It's Time to Loosen Rule 23's Belt: Problems with Class Action Lawsuits

Scott A. Harford

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It's Time to Loosen Rule 23's Belt: Problems with Class Action Lawsuits

INTRODUCTION

Our increasingly technological society has caused the development and expansion of mass tort litigation. An incalculable number of parties claim to have suffered injury through exposure to asbestos, cigarettes, silicone breast implants, agent orange, and other hazards. When the negligent conduct of one corporation causes the same injury to a multitude of people, the injured parties often combine forces and allege negligent conduct against the corporation. The primary problem yet to be resolved with these class action suits is logistical in nature: how to combine a number of individual plaintiff parties together to litigate against the same tortious defendant corporation in the same courtroom at the same time. Today's legal system does not provide a satisfactory answer to this problem.

Part One of this comment discusses the benefits of class action lawsuits. Part Two provides an overview of the requirements for filing and maintaining a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure. Part Three examines three significant problems in maintaining a class action suit today; the inconsistency in plaintiff's opt out rights, the difficulty in determining which forum's laws apply, and the absence of a harmonious federal approach to mass tort law. Part Four


2. See In re School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir. 1986) (estimating that asbestos was present in approximately 14,000 American schools, with 8,500 of which having abatement problems); In re Agent Orange Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

3. See Castano, 84 F.3d at 737; In re Agent Orange, 635 F.2d at 988.
recommends improving the class action mass tort model by returning to the doctrine announced in *Swift v. Tyson*. Part Five demonstrates the United States Supreme Court’s reluctance to take any such action.

I. BENEFITS OF CLASS ACTION LAWSUITS

A class action lawsuit attempts to align plaintiffs with common questions of law or fact in litigation against a common defendant in the same courtroom. Rather than having multiple separate trials deciding the same issues against the same defendant in different jurisdictions, class actions place everyone in the same room simultaneously. As a result, plaintiffs are able to pool their money to secure the most qualified lawyers, expert witnesses, and general resources for trial. Defendants, in the same manner, can avoid multiple trials held over long periods of time in different jurisdictions by consolidating resources, with the possible result of settling the entire controversy in a single trial.

Class actions also keep court dockets from overloading by adjudicating many cases as one judicial proceeding. Claims that otherwise would not be heard until much later can now be heard sooner. This allows courts to avoid the hassle of “reinventing the wheel” for every related mass tort case that comes before it.

4. *See FED. R. CIV. P. 23(a)(2)* (allowing one member of a class to sue on behalf of all the members of the class if, among other requirements, “there are questions of law or fact common to the class”).
5. *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990).
7. Today’s corporate defendants can typically expect to be haled into court in many jurisdictions. *See 28 U.S.C. § 1391(c) (1994)*:

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

*Id.* *See also* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (asserting that a state could force a defendant to defend themselves in its jurisdiction if the defendant possessed “sufficient contacts or ties with the state”).
8. *See generally Jenkins*, 782 F.2d at 470. In *Jenkins*, the Court of Appeals for the Fifth Circuit approved a class certification because there were about 5,000 asbestos cases awaiting trial in the circuit. *Id.*
9. *See In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986). In this case, the Third Circuit approved a nationwide class certification, finding that asbestos was present in over
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large class action will solve the controversy and complaints of numerous plaintiffs all at once. There is little logic in having similar witnesses and testimony multiple times to determine the same issue when courts can do it all at one proceeding.\textsuperscript{10}

Class action lawsuits seem to be the easiest and most efficient manner to adjudicate similar claims involving a multiple number of plaintiffs. However, closer examination of the rule and technique reveals limitations and obstacles. To adjudicate a claim as a class action, the class must first establish as a matter of law that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been fulfilled.\textsuperscript{11} The named plaintiff, who was established by the class to represent their interest in the lawsuit, will petition the court for certification of the class.\textsuperscript{12} This is the party who will represent the class not only for purposes of certification, but also for trial or settlement purposes.\textsuperscript{13} The named plaintiff is the only party from the entire class that must satisfy the constitutional and statutory requirements for federal diversity.\textsuperscript{14} However, in diversity cases all the parties in the class, whether named or not, must satisfy the statutory requisite of having more than $75,000 for amount in controversy.\textsuperscript{15} In any event, the class must satisfy all of the requirements of Rule 23.

II. THE REQUIREMENTS OF RULE 23

A highly technical rule, Rule 23 requires class action plaintiffs to satisfy four threshold requirements\textsuperscript{16} and one of three additional

\textsuperscript{10} In re School Asbestos Litig., 789 F.2d at 1001. A report by the Rand Corporation found that the cost involved with individually trying each asbestos case was substantially higher than the compensation that would be paid out. Id.

\textsuperscript{11} Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996).

\textsuperscript{12} United States Parole Commrs v. Geraghty, 445 U.S. 388, 389-90 (1980); Fink, supra note 1, at 540-41.

\textsuperscript{13} Fink, supra note 1, at 540-41.

\textsuperscript{14} Id. at 542. The constitutional requirement is only minimal diversity, while the statutory requirement is one of complete diversity. See U.S. CONST. art. III § 2; 28 U.S.C. § 1332 (1994).

\textsuperscript{15} Fink, supra note 1, at 542 (citing Zahn v. International Paper Co. 414 U.S. 291, 301 (1973)). In Zahn, the United States Supreme Court held that every member of a class must have a claim that exceeds the monetary statutory requirement in order to remain in the action. Zahn, 414 U.S. at 301.

\textsuperscript{16} Fed. R. Civ. P. 23(a) states:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the
requirements. The four threshold requirements are found in subsection (a).17

A. Four Requirements of Rule 23(a)

The four requirements under Rule 23(a) are: (1) numerosity; (2) the existence of questions of law or fact common to the class; (3) typicality of claims or defenses; and (4) adequacy of representation.18

The numerosity prerequisite of Rule 23(a)(1) asserts that the class must be “so numerous that joinder of all members is impracticable.”19 Pursuant to Rules 19 and 20 of the Federal Rules of Civil Procedure, joinder is a technique whereby plaintiffs may join together in a lawsuit in which they have a common interest, so as to become actively involved in the litigation.20 However, when the number of plaintiffs run into the hundreds or even thousands, joinder becomes an impossible aggregative procedure.21 Each party in a joinder claim has the right to participate in and direct the litigation strategy.22 Therefore, if a plaintiff class consisted of five hundred plaintiffs, under the rules of joinder, each one could proceed with the trial in a way they individually saw fit. The result could mean a class that has essentially five hundred different trials within it. There simply would be no reasonable way to join that many plaintiffs in a single trial.23

However, unlike the aggregative technique of joinder, a class action has only one party, the named plaintiff, to determine the litigation strategy and procedure.24 Thus, all plaintiffs are joined as claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.
17. Id.
18. Id.
21. See Jenkins, 782 F.2d at 470; In re School Asbestos Litig., 789 F.2d at 1000-01; and Castano, 84 F.3d at 737.
23. See Jenkins, 782 F.2d at 470.
24. FINK, supra note 1, at 540-41 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)).

