury victims to attorneys willing to represent them. In recent years, plaintiffs' attorneys have facilitated this process by advertising their availability to represent specific classes of claimants³¹⁸ and, at times, by aggressively seeking out such claimants. For example, advertisements by lawyers seeking clients with silicone breast implants and other new mass claims have ap-

³¹⁶ See Ronald Motley & Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?* 13 CARDOZO L. REV. 1919 (1992).

³¹⁷ See generally BRODEUR, *supra* note 292.

³¹⁸ The Supreme Court rejected prohibitions on lawyer advertising in *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that a state cannot prevent a lawyer from advertising the availability of legal services). By 1984, local television advertising by attorneys topped \$28 million. Martha Middleton, *TV Ad Spending Shows Sharp Rise*, NAT'L L.J., Mar. 25, 1985, at 3.

peared in newspapers in major metropolitan areas nationwide (see Figure 2).³¹⁹ Many law firms that advertise serve only as referring lawyers who sign up and then refer claims to experienced law firms that specialize in representing mass tort claimants, creating what might be thought of as an American mass tort version of Great Britain's solicitor-barrister relationship.

Plaintiffs' attorneys have enhanced their probability of winning cases against manufacturers by combining their resources, sharing information and coordinating strategic actions. For example, by 1992 (less than six months after the \$7.3 million award to Hopkins), under the aegis of the plaintiffs' attorney-supported Public Citizen, more than 150 plaintiffs' attorneys had joined a breast implant "information clearing-house."³²⁰ "Litigation groups," sponsored by The American Trial Lawyers Association ("ATLA"), also provide a mechanism for coordinating plaintiff efforts. For example, litigation over L-tryptophan led to the formation of an ATLA litigation group comprising 300 attorneys who pooled resources to organize medical seminars, conduct legal research (including research on jurisdictional issues related to suing Japanese manufacturers), publish a monthly newsletter, locate medical laboratories, maintain document depositories and retain medical and scientific experts. They also formed teams to depose the manufacturer's scientists and participate in discovery with foreign lawyers. Finally, the litigation group recruited a slate of attorneys that was elected to serve as the MDL steering committee.³²¹

As these efforts have proved successful, plaintiffs' attorneys have become increasingly willing to take on new mass torts, making it more likely that mass injury claimants will succeed in finding attorneys willing to represent them.

³¹⁹ As early as 1980, Melvin Belli advertised in the *SAN FRANCISCO CHRONICLE* for "help for epidemiological and statistical purposes" relating to a trial of Bendectin plaintiffs in Florida. See Sanders, *supra* note 90, at 353, n.217.

³²⁰ Frankel, *supra* note 24, at 90.

³²¹ *ATLA's L-Tryptophan Group Produces Model for National Litigation*, ATLA *ADVO.*, Mar. 1993, at 11. On the role of litigation groups in mass tort litigation, see Paul Rheingold, *The Development of Litigation Groups*, 6 *AM. J. TRIAL ADVOC.* 1 (1982) and David Ranii, *How the Plaintiffs' Bar Shares Its Information*, *NAT'L L.J.*, July 23, 1984, at 1.

C. *The Contribution of Substantive and Procedural Law*

Plaintiffs' attorneys' willingness to represent mass tort claimants depends, of course, on their assessment of the odds of winning such cases. Over the past several decades, changes in legal doctrine and procedure have increased these odds considerably. Until the 1960s, consumers rarely sued and less often won personal injury suits against product manufacturers. But by the end of the 1970s, the almost universal spread of strict liability enabled plaintiffs to recover without showing manufacturers' negligence if a product carried inadequate warnings or was defectively designed or manufactured. Although legal scholars differ in their characterizations of this doctrinal revolution,³²² the empirical evidence indicates that both the number of product liability claims and plaintiffs' success in those claims increased greatly through the mid-1980s.³²³

The explosion of mass tort litigation in the 1980s illustrated in Figure 1 could not have taken place were it not for this revolution in product liability doctrine during the two prior decades. Modern product liability law gave persons who suffered mass injuries in circumstances other than catastrophic accidents the opportunity to sue the same defendants, product manufacturers. In the absence of modern product liability doctrine, accident victims either could claim workers' compensation from their employers (for workplace injuries) or could sue their physicians for medical malpractice (for injuries due to drugs and medical devices). Under either scenario, claims would be dispersed among many different defendants, thereby

³²² For a critical review of recent tort scholarship, see Schwartz, *supra* note 276. Schwartz argues that negligence principles have continued to play an important role in product liability law, despite doctrinal evolution. See also James Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

³²³ On patterns of product liability filings in the federal courts, see TERENCE DUNWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN THE FEDERAL COURTS* (1988), and Hensler, *Reading the Tort Litigation Tea Leaves*, *supra* note 2, at 25-27. On trends in product liability awards, see MARK PETERSON, *CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* (1987); Stephen Daniels & Joanne Martin, *Don't Kill the Messenger 'Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990*, 16 JUS. SYS. J. 69 (1993).

diluting their numerical power, obscuring their commonality and mitigating interdependencies among case values—the defining characteristics of mass torts. It was the opportunity for multiple suits against a single or few manufacturers that created the conditions for mass torts outside of the context of catastrophic accidents.

Strict product liability was not the only legal doctrine that supported the development of mass litigation. Liberal construction of statutes of limitations and, in some jurisdictions, special statutes, enabled individuals to file claims for injuries associated with product exposure that began decades earlier.³²⁴ The “market share liability” doctrine allowed some mass tort plaintiffs to recover even if they were unable to demonstrate which of several companies’ products caused their injury³²⁵—a likely circumstance when injuries occur years before recognition of the causal link between products and injuries. Another impor-

³²⁴ For a discussion of the role of statutes of limitations in the evolution of asbestos litigation, see HENSLER ET AL., *ASBESTOS IN THE COURTS*, *supra* note 1, at 37-41.

³²⁵ “Market share” liability was first adopted by the California Supreme Court in *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980), a class action suit brought on behalf of DES victims. Although the plaintiffs (daughters of women who had used DES during their pregnancies) could not identify the manufacturers of the specific products associated with their injuries, the court held that manufacturers could be held liable and assessed damages proportionate to their share of the market for DES. *Id.* at 936-37. New York and other states followed California’s lead. See *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989). Although initially seen as having broad implications for mass torts, see HENSLER ET AL., *ASBESTOS IN THE COURTS*, *supra* note 2, at 43-44, courts have generally refused to apply market share theory to asbestos litigation, see, e.g., *Mullen v. Armstrong World Indus.*, 246 Cal. Rptr. 32 (Cal. Ct. App. 1988), childhood vaccine litigation, or to litigation against paint manufacturers for lead poisoning. *Santiago v. Sherwin-Williams Co.*, 794 F. Supp. 29 (D. Mass. 1992), *aff’d*, 3 F.3d 546 (1st Cir. 1993); see also *City of Philadelphia v. Lead Indus. Ass’n*, 944 F.2d 112 (3d Cir. 1993) (action by city against manufacturer of lead-based paint to recover costs of abatement). But some more recent decisions have allowed plaintiffs to prove market share liability against asbestos manufacturers, *Wheeler v. Raybestos-Manhattan*, 11 Cal. Rptr. 109 (Cal. Ct. App. 1992) (products liability action against manufacturer of brake pads made of asbestos); *Thacker v. UNR Indus.*, 603 N.E.2d 449 (Ill. 1992) (suit by widow of pipe coverer who died from lung cancer) and courts have split on the applicability of market share liability to blood transfusion cases brought by HIV victims. See, e.g., *Kellar v. Cutter Labs.*, No. 88-14059 (S.D. Fla. Nov. 6 1989); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991) (allowing recovery under market share theory of liability). For a recent review of the state of market share liability doctrine, see Debra L. Scammon & Mary Jane Sheffét, *Market Share Liability: An Analysis Since Sindell*, 11 J. PUB. POL. MARKET. 1 (1992).

tant change has been the judicial acceptance of "fear of" future injuries as compensable damages, even in the absence of current illness or impairment. For example, fear of cancer resulting from asbestos exposure or fear of heart failure resulting from failure of the Shiley Heart Valve, may entitle a plaintiff to damages,³²⁶ thus expanding the pool of potential mass tort claimants from those with a current impairment that can be linked to product use or exposure to (in principle) all those who could document product usage or exposure. Liberal construction of "successor liability" doctrine assured the availability of assets to compensate injured individuals' claims when the ownership of product manufacturers had changed—as is particularly likely when products blamed for injuries were designed and manufactured many years ago. Indeed, where a product manufacturer has been acquired and its operations merged into the acquiring business, the entire business assumes liability for injuries, thereby increasing the pool of assets available for compensation.³²⁷ In addition, courts have often construed manufacturers' insurance contracts to maximize coverage available to compensate mass tort claimants. Under the "triple trigger" theory, defendants can call on each insurance policy in force from the time that a plaintiff was first exposed to a product until the plaintiff's product-related disease manifests itself, again increasing the pool of assets available for compensation.³²⁸

In parallel with these doctrinal developments, there was an evolution of civil procedures which ultimately facilitated mass tort litigation. By the early 1960s, federal judges had in

³²⁵ See *supra* text accompanying notes 142-57.

