Part II

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20. Multiple Jurisdiction Litigation

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Multiplication of cases within the federal system or across the federal and state systems is a common characteristic of complex litigation. Multiple claims may be aggregated in a single class action if the prerequisites of Federal Rule of Civil Procedure 23 are met. Frequently, though, separate lawsuits asserting similar claims are initiated; multiple, overlapping class actions are filed in federal and state courts; or class members opt out to file their own cases. Occasionally, peripheral claims in complex litigation will lead to multiple cases, as in the case of insurance coverage litigation or reactive litigation motivated by forum preferences. Control over the proliferation of cases and coordination of multiple claims is crucial to effective management of complex litigation. When the limitations of federal jurisdiction preclude such control, voluntary means may be available to achieve coordination and thereby reduce duplicative activity, minimize the risks of conflict, and avoid unnecessary expense.

The most powerful device for aggregating multiple litigation pending in federal and state courts—the bankruptcy law[636]—is, except for the mass tort context, beyond the scope of this manual. Where related adversary proceedings are pending in bankruptcy court, however, the bankruptcy judge should consider having them reassigned, at least tentatively, to the district judge handling related litigation.[637] When related bankruptcy reorganization pro-

636. *See* A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986). *See generally* section 22.5.
637. *See generally* section 22.54.

ceedings are pending in different districts, judges should consider methods of consolidating those proceedings before a single judge.[638]

20.1 Related Federal Civil Cases

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20.11 Cases in Same Court

All related civil cases pending in the same court should initially be assigned to a single judge to determine whether consolidation, or at least coordination of pretrial proceedings, is feasible and is likely to reduce conflicts and duplication (see section 10.12). If the cases appear to involve common questions of law or fact, and consolidation may tend to reduce cost and delay, the cases may be consolidated under Federal Rule of Civil Procedure 42(a) (see section 11.631). Cases pending in different divisions of the court may be transferred upon request under 28 U.S.C. § 1404(b). Cases should not be consolidated if it would result in increased delay and other unnecessary burdens on parties, such as having to participate in discovery irrelevant to their cases.[639]

At the initial conference, consider whether cases should be coordinated or consolidated for pretrial proceedings or for all purposes even if the final decision must be deferred pending the development of additional information. When cases are coordinated or consolidated, the court should enter an order establishing a master file for the litigation in the clerk's office, relieving the parties from multiple filings of the same pleadings, motions, notices, orders, and discovery materials, and providing that documents need not be filed separately in an individual case file unless uniquely applicable to that particular case.

638. *See* Order of Chief Judge Edward H. Becker, Designation of a District Judge for Service in Another District Within the Circuit (3d Cir. Nov. 27, 2001). The order was based on authority granted the chief judge in 28 U.S.C. § 292(b), which permits such reassignments "in the public interest."

639. *In re* Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993).

20.12 Cases in Different Federal Courts

Related cases pending in different federal courts may be consolidated in a single district by a transfer of venue. Under 28 U.S.C. § 1404(a), the court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought."[640] Plaintiffs' choice of forum is, however, entitled to substantial deference.[641]

20.13 Multidistrict Transfers Under Section 1407

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The Judicial Panel on Multidistrict Litigation ("the Panel") is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon the Panel's determination that transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."[642] The Panel's authority is not subject to venue restrictions[643]—it extends to most civil actions[644] and, with one statutory exception, only to transfer for pretrial proceedings (as of December 2003).[645]

20.131 Requests for Transfer

Transfer proceedings may be initiated by one of the parties or by the Panel itself, although the latter procedure is ordinarily used only for "tag-along" cases (transfer on the request of a person not a party in one or more of the

640. For the implications of the phrase "where it might have been brought," see *infra* note 649.

641. *See* Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947).

642. 28 U.S.C. § 1407 (West 2003).

643. *In re* N.Y. City Mun. Sec. Litig., 572 F.2d 49 (2d Cir. 1978).

644. Antitrust actions brought by the United States are exempt from the Panel's power, 28 U.S.C. § 1407(g) (West 2002), as are injunctive actions instituted by the Securities and Exchange Commission unless the SEC consents to consolidation, 15 U.S.C. § 78u(g) (2000).

645. *See infra* section 20.132 and text accompanying notes 666–71. *Parens patriae* antitrust actions brought by states under 15 U.S.C. § 15c(a)(1) may be transferred by the Panel for both pretrial and trial. 28 U.S.C. § 1407(h) (West 2002). The Panel can also designate the circuit court to hear appeals of federal agency rulings in certain instances in which petitions for review have been filed in multiple circuits. *Id*. § 2112(a)(3).

cases).[646] The Panel evaluates each group of cases proposed for multidistrict treatment on the cases' own facts in light of the statutory criteria. The objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts.[647] As few as two cases may warrant multidistrict treatment,[648] although those advocating transfer bear a heavy burden of persuasion when there are only a few actions, particularly those involving the same parties and counsel.[649]

Occasionally, only certain claims in an action are related to multidistrict proceedings, or an action contains claims relating to more than one multidistrict docket (e.g., a plaintiff suing its broker over purchases of stock in two different companies, each of which is the subject of a separate multidistrict docket). Section 1407(a) authorizes the Panel to transfer only "civil actions," not claims; however, section 1407(a) also empowers the Panel to accomplish "partial" transfer by (1) transferring an action in its entirety to the transferee district, and (2) simultaneously remanding to the transferor district any claims for which transfer was not deemed appropriate, such as cross-claims, counterclaims, or third-party claims. If the "new" action containing the remanded claim in the transferor district is also appropriate for inclusion in a second transferee docket, the process can proceed one step further with simultaneous retransfer to the second docket's transferee district.

A transfer under section 1407 becomes effective when the order granting the transfer is filed in the office of the clerk of the transferee court. At that point, the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction.[650] During the pendency of a motion (or show cause order) for transfer, however, the court in which the action was filed retains jurisdiction over the case.[651]

The transferor court should not automatically stay discovery; it needs to consider provisions in local rules that may mandate early commencement of discovery, and an order modifying such provisions' impact on the litigation may be necessary. Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings. When notified of

646. The Panel may order transfer on the request of a person not a party in one or more of the cases. *See, e.g., In re* Equity Funding Corp. Sec. Litig., 375 F. Supp. 1379, 1390 n.4 (J.P.M.L. 1974).

647. *See In re* Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.L. 1968).

648. *See, e.g., In re* Clark Oil & Ref. Corp. Antitrust Litig., 364 F. Supp. 458 (J.P.M.L. 1973).

649. *See, e.g., In re* Scotch Whiskey, 299 F. Supp. 543 (J.P.M.L. 1969).

650. *In re Plumbing Fixture*, 298 F. Supp. 484. Unless altered by the transferee court, orders entered by the transferor court remain in effect.

651. J.P.M.L. R.P. 1.5; *In re* Four Seasons Sec. Laws Litig., 362 F. Supp. 574 (J.P.M.L. 1973).

the filing of a motion for transfer,[652] therefore, matters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer. The Panel has sometimes delayed ruling on transfer to permit the court in which the case is pending to decide critical, fully briefed and argued motions. At the same time, it may be advisable to defer certain matters until the Panel has the opportunity to rule on transfer. For example, there would be little purpose in entering a scheduling order while a conditional order of transfer is pending. The court should, however, modify any previously scheduled dates for pretrial proceedings or trial as may be necessary to avoid giving the Panel a misleading picture of the status of the case.

More often, however, the Panel has held that the pendency of potentially dispositive motions is not an impediment to transfer of actions, because such motions can be addressed to the transferee judge for resolution after transfer. Furthermore, the pendency of motions raising questions common to related actions can itself be an additional justification for transfer.[653]

The Panel uses no single factor to select the transferee district,[654] but the Panel does consider where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges. Based on these factors, the Panel will designate a judge (on rare occasions, two judges) to whom the cases are then transferred for pretrial proceedings. The judge is usually a member of the transferee court, but occasionally the Panel selects a judge designated to sit specially in the transferee district on an intracircuit or intercircuit assignment.

20.132 During Period of Transfer

After the transfer, the transferee judge[655] exercises not only the judicial powers in the transferee district but also "the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings."[656] The Panel has no authority to direct transferee judges in the exercise of their powers and discretion in supervising multidis-

652. A copy of the motion is to be filed with the court where the action is pending. *See* J.P.M.L. R.P. 5.12(c).

653. *See, e.g., In re* Ivy, 901 F.2d 7, 9 (2d Cir. 1990).

654. *See* Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214–215 (1977).

655. *In re Plumbing Fixture*, 298 F. Supp. at 489.

656. 28 U.S.C. § 1407(b) (West 2003).

trict proceedings.[657] This supervisory power over depositions in other districts may be exercised in person or by telephone.[658] The transferee judge may vacate or modify any order of a transferor court, including protective orders;[659] unless altered, however, the transferor court's orders remain in effect.[660]

Although the transferee judge has no jurisdiction to conduct a trial in cases transferred solely for pretrial proceedings, the judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees.[661] Complexities may arise where the rulings turn on questions of substantive law. In diversity cases, the law of the transferor district follows the case to the transferee district.[662] Where the claim or defense arises under federal law, however, the transferee judge should consider whether to apply the law of the transferee circuit or that of the transferor court's circuit,[663] keeping in mind that statutes of limitations may present unique problems.[664] An action is closed by appropriate orders entered in the transferee court, without further involvement by the Panel or the original transferor court.

The transferee judge's management plan for the litigation should include provisions for handling tag-along actions transferred by the Panel after the initial transfer. Panel Rules 7.2(I) and 7.5(e) impose an affirmative obligation on parties in cases in which a motion to transfer is pending, or that previously have been transferred by the Panel, to promptly notify the Panel of any potential tag-along action in which the party is also named. This obligation also is imposed on counsel with respect to any action in which the counsel appears. Ordinarily, it is advisable to order that (1) tag-along actions shall be automatically made part of the centralized proceedings upon transfer to, or filing in, the transferee court; (2) rulings on common issues—for example, on the statute of limitations—shall be deemed to have been made in the tag-along

657. *Id.*

658. *See In re* Corrugated Container Antitrust Litig., 662 F.2d 875 (D.C. Cir. 1981); *In re* Corrugated Container Antitrust Litig., 644 F.2d 70 (2d Cir. 1981); *In re* Corrugated Container Antitrust Litig., 620 F.2d 1086 (5th Cir. 1980).

659. *See, e.g., In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114 (6th Cir. 1981).

660. *See In re* Master Key Antitrust Litig., 320 F. Supp. 1404 (J.P.M.L. 1971).

661. *See, e.g., In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 367–68 (3d Cir. 1993).

662. Van Dusen v. Barrack, 376 U.S. 612 (1964); *In re* Dow Co. "Sarabond" Prods. Liab. Litig., 666 F. Supp. 1466, 1468 (D. Colo. 1987).

663. *Compare In re* Korean Air Lines Disaster, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd on other grounds sub nom.* Chan v. Korean Air Lines Ltd., 490 U.S. 122 (1989), *with* Dow "Sarabond," 666 F. Supp. 1466 (D. Colo. 1987), and cases cited therein.

664. *See, e.g.,* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 406 (2d Cir. 1975).

action without the need for separate motions and orders; and (3) discovery already taken shall be available and usable in the tag-along cases.[665] Consider other means of reducing duplicative discovery activity and expediting later trials by measures such as videotaping key depositions or testimony given in bellwether trials, particularly of expert witnesses, for use at subsequent trials in the transferor courts after remand.

One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases. See section 20.31.

Until 1998, actions based on section 1407 proceedings and not settled or otherwise dismissed in the transferee districts during their pretrial stages often remained in the transferee districts for trial. Transferee judges entered orders effecting transfer for trial, pursuant to 28 U.S.C. § 1404 or 1406, of cases previously transferred to them for pretrial under section 1407.

In 1998, the U.S. Supreme Court held that a district court has no authority to invoke section 1404(a) to assign a transferred case to itself for trial, because section 1407(a) "uncondition[ally]" commands the Panel to remand, at the end of pretrial proceedings, each action transferred by the Panel that has not been terminated in the transferee district.[666] However, the policy reasons for the pre-1998 practice remain: (1) during the often protracted time of the section 1407 assignment, the transferee judge gains a solid understanding of the case, and it makes sense for trial to be conducted by the judge with the greatest understanding of the litigation; (2) the transferee judge may already be trying the constituent centralized action(s), and there may be efficiencies in adjudicating related actions or portions thereof in one trial; and (3) the transferee judge, if empowered to try the centralized actions, may have a greater ability to facilitate a global settlement.

665. For a discussion of the use of supplemental depositions, see *supra* section 11.453. *See also infra* sample order at section 40.29.

666. *In re* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). The Court infers that MDL transferee judges may not use section 1404(a) to transfer to any district at all, neither to a third district or back to the section 1407 transferor district. *Id.* at 41 n.4. By analogy and further inference, an MDL transferee judge likewise now may not transfer under section 1406. *See id.*

Accordingly, evolving alternatives, such as those below, permit the transferee court to resolve multidistrict litigation through trial while remaining faithful to the *Lexecon* limitations:

- Prior to recommending remand, the transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions,[667] or (2) may otherwise promote settlement in the remaining actions.
- Soon after transfer, the plaintiffs in an action transferred for pretrial from another district may seek or be encouraged (1) to dismiss their action and refile the action in the transferee district, provided venue lies there, and the defendant(s) agree, if the ruling can only be accomplished in conjunction with a tolling of the statute of limitations or a waiver of venue objections, or (2) to file an amended complaint asserting venue in the transferee district,[668] or (3) to otherwise consent to remain in the transferee district for trial.[669]

667. *See, e.g., In re* Air Crash Near Cali, Colombia on Dec. 20, 1995, MDL No. 1125, Order No. 1522 (S.D. Fla. Jan. 12, 2000) (noting that parties in some of the actions transferred under section 1407 had agreed to be bound by the results of a consolidated liability trial and had been instructed to file appropriate motions after the completion of the trial, seeking a ruling that effectuated such agreements).

668. Often in multidistrict litigation the transferee court will consider establishing a master file with standard pleadings, motions, and orders. This file may include a single amended consolidated complaint, alleging that venue is proper in the transferee district. If such a document is used, the court and parties should take care to ensure a common understanding of the document's intent and significance—that is, whether it is being used as a device simply to facilitate ease of the docket's administration, or whether the filing in the transferee district constitutes the inception of a new "case or controversy" in that district, thereby superseding and rendering moot the pending separate actions that had been transferred to that district for pretrial proceedings by the Panel under section 1407.

669. *See, e.g.,* State v. Liquid Air Corp. (*In re* Carbon Dioxide Indus. Antitrust Litig.), 229 F.3d 1321 (11th Cir. 2000) (ruling that *Lexecon* does not prohibit parties from waiving venue objections in centralized actions where transferee court otherwise had subject-matter jurisdiction); *In re* Dippin' Dots Patent Litig., MDL No. 1377, Docket No. 1:00-CV-907 (N.D. Ga. July 23, 2001) (transferee court ordered all parties to file a pleading stating whether they consented to trial in the transferee district); *In re* Research Corp. Techs., Inc. Patent Litig., Docket No. 97-2836 (D.N.J. Dec. 3, 1999) (order entering final judgment and staying further pretrial proceedings; transferee court found it reasonable to conclude that final judgment may be entered following trial proceedings consented to by the parties that resulted in termination of the actions).

- After an action has been remanded to the originating transferor court at the end of section 1407 pretrial proceedings, the transferor court could transfer the action,[670] pursuant to 28 U.S.C. § 1404 or 1406, back to the transferee court for trial by the transferee judge.[671]
- The transferee judge could seek an intercircuit or intracircuit assignment pursuant to 28 U.S.C. § 292 or 294 and follow a remanded action, presiding over the trial of that action in that originating district.

20.133 Remand

Section 1407 directs the Panel to remand, after appropriate pretrial proceedings, actions not filed or terminated in the transferee court to the respective transferor courts for further proceedings and trial. When this should be done will depend on the circumstances of the litigation. In some cases, remands have been ordered relatively early, while substantial discovery remained to be done; in others, virtually all discovery had been completed and the cases were ready for trial at the time of remand to the transferor districts. Some of the constituent cases may be remanded, while others are retained for further centralized pretrial proceedings.

The Panel looks to the transferee court to suggest when it should order remand, but that court has no independent authority to order section 1407 remand.[672] The transferee court should consider when remand will best serve the expeditious disposition of the litigation. The Panel may also order remand on its own initiative or on the motion of a party.[673] Although authorized to "separate any claim, cross claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded," the Panel has rejected most requests to exclude portions of a case from transfer

670. *Lexecon*, 523 U.S. at 19.

671. *See, e.g.,* Kenwin Shops, Inc. v. Bank of La., 97 Civ. 907, 1999 WL 294800, at *11 (S.D.N.Y. May 11, 1999). The transferee court might also facilitate such a transfer by expressly recommending it either in its suggestion of remand to the Panel or in its final pretrial order. *See, e.g., In re* Air Crash at Dubrovnik, Croatia on Apr. 3, 1996, MDL No. 1180 (Letter from Alfred V. Covello, Chief Judge, U.S. District Court, D. Conn., to Michael J. Beck, Clerk of the Panel, Judicial Panel on Multidistrict Litigation, suggesting that four remanded cases be transferred back to the court and consolidated for trial (Jan. 4, 2002) (on file with the Judicial Panel on Multidistrict Litigation)).

672. *See In re* Roberts, 178 F.3d 181 (3d Cir. 1999).

673. J.P.M.L. R.P. 7.6(c). Great deference is given to the views of the transferee judge. *See, e.g., In re* IBM Peripheral EDP Devices Antitrust Litig., 407 F. Supp. 254, 256 (J.P.M.L. 1976). Efforts by parties to use the Panel as a substitute for appellate review, by seeking premature remand, have been uniformly rejected.

under section 1407.[674] The transferee court may give such matters individualized treatment if warranted, and the transferee judge (who will develop a greater familiarity with the nuances of the litigation) can suggest remand of claims in any constituent action whenever the judge deems it appropriate.[675] The Panel has further concluded that it has no power to transfer (or sever and remand) particular "issues," as distinguished from particular "claims."[676]

After remand, the transferor court has exclusive jurisdiction, and further proceedings in the transferee court with respect to a remanded case are not authorized absent a new transfer order by the Panel.[677] The transferor court conducts further pretrial proceedings, as needed, and thus all cases remanded to the same court for additional proceedings and trial should be assigned at least initially to a single judge for coordination or consolidation. Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and "law of the case" considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.[678]

The complete pretrial record is sent to the transferor court upon remand of the case. One of the final actions of the transferee court should be a pretrial order that fully chronicles the proceedings, summarizes the rulings that will affect further proceedings, outlines the issues remaining for discovery and trial, and indicates the nature and expected duration of further pretrial proceedings.[679] Transferee courts typically do not provide transferor courts with status reports during the pretrial proceedings, so this order will help the transferor

674. *But see In re* Hotel Tel. Charge Antitrust Litig., 341 F. Supp. 771 (J.P.M.L. 1972); *cf. In re* Midwest Milk Monopolization Litig., 386 F. Supp. 1401 (J.P.M.L. 1975).

675. *See, e.g., In re* Collins, 233 F.3d 809 (3d Cir. 2000), *cert. denied sub nom.* Collins v. MacMillan Bloedel, Inc., 532 U.S. 1066 (2001) (upholding severance of punitive damage claims by the transferee court in actions where the rest of the claims were suggested for remand); *In re* Patenaude, 210 F.3d 135, 143 (3d Cir. 2000) (ruling that the phrase "coordinated or consolidated pretrial proceedings" in section 1407(a) is to be interpreted broadly, here in the context of the transferee judge's wide leeway regarding when to suggest remand).

676. *In re* Plumbing Fixture Case, 298 F. Supp. 484, 489–90 (J.P.M.L. 1968).

677. *See, e.g., In re* The Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 508 F. Supp. 1020 (E.D. Mich. 1981). In unusual circumstances, the Panel has by a new order again transferred a remanded case to the transferee district or transferred it to a new district as part of another multidistrict proceeding.

678. *See* Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).

679. *See In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 1962, 2001 WL 497313 (E.D. Pa. May 9, 2001), *available at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (final pretrial order establishing a process for the remand of transferred cases that have completed the pretrial process).

courts plan further proceedings and trial. Transferee judges have occasionally received intracircuit or intercircuit assignments under 28 U.S.C. §§ 292(b) and 292(d) to preside at trials of cases remanded to the transferor courts.

20.14 Coordination Between Courts

Even when related cases pending in different districts cannot be transferred to a single district, judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts. Coordination requires effective communication between judges and among judges and counsel.

Steps that may be taken include the following:

- *Special assignment of judge.* All cases may be assigned to a single judge designated by the chief justice or the chief circuit judge under 28 U.S.C. §§ 292–294 to sit temporarily in the district where the cases are pending (either within or outside of the assigned judge's own circuit).
- *Lead case.* Counsel in the various cases may agree with the judge to treat one case as the "lead case." The agreement may provide for staying proceedings in the other cases pending resolution of the lead case, or rulings in the lead case may be given presumptive, though not conclusive, effect in the other courts.
- *Joint conferences and orders.* All judges may attend joint hearings or conferences, in person or by telephone. Federal Rule of Civil Procedure 77(b) requires consent of the parties for trials or hearings to be conducted outside the district; consent is not required for other proceedings, such as conferences. The joint proceedings may be followed by joint or parallel orders by the several courts in which the cases are pending.
- *Joint appointments.* The several courts may coordinate the appointment of joint experts under Federal Rule of Evidence 706, or special masters under Federal Rule of Civil Procedure 53, to avoid duplicate activity and inconsistencies. The appointments may help resolve claims of privilege made in a number of cases on similar facts, or where global settlement negotiations are undertaken. The courts may also coordinate in appointing lead or liaison counsel.
- *Avoiding duplicative discovery.* Judges should encourage techniques that coordinate discovery and avoid duplication, such as those discussed in sections 11.423, 11.443, 11.452, and 11.464. Filing or cross-filing deposition notices, interrogatories, and requests for production in related cases will make the product of discovery usable in all cases

and avoid duplicative activity. Relevant discovery already completed should ordinarily be made available to litigants in the other cases.[680] If the material is subject to a protective order, the court usually may accommodate legitimate privacy interests by amending the order to include the new litigants within the order's restrictions,[681] and the party seeking the discovery may be required to bear a portion of the cost incurred in initially obtaining the information. Document production should be coordinated and joint depositories established.[682] The resolution of discovery disputes can also be coordinated to some degree (e.g., by referring them to a single magistrate judge or special master).

- *Clarifying class definitions.* Conflicts between class actions, or between a class action and individual actions, can be avoided by coordinating the drafting of class definitions when actions are certified. See section 20.32.
- *Stays.* In appropriate cases, a judge may order an action stayed pending resolution of a related case in a federal court.

20.2 Related Criminal and Civil Cases

Major management problems arise in concurrent criminal and civil cases involving the same persons. Witnesses may claim a Fifth Amendment privilege in the civil actions, especially if examined prior to final resolution of the criminal proceedings.[683] Serious questions may arise as to requiring an accused, during the pendency of criminal charges, to produce in civil proceedings either adverse (although nonprivileged) evidence or exculpatory evidence to which

680. *See* Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980) ("Where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. . . . Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.").

681. *Id.* at 1301.

682. *See* Fed. R. Civ. P. 26(b)(2) ("The frequency or extent of use of [discovery] . . . shall be limited by the court if it determines that: (i) the discovery is unreasonably . . . duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . .").

683. Termination of the criminal case will not necessarily result in testimony becoming available. *See* Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (witness compelled by grant of "use immunity" to give testimony to grand jury does not waive right to claim Fifth Amendment in subsequent civil litigation).

the prosecution would not be entitled under Federal Rule of Criminal Procedure 16. The criminal proceeding ordinarily has first priority because of the short pretrial period allowed under the Speedy Trial Act[684] and because of the potential impact of a conviction. Even if conviction will not preclude relitigation of issues in a subsequent civil proceeding, it may be admissible in the civil case as substantive evidence of the essential elements of the offense under Federal Rule of Evidence 803(22) or as impeachment evidence under Federal Rule of Evidence 609. Suspending all pretrial activities in civil litigation until the end of the criminal proceeding, however, may be inadvisable, since it may be possible to conduct major portions of the civil case's discovery program without prejudice before completion of the criminal proceedings.[685]

To facilitate coordination, related criminal and civil cases should be assigned, if possible, to the same judge (though, as noted in section 10.12, circumstances may make assignment to the same judge inadvisable). Although the MDL Panel has no authority to transfer criminal cases, it has frequently ordered transfer of civil actions to the location of related criminal proceedings. If the cases are assigned to different judges, the judges should at least communicate and coordinate informally. If grand jury materials from another court are sought, the two-step procedure described in *Douglas Oil Co. of California v. Petrol Stops Northwest*[686] must be followed.

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20.31 Coordination

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Increasingly, complex litigation involves related cases brought in both federal and state courts. Such litigation often involves mass torts (see section

684. The complexity of the case may be a ground for extending the statutory time limits. 18 U.S.C. § 3161(h)(8)(B) (2000). *See infra* section 30.4.

685. *See* Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936); Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967).

686. 441 U.S. 211 (1979).

22.2). Some sets of cases may involve numerous claims arising from a single event, confined to a single locale (such as a plane crash or a hotel fire). Other more-complicated litigations may arise from widespread exposure to harmful products or substances dispersed over time and place.

No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court (see sections 22.32 and 22.33).

State and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation[687] so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation. State judges, for example, can bring additional resources that might enable an MDL transferee court to implement a nationwide discovery plan or a coordinated national calendar.[688] There are, however, potential disadvantages of cooperative activity. Coordination can delay or otherwise affect pending litigation, conferring an advantage to one side in contentious, high-stakes cases.[689] Such litigation activates strategic maneuvering by plaintiffs and defendants. For example, plaintiffs may seek early trial dates in jurisdictions with favorable discovery rules.[690]

687. *See generally* William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992) (reporting on a study of eleven notable instances of state–federal coordination in litigation arising from (1) 1972 Federal Everglades air crash, (2) 1977 Beverly Hills Supper Club fire, (3) 1979 Chicago air crash, (4) 1980 MGM Grand Hotel fire, (5) 1981 Hyatt skywalk cases, (6) 1986 technical equities fraud, (7) 1987 L'Ambience Plaza collapse, (8) 1989 Exxon Valdez oil spill, (9) 1989 Sioux City air crash, (10) Ohio asbestos litigation, and (11) Brooklyn Navy Yard asbestos litigation). *See infra* section 33.23.

688. *See* Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1569, 1571 (1995) (discussing state judges taking primary responsibility for portions of common discovery and other aspects of the silicone gel breast implant MDL process). *See also* E. Norman Veasey, *A Response to Professor Francis E. McGovern's Paper Entitled Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. Pa. L. Rev. 1897, 1898 (2000) ("Over 95% of all litigation and roughly the same percentage of resources are in the state courts.").

689. *See generally* Mark Herrmann, *To MDL or Not to MDL: A Defense Perspective*, 24 Litig. 43 (1998).

690. Paul D. Rheingold, *Symposium: National Mass Torts Conference: Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1581, 1582–83 (1995). Defendants may have concerns about state cases being resolved before federal cases consolidated under the MDL procedure. *See* Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. Rev. 1851, 1858 (1997) [hereinafter McGovern, *Rethinking Cooperation*] ("[P]laintiffs' attorneys rush to their favorite judges and demand

State and federal judges also have initiated state–federal cooperation between jurisdictions to minimize conflicts that distract from the primary goal of resolving the parties' disputes.

20.311 Identifying the Need and Opportunity

Coordination approaches differ depending on the nature of the litigation. Coordination is relatively easy if all of the cases are pending in a single state. States increasingly have adopted procedures for assigning complex multiparty litigation to a single judge or judicial panel or have created courts to deal with complex business cases,[691] facilitating coordination between state and federal courts. Federal judges should learn about their own state or local courts' practices and procedures for consolidating cases.

The Judicial Panel on Multidistrict Litigation has no power over cases pending in state courts, but has facilitated coordination by transferring federal cases to a district where related cases are pending in the state courts.[692]

Coordination is easier when counsel for some or all of the parties in the related actions have the same counsel. In appointing lead or liaison counsel or otherwise organizing counsel (see section 10.22 (general) and section 22.62 (mass torts) and 21.27 (class actions)), consider including attorneys from jurisdictions with cases that may need to be coordinated with either class action or multidistrict litigation.

The need to coordinate is especially acute where overlapping or multiple identical class actions are filed in more than one court (see section 21.15). It is best to communicate with state and federal judicial counterparts at an early stage to begin coordinating such cases. Unilateral action by any judge to certify a class or assert nationwide jurisdiction can fatally undermine future coordination efforts.

Coordination becomes much more complex when cases are dispersed across a number of states, even where the federal cases are all centered in a

draconian procedures to pressure defendants to make block settlements . . . Defendants seek the opposite—delay is their nirvana.").

691. Alexander B. Aikman, Managing Mass Tort Cases: A Resource Book for State Trial Court Judges § 3.11 (December 1995). For examples of such rules, see *id.* at app. C. *See also* Helen E. Freedman, *Product Liability Issues In Mass Torts—View From the Bench*, 15 Touro L. Rev. 685, 687, n.8 (1999), and cases cited therein; Paul D. Rheingold, Mass Tort Litigation §§ 6:3, 6:7 (1996) (discussing statewide systems in California, New York, and elsewhere). *See also, e.g.*, N.C. Rules of Prac. for Sup. & Dist. Cts. R. 2.1 (West 2003). See www.ncbusinesscourt.net for a history and overview of the workings of the North Carolina Business Court.

692. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, *supra* note 654, at 215.

single MDL transferee court. Electronic media—e.g., Internet Web sites and list-servs—can improve communication in such circumstances.

Reciprocity and cooperation create trust and mutual respect so that attempts to coordinate are not perceived as attempts to dominate. The special master who facilitated state–federal coordination in the silicone gel breast implant litigation observed that the more transparent, formal, even-handed, and administrative the proposed cooperative venture is, the more acceptable it will be to other judges.[693]

20.312 Threshold Steps

The nature and extent of multiple filings related to the same subject matter in different courts should be clarified, so as to minimize conflicts. The court should direct counsel to identify the names of all similar cases in other courts, their stage of pretrial preparation, and the assigned judges. Such a direction should be part of the initial case-management order in any case with related litigation pending in other courts,[694] and many courts have local rules requiring disclosure of similar information.[695]

Dispersed litigation makes essential an information network, perhaps formalized as a judicial advisory committee,[696] which can serve as a catalyst for some degree of state–federal coordination. If the litigation warrants it, a meeting of a judicial advisory committee can help to develop relationships

693. McGovern, *Rethinking Cooperation*, *supra* note 690, at 1870.

694. *See, e.g., In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order No. 1 (N.D. Ala. June 26, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

695. *See, e.g.,* Alaska U.S. Dist. Ct. L.R. 40.2 ("Whenever counsel has reason to believe that an action or proceeding on file or about to be filed in this court is related to another action or proceeding in this or any other federal or state court, whether pending, dismissed or otherwise terminated, counsel shall promptly file and serve a Notice of Related Case."); Ohio N.D., Civ. L.R. 16.3 ("An attorney who represents a party in Complex Litigation, as defined above, shall, with the filing of the complaint, answer, motion, or other pleading, serve and file a Case Information Statement which briefly describes the nature of the case, identifies by title and case number all other related case(s) filed in this and any other jurisdiction (federal or state) . . . .").

696. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 1014 (E.D. Pa. Dec. 7, 1999), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003). Judge Bechtle, the MDL judge, had earlier communicated with and established an informal network of state judges to coordinate the litigation. The settlement agreement with American Home Products expressly provided for the creation of a State Court Judicial Advisory Committee to assist in administering the settlement agreement. *In re Diet Drugs*, MDL No. 1203, Nationwide Class Action Settlement Agreement with Am. Home Prods., at § VIII(B)(3)–(6) (E.D. Pa. Nov. 18, 1999), *at* http://www.fenphen.verilaw.com/mdl_settle/settleagree.pdf (last visited Nov. 10, 2003).

among the judges and ease coordination efforts.[697] An Internet list-serv is another economical way to foster communications among geographically dispersed attorneys and judges. In some mass torts litigation, the National Conference of State Chief Justices, the National Center for State Courts, and the State Justice Institute have helped create and fund coordinating committees of state court judges with significant mass tort assignments. Federal judges with mass tort responsibilities have sometimes participated in person or by presenting written or telephonic reports and updates of federal activities. Such committees help identify specific types of coordination that can be recommended to other state and federal judges assigned to the same type of litigation. It may also be helpful to organize attorneys from states with significant numbers of cases into an advisory committee, to be a channel of communication between the judges and other attorneys.[698]

Federal judges should communicate personally with state court judges who have a significant number of cases in order to discuss mutual concerns and suggestions, such as designating a liaison attorney and judge to communicate with federal counterparts. These communications provide an opportunity to exchange pretrial orders and proposed schedules that help avoid potential conflicts. One special master has concluded that "[t]he earlier and more comprehensive the cooperative intervention occurs in the litigation cycle, the greater the benefits and the less the resistance."[699]

Class counsel generally have the benefit of the common fund doctrine to support payment for their efforts on behalf of the class or consolidated litigants.[700] MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.[701] Without special provisions to com-

697. *See, e.g., In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001). The transferee judge convened a conference from June 6–8, 2002, that included twenty-three state judges. Notably, the meeting was held in New Orleans, La., not in the transferee district. The agenda of the conference is available online at http://www.mnd.uscourts.gov/Baycol_Mdl (last visited Nov. 10, 2003).

698. *See, e.g., In re Diet Drugs*, MDL No. 1203, Order No. 39 (E.D. Pa. Apr. 21, 1998), *available at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (appointing twenty lawyers from fourteen states to serve as members of the plaintiffs' state liaison committee).

699. McGovern, *Rethinking Cooperation*, *supra* note 690, at 1870.

700. *See supra* section 14.12. *See also* Paul D. Rheingold, Mass Tort Litigation § 7:33 (1996 & Supp. 2000).

701. *See, e.g., In re Diet Drugs*, MDL No. 1203, Order No. 467 (E.D. Pa. Feb. 10, 1999), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (ordering defendants to withhold a fixed portion of settlements and pay into a common fund). *See also In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, unnumbered order (N.D. Ala.

pensate state attorneys who cooperate with federal MDL-funded attorneys, the MDL fee structure presents an obstacle to cooperation. State attorneys and judges may realistically perceive that state attorneys' legal work might not be rewarded appropriately even though it advances the national litigation.

There are various ways to handle these fee issues.[702] It is important to allay the coordinating state lawyers' concerns about being fairly compensated. In the diet drug litigation, discovery proceedings were coordinated between the MDL court and the judge presiding over California's statewide consolidated diet drug litigation. The federal and state judges entered orders establishing rates of contribution for lawyers who settled cases using coordinated state–federal discovery.[703] The state judge controlled the fund, eliminating concerns about federal dominance and providing a direct financial link between the state and federal common-benefit activities. In other mass tort litigation, judges have permitted state attorneys who were not part of the MDL plaintiffs' attorneys' steering committee to make claims for MDL-managed funds. In the silicone gel breast implant litigation, the MDL transferee judge appointed a former state judge to rule on attorneys' disputed claims for common fund fees.[704] Lawyers should be encouraged to resolve fee disputes among themselves and to seek judicial intervention only if necessary. It may be helpful to appoint a

Oct. 7, 1998), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (denying attorneys' motions for relief from Order No. 13, which required payment of 6% of settlements into a "common benefit" fund). Judge Pointer carefully tailored Order No. 13, entered on July 23, 1993, to comply with the Fourth Circuit ruling that fee orders in MDL cases cannot be applied to cases that were not within the jurisdiction of the MDL transferee court. *See In re* Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II, 953 F.2d 162 (4th Cir. 1992). To comply with this jurisdictional limit, Judge Pointer applied the assessment to cases that were in MDL No. 926 at any time, except those that were remanded because they were improperly removed from state court. He also extended the obligation to counsel who agreed to it and to "cases in a state court to the extent so ordered by the presiding judge of that court." *Silicone Gel*, MDL No. 926, Order No. 13, § 2(c), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

702. For an extensive discussion of mechanisms for allocating fees in mass tort litigation, including case summaries discussing the orders in the silicone gel breast implant and diet drug litigations, see Rheingold, *supra* note 691, §§ 7:33, 7:36, 7:40.

703. *In re Diet Drugs,* MDL No. 1203, Order No. 467 (establishing a deduction of 9% from all settlements of MDL cases transferred from California federal district courts and 6% from all settlements in California state court actions, and creating a coordinated discovery plan). *See also* Rheingold, *supra* note 691, § 7:40 (discussing PTO 467).

704. Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, & John Shapard, Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters 26–27 (Federal Judicial Center 2000) [hereinafter FJC Study, Special Masters].

special master to coordinate proceedings among the state and federal courts,[705] reducing to manageable proportions the challenge of communicating and coordinating with dozens of judges.

In the silicone gel breast implant and diet drug litigations, state and federal judges created working relationships that came close to achieving a comprehensive approach to state–federal cooperation.[706] Extending that approach to other mass torts "could build upon generally accepted models for resolving local mass torts, such as the use of test plaintiffs for discovery, with settlement discussions based upon the results of the test cases."[707] In the diet drug and silicone gel breast implant litigations, the federal MDL transferee judge took the lead in implementing a comprehensive state–federal discovery plan while state judges presided over individual trials and settlements. The parties achieved the economies of consolidated discovery and developed information about the value of individual cases, providing a basis for aggregated settlements and judgments.

20.313 Specific Forms of Coordination

Aggregation and consolidation decisions. Discussions between state and federal judges about the timing of class certification hearings and decisions have a beneficial effect on other aspects of cooperation. The prospect that one judge might unilaterally certify a nationwide class and enter a binding national judgment has a chilling effect on cooperative relationships. Joint deferral of decisions on certification and perhaps joint hearings on motions to certify a class enhance the chances that both sets of courts will find appropriate roles in managing the litigation. Judges might agree that the court with most of the cases or the strongest interest should take the lead in certain proceedings, such as class certification.[708]

The court should also consider staying cases until actions in the other tribunal have been tried. Important factors in making that decision include the

705. In *In re Silicone Gel Breast Implants Product Liability Litigation*, the MDL transferee judge appointed a special master to serve as liaison between the federal and state judges and to facilitate coordination. *See* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. Pa. L. Rev. 1867, 1886–87 (2000) [hereinafter McGovern, *Cooperative Strategy*]. *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1839 (1995) [hereinafter McGovern, *Mass Torts for Judges*].

706. For a discussion of mechanisms for coordinating cases that are dispersed nationwide among state and federal courts, including a brief history of the Mass Tort Litigation Committee (MTLC), which was funded by the State Justice Institute, see *supra* section 20.31.

707. McGovern, *Cooperative Strategy*, *supra* note 705, at 1886.

708. *See, e.g.,* Union Light, Heat, & Power Co. v. United States Dist. Court, 588 F.2d 543 (6th Cir. 1978) (discussing Beverly Hill Supper Club fire class action proceedings on common issues).

extent of pretrial discovery and motions activities in the various jurisdictions, the typicality of the claims, the likelihood that verdicts will provide useful information about the values of other pending cases, and the impact that delay may have on the parties.

Pretrial motions and hearings. State and federal judges have often worked together during the pretrial process.[709] They have jointly presided over hearings on pretrial motions, based on a joint motions schedule, sometimes alternating between state and federal courthouses. Joint hearings have used coordinated briefs so that one set of briefs can be used in both state and federal courts, with supplements for variations in the applicable laws and choice-of-law questions.

Cooperative approaches might also include jointly appointing a special master, court-appointed expert, or other adjunct to assist the courts with some aspect of the litigation. Some state courts are not authorized to appoint such adjuncts and may wish to share the benefits of the federal authority.

At a minimum, judges should exchange case-management orders, master pleadings, questionnaires, and discovery protocols. This simple step can encourage judges to adopt the same or similar approaches to discovery and pretrial management.

Also, consider joint appointments of lead counsel, committees of counsel, or liaison counsel to coordinate activities between the courts. Having some overlapping membership among counsel in state and federal cases facilitates cooperation by establishing channels of communication.

Pretrial discovery. State and federal judges have considerable experience coordinating and managing nationwide discovery.[710] For example, courts may issue joint orders for the preservation of tangible, documentary, and electronic evidence and for coordinating the examination of evidence by experts in both state and federal proceedings. Early attention to questions concerning expert evidence may be necessary to take advantage of various options for managing such evidence, including the possibility of appointing common experts.[711]

Coordination could involve inviting state judges to participate in a coordinated national discovery program while retaining control of local discovery. Depending on the progress of the state litigation, some aspects of discovery in state cases may in some instances serve as the basis for national

709. *See generally*, Schwarzer et al., *Judicial Federalism in Action*, *supra* note 687, at 1690.

710. *See, e.g., In re Diet Drugs*, MDL No. 1203, Order No. 467, 1999 WL 124414, at *4–*6 (order granting, in part, plaintiff's petition for management committee).

711. Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity,* 43 Emory L.J. 995, 1058–62 (1994) (describing a pretrial procedure designed to identify issues regarding expert evidence and any need for special assistance).

discovery. For example, in the silicone gel breast implant litigation, state judges in Texas had progressed further in discovery than had federal courts at the time the MDL cases were assigned to Judge Pointer. Recognizing the state court's advantage, Judge Pointer "agreed to designate certain Texas depositions as official ones for the entire multidistrict litigation (MDL)."[712] Procedures to minimize duplicative discovery activity include consolidating depositions of experts who will testify in numerous cases and maintaining document depositories. It is important to remember that the rulings of a single court can become preemptive; for example, the first court to reject a particular privilege claim likely will cause the material sought to be protected to become discoverable for the entire litigation.[713]

Specific elements of discovery coordination have included

- creating joint federal–state, plaintiff–defendant document depositories, accessible to attorneys in all states;[714]
- ordering coordinated document production and arrangements for electronic discovery;
- ordering discovery materials from prior state and federal cases to be included in the document depository;
- scheduling and cross-noticing joint federal–state depositions;[715]
- designating state-conducted depositions as official MDL depositions;[716]
- enjoining attorneys conducting federal discovery from objecting to use of that discovery in state courts on the grounds that it originated in federal court;
- adopting standard interrogatories developed by state judges for litigation in their cases; and

712. Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 Tex. L. Rev. 1573, 1574 (1995).

713. *Supra* section 22.6 discusses relevant provisions of case-management orders in the silicone breast implant and diet drugs litigations implementing state–federal coordination of multiple actions in many states. See also *supra* section 22.4 for suggestions about eliciting information that may be useful in planning for state–federal coordination.

714. *See, e.g., In re Diet Drugs*, MDL No. 1203, Order No. 22, ¶ 6 (E.D. Pa. Mar. 23, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (establishing plaintiffs' document depository).

715. *In re Diet Drugs*, MDL No. 1203, Order No. 467, 1999 WL 124414, at *4–*6.

716. *Id.* (separating the portion of the deposition to be used in the MDL proceedings from portions designed to be admissible in state proceedings).

- coordinating rulings on discovery disputes, such as the assertion of privilege, and using parallel orders to promote uniformity to the extent possible.[717]

Settlement. State and federal judges should consider conducting joint comprehensive settlement negotiations, hearings, and alternative dispute resolution procedures to establish case values.[718] Insurance coverage disputes may require special attention and coordination because resolution of the primary litigation may depend on resolution of the coverage dispute.

Trial. State and federal judges have developed coordinated management plans for an entire litigation.[719] Joint trials, where separate state and federal juries sit in the same courtroom and hear common evidence, present substantial procedural and practical difficulties,[720] but differences in state and federal procedures have not been insurmountable barriers to useful coordination. Any coordination must be flexible because cases in some state courts will reach trial sooner than those in others. State and federal courts should establish a mechanism to coordinate trial dates so that they do not unduly burden parties or their attorneys with multiple conflicting trial settings. Judges may also set the order and location of trials cooperatively to provide better information as to the diverse range of value of the cases included in the mass tort.

20.32 Jurisdictional Conflicts

The pendency of related state and federal actions can cause jurisdictional complexities and conflicts, leading to requests that the federal court either stay or dismiss its proceeding or enjoin state court proceedings. Such injunctions should be a last resort, invoked only after voluntary coordination efforts have failed. An injunction against pending state proceedings, even if authorized by federal statutes and case law (see below, this section, and see also section 21.15), can have a detrimental effect on future efforts to work cooperatively and should be used only as a last resort, if at all.

Federal courts have a duty to exercise their jurisdiction, notwithstanding the mere pendency of parallel or related litigation in state court. Discretion to stay or dismiss the federal proceedings exists, however, in the following circumstances: (1) where a pending state proceeding may decide a pivotal question of state law, the decision of which may remove the need for the

717. *See* Coordinating Proceedings in Different Courts, *infra* section 40.41.
718. Schwarzer et al., *Judicial Federalism in Action*, *supra* note 687, at 1714–21.
719. *See, e.g.*, *id*. at 1702–03 (describing the Ohio asbestos litigation).
720. *See id.* at 1727–32.

federal court to decide a constitutional issue before it;[721] (2) where state law claims are alleged and federal court litigation would impair a comprehensive state regulatory scheme;[722] and (3) in order to avoid piecemeal litigation where the state court has previously acquired jurisdiction of the res and is the more convenient forum.[723]

Where the action alleges both federal claims and related state law claims joined on the basis of supplemental jurisdiction, 28 U.S.C. § 1367(c) permits the district court to decline to exercise jurisdiction over a state law claim if the claim raises a novel or complex issue of state law, if it substantially predominates over the federal claims, if the district court has dismissed all federal claims, or, in exceptional circumstances, if there are compelling reasons for declining jurisdiction. In some circuits, the court's discretion to dismiss claims entertained under its supplemental jurisdiction has been held to be considerably narrower than under the former doctrine of pendent jurisdiction.[724] In deciding whether to entertain the state law claims, the court should consider whether dismissal or remand will result in substantially duplicative litigation and unnecessary burdens on parties, witnesses, or the courts.

The federal court's power to interfere with parallel or related proceedings in state court is limited by the Anti-Injunction Act, which prohibits federal

721. R.R. Comm'n v. Pullman, 312 U.S. 496 (1941).

722. Burford v. Sun Oil Co., 319 U.S. 315 (1942).

723. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

724. Some courts have emphasized that discretionary dismissals are limited to exceptional circumstances that are as compelling as the circumstances specified in 28 U.S.C. § 1367(c)(1)–(3) (West 2003) and have held that the statute does not authorize a court to decline jurisdiction based on the amount of judicial time required to adjudicate the state claim. *See* Itar–Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 446–48 (2d Cir. 1998) and cases cited therein; Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1555–62 (9th Cir. 1994). But other circuits have taken a different view of what constitutes "exceptional circumstances" under section 1367(c). *See* Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995) ("[T]he district court, in reaching its discretionary determination on the jurisdictional question, will have to assess the totality of the attendant circumstances."); Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) ("Section 1367(c) . . . was intended simply to codify the preexisting pendent jurisdiction law, enunciated in *Gibbs* and its progeny . . . ."). Where a case has been removed under 28 U.S.C. § 1441(c) (West 2003), discretion to remand the separate and independent state law claim may be broader. *See* Moralez v. Meat Cutters Local 539, 778 F. Supp. 368 (D. Mich. 1991) (remanding federal and state claims removed under 28 U.S.C. § 1441(c) on the grounds that the separate and independent state law claims predominate). *See also* Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611 (4th Cir. 2001) (finding inherent authority to remand state law statutory claims after federal claims involving some plaintiffs settled, based on finding that state law claims predominated).

courts from enjoining or staying state court proceedings[725] except as expressly authorized by an act of Congress,[726] or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The exceptions under the Act are narrowly construed.

The pendency of a parallel state court action does not by itself warrant an injunction, even though an impending judgment in that action would be *res judicata* in the federal action.[727] Similarly, the fact that persons who fall within the scope of a class certified in a federal court action have filed parallel actions in state court does not afford a basis for interfering with the state court actions during the pendency of the federal action. Accordingly, when defining a proposed class, a federal court should consider whether a class can be defined so as to avoid unnecessary conflict with state court actions.[728] However, where a class has been certified under Federal Rule of Civil Procedure 23(b)(3), and where class members have failed to avail themselves of their right to opt out and litigate their claims independently in state or federal court, a district judge may enjoin those members from initiating or proceeding with civil actions in other state or federal courts.[729]

In limited circumstances, federal courts have used the All Writs Act[730] and the necessary-in-aid-of-jurisdiction exception to the Anti-Injunction Act[731] to protect their exercise of jurisdiction. The Anti-Injunction Act enables a judge to issue orders directed to nonparties in the pending litigation.[732] Generally, those statutes have been used to effectuate global settlements in large scale litigation by enjoining or removing to federal court parallel state court litigation that would otherwise frustrate the adoption or implementation of comprehensive class settlements approved by the federal court as binding on

725. 28 U.S.C. § 2283 (West 2002). *See also* Younger v. Harris, 401 U.S. 37 (1971). Note, however, that *Younger* abstentions have been applied to civil cases only in limited circumstances involving significant state interests. *See, e.g.*, Pennzoil v. Texaco, 481 U.S. 1 (1987).

726. The prime example of such authorizing legislation is 42 U.S.C. § 1983 (2000). *See* Mitchum v. Foster, 407 U.S. 225 (1972).

727. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977).

728. Where the class is certified under Fed. R. Civ. P. 23(b)(3), class members have the right to opt out and litigate their claims independently in state or federal court.

729. *See infra* section 21.42 at notes 934–42.

730. 28 U.S.C. § 1651(a) (West 2002) authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

731. The Anti-Injunction Act bars federal courts from granting "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (West 2003).

732. *See* United States v. N.Y. Tel. Co., 434 U.S. 159 (1977).

the parties to the state court litigation,[733] or that would require relitigation in state court of a matter finally decided in federal court.[734] Courts have also enjoined state court stay orders that would otherwise prevent a federal court from proceeding with pretrial aspects of the litigation.[735]

733. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied sub nom.* Ivy v. Diamond Shamrock Chems. Co., 510 U.S. 1140 (1994); *In re* Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985). *But cf.* Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) (due process requires that plaintiffs with monetary claims be given right to opt out of class action settlement); *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir. 1989).

734. *See* Kelly v. Merrill Lynch, Pierce, Fenner & Smith, 985 F.2d 1067 (11th Cir. 1993).

735. *See, e.g.,* Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202–03 (7th Cir. 1996) (holding that an MDL transferee judge had authority to issue an injunction to protect the integrity of an order barring discovery of a particular matter); *In re* Columbia/HCA Healthcare Corp., Billing Practices Litig., 93 F. Supp. 2d 876 (M.D. Tenn. 2000) (issuing injunction under All Writs Act against competing motion to compel discovery filed in state court).

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Equity courts created class action procedures to manage group litigation fairly and efficiently. Since 1966, when Federal Rule of Civil Procedure 23[736] was amended to add the damages class action under Rule 23(b)(3), class action litigation has greatly expanded. Class actions range from claims involving very small individual recoveries (such as consumer claims) that would otherwise likely not be litigated because no individual has a stake sufficient to justify individual litigation, to claims in which individual damages are high but the volume of claims creates advantages in group resolution. Because the stakes and scope of class action litigation can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation. Class action suits present many of the same problems and issues inherent in other types of complex litigation. The aggregation of a large number of claims and the ability to bind people who are not individual litigants tend to magnify those problems and issues, increase the stakes for the named parties, and create potential risks of prejudice or unfairness for absent class members.[737] This imposes unique responsibilities on the court and

736. Rule 23's predecessor was Federal Equity Rule 38, which provided that one or more may sue or defend for the whole when the question is "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." Fed. R. Civ. P. 23(a) committee note (1937 adoption).

737. *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). For a discussion of problems in class action litigation, see Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain

counsel. Once class allegations are made, decisions such as whether to settle and on what terms are no longer wholly within the litigants' control. Rather, the attorneys and named plaintiffs assume responsibilities to represent the class. The court must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative powers to do so, reflecting the equity origins of class actions.[738]

This section applies to a broad spectrum of subject areas, including statutory and common-law causes of action involving personal injury, property damage, consumer, civil rights, antitrust, environmental, and employment-related claims. This section also covers various types of relief, including injunctions, declaratory judgments, common resolution of particular issues in a case, and damages.[739] The various aspects of managing class action litigation discussed in this section are closely intertwined with other *MCL, 4th* sections, including those on mass tort litigation, attorney fees, and multiple jurisdiction litigation. Other sections of the *MCL, 4th* describe three types of class actions that have unusual features and procedural requirements: mass torts (see section 22.7); private securities litigation, including shareholder derivative actions under Rule 23.1 (see section 31.5); and employment discrimination (see section 32.42).

Occasionally, a plaintiff or other party seeks to have a defendant class certified. Such requests are unusual. The rules discussed in this section, which focus on plaintiffs' classes, must be specifically tailored to the issues defendant classes raise.[740] Additionally, conflicts of interest between an unwilling class

(2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367–82 (1995) (discussing incentives for collusion in settlement class actions); Note, *In-Kind Class Action Settlements*, 109 Harv. L. Rev. 810 (1996).

738. *See Ortiz*, 527 U.S. at 832–33; Blanchard v. Edgemark Fin. Corp., 175 F.R.D. 293, 298–300 (N.D. Ill. 1997) (holding that any individual settlement with a certified class representative must be submitted to the court for approval because the representative has voluntarily undertaken a fiduciary responsibility toward the class as a whole and the court has a commensurate duty to protect absent class members); 7A Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 1751 (1986 & Supp. 2002).

739. For reference to the law of class actions, see generally Alba Conte & Herbert B. Newberg, Newberg on Class Actions (4th ed. 2002); 5 James Wm. Moore et al., Moore's Federal Practice (3d ed. 1997 & Supp. 2002); 7A & 7B Wright et al., *supra* note 738. The case-management requirements imposed by the Private Securities Litigation Reform Act of 1995 are discussed in *infra* section 31.33.

740. *See* 2 Conte & Newberg, *supra* note 739, § 4:46, at 339 (indicating that "[d]efendant class actions must meet all the Rule 23 criteria" and that "[d]efendant classes pose unique problems in the application of Rule 23 criteria" and raise distinct due process concerns). For examples of Rule 23 analysis in the defendant class certification context, see *CBS, Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988); *In re LILCO Sec. Litig.*, 111 F.R.D. 663 (E.D.N.Y. 1986). *See*

representative and the class warrant special attention when a defendant class certification motion is made.[741] Plans for compensating counsel for a defendant class representative need to be addressed at the certification stage. A class settlement that provides for a defendant class representative's attorney fees also may demand special scrutiny.

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21.11 Initial Case-Management Orders

Initial case-management orders in a class action guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case.

also Scott D. Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 Colum. L. Rev. 1371, 1387–89 (1984) (discussing potential burdens defendant classes may impose on courts). Defendant classes may also raise questions about ascertaining the identity of class members that differ from plaintiff classes. S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1029–30 (10th Cir. 1993). There is a split among courts of appeals concerning whether Rule 23(b)(2) applies to defendant cases. *See* Henson v. E. Lincoln Township, 814 F.2d 410 (7th Cir. 1987) (affirming district court's order denying certification of a defendant class); *cf.* Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Luyando v. Bowen, 124 F.R.D. 52, 59 (S.D.N.Y. 1989) (certifying a defendant class). Protecting absent members of a defendant class may require special effort on the part of court and counsel. *In re* Integra Realty Res., Inc., 262 F.3d 1089, 1105 (10th Cir. 2001) (stating that "defendant class actions create a special need to be attentive to the due process rights of absent parties").

741. Courts should give greater scrutiny to the adequacy of representation in defendant class actions "because of the risk that plaintiff[s] will seek out weak adversaries to represent the class." 7A Wright et al., *supra* note 738, § 1770. *See, e.g.*, *In re Integra Realty*, 262 F.3d at 1111–13 (finding representation by unwilling mutual fund with largest losses to be adequate and noting that a settlement providing compensation for attorney fees was potentially troubling). For further commentary on *Integra*, see 15A Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3902.1, at 53–54 (Supp. 2002).

Whether a class is certified and how its membership is defined affects case management as well as outcome. Certification and class membership determine not only the stakes involved, but also the scope and timing of discovery and motion practice, the structure of trial and methods of proof, and the length and cost of the litigation. Certification decisions are critical and should be made only after consideration of all relevant information and arguments presented by the parties.[742]

Before ruling on class certification, a judge should address the following matters at an early stage in the case, typically in initial case-management conferences under Rule 16:

- *Whether to hear and determine threshold dispositive motions, particularly motions that do not require extensive discovery, before hearing and determining class certification motions.* Motions such as challenges to jurisdiction and venue, motions to dismiss for failure to state a claim, and motions for summary judgment may be decided before a motion to certify the class, although such precertification rulings bind only the named parties. If the judge decides to hear such threshold motions before ruling on class certification, the initial scheduling order should set a timetable for the submission of motions for briefs and for any necessary discovery.
- *Whether to appoint interim class counsel during the period before class certification is decided.*[743] If the lawyer who filed the suit is likely to be the only lawyer seeking appointment as class counsel, appointing interim class counsel may be unnecessary. If, however, there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be consolidated, a number of lawyers may compete for class counsel appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement. In cases

742. A court may act on its own initiative in deciding whether to certify a class. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981) ("The trial court has an independent obligation to decide whether an action was properly brought as a class action, even where neither party moves for a ruling on class certification."). A court may not, however, act on its own initiative to expand an individual complaint into a class action. Newsom v. Norris, 888 F.2d 371, 380–82 (6th Cir. 1989) (vacating district court order converting an individual action into a class action and certifying the class).

743. *See* Fed. R. Civ. P. 23(g)(2)(A) committee note (permitting the designation of interim counsel before determining whether to certify a class).

involving overlapping, duplicative, or competing suits in other federal courts or in state courts, the lawyers may stipulate to the appointment of a lead interim counsel and a steering committee to act for the proposed class. Such a stipulation leaves the court with the tasks of determining that the chosen counsel is adequate to serve as interim class counsel and making a formal order of appointment. Absent a stipulation, the court may need to select interim class counsel from lawyers competing for the role and formally designate the lawyer selected.

- *Whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts, including pretrial preparation, schedules and orders, and the need for any coordinated activity.* Section 20.31 discusses coordination and other approaches to pending parallel litigation with state judges.
- *Whether any discovery is needed to decide whether to certify the proposed class.* See section 21.13. Precertification discovery permits the parties to "gather information necessary to make the certification decision," which "often includes information required to identify the nature of the issues that actually will be presented at trial."[744] To define the need for and appropriate limits on precertification discovery, it is useful to direct the parties to discuss these and related problems at the Rule 26(f) conference and to present a plan to the court at an early Rule 16 hearing. The judge can then put into place a schedule for determining the scope of discovery necessary to decide certification, as opposed to merits discovery. At such hearings, the judge should also inquire whether the parties contemplate precertification discovery from the potential class members, determine whether such proposed discovery fills a legitimate need, and make appropriate plans for the most cost-effective means of conducting it.

21.12 Precertification Communications with the Proposed Class

Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification.[745] Such regulations, however, could

744. *See* Fed. R. Civ. P. 23(c)(1) committee note (setting a flexible time standard by providing that certification decisions should be made "at an early practicable time").

745. *In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) ("Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process.").

implicate the First Amendment.[746] Moreover, restrictions of this type may be difficult to implement given the ease and speed of communicating with dispersed groups. For example, many class actions attorneys establish Internet Web sites for specific class actions, in addition to using conventional means of communication, such as newspapers. Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.[747]

Direct communications with class members, however, whether by plaintiffs or defendants, can lead to abuse.[748] For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed. If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.[749]

Judicial intervention is generally justified only on a clear record and with specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Such intervention "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[750] Even if the court finds that there has been an abuse, less burdensome remedies may suffice, such as requiring parties to initiate communication with potential class members

746. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

747. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101–02 (1981).

748. *See id.* at 99–100 & n.12; Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985); Keystone Tobacco Co. v. U.S. Tobacco Co., 238 F. Supp. 2d 151 (D.D.C. 2002), *reconsideration denied*, 2003 U.S. District LEXIS 14653 (2003); Hampton Hardware Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994).

749. Ralph Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001); *see also* 2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 38.4, at 38-6 (3d ed. 2002) (copies of communications sent by defendants who have ongoing business relationships with potential class members relating to pending litigation should be given to opposing counsel).

750. *Gulf Oil*, 452 U.S. at 101–02. For an example of a limited ban on communications between a defendant and class members, see *Rankin v. Board of Education of Wichita Public Schools*, 174 F.R.D. 695, 697 (D. Kan. 1997) (ordering that "defendants and their counsel shall not make any contact or communication with [prospective class members] which expressly refers to this litigation"). Generally, more than just the potential for abuse is required to support issuance of a protective order. Basco v. Wal-Mart Stores, Inc., No. CIV.A.00-3184, 2002 WL 272384, at 3–4 (E.D. La. Feb. 25, 2002).

only in writing or to file copies of all nonprivileged communications with class members.[751] If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future.[752] Rule 23 and the case law make clear that, even before certification or a formal attorney–client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.[753]

Misrepresentations or other misconduct in communicating with the class may impair the fairness and adequacy of representation under Rule 23(a)(4), may affect the decision whether to appoint counsel under proposed Rule 23(g), and may be prohibited and penalized under the court's Rule 23(d)(2) plenary protective authority. Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification,[754] but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). Ethics rules restricting communications with individuals represented by counsel may apply to restrict a defendant's communications contract with the named plaintiffs.[755]

751. *See Gulf Oil*, 452 U.S. at 104 n.20.

752. E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869, 870–71 (7th Cir. 1996) (reciting district court action to cure precertification miscommunication regarding communications between employees and employer and to require prior notice to prevent future miscommunications); *Ralph Oldsmobile*, 2001 WL 1035132, at *7 (curative notice sent to members of the proposed class at the expense of defendant).

753. *See* Fed. R. Civ. P. 23(g)(2)(A) committee note; *cf.* 2 Hazard & Hodes, *supra* note 749, § 38.4, at 38-7 (indicating that the lawyer for the proposed class has a fiduciary obligation and owes class members "duties of loyalty and care").

754. *See Gulf Oil*, 452 U.S. 95 (after a class action had been commenced but before certification, defendant continued to deal directly with potential class members concerning an offer of settlement that had been earlier negotiated with the Equal Employment Opportunity Commission (EEOC)).

755. *See Ralph Oldsmobile*, 2001 WL 1035132, at *4, *7 (finding that defendant's failure to inform independent dealers about pending class actions was misleading and ordering defendant to send corrective notice to potential members of the proposed class); Hampton Hardware v. Cotter & Co., 156 F.R.D. 630, 634–35 (N.D. Tex. 1994) (court found abuse and issued protective order limiting communications after defendant contacted potential class members and encouraged them not to participate in the class action by stating that such participation would negatively impact the parties' ongoing business relationship); *see also infra* section 21.323 (other communications from class members). *See generally* Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) ("If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent may be coercive.") (quoting Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1600 (1976)).

21.13 Standards for Class Certification and Precertification Discovery

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21.131 Certifying a Litigation Class

To obtain an order to prevail in their efforts to certify a class, proponents must satisfy two sets of requirements: those set forth in Rule 23(a) and those contained in Rule 23(b). Rule 23(a) requires that (1) the proposed class be sufficiently numerous; (2) there is at least one common question of fact or law; (3) the named plaintiff's claims are typical of the class as a whole; and (4) the named plaintiff will adequately represent the class.[756]

Rule 23(b) permits maintenance as a class action if the action satisfies Rule 23(a)'s prerequisites and meets one of three alternative criteria for maintainability. First, Rule 23(b)(1)(A) permits certification to prevent inconsistent rulings regarding defendants' required conduct. Standards for certifying a class under Rule 23(b)(1)(B) relate primarily to limited fund settlements and are discussed below in section 21.132. Second, Rule 23(b)(2) permits a class action if "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." Third, Rule 23(b)(3) permits a class action if "the court finds that 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." Section 21.141 elaborates on the requirements for certifying a litigation class.