The theory of Ben-Hur was that members of a class could be bound to the outcome of the action, even though they did not participate in the litigation, because their interests in the common right litigated were indivisible. Therefore, in protecting their own interests, the representative automatically protected the interest of the entire class.

Id. at 541.
a class but the only active party is the named plaintiff, who for all purposes represents the interests of everyone involved in the class. For purposes of litigation, the strategy as to procedure is developed by either the lawyer of the named party, or the named party himself. The other parties in the class action may protect their interest in the litigation by attempting to "opt out" of the class if they do not agree with this strategy.

The second threshold prerequisite of a class action, section 23(a)(2), requires that the actions of the parties must concern "questions of law or fact common to the class." This demand for commonality is not a "high threshold." The rule only requires that the "resolution of the common questions affect all or a substantial number of the class members." By interpreting the commonality requirement broadly, courts demonstrate some willingness to sacrifice strict adherence to procedure in order to gain efficiency by trying large, related mass tort cases together.

The third threshold prerequisite of a class action, the typicality requirement of Rule 23(a)(3), centers on whether the claims asserted by the named plaintiff are representative of the class. Rather than concentrating on questions of law and fact, this provision focuses on the actual claims asserted by the plaintiffs. It also tends to focus not on the strength of the named plaintiff's claim, but rather on its interrelatedness with the various class claims to insure that all of the parties' interests will be adequately protected.

The final prerequisite contained in Rule 23(a)(4), adequacy, determines whether the named plaintiffs and their counsel are sufficiently equipped and competent enough to handle the interests of all members of the class. This takes into consideration the number of members in the class, the amount of money at stake,
B. Three Requirements of Rule 23(b)

Assuming the court finds all four threshold prerequisites satisfied, the plaintiffs must then fulfill one of the three elements of Rule 23(b), which describe different types of actions plaintiffs may pursue in bringing a class action. The first provision of Rule 23(b) has two different subsections, but the plaintiff need only fulfill one of the requirements to bring a class action. The first subsection, 23(b)(1)(A), can only be satisfied if there exists a risk of receiving different judgments in individual lawsuits if no class action is filed. The provision protects against inconsistent standards for the defendant, since one court could rule that conduct was negligent.

35. See Jenkins, 782 F.2d at 472-73 (court estimated that about 5,000 asbestos-related cases were pending in the circuit).

36. Fed. R. Civ. P. 23(b). Under subsection (b) of rule 23, a plaintiff must establish all four prerequisites of (a), and one of the three provisions of (b). It is only after both of these subsections have been satisfied that a court will grant class certification. Id. Rule 23(b) states:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

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

Id.

37. Id.

and another court could assert it was reasonable.\textsuperscript{39}

The plaintiffs may also argue under subsection 23(b)(1)(B) that
the defendant has a "limited fund" and there simply would not be
enough money available to disperse to all claimants if the plaintiffs
brought individual actions.\textsuperscript{40} The risk here is that the first few
plaintiffs who receive an early verdict against the defendant would
recover large sums, leaving the defendant bankrupt and unable to
compensate parties who subsequently file suit.\textsuperscript{41}

If the plaintiffs are unable to satisfy either of the 23(b)(1)
requirements, they may instead argue that the defendant acted in a
manner that was "generally applicable to the class" and that all
parties would request similar equitable relief against the
defendant.\textsuperscript{42} This is subsection (b)(2) of Rule 23, known as the
equitable provision of a class action lawsuit.\textsuperscript{43} It applies only to
plaintiffs requesting injunctive relief for the defendant to refrain
from or perform some type of action.\textsuperscript{44} A cause of action asserting
money damages cannot be upheld under 23(b)(2), because the
provision only applies to requests for injunctive or equitable relief.\textsuperscript{45}

The final option for the plaintiffs to fulfill Rule 23(b) can be
found within subsection (b)(3).\textsuperscript{46} This subsection requires that the
plaintiffs' claims have common questions of law or fact that
"predominate" over separate individual ones, and that a class action
is "superior" to all other methods of adjudication.\textsuperscript{47} In its analysis
of "predominance" and "superiority," a court must take into
consideration four different matters: (1) the interest of individual
control of the claims; (2) the extent that other litigation has already
begun; (3) the benefits of consolidating the matter in one forum;
and (4) the difficulties that may ensue in managing the class

\textsuperscript{39} Id.

\textsuperscript{40} FED. R. CIV. P. 23(b)(1)(B). See also FINK, supra note 1, at 583. Federal courts have
rarely allowed certification of a class under a "limited fund" analysis. Id. Most plaintiff's are
unable to establish that a "limited fund" does exist. Id. See also In re School Asbestos Cases,
789 F.2d at 1003.

\textsuperscript{41} See In Re Asbestos Litig., 134 F.3d 668, 672-73 (5th Cir. 1998).

\textsuperscript{42} FED. R. CIV. P. 23(b)(2).

\textsuperscript{43} In re School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986).

\textsuperscript{44} Id.

\textsuperscript{45} Id. In In re School Asbestos Litig., the court asserted that "an action for money
damages may not be maintained as a Rule 23(b)(2) class action." Id. The provision is used
exclusively as an equitable cause of action. Id.

\textsuperscript{46} FED. R. CIV. P. 23(b)(2).

\textsuperscript{47} Id.
action. Whether a class fulfills the requirements of “predominance” and “superiority” depends on how the court balances those four provisions.

To summarize, plaintiffs must first satisfy all four requirements of Rule 23(a) to maintain a class action lawsuit. The execution of their lawsuit must then comply with one of the three alternative requirements contained within of Rule 23(b). Only then may a district court grant certification of a class for purposes of litigation. This decision is made as a matter of law and is within the court’s complete discretion, although the ruling must reflect the technical framework of the rule.

III. PROBLEMS WITH CLASS ACTION LAWSUITS

This section deals with three significant problems that arise under the current system of class action lawsuits: the inconsistency in plaintiffs’ opt out rights, the difficulty in determining which forum’s laws apply, and the failed attempts to provide uniformity in the law by creating a federal common law for mass tort case.

A. Inconsistency in Plaintiffs’ Opt Out Rights Depending On Which Provision of Rule 23(b) the Class Action is Based

An area where the three provisions of Rule 23(b) contain a certain amount of inconsistency is in the right of class members to “opt out” of the class. Opt out rights give class members the opportunity to withdraw from the class at any time they feel their individual rights are not properly represented. Class members opt out as a result of a grievance with decisions made regarding the


49. Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986). The Fifth Circuit held that in order to “predominate, common issues must constitute a significant part of the individual cases.” Id. The court also ruled that the superiority test mandated that a class action must be so superior that it must be used to the exclusion of all other mechanisms of adjudications. Id. at 473.

50. In re School Asbestos Litig., 789 F.2d at 1011.

51. Id. at 1011. In the School Asbestos Litig., the Third Circuit ruled that the district court is given “wide discretion” in granting class certification. Id.

52. Steven T. O. Cottreau, The Due Process Right to Opt Out of Class Actions, 73 N.Y.U. L. Rev. 480, 484-85 (1998). In the “mandatory” provisions of subsections (b)(1) and (b)(2), Rule 23 does not expressly state the right of a class member to opt out. Id. at 483. In contrast to these provisions, the rule explicitly allows parties to opt out under subsection (b)(3). Id. at 485.