³²⁷ California courts repudiated the general rule that, after a good faith sale of assets, a successor corporation is not liable for the obligations of the former corporation. *Ray v. Alad Corp.* 560 P.2d 3 (Cal. 1977) (finding an exception for claims of strict products liability). The ruling was later extended, see, e.g., *Rawlings v. D.M. Oliver, Inc.*, 159 Cal. Rptr. 119 (Cal. Ct. App. 1979) (holding the successor corporation liable even when successor products are different from the earlier product line), and applied to DES in *Maloney v. American Pharm. Co.*, 255 Cal. Rptr. 1 (Ct. App. 1988) (affirming the applicability of the doctrine but declining to hold successor corporation liable on the facts before it).

³²⁸ *Keene Corp. v. Insurance Co. of North Am.*, 667 F.2d 1034, 1050 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). For a discussion of the evolution of court doctrine on insurance coverage in the related area of environmental liability, see Kenneth Abrahams, *Cleaning up the Environmental Liability Mess*, 27 VAL. U. L. REV. 601 (1993).

place an array of procedures, including Rule 23 class actions and multidistricting and consolidation under Rule 42, that permitted them to process civil cases collectively for some or all purposes. These procedures had the potential to reduce the costs of litigating mass claims and expedite disposition.³²⁹ But their use in mass tort litigation was controversial, and through the early 1980s courts proved reluctant to apply them to this litigation, preferring to rely on a variety of *ad hoc*, informal aggregative procedures.³³⁰ In the absence of formal aggregation, both plaintiffs' attorneys' and defendants' strategies had to incorporate the possibility that they would be called on to try myriad individual cases, with attendant high costs and uncertain outcomes.

With the passage of time, and as mass litigation caseloads mounted, some judges began to challenge the traditional thinking about the applicability of class actions, consolidated trials and multidistricting to mass torts. By the end of the decade, all of these formal aggregative devices had been used to resolve mass tort litigation. In addition, some mass tort claims had been resolved in bankruptcy proceedings and in some jurisdictions state and federal judges were coordinating the disposition of mass tort litigation.³³¹ Now plaintiffs' attorneys and defendants might proceed with the understanding that thousands of cases—indeed, tens or hundreds of thousands of cases—might be resolved as a result of a single negotiated agreement or trial outcome. These changes in stakes and parties' expectations had powerful effects on the dynamics of mass tort litigation, and may have further fueled the growth of mass litigation in the late 1980s and early 1990s.

IV. WHY ARE MASS TORTS SO DIFFICULT TO RESOLVE?

Although there is much about mass tort litigation that is controversial, few would disagree with the conclusion that the

³²⁹ Resnik, *supra* note 16, at 46.

³³⁰ HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 48-66; see also Hensler, *supra* note 10, at 90 (noting the traditional hesitancy of courts to use procedures such as class actions, consolidations and multidistrict litigation).

³³¹ Resnik, *supra* note 16, at 52-57; see also Schwarzer et al., *supra* note 13, at 1689-96 (discussing how state and federal judges can coordinate complex litigation in their courts).

cases have proved difficult to resolve efficiently and fairly. Transaction costs—chiefly, legal fees—dwarf the amounts paid to injured claimants, who often wait years to receive compensation. Furthermore, the amounts recovered by similarly situated claimants may vary dramatically, and litigants with no impairment may receive compensation while those with disabling injuries receive little or no financial support. The courts hold out the promise of individualized dispositions, but at best deliver mass justice.

If courts have failed to deliver on the promise of justice in mass personal injury litigation, it is not for want of trying. Judges and lawyers have devised a variety of approaches to deal with the special features of mass torts. When courts first began to grapple seriously with mass personal injury litigation in the 1980s, they focused their attention on managing pretrial development of the cases—i.e., pleadings, discovery and motion practice. Judges who found themselves dealing with thousands of like cases, in which parties were represented by relatively small numbers of attorneys on each side, fashioned a variety of rules and practices to reduce duplicative activities and minimize transaction costs.³³² Defense and plaintiffs' attorneys generally cooperated in these efforts, which benefited all involved in the litigation. Although there has been no empirical analysis of the success of such efforts, it seems reasonable to assume that they help to limit litigation costs, both for the courts and the parties. But streamlining and expediting pretrial case development alone does not lead inevitably to efficient or equitable case disposition. Efficient disposition of a large volume of litigation concentrated within one or a small number of courts requires some type of aggregative or collective procedure. As a result, when courts have been precluded from using

³³² For example, trial judges have encouraged or required standardized pleadings, eliminated or minimized the paperwork required for cross-complaints (which are common in mass torts involving multiple defendants), developed standardized interrogatories and adopted procedures for applying decisions on key discovery motions to all cases in a litigation. In federal courts, in the context of multidistrict litigation, judges can treat thousands of cases in such a standardized fashion. In state courts, cases may also be transferred to a single judge for like treatment. And, when federal and state judges agree to coordinate their rulings, standardized pleadings, motions and rulings can be applied broadly to entire mass tort caseloads. See HENSLER ET AL., *ASBESTOS IN THE COURTS*, *supra* note 2, at 68-78, Schwarzer et al., *supra* note 13, at 1707-33.

formal aggregative techniques, they have tended to adopt informal means of collective disposition. Whatever efficiencies have been gained through the use of such procedures, however, have often come at the price of equity, by pressing defendants to settle cases in which liability was far from certain, and by forcing plaintiffs to accept compensation that reflected their current and future losses poorly, at best. Moreover, aggregative dispositions—typically, negotiated settlements, rather than adjudications of the facts and law—provide little or no opportunity for plaintiffs publicly to voice their feelings that they have been wrongfully harmed by defendants or, for defendants who believe that they are not blameworthy, to vindicate themselves. In the face of aggregation, mass personal injury litigation inevitably becomes more of a financial transaction than a dispute over defendants' culpability and plaintiffs' monetary and nonmonetary losses. Further, by aggregating cases to achieve efficient dispositions, courts may increase incentives of plaintiffs' attorneys to expand the litigation to include claimants with questionable losses or grounds for liability, which may further diminish the compensation available to more meritorious plaintiffs with significant losses, and drive up transactions costs.

Understanding why mass personal injury litigation is so difficult to resolve—and why aggregation has proved so problematic—requires understanding: (1) the special factual and legal issues that arise when litigation involves latent (as contrasted with traumatic) injuries;³³³ (2) the peculiar risk profile of the litigation, which confers special advantages on plaintiffs' attorneys who represent large numbers of clients; (3)

³³³ Many practitioners believe that mass litigation arising out of catastrophic accidents, such as the Hyatt Skywalk collapse or the DuPont Plaza Hotel fire, is relatively unproblematic by comparison with mass latent injury litigation. However, although catastrophic accidents do not pose the causation problems associated with mass latent injury litigation, mass catastrophes do present similar strategic opportunities for plaintiffs' attorneys, as evidenced by the large numbers of claimants and defendants associated with such litigation, relative to the number of fatalities and the apparent singularity of the source of injuries. For example, the total number of claims filed in the Dupont Plaza Hotel fire—which killed 97 occupants and injured several hundred more—was 2300, and the number of defendants was upward of 250, although the fire was actually set by a single disgruntled worker and the hotel was owned by a single financial entity. See *supra* text accompanying notes 59-70.

the issues that future injuries and future plaintiffs pose for settlement efforts; and (4) the conflicts of interest inherent in collective litigation that involves defendants and insurers with different and competing risks of liability, plaintiffs, both current and future, whose injuries differ greatly in severity, and plaintiffs' attorneys with different types of practices, and with all of these interests varying among suits brought in various states with differing law, procedures and patterns of jury verdicts.

A. *Factual and Legal Issues*

For mass litigation to occur, both plaintiffs' attorneys and defendants must believe that the expected value of the litigation—the likelihood of establishing causation and liability, multiplied by the likely value of damages in an individual case—is great enough to warrant a significant investment of time and capital in the litigation. Both plaintiffs' attorneys' and defendants' estimates of expected value are powerfully influenced by the numerosity, commonality and interdependence of case values, which distinguishes mass torts from ordinary personal injury litigation: The larger the number of potential claims and the greater the likelihood that common factors among claims will pull the values of many claims upward, the larger the expected value of the litigation.

At the inception of the litigation, however, all sides' estimates of expected value are highly uncertain, depending—as they must—on guesses as to likely judicial decisions on discovery motions, evidentiary issues, choice of law and other doctrinal issues and trial juries' likely reactions to the facts of the cases. Indeed, at the inception of litigation, scientific evidence on causation may not be fully developed, and whether evidence can be assembled to establish defendant liability may not be known to defendants or plaintiffs.³³⁴

³³⁴ Bendectin litigation appears to have spurred scientific research on causation. See Sanders, *supra* note 90, at 303. Key information establishing Robins' knowledge of problems associated with the Dalkon Shield did not appear until late in the litigation.

1. Causation

All successful tort litigation requires that the plaintiff establish (or persuade the defendant that she could establish), to the satisfaction of the factfinder, that an action or omission on the part of the defendant was the cause-in-fact of the claimant's injuries. Whether incurred in a single accident or as a result of a mass catastrophe, such as a building collapse, linking traumatic injuries, such as fractures, to an event is usually relatively easy. But for latent injuries, establishing causation is far more difficult. The plaintiff first must establish that the type of product use or exposure that she alleges is capable of causing her alleged injuries (general causation), and then establish that this use or exposure was the cause-in-fact of injury in this case (specific causation).