21.132 Certifying a Settlement Class

Parties frequently settle before the judge has decided whether to certify a class.[757] Some settle before a motion to certify or even a class action complaint has been filed. Such settlements typically stipulate that the court may certify a class as defined in the agreement, but only for the purpose of settlement. When a case settles as a class action before certification, the parties must present the

756. Fed. R. Civ. P. 23(a).

757. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998); Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998); *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330 (N.D. Ohio 2001); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000); *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999).

court a plan for notifying the class and, if Rule 23(b)(3) applies, providing an opportunity to opt out, along with the motions for certification and preliminary approval of the settlement. If the case settles after it has been certified as a litigation class, different notice requirements apply (see section 21.312).

Rule 23(a) and (b) standards apply equally to certifying a class action for settlement or for trial, with one exception. In *Amchem Products, Inc. v. Windsor*, the Supreme Court held that because a settlement class action obviates a trial, a district judge faced with a request to certify a settlement class action "need not inquire whether the case, if tried, would present intractable management problems"[758] under Rule 23(b)(3)(D). The Court added, however, "that the settlement context demands undiluted, even heightened attention to unwarranted or overbroad class definitions."[759]

Post-*Amchem* courts have emphasized that a settlement class must be cohesive. This means, according to one court of appeals, that there should be a common nucleus of facts and potential legal remedies among all class members,[760] and that the class and any necessary subclasses must be definable and defined for the judge. In a nationwide or multistate settlement class, counsel should be ready at the class certification hearing to explain the common elements of the substantive law that are applicable to all class members so that choice of law issues will not defeat predominance and the manageability component of superiority.[761] As in a litigation class, counsel seeking certification of a settlement class must address variations in applicable state law. The court must determine whether the variations or conflicts defeat commonality, predominance, and superiority and the extent to which the creation of subclasses removes such conflicts so as to permit certification. As in a litigation class, counsel seeking certification of a settlement class must show that there are no actual conflicts among the anticipated claims of class members[762] or must show that conflicts can be avoided or ameliorated by proposing subclasses or by providing a plan for distributing benefits based on objective

758. 521 U.S. 591, 620 (1997).

759. *Id.*

760. *Hanlon*, 150 F.3d at 1022 (affirming certification of a settlement class).

761. *Id.*

762. *Id.* at 1021 (finding "no structural conflict of interest based on variations in state law [in part, because] . . . the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses"); *see also In re* Mex. Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001) (affirming a nationwide class action settlement against objections that class members from certain states had superior remedies not reflected in the settlement terms and noting that class representatives avoided the "pitfall" of state law variations by confining their theories to "federal law plus aspects of state law that are uniform" and by asking for "certification of a class for settlement only"); *In re Prudential*, 148 F.3d at 314–15.

criteria. The court must determine whether the process for presenting claims and awarding relief to individual class members is manageable and takes account of differences among class members without creating conflicting interests.[763] Counsel seeking class certification must also present a plan for communicating adequate notice of a settlement to individual class members, an important factor in the court's determination that the proposed settlement class is manageable.[764]

A proposed settlement of a mandatory "limited fund" class[765] under Rule 23(b)(1)(B) must meet the exacting standards articulated by the Supreme Court in *Ortiz v. Fibreboard Corp.*[766] Because limited-fund classes do not permit opt-outs, certification for settlement imposes particularly stringent standards.

In any certification for settlement, the court must examine adequacy of representation and predominance of common issues to be sure that the settlement does not mask either conflicts within classes or the overwhelming presence of individual issues. Section 21.61 discusses determining whether to approve the terms of proposed settlements in class actions, which involves a separate set of issues from deciding whether to certify a proposed settlement action. The particular problems raised by proposed class and other settlements in mass torts cases are discussed in section 22.9.

21.133 Timing of the Certification Decision

Federal Rule of Civil Procedure 23(c)(1) directs the court to determine "at an early practicable time"[767] whether to certify an action as a class action. The "early practicable time" is when the court has sufficient information to decide

763. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *43, *51–*52 (E.D. Pa. Aug. 28, 2000) (certifying a settlement class based on objective national standards for claims); *cf.* Walker v. Liggett Group, Inc., 175 F.R.D. 226, 232–33 (S.D. W. Va. 1997) (denying certification of a settlement class and citing need to ascertain variations in state law, to decide how millions of class members could offer input during the comment period, to create subclasses, and to appoint representatives to an already difficult to define class).

764. Thomas v. NCO Fin. Sys., Inc., No. CIV.A.00-5118, 2002 WL 1773035, at *5–*7 (E.D. Pa. July 31, 2002) (denying certification of a settlement class where parties proposed notice in two newspapers and failed to introduce evidence that the individual names of class members were available).

765. Class actions certified under Rule 23(b)(1) or (b)(2) are often referred to as "mandatory" class actions because Rule 23 does not expressly require that members be permitted to opt out; some courts, however, have granted limited opt-out rights in so-called "mandatory" class actions, recognizing this act as being within the court's discretion and equity jurisdiction. *See, e.g.*, County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302–03 (2d Cir. 1990).

766. 527 U.S. 815, 838–53 (1999).

767. Fed. R. Civ. P. 23(c)(1)(A).

whether the action meets the certification criteria of Rules 23(a) and (b). The timing of the certification decision deserves discussion early in the case, often at the initial scheduling conference where the judge and counsel can address the issues bearing on certification and can establish a schedule for the work necessary to permit an informed ruling on the class certification motion. Appropriate timing will vary with the circumstances of the case, although an early resolution is generally desirable.

Precertification discovery may be necessary. The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties.[768] Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment.[769] Precertification rulings frequently dispose of all or part of the litigation.[770]

Efficiency and economy are strong reasons for a court to resolve challenges to personal or subject-matter jurisdiction before ruling on certification. The judge should direct counsel to raise such challenges before filing motions to certify. Similarly, courts should rule early on motions to dismiss, challenging whether the plaintiffs have stated a cause of action. Early resolution of these questions may avoid expense for the parties and burdens for the court and may minimize use of the class action process for cases that are weak on the merits.[771] In unusual cases, involuntary precertification dismissal may unfairly

768. Dismissal before certification is *res judicata* only as to the class representatives, not class members. Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984); *see also* Schwarzchild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995) (moving for and obtaining summary judgment after class certification but before notice to the class implicitly waives defendant's interest in notifying the class). A grant of summary judgment dismissing the claims of class representatives often has the effect of mooting the class certification issue. Cowen v. Bank United of Tex., 70 F.3d 937, 941 (7th Cir. 1995).

769. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 29–32 (Federal Judicial Center 1996) [hereinafter FJC Empirical Study of Class Actions] (finding that the rate of precertification rulings on motions to dismiss was about 80% in three of four districts studied and about 60% in the other district).

770. *Id.* at 33 (finding that "[a]pproximately three out of ten cases in each district were terminated as a direct result of a ruling on a motion to dismiss or for summary judgment").

771. *See, e.g.*, Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001) (holding that "where . . . the plaintiffs' claims can be readily resolved on summary judgment, where the defendant seeks an early disposition of those claims, and where the plaintiffs are not prejudiced thereby, a district court does not abuse its discretion by resolving the merits before considering the question of class certification"); Mira v. Nuclear Measurements Corp., 107 F.3d 466, 474–76

affect the interests of members of the proposed class. For example, in a case in which the filing was accompanied by extensive publicity, but where the dismissal had little publicity, individual members of the proposed class may rely on the pendency of the class action to toll limitations. If the risk of unfair prejudice is present, some form of notice under Rule 23(d)(2) may be appropriate.

Some local rules specify a short period within which the plaintiff must file a motion to certify a class action. Such rules, however, may be inconsistent with Rule 23(c)(1)(A)'s emphasis on the parties' obligation to present the court with sufficient information to support an informed decision on certification. Parties need sufficient time to develop an adequate record.

Rule 23(c)(1)(C) makes clear that an action should be certified only if it meets Rule 23's requirements. However, Rule 23(c)(1)(C) permits later alteration or amendment of an order granting or denying class certification. Nevertheless, decertifying or redefining an expansive class, certified on insufficient information, may unnecessarily cost the parties substantial time and expense and add to the court's load. In a federal question case, the pendency of class action allegations tolls the statute of limitations.[772] Individuals removed from a narrowed class after receiving notice that they were included may be entitled to notice that the statute of limitations has now begun to run against them.[773] If the judge expands a class definition in a Rule 23(b)(3) case, those added members must receive notice and an opportunity to opt out, adding expense and effort.

(7th Cir. 1997) (asserting that deciding summary judgment before ruling on class certification was an appropriate way to deal with meritless litigation).

772. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

773. For those excluded from the class, the statute of limitations, which was tolled by the filing of the class complaint, begins to run again when the opt-out form is filed. *See, e.g.*, Chardon v. Fumero Soto, 462 U.S. 650 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); *Am. Pipe*, 414 U.S. at 561. In diversity cases, state rules on equitable and cross-jurisdictional tolling may or may not toll the statute of limitations for individual claims filed subsequent to the denial of certification of a class action. *See, e.g.*, Wade v. Danek Med., Inc., 182 F.3d 281, 290 (4th Cir. 1999) (affirming that statute of limitations for state law claims was not tolled during the pendency of a diversity-based class action in federal court); Vaught v. Showa Denko K.K., 107 F.3d 1137, 1147 (5th Cir. 1997) (same).

21.14 Precertification Discovery

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A judge faced with a motion for class certification must decide whether the record is sufficient to determine if the prerequisites of Rule 23 have been met and, if so, how to define the class.

A threshold question is whether precertification discovery is needed. Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation). Some discovery may be necessary, however, when the facts relevant to any of the certification requirements are disputed (see sections 21.141 and 21.142), or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues. Generally, application of the Rule 23 criteria requires the judge to examine the elements of the parties' substantive claims and defenses[774] in order to analyze commonality, typicality, and adequacy of representation under Rule 23(a), as well as the satisfaction of Rule 23(b)'s maintainability requirements.[775]

At this stage, the court should not decide or even attempt to predict the weight or outcome of the underlying claims and defenses,[776] but it need not rely only on the bare allegations of the pleadings. A preliminary inquiry into the merits may be required to decide whether the claims and defenses can be presented and resolved on a class-wide basis.[777] Some precertification discovery

774. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.12 (1978) (reasoning that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" and that "'[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims'" (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963) and 15 Charles Wright et al., Federal Practice and Procedure § 3911, at 485 n.45 (1976))); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (ruling that "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues" (citing Manual for Complex Litigation, Third, § 30.11 (1995))). For consideration of how examination of the merits has evolved in the context of mass tort class actions and other forms of aggregation, see *infra* sections 22.2 and 22.31.

775. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir.) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23."), *cert. denied*, 534 U.S. 951 (2001).

776. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974) (reversing order requiring defendant to pay for class notice based on preliminary assessment of probabilities of plaintiff's success).

777. *Szabo*, 249 F.3d at 676.

may be necessary if the allegations in the pleadings—with affidavits, declarations, and arguments or representations of counsel—do not provide sufficient, reliable information.[778] To make this decision, the court should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed, to reduce the extent of precertification discovery, and to refine the pertinent issues for deciding class certification.

Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. There is not always a bright line between the two. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.

Allowing some merits discovery during the precertification period is generally more appropriate for cases that are large and likely to continue even if not certified. On the other hand, in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden. If merits discovery is stayed during the precertification period, the judge should provide for lifting the stay after deciding the certification motion.

It is often useful under Rule 26(f) to require a specific and detailed precertification discovery plan from the parties. The plan should identify the depositions and other discovery contemplated, as well as the subject matter to be covered and the reason it is material to determining the certification inquiry under Rule 23. Discovery relevant to certification should generally be directed to the named parties. Discovery of unnamed members of a proposed class requires a demonstration of need.[779] If precertification discovery of unnamed class members is appropriate, the court should consider imposing limits beyond those contemplated by the Federal Rules of Civil Procedure. Such limits might include the scope, subject matter, number, and time allowed for depositions, interrogatories, or other discovery directed to class representatives

778. *Id.* (referring to use of affidavits and inquiries from judges); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571–72 (2d Cir. 1982).

779. *See* Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598 (N.D. Cal. 1993).

or unnamed class members, and might limit the period for completing certification-related discovery. Section 21.41 discusses postcertification discovery from unnamed class members. If some merits discovery is permitted during the precertification period, consider limits that minimize the time and effort involved, such as requiring the use of questionnaires or interrogatories rather than depositions, and consider limiting discovery to a certain number or a sample of proposed class members.[780]

21.141 Precertification Discovery into the Rule 23(a) Requirements

Numerosity. Determining whether the proposed class is sufficiently numerous for certification is usually straightforward. Affidavits, declarations, or even reasonable estimates in briefs are often sufficient to establish the approximate size of the class and whether joinder might be a practical and manageable alternative to class action litigation.

Commonality. Identifying common questions typically requires examining the parties' claims and defenses, identifying the type of proof the parties expect to present, and deciding the extent to which there is a need for individual, as opposed to common, proof. Courts have come to varying results in applying such tests, particularly in the mass tort context. See section 22.7.

A trial plan often assists in identifying the relationship between individual and common elements of proof, but Rule 23 does not operate in a vacuum. Bifurcation and severance under Rule 42 are available as tools that might make a case more manageable by separating out discrete issues for a phased or sequenced decision by the judge or at trial. In making such decisions, the judge must decide whether certification of issues classes, bifurcation, or severance are fair and workable ways to achieve class certification, or whether they would merely mask the predominance of individual issues and result in prejudice

780. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621–22 (S.D. Tex. 1991) (approving interrogatories relevant to common issues and limiting their service to 50 of 6,000 absent class members); *cf.* Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313 (D. Colo. 1999) (allowing after class certification, brief, nonmandatory questionnaire relating to common issues); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309 (D. Conn. 1995). On the other hand, courts have declined to limit discovery conducted on behalf of a class to a sample selected by the defendant. *See* Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (noting that "[t]he Federal Rules and this [c]ourt do not countenance self-selecting discovery by either party"). Accordingly, the court should assure that any use of sampling in the context of class-related discovery provides a meaningful random, or at least objective, sample of data.

from presenting claims or defenses out of context.[781] Issues classes are discussed further at section 21.24.

Typicality. Deciding typicality requires determining whether the named plaintiff's claim arises from the same course of events and involves legal arguments similar to those of each class member.[782] The court must also establish that the proposed class representative's claims are not subject to defenses that do not apply to other members of the class.[783] Discovery may be necessary to determine if the plaintiff's claim is atypical, although discovery may not be necessary if the pleadings or readily available information reveals that a named plaintiff's claim is idiosyncratic.

Adequacy of representation. The named plaintiffs must show that the proposed action will fairly and adequately protect the interests of the class. They must first demonstrate that class counsel is qualified, experienced, and able to conduct the litigation in the interests of the class. That also is part of the showing required for appointment of class counsel under Rule 23(g). See section 21.27.

Plaintiffs also must show that the named representatives have no substantial interests antagonistic to those of proposed class members and that the representatives share the desire to prosecute the action vigorously. A trial plan can help to identify distinct claims that may demand separate representation or a denial of certification. If the motion to certify is for a litigation class or for a settlement class that is opposed, as contrasted with a jointly submitted motion to certify a class for settlement, the adversaries may help to identify the range and divergence of claims. In a jointly submitted motion to certify a settlement class, the judge may need to press the parties to identify differences in the positions or interests of class members. Proposed class members' interests may differ from those of the named representatives for a variety of

781. *See, e.g.*, *In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1139 (9th Cir. 2002) (remanding with recommendation that the trial court consider "[class] certification only for questions of generic causation common to plaintiffs who suffer from the same or a materially similar disease"); *In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (upholding constitutionality of aggregate phase I trial on common issues of generic causation); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986) (dividing trial into phases dealing with common and individual issues separately); *see also* Simon v. Philip Morris, Inc., 200 F.R.D. 21 (E.D.N.Y. 2001) (discussing severance and consolidation of issues for phased trials in class action); *but cf. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (discussing difficulty of having multiple juries decide comparative negligence and proximate causation).

782. *See generally* Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) (rejecting claim of employee denied promotion as not typical of claims of applicants for work).

783. *See* Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978); Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 Va. L. Rev. 1001, 1032–33 (1992).

reasons. Different state law may apply to different class members.[784] In a mass tort case, those with present injuries have different interests than those who have been exposed to the injurious substance but have not yet manifested injury.[785] Those with severe injuries may have different interests than those with slight injuries.

The proponents of certification sometimes attempt to meet Rule 23's adequacy-of-representation requirements by suing for only one type of relief, such as an injunction, on behalf of the class. In that case, the named plaintiffs may be inadequate representatives for class members who also have existing damage claims.[786] Discovery may be needed to identify any appropriate remedies not included in the proposed class claims.

Under the Private Securities Litigation Reform Act (PSLRA), courts must select as "lead plaintiff" the most knowledgeable and sophisticated investor who is willing to serve.[787] Note that the court may or may not select the lead plaintiff to serve as a Rule 23(a) "class representative" if the court decides to certify a class. Even without such a statutory requirement, the proposed class representative should be willing to participate in discovery[788] and demonstrate familiarity with the claims asserted and the role of the class representative.[789]

784. *See generally In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); Spence v. Glock, 227 F.3d 308 (5th Cir. 2000).

785. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

786. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 338–40 (S.D.N.Y. 2002) (actual conflicts between proposed class representatives who seek injunctive relief and members of the proposed class who have already experienced personal injuries render the representatives inadequate under Rule 23(a)); *see also* Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 550–51 (D. Minn. 1999) (same).

787. 15 U.S.C. § 78u-4(a)(2)(A) (2000); Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001) (noting that the PSLRA raises the adequacy of representation standard by requiring that "securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation"), *reh'g denied*, 279 F.3d 313 (2002) (noting that the Rule 23 standard remains the same).

788. *In re* Storage Tech. Corp. Sec. Litig., 113 F.R.D. 113, 118 (D. Colo. 1986) (holding that "failure to comply with proper discovery is a sufficient basis . . . to conclude that these plaintiffs would not adequately represent the class").

789. Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 698 (M.D. Ala. 1997) (finding that adequate class representatives need only "have a basic understanding about the nature of [the] lawsuit" and "need not be intimately familiar with every factual and legal aspect" of the litigation). A named plaintiff who shows no understanding of the complaint and proceedings is inadequate. Kelley v. Mid-America Racing Stables, Inc., 139 F.R.D. 405, 409 (W.D. Okla. 1990) (finding named plaintiffs inadequate because of "their almost total lack of familiarity with the facts of their case"); *In re Storage Tech.*, 113 F.R.D. at 118 (disqualifying one plaintiff who was "unaware of even the most material aspects of this action" and another who was "too passive to assure vigorous prosecution").

Precertification inquiries into the named parties' finances or the financial arrangements between the class representatives and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have the resources to represent the class adequately. Ethics rules permit attorneys to advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.[790] Such arrangements may later become relevant when awarding fees. See section 14.12.

21.142 Precertification Discovery into the Rule 23(b) Requirements

Rule 23(b)(1)(B). In addition to satisfying the Rule 23(a) criteria, a Rule 23(b)(1)(B) non-opt-out "limited fund" class must overcome a high threshold set by the Supreme Court.[791] Indeed, the Court has questioned whether a mass tort class action could ever be certified as a limited-fund class action.[792] First, the judge must find that there is a limited fund. The evidence must prove that the value of class claims exceeds the proven value of the fund.[793] Next, the judge must find that there would be equitable treatment of all claimants,[794] which may require the creation of subclasses for differing interests or, if the interests are too numerous and too conflicting, may defeat certification.[795] Finally, the judge must find that payment of the claims would exhaust the limited fund or that failure to exhaust the fund would be justified.[796] Efforts to certify limited-fund class actions after *Ortiz* have not been successful.[797]

790. Model Rules of Prof'l Conduct R. 1.8(e)(1) (2002). *See* Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991) (indicating that class representatives are not responsible to underwrite class-wide costs and that class counsel who are compensated based on class benefits are more appropriate underwriters); Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435 (9th Cir. 1983); *In re* Workers' Comp., 130 F.R.D. 99, 108 (D. Minn. 1990).

791. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838–53 (1999).

792. *Id.* at 842, 844, 864. *See also* S. Elizabeth Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 37 (Federal Judicial Center 2000) (indicating that the Supreme Court reserved "[t]he larger question . . . whether a mass tort case could ever qualify for mandatory class treatment under Rule 23(b)(1)(B)").

793. *Ortiz*, 527 U.S. at 849.

794. *Id.* at 841.

795. *Id.* at 856–57.

796. *Id.* at 841, 858–60.

797. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 873 (6th Cir. 2000) (decertifying a limited fund settlement class because parties did not have a "limited fund"); *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985, 1029 (S.D. Ohio 2001) (a renegotiated Rule 23(b)(3) opt-out settlement was granted final approval). *See also In re* River City Towing Servs., Inc., 204 F.R.D. 94, 96 (E.D. La. 2001) (finding that the "kind of limited fund necessary to certify a (b)(1)

Certifying a Rule 23(b)(1)(B) class ordinarily will call for extensive factual findings showing that the standards have been met,[798] which may require extensive discovery.

Rule 23(b)(2). The Rule 23(b)(2) class action applies when class-wide injunctive or declaratory relief is necessary to redress group injuries, such as infringements on civil rights, and is commonly relied on by litigants seeking institutional reform through injunctive relief.[799] Because a Rule 23(b)(2) class action does not permit opting out, it presumes that the class is homogenous and therefore cohesive. That presumption can be destroyed by showing individualized issues as to liability or remedy.

The grant of Rule 23(b)(2) certification in the tort context depends on factors such as whether state law recognizes medical monitoring claims, and, if so, treats them as calling for injunctive relief rather than money damages. Discovery may be necessary to show the existence of underlying state law preconditions for such claims as medical monitoring. Section 22.74 further

class action" was not determined); Doe v. Karadzic, 192 F.R.D. 133, 144 (S.D.N.Y. 2000) (decertifying after reconsideration because plaintiffs could not provide evidence of a limited fund); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 1999 WL 782560, at *10 (E.D. Pa. Sept. 27, 1999) (vacating a conditionally certified settlement because the parties could not provide evidence of a true limited fund). *Cf. In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 359, 378, 383 (N.D. Ohio) (preliminarily approving a Rule 23(b)(3) class in which participants in settlement would be given prior liens on defendant's assets over opt outs), *later proceeding at* 174 F. Supp. 2d 648, 653–55 (N.D. Ohio) (granting injunctive relief by enjoining the initiation of claims against defendants), *and injunction stayed*, No. 01-4039, 2001 WL 1774017, at *1 (6th Cir. Oct. 29, 2001) (ruling that "financial disincentives on the right to opt out of the settlement class . . . raise the due process concerns addressed in Ortiz").

798. *See In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 208 F.R.D. 625, 634 (W.D. Wash. 2002) (stating that "to certify such a class in the context of a limited fund claim, the court must have before it, at a minimum, evidence as to the assets and potential insolvency of the defendants involved in these cases").

799. Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994). *See also* Daniels v. City of New York, 198 F.R.D. 409, 422 (S.D.N.Y. 2001) (certifying class of African-American and Latino men who were allegedly stopped and frisked by police street crimes unit without reasonable suspicion); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 451–52 (N.D. Cal. 1994) (certifying class of disabled theatergoers who sought movie theaters' compliance with the Americans with Disabilities Act). In addition to its frequent application to civil rights cases, some courts have extended this provision to, *inter alia*, classes alleging systemic failure of child welfare services, *see, e.g.*, *Baby Neal*, 43 F.3d at 58–59 *and* LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.D.C. 1991), as well as suits alleging miscalculation of Social Security benefits. *See* Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993); Gilchrist v. Human Res. Admin., No. 87 CV 7820, 1989 U.S. Dist. LEXIS 7850, at *10 (S.D.N.Y. July 13, 1989). Indeed, its drafters stated expressly that "[s]ubdivision (b)(2) is not limited to civil-rights cases." Fed. R. Civ. P. 23(b)(2) committee note (1966 amendment).

discusses medical monitoring claims and the factors affecting whether they may be certified as class actions under either Rule 23(b)(2) or Rule 23(b)(3).

When a proposed class seeks both injunctive relief and damages, the judge may have to make findings as to the relative importance of the damage claims and decide whether to provide class members notice and an opportunity to opt out. Rule 23(c)(4)(A) permits certification under the appropriate subsection of the rule to be made on a claim-by-claim basis. Some claims justify Rule 23(b)(3) certification, others will justify Rule 23(b)(2) treatment, and other claims should not be certified at all.

Rule 23(b)(3). Rule 23(b)(3) maintainability requires the judge to determine that common questions predominate over individualized ones and that class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy.

To analyze predominance, the judge must determine whether there are individualized issues of fact and how they relate to the common issues, and then examine how the class action process compares to available alternatives (either alone or in combination): individual suits or joinder; consolidation, intervention, or other nonrepresentational forms of aggregate litigation; test cases; more narrowly defined class actions, perhaps filed in different courts; and agency enforcement. The Supreme Court has emphasized that judges should consider, in cases involving small claims, the access to court that the class mechanism provides.[800]

Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the claims, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof. A trial plan addressing each element of the claims can help to identify the nature and extent of the individualized proof required.

To analyze superiority, the judge will need information from the parties about alternative approaches to the claims of the proposed class and the defenses they will face. Discovery may be needed to determine the extent to which individual potential class members have an interest in separate actions, inconsistent with class treatment. For example, discovery may be necessary to determine whether some class members are likely to assert individual claims for damages that could support individual suits, while other class members have claims for small amounts that would not justify individual litigation.

800. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (stating that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights'" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

The judge must decide whether the proposed Rule 23(b)(3) class will be manageable. For the most part, courts determine manageability by reviewing affidavits, declarations, trial plans, and choice-of-law analyses that counsel present.[801] Discovery may be needed to determine whether a need for individual proof will hinder the fair presentation of common questions to the finder of fact[802] and whether class members can be identified without making numerous fact-intensive inquiries. In unusual circumstances, judges have used test cases or alternative dispute resolution (ADR) approaches to test the manageability of a class trial. See section 21.5.

An important aspect of precertification discovery is coordination with any discovery underway or anticipated in cases involving parallel suits simultaneously pending in other federal or state courts. The following section discusses the precertification relationship with other cases.

21.15 Relationship with Other Cases Pending During the Precertification Period

There may be other class actions, consolidated cases, or individual lawsuits in other courts or before other judges in the same division or district that arise out of the same legal and factual basis as the class action proposed for certification. These cases may purport to bind overlapping or duplicative groups. A federal district judge asked to certify a class action that overlaps with, duplicates, or competes with cases pending in other federal or state courts may face conflicts involving rulings on discovery or substantive motions, timetables for discovery, selection of class counsel, certification rulings, trial, and settlement, and may also face duplicative work and expense. The judge should obtain complete information from the parties about other pending or terminated actions in federal or state courts relating to the claims, defenses, and issues presented.

If multiple cases are pending in federal courts, the Judicial Panel on Multidistrict Litigation has the authority to transfer related federal cases to one district court for consolidated and coordinated pretrial proceedings[803] in order to prevent inconsistent rulings and to minimize duplicative discovery. See

801. *See, e.g.*, Zinser v. Accufix Research Inst., 253 F.3d 1180, 1187–90 (9th Cir. 2001) (discussing plaintiff's proposals for managing variations in state laws); *cf.* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) (stating that a judge should "receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class").

802. *See Szabo*, 253 F.3d at 676 (indicating that determining manageability required making a choice-of-law decision that in turn required resolving a factual issue on the merits).

803. 28 U.S.C. § 1407(a) (West 2002).

section 20.1. Prior to overlapping federal cases being transferred, or if the federal cases are not transferred at all, coordination among the judges handling the cases may be critical. Such coordination can be informal, consisting of telephone calls or other communication to minimize conflicts in scheduling and to arrange for the results of discovery to be used in all or most of the related cases. Some judges prefer more formal procedures, such as orders entered in the related cases that establish a coordinated schedule and arrangements for discovery and motions practice.

If the overlapping or duplicative cases are pending in both state and federal courts, there is no formal mechanism for global consolidation. If the federal cases have been transferred to one judge, the transferee court can then contact the other courts to discuss cooperation and coordination. Section 20.31 discusses in more detail approaches to coordination with state courts, particularly after a class action has been certified in the federal court.

Courts rely on a variety of techniques to coordinate overlapping or duplicative cases, such as establishing coordinated schedules for discovery and the filing and briefing of motions. Federal and state judges sometimes jointly hold hearings or arguments on the motions and establish coordinated discovery schedules.

The pendency of overlapping or duplicative cases in other courts may affect the timing of the certification decision. If transfer to a multidistrict litigation (MDL) proceeding is likely, it is usually best to defer certification until the MDL Panel acts (see generally section 20.31). A delay in deciding certification might also be appropriate if other cases in state or federal court are at a more advanced stage in the litigation.

A court may want to defer to other courts that have developed the record necessary to decide certification or are about to decide threshold dispositive motions to dismiss or for summary judgment.[804] Judges sometimes defer certification decisions pending the results of individual actions that are in or nearing trial or summary judgment. For example, in a mass tort case the trial of individual claims might inform a judge considering class certification about the nature of the claims and defenses and whether class certification is proper.[805] On the other hand, if the federal case is more advanced, the judge

804. *See, e.g.*, Nolan v. Cooper Tire & Rubber Co., No. CIV.A.01-83, 2001 WL 253865 (E.D. Pa. Mar. 14, 2001) (remanding nationwide class action to state court based in part on conduct originating in New Jersey).

805. *See In re* Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700 (E.D. Tex. 1997) (ruling on first set of bellwether plaintiffs' complaints); *infra* section 22.31 (criteria for aggregating mass tort claims); *see also* Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. Pa. L. Rev. 2225, 2253–61 (2000)

may want to accelerate action on certification to protect against inconsistent rulings on class certification, appointment of class counsel, discovery motions, choice of law, and dispositive motions.

Competing class actions may produce a race to certification in different courts for the perceived advantages of a given forum. Such efforts should not influence the timing of the certification decision, and, through coordination with other courts, the judge should avoid facilitating such adversarial contests.

When informal efforts at cooperation and coordination prove unsuccessful, federal courts have on occasion felt it necessary to resort to efforts to stay parallel suits pending in other fora. The Anti-Injunction Act[806] and the All Writs Act[807] define federal court authority to stay or enjoin state court proceedings. Under these statutes, a federal court may enjoin actions in state courts, but only when necessary to aid its jurisdiction.[808] For example, a federal court may enjoin parallel state court actions to protect a class action settlement preliminarily or finally approved in the federal court.[809] Less clear is federal court authority to issue such orders outside the context of a pending settlement and before a class is certified.[810] A federal court considering an injunction

(discussing a multidimensional approach to mass tort case management that includes, among other factors, the concept of maturity). *See generally* McGovern, *Mass Torts for Judges*, *supra* note 705, at 1841–45 (presenting the concept of maturity, i.e., the idea that individual cases should be adjudicated and evaluated before courts consider certifying a class or otherwise aggregating claims).

806. 28 U.S.C. § 2283 (West 2002).

807. *Id.* § 1651.

808. At least four federal courts of appeals have approved such an injunction in "consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) (citing Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197 (3d Cir. 1993); *In re* Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334–35 (5th Cir. 1981)); *see also, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998) (affirming the district court's injunction of state court proceedings where it had preliminarily approved a nationwide class settlement); White v. Nat'l Football League, 41 F.3d 402, 409 (8th Cir. 1994) (affirming injunction of related proceedings where district court had given final approval to a nationwide class settlement); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197 (3d Cir. 1993) (same).

809. *Hanlon*, 150 F.3d at 1025; *White*, 41 F.3d at 409; *Carlough*, 10 F.3d at 197; *In re* Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334–35 (5th Cir. 1981).

810. *See In re* Bridgestone/Firestone Tires Prods. Liab. Litig., Nos. 03-1-1399 & 03-1564 (7th Cir. June 20, 2003) (once federal appellate court held nationwide class action improper, federal district courts required to enjoin members of the putative national classes and their lawyers to have nationwide classes certified over defendants opposition with respect to same claims). *See also* Newby v. Enron Corp., 302 F.3d 295, 300 (5th Cir. 2002) (indicating *in dicta* that a district

or similar action directed toward parallel state court actions, before the federal court has certified a class or preliminarily approved a settlement, should be cautious in doing so; it is critical that the court be clear and precise in identifying the legal and factual basis for the injunction and the parties against whom the injunction operates.

21.2 Deciding the Certification Motion

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21.21 Certification Hearings and Orders

A hearing under Federal Rule of Civil Procedure 23(c) is a routine part of the certification decision. The nature and scope of the disputed issues relating to class certification bear on the kind of hearing[811] the judge should conduct. An evidentiary hearing may be necessary in a challenge to the factual basis for a

judge could not issue an injunction restraining a lawyer from filing related state court proceedings absent a pattern of abuse); *In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *2 (6th Cir. Oct. 29, 2001) (staying injunction against members of the proposed class in conditionally certified class "[b]ecause the validity of the proposed settlement is questionable"). *See also infra* section 31.32.

811. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23."); Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997) (affirming certification but ordering the district court to create subclasses and "[i]f necessary, . . . allow additional discovery and hold evidentiary hearings in order to determine which classifications may be appropriate"); Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984) (remanding and holding that an evidentiary hearing on class certification is required unless clear grounds for denying certification exist); *cf. In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 682 n.4 (N.D. Ga. 1991) (holding that discretionary evidentiary hearing need not afford defendants unlimited opportunity to examine or cross-examine witnesses opposing class certification and addressing the merits).

class action.[812] Disputed facts material to deciding certification may be narrowed or eliminated by stipulations, requests for admission, affidavits, or declarations. The parties should submit a statement of stipulated facts and identify disputed facts relevant to Rule 23 issues using the general procedure described in section 11.47. When there is disagreement over the legal standards but not over the facts material to the certification decision, the court may rely on the parties' stipulations of fact, affidavits, declarations, and relevant documents to establish the factual record. In such a case, a hearing may be limited to argument over whether the certification requirements are met. A hearing is appropriate, even if the parties jointly move for certification of a class for settlement and for approval of the settlement class. A hearing ensures a full record, particularly if it is unclear that the certification standards are met or if there are likely to be objections to the settlement.

An evidentiary hearing to resolve disputed facts relevant to the certification decision should not be a minitrial on the merits of the class or individual claims.[813] Instead, the parties should present facts and arguments to let the judge determine the nature of the claims and defenses and how they will be presented at trial, whether there are common issues that can be tried on a class-wide basis, and whether those common issues predominate and class treatment is a superior method of resolving them. The judge may limit the number of witnesses, require depositions to be summarized, call for written statements of the direct evidence, and use other techniques described in section 12.5 for nonjury proceedings.[814]

If the parties have submitted a trial plan to aid the judge in determining whether certification standards are met, the certification hearing provides an opportunity to examine the plan and its feasibility.

Expert witnesses play a limited role in class certification hearings; some courts admit testimony on whether Rule 23 standards, such as predominance and superiority, have been met.[815] The judge need not decide at the certification stage whether such expert testimony satisfies standards for admissibility at

812. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157–60 (1982).

813. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974).

814. *In re Domestic Air*, 137 F.R.D. at 682 (allowing each side to use written statements of expert witnesses).

815. *See, e.g.*, *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134–35 (2d Cir. 2001) (affirming district court's reliance on plaintiff's expert testimony to support its decision to certify a class), *cert. denied*, 536 U.S. 917 (2002); *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 214–18 (E.D. Pa. 2001) (relying on an econometrics expert to show that issues relating to common impact and common damages predominate and are susceptible to class-wide proof); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321–26 (E.D. Mich. 2001) (using expert testimony to show a plausible method of proving class-wide damages).

trial. Courts have applied a high threshold for assessing the need for expert testimony at the certification stage.[816] A judge should not be drawn prematurely into a battle of competing experts.[817]

After the hearing, the court should enter findings of fact and conclusions of law addressing each of the applicable criteria of Rule 23. Failure to make such findings may result in reversal or remand for further proceedings after interlocutory appeal under Rule 23(f).[818]

Rule 23(c)(1)(B) specifies that an order certifying a class must define the class membership and identify the class claims, issues, or defenses. It also requires that the order appoint class counsel under Rule 23(g). An order certifying a Rule 23(b)(3) class must inform the members of the proposed class when and how they may elect to opt out.[819]

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21.221 Type of Class

The certification order must specify whether Rule 23(b)(1), (b)(2), or (b)(3) forms the basis for certification. Members of a Rule 23(b)(3) class are entitled to individual notice and an opportunity to opt out.[820] Rules 23(b)(1)

816. *See, e.g.*, *In re Visa*, 280 F.3d at 135 ("A district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." (citing Cruz v. Coach Stores, Inc., 96 Civ. 8099, 1998 U.S. Dist. LEXIS 18051, at *13 n.3 (S.D.N.Y. Nov. 18, 1998))); Vickers v. Gen. Motors Corp., 204 F.R.D. 476, 479 (D. Kan. 2001) (same).

817. *See, e.g.*, *In re Visa*, 280 F.3d at 135 ("[A] district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts." (citing Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999))); *In re Linerboard*, 203 F.R.D. at 217 n.13 (same); *see also In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 30 (N.D. Ga. 1997) (noting that "the evidence relied upon . . . has not been subjected to the adjudicative process" and that class certification "'should not be viewed as a prediction that Plaintiffs will ultimately prevail on the merits'" (quoting Diaz v. Hillsborough County Hosp. Auth., 165 F.R.D. 689, 692 (M.D. Fla. 1996))).

818. *See* Consol. Edison Co. of N.Y. v. Richardson, 233 F.3d 1376, 1384 (Fed. Cir. 2000) (remanding issue of certification because district court provided no reasons for its denial), *amended by* No. 99-1436, 2000 U.S. App. LEXIS 35446, at *22–*23 (Fed. Cir. Feb. 27, 2001); *see also* Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 149–50 (4th Cir. 2001) (vacating and remanding for determination of factual issue); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1276 (11th Cir. 2000) (noting "a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision").

819. Fed. R. Civ. P. 23(c)(2)(B).

820. *Id.*

and (b)(2) do not mandate notice or an opt-out opportunity, but amended Rule 23(c)(2)(A) recognizes a court's discretion to require notice of class certification in such cases. See section 21.311.[821]

A class action seeking injunctive and declaratory relief may also include a claim for monetary relief, and the judge must decide whether a class should be certified under Rule 23(b)(2) or (b)(3).[822] Courts have held that where money damages constitute the primary relief requested, even though injunctive relief is also sought, the class must be certified under Rule 23(b)(3) and must meet due process requirements.[823] In such cases, the notice and opt-out requirements of that subsection apply, even if the class also qualifies for certification under Rule 23(b)(1) or (b)(2).[824] On the other hand, where the damages flow directly from the equitable remedy, without the need for individual calculation, some courts have held that Rule 23(b)(2) is the only standard that must be met.[825] The circuits have divided on the resolution of this issue, which arises most often in employment discrimination class actions.

821. A court has discretion under Rules 23(d)(2) and (d)(5) to permit a class member to exclude itself from a Rule 23(b)(1)(B) class. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304–05 (2d Cir. 1990). A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation. Such a definition may be appropriate in some Rule 23(b)(2) cases or in a Rule 23(b)(1)(B) case in which the class was formed merely because separate actions by class members might impede their ability to protect their interests. *See, e.g.*, Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981).

822. Eubanks v. Billington, 110 F.3d 87, 91–92 (D.C. Cir. 1997). The above cases deal with employment discrimination actions. Courts have similarly divided over whom to certify in proposed mass tort medical monitoring class actions, and whether under Rule 23(b)(2) or (b)(3). *See infra* section 22.74 (medical monitoring class actions).

823. Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); *see also* Molski v. Gleich, 318 F.3d 937, 947–48 (9th Cir. 2003) (holding in a case primarily seeking injunctive relief that release in settlement of claims for individual damages triggers applicability of Rule 23(b)(3) requirements of individual notice and the right to opt out); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999).

824. *In re* Ikon Office Solutions, Inc. Sec. Litig., 209 F.R.D. 94, 101–02 (E.D. Pa. 2002) (certifying Rule 23(b)(1) and (b)(3) settlement classes with first-class mail notice supplemented by publication and Internet posting); Wilson v. United Int'l Investigative Servs. 401(k) Sav. Plan, No. CIV.A.01-CV-6126, 2002 WL 734339, at *6–*7 (E.D. Pa. Apr. 23, 2002) (certifying Rule 23(b)(2) and (b)(3) class with individual notice pursuant to Rule 23(c)(2)).

825. *See Allison*, 151 F.3d at 414–15, and cases cited therein. Damages would be incidental to an injunction when a statute serving as the basis for an injunction also establishes a fixed sum as damages. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (holding that Rule 23(b)(2) certification is permissible if the district court finds that "'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed'" and that "class treatment would be

21.222 Definition of Class

Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the "best notice practicable" in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable. For example, the class may consist of those persons and companies that purchased specified products or securities from the defendants during a specified period, or it may consist of all persons who sought employment or who were employed by the defendant during a fixed period.

Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable. Because individual class members must receive the best notice practicable and have an opportunity to opt out, and because individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not.[826] An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against).[827] The order should use objective terms in defining persons to be excluded from the class, such as affiliates of the defendants, residents of particular states, persons who have filed their own actions, or members of another class.

A class may be defined to include individuals who may not become part of the class until later. Such "future claimants" are primarily a feature of those mass tort actions involving latent injury. Section 22.1 defines the three types of mass tort future claimants. Apart from mass tort cases, membership in a Rule 23(b)(3) class ordinarily should be ascertainable when the court enters judgment. There is no need to identify every individual member at the time of certification of a Rule 23(b)(2) class action for injunctive relief as long as the court can determine at any given time whether a particular individual is a

efficient and manageable" (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting))), *cert. denied*, 535 U.S. 951 (2002).

826. Garrish v. United Auto., Aerospace, & Agric. Implement Workers, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001) (finding that the plaintiff's definition of the Rule 23(b)(3) class is "readily ascertainable by reference to objective criteria"); *see generally* 5 Moore et al., *supra* note 626, §§ 23.21[1] & 23.21[3] (discussing how a precise class definition allows courts to determine whether a particular individual is a member of the proposed class and who is entitled to notice).

827. *See, e.g.*, Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) ("defining the purported class as 'all residents and businesses who have received unsolicited facsimile advertisements' requires addressing the central issue of liability" and "[d]etermining a membership in the class would essentially require a mini-hearing on the merits of each case").

member of the class.[828] See section 21.24 for a discussion of issues classes certified under Rule 23(c)(4).

The court should also consider whether the class definition captures all members necessary for efficient and fair resolution of common questions of fact and law in a single proceeding. If the definition fails to include a substantial number of persons with claims similar to those of the class members, the definition of the class may be questionable. A broader class action definition or separate class might be more appropriate. If the class definition includes people with similar claims but divergent interests or positions, subclasses with separate class representatives and counsel might suffice.

The applicable substantive law and choice-of-law considerations may also affect the appropriate scope of the class.[829] The difficulties posed by these considerations are likely to be compounded in nationwide or multistate class action litigation raising state law claims or defenses. Differences in applicable law and the number of divergent interests may lead a court to decline to certify a class.[830]

The class definition should describe the operative claims, issues, or defenses, such as injury resulting from securities fraud or denial of employment on account of race.[831] The relevant time should be included in the class definition. The relevant time, often referred to as the "class period," is, for example, the period during which members of the proposed class incurred the claimed injury. The order should delineate how the class representatives meet the commonality and typicality requirements of Rule 23(a).[832] In a Rule 23(b)(3) case, defining the class and the class claims in the order helps confirm

828. Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 897 (S.D.N.Y. 1975).

829. A court to which cases have been transferred, through multidistrict proceedings or otherwise, is obliged to apply the choice-of-law rules of the transferor court. Van Dusen v. Barrack, 376 U.S. 612 (1964). Courts have applied *Van Dusen* to proceedings under the multidistrict litigation statute. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 552 n.14 (1996) (citing case law).

830. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); Spence v. Glock, 227 F.3d 308, 313 (5th Cir. 2000); Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996).

831. Fed. R. Civ. P. 23(c)(2)(B). A description of the claims made on behalf of or against the class will be useful if questions relating to preclusive effects arise in later litigation. *See* Collins v. E.I. Dupont de Nemours & Co., 34 F.3d 172, 179–80 (3d Cir. 1994); *cf.* Cooper v. Fed. Reserve Bank, 467 U.S. 867, 880–81 (1984) (judgment against class in Title VII action bars only "class claims" and individual claims actually tried).

832. Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) (meritorious individual claim of employment discrimination in promotion could not serve as a basis for certifying a class claim relating to "across the board" hiring practices).

that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy.[833]

21.23 Role of Subclasses

Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel. Those differences may arise from a variety of sources. Subclassing sometimes represents a workable solution to differences in substantive law and for choice-of-law difficulties. For example, in tort cases class members may have different levels of exposure to the same allegedly toxic substance, allege different types and degrees of injury, or seek different relief. Class members who have been exposed to a toxic substance but have no present injury (so-called future claimants) have an interest in ensuring that they will receive adequate compensation if an injury manifests itself in the future; those whose exposure has already resulted in injury have a conflicting interest in maximizing the present recovery for the damage they have already sustained. In securities fraud cases, class members may have received different information or communications at different times, requiring the creation of subclasses.

Each class or subclass must independently satisfy all the prerequisites of Rules 23(a) and (b).[834] The necessity of a large number of subclasses may indicate that common questions do not predominate. The creation of a number of subclasses may result in some that are too small to satisfy the numerosity requirement, may make the case unmanageable, or, in a Rule 23(b)(3) suit, may defeat the superiority requirement. Denial of class status in such circumstances is appropriate; if conflicts and differences among class members are so sharp that a number of small subclasses result, class treatment may not be justified in the first place.

21.24 Role of Issues Classes

Rule 23(c)(4)(A) permits a class to be certified for specific issues or elements of claims raised in the litigation.[835] Selectively used, this provision

833. Fed. R. Civ. P. 23(b)(3); *see also In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998). *See infra* section 22.

834. Fed. R. Civ. P. 23(c)(4)(B); *see, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 351 (S.D.N.Y. 2002).

835. *See, e.g.*, Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 184 (4th Cir. 1993) (class certified for eight common issues); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472–73

may enable a court to achieve the economies of class action treatment for a portion of a case, the rest of which may either not qualify under Rule 23(a) or may be unmanageable as a class action.[836] A court may certify a Rule 23(b)(3) class for certain claims, allowing class members to opt out, while creating a non-opt-out Rule 23(b)(1) or (b)(2) class for other claims.[837] Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.[838] If the resolution of an issues class leaves a large number of issues requiring individual decisions, the certification may not meet this test. In product-liability cases, there is a split of authority as to whether questions relating to product defects should be certified in an issues class.[839]

(5th Cir. 1986) (class action to adjudicate "state of the art" defense); Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) (class for injunctive relief).

836. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84 (3d Cir. 1979) (dictum), *rev'd on other grounds*, 451 U.S. 1 (1981). This appears to have been the intention of the drafters of the clause. *See* Fed. R. Civ. P. 23(c)(4) committee note (1966 amendment). Courts have, for example, considered the propriety of post-verdict proceedings in class actions under the securities acts in which, after the jury has determined liability, individual plaintiffs could seek recovery for qualifying shares. *See* Biben v. Card, 789 F. Supp. 1001, 1003 (W.D. Mo. 1992) (bifurcating trial proceeding into liability determination phase and individual claims for damages phase); Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 302–03 (D.N.J. 1989) ("[I]t is well settled that the issue of liability may be tried separately from the damage claims of individual class members."). If filing a claim is the only way for class members to recover individual damages, this process amounts to a "claims class," that is, one in which liability has been determined on a class-wide basis, and individual damages are based on reviewing individual claims from class members.

837. *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 147 (2d Cir. 2001); *see also* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002).

838. *Robinson*, 267 F.3d at 167 n.12 ("'the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole'" (quoting *In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985))). *See also MTBE*, 209 F.R.D. at 352–53.

839. *See infra* section 22.75. *Compare In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302–03 (7th Cir. 1995) (rejecting the use of an issues class in product liability case because of individual liability issues), *and* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (same), *with* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (indicating that even "if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues"). *See also* Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) (reciting the advantages of claim-by-claim certification and remanding case for determination of whether certification of a modified class with respect to some of the claims under Rule 23(b)(2) or (b)(3) would be proper).

An issues-class approach contemplates a bifurcated trial where the common issues are tried first, followed by individual trials on questions such as proximate causation and damages. A bifurcated trial must adequately present to the jury applicable defenses and be solely a class trial on liability.[840] There is a split of authority on whether the Seventh Amendment is violated by asking different juries to decide separate elements of a single claim.[841]

Before certifying an issues class under Rule 23(d), the judge should be satisfied that common questions are sufficiently separate from other issues and that a severed trial will not infringe any party's constitutional right to a jury trial and will permit all the parties fairly to present the claims and defenses.[842]

21.25 Multiple Cases and Classes: The Effect on Certification

The broad range of venues available in class actions means that competing, conflicting, or overlapping suits are often simultaneously pending in state and federal courts. Any of the following circumstances or combinations of circumstances may exist:

- multiple cases with similar class allegations, each of which might be appropriately certified under Rule 23 but which may overlap or conflict if more than one is certified;
- cases alleging a nationwide class and cases seeking multistate or single-state class certification pending in different courts at the same time;
- cases filed as class actions in federal and state courts relating to the same type of transactions and involving some or all of the same parties;
- cases filed by the same lawyers seeking to represent an overlapping or duplicative class of plaintiffs in order to obtain the most favorable forum;
- cases filed by different lawyers competing for the fastest and most favorable rulings on class certification and appointment as class counsel;

840. *In re Rhone-Poulenc*, 51 F.3d at 1299.

841. *Compare In re Rhone-Poulenc*, 51 F.3d at 1303 (holding that the Seventh Amendment includes "a right to have juriable issues determined by the first jury impaneled to hear them"), *with Robinson*, 267 F.3d at 169 ("Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment" as long as a single factual issue is not "tried by different, successive juries."). *See also* Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 736–37 (2000); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499 (1998).

842. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931); Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978). *See also supra* section 21.132.

- multiple individual actions or other forms of aggregate litigation pending in state and federal courts, raising the same issues and involving some or all of the same parties; or
- prior unsuccessful class certification efforts in state or federal courts.

A judge should be mindful of the various possibilities in deciding the best approach to precertification case management, in deciding whether and for what purpose to certify a class action, and in determining how to define the class. The first step is to obtain complete information from the parties about other pending or terminated actions in federal or state courts relating to the claims presented.

If all the cases are pending in federal court and have been centralized by an MDL proceeding, the transferee court can order consolidated pleadings and motions to decide how to resolve competing claims for certification, appointment of class counsel, and appointment of lead class counsel. See section 21.27. Counsel sometimes request certification of multiple classes and subclasses primarily to gain appointment to positions of leadership in the litigation. The court should attempt to distinguish such requests from competing certification motions that reflect more significant differences.

If multiple class actions or individual actions are pending at the same time in one or more federal and state courts, the certification decision requires the judge to consider the relationship among the cases. Federal class actions may encompass plaintiffs who are parties to individual cases or members of proposed class actions pending in other federal courts. If the MDL Panel has not been asked to centralize those cases, a court that has gathered information about the cases' status might discuss with counsel whether MDL status should be sought. In order to enable and facilitate essential intercourt communication and as an ongoing duty of candor to the tribunal, the court should, at an early date, call on counsel to disclose all related actions in other courts (state or federal) that may involve multiple, overlapping, or competing class allegations. Whether the related cases are pending in other federal or state courts, the federal judge asked to certify a class action that will overlap with or duplicate parallel cases should communicate with the judges handling the other proceedings and coordinate approaches to the class certification issues, including precertification discovery, motions, arguments, and proposed class definitions. See sections 20.14 and 20.31.

If each case meets the Rule 23 requirements, the judge has broad discretion in deciding which of several related cases to certify as a class action. A number of factors are relevant to this decision:

- the extent and nature of other litigation;[843]
- choice-of-law consequences (see section 21.23);
- whether persons who are class members under the allegations of one complaint are also included as members of other classes pleaded in other courts; and
- the existence of parallel state court actions.

If a state court class action has proceeded to certification before the federal action, there may be no need for the federal action. If the federal court finds that a certifiable class exists, it might define that class so as to exclude the members of a certified state class,[844] thus preventing needless conflicts between state and federal proceedings.

To the extent that these problems relate to differences in pleadings in different cases, they may be solved by ordering or allowing the filing of a consolidated complaint that amends existing complaints to add the necessary or appropriate claims and parties. A single pleading, in a single action, can then serve as the vehicle for defining the proposed class and deciding class certification.

A federal class action may include plaintiffs who are members of state classes. Because a prior resolution of the federal action may have a preclusive effect on claims pending in state courts, it is important to give adequate notice to enable individual state plaintiffs[845] to decide whether to opt out. Note, however, that a judgment in a federal non-opt-out Rule 23(b)(1) or (b)(2) class case has the practical effect of an injunction against the state court proceeding.[846] See section 21.3.

21.26 Appointment of the Class Representatives

The judge must appoint one or more representatives of the class and any subclass. The Private Securities Litigation Reform Act (PSLRA) requires that a class representative act independently of counsel, be familiar with the subject

843. *See* Califano v. Yamasaki, 442 U.S. 682, 703 (1979) (need to consider whether proposed nationwide class would improperly interfere with similar pending litigation in other courts).

844. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 1999 U.S. Dist. LEXIS 13228, at *49–*50 (E.D. Pa. Aug. 26, 1999) (conditionally certifying nationwide medical monitoring class that excludes members of certified state medical monitoring classes).

845. Due process for individual class members requires that the decision whether or not to opt out rests with the individual and not be made by a class representative or class counsel. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024–25 (9th Cir. 1998); *see also* Conte & Newberg *supra* note 739, § 16.16 at 210.

846. *See In re* Fed. Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

matter of the complaint, and authorize initiation of the action.[847] In other kinds of class actions as well, courts have required that representatives be knowledgeable about the issues in the case. This does not necessarily require legal experience or expertise on the part of the representative, who is usually a layperson. No particular level of education or sophistication is required.[848] In all cases, the representatives must be free of conflicts and must represent the class adequately throughout the litigation. The judge must ensure that the representatives understand their responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class,[849] including subjecting themselves to discovery.

Later replacement of a class representative may become necessary if, for example, the representative's individual claim has been mooted or otherwise significantly altered. Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation.[850] In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.[851]

847. 15 U.S.C. § 78u-4(a)(2)(A) (2000). *See generally* Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), *reh'g denied*, 279 F.3d 313 (2002); *see also In re* Cell Pathways, Inc., Sec. Litig. II, 203 F.R.D. 189, 193–94 (E.D. Pa. 2001) (granting a post-PSLRA motion of a group of four businessmen to serve as lead plaintiffs indicating that they were all "sophisticated businessmen who share a substantial and compelling interest in vigorously prosecuting the claims on behalf of the class"). In a nonsecurities context, courts have commented that demanding a high degree of sophistication from class representatives is inconsistent with allegations in consumer cases that defendants' conduct targets those who are not sophisticated. *See* Dienese v. McKenzie Check Advance of Wis., L.L.C., No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *20 (E.D. Wis. Dec. 11, 2000); *see also* Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 698 (M.D. Ala. 1997) (holding that an unsophisticated consumer's reliance on counsel to investigate and litigate the case does not make this plaintiff an inadequate class representative).

848. *See* cases cited *supra* note 789.

849. *See In re* Storage Tech. Corp. Sec. Litig., 113 F.R.D. 113, 118 (D. Colo. 1986) (disqualifying named plaintiffs who failed to appear at depositions and another who appeared too passive to prosecute the case vigorously); 1 Conte & Newberg, *supra* note 739, § 3:22, at 409–14.

850. *See* Greenfield v. U.S. Healthcare, Inc., 146 F.R.D. 118 (E.D. Pa. 1993).

851. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 172 F.R.D. 271, 283 (S.D. Ohio 1997) (court named substitute new class representative without formal intervention joinder); *see also* Shankroff v. Advest, Inc., 112 F.R.D. 190, 194 (S.D.N.Y. 1986) (sole proposed representative found inadequate, although other class certification criteria were met; plaintiff's counsel were given thirty days to propose at least one substitute representative).

Aside from the need to replace a class representative, formal intervention by class members is infrequent. Intervention is not necessary for a class member to pursue an appeal after objecting to a class settlement.[852] Class members in Rule 23(b)(3) actions may, however, appear by their own attorneys, subject to the court's power to adopt appropriate controls regarding the organization of counsel.

21.27 Appointment of Class Counsel

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Rules 23(c)(1)(B) and 23(g) recognize that the certification decision and order require judicial appointment of counsel for the class and any subclasses. This section deals with that process. Sections 21.7 and 14 discuss the procedures for reviewing and awarding attorney fees for class counsel.

Unlike other civil litigation, many class action suits do not involve a client who chooses a lawyer, negotiates the terms of the engagement, and monitors the lawyer's performance. Those tasks, by default, fall to the judge, who creates the class by certifying it and must supervise those who conduct the litigation on behalf of the class. The judge must ensure that the lawyer seeking appointment as class counsel will fairly and adequately represent the interests of the class.[853] If the certification decision includes the creation of subclasses reflecting divergent interests among class members, each subclass must have separate counsel to represent its interests.[854]

21.271 Criteria for Appointment

Rule 23(g) sets out the criteria and procedures for appointment of class counsel. In every case, the judge must inquire into the work counsel has done in investigating and identifying the particular case; counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; counsel's knowledge of the applicable law; the resources counsel will commit to representing the class; and any other factors that bear on the attorney's ability to represent the class fairly and adequately. This last category may include the ability to coordinate the litigation with other state and federal

852. Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening").

853. Fed. R. Civ. P. 23(g)(1)(B).

854. Fed. R. Civ. P. 23(g)(1)(A) committee note.

class and individual actions involving the same subject matter. Those seeking appointment as class counsel must identify related litigation in which they are participating. It is important for the judge to ensure that counsel does not have a conflict with class interests.[855]

In many cases, the lawyers who filed the suit will be the obvious or only choice to be appointed counsel for the class. In such cases, the judge's task is to determine whether the applicant is able to provide adequate representation for the class in light of the Rule 23(g)(1)(C) factors.

The judge must choose the class counsel when more than one class action has been filed and consolidated or centralized, or more than one lawyer seeks the appointment. The term "appoint" here means to "select" as well as to "designate" the lawyer as class counsel. If there are multiple applicants, the court's task is to select the applicant best able to represent the interests of the class. No single factor is dispositive in evaluating prospective class counsel. In addition to those listed above, relevant considerations might include

- involvement in parallel cases in other courts;
- any existing attorney–client relationship with a named party; and
- fee and expense arrangements that may accompany the proposed appointment.

21.272 Approaches to Selecting Counsel

There are several methods for selecting among competing applicants. By far the most common is the so-called "private ordering" approach: The lawyers agree who should be lead class counsel and the court approves the selection after a review to ensure that the counsel selected is adequate to represent the class interests.[856] Counsel may agree to designate a particular lead class counsel in exchange for commitments to share the legal work and fees. To guard against overstaffing and unnecessary fees,[857] the court should order the attorneys to produce for court examination any agreements they have made relating to fees or costs.[858] See section 21.631.

855. For an overview of possible conflicts of interest and other abuses (such as the "reverse auction" settlement in which defendant seeks to settle with counsel willing to accept the lowest offer), see sources cited *supra* note 737 and see *infra* sections 21.611–21.612.

856. *See* Third Circuit Task Force Report on Selection of Class Counsel, 74 Temp. L. Rev. 689, 693–94 (2001) [hereinafter Third Circuit 2001 Task Force Report]; *see generally supra* section 14.

857. *See, e.g.*, *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984).

858. *See* Fed. R. Civ. P. 23(h) committee note; *see also* Fed. R. Civ. P. 23(e)(2) (settlement approval); Fed. R. Civ. P. 54(d)(2)(B) (attorney fees motions).

In the "selection from competing counsel" approach, the judge selects from counsel who have filed actions, are unable to agree on a lead class counsel, and are competing for appointment. The lawyer best able to represent the class's interests may emerge from an examination of the factors listed in Rule 23(g)(1)(C), as well as other factors, such as those delineated above.

A third and relatively novel approach, competitive bidding, entails inviting applicants for appointment as class counsel to submit competing bids. The fees to be awarded are one of the many factors in the selection.[859] Rules 23(g)(1)(iii) and 23(g)(2)(C) expressly permit the court to consider fee arrangements in appointing counsel. Some judges propose a fee structure as a framework for comparing bids for different percentages at different levels of recovery.[860]

Judges in antitrust and securities class actions have used competitive bidding to select counsel and to establish in advance a rate or formula for calculating attorney fees. Studies suggest that bidding may be more appropriate when

- prospective damages are relatively high;
- the chances of success are relatively predictable;
- prefiling investigative work was conducted by governmental agencies or others, so that the lawyers' foundational work is minimal; and
- the bidding process does not directly conflict with statutory or policy goals.

Bidding remains an experimental approach to selecting counsel and establishing presumptive fee levels.[861]

859. *See* Third Circuit 2001 Task Force Report, *supra* note 856, at 715–22; Laural L. Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study (Federal Judicial Center Aug. 29, 2001), *reprinted in* 209 F.R.D. 519 (2002); *see also In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal.), *later proceedings at* 157 F.R.D. 467 (N.D. Cal. 1994); *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal.), *later proceedings at* 132 F.R.D. 538 (N.D. Cal. 1990), *and* 136 F.R.D. 639 (N.D. Cal. 1991); *supra* section 10.224. *See generally* Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation 99–101 (Federal Judicial Center 1994); Steven A. Burns, Note, *Setting Class Action Attorneys' Fees: Reform Efforts Raise Ethical Concerns*, 6 Geo. J. Legal Ethics 1161 (1993).

860. For examples of fee structures that were used in the bidding cases, see Hooper & Leary, *supra* note 859, at 34–45, reprinted in 209 F.R.D. at 561–73 (documenting key features of the various bidding approaches used in all twelve bidding cases identified in this descriptive study).

861. *See generally* Hooper & Leary, *supra* note 859; Third Circuit 2001 Task Force Report, *supra* note 856.

Cases in which liability is relatively clear and the amount of damages relatively predictable may be particularly good candidates for *ex ante* fee setting. Even if there is no court-ordered competition, a court may consider asking counsel to submit fee proposals to help analyze which application is best able to represent the class. In any case in which the judge does not appoint as class counsel the attorneys who investigated and filed the case, those attorneys may be entitled to compensation based on work performed. See section 14.12.

The Private Securities Litigation Reform Act of 1995 mandates an "empowered-plaintiff" approach to appointment of counsel in securities class actions.[862] This statute-based model provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."[863] Section 31.3 provides a useful analogy for similar class actions brought by sophisticated plaintiffs with large losses or sizeable claims.

The order that appoints counsel might specify some of the criteria the judge expects to use in determining a fee award. The order can include provisions that will affect the fees *ex ante*[864] as part of the appointment process, even in jurisdictions that require a searching and detailed *ex post* review of the fee award at the end of the case. For example, the court can clarify whether it will use the percentage or lodestar method or a combination of the two in calculating fees. The judge can also specify terms that may reduce duplicative work, unnecessary hours, and unnecessary costs, such as agreements on the numbers of lawyers who may appear at depositions or agreements on the types of permissible expenses. See section 14.211. With the percentage-of-fund method for calculating attorney fee awards, such detailed limitations are less important since the maximum fee award is fixed at a reasonable percentage of the class recovery, no matter how many lawyers work to produce it. Even under a percentage-of-fund approach, however, consider controlling litigation

862. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 78u-4 to 78u-5 (2000)). For a discussion of the underpinnings of the empowered plaintiff model, see generally Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053 (1995).