53. Id. at 481.
trial strategy, the amount of monetary recovery at trial, or the possibility of a settlement agreement.\textsuperscript{54}

The advocates of opt out rights rely on the fact that plaintiffs who are not the named representative in a class action have no right to participate at trial.\textsuperscript{55} Although the class members may make suggestions to the named plaintiff’s attorney, they have no control over the strategies used at trial or possible settlement negotiations; those determinations lay primarily within the discretion of the named plaintiff’s attorney.\textsuperscript{56} Thus, opt out rights give the non-named class members the right to leave the class to pursue their own individual lawsuit if they feel their individual rights were not properly represented.\textsuperscript{57} This ability to opt out arises from the class members’ rights of procedural due process under the United States Constitution.\textsuperscript{58}

A close look at Rule 23(b)(1) and (2), however, reveals a clash between what both rules seek to obtain and the existence of opt out rights granted under the Constitution. As previously stated, opt out rights emerge from procedural due process,\textsuperscript{59} which guarantees under the Fourteenth Amendment that the government will not take away a citizen’s rights of life, liberty, or property without due process of law.\textsuperscript{60} In particular, opt out rights seek to restrict the judicial system from holding class members personally accountable for whatever verdict or recovery may ensue at trial.\textsuperscript{61}

Rule 23(b)(1)(A), however, is premised on the idea that individual lawsuits would create “incompatible standards of conduct” for the defendant.\textsuperscript{62} This particular provision protects against courts handing down contrasting rulings against the same defendant. Thus, for a court to have the ability to order a


\textsuperscript{55} FINK, supra note 1, at 540-41. A way class members may protect their interest against the named representative is to opt out of the class. Id. at 559.

\textsuperscript{56} Id.

\textsuperscript{57} Cottreau, supra note 52, at 481.

\textsuperscript{58} Phillips, 472 U.S. at 781-82. In Phillips, the Court ruled:

[If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.]

Id.

\textsuperscript{59} Id.

\textsuperscript{60} U.S. CONST. amend. XIV.

\textsuperscript{61} Cottreau, supra note 52, at 480-82.

\textsuperscript{62} FED. R. CIV. P. 23(b)(1)(A).
defendant to adhere to a single standard of conduct, all the plaintiffs claims must be adjudicated together. If the court allowed individual plaintiffs to opt out of a class to pursue their own lawsuits, the probability of courts ordering a multiple standard of conduct for a single defendant would likely increase.

Rule 23(b)(1)(B) is also based on the existence of a "limited fund" for the plaintiff class. \(^63\) Allowing single plaintiffs to opt out of the class and sue in their individual capacity defeats the entire purpose of having a limited fund class. This would permit independent, single parties to sue individually for large amounts of money, possibly depriving the plaintiffs remaining in the class from recovering any equitable amount. \(^64\)

An action maintained under Rule 23(b)(2) also creates some friction if parties are permitted to opt out of the class. Rule 23(b)(2) is the equity provision that allows a class to be certified if the defendant has acted in a way that makes the same injunctive relief appropriate for the entire class. \(^65\) Allowing separate plaintiffs to opt out to assert their own injunctive relief could cause the defendant to be held to two different standards of conduct that are at complete odds with one another. This is because now that an individual is suing outside the class, there is no guarantee that his injunction will be exactly similar to the one filed by the class. In fact, the lawsuit may be completely at odds with the one filed by the class, thereby forcing the defendant to act in disregard to one of the court rulings.

In contrast to the provisions of subsections (b)(1) and (b)(2), the language of subsection (b)(3) specifically allows for plaintiffs to opt out of the class. \(^66\) Rule 23(c)(2) entitles all plaintiffs to receive notice that they are permitted to opt out of the class before a certain date, such that they can notify the class of their intent to be


\(^{64}\) See In re School Asbestos Litig., 789 F.2d 996, 1003 (3d Cir. 1986).

\(^{65}\) Fed. R. Civ. P. 23(b)(2).

\(^{66}\) Fed. R. Civ. P. 23(c)(2).

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best possible notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

\(Id.\)
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excluded up to and including that date.\(^6\)

In *Phillips Petroleum Co. v. Shutts*,\(^6\) the Supreme Court of the United States addressed the issue of opt out rights in a class action lawsuit.\(^6\) *Phillips* involved a class action lawsuit brought in Kansas state court against Phillips Petroleum Company, a gas producer who leased land in eleven states.\(^7\) The plaintiff class members were royalty owners who owned rights in the land leases, from which Phillips produced the gas.\(^7\) The plaintiff class filed suit in Kansas against Phillips, seeking to recover interest on delayed royalty payments.\(^7\) The named plaintiffs filed suit under the Kansas state version of Rule 23(b)(3) on behalf of 28,000 royalty owners located in all fifty states.\(^7\) The case was not filed in federal court due to a lack of diversity jurisdiction.\(^7\)

The plaintiff class recovered a judgment against Phillips at trial and the defendant appealed, asserting that the Due Process Clause of the Fourteenth Amendment prevented the State of Kansas from obtaining jurisdiction to adjudicate the claims of the plaintiffs.\(^7\) The Supreme Court of Kansas affirmed the decision of the trial court, and the United States Supreme Court granted certiorari.\(^7\)

Phillips contended on appeal that Kansas did not have the requisite personal jurisdiction over the plaintiffs who were not affiliated with Kansas, as required by the United States Supreme Court in *International Shoe Co. v. Washington*.\(^7\) Phillips claimed that the opt out notice given to each plaintiff, which required each

\(^6\) Id.
\(^6\) 472 U.S. 797 (1985).
\(^6\) See also Cottreau, supra note 52, at 492.
\(^7\) Phillips, 472 U.S. at 799.
\(^7\) Id.
\(^7\) Id.
\(^7\) See KAN. STAT. ANN. § 60-223(b)(3) (West 1994). All rights were discretionary under the Kansas class action rule. Id.

\(^7\) See 28 U.S.C. § 1332 (a) (1994). In diversity cases, all parties in the class must satisfy the requisite $75,000 for amount in controversy . In *Phillips*, the Court claimed each individual claim averaged about one hundred dollars. Phillips, 472 U.S. at 809.

\(^7\) Phillips, 472 U.S. at 802. The defendant asserted that forcing the plaintiffs to return their opt out notice requesting exclusion was insufficient to bind class members with no "minimum contacts" to the state of Kansas. Id. See also *International Shoe v. Washington*, 326 U.S. 310 (1945).

\(^7\) Phillips, 472 U.S. at 803. "The Supreme Court of Kansas held the entire cause of action was maintainable under the Kansas class-action statute . . . ." Id.