Mass toxic tort litigation will not move forward unless plaintiffs' attorneys can persuade themselves and defendants that they can establish general causation. Usually this will require winning at least a few jury trials, which in turn will require that judges permit plaintiffs to introduce the scientific evidence on which their causation claims rest, and that juries accept that evidence as proof of causation. As they contemplate initiating or defending toxic tort litigation, both plaintiff attorneys and defendants have a number of reasons to be uncertain about plaintiffs' ability to prevail on the causation issue.

First, at the early stages of litigation the scientific evidence of a causal link between product use or exposure and the damages claimed, in truth, may be uncertain. Science evolves over time: Evidence that first appears to support a causal link, later may be controverted. Conversely, evidence of causation that first appears shaky, over time, may be bolstered by new studies. Moreover, there are a variety of scientific approaches for investigating causal links between substance exposure and disease, including epidemiology (the study of the spread of disease in human populations) and laboratory experimentation with tissue cultures (i.e., *in vitro*) and live animals (i.e., *in vivo*). Each of these has its strengths and weaknesses. In some instances, results from one sort of scientific investigation point in one direction, while results from another point in the opposite direction. In addition, scientific evidence of causation may be different for different diseases, or even for different demo-

graphic groups. In the context of mass litigation, these differences either may be ignored, or may themselves become a source of dispute.³³⁵

For some of the litigation discussed in Part II (e.g., asbestos litigation) the scientific evidence linking exposure and certain diseases was well established by the 1980s. With regard to others (e.g., silicone breast implants and electromagnetic radiation) the scientific evidence remains uncertain. The evidence of infant neurological impairment resulting from ingestion of lead is quite strong; the evidence of effects on older children is disputed. Moreover, the prospect of litigation itself, may, stimulate scientific research. Professor Sanders has documented the complex relationship between scientific investigations of Bendectin and the litigation.³³⁶

In addition to the uncertainties attendant upon science itself, there are uncertainties about how courts will respond to whatever scientific evidence is available. There has been considerable variation in judges' willingness to permit plaintiffs to present key causation evidence to juries. For example, Judge Jack B. Weinstein refused to allow claimants who opted out of the Agent Orange class action litigation to take their case to jury trial, because there was inadequate epidemiological evidence to demonstrate a causal link between dioxin exposure and the plaintiffs' alleged injuries.³³⁷ In *Ferebee v. Chevron*,³³⁸ however, the district court permitted a plaintiff alleging injuries due to the pesticide Paraquat to take his case to jury, notwithstanding the absence of epidemiological evidence demonstrating the existence of a causal link between his type of exposure and his injuries. In both cases, the plaintiffs were prepared to submit clinical evidence of causation. In *Agent Orange*, the trial judge deemed the clinical evidence inadequate as a matter of law to establish a claim; in *Ferebee* the

³³⁵ Discussions of the problems of dealing with scientific evidence in courts abound. See, e.g., Bert Black, *A Unified Theory of Scientific Evidence*, 50 *FORDHAM L. REV.* 595 (1988); Troy Brennen, *Helping Courts With Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 *U. PITT. L. REV.* 1, 10-19 (1989).

³³⁶ See Sanders, *supra* note 90, at 331-48.

³³⁷ *In re Agent Orange Prods. Liab. Litig.*, 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); see also SCHUCK, *supra* note 10, at 234-42.

³³⁸ 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

court held that the adequacy of the clinical evidence was a fact question that was appropriate for jury decision.³³⁹ Moreover, even when they do permit cases with uncertain scientific evidence to go to trial, judges may exercise their authority to exclude certain types of evidence, perhaps thereby weakening the plaintiff's case. Appellate courts have generally (although not always) upheld trial courts' evidentiary decisions.³⁴⁰

Although the recent Supreme Court decision on *Daubert* made it clear that the Federal Rules of Evidence govern judicial decisions on the admissibility of scientific evidence,³⁴¹ the Court did not specify a bright-line test for judges to use when deciding what kinds of evidence may be presented to a jury. Thus, uncertainty will continue over whether particular evidence of causation in specific cases will meet the trial judge's standards for admissibility. Moreover, there is likely to be continued variation in judicial decisions on admissibility of the same evidence across jurisdictions.

Finally, there has been considerable variation in juries' evaluation of evidence of causation, even within the same litigation. For example, although the jury that heard the consolidated trial of Bendectin cases in the middle district of Ohio delivered a defense verdict on causation, at least two juries

³³⁹ 736 F.2d at 1534.

³⁴⁰ See, e.g., *Agent Orange*, 818 F.2d at 151 (upholding, inter alia, Judge Weinstein's refusal to permit Agent Orange opt-out plaintiffs to proceed to trial on clinical evidence of causation); *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128 (9th Cir. 1991) (upholding trial court's refusal to admit plaintiffs' analyses of unpublished epidemiological analyses and granting of summary judgment), *vacated*, 113 S. Ct. 2786 (1993).

³⁴¹ In *Daubert*, a case arising out of Bendectin litigation, the Supreme Court was asked to decide whether the Federal Rules of Evidence adopted in 1975 superseded the *Frye* rule adopted in *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923). Under *Frye*, evidence not "generally accepted" by the scientific community was deemed insufficiently reliable and, thus, inadmissible. Subsequent to the adoption of the Federal Rules of Evidence, courts divided on the issue of whether *Frye* still applied. The *Daubert* Court explicitly rejected the applicability of *Frye* and placed decisions of admissibility squarely on the shoulders of the trial judge. Moreover, the Court refused to set forth specific tests for admissibility of scientific evidence, such as publication in a peer-reviewed journal, which had been proposed by respondents and their amici. Rather, the Court admonished trial judges to determine whether the evidence proffered by parties met standards for "good science," variously defined. *Daubert*, 113 S. Ct. at 2786; see also Bert Black & John Singer, *From Frye to Daubert: A New Test For Scientific Evidence*, 1 SHEPARD'S EXPERT & SCI. EVID. Q. 19 (1993).

prior to that trial and four juries subsequently found for the plaintiff in individual Bendectin cases.³⁴² Over the long course of asbestos worker injury litigation, some juries have delivered defense verdicts on general causation, notwithstanding substantial scientific evidence that asbestos exposure causes various injuries.

2. Liability

In addition to persuading themselves and defendants that they can prove general causation, plaintiffs' attorneys need to convince themselves and the defendants that the factfinders will hold the defendants legally responsible for plaintiffs' injuries. For a number of reasons, this may be less difficult than it is to demonstrate their ability to prevail on the causation issue.

First, in the face of the expansion of product liability doctrine and the evidence in the late 1970s and early 1980s of rising product liability caseloads, increasing rates of plaintiff success at trial and increasing jury awards, manufacturers have apparently become convinced that the civil justice system has tilted against them. In particular, many corporate defendants believe that juries tend to sympathize with injured individuals and, therefore, consistently deliver verdicts against so-called "deep pocket" defendants, without regard to the evidence and legal rules that should govern their decision. Thus, defendants may be inclined to believe that if plaintiffs' attorneys can get their liability case before juries, the plaintiffs will prevail.

In addition, experienced defense counsel for mass toxic tort defendants fear that in many instances, the extensive discovery permitted under contemporary rules of civil procedure will uncover documents related to corporate review of the risks and benefits associated with their products that plaintiffs may be able to use to persuade juries that defendants inappropriately discounted potential harms to product users. For their part, plaintiffs' attorneys may well expect that if they invest sufficient time and effort in the discovery process they will be able

³⁴² See Sanders, *supra* note 90, at 401 (Table 9) (listing nine Bendectin cases reviewed by appellate courts that had reached a jury verdict after trial, three of which resulted in defense verdicts).

to locate such "smoking guns." In a unitary trial (where causation, liability, and damages are tried together and the jury deliberates after it has heard evidence on all matters of fact), such documents may loom larger in jurors' minds than the likely more ambiguous scientific evidence on general causation.³⁴³ Such documents have been used successfully not only to establish liability but also to obtain large punitive damage awards in asbestos litigation, Dalkon Shield litigation, Shiley Heart Valve litigation and silicone breast implant litigation, among others.³⁴⁴ The potential for exposing "bad documents" also poses broader risks to corporate defendants with an interest in protecting brand names and corporate image.

That juries will find defendants liable is, however, by no means certain. In tobacco litigation, juries to date have demonstrated considerable skepticism towards the claim that manufacturers should be held liable for the injury or death of plaintiffs who continued to smoke in the face of widespread public information about smoking-related risks. The tobacco cases suggest that assumption of risk may be a strong defense in circumstances where information about risks and risk avoidance strategies is widespread and where there is considerable evidence that individuals indeed can reduce their risk by changing their own behavior.³⁴⁵

Mass toxic tort litigation poses other challenges to plaintiffs' attorneys' ability to demonstrate liability as well. These challenges derive from the long period between initial exposure to the injurious product or substance and the filing of the lawsuit. To establish liability of any particular defendant, the plaintiff generally must be able to link that defendant's product to the alleged injury. But in cases where injuries occurred some years ago and where different manufacturers'

³⁴³ For experimental evidence of the effect of trial structure on jury outcomes in complex cases, see Irvin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990).

³⁴⁴ See *supra* text accompanying notes 112-31, 142-96 & 229-40.