863. 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v) (2000).

864. At least one court of appeals has expressed a preference for establishing the terms of appointment *ex ante*. *See In re* Synthroid Mktg. Litig., 264 F.3d 712, 718–19 (7th Cir. 2001) ("The best time to determine [a market] rate is the beginning of the case, not the end . . . ."). Another court of appeals has ruled that *ex ante* consideration of the terms of appointing counsel is not a substitute for *ex post* review of fees that were calculated using a formula established at the outset of the litigation. *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 736–37 (3d Cir. 2001).

expenses that would ordinarily be deducted from the award to the class before fees are calculated. Many courts use the lodestar method as a cross-check on the reasonableness of the fee awarded under a percentage-of-fund approach. See section 14.122.

If no applicant would provide adequate representation, the judge may refuse to certify the class. If the class appears otherwise certifiable, however, refusal to certify solely on a finding of inadequate representation is very problematic. One alternative is to allow a reasonable time period for other attorneys to seek appointment.

21.273 Procedures for Appointment

If only one lawyer seeks appointment as class counsel, or if the parties agree who should be class counsel or lead class counsel, the application is generally submitted as part of the certification motion. If competing applications are likely, a reasonable period after commencement of the action should be allowed for attorneys to file class counsel applications. Competing applications are likely where more than one class action has been filed or other attorneys have filed individual actions on behalf of members of the proposed class. To facilitate comparison among applications, consider ordering applicants to follow a common format designed to elicit information about the court's appointment criterion. Any order of appointment should include a statement of the reasons for the appointment. Section 10.2 considers appointment of liaison counsel and committees of counsel in complex class action cases or cases resulting from the consolidation of different classes or subclasses.

21.28 Interlocutory Appeals of Certification Decisions

Rule 23(f) provides that a court of appeals may permit parties to appeal a district court order granting or denying class certification if application to the court of appeals is made within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or court of appeals so orders. Whether to grant an interlocutory appeal lies within the discretion of the court of appeals. The reported opinions produce a rough consensus[865] that interlocutory review should not be granted unless one or

865. *See* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000); Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999); *but cf.* Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001). Other courts, however, have indicated a more expansive standard for granting interlocutory appeals. *See, e.g.*, *Isaacs*, 261 F.3d at 681 (expressing doubt that creating an exhaustive list of factors to

more of the following factors are evident: (1) the certification order represents the death knell of the litigation for either the plaintiffs (who may not be able to proceed without certification) or defendant (who may be compelled to settle after certification); (2) the certification decision shows a substantial weakness, amounting to an abuse of discretion; or (3) an interlocutory appeal will resolve an unsettled legal issue that is central to the case and intrinsically important to other cases but is otherwise likely to escape review.[866]

Rule 23(f) differs from other interlocutory review provisions in that it does not call for the district judge to recommend whether the appellate court accept the interlocutory appeal. Rule 23(f) also does not automatically impose a stay, either during the pendency of the petition or during any appeal that the court of appeals permits.[867] A party seeking a stay should file an application in the trial court in the first instance.[868] Interlocutory appeals can disrupt and delay the litigation without necessarily changing the outcome of what are often familiar and almost routine issues.[869] Granting a stay depends, in the language of one early decision applying the amended rule, on "a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the cost of waiting."[870] In deciding whether to enter a stay, the effect of the certification decision on the statute of limitations is a consideration.[871] A stay of an order denying certifica-

consider in deciding whether to allow an interlocutory appeal would be desirable); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001) (an "erroneous ruling" by the trial court or "'any consideration that the court of appeals finds persuasive'" justifies granting an interlocutory appeal (quoting Fed. R. Civ. P. 23(f) committee note (1998 amendment))).

866. *Prado-Steiman*, 221 F.3d at 1274–75. The court also indicated that the pretrial posture of the case, the state of the record, and future events, such as an impending settlement or bankruptcy, could have a substantial impact on the decision of whether to allow an interlocutory appeal. *Id.* at 1276.

867. Fed. R. Civ. P. 23(f) committee note ("Permission to appeal does not stay trial court proceedings.").

868. *Newton*, 259 F.3d at 165.

869. Fed. R. Civ. P. 23(f) committee note (referring to FJC Empirical Study of Class Actions, *supra* note 769); *see also In re* Sumitomo Copper Litig., 262 F.3d 134, 140 (2d Cir. 2001) (noting that "parties should not view Rule 23(f) as a vehicle to delay proceedings in the district court"); *Newton*, 259 F.3d at 165; *Prado-Steiman*, 221 F.3d at 1272 (citing Fed. R. Civ. P. 23(f) committee note).

870. *Blair*, 181 F.3d at 835 (noting that "Rule 23(f) is drafted to avoid delay"); *see also In re Sumitomo*, 262 F.3d at 140 (holding that "a stay will not issue unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay").

871. *See* Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., No. 98 CV 1492, 2000 U.S. Dist. LEXIS 13910 (E.D.N.Y. Sept. 26, 2000); *see also In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 114580, at *4, *7 (N.D. Ala. Apr. 1, 1994) (extending

tion may continue to toll the statute of limitations and thereby discourage the filing of individual cases that might otherwise follow denial of class certification, particularly where the stakes for an individual are large enough to support litigation.[872] In general, a court considering whether to grant a stay pending interlocutory appeal should consider possible prejudice to the parties that may arise from delaying the proceedings. If the appeal is from a grant of certification, the district court should ordinarily stay the dissemination of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification after notice dissemination.[873] The ten-day rule for filing appeals is applied strictly.[874]

21.3 Postcertification Communications with Class Members

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Communication by the court and counsel with the class is a major concern in the management of class actions. It is important to develop appropriate means for providing information to, and obtaining information from, class

indefinitely the time for opting out of a provisionally certified class action and stating that the pendency of that action would toll the statute of limitations for members of that class). Ordinarily, the tolling effect of a proposed class action ceases when a court denies class certification. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378 (11th Cir. 1998).

872. *Nat'l Asbestos Workers*, 2000 U.S. Dist. LEXIS 13910, at *8. *See also Armstrong*, 138 F.3d at 1380, 1389–90 (a pre-Rule 23(f) decision in which appellants did not seek to certify an interlocutory appeal under 28 U.S.C. § 1292(b); stating test for tolling as whether it is reasonable for members of the proposed class to rely on the possibility of reconsideration, or reversal through an interlocutory appeal, and holding that it was not reasonable in that case).

873. *See* Ramirez v. DeCoster, 203 F.R.D. 30, 40 (D. Me. 2001) (ordering a fairness hearing if no Rule 23(f) appeal filed, staying proceedings if appeal filed).

874. *See, e.g.*, Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc., 202 F.3d 957, 958–59 (7th Cir. 2000) (denying inexcusably late Rule 23(f) petition to appeal and rebuffing attempt to treat such a petition as an interlocutory appeal under 28 U.S.C. § 1292(b)); Gary v. Sheahan, 188 F.3d 891, 893 (7th Cir. 1999) (ruling that to extend the ten-day rule, a motion for reconsideration must be filed within ten days of the certification decision).

members, and for handling inquiries from potential or actual class members. It is equally necessary to avoid communications that might interfere with or burden the litigation. Rule 23(c)(2) provides significant guidance on the form and content of notices to the class. A committee note to that rule urges courts to "work unremittingly at the difficult task of communicating with class members" in plain language.[875]

21.31 Notices from the Court to the Class

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Notice to class members is required in three circumstances: (1) when a Rule 23(b)(3) class is certified; (2) when the parties propose a settlement or voluntary dismissal that would be binding on the class; and (3) when an attorney or party makes a claim for an attorney fee award. Rule 23(c)(2)(A) expressly grants the court discretion to require certification notice in Rule 23(b)(1) and (b)(2) classes in appropriate circumstances. Notice of settlement is required in all class actions. Rule 23(h)(1) requires that the court direct notice to the class members "in a reasonable manner" when an attorney or party files a motion for an award of attorney fees.[876] A judge who simultaneously certifies a class action and preliminarily approves a class-wide settlement (see section 21.612) typically combines notice of certification with notice of settlement and ordinarily includes notice of an application for an award of attorney fees. A case that is certified as a class action and has notice issue at that point, then settles at a later date (see section 21.611) requires a separate notice of the settlement.

Notice is a critical part of class action practice. It provides the structural assurance of fairness that permits representative parties to bind absent class members.[877] In a Rule 23(b)(3) class, notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so. In all class actions, notice provides an opportunity for class members to participate in the litigation, to monitor the performance of class representatives and class counsel, and to ensure that the predictions of adequate representation made at the time of certification are fulfilled. Proper notice also

875. Fed. R. Civ. P. 23(c)(2)(B) committee note.
876. Fed. R. Civ. P. 23(h)(1).
877. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

lessens the vulnerability of the final judgment to collateral attack by class members.[878]

Rule 23(c)(2)(B) specifies information that must be included in a notice, such as the nature of the action, the definition of the class, and the claims, issues, and defenses to be litigated. The rule requires that notices state essential terms "concisely and clearly . . . in plain, easily understood language." In addition, the court can require notice to be given when needed for the protection of class members or for the fair conduct of the action.[879] Notice generally is given in the name of the court, although one of the parties typically prepares and distributes it.

The Federal Judicial Center has produced illustrative forms of notice that combine notice of class certification and settlement in two types of class actions: a securities case and a products liability case in which both monetary damages and medical monitoring are provided. These forms can be adapted to specific cases. The Center has also drafted a form illustrating certification notice in an employment discrimination case. The form notices can be downloaded from the Center's Web site.[880]

Published notice should be designed to catch the attention of the class members to whom it applies. In many cases, a one-page summary of the salient points is useful, leaving fuller explanation for a separate document. Headlines and formatting should draw the reader's attention to key features of the notice. A short, informative blurb ("If you were exposed to ___, you may have a claim in a proposed class action settlement") on the outside of a mailing envelope serves a similar purpose.

Question-and-answer formats help to make information accessible and can guide the reader through each step of a complicated certification or settlement explanation. Counsel should logically order the information that will assist the class member in making important decisions, such as whether to opt out of the class, object to a settlement, or file a claim. Counsel should discuss with the court whether class members are likely to require notice in a language other than English or delivery by a means other than mail. Lists of class members usually provide the best source of information for deciding how to deliver notice. In some cases, the cohesiveness of a class (for example, employees of a single plant) or the existence of a common gathering place (for

878. *See* 7B Wright et al., *supra* note 738, §§ 1789, 1793.

879. Fed. R. Civ. P. 23(d).

880. The FJC has tested the form notices for comprehension and identified some principles that will be of value to those drafting such notices. Forms and discussion of plain language drafting principles are on the Center's Web page at http://www.fjc.gov (last visited Nov. 10, 2003).

example, shelters or food kitchens for a case involving the homeless) may suggest reliable and efficient ways to communicate notice.[881]

21.311 Certification Notice

Rule 23(c)(2)(A) and Rule 23(d) authorize the court to direct notice that a case has been certified as a Rule 23(b)(1) or (b)(2) class action. The court must provide notice for Rule 23(b)(3) classes. Notice in Rule 23(b)(1) and (b)(2) actions is within the district judge's discretion. Rule 23(c)(2)(A) recognizes the court's authority to direct "appropriate" notice in Rule 23(b)(1) and (b)(2) class actions, but contemplates different and more flexible standards for those cases than for Rule 23(b)(3) actions. Notice to members of classes certified under Rule 23(b)(1) or (b)(2) serves limited but important interests, such as monitoring the conduct of the action. This more flexible role of notice recognizes that in some cases, such as public interest organizations' civil rights class action suits, the costs of a wide-reaching notice might prove crippling and the benefits may be relatively small.

A court must decide whether and how to provide notice in Rule 23(b)(1) and (b)(2) actions. It may be preferable in some cases to forego ordering notice if there is a risk that notice costs could outweigh the benefits of notice, deterring the pursuit of class relief. If notice is appropriate, it need not be individual notice because, unlike a Rule 23(b)(3) class, there is no right to request exclusion from Rule 23(b)(1) and (b)(2) classes.

Who is to receive notice and how is notice to be delivered? Individual members in a Rule 23(b)(3) action have a right to opt out of the class proceedings. Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort. Those who cannot be readily identified must be given "the best notice practicable under the circumstances."[882] When the names and addresses of most class members are known, notice by mail[883] usually is preferred.

881. For a description of a case involving communication of notice on a worldwide basis to disparate groups, see *In re Holocaust Victims Assets Litigation*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) ("Swiss Banks" litigation). Under the notice plan approved by the court, notice went to forty-eight countries under a "multi-faceted notice plan, involving, in addition to direct mail utilizing existing lists covering segments of the settlement classes, worldwide publication, public relations (i.e., 'earned media'), Internet and grass roots community outreach." *Id.*

882. Fed. R. Civ. P. 23(c)(2)(B); *In re Holocaust Victims*, 105 F. Supp. 2d at 144. Historically, due process has not required actual notice to parties who cannot reasonably be identified. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–19 (1950); Silber v. Mabon, 18 F.3d 1449 (9th Cir. 1994); *but see Amchem*, 521 U.S. at 595. *See also In re* Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 327 n.11 (3d Cir. 2001) (listing recommended practices for expanding the pool of names of class members for actual notice); *In re Holocaust Victims*, 105 F.

Posting notices on dedicated Internet sites, likely to be visited by class members and linked to more detailed certification information, is a useful supplement to individual notice, might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the Internet for information increases. An advantage of Internet notice is that follow-up information can easily be added, and lists can be created to notify class members of changes that may occur during the litigation. Similarly, referring class members to an Internet site for further information can provide complete access to a wide range of information about a class settlement.[884] Many courts include the Internet as a component of class certification and class settlement notice programs.

Publication in magazines, newspapers, or trade journals may be necessary if individual class members are not identifiable after reasonable effort or as a supplement to other notice efforts. For example, if no records were kept of sales of an allegedly defective product from retailers to consumers, publication notice may be necessary. Financial and legal journals or financial sections of broad circulation newspapers, while useful to a degree, might not be read by many members of the general public. Such publications may, however, be useful in certain kinds of cases, such as securities fraud suits. Determination of whether a given notification is reasonable under the circumstances of the case is discretionary. The sufficiency of the effort made might become an issue if the preclusive effect of the class action judgment is later challenged. Section 21.22–21.23 discusses class certification under Rule 23(b)(3) in conjunction with Rule 23(b)(2).

When should notice be given? Ordinarily, notice to class members should be given promptly after the certification order is issued. When the parties are nearing settlement, however, a reasonable delay in notice might increase incentives to settle and avoid the need for separate class notices of certification and settlement. Delaying notice of certification until after settlement apparently is a common practice in such cases.[885]

Notice to the added class members is required if the certification order is amended to expand the class definition. If the certification order is amended to

Supp. 2d at 144–45; *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000).

883. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n.22 (1978), speaks favorably of the use of mail, without specifying the class of mail.

884. See, for example, the notice and forms published on a Web site created for the diet drugs class action settlement in *In re Diet Drugs Products Liability Litigation*. The site can be visited at http://www.settlementdietdrugs.com/dhome.php3#forms (last visited Nov. 10, 2003).

885. FJC Empirical Study of Class Actions, *supra* note 769, at 62.

eliminate previously included class members, consider whether notice is necessary to inform affected individuals who might have relied on the class action to protect their rights. If repetitive notice and frequent orders affect class interests, ordering the parties to use the Internet—especially a specific Web site dedicated to the litigation—may be a particularly cost-effective means to provide current information in a rapidly evolving situation.

What must the notice include? If a class is certified and settled simultaneously, a single notice is generally used. Rule 23(c)(2)(B) requires that a class certification notice advise class members of the following:

- the nature of the action;
- the definition of the class and any subclasses;
- the claims, issues, and defenses for which the class has been certified;
- the right of a potential class member to be excluded or to opt out from the class;
- the right of a class member to enter an appearance by counsel; and
- the binding effect of a class judgment.

In Rule 23(b)(3) actions, the notice also must describe when and how a class member may opt out of the class.

Sufficient information about the case should be provided to enable class members to make an informed decision about their participation. The notice should

- describe succinctly the positions of the parties;
- identify the opposing parties, class representatives, and counsel;
- describe the relief sought; and
- explain any risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses.

A simple and clear form for opting out is often included with the notice. If the certification notice is combined with a settlement notice, it should identify specific benefits for class or subclass members (or a formula for calculating such benefits), the choices available to class members, and any other information a class member reasonably would need to make an informed judgment about whether to remain in the class.[886] In a combined notice of certification and settlement, the opt-out form should be distinguished from a claims form

886. Ravens v. Iftikar, 174 F.R.D. 651, 655 (N.D. Cal. 1997) (citing *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104–05 (5th Cir. 1977)).

or a notice of appearance. Color coding or similar approaches may be appropriate.

Notice may be published in more than one language if appropriate to the demographics of the class.[887] The Federal Judicial Center's illustrative notices offer guidance in meeting the plain language requirement.[888]

Who pays for the notice? In a Rule 23(b)(3) class, the parties seeking class certification must initially bear the cost of preparing and distributing the certification notice,[889] including the expense of identifying the class members.[890] Individual class representatives, however, are responsible only for their pro rata share of notice costs (and other class action costs).[891] Class counsel may properly advance such costs with repayment contingent on recovery.[892] Class counsel should keep accurate and complete records of the steps taken to provide notice. Those records will be useful for assessing costs and for responding to any post-judgment attacks on the adequacy of notice.

There is no clear rule regarding who should pay the initial cost of preparing and distributing certification notice when it is ordered in Rule 23(b)(1) and (b)(2) actions. Some judges have required class representatives to pay this cost.[893] Others have required the defendant to bear these costs, particularly

887. *See, e.g.*, Montelongo v. Meese, 803 F.2d 1341, 1352 (5th Cir. 1986) (finding notice with English and Spanish language mailings, announcements on Spanish radio, and notice in Spanish newspapers to be sufficient); S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78-1445, 2001 WL 1922333, at *4 (N.D. Cal. Oct. 24, 2001) (finding notice requirements met because of publication and postings in English, Chinese, and Spanish); *In re* Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (reporting "notice was provided via television, radio, and newspaper advertising in the Untied States and Mexico").

888. See the Center's Web page at http://www.fjc.gov (last visited Nov. 10, 2003).

889. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974) (interpreting Rule 23).

890. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 (1978).

891. Rand v. Monsanto Co., 926 F.2d 596, 601 (7th Cir. 1991) (holding that "a district court may not establish a per se rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action").

892. Model Rules of Prof'l Conduct R. 1.8(e)(1) (2002).

893. Coalition for Econ. Equity v. Wilson, No. C 96-4024, 1996 WL 788376, at *4 (N.D. Cal. Dec. 16, 1996); Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 483 (D.S.D. 1979).

when the defendant requested the notice[894] or where notice follows a finding of liability and the granting of injunctive relief.[895]

In Rule 23(b)(3) class actions, determining how and to whom notice should be delivered can be controversial. The mode and extent of notice implicates issues of cost and fairness to the parties and class members, and raises the potential for prejudice to one side or the other. In securities cases, for example, brokers or financial institutions might hold the shares of many class members, but giving notice to these agents for class members alone may not always suffice to give notice to the class members.[896] In that case, however, the class representatives usually are able to make arrangements with the nominees to forward the notices to class members, or at least to provide a list of the names and addresses of the beneficial owners. If the nominees are not willing to do so and are not parties to the litigation, the court can issue a subpoena *duces tecum* directing them to produce the records from which the class representatives can compile a mailing list. If the litigation eventually is terminated favorably to the class, the representatives might be entitled to reimbursement for these expenses, either from the entire fund recovered for the class, from that part of the fund recovered on behalf of security holders whose shares were held by brokers, or perhaps from the defendants.[897]

Similar problems may arise in consumer class actions on behalf of individual purchasers of goods or services. Sales records might be lost, incomplete, or unreliable, making identification and notification of individual class members difficult. A program to publish notice is especially useful in such cases. The

894. *See generally* 7B Wright et al., *supra* note 738, § 1788; *see also* S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1030 (10th Cir. 1993) (observing that one of two issues certified would only benefit a class of defendants and reversing an order that plaintiffs pay a portion of the costs that representative defendant had previously incurred in compiling a list of defendants).

895. *See* Barahona-Gomez v. Reno, 167 F.3d 1228, 1236–37 (9th Cir. 1999) (upholding notice of preliminary injunction based in part on finding that notice would not impose a burden on defendant).

896. *Compare* Silber v. Mabon, 18 F.3d 1449, 1454, n.3 (9th Cir. 1994) (approving method of notice where brokerage house forwards notice to shareholders and affirming that class member's notice was sufficient even though not actually received until after the opt-out period expired), *and In re* Victor Tech. Sec. Litig., 792 F.2d 862, 866 (9th Cir. 1986) (affirming order requiring plaintiffs to pay, in advance, record owners for costs related to forwarding notice to shareholders), *with* Blum v. BankAtlantic Fin. Corp., 925 F.2d 1357, 1362, n.10 (11th Cir. 1991) (noting that evidence of industry practice of record owners not forwarding notice may "sustain a Rule 23(c)(2) challenge" but appellants presented no current evidence of this practice).

897. *See* Zuckerman v. Smart Choice Auto. Group, Inc., No. 6:99-CV-237, 2001 WL 686879, at *2 (M.D. Fla. May 3, 2001).

published notice should give class members access to more detailed and ongoing information by providing telephone numbers and Internet addresses.

Individual notice generally is preferable. If individual names or addresses cannot be obtained through reasonable efforts, the court must, with counsel's assistance, determine how to provide the best notice practicable under the circumstances. Alternative techniques for providing notice include

- publication notice;[898]
- Internet notice;[899] and
- posting notice in public places likely to be frequented by class members.[900]

Plaintiffs may propose distributing notice with a defendant company's routine mailings when, for example, the class members consist of, or overlap with, shareholders, credit card holders, customers, or employees.[901] Defendant may object that requiring it to use its own mailings to announce the certification of

898. *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 327 (3d Cir. 1998) (notice published in newspapers in all fifty states and the District of Columbia); Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 475 (E.D. Pa. 2000) (notice published one time in national newspaper); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *35 (E.D. Pa. Aug. 28, 2000) (notice published in largest newspapers across the country including those that targeted the Hispanic market).

899. *Fry*, 198 F.R.D. at 475 (Internet notice published on news Web site); *In re Diet Drugs*, 2000 WL 1222042, at *35 (Web site provided detailed notice package to class members who registered); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (extensive notice package was "successfully implemented," which included world-wide publication, press coverage, extensive community outreach, direct mail to 1.4 million people in forty-eight countries, and Internet notice).

900. *In re* Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 549 (N.D. Ga. 1992) (notice posters sent to "approximately 36,000 travel agencies in the United States"); *cf. In re* Ariz. Dairy Prods. Litig., No. Civ. 74-569A, 1975 WL 966, at *1 (D. Ariz. Oct. 7, 1975) (notice printed on milk cartons).

901. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 n.22 (1978) (noting that "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice"); *In re* Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 515 n.19 (S.D.N.Y. 1996) (requiring notice sent to subclass be inserted in defendants' mailings); Kan. Hosp. Ass'n v. Whiteman, 167 F.R.D. 144, 145–46 (D. Kan. 1996) (requiring defendants to insert notice of the "proposed disposition" of case into monthly mailings); Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 437 (D.N.M. 1988) (allowing plaintiffs to provide individual notice to class members by enclosing an insert in defendant's monthly billing statements to current customers).

a class against it may be prejudicial[902] and may even deprive it of First Amendment rights.[903] It is important to balance any efficiencies that might be gained by this approach against the burden such mailings can impose. Before requiring a defendant to use its own mailings to provide certification notice, the court should require class counsel to show the absence of feasible alternatives.

21.312 Settlement Notice

Rule 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise" regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3). Certification and settlement notices are subject to many of the same considerations.[904]

When is a settlement notice required? Rule 23(e) requires notice of a settlement only if it would bind the class. If individual members settle individual claims before class certification, notice to the class is not required even if the class claims have been dismissed without prejudice or withdrawn. When a proposed class has not been certified, however, special circumstances might lead a court to impose terms to prevent abuse of the class action procedure. Section 21.61 discusses potential abuses, especially the filing and voluntary dismissal of class allegations for strategic purposes; section 21.62 discusses criteria for reviewing proposed settlements, especially when named plaintiffs receive relief that is disproportionately large. The judge might also require notice directed to the absent members of the proposed class under Rule 23(d)(2).[905] However, requiring such notice is unusual. The court should

902. Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir. 1974) (en banc) (noting that credit card customers might refuse to pay their regular bills as a result of a notice including information about statutory damages).

903. *See* Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (plurality opinion in nonclass action context).

904. *See supra* note 880. *See, e.g.*, *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977).

905. The cases cited in this note were all decided under the pre-2003 version of Rule 23(e). *See, e.g.*, Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1409 (9th Cir. 1989) (notice of a precertification voluntary dismissal of a complaint with class action allegations should be given to protect members of the proposed class from "prejudice [they] would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action"; notice not required in Diaz case); *see also* Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 627 (7th Cir. 1986) (dicta that notice of a settlement or summary judgment dismissal of a case before deciding on certification should be given because the settlement or dismissal "creates obvious dangers; the representative may have been a poor negotiator or may even be in cahoots with the defendant"); *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 439 (D.N.J.

weigh the costs and consequences of such notices against the need for the protection it may provide in a given case.[906]

Who is to receive settlement notice and how is notice to be delivered? Rule 23(e)(1)(B) requires notice in a reasonable manner to "all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Even if a class member has opted out after receiving a certification notice, the parties might direct notice to such opt outs to give them an opportunity to opt back into the class and participate in the proposed settlement.

In general, settlement notices should be delivered or communicated to class members in the same manner as certification notices (see section 21.311). As with certification notices, individual notice is required, where practicable, in Rule 23(b)(3) actions. Posting notices and other information on the Internet, publishing short, attention-getting notices in newspapers and magazines, and issuing public service announcements may be viable substitutes for, or more often supplements to, individual notice if that is not reasonably practicable.

When should the notice be given? In an order preliminarily approving the settlement under Rule 23(e), the judge sets the date for providing notice of the proposed settlement. This order, as well as the notice, should establish the time and place of a public hearing on the proposed settlement and specify the procedure and timetable for opting out, filing objections, and appearing at the settlement hearing. If problems or questions concerning the terms of the settlement are identified at the preliminary approval stage, notice to the class ordinarily is deferred until there has been an opportunity to resolve those issues.

What must the notice include? The notice should announce the terms of a proposed settlement and state that, if approved, it will bind all class members. If the class has been certified only for settlement purposes, that fact should be disclosed. Even though a settlement is proposed, the notice should outline the original claims, relief sought, and defenses so class members can make an informed decision about whether to opt out.[907]

2000) (stating that "a district court should make a 'proper inquiry' to determine whether a proposed settlement and dismissal are tainted by collusion or will prejudice absent members of the putative class"); Gassie v. SMH, Ltd., Civ. A. No. 97-1786, 1997 U.S. Dist. LEXIS 13687, at *4–*5 (E.D. La. Sept. 9, 1997) (same).

906. *Diaz*, 876 F.2d at 1411.

907. If the class had been certified previously under Rule 23(b)(3), and if the parties propose a class settlement after expiration of the opportunity for class members to opt out, Rule 23(e)(3) authorizes the court, in its discretion, to refuse to approve a settlement unless the parties provide a second opportunity to opt out. *See infra* section 21.611.

The notice should

- define the class and any subclasses;
- describe clearly the options open to the class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;
- provide information regarding attorney fees (see section 14);
- indicate the time and place of the hearing to consider approval of the settlement;
- describe the method for objecting to (or, if permitted, for opting out of) the settlement;
- explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations;
- explain the basis for valuation of nonmonetary benefits if the settlement includes them;
- provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses;[908] and
- prominently display the address and phone number of class counsel and how to make inquiries.

In a Rule 23(b)(3) class, the notice and any Internet Web site should include opt-out forms. The notice must clearly explain the options available to a class member and the difference between opting out and claiming benefits.[909] If the details of a claims procedure have been determined, and there is little

908. *See, e.g.*, Grunin v. Int'l House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975) (stating "the notice may consist of a very general description of the proposed settlement, including a summary of the monetary and other benefits that the class would receive and an estimation of attorneys' fees and other expenses"); Boggess v. Hogan, 410 F. Supp. 433, 442 (N.D. Ill. 1975) (stating "the notice should . . . include . . . an estimated range of unitary recovery"). *Cf.* 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 8:32, at 265 (4th ed. 2002) (indicating that "[i]t is unnecessary for the settlement distribution formula to specify precisely the amount that each individual class member may expect to recover").

909. *But see In re* Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 554 (N.D. Ga. 1992) (refusing to include opt-out form with notice to class because of "possible confusion resulting from inclusion of such a form" (citing Roberts v. Heim, 130 F.R.D. 416, 423 (N.D. Cal. 1988) (disallowing opt-out form with class notice on the basis that "on balance, such a separate form will engender confusion and encourage investors to unwittingly opt out of the class"))); *see also* 3 Conte & Newberg, *supra* note 908, § 8:31, at 257–59 (describing use of forms for class members to notify court of desire to be excluded).

indication of any serious challenge to or problems with the settlement, claims forms might be included with the settlement notice. Often, however, the outcome of objections to or concerns over the settlement terms and the details of allocation and distribution are not established until after the settlement is approved. In that situation, claims forms are distributed after the approval.[910] The court can direct class counsel or their agents (such as settlement claims administrators) to communicate with class members whose intentions are unclear in order to help ensure that they make an informed election or exclusion of class membership and that the outcome (claimant status or opt-out status) is what they intended. Rule 23(d)(2) permits the court to revoke inadvertent opt outs to protect class members' interests and advance "the fair conduct of the action."

In most instances, the notice does not include the full text of the proposed settlement. If the agreement itself is not distributed, however, the notice must contain a clear, accurate description of the key terms of the settlement and inform class members where they can examine or obtain a copy, such as from the Internet, the clerk's office, class counsel, or another readily accessible source. For example, in an employment discrimination case, the agreement may be obtained from a defendant's employer's office.

Who pays for the notice? The parties generally use the settlement agreement to allocate the cost of settlement notices. The costs are often assessed against a fund created by the defendants or to the defendant, in addition to any funds paid to the class.

21.313 Other Court Notices

Rule 23(d)(2) authorizes the court to require that notice be given

> for the protection of the members of the class . . . of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

910. For example, in *In re Holocaust Victim Assets Litigation ("Swiss Banks")*, the pre-fairness hearing on worldwide notice did not include a detailed plan of allocation; instead, the notice program was actively used to solicit allocation proposals and preferences from the class members themselves. These were submitted to a court-appointed special master, who in turn considered the suggestions and prepared a detailed plan of allocation, after final settlement approval, that the court ultimately approved and implemented. *See In re* Holocaust Victim Assets Litig., No. CV 96-4849, 2000 U.S. Dist. LEXIS 20817, at *13 (E.D.N.Y. Nov. 22, 2000).

There are a number of circumstances under which notice is appropriate to protect the class or proposed class or for the fair conduct of the action. For example, if a decision is made to decertify a previously certified class or to exclude previously included members of the class after certification notice has been issued and after the time for opting out has expired, the judge should consider whether to inform the affected class members of the change in their status and any effect on the statute of limitations.[911]

The type and contents of any notice and who should bear the cost depend on the circumstances surrounding the notice, including what prompted the notice, who should be notified, whose duties are discharged, and when the notice is given. The court may consider using means less costly than personal notice. For example, if there was little or no publicity about the filing of a proposed class action, posting or publishing a notice of the court's denial of certification may suffice.

In Rule 23(b)(3) actions in which liability issues are adjudicated on a class-wide basis and individual damages claims are left for separate resolution, the class members must be provided notice of the results of the liability adjudication and an opportunity to file claims for individual relief in a later phase of the proceedings. See, e.g., section 21.322.

The judge also can require notice to correct misinformation or misrepresentations made by one of the parties or by parties' attorneys.[912] See section 21.33. Those who made the misstatements should bear the cost of a notice to correct misstatements. Curative notices generally should be disseminated in the same form as was the misinformation to be corrected.

If the notice of settlement does not establish a claims procedure, subsequent notice will be necessary to advise the class about when, where, and how to file claims, and the notice should also provide claims forms. This notice should be sent to all known members of the class and is generally part of the cost of administering the settlement, paid out of a settlement fund.

911. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974); *see also* Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002) (notice of decertification of class required unless "it is plain that there is no prejudice"); Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 764–65 (8th Cir. 2001) (when class has not been certified, notice of voluntary dismissal is not required unless there is prejudice).

912. Georgine v. Amchem Prods., Inc., 160 F.R.D. 498, 518 (E.D. Pa. 1995) (finding objectors' communications about settlement misleading and inaccurate and ordering curative action).

21.32 Communications from Class Members

.321 Class Members' Right to Elect Exclusion 298
.322 Communications Relating to Damage or Benefit Claims 299
.323 Other Communications from Class Members 299

Important types of communications from class members include solicited responses (such as returns of opt-out forms or claim benefit forms) and unsolicited communications initiated by class members.

21.321 Class Members' Right to Elect Exclusion

In Rule 23(b)(3) actions, class members must have the opportunity to exclude themselves from the litigation; this opportunity is discretionary in other types of class actions. See section 21.311. The opt-out procedure should be simple and should afford class members a reasonable time in which to exercise their option. Courts usually establish a period of thirty to sixty days (or longer if appropriate) following mailing or publication of the notice for class members to opt out. If the case involves a complex settlement or significant individual claims, a class member might need more time to consult with attorneys or financial advisors before making an informed opt-out decision. A form for members of the proposed class who wish to opt out might be included with the notice; it should clearly and concisely explain the available alternatives and their consequences. Typically, opt-out forms are filed with the clerk, although in large class actions the court can arrange for a special mailing address and designate an administrator retained by counsel and accountable to the court to assume responsibility for receiving, time-stamping, tabulating, and entering into a database the information from responses (such as name, address, and social security number).

The judge may treat as effective a tardy election to opt out. Factors affecting this decision include the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.[913] Relief from deadlines, however, should be granted only if the delinquency is not substantial or if there is good cause shown. The state of the class at the end of the opt-out period should be fixed enough to allow parties to conduct their affairs. A general extension of time for making the election may be appropriate if logistical or other problems require further mailings or publications.

Counsel should maintain careful records of who has opted out and when, both to comply with Rule 23(c)(3) and for use in allocating and distributing

913. Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994).

funds obtained in the litigation for the class. Computer databases are routinely used and are critical if the class is large. For a discussion of settlement opt-out opportunities, see section 21.611.

21.322 Communications Relating to Damage or Benefit Claims

Class members are sometimes asked for information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual relief under a judgment or settlement. See section 21.66.

21.323 Other Communications from Class Members

The court can expect to receive inquiries about the litigation from class members and the public and should establish procedures for responding to such inquiries. Notices and other communications to the class should instruct class members to communicate directly with counsel through mechanisms developed for the case, including communications addressed to the court at a post office box number maintained by counsel. A Web site, a voicemail system providing scripted answers to frequently asked questions, or a toll-free telephone number with an automated menu or support staff can provide information efficiently without placing demands on court personnel. The court can establish a routine procedure, using the clerk's office, to refer inquiries to class counsel or another appropriate source of information. If the clerk's office has procedures to handle such matters efficiently and fairly, there should rarely be cause for judicial involvement.

If communications from the class—such as assertions that counsel have refused to respond to their inquiries—indicate the possibility of inadequate representation, the judge should take appropriate steps, including holding a hearing, ordering additional information directed to the class, or, in unusual cases, substituting new class counsel. See section 21.27. If misleading communications have contaminated the notice period, the judge should consider necessary action to correct the misinformation.[914]

914. *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209–11 (11th Cir. 1985) (trial court found that defendants violated court order limiting communication with class members by initiating a surreptitious telephone campaign to solicit potential class members to opt out; trial court ordered defendant's lead trial counsel disqualified and issued a $50,000 fine against defendants; on appeal, order and fine upheld, but disqualification order remanded for notice and hearing); *Georgine*, 160 F.R.D. at 518–19 (objectors to settlement sent misleading communications and advertisements to absent class members encouraging them to opt out of settlement agreement; court ordered second notice and opt-out period); Impervious Paint Indus., Inc. v.

21.33 Communications Among Parties, Counsel, and Class Members

Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel.[915] (Section 21.12 discusses precertification communication between interim class counsel and potential class members.) Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation.[916] Communications with class members in the ordinary course of business, unrelated to the litigation, remain permitted.

Where appropriate, the court should authorize defendants' counsel to answer inquiries from class members about a proposed class settlement. Such inquiries are expected in cases in which the class members have an ongoing relationship with the defendant, such as policyholders in a class action against an insurance company, account holders in a class action against a bank, customers in a class action against a telephone company, or employees in a class action against an employer. To avoid problems over such communication, the courts often channel class members' requests for information to a "hotline." Such a telephone line can be staffed by individuals who use agreed-on scripts to respond to questions. Another technique is to include a list of "frequently asked questions" on a Web site or in a notice (or both), with answers prepared jointly by the parties and approved by the court. An interactive Web site can also be used.

The judge has ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.[917] Objectors to a class settlement or their attorneys may not communi-

Ashland Oil, 508 F. Supp. 720, 723–24 (W.D. Ky. 1981) (finding that defendant contacted class members during opt-out period with the intent of sabotaging the class and ordering corrective notice).

915. *See In re* Sch. Asbestos Litig., 842 F.2d 671, 679–83 (3d Cir. 1988) (indicating that court had authority under Rule 23(d) to require defendants' affiliate prominently to display a proscribed court-approved notice whenever it communicated directly with the members of the class); Erhardt v. Prudential Group, Inc., 629 F.2d 843, 845 (2d Cir. 1980) (detailing defendants' compliance with district court's contempt order enjoining them from further communicating with class members without prior court approval).

916. *Kleiner*, 751 F.2d at 1207 n.28; Blanchard v. Edgemark Fin. Corp., 175 F.R.D. 293, 300–02 (N.D. Ill. 1997); Resnick v. Am. Dental Ass'n, 95 F.R.D. 372, 376–77 (N.D. Ill. 1982); *see also* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981).

917. Corrective or prophylactic notice to potential class members may be ordered under Rule 23(d)(2)at any stage of the proceedings, including the precertification stage. Ralph

cate misleading or inaccurate statements to class members about the terms of a settlement to induce them to file objections or to opt out.[918]

If improper communications occur, curative action might be necessary, such as extending deadlines for opting out, intervening, or responding to a proposed settlement, or voiding improperly solicited opt outs and providing a new opportunity to opt out.[919] Other sanctions may be justified, such as exclusion of information gained in violation of the attorney–client relationship,[920] contempt and fines,[921] assessment of fees, or, in the most egregious situations, the replacement of counsel or a class representative.[922]

Restrictions on communications with the class can create problems. For example, in employment discrimination class actions, key individuals in supervisory positions might be members of the class. Barring direct communications would seriously handicap the employer's defense because the employer must rely on those individuals for evidence and for assisting its attorneys. In such circumstances, the court can consider certification under Rule 23(b)(3) (enabling class members to opt out), exclusion of such persons from the class

Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001) (ordering curative notice for improper precertification communications). The issuance of corrective or protective notice under Rule 23(d)(2) is considered an exercise of the court's case-management authority. The "district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100. Courts need not issue a formal injunction requiring the party to meet the procedural requirements of Federal Rule of Civil Procedure 65. *See Kleiner*, 751 F.2d at 1201; *cf. In re* Domestic Air Transp. Antitrust Litig., MDL No. 861, 1992 WL 357433, at *1 (N.D. Ga. Nov. 2, 1992) (finding "injunctive relief requested by plaintiffs" is appropriate under Rule 23(d)(2), which "gives to the certifying court specific authority to devise and issue appropriate orders necessary for the protection of class members").

918. *Georgine*, 160 F.R.D. at 518.

919. *Id.* at 502–08 (invalidating previous opt outs, mandating curative notice limited to opt outs, and creating a new four week opt-out period for them); *cf. In re* Potash Antitrust Litig., 896 F. Supp. 916, 919–21 (D. Minn. 1995) (rejecting request for gag order and ordering defendants to gather communications and submit for in camera review).

920. Hammond v. City of Junction City, 167 F. Supp. 2d 1271, 1293 (D. Kan. 2001) (excluding evidence gained from improper communications).

921. *Ralph Oldsmobile*, 2001 WL 1035132, at *7 (ordering corrective notice be sent at the expense of the party at fault); *Hammond*, 167 F. Supp. 2d at 1293–94 (ordering party at fault to pay attorneys' fees and costs incurred by opposing party to file protective orders); *In re* McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1247 (N.D. Cal. 2000) (ordering printing and mailing costs of curative notice to be paid by party at fault).

922. *See Hammond*, 167 F. Supp. 2d at 1289 (disqualifying plaintiff's counsel and their firm because of improper communications); *see also Kleiner*, 751 F.2d at 1210–11 (holding that due process requires notice and a hearing before any disqualification of counsel).

if they have no genuine claims, or certification of a subclass for which the court could permit limited communication with the defendant.

21.4 Postcertification Case Management

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21.41 Discovery from Class Members

Postcertification discovery directed at individual class members (other than named plaintiffs) should be conditioned on a showing that it serves a legitimate purpose. See section 21.14. One of the principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subjected to discovery. Most courts limit discovery against unnamed class members, but do not forbid it altogether.[923] In setting appropriate limits, a judge should inquire whether the information sought from absent class members is available from other sources[924] and whether the proposed discovery will require class members to obtain personal legal counsel or technical advice from an expert.[925] Some courts have held that class members are not parties for the purpose of discovery by interrogatories,[926] but may be required to respond to a questionnaire approved by the court. Others have

923. 8A Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 2171, at 277 (1994).

924. *See* Redmond v. Moody's Investor Serv., No. 92 CIV. 9161, 1995 WL 276150, at *2 (S.D.N.Y. May 10, 1995) (granting plaintiff's motion for protective order under Rule 26(c) to restrict interrogatories and document requests); *see also* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977).

925. *See, e.g.*, Collins v. Int'l Dairy Queen, 190 F.R.D. 629, 632–33 (M.D. Ga. 1999) (denying discovery motion allowing defendant opportunity to ask absent class members questions that would "require the assistance of an accountant or an attorney"); Kline v. First W. Gov't Sec., Inc., No. CIV.A.83-1076, 1996 WL 122717, at *5 (E.D. Pa. Mar. 11, 1996) (denying defendant's motion for discovery of absent class members and noting discovery would be impractical as class members would need to consult an attorney or accountant).

926. *See, e.g.*, Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313, 319 (D. Colo. 1999) (holding that while "class members are not considered parties for purposes of traditional discovery measures," limited discovery of class members will be allowed "in the form of questionnaires"); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D. Conn. 1995) (holding that questionnaire directed at absent class members was essentially a "proof of claim" form and would not be allowed); *cf.* Krueger v. N.Y. Tel. Co., 163 F.R.D. 446, 451 (S.D.N.Y. 1995) (allowing defendant to send to all members of a small class a questionnaire limited to individual damage questions).

permitted limited numbers of interrogatories upon a showing of need,[927] limited the number of class members to whom interrogatories may be directed,[928] limited the scope of the discovery to a brief, nonmandatory questionnaire relating to common issues,[929] or have imposed on defendants the added cost of mailing otherwise permissible interrogatories to absent members of a plaintiff class.[930] Deposing absent class members requires greater justification than written discovery.[931]

21.42 Relationship with Other Cases

Claims identical or similar to those in a federal class action might be the subject of other litigation in the same court, in other federal district or bankruptcy courts, or in state courts. Once the federal class action has been certified, the issues involving cases pending in other courts are somewhat different than those arising before certification (discussed in section 21.15).

When the claims asserted in a certified Rule 23(b)(3) class action overlap with claims in individual cases pending in other federal courts, in bankruptcy court,[932] or in state courts, the claimants ordinarily will have opted out of the federal class action or will be pursuing related individual actions. Persons who are members of a certified federal court class might pursue their own separate

927. *See* Long v. Trans World Airlines Inc., 761 F. Supp. 1320, 1329 (N.D. Ill. 1991) (finding discovery of absent class members by sampling necessary and appropriate in determining damage claims).

928. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 622 (S.D. Tex. 1991) (permitting discovery from 50 of 6,000 absent class members); *Long*, 761 F. Supp. at 1333 (allowing discovery of absent class members "only on a random sample basis"); *cf.* Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 341–42 (N.D. Ill. 1995) (declining to limit discovery conducted on behalf of a class to a sample selected by the defendant). *See also supra* note 780 and accompanying text.

929. *Schwartz*, 185 F.R.D. at 316–17, 319; *see also* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 403–04 (1986) (describing the use of a survey interview protocol by specially trained college students to elicit information from 9,000 claimants).

930. Alexander v. Burrus, Cootes & Burrus, 24 Fed. R. Serv. 2d (Callaghan) 1313, 1314 (4th Cir. 1978) (per curiam) (unpublished opinion) (allowing defendant accounting firm to use contact information furnished by plaintiffs to mail its interrogatories to class members at its own expense); *cf. Schwartz*, 185 F.R.D. at 320 (requiring plaintiffs and defendants to share the costs of mailing to absent class members a questionnaire that aids both sides); *In re* Airline Ticket Comm'n Antitrust Litig., 918 F. Supp. 283, 288 (D. Minn. 1996) (ordering defendants to pay 75% of costs relating to survey of absent class members).

931. *See* Redmond v. Moody's Investor Serv., No. 92 CIV. 9161, 1995 WL 276150, at *2 (S.D.N.Y. May 10, 1995).

932. *See, e.g.*, *In re* Flight Trans. Corp. Sec. Litig., 730 F.2d 1128 (8th Cir. 1984).

actions in the same court or in other courts even if they have not elected to be excluded from the class. A member of a certified Rule 23(b)(2) class in a civil rights action might, for example, wish to pursue a damage claim not encompassed in the 23(b)(2) action.[933] Much of the discovery in those parallel cases might be related to the class action and many of the witnesses will overlap. The judges involved should coordinate to avoid undue burden, expense, and conflict. If a federal court has certified a class action that overlaps with individual lawsuits or class actions pending in other federal courts, coordinated action or consolidation can be accomplished through reassignment of cases pending in the same division (see section 20.11); through informal coordination between the judges (see section 2014); by invoking 28 U.S.C. § 1404, the statutory provision for change of venue (see section 20.12); or through multidistrict transfers under 28 U.S.C. § 1407 (see section 20.13).

If the federal court has certified a class action that duplicates or overlaps with individual suits or class actions pending in state courts, the federal court should consider coordinating the litigation with state courts. Appropriate techniques may include coordinating motions, briefing schedules, and trial schedules setting simultaneous arguments before the different judges, and coordinating the timetable for, and use of, discovery in the different proceedings. See section 20.3.

If informal coordination is unsuccessful, the court may entertain a motion to enjoin the related state cases on the ground that the state cases conflict with, or threaten the integrity of, the federal class action.[934] Some of the constraints

933. *See, e.g.*, Hiser v. Franklin, 94 F.3d 1287, 1290–92 (9th Cir. 1996) (issue not resolved in injunctive action and plaintiff's claim had not arisen before the injunction); Fortner v. Thomas, 983 F.2d 1024, 1031 (11th Cir. 1993) (stating "[i]t is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action"); *but see In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 339–40 (S.D.N.Y. 2002) (holding that claims for equitable relief and damages for personal injuries related to groundwater contamination could not be split and distinguishing Hiser and Fortner that allow claims splitting).

934. *See In re* Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 235 (3d Cir. 2002) (holding that "a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction" (citing Carlough v. Amchem Prods., Inc., 10 F.3d 189, 202–04 (3d Cir. 1993))); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) (injunction may be issued where "the state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation"); *see also* Newby v. Enron Corp., 302 F.3d 295, 301 (5th Cir. 2002) (affirming injunction restraining a lawyer from filing related state court proceedings without the federal district judge's approval and seeking *ex parte* relief dealing with matters previously adjudicated in

that limit the federal court's authority to issue such injunctions before certification are not present once the class certification order has issued.[935] For example, the federal court might not have jurisdiction to enjoin state actions before certification[936] because the Anti-Injunction Act, 28 U.S.C. § 2283, limits the power of federal courts to enjoin state proceedings, with certain narrow exceptions. After certification, the federal court is authorized to issue an injunction "when necessary in aid of its jurisdiction,"[937] which may make it possible to enjoin pending state litigation if settlement in the certified federal class action is completed or imminent and the need to protect the class settlement is shown.[938] Another exception allows for an injunction "when

federal court); *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 364–65 (3d Cir. 2001) (injunction appropriate to prevent relitigation of claims settled in federal class action). *But see In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145 (3d Cir. 1998) (declining to invoke the All Writs Act to interfere with the state court settlement of a revised version of a proposed settlement a federal court had previously rejected). *See generally* Southeastern Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 210 F. Supp. 2d 689 (E.D. Pa. 2002); *In re* Briarpatch Film Corp., 281 B.R. 820 (Bankr. S.D.N.Y. 2002).

935. *See generally In re Diet Drugs*, 282 F.3d at 236–36; Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203 (3d Cir. 1993).

936. *In re Diet Drugs*, 282 F.3d at 236 (noting that the "threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are conditional class certifications and impending settlements in federal actions"); *cf. In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *2 (6th Cir. Oct. 29, 2001) (staying injunction against members of the proposed class in a conditionally certified class from opting out or pursuing litigation in state court pending review of a class settlement). *See also* sources cited *supra* notes 806–810.

937. 28 U.S.C. § 2283 (West 2002). The exception overlaps with the provision in the All Writs Act allowing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." *Id.* § 1651(a). The All Writs Act's use of the term "appropriate" suggests a broader authority than the reference to "necessary" in both the All Writs Act and the Anti-Injunction Act. *In re Diet Drugs*, 282 F.3d at 239.

938. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998); *Carlough*, 10 F.3d at 201–04; *In re* Baldwin-United Corp., 770 F.2d 328, 336–38 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332 (5th Cir. 1981); *supra* notes 808–09 and accompanying text. *See also infra* section 20.32. An extraordinary writ staying or otherwise limiting other litigation involving the same claims or parties may also be warranted. *In re* Lease Oil Litig., 200 F.3d 317 (5th Cir. 2000). In *In re Lease Oil*, the district judge framed an injunction to bar the parties from settling federal claims in other related cases without its approval, and the court of appeals affirmed the injunction. *Id.* at 319; *see also In re Diet Drugs*, 282 F.3d at 242 (affirming order enjoining a mass opt out of the consolidated federal litigation by a statewide subclass); *Carlough*, 10 F.3d at 202–04 (affirming injunction enjoining state court proceedings pursuant to the "necessary in aid of jurisdiction" exception under the Anti-Injunction Act and All Writs Act).

expressly authorized by Act of Congress."[939] An injunction or extraordinary writ might also be available to protect the settlement during the period between conditional approval of the class action settlement and the Rule 23(e) fairness hearing.[940]

The binding effect of a judgment in an individual or class action on other related actions depends on principles of claim and issue preclusion. A judgment in the class action adverse to the class will, however, bar only class claims or individual claims actually litigated and resolved in the class action.[941] Questions concerning the court's ability to bind class members outside of its jurisdiction and the adequacy of the notice given might raise complex due process issues that affect the binding effect of a class action judgment.[942]

21.5 Trials

Trial techniques applicable to other forms of complex litigation will also be useful for class actions. Section 12.4 discusses jury notebooks, preliminary instructions, and special verdicts, all of which might help jurors organize the volume of complex information that is likely to be involved in a class action trial. Sections 21.141 and 21.21 discuss trial plans submitted as part of the certification process. In nonjury class action trials, the judge can limit the number of witnesses, require depositions to be summarized, call for the presentation of the direct evidence of witnesses by written statements, and use other techniques (described in section 12.5).

In jury cases, the court may consider trying common issues first, preserving individual issues for later determination. Such orders must be carefully drawn to protect the parties' right to a fair and balanced presentation of their claims and defenses and their right to have the same jury determine separate claims.[943] Approaches that have been tried in mass tort litigation might apply

939. 28 U.S.C. § 2283 (West 2002); *see also, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 263 F.3d 795, 801 (8th Cir. 2001) (injunction authorized where a federal statute, the Private Securities Litigation Reform Act of 1995, "create[d] a federal right or remedy that can only be given its intended scope by such an injunction").

940. *See* cases cited *supra* note 934.

941. *See* Cooper v. Fed. Res. Bank, 467 U.S. 867, 880–81 (1984).

942. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

943. *See In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (describing multiphase class-wide trial of claims arising from the Exxon Valdez oil spill; affirming class-wide compensatory damages award, and vacating and remanding for district court recalculation the punitive damages verdict); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (describing and affirming three-phase class-wide trial of punitive damages, liability, and compensatory damages of 10,000 member class of victims of alleged atrocities by the Marcos regime); *In re* Bendectin

(see section 22.93). Judges can encourage parties to stipulate to a test case approach, in which a sufficient number of individual or consolidated cases are tried in order to test the merits of the litigation. Such an approach is particularly useful if the claim is novel or otherwise "immature." See section 22.315. Some courts have used summary jury trials, an alternative dispute resolution (ADR) technique,[944] to determine the manageability of a class-wide trial of common issues. For example, in the *Telectronics* litigation, summary jury trial demonstrated the manageability of a common-issues trial and, as a result, facilitated informed settlement discussions.[945]

Although not accepted as mainstream, the following approaches have occasionally been suggested as ways to facilitate class action trials: using court-appointed experts to examine cases and report their findings to a jury, subject to cross-examination by the parties;[946] or adopting administrative models to administer damage awards, to the extent that such administrative models meet Seventh Amendment standards.[947] There is no consensus on the use of such procedures, however, and appellate review is scant.

Litig., 857 F.2d 290 (6th Cir. 1988) (describing and upholding constitutionality of trial to verdict of generic causation issue in aggregate proceedings); *see also In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001) (suggesting "bifurcating liability and damage trials with the same or different juries" as one alternative for trial of antitrust action).

944. *See* Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR 8–9, 44–45 (Federal Judicial Center 2001).

945. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001).

946. *Hilao*, 103 F.3d at 782–84 (describing district court's use of a special master as a court-appointed expert); *see also* Sol Schreiber & Laura D. Weissbach, *In re Estate of Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 Loy. L.A. L. Rev. 475 (1998).

947. *See* Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 Rev. Litig. 463, 471–80 (1991) (discussing administrative models for determining damage awards in mass contract, Title VII, and tort cases); *see also In re Visa*, 280 F.3d at 141 (listing five alternatives for district court to consider in approaching any need for individualized damages determinations).

21.6 Settlements

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This section deals with judicial review of the fairness, reasonableness, and adequacy of proposed settlements in class actions. (Section 13 discusses settlement in complex litigation generally; section 22.9 discusses settlement in the context of mass tort litigation; and section 31.8 discusses settlement in the context of securities class action litigation. Section 21.132 discusses issues relating to certification standards for settlement classes.)

Whether a class action is certified for settlement or certified for trial and later settled, the judge must determine that the settlement terms are fair, adequate, and reasonable. Rule 23(e)(1)(A) mandates judicial review of any "settlement, voluntary dismissal, or compromise of the claims, issues, or

defenses of a certified class."[948] Rule 23.1 contains a similar directive for shareholder derivative actions.

The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement.[949] A judge's statement of conditions for approval, reasons for disapproval, or discussion of reservations about proposed settlement terms, however, might lead the parties to revise the agreement. See section 13.14. The parties might be willing to make changes before the notice of the settlement agreement is sent to the class members if the judge makes such suggestions at the preliminary approval stage.[950] Even after notice of a proposed settlement is sent, a judge's statement of concerns about the settlement during the fairness hearing might stimulate the parties to renegotiate in order to avoid possible rejection by the judge.[951] If the fairness hearing leads to substantial changes adversely affecting some members of the class, additional notice, followed by an opportunity to be heard, might be necessary.

To determine whether a proposed settlement is fair, reasonable, and adequate, the court must examine whether the interests of the class are better served by the settlement than by further litigation. Judicial review must be exacting and thorough. The task is demanding because the adversariness of litigation is often lost after the agreement to settle. The settling parties frequently make a joint presentation of the benefits of the settlement without significant information about any drawbacks. If objectors do not emerge, there may be no lawyers or litigants criticizing the settlement or seeking to expose flaws or abuses. Even if objectors are present, they might simply seek to be treated differently than the class as a whole, rather than advocating for class-

948. Rule 23(e) does not require court approval when the parties voluntarily dismiss class allegations before certification. However, in certain situations in which a voluntary dismissal might represent an abuse of the class action process, the court should inquire into the circumstances behind the dismissal. *See* discussion *supra* section 21.312 and text accompanying notes 905–06.

949. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety."); *but cf. In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648, 2001 WL 170792, at *18 (S.D.N.Y. Feb. 22, 2001) (conditioning approval of a settlement on parties' adopting changes specified by the district court).

950. Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 707 (N.D. Ohio 1996) (noting that a "proposed agreement is more readily alterable" and that "[t]he choice facing the court and parties is not limited to the binary alternatives of approval or rejection").

951. *See, e.g.*, Bowling v. Pfizer, Inc. 143 F.R.D. 138 (S.D. Ohio 1992) (raising questions about proposed settlement and continuing fairness hearing); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 146 (S.D. Ohio 1992) (approving revised settlement); *see also* Jay Tidmarsh, Mass Tort Settlement Class Actions: Five Case Studies 35, 38 (Federal Judicial Center 1998).

wide interests. The lack of significant opposition may mean that the settlement meets the requirements of fairness, reasonableness, and adequacy. On the other hand, it might signify no more than inertia by class members or it may indicate success on counsel's part in obtaining, from likely opponents and critics, agreements not to object. Whether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms.

Factors that moved the parties to settle can impede the judge's efforts to evaluate the terms of the proposed settlement, to appraise the strength of the class's position, and to understand the nature of the negotiations. Because there is typically no client with the motivation, knowledge, and resources to protect its own interests, the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.

There are a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements:

- conducting a "reverse auction," in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees);[952]
- granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants' product, while granting substantial monetary attorney fee awards;[953]
- filing or voluntarily dismissing class allegations for strategic purposes (for example, to facilitate shopping for a favorable forum or to obtain a settlement for the named plaintiffs and their attorneys that is disproportionate to the merits of their respective claims);[954]

952. *Coffee*, *supra* note 737, at 1354, 1370–73; *see, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 839 (7th Cir. 1999) (suggesting that "[p]erhaps [defendant] found a plaintiff (or lawyer) willing to sell out the class"); *see also* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283 (7th Cir. 2002) (finding that "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it"); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000) (rejecting class settlement because "Crawford and his attorney were paid handsomely to go away; the other class members received nothing").

953. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818–19 (3d Cir. 1995) (rejecting as unfair a settlement based on $1,000 nontransferable coupon redeemable only upon purchase of new GM truck); *see generally* FJC Empirical Study of Class Actions, *supra* note 769, at 77–78, 183–85; Note, *supra* note 737, at 816–17.

954. Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989); Shelton v. Pargo, Inc., 582 F.2d 1298, 1303, 1314 (4th Cir. 1978) (holding that the Rule 23(e) notice

- imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendants;[955]
- treating similarly situated class members differently (for example, by settling objectors' claims at significantly higher rates than class members' claims);[956]
- releasing claims against parties who did not contribute to the class settlement;[957]
- releasing claims of parties who received no compensation in the settlement;[958]
- setting attorney fees based on a very high value ascribed to nonmonetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settle-

requirement does not apply to a precertification dismissal that does not bind the class, but that "the court must, after a careful hearing, determine what 'claims are being compromised' between the plaintiff and defendant and whether the settling plaintiff has used the class action claim for unfair personal aggrandizement in the settlement, with prejudice to absent putative class members"); 3 Conte & Newberg, *supra* note 908, § 8:19. In many instances, notice and court approval of a voluntary dismissal will not be given or obtainable because the members of the proposed class will not yet have been determined. *Shelton*, 582 F.2d at 1303.

955. *See, e.g.*, Reynolds, 288 F.3d at 282–83; *see also* Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 427–30 (2000) [hereinafter RAND Class Action Report] (reporting actual distribution of benefits in ten case studies, in three of which class members claimed less than half the funds).

956. Gibson, *supra* note 792, at 154–55 (payment for dismissal of objectors' appeal regarding Rule 23(b)(1)(B) mandatory class); Tidmarsh, *supra* note 951, at 40–41 (objectors entered into private fee-sharing arrangements; opt-out cases settled for much higher sums than class members received).

957. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 873 (6th Cir. 2000) (decertifying a limited fund settlement class because some of the released parties did not qualify for "limited fund" certification); *see also In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001) (approving a Rule 23(b)(3) opt-out settlement).

958. Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) (finding that settlement released individual damage claims without compensating class members other than class representative); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000) (finding that only the class representative received compensation); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 169–70 (S.D. Ohio 1992) (concluding that objection concerning lack of compensation for release of claims for loss of consortium became moot by addition of $10 million fund for spouses of class members).

ment funds, rather than the funds actually claimed by and distributed to class members;[959] and

- assessing class members for attorney fees in excess of the amount of damages awarded to each individual.[960]

In addition, although Rule 23(e) no longer requires court approval of a settlement or voluntary dismissal of individual claims as long as the settlement does not bind the class, the settlement of individual claims can represent an abuse of the class action process. For example, a party might plead class allegations to promote forum-shopping or to extract an unreasonably high settlement for the sole benefit of potential class representatives and their attorneys. Use of the court's supervisory authority to police the conduct of proposed class actions under Rule 23(d) may be appropriate in such circumstances.[961]

21.611 Issues Relating to Cases Certified for Trial and Later Settled

When a Rule 23(b)(3) class is certified for trial, the decision whether to opt out might have to be made well before the nature and scope of liability and damages are understood. Settlement may be reached only after the opportunity to request exclusion has expired and after changes in class members' circumstances and other aspects of the litigation have occurred. Rule 23(e)(3) permits the court to refuse to approve a settlement unless it affords a new opportunity to request exclusion at a time when class members can make an informed decision based on the proposed settlement terms.[962]

This second opt-out opportunity helps to provide the supervising court the "structural assurance of fairness," called for in *Amchem Products Inc.* This part of Rule 23(e)(3) affects only cases in which the class is certified and the

959. *See supra* section 14.121.

960. The only reported example of this egregious practice is *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (class member received an award of $2.19, but $91.33 was deducted from class member's bank account for attorney fees).

961. *See supra* notes 904–10 and accompanying text. Prior to the change on this issue in Rule 23(e), some courts subjected precertification requests for dismissal to rigorous review. For an example of the Rule 23(e) analysis of the district court in the dismissal (pursuant to diplomatic settlement) of major German Holocaust-related litigation, see *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000).

962. Providing a second opportunity to opt out may be appropriate "if the earlier opportunity . . . provided with the certification notice has expired by the time of the settlement notice" and if there have been "changes in the information available to class members since expiration of the first opportunity to elect exclusion." Rule 23(e)(3) committee note. See also text at note 238 for a description of an organized opt-out campaign.

initial opt-out period expires before a settlement agreement is reached. The rule provides a court with broad discretion to determine whether, in the particular circumstances, a second opt-out opportunity is warranted before approving a settlement.

21.612 Issues Relating to Cases Certified and Settled at the Same Time

Parties quite frequently enter into settlement agreements before a decision has been reached whether to certify a class.[963] Section 21.132 discusses the standards for certifying such a class. This section is about reviewing a proposed settlement in such a context.