\(^7\) Id. at 803-04. See also *International Shoe*, 326 U.S. 310, 320 (1945) (holding that if the defendant possessed certain minimum contacts with the state, so that it was "reasonable and just, according to our traditional conception of fair play and substantial justice for a State to exercise personal jurisdiction," the State could force the defendant to defend himself in the forum).
class member who wished to be excluded to return a request stating their wish to be excluded from the class, was insufficient to gain jurisdiction on residents outside of Kansas who did not possess "minimum contacts" with the state. The defendant Phillips was contending, in effect, that the plaintiffs' due process rights were being violated by the notice procedure given by the class. Phillips argued that each individual plaintiff must affirmatively request inclusion into the class before the state could obtain jurisdiction.

The defendant Phillips was contending, in effect, that the plaintiffs' due process rights were being violated by the notice procedure given by the class. Phillips argued that each individual plaintiff must affirmatively request inclusion into the class before the state could obtain jurisdiction.

The United States Supreme Court ruled in favor of the opt out procedure implemented by the plaintiff class and the Kansas state court. The Court asserted that notice sent to each member of the class via first class mail, which fully described the right to opt out, satisfied due process and automatically included the individual in the class action. The court reasoned that if each plaintiff were required to affirmatively request inclusion into the class on his own behalf, it would impede the progress of class action lawsuits such as this one, where the individual actions were small. Further, it would be much easier for an individual plaintiff, who has a small interest in the litigation, to receive notice and be automatically included in the class, than to be required to fill out a form for inclusion in the class. Also, a particular plaintiff may be unfamiliar with the law at issue, or simply not want to bother filling out a form in order to recover a nominal amount of money.

In response to the argument concerning International Shoe, the Court asserted that the purpose of the test articulated in that case was to protect a defendant from the hassle of defending in a distant forum. The Court reasoned that the burdens placed on a defendant litigating in a distant forum are not the same as those placed on a plaintiff in a class action lawsuit.

The Court also cited the case of Hansberry v. Lee, which ruled

78. Phillips, 472 U.S. at 806.
79. Id. Phillips contended that, in order to satisfy due process, each plaintiff must affirmatively opt in. Id. at 811.
80. Id.
81. Id. at 812.
82. Id.
84. Phillips, 472 U.S. at 813.
85. Id. at 807. See supra note 77 for the International Shoe "minimum contacts" test.
86. Phillips, 472 U.S. at 810-12. The Court asserted that "unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Id. at 810.
that a lawsuit brought by a "class or representative" acted as an exception to the general rule that a state could not obtain personal jurisdiction over someone unless they were made a party "in the traditional sense." Under *Hansberry*, the class action lawsuit is a creation of a court's equity power, which enables a large number of plaintiffs to bring suit when joinder is impossible.

The *Phillips* Court went on to assert that the goals of modern day class actions are analogous to the goals developed in *Hansberry*. Both goals first seek to allow for litigation of common questions of law or fact when the number of plaintiffs far exceeds manageable limits for joinder. Additionally, the goals also create a way to litigate a claim that would be impossible to litigate in the absence of some aggregative technique. In *Phillips*, for example, the average amount of each plaintiff's claim was approximately one-hundred dollars. This amount would not be worth the expense incurred by individual plaintiffs to litigate against a large corporation such as Phillips; however, the availability of trying such a case becomes more viable when thousands of individual claims are pooled together.

Finally, the *Phillips* Court asserted that the dilemma faced by a defendant forced into an out of state forum to litigate a matter would not be an issue for the plaintiff class in this case. The members of the plaintiff class were not forced to appear in an out of state court or suffer a default judgment. In fact, the members

87. *Id.* at 808 (citing *Hansberry* v. Lee, 311 U.S. 32, 40-41 (1940)). *Hansberry* concerned an action brought by a number of plaintiffs to enforce a racially restrictive covenant in Chicago. *Hansberry* v. Lee, 311 U.S. 32, 37 (1940), *distinguished* by *Frank* v. Teachers Ins. and Annuity Ass'n of America, 365 N.E.2d 28, 33-34 (Ill. App. Ct. 1977), *rev'd*, 376 N.E.2d 1377, 1382 (Ill. 1978). In *Frank*, the Illinois Appellate Court overruled an ostensible reading of *Hansberry* that notice of the pendency of a class action is not required of the class representative in fulfilling due process requirements. *Frank*, 365 N.E.2d at 33-34. The court nevertheless held that notice would not be required in the instant case due to the circumstances not requiring it. *Id.* at 41-42. The Illinois Supreme Court reversed this ruling finding that notice was necessary due to a potential conflict of interest between the named plaintiffs and other members of the class. *Frank* v. Teachers Ins. and Annuity Ass'n of America, 376 N.E.2d 1377, 1382 (Ill. 1978).

88. *Hansberry*, 311 U.S. at 41.
90. *Id.*
91. *Id.*
92. *Id.* It should be noted again that in order to certify a class action lawsuit in federal court, each plaintiff in the class must fulfill the $75,000 amount in controversy. 28 U.S.C. § 1332 (1994).
94. *Id.*
of the class who were not the "named representatives" did not even have to appear in a Kansas court, and only stood to gain from the procedure. As plaintiffs, their situation differed completely from that faced by a defendant dragged into a distant forum.95

The United States Supreme Court, therefore, held in Phillips that the opt out procedure implemented to protect members of the plaintiff class satisfied the Due Process Clause of the Fourteenth Amendment.96 The Kansas court protected the interests of absent plaintiffs by sending notices to each, providing for the right to opt out of the class.97 However, it should be noted that the Court limited its ruling to those seeking money damages under nonmandatory subsection (b)(3) type actions:

Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a defendant class.98

In Brown v. Ticor Title Insurance Co.,99 the Ninth Circuit ruled upon the use of opt out rights in "mandatory class action" lawsuits pursuant to Rules 23(b)(1) and (2).100 The case involved a class action initiated by title insurance consumers certified under Rules 23(b)(1) and (2), and was filed in the state of Pennsylvania.101 The suit alleged Ticor violated antitrust laws by participating in state-licensed rating bureaus.102 The class eventually entered into a settlement agreement with Ticor, where the monetary claims were dropped and various claims of injunctive relief granted.103

The Pennsylvania district court considered and rejected various objections made by several members of the plaintiff class regarding

95. Id. at 808.
96. Id. at 812.
97. Id.
98. Phillips, 472 U.S at 811-12 n.3.
99. 982 F.2d 386 (9th Cir. 1992).
100. Brown, 982 F.2d at 386.
101. Id. at 389. The class was consolidated from 12 different class actions in five federal district courts. Id. at 388. The consolidated class was filed in the Eastern District of Pennsylvania as MDL 633 by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. Id.
102. Id. at 388. The class filed a complaint alleging that Ticor was involved in a conspiracy to fix price levels for title search and examination services. Id.
103. Id. at 389.
Brown subsequently filed a similar action in an Arizona district court on behalf of title consumers from Washington and Arizona. Brown asserted after a settlement was reached, that the class' due process rights were violated because class members were not given the opportunity to opt out when dissatisfied with the settlement amount. Ticor moved for dismissal pursuant to the doctrine of res judicata, contending that Brown was a party to the prior settlement, and thereby bound by its terms, which estopped him from implementing a similar lawsuit against Ticor. The district court upheld Ticor's argument and dismissed Brown's case on the basis of res judicata. Brown appealed the decision to the Ninth Circuit Court of Appeals.