³⁴⁵ See Schwartz, *supra* note 26. A factor akin to assumption of risk may influence some juries in silicone breast implant cases, who are widely believed to be less willing to assign liability to defendants when plaintiffs chose to obtain breast implants for "purely cosmetic" reasons. See, e.g., *Woman Loses Breast Implant Lawsuit*, L.A. TIMES, June 12, 1993, at A21 (reporting a failed \$7 million lawsuit brought by "ex-topless dancer").

products were used interchangeably, it may be difficult—if not impossible—to establish this product-injury nexus. For example, in the early days of asbestos litigation, plaintiffs' attorneys had to devote considerable effort to developing evidence about the specific products that were used in different shipyards and other worksites.³⁴⁶

Demonstrating a product-injury nexus poses even larger problems when neither plaintiff nor defendant have any way of establishing what specific product was associated with the plaintiff's injury. For example, in DES cases, the injured party is the daughter or grandchild of a woman who took DES while pregnant. Usually, the DES user does not recall the specific brand of the drug that was prescribed, nor is there any documentary record. In *Sindell*, the court responded to this problem by recognizing a "market share" theory of liability, which held all DES manufacturers liable for the injury and apportioned damages among them in proportion to their individual shares of the market. But courts generally have been unwilling to extend market share liability to other litigation. For example, the courts' unwillingness to apply the market share theory to lead litigation so far has stymied mass lead injury litigation against paint manufacturers. However, some plaintiff attorneys assert that they will be able to develop evidence linking specific paint manufacturers and products to particular housing units, thus overcoming this obstacle to suits against manufacturers by tenant-parents of lead-impaired children.

As a practical matter, most mass tort litigation to date has not posed this problem: the Dalkon Shield was manufactured only by A.H. Robins, Bendectin only by Merrell-Dow and the Shiley Heart Valve by Shiley, Inc., which was later purchased by Pfizer. DDT was dumped into the Tennessee River in Triana, Alabama by Olin. Asbestos was manufactured by many corporations, but litigators have been able to develop evidence indicating what specific products were actually used at different worksites. Only in cases where it is truly impossible to determine who manufactured the product in question, will a

³⁴⁶ Once the evidence was collected, however, it was used repeatedly as claimants came forward from these sites. The ability to use evidence gathered for one case in a large number of other cases is an example of the economies of scale that flow from plaintiffs' attorney's representation of a large number of claimants. See HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 2, at 68-82.

Sindell-like approach be necessary for mass tort litigation to go forward.

3. Damages

Finally, to succeed, plaintiffs must demonstrate that their claims have real monetary value. Although the total monetary value of mass litigation is the sum of damages for all individuals in the injury pool who can establish causation and liability, it usually requires some number of jury trials to establish that these individuals' cases, in fact, do have substantial monetary value. Thus, the nationwide surge of silicone breast implant litigation occurred after an award of \$7.3 million by a San Francisco jury, and gained further impetus when a Texas jury awarded \$28 million in a similar trial the following year. A large damage award to users of the Copper-7 intrauterine device led many to believe that litigation over that product ultimately might assume the dimensions of the Dalkon Shield litigation. Sizeable awards to asbestos cancer victims appear to have increased the value of all asbestos claims, even for those victims who do not allege any current impairment.

Conversely, if plaintiffs' attorneys fail to establish that individual claims have significant value, the value of the entire litigation will be called into question. A Mississippi jury's³⁴⁷ award of zero damages to a plaintiff claiming injury due to smoking—one of the few plaintiff victories ever reported in tobacco litigation—signalled to many the unlikelihood that suits by smokers would ever be transformed into mass litigation. Efforts to develop mass litigation against manufacturers of diet products have apparently foundered because the alleged injuries are associated with modest losses.

The potential for punitive damages has a significant influence on the value of mass tort litigation. For example, when a jury in east Texas awarded \$3.8 million in punitive damages to four asbestos plaintiffs whose injuries varied from clinical evidence of asbestos exposure with no impairment to severe disability, defendants agreed to settle the class of 30 claims that the 4 plaintiffs represented for \$12 million, or about \$400,000 per claim. Generally, during this period, asbestos

³⁴⁷ Horton v. American Tobacco Co., 508 So. 2d 1057 (Miss. 1990).

claims had been settling for less than \$200,000 per claim.³⁴⁸ Similarly, after a jury awarded \$75,000 in punitive damages (and \$10,000 in compensatory damages) to a Dalkon Shield plaintiff in 1975, claims began settling for an average of \$11,000. In 1985, after juries awarded two Shield plaintiffs \$1.75 million in punitive damages, and a third plaintiff \$7.5 million in punitive damages, A.H. Robins sought the protection of Chapter 11.³⁴⁹ In another example, that a Texas breast implant verdict included \$20 million in punitive damages was not lost on plaintiff attorneys around the country.³⁵⁰ And, although in the early years of Copper-7 litigation Searle won 15 out of 17 trials, after a jury awarded Esther Kociemba \$8.75 million in damages, including \$7 million in punitive damages, the company agreed to settle all of the 130 Copper-7 suits that had been brought against it by Kociemba's law firm.³⁵¹

Records about defendants' knowledge of product-related risks, and their response to this knowledge have played a critical role in obtaining large punitive damage award. Plaintiffs' attorneys' discovery of the Sumner-Simpson papers, indicating manufacturers' awareness of asbestos-related injuries, led to punitive damage verdicts and may have changed the course of asbestos litigation. Documents obtained through legal discovery indicating that A.H. Robins had been informed by its own staff of risks associated with the Dalkon Shield design, led to the large punitive damage verdicts in those cases. Some courts have limited plaintiffs' attorneys' search for or use of documents that might lead to punitive damages, by refusing to admit such documents in evidence, or by granting secrecy orders that prohibited the use of documents discovered in one case from being used in another.

When punitive damage claims fail, the value of mass litigation may plunge. For example, the Chicago salmonella litigation against Jewel Foods began as mass litigation, involving many claims. But most of the claims involved minor injuries; their value rested on the potential for punitive damages

³⁴⁸ See MOLLY SELVIN & LARRY PICUS, *THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE* (1987); PETERSON & SELVIN, *supra* note 220, at 46-47.

³⁴⁹ See *supra* text accompanying notes 123-31.

³⁵⁰ See *supra* text accompanying notes 186-87.

³⁵¹ See *supra* text accompanying notes 132-41.

against the supermarket chain. When a class action of the punitive damages claim ended with a defense verdict, the value of claims dropped dramatically and plaintiffs' attorneys agreed to a procedure under which serious claims were litigated individually, and the remainder were negotiated using an alternative dispute resolution ("ADR") process.³⁵²

B. *The Special Risk Profile of Mass Litigation*

Although uncertainty about the plaintiffs' ability to establish causation and liability and win large damages colors the early stages of mass personal injury litigation, the risks that plaintiff attorneys and defendants face at the litigation's inception are not symmetric. For plaintiffs' attorney firms, the cost of losing is determined by the size of the firm's investment in the litigation, including the cost to cover expenses associated with identifying clients (e.g., advertising, referral fees, medical screening exams); developing the facts of individual plaintiffs' cases (e.g., discovery of documents and medical exams); preparing cases for trial (e.g., deposing expert witnesses); and, perhaps, aiding in developing scientific evidence of general causation. There is wide variation in how much plaintiffs' law firms invest to obtain and prepare their cases. Some firms (commonly termed "boutique firms") screen potential cases carefully, select only those for which liability appears strong and damages large and invest substantial amounts in developing the cases they accept. At the other extreme, some firms adopt a more "wholesale" approach based on representing a large number of claims. These firms may make substantial investments to obtain cases, but spend relatively little to develop individual cases for settlement or trial. Whatever the approach, plaintiffs' firms may invest hundreds of thousands or even millions of dollars before realizing any income from their mass tort claims.

Experienced firms, however, can balance the size of their caseload and their expenses to limit their risk to an amount they deem acceptable. Much of the financial risk of acquiring cases is mitigated by fee arrangements with lawyers who refer cases: Referring lawyers continue to represent a client as co-

³⁵² See *supra* text accompanying note 203.

counsel and are paid a share of the contingency fee only if and when defendants settle. By joining forces either through court-appointed plaintiffs' steering committees or informal litigation groups, plaintiffs' law firms can limit the risk to each firm by sharing costs of discovery and scientific investigation. Indeed because of the interdependence of claim values, some firms might avoid the significant costs of preparing and trying cases, by free-riding on success of other firms that take their cases to trial.³⁵³

Balanced against the costs for a plaintiffs' firm is the huge potential recovery if the firm successfully represents scores, hundreds or even thousands of claims. Several implications follow from this balance. First, a plaintiffs' law firm may be willing to invest substantial sums in developing scientific information and otherwise preparing and trying one or a few cases. Investments that could not be justified for a single case are, in contrast, sound when the firm knows that its entire portfolio of cases will gain value if lead cases succeed. Second, as a result of the special cost-benefit relationship for mass torts, the firm can justify additional expenses simply by acquiring a larger portfolio of claims. With a sufficient number of claims, the potential returns will exceed any costs. Third, plaintiffs' firms may pursue potential mass tort cases even where liability and causation are highly uncertain. Because potential returns are so great, plaintiffs' firms can accept high risks that they would not bear in ordinary litigation where returns are limited to one or a few cases.