Settlement classes—cases certified as class actions solely for settlement—can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. See section 22.921. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved and, in Rule 23(b)(3) actions, to withdraw from the settlement if too many class members opt out. An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.[964]

Class actions certified solely for settlement, particularly early in the case, sometimes make meaningful judicial review more difficult and more important. Courts have held that approval of settlement class actions under Rule 23(e) requires closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process.[965] See section 22.9. Extended litigation between or among adversaries might

963. FJC Empirical Study of Class Actions, *supra* note 769, at 35.

964. *See supra* section 14.12 (noting the desirability of fee arrangements that reward counsel for efficiency, such as percentage of recovery fees). *See also* Hirsch & Sheehey, *supra* note 859, at 65–66.

965. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (calling for "a higher standard of fairness" in reviewing a settlement negotiated before class certification), and cases cited therein. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (calling for "undiluted, even heightened, attention" to class certification requirements in a settlement class context). *Cf. also In re* PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 122 (S.D.N.Y.) (holding that close scrutiny need not be given when class was certified for settlement purposes long before an agreement was reached), *aff'd*, 117 F.3d 721 (2d Cir. 1997). *See generally* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 826–35 (1995) (discussing problems relating to adequacy of representation in settlement class involving claims relating to future injuries and setting forth principles for reviewing settlement class actions); *Coffee*, *supra* note 737, at 1367–82, 1461–65 (discussing incentives for collusion in settlement class actions and possible antidotes). *See also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000).

bolster confidence that the settlement negotiations were at arm's length. If, by contrast, the case is filed as a settlement class action or certified for settlement with little or no discovery, it may be more difficult to assess the strengths and weaknesses of the parties' claims and defenses, to determine the appropriate definition of the class, and to consider how class members will actually benefit from the proposed settlement. The court should ask questions about the settlement and provide an adequate opportunity for settlement opponents to be fully heard.

Recurring issues raised by settlement classes include the following:

- *Conflicts between class counsel and counsel for individual plaintiffs.* Approval of the class settlement will, for the most part, take responsibility for providing relief to individual claimants from their individual attorneys and shift it to class counsel. Settlement will also effectively terminate other pending individual and class actions subsumed in the certified settlement class. Divergent interests must be taken into account and fairly accommodated before the parties negotiate a final settlement. Consider whether the counsel who have negotiated the settlement have fairly represented the interests of all class members. (This concern appears to be one of the major reasons the Court rejected the proposed settlement in *Amchem*.[966]) If the parties have not anticipated the need for subclasses, the court may decide to certify subclasses, appoint attorneys to represent the subclasses, and send the parties back to the negotiating table.
- *Future claimants.* In some mass tort cases, the court should consider whether a settlement purports to bind persons who might know that they were exposed to an allegedly harmful substance but are not yet injured, and persons who might not even be aware that they were exposed. The opt-out rights of those in the first category can be illusory in a Rule 23(b)(3)[967] action unless they are protected by "back-end opt-out" rights that permit individuals to decide whether to remain in the class after they become aware that they are injured, may have a claim, and understand the severity of their injury. (Rule 23(e)(3) gives a trial judge discretion to provide class members an opportunity to opt out of a Rule 23(b)(3) class settlement even though they had an earlier opportunity to opt out of the class after it was certified.) Because those in the second category, those who might not even know that they have been exposed or injured, cannot be given meaningful notice, an effort

966. 521 U.S. at 620.
967. *See generally id.*

to include them in the class can raise constitutional and due process issues.[968] See section 22.72. In some settlements, parties have negotiated terms that allow certain class members to defer choosing between accepting the benefits of a class settlement or litigating the class member's claim until after the claim arises.[969]

- *Administration of claims procedure.* The court should determine whether the persons chosen to administer the procedure are disinterested and free from conflicts arising from representing individual claimants.
- *Review of attorney fee applications*. See section 21.7.

21.62 Criteria for Evaluating a Proposed Settlement

Rule 23(e)(1)(C) establishes that the settlement must be fair, reasonable, and adequate. Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process.

A number of factors are used to apply those criteria and evaluate a proposed settlement. Deciding which factors apply and what weight to give them depends on a number of variables: (1) the merits of the substantive class claims, issues, or defenses; (2) whether the class is mandatory or opt-out; and (3) the mix of claims that can support individual litigation, such as personal injury claims, and claims that are only viable within a class action, such as small economic loss claims. A class involving small claims may provide the only opportunity for relief and pose little risk that the settlement terms will sacrifice the interests of individual class members. A class involving many claims that can support individual suits—ranging from claims of severe injury or death to relatively slight harms, as for example a mass torts personal-injury class—might require more scrutiny by the court to fairness.

968. *See id.* at 628 (questioning whether proper notice could ever be given to "legions so unselfconscious and amorphous").

969. *See, e.g.*, *In re* Diet Drugs, MDL No. 1203, 2000 WL 1222042, at *21 (E.D. Pa. Aug. 28, 2000) (approving second opt-out opportunity to pursue individual claim for compensatory (but not punitive) damages if injury worsens); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 170 (S.D. Ohio 1992) (approving settlement in which class members retain rights to sue, pursue arbitration, or accept a guaranteed settlement amount for a future heart valve fracture).

Some factors that may bear on review of a settlement are set out below:[970]

1. the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;
2. the probable time, duration, and cost of trial;
3. the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;
4. the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;
5. the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;
6. the number and force of objections by class members;
7. the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;
8. the effect of the settlement on other pending actions;
9. similar claims by other classes and subclasses and their probable outcome;
10. the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;
11. whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;
12. the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
13. the fairness and reasonableness of the procedure for processing individual claims under the settlement;

970. The list is not exclusive and is subject to change depending on common-law development, including evolving interpretation of the 2003 amendments to Rule 23(e) and any legislation affecting class action or other mass tort suits. A helpful review of many factors that may deserve consideration is provided by *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–24 (3d Cir. 1998).

14. whether another court has rejected a substantially similar settlement for a similar class; and
15. the apparent intrinsic fairness of the settlement terms.

In determining the weight accorded these and other factors, courts have examined whether

- other courts have rejected similar settlements for competing or overlapping classes;
- the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large (differentials are not necessarily improper, but may call for judicial scrutiny);[971]
- the settlement amount is much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlements or verdicts in individual cases;
- the settlement was completed at an early stage of the litigation without substantial discovery and with significant uncertainties remaining;
- nonmonetary relief, such as coupons or discounts, is unlikely to have much, if any, market or other value to the class;[972]
- significant components of the settlement provide illusory benefits because of strict eligibility conditions;
- some defendants have incentives to restrict payment of claims because they may reclaim residual funds;
- major claims or types of relief sought in the complaint have been omitted from the settlement;
- particular segments of the class are treated significantly differently from others;
- claimants who are not members of the class (e.g., opt outs) or objectors receive better settlements than the class to resolve similar claims against the same defendants;
- attorney fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion;

971. Compensation for class representatives may sometimes be merited for time spent meeting with class members, monitoring cases, or responding to discovery. *In re* Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 374 (S.D. Ohio 1990).

972. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818–19 (3d Cir. 1995) (rejecting as unfair a settlement based on $1,000 nontransferable coupon redeemable only upon purchase of new GM vehicles); *see generally* Note, *supra* note 737.

- defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel; and
- a significant number of class members raise apparently cogent objections to the settlement. (The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation. When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction. When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class' sentiments toward the settlement. However, an apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large. A similar phenomenon is the organized opt-out campaign.)[973]

A settlement will occasionally cover a class different from that certified. Review of the terms of the settlement or objections might reveal a need to redefine the class or to create subclasses based on the revelation of conflicts among class members. Frequently, the parties propose to enlarge the class or the claims of the class to give the settling defendants greater protection against future litigation. The court faced with a request for an expanded class definition should require the parties to explain in detail what new facts, changed circumstances, or earlier errors support the alteration of the original definition. If a Rule 23(b)(3) class is enlarged, notice must be given to the newly added members of their right to opt out; if a class is reduced, those being excluded should receive notice under Rule 23(d) if they previously received notice that they were included in the class and did not opt out.

21.63 Procedures for Reviewing a Proposed Settlement

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21.631 Obtaining Information

Required disclosures. Counsel for the class and the other settling parties bear the burden of persuasion that the proposed settlement is fair, reasonable, and adequate. In discharging that burden, counsel must submit to the court certain required disclosures, such as the terms of the settlement. Rule 23(e)(2)

973. *See* Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993).

also requires a statement identifying any agreement made in connection with the settlement, including all agreements and undertakings "that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification."[974]

Separate side agreements or understandings may encompass such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, or restrictions on counsel's ability to bring related actions in the future. The reference to agreements or undertakings related to the proposed settlement is necessarily open-ended. It is intended to reach agreements that accompany settlement but are not reflected in formal settlement documents and, perhaps, not even reduced to writing. The spirit of Rule 23(e)(2) is to compel identification of any agreement or understanding that might have affected the interests of class members by altering what they may be receiving or foregoing. Side agreements might indicate, for example, that the settlement is not reasonable because they may reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their attorneys.

The court should, after reviewing the statement identifying related agreements and undertakings, decide whether to require specified agreements to be revealed and whether to require filing complete copies or only summaries of the agreements. Requiring the parties to file the complete agreement might elicit comments from class members and facilitate judicial review. A judge might consider acting in steps, calling first for a summary of any agreement that might have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review.

A direction to disclose a summary or copy of an agreement might raise confidentiality concerns, as with agreements that include information that merits protection against general disclosure. The parties should be given an opportunity to claim work-product or other protections. Opt-out agreements, in which a defendant conditions its agreement on a limit on the number or value of opt outs, may warrant confidential treatment. Knowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out. A common practice is to receive information about such agreements *in camera*.

Agreements between a liability insurer and a defendant may require balancing the need to know the terms of the agreement with the potential impact of making such terms public. The amount of insurance coverage

974. Fed. R. Civ. P. 23(e)(2) committee note.

available to compensate class members can bear on the reasonableness of the settlement, and identification of such agreements sometimes provides insufficient information. Unrestricted access to the details of such agreements, on the other hand, might impede resolution of important coverage disputes.

Rule 23(e)(2) does not specify sanctions for failure to identify an agreement or an understanding connected with the settlement. One possible sanction is reopening the settlement if the agreements or understandings not identified bear significantly on the settlement's reasonableness.

Requests for additional information. The judge may direct counsel to provide additional information necessary to evaluate the proposed settlement. Where settlement is proposed early in the litigation, for example, consider asking counsel to provide complete and detailed information about the factors that indicate the value of the settlement. Such factors include[975]

- likelihood of success at trial;
- likelihood of class certification;
- status of competing or overlapping actions;
- claimant's damages and value of claims;
- total present value of monetary and nonmonetary terms;
- attorney fees;
- cost of litigation; and
- defendant's ability to pay.

Discovery in parallel litigation may supply additional information. The outcomes of parallel litigation may also inform the court and objecting class members about the fairness, reasonableness, and adequacy of the proposed settlement.

21.632 Preliminary Fairness Review

Review of a proposed class action settlement generally involves two hearings.[976] First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supple-

975. The enumeration of issues and factors affecting the evaluation of settlements in this section draws on the opinion in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998), and William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 843–44 (1995). *See also* RAND Class Action Report, *supra* note 955, at 486–90.

976. *See, e.g.*, *In re* Amino Acid Lysine Antitrust Litig., MDL No. 1083, 1996 U.S. Dist. LEXIS 5308, at *11 (N.D. Ill. Apr. 22, 1996) (conducting a preliminary review of whether a proposed settlement is within the range of reasonableness and raising questions for the fairness hearing).

mented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). See section 21.22. If there is a need for subclasses, the judge must define them and appoint counsel to represent them. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing. In settlement classes, however, it is often prudent to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who represent individual class members but did not participate in the settlement negotiations.

Whether the case has been certified as a class at an earlier stage or presented for certification and settlement approval at the same time, the judge can have a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect the absent class members, and assist the judge in determining whether the fairness, reasonableness, and adequacy requirements for approval are met. Individuals sometimes provide expert testimony regarding the valuation of the settlement or even of its legal validity. Given the nonadversarial posture of these experts, it is important to evaluate such testimony under Federal Rules of Evidence 701, 702, and 703 and question whether the proffered expert testimony will "assist the trier of fact to understand the evidence or determine a fact in issue."[977] The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys. The parties then have an opportunity to resume negotiations in an effort to remove potential obstacles to court approval.

21.633 Notice of Fairness Hearing

Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members. For economy, the notice under Rule 23(c)(2) and the Rule 23(e)

977. Fed. R. Evid. 702.

notice are sometimes combined. The fairness hearing notice should alert the class that the hearing will provide class members an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms.

The notice of the fairness hearing should tell objectors to file written statements of their objections with the clerk of court by a specified date in advance of the hearing and to give notice if they intend to appear at the fairness hearing. Despite such ground rules, people who have not filed a written statement may be allowed to present objections at the hearing.[978]

21.634 Fairness Hearing

At the fairness hearing, the proponents of the settlement must show that the proposed settlement is "'fair, reasonable, and adequate.'"[979] The parties may present witnesses, experts, and affidavits or declarations. Objectors and class members may also appear and testify. Time limits on the arguments of objectors are appropriate, as is refusal to hear the same objections more than once. An extended hearing may be necessary.[980]

21.635 Findings and Conclusions

Even if there are no or few objections or adverse appearances before or at the fairness hearing, the judge must ensure that there is a sufficient record as to the basis and justification for the settlement. Rule 23 and good practice both require specific findings as to how the settlement meets or fails to meet the statutory requirements. The record and findings must demonstrate to a reviewing court that the judge has made the requisite inquiry and has consid-

978. *See, e.g.*, *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., MDL No. 991, 1994 U.S. Dist. LEXIS 15790 (E.D. La. Nov. 1, 1994) (permitting testimony by objectors who had not filed written statements, subject to inclusion of such objectors on witness lists and to limitation by the judge based on weight and significance of arguments); *In re* Prudential-Bache Energy Income P'ships Sec. Litig., 815 F. Supp. 177, 179 (E.D. La. 1993) (allowing objectors to submit evidence and testimony and to cross examine plaintiffs' experts). *See also* Tidmarsh, *supra* note 951, at 56, 68 (observing that two mass tort settlement class actions used trial-like procedure at the fairness hearing).

979. *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998) (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)); *see also* Fed. R. Civ. P. 23(e)(1)(C).

980. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (reporting hearing from breast implant recipients during three days of hearings); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 746–47 (E.D.N.Y. 1984) (reporting on national hearings involving numerous veterans and their families), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

ered the diverse interests and the requisite factors in determining the settlement's fairness, reasonableness, and adequacy.

21.64 Role of Other Participants in Settlement Review

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21.641 Role of Class Counsel in Settlement

Attorneys representing a class are responsible for communicating a settlement offer to the class representatives and ultimately to the members of the class. But the attorneys are also responsible for protecting the interests of the class as a whole, even in circumstances where the class representatives take a position that counsel consider contrary to the interests of absent class members.[981] Class counsel must discuss with the class representatives the terms of any settlement offered to the class.[982] Approval or rejection of the offer by the representatives, however, does not end the attorneys' obligations, because they must act in the best interests of the class as a whole.[983] Similarly, class counsel should bring to the court's attention any settlement offer that the class representatives approve, even if, as attorneys for the entire class, they believe it should not receive court approval.

Class counsel must be available to answer questions from class members in the interval between notice of the settlement and the settlement hearing. Counsel for the parties can create a Web site to convey factual information

981. *See, e.g.*, Flinn v. FMC Corp., 528 F.2d 1169, 1174–76 (4th Cir. 1975); *cf.* Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982); Saylor v. Lindsley, 456 F.2d 896, 899–900 (2d Cir. 1972). In the Diet Drugs litigation, several of the subclass representatives opposed approval of a settlement that had been negotiated on their behalf; the trial court discussed adequacy of representation requirements under these circumstances, and the fulfillment of *Amchem* criteria. *In re* Diet Drugs Prods. Liab. Litig., 2000 WL 1222042, at *50–*53 (E.D. Pa. Aug. 28, 2000).

982. Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 421, 428–29 (E.D. La. 1997) (finding inadequacy of representation, based in part on counsel's failure to communicate with named plaintiff about settlement offers); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128, 140–41 (W.D.N.C. 1991) (ordering sanctions because class counsel failed to communicate settlement offers to class representatives).

983. *See, e.g.*, Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (indicating that "the 'client' in a class action consists of numerous unnamed class members as well as the class representative"); *see also* Heit v. Van Ochten, 126 F. Supp. 2d 487, 494–95 (W.D. Mich. 2001) (approving proposed settlement and approving class counsel's motion to withdraw from representing named representative who filed objection to the settlement).

about the settlement, including a complete copy of the agreement, and to give jointly prepared and court-approved answers to frequently asked questions.[984] Counsel for the parties may also arrange for a toll-free telephone number that provides information and an opportunity for class members to speak with personnel who have been trained to follow prearranged scripts in responding to various types of questions. In addition to or in lieu of an automated system, the notice may tell members to direct questions to class counsel and give a mailing address, a fax number, an E-mail address, or a telephone number. When most of the class members reside in the same locale (for example, in employment discrimination cases involving a single plant or facility), class attorneys and class representatives can meet with members to explain the terms and consequences of the proposed settlement.

Counsel for the parties are the main court's source of information about the settlement. The judge should ensure that counsel meet their obligations to disclose fully all agreements and understandings, including side agreements with attorneys or class members (see section 21.631) and be prepared to explain how the settlement was reached and why it is fair and reasonable. Counsel must also disclose any facet of the settlement that may adversely affect any member of the class or may result in unequal treatment of class members.

Ordinarily, counsel should confer with the judge to develop an appropriate review process. See section 21.61. Counsel should submit the settlement documents and a draft order setting a hearing date, prescribing the notice to be given to class members, and fixing the procedure for objections. Counsel may also be asked for statements about the status of discovery, the identity of those involved in the settlement discussions, the arrangements and understandings about attorney fees, and the reasons the settlement is in the best interests of the class. Counsel should be required to disclose and explain any incentive awards or other benefits to be received only by the class representatives.

At the hearing to consider final approval of the proposed settlement, counsel for the settling parties must make an appropriate showing on the record as to why the settlement should be approved. The nature and extent of that showing depends on the circumstances of the case—e.g., the importance of individual class members' stakes, the extent of disapproval within the class with regard to the settlement, whether relief to the class is in-kind only,

984. *See, e.g.*, *In re* Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., No. 1:01-CV-9000, 2001 WL 1842315, at *16 (N.D. Ohio Oct. 20, 2001) (notice of class action and proposed settlement can be found at http://www.sulzerimplantsettlement.com (last visited Nov. 10, 2003)); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *35 (E.D. Pa. Aug. 28, 2000) (additional information available at http://www.settlementdietdrugs.com (last visited Nov. 10, 2003)).

whether individual cases are being settled concurrently, and any varying allocations among groups of claimants and attorneys.

Counsel owe a duty of candor to the court to disclose all information relevant to the fairness of the settlement. If the class was certified in adversary proceedings, counsel must take into account their ongoing obligation to their clients and the need to protect their clients' positions should the settlement fail. In evaluating the settlement, the court should take into account not only the presentations of counsel but also information from other sources, such as comments from class representatives and class members, presentations by objections, the court's own knowledge of the case obtained during pretrial proceedings, and information provided by special masters or experts appointed by the court to assess the settlement.

21.642 Role of Class Representatives in Settlement

The court should examine closely any opposition by class representatives to a proposed settlement; those objections might be symptomatic of strained attorney–client relations. Notice of the settlement hearing might indicate any terms about which class counsel and class representatives differ.

Although rejection of a proposed settlement by a class representative may influence class counsel not to present the settlement to the court, a class representative cannot alone veto a settlement, especially one that has been presented to and approved by the court.[985] If the judge concludes that class representatives have placed individual interests ahead of the class's and impeded a settlement that is advantageous to the class as a whole, the judge should take appropriate action, such as notifying the class of the proposed settlement or removing the class representatives, or both.

When class representatives favor acceptance of a settlement offer that class counsel believe is inadequate or unfair, the representatives should be permitted to submit it to the court for preliminary approval and, if the court so orders, a fairness hearing. Although the court will ordinarily not approve a settlement that counsel do not recommend, class counsel, like class representatives, have no veto power over settlement of class actions.

985. *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 591 (3d Cir. 1999) (affirming order approving settlement of class action and denying lead plaintiff's objections and motions for certification of subclass and disqualification of class counsel); *see also* Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422, 1429–30 (S.D.N.Y. 1994) (holding that settlement was fair, adequate, and reasonable despite objections from class representatives and some class members).

21.643 Role of Objectors in Settlement

Objectors can play a useful role in the court's evaluation of the proposed settlement terms. They might, however, have interests and motivations vastly different from other attorneys and parties.

Objectors can provide important information regarding the fairness, adequacy, and reasonableness of settlements. Objectors can also play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement. For example, an organization's objection in one case transformed a settlement from one in which the lawyers received a majority of the funds to one that primarily benefited class members.[986]

Some objections, however, are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections). An objection, even of little merit, can be costly and significantly delay implementation of a class settlement. Even a weak objection may have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement. Objections may be motivated by self-interest rather than a desire to win significant improvements in the class settlement. A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes.[987] An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory. Fee awards made on the basis of insignificant or cosmetic changes in the settlement serve to condone and encourage improper use of the objection process. Federal Rule of Civil Procedure 11 applies to objectors and their attorneys and should be invoked in appropriate cases.

Who may object? Any class member who does not opt out may object to a settlement, voluntary dismissal, or compromise that would bind the class. Any party to the settlement may also object (for example, a shareholder of a corporation involved in the settlement).[988]

986. RAND Class Action Report, *supra* note 955, at 461–62. For a detailed discussion of the objections and the settlement discussions in that case, see *id.* at 201–05. *See also id.* at 355–60 (discussing objections, the fairness hearing, and a renegotiated settlement in the *Oriented Strand Board Home Siding Litigation*).

987. *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993).

988. *See* 4 Conte & Newberg, *supra* note 908, § 11:55, at 168 ("Any party to the settlement proceeding has standing to object to the proposed settlement."). *See also id.* at 176–77 ("[A]n objection may be registered by . . . any settling defendant, or any shareholder whose corporation is involved in settlement" (footnote call number omitted)).

Individually based objections. Objectors sometimes act individually, arguing that the objector should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Unless a number of class members raise similar objections, individual objectors rarely provide much information about the overall reasonableness of the settlement. Individual terms more favorable than those applicable to other class members should be approved *only* on a showing of a reasonable relationship to facts or law that distinguish the objector's position from other class members.

If a complaint about differential treatment reflects genuine distinctions between the objector's position and the positions of other class members, the court should consider whether that distinction requires a subclass or otherwise uncovers an imperfection in the class definition or the settlement terms. Any modification to the settlement agreement generally should benefit other members of the class or subclass in addition to the objector. In the context of a certified class, different treatment of an individual objector must be based on a finding that the objector shares the common characteristics of the class yet possesses distinct attributes that are so unique as not to call for a subclass.

Class-based objections. Objections also may be made in terms common to class members or that seem to invoke both individual and class interests. So long as an objector is acting at least in part on behalf of the class, it is appropriate to impose on the objector a duty to the class similar to the duty assumed by a named class representative. In order to guard against an objector who is using the strategic power of objecting for private advantage, the court should examine and consider disapproving the proposed withdrawal of an objection if the objector is receiving payment or other benefits more favorable than those available to other similarly situated class members.[989]

Discovery and other procedural support. The important role some objectors play might justify additional discovery, access to information obtained by class counsel and class representatives, and the right to participate in the fairness hearing.[990] Parties to the settlement agreement should generally provide access

989. *See, e.g.*, Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1 (1st Cir. 1999).

990. *See* Scardelletti v. Debarr, 265 F.3d 195, 204 n.10 (4th Cir. 2001) (affirming denial of motion to intervene and stating "'while [the court] should extend to any objector to the settlement leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision'" (quoting Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (internal quotation marks in original omitted))), *rev'd on other grounds sub nom.* Devlin v. Scardelletti, 536 U.S. 1 (2002); *In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 24, 26 (D.D.C. 2001) (holding that "[c]lass members who object to a class action settlement do not have an absolute right to discovery; the Court may

to discovery produced during the litigation phases of the class action (if any) as a means of facilitating appraisal of the strengths of the class positions on the merits.

Objectors might seek intervention and discovery to demonstrate the inadequacy of the settlement. Discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel. A court should monitor postsettlement discovery by objectors and limit it to providing objectors with information central to the fairness of the proposed settlement. A court should not allow discovery into the settlement-negotiation process unless the objector makes a preliminary showing of collusion or other improper behavior.[991]

An opportunity to opt out after the settlement terms are known, either at the initial opportunity or a second opportunity, might reduce the need to provide procedural support to objectors or to rely on objectors to reveal deficiencies in a proposed settlement. Class members who find the settlement unattractive can protect their own interests by opting out of the class.

Withdrawal of objections. Court approval is necessary for withdrawal of objections to settlements binding on the class.[992] If objections are withdrawn but result in modifications to the class settlement terms, the withdrawal is reviewed as part of the class settlement. If the objector simply abandons pursuit of the objection, the judge should inquire into the circumstances, asking the parties and the objector to identify any benefit conveyed or promised to the objector or objector's counsel in connection with the withdrawal. Although an objector cannot ordinarily be required to pursue objections, judicial inquiry into—and potential disapproval of—so-called side agreements or tacit understandings can discourage improper uses of objections.

Intervention and appeal. A class member may appear at the settlement hearing and object without seeking intervention. Objectors need not formally intervene to appeal matters to which they objected during the fairness hearing.[993] Once an objector appeals, control of the proceeding lies in the court of appeals.

in its discretion allow discovery if it will help the Court determine whether the settlement is fair, reasonable, and adequate" and allowing limited discovery).

991. Bowling v. Pfizer, 143 F.R.D. 141, 153 & n.10 (S.D. Ohio 1992).

992. Fed. R. Civ. P. 23(e)(4)(B).

993. Devlin v. Scardelletti, 536 U.S. 1 (2002).

21.644 Role of Magistrate Judges, Special Masters, and Other Judicial Adjuncts in Settlement

Reviewing a proposed class settlement for fairness, reasonableness, and adequacy is a time-consuming and demanding task, but it is essential and must be done by the judge. Typically, the parties and their attorneys will be primarily interested in upholding the settlement and may present information in a way that supports their position. In cases with a sparse record, the judge may appoint an adjunct: a magistrate judge, guardian *ad litem*, special master, court-appointed expert, or technical advisor, to help obtain or analyze information relevant to the proposed settlement.[994] For example, a judge might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy.[995] Even in that context, however, the judge generally has to identify the issues and the procedures needed to address and resolve them.

21.65 Issues Raised by Partial or Conditional Settlements

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21.651 Partial Settlements

Settlement classes present special problems when they involve partial settlements, such as a settlement with one of several defendants. The settling defendant might be liable to the class as a whole or only to certain members of the class, and members of the settlement class might have difficulty understanding their position in the litigation. Because they may not know whether they will be members of a class with respect to claims against nonsettling defendants, they might be unable to make an informed decision regarding the adequacy of the settlement.

Given that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately. The adequacy of the settlement depends in part on the relative exposure and resources of other parties. An informed evaluation is extremely difficult if

994. For examples of such appointments in a mass tort context, see *infra* notes 1344–46 and accompanying text. Expert testimony may assist the court in making its evaluation. *See In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 215 n.30 (5th Cir.), *on second appeal*, 659 F.2d 1322 (5th Cir. 1981).

995. *See, e.g.*, Gibson, *supra* note 792, at 22–23.

discovery is incomplete or has been conducted against only a few of the defendants.

Partial settlements are nevertheless not unusual. If several such settlements are being negotiated, it is ordinarily wise to defer consideration until all are submitted, thereby saving the time and expense of successive notices and hearings and allowing the judge and class members to assess the adequacy of the settlements as a whole. In the interest of fairness, a partial settlement should be brought to the attention of all parties. The judge may wish to defer ruling on temporary approval if a nonsettling party so requests and shows substantial progress in negotiating a settlement of its own. Funds from the settlements typically are placed in income-producing trusts established by class counsel for the benefit of the class and held until the case is fully resolved.

Partial settlements shortly before trial can disrupt the trial, resulting, for example, in the departure of a lead counsel. The court should set a deadline for the presentation of partial settlements sufficiently in advance of trial so that fairness hearings may be completed while still allowing the parties sufficient time to prepare for trial. See section 13.21.

Partial settlements containing provisions that might interfere with further proceedings, such as those attempting to limit further discovery, should rarely be approved. See section 13.22. A provision under which the class agrees to a refund if it later settles on terms more favorable to other defendants is particularly inappropriate, because the adequacy of such a proposed settlement cannot be fairly determined. Similarly, a defendant's agreement to increase the settlement fund if individual plaintiffs later settle for a greater amount does not diminish the court's responsibility to evaluate the adequacy of the amount offered to the class. See section 13.23. Although the court can give some deference to provisions purporting to allocate a settlement fund according to particular theories of recovery, claims, or time periods, it should reserve the power to make modifications when warranted. See section 13.21.

21.652 Conditional Settlements

The parties sometimes propose a precertification settlement that permits the settling parties to withdraw from the settlement if a specified number of persons opt out of the class or settlement. Although doing so might promote settlement by giving a defendant greater assurance of ending the controversy and avoiding the expense of litigating numerous individual claims, it might delay a final settlement. A reasonable cut-off date for the defendant's election, such as thirty days after the opt-out period, should keep any delays to a minimum. An alternative approach is to provide that the benefits paid to the class will be reduced in proportion to the number of opt outs or the total amount of their claims. If the reduction in benefits is substantial, fairness might require providing class members another opportunity to opt out.

Some settlements, particularly in securities and consumer litigation, are conditioned on class members waiving claims for additional periods not covered by the pleadings or are conditioned on waiving additional potential claims against the settling defendants. Often such waivers take the form of changing the definition of the class (e.g., by adding spouses or children). Review of such waivers will ensure that notice of them is clear, conspicuous, and not abusive.

21.66 Settlement Administration

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.662 Undistributed Funds 333

Class settlements are rarely self-executing and various problems may arise in their administration. Sometimes a settlement fund is to be divided equally among all class members who meet specified criteria (for example, employees who sought promotion during a certain time period) or allocated in proportion to some measure of damage or injury (for example, the price paid for particular securities). In such cases, the class members are in potentially conflicting roles, because increasing one claimant's benefits will reduce another's recovery. Where the settlement provides that each qualifying class member receive a specified payment, either a flat sum or an amount determined according to a formula, settling defendants may have an interest in maximizing the extent to which class members are disqualified or have their claims reduced.

Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement.[996] In larger class actions, forms and instructions might be provided on the Internet, and an E-mail address or a toll-free telephone number may be established for handling questions. In any event, class members should receive some means of personal communication. Verification of claims forms by oath or affirmation under 28 U.S.C. § 1746 may be required, and it may be appropriate to require substantiation of the claims (e.g., through invoices, confirmations, or brokers' records).

Completion and documentation of the claims forms should be no more burdensome than necessary. Nor, for purposes of administering a settlement, should the court require the same amount and specificity of evidence needed

996. For examples of claims forms, see *In re Diet Drugs Products Liability Litigation*, AHP Diet Drug Settlement Forms, available at http://www.settlementdietdrugs.com/d.home.php3#forms (last visited Nov. 10, 2003).

to establish damages at a trial; secondary forms of proof and estimates are generally acceptable. A default award may be appropriate for those who can establish membership in the class but cannot, or prefer not to, submit detailed claims. Typically, such an award would be at the low end of the range of expected claims. The parties will usually have negotiated the amount and nature of proof necessary for a class member to recover under the settlement. To achieve the intended distribution to beneficiaries, additional mailings, telephone calls, and investigative searches might be needed if notices to class members are returned or if class members fail to submit claim forms. There may be no need to require action by class members, as where the defendants' records provide a satisfactory, inexpensive, and accurate method for determining the distribution of a settlement fund.

Class counsel should establish a procedure for recording receipt of the claims forms and tabulating their contents, with arrangements subject to court approval. If the class is large, forms are customarily sent to a separate mailing address and the essential information is recorded on computers. Judges sometimes require class counsel to use follow-up procedures to contact class members where only a few have filed claims.[997] Form letters can answer common inquiries from class members and deal with recurring errors in completing the claims forms. These procedures should be made part of the record to minimize subsequent disputes.

Audit and review procedures will depend on the nature of the case. Claims for modest amounts are frequently accepted solely on the basis of the verified claim forms.[998] Medium-sized claims or a portion of such claims selected by random sampling may be subjected to telephone audit inquiries or cross-checks against other records. Large claims might warrant a field audit to check for inaccuracies or fraud.[999]

21.661 Claims Administrator or Special Master

Judges often appoint a claims administrator or special master and describe the duties assigned in the order approving the settlement agreement. Duties may include taking custody of settlement funds, administering the distribution procedures, and overseeing implementation of an injunction. The adminis-

997. *See* Fed. R. Civ. P. 23(d)(2); *In re* Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 327–28, n.11 (3d Cir. 2001) (listing recommended practices for identifying class members entitled to actual notice).

998. *See infra* section 40.44.

999. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 236 F. Supp. 2d 445, 462, 464 (E.D. Pa. 2002) (order increasing field audits for doctors and law firms that had submitted medically unreasonable claims).

trator or special master may be charged with reviewing the claims and deciding whether to allow claims that are late, deficient in documentation, or questionable for other reasons.[1000] The specific procedure for reviewing claims may be limited to the materials submitted or may include a hearing at which the claimant and other interested parties may present information bearing on the claim. The claims procedure may allow appeal of a decision to disallow a claim. That appeal may involve review by a disinterested individual or panel or, in some instances, by the court.

The administrator should make periodic reports to the court. These reports should include information about distributions made, interest earned, allowance and disallowance of claims, the progress of the distribution process, administrative claims for fees and expenses, and other matters involving the status of administration. Section 32.39 discusses the use of special masters and magistrate judges in implementing class settlements in employment discrimination cases.

21.662 Undistributed Funds

The settlement might provide for disposition of undistributed or unclaimed funds.[1001] Judicial approval is required for such disposition, and the parties may want the funds to be returned to the settling defendant, paid to other class members, or distributed to a charitable or nonprofit institution. The court should allow adequate time for late claims before any refund or other disposition of settlement funds occurs,[1002] and might consider ordering a reserve for late claims.

1000. *See, e.g.*, *In re* Crazy Eddie Sec. Litig., 906 F. Supp. 840, 844–47 (E.D.N.Y. 1995) (reviewing criteria for deciding whether to allow late claims).

1001. Although disfavored in a fully tried class action, "fluid recovery," in which damages are paid in the aggregate without individual proof, may be permissible in a settlement. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 185–86 (2d Cir. 1987) (finding "some 'fluidity' is permissible in the distribution of settlement proceeds" and holding that the district court must supervise the programs that will consume such proceeds). *Compare* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) (noting "[f]ederal courts have frequently approved this remedy [fluid recovery for distribution of unclaimed funds] in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly"), *with* Daly v. Harris, 209 F.R.D. 180, 197 n.5 (D. Haw. 2002) (noting "fluid recovery system, as a method of aggregating damages as opposed to a distribution method, would not be appropriate here since Section 1983 requires proof of actual damages").

1002. *In re Crazy Eddie*, 906 F. Supp. at 845 (noting "there is an implicit recognition that late claims should ordinarily be considered in the administration of a settlement" (citing Manual for Complex Litigation, Third, § 30.47 (Federal Judicial Center 1995)).

The court's equitable powers may be necessary to deal with other problems that commonly arise during administration of settlement but might not be covered by the terms of the agreement. Such problems include

- the impact of divorce, death, incompetence, claims by minors, and dissolution of business entities or other organizations;
- investment of settlement funds (security of settlement funds is critical—the court should permit these funds to be held in only the most secure investments unless prudent investment of long-term holdings (e.g., to administer a trust for a mass tort settlement involving latent claims) calls for a balance between maintaining security and gaining returns on the investment);
- interim distributions and partial payments of fees and expenses; and
- procedures for handling lost or returned checks (although checks should ordinarily be stamped with a legend requiring deposit or negotiation within ninety days, counsel should be authorized to grant additional time).

The court and counsel should be alert to the possibility of persons soliciting class members after the settlement and offering to provide "collection services" for a percentage of the claims. Such activities might fraudulently deprive class members of benefits provided by the settlement and impinge on the court's responsibility to control fees in class actions.[1003]

21.7 Attorney Fee Awards

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Attorney fee applications may arise as part of the settlement of a class award or after litigation of the class proceedings. The request may be based on a percentage of a common fund that the class action has produced or may be based on a statutory fee award. Statutory awards are generally calculated using the lodestar method (number of hours reasonably spent on the litigation

1003. Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co., 1985-2 Trade Cas. (CCH) ¶ 66,830 (D.D.C. 1985).

multiplied by the hourly rate, enhanced in some circumstances by a multiplier), subject to any applicable statutory ceiling on the hourly rate. Some courts use a lodestar method as a crosscheck to ensure that the percentage method does not result in an excessive award. See section 14.122.

The court's settlement review should include provisions for the payment of class counsel. In class actions whose primary objective is to recover money damages, settlements may be negotiated on the basis of a lump sum that covers both class claims and attorney fees. Although there is no bar to such arrangements,[1004] the simultaneous negotiation of class relief and attorney fees creates a potential conflict.[1005] Separate negotiation of the class settlement before an agreement on fees is generally preferable. See generally sections 14.22, 14.23 (court-awarded attorney fees), and 32.463 (employment discrimination, attorney fees). This procedure does not entirely eliminate the risk of conflict, and, if negotiations are to be conducted in stages, counsel must scrupulously avoid making concessions affecting the class for personal advantage. If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, both amounts must be disclosed to the class. Moreover, the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel. The total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable. Although the court may not rewrite the parties' agreement, it can find the proposed funds for the class inadequate and the proposed attorney fees excessive, and can allow the parties to renegotiate their agreement. The judge can condition approval of the settlement on a separate review of the proposed attorneys' compensation.

1004. *See* Evans v. Jeff D., 475 U.S. 717, 733–34 (1986); Marek v. Chesny, 473 U.S. 1, 5–7 (1985).

1005. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 334–35 (3d Cir. 1998) (approving a settlement in which parties sought permission of the court to negotiate fees after the merits had been resolved); Malchman v. Davis, 761 F.2d 893, 904–05 (2d Cir. 1985) (rejecting, for lack of factual support, appellant's argument that simultaneous negotiation of the merits and fees had tainted the settlement); Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996) ("The decision by plaintiffs to pursue attorneys' fees and costs subsequent to judicial approval of a settlement agreement demonstrates their commitment to arms-length negotiations."). *See also* Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 269 (1985) (calling for, among other things, allowing parties to enter into a conditional settlement pending resolution of fees and for parties to seek the court's permission before discussing fees).

21.71 Criteria for Approval

Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees. The "fundamental focus is the result actually achieved for class members."[1006] That approach is premised on finding a tangible benefit actually obtained by the class members. See section 14.11. In comparing the fees sought by the lawyers to the benefits conferred on the class, the court's task is easiest when class members are all provided cash benefits that are distributed. It is more complicated when class members receive nonmonetary or delayed benefits. In such cases, the judge must determine the value of those benefits.

Nonmonetary benefits can take a number of forms. In a Rule 23(b)(3) case, nonmonetary benefits can include coupons, discounts, or securities, or other forms. In a Rule 23(b)(2) case, the benefits may include different forms of injunctive relief, or relief that may mix injunctive and damages elements. A court may need to determine the dollar value of medical monitoring programs or warranty programs. A civil rights case may require evaluating an injunction redressing employment or other forms of discrimination. The court's evaluation and review of such benefits as part of the settlement review process (see section 21.62) is important for its review of fee applications. If a settlement provides only speculative, uncertain, or amorphous benefits to the class, that resists valuation in dollar terms.

The court should carefully scrutinize any agreement providing that attorneys for the class receive a noncontingent cash award.[1007] The court should refuse to allow attorneys to receive fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members. It might be appropriate to require attorneys to share in the risk of fluctuations in the value of an in-kind settlement, either by taking all or part of its counsel fees in in-kind benefits or by deferring collection of fees and making them contingent on the value of in-kind benefits that are actually delivered to the class members.[1008]

1006. Fed. R. Civ. P. 23(h) committee note. *See also* 15 U.S.C. § 77z-1(a)(6) (2000) (limiting fee award to a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"); RAND Class Action Report, *supra* note 955, at 490 (concluding that the "single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society") (emphasis omitted).

1007. *See* RAND Class Action Report, *supra* note 955, at 429 ("In at least three instances [among 10 cases studied in depth], class members claimed less than half of the funds set aside for compensation.").

1008. *See supra* section 24.121; *see also, e.g.*, Bowling v. Pfizer, Inc., 132 F.3d 1147 (6th Cir. 1998) (reserving decisions on fees related to future funding until the class receives its benefits over a ten-year period); *In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648, 2001 WL

In some instances, the court might find the benefit to the class so speculative that it will use the lodestar method rather than the common-fund method to determine the amount of fees to which the attorneys are entitled.[1009] In other instances, the court may greatly reduce the parties' estimates of the dollar value of the benefits delivered to the class members and base the attorney fee award on the reduced amount. In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered. It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete.

If a case is primarily concerned with injunctive or declaratory relief, exclusive concern with monetary benefits may not be appropriate.[1010] If the value of such relief cannot be reliably determined or estimated, consider using the lodestar method, including any appropriate multiplier, to calculate fee awards.

The common-fund theory may call for awarding attorney fees to counsel other than class counsel. If the court has appointed as class counsel attorneys who did not file one of the original complaints (see section 21.27), attorneys who investigated and filed the case might be entitled to a fee award. Attorneys for objectors to the settlement or to class counsel's fee application might also have provided sufficient benefits to a class to justify an award.[1011]

Rule 23(h) also authorizes the award of nontaxable costs in class action litigation and settlements.

170792, at *3–*5, *15–*17 (S.D.N.Y. Feb. 22, 2001) (counsel fees for cash and coupon components of settlement to be paid in same proportion of cash and coupons as class benefits paid).

1009. Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 851–52 (5th Cir. 1998) (upholding use of lodestar method of calculating fees in relation to a "phantom" common fund); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) (calling for lodestar calculation where common benefit "evades the precise evaluation needed for the percentage of recovery method").

1010. Fed. R. Civ. P. 23(h) committee note (citing an individual civil rights action for the proposition that placing an "'undesirable emphasis' on 'the importance of the recovery of damages in civil rights litigation' . . . might 'shortchange efforts to seek effective injunctive or declaratory relief'" (quoting Blanchard v. Bergeron, 489 U.S. 87, 95 (1989))).

1011. *Id.*

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21.721 Motions

Rule 23(h)(1) calls for the court to fix a time for submission of motions for attorney fees in class actions. For a discussion of procedures applicable in other types of cases, see section 14.22. Rule 23(h) does not contemplate application of the fourteen-day rule specified in Rule 54(d)(2)(B) unless the court chooses to set that time. In general, parties should be prepared to submit such motions as soon as possible after announcing a settlement so that the required Rule 23(h)(1) notice of the fee request can be combined with the required Rule 23(e) notice of settlement and sent to the class at the same time.

21.722 Notice

Rule 23(h)(1) requires that notice of fee requests be "directed to class members in a reasonable manner." The rule contemplates that, in cases involving settlement review under Rule 23(e), "notice of class counsel's fees motion should be combined with notice of the proposed settlement" and afforded the same notice as Rule 23(e) requires.[1012] In adjudicated class actions, "the court can calibrate the notice to avoid undue expense."[1013]

21.723 Objections

Rule 23(h)(2) limits the right to object to class members or parties from whom payment is sought. Specifically, nonsettling defendants who will not be contributing to the fee payment sought may not object to the motion for a fee award.[1014]

21.724 Information Supporting Request and Discovery for Fee Requests

The party seeking fees has the burden of submitting sufficient information to justify the requested fees and taxable costs. Even in common fund cases, judges frequently call for an estimate of the number of hours spent on the

1012. Fed. R. Civ. P. 23(h)(1) committee note.
1013. *Id.*
1014. Fed. R. Civ. P. 23(h)(2) committee note.

litigation and a statement of the hourly rates for all attorneys and paralegals who worked on the litigation. Such information can serve as a "cross-check" on the determination of the percentage of the common fund that should be awarded to counsel. See section 14.122. In lodestar or statutory fee award cases, applicants must provide full documentation of hours and rates. To facilitate meaningful review of fee petitions, the court may specify the categories that attorneys should use to group their fee requests (e.g., by motion, brief, or other product) and establish other guidelines for any requests.[1015]

If there is a request for discovery to support an objection to a motion for attorney fees, the court should consider "the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard."[1016] If "the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information."[1017] As provided in Rule 23(e)(2), objectors should usually have access to the parties' statement about "any agreement made in connection with the proposed settlement." Whether the actual agreement will be discoverable depends on the extent to which the parties demonstrate a legitimate interest in confidentiality. See section 21.631.

21.725 Required Disclosures

Side agreements provide information relevant to the allocation of fees among counsel for various parties and interests. Any concurrent settlements of individual plaintiffs' cases by class counsel may be of particular interest. The court should examine the fee arrangements and the terms of individual settlements to avoid some plaintiffs' being favored over similarly situated class members.[1018]

21.726 Hearing and Findings

Rule 23(h)(3) permits the court to hold a hearing on a fee motion and directs the court to find the facts and state its conclusions of law. The circumstances and needs of the case will dictate the form of any hearing. For example, where the fee request depends on an evaluation of the relief earned for the class, a hearing may be necessary to provide evidence of such an appraisal. Usually, evidence of the value of the settlement will have been presented at the

1015. *See* Hirsch & Sheehey, *supra* note 859, at 103–05; *see also supra* section 14.21.

1016. Fed. R. Civ. P. 23(h)(2) committee note.

1017. *Id.*

1018. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 258, 260, 307–09 (E.D. Pa. 1994), *vacated on other grounds*, 83 F.3d 610 (3d Cir. 1996), *and aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

hearing on settlement review. In many instances, hearings on settlement review and fees can be conducted at the same time.

21.727 Use of Special Masters or Magistrate Judges

Rule 23(h)(4) provides broad authority to refer issues related to the amount of a request for fees to a special master or magistrate judge. In this context, as in other posttrial contexts, Rule 53(a)(1)(C) does not require a finding of exceptional circumstances before making such a referral. Considerations of timing and cost, however, might affect a decision to refer the matter.

22. Mass Torts

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22.1 Introduction

This section provides a general definition of mass torts and distinguishes between multiple tort claims arising out of a single incident and dispersed mass tort claims. Section 22.2 identifies categories of information helpful to a judge managing mass tort suits. Section 22.3 analyzes a threshold issue in mass tort litigation—whether and when to aggregate related cases filed in different federal district courts, in federal and state courts, and in federal district courts, bankruptcy courts, and state courts. Throughout this section, "aggregated treatment" refers to various devices that bring claims and cases together for pretrial management, settlement, or trial. These devices include intradistrict consolidation under Federal Rule of Civil Procedure 42, class certification under Rule 23, multidistrict transfer under 28 U.S.C. § 1407, and the assembling of tort claims that automatically accompanies a bankruptcy filing. Section 22.31 focuses on aggregated treatment of related cases for pretrial case

management, criteria for deciding whether consolidation for trial is appropriate, and coordination techniques for nonaggregated cases. Subsequent sections focus on the particulars of mass tort case management and problems that can arise when class certification is sought in mass tort cases.

Mass torts litigation "emerges when an event or series of related events injure a large number of people or damage their property."[1019] A mass tort is defined by both the nature and number of claims; the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed. Some argue that 10,000 claims represent a threshold for mass torts that require special management;[1020] others argue that 100 suits will suffice. A 1999 report by the Working Group on Mass Torts considered fifty distinct groups of mass tort cases, representing a spectrum ranging from hundreds to hundreds of thousands of claims.[1021] The central question is whether the group of claims, whatever its size, calls for special management.

The need for special judicial management of mass torts arises from the sheer volume of the litigation generated. Judges must efficiently and fairly manage hundreds, even thousands, of related cases without unduly disrupting the court's other work. Mass tort cases are often characterized by a combination of issues, some that may lend themselves to group litigation (such as the history of a product's design) and others that require individualized presentation (such as the circumstances of individual exposure, causation, and damages). Because these factors vary from tort to tort, and case to case, generalized rules about handling mass tort cases are difficult to formulate.

State substantive law usually governs mass tort cases, making multistate aggregations of cases even more complex. Some products, like asbestos and diethylstilbestrol (DES), were produced by a substantial number of companies, and allocating responsibility among defendants and their insurers introduces additional complications. The trial judge ordinarily should distinguish between issues appropriate for aggregate determination and issues that require individualized determinations before making any decision about whether or how to aggregate claims for pretrial management or final resolution.

Courts have long recognized the need for special case-management practices in single incident mass torts, such as a hotel fire, the collapse of a structure, the crash of a commercial airliner, a major chemical discharge or

1019. Advisory Comm. on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation 10 (Feb. 15, 1999), *reprinted without appendices in* 187 F.R.D. 293, 300 [hereinafter, Working Group Report].

1020. *Id.* at 300 n.1 and sources cited therein.

1021. Working Group Report, *supra* note 1019, app. D, at 1.

explosion, or an oil spill. Since the early 1980s, however, there has been a rapid increase in litigation involving dispersed mass torts, which typically arise from widespread use of, or exposures to, widely distributed products or substances, often over an extended time.[1022] Prominent examples include litigation involving asbestos, Dalkon Shield intrauterine devices, silicone gel breast implants, and diet drugs. Key elements of such claims are a high volume of repetitive litigation involving the same or similar product or substance, and an evolving and uncertain group of potential claimants and potential defendants. In a dispersed mass tort, "the universe of potential plaintiffs is unknown and many times is seemingly unlimited, and the number of potential tortfeasors is equally obtuse . . . ."[1023] By contrast, with single incident mass torts, "the universe of potential claimants is either known or . . . capable of ascertainment and the event or course of conduct . . . occurred over a known time period and is traceable to an identified entity or entities."[1024]

Some dispersed mass tort cases involve only claims by individuals who know that they consumed a certain product or were exposed to a certain substance and who sustained a present injury of predictable severity within a relatively short period. Examples of such cases include a pharmaceutical drug or a medical device that is withdrawn from the market within a year or two after introduction, such as the Baycol (antistatin drug)[1025] and Sulzer Inter-Op Hip Prosthesis[1026] litigations. In other cases, the product or substance exposure can occur over years and produce latent injury that may take decades or more to appear and even longer for the extent or severity of injury to become clear. Such cases are often termed latent dispersed mass torts. Examples of latent injury claims include those related to asbestos,[1027] intrauterine devices,[1028]

1022. *See generally* American Law Institute, Complex Litigation: Statutory Recommendations and Analysis § 6.01, at 340–41 (1994) [hereinafter ALI, Complex Litigation] (a succinct history of some major events in the history of mass torts); *see also* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659 (1989) [hereinafter McGovern, *Mature Mass Tort*].

1023. *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1018 (5th Cir. 1997) (claims of personal injury and property damage related to alleged contamination of property and groundwater by dumping hazardous wastes).

1024. *Id. See also* McGovern, *Mass Torts for Judges*, *supra* note 705, at 1827–38 (analyzing various factors related to the volume or elasticity of some mass torts).

1025. *See In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001).

1026. *In re* Inter-Op Hip Prosthesis Prods. Liab. Litig., 149 F. Supp. 2d 931 (J.P.M.L. 2001).

1027. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) ("[L]atency period that may last as long as 40 years for some asbestos related diseases . . . .").

1028. *See* Richard B. Sobol, Bending the Law: The Story of the Dalkon Shield Bankruptcy 107 (1991) ("The discovery of infertility related to the use of the Dalkon Shield frequently occurred long after the removal of the device.").

silicone gel breast implants,[1029] radiation exposure,[1030] and pharmaceutical products, such as morning sickness remedies.[1031] Some potential claimants will know that they have been exposed to a harmful product or substance, even absent present injury. Other individuals, however, may not be aware that they have been exposed to a potentially injurious product or substance (e.g., the female children of women who took DES during pregnancy[1032] or individuals who have unknowingly been exposed to asbestos[1033]). Some individuals may not yet have been exposed to products such as asbestos, lead, or other harmful substances, but may be exposed later. Justice Ginsburg described such categories of potential claimants as "unselfconscious and amorphous,"[1034] a characterization that underscores the difficulty of providing notice to them in a class action.

Those who have been exposed to a potentially harmful product or substance but have no discovered injury are sometimes referred to as future claimants or present future claimants. People who have not yet been exposed to the product or substance but who are in the future are sometimes referred to as future future claimants. Some question exists whether future claimants, of whatever type, can receive class action notice that is sufficient under the Constitution and Rule 23.[1035] Some cases present allegations of both present injury and latent injury, adding to the variability among the claims. Breast implant and asbestos claims exemplify this latter category.[1036]

1029. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, No. CV92-P-10000-S, Civ. A. No. CV 94-P-11558-S, 1994 WL 578353, at *8 (N.D. Ala. Sept. 1, 1994) (approving ongoing disease compensation program for thirty years that provides for potentially adding illnesses of children of women with implants).

1030. *In re* TMI Litig., 193 F.3d 613, 643 (3d Cir. 1999) (finding that latency period for exposure to radiation may vary, depending on disease, from eight to ten years).

1031. *In re* DES Cases, 789 F. Supp. 552, 558 (E.D.N.Y. 1992) (noting that babies exposed to DES in womb may have latent diseases in adult years); *cf. In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL No. 1203, No. 99-20593, 2000 WL 1222042, at *46 (E.D. Pa. Aug. 28, 2000) (finding no real latency period from time of discontinued use of diet drug).

1032. *DES Cases*, 789 F. Supp. at 558 ("Women exposed to DES *in utero* may develop adenosis, a pre-cancerous cell change . . . .").

1033. *Amchem*, 521 U.S. at 628 (noting that many persons may not know they were exposed, including children and spouses of claimants).

1034. *DES Cases*, 789 F. Supp. at 558. *See generally*, *Amchem*, 521 U.S. at 628.

1035. Jay Tidmarsh, Mass Tort Settlement Class Actions 29 n.72 (Federal Judicial Center 1998) (dividing "future plaintiffs" into "present futures" and "future futures"); Working Group Report, *supra* note 1019, at 302 (referring to "future claimants").

1036. *See, e.g., Amchem*, 521 U.S. at 626–27 (discussing "currently injured" and future claimants); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 578353, at *8 (N.D. Ala. Sept. 1, 1994) (alleging wide range of injuries).

These different categories of potential claimants may create conflicts of interest. Those with present injuries want to maximize present recoveries; those who may reveal no injury for years want to ensure that sufficient assets are available in the future to provide compensation if and as needed.[1037] Those who have not yet been exposed or are unaware of exposure may not be identifiable. Including such individuals in a binding resolution, as in a global settlement, raises issues of notice and fairness.

Identifying the differences between single incident and dispersed mass torts does not necessarily indicate how specific cases should be managed. Some single incidents, such as accidental discharges of pollutants, can also lead to claims that are widely dispersed over time and place.[1038] Even single event torts with a strong local nexus, such as a plant emission or a spill of toxic materials, may include latent exposure effects or be affected by individual variables, such as smoking. The "common distinction between 'single event' and 'dispersed' mass torts identifies prototypes," but does not neatly divide mass torts "into two tidy categories that can be managed by separate or distinctive means."[1039] The "crucial point is not whether the underlying tort itself is a single event, but whether its consequences are dispersed."[1040]

Toxic tort and defective product cases are often filed throughout the state and federal court systems, including the bankruptcy courts. The sheer number of cases can create enormous pressure to aggregate or combine them in order to reduce delay and docket congestion and to avoid the costs of repetitive litigation that can drain potential compensation funds. That pressure has led to creative and experimental procedures by attorneys and judges. A "process of common law evolution" and "a growing corps of experienced litigators" have helped "state and federal courts continue to experiment with existing procedures and allocations of jurisdiction."[1041] District judges have exercised their broad discretion to create some of the innovations described in this section. The purpose of these innovations, often stimulated by necessity, was to implement the goals of Rule 42 or 28 U.S.C. § 1407. Although appellate courts have not reviewed many of the innovative techniques, several of these techniques are clearly within the district court's discretionary power to manage the

1037. *Amchem*, 521 U.S. at 626–27.

1038. *See*, *e.g.*, *In re* TMI Litig., 193 F.3d 613, 624, 625 n.8 (3d Cir. 1999) (personal injury claims were filed from the early eighties to mid-nineties); Allen v. United States, 588 F. Supp. 247, 257–58 (D. Utah 1984) (discussing personal injury claims related to radioactive fallout from nuclear test site where pollutants were dispersed over parts of Nevada, Utah, and Arizona).

1039. Working Group Report, *supra* note 1019, at 301.

1040. *Id.* at 302.

1041. *Id.* at 316.

litigation. However, some approaches, especially those that aggregate large numbers of claims with significant variations, may not comply with the underlying substantive law or may be unfair to some litigants.[1042] Nevertheless, courts recognize that the complexity, diversity, and volume of mass tort claims require adapting traditional procedures to new contexts, to achieve both fairness and efficiency. Effective management of mass tort cases typically requires early and regular meetings with the lawyers, identifying the nature of the claims, making decisions on pretrial or trial aggregation or coordination, and entering detailed orders necessary to the orderly development of the case.[1043] This management role should begin early in the litigation.

Procedures to aggregate claims sometimes encourage the filing of questionable claims, accelerate the rate at which claims are presented,[1044] or even create a mass tort out of what otherwise might simply have been a flurry of similar cases that would have quickly faded away. For example, in the repetitive stress injury litigation, the Judicial Panel on Multidistrict Litigation (MDL Panel) (see section 20.13) rejected plaintiffs' request for consolidation because the Panel was "not persuaded . . . that the degree of common questions of fact among these actions rises to the level" required under 28 U.S.C. § 1407.[1045] Subsequently, plaintiffs failed to succeed on the merits in trials in seven different jurisdictions and such claims disappeared from the mass tort landscape.[1046]

1042. For a case study discussing the appropriate use of mass tort innovations discussed in this manual, see Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the* Manual for Complex Litigation, 148 U. Pa. L. Rev. 2225 (2000) (focusing on use of *MCL, 3d*'s treatment of the maturity concept in nationwide tobacco class action) [hereinafter Willging, *Beyond Maturity*]; see also ALI, Complex Litigation, *supra* note 1022, § 3.01, at 41–51 (discussing efficiency and fairness in deciding whether to aggregate claims).

1043. *See generally* Jack B. Weinstein, *Ethical Dilemmas in Mass Torts Litigation*, 88 Nw. U. L. Rev. 469 (1994); Geoffrey C. Hazard, Jr., *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Torts Litigation*, 88 Nw. U. L. Rev. 569 (1994).

1044. *See* McGovern, *Mass Torts for Judges*, *supra* note 705, at 1822 ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger the mass tort filings become."); *see also id.* at 1841–45 (discussing different case-management approaches for different levels of maturity of mass tort litigation).

1045. *In re* Repetitive Stress Injury Prods. Liab. Litig., No. 955, 1992 WL 403023, at *1 (J.P.M.L. Nov. 27, 1992). *See also In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (vacating a pretrial consolidation order under Rule 42; approving assignment of cases to a single judge).

1046. *See* George M. Newcombe, *RSI Defendants Fight for Due Process: "Mass Torts" Needn't Always Be Massive,* 63 Def. Couns. J. 36, 39–40 (1996). A prominent plaintiffs' attorney had described RSI cases as "the mass tort of the nineties" (see Stanley J. Levy, *Repetitive Trauma: The Mass Tort of the Nineties, in* Proving or Defending Repetitive Stress Injury, Medical Device, Lead,

Although the "just, speedy, and inexpensive determination of every action"[1047] requirement applies to all cases, the difficult and sometimes contradictory demands posed by mass torts make case management both challenging and critical. The absence of precedent or of legislative or rule-making solutions should not foreclose innovation and creativity. Such creativity must be carefully applied, accompanied by an examination of the specific issues raised in each case, the legal authority for and against the procedures devised, and other factors that might affect fairness and efficiency.

22.2 Initial Issues in Mass Tort Suits

The goals of mass tort case management parallel the goals of Federal Rule of Civil Procedure 1 and include the following:

- providing a forum for all parties to have a fair test of the merits of their claims and defenses;
- avoiding inefficient and duplicative litigation of similar issues of law or fact;
- effecting the statutory and common-law goals of compensating those injured by tortious conduct and deterring such conduct; and
- affording similar treatment to similar cases in order to promote public confidence in the courts through consistent, predictable, and cost-effective outcomes.

These goals sometimes require the court to marshal limited assets for the protection of present and future claimants not yet before the court.

Mass tort case management must keep the litigation moving efficiently, without truncating necessary pretrial preparation or distorting the presentation of issues. Cases involving a large volume and variety of claims and parties, and the presence of individualized issues, often create conflicting demands for speedy adjudication and fairness to all parties. The challenge for the judge is to avoid excessive delay while preserving the right to a fair trial. For example, the court may need to establish priorities by considering claims involving serious impairment before claims that appear to involve little or no impairment. (This section later discusses types and varieties of claims; section 22.633 discusses deferred docketing.)

The paradox of mass torts is that all of the claims share some common attributes, and all present similar challenges, but each particular case has some

Pharmaceutical and Closed Head Trauma Cases 167 (PLI Comm. Law & Practice Course, Handbook Series No. 723, 1995)).

1047. Fed. R. Civ. P. 1.

unique features. A judge must gather information that affects the threshold decisions for organizing the litigation and for setting a timetable for pretrial discovery, preliminary or dispositive motions, and trial. A critical question often is whether to aggregate cases for pretrial and trial management or to proceed on a case-by-case basis. Important factors to consider include the following:

- *What is the number of potential claims?* Mass production and widespread distribution of potentially harmful products or broad exposure to harmful substances is at the core of most mass torts. The volume of sales or the extent of public exposure to the products or substances at issue can help the court approximate the potential size of a mass tort. Information about the number of cases already filed in state and federal courts and the number of people exposed may provide a basis for predicting the number of cases likely to be filed in the future and the likely rate of filings. The number of actual and potential claimants affects decisions about whether to aggregate a group of cases, when aggregation is appropriate, and what form aggregation should take. A court should be cautious before aggregating claims or cases, particularly for trial, learning first about the nature of the litigation and whether the issues are appropriate even for pretrial aggregation or consolidation. Premature aggregation might be unworkable, unfair, or even accelerate the number and rate of filings and increase the size of the mass tort.
- *What are the types and varieties of claims involved?* Considering the following will help inform case-management decisions:
  - whether there is mixed severity among injury claims and whether any alleged diseases are latent (if a latent disease, the length of the latency period—that is, the period between exposure and manifestation of injury);
  - whether there are claims for personal injury, property damage, economic damage, or combinations of these elements;
  - whether claims for personal injuries involve imminent death, disability, chronic illness, or fear of future injury;
  - if an increased risk of future injuries is at issue, whether medical monitoring is an available cause of action or remedy under applicable law; and
  - whether the mix of injuries suggests a need to establish priorities for the most serious claims and a correlative need to defer consid-

eration of claims with little or no present impairment.[1048] Section 40.52 has a sample order. Section 22.633 discusses deferred docketing. Judges have also devised ways to screen claims that appear to have no factual basis.[1049]

A latency period raises the issue of future claimants and their relationship to those already manifestly injured. A long latency period complicates the identification and resolution of future claims, particularly claims by those who are still unaware that they have been exposed to a dangerous product or substance, or who may not yet have been exposed. The likelihood of future claims, and the number of those claims, may be difficult or impossible to determine.