Brown argued to the Ninth Circuit that, pursuant to Phillips, "minimal procedural due process must be provided in a class action lawsuit in order 'to bind plaintiffs concerning claims wholly or predominately' for money damages." Brown asserted that the original lawsuit against Ticor predominately concerned money damages that were dropped in the settlement agreement. He argued that a class action must provide opt out rights to all plaintiffs in the class in order to fulfill due process rights, even under the provisions of subsections (b)(1) and (b)(2), which preclude any future recovery of money damages.

The Ninth Circuit agreed with Brown and held that res judicata could not apply to Brown in reference to his failure to recover

104. Id. at 389. The court asserted that the objections were made on behalf of the states by their attorneys general, and not by the individual members of the class. Id.
105. Brown, 982 F.2d at 389-90. Brown's cause of action was similar to that in the MDL 633 litigation, "a combination and conspiracy by Ticor to fix, maintain and stabilize rates in Arizona and Washington for title search and examination services in violation of the federal antitrust laws, codified at 15 U.S.C. § 1." Id.
106. Id. at 392.
107. Id. at 390. As defined by Black's Law Dictionary, res judicata is the "[r]ule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).
109. Id. at 390. The district court granted summary judgment in favor of Ticor relying on res judicata and state immunity action. Id.
110. Id. The Ninth Circuit reviewed the grant of summary judgment under a grant of de novo review. Id.
111. Id. at 392.
112. Id.
113. Brown, 982 F.2d at 392. It should be noted that the class action in the original MDL 633 litigation was certified under the provisions of Rule 23(b)(1) and (b)(2). Id. at 389.
money damages because of an inability to opt out of the class.\textsuperscript{114} However, the Ninth Circuit applied \textit{Phillips} strictly to money damages and not to any equitable or injunctive relief:

[\textit{Phillips}] is limited to claims "wholly or predominately for money judgments." . . . Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damages claims were held barred by res judicata. Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but res judicata will not bar Brown's claims for monetary damages against Ticor.\textsuperscript{115}

Thus, Brown and the plaintiffs he represented would only be allowed to pursue their own lawsuit against Ticor for money damages.\textsuperscript{116} However, the doctrine of res judicata would restrict Brown and the plaintiffs he represented from litigating any further claims against Ticor for injunctive or equitable relief.\textsuperscript{117}

While the Ninth Circuit ruled that plaintiffs are not permitted to opt out of a class action under subsections (b)(1) and (b)(2) when equitable remedies are at stake, the court would allow a plaintiff to opt out if the lawsuit was "predominately" for money damages.\textsuperscript{118} However, the court failed to directly address the issue of whether it would grant opt out rights if the class was certified as a "limited fund class" under subsection (b)(1)(B).\textsuperscript{119} A "limited fund class" is based completely on recovering money damages from a defendant and the language of the Ninth Circuit seems to suggest that a plaintiff in a "limited fund class" could disregard the reasoning behind certification, and pursue an individual lawsuit in defiance of the class.\textsuperscript{120} This is a further demonstration of the inconsistencies of plaintiffs' opt out rights under Rule 23.

\textsuperscript{114} \textit{Id.} at 392.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Brown,} 982 F.2d \textit{at 392.}
\textsuperscript{119} \textit{Id.} This class is premised upon the fact that members should all recover together in order to allow the parties to recover something from the defendant. \textit{Fed. R. Civ. P. 23(b)(1)(B).} "(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." \textit{Id.}
\textsuperscript{120} \textit{Brown,} 982 F.2d \textit{at 392.}
B. The Difficulty In Determining Which Forum's Laws Apply

The next problem to address in class action lawsuits, which law applies when the class is devised of plaintiffs from different states, is commonly known as the "Erie" problem of mass tort class action litigation. The situation involves a multitude of plaintiffs who originally file separate actions in states different than the one state where they later join with similarly situated plaintiffs and file a class action lawsuit.

As long as the "named plaintiff" and defendant satisfy diversity, and each individual plaintiff satisfies the requisite amount in controversy, the class action case is usually filed in federal court pursuant to the federal diversity jurisdiction statute. When the class action is filed in federal court, the doctrine of Erie Railroad Co. v. Tompkins states that the substantive law of the forum state controls and the federal rules of procedure apply. The problem that ensues from the application of the Erie doctrine is twofold. First, most mass tort lawsuits do not concern questions of federal law; therefore, federal court jurisdiction is based on diversity and the forum state's substantive law applies under Erie. It certainly would be more convenient for courts to use an all-encompassing federal law dealing with asbestos or cigarette litigation, but Congress has never passed such a law. This would allow courts to use one law throughout the litigation rather than a number of different state laws. Instead, the various federal courts hearing mass tort cases must apply state law to the various claims. This presents a difficulty because states tend to

121. Fink, supra note 1, at 584.
123. See 28 U.S.C. § 1332 (a) (1994) (stating that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . (1) citizens of different States").
126. Fink, supra note 1, at 584.
127. Erie, 304 U.S. at 78. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." Id.
128. Schuck, supra note 1, at 969. "Still, no jurisdiction has come even close to establishing a comprehensive statutory regime to govern the litigation or compensation of mass tort claims." Id.
129. Weintraub, supra note 122, at 133.
vary in the way they use and apply the law in mass tort issues.\textsuperscript{130} A federal court sitting in Utah could have a jury charge much different than one in Massachusetts.

The second problem with the application of \textit{Erie} to class action mass tort cases is that federal courts are not always free to apply the substantive law of the forum state exclusively.\textsuperscript{131} A description of mass tort cases would best depict the problem. There are currently two types of mass torts.\textsuperscript{132} In one, a single event occurs that injures or harms a great number of people, such as a plane crash.\textsuperscript{133} The second type of mass tort originates from some type of alleged negligence on the part of the defendant that causes injuries over a certain period of time.\textsuperscript{134} Examples of this second type include lawsuits based on exposure to asbestos, defective products, and cigarettes.

Many plaintiffs involved in mass tort actions originally file suit in a jurisdiction different than the location of the class action forum.\textsuperscript{135} This creates a conflict of law problem because the forum court, where the class action is taking place, must apply the choice of law of the state where each plaintiff originally filed, in accordance with \textit{Erie}.\textsuperscript{136} The state where the class action is filed must look back to the original state where each plaintiff filed and apply that state's choice of law to the case.\textsuperscript{137} It is the plaintiff's original forum that will then determine which state's substantive law to use. Thus, because all of the plaintiffs in a particular class

\begin{flushleft}
\textsuperscript{131} Weintraub, supra note 122, at 133-34.
\textsuperscript{132} Id. at 129.
\textsuperscript{133} Id. at 129-130.
\textsuperscript{134} Id. at 129. With both types of mass torts, myriads of plaintiffs have filed complaints against a defendant. Id. For two examples: an explosion at the Union Carbide Gas Plant at Bhopal, India, killed over two thousand people and injured more than two-hundred thousand; and since 1940, more than twenty-one million people have been exposed to asbestos in the United States. See Weintraub, supra note 122, at 129 (citing \textit{In re Union Carbide Corp. Gas Plant disaster at Bhopal, India}, 809 F.2d 195, 197 (2d Cir. 1984).
\textsuperscript{135} Weintraub, supra note 122, at 133.
\textsuperscript{137} Id. It should also be known that a state's conflict of law is considered substantive and thus would control in a federal diversity case. See Klaxon Co. v. Stentor Electric Mfg. Co. Inc., 313 U.S. 487 (1941).
\end{flushleft}
action might have originally filed in different states, the class action forum state must go through this process with each individual plaintiff. The court would have to apply different laws and give different jury instructions for each individual plaintiff in a class which could number into the thousands.