For defendants, the cost of losing early in the litigation is determined not just by the cost of defending the early cases and indemnifying claimants who prevail, but also by the increase in value of other pending claims that will then ensue, and by the fact that each plaintiff verdict will encourage new case filings. When the pool of potential claimants (all those who used the product or were exposed to the substance) numbers in the hundreds of thousands or millions, when there is a finite possibility that each exposed individual might be deemed

³⁵³ But defendants may be able to exploit such free-riders. Searle settled its Copper 7 cases with only the one firm that had invested heavily and shown that it could succeed at trial. Searle gambled successfully that other firms would not be able to carry the litigation. See *supra* notes 132-41 and accompanying text.

to have a viable claim, if only for emotional damages, and when punitive damages of large and unpredictable amounts can be awarded over and over, the defendant's exposure may appear well-nigh unlimited—in the common parlance, a “bet the company” proposition.

In deciding what strategy they should adopt, defendants must consider the possibility that one or more judges or juries will decide against them, even if they have been advised that their scientific case is strong. Indeed, plaintiffs won the first Bendectin trial and several subsequent trials.³⁵⁴ Litigation is uncertain even with strong cases and fair judges and juries, and defendants should expect a few anomalous verdicts among the universe of trial dispositions. If such verdicts occur randomly, there is a finite chance that they will occur during the initial phase of litigation. Thus, while the special characteristics of mass torts spur plaintiffs' attorneys to invest heavily in preparing for trial, they may lead defendants to shy away from trial. This extreme risk aversion is becoming more apparent as defendants (and their insurers) better understand mass torts. Prior to the consolidated trial that resulted in a defense verdict and the virtual collapse of the litigation against them, Merrell-Dow had offered \$120 million to settle the proposed Bendectin class action.³⁵⁵ More recently, Pfizer agreed to settle tens of thousands of Shiley Heart Valve claims before many cases had been tried. Breast implant defendants may settle that litigation for billions of dollars before scientific research on causation is completed.

Moreover, some judges are not adverse to using the potential for such jury outcomes as levers to achieve settlement even when the scientific evidence is thin. For example, despite Judge Weinstein's declaration that there was insufficient scientific evidence to sustain the Agent Orange “opt-out” claims, he was instrumental in securing a \$180 million settlement of the Agent Orange class action litigation. Similarly, special master Frances McGovern engineered a \$15 million settlement of the second DDT class action in Triana, Alabama although there was little scientific support for a link between DDT ingestion

³⁵⁴ See *supra* note 83.

³⁵⁵ See *supra* text accompanying note 84.

and the plaintiffs' alleged injuries.³⁵⁶

Because the risks facing the corporate defendant are larger than the risks facing any one plaintiffs' law firm, and because plaintiffs' firms have discovered the value of joining forces and pursuing cooperative strategies against defendants, defendants in mass tort litigation may not hold the same advantages over the plaintiff that they have in ordinary tort litigation. As a result, they may be more willing to settle questionable claims than would ordinarily be the case. But this in turn further strengthens the plaintiffs' attorney's hand, and may provide incentives for plaintiffs' attorneys to take on more questionable litigation and to dip even deeper into the potential claimant pool once litigation is well underway. Indeed, after the initial investment in the litigation has been made, plaintiffs' attorney firms have incentives to identify many more claimants so that they can spread their costs across this client pool, and maximize their fees. Thus, the economics of mass tort litigation, and the asymmetric risks facing plaintiff attorneys and defendants have the potential to drive the litigation forward, ever broadening its scope, until it reaches either the limits of the exposed population or the limits of the available defendant assets.

C. *Future Injuries and Future Plaintiffs*

When product use or exposure to substances causes latent injuries, the product is likely to remain on the market for many years. As a result, there is likely to be a long period of time following the first recognition of a causal link between exposure and injury during which individuals will become ill, be diagnosed as suffering from an injury linked to the exposure and appear as plaintiffs in court. The civil law is not well fashioned to deal with this latent injury process. Asbestos worker injury litigation offers the most vivid example of the "futures" problem posed by all or most latent injury litigation.

Statutes of limitation typically require that individuals make legal claims within a few years of when they know (or should have known) that they were injured as a result of product use or exposure.³⁵⁷ Since clinical evidence of injury may

³⁵⁶ See *supra* text accompanying note 241.

³⁵⁷ Prior to the surge of mass toxic tort litigation, many states required that

appear well before an individual suffers serious impairment, the result is that many of those filing claims will have little or no current impairment. Consequently, statutes of limitations have encouraged the filing of many marginal claims. Many asbestos defendants assert that the majority of claims they now face are, in their view, frivolous, in that the claimants have clinical signs of exposure (i.e., pleural conditions) but no current sign of impairment. Most of these claimants, they assert, will never develop asbestos-related impairment. Damages in these cases must be based primarily on estimates of future medical expenses and work loss or non-monetary losses due to concern about their fate (e.g., fear of cancer claims)—both highly subjective and subject to controversy.

Despite the subjective nature of their injuries, some asbestos plaintiffs with pleural conditions have received large verdicts at trial.³⁵⁸ Plaintiffs' lawyers convince juries that plaintiffs with pleural conditions face a future of cancer or debilitating lung impairment—an example of how in mass torts less serious cases borrow value from serious cases.³⁵⁹ Because these cases have value at trial, they have value in settlement. But because average verdicts are less for plaintiffs with pleural conditions than for claims involving present impairment, pleural cases typically have less value than other asbestos claims. Thus, asbestos plaintiffs with pleural conditions are faced with a dilemma. Although they are not currently impaired, some will later develop serious asbestos-related disease, since persons with pleural conditions have increased risks of asbestos-related cancers.³⁶⁰ Because settlements of pleural claims are relatively small, those settlements will be woefully inadequate should these plaintiffs subsequently develop asbestos-related

personal injury claims be filed within one or a few years of the occurrence of injury. Because the injury may be deemed to have happened at the time of first product use or substance exposure, this rule effectively barred many individuals with latent injuries from filing claims. The more recent interpretation circumvents this problem by setting time of first knowledge of the injury as the event that begins tolling the statute. See HENSLER ET AL., ASBESTOS IN THE COURT, *supra* note 2, at 37-41.

³⁵⁸ In *Cimino v. Raymark Indus., Inc.*, 739 F. Supp. 328 (E.D. Tex. 1990), the East Texas class action, juries awarded larger verdicts to plaintiffs with pleural conditions than to those with more serious asbestosis.

³⁵⁹ See SELVIN & PICUS, *supra* note 348.

³⁶⁰ Selikoff et al., *supra* note 287, at 22.

cancer. Some courts have attempted to deal with this problem by establishing "registries," which allow plaintiffs to secure their right to claim in a timely fashion, while postponing any estimate of damages and settlement until their injury becomes more serious.³⁶¹ But postponing payment of the claim may mean that a plaintiff's attorney has no means to receive compensation for time invested in the case. As a result, some plaintiffs' attorneys have opposed this solution to the problem of future impairment. Disputes over this aspect of the "futures" problem have contributed to the emotional "heat" surrounding asbestos litigation, further complicating settlement.³⁶²

In addition to those who already show some clinical signs of injury, however limited its effect, there are those who have been exposed to the product—perhaps unwittingly—but have not yet asserted legal claims. If claims are paid simply in the order in which they are filed, but without regard to severity of injury, those with little or no current impairment who come forward early will secure compensation, and those with serious impairments who come forward later may find that there are no funds left to provide them with compensation for their losses.

The potential for a "race to the courthouse" has contributed to trial judges' willingness to certify mandatory (non-"opt out") Rule 23(b)(1)(B) class actions for all or some aspects of mass tort litigation, under a "limited fund" theory. A mandatory class was successfully certified for punitive damage claims in the *Salmonella* cases,³⁶³ but most other 23(b)(1)(B) class action certifications have been vacated by appellate courts.³⁶⁴

Whether or not a limited fund class is certified, defendants may adopt a strategy of trying to obtain a "global settlement" of mass tort litigation, including not only all currently pending claims, but all future claims, as well. The \$215 million settle-

³⁶¹ See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 75 JUDICATURE 318 (1992) (noting the advantages of deferral registries).

³⁶² For a discussion of the consequence of "heat" for resolving mass toxic torts, see PETERSON & SELVIN, *supra* note 220, at 36 (discussing how emotions caused by the litigation can both inflame jurors and upset litigants).

³⁶³ See *supra* text accompanying notes 202-03.

³⁶⁴ See, e.g., *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

ment of Shiley Heart Valve claims, now on appeal, and the \$4.75 billion offer to settle breast implant claims, are intended to bind future as well as present claimants.³⁶⁵

Efforts to bind future claimants, however, are fraught with problems. How many claimants ultimately will come forward? When there is uncertainty about disease etiology and about the magnitude of exposure to products and substances, it is impossible to determine with certainty how many individuals ultimately will suffer disease and be able to present viable claims. At the time the first Manville Trust agreement was signed, there were about 26,000 claims pending against Manville, and the parties estimated the total number of future claims at less than 100,000; within about two years, 90,000 new claims had appeared and the Trust was insolvent.³⁶⁶ A recent court-appointed expert panel has estimated that there may be as many as 300,000 more asbestos claims brought in the future.