- *What is the strength and reliability of the scientific evidence?* Is statistically significant and reliable information to support general causation available or likely to become available? Epidemiological evidence may not be available when the exposed population is relatively small, the disease or injury at issue is relatively rare, or both.[1050] Is other reliable evidence available or likely to become available from which a causal relationship might be proven—for example, findings from toxicology or medicine?[1051] These issues are often raised in challenges to the sufficiency and reliability of expert evidence.

1048. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 875, 2002 U.S. Dist. LEXIS 16590, at *1 (E.D. Pa. Jan. 16, 2002) (order ruling that "priority will be given to the malignancy and other serious health cases over the asymptomatic claims," administratively dismissing cases based on mass screenings, and tolling the statute of limitations for such cases). See generally 28 U.S.C. § 1657 (West 2003) and Fed. R. Civ. P. 40 for statutory and rule-based authority of courts to set priorities for civil cases; see also *In re Joint Eastern & Southern Districts Asbestos Litigation*, 237 F. Supp. 2d 297, 319–24, 336 (E.D.N.Y. & Bankr. S.D.N.Y. 2002) (approving amended trust terms that modify disease categories, criteria, and values to increase compensation to claimants with severe impairments).

1049. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., 236 F. Supp. 2d 445, 462–64 (E.D. Pa. 2002) (finding echocardiograms and claims forms submitted by two cardiologists and two law firms to have been medically unreasonable and authorizing the settlement trust to audit all claims submitted by those law firms and all reports by those cardiologists).

1050. *See generally* Michael D. Green et al., *Reference Guide on Epidemiology, in* Reference Manual on Scientific Evidence 333, 343 (Federal Judicial Center 2d ed. 2000) (indicating that for a rare disease, a cohort study may not be possible because "an extremely large group would have to be studied in order to observe the development of a sufficient number of cases for analysis); *see also id.* at 356 ("Common sense leads one to believe that a large enough sample of individuals must be studied if the study is to identify a relationship between exposure to an agent and disease that truly exists.").

1051. *See* Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology, in* Reference Manual on Scientific Evidence 401–37 (Federal Judicial Center 2d ed. 2000), *and*

- *Do the basic elements of the mass tort present issues common to all claimants?* Is the proof of those basic issues common to enough claimants to warrant common treatment? Common factual issues may arise from the development, manufacturing, or marketing of an allegedly defective product. The evidence as to whether a product was defective, whether there is general causation, and the presence and extent of damages must all be analyzed to determine whether it is common to all claimants or primarily dependent on individual circumstances.

  Causation must be analyzed to determine whether it can be established on a group-wide basis. Proof of causation requires evidence of exposure to the allegedly defective product or substance, the amount and duration of exposure, the alleged causal mechanism, and the role of alternative causal agents. In some cases, judges have treated general causation as suitable for aggregation through consolidation or certification of an issues class;[1052] in other cases, judges have found the issue too intertwined with individual questions to permit such an approach.[1053] Some products leave a signature injury, such as mesothelioma from asbestos. Even in those cases, however, proof of individual exposure to the causal agent is essential. An identifiable agent that consistently causes a particular injury may make it easier to prove causation on a group-wide basis. Without a signature injury or a readily identifiable agent, evidence as to the amount of exposure and the role of alternative causal agents is more individualized and may make aggregation of the claims questionable.

  Alleged product defects must also be analyzed to determine whether they can be established by proof common to the group. Such proof may relate to a single version of a product or to variations among similar products. The number and extent of the variations will affect

Mary Sue Henifin et al., *Reference Guide on Medical Testimony, in* Reference Manual on Scientific Evidence 439–84 (Federal Judicial Center 2d ed. 2002).

1052. *See In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1139 (9th Cir. 2002) (distinguishing between nature of expert testimony and proof required for individual as opposed to generic causation, and remanding with recommendation that the trial court consider "[class] certification only for questions of generic causation common to plaintiffs who suffer from the same or materially similar disease"); *In re* Bendectin Litig., 857 F.2d 290, 308–09 (6th Cir. 1988) (constitutionality of separate common issues trial of generic causation upheld); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (severing, and granting class certification on, issues of generic causation).

1053. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302–03 (7th Cir. 1995) (rejecting the use of an issues class in product liability case because of individual liability issues); Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (same).

the extent to which proof of deficiencies applies across a substantial group of claimants. Similarly, claims for punitive damages may be affected by the number of products involved and variations in their production and marketing.

Proof of individual, compensatory damages will typically be specific to each claimant. Accordingly, individual decisions on actual damages are usually required.

- *How many defendants are there and what is the relationship among them?* The number of defendants that designed, manufactured, or marketed the suspect product is an important consideration. The claims among codefendants or third-party defendants may affect not only the type and extent of discovery, but also whether all necessary parties are before the court for comprehensive adjudication or settlement. In appropriate cases, the court should encourage defendants to present joint defenses or to coordinate motions and eliminate repetitive arguments. Early in the litigation, the court should determine whether other parties, such as insurers, are appropriately and usefully included in the litigation. If there are related insurance coverage actions pending, the court should consider whether those actions should be coordinated or consolidated with the litigation. Treatment of coverage issues in conjunction with personal injury litigation has generally occurred in limited fund class action or bankruptcy contexts.[1054] Whether any of the defendants are judgment-proof or seeking protection under the Bankruptcy Code are also important considerations. If the funds available appear inadequate to satisfy likely claims, the court should assess whether some identifiable plaintiffs are so disabled or critically ill as to warrant priority consideration, such as expedited trial dates.[1055] For example, the MDL asbestos court severed punitive damages claims and delayed their consideration until compensatory damages had been paid.[1056]
- *Have numerous cases presenting the same issues been filed in other courts?* Courts routinely order counsel to disclose, on an ongoing basis past, and pending related cases in state and federal courts and to report on their status and results. This information is necessary to case-management decisions, including the appropriate level of communi-

1054. *See generally, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (asbestos-related limited fund class action); *In re* Dow Corning Corp., 113 F.3d 565 (6th Cir. 1997) (bankruptcy).

1055. *See* discussion of Tidmarsh and *Working Group Report*, *supra* note 1035.

1056. *See In re* Asbestos Prod. Liab. Cases (No. VI), MDL No. 875, Suggestion of Remand Order (E.D. Pa. Feb. 26, 2003) (ordering punitive damages severed).

cation, cooperation, or coordination with other courts. If similar cases are dispersed among federal courts, the Judicial Panel on Multidistrict Litigation may order the cases transferred to a single court for coordinated or consolidated pretrial purposes. See section 22.33. If similar cases are pending in state courts as well as federal courts, the judge should inquire whether any of the state cases have been considered, and, if so, in what courts. Formal and informal techniques to coordinate discovery, pretrial motions, rulings on class certification, trial schedules, and other matters should be considered. See section 22.4.

- *What is the impact of different state laws that may apply?* State law usually governs tort claims, even when filed in federal court. The judge, early in the litigation, should consider the applicable conflicts and choice-of-law rules. Consider which state laws and defenses apply and how they affect whether issues of defect, causation, or damages are subject to common proof. The judge should examine whether any claims or defenses create individual issues or make aggregate treatment appropriate only for certain parts of the case, or for limited purposes, such as pretrial discovery. And consider whether there are conflicts among the applicable state laws that might present significant obstacles to any aggregate treatment.
- *What are the experiences of other courts with similar claims?* The court might inquire whether similar cases have been tried or settled, and, if so, with what results; whether other courts have ruled on dispositive motions or on the limits of appropriate discovery; and what information is available as to the value of a particular set of cases, based on prior trials or prior settlements.[1057] Consider whether there is a need for more trials of individual cases to determine whether claims should be aggregated and on what terms. Also, determine if trials of test cases, common issues trials, or summary jury trials should be used.[1058]

1057. For an example of an order for counsel to submit preliminary reports summarizing the status of litigation pending in state courts, see *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL No. 926, Order No. 1 (N.D. Ala. June 26, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1058. For discussion of summary jury trials as an ADR technique, see Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR 44 (Federal Judicial Center 2001); see also *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig.*, 137 F. Supp. 2d 985, 993 (S.D. Ohio 2001).

- *Would a court-appointed expert, panel of experts, technical advisor, or special master be of assistance to the trier of fact?*[1059] Determine whether there are less costly methods or alternative ways for the court to manage the expert testimony, such as joint meetings of the parties' experts to identify the sources of differences in their approaches to the same questions.

The information discussed above will help in devising a plan for managing the litigation. A threshold question is whether to aggregate cases for pretrial management or to proceed on a case-by-case basis.

1059. *See generally* Laural L. Hooper, Joe S. Cecil & Thomas E. Willging, Neutral Science Panels: Two Examples of Panels of Court-Appointed Experts in the Breast Implants Product Liability Litigation (Federal Judicial Center 2001) [hereinafter FJC Study, Neutral Science Panels] (comparison of methods two judges used to appoint scientific experts to assist in resolving mass tort litigation); FJC Study, Special Masters, *supra* note 704 (reporting empirical findings about the incidence of using special master in various types of cases and describing the appointment and use of such masters); Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference,* 77 Or. L. Rev. 59 (1998) (examining the uses and pitfalls of appointing experts, especially difficulties in assuring neutrality and counteracting the tendency to defer to an appointed expert); Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity,* 43 Emory L.J. 995 (1994) (reporting results of an empirical study of judicial use of court-appointed experts, identifying purposes and problems relating to the appointments, and describing a pretrial procedure to identify expert issues early in the litigation).

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Aggregation—bringing together hundreds or even thousands of similar claims into a single unit—is among the most important decisions a judge faces in mass tort litigation.[1060] The decision whether to aggregate related mass tort cases is very different when made for the purpose of pretrial case management only, as opposed to trial. This section discusses the criteria and factors applicable to both of these decisions.

Aggregation of mass tort cases can take different forms: assigning cases filed within a district to a single judge in that district and entering consolida-

1060. For an overview of the range of informed opinions on whether and when aggregation should be used in mass tort litigation, see Thomas E. Willging, *Appendix C, Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group* (1999), *in* Working Group Report, *supra* note 1019, at app. C.

tion orders under Federal Rule of Civil Procedure 42[1061] for pretrial or trial management; transferring cases filed in different districts for coordinated or consolidated treatment by a single judge under the multidistrict litigation (MDL) statute;[1062] and certifying similar cases as a class action for litigation or settlement purposes. Sections 22.3 and 20.13 discuss MDL transfers and section 22.7 discusses class actions. The recent trend in federal courts, with a few notable exceptions,[1063] has been to reject certification of nationwide mass tort personal injury class actions,[1064] particularly outside the settlement context. This trend makes the search for other tools of aggregation and coordination even more important.

1061. For a discussion of the structural differences between class actions and consolidations, see Charles Silver, *Comparing Class Actions and Consolidations,* 10 Rev. Litig. 495 (1991). Occasionally, cases are consolidated among districts within the same state, but such consolidations do not warrant separate discussion beyond noting the possibility that judges can be designated to handle cases filed in another district. *See In re* Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85 (E.D.N.Y. & Bankr. S.D.N.Y. 1991); *In re* Johns-Manville Corp., 1990 Bankr. LEXIS 1940 (Bankr. S.D.N.Y. Aug. 21, 1990) (consolidated cases 82 B 11656 (BRL) through 82 B 11676); *In re* Joint E. & S. Dists. Asbestos Litig., 120 B.R. 648, 652–53 (E.D.N.Y. & Bankr. S.D.N.Y. 1990) (discussing Order of James L. Oakes, Chief Judge, Second Circuit, dated January 23, 1990, and July 20, 1990; Order of Charles L. Brieant, Chief Judge, United States District Court S.D.N.Y., dated July 20, 1990, assigning responsibility for pending asbestos cases).

1062. 28 U.S.C. § 1407 (West 2003). If a motion to transfer pursuant to the MDL is not filed, there may be motions to transfer the venue of related cases to permit assignment before a single judge. *Id.* § 1404(a).

1063. Federal trial courts certified nationwide classes for specified common liability-related issues in the following cases: *In re Telectronics Pacing System, Inc., Products Liability Litigation*, 172 F.R.D. 271 (S.D. Ohio 1997); *In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litigation*, 161 F.R.D. 456 (D. Wyo. 1995), *In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litigation*, 158 F.R.D. 485 (D. Wyo. 1994) (manufacturing defect in batch of pharmaceutical product); see also *Lewis Tree Service Inc. v. Lucent Technologies, Inc.*, 211 F.R.D. 228 (S.D.N.Y. 2002). In *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit vacated the district court's class certification order and remanded for adequate findings, holding that "the law of this circuit . . . does not create any absolute bar to the certification of a multi-state plaintiff class action in the medical products liability context." 97 F.3d 1227, 1230 (9th Cir. 1996). In *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995), the Court discusses a litigation class of personal injury, wrongful death, and torture claimants that was certified for purposes of a three-phase class-wide trial on liability, punitive damages, and compensatory damages, under the Alien Tort Claims Act, 28 U.S.C. § 1350 (West 2003).

1064. *See, e.g., In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that because the claims would have to "be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable"); Castano v. Am. Tobacco Co., 84 F.3d 734, 743–44, 749–52 (5th Cir. 1996).

22.311 Criteria

The criteria for aggregation of mass tort cases for trial are more stringent than for more limited purposes, such as pretrial discovery, motions, or settlement. Aggregation of related cases for pretrial preparation often promotes efficiency in discovery, even when the cases cannot be aggregated for all phases of pretrial preparation or for trial.

The key factor in deciding to aggregate cases for pretrial is the presence of common issues that can be discovered and litigated efficiently and fairly, through motions or otherwise, in coordinated or consolidated proceedings. A common issue is one that is susceptible to common proof. Decisions about whether to aggregate cases, and for what purposes, should be based on the presence of common issues critical to liability determinations. In general, product-based mass torts in which the evidence of exposure and general causation is clear may be candidates for some form of aggregation.[1065] When the circumstances of exposure vary widely, or where causation is uncertain or varying, aggregation for trial is inappropriate. In such cases, aggregation for pretrial discovery and motions may provide some efficiencies but will require careful management to protect some parties from unfair burden.[1066]

22.312 Advantages and Disadvantages of Aggregation

Aggregation of similar claims can maximize fair and efficient case management, minimize duplication, reduce cost and delay, enhance the prospect of settlement, promote consistent outcomes, and increase procedural fairness.[1067] Without aggregation, some types of tort or tort-like claims, such as consumer claims asserting economic loss or property damage but not personal injury, may simply be foreclosed or delayed for reasons unrelated to the merits.[1068] On the other hand, aggregation can increase the complexity of cases and introduce

1065. In a report to the Mass Tort Working Group, Federal Judicial Center staff identified the following mass torts areas as having clear causation and identifiable exposure: asbestos, Dalkon Shield, heart valves, HIV blood factors, tobacco, TMJ implants, J-pacemaker leads, and Thalidomide. Working Group Report, *supra* note 1019, app. D, at 10 tbl. 3.

1066. *See*, *e.g.*, *In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (vacating consolidation order and noting party pursuing aggregation should not do so to increase costs for adversary).

1067. *See* Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 Touro L. Rev. 685, 686–88 (1999).

1068. In *Amchem Products, Inc. v. Windsor*, the Court noted the intent of Rule 23's drafters to vindicate the rights of those who might not be able to use the courts at all without a class action device. 521 U.S. at 617.

additional cost and delay associated with individualized issue resolution. In such instances, aggregation can be unfair to plaintiffs and defendants.[1069]

22.313 Timing of Aggregation Decisions

Judges have broad discretion as to the timing of aggregation decisions. Federal Rule of Civil Procedure 42 permits consolidation whenever "actions involving a common question of law or fact are pending before the court." Rule 23(c)(1) directs the court to decide class certification "at an early practicable time." The statute governing multidistrict litigation, 28 U.S.C. § 1407, simply refers to "pretrial" proceedings. The MDL Panel sometimes decides to defer or reject consolidation because one or more of the component cases is approaching trial.[1070] On the other hand, MDL consolidation can occur long after a substantial number of similar cases have been resolved by trials or settlements.[1071] In most cases, timing depends on the availability of reliable and sufficient information about whether there are common issues that can be determined fairly and efficiently across a large number of claims and whether the nature and value of the claims makes aggregation useful.

22.314 Obtaining Information About Common Issues and Case Values

A "mature" mass tort is one that rests on clearly established law and tested and accepted evidence. In a mature mass tort, the cases have a predictable range of values produced through a number of trials and settlements in a variety of tribunals. Maturity exists on a continuum and resists clear definition. Determining whether a particular mass tort is mature requires scrutinizing the merits of the litigation—merits which may become evident in pretrial rulings

1069. *See, e.g., In re* Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993) ("'The systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.'" (quoting *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992))); Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 354 (2d Cir. 1993) (disapproving a consolidated trial and cautioning "that it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process"); *see also* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: the Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psychol. 909 (2001) (experimental research on jury decision making found that aggregations of up to ten cases—when compared with single trials or smaller aggregations—increased the likelihood that defendant would be found liable, but reduced the average damage award per plaintiff).

1070. *See In re* Asbestos & Asbestos Insulation Materials Prods. Liab. Litig., 431 F. Supp. 906, 909–10 (J.P.M.L. 1977).

1071. *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

on discovery and motions in the first case filed—to decide whether core issues of liability remain unsettled.[1072] Litigation is generally considered mature if through previous cases (1) discovery has been thorough, producing a consensus that the available important information has been provided, (2) a number of verdicts have been received indicating the value of claims, and (3) plaintiffs' contentions have been shown to have merit.[1073] In a typical mature mass tort, little or no new evidence is likely, appellate review of novel legal issues has been completed, and a full cycle of trial strategies has been explored.[1074]

Cases with extensive history or development in other litigation generally allow a judge to decide whether to aggregate claims, and for what purposes, with little additional information. Perhaps the best example of a mature mass tort is the asbestos litigation where discovery has been exhaustively conducted into many of the issues common to asbestos claims, including factors affecting causation; the many asbestos verdicts and settlements provide information as to the value of a particular claim; and repeated litigation in a variety of tribunals has proven specific causation for certain types of injury. The issues in newly filed asbestos claims focus on whether a particular plaintiff has the injury claimed and, if so, whether it was caused by asbestos exposure or by alternative causes, such as using tobacco.

In less mature mass tort cases, aggregation decisions may be more difficult and may require the judge to obtain additional information. If the injuries allegedly arise from new products or substances, or liability is predicated on novel legal claims, causation may be disputed or scientific evidence may be conflicting. If there are few prior verdicts, judgments, or settlements, additional information may be needed to determine whether aggregation is appropriate. The need for such information may lead a judge to require a number of single-plaintiff, single-defendant trials, or other small trials. These trials would test the claims of causation and damages and whether the evidence applies across groups, in order to provide the necessary information as to whether aggregation is appropriate, the form and extent of aggregation, and the likely range of values of the various claims.

A variety of case-management techniques are available when there is insufficient information as to the nature, strength, or value of the claims.

1072. *See generally infra* section 22.2 *and* Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. Pa. L. Rev. 2225, 2254–55 and sources cited therein (2000); *see also* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions,* 26 J. Legal Stud. 521 (1997) (presenting the view that substantive review of the merits of a claim is essential to effective management of mass tort class actions).

1073. *See* McGovern, *Mature Mass Tort*, *supra* note 1022, at 659.

1074. *Id.*

Before making aggregation decisions, the judge should order the parties to identify other, pending, related cases and their status. The judge also might consider setting several individual cases on a schedule for pretrial motions, discovery, and trial as test cases, while holding other cases or claims in abeyance. As another technique, a court may stay or defer decisions in the cases before it until more advanced cases or dispositive motions pending in other courts are concluded. Identifying and implementing such approaches promptly will avoid unnecessary delay.

22.315 Test Cases

If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases. Some judges permit the plaintiffs and defendants to choose which cases to try initially, but this technique may skew the information that is produced.[1075] To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.[1076]

Test cases should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis' and what range of values the cases may have if resolution is attempted on a group basis. The more representative the test cases, the more reliable the information about similar cases will be.

22.316 Case Characteristics

In litigation with numerous plaintiffs, the judge may direct the parties or a special master to identify relevant characteristics of the parties affecting pretrial organization,[1077] discovery, settlement, or trial. For example, in litigation

1075. *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) (noting that trial of cases selected by each side separately "is not a bellwether trial. It is simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation.").

1076. *Id.* ("A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to a universe of claimants has as a core element representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence . . . .").

1077. *See* Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) (affirming consolidation of two cases with similar characteristics and specifying criteria for identifying common

involving allegedly harmful products or substances, the parties might be directed to organize information such as (1) the circumstances of exposure to the toxic product (e.g., the place, time span, and amount of exposure), (2) the types of diseases or injuries attributable to the exposure (e.g., in the diet drug litigation, heart-valve disease and primary pulmonary hypertension), (3) relevant and distinguishing characteristics of multiple products, including manufacturing and distribution information (e.g., prescription from a doctor or over-the-counter distribution through specific retailers), and (4) the types of occupations or other roles of the plaintiffs (e.g., asbestos factory worker, installer, consumer, bystander, exposed spouse). Emerging patterns may assist the court in organizing and managing the litigation, whether by aggregated treatment or otherwise.

Also relevant is whether the cases have the same counsel on one or both sides and whether the cases are at similar stages of pretrial development. Cases having substantially similar evidence from the same expert or percipient witnesses sometimes benefit from some form of aggregation.

22.317 Role of Different State Laws

When different state laws apply, a judge might ask the parties to research the feasibility of organizing cases based on the similarity of the applicable laws.[1078] If the cases are consolidated for pretrial purposes, lead counsel can file "core" briefs on dispositive motions based on the most widely applicable or otherwise most significant state substantive law. Variations in state laws can be addressed separately through supplemental briefs, which can be prepared by lawyers whose clients assert that a different law applies to some or all of their cases.

Differences in the applicable substantive law do not necessarily preclude aggregation for pretrial proceedings, but may create substantial obstacles to consolidation for trial, even if the underlying facts on liability are the same.[1079]

issues); *see also* Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495–97 (11th Cir. 1985) (discussing bases for consolidation); *cf. In re* Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993) (vacating a pretrial consolidation order under Rule 42 while approving assignment of cases to a single judge), *and* Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993) (reversing a jury verdict after trial of forty-eight consolidated cases involving asbestos workers whose various occupations, worksites, time of exposure, disease types, and injuries were not sufficiently common to support a consolidated trial); *see also* Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System 473–87 (1998); Thomas E. Willging, Trends in Asbestos Litigation 104–07 (Federal Judicial Center 1987) [hereinafter Trends].

1078. *See In re* School Asbestos Litig., 789 F.2d 996, 1010–11 (3d Cir. 1986).

1079. *See, e.g.*, *In re* Bendectin Litig., 857 F.2d 290, 293–94 (6th Cir. 1988) (noting differences in the complaints and finding "most are virtually identical, requesting relief on grounds of

Differences in affirmative defenses, such as statute of limitations defenses, sometimes create a need for separate discovery and motions practice.

22.318 Trial Plans

Trial plans can assist in determining whether common issues justify aggregating related cases for trial and the extent and nature of the appropriate aggregation. Plans should address whether to try cases on a traditional case-by-case basis, on a test case basis, in a bifurcated or multifurcated organization of issues, in a consolidated or class format, or on some other basis. See section 22.32. The parties should point to evidence that will prove the elements of the claims and defenses in issue. Such information enables the judge to test whether common issues support some form of aggregation and whether to limit aggregation to particular issues. One court tested the manageability of a class action trial in a multidistrict medical-device proceeding by designing a plan for a summary jury trial conducted over approximately a one-week period.[1080] Other courts have rejected class certification after the trial plans exposed an inability to try proof of causation or other elements of liability on a class-wide basis.[1081]

22.32 Intradistrict Assignment to a Single Judge

A single judge's supervision of related mass tort cases filed in a single district provides centralized management of the cases pending in that district and also can facilitate coordination of related cases in other districts. Efficiency is increased if all related cases pending in the same division or district—including actions regarding insurance coverage, suits for indemnification, and adversary proceedings in bankruptcy—are assigned to the same judge, at least for pretrial management (see sections 20.11 and 10.12).

negligence, breach of warranty, strict liability, fraud, and gross negligence"); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 468–69 (D. Wyo. 1995) (presenting trial plan to deal with differences in state laws).

1080. *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 985, 993 n.8 (S.D. Ohio 2001) (noting that "utilization of the summary jury trial technique in these cases assisted the Court and these Parties in determining whether a trial on the merits was manageable").

1081. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (finding the use of multiple juries deciding comparative negligence and proximate causation would violate the Seventh Amendment's reexamination clause); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 334, 351–53 (S.D.N.Y. 2002) (denying plaintiffs' motion for class certification because trial plan could not resolve individual issues of causation).

The district court may withdraw the references to bankruptcy judges of proceedings to determine the dischargeability of tort claims and assign those proceedings to the judge presiding over the underlying claims. 28 U.S.C. § 157(d). See section 22.52. The judges of a district court in which the bankruptcy proceeding is pending may also decide to defer transfer of multiple claims for personal injury or wrongful death under 28 U.S.C. § 157(b)(5), which provides for trial of such claims in the district court in which the bankruptcy case is pending or in the district in which the claim arose, until after a period of centralized pretrial management. In some mass tort cases, district judges and bankruptcy judges have presided jointly and issued joint opinions and orders.[1082] Bankruptcy courts sometimes grant relief from the automatic stay to save time and conserve resources by enabling distinct claims, such as insurance coverage or ERISA claims, to proceed simultaneously in other districts.[1083] See section 22.54.

If several cases are remanded to transferor courts in a single district for trial after a period of multidistrict supervision under 28 U.S.C. § 1407,[1084] judges in that district should consider whether the remanded cases are most efficiently handled by assignment to one judge, at least initially. If so, that judge may coordinate further discovery as needed and determine the most appropriate trial structure and schedule.

Local rules sometimes authorize transfer to a single judge of related mass tort cases filed before different judges in the same division of a district, or in multiple divisions of the same district. For example, one local rule defines related cases as those in which "a substantial saving of judicial resources is likely to result" by assigning them to the same judge "because of the similarity of facts and legal issues or because the cases arise from the same transactions or events."[1085] Such local rules generally provide a random or objective basis for selecting the transferee judge—for example, assignment to the judge who initially received the lowest-numbered case.[1086] Another court's local rule directs the clerk to seek the guidance of the judges in the division in the event

1082. *See, e.g., In re* A.H. Robins Co., 158 B.R. 640 (Bankr. E.D. Va. 1993); *In re* Joint E. & S. Dist. Asbestos Litig., No. CV90-3973, 1993 WL 207565 (E.D.N.Y. & Bankr. S.D.N.Y. June 10, 1993).

1083. *In re* Enron Corp., No. 01-16034, 2002 WL 1008240, at *1 (Bankr. S.D.N.Y. May 17, 2002) (order lifting automatic stay to permit payments under insurance policies).

1084. *See infra* section 22.33 and *supra* section 20.13.

1085. U.S. Dist. Ct. R. 50.3(a) (E.D.N.Y Westlaw, current as of Oct. 15, 2003); *cf.* U.S. Dist. Ct. R. 40.1 (E.D. Pa. Westlaw, current as of Oct. 15, 2003) (defining a related case as one that "relates to property included in another suit, or involves the same issue of fact or grows out of the same transaction as another suit").

1086. U.S. Dist. Ct. R. 50.3(e) (E.D.N.Y. 2002).

of multiple related filings, defined as five or more related cases.[1087] Courts have applied intradistrict assignments to a variety of mass tort cases. In one instance, two courts combined and consolidated their asbestos caseloads before a single judge designated by the chief judge of the court of appeals.[1088]

Once cases have been assigned to a single judge, that judge can determine the nature, extent, and purpose of the coordination or consolidation. Federal Rule of Civil Procedure 42(a) permits consolidation when the cases involve "a common question of law or fact." Such consolidation may be of "any or all of the matters in issue in the actions." In single incident mass tort litigation, early aggregation and pretrial consolidation of all or most of the individual cases generally has proved to be feasible and efficient.[1089] In such cases, consolidation under Rule 42 for trial purposes as well is often fair and efficient. If there are some variations among cases within a single district, subdividing them into groups or clusters of cases that raise similar issues or present similar case-management needs can also be an efficient approach.

In dispersed mass tort litigation, by contrast, coordinated discovery and pretrial motions may be feasible, but differences in facts relevant to exposure, causation, and damages, as well as in the applicable law, often make consolidation for trial purposes both inefficient and unfair.[1090] A court should avoid ordering even pretrial aggregation until it is sufficiently clear that there are common questions of fact and law.

Judges in a single division or district sometimes defer any transfer and intradistrict assignment until some of the cases have been discovered or tried on an individual basis. If the cases are assigned to a single judge in the district, that judge often defers the decision on whether to aggregate some or all of the cases for trial until after discovery and motions practice in cases coordinated for pretrial purposes have narrowed the claims, issues, and defenses and illuminated the extent to which they can fairly and efficiently be tried on an aggregated basis.[1091]

1087. *In re* Div. of Cases Among Dist. Judges (Standing Order) (W.D. Va. Jan. 30, 2001), *at* http://www.vawd.uscourts.gov/storders/contents.asp (last visited Nov. 10, 2003).

1088. *In re* Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85 (E.D.N.Y. & Bankr. S.D.N.Y. 1991).

1089. *See generally* Working Group Report, 187 F.R.D. 293, 301–02, *supra* note 1019, at 11–14 (exploring similarities and differences between single incident and dispersed mass torts); *see also In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (describing consolidation of oil spill-related claims and multiphase class action trial in single federal court; affirming class-wide compensatory damages verdict, and vacating and remanding class-wide punitive damages verdict to district court for recalculation).

1090. *See In re* Repetitive Stress Injury Litig., 11 F.3d 368, 373–74 (2d Cir. 1993).

1091. Fed. R. Civ. P. 42(a). *See also* cases cited at *supra* note 1079.

The extent and duration of supervision by one judge, and whether to consolidate some or all of the cases for trial, will depend on the facts. A court should, for example, examine whether any common issues are central to the litigation,[1092] whether the common issues are separable from individual issues,[1093] and whether there is a feasible plan for dealing with any individual issues that remain after a verdict on the common issues.[1094] A key factor is whether the claims originated from a single incident. Section 22.32 has further discussion of trial structures. In dispersed mass tort cases, judges often require separate trials of individual actions, or of groups of individual actions, and arrange for assignments or remand to a number of judges after completion of common discovery.[1095]

Intradistrict aggregation sometimes leads to adverse consequences. Assignment to a single judge might delay disposition if that judge has other major cases to handle.[1096] Requiring each party to participate in tangentially related cases brought by or against other parties may increase costs unnecessarily.[1097] Case-management orders should tailor specific discovery to the parties affected, relieving other parties of that expense and burden. Even in a single district, aggregation ordered before it is clear that the cases actually

1092. *See, e.g., In re* Bendectin Litig., 857 F.2d 290, 295–96 (6th Cir. 1988) (reciting district court finding of common issues relating to causation and liability); *see also In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 158 F.R.D. 485, 488–89 (D. Wyo. 1994) (finding common issues based on contamination of product sold across the country).

1093. *See infra* text accompanying notes 1395–99, discussing *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931) (holding that "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again") and *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

1094. *See infra* text at notes 1400–02 (discussing trial plans for issues classes).

1095. *See, e.g., In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1998 WL 118060, at *1 (E.D. Pa. Jan. 12, 1998) (remanding case after managing all aspects of civil procedure and discovery); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order 30 (N.D. Ala. Mar. 25, 1996, with app. B (Apr. 2, 1996)), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (remanding cases back to transferor courts with summary of significant rulings, an "outline of issues remaining for discovery and trial," and indicating "the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer").

1096. Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1569, 1571 (1995) ("formal assignment of all cases to one court may result in the loss of valuable judicial resources").

1097. *See, e.g., In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) ("A party may not use aggregation as a method of increasing the costs of its adversaries—whether plaintiffs or defendants—by forcing them to participate in discovery or other proceedings that are irrelevant to their case.").

represent a mass tort litigation, as opposed to a short-lived filing of similar claims, might "encourage additional filings and provide an overly hospitable atmosphere for weak cases," thereby "render[ing] the label 'mass tort' into a self-fulfilling prophecy."[1098]

22.33 Interdistrict Transfer (Including MDL)

Aggregating cases from multiple federal districts can be addressed on a case-by-case basis through motions to transfer[1099] or on a national basis through the MDL Panel. The Panel has transferred a significant number of dispersed products liability and other mass torts cases "for coordinated or consolidated pretrial proceedings" (sometimes referred to as "centralized proceedings") in a single district.[1100] In one instance, the Panel transferred a single district's asbestos cases to an adjoining district for centralized management.[1101] Later, the Panel transferred all federal asbestos cases, which were by then mature mass tort cases, to a single district for nationwide centralized management.[1102]

The Panel applies a threshold set of criteria for transfer to a single district. The first issue is whether the underlying actions present common questions of fact.[1103] The common questions of fact must be complex, numerous, and incapable of resolution through other available procedures such as informal coordination.[1104] Next, the Panel looks to prudential and procedural factors

1098. Freedman, *supra* note 1067, at 688.

1099. "For the convenience of the parties and witnesses, in the interest of justice, a district judge may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (West 2003). *See also id.* § 1406.

1100. 28 U.S.C. § 1407(a) (West 2003). *See, e.g., In re* Meridia Prods. Liab. Litig., 217 F. Supp. 2d 1377 (J.P.M.L. 2002); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 173 F. Supp. 2d 1377 (J.P.M.L. 2001); *In re* Propulsid Prods. Liab. Litig., No. 1355, 2000 U.S. Dist. LEXIS 11651 (J.P.M.L. Aug. 7, 2000); *In re* Diet Drugs Prods. Liab. Litig., 990 F. Supp. 834 (J.P.M.L. 1998); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

1101. *In re* Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85 (E.D.N.Y. & Bankr. S.D.N.Y. 1991).

1102. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

1103. *In re* Serzone Prods. Liab. Litig., 217 F. Supp. 2d 1372 (J.P.M.L. 2002); *In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001); *Silicone Gel Breast Implants*, 793 F. Supp. at 1098.

1104. *See, e.g., In re* DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig., 217 F. Supp. 2d 1376 (J.P.M.L. 2002); *In re* Unitrin, Inc., Ins. Sales Practices Litig., 217 F. Supp. 2d 1371 (J.P.M.L. 2002); *In re* Chromated Copper Arsenate (CCA) Treated Wood Prods. Liab. Litig., 188 F. Supp. 2d 1380 (J.P.M.L. 2002); *In re* Amino Acid Lysine Antitrust Litig., 910 F. Supp. 696

supporting the necessity of centralization under section 1407. Centralization serves judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive rulings, and conserving the financial resources of the parties, their counsel, and the judiciary.[1105] The Panel will not grant such a motion unless transfer ultimately will serve the convenience of the parties and the courts. Finally, the Panel looks for an available and convenient transfer forum, usually one that (1) is not overtaxed with other MDL cases,[1106] (2) has a related action pending on its docket,[1107] (3) has a judge with some degree of expertise in handling the issues presented,[1108] and (4) is convenient to the parties.[1109]

Typically, MDL orders do not provide elaborate explanations or justifications for granting transfer in product liability cases; the Panel merely provides a short description of the criteria and concludes that the pending litigation satisfies them. For example:

> Common factual questions arise because all actions focus on alleged side effects of Meridia, a widely-prescribed weight loss drug, and whether defendants knew of these side effects and either concealed, misrepresented or failed to warn of them. Centralization under Section 1407 is thus necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings (such as those regarding class certification), and conserve the resources of the parties, their counsel and the judiciary.[1110]

(J.P.M.L. 1995); *In re* Repetitive Stress Injury Prods. Liab. Litig., No. 955, 1992 WL 403023, at *1 (J.P.M.L Nov. 27, 1992).

1105. For a representative example of the standard language used in nearly all of these grants, see *Baycol*, 180 F. Supp. 2d at 1380 (arguing that "Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary").

1106. *In re* Inter-Op Hip Prosthesis Prods. Liab. Litig., 149 F. Supp. 2d 931, 933–34 (J.P.M.L. 2001).

1107. *In re* Lupron Mktg. & Sales Practices Litig., 180 F. Supp. 2d 1376, 1378 (J.P.M.L. 2001). Though frequently a condition, this factor appears not to be essential. *See In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1100–01 (J.P.M.L. 1992) (appointing transferee judge from the "universe of federal district judges," based on comprehensive complex litigation experience).

1108. *In re* Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig., 170 F. Supp. 2d 1356, 1358 (J.P.M.L. 2001).

1109. *In re* Diet Drugs Prods. Liab. Litig., 990 F. Supp. 834, 835–36 (J.P.M.L. 1998).

1110. *In re* Meridia Prods. Liab. Litig., 217 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002).

22.34 Denial of Transfer

.341 Insufficient Common Facts 368
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The Panel tends to offer more detailed justifications when denying transfer. It has generally declined to order transfer if one or more of the following are present.

22.341 Insufficient Common Facts

The most common reason for denial is that the cases or the common questions of fact are not sufficiently complex or numerous.[1111] For example, in the DaimlerChrysler seat belt buckle litigation, the Panel held that the number of actions on the docket was insufficient to justify the inconvenience that would be caused by the transfer.[1112] Even if the number of cases is substantial, the Panel may find that the cases involve significantly different claims that do not raise common questions of fact.[1113] Section 1407, however, does not require a complete identity of factual and legal issues as a prerequisite to centralization."[1114] The Panel has centralized cases where the presence of core common questions of fact outweighed the existence of individual factual questions or varying legal arguments.[1115] In such cases, the transferee court generally allows concurrent discovery of noncommon and common issues.[1116]

Where it has found common issues, the Panel typically has rejected arguments against transfer that are based solely on the special interests of the parties. For example, in the Starlink corn products liability litigation, a class of farmers argued against section 1407 centralization based on significant

1111. *In re* DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig., 217 F. Supp. 2d 1376 (J.P.M.L. 2002). *See also, e.g., In re* First Union Mortgage Corp. Yield Spread Premium Litig., 215 F. Supp. 2d 1360 (J.P.M.L. 2002); *In re* Chromated Copper Arsenate (CCA) Treated Wood Prods. Liab. Litig., 188 F. Supp. 2d 1380 (J.P.M.L. 2002); *In re* Amino Acid Lysine Antitrust Litig., 910 F. Supp. 696 (J.P.M.L. 1995); *In re* Repetitive Stress Injury Prods. Liab. Litig., No. 955, 1992 WL 403023, at *1 (J.P.M.L. Nov. 27, 1992).

1112. *DaimlerChrysler*, 217 F. Supp. 2d at 1377.

1113. *Amino Acid*, 910 F. Supp. at 701.

1114. *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001).

1115. *In re* Immunex Corp. Average Wholesale Price Litig., 201 F. Supp. 2d 1378, 1380–81 (J.P.M.L. 2002); *In re* Inter-Op Hip Prosthesis Prods. Liab. Litig., 149 F. Supp. 2d 931, 933 (J.P.M.L. 2001); *In re* Bridgestone/Firestone Tires Prods. Liab. Litig., No. 1373, 2000 WL 33416573, at *2 (J.P.M.L. Oct. 24, 2000).

1116. *PPA*, 173 F. Supp. 2d at 1379.

differences between their interests and the interests of a class of consumers.[1117] In granting the defendants' motion for transfer, the Panel concluded that the farmer actions and the consumer actions were not different enough to warrant separate pretrial proceedings.[1118] The Panel cited the availability of concurrent discovery of common and divergent issues as its primary justification for granting transfer.[1119]

22.342 Procedural Alternatives

Another reason for denying MDL centralization is the existence of other procedural alternatives, such as consolidation or cooperative management.[1120] In the CCA treated wood products liability case, the Panel observed that numerous alternatives to transfer exist for less complex actions.[1121] The Panel also has refused to grant centralization where the resolution of an interlocutory appeal may obviate the need for transfer.[1122]

22.343 Geographical Diversity and Economy

The Panel also has cited lack of geographic diversity between parties as a reason for denying transfer. Where all actions are pending in adjacent federal districts, the Panel has found that the similarity of actions and the ready availability of cooperative management minimize the necessity for section 1407 centralization.[1123]

Conversely, where similar cases are widely dispersed, economic burden or inconvenience arguments are usually rejected as a reason for delaying or

1117. *In re* Starlink Corn Prods. Liab. Litig., 152 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001).

1118. *Id.*

1119. *Id*.

1120. *In re* Unitrin, Inc. Ins. Sales Practices Litig., 217 F. Supp. 2d 1371, 1372 (J.P.M.L. 2002); *In re* Chromated Copper Arsenate (CCA) Treated Wood Prods. Liab. Litig., 188 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002).

1121. *CCA*, 188 F. Supp. 2d at 1381 (finding that "alternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings" (citing *In re* Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242 (J.P.M.L. 1978) *and* Manual for Complex Litigation, Third, § 31.14 (1995))). In *In re Eli Lilly*, the Panel identified a number of alternatives for dealing with three cases that involved the validity of the same patent: One or more courts could order that discovery in each case would apply in the others; the parties could stipulate to coordinated discovery and pretrial approaches; the courts could coordinate pretrial rulings to avoid duplicative activity; a court could stay the litigation pending action in the other courts; or collateral estoppel could dispose of the issues. *In re Eli Lilly,* 446 F. Supp. at 244.

1122. *In re* First Union Mortgage Corp. Yield Spread Premium Litig., 215 F. Supp. 2d 1360, 1361 (J.P.M.L. 2002).

1123. *Unitrin*, 217 F. Supp. 2d at 1372.

denying transfer.[1124] The Panel has noted that after section 1407 centralization, the appointment of lead counsel may reduce the need for large numbers of lawyers to travel to the transferee district.[1125]

22.344 Maturity of Litigation

The Panel sometimes rejects a motion for MDL transfer filed late in the litigation when centralization may delay the progress of cases approaching trial and it is too late to avoid duplicative judicial efforts.[1126] In the Propulsid case, the Panel rejected the idea that it should wait until the litigation matured before ordering transfer:

> If the Panel were to adopt the defendants' concept of maturity, many of the judges assigned to the various actions would be required to needlessly replicate other judges' work on such matters as class action certifications, medical monitoring claims, the structuring of confidentiality and other discovery orders, the scheduling of depositions and other discovery, rulings on motions to dismiss, and so forth. Only when such common pretrial matters had been repetitiously resolved in an undetermined number of federal actions would defendants concede that Section 1407 centralization might then become appropriate. We conclude that such an approach would defeat the very purposes leading to the enactment of Section 1407.[1127]

In a later opinion, the Panel again rejected the maturity argument by refusing to delay centralization where several actions were subject to pending motions to remand to state court.[1128] Finally, an early transfer affords the Panel flexibility in choosing the best forum for the common questions of fact.

1124. *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001).

1125. *Id.* at 1379. *See also In re* Nissan Motor Corp. Antitrust Litig., 385 F. Supp. 1253, 1255 (J.P.M.L. 1974).

1126. *In re* Asbestos Sch. Prods. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying motion to transfer based on several factors including the fact that several "actions [were] scheduled for trial within the next six months"). *See generally In re* Grand Funk Railroad Trademark Litig., 371 F. Supp. 1084, 1086 (J.P.M.L. 1974) (denying motion to transfer because the case was close to trial and "transfer of these actions at this time will neither serve the convenience of the majority of the parties and witness nor promote the just and efficient conduct of the litigation").

1127. *In re* Propulsid Prods. Liab. Litig., No. 1355, 2000 U.S. Dist. LEXIS 11651, at *3–*4 (J.P.M.L. Aug. 7, 2000).

1128. *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Prods. Liab. Litig., No. 1373, 2000 WL 33416573, at *2 (J.P.M.L. Oct. 24, 2000).

22.35 Authority of a Judge Pending Decision by the MDL Panel

In many cases, a court with one or more cases that are part of a mass tort may anticipate transfer by the MDL Panel. That court may, however, have motions to remand, motions to dismiss, or motions relating to discovery filed before the MDL Panel rules. A court in that position has the authority to grant or deny a motion or to stay the cases before it, pending the Panel's decision on transfer. If the case is transferred, the transferee court then decides unresolved motions after transfer.[1129]

A stay pending the Panel's decision can increase efficiency and consistency, particularly when the transferor court believes that a transfer order is likely and when the pending motions raise issues likely to be raised in other cases as well.[1130] The reasons for a stay diminish, however, if the pending motions raise issues relating to the law of a single state that are unlikely to arise in other related cases, if MDL transfer appears unlikely, or if the absence of federal jurisdiction is clear.[1131] Judicial economy may then be served by resolving specific issues and declining to stay the proceedings.[1132] Similarly, if the case is far along in discovery or motions practice, and there is an urgent need to have that case resolved, the court may decide not to stay the proceedings.[1133] For example, if the case involves a critically ill plaintiff who cannot wait an ex-

1129. The rules of the Judicial Panel on Multidistrict Litigation expressly provide that the pendency of a proceeding before the Panel to transfer a case "does not affect or suspend orders or pretrial proceedings in the district court in which the action is pending." J.P.M.L. R. P. 1.5 (West 2003); *see also In re* Asbestos Prods. Liab. Litig., 170 F. Supp. 2d 1348, 1349 n.1 (J.P.M.L. 2001) (citing Rule 1.5 and noting that proceedings for transferring tag-along actions experience "a lag time of at least three or four months from the filing of an action . . . and the issuance of the Panel's subsequent order").

1130. Moore v. Wyeth-Ayerst Labs., 236 F. Supp. 2d 509, 510–11 (D. Md. 2002) (observing that the MDL transferee judge had faced multiple motions to remand cases removed from state courts).

1131. *See, e.g.,* Caldwell v. Am. Home Prods. Corp., 210 F. Supp. 2d 809, 811 (S.D. Miss. 2002) (stating "the law in this circuit is clear that the *All Writs Act* does not provide an independent basis for federal jurisdiction").

1132. McGrew v. Schering-Plough Corp., No. CIV.A.01-2311, 2001 WL 950790, at *3 (D. Kan. Aug. 6, 2001) ("For purposes of judicial economy, the jurisdictional issue should be resolved immediately," before action by the MDL panel.).

1133. *See, e.g.,* Carden v. Bridgestone/Firestone, Inc., No. CIV.00-3017, 2000 WL 33520302, at *4 (S.D. Fla. Oct. 18, 2000) (denying stay and remanding case seeking injunctive relief to state court); *see also* Naquin v. Nokia Mobile Phones, Inc., No. CIV.A.00-2023, 2001 WL 1242253, at *1 (E.D. La. June 20, 2001) (denying motions to stay because "the prior substantial rulings in this case and continuing efforts by counsel may in fact aid the multidistrict litigation").

tended period for trial, the court may decide to proceed rather than wait for MDL action.

22.36 The Tasks of an MDL Transferee Judge

Aside from deciding any threshold motion to remand, the initial tasks of the MDL transferee judge include coordinating or consolidating the cases previously pending in a number of different districts; identifying differences in applicable law; and seeking information from the parties as to the status of the cases in order to determine how to proceed with pretrial discovery and motions. See sections 22.2 and 22.61. As to remand motions, the Panel's policy is not to delay a transfer decision because a remand motion is pending. The transferor court may rule on such a motion—or any other motion—while the Panel considers transfer. If the transferor courts have not decided remand motions before the MDL Panel order is issued, the transferee court should try to resolve the remand motions promptly because they invariably affect federal subject-matter jurisdiction, and the failure to rule on them until a case is returned to the transferor court may result in unnecessary and prejudicial delay.

An MDL transferee judge has authority to dispose of cases on the merits—for example, by ruling on motions for summary judgment[1134] or trying test cases that had been originally filed in the transferee district or refiled in or transferred to that district. If summary judgment motions are pending, the transferee judge must consider whether to decide the motions or to transfer the cases back to the transferor districts. If the summary judgment motion pertains to one or few cases, or rests on application of the transferor court's conflicts-of-law and substantive law rules, the transferor judge may be able to decide the motions most efficiently.[1135] If the summary judgment motions involve issues common to all the cases centralized before the MDL court, however, the transferee judge may be in the best position to rule.[1136]

1134. *See*, *e.g.*, *In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1488 (8th Cir. 1997) (affirming grant of summary judgment for defendant Dow Chemical in relation to liability for the use of silicone gel in TMJ implants).

1135. *See In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1997 WL 109595, at *2 (E.D. Pa. Mar. 7, 1997) (ruling on motions for partial summary judgment would not advance the litigation and would serve no useful purpose (citing Manual for Complex Litigation, Third, § 21.34 (1995))); *see also* Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 Mich. L. Rev. 2077 (1997) (citing *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1455 (N.D. Ala. 1995)) [hereinafter McGovern, *Judicial Centralization*].

1136. *See, e.g.*, *In re* Norplant Contraceptive Prods. Liab. Litig., 215 F. Supp. 2d 795, 810, 835 (E.D. Tex. 2002) (granting summary judgment terminating "nearly all remaining non-settling

MDL transferee judges cannot try cases that were not filed in their districts or refiled or transferred to their districts by the court of origin, absent consent of the parties.[1137] Some courts and parties, however, have attempted to adopt techniques to facilitate trials in MDL transferee courts—for example, by the filing of a consolidated amended class action complaint, or master complaint, as an original action in the transferee forum. That complaint then may serve as the vehicle for determination of common issues, including trial.[1138] Section 20.132 describes other circumstances in which the transferee court may have authority to retain cases for trial.

Even if the transferee court has authority, by consent or otherwise, to try transferred cases, the court may decide to use a decentralized approach in which authority to decide individual cases remains with or returns to the non-MDL judges.[1139] If, however, there are summary judgment motions that might resolve all of the issues for all of the parties, or if there are common issues that might be tried, either on a test-case basis or otherwise, the transferee judge may find it more efficient to address the merits in a centralized manner.[1140]

Plaintiffs and their claims in the Norplant multidistrict litigation proceedings" based in part on the common-law application of the learned intermediary doctrine); *see also In re* Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374, 378 (5th Cir. 1999) (affirming district court's summary judgment ruling applying learned intermediary doctrine); *cf. In re* Norplant Contraceptive Prods. Liab. Litig., 961 F. Supp. 163, 169 (E.D. Tex. 1997) (denying defendants' motion for partial summary judgment based on statute-of-limitations grounds).

1137. Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998) (interpreting 28 U.S.C. § 1407 as limiting authority of transferee judge to transfer action to itself for trial). Legislation has been proposed to amend section 1407 and remove the limitation on transfers for trial.

1138. For example, in *In re Bridgestone/Firestone Inc., ATX, ATX II, & Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), the parties filed a master complaint as an original proceeding in the MDL transferee court and the court used this complaint to support applying Indiana's choice-of-law rules to determine defendants' motions to dismiss. The district court subsequently certified a nationwide class, which order was reversed *sub nom* in *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), on grounds, *inter alia*, that the district court had misapplied Indiana's choice-of-law doctrine.

1139. *See* McGovern, *Judicial Centralization*, *supra* note 1135, at 2079–81 (describing the approach used in the silicone gel litigation); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order No. 60A (N.D. Ala. May 30, 2000), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (remanding thirteen cases).

1140. *See*, *e.g.*, *Norplant*, 215 F. Supp. 2d at 835 (granting partial summary judgment terminating "nearly all remaining non-settling plaintiffs and their claims" in the MDL); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2001 WL 497313, at *3 (E.D. Pa. May 9, 2001) (noting special master's dismissal of defendants "for lack of product identification"); *In re* MasterCard Int'l, Inc. Internet Gambling Litig., 132 F. Supp. 2d 468, 497 (E.D. La. 2001) (dismissing two test cases); *In re* Honda Am. Motor Co. Dealership Relations Litig., 979 F. Supp. 365, 368–69 (D. Md. 1997) (rejecting test case approach in favor of limited issues class ap-

In a number of recent MDL centralizations, transferee judges have exercised their discretion to select test cases for discovery, motions, and trial, and to coordinate their dockets with state courts handling similar cases.[1141] Courts have also carved out issues classes to resolve common issues.[1142] Section 22.315 discusses the selection of test cases and implementation of a test-case strategy beginning at the pretrial stage, while section 22.93 discusses the use of a test-case strategy at the trial stage. Section 22.75 discusses issues classes, and section 22.4 discusses state–federal coordination.

Two RICO cases illustrate some advantages and disadvantages of using a test-case approach as compared with using a class action approach. In one case—alleging that credit card companies had facilitated use of the Internet to support illegal gambling—the court determined that a test case was the best approach to resolve the RICO issues that the plaintiffs' claims raised.[1143] In the other case—involving allegations of fraud and bribery in dealings between an automobile franchisor and its franchisee dealerships—the court expressly rejected a test-case approach and elected to deal with RICO and non-RICO issues by managing the case through a bifurcated limited issues class trial.[1144] In both contexts, the case-management approaches focused on whether the RICO claims could establish liability. In context, each approach appears to have adjudicated the validity of plaintiffs' claims in an efficient, fair, and balanced manner.

An advantage of using the test-case approach in the Internet gambling MDL proceeding was that it allowed the court to isolate and resolve a disputed and dispositive threshold issue: whether plaintiffs' best cases could survive a motion to dismiss for failure to state a claim for relief.[1145] Other advantages of using test cases might include litigating and trying all of the claims in the test cases, which would allow the litigation to mature through trials. If the MDL

proach); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL. No. 926, Order No. 31 (N.D. Ala. May 31, 1996), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (appointing national science panel).

1141. McGovern, *Cooperative Strategy, supra* note 705, at 1886–92 (2000) (describing the "de facto" strategy implemented in the diet drug, Norplant, and California silicone gel breast implant litigations).

1142. *See, e.g., In re* Honda Am. Motor Co. Dealership Relations Litig., 979 F. Supp. 365 (D. Md. 1997).

1143. *In re* MasterCard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468 (E.D. La. 2001).

1144. *Honda*, 979 F. Supp. at 366.

1145. *MasterCard,* 132 F. Supp. 2d at 497 (holding that plaintiffs failed to plead several elements of a RICO case, dismissing Rule 19 motions as moot, and statistically closing the remaining MDL cases for administrative purposes).

cases include class allegations, the test-case approach resolves the claims as to the named parties, ends the tolling of the statute of limitations, and requires potential litigants to file lawsuits if they wish to pursue claims.[1146]

Potential disadvantages of using test cases include the lack of any clear preclusive effect of a judgment for defendants, possible limits on the preclusive effects of judgments for the plaintiffs, and the possibility of creating "chaos among plaintiffs' counsel"—that is, lead counsel appointed to represent plaintiffs in the MDL proceedings.[1147] On the other hand, the *Honda American* MDL transferee court decided that an issues class action approach would yield a mutual preclusive effect and would "serve to keep the leadership structure among plaintiffs' counsel in place."[1148]

The transferee judge usually supervises discovery, decides motions, and, if called for, decides whether to certify a class action.[1149] Under the decentralized approach, the transferee judge would then remand the cases to their original districts for trial, as in the breast implant and orthopedic bone screw litigations.[1150] In other cases, grants of summary judgment or approvals of settlement have obviated remand to the transferee courts.[1151]

1146. *Honda*, 979 F. Supp. at 368.

1147. *Id.*

1148. *Id.* at 368–69. The disadvantage of continued tolling of the statute the limitations could be ameliorated by ending the tolling for damage claims, which were not included among the issues to be adjudicated on a class-wide basis. *Id.* at 370–71.

1149. *See, e.g.*, *Bridgestone/Firestone*, 288 F.3d at 1018 (holding that the certified class was not manageable). The court noted that the transferee court had certified a nationwide class that "would make all other suits [MDL transferred cases] redundant." *Id.* at 1015. The court did not decide, however, whether certification of a class action meeting Rule 23 requirements would authorize the transferee court to retain the class action (and all the underlying cases) for trial, effectively bypassing the *Lexecon* restriction on trial of transferred cases by the transferee court. As of mid-2003, that question has not been the subject of an appellate ruling.

1150. *See, e.g., In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, Order No. 1507, 1998 WL 411380, at *1 (E.D. Pa. June 30, 1998); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Revised Order No. 30 (N.D. Ala. Mar. 25, 1996), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1151. *In re* Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374 (5th Cir. 1999) (affirming summary judgment of test cases); *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330 (N.D. Ohio 2001) (certifying settlement class); *In re* Diet Drugs Prods. Liab. Litig., 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (same).

22.37 The Task of the Transferor Judge Following Remand After MDL Proceedings

When the MDL pretrial proceedings are concluded and individual cases are remanded to the transferor courts, the transferor judge must decide whether additional discovery and other pretrial work require completion, including deciding dispositive motions.[1152] In some remanded cases, the cases are assigned to a single judge in a district for coordinated final pretrial proceedings and trial. If the remanded cases raise individual questions of exposure, causation, injury, or damages, such aggregated proceedings may not be useful.

22.4 Multiple Filings in State and Federal Courts

Mass tort litigation frequently involves filings in both federal and state courts. As discussed in section 22.33, multidistrict treatment of the federal cases under 28 U.S.C. § 1407 may be possible,[1153] but some state court cases may not have been removed—or may not be removable—and will not be subject to section 1407 transfer. Although it is likely that the Panel will transfer federal cases alleging the same mass tort to a single federal district judge for pretrial proceedings, there will likely be numerous state court cases raising similar allegations. Absent certification of a national class (which is unlikely in a mass tort case alleging personal injuries or property damages based on state

1152. *In re* Silicone Gel Breast Implants Prods. Liab. Litig, MDL No. 926, Pretrial Order No. 30, at ¶ 1 (summarizing the MDL proceedings and significant rulings), ¶ 4(c) (detailing remaining discovery), and ¶ 7(c) (specifying further pretrial proceedings likely to be needed in the remand courts) (N.D. Ala. Mar. 25, 1996), *and id.*, app. B (Apr. 2, 1996), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003). *See also* Recent Developments in the Silicone Gel Breast Implant Products Liability Litigation: A Briefing for Federal and State Court Judges (Federal Judicial Center 1996) (FJC Media Catalog No. 3095-V/96) (videotape supplementing Judge Pointer's order in the silicone gel breast implant litigation instructing judges on the background of the litigation and other pretrial issues).

1153. *See supra* section 20.13. The Judicial Panel on Multidistrict Litigation has centralized a number of mass tort cases for pretrial management. *See supra* section 22.33. After initially rejecting applications to centralize asbestos personal injury actions, *see, e.g.*, *In re* Asbestos & Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977), the panel later transferred all pending federal asbestos personal-injury claims in the Eastern District of Pennsylvania. *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991). For other examples of centralization of mass tort litigation, see *In re Diet Drugs Products Liability Litigation*, 990 F. Supp. 834 (J.P.M.L. 1998), *In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 844 F. Supp. 1553 (J.P.M.L. 1994), and *In re Silicone Gel Breast Implant Products Liability Litigation*, 793 F. Supp. 1098 (J.P.M.L. 1992).

law causes of action), there is no procedural mechanism analogous to the Multidistrict Litigation Panel's transfer under section 1407 for formal coordination or consolidation of state and federal cases.

Federal and state court judges frequently cooperate informally and effectively to coordinate discovery and pretrial proceedings in mass tort cases. For example, in the PPA litigation, the MDL transferee judge coordinated the discovery and *Daubert* hearing schedules with state judges.[1154] In the diet drug litigation, a state judge, the MDL transferee judge, and counsel worked out a formula for compensating the lawyers handling the state court cases who had conducted discovery that was useful in the MDL cases.[1155] These and other approaches to state–federal coordination are discussed extensively in section 20.3, which emphasizes cooperative efforts that have taken place in the mass tort context.

In the absence of a class certification and a pending settlement, the authority of federal courts to enjoin state court proceedings is limited. Read together, the Anti-Injunction Act[1156] and the All Writs Act[1157] allow injunctions against state proceedings only when necessary to aid a federal court's jurisdiction. For example, in a case in which the MDL transferee judge issued a pretrial order that barred discovery of certain matters and applied to discovery conducted in state court cases involving the same subject matter, the court of appeals held that "the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pretrial rulings like discovery orders."[1158] Such an order must be "narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly."[1159] Section 21.15 discusses the authority of a federal court to

1154. *See In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., MDL No. 1407, Order Granting in part and Denying in part Manufacturing Defendants Motion to Accelerate Daubert Hearing (W.D. Wash. Sept. 19, 2002), *at* http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page (last visited Nov. 10, 2003) (adjusting calendar for *Daubert* proceedings to coordinate with similar proceedings in state courts); *id.*, MDL No. 1407, Order No. 1 (W.D. Wash. Jan. 29, 2002), *at* http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page (last visited Nov. 10, 2003) ("This Court has taken into consideration the present status and progress of discovery against various groups of defendants in fashioning a discovery schedule that will aid in fostering state and federal court coordination of PPA cases, and completing the tasks undertaken in this MDL 1407 with reasonable dispatch in keeping with the needs and expectations of litigants.").

1155. *See supra* section 20.31 and text accompanying notes 702–04.

1156. 28 U.S.C. § 2283 (West 2003).

1157. *Id.* § 1651.

1158. Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1203 (7th Cir. 1996).

1159. *Id. See also In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., 2001 WL 1774017, at *1 (6th Cir. Oct. 29, 2001) (rejecting order enjoining all litigation pending settlement review).

enjoin state court proceedings before class certification. Section 21.42 discusses such authority in relation to certified class actions. Section 20.32 discusses state–federal jurisdictional conflicts in general and the variety of means of addressing them, including injunctive relief. The limits on a federal court's authority to enjoin overlapping and duplicative proceedings in state courts makes cooperative efforts at coordination critical to minimize conflicts and duplication unrelated to the strengths or weaknesses of the merits.

22.5 Multiple Filings in District and Bankruptcy Courts[1160]

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Corporate defendants in mass tort litigation sometimes file for relief under the Bankruptcy Code in order to attempt a global resolution of pending and threatened mass tort claims. The constraints on certification of some settlement classes imposed by the Supreme Court's decisions in *Amchem* and *Ortiz* appear to have increased the use of the bankruptcy courts for this purpose,

1160. This subsection draws heavily on a preliminary draft of Professor S. Elizabeth Gibson's work on a Federal Judicial Center manual on case management of bankruptcy proceedings in cases involving mass torts. S. Elizabeth Gibson, Judicial Management of Mass Tort Bankruptcy Cases (Federal Judicial Center forthcoming; title is tentative) [hereinafter Gibson, Judicial Management]. *See also* S. Elizabeth Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations (Federal Judicial Center 2000) [hereinafter Gibson, Case Studies].

particularly in asbestos cases.[1161] Generally, such defendant-debtors seek confirmation of a reorganization plan under Chapter 11 that will provide adjusted payments to creditors, including tort claimants. Such a plan allows the reorganized business to emerge from bankruptcy free of the obligations to creditors, including tort claimants, that led to the reorganization. On rare occasions debtors liquidate their businesses under Chapter 7. Bankruptcy filings can dramatically alter the scope and direction of a pending mass tort litigation and can alter the claims and cases directly or indirectly related to the bankrupt debtor's activities.

When a defendant in mass tort litigation files for bankruptcy, all the pending litigation in all state and federal courts against that party is automatically stayed as of the petition date.[1162] The automatic stay, combined with the bankruptcy court's exclusive control of the debtor's assets, effectively centralizes that defendant's state and federal mass tort cases into a single federal court. The bankruptcy filing and resulting centralization raise questions relating to the venue of the cases, the division of labor among various judges (including considerations relating to withdrawing the reference to the bankruptcy judge), the coordination and consolidation of the tort claims with other related cases (including cases involving codefendants that are not in bankruptcy), the representation of future mass tort claimants, the process for estimating the value of mass tort claims, and, finally, the process for negotiating a reorganization plan that includes provisions for payment of present and future claims. This section addresses those questions in summary fashion, focusing on issues that involve district as well as bankruptcy judges.[1163]

1161. Stephen Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report (2002), *available at* http://www.rand.org/publications/DB/DB397 (last visited Dec. 2, 2003). *See generally* ALI-ABA, Asbestos Litigation in the 21st Century (Sept. 19–20, 2002). *See infra* section 22.71 for discussion of the *Amchem* and *Ortiz* decisions.