This issue was addressed in Shutts, where the plaintiff class was composed of parties from all fifty states, who filed outside the forum state of Kansas. While the United States Supreme Court granted the Kansas trial court personal jurisdiction over all these plaintiffs, it did not allow the court to apply Kansas law to all parties. The Court clearly asserted that the issue of personal jurisdiction was completely distinct from the question of which state's choice of law to apply for each plaintiff's claim. Ultimately, while the Court admitted that Kansas could not apply its own law to all plaintiffs, it could not give any suggestion as to which law should govern the various plaintiffs contained in the class, leaving this for the trial court to decide upon remand.

*In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973,* the conflict of law problem evident in mass tort litigation manifested itself to an even greater extent. The case concerned a Delta aircraft that crashed in Boston Harbor while attempting to take off from Boston's Logan International Airport. The Massachusetts District Court held that claims originally filed in Massachusetts by out of state residents were subject to a wrongful death statutory limit under Massachusetts law, but other claims originally filed in other states were not governed by the same law. Those who originally filed in Massachusetts would have Massachusetts' conflict of law applied in their case, which was "lex loci delicti," the law of the place of the accident. The end result,

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138. Phillips Petroleum Company v. Shutts, 472 U.S. 797, 799 (1985). "Respondents are some 28,000 of the royalty owners possessing rights to the leases from which petitioner produced the gas; they reside in all fifty states, the District of Columbia, and several foreign countries." Id.
139. Id. at 820-21.
140. Id. at 821.
141. Id. at 823. The Court declared, "We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in Allstate that in many situations a state court may be free to apply one of several choices of law." Id.
143. *In Re Air Crash Disaster at Boston,* 399 F. Supp. at 1108.
144. Id. at 1107.
145. Id. at 1122.
146. Id. at 1115. The court found that claimants who filed in other states were not
that some out of state residents had their cause of action capped by a Massachusetts statutory damages limitation, depended on whether the plaintiff originally filed in Massachusetts.\textsuperscript{147}

In \textit{In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979},\textsuperscript{148} the difficulty faced by the court in trying to analyze which substantive law to apply became readily apparent.\textsuperscript{149} The case concerned a multidistrict litigation lawsuit that arose after a plane crashed shortly after taking off from Chicago’s O’Hare International Airport.\textsuperscript{150} All 271 persons aboard the plane were killed, along with two people on the ground.\textsuperscript{151} Wrongful death lawsuits were originally filed in Illinois, California, New York, Michigan, Hawaii, and Puerto Rico by citizens domiciled in ten states and four foreign countries.\textsuperscript{152}

In analyzing the issue of punitive damages, the Seventh Circuit was forced to review each individual plaintiff’s original forum state’s choice of law, and then decide which state’s substantive law would control.\textsuperscript{153} For example, the Illinois conflict of law contained a “most significant relationship” test, meaning the state with the most significant relationship to the accident with regard to punitive damages would control the substantive law for that particular issue.\textsuperscript{154} Usually under this test the law of the state where the accident occurred would govern, unless another state somehow had a “more significant relationship.”\textsuperscript{155}

In the instant case, however, there were other states that arguably had a more significant relationship to the accident than Illinois.\textsuperscript{156} The corporate defendants in the case, McDonnell Douglas Corporation (“MDC”) and American Airlines, were incorporated in Maryland and Missouri respectfully.\textsuperscript{157} MDC also had its principal governed by Massachusetts substantive law because the states’ conflict of laws applied their own substantive law. \textsuperscript{Id. at 1108-20.} The states included Vermont, New Hampshire, Florida, and New York. \textit{Id.}

\textsuperscript{147} \textit{Id. at 1114.} The Massachusetts statute placed a $200,000 ceiling on all wrongful death lawsuits. \textit{Id.}

\textsuperscript{148} 644 F.2d 594 (7th Cir. 1981).

\textsuperscript{149} \textit{In re Air Crash Disaster Near Chicago,} 644 F.2d at 604.

\textsuperscript{150} \textit{Id. “The cases were transferred to the Northern District of Illinois for pretrial purposes by the Judicial Panel on Multidistrict Litigation.” Id. at 604 n.1. See 28 U.S.C. § 1407 (1994).}

\textsuperscript{151} \textit{In re Air Crash Disaster Near Chicago,} 644 F.2d. at 604.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id. at 605.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id. at 611.}

\textsuperscript{156} \textit{In re Air Crash Disaster Near Chicago,} 644 F.2d. at 613.

\textsuperscript{157} \textit{Id. at 604.}
place of business in Maryland, while American's was in Texas.\textsuperscript{158} Additionally, MDC's alleged negligence in designing of the plane occurred in California.\textsuperscript{159} Thus, the Seventh Circuit had to decide which of these states had the most significant contact with the accident, and whether that particular state's substantive law allowed punitive damages.

While a court's ruling as to which state's substantive law to apply seems extremely confusing, one must remember as well that in this example the court is only determining the punitive damages issue for a plaintiff who had originally filed in Illinois. The court must additionally go through this analysis not just for every plaintiff, but also for every issue. This is why in their concluding opinion, the Seventh Circuit asserted:

\begin{quote}
Along with the district court, we conclude that it is clearly in the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments, that airline tort liability be regulated by federal law. Of course, we are well aware of the fact that it is up to Congress, and not the courts, to create the needed uniform law.\textsuperscript{160}
\end{quote}

Unfortunately, the attempts to create such uniform law have failed.

C. Failed Attempts To Create Federal Common Law For Mass Tort Cases

The idea suggested by the Seventh Circuit, to have Congress create federal common law, at least as to airline mass tort, is not a novel idea. Various judges and parties around the country have continuously tried to persuade either Congress or the courts to create some type of federal common law to apply to the area of mass tort.\textsuperscript{161} Recognizing the difficulty associated with conflict of laws, the large number of plaintiffs involved in class actions, and the numerous forums many of the parties originally file suit in, the need for federal common law could not be more clear. Unfortunately, with the absence of any congressional action in this area, courts have similarly been unwilling to lend any support, other than to continue applying state conflict and substantive

\begin{footnotes}
\item[158] Id.
\item[159] Id.
\item[160] Id. at 632-633.
\item[161] See In re Agent Orange Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980); Fink, supra note 1, at 586; and Schuck, supra note 1 at 969-70.
\end{footnotes}
One case in which the members of a class attempted to persuade a court to apply federal common law was *In re Agent Orange Product Liability Litigation*. This litigation started in the late 1970's when Vietnam War veterans commenced actions against the government for injuries sustained as a result of exposure during the war to Agent Orange.