Even when there is more certainty about the number of possible future claims—for example, when the product manufacturer has firm figures on the total number of products marketed and the injury rate is reasonably well-established—courts must wrestle with the question of how to represent future claimants in settlement negotiations. This issue is at the core of controversy over the recently announced settlements of future claims against a large group of asbestos manufacturers.³⁶⁷ In formal aggregative proceedings, such as Chapter 11 proceedings and Rule 23 class actions, judges have appointed attorneys to represent future claimants, but the notion of clientless attorneys challenges our concept of the adversarial process. In more informal aggregative settlement proceedings, the nature and effectiveness of future claimant representation is even more obscure.

D. *Conflicting Interests*

In the paradigmatic personal injury suit, there are two parties with opposing interests, two attorneys, each of whose

³⁶⁵ See *supra* text accompanying notes 151-57 & 193-96.

³⁶⁶ Hensler, *Fashioning a Resolution*, *supra* note 2, at 1971.

³⁶⁷ See Henry Weinstein, *Debate Rages as Court Gets Plan to Settle Asbestos Cases*, L.A. TIMES, Feb. 21, 1994, at A1, A24-25.

interests are aligned with their clients, and a neutral judge. Mass personal injury litigation breaks this paradigmatic mold in all respects.³⁶⁸

On the plaintiffs' side, there are individuals with varying degrees of injury and with claims of varying strength against specific defendants. Some would best be served by receiving immediate compensation, while others would best be served by delaying settlement. Some would better be served by a settlement that spends down all defendant assets in the short-term, while others would better be served by a settlement that preserves assets into the future at a cost of diminishing short-term payments. Some plaintiffs' attorneys, whose caseloads are characterized by volume rather than quality of claim, will best be served by a short-term global resolution of the litigation for a large lump sum, from which they will receive a large fee, although their clients may each receive as compensation only a small fraction of their ultimate losses. Other plaintiffs' attorneys, whose caseloads comprise a smaller number of claims with large damages and strong evidence of defendant culpability, will best be served by a lengthier process resulting in trial verdicts that will enhance the value of all of their cases, ultimately yielding them generous fees and yielding their clients generous settlements.

On the defendants' side, where multiple product manufacturers are involved, there will also be diverse and conflicting interests. Some defendants, whose market share was relatively modest and whose files hold little in the way of incriminating evidence, may best be served by striking agreements with plaintiffs' attorneys that offer modest payments in return for modest attorney investment. Such payments can be used, in turn, by these plaintiffs' attorneys to subsidize their battles against defendants with greater exposure (and deeper pockets). Other defendants may believe that they face financial ruin if they adopt a conciliatory stance early in the litigation process. Moreover, over the course of the litigation, individual defendants' posture will change, as some deplete their insurance coverage, or as the characteristics of the claimant pool

³⁶⁸ The varying interests of parties and their attorneys are discussed in detail in Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

change. The interests of defendants differ from those of their insurers, and insurers differ among themselves, depending on the level, years and terms of their policies. Defendants' attorneys, in turn, have financial incentives to pursue aggressive litigation strategies that may not be best for defendants or insurers. Even the judges in mass tort litigation may eschew their paradigmatic role, as the pressures of mass torts cause some to avoid the litigation while others become caught up in the challenge of settling "mega-cases."³⁶⁹

E. *The Aggregation Dilemma*

As mass tort claims flooded their courtrooms, trial judges quickly learned that they could not deal with the cases individually. In the face of appellate courts' resistance to the use of formal aggregative techniques, courts informally aggregated cases for settlement and trial. But court efforts to achieve efficient and equitable resolution of mass torts through aggregation have foundered on the factual realities of the cases, the peculiar incentives created by the special risk profile of mass litigation, the problems posed by future claimants and the conflicts of interest among parties and attorneys.

For defendants, aggregating cases and arriving at a global resolution of mass litigation offers a means of capping their exposure. Global resolutions that depend upon a single litigation event—for example, consolidated trials, or trials of class actions—carry high risks. But global settlements are attractive even when the price is high, because they offer the opportunity to reduce uncertainty and limit transaction costs. However, when mass torts involve multiple defendants with different degrees of exposure, even these attractions may not produce agreement among defendants as to a favorable global resolution.

Plaintiffs' attorneys' interests in aggregation and global resolution may also be mixed. "Boutique" attorneys believe that it is in their and their clients' interest to pursue individual cases to trial, in order to demonstrate the value of their caseload, and then to negotiate settlements of the remainder of

³⁶⁹ For a discussion of the judge's interest in mass litigation, see Peterson & Selvin, *supra* note 16.

their cases. Plaintiff attorneys with larger numbers of less valuable cases are more supportive of aggregation and global resolution: By achieving a class action settlement, they can maximize the total recovery for the largest number of claimants, and maximize their total fees. Disputes among plaintiffs' attorneys are played out in the form of competition to serve on court-appointed plaintiffs' "steering committees." When federal silicone breast implant cases were assigned to Judge Sam C. Pointer Jr., class action proponent Stanley Chesley vied for co-chairmanship of the committee against attorneys who had opposed him in his unsuccessful effort to certify a breast implant class in the federal district court in Cincinnati. After an attempt to reach a compromise among the more than 100 plaintiffs' firms involved in the litigation failed, each group submitted its own slate of candidates to Judge Pointer.³⁷⁰

If some plaintiffs' attorneys are not prepared to agree with a global resolution, the attractiveness of the resolution will be diminished for defendants, whose prime goal is to bring all litigation to an end. Moreover, unhappy plaintiffs' attorneys are likely to challenge global resolutions. Because appellate courts remain uncomfortable with aggregative procedures, such challenges may well be sustained. Uncertainty about whether a particular global resolution will survive an appeal, in turn, will further diminish the value of the resolution to defendants.

In addition, global resolution requires courts and parties to perform difficult estimations of the value of claims that are pending but have not been tried or even completed discovery. If global resolutions are sought early in mass tort litigation, there may be little agreement on what particular types of cases are "worth." Moreover, global resolution requires decisions concerning the future: to cap the defendants' liability, the resolution must bind future as well as present claimants. Reaching agreement on the number and value of future claims is also difficult.

Because global resolutions are so hard to achieve, courts and parties often attempt to devise partial resolutions of mass tort litigation, securing payments for cases brought against some defendants, or by certain plaintiffs' attorney firms alleg-

³⁷⁰ Alison Frankel, *Implant Litigation: Heavy Politics, Lingering Questions*, AM. LAW., Sept. 1992, at 90.

ing a particular fact pattern, or for cases filed in a particular jurisdiction. Such resolutions have been achieved for large groups of asbestos cases, for some Copper-7 cases and, most recently, for breast implant cases. Inevitably these partial resolutions lead to an inequitable allocation of compensation as the availability of assets to compensate plaintiffs either diminishes over time, or ebbs and flows with the entrance and exit of different insurers and defendants. Because the litigation continues, there are continuing expenditures for legal fees and expenses, which further deplete defense resources for compensation. As some defendants exit the litigation, plaintiffs' attorneys cast their nets further to include other defendants. Continuing litigation attracts additional plaintiffs' attorney firms, with new, often weaker cases, and new strategic interests.

V. PROPOSALS FOR CHANGE

Proposals for improving the resolution of mass personal injury litigation range from creative adaptations of current rules to formal revisions in current rules and to substitution of new fora and compensation mechanisms for current legal processes. Most proposals for change focus on procedure rather than substantive doctrine, and most are aimed at increasing judges' ability to achieve global resolutions of mass tort litigation. Neither the proposed rule adaptations and changes nor the proposals for new fora deal directly with the factual and legal complexity of the cases. Nor do they address the conflicts of interest that inhere in the litigation or the problems related to future plaintiffs. And they ignore the peculiar risk profile that drives mass tort litigation. In an effort to reduce transaction costs and expedite settlement, these proposals aim to rationalize what courts are already doing, while failing to confront the difficult ethical and equity issues that are now inextricably intertwined with mass personal injury litigation.

A. *Variations Within the Current Rules*

1. Consolidation

Under Federal Rule 42(a), judges have experimented with consolidating larger and larger numbers of cases for trial.

Judge Robert Parker, whose more than a decade-long experience trying asbestos cases has included innumerable attempts to achieve collective resolutions, attempted an innovative approach to consolidated trials in the Eastern District of Texas. In *Cimono v. Raymark*,³⁷¹ Judge Parker selected 160 cases to represent more than 2000 aggregated claims, and tried these cases in multiple phases to three juries. In Phase I, the initial jury heard evidence on liability and found in favor of the plaintiffs. This jury also determined multipliers to be used in computing punitive damages. In Phase II, two new juries, sitting together, heard evidence on plaintiffs' exposure to defendants' products. In Phase III, the same two juries, sitting jointly, heard evidence on contributory negligence (i.e. smoking) and, sitting separately, heard damages for two different groups of claimants. Each of these two groups of claimants comprised several sub-groups, each of which in turn was composed of individuals who had been chosen to represent claimants with different types and degrees of injury. The individuals whose cases were actually tried to the juries received whatever the jury awarded in damages (which, in the case of defense verdicts, amounted to zero). Then, the awards for plaintiffs in each of the sample groups, including zero awards, were averaged and the claimants whose injuries placed them within that group, but whose cases were not actually tried, were awarded that average amount.³⁷² Judge Parker's experiment had the support of plaintiffs' attorneys, but defendants appealed the unusual arrangement.