1162. 11 U.S.C. § 362(a)(1) (2003). The Bankruptcy Code also bars the bringing of new suits on claims that arose before the petition was filed. *Id.*

1163. *See generally* Gibson, Judicial Management, *supra* note 1160. That manual will also cover topics primarily relevant to the operation of the bankruptcy system, such as the appointment of committees, the compensation of professionals, and procedures for voting on and confirming reorganization plans.

22.51 Venue, Transfer, and Consolidation

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22.511 Venue and Transfer

The defendant-debtor makes the initial decision about where to file the bankruptcy petition.[1164] Where the MDL Panel has centralized the tort claims in a given district, the bankruptcy petition can be filed in that district if other venue requirements are met.[1165] If the debtor files the bankruptcy case in a district other than the transferee district, the bankruptcy court may, under certain conditions, "transfer a case or proceeding . . . to a district court for another district, in the interest of justice or for the convenience of the parties."[1166] Although this procedure has not been invoked in any mass tort bankruptcy case to date, a retrospective analysis of the proceedings in the Dow Corning reorganization indicated that "prospects for [bankruptcy/MDL] coordination can be enhanced if the [MDL] transferee judge sits in the district where the bankruptcy proceedings are pending."[1167] Accordingly, the debtor, other parties, and judges in the district in which the bankruptcy is filed should consider this and other options to centralize MDL and bankruptcy case management in a single district.

22.512 Consolidation and Reassignment

In an innovative approach to coordinate asbestos-related bankruptcies, the Third Circuit Court of Appeals found that five asbestos-related Chapter 11 cases that had been filed in the District of Delaware needed "to be consolidated before a single judge so that a coordinated plan for management [could] be developed and implemented."[1168] Courts may also want to consider consoli-

1164. *See generally* Gordon Bermant, Arlene Jorgensen Hillestad & Aaron Kerry, Chapter 11 Venue Choice by Large Public Companies: Report to the Judicial Conference Committee on the Administration of the Bankruptcy System (Federal Judicial Center 1997).

1165. *See* 28 U.S.C. § 1408(1) (West 2003) (specifying as key factors the entity's domicile, residence, principal place of business, or principal location of assets).

1166. 28 U.S.C. § 1412 (West 2003). For a discussion of the considerations involved in such a transfer, see John F. Nangle, *Bankruptcy's Impact on Multidistrict Litigation: Legislative Reform as an Alternative to Existing Mechanisms,* 31 Ga. L. Rev. 1093, 1103–04 (1997) (Nangle is the former chair of the JPML).

1167. Nangle, *supra* note 1166, at 1102. See generally Judge Nangle's article for consideration of the advantages and disadvantages of various options for achieving coordination of bankruptcy and MDL proceedings.

1168. Order of Chief Judge Edward H. Becker, *cited in In re* Federal-Mogul Global, Inc., 300 F.3d 368 (3d Cir. 2002) (designation of a district judge for service in another district within the

dating bankruptcy cases dealing with the same or similar products to achieve any efficiencies that might be associated with consolidated case management and with the linkage of claims-resolution facilities. Such consolidated procedures are novel. It remains unclear that they will achieve such efficiencies and at what cost.

22.52 Withdrawing the Reference

A mass tort bankruptcy brings new judges into a mass tort litigation, including the bankruptcy judge to whom the case is assigned and district judges who will hear appeals from the bankruptcy judge. The district court of the district where the case is filed has the authority to withdraw the reference of jurisdiction to the bankruptcy court in whole or in part.[1169] Throughout the bankruptcy case, the district and bankruptcy judges involved should consider whether some aspects of that case should or must be resolved by judges other than the assigned bankruptcy judge and whether and how knowledge and expertise already accumulated by other judges can be used in the bankruptcy proceedings.

A district judge might partially withdraw the reference in a mass tort bankruptcy case for a number of reasons, including prior familiarity with the tort claims involved, greater expertise as to the legal issues raised, desire to avoid duplication of effort, jurisdictional limitations on the bankruptcy court's authority, and statutory command.[1170] Once the withdrawal occurs, it will be especially important for the bankruptcy and district judges handling the various aspects of the bankruptcy case to have frequent communications so that the matters can proceed in a coordinated fashion.

In several mass tort cases, district judges have withdrawn the reference with respect to various proceedings relating to the personal-injury and

circuit). The order was based on authority granted the chief judge in 28 U.S.C. § 292(b) (West 2003), which permits such reassignments "in the public interest."

1169. District courts are authorized by 28 U.S.C. § 157(d) to, "for cause," withdraw the reference of any bankruptcy case or proceeding from the bankruptcy court and to exercise original jurisdiction over the withdrawn matter. The district court may take this action on its own motion or on a party's motion. 28 U.S.C. § 157(d) (West 2003).

1170. *See* 28 U.S.C. § 157(d) (West 2003) (requiring a district court, upon timely motion of a party, to withdraw the reference of jurisdiction to a bankruptcy judge with respect to a proceeding if resolution of that proceeding "requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce"). Because mass tort personal-injury claims are typically governed by state law, they will rarely trigger the mandatory withdrawal provision. Their liquidation or estimation for purposes of distribution, however, will have to take place in the district court. *Id.* § 157(b)(2)(B)(5).

wrongful-death tort claims against the debtor. Perhaps the broadest example occurred in the *A.H. Robins* case where the district judge, who had been presiding over a large group of Dalkon Shield cases against Robins, partially withdrew the reference of jurisdiction from the bankruptcy court at the debtor's request on the day the debtor filed its petition. The district court specified seventeen categories of proceedings and motions that it would resolve, including all "[p]roceedings involving the estimation or liquidation of any personal injury tort or wrongful death claims against the estate."[1171] Included within this category of withdrawn matters were the following: motions to establish procedures for filing and resolving the tort claims, including the establishment of bar dates; motions concerning procedures for and discovery in proceedings relating to the estimation or liquidation of the tort claims; requests for declaratory relief concerning the debtor's liability for the tort claims; the estimation or liquidation of the tort claims for purposes of allowance, confirmation, or distribution; motions concerning the automatic stay's application to tort claims; and requests for relief under 11 U.S.C. § 105 with respect to a tort claim. Other matters withdrawn for the district court's determination included motions for conversion or dismissal, appointment of committees, extensions of exclusivity, approval of disclosure statements, confirmation, appointment of a trustee, compensation for services, and enforcement of the automatic stay.[1172]

In other mass tort bankruptcies, district judges have withdrawn the reference with respect to a narrower set of proceedings. In *In re Dow Corning Corp.*,[1173] for example, the district judge withdrew from the bankruptcy court jurisdiction to decide the debtor's "omnibus objection to disease claims" that sought a determination that the tort plaintiffs lacked proof that the debtor's product caused their alleged diseases.[1174] Another district judge acting in a mass tort case withdrew the reference with regard to the validity of the personal injury claims against the debtor, specifically including, within the withdrawn proceedings, motions for the following: setting a bar date for filing claims,

1171. *In re* A.H. Robins Co., 59 B.R. 99, 105 (Bankr. E.D. Va. 1986).

1172. *Id.* at 105–07.

1173. *In re* Dow Corning Corp., 215 B.R. 526 (Bankr. E.D. Mich. 1997).

1174. The bankruptcy judge recommended withdrawal of the reference because a similar issue was likely to be raised in cases against the debtor's shareholders already pending in the district court, *id.* at 527–29, and because a ruling on the debtor's objection depended largely on application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on which the bankruptcy court believed the district court possessed greater expertise. *In re Dow Corning*, 215 B.R. at 530.

concerning notice to claimants, relating to the form to be used for proofs of claim, and for summary judgment based on threshold liability issues.[1175]

22.53 Dividing the Labor Among Judges

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Withdrawals often retain in the district court matters relating to the estimation and resolution of mass tort liability. Conversely, matters that relate exclusively to the administration of the bankruptcy estate and the supervision of the ongoing business of the debtor have been generally retained in the bankruptcy court. In some bankruptcy cases, following a partial withdrawal of the reference, the bankruptcy and district judges have held hearings at which they presided jointly and after which they issued joint rulings.[1176] In such situations, the judges and the parties should have a clear understanding of their respective roles and responsibilities.

22.531 MDL Transferee Judge

In addition to matters relating to withdrawal of the reference, district and bankruptcy judges should consider drawing on the knowledge and experience of other judges who have presided over all or part of the mass tort litigation. The transferee judge assigned to coordinate the multidistrict litigation represents a primary, and in many cases an indispensable, source of such expertise.[1177] When the bankruptcy has been filed in a district other than the MDL transferee district and not transferred to that district, the MDL transferee judge can be assigned to handle portions of a bankruptcy case, but only with the cooperation of the bankruptcy and district judges presiding over the case.[1178]

1175. *In re* Babcock & Wilcox Co., No. CIV.A.00-0558, 2000 WL 422372, at *3–*4 (E.D. La. Apr. 17, 2000). The court based its decision on the fact that the law was unresolved within its circuit as to whether a bankruptcy judge has authority to decide dispositive pretrial motions concerning personal injury and wrongful death claims against a bankruptcy estate. *Id*. at *4.

1176. *See, e.g., In re* A.H. Robins Co., 88 B.R. 742, 743 (E.D. Va. 1988) (memorandum in re confirmation order jointly issued by district judge Merhige and bankruptcy judge Shelley, noting that "[b]y agreement, the undersigned, with few exceptions, conducted all proceedings jointly").

1177. *See generally* Nangle, *supra* note 1166.

1178. *Id.* at 1111 ("It must be remembered, of course, that mere assignment of the multidistrict judge or judges to the district in which the bankruptcy is pending will be of limited utility in the absence of cooperation from that district's bankruptcy and district judges.").

Such an assignment should be initiated by judges of the bankruptcy district rather than one of the parties.

The mere existence of an MDL proceeding does not mean that the MDL transferee judge should be assigned automatically to the bankruptcy district. Such an assignment should be sought only when the MDL transferee judge can play a specific and useful role. If causation is not seriously in issue and the bankruptcy court believes the parties will successfully attempt to negotiate a resolution of the tort claims, there may be no need for the MDL transferee judge's involvement. In some bankruptcy cases, however, there may be a need for a ruling on causation or other global liability issues, or for judicial estimation of the tort claims; the MDL transferee judge is often well suited to preside over such matters. There also may be cases in which the participation of the MDL transferee judge facilitates the settlement of claims involving multiple defendants or the establishment of joint claims resolution facilities.

22.532 Other Judges

Litigation pending in other courts may be important to the bankruptcy proceedings, even if the pending litigation does not involve tort claims. For example, the debtor may have previously filed suit against one or more of its insurers seeking a declaration of coverage. A declaratory judgment action against an insurer is not an action against the debtor and would not ordinarily be stayed automatically by the debtor's bankruptcy filing. Unless the parties obtain a transfer of the litigation to the bankruptcy court, or the debtor dismisses the suit and refiles it in the bankruptcy court, the insurance litigation can proceed where originally filed. The bankruptcy judge should stay informed of the progress of that litigation by requiring counsel to submit periodic status reports or through informal consultation with the judge handling the case.[1179] Should it appear that the resolution of the litigation in the nonbankruptcy court will frustrate or delay progress in the bankruptcy case, the bankruptcy judge should encourage the parties to seek a change of venue to the bankruptcy court or initiate a new adversary proceeding there.

22.533 Bankruptcy Appeals

A mass tort bankruptcy case will always involve judges who will hear appeals from the bankruptcy judge. Such appeals may be to district judges,

1179. *See* McGovern, *Rethinking Cooperation*, *supra* note 690, at 1868 (noting that cooperation among judges in the form of "[s]uccessful coordination of pretrial activities by reconciling overlapping schedules and eliminating redundancies in case development" and "the reduction of duplication" rarely presents problems).

bankruptcy appellate panel judges,[1180] or circuit judges.[1181] The assignment of a single district judge to hear all appeals in a mass tort bankruptcy case will enable that judge to learn about the case, thereby expediting decision making and facilitating consistent rulings. For similar reasons, some courts of appeals have assigned all appeals from a single mass tort bankruptcy case to the same appellate panel.[1182] This approach should also be considered in courts with bankruptcy appellate panels.

22.54 Coordinating and Consolidating Tort Claims and Related Cases

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A principal advantage of using a bankruptcy court to resolve mass tort litigation is that it consolidates all pending mass tort litigation in the district in which the bankruptcy case is filed.[1183] The bankruptcy filing itself largely accomplishes this consolidation. Parties may also ask the bankruptcy court to transfer the tort suits pending against the debtor to the district in which the bankruptcy is pending and to expand the scope of this consolidation to include claims against nondebtor parties. Despite possible advantages, a number of legal and practical questions will present themselves to the bankruptcy or district judges who are asked to approve such a consolidation. An important question is what steps, if any, should be taken to resolve the multitude of personal injury tort cases pending against the debtor and others in state and federal courts around the country at the time the bankruptcy petition is filed.

1180. *See* 28 U.S.C. §§ 158(a), (b)(1) (West 2003).

1181. *See id.* § 158(d).

1182. *See, e.g.,* Official Comm. of Tort Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 142 F.3d 433 (6th Cir. 1998); Lindsey v. Dow Chem. Co. (*In re* Dow Corning Corp.), 113 F.3d 565 (6th Cir. 1997); Tort Claimants' Comm. v. Dow Corning Corp. (*In re* Dow Corning Corp.), 103 F.3d 129 (6th Cir. 1996); Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482 (6th Cir. 1996) (appeals all decided by a panel of the same three judges).

1183. *See, e.g.*, Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. Pa. L. Rev. 2045, 2050–54 (2000); Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 Loy. L.A. L. Rev. 451, 457 (1998).

22.541 Claims Against the Debtor

Consolidation of the mass tort litigation is achieved by virtue of the automatic stay and the bankruptcy court's exclusive jurisdiction over the property of the debtor and of the estate.[1184] The bankruptcy court itself, however, does not have jurisdiction to hear and determine personal injury and wrongful death claims.[1185] Those claims must be adjudicated by the district court, either in the district of the bankruptcy case or the district where the tort claim arose.[1186] Any jury trial rights that exist outside of bankruptcy are statutorily preserved in bankruptcy.[1187] This does not mean, however, that all of the thousands of personal injury and wrongful death claims against the debtor will have to be tried to a jury in district court. A right to jury trial may be waived by a tort claimant who accepts a reorganization plan's provisions for settlement or for alternative dispute resolution methods.[1188] Moreover, most courts have concluded that the bankruptcy court has authority to estimate the value of the mass tort claims for purposes of voting and confirmation and for determining the feasibility of the reorganization plan.[1189]

A practical question is whether there is good reason to transfer the mass tort case files from the federal and state courts around the country to the district in which the bankruptcy case is filed. The district court has authority to do so.[1190] In both the *Dow Corning* and the *A.H. Robins* bankruptcies, courts

1184. *See* 28 U.S.C. § 1334(e) (West 2003).

1185. *Id.* § 157(b)(5) (excluding the determination of personal injury tort and wrongful death claims for purposes of distribution through bankruptcy from the definition of core bankruptcy proceedings).

1186. *Id.*

1187. *Id.* § 1411(a); *see also id.* § 157(b)(5).

1188. *See, e.g.,* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1013 n.17 (4th Cir. 1986); *In re* Dow Corning Corp., 187 B.R. 919, 929–30 (Bankr. E.D. Mich. 1995), *rev'd in part on other grounds*, 86 F.3d 482 (6th Cir. 1996); *In re* UNR Indus., Inc., 45 B.R. 322, 326 (Bankr. N.D. Ill. 1984); Resnick, *supra* note 1183, at 2053.

1189. *See, e.g., A.H. Robins Co.*, 788 F.2d at 1012 (citing Roberts v. Johns-Manville Corp., 45 B.R. 823, 825–26 (S.D.N.Y. 1984)); *UNR Indus.*, 45 B.R. at 326–27; Resnick, *supra* note 1183, at 2052–53. Courts are divided, however, over whether a bankruptcy judge is authorized to rule on dispositive motions seeking to disallow personal injury and wrongful death claims against the debtor. *Compare In re* U.S. Lines, Inc. v. U.S. Lines Reorganization Trust, 262 B.R. 223 (S.D.N.Y. 2001), *and In re* Dow Corning Corp., 215 B.R. 346 (Bankr. E.D. Mich. 1997), *with* Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. 1991), *and In re* UNR Indus., Inc., 74 B.R. 146 (N.D. Ill. 1987).

1190. Courts have consistently read 28 U.S.C. § 157(b)(5) as authorizing the district court in the district of the bankruptcy case to transfer personal injury tort and wrongful death claims to its district. *See, e.g., In re* Dow Corning Corp., 86 F.3d 482, 496 (7th Cir. 1996); *In re* Pan Am. Corp., 16 F.3d 513, 516 (2d Cir. 1994); *A.H. Robins Co.*, 788 F.2d at 1010–11.

concluded that transfers were warranted[1191] but stopped short of requiring the physical shipment of case files to the district in which the bankruptcy case was filed.[1192] In fact, in the *Dow Corning* case, the court ordered that the files for all removed cases continue to be transferred to the MDL judge for pretrial purposes.[1193] In asbestos-related mass tort bankruptcies, actions pending against the debtors have generally not been transferred to the bankruptcy district. In at least one of those cases, the bankruptcy court was able to estimate the value of the tort claims without having the pending cases transferred to its district,[1194] and in other cases the parties were able to negotiate a value of the relevant tort claims without having all of the underlying actions against the debtor consolidated in the district in which the bankruptcy case was pending.[1195]

After the reorganization plans have been confirmed, individual tort claims generally will be resolved according to the terms of the plans. Those terms typically include the establishment of trusts from which all present and future asbestos claims for payment are paid, under so-called channeling injunctions.[1196]

1191. *See Dow Corning*, 187 B.R. at 929 (discussing the advantage of transferring because "one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation" might "best be accomplished if all cases pending against the Debtor are before one court"); *A.H. Robins Co.*, 788 F.2d at 1014 (concluding that "[n]o progress along estimating these contingent claims . . . can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized").

1192. In the *Dow Corning* case, the district court found that "no physical transfer of case files or case records to the Eastern District of Michigan is necessary at this time." *Dow Corning Corp.*, 187 B.R. at 932. In the *A.H. Robins* case, physical transfer of the case files to the Eastern District of Virginia was contemplated, but the Fourth Circuit held that no actual transfer of the case files should take place until the individual plaintiff in each case was given notice and an opportunity to object. *A.H. Robins Co.*, 788 F.2d at 1016.

1193. *Id. But see* Maritime Asbestosis Legal Clinic v. U.S. Lines, Inc. (*In re* U.S. Lines, Inc.), 216 F.3d 228, 236 (2d Cir. 2000) (holding that the district court lacked authority under section 157(b)(5) to transfer personal injury or wrongful death claims against the debtor to the MDL district unless the claims arose there).

1194. *See, e.g., In re* Eagle-Picher Indus., 189 B.R. 681 (Bankr. S.D. Ohio 1995).

1195. *See, e.g., In re* UNR Indus., No. 82B9841–45, 1996 Bankr. LEXIS 1455, at *11 (Bankr. N.D. Ill. Aug. 13, 1996) (quoting disclosure statement explanation of how the value of asbestos claims was negotiated).

1196. *See, e.g., In re* Eagle-Picher Indus., 203 B.R. 256, 279, 282 (S.D. Ohio 1996); *In re* UNR Indus., 143 B.R. 506, 514–15 (Bankr. N.D. Ill. 1992).

22.542 Claims Against Other Defendants

The provisions of the Bankruptcy Code that allow consolidation and coordination of the mass tort litigation against the debtor are not explicitly applicable to the debtor's nonbankrupt codefendants.[1197] Parties may, however, seek rulings to permit the litigation against these nondebtor parties to be consolidated in the district in which the debtor's bankruptcy case is pending. Nondebtor defendants may also ask the district court to extend the automatic stay to include related claims against them. The motivations for such requests may be any of the following: to achieve the efficiencies of a unified resolution; to prevent the potential unfairness resulting from the continued prosecution of actions against derivative defendants, while the actions against the major defendant, the debtor, are stayed; to prevent the dissipation of a jointly held asset; or to achieve delay. Whatever the reason, a motion to transfer the actions against these nondebtor parties to the district in which the debtor's bankruptcy case is located raises a number of difficult and uncertain legal issues.

22.543 Consolidation of Cases

Although the structure of the bankruptcy laws might theoretically permit a nationwide consolidation and resolution of all related claims against all defendants, no mass tort case to date has attempted globally to resolve claims against unaffiliated nondebtor manufacturers as part of a debtor's bankruptcy case. Mass tort litigation against nondebtor parties falls within bankruptcy jurisdiction, if at all, only if it is related to a bankruptcy case. The district court (and by reference the bankruptcy court) is granted subject-matter jurisdiction over cases and all civil proceedings arising under or related to cases arising under title 11. 28 U.S.C. §§ 1334(a) & (b).[1198] The most far-reaching decision regarding mass tort litigation against nondebtor codefendants held that claims against breast implant manufacturers other than the debtor fell within "related

1197. The automatic stay prohibits the "commencement or continuation . . . of a judicial . . . proceeding[] against the *debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the *debtor* that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1) (West 2003) (emphasis added). Bankruptcy courts are granted exclusive jurisdiction over "all of the property, wherever located, of the *debtor* as of the commencement of such case, and of property of the *estate*." 28 U.S.C. § 1334(e) (West 2003) (emphasis added).

1198. In *Pacor, Inc. v. Higgins*, a proceeding is related to a bankruptcy case, and thus falls within federal subject-matter jurisdiction under section 1334(b), if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted). *See also In re* Federal-Mogul Global, Inc., 300 F.3d 368, 381 (3d Cir. 2002) (noting "the widespread acceptance of *Pacor*").

to" jurisdiction because the prosecution of such claims could lead to claims for contribution or indemnity against the debtor.[1199] The district court abstained from exercising that jurisdiction,[1200] and the Sixth Circuit denied the petitions for mandamus.[1201] Other courts have not read the jurisdictional statute this broadly.[1202] The bankruptcy of one defendant has not yet achieved a global resolution of a mass tort litigation against an entire industry.[1203] However, courts have allowed some claims against some nondebtor parties to be resolved in the bankruptcy proceedings. Some of the debtor's codefendants with such close relationships to the debtor as officers, directors, shareholders, and related entities with joint insurance coverage, are more likely to be found within "related to" jurisdiction than other nondebtor parties.[1204]

22.544 Transfer of Related Cases of Nondebtor Defendants

A judge who determines that mass tort claims against some or all of the debtor's codefendants come within bankruptcy jurisdiction must then determine whether the district court in the district of the bankruptcy case has authority to transfer all of those claims from state and federal courts to the bankruptcy district. Section 157(b)(5) authorizes the district court where the bankruptcy case is pending to determine the place of trial of "personal injury tort and wrongful death claims." Other parts of that same statute refer more specifically to "personal injury tort or wrongful death claims *against the estate*" (emphasis added). Two courts of appeals have concluded that section 157(b)(5) allows the district court in the district where the bankruptcy is filed

1199. Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482, 494 (6th Cir. 1996).

1200. *In re* Dow Corning Corp., No. 95-CV-72397, 1996 WL 511646, at *4 (E.D. Mich. July 30, 1996).

1201. *In re* Dow Corning Corp., 113 F.3d 565, 572 (6th Cir. 1997).

1202. *See, e.g., In re* Federal-Mogul Global, Inc. 300 F.3d 368 (3d Cir. 2002); Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984); *cf.* GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405 (Bankr. S.D.N.Y. 1983) (declining to extend scope of automatic stay to cover suits against nondebtor codefendants).

1203. *Federal-Mogul Global*, 300 F.3d at 379–84 (rejecting codefendants' argument that claims are related to the debtor's claims because of the possibility that debtor may have to indemnify codefendants); *cf. In re* Johns-Manville Corp., 26 B.R. 405, 409 (Bankr. S.D.N.Y 1983) (rejecting codefendant manufacturer's proposal for "an industry-wide solution of the entire asbestos health-related problem," despite finding it "tempting").

1204. *See, e.g., Lindsey*, 86 F.3d at 490–95; *cf.* A.H. Robins v. Piccinin, 788 F.2d 994, 1007 (4th Cir. 1986) (affirming district court's exercise of bankruptcy jurisdiction to stay mass tort actions against officers, directors, and employees of the debtor). Direct claims against a debtor's insurers have also been found to come within "related to" jurisdiction. *See, e.g.,* Coar v. Nat'l Union Fire Ins. Co., 19 F.3d 247 (5th Cir. 1994).

to fix venue for cases pending against nondebtor defendants that are related to a debtor's bankruptcy proceedings, pursuant to section 1334(b).[1205] In both of those cases, however, only claims against certain closely affiliated nondebtor defendants were part of the overall resolution of the tort claims in the debtor's plan of reorganization.[1206] Because those nondebtor parties were released from further liability after confirmation of the debtor's plan, the claims against them were never litigated.

The fact that a district court determines that it has authority under section 157(b)(5) to transfer personal injury tort litigation pending against a debtor's codefendants does not necessarily mean that the court will choose to exercise that authority, especially at the outset of the bankruptcy case. If the goal of the transfer is to coordinate and consolidate all the mass tort cases pending against the debtor and related parties, a favorable ruling by the court on a motion to expand the stay to cover the nondebtor parties (see section 22.545) may make transfer of the litigation to the bankruptcy district unnecessary.[1207]

Claims against nondebtor defendants do not necessarily have to be tried in the bankruptcy district. Courts have held that in addition to the venue options expressly included in section 157(b)(5)—the district where the bankruptcy case is pending and the district where the personal injury claim arose—the district court has the option of abstaining and allowing the personal injury tort cases to remain in the courts in which they are pending.[1208] Other courts, however, may find that the factors governing abstention lend themselves to a categorical analysis when applied to a large number of similar cases against nondebtor defendants. Before making a final decision to transfer personal injury cases to the bankruptcy district, the district court must give an opportunity for the individual plaintiffs in each case to object.[1209]

1205. *Lindsey*, 86 F.3d at 497; *A.H. Robins*, 788 F.2d at 1014.

1206. *See, e.g., In re* Dow Corning Corp., 255 B.R. 445, 475 (E.D. Mich. 2000); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 629–30 (1982) (describing provisions of *A.H. Robins* reorganization plan that released non-debtor parties from liability).

1207. *See In re* Johns-Manville Corp., 45 B.R. 823, 825 (S.D.N.Y. 1984) (Section 157(b)(5) "does not mandate that all personal injury and wrongful death claims be tried. It merely sets forth the procedure by which the forum for trial shall be designated for those . . . claimants who do not agree to another procedure for settling their claims.").

1208. *In re* Dow Corning Corp., 86 F.3d 482, 497 (6th Cir. 1996); *In re* Pan Am. Corp., 950 F.2d 839, 844 (2d Cir. 1991); *In re* White Motor Credit, 761 F.2d 270, 271, 273 (6th Cir. 1985). The Sixth Circuit has held that the abstention decision must be made on a case-by-case basis, rather than globally. *In re* Dow Corning, Corp., 113 F.3d 565, 569–70 (6th Cir. 1997).

1209. *A.H. Robins*, 788 F.2d at 1014 ("[D]ue process requires some form of notice and an opportunity for a hearing before there can be a change of venue and before trial of a personal

22.545 Expanding the Automatic Stay or Enjoining Related Cases

Just as nondebtor parties may seek the transfer of mass tort litigation against them to the bankruptcy district, they may also attempt to use the debtor's bankruptcy to gain a stay of the litigation against them by virtue of 11 U.S.C. § 362. Alternatively, nondebtor parties may seek an order under to 11 U.S.C. § 105 temporarily enjoining the prosecution of the litigation against them. A court asked to stay litigation pending before it may also be asked to declare that the automatic stay applies to nondebtors or to stay litigation pending in other courts against nondebtors. Courts presented with such requests have concluded that they have authority to enter the requested relief, but only with respect to the cases before them.[1210] A bankruptcy court, however, has authority to enjoin litigation against nondebtors pending in other courts so long as that litigation is at least related to the bankruptcy case.[1211]

Expanding the automatic stay. Although only the debtor itself is generally entitled to the benefit of the automatic stay in Chapter 11 cases,[1212] several courts have found circumstances in mass tort bankruptcies that justify expanding the scope of that protection.[1213] The primary considerations in deciding whether to stay related litigation are whether it is tantamount to litigation against the debtor and whether it constitutes an effort to obtain possession of, or exercise control over, property of the estate. The focus must be on the litigation's impact on the debtor and its bankruptcy estate, rather than on the possible impact on the nondebtor parties.[1214]

injury tort cause of action against a debtor may be transferred finally from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.").

1210. *See, e.g.,* Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); *In re* Related Asbestos Cases, 23 B.R. 523 (N.D. Cal. 1982); *see also* G. Hisae Ishii-Chang, *Litigation and Bankruptcy: The Dilemma of the Codefendant Stay*, 63 Am. Bankr. L.J. 257, 277–79 (1989).

1211. Celotex Corp. v. Edwards, 514 U.S. 300, 307–10 (1995).

1212. *See, e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197 (6th Cir. 1983); *Wedgeworth*, 706 F.2d at 544; *In re* Sunbeam Sec. Litig., 261 B.R. 534, 536 (Bankr. S.D. Fla. 2001). In limiting the benefit of the automatic stay to debtors in Chapter 11 cases, courts have sometimes contrasted the expanded scope of the automatic stay in Chapter 13 cases, where it is expressly made applicable to persons liable with the debtor on a debt. *See, e.g., Wedgeworth*, 706 F.2d at 544 (citing 11 U.S.C. § 1301(a) (West 2003)).

1213. *See, e.g., In re* Eagle-Picher Indus., 963 F.2d 855 (6th Cir. 1992); A.H. Robins v. Piccinin, 788 F.2d 994 (6th Cir. 1986); *In re* Johns-Manville Corp., 40 B.R. 219 (Bankr. S.D.N.Y. 1984).

1214. *See, e.g., Eagle-Picher Indus.*, 963 F.2d at 862 ("[I]t is for the protection of Eagle-Picher's numerous *creditors*, not for [nondebtor defendants] Hall and Ralston, that AISI is properly prohibited from proceeding with its action against Hall and Ralston . . . .") (emphasis in original); *In re* Johns-Manville Corp., 26 B.R. 420, 430 (Bankr. S.D.N.Y. 1983) (enjoining under sections 362 and 105 suit against nondebtors because it "threatens adversely to impact on

In *A.H. Robins Co. v. Piccinin*,[1215] the Fourth Circuit affirmed the district court's stay under sections 362(a)(1) and (3) of personal injury suits against various individual defendants who were closely associated with the debtor—its chairman of the board, president, chief medical officer, and the inventor of the Dalkon Shield, whom the debtor had agreed to indemnify—and litigation against the debtor's insurer.[1216] The Fourth Circuit concluded that the interests of the individual defendants were "so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest."[1217] The court emphasized that the individual defendants had an absolute right to be indemnified by the debtor for any judgments rendered against them.[1218]

Courts have not, however, been willing to read the automatic stay provision as extending to unrelated nondebtor codefendants who have merely a joint tortfeasor relationship with the debtor. In several asbestos bankruptcies, for example, courts have rejected codefendant manufacturers' attempts to bring themselves within the scope of the debtor's automatic stay.[1219]

Enjoining proceedings under section 105. Most courts that have extended the automatic stay to nondebtor parties have done so under section 105 rather than by an expansive application of section 362. These courts have entered preliminary injunctions temporarily staying litigation against the protected parties, rather than holding that the debtor's filing of its Chapter 11 petition automatically accomplished this result.[1220] Similar to the Fourth Circuit's

property of the debtor's estate as well as disrupt the reorganization proceedings and frustrate Manville's efforts to achieve financial rehabilitation"), *aff'd*, 40 B.R. 219 (Bankr. S.D.N.Y. 1984); Charles Jordan Tabb, The Law of Bankruptcy 170–71 (1997) (discussing the "very limited circumstances" under which actions against nondebtors may be stayed under section 362 in Chapter 11 cases).

1215. 788 F.2d 994 (4th Cir. 1986).

1216. *Id.* at 1007; *see also id.* at 999 (application of the automatic stay to nondebtors was appropriate only in "unusual circumstances"—such unusual circumstances exist "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor").

1217. *Id.* at 1001.

1218. *Id.* at 1007.

1219. *See, e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); *In re* Johns-Manville Corp., 26 B.R. 405 (Bankr. S.D.N.Y. 1983).

1220. *See, e.g., In re* Eagle-Picher Indus., 963 F.2d 855 (6th Cir. 1992) (affirming grant of preliminary injunction pursuant to section 105 enjoining prosecution of civil action against debtor's officers); A.H. Robins v. Piccinin, 788 F.2d 994 (4th Cir. 1986) (affirming grant of preliminary injunction pursuant to section 105 enjoining litigation against debtor's insurers, corporate officers, and other indemnified persons, in addition to relying on section 362 as basis for the stay); *In re* Johns-Manville Corp., 33 B.R. 254, 263 (Bankr. S.D.N.Y. 1983) (granting

interpretation of section 362(a), however, courts have read section 105 as providing authority to extend the stay to nondebtor parties only if the acts to be enjoined "would frustrate the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property."[1221] Accordingly, courts ruling on requests for extension of the stay to protect nondebtor parties in mass tort cases have generally restricted such relief to key officers and employees of the debtor, persons covered by the debtor's insurance policy, and in some instances the debtor's liability insurers.[1222] Courts generally have declined to grant this relief under section 105 to alleged joint tortfeasors who are merely codefendants of the debtor.[1223]

22.55 Providing Representation for Future Mass Tort Claimants

As discussed below in section 22.7 and in sections 21.1 and 21.2 of the class actions section, a challenging aspect of managing mass or class litigation is the need to give fair and consistent treatment to claimants who present widely disparate claims. A lesson of the *Amchem* and *Ortiz* (see section 22.71) decisions is that before resolving claims in an aggregated fashion, courts must find a fair mechanism for representing the different interests of present and future claimants. Because the decisions invoked due process principles as well as the limits of Federal Rule of Civil Procedure 23, the concerns that they raise affect bankruptcy proceedings. See section 22.58.

The need for fair treatment of future claimants is heightened in the bankruptcy context because the very act of filing for bankruptcy usually signals that the defendant does not have sufficient assets fully to compensate all claimants. Because most mass tort bankruptcies are precipitated by the debtor's desire to achieve a global resolution of all the tort claims that have

preliminary injunction enjoining litigation against officers, directors, and employees of debtor "[b]ased upon the broad grant of power contained in Section 105(a)").

1221. *In re* Johns-Manville Corp., 26 B.R. 420, 427 (Bankr. S.D.N.Y. 1983); *see also* Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 40 B.R. 219, 225 (Bankr. S.D.N.Y. 1984) (holding that "to issue a stay under § 105, the court must determine that such relief is at least appropriate to achieve the goals of a Chapter 11 reorganization, and is necessary to protect the debtor").

1222. *See In re* Forty-Eight Insulations, Inc., 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985); David G. Epstein et al., Bankruptcy 126 (1993) (listing factors increasing chances of obtaining a stay of litigation against a nondebtor).

1223. *See, e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); *Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y. 1983).

been or will be asserted against it, the debtor will seek to discharge not only the claims of persons who are presently sick or injured but also the claims of persons who have been exposed to the offending product but have not yet manifested any injury (i.e., present-future claimants). A debtor may also attempt to discharge the claims of persons who have not yet been exposed to the debtor's product but who will be exposed in the future and will suffer injury as a result (i.e., future-future claimants).

Judges presiding over the early mass tort bankruptcy cases struggled over the question whether persons who had not yet manifested any injury from exposure to the debtor's product could be dealt with in the bankruptcy proceedings.[1224] These doubts arose from an uncertainty whether such persons had a "right to payment" as required by the statutory definition of "claim."[1225] Doubts also arose from the due process concerns raised by adjudicating such persons' rights in the bankruptcy without the persons' notice of and opportunity to participate in the proceedings.[1226] Most courts eventually concluded that future mass tort claims could not be ignored.[1227] At the very least, these future claimants were "parties in interest" who had a right to be heard in the proceedings and were entitled to representation.[1228] As a result, courts began

1224. *See, e.g., In re* Amatex Corp., 755 F.2d 1034 (3d Cir. 1985) (reversing denial by bankruptcy court, affirmed by district court, of request for appointment of representative for future asbestos claimants); *In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (granting motion for appointment of future claims representative); *In re* UNR Indus., Inc., 29 B.R. 741 (N.D. Ill. 1983) (denying application for appointment of a future claims representative), *appeal dismissed,* 725 F.2d 1111 (7th Cir. 1984). The specific legal issue presented in the above cases was whether such future claimants were "creditors" who held "claims," within the meaning of the Bankruptcy Code, that could be discharged at the end of the case.

1225. 11 U.S.C. § 101(10)(A) (2000).

1226. *See, e.g.*, *UNR Indus.*, 29 B.R. at 745 ("[T]he putative claimants—who have been exposed to asbestos some time in their lives but do not now have or do not know that they have an asbestos-related disease—have no claims under state law, and therefore do not have claims cognizable under the Code."); *id.* at 747 ("It would be impossible for one legal representative to represent adequately the claims of tens of thousands of future claimants. . . . The practical and legal problems of notifying those who the legal representative would be able to bind . . . are insurmountable.").

1227. *See, e.g., In re* UNR Indus., 725 F.2d 1111, 1119 (7th Cir. 1984) ("If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern."); *Johns-Manville Corp.*, 36 B.R. at 749 ("Any plan not dealing with their interests precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization body politic.").

1228. *See, e.g., UNR Indus.,* 725 F.2d at 1120; *In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *Johns-Manville Corp.*, 36 B.R. at 749. *See, e.g., In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re* Johns-Manville Corp., 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984).

appointing future claims representatives to represent, in the bankruptcy proceedings, the interests of those persons who would be injured by the debtor's product sometime in the future. Congress ratified this judicial practice in the context of asbestos bankruptcies by amending the Bankruptcy Code to make appointment of a future claims representative a condition for a court's statutory authority to issue a channeling injunction directing that claimants may seek payment only from a trust created under a reorganization plan.[1229] Section 22.58 further discusses statutory provisions for discharging future asbestos claims.

Neither the Bankruptcy Code nor the bankruptcy rules set forth procedures for the appointment of a future claims representative. The courts have had to devise such procedures. Typically the debtor files a motion to have the court appoint a future claims representative.[1230] Occasionally other participants in the bankruptcy have requested the appointment.[1231] In Chapter 11 reorganization cases in which the debtor likely faces significant long-term tort liability, the appointment of a future claims representative has become standard. On the other hand, the request for such an appointment in a mass tort liquidation[1232] or where the existence of future tort liability is disputed[1233] is likely to provoke opposition from some of the existing parties. Courts routinely grant a hearing in such circumstances. The decision whether to appoint a future claims representative should be based on an assessment of the likelihood of future claimants, the number, nature, and variety of their claims, and the impact that the bankruptcy will have on these claims.

The court necessarily selects and appoints the future claims representative without the consent of the class of persons represented; the representative is

1229. 11 U.S.C. § 524(g)(4)(B)(i) (West 2003).

1230. *See, e.g., In re* Amatex Corp., 755 F.2d 1034, 1036 (3d Cir. 1985) (referring to debtor's application for the appointment of a guardian *ad litem* to represent future asbestos claimants on all issues before the court); *In re* UNR Indus., 46 B.R. 671, 673 (Bankr. N.D. Ill. 1985) (referring to debtors' application for a legal representative for unknown putative asbestos-related claimants).

1231. *See, e.g.,* Locks v. U.S. Trustee, 157 B.R. 89, 90 (Bankr. W.D. Pa. 1993) (referring to motion for the appointment of a future claims representative filed by a plaintiff's attorney who was a member of the unsecured creditors' committee); *Johns-Manville Corp.*, 36 B.R. at 744 (referring to motion filed by Keene Corp., a codefendant of the debtor, to appoint a legal representative for asbestos-exposed future claimants).

1232. *See Locks*, 157 B.R. at 91; *In re* H.K. Porter Co., 156 B.R. 16, 17–18 (Bankr. W.D. Pa. 1993).

1233. *See In re* Dow Corning Corp., 211 B.R. 545, 598 n.55 (Bankr. E.D. Mich. 1997) (discussing the denial of a motion to appoint a representative for future breast implant claimants on the ground that all such claimants were aware of their implants and thus were present, not future, claimants).

not a true agent of those represented.[1234] Unlike the named plaintiffs in a class action, the representative is not a member of the class being represented. Instead, the future claims representative is invariably a lawyer and does not claim the same potential injury that the future claimants face. Because there is no shared or common interest to ensure "'that the interests of the class members will be fairly and adequately protected in their absence, courts look to other bases for such assurance.'"[1235]

Future claims representatives are appointees of the court, and are thus viewed by some as neutral brokers seeking consensual reorganizations rather than as zealous advocates for the interests of future claimants.[1236] A judge appointing a future claims representative can diminish concerns about adequacy of representation in the following ways:[1237]

- Weight should be given to qualifications and experience as an effective advocate when appointing the representative. When a potential future claims representative has previously served in that capacity, the court should consider the results achieved.
- The class of persons represented must be defined as clearly as possible. For example, determine whether the future claims representative is expected to act on behalf of persons injured only by a certain type of product (e.g., those containing asbestos) manufactured by the debtor or on behalf of those injured by multiple products (e.g., lead-based products); on behalf of only persons exposed to the product(s) prior to confirmation or on behalf of those exposed post-bankruptcy as well; or on behalf of those who will suffer only slight or questionable injury as well as those who will be able to demonstrate serious injury.
- The representative needs supporting resources with the same degree of expertise as the creditors' committees possess. The future claims representative should be authorized to hire counsel and financial experts when shown to be necessary.

1234. *See* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 Chap. L. Rev. 43, 59 (2000).

1235. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997) (quoting Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982)).

1236. *See* Tung, *supra* note 1234, at 70–71 ("A judge—and certainly parties in interest—might be less interested in finding a person to provide zealous representation for future claimants than one who understands the paramount goal of reorganization.").

1237. *See* Gibson, Case Studies, *supra* note 792, at 91–93. For the *UNR* reorganization, see *id.* at 161–67, 180–81; for the *Dalkon Shield* reorganization, see *id.* at 207–09.

22.56 Estimating the Value of Mass Tort Claims

Most courts have found that the bankruptcy court has the authority to estimate the value of mass tort claims for purposes of determining the feasibility of a reorganization plan, confirming a plan, or establishing a framework for voting on a proposed plan.[1238] However, district judges with experience in handling mass tort claims involving the debtor, particularly an MDL transferee judge, may be able to bring a special knowledge and expertise to the estimation process and should ordinarily be invited into the process. See section 22.53.

Although courts have generally allowed the parties to negotiate a plan without judicial estimation proceedings, such proceedings can clarify the extent and value of potential tort claims against the debtor. Knowing the extent of the potential liability in relation to the debtor's assets may determine whether there is any value in the company for equity shareholders.[1239] That information might propel the negotiations and produce a basis for agreement about a reorganization plan.[1240]

If the parties are unable to reach agreement on the value of the claims, evidentiary hearings can assist the judge in resolving this difficult issue.[1241] Along with any unsecured creditors' committee, tort claimants committee, equity committee, and the debtor, future claims representatives have participated in claims estimation hearings by presenting their own experts on the value of the future claims.[1242] In such cases, the judge should consider whether appointment of an expert under Federal Rule of Evidence 706 or appointment of a special master might be appropriate.

1238. The court's authority to estimate the value of tort claims does not, however, include the authority to use those estimates to determine the final value of any individual claim, *see* 28 U.S.C. § 157(b)(5) (West 2003), or a consensual reorganization plan. *See infra* section 22.57.

1239. See, e.g., the discussion of the effect of the estimation order in *Eagle-Picher*, in Gibson, Case Studies, *supra* note 1160, at 80 ("Given the court's estimation order, the writing was on the wall.").

1240. See, e.g., the discussion of the *A.H. Robins* reorganization in Gibson, Case Studies, *supra* note 1160, at 196 ("Within a week of Judge Mehige's estimation ruling, American Home Products (AHP) made an offer to merge with Robins. . . . This offer became the heart of the reorganization plan soon agreed to by Robins."); *see also id.* at 91 (discussing the effect of the estimation order on *Eagle-Picher* negotiations).

1241. *See* Gibson, Case Studies, *supra* note 1160, at 78–79 (describing the testimony in the *Eagle-Picher* estimation hearing), *and id.* at 195–96 (describing the testimony in the *A.H. Robins* estimation hearing).

1242. *See, e.g.*, *In re* A.H. Robins Co., 88 B.R. 742, 747 (E.D. Va. 1988) (describing the evidence presented at the claims estimation hearing by the expert for the future claims representative), *aff'd*, 880 F.2d 694 (4th Cir. 1989); *In re* Eagle-Picher Indus., 189 B.R. 681, 687–88 (Bankr. S.D. Ohio 1995) (same).

A district judge with experience in the mass tort litigation can help lay the groundwork for estimating the tort claims by using different techniques, including the following:

- conducting trials of representative bellwether cases as discussed in section 22.93;
- conducting trials of specific issues to resolve a disputed common issue (e.g., general causation), as discussed in sections 21.24 and 22.75; and
- mediating or otherwise assisting in negotiation of a consensual reorganization plan once any estimation process has been completed.

22.57 Negotiating a Reorganization Plan

The traditional practice in mass tort bankruptcies involving future claimants has been for the court to appoint a representative for those interests (see section 22.55). The representative then participates in plan negotiations with the debtor and representatives of other committees, appears in court, and raises objections on behalf of the future claimants.

The primary role of the future claims representative has been that of a negotiator. Typically negotiations take place among the debtor, the tort claimants' committee, the future claims representative, and the unsecured creditors' committee, in varying combinations. These entities try to arrive at an agreement on the ratio of tort debt to other unsecured debt, the division of tort debt between present and future claims, the terms for liquidation and payment of the tort claims, the percentage of payment for unsecured claims, and the amount, if any, to be provided to equity.[1243] Although there is authority for the court to appoint a mediator to facilitate the negotiations of a reorganization plan,[1244] the expense should be considered.

The future claims representative does not have a formal veto over a proposed reorganization plan, but gaining the representative's assent has proven essential for arriving at a consensual plan of reorganization. A representative's influence is based on the concerns of other parties about the feasibility and legitimacy of confirming a plan to which the future claims representative objects, as well as the persuasive abilities of the representative (both in court and in negotiations). The cases provide examples of how the

1243. *See, e.g., In re* UNR Indus., 212 B.R. 295, 298 (Bankr. N.D. Ill. 1997) (describing the negotiation history of the UNR asbestos bankruptcy); Gibson, Case Studies, *supra* note 1160, at 90–91 (describing the negotiation history of the Eagle-Picher asbestos bankruptcy).

1244. *See, e.g.*, Gibson, Case Studies, *supra* note 1160, at 75–76 (describing the use of mediation in the *Eagle-Picher* reorganization).

future claims representative's implicit veto power and advocacy in court results in the improved treatment of future claimants in the reorganization plans.[1245]

Judges should monitor and evaluate the quality of the future claimants' representation and whether it furthers future claimants' ability to receive a fair and adequate recovery. One way to do so compares the recoveries provided in the reorganization plan for future claimants with recoveries provided to present claimants both in the reorganization plan and in settlements immediately before the reorganization. Another measure of the future claims representative's efficacy is the strength and fairness of any mechanisms established to deal with a possible shortfall of funds for the trust. Consider whether procedures are in place to distribute the burden of such shortfalls across the spectrum of claims, and whether monies have been reserved to deal with anticipated future claims.

22.58 Discharging Future Claims

At the end of the bankruptcy, the parties generally negotiate a plan requiring future claimants to proceed against a trust established to pay both present and future tort claims, rather than against the reorganized debtor and related entities. Judicial decisions about future claims have recognized, but not clearly resolved, issues concerning the means of discharging such claims.[1246]

Congress to some extent validated the trust concept in 1984 when it added subsections (g) and (h) to section 524 of the Bankruptcy Code.[1247] This amendment, limited to Chapter 11 asbestos cases, authorizes courts in connection with an order confirming a reorganization plan to issue a channeling injunction requiring claimants—present and future—to proceed only against the tort claimant trust established by the plan.[1248] Section 524(g) requires,

1245. *See, e.g., In re* Nat'l Gypsum Co., 219 F.3d 478, 481 (5th Cir. 2000) (referring to the future claims representative's successful objection to a permanent injunction that would have prevented future claimants from seeking recovery from the debtor's successor); Gibson, Case Studies, *supra* note 1160, at 208–09 (describing the successful efforts of the future claims representative in the *A.H. Robins* bankruptcy to amend the proposed plan to allow payment for future claimants who did not file a claim in the bankruptcy proceedings by the bar date).

1246. *See, e.g., In re* Amatex Corp., 755 F.2d 1034, 1043 (1985) ("At this juncture . . . we do not know whether future claimants can or should be considered 'creditors' under the Code . . . and how best to solve a whole host of other problems which have not been briefed."); *In re* Johns-Manville Corp., 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984) ("[I]t is unnecessary for this Court to face the dischargeability issue at this time in order to decide whether these claimants are parties in interest.").

1247. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113–17 (codified as amended at 11 U.S.C. §§ 524(g), (h) (West 2003)).

1248. 11 U.S.C. § 524(g)(1)(A) (West 2003).

among other things, that the court appoint during the bankruptcy proceedings "a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind."[1249] The statute, however, does not address future claims in the following: mass tort bankruptcies involving a product other than asbestos; Chapter 7 liquidations; or cases creating a payment mechanism other than a trust having the characteristics described in that provision. Nor does the statute address whether future claimants may participate in the bankruptcy proceedings, either directly or through a court-appointed representative; whether the rights of such persons may be dealt with by a reorganization plan; whether such persons are entitled to payment in a liquidation distribution; or whether the rights of such persons to proceed against the reorganized debtor and related entities may be terminated by the plan or court-issued injunction.[1250] Even in Chapter 11 asbestos cases, it is unclear whether section 524(g) provides the exclusive method for dealing with future claims or whether other methods may be used. The act amending section 524 included a provision stating that the amendment "shall not be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."[1251] Uncertainties remain concerning the existence of any other authority to enjoin future claimants.

Despite the courts' reliance on future claims representatives and the analogy to the conditions that Congress found essential to a fair resolution of asbestos mass tort claims under section 524(g), uncertainty as to the constitutionality of binding future claimants remains. One unresolved issue is whether constitutionally adequate notice can be provided to future claimants. The Supreme Court has given conflicting signals. In 1950, the Court held that notice by publication in a single newspaper was sufficient with respect to "beneficiaries whose interests or addresses are unknown to the trustee,"[1252] because "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all."[1253] Often, though, no form of notice will be

1249. *Id.* § 524(g)(4)(B)(i).

1250. *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years: National Bankruptcy Review Commission Final Report 320–22 (1997) [hereinafter NBRC Report].

1251. Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (codified as amended at 11 U.S.C. § 524 (West 2003), committee note).

1252. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

1253. *Id.* at 319. Most authorities that have supported the treatment of future claims in mass tort bankruptcies have relied on the appointment of a future claims representative, not merely notice, as the key to satisfying due process. *See, e.g.,* NBRC Report, *supra* note 1250, at 329–34;

"reasonably certain to reach most" future mass tort claimants. As the Court stated in *Amchem Products, Inc. v. Windsor*, "[m]any persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur."[1254]

The Court "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[1255] Whether it is possible to provide constitutionally adequate notice to future claimants in the bankruptcy context similarly remains open to question.

Due process concerns also attend possible conflicts of interest within the class of future claimants. In other representational situations, the Supreme Court has insisted on a careful alignment of interests between the representative and those represented and has prohibited grouping of class members with divergent interests.[1256] A similar insistence in the bankruptcy context might require appointment of more than one future claims representative. For example, separate representatives might be necessary for seriously injured future claimants and for those future claimants who will suffer only minor injury.[1257] Given the lack of clear precedent on the resolution of future claims in the bankruptcy context, courts should proceed with caution, recognizing the constitutional, statutory, and practical questions that remain unresolved. Courts should draw on the practices that have been developed to provide procedural protections for future claimants.

22.59 Confirming a Reorganization Plan

The Bankruptcy Code provides that "[a]fter notice, the court shall hold a hearing on confirmation of a plan"[1258] and that "[a] party in interest may object to confirmation of a plan."[1259] Judicial review of the plan must take place

Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 Am. Bankr. L.J. 515 (1995); Resnick, *supra* note 1183, at 2076.

1254. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997).

1255. *Id.*

1256. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999); *Amchem*, 521 U.S. at 625–28.

1257. *See* S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. Pa. L. Rev. 2095, 2114–15 (2000).

1258. 11 U.S.C. § 1128(a) (2000).

1259. *Id.* § 1128(b).

even if every impaired class of claims or interests has affirmatively accepted the plan.[1260]

Before confirming a plan, the Bankruptcy Code requires the court to determine whether the plan satisfies thirteen statutory requirements. For example, the Code explicitly requires that a Chapter 11 reorganization plan identify and designate separate classes of creditors' claims and equity holders' interests, specify the treatment to be afforded each class of claims or interests affected by the plan, provide equal treatment for each claim or interest within a particular class, and avoid benefiting directors, officers, and trustees at the expense of creditors and interest holders.[1261]

It is generally efficient to have the bankruptcy judge and a district judge sit jointly to decide whether a proposed plan should be confirmed. In an asbestos bankruptcy (or one following the asbestos statutory model), this approach streamlines the process because, under the statute, the district judge has to either issue or affirm the confirmation order for a channeling injunction to become valid and enforceable.[1262] In circuits without a bankruptcy appeals panel, a joint sitting may also bypass what would otherwise be an appeal of right from a bankruptcy judge's ruling to a judge of the district court.[1263] Instead, an appeal of the joint decision would proceed directly to the court of appeals.[1264]

1260. *See* Gerald F. Munitz & Karen M. Gebbia, *The Chapter 11 Plan, Confirmation and Cramdown*, *in* Basics of Bankruptcy and Reorganization 339, 355 (1992).

1261. *See* 11 U.S.C. § 1129(a)(1)–(13) (West 2003). For additional requirements, see *id.* § 1129(b)–(d); for requirements relating to the contents of a reorganization plan, see *id.* § 1123. For an example of a confirmation ruling and order, see *In re Eagle-Picher Industries*, 203 B.R. 256 (Bankr. S.D. Ohio 1996).

1262. 11 U.S.C. § 524(g)(3)(A) (West 2003).

1263. 28 U.S.C. § 158(a) (West 2003). *See, e.g.*, *In re* Eagle-Picher Indus., 203 B.R. 256 (Bankr. S.D. Ohio 1996). In the *A.H. Robins* reorganization, the district judge and bankruptcy judge sat jointly throughout the bankruptcy proceedings. Gibson, Case Studies, *supra* note 1160, at 190. Because a bankruptcy appellate panel serves as a substitute for appeal to a district court, *see* 28 U.S.C. § 158 (b)(1) (West 2003), a joint hearing with a bankruptcy judge and a district judge would not save a step in the process. Appeal from that joint decision would lie with a three-judge bankruptcy appellate panel and then with the court of appeals. 28 U.S.C. §§ 158(c) & (d) (West 2003).

1264. *Id.* § 158(d).

22.6 Case-Management Orders

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When responsibility for numerous related cases pending in the federal courts is centralized early with a single judge, active case management is imperative. The judge must promptly develop case-management plans and orders, updating and modifying them as the litigation unfolds. An initial case-management order will set the stage for the ongoing management process. That order should start to organize the cases and counsel; address discovery issues, including preservation of documents, electronic data, and other evidence; set priorities for pretrial pleadings and defer unnecessary pleadings; identify preliminarily the critical threshold legal and factual issues; outline preliminary discovery and motions and, if possible, set a timetable; and direct counsel to coordinate the implementation of the order. The order should coordinate discovery and threshold pretrial motions with discovery and motions in related cases pending in state and other federal courts. The order should also take into account the proposals of counsel and encourage continuing collaboration among counsel and the parties in the cases pending in different courts.[1265]

22.61 Initial Orders

Items that might be covered in initial and follow-up case-management orders in mass tort litigation are illustrated by the orders issued in the MDL-centralized silicone gel product liability litigation, the fen-phen diet drug litigation, the phenypropanolamine (PPA) litigation, and other mass tort litigations. Section 40.52 contains a composite of those orders, which typically are used to accomplish the following tasks:[1266]

1265. *See generally supra* sections 21.2 & 21.3.

1266. *See In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-1000-S, Order No. 1 (N.D. Ala. June 26, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003); *see also In re* Diet Drugs Prods. Liab. Litig., MDL No. 1421 (E.D. Pa.), *at* http://www.fenphen.verilaw.com/ (last visited Nov. 10, 2003); *In re* Phenylpropanolamine (PPA)

- set the agenda and ground rules for the initial conference and notify parties that attendance by each party or attorney is not necessary and that parties with similar interests are expected to agree to be represented at the conference by a single attorney;
- establish an initial service list of counsel, which can later be modified to include a statement that defendants authorized listed counsel to accept service of process or service of other papers and motions by certified mail or by electronic means;
- urge counsel to familiarize themselves with the *Manual for Complex Litigation* and "be prepared at the conference to suggest procedures to facilitate the expeditious, economical, and just resolution of this litigation";
- direct counsel for each side to meet, confer, and seek consensus on all agenda items and, specifically, to propose a discovery plan, including methods to obtain expert discovery and a timetable for considering motions, including any class certification motions;
- call for (1) preliminary reports on the critical factual and legal issues, (2) lists of all affiliated companies and counsel (to assist the court in addressing recusal or disqualification questions), (3) lists of pending motions, and (4) summaries of the nature and status of similar litigation pending in state courts;
- direct attorneys interested in serving as lead, liaison, or coordinating counsel to "submit information showing how and at what rates they will be expected to be compensated" and to disclose any "agreements or commitments they have made respecting the role and responsibility of other attorneys in conducting pretrial proceedings, discovery, and trial";[1267]
- consolidate cases for pretrial proceedings, create a master docket and file, and establish a case-caption format;
- bar motions under Rule 11 or 56 without leave of court and order that counsel meet and attempt to resolve other motions (except Rule 12 motions to dismiss), an approach that should be reaffirmed and applied throughout the litigation;

Prods. Liab. Litig., MDL No. 1407 (W.D. Wash.), *at* http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page (last visited Nov. 10, 2003).

1267. *Id. See also In re* Diet Drug Prods. Liab. Litig., MDL No. 1203, Order No. 16 (E.D. Pa. Mar. 13, 1998), *at* http://www.fenphen.verilaw.com/all_court.icl (last visited Nov. 10, 2003) (establishing guidelines for attorneys' common benefit fund time and expense reports, including time categories and limitations on expenses).

- order the parties to preserve all documents and records containing relevant information, establish ground rules for any routine purges of computer records, and address other issues relating to electronic data likely to be the subject of discovery (see sections 11.432 and 40.26);
- stay formal discovery and grant extensions of time for responding to complaints and motions, pending establishment of a schedule; and
- announce whether the judge intends to handle all matters personally and, if applicable, designate a magistrate judge to handle matters requiring immediate judicial attention when the district judge is unavailable.

Similar orders have been used by judges handling a variety of dispersed mass tort personal injury and property damage cases[1268] and single incident mass tort litigation.[1269]

22.62 Organization of Counsel[1270]

Early organization of the counsel who have filed the various cases transferred or consolidated for pretrial purposes is a critical case-management task. The judge will often need to appoint lead counsel or a committee of counsel to

1268. *See, e.g.*, *In re* Baycol Prods. Litig., MDL No. 1431, Order No. 4 (D. Minn. Mar. 4, 2002), *at* http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial.htm (last visited Nov. 10, 2003) (pretrial order, issued after initial conference, dealing with docketing, service, conferences, refinement of pleadings, discovery, and attorneys' time records); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., MDL No. 1407, Order No. 1 (W.D. Wash. Jan. 29, 2002), *at* http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page (last visited Nov. 10, 2003) (order, issued after initial case-management conference, dealing with discovery, experts, use of technology, class actions, and state–federal coordination); *In re* Inter-Op Prosthesis Prod. Liab. Litig., MDL No. 01-CV-9000, Case Management Order (N.D. Ohio Sept. 13, 2001), *at* http://www.ohnd.uscourts.gov/Clerk_s_Office/Notable_Cases/index.html (last visited Nov. 10, 2003) (pretrial order including statements of responsibilities of counsel and participation of state court counsel; extensive treatment of discovery); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, Order No. 2 (E.D. La. Oct. 2, 2000), *at* http://propulsid.laed.uscourts.gov/orders.htm (last visited Nov. 10, 2003) (pretrial case-management plan including detailed organization of counsel).

1269. *See, e.g.*, *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001); *In re* San Juan Dupont Plaza Hotel Fire Litig., MDL No. 721, 1989 WL 168401 (D.P.R. Dec. 2, 1988) (case-management order).

1270. For a general outline of factors for the court to consider in selecting, providing compensation for, and monitoring the performance of lead counsel in coordinated or consolidated litigation, see *supra* section 10.22. For more specific discussion of the factors relevant to selecting counsel and establishing an initial understanding about attorney fees, see *infra* section 14.211.

coordinate discovery and other pretrial preparation. Lead counsel and committees of counsel for the plaintiffs in mass tort litigation perform a host of functions. They develop proof of liability and anticipate defenses; gather the expertise necessary to prove causation and other elements of plaintiffs' cases; trace patterns of exposure; manage discovery; coordinate the various filings; and communicate with counsel for plaintiffs, counsel for defendants, and the court.[1271] In cases involving numerous defendants, liaison counsel for defendants generally play an important coordinating role in the mass tort litigation. As the appointing authority, the judge has the opportunity and obligation to monitor the activities of counsel and to implement the litigation management plan. Many judges monitor the activities of the parties and counsel through regularly scheduled status conferences and hearings on pretrial motions and discovery. Section 21.27 discusses the rule provision that applies to appointing counsel in class actions.

Where several counsel are competing to be lead counsel or to serve on a key liaison committee, the court should establish a procedure for attorneys to present their qualifications, including their experience in managing complex litigation and knowledge of the subject matter, their efforts in researching and investigating the claims before the court, and the resources that they can contribute to the litigation.[1272] Often counsel will agree among themselves as to who should serve as lead counsel or assume responsible positions on counsel committees; but the judge must be satisfied that counsel can perform the assigned roles and that they have not entered into improper arrangements to secure such positions.[1273] Including plaintiffs' attorneys with different perspectives and experience in lead or liaison counsel or as committee members can be helpful. Consider also including counsel handling significant numbers of state cases to facilitate coordination among state and federal cases. Section 20.31 discusses steps that judges can take in organizing counsel to help coordinate cases among state and federal courts, emphasizing the need to include attorneys involved in cases needing coordinated efforts.[1274]

1271. *See* Paul D. Rheingold, Mass Tort Litigation §§ 7:20 to 7:28 (1996 & Supp. 2002).

1272. *See infra* section 14.211; *see also* Fed. R. Civ. P. 23(h)(2) & committee notes.

1273. *See, e.g., In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 70–75 (E.D. Pa. 1983) (describing agreements among attorneys to influence the organizational structure of the Plaintiffs Steering Committee and the Executive Committee), *aff'd in part, rev'd in part,* 751 F.2d 562 (3d Cir. 1984).