In *Agent Orange*, the plaintiffs argued that federal common law should control the substantive law of the case "because of the unique federal nature of the relationship between the soldier and his government." The plaintiffs cited to *Clearfield Trust Co. v. United States* to support their argument that governmental interest would place the case within the jurisdiction of federal common law. In *Clearfield Trust*, the United States Supreme Court held that "the rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." In their attempt to draw an analogy between the government interest argument in *Clearfield Trust* and their own case, the plaintiffs contended that the government also had an interest in seeing that veterans would be compensated by the governmental contractor who manufactured Agent Orange for any injury sustained from its use. Additionally, the plaintiffs claimed that, due to differences in state law, any application of state law would impair the ability of all the plaintiffs to uniformly recover damages.

The Second Circuit analyzed this issue by referring to a related ruling handed down by the United States Supreme Court in *Wallis v. Pan American Corp.*: "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is

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162. Schuck, *supra* note 1, at 969.
163. 635 F.2d 987 (2d Cir. 1980).
164. *In re Agent Orange*, 635 F.2d at 988-89. Agent Orange was a chemical defoliant manufactured by the defendant chemical companies and supplied to the United States government for use by the United States military in Vietnam. *Id.* at 988.
165. *Id.* at 990 (citing United States v. Standard Oil, 332 U.S. 301 (1947)). In *Standard Oil*, the Court declared, "Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of the armed forces." *Standard Oil*, 332 U.S. at 305.
166. *In re Agent Orange*, 635 F.2d. at 990 (citing Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)).
168. *In re Agent Orange*, 635 F.2d at 990.
169. *Id.* at 990.
that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown . . . ."\textsuperscript{171}

After applying this principle to the facts at hand, the Second Circuit ruled that the United States was not a party to the litigation.\textsuperscript{172} The plaintiffs brought a claim against private manufacturers who supplied Agent Orange to the government, and since the government was not directly involved in the manufacture or development of Agent Orange, the litigation at issue here was between private parties.\textsuperscript{173} The Second Circuit asserted that there was no substantial governmental rights or duties contingent on the outcome of the trial.\textsuperscript{174} As a result, the Second Circuit concluded that no federal policy existed to justify the creation of some type of federal common law.\textsuperscript{175} In its concluding paragraph, the Second Circuit clarified its holding by declaring that "before federal common law rules should be fashioned, the use of state law must pose a threat to an identifiable federal policy."\textsuperscript{176} The court asserted that no identifiable federal policy existed that posed a threat, since the litigation took place between private parties with no manifest governmental interest.\textsuperscript{177}

An interesting judicial attempt to create federal common law with regard to mass tort litigation occurred on August 10, 1990.\textsuperscript{178} Ten federal judges, all with a large number of asbestos cases overloading their dockets, strove to create a mandatory, nationwide class action.\textsuperscript{179} These ten federal judges sought to send, for purposes of litigation, all asbestos cases to three federal judges: Judge Parker in the Eastern District of Texas, Judge Weinstein in the Eastern District of New York, and Judge Lambros in the Northern District of Ohio.\textsuperscript{180} However, within a week of attempting this arrangement, the Sixth Circuit struck down the order created

\textsuperscript{171} In re Agent Orange Prod., 635 F.2d 987, 993 (2d Cir. 1980) (citing Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).
\textsuperscript{172} Id. at 993-94. "These claims are brought by former servicemen and their families against private manufacturers; they are not asserted by or against the United States, and they do not directly implicate the rights and duties of the United States." Id. at 993.
\textsuperscript{173} Id. at 993.
\textsuperscript{174} Id. at 993. The fact that various applications of state law could produce differing results for the plaintiffs could not sway the court. Id. at 991-92.
\textsuperscript{175} Id. at 994-95.
\textsuperscript{176} In re Agent Orange, 635 F.2d at 995.
\textsuperscript{177} Id.
\textsuperscript{178} FINK, supra note 1, at 586.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
by the federal judges.\textsuperscript{181}

In issuing this order, the federal judges were trying to alert Congress to an alarming problem developing in the federal court system.\textsuperscript{182} In 1990, the year in which the ten judges attempted this nationwide class action, there were more than thirty thousand asbestos cases awaiting litigation in federal courts across the country.\textsuperscript{183} There is little doubt that the judges' attempt to create a novel brand of class action was a desperate action to avoid judicial paralysis.

Congress has effectively ignored this crisis by failing to enact any comprehensive federal mass tort law.\textsuperscript{184} The fact that such legislation would be extremely controversial is one explanation for congressional inaction.\textsuperscript{185} A federal mass tort law would involve large amounts of money, human suffering, and values, which could be at odds with each other.\textsuperscript{186} Regardless of how controversial the legislation would be, however, Congress cannot continue to avoid an issue that strikes at the heart of our judicial system. Historically, there have been many issues in the past that Congress has addressed that one would argue are substantially more controversial than mass tort law.\textsuperscript{187} Additionally, the idea that Congress is satisfied with the present system cannot be perceived as a reasonable explanation.\textsuperscript{188} Almost all politicians who publicly address the issue comment that the present system is in a state of crisis.\textsuperscript{189}

IV. Recommendation For Improving The Class Action Mass Tort System: A Return To Swift

A possible solution to the present dilemma of mass tort law, without requiring congressional action, could be found if the courts

181. Id.
182. Id. at 587.
183. PINK, supra note 1, at 587.
184. Schuck, supra note 1, at 970.
185. Id.
186. Id. One example of Congressional action that turned out to be disastrous was the black lung program. Id. The program involved "arbitrary, unscientific use of presumptions which vastly increased the amount of compensation paid." Id. at 969 n.124.
187. Id. Such issues would include gun control, abortion, taxation, affirmative action, and health care reform. Id. These are issues Congress regularly takes public positions on. Id.
188. Id.
189. Schuck, supra note 1, at 970. "Virtually all politicians (and judges) who comment on the mass torts system perceive a crisis and assert that there are better ways to handle mass tort claims . . . ." Id.
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returned to the pre-Erie analysis of Swift v. Tyson. In Swift, the United States Supreme Court interpreted the Rules of Decision Act, which stated that federal courts must apply the "law of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." Swift dealt with the issue of whether the words "laws of the several states" referred to common law or statutory law.

The Swift Court ruled that federal courts were bound only to state law that had been articulated through the use of federal or state constitutions, statutes, or local matters such as real estate. In all other legal affairs, federal courts were free to apply their own common law, regardless of how state courts handled the issue.

The opinion in Swift was in part, a reaction to a prevalent movement during the 1840's, pushing for a "codification of the laws." The movement strove to "simplify the law" and make it more understandable to "the common man." Writing for the majority of the Court, Justice Story's extraordinarily articulate opinion stressed the need for "one law for one world." Unlike any time before, today's world utilizes technology that allows us to be in touch with the entire world within seconds. A myriad of international business and communications places many of our nations in constant interaction through the use of e-mail, computers, and similar technology. Implementing one law could create a clear understanding of the law for many nations in conducting international business and communications abroad.