The *Cimono* approach to consolidation addresses one of the sets of conflicting interests inherent in mass claims. By dividing claimants according to severity of injury, asking juries to decide representative cases in each severity category and then allocating damages among categories of claimants based on average verdicts within each category, the procedure increases the likelihood that settlement amounts will mirror actual losses, and decreases the likelihood that the value of serious claims will be diluted by the existence of a large volume of

³⁷¹ 751 F. Supp. 649 (E.D. Tex. 1990).

³⁷² See also Michael J. Saks & Peter Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 822-23 (1992).

minor injury claims. By itself, however, this approach cannot deal with the problem of future claimants; nor does it change incentives for plaintiffs' attorneys to identify as many cases as possible as soon as possible, without regard to injury severity.³⁷³

Cimino was followed by an even more ambitious application of this consolidation method. The Baltimore consolidation of more than 8000 asbestos cases is the largest such trial reported to date³⁷⁴—more than six times the size of the consolidated trial of Bendectin cases presided over by Judge Rubin in the mid-1980s. Leading mass tort practitioners and judges with prior experience in dealing with such cases evince little enthusiasm for replicating the experience.

2. Federal-state coordination

Another approach to resolving mass claims that has become increasingly popular in recent years is coordination of federal and state judges' activities. There are no formal mechanisms for aggregating cases across state and federal jurisdictional boundaries. But, in a recent article, Judge William Schwarzer and his associates discuss eleven cases—nine of which involved mass personal injuries—in which federal and state judges established procedures for coordinating pretrial activities and engaging in joint settlement efforts.³⁷⁵ In three of these instances, the judges considered, but later abandoned, the notion of holding joint trials.³⁷⁶ The authors' discussion suggests that the judges' efforts were motivated both by a desire to reduce transactions costs and to expedite pretrial activities and by an interest in achieving global settlements. Federal-state coordination, then, is a logical next step along the path that judges have trod in dealing with mass personal

³⁷³ In principle, each case tried to verdict (or represented by a tried case within its injury severity class) is eligible for punitive damages without regard to severity, and without regard to the amount of punitive damages previously assessed against the defendant.

³⁷⁴ See *supra* note 235 and accompanying text.

³⁷⁵ Schwarzer et al., *supra* note 13, at 1700-07. The authors did not conduct a comprehensive survey to identify all instances of such coordination; a more extensive search might find that such coordination is more prevalent than generally believed.

³⁷⁶ *Id.* at 1700-06.

injury claims over the past decade: It aims to achieve more efficient resolution of mass claims, without addressing the equity issues that inhere in them.

B. *Proposed Revisions to Current Rules*

1. Multidistricting

There have been several proposals to change the civil rules to permit "multidistricting" mass tort claims across federal and state jurisdictions, and formally to provide for trial, as well as pretrial management, of the collected claims within the district to which they are assigned. In 1989, the American Bar Association ("ABA") Commission on Mass Torts drafted a recommendation to the ABA House of Delegates for Congressional authorization of federal court jurisdiction for litigation involving 250 or more claims arising out of a single accident or exposure to a single product or substance.³⁷⁷ Support for the proposal however, was deemed so slight that it was withdrawn from consideration before formal debate. For several years, bills have been considered in the House that would establish federal jurisdiction for mass disaster claims. Under the terms of the Multiparty, Multiforum Jurisdiction Act of 1991 (H.R. 2450), introduced June 1991, federal jurisdiction would be granted whenever twenty-five or more deaths or injuries result from a single "accident at a discrete location"—i.e., not including mass product injuries or toxic exposure cases—when resulting injuries each involve losses of \$50,000 or more, and when minimal requirements for diversity are met. Cases would be transferred to a single jurisdiction, which would retain the cases not only for pretrial management but also for determination of liability and punitive damages. Cases would be remanded to their original federal district or state court for determination of other damages, unless the court found that it would serve the convenience of the parties and the interests of justice to retain the case for such determination. Decisions on choice of law would be made by the transferee court.³⁷⁸ The bill passed the House

³⁷⁷ *Id.* at 1697.

³⁷⁸ Multiparty, Multiforum Jurisdiction Act of 1991, H.R. REP. NO. 2450, 102d Cong., 1st Sess. (1991).

in the 102d Congress, but did not reach the Senate. Most recently, the American Law Institute ("ALI") has recommended that Congress replace the Judicial Panel on Multidistrict Litigation with a "Complex Litigation Panel." The Panel would have the authority to transfer to a single jurisdiction (federal or state) "transactionally related" federal and state cases on the motion of parties or of federal or state judges, *sua sponte*, for pretrial management and disposition, without regard to diversity. To facilitate consolidation of cases, the ALI proposed that Congress adopt a uniform federal choice of law code for complex litigation.³⁷⁹

As suggested by their description, all of these proposals are intended to facilitate collective resolution of complex litigation. The ALI proposal—the most ambitious and comprehensive plan put forward to date, meticulously laid-out in two several-hundred-page volumes—incorporates concerns about fairness and party autonomy in the standards set forth for determining the appropriateness of intra and inter-system consolidation. But it and the other proposals for expanding multidistricting are more attentive to the mechanics of achieving consolidation than to the substantive issues and conflicts of interest that have complicated resolution of mass personal injury litigation to date.

2. Class actions

There has been a dramatic shift in beliefs about the appropriateness of Rule 23 class actions for mass toxic torts since the Advisory Committee penned its admonition against the use of the Rule in tort actions in 1966. Although class action certification was denied by trial courts or vacated by appellate courts in some asbestos cases,³⁸⁰ the federal Hyatt Skywalk cases³⁸¹ and the California Dalkon Shield litigation,³⁸² class

³⁷⁹ COMPLEX LITIGATION PROJECT, § 5.01, *supra* note 12.

³⁸⁰ See, e.g., *In re Fibreboard Corp.*, 893 F.2d 760 (5th Cir. 1990); *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D. Tex. 1974).

³⁸¹ See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (denying class certificates of plaintiffs in asbestos litigation because they suffered different diseases and were exposed to asbestos in different ways and to different degrees).

³⁸² *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847

actions have proceeded in other asbestos cases,³⁸³ Agent Orange, in some mass disaster cases,³⁸⁴ in some toxic exposure cases and in the context of bankruptcy. The Advisory Committee on Civil Rules has been considering a revision to Rule 23 for some time. A draft circulated for comment in 1993 proposes eliminating the various subdivisions of the current Rule that set forth grounds for class action certification and substituting a provision that permits the court to determine whether class members may opt out or in to a particular class. An explicit provision for certification of only some issues in dispute is also included in the draft revisions.

Although the proposed changes to Rule 23 seem intended, in part, to facilitate global resolutions of mass torts, unlike the proposals discussed above, they appear to reflect concerns about some of the more problematic aspects of such resolutions. An accompanying Note to Rule 26(e) suggests that class action settlements might be referred to an independent counsel "as a means of breaking the information monopoly of self-interested parties," and a reference to "fiduciary duty" in Rule 23 itself is "calculated to emphasize the obligation of representatives and attorneys to put aside self-interest." In his letter discussing the proposed revisions, the Reporter to the Advisory Committee asks "would more detailed principles of fiduciary duty to the class be useful?" and "should the draft provision for investigation [of a settlement] be expanded to require appointment of an independent representative for the class to evaluate any proposed dismissal and settlement?" He also suggests that "procedures might be drafted to increase the attention given to [conflicts within a class]."³⁸⁵

(9th Cir. 1982) (vacating trial court's certification of nationwide class of claimants), *cert. denied*, 459 U.S. 1171 (1983).

³⁸³ See, e.g., *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (affirming trial court's class certification in asbestos litigation and its bifurcation of punitive and actual damages determination).

³⁸⁴ *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977) (certifying class action in Beverly Hills Supper Club Fire litigation).

³⁸⁵ Edward Cooper, Reporter, Advisory Committee on Civil Rules, Letter to "Civil Procedure Buffs" (Jan. 21, 1993).

C. *New Fora*

1. Special courts

Proposals to enhance courts' ability to collect cases across state and federal jurisdictional boundaries have met with objections from judges, practitioners and scholars concerned about preserving the values of federalism. Some also worry that there may be a natural tendency to collect mass litigation in federal courts rather than state courts, leading to overburdening of the federal system. In response to such concerns, some commentators have suggested establishing a "national disaster court" devoted exclusively to mass personal injury claims.³⁸⁶ But such a court would merely change the venue in which mass tort litigation would be played out, without significantly changing the dynamics of the litigation. Indeed, creation of a single national disaster court might serve to further concentrate mass personal injury litigation in the hands of a very few law firms, which would seem more likely to exacerbate, than mitigate, the conflicts of interest inherent in the litigation.

2. Statutory schemes'

The most radical proposals for resolving mass tort claims call for substituting statutory administrative compensation schemes for tort law. These proposals have typically been put forth as a "solution" to long-lived mass tort litigation, such as asbestos worker injury litigation.³⁸⁷ Whatever the merits of such schemes, they are unlikely to prove politically feasible because of the public costs involved and because, once litigation is well-established, the attorneys have such large financial stakes in continuing the litigation that they are likely to oppose legislative alternatives. Moreover, defendants who have favored such legislative alternatives have not always been willing to entertain compensation schedules that would provide reasonable levels of compensation to injury victims and their families.

³⁸⁶ Lancaster & Connors, *supra* note 14, at 1754.