1274. *See also, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 39 (E.D. Pa. Apr. 21, 1998), *at* http://www.fenphen.verilaw.com/pto.icl (last visited Nov. 10, 2003) (creating Plaintiff's State Liaison Committee with twenty lawyers from fourteen states).

During the selection process, judges should explicitly articulate their expectations about attorney compensation.[1275] For example, the judge can establish guidelines on the number of attorneys who can be present for or involved in specific tasks, the use of paralegals and associates, record keeping and reporting of time and expenses, ranges of allowable expenses, and similar requirements. See section 14.21.

The cost of the legal services may be apportioned among all parties who benefit from the services.[1276] Fees, however, may not be imposed by an MDL transferee judge on attorneys in cases that are not within the jurisdiction of the MDL courts.[1277] In general, those attorneys who provide a common benefit to a group of litigants may also receive compensation from a common fund—even if the attorneys who provide the benefit are not part of an official committee.[1278]

At a minimum, the judge should consider designating one or more attorneys for the plaintiffs and defendants to conduct common discovery and to present motions and arguments during coordinated pretrial proceedings. To minimize repetitious or marginal presentations, lawyers should be encouraged to consult with such designated or liaison counsel before presenting motions or arguments to the court.

Disagreements among the parties and counsel should not prevent designation of an attorney to act as liaison counsel in distributing documents, developing joint discovery requests, and otherwise assisting in the coordination of the litigation.

1275. *See* Fed. R. Civ. P. 23(g)(2)(B) & committee notes.

1276. *See* Smiley v. Sincoff, 958 F.2d 498 (2d Cir. 1992); *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1992, 549 F.2d 1006 (5th Cir. 1977); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order No. 13 (N.D. Ala. July 23, 1992), *at* http://ww.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1277. *In re* Showa Denko K.K. L-Tryptophan Prods. Liab. Litig., 953 F.2d 162 (4th Cir. 1992).

1278. *See supra* section 20.31; *see also Diet Drugs*, Order No. 467 (E.D. Pa. Feb. 10, 1999) (establishing fund for MDL lawyers and corresponding fund for cooperating state lawyers working on common discovery).

22.63 Subsequent Case-Management Orders

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22.631 Adding Parties

New actions will likely be commenced throughout the course of the litigation, particularly in cases involving latent toxic torts. As discovery progresses, additional defendants can be joined by amendments to plaintiffs' complaints or by a succession of third-party complaints. Under Federal Rule of Civil Procedure 16(b)(1), the judge should establish at the initial pretrial conference a schedule for joinder of additional parties and for amendment of pleadings. The schedule should provide the parties a reasonable opportunity for discovery before the deadline for adding parties or amending pleadings and should not be modified without a showing of good cause. A presumptive period for later-added parties to join—usually sixty days from service—should be included, subject to the right to seek additional time.[1279]

It is helpful to develop a system for adding new plaintiffs into the structure of the litigation[1280]—for example, a system for assigning new cases to existing groups, or for creating new groups if prior cases have been categorized by worksite, disease, or some other feature. Such a system may entail collecting information about the characteristics of each new case. Necessary data about each new case can be collected at filing and used to create a current database of the information needed to manage the litigation.

Consider directing the defendants to compile information, such as the dates on which and areas in which each defendant marketed a particular product, so that plaintiffs can identify the proper defendants.[1281] Such records might forestall claims being filed against improperly named defendants.

Ordinarily, discovery should not be postponed until all parties have been joined; indeed, some discovery is necessary to identify the proper parties.

1279. *See, e.g., Diet Drugs*, Pretrial Order No. 807 (E.D. Pa. July 20, 1999) (establishing a bar date for cross-claims and third-party claims).

1280. *See, e.g., Silicone Gel* (Revised Case Management Order), Pretrial Order No. 5 at ¶ 4(c) (N.D. Ala. Sept. 15, 1992) (granting leave for plaintiffs' counsel to add, without further motion or order, additional plaintiffs from the same state as parties with pending claims against defendants).

1281. *See, e.g., Diet Drugs*, Pretrial Order No. 418 (E.D. Pa. Jan. 6, 1999) (requiring defendants to prepare lists of products and for plaintiffs to provide notice regarding product identification).

Interrogatories may be served on the existing parties, and the judge can order their answers available to, and usable by, parties later added to the litigation. Similarly, new parties may use documents produced in response to requests by others and be given access to document depositories.[1282] Newly added parties may use depositions taken earlier, supplemented as necessary by later, limited depositions. See section 11.453 (deferred supplemental depositions).

22.632 Pleadings and Motions

Establishing a master file with standard pleadings, motions, and orders can be particularly helpful if the litigation will involve a number of actions filed, removed, or transferred over an extended period.[1283] Answers, third-party complaints, and motions contained in the master file may be deemed automatically filed in each new case to the extent applicable.[1284] A pretrial order establishing a standard plan and schedule for discovery can also be deemed to apply automatically. Rulings on motions under Federal Rules of Civil Procedure 12 and 56 may be deemed to apply in the newly filed cases unless an objecting party can show good cause.[1285] If the parties have already filed separate motions, consider consolidating related motions that affect the structure of the litigation, such as motions for consolidation for class certification[1286] or to establish a trial plan.

These procedures will expedite proceedings in the later-filed cases while preserving the parties' rights to claim error from adverse rulings. The parties should not, however, be automatically precluded from presenting special issues or requests in individual cases by supplemental pleadings, motions, and arguments.

1282. *See supra* section 11.444.

1283. *See infra* section 40.52.

1284. *See supra* section 11.32 (pleading and motion practice).

1285. *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order No. 1 (N.D. Ala. June 26, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (deeming that any motion, brief, response, and corresponding order applies to each similarly situated party unless that party expressly disavows it).

1286. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 419 (E.D. Pa. Jan. 6, 1999), *at* http://www.fenphen.verilaw.com/pto.icl (last visited Nov. 10, 2003) (scheduling a hearing on motions to certify classes, requiring each side to specify facts they intend to prove, and calling for stipulations of uncontested facts and briefs); *id.*, Order No. 252 (E.D. Pa. Aug. 13, 1998) (establishing deadlines for class certification motions and requiring parties to confer with the Plaintiffs' Management Committee and seek to consolidate such motions); *id.,* Order No. 4 (E.D. Pa. Jan. 16, 1998) (suspending filing and consideration of motions for class certification).

22.633 Deferred Docketing

In latent toxic tort cases, exposure to the product may precede manifestation of injuries by a number of years. The presence, nature, and extent of injury or harm may not be known for years or even decades after exposure. Nevertheless, parties may file cases to prevent statutes of limitation or statutes of repose from extinguishing their claims. Some judges, generally with the consent of the parties affected, have established deferred dockets, sometimes referred to as dormant or inactive dockets, to register such claims with the court and toll the running of statutes of limitation or repose while deferring their consideration until any injuries become manifest.[1287]

Other means are available to defer decisions on mass tort claims that are not ready to be adjudicated. For example, judges severed and deferred cases involving claims of systemic injuries resulting from exposure to the silicone gel in breast implants until a national panel of scientific experts appointed under Federal Rule of Evidence 706 issued its report in the multidistrict litigation on the causation issues. Cases involving allegations of localized injuries were not deferred because those causation issues did not raise the same scientific questions or require the same scientific evidence.[1288] Another judge entered an interim order granting in limine motions to exclude plaintiffs' experts, subject to reexamination when the Rule 706 panel issued its report.[1289] Yet another judge deferred claims by tolling the statute of limitations and maintaining a class action relating to those claims on the court's docket.[1290]

22.634 Issue Identification and Development

Identifying the issues—and the governing statutory or decisional law—is critical to developing a plan for efficiently resolving complex tort litigation. Multiple tort cases frequently involve claims and defenses asserted under

1287. *See, e.g., In re* Asbestos II Consolidated Pretrial, 142 F.R.D. 152 (N.D. Ill. 1991); Freedman, *supra* note 1067, at 688–89. *See generally,* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 75 Judicature 318 (1992); *see also In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875, 2002 U.S. Dist. LEXIS 16590 (E.D. Pa. Jan. 14, 2002) and the discussion of priorities, *supra* note 1048; *see also infra* section 40.52, ¶ 9.

1288. *In re* Breast Implant Cases, 942 F. Supp. 958 (E.D.N.Y. & S.D.N.Y. 1996). For a discussion of the process of appointing and receiving the report of the national panel see FJC Study, Neutral Science Panels, *supra* note 1059.

1289. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1394–95 (D. Or. 1998).

1290. *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order No. 5 (N.D. Ala. Sept. 15, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS.htm (last visited Nov. 10, 2003) (extending indefinitely the time for opting out of a provisionally certified class action and stating that the pendency of that action would toll the statute of limitations for members of that class).

various federal and state laws. In early Federal Rule of Civil Procedure 16 conferences and status conferences, the judge and counsel should work to narrow the issues, claims, and defenses. Such conferences should explore, for example, whether stipulations are feasible to determine what law applies to certain groups of claims or claimants, or to determine what products were distributed during certain periods or in certain geographic areas.

Issues to be taken up early in the litigation may include the following:

- whether the facts and expert evidence support a finding that the products or acts in question have the capacity to cause the type of injuries alleged;
- whether plaintiffs' claims of causation are generally applicable and susceptible to proof across large groups of individuals and over time;
- what law applies and whether there are material differences among the applicable laws;
- whether plaintiffs' claims are barred by statutes of limitations or other legal bars;
- whether plaintiffs can pursue punitive damages;[1291]
- whether one or more classes should be certified and, if so, how to define the class and whether it should be limited to particular claims or issues;[1292] and
- whether to consolidate groups of cases under Federal Rule of Civil Procedure 42(a) for pretrial management.

Some legal issues may be susceptible to resolution and review on interlocutory appeal relatively early in the litigation.[1293] Examples include whether claims are cognizable under federal common law,[1294] barred by the statute of limitations,[1295] subject to issue or claim preclusion,[1296] or covered by insurance.

1291. *See generally In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (reviewing punitive damages award); *In re* TMI, 67 F.3d 1119, 1127–28 (3d Cir. 1995) (affirming order allowing punitive damage award based on state law); *In re* Simon II Litig., 211 F.R.D. 86, 158–63 (E.D.N.Y. 2002) (discussing punitive damages). *See also* State Farm Mut. Auto. Ins. Co., 123 S. Ct. 1513 (2003).

1292. *See supra* section 21.1; *see also* Fed. R. Civ. P. 23(c)(4)(A). Recent decisions have called into question the applicability of Rule 23(c)(4)(A) in the mass tort context. *See infra* section 22.75.

1293. *See supra* sections 15.11–15.12.

1294. *See In re* Agent Orange Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980).

1295. *See* Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570 (7th Cir. 1982).

1296. *See In re* Air Crash at Dallas/Ft. Worth Airport, 861 F.2d 814 (5th Cir. 1988); *In re* Asbestos Litig., 829 F.2d 1233, 1242 (3d Cir. 1987); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982); Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979); *see also*

Interlocutory certification of controlling but unresolved questions of state law to state courts may also be feasible.[1297]

Differences in the substantive law governing liability and damages may substantially affect discovery, trial, and settlement. In all mass tort litigation, the judge must analyze applicable choice-of-law rules and determine what state law will govern particular issues.[1298] In single incident mass tort cases, the applicable choice-of-law rules may indicate that only one state's law applies.[1299] In dispersed, multistate toxic tort and defective products litigation, choice-of-law issues may be more problematic because there may be a wide range of applicable state laws, and the state in which the action is pending may not have a significant relationship with many of the class members, with the defendants, or with the activities that are subject to the litigation.[1300] If the choice-of-law and subsequent analysis show little relevant difference in the governing law, or that the law of only a few jurisdictions applies, the court might address these differences by creating subclasses or by other appropriate grouping of claims.[1301] See sections 22.72 and 22.75.

Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation,* 70 Iowa L. Rev. 141 (1984).

1297. *See supra* section 15.1.

1298. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In a case transferred under 28 U.S.C. § 1404(a), the transferee court must apply the choice-of-law rules that would have governed in the transferor court. Ferens v. John Deere Co., 494 U.S. 516 (1990); Van Dusen v. Barrack, 376 U.S. 612 (1964).

1299. As a threshold matter, there "can be no injury in applying [the forum state's law] if it is not in conflict with that of any other jurisdiction" connected with the litigation. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985). *See also, e.g., In re* Air Crash Disaster near Chicago, Ill. on May 25, 1979, 644 F.2d 594 (7th Cir. 1981) (punitive damages); *In re* Air Crash Disaster near Chicago, Ill. on May 25, 1979, 644 F.2d 633 (7th Cir. 1981) (prejudgment interest).

1300. *Phillips Petroleum*, 472 U.S. at 821–22 (where a state does not have significant contacts with the claims asserted by each member of the plaintiff class, the application of that state's law to all members of the class is arbitrary, unfair, and hence unconstitutional). *See also In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 769 (3d Cir. 1989) ("[I]f the [proposed class] member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must have either minimum contacts with the forum or consent to jurisdiction" to be precluded from litigating its claims in its own forum.).

1301. *In re* Sch. Asbestos Litig., 977 F.2d 764, 796–98 (3d Cir. 1992) (division of state laws into four categories that encompass the variations in the product liability laws of the states may prove successful; plaintiff's proposal to pursue the strictest state standards of liability would raise constitutional issues about whether class members from a state with a less strict law could be precluded from challenging an adverse decision based on another state's stricter standard). *See also In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001); *In re* Telectronics Pacing Sys., Inc. Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 880 (6th Cir. 2000); Watson v. Shell Oil

22.635 Electronic Communications[1302]

Effective management requires constant attention to developments in the litigation. The judge must promptly identify and resolve problems, such as difficulties in implementing current orders. Soliciting frequent feedback on the operation of the case-management plan usually yields the information necessary to adjust procedures. Establishing an electronic mechanism for ongoing communication among the lawyers and the court during the course of complex mass tort litigation has become essential.[1303]

22.7 Class Actions in Mass Tort Cases

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Federal courts have "ordinarily" disfavored—but not ruled out entirely—using class actions in dispersed mass tort cases.[1304] After experimenta-

Co., 979 F.2d 1014 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh'g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing).

1302. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 173 (E.D. Pa. July 13, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (setting up Web site); *see also In re* Baycol Prods. Litig., MDL No. 1431, Order No. 18 (D. Minn. May 9, 2002), *at* http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial.htm (last visited Dec. 2, 2003) (setting up electronic filing, service, storage, and delivery of documents via Web site); *id.*, Order No. 19 (D. Minn. May 9, 2002) (setting up protocol for production of documents from electronic storage); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, Order No. 4 (E.D. La. Nov. 21, 2000), *at* http://propulsid.laed.uscourts.gov/orders.htm (last visited Nov. 10, 2003) (setting up electronic records protocols).

1303. *In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order No. 7 (N.D. Ala. Oct. 6, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (establishing an electronic bulletin board). The court also established a Web site located on the Federal Judicial Center's homepage at http://www.fjc.gov/BREIMLIT/mdl926.htm (last visited Nov. 10, 2003).

1304. "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of

tion with class treatment of some mass torts during the 1980s and 1990s,[1305] the courts have greatly restricted its use in mass torts litigation.[1306] Mass tort personal injury cases are rarely appropriate for class certification for trial. In a settlement context, the proposed class must meet Rule 23 requirements, with the exception of trial manageability, and the court must carefully review the proposed settlement terms to ensure that they are fair, reasonable, and adequate.[1307] The trend appears to be that cases involving significant personal injuries should not be certified for trial, particularly on a nationwide or multistate basis, because individual issues of causation and individual damages often predominate and state law often varies. Property damage claims may be different—if the amounts at issue in each individual claim are too small, individual litigation may not be a superior, or even feasible, alternative for resolution, especially when the proposed mass tort rests on a novel or untested scientific or legal claim. Some courts have addressed these difficulties by certifying some, but not all, issues for class treatment, and by structuring subclasses under Federal Rule of Civil Procedure 23(c)(4) to reflect state law differences.[1308] This section examines the case-management challenges presented by mass tort litigation and settlement class actions.

22.71 Background[1309]

In the 1980s and 1990s, some district courts certified mass tort class actions on an opt-out basis under Rule 23(b)(3) for litigation arising both

damages but also of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. P. 23 committee note, *reprinted in* 39 F.R.D. 69, 103 (1966). For a detailed discussion of a relatively brief trend away from this view, see *In re A.H. Robins Co.*, 880 F.2d 709, 729–38 (4th Cir. 1989).

1305. *See* Manual for Complex Litigation, Third, § 33.262 (1995).

1306. *See*, *e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). *But see* Valentino v. Carter-Wallace, 97 F.3d 1227 (9th Cir. 1996) (declining to adopt across-the-board rejection of class treatment in pharmaceutical injury mass tort claim).

1307. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

1308. *See* Simon v. Philip Morris, 200 F.R.D. 21 (E.D.N.Y. 2001) (appeal pending); *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 172 F.R.D. 271 (S.D. Ohio 1997); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456 (D. Wyo. 1995); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 158 F.R.D. 485 (D. Wyo. 1994).

1309. For a comprehensive review of class action activity in mass tort litigation, see Rheingold, *supra* note 1271, §§ 3:13 to 3:43.

from single incident mass disasters[1310] and dispersed mass torts.[1311] Opinions in those earlier cases should be read with caution in light of subsequent rulings of the Supreme Court and courts of appeals. For an instructive approach, see that taken by the district and appellate courts that have determined or reviewed class certification requests in the mass tort context after the *Amchem* and *Ortiz* decisions.[1312]

As mass tort litigation expanded and became more prevalent, the phenomenon of a settlement class action emerged—that is, a class certified for settlement purposes only, that may not meet all the requirements for class certification for trial. Sections 22.72 and 22.73 discuss the various types of settlement classes and the important differences among them.

In some mass tort cases, judges focus on common issues of fact or law and carve out issues classes for certification under Rule 23(c)(4)(A),[1313] expressly

1310. Watson v. Shell Oil Co., 979 F.2d 1014, 1020–21 (5th Cir. 1992) (personal injury and property damage claims arising from oil refinery explosion), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh'g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (opt-out class of water-contamination victims in vicinity of a landfill); *In re* Fed. Skywalk Cases, 95 F.R.D. 483 (W.D. Mo. 1982) (certifying opt-out class of business invitees injured in collapse of hotel skywalk after mandatory class was vacated); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977) (Beverly Hills Supper Club fire), *mandamus denied sub nom*. Union Light, Heat & Power Co. v. U.S. Dist. Ct., 588 F.2d 543 (6th Cir. 1978).

1311. *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986) (nationwide Rule 23(b)(3) class of schools presenting property damage claims associated with asbestos-containing building materials used in the schools); Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (districtwide class of asbestos personal injury claimants to resolve specific issues, including the "state-of-the-art" defense); *Albuterol*, 158 F.R.D. at 485 (wrongful death and personal injury claims relating to a contaminated batch of drugs); *In re* Agent Orange Prods. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) (nationwide class of Vietnam veterans exposed to dioxins certified under Rule 23(b)(3) for compensatory relief and under Rule 23(b)(1)(B) for punitive damages), *aff'd*, 818 F.2d 145, 163–67 (2d Cir. 1987).

1312. *See, e.g.*, *In re* The Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (affirming class-wide compensatory damages verdict, vacating class-wide punitive damages verdict on review of judgment from multiphase class-wide trial in single incident mass tort certified under "limited punishment" theory as mandatory litigation class action); *see also In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870 (6th Cir. 2000) (reversing mandatory settlement-purposes class certification pursuant to *Ortiz*). The Sixth Circuit *Telectronics* decision left undisturbed the earlier decision granting a Rule 23(b)(3) litigation class, and the case was later settled on a Rule 23(b)(3) basis. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001).

1313. See *infra* section 22.75 for a discussion of issues classes in light of the decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (issues class to determine negligence liability for infected blood decertified on mandamus); *cf. Jenkins*, 782 F.2d at 473 (certifying asbestos personal injury claimant class to resolve common issues, including the "state of the art"

providing for the resolution of individual issues through nonclass procedures, such as individual hearings or alternative dispute resolution. Recently, questions have been raised about the constitutionality, fairness, and usefulness of issues classes in the mass tort context.[1314] Section 22.75 discusses issues classes.

The Supreme Court in *Amchem* and *Ortiz* examined class certification standards in the dispersed mass tort context. The Court focused on settlement classes, but identified principles that apply generally to class certification issues. After *Amchem*, cases can still be certified for settlement purposes only, but they must meet all of Rule 23(a)'s certification standards and all of those in Rule 23(b)(3) except manageability for trial. *Ortiz* has greatly restricted the use of Rule 23(b)(1) to certify mass tort settlement classes on a limited fund theory. Section 22.74 discusses the specific issues in using Rule 23(b)(2) to certify medical monitoring settlement class actions.

22.72 Post-*Amchem* Class Certification

After the 1997 *Amchem* decision, a court reviewing a proposed mass tort settlement class action faces two questions: Can the case be certified for settlement? And can the settlement be approved as fair, reasonable, and adequate to the absent class members? This section considers the first question; section 22.92 considers the second, and quite separate, question. The *Amchem* Court unequivocally held that a finding that a proposed settlement is fair does not resolve whether a settlement class can be certified under Rules 23(a) and 23(b).[1315]

In *Amchem,* the Supreme Court ruled that, in order to be certified, a settlement class must meet the requirements in Federal Rules of Civil Procedure 23(a) and (b), even though the parties do not intend to try the case. A court may take the settlement into account in deciding whether Rules 23(a) and (b) are met in that the court need not find that trial manageability is satisfied.[1316] The Court noted, however, that those portions of Rule 23 that are

defense where law of only one state applied); *Albuterol*, 158 F.R.D. at 491–92 (certifying issues class for negligence and breach of warranty claims related to contamination of bronchodilator).

1314. *See, e.g.,* Castano v. Am. Tobacco Co., 84 F.3d 734, 748–51 (5th Cir. 1996) (decertifying issues class, citing Seventh Amendment and fairness grounds); *Rhone-Poulenc*, 51 F.3d at 1298–1304 (same).

1315. *Amchem*, 521 U.S. at 622 ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair' then certification is proper.").

1316. *Id.* at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial.").

"designed to protect absentees by blocking unwarranted or overbroad class definitions . . . demand undiluted, even heightened, attention in the settlement context."[1317]

The Court rejected the parties' proposed nationwide settlement in *Amchem* involving hundreds of thousands of class members and twenty asbestos manufacturers because the proposed class was "sprawling" and because common issues failed to predominate over individual issues, as required for an opt-out class action under Rule 23(b)(3).[1318] The class's sprawl or lack of cohesiveness also implicated Rule 23(a)(4)'s adequacy-of-representation requirement because the interests of some class members and representatives conflicted with those of other members and representatives. In particular, the interest of present claimants asserting asbestos-related injuries conflicted with the interests of future claimants, both those who knew they had been exposed but had not manifested any injury, and those who had no manifest injury and did not even know that they had been exposed.[1319] The Court also noted with concern—but did not rule on—the difficulties of providing adequate notice to future claimants, particularly those who might not know that they had been exposed to asbestos dust or injured by it. The court pointed out "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[1320]

After *Amchem*, judges asked to certify mass tort class actions for settlement purposes only must scrutinize the cohesiveness, adequacy of representation, and predominance of common issues presented in the proposed class. In *Amchem* itself, indications of the lack of cohesiveness included the nationwide dispersal of cases and the wide range of differences in the asbestos products, claimants' exposures to varied asbestos products, medical histories, severity of injuries, and the presence of alternative causal agents, particularly smoking history.[1321] Judges have also applied *Amchem's* teachings to mass tort litigation outside of the asbestos context, finding deficiencies under Rule 23 that preclude certification.[1322]

1317. *Id.*

1318. *Id.* at 622–25.

1319. *Id.* at 625–28.

1320. *Id.* at 628.

1321. *See* John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims After Amchem Products, Inc. v. Windsor,* 33 Tort & Ins. L.J. 905, 913 (1998) ("[O]ther, unnamed Rule 23 criteria warranted undiluted or even heightened scrutiny—presumably, the criteria that relate to the 'cohesiveness' of the class.").

1322. *See* text accompanying *infra* notes 1328–29.

Courts have created subclasses to respond to concerns about adequacy of representation, providing separate representation for each.[1323] Each subclass, however, must also meet all the applicable certification criteria of Rule 23.[1324] The individual nature of many exposure, causation, and damages issues may predominate even within a proposed subclass. Such differences can extend far beyond conflicts between present and future claimants and can defeat certification even if there are no future claimants involved.

Two post-*Amchem* mass tort exposure cases illustrate the importance of subclassing. Both involve claims related to defective pacemaker leads. In the first case, a district judge certified subclasses for medical monitoring, negligence, and strict liability claims, but rejected a subclass for punitive damages. Where the laws of various states differed, the judge created subclasses for each of the major groups of state laws, and later approved a settlement of an opt-out class based on the subclasses previously created.[1325] The other case involved a similar product manufactured by the same defendant. The district judge denied plaintiffs' motion to certify a class to litigate claims for negligence,

1323. Aldock & Wyner, *supra* note 1321, at 914 ("[A] prudent reading of *Amchem* would suggest that subclasses, with separate representatives and counsel, should be established where a strong case can be made that groups of class members have conflicting settlement goals."); Stephen A. Saltzburg (moderator), *The Future of Class Actions in Mass Tort Cases: A Roundtable Discussion,* 66 Fordham L. Rev. 1657, 1681–82 (1998) (Judge Weinstein recounts his experience in the *Manville* litigation in which the first settlement was "properly reversed" for lack of subclasses and then resettled "on a different basis"); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 828 (1995) ("Adequate representation of a huge class of future tort claimants is possible, if at all, only if the lawyers negotiating for the class are representative of all the major divisions and groups within the class.").

1324. Walker v. Liggett Group, Inc., 175 F.R.D. 226, 233 (S.D. W. Va. 1997) (holding that a proposed class of past and present cigarette smokers, their families and estates, those exposed to secondhand smoke, and those who paid medical claims was "of such diversity and enormity that adequacy of representation cannot be achieved even with separate representatives and subclasses").

1325. *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 172 F.R.D. 271 (S.D. Ohio 1997) (certifying a mandatory class pursuant to Rule 23(b)(1)(B) and approving a settlement creating a "limited fund" and releasing the parent corporations as well as the subsidiary from further liability). The court of appeals rejected the settlement and the certification of a Rule 23(b)(1)(B) class and held that "bootstrapping of a Rule 23(b)(3) class into a Rule 23(b)(1)(B) class is impermissible and highlights the problem with defining and certifying class actions by reference to a proposed settlement." *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 880 (6th Cir. 2000). After remand, the district court approved a revised settlement providing opt-out rights. *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001).

products liability, and medical monitoring. The court of appeals affirmed,[1326] holding that the common issues did not predominate, in part because plaintiffs had not submitted a plan for designating subclasses that would satisfy Rule 23.[1327]

Amchem does not categorically preclude certification of a mass tort personal injury or property damage settlement class action. Since *Amchem*, however, a number of district courts have refused to certify dispersed personal injury or property damage mass tort class actions for the purpose of trial, or have decertified them,[1328] finding that varying state laws and individual issues of exposure, causation, and damages defeat the predominance requirement of Rule 23(b)(3), making trial unmanageable. Another basis for rejecting certification is that such variations make class representatives inadequate or atypical of the interests of the absent class members.[1329]

Since *Amchem*, a number of district courts have also refused to certify, or have decertified, mass tort class actions proposed for settlements, or have refused to approve the settlement terms. For example, in a case dealing with a proposed settlement arising out of alleged intentional exposure of workers to radioactive isotopes, the judge rejected a proposed settlement in part because it favored the interests of current employees over the interests of past employees and retirees.[1330] In a case dealing with the alleged exposure of cancer patients to high doses of radiation without their consent, the judge declined to review a proposed settlement because the proposed class did not satisfy the requirements of either Rule 23(a) or (b).[1331] In the former case, the judge reviewed and rejected the entire settlement before ruling on the certification motion. In the

1326. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1198 (9th Cir. 2001) (Fletcher, B., dissenting). The dissent concluded that common issues predominate and that "representative subclasses based on state law commonalities" would satisfy Rule 23's superiority requirement. *Id*. at 1199.

1327. *Id.* at 1190.

1328. *See, e.g., In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); Spence v. Glock, 227 F.3d 308 (5th Cir. 2000); Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323 (S.D.N.Y. 2002); Walker v. Liggett Group, 175 F.R.D. 226 (S.D. W. Va. 1997).

1329. *See, e.g., MTBE*, 209 F.R.D. at 338–41.

1330. Levell v. Monsanto Research Corp., 191 F.R.D. 543, 548–49 (S.D. Ohio 2000) (noting that, after *Amchem,* "if class certification is not appropriate under Rule 23(a) and (b), then the Court *cannot* approve the proposed Agreement"). The court also noted that the parties had up until the proposed settlement disputed the issue whether a class could be certified. *Id.*

1331. *In re* Cincinnati Radiation Litig., No. C-1-94-126, 1997 WL 1433832 (S.D. Ohio Aug. 4, 1997). Two years later, the same judge reviewed and approved a revised settlement and certified a hybrid opt-out class under Rules 23(b)(2) and (d)(2). *In re* Cincinnati Radiation Litig., 187 F.R.D. 549 (S.D. Ohio 1999).

latter case, the judge denied certification at the preliminary approval stage and thereby avoided the need to conduct a full review of the settlement. See section 21.63. The better practice is to determine class certification at the preliminary approval stage, thus resolving the central issue of class certification before investing the significant resources required in reviewing what is often a complex settlement agreement and the considerable costs of providing notice to the class.[1332]

In a number of cases, however, judges have continued to certify settlement class actions in the mass tort context, particularly when there are no unknown future claimants and the absent class members are readily identifiable and can be given notice and an opportunity to opt out.[1333] Those judges have emphasized that because the case will be settled rather than tried, differing state laws that might make a class-wide trial unmanageable do not defeat certification for settlement purposes only. The judges address the differences among state laws by certifying subclasses and appointing separate class representatives and counsel for each subclass.[1334] In evaluating the proposed settlements, judges have taken differing state laws into account to ensure that similarly situated claimants do not receive disparate treatment.[1335] In other settlements dealing with the laws of more than one state, parties and judges have avoided choice-of-law and adequacy-of-representation problems by framing settlement

1332. For an example of a case in which the court combined a ruling on certification of a proposed settlement class with a ruling preliminarily approving a proposed settlement, see *In re Inter-Op Hip Prosthesis Liability Litigation*, 204 F.R.D. 330 (N.D. Ohio 2001).

1333. *See, e.g., In re* Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., No. 1:01-CV-9000, 2001 WL 1842315, at *7 n.9, *14 (N.D. Ohio Oct. 20, 2001) (conditionally certifying settlement class and noting that a "'single set of operative facts establishes liability'" and a "single proximate cause applies to each potential class member"); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *41, *69 (E.D. Pa. Aug. 28, 2000) (certifying settlement class and finding claimants shared single product and common injury).

1334. *See, e.g., Diet Drugs,* 2000 WL 1222042, at *50–*53 (discussing the differences in benefits for different groups of claimants and the role of counsel for subclasses in the negotiations).

1335. *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985, 1022–24 (S.D. Ohio 2001). *See also* Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1146–47 (8th Cir. 1999) (analyzing differences in settlement amounts for property damage claims in different zones and finding sufficient "'structural assurance' of adequate representation" required by *Amchem*); *Diet Drugs,* 2000 WL 1222042, at *47–*49 (discussing the reasons for the different treatment of neurotoxic injuries, which received no benefits but were released in the settlement); *id.* at *50–*53 (discussing the differences in benefits for different groups of claimants and the role of counsel for subclasses in the negotiations); *Levell*, 191 F.R.D. at 551 (rejecting settlement because "it disparately benefits current employees, who are represented by nearly all of the named class members, at the expense of former employees and retirees").

allocations in terms of matrices of benefits based on differences in the severity and impact of various injuries.[1336]

22.73 Post-*Ortiz* Mandatory Limited Fund Class Settlements

In *Ortiz v. Fibreboard Corp.*, the Court summarized the traditional and "presumptively necessary" characteristics of a limited-fund class action under Rule 23(b)(1)(B) as "[1] a 'fund' with a definitely ascertained limit, [2] all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, [3] by an equitable, pro rata distribution."[1337] The Court refused to recognize an amount of insurance proceeds that the parties had agreed to make available as a limited fund, despite recognition that without the settlement the insurance would be subject to competing claims, and in any event fell below the amounts of projected claims.

Before *Ortiz*, judges had occasionally certified mandatory (i.e., non-opt-out) settlement classes under Rule 23(b)(1) in mass tort cases.[1338] Parties invoked such limited-fund class actions typically as settlement class actions in situations in which "a defendant's potential tort liability . . . threatens to overwhelm the company's assets."[1339] The limited-fund class action usually represented an effort to resolve mass tort liability without forcing a company to file for reorganization under the bankruptcy laws.[1340] *Ortiz* put in doubt the viability of limited-fund class actions in mass tort cases. The requirements are so difficult to meet that a number of companies have turned to Chapter 11 reorganization as a means of limiting mass tort suits and attempting a global resolution of the claims rather than asserting that their assets can be consid-

1336. *See, e.g., Sulzer*, 2001 WL 1842315, at *11 n.15, *14 (N.D. Ohio Oct. 20, 2001) (conditionally certifying settlement class and finding "parties' tentative identification of appropriate factors to include in the matrix" supports a preliminary finding of fairness); *Diet Drugs*, 2000 WL 1222042, at *19–*29, *68 (certifying settlement class and approving matrix compensation benefits).

1337. Ortiz v. Fibreboard Corp., 527 U.S. 815, 841–42 (1999).

1338. *See In re* A.H. Robins Co., 880 F.2d 709, 738–40 (4th Cir. 1989) (discussing trend of certifying mass torts for settlement). *But see In re* Joint E. & S. Dists. Asbestos Litig. Corp., 982 F.2d 721, 735–45 (2d Cir. 1992) (vacating district court approval of a settlement class in which competing interests of subgroups of personal injury claimants and codefendants were combined and represented collectively); *see also infra* section 22.9 (settlement). For a post-*Amchem*, pre-*Ortiz* limited fund certification, see *In re Orthopedic Bone Screw Products Liability Litigation*, 176 F.R.D. 158 (E.D. Pa. 1997). For a detailed discussion of the orthopedic bone screw litigation, see Gibson, Case Studies, *supra* note 1160, at 127–58.

1339. Gibson, Case Studies, *supra* note 1160, at 7.

1340. For an in-depth comparison of limited fund procedures under Rule 23 with comparable procedures under the Bankruptcy Code, see Gibson, Case Studies, *supra* note 1160.

ered a limited fund.[1341] Section 22.5 discusses the management of bankruptcies involving mass tort claims. This section discusses the conditions the Court imposed in *Ortiz*. Note that satisfaction of those conditions for a limited fund does not necessarily require the court to approve a mandatory limited fund action under Rule 23(b)(1)(B), either for settlement or for litigation. The Supreme Court in *Ortiz* announced that it could not, in the context of that case, "decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment."[1342] The court said that "the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question . . . ."[1343]

Ortiz provides guidance for district judges to follow in reviewing proposed limited fund class settlements under Rule 23(b)(1)(B). A court must

- undertake an independent investigation as to whether the valuation of the assets comprising the proposed fund has been set at the upper limit;[1344]
- determine on the record the value of present and future tort claims against the limited fund and whether the fund is adequate to meet those claims;[1345]
- analyze any side agreements, such as the contingent settlement of present claims, that might affect the incentives of attorneys for the class;[1346]

1341. According to the Rand Institute for Civil Justice, twenty-two companies filed asbestos-related bankruptcies between January 2000 and July 2002. Carroll, *supra* note 1161.

1342. Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999). The court specifically raised questions about limitations that might inhere in the Rules Enabling Act, 28 U.S.C. § 2072(b) (requiring that federal rules of procedure "not abridge, enlarge or modify any substantive right"), and the Seventh Amendment rights of absent class members, including future claimants, to trial by jury and due process. *Ortiz*, 527 U.S. at 845–47.

1343. *Id.* at 864.

1344. *Id.* at 852 (referring to the general assets of the company plus any insurance coverage and calling for an independent valuation repeatedly in this section of the opinion). A trial court has numerous options, such as directing the parties to present evidence and argument on specific issues, including those in the text following this note, or appointing a magistrate judge, special master, Federal Rule of Evidence 706 expert, or a technical advisor. *See generally supra* section 20.14.

1345. *Ortiz*, 527 U.S. at 849 ("Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge.").

1346. *Id.* at 852–53.

- compare the interests of different claimants who are included in the class, such as present versus future claimants, and consider whether those differing interests were adequately represented in the negotiations;[1347]
- compare the interests of those in the class with those not in the class, such as present claimants who settled before the class was certified or claimants who opt out of the settlement;[1348] and
- consider who should get the savings of "transaction costs" in settlement agreements, plaintiffs or defendants (which the Supreme Court found to be "at least a legitimate question, which we leave for another day").[1349]

Based on *Ortiz*, several judges have invalidated limited fund settlements approved before the Court's decision.[1350] Some commentators have expressed doubts as to whether a limited-fund class action is ever appropriate in a mass tort[1351] and whether a class action provides structural fairness equivalent to the

1347. *Id.* at 856 ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. *See Amchem*, 521 U.S. at 627.").

1348. *Id.* at 854–55. *Cf. In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *1 (6th Cir. Oct. 29, 2001) (staying an injunction against pursuing claims in other forums that "imposes significant financial disincentives on the right to opt out of a proposed class action settlement").

1349. *Id.* at 861. For further discussion of the allocation of savings in a "going concern" settlement, see Matthew C. Stiegler, Note, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After* Ortiz v. Fibreboard Corporation, 78 N.C. L. Rev. 856, 895–99 (2000).

1350. *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 877 (6th Cir. 2000) (mandatory limited fund class settlement approved by district court before *Ortiz* held invalid for failure to satisfy the *Ortiz* criteria, noting that "the applicability of Rule 23(b)(1)(B) to a fund purporting to liquidate actual and potential tort claims is 'subject to question'"); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 1999 WL 782560, at *6–*12, *14 (E.D. Pa. Sept. 27, 1999) (district court disapproved a mandatory limited fund proposed for a Rule 23(b)(1)(B) settlement class that the court had conditionally certified before *Ortiz,* holding that the proposed settlement did not satisfy any of the three criteria in *Ortiz*'s historical model). *But cf.* Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1143–48 (8th Cir. 1999) (affirming mandatory settlement for pollution damages and injunctive relief, distinguishing *Ortiz,* and ruling that differences in damages among class members do not necessarily create conflicts of interest that require subclasses).

1351. *See* Gibson, Case Studies, *supra* note 1160, at 37–38 ("[t]he larger question, repeatedly raised but not answered by [the *Ortiz* opinion] was whether a mass tort could ever qualify for mandatory class treatment under Rule 23(b)(1)(B)"); Stiegler, *supra* note 1349, at 900 ("[O]rtiz

Bankruptcy Code.[1352] Others have declared that bankruptcy is the only recourse for companies facing tort claims exposure that may last for years and ultimately prove overwhelming.[1353] The *Ortiz* decision itself did not go this far,[1354] and the Court expressly recognized that an undetermined portion of a company's limited funds may go back into the business.[1355]

22.74 Medical Monitoring Class Actions

In cases involving exposure to allegedly toxic substances in which resulting injury might be latent, plaintiffs may seek certification of a class to provide medical monitoring for the members. Such claims typically seek relief in the form of either a court-administered fund to establish and pay for specific diagnostic testing and research or to prepay for testing or reimburse the class members for costs incurred if and when they obtain such testing on their own.

Medical monitoring has evolved predominantly under state common law[1356] but can also arise under federal[1357] or state statutes.[1358] The elements of

has made limited fund class certification substantially, perhaps prohibitively, more difficult and uncertain.").

1352. Gibson, Case Studies, *supra* note 1160, at 5–6 (concluding that "bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review" while limited fund class action settlements come out ahead . . . with regard to the efficiency of the resolution process and the likelihood that defendant will invoke that resolution method").

1353. *See, e.g., Telectronics*, 221 F.3d at 880 (ruling that imminent threat of bankruptcy does not provide a good reason to approve a limited-fund class action settlement).

1354. *Ortiz*, 527 U.S. at 860 (no inherent conflict between a limited-fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code).

1355. *Id.* at 860 n.34 ("We need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class certification.").

1356. *See*, *e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 787–88 (3d Cir. 1994) (discussing elements of medical monitoring claim and remedy that Pennsylvania would recognize) [hereinafter Paoli II]; Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824–25 (D.C. Cir. 1984) (examining "general principles of tort law, the Restatement (Second) of Torts, and the law of other jurisdictions," the court found that the District of Columbia Court of Appeals would recognize a medical monitoring claim and remedy in a case brought on behalf of children who were at risk of future neurological disorders because they were exposed to severe decompression and loss of oxygen during an airplane flight); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 431–32 (W. Va. 1999) (on certification from federal district court, state court finds a common-law cause of action for medical monitoring in the context of plaintiffs' exposure to allegedly toxic substances in a pile of debris from the manufacture of light bulbs); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979–80 (Utah 1993) (workers exposed to asbestos in the course of renovating an office have a state common-law cause of action to the extent that monitoring is "medically advisable"); Ayers v. Jackson, 525 A.2d 287, 291 (N.J. 1987)

state law claims for medical monitoring typically include exposure to a harmful substance or product that the defendant marketed or wrongfully released into the environment and that has significantly increased the plaintiffs' risk of developing a serious latent disease. Plaintiffs must show that the defendant caused the exposure to the substance and the consequent increase in risk. Courts generally require plaintiffs to show that diagnostic tests exist, that the increased risk has made testing reasonably necessary, and that early detection can significantly improve medical treatment of the disease.[1359] However, courts have not, to date, required plaintiffs to show that the increase in risk constitutes the proximate cause of any injury that might follow, leaving that issue for any personal injury damage actions that might ensue. Some courts have adopted a lesser standard for evaluating how much of an increase in risk plaintiffs must show to trigger the medical monitoring remedy.[1360]

(residents of an area near a landfill that allegedly leaked contaminants into nearby well sought medical monitoring based on their increased risk of developing cancer).

1357. In *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), the Court refused to recognize an individual claim under the Federal Employers' Liability Act (FELA) for lump-sum economic damages for future medical testing required as a result of plaintiffs' exposure to asbestos. The Court, however, avoided ruling out "medical cost recovery rules more finely tailored than the rule we have considered [lump sum damages]," *id.* at 444, and noted that courts recognizing a medical monitoring remedy often imposed limitations on that remedy, such as channeling payments through a court-supervised fund. *Id.* at 440–41. *See also In re* Marine Asbestos Cases, 265 F.3d 861, 866–67 (9th Cir. 2001) (discussing Jones Act claim and concluding that *Metro-North* left the medical monitoring question unresolved as to a similar FELA claim).

1358. *See*, *e.g.,* Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 142 (Pa. 1997) (holding that plaintiffs' claims for medical monitoring based on alleged exposure to toxic chemicals in a park built over a landfill state a cause of action arising under Pennsylvania Hazardous Sites Cleanup Act because medical testing qualifies as a statutory "cost of response" to the release of a hazardous substance), *dismissed on jurisdictional grounds after remand aff'd sub nom.* O'Neil v. Dept. of the Army, 742 A.2d 1095 (Pa. Super. Ct. 1999).

1359. The elements of a medical monitoring claim, as described above in the text, are set out in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990) [hereinafter Paoli I]. *See also Marine Asbestos Cases*, 265 F.3d at 866; Arch v. Am. Tobacco Co., 175 F.R.D. 469, 481 (E.D. Pa. 1997); *Redland Soccer Club*, 696 A.2d at 143–45.

1360. *See*, *e.g.*, *Paoli I*, 916 F.2d at 851 ("[T]he appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future but rather whether medical monitoring is, to a degree of medical certainty, necessary in order to diagnose properly the warning signs of disease."); Ayers v. Twp. of Jackson, 525 A.2d 287, 312 (N.J. 1987) ("Even if the likelihood that these plaintiffs would contract cancer were only slightly higher than the national average, medical intervention may be completely appropriate in view of the attendant circumstances."); *cf.* Donald L. DeVries & Ian Gallacher, *Medical Monitoring in Drug and Medical Device Cases: Taking the Temperature of a New Theory,* 68 Def. Couns. J. 163, 173 (2001)

Some courts have found that the applicable state law precludes medical monitoring claims if the claimants have no present injury.[1361] Still others have held that medical monitoring is "a separate and distinct cause of action."[1362] Many state courts have not addressed whether there is a cause of action or remedy for medical monitoring. A federal district judge managing mass tort diversity litigation might thus consider certifying to the relevant state courts the question whether there is a cause of action for medical monitoring or a medical monitoring remedy.[1363]

Certifying a class action for medical monitoring raises the same threshold issues that apply to all mass torts, see section 22.72, and that apply to class actions generally, see section 21.2. If state law recognizes medical monitoring, either as a cause of action or as a remedy, a judge must still decide whether the proposed class action satisfies the criteria set out in Federal Rule of Civil Procedure 23(a) and the criteria of at least one of the Rule 23(b) types of classes.[1364] The typicality of the class representatives' claims and possible conflicts of interest among class representatives and class members remain critical.[1365] See sections 21.141 (adequacy of representation) and 22.72.

(arguing that plaintiffs should have to show a probability of future harm and citing cases requiring such a showing as well as cases not requiring that level of proof).

1361. *See, e.g.,* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993) (indicating that medical monitoring is a remedy available to a plaintiff who proves defendant's liability); *see also* Crooks v. Metro. Life Ins. Co., 785 So. 2d 810, 811 (La. 2001) (applying statute requiring actual physical harm as a prerequisite to medical monitoring damages).

1362. *Arch*, 175 F.R.D. at 481, and cases cited therein.

1363. *See, e.g.,* Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 428 (W. Va. 1999) (district judge certified question to state supreme court); *but cf. Paoli II*, 35 F.3d 717, 785 (3d Cir. 1994) (summarizing the judges' role in *Paoli I* as "predict[ing] the holding of Pennsylvania courts on a claim for medical monitoring"); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824–25 (D.C. Cir. 1984) (looking to local tort law and general principles of tort law in the Restatement, Second).

1364. See *In re Diet Drugs Products Liability Litigation*, No. CIV.A.98-20626, 1999 WL 673066, at *14–*19 (E.D. Pa. Aug. 26, 1999), for a thorough discussion of procedure and of cases applicable to a court's analysis of Rule 23(a) factors in the context of a proposed medical monitoring class. Note that "'a single common question is sufficient to satisfy Rule 23(a)(2).'" *In re Diet Drugs,* 1999 WL 673066, at *8 (quoting Lake v. First Nationwide Bank, 156 F.R.D. 615, 624 (E.D. Pa. 1994)).

1365. *See generally* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *see also* Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998) ("The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.").

Courts are divided over whether Rule 23(b)(2) or Rule 23(b)(3) is the appropriate vehicle for certifying a mass tort class for medical monitoring.[1366] A key question is whether the primary type of relief plaintiffs seek is for money damages. Rule 23(b)(2) generally applies when the relief sought is a court-supervised program for periodic medical examination and research to detect diseases attributable to the product in question.[1367] If money damages are the primary relief sought in a medical monitoring class, as in programs that pay class members but leave it to the members to arrange for and obtain tests, certification generally must meet the Rule 23(b)(3) standards.[1368] Judges who applied Rule 23(b)(3) have generally found that common issues did not predominate and that differing state laws controlled the claims for medical monitoring. These judges concluded that nationwide or multistate class certification was not a superior method of resolving such claims.[1369]

The choice between application of Federal Rules of Civil Procedure 23(b)(2) and (b)(3) revolves around whether the complaint is seeking predominantly money damages or equitable relief.[1370] That determination requires

1366. *Barnes*, 161 F.3d at 142–44 (affirming decertification); *Diet Drugs*, 1999 WL 673066, at *19 (class certified); Day v. NLO, 851 F. Supp. 869, 885–87 (S.D. Ohio 1999) (certification granted). *But cf.* Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 478–80 (D. Colo. 1998) (decertifying a Rule 23(b)(2) medical monitoring class because the underlying claims are for damages for personal injuries).

1367. *Barnes*, 161 F.3d at 132 (stating that a court-supervised program to detect diseases caused by smoking is a "paradigmatic request for injunctive relief"; certification denied on other grounds); *Diet Drugs*, 1999 WL 673066, at *6 (finding the "request for relief in this action is equitable in nature"); Katz v. Warner-Lambert Co., 9 F. Supp. 2d 363, 364 (S.D.N.Y. 1998) (stating that "[a] claim for a medical monitoring and research fund is injunctive in nature"); Day v. NLO, Inc., 144 F.R.D. 330, 335–36 (S.D. Ohio 1992) (certifying a Rule 23(b)(2) class for medical monitoring in the form of a court's program, managed by court-appointed, court-supervised trustees, and using monitoring data for group studies and distinguishing programs seeking monetary relief).

1368. *See* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001) (holding that establishment of reserve fund for past and future damages and compensation for future medical treatment was primarily a claim for money damages; claim for research into alternative methodologies to uncover remedies for class members' conditions amounted to incidental injunctive relief); Arch v. Am. Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997) (claims for relief are primarily for treatment, hence primarily for damages, not injunctive relief).

1369. *See In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 70–71 (S.D.N.Y. 2002) (denying certification because choice-of-law issues defeat superiority); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 350 (S.D.N.Y. 2002) (concluding that "the class action device in this case is not superior to a combination of individual suits and state agency relief").

1370. *Zinser*, 253 F.3d at 1195 (rejecting plaintiffs' argument that their complaint called for equitable relief and stating "[a] request for medical monitoring cannot be characterized as primarily equitable or injunctive *per se*"); *Arch*, 175 F.R.D. at 483 ("The court . . . may properly

an informed understanding of the essential nature of the medical monitoring relief that plaintiffs prove to be necessary in the particular case.

If medical monitoring is available under the applicable state law and the nature of the relief sought is equitable, the court must then decide whether the proposed class meets Rule 23(b)(2)'s requirement that "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." In general, Rule 23(b)(2) requires that the class be "cohesive"[1371] in that "the defendant is alleged to have acted in some uniform way toward the class . . . and that the injunctive relief requested is applicable to the entire class."[1372] In cases seeking multistate class certification, the court must determine whether applicable state laws are uniform or whether significant differences can be addressed by certification of subclasses.[1373]

Also important is whether the diagnostic procedures requested are reasonably necessary and likely to provide benefits to the class.[1374] One court has framed the test as whether "informed physicians . . . would recommend routine monitoring on the basis of" former use of the product in question.[1375] Another court examined whether plaintiffs can prove "the existence of accepted medical monitoring regimes that make early detection of [the diseases in question] possible and beneficial."[1376] State and federal medical monitoring case law development remains dynamic and variable.[1377]

certify a medical monitoring claim under Rule 23(b)(2) when the plaintiffs seek such specific relief which can be properly characterized as invoking the court's equitable powers.").

1371. *Barnes*, 161 F.3d at 143.

1372. *Diet Drugs*, 1999 WL 673066, at *6 (holding that request for medical monitoring relief "in this action is equitable in nature"). Applicability to the entire class does not mean that the class definition or the use of subclasses cannot further define or limit the scope of the class to achieve cohesiveness. *Id.* at *11–*12 (establishing subclasses and defining the class to exclude, for example, those who used diet drugs for fewer than thirty days).

1373. *See, e.g., id.*

1374. *See* text accompanying *supra* notes 1357–60.

1375. *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 73–74 (S.D.N.Y. 2002).

1376. Carey v. Kerr-McGee Chem. Corp., 60 F. Supp. 2d 800, 811 (N.D. Ill. 1999).

1377. *See, e.g., Rezulin*, 210 F.R.D. at 75 (denying certification of medical monitoring Rule 23(b)(2) class, finding the proposed class lacked cohesion and individual issues, making it unmanageable); *In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 143–47 (E.D. La. 2002) (denying certification of the proposed class and noting variations in state recognition of medical monitoring as a claim or remedy).

22.75 Issues Classes

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Rule 23 provides that "an action may be brought and maintained as a class action with respect to particular issues" under Rule 23(c)(4)(A),[1378] but courts have held that the proponent must show that issue certification "will materially advance a disposition of the litigation as a whole."[1379] Section 21.24 discusses the role of issues classes in class actions generally.

In deciding whether an issues class will materially advance the disposition of a set of mass tort cases, courts often consider the following factors:

- the issue(s) to be resolved on a class-wide basis;
- the applicable law, based in part on whether the cases arise from a single incident or a series of dispersed activities;[1380]

1378. Fed. R. Civ. P. 23(c)(4)(A). The rule was intended to recognize that "an action may be maintained as to particular issues only," for example, by separating class adjudication of liability from individual adjudication of damages. *Id.*, committee note to 1966 Amendment, subdivision (c)(4). *See also* Simon v. Philip Morris, Inc., 200 F.R.D. 21 (E.D.N.Y. 2001) (analyzing Rule 23(c)(4)(A) in the historical context of the Seventh Amendment) (appeal pending).

1379. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 n.12 (2d Cir. 2001). *See also In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 351–53 (S.D.N.Y. 2002); Sprague v. Gen. Motors Corp. 133 F.3d 388, 397 (6th Cir. 1998) (stating that the court is looking for a common issue that will advance and resolve the litigation); Harding v. Tambrands, Inc., 165 F.R.D. 623, 630 (D. Kan. 1996) ("[c]ertification [of 'general causation'] would not materially advance the disposition of the litigation as a whole" where individual issues of causation and damages under the laws of fifty states would remain); *cf. In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 352 (D.N.J. 1997) ("If there were certain basic issues (such as defect) to which only one state's laws applied and concerning which class-wide issues predominated, the court could consider certifying a class with respect to those issues only.") (citing Fed. R. Civ. P. 23(c)(4)).

1380. *See, e.g.*, *MTBE*, 209 F.R.D. at 330 (alleging widespread dispersed groundwater contamination by petroleum companies as a result of a gasoline additive); *cf.* Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 623 (5th Cir. 1999) (casino employees claiming they developed respiratory illness caused by the casino's "defective and/or improperly maintained air-conditioning"); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229 (9th Cir. 1996) (claiming side effects arising from taking a single drug by a single manufacturer for a relatively short period); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 457 (D. Wyo. 1995) (claims arising from a nationwide recall of a bronchodilator prescription pharmaceutical following alleged incident of contamination).

- in dispersed mass tort cases, whether a limited and manageable set of state or federal substantive laws would apply in a trial of specific issues;
- if there are differences in applicable state laws, whether subclasses can be used to organize the applicable laws into manageable categories;
- whether each common issue is sufficiently separable from the individual issues so that it need not be "reexamined" in individual trials that may follow;
- whether the remaining issues of liability or damages will be resolved, an analysis often aided by trial plans that the parties submit; and
- the impact that determining the common issues will have on advancing the litigation as a whole.

22.751 Identify the Issues

The threshold question is whether there is a separate common issue that can be certified under Rule 23(c)(4)(A). In mass tort litigation, issues classes have been used to establish liability elements, such as general causation, negligence, or breach of warranty.[1381] Judges have also certified issues classes to establish class-wide affirmative defenses, such as the state of the art,[1382] the defendant's status as a government contractor,[1383] and medical monitoring claims (see section 22.74). Issues of specific causation and resulting damages to exposed individuals, however, cannot fairly or realistically be decided on a class-wide basis. As discussed in section 22.756, the judge and parties need to design other appropriate structures for resolving individual issues if adjudication of common issues establishes entitlement to damages upon proof of injury. The fact that such procedures will eventually be required does not

1381. *See, e.g.,* Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 912 (7th Cir. 2003) (identifying as common issues leakage of contaminant by defendant and the geographical limits of the leakage); *In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124 (9th Cir. 2002) (identifying general causation as potential issue for class treatment, approving certification of Price-Anderson Act common liability issues as issues class, and approving bifurcated trial with common issues trial followed by individual trials of causation and damages issues); Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (affirming certification of asbestos personal injury claimant class to resolve common liability issues and the "state of the art" defense); *Albuterol*, 161 F.R.D. at 467 (certifying issues classes for negligence and breach of warranty claims relating to contamination of bronchodilator).

1382. *Jenkins*, 782 F.2d at 473.

1383. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 166–67 (2d Cir. 1987).

necessarily defeat the predominance or superiority requirements of Rule 23(b)(3).[1384]

22.752 Determine Applicable Law

The choice of applicable law is critical. It often turns on whether the mass tort in question derives from a single incident in a confined locale or from a series of events dispersed by geography or time, or both. For example, a court addressing a Jones Act case dealing with occupational respiratory illnesses allegedly caused by a defective ventilation system on board a ship found that certification of an issues class was appropriate.[1385] The discrete issue presented in that case was very different from the "'Frankenstein Monster'" later described by the same court in rejecting an issues class for a nationwide group of millions claiming damages for tobacco addiction.[1386]

The dichotomy between a single incident and a dispersed mass tort is not always so clear. In a case involving a contaminated product that was distributed nationally before its recall, a judge certified an issues class as to liability. The judge found that defendant's admission of liability for some of the contamination, the widespread use of strict liability concepts by the states involved, and the improbability that comparative negligence would apply to use of a contaminated product, made the applicable law and proof consistent across the class.[1387] At the other end of the spectrum, in the Methyl Tertiary Butyl Ether (MTBE) multidistrict litigation, a group of plaintiff ground well owners complained of contamination from MTBE, a product used as a gasoline additive that had allegedly leaked into groundwater sources. The district court rejected an effort to certify "the appropriateness of injunctive relief" or "general liability" as issues classes under Rule 23(c)(4). The court also held that the proposed injunctive issues class failed to meet Rule 23(b)(2) criteria: The well owners were not a cohesive class because of the differences in the levels of any contamination, in the sources of any contamination, in the effects on each plaintiff, and in the extent and nature of relief required.[1388] The

1384. *See Jenkins*, 782 F.2d at 472–73.

1385. *Mullen*, 186 F.3d at 620 (approving certification of Jones Act common liability issues as issues class and approving bifurcated trial with common issues trial of negligence and seaworthiness followed by individual trials of causation and damages issues); *see also Mejdrech*, 319 F.3d at 911 (all class members in groundwater pollution case proceeding under same state and federal laws).

1386. Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996).

1387. *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 464–65 (D. Wyo. 1995).

1388. *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 341–44 (S.D.N.Y. 2002).

court also held that the general liability issues class would not materially advance the litigation and would be subject to the individual differences among plaintiffs, requiring countless individual trials.[1389]

22.753 Identify a Limited Set of Laws[1390]

Where the cases are derived from activities with dispersed origins, an issues class will advance the litigation only if it can proceed to jury trial with clear instructions relating to a common legal standard or a small group of standards. Drafting sample jury instructions may help to clarify whether an issues class will work. Where liability relates to an allegedly defective product, Restatement of Law principles may be applicable and an issues class may be viable.[1391] With regard to negligence claims that are strongly disputed, courts could face the ungainly prospect of a "single trial before a single jury instructed in accordance with no actual law of any jurisdiction—a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the fifty states and the District of Columbia."[1392] An issues class is rarely viable in such circumstances.

22.754 Subclasses to Reflect Differences in State Law

Determining whether the applicable laws can be grouped into a few sets that are very similar may help determine whether common issues are sufficiently present.[1393] If subclasses are proposed based on different categories of

1389. *Id.* at 344–46.

1390. *See supra* section 22.317. The process of classifying and grouping the pertinent states' laws is a task that has been described as "not . . . fun, but . . . far from impossible." Larry Kramer, *Choice-of-Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 582 (1996). As Professor Kramer observed, "surveying state laws is not the problem that could make mass consolidation unmanageable. Determining the law in many states is not easy, to be sure. But every practicing lawyer has done a fifty-state search at some time in his or her career and this is certainly manageable. Moreover, the time and expense required to ascertain the content of the laws, even in a fifty-state search, are a drop in the bucket compared to the other costs of litigating a mass tort." *Id.*

1391. *See Albuterol,* 161 F.R.D. at 465 (citing *In re* Asbestos Sch. Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984), *modified,* 789 F.2d 996 (3d Cir. 1986)) (observing that "51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts § 388" and "forty seven jurisdictions have adopted strict liability and all of them start with the concept of a defective product," and holding that "substantial duplication" of negligence and strict liability laws in fifty-one jurisdictions make a nationwide class manageable).

1392. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

1393. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 172 F.R.D. 271, 293–94 (S.D. Ohio 1997) (finding that four subclasses "sufficiently take into account state law variations in the law of strict liability"); *Albuterol*, 161 F.R.D. at 465 (directing

applicable state law, each subclass must independently meet all the requirements of Rule 23(a) and at least one of the categories specified in Rule 23(b). See sections 22.72, 21.22, and 21.23.

22.755 Determine Separability of Common Issue

The Reexamination Clause of the Seventh Amendment of the U.S. Constitution provides: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." The courts have divided over the application of this clause to issues classes when two or more trials, with separate juries, will be required.[1394] See section 21.24. In the *Gasoline Products* case, the Supreme Court held that it is consistent with the Seventh Amendment to allow separate juries to hear different issues in the same case, as long as the issues tried to separate juries are so "distinct and separable" that the second jury will not revisit issues determined by the first, and separate trials may be "had without injustice."[1395] See section 21.24. In *Rhone-Poulenc*, the Seventh Circuit concluded that a trial plan under which one jury would first determine the common issue of negligence and subsequent juries would determine comparative negligence and proximate causation violated the Reexamination Clause.[1396] Other courts have concluded that the Seventh Amendment is not offended by a bifurcation of the proceedings into class-wide claims and individual claims, on the ground that the second phase would not involve the "same issues" as the first phase.[1397] See section 22.751. Unless the decision of the first jury will "provide sufficient guidance to allow later juries to implement the first jury's formal findings

that "if an individual state's law is at variance with the general law on a relevant point of law, its residents may be removed from the class"). *Cf.* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001) (rejecting the use of subclasses).

1394. *Compare In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995), *with* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 169 (2d Cir. 2001). *See supra* section 21.24; *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 750–51 (5th Cir. 1996) (ruling that "if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent"); *cf.* Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628–29 (5th Cir. 1999) (distinguishing *Castano* and *Rhone-Poulenc*).

1395. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931). *See also* Ala. v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) (approving a bifurcated statewide class trial of an antitrust action and disapproving a nationwide class action trial plan).

1396. *Rhone-Poulenc*, 51 F.3d at 1303–04.

1397. *See In re* Asbestos Sch. Litig., 789 F.2d 996 (3d Cir. 1986); *see also Albuterol*, 161 F.R.D. at 456.

without confusion or uncertainty, issues cannot be certified."[1398] Use of special verdict forms can provide the specificity necessary for instructing a second jury as to the aspects of the litigation previously resolved. The forms should clearly distinguish among the possible interpretations of the first jury's findings, to allow later juries to understand and apply those findings.[1399]

22.756 Establish a Trial Plan

A trial plan for the proposed common issues class will help determine whether a trial will be manageable and meet all the Rule 23 certification standards. Section 22.93 discusses mass tort trial plans. Any plan should also address individual issues, such as specific causation and damages, and defenses such as comparative negligence or limitations.[1400] Some judges have used trial plans that rely on representative plaintiffs to present test cases, followed by a procedure for determining remaining issues.[1401]

A trial on general liability can impose unfair burdens on parties forced to litigate issues out of context—for example, by trying liability on a class-wide basis without reference to statute of limitations defenses. One concern is that a "composite" issues class is often much stronger than any plaintiff's individual action would be.[1402] A trial plan should identify such risks and propose ways to avoid or minimize them.

1398. Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause,* 83 Iowa L. Rev. 499, 531 (1998). *See also* Steven S. Gensler, *Bifurcation Unbound,* 75 Wash. L. Rev. 705, 736–37 (2000).