A movement by the courts to return to Swift would create a

190. 41 U.S. 1 (1842).
191. Swift, 41 U.S. at 17-18. See The Rules of Decision Act, 28 U.S.C. § 1652 (1948) (originally enacted as section 34 of the Judiciary Act of 1789): "The laws of the several states, except where the Constitution or treaties or statutes of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
192. Id.
193. Id.
194. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to the rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.
195. Id.
196. Id.
197. Swift, 41 U.S. at 18.
uniform way to handle the complexities associated with mass tort law. Federal courts would be permitted to create their own common law in the area of mass tort, which could then act as precedent, for this overly-complicated area. This would completely avoid the difficulties of applying state law with its accompanying Erie conflict of law problems.

V. THE SUPREME COURT'S RELUCTANCE TO LOOSEN THE RULE 23 REQUIREMENTS

In their most recent case mass tort class action case, however, the United States Supreme Court showed a complete reluctance to use any such inventiveness to certify a class. In *Amchem Products, Inc. v. Windsor*, the Court invalidated a district court's recent creation, called a "settlement class," to handle mass tort litigation. A settlement class is a class that has been certified by the court for the sole purpose of settling the lawsuit outside of court. The United States Supreme Court rejected this approach and halted a growing tendency by district courts to certify classes joined only for settlement purposes.

The class in *Amchem* included millions of claimants who have incurred harm by asbestos exposure manufactured by any of twenty defendant companies. The class was certified by the United States District Court for the Eastern District of Pennsylvania, under Rule 23(b)(3) as a case that would never be litigated, but rather was certified for the purpose of settlement. The district court found that the settlement proposal was fair, and that representation of and notice by the named plaintiff was adequate. Further, the court prohibited other members of the class from individually pursuing their own lawsuit subsequent to the final order of the settlement. The Court of Appeals for the Third Circuit disagreed and vacated the order by the district court, ruling that the certification failed to satisfy the requirements of Rule 23(b)(3). Specifically, the Third Circuit ruled that the

201. *Amchem*, 521 U.S. at 597.
202. *Id.* When a class is certified as one for settlement, the assumption of the court and parties involved is that the action will not be litigated by the class. *Id.* at 601.
203. *Id.*
204. *Id.*
205. *Id.* See supra notes 36-49 and accompanying text for a discussion of Rule 23(b).
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requirement of Rule 23(b)(3) that common questions of law “predominate over” all other questions was insufficiently established by the plaintiff class. Although the class was asserting harms from exposure to asbestos, there were many uncommon questions as to the degree of these harms. Additionally, the Third Circuit reached the legal conclusion that the requirements for Rule 23(b)(3) must be met “without taking into account the settlement.”

While the United States Supreme Court granted certiorari in 1997 and affirmed the Third Circuit’s ruling, the Court began its analysis by clearly asserting that the legal conclusion reached by the Third Circuit was erroneous. In contrast with the Third Circuit ruling, the Supreme Court declared that it was permissible for a court to consider the existence of a settlement when faced with the decision of whether to certify a settlement class. However, the Court clarified that, pursuant to Rule 23(e):

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The Court first analyzed the class in accordance with the predominance requirement under Rule 23(b)(3). The Court asserted that this requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” The mere fact that there was a common interest for a fair settlement among the class members, or that they had all been exposed to asbestos at one time, was not enough to satisfy this provision. The predominance requirement is much more

206. Amchem, 521 U.S at 609.
207. Id.
209. Amchem, 521 U.S. at 619. The Court agreed with the petitioner that settlement was relevant to a class certification. Id. The Third Circuit’s opinion declared that the requirements of Rules 23(a) and 23(b) had to be satisfied regardless of whether there was a settlement. Id.
210. Id. at 620. This eliminates the need for a court to inquire into the management problems a class may face if the case went to trial, because the court already knows the class was brought together only for purposes of settlement. Id.
211. Id. at 620-21 (citing Fed. Civ. R. P. 23(e)). The provision was designed as an additional requirement of Rule 23, not one that superseded all other requirements. Id. at 621.
212. Id. at 622.
213. Id. at 623.
demanding than the already fulfilled prerequisite of commonality found in subsection (a)(2). As the Third Circuit in *Amchem* highlighted, there were simply too many disparities within the class, which precluded it from certification as a class where common questions of law and fact predominated.

The Supreme Court also asserted that the class lacked the requisite amount of representation required by subsection (a)(4). The test that must be satisfied under this provision is that the named plaintiff "will fairly and adequately protect the interests of the class." The Court ruled that the named representative must be part of the same interest and suffer the same injury as all other parties in the class. The settlement class at issue had conflicts between those parties who had only been exposed to asbestos in the past, and others that were currently suffering injury from that exposure. The settlement included no adjustment for inflation, which worked against the interests of exposure to plaintiffs who might become ill at a later time.

Finally, the Court addressed the failure of the settlement class to notify future plaintiffs whose illness might not become manifest until a later date. These plaintiffs would also be bound to the settlement agreement without even knowing at the time that they had been exposed to asbestos. Because they failed to receive any notice, future plaintiffs could not make an informed decision as to whether to opt out of the class. For all these reasons, the Court held that the class certification failed to meet the exacting

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215. O'Leary, supra note 200, at 473.
Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffered no physical injury or had only asymptomatic pleural changes, while others suffered from lung cancer, disabling asbestosis, or from mesotheliom. Each had a different history of cigarette smoking, a factor that complicated the causation inquiry. *Id.*
217. *Id.* "Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties will fairly and adequately protect the interests of the class." *Id.* at 625.
218. FED. R. CIV. P. 23(a)(4).
220. *Id.* at 626.
221. *Id.* at 627. The Court also mentioned that the settlement included only a few claimants a year that could opt out, and loss of consortium claims were terminated. *Id.*
222. *Id.* at 628.
223. *Id.*
requirements of Rule 23.225

CONCLUSION

Today's legal system is struggling to find a way to figuratively get all the plaintiffs in a class action mass tort case in the same court room. The efficiency benefits of class action litigation are heavily burdened by the inconsistencies in the plaintiffs' ability to opt out of the class, the extreme difficulty in determining which forum's laws apply to any particular issue, and the failure to create a federal common law for mass tort cases. Unfortunately, because of congressional inaction and the Supreme Court's strict adherence to the requirements for a settlement class, the answer to this puzzle remains elusive. In the years to come, the judicial system will struggle with the Supreme Court's decision in Amchem. The Amchem ruling severely restricted compromise in an area that, as shown by this comment, places tremendous obstacles in the plaintiff's path to trial.

As we prepare for the new millennium, nothing suggests a slowdown in technology. Continued technological growth will spawn an increase in the amount of contact that corporations will have with ever-larger numbers of people around the world. Unfortunately, our current system of justice offers no adequate procedures to allow a large number of claimants to keep such a corporation in check by efficiently bringing a class action suit together. It's time to loosen the hyper-technical constraints of Rule 23 and the Erie doctrine, and allow class action suits to move forward.

Scott A. Harford

225. Id. at 629.