³⁸⁷ See, e.g., Brickman, *supra* note 15.

3. Claims Resolution Facilities

Currently, claims resolution facilities designed jointly by judges, plaintiffs' attorneys and defendants appear to offer the most promise for resolving mass personal injury litigation, although the promise has yet to be realized. Such facilities typically offer a combination of administrative compensation schedules, alternative dispute resolution, and—in some instances—jury trial, custom-tailored to meet the requirements of plaintiffs' attorneys and defendants in particular cases. Because such facilities are *sui generis*, they necessitate only negotiating agreements within the narrow confines of a specific litigation, rather than building a broad-based political constituency to support a legislative remedy. They offer defendants an opportunity to reach closure in litigation, and plaintiffs an opportunity to match procedures and remedies to differing circumstances. Because they are designed in the course of litigation, they typically provide compensation to plaintiffs' attorneys for their investment in the litigation. They also may be designed to reserve funds for compensating future claimants. And if they are designed under the aegis of the court, their remedies and procedures should be subject to judicial review and approval.³⁸⁸

But claims resolution facilities are not a panacea for mass tort litigation. Typically, they emerge late in a litigation, often after the defendants have entered bankruptcy proceedings, when funds to compensate plaintiffs may have been seriously depleted. Often they offer levels of compensation to individuals with pending claims that are far less than the amounts received by those who were successful in prior litigation. The creatures of negotiated settlements, they may pay compensation without regard to the validity of the underlying claims of a causal connection between product use or exposure and injury. They also relieve culpable defendants of the threat of punitive damages. Since each facility is custom-designed by a different set of litigators, they offer none of the economies of scale that might be offered by a publicly-administered centralized compensation program. Their reliance on administrative proce-

³⁸⁸ On claims resolution facilities, see Francis E. McGovern, *Foreword*, 53 *LAW & CONTEMP. PROBS.* 1 (Autumn 1990).

dures—required to minimize transactions costs and expedite dispositions—denies many, if not all, injured individuals of an opportunity to have their cases heard and to bring culpable defendants to account in a public forum. Judges who have developed a personal stake in resolving litigation may be too prone to approve whatever remedies and procedural rules are proposed by the parties in order to achieve closure. In addition, the history of some claims facilities suggests that, over time, their administrators and directors may become so concerned about preserving the facilities' assets that they adopt the role of recalcitrant defendants vis-a-vis claimants, rather than the role of neutral administrators implementing a program design to deliver compensation to injured claimants. And, ultimately, claims resolution facilities will do little to change the troubling dynamics of mass personal injury litigation.

CONCLUSION

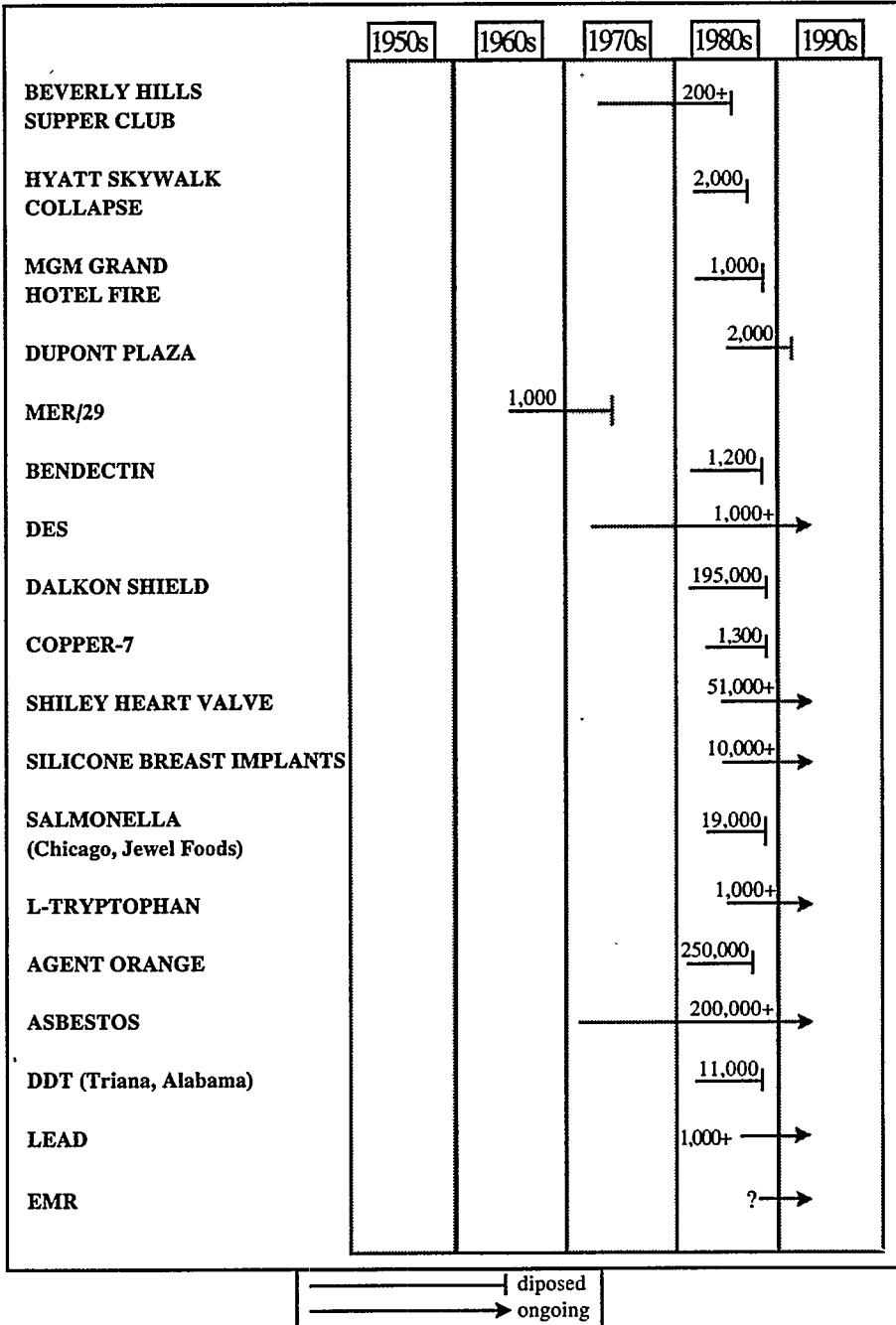
In the early 1980s, as asbestos filings mounted, some observers suggested that despite their numbers, they were merely another example of product liability litigation, which courts would soon learn to handle efficiently and expeditiously. When asbestos filings continued to rise at an exponential pace, and litigation involving mass marketed drugs and medical devices crowded the dockets, the rhetoric surrounding mass personal injury litigation became more heated. Defendants saw greedy plaintiffs' attorneys as solely to blame for the litigation, while plaintiffs' attorneys and consumer activists pointed to irresponsible and intransigent manufacturers and a flawed regulatory process.

A review of the history of mass personal injury litigation over the past two decades reveals a more complex story of the emergence of the litigation and court efforts to resolve it. Plaintiff attorneys do play a central role in the story of mass personal injury litigation, both as advocates of injured parties and as risk-taking entrepreneurs. Juries and judges have found repeatedly that manufacturers marketed inadequately tested or unsafe products, or provided inadequate information about product risks and benefits. Regulators have often done too little, too late. But the character of the litigation reflects the structure of the legal process, including substantive and

procedural rules and judicial attitudes and behaviors, as much as it reflects the character of attorneys and defendants. And the emergence of mass tort litigation owes as much or more to changes in science and technology, marketing, information diffusion and cultural attitudes as it does to changes in the legal system. Perhaps most importantly, mass tort litigation reflects the fundamental decision of American society to rely on the civil justice system to compensate individuals for injury and disease, to deter corporate wrong-doing and to achieve corrective justice.

If we are to continue to rely on the legal system to achieve these aims with regard to mass injuries, decisionmakers need to fashion procedures that provide compensation, in adequate amounts, to those who are truly injured, when they are injured, and that allocate the bulk of available resources to injured claimants, rather than to attorneys for plaintiffs and defendants. Decisionmakers need to assume that liability rules and procedures for applying them that hold manufacturers and service providers to high safety standards, while also insuring that beneficial products are developed and remain on the market at a reasonable price. Finally, decisionmakers need to fashion processes that properly align attorneys' and clients' interests, that provide vehicles for plaintiffs to have a voice in the resolution of their claims and for non-culpable defendants to vindicate themselves. Currently, despite considerable efforts and creativity on the part of judges, attorneys and parties, the legal system too often fails these tests in its approach to resolving mass personal injury litigation.

**Appendix Figure 1
A Profile of Mass Tort Litigation**



APPENDIX FIGURE 2

LAWYER ADVERTISEMENT FOR BREAST IMPLANT CASES

 Los Angeles Times Recycling for an abundant future
ATTENTION WOMEN WHO HAVE HAD BREAST IMPLANTS
We are a Beverly Hills law firm presently investigating all claims caused by silicone implants.
Even if you are symptom-free you may still have a claim.
PROFESSIONAL-DISCREET-CONFIDENTIAL Law Offices of Jeffrey W. Steinberger 8383 Washire Bl., Suite 1032, Beverly Hills, CA 90211 (310) 274-5252
STATUTE DEADLINES Call or you may lose your rights!

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