1399. *See, e.g.,* Henley v. FMC Corp, 20 Fed. Appx. 108, 118–20 (4th Cir. 2001) (finding an inability to distinguish whether jury finding applied to representative parties or the class as a whole, reversing, and remanding).

1400. Jenkins v. Raymark Indus., 782 F.2d 468, 471 (5th Cir. 1986) (affirming district court's determination that a bifurcated trial plan would best address specific causation and damage issues); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 158 F.R.D. 485, 492 (D. Wyo. 1994) (outlining a bifurcated trial plan to determine class-wide liability and individual causation/damages).

1401. *See, e.g., In re* Shell Oil Refinery, 136 F.R.D. 588, 593–97 (E.D. La. 1991), *affirmed sub nom.* Watson v. Shell Oil Co., 979 F.2d 1014, 1017–20 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh'g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing); *see also* Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 623 (5th Cir. 1999) (providing for hearing individual issues in groups of approximately five class members at a time).

1402. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1301 (7th Cir. 1995); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 352–53 (S.D.N.Y. 2002).

22.757 Assess the Overall Impact[1403]

When one or more issues classes are proposed, a judge should do the following: weigh whether the issues are sufficiently distinct and separate to comply with the Seventh Amendment under the *Gasoline Products* test;[1404] consider the delays that might be occasioned by separate trials; balance the need for individualized determinations, even apart from damages, on issues such as the type or duration of exposure, proximate causation, comparative causation, or the applicability of different defenses; and, ultimately, determine whether certification of an issues class or case-by-case adjudication represents the fairest response to the demands of the Seventh Amendment and due process of law. One court of appeals identified three primary considerations in deciding whether issues could be separately tried in consolidated mass tort litigation: "(1) whether the issue was indeed a separate issue; (2) whether it could be tried separately without injustice or prejudice; and (3) whether the separate trial would be conducive to judicial economy, especially if a decision regarding that question would be dispositive of the case and would obviate the necessity to trying any other issues."[1405]

22.8 Discovery

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Discovery in mass tort cases generally has two distinct dimensions: one involving the conduct of the defendants, and another relating to the individual plaintiffs' conduct, causation, and injuries. Sometimes—particularly in multidistrict litigation—judges direct initial discovery toward matters bearing on the defendants' liability to all plaintiffs.[1406] This approach may be appropriate when liability is seriously disputed. In other cases, however, particularly

1403. For an exploration of the difficulties of applying prior findings in later trials in a mass tort context, see Green, *supra* note 1296.

1404. Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931).

1405. *In re* Bendectin Litig., 857 F.2d 290, 320 (6th Cir. 1988) (affirming constitutionality of bifurcated trial plan).

1406. Videotaped depositions are particularly useful in multidistrict litigation where the testimony of key witnesses may have to be presented at trial in numerous, geographically dispersed transferor (or state) courts after remand. *See generally supra* section 11.452.

those involving "mature" mass torts, the judge and parties prefer at the outset to discover plaintiff-specific information or to conduct discovery from plaintiffs concurrently with discovery from the defendants. Interrogatories inquiring into the extent of the plaintiffs' damages may be useful early in the litigation even if depositions of the plaintiffs are to be delayed. Answers to such interrogatories may be prepared without disrupting the schedule for discovery from the defendants and may be a valuable starting point for settlement discussions. For example, in the Ohio asbestos litigation, special masters worked with the parties to develop standard forms disclosing information that would be relevant to both settlement and trial. [1407]

The volume and complexity of discovery in dispersed mass tort litigation might warrant appointing a special master to assist the court. In the breast implant litigation, the MDL transferee judge resolved discovery disputes without such assistance, but did appoint a special master to coordinate discovery and case management with state court judges handling large numbers of related cases. In the diet drug litigation, the MDL transferee judge appointed a special master to resolve discovery disputes and to help coordinate state and federal litigation.[1408] Other steps to organize discovery and divide work into manageable categories include organizing discovery in waves, as in the diet drug litigation,[1409] or dividing discovery into national, regional, and case-specific categories, as in the breast implant litigation.[1410]

22.81 Sampling

In some cases that involve a massive number of claims for damages for similar injuries and in which causation is not in doubt, sampling techniques can streamline discovery relating to individual plaintiffs' conduct and injuries.[1411] Sampling and surveying by questionnaires can provide information for

1407. *See* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 478–91 (1986); Wayne D. Brazil, *Special Masters in Complex Case: Expanding the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 399–402 (1986); Trends, *supra* note 1077, at 60–69.

1408. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 26 (E.D. Pa. Mar. 30, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003).

1409. *Id.,* Order No. 22 (E.D. Pa. Mar. 23, 1998).

1410. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order No. 5 (N.D. Ala. Sept. 15, 1992), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1411. *See supra* section 11.493; *see also* Hilao v. Estate of Marcos, 103 F.3d 767, 782–87 (9th Cir. 1996) (describing sampling for discovery and aggregated trial of damages issues).

settlement discussions and for test case selection for individual trials.[1412] For example, in a case involving thousands of claimants seeking damages for injuries allegedly caused by eating fish contaminated with DDT, the parties agreed to limit formal discovery to a sample of the claimants randomly selected by a special master.[1413] Responses to questionnaires provided information about the remaining claimants and served as the basis for screening out a substantial number of claims.[1414] In the absence of consent or a settlement, however, litigants are entitled to full discovery and to adjudication consistent with the U.S. Constitution.[1415] Whether the aim is discovery, settlement, or a test-case trial, any sample should be representative of the claims and claimants, taking into account relevant factors such as the severity of the injuries, the circumstances of exposure to the product or accident, the mechanisms of causation, the products and defendants alleged to be responsible, any affirmative defenses, and the applicable state law.[1416] If sampling does not lead to a global settlement, individual discovery of all plaintiffs will likely be needed.

22.82 Initial Disclosures

Federal Rule of Civil Procedure 26(a) specifies information that must be disclosed in advance of discovery. Such disclosures are often inappropriate to mass tort cases because they require repetitive disclosures of the same information to the same attorneys.[1417] The rule permits the judge to order or the parties to stipulate that these requirements do not apply to the particular litigation.[1418] See also section 22.61.

1412. *See supra* sections 11.422, 11.423, 11.464, and *infra* section 22.9. *See also* Brazil, *supra* note 1407, at 402–06 (discussing sampling and surveying techniques used by special master as settlement aid in Alabama DDT case); *In re* Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) (ruling that cases selected for a bellwether trial need to be representative of all cases).

1413. Willhoite v. Olin Corp., No. CV-83-C-5021-NE (N.D. Ala. 1983) (discussed in Brazil, *supra* note 1407, at 402 n.32, 403–06). Use of random sampling apparently quelled defendants' fears that plaintiffs' counsel would otherwise select "a disproportionately small or unrepresentative sample." Brazil, *supra* note 1407, at 403. The size of the sample was twenty. *Id.*

1414. *Id.* at 403.

1415. *See* Cimino v. Raymark Indus., 151 F.3d 297, 320 (5th Cir. 1998) (holding that nonconsensual statistical extrapolation violated the defendant's "Seventh Amendment right to have the amount of legally recoverable damages fixed and determined by a jury").

1416. *See, e.g., Chevron U.S.A.*, 109 F.3d at 1020.

1417. *See* Fed. R. Civ. P. 26(a)(1) committee note ("Case-specific orders remain proper" and "are expressly required if a party objects that initial disclosure is not appropriate to the circumstances of the action."); *see also supra* section 11.13 (prediscovery disclosure).

1418. Fed. R. Civ. P. 26(a)(1).

22.83 Interrogatories

Encouraging or requiring parties with similar interests to confer and fashion joint interrogatories supplemented as necessary can help prevent multiple requests for the same information.[1419] In lieu of interrogatories, questionnaires directed to individual plaintiffs in standard, agreed-on forms were used successfully in the breast implant and diet drug litigations.[1420] Answers to interrogatories should generally be made available to other litigants, who in turn might then be permitted to ask only supplemental questions.

22.84 Depositions: New Parties

Standard discovery requests can be deemed filed automatically as new parties are joined or new actions filed. Consider instituting procedures to facilitate the use of depositions against similarly situated parties later added to the litigation[1421] and to provide counsel in related cases in other courts with access to relevant confidential materials covered by protective orders.[1422] Courts routinely establish preliminary guidelines for conducting depositions and create a system for resolving disputes that arise during depositions.[1423]

Limiting repetitive depositions of some witnesses promotes efficiency, as does using videotaped depositions for witnesses likely to testify more than once.[1424] Parties with different interests must be allowed fair discovery, but discovery that has already been competently conducted need not be reopened for later-added parties, absent a showing of a specific need. Judges may wish to

1419. Trends, *supra* note 1077, at 47–50. Alternative sets of interrogatories might be drafted to deal with variations, such as differences in the use of a toxic product or in the measure of damages for various plaintiffs.

1420. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 22 (E.D. Pa. Mar. 23, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (including "Plaintiff Fact Sheet" and medical authorizations in "First Wave Discovery"); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order No. 30 (N.D. Ala. Mar. 25, 1996), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (approving the use of MDL questionnaire "which is treated as the plaintiff's answer to interrogatories and requests for production") (last visited Nov. 10, 2003).

1421. *See supra* sections 11.453, 11.445.

1422. *See supra* section 11.43.

1423. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 21 (E.D. Pa. Mar. 16, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (deposition guidelines). In *Diet Drugs*, the court appointed a special master to supervise discovery and rule initially on any disputes. *Id.,* Order No. 26, filed Mar. 30, 1998. *See also, e.g., Silicone Gel*, Order No. 11 (N.D. Ala. June 30, 1993) (deposition guidelines).

1424. *See, e.g.*, *Silicone Gel*, Order No. 5, at ¶¶ 7(f)(1)(A)–(d) (N.D. Ala. Sept. 15, 1992).

consider vacating any protective orders issued in individual cases before their consolidation and taking other actions to promote access to materials from other litigation.[1425] See section 11.452 for discussion of technology to enable broad remote participation in depositions conducted by a few lawyers physically present and other lawyers participating by electronic access, perhaps with a magistrate judge or other discovery "master" available to handle objections. In mass tort litigation, such approaches may avoid the need for repetitive depositions of significant decision makers, defendants, or experts.

22.85 Documents

The volume of discovery in a mass tort often warrants creation of a document depository, a Web site or sites, and other physical and electronic means of making discovery materials available to all parties. The goal is to have as much discovery material as possible readily accessible to litigants in federal and state courts. Generally, documents relating to scientific studies, public records, and public reports would be included at such a site, as well as responses to written discovery requests, copies of deposition transcripts, and documents discovered by the parties. Requests for documents can be coordinated and handled by using an electronic or physical depository for the collection and storage of the requested documents. The parties and court reporters should provide depositions and other discoverable documents in an electronic format so that the court and the parties can use electronic search tools to locate relevant information. Procedures should permit a party easily and quickly to request the return of inadvertently disclosed privileged or confidential information or documents without waiving attorney–client or work-product privilege or protection against discovery.[1426]

22.86 Physical Evidence

In a single-event mass tort case, such as an airplane crash or other accident simultaneously affecting a number of persons, it may be advisable to order the

1425. *See, e.g., id.*, at ¶ 7(e)(5). In that order the court indicated that it expected parties to the litigation to waive rights under protective orders issued in cases that were not centralized under the MDL order. The court also required applications for protective orders to specify the materials to be protected and the terms and conditions of any proposed limits to the protection.

1426. *See, e.g.*, *Diet Drugs*, Order No. 41 (E.D. Pa. Apr. 23, 1998) (providing that inadvertent disclosure of privileged documents does not constitute a waiver of the privilege generally or in relation to the specific document in question); *id.*, Order No. 27 (E.D. Pa. Mar. 31, 1998) (last visited Nov. 10, 2003) (establishing ground rules for making and preserving claims of confidentiality during the discovery process).

preservation of physical evidence, to set conditions on its handling, testing, and custody, and to establish ground rules for access to and examination of the accident site. This type of discovery may require participation by experts from both sides—and perhaps a court-appointed expert or special master—to sift through evidence at the site, preserve and document samples for common testing and use at trial, and videotape and photograph the scene.[1427] A judge might appoint a joint committee of experts to coordinate collecting, recording, and testing evidence,[1428] thereby reducing disputes over testing procedures. As soon as practicable, the court should establish a central location, accessible to all parties, for storage and preservation of evidence. In mass accidents occurring on a defendant's property or involving a mechanical product, it may be necessary for the defendant to produce blueprints or other technical drawings to enable plaintiffs to investigate the site or product adequately.

Dispersed mass tort cases may also require steps to ensure the retention and preservation of physical evidence. In cases alleging product design or manufacturing defects in models, makes, or lots that may have changed over time, such orders should be entered early in the case. For example, in the *Bridgestone/Firestone* MDL proceedings, the judge ordered a detailed system for the parties to identify, inspect, retain, and store—and, in the case of new salable models, share the cost of obtaining—the extensive range of recalled and new tires that were in issue.[1429] If the case involves a number of product makes, models, or lots, the parties should work toward a joint proposed order setting procedures to collect, store, and inspect or test a sampling of such products. Although the need for joint testing might be less critical than in single-incident torts where there may be only a single product or remnant to be tested, joint testing may still be advisable to minimize unnecessary disputes.

22.87 Experts and Scientific Evidence

Section 23.2 discusses management of expert evidence in complex litigation generally. Because expert opinions play a vital role in many mass tort cases, both during the discovery process and at trial, judges often establish at an early pretrial conference a schedule for disclosing expert opinions in a

1427. *See In re* Shell Oil Refinery, 132 F.R.D. 437, 439–40 (E.D. La. 1990).

1428. *See infra* section 34.25 (discussing use of databases in Superfund litigation); *see also infra* section 40.52, at ¶¶ 3, 4 (mass tort case-management order).

1429. *See In re* Bridgestone/Firestone, Inc., ATX, ATXII, & Wilderness Tires Prods. Liab. Litig., No. IP00-9373, 2001 WL 219858, at *1 (S.D. Ind. Mar. 6, 2001) (Tire Preservation Order); *see also In re* Bridgestone/Firestone, Inc., ATX, ATXII, & Wilderness Tires Prods. Liab. Litig., 129 F. Supp. 2d 1207, 1213 (S.D. Ind. 2001) (ordering parties to jointly prepare a preservation order).

written report, for deposing the experts, and for resolving *Daubert* motions.[1430] In deciding the timing of expert disclosures, depositions, and *Daubert* hearings, courts should consider whether and to what extent

- scientific or technical issues are novel, developing, or settled;
- scientific or technical issues are central to the claims and defenses and whether resolution of the admissibility of such evidence will as a practical matter be dispositive of the litigation;
- parties and their experts disagree about crucial scientific evidence;
- underlying scientific issues are complex and require extensive time for discovery and for experts to prepare the reports required by Rule 26(a)(2)(B); and
- scientific issues need to be sequenced or staged in a particular order to promote economy and efficiency in the litigation.

Generally, the more novel, complex, and central the scientific or technical issues, the more time the parties will need to conduct discovery, prepare expert reports, and brief the issues for a *Daubert* hearing. Although an evidentiary hearing is not always required to resolve *Daubert* issues, having the witnesses testify may allow the judge to test the underlying assumptions and reasoning employed by the experts and to compare various approaches to the same subject.[1431]

Where causation issues dominate litigation, it may be appropriate for the transferee court in an MDL proceeding to conduct a *Daubert* hearing on general causation issues, leaving specific causation issues for the transferor courts on remand.[1432] Such a division in the appropriate case efficiently separates the role of the MDL court from that of the trial courts after re-

1430. *See infra* section 23.32 (outlining expert evidence questions for the initial conference) & *supra* section 11.48 (disclosure and discovery of expert opinions); *see also, e.g., In re* Phenylpropanolamine (PPA) Prod. Liab. Litig., MDL No. 1407, Order No. 6 (W.D. Wash. Mar. 22, 2002), *at* http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page (last visited Nov. 10, 2003) (Expert Discovery Schedule).

1431. *See In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1138 (9th Cir. 2002) ("[W]e encourage the court to hold a hearing on remand to provide plaintiffs with an opportunity to respond to the defendants' challenges . . . ."); *see also infra* section 23.33 (discussion of using a post-disclosure Rule 16 conference to identify the bases for disagreements among the experts).

1432. *Hanford Nuclear*, 292 F.3d at 1129; *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1200 (6th Cir. 1988).

mand.[1433] In scheduling *Daubert* proceedings in a dispersed mass tort case, an MDL judge should explore opportunities to coordinate scheduling with state courts handling parallel cases.[1434] Federal and state judges have successfully conducted joint *Daubert* hearings creating a record that other judges might use.

Early consideration of expert disclosure and discovery also assists a court in deciding whether to appoint an independent expert or panel of experts under Federal Rule of Evidence 706.[1435] Court-appointed experts or panels of experts under Rule 706 occasionally have been used in mass tort litigation to help resolve disputed causation issues.[1436] Such experts have also been used to screen cases to determine whether individual plaintiffs or groups of plaintiffs can establish a threshold level of injury.[1437] The experience with Rule 706 experts in the silicone gel breast implant litigation indicates that the benefits must be weighed against the cost[1438] and delay[1439] involved. Before appointing a Rule 706 expert or a panel of experts in mass tort litigation, a judge should determine at an early stage of the litigation whether the cases sufficiently demonstrate the following features:

- a highly disputed subject in which strong evidence appears to support the contentions of both sides of the litigation;
- a technical complexity that taxes the capacity of the adversary system;[1440]

1433. *See PPA*, Order Clarifying Expert Discovery Order (filed Aug. 13, 2002) (finding that issues relating to substantial subsets of the general population "constitute issues of general applicability" suitable for resolution by an MDL transferee court).

1434. *See PPA*, Order Granting in Part and Denying in Part Defendants' Motion to Accelerate *Daubert* Hearing (filed Sept. 19, 2002) (altering *Daubert* discovery schedule to coordinate with state court schedule). *See also id.,* Order Granting in Part and Denying in Part Defendants' Motion to Preclude Plaintiffs' Expert Witnesses as to General Causation (June 18, 2003).

1435. *See generally supra* section 11.51. For a discussion of a pretrial procedure to assist in determining the need for a court-appointed expert, see Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706, at 83–95 (Federal Judicial Center 1993).

1436. FJC Study, Neutral Science Panels, *supra* note 1059 (comparison of methods two judges used to appoint scientific experts to assist in resolving mass tort litigation).

1437. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991) (appointment of experts from a roster compiled by a district court to perform pulmonary function analyses in asbestos litigation in a single district).

1438. FJC Study, Neutral Science Panels, *supra* note 1059, at 3.

1439. *Id.*

1440. *See* FJC Study, Court-Appointed Experts, *supra* note 1435, at 12–14.

- a likelihood that scientific evidence will determine the course of the litigation;[1441]
- sufficient homogeneity among the parties that the findings of court-appointed experts will have a significant impact on other claims;
- a need to develop criteria to decide the admissibility of evidence, as in cases involving novel claims;[1442]
- a sufficiently large number of cases to support the costs of an expert or panel of experts; and
- the availability of neutral experts to serve under Rule 706.[1443]

Appointing an expert without unduly delaying the litigation requires establishing procedures for previewing proposed expert testimony at an early stage.[1444]

In cases involving disputed scientific evidence on causation, there will often be ongoing scientific studies addressing the disputed issue. The court may need to establish procedures for discovery of information regarding such studies. Generally, courts have afforded protection to researchers from disclosure of data or opinions relating to an ongoing unpublished study.[1445] By

1441. *See* FJC Study, Neutral Science Panels, *supra* note 1059, at 87–92 (finding mixed but generally positive early assessments of the impact of the expert panel appointed in the silicone gel breast implant litigation).

1442. *See* Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1391–93 (D. Or. 1996) (acting "in its role as 'gatekeeper'" in about seventy statewide consolidated silicone gel breast implant cases, the court appointed a technical advisor).

1443. There are programs available that help judges identify and obtain expert assistance. *See* American Association for the Advancement of Science (AAAS), *Court Appointed Scientific Experts: A Demonstration Project of the AAAS*, *at* http://www.aaas.org/spp/case/case.htm (last visited Nov. 10, 2003).

1444. For the series of orders addressing matters related to the work of the science panel in the breast implant litigation, see *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL No. 926, Order No. 31 (N.D. Ala. May 30, 1996) and subsequent orders using the number 31 and a letter, at http://www.fjc.gov/BREIMLIT/mdl926.htm (last visited Nov. 10, 2003).

1445. *See, e.g., In re* Am. Tobacco Co., 880 F.2d 1520, 1529 (2d Cir. 1989) (stating, *in dicta*, that the "principal legitimate chilling effect on scientific research . . . is the possibility that research results discovered prior to their publication would be vulnerable to preemptive or predatory publication by others"); Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 565 (7th Cir. 1984) (indicating that "[n]o discovery should be allowed of any material reflecting development of [the researcher's] ideas or stating his or others' conclusions not yet published"); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276 (7th Cir. 1982), *aff'g sub nom.* United States v. Allen, 494 F. Supp. 107, 113 (W.D. Wis. 1980) (referring to a possible "chilling effect" on academic research by subjecting it to premature criticism); *see also* Elizabeth C. Wiggins & Judith A. McKenna, *Researchers' Reactions to Compelled Disclosure of Scientific Information,* 59 Law & Contemp. Probs. 67, 86–88 (1996).

contrast, courts generally allow some discovery into party-sponsored studies.[1446] For completed party-sponsored studies, courts generally require production of all data; for pending studies, courts often require disclosure of the written protocol, the statistical plan, sample data entry forms, and a specific description of the progress of the study until it is completed.[1447]

In some cases, one or both of the parties will attempt to subpoena raw data and other information regarding scientific studies that were not sponsored by a party from researchers who were not retained by a party. Subpoenas issued to discover ongoing or completed research conducted by scientists independent of the parties raise a number of considerations. A paradigmatic case would involve a subpoena directed at an academic researcher whose studies examine whether a causal link exists between a product and plaintiffs' alleged injuries.[1448] A court faced with a challenge to such a subpoena must balance the researcher's claim for protection of confidentiality, intellectual property rights, research privilege, and the integrity of the research with opposing claims that the information is necessary and cannot be obtained from any alternative source.[1449] The burden of compliance with repetitive subpoenas in mass tort litigation may need to be considered.[1450]

Federal Rule of Civil Procedure 45(c)(3)(B)(ii) permits enforcement of subpoenas on a showing of "substantial need for the testimony that cannot be otherwise met without undue hardship," and on assurance that third parties

1446. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 420 (E.D. Pa. Jan. 6, 1999), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (defining an ongoing study as one in which data-collection activity occurred within the last 150 days). *See also id.*, Order No. 580, filed Apr. 23, 1999 (modifying Order 420 in context of a request for international judicial assistance regarding studies by a foreign defendant); *Silicone Gel*, Order No. 36 (E.D. Pa. Nov. 27, 1996) & Order No. 36A (E.D. Pa. May 9, 1997) (ordering reciprocal exchange of information regarding ongoing studies funded by a party), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1447. *Diet Drugs,* Order No. 420, at ¶ 4 (E.D. Pa. Jan. 6, 1999).

1448. *See, e.g., Deitchman*, 740 F.2d at 562 (involving research showing a statistical relationship between diethylstilbestrol (DES) and certain cancers); *see also Am. Tobacco*, 880 F.2d at 1522–23 (seeking raw data from studies examining the effects of asbestos and smoking). *See generally* Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers' Data: A Judge's View,* 59 Law & Contemp. Probs. 9, 10–16 (1996) (discussing *Deitchman*).

1449. *See generally* Crabb, *supra* note 1448.

1450. *See Am. Tobacco*, 880 F.2d at 1530 (discussing a report that forty subpoenas had been served seeking the same data and suggesting district court consider establishing a central repository or consider seeking a centralized MDL response); *see also* Anker v. G.D. Searle & Co., 126 F.R.D. 515, 521 (M.D.N.C. 1989) (discussing a requirement that the party who discovers the records make them available to other litigants); Wiggins & McKenna, *supra* note 1445, at 90–91 (reporting that one tobacco company "agreed to serve as a central depository for the information" involved in *American Tobacco*).

subject to the subpoena "will be reasonably compensated." Judges have recognized litigants' need to examine data underlying research studies used to support claims or defenses asserted against them.[1451] The court has discretion to impose additional conditions on enforcement of a subpoena.[1452] Judges have generally crafted orders that enforce the subpoena while imposing restrictions to protect the researchers' interests. For example, the judge may redact information that would divulge the identity of research subjects who have been promised confidentiality;[1453] the judge may also consider other ways of protecting the identity of subjects.[1454] Claims of excessive burden on researchers have been accommodated by financial reimbursement, use of temporary workers to prepare data for production, or extending the response time to allow a researcher to continue working with minimal disruption.[1455]

1451. *Deitchman*, 740 F.2d at 563 (concluding that for defendant "to prepare properly a defense on the causation issue, access to the Registry data to analyze its accuracy and methodology is absolutely essential"). Consider also Judge Crabb's summary of the balancing test courts apply. Crabb, *supra* note 1448, at 28.

1452. For a thorough discussion of the issues involved in enforcing such subpoenas, see generally Joe S. Cecil & Gerald T. Wetherington, *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law,* 59 Law & Contemp. Probs. 1 (1996).

1453. Crabb, *supra* note 1448, at 28–29. *See also Am. Tobacco*, 880 F.2d at 1530 (affirming a protective order allowing redaction of research participants' names, addresses, social security numbers, employers, and union registration numbers).

1454. Crabb, *supra* note 1448, at 28–29. *See also Am. Tobacco*, 880 F.2d at 1530 (affirming a protective order binding party and subsequent users not to determine the identity of research participants, under penalty of contempt); *Deitchman*, 740 F.2d at 564 (suggesting review by an independent third party).

1455. *See* Crabb, *supra* note 1448, at 28.

22.9 Settlement and Trial

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22.91 Judicial Role and Settlement[1456]

In mass torts, as in other types of complex litigation, questions regarding the appropriate extent of judicial involvement in settlement negotiations are important because the costs associated with recusing a judge familiar with the litigation are high.[1457] Although some judges participate actively in settlement negotiations,[1458] others insulate themselves from the negotiations, leaving this activity to a magistrate judge, a special master, or a settlement judge.[1459] Judges who have been involved in unsuccessful settlement negotiations sometimes turn over to another judge the responsibility for trying the case because they have been privy to information on the merits of the case or on issues that

1456. *See generally supra* sections 13 (settlement), 13.14 (judicial review and approval of settlements), 21.61 (judicial review of class action settlements), & 21.66 (administration of class action settlements). *See also* D. Marie Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

1457. *See supra* section 13.11. *See, e.g., In re* Sch. Asbestos Litig. Pfizer, Inc., 977 F.2d 764, 784–85 (3d Cir. 1992) (ordering the judge to disqualify himself and noting that the "newly assigned district judge will face a gargantuan task in becoming familiar with the case" and additional delay that may "disadvantage the plaintiffs").

1458. *See, e.g., In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (2d Cir. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). For an assessment of the risks of such judicial involvement in settlement, see Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337, 359–65 (1986).

1459. *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, Order: Opinion & Final Judgment Approving Global Settlement (N.D. Ala. Sept. 1, 1994), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (in which the transferee judge appointed three judges to act as mediators to assist in discussing a global settlement); *In re* MGM Grand Hotel Fire Litig., 570 F. Supp. 913, 918 (D. Nev. 1983) (special master appointed as "settlement coordinator"); *id.* at 924–26. In *In re San Juan Dupont Plaza Hotel Fire Litigation*, MDL No. 721, 1988 U.S. Dist. LEXIS 17332, at *201 (D.P.R. Dec. 2, 1988), the transferee judge appointed the former transferee judge from the *MGM Grand* litigation to serve as settlement coordinator while the transferee judge managed the litigation.

would otherwise not have been revealed. Judges who have been involved in successful settlement negotiations may transfer to another judge judicial review of the settlement to avoid having to rule on the fairness, reasonableness, and adequacy of a settlement they helped to craft.[1460]

In some cases, a judge can facilitate settlement negotiations by establishing a system to collect information about past, pending, and likely future claims.[1461] In some MDL mass tort centralizations, courts have ordered claimants to complete questionnaires eliciting a wide range of information, such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement.[1462] In many cases, the parties themselves provide the data for entry into a centralized electronic database. Judges have occasionally appointed special masters to assemble databases documenting essential information concerning the thousands of personal injury claims that may be pending. Special masters have sometimes used electronic data to compare individual pending cases against closed cases having similar characteristics to produce a range of settlement values.[1463]

The judge may assist the parties to achieve a "global" settlement resolving not only the defendants' potential liability to the plaintiffs, but also their

1460. Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437, 1445 (E.D. Pa. 1993) (order appointing second district judge to conduct hearings on fairness of class settlement), *settlement approved sub nom.* Georgine v. Amchem Prods., 157 F.R.D. 246 (E.D. Pa. 1994), *vacated and remanded,* 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). *See also* Flanagan v. Ahearn, 90 F.3d 963, 994 (5th Cir. 1996) (Smith, J., dissenting) (noting, in dissent, that "the district judge presided at the fairness hearing on the very settlement he had helped to craft"), *reversed sub nom.* Ortiz v. Fibreboard, 527 U.S. 815 (1999); *and* Hon. S. Arthur Spiegel, *Settling Class Actions*, 62 U. Cin. L. Rev. 1565 (1994) (discussing the advantages and disadvantages of having a judge participate in and review the same settlement).

1461. In *Jenkins v. Raymark*, the special master used the same database to support settlement discussions and to demonstrate to a jury the array of claims in the class action. McGovern, *Mature Mass Tort, supra* note 1022, at 669–70, 674. *See also id.* at 682–88 (describing the $5 million data-collection process established to estimate the value of Dalkon Shield personal injury claims under section 502(c) of the Bankruptcy Code).

1462. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 22 (E.D. Pa. Mar. 23, 1998), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003); *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1995 WL 925678 (E.D. Pa. Feb. 1, 1995); *see also* Brazil, *supra* note 1407, at 402–06 (describing the use of questionnaires to obtain claims-related information from thousands of claimants alleging damages from DDT contamination).

1463. *See* Brazil, *supra* note 1407, at 399–402 (describing the computer-based data-collection procedures used by special masters Francis McGovern and Eric Green in the Ohio asbestos litigation); *see also* Trends, *supra* note 1077, at 60–69 (discussing and evaluating the use of computer data in the Ohio asbestos litigation).

liability to one another for indemnification or contribution. Efforts to achieve global settlements through class certification, however, may not pass muster under Rule 23 or the due process clause. See discussion at sections 22.72, 22.73, 22.922. The parties may be able to resolve discrete sets of claims that significantly reduce or limit the scope of the litigation through a series of case-by-case, party-by-party settlements.[1464]

District judges have approved settlements affecting the rights of "future claimants" who have no present injury, even after *Amchem* and *Ortiz*. However, they have done so only in cases involving claimants who could be identified and given notice, and after scrutiny to ensure that Rule 23 was satisfied, including the requirement of adequate representation both to those presently injured and to those exposed but not presently injured. Courts have approved settlements that included protections for those who knew that they had been exposed to a potentially injurious substance but did not know if injury would result or whether it would be disabling or much less severe. Such protections have included the opportunity to opt out if and when injury is manifested or its extent is apparent. See discussion of back-end opt outs in section 22.922 and the discussion of future claimants in section 21.612.

Parties that are unable to agree on a global settlement may still be able to agree on a process for resolving the litigation. For example, in cases involving immature torts, the parties may agree to use test-case trials to establish a range of values for resolving similar claims. Alternatively, they may agree to draw a representative sample of claims and resolve the sample through mediation, arbitration, or another form of alternative dispute resolution.[1465] Information generated through trials or ADR processes might enable the parties to arrive at a reasonable estimate of the value of the aggregate claims from which they drew the sample. Alternative dispute resolution techniques (e.g., summary jury trials) may assist the parties in valuing cases for settlement purposes and give the court and parties information about the viability of various trial options.[1466] Yet another approach is to appoint a special master to facilitate settlement by reviewing information on liability and damages and placing an estimated value

1464. *See, e.g., Ortiz*, 527 U.S. at 822–28 (reciting the history of asbestos litigation and *Fibreboard*'s settlements). The hazards of partial settlements are discussed in *supra* sections 13.21 and 21.651.

1465. *See* Brazil, *supra* note 1407, at 403, nn.37–38.

1466. *See, e.g., In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985, 993–94 (S.D. Ohio 2001) (illustrating the advantage of a summary jury trial).

on each claim. Judges have used this approach with considerable success in both single-incident and dispersed mass tort litigation.[1467]

Approaches to resolving presently identifiable future claims on a class-wide basis must meet the Supreme Court's standards for opt-out or limited fund settlement class actions. See sections 22.72 and 22.73.[1468] In some cases, litigants have invoked the bankruptcy process as a settlement vehicle for mass tort litigation. See section 22.5. The issues presented by the need for court approval of settlement classes in mass tort cases are fully discussed in the following section.

22.92 Review of Settlement in Mass Tort Class Actions

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Federal Rule of Civil Procedure 23(e) calls for the court to review "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class" and to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Judicial review requires two separate determinations: first, whether the proposed settlement class satisfies the criteria for

1467. *See* William W Schwarzer, Nancy E. Weiss, & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts,* 78 Va. L. Rev. 1689, 1715–20 (1992) (discussing settlement techniques used in the L'Ambience Plaza building collapse litigation and in the MGM Grand Hotel fire litigation).

1468. Cases involving future claimants in narrow contexts, such as single-incident torts involving a small number of claims, do not appear to raise the problems of adequacy of representation or due process of law that were present in *Amchem*. For example, the court in one case set aside a portion of settlement funds to purchase an annuity, to fund a trust to pay future benefits, or to provide diagnostic services to cover future injuries to known plaintiffs. The fund allowed the parties to accommodate such contingencies as medical developments, expenses, and economic losses after the date of the settlement. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (affirming preliminary injunction requiring a corporate defendant that had conceded liability and settled some cases to provide funds for diagnostic, treatment, and educational services for plaintiffs awaiting trial). Similarly, to deal with concerns about the possibility of actions being instituted after the settlement—for example, by minors with respect to whom the statute of limitations may have tolled—a court reserved settlement funds to pay such claims when asserted later. *See, e.g., In re* MGM Grand Fire Hotel Litig., 570 F. Supp. 913, 929 (D. Nev. 1983).

certification under Rules 23(a) and (b);[1469] and second, whether the proposed settlement terms are fair, reasonable, and adequate. Rule 23(e)(1)(C) requires the court to make such determinations "only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." This subsection analyzes the Rule 23(a) and (b) criteria for certifying a settlement class, the process of gathering information and conducting a Rule 23(e) hearing on the fairness of a proposed settlement, and the criteria for evaluating the merits of a proposed settlement.[1470]

22.921 Class Certification in a Settlement Context

Even if the parties have agreed to settle a case on a class-wide basis, the court must determine whether the proposed class satisfies all the requirements of Rule 23(a) (numerosity, typicality, commonality, and adequacy of representation) and either Rule 23(b)(1), (2), or (3).[1471] As discussed in sections 21.6 and 22.71, a settlement in a class action can arise in several ways: (1) a class action may have previously been certified as a litigation class and a settlement reached after certification; (2) a proposed class action may be presented for certification as a settlement class after pretrial discovery has taken place and certain motions have been decided; or (3) a proposed class action may be filed simultaneously with motions to certify the class for settlement and to approve the settlement terms. In the third category, there may or may not have been litigation before the settlement and certification motions were presented.

Each of the three categories raises different issues. If the case has been filed as a settlement class, with little or no prior litigation, there may be insufficient information to determine whether the class can properly be certified under Rules 23(a) and (b) and whether the settlement terms can properly be approved as fair, adequate, and reasonable. Judicial review should be proactive. The parties who support the settlement may have previously reached agreements with potential objectors, calling for them to refrain from objecting or to withdraw objections previously filed. If individual damages are small, there may be insufficient incentive for objectors to participate. The judge may have little or no adversarial presentation to assist in exploring the settlement terms and determining whether the terms are fair to the absent class members.

1469. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (finding that "the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)").

1470. For an example of a trial court's post-*Amchem* evaluation of a personal injury class settlement, see *In re Diet Drugs Products Liability Litigation*, MDL No. 1203, 2000 U.S. Dist. LEXIS 12275 (E.D. Pa. Aug. 28, 2000).

1471. *Amchem*, 521 U.S. at 613–14.

If the case has been litigated extensively, the judge may have sufficient reliable information to determine whether the class should be certified and whether the settlement terms are the fair, reasonable, and adequate result of arms-length negotiations. Mass torts rarely come before a court for class settlement without extensive pre-settlement litigation; lack of information about the issues and the litigants is usually not a problem for the court. Nonetheless, it is important to have an informed understanding of the dynamics of the settlement discussions and negotiations, the participants, and the steps taken by those negotiating on the plaintiffs' behalf to protect the procedural and substantive rights and interests of those whose claims they propose to settle. A judge should consider conducting such an inquiry in chambers if necessary to preserve confidential aspects of the negotiations.

If, however, the parties have reached settlement simultaneously with or shortly after filing the case and there is little prior related litigation, the parties must provide sufficient information to support their contentions regarding each applicable element of Rules 23(a) and (b) and the settlement's fairness, adequacy, and reasonableness. The judge must make specific findings on certification and settlement approval and must ensure that there is a record to support those findings.

In considering the Rule 23(a) factors, the Court in *Amchem* and *Ortiz* gave paramount importance to the district court's assessment of the adequacy of class representation.[1472] Accordingly, the judge should examine the interests of all groups, including any future claimants, and make affirmative findings that each group is adequately represented by claimants and counsel who have no conflicting interests.[1473] Sometimes it is necessary to create subclasses to accommodate divergent interests.[1474] For a discussion of numerosity, typicality, and commonality under Rule 23(a), see section 21.141.

Even if the proposed settlement class action meets all four Rule 23(a) requirements, it must also meet the requirements of at least one of the subsections of Rule 23(b), with the exception of trial manageability. Section 22.73 discusses whether a proposed mass tort class action meets the post-*Ortiz* standards for certification under Rule 23(b)(2) as a "limited fund" class. Section 22.74 discusses whether a proposed mass tort class action meets the standards for certification as a medical monitoring class under Rule 23(b)(2).

1472. *See supra* section 21.26; Ortiz v. Fibreboard Corp., 527 U.S. 815, 831–32 (1999) (noting that the lower court fell short of its duty to apply *Amchem* when it failed "to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4)").

1473. *See Amchem*, 521 U.S. at 625–27.

1474. *Id.* at 627.

In evaluating whether common questions of law or fact predominate over individual issues, the court should

- determine whether the alleged injuries arose from a single incident and therefore might be more likely to have common issues predominate than in a dispersed mass tort;[1475]
- focus "on the legal or factual questions that qualify each class member's case as a genuine controversy";[1476]
- look for variations in individual factual issues that may arise out of different levels and timing of exposure, different types of injuries and levels of damages, and different issues of causation; and
- consider whether "[d]ifferences in state law . . . compound [any] disparities."[1477]

In evaluating whether a proposed settlement class action is "superior to other available means for the fair and efficient adjudication of the controversy,"[1478] the judge must consider the following factors:

- whether the proposed settlement[1479] is manageable;[1480]
- whether, given the individual stakes for members of the proposed class, potential class members have an interest in "individually controlling the prosecution . . . of separate actions," recognizing that as the amount of damages at stake increases, a class member's interest in individual control typically increases;[1481] and

1475. *Id.* at 625 (referring to the 1966 advisory committee note to Rule 23(b)(3) where the Court stated a "mass accident" resulting in injuries to numerous persons is "ordinarily not appropriate for a class treatment").

1476. *Id.* at 623. The court explicitly held that a common interest in a fair settlement cannot be used to satisfy the predominance test. *Id.*

1477. *Id.* at 624. Because the case is to be settled and not tried, variations in state laws that might make a class-wide trial unmanageable might not defeat certification for settlement purposes. *Id.* at 620, 636. See also *In re Diet Drugs Products Liability Litigation*, MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000), describing the litigation and ultimate settlement of claims for medical monitoring, economic loss, and present and future personal injuries arising from ingesting diet drugs.

1478. Fed. R. Civ. P. 23(b)(3). The rule lists four factors that might affect superiority. *Id.*

1479. *Amchem,* 521 U.S. at 620 ("a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial").

1480. *See, e.g., Diet Drugs*, 2000 WL 1222042, at *43, *49 (settlement approval opinion discussing the fact that the settlement contemplates a national matrix based on the type of injury and does not require variable treatment based on state law).

1481. *Amchem,* 521 U.S. at 616–17 (quoting the advisory committee's reporter, Benjamin Kaplan, to the effect that the "interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be

- whether other settlements have been presented to other courts, and, if so, the status of those actions and whether any determinations in other courts might preclude certification of the class proposed.

22.922 Fairness, Adequacy, and Reasonableness of the Settlement

Claimants in many personal injury dispersed mass torts may range from those with severe present injuries to those with minor present injury to those with no present injury whatsoever. A variety of techniques acknowledge these differences and still achieve broad settlements that courts have found to be fair, reasonable, and adequate. Some of these techniques are listed below:

- *Back-end opt-outs*. This is a deferred opportunity for an absent class member to request exclusion from the class until a certain point in the future. A class member who does not have a present injury may postpone the decision on whether to remain in the class and accept the settlement or opt out to pursue separate litigation.

  This decision may be deferred until the class member discovers that the past exposure has resulted in an injury.[1482] This differs from a front-end decision to opt out because the back-end opt-out class member may be bound by an agreement to give up certain rights, such as any right to punitive damages.[1483] This type of opt-out depends on identifying the class members and giving them adequate notice of their right to accept a present settlement, opt out, or, if they have no present injury, defer the decision. Individuals who ingested an identified prescription drug can, for example, be readily identified and provided such notice. A back-end opt-out provision may not be appropriate if the absent class members cannot be identified or provided notice of the deferred right to request exclusion.

no more than theoretic where the individual stake is so small as to make a separate action impracticable" and that "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'" (citation omitted)).

1482. *See, e.g., Diet Drugs*, 2000 WL 1222042, at *20–*21, *26, *39 (E.D. Pa. Aug. 28, 2000) (describing back-end opt-out provisions and concluding that they contribute to resolving potential notice problems).

1483. *Id.* at *20. In a settlement involving an allegedly defective heart valve, class members who did not opt out of a settlement retained their right to sue the manufacturer, subject to all defenses, in the event that a heart valve fractured at any time. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 170 (S.D. Ohio 1992). In those cases, class members also had the option of accepting an amount specified in the settlement or proceeding to arbitration against the defendant who waived all defenses to proceeding in arbitration. *Id.*

- *Limits on opt-outs.* Defendants often condition a settlement in a Rule 23(b)(3) class on having the number of opt-outs remain at or below a certain percentage or number of absent class members, commonly known as a "blow-out" clause. This is particularly significant in cases with a large number of claims that might support individual litigation. In the event the number of opt-outs exceeds the parties' expectations, the parties may attempt to renegotiate the settlement terms. In that event, there may be a need for additional notice to the class members.[1484]
- *Using claims facilities.* Where the value of the personal injury claims varies, courts have approved settlements that establish fixed amounts for injuries that meet defined criteria and create claims facilities to administer the claims process.[1485] The parties may establish an administrative appeal process, an auditing process, or both, to review the claims of those dissatisfied with the application of the criteria. At least one court has found that such review processes help satisfy the fairness prong of Rule 23(e).[1486]

22.923 Criteria for Evaluating the Merits of a Proposed Settlement

For the most part, the judge's role in evaluating the merits of a proposed mass tort class settlement parallels the review of any other class action settlement. A judge examines the proposed settlement terms and determines "whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members,"[1487] and "whether the claims process under the settlement is likely to be fair and equitable in its operation."[1488] Section 21.61 to 21.66 discusses standards and issues relating to review and administration of class action settlements generally. The following guidelines may

1484. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order No. 27 (N.D. Ala. Dec. 22, 1995), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003).

1485. *Diet Drugs*, 2000 WL 1222042, at *23–*24.

1486. *Id.* at *63.

1487. *In re* Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d 283, 324 n.73 (3d Cir. 1998) (citing William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 843–44 (1995)). *See also* Tidmarsh, *supra* note 951, at 6 (observing that courts generally examined mass tort settlement class actions for "the strength of the plaintiff's case in relation to the settlement, the maturity of the litigation, the complexity of the case, and the objections to the settlement").

1488. *Prudential Ins.*, 148 F.3d at 324 n.73 (citing Schwarzer, *Mass Tort Class Actions, supra* note 1487, at 843–44).

help the judge to bring to light any serious defect in the settlement terms and ensure that a mass torts class settlement is fair, reasonable, and adequate.

A meaningful review of a proposed class settlement in a mass tort case requires an accurate understanding of what benefits the class members will actually receive and on what terms. Rule 23(e)(2) requires disclosure of any side agreements. See section 21.631. In a mass tort context, the parties must identify to the overseeing court any agreements that relate to the proposed settlement, such as agreements to settle "inventories" of individual cases in addition to the class settlement;[1489] agreements by lawyers not to bring certain types of cases in the future; collateral agreements that affect attorney fees;[1490] or other agreements relating to the factors discussed below.[1491] Active judicial oversight of the settlement process helps "prevent collusion between counsel for the class and defendant" and minimize the potential for unfair settlements.[1492]

Courts have identified certain features of settlement terms that, if uncorrected, should bar approval. Section 21.62 discusses factors that may affect class action settlements generally. Sections 21.631 discusses things to avoid in mass tort settlement, including the following:

- providing dissimilar treatment to persons with similar claims;[1493]

1489. Unless the court makes a special effort, the clients in these "inventory settlements" have none of the formal procedural rights enjoyed by absent class members in litigation or settlement classes. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (appointing special master and comparing inventory settlements with class settlement), *vacated on other grounds,* 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). *See, e.g.,* Tidmarsh, *supra* note 951, at 40–41 (discussing the "cloud of secrecy [that] hung over the negotiation process" in the Bjork–Shiley heart valve litigation and the settlement of large inventories of cases for greater sums than class members received).

1490. *See, e.g., In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 70–75 (E.D. Pa. 1983) (describing agreements among attorneys regarding the structure and composition of committees to represent a class of plaintiffs), *aff'd in part, rev'd in part,* 751 F.2d 562 (3d Cir. 1984).

1491. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1367–79 (1995). For a post-*Amchem* analysis of the structural and procedural alternatives for the protection of class members' interests in the mass tort settlement context, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000).

1492. Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement,* 31 Loy. L.A. L. Rev. 437, 449 (1998); *see also* Tidmarsh, *supra* note 951, at 6 ("[c]ollusion was also frequently mentioned" by judges in reviewing mass tort settlement class actions).

1493. *See, e.g.,* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630–31 (3d Cir. 1996) (comparing class settlement's treatment of various types of present and future claimants), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

- splitting claims of class members for injuries or losses arising out of the same or related occurrences and excluding some claims from the settlement (e.g., potentially precluding personal injury claims when settling medical monitoring claims or economic claims for breach of warranty);[1494]
- settling an inventory of pending cases at a premium level and future cases at lesser amounts;[1495]
- allowing duplicative or overlapping attorney fees both for serving as class counsel and for representing individual plaintiffs;
- using strict eligibility criteria for receipt of settlement proceeds to mask the fact that the settlement benefits that will be distributed are far less than the stated value of the settlement fund made available;
- permitting defendants to select certain plaintiffs' counsel with whom to negotiate a precertification and perhaps prefiling a settlement class action, resulting in a settlement with the lowest bid (a so-called reverse auction);
- restricting the ability of individuals to opt out of a settlement;
- providing illusory benefits, such as coupons, to class members while providing attorneys with fees calculated by valuing illusory class benefits at an unrealistically high level (see section 22.925); and
- calculating attorney fees on the basis of the maximum value of benefits set aside for the class members, rather than on the amounts actually distributed, particularly when an elaborate claims procedure reduces or minimizes the amounts distributed and the settlement provides that unclaimed benefits revert to the defendants.

22.924 Gathering Information and Conducting a Fairness Hearing

Reviewing a settlement consists of (1) a hearing and preliminary findings on the fairness, reasonableness, and adequacy of the proposed settlement; (2) review of any notice to the class; and (3) a final fairness hearing to make a final determination. Section 21.63 discusses the process.

1494. *See generally,* Schwarzer, *Mass Tort Class Actions, supra* note 975, at 843–44. For an example and discussion of the possible effects of this type of claim-splitting, see *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 209 F.R.D. 323, 339–41 (S.D.N.Y. 2002).

1495. *See, e.g.,* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 295–304 (E.D. Pa. 1994) (discussing relation of inventory settlement and class settlement), *vacated on other grounds,* 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

Reviewing a proposed settlement requires objective information about factors related to class certification and to the fairness and reasonableness of the proposed settlement.[1496] The parties will be advocates for the settlement they have crafted; without direction from the court, they may not volunteer all the information the court needs to understand fully the settlement terms and their effect. Settlement class actions pose special challenges because they may not include an underlying record of discovery or other adversarial activity bearing on the merits of the dispute.

In some cases, objectors may provide an adversarial scrutiny of the proposed certification and settlement terms. Section 21.643 discusses the role of objectors in class actions generally and the differences between class-based objections and individually based objections. At their best, objectors may speak out on behalf of class interests that have not been fully represented or accounted for in the proposed settlement. On the other hand, some objectors may represent narrow self-interests and seek to impede or delay a settlement until those interests are accommodated.

To fulfill their role under Rule 23(e),[1497] judges may find it helpful to undertake the following steps:

- Identify and require the parties to provide information useful for evaluating the proposed settlement, particularly information relating to the merits of the claims and defenses and the historic values of cases involving the same or similar claims and defenses. See section 21.631.[1498]
- Require disclosure of side agreements among the parties or lawyers relating to the terms or implementation of the settlement, including eligibility for, or amounts and allocation of, attorney fees.[1499]
- Permit focused discovery by objectors on a showing of need. In considering such discovery requests, consider whether the objectors represent a large and potentially discrete group whose interests were not

1496. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. Chi. L. Rev. 1, 46 (1991) (asserting that "trial courts may simply lack information to make an informed evaluation of the fairness of the settlement").

1497. *See supra* section 21.61. For a descriptive case study discussing ways that judges evaluated settlements and attorney fees in a select group of substantial cases, see Deborah Hensler et al., Class Actions Dilemmas: Pursuing Public Goals for Private Gain 460–66 (2000).

1498. *See also* Bowling v. Pfizer, Inc., 143 F.R.D. 138, 140 (S.D. Ohio 1992) (requesting information, including *in camera* disclosure of all prior settlements involving the Bjork-Shiley heart valve).

1499. *See, e.g., In re* Chambers Dev. Sec. Litig., 912 F. Supp. 852, 867 (W.D. Pa. 1995) (ordering counsel to disclose side agreements pertaining to attorney fees).

accommodated in the settlement. It is important to distinguish between objectors' discovery into the merits of the claims and defenses in relationship to the fairness, reasonableness, and adequacy of the proposed settlement,[1500] and discovery into the settlement negotiations, which courts have refused to permit absent evidence of collusion.[1501]

- Consider establishing a special settlement discovery court to be convened on a regular basis during the period leading up to the final fairness hearing.[1502]
- List specific issues and concerns that bring into question the fairness, reasonableness, and adequacy of the proposed settlement, and give the parties an opportunity to explain or renegotiate the settlement before the court rules.[1503]
- Appoint one or more adjuncts, such as a magistrate judge, guardian *ad litem*,[1504] special master,[1505] or court-appointed expert[1506] to assist in gathering information and in evaluating the proposed settlement.

1500. *See, e.g.,* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 260 n.9 ("Objectors were given the opportunity to probe into facts surrounding the proposed settlement through depositions of relevant persons. . . . In all, thousands of pages of documents were produced and over thirty depositions took place during the discovery period."); *see also* Tidmarsh, *supra* note 951, at 5, 12 (finding that "[t]wo of the [five] cases (*Georgine* and *Ahearn*) permitted broad rights of discovery to objecting parties").

1501. *See* Bowling v. Pfizer, Inc., 143 F.R.D. 141, 153 n.10 (S.D. Ohio 1992); *see also* Charles Alan Wright et al., Federal Practice and Procedure § 1797.1, at 413 (2d ed. 1986).

1502. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 1071 (E.D. Pa. Jan. 28, 2000), *at* http://www.fenphen.verilaw.com/search_common.icl (last visited Nov. 10, 2003) (establishing a special discovery court to meet weekly prior to the fairness hearing).

1503. *See* Bowling v. Pfizer, Inc., 143 F.R.D. 138, 140–41 (S.D. Ohio 1992) (listing six concerns, continuing the fairness hearing after three days, and directing the parties to report on any changes in the proposed settlement when the hearings resume).

1504. *See, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815, 827, 854 (1999) (noting the appointment by the district court of a law professor as guardian *ad litem* and citing the guardian's report on a factual matter). The district judge requested the guardian *ad litem* in *Ortiz* "to review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interest will be adequately protected." *In re* Asbestos Litig., 90 F.3d 963, 972 (5th Cir. 1996), *rev'd sub nom* Ortiz v. Fibreboard, 527 U.S. 815 (1999). *See also* Miller v. Mackey Int'l, Inc., 70 F.R.D. 533, 535–36 (S.D. Fla. 1976) (using its residual authority under Rule 23(d)(5), the district court appointed a guardian *ad litem* to represent the interests of the class in responding to plaintiffs' attorneys' requests for fees). *See generally* Macey & Miller, *supra* note 1496, at 47–48 (suggesting that judicial review of class action settlements could be improved by the use of guardians *ad litem* to represent the interest of the class).

1505. *See, e.g.,* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 257–58 (E.D. Pa. 1994) (indicating that the parties "filed a joint motion for appointment of a special master to assist the

- In a limited fund settlement, permit additional discovery by objectors or an independent evaluator to examine whether a limited fund exists and meets the standards set forth in Rule 23(b)(1) and *Ortiz*.[1507]
- Allow some trial-type procedures for the fairness hearing, such as the receipt of sworn testimony subject to cross-examination.[1508] Whether an evidentiary hearing is necessary will depend on the facts and circumstances of the case, including the extent to which there are objections to the settlement or reasons for the court to be skeptical of its fairness.[1509]

A court should also consider whether class members who did not opt out initially should receive a second opportunity to opt out after a settlement is reached. Rule 23(e)(3) grants the court authority to refuse to approve a settlement that does not afford an opportunity for members of the proposed class to opt out after the parties announce the settlement terms. See section

court during the discovery process, and to review sensitive and confidential information relevant to these proceedings"), *vacated on other grounds,* 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). *See generally* FJC Study, Special Masters, *supra* note 704 (reporting empirical findings about the use of special masters at pretrial and posttrial stages of civil litigation).

1506. *See, e.g.,* Williams v. City of New Orleans, 543 F. Supp. 662 (E.D. La. 1982) (evaluation of a consent decree in the face of objections from intervenors); Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 4, 11 (N.D. Ohio 1982) (court-appointed expert who played "key role in the lengthy, protracted, and heated negotiations" testified that the resulting settlement was "fair, reasonable, and adequate"); *but cf. In re* Armored Car Antitrust Litig., 472 F. Supp. 1357, 1375 (N.D. Ga. 1979) (court-appointed expert on damages was unnecessary because "educated estimate[s]" of the parties were sufficient to support evaluation of proposed settlement). *See also* Real, *supra* note 1492, at 448–49 (advocating that judges "know the details of how a settlement has been reached," which "may require consultation with independent experts—available under Rule 706 of the Federal Rules of Evidence—who have knowledge of the business or industry that gave rise to the injury or damages").

1507. *Ortiz,* 527 U.S. at 853–54; *see also id.* at 864 ("[I]t would be essential that the fund be shown to be limited independently of the agreement of the parties to the action . . . ."). *See also* section 22.73.

1508. *See, e.g., In re* The Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 325 (3d Cir. 1998) ("Objectors are 'entitled to an opportunity to develop a record in support of [their] contentions by means of cross-examination and argument to the court.'" (quoting Greenfield v. Villager Indus., Inc., 483 F.2d 824, 833 (3d Cir. 1973))); *see also* Tidmarsh, *supra* note 951, at 5, 12 (finding that "[t]wo of the [five] cases (*Georgine* and *Ahearn*) . . . used trial-like procedures at the fairness hearing.").

1509. *See* Wright, *supra* note 1501, § 1797, at 354, and cases cited therein (stating "whether an evidentiary hearing is necessary before the approval of a proposed settlement and the extent of the testimony that may be allowed at any hearing that is held depends on the circumstances of each case").

21.611 for a discussion conditioning settlement approval on the extension of a second opt-out opportunity.

22.925 Evaluating Nonmonetary Benefits

Determining the fairness, adequacy, and reasonableness of a settlement, and determining the reasonableness of attorney fees, presupposes that the court can place a value on the parties' settlement terms. Establishing a value for nonmonetary benefits, such as coupons, stock, or other contingent promises to pay a benefit of uncertain value, represents a special challenge. Experts sometimes can assist in determining a market value for coupons or other nonmonetary settlement proceeds.[1510]

Establishing a value of medical monitoring remedies for individual class members may present a particularly difficult challenge. If the law of the state supports medical monitoring in the form of payments for monitoring examinations, the value will depend on the number of people who actually use the monitoring made available, which may require the court to defer valuation.[1511]

If the judge assigned to the case has actively assisted the parties in crafting a proposed settlement, transferring the case to another district judge to review the settlement may be appropriate.[1512] Some judges who have participated in settlement negotiations, however, believe that they are better equipped to review the settlement because they know its provisions and the compromises that went into its creation.[1513] One judge, for example, suggests that judicial oversight of the settlement process allows the judge to "[a]ssess fairness and reasonableness of the settlement to all class members, and make findings as to the value to each individual plaintiff."[1514]

22.926 Presenting the Decision

The fairness hearing should create a record sufficient to determine whether the proposed settlement is fair, reasonable, and adequate to the class and to

1510. *See, e.g.*, *In re* Auction Houses Antitrust Litig., No. 00-0648, 2001 WL 170792, at *10 (S.D.N.Y. Feb. 22, 2001).

1511. *In re* Diet Drugs Prods. Liab. Litig., No. CIV.A. 98-20626, 1999 WL 673066, at *18–*19 (E.D. Pa. Aug. 26, 1999) ("Absent class treatment, the class members will be unable to obtain the benefit of collection and research of medical data and thereby better understand issues such as latency periods and techniques of diagnosis of the diseases . . . .").

1512. *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 258 (E.D. Pa. 1994).

1513. *See* Hon. S. Arthur Spiegel, *Settling Class Actions*, 62 U. Cin. L. Rev. 1565, 1569 (1994) (indicating that "the judge who was involved in the settlement negotiations will be in a better position to consider objections at the fairness hearing, particularly in a complex case").

1514. Real, *supra* note 1492, at 450.

support findings of fact and conclusions of law. See section 21.635. Section 21.66 discusses issues that may arise during the administration of a class action settlement.

Occasionally, a proposed settlement will directly affect cases that are pending in other courts. The parties may, for example, agree to dismiss related cases pending in a state court or another federal court.[1515] It is important to communicate clearly and directly with the other courts to prevent any misunderstandings. Section 20.31 discusses state–federal coordination. If counsel are charged with communicating with the other courts, it is helpful to specify that responsibility and to follow up, if necessary, to enforce counsel's duty.[1516] If proceedings in other courts threaten the integrity of the certified class settlement and the ability of the court to enforce the approved class action settlement terms, the court presiding over the class action should consider whether to enjoin the parties from proceeding further in derogation of the certified class action, as discussed in section 21.42.

22.927 Awarding and Allocating Attorney Fees

Section 14.12 discusses standards for reviewing attorney fee petitions in common fund class actions. Section 14.21 discusses techniques for simplifying and expediting the review of attorney fee applications.

Linking attorney fees to the value of the settlement benefits actually received by class members is especially important in mass tort litigation. Settlements that call for nonmonetary or deferred payments—such as medical monitoring, the contingent payment of future claims, or coupons for repair or replacement of allegedly defective products—should either be assigned an accurate present value or the payment of attorney fees should be delayed until benefits are in fact distributed to class members and the court knows how much they actually received.[1517]

A major difference between mass torts and other class actions is that class members in mass tort litigation are often represented by individually retained

1515. *See, e.g.,* Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 30–31 (2002) (describing setting in which parties agreed to dismiss stayed state case and plaintiff informed court that agreement was limited to some claims). The Court held that the All Writs Act did not provide an independent source of federal jurisdiction and could not be used to remove a diversity case to federal court. *Id.* at 33–35.

1516. *Id.* at 31–32 (imposing sanctions that were upheld on appeal).

1517. *See generally,* Bowling v. Pfizer, Inc., 132 F.3d 1147 (6th Cir. 1998) (overarching principle is to compensate counsel for benefits actually conferred on the class).

plaintiffs' attorneys.[1518] In a class action or in federal litigation that has been centralized by the Judicial Panel on Multidistrict Litigation, the transferee judge generally appoints class counsel to litigate common issues and prepare the case for trial or settlement.[1519] Individually retained attorneys may conduct discovery, motions practice, and settlement negotiations on behalf of individual clients. If an MDL case proceeds to trial in federal court, individual attorneys may handle aspects of the trial, such as individual exposure and damages.[1520] If a related case proceeds to trial in state court, individual attorneys represent their clients, with or without the use of discovery conducted in the MDL proceedings. Individually retained counsel have contingent fee arrangements, and counsel for the class or the MDL counsel steering committee may represent individual class members under such agreements.

Absent agreement among the attorneys, the court will have to allocate fees among the attorneys, a task that involves placing a value on the services provided by different attorneys.[1521] The judge can protect members of the class from excessive fees by limiting the amount of contingent fees awarded for pursuing individual claims in a common-fund settlement.[1522] If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a certain percentage of

1518. *In re* Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995). *See generally* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees,* 71 N.Y.U. L. Rev. 296, 300 (1996). *See also* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DePaul L. Rev. 425 (1998).

1519. *See, e.g., Thirteen Appeals,* 56 F.3d at 300 ("The PSC [Plaintiffs' Steering Committee] members looked after the big picture: mapping the overarching discovery, trial, and settlement strategies and coordinating the implementation of those strategies.").

1520. *See, e.g., id.* ("The IRPAs [Individually-Retained Plaintiffs' Attorneys] handled individual client communication and other case-specific tasks such as answering interrogatories addressed to particular plaintiffs, preparing and attending the depositions of their clients, and taking depositions which bore on damages."). IRPAs also worked with a settlement judge to negotiate appropriate settlement values for individual claims and collaborated with PSC members in the trial of twelve representative claims.

1521. *See generally, Thirteen Appeals*, 56 F.3d at 309–11.

1522. *See, e.g., In re* Rio Hair Naturalizer Prods. Liab. Litig., MDL No. 1055, 1996 WL 780512, at *20–*21 (E.D. Mich. Dec. 20, 1996) (limiting contingency fee contracts with individual class members to 5% of limited fund class settlement); *In re* A.H. Robins Co., 86 F.3d 364, 377–78 (4th Cir. 1996) (upholding district court's limit of 10% on contingent fees for supplemental payments from settlement trust); *In re* Joint E. & S. Dists. Asbestos Litig., 878 F. Supp. 473, 561–62 (E.D.N.Y. & S.D.N.Y. 1995) (contingency fee contracts reduced from 33.3% to 25%); *In re* Beverly Hills Fire Litig., 639 F. Supp. 915, 924–25 (E.D. Ky. 1986) (class members' individual attorneys' contingency fees limited to 6.3% of the individual client's award).

the fees they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well.[1523] Section 20.31 discusses some state–federal considerations in setting such fees. Typically courts have also limited the percentage of a mass settlement allocated to attorneys representing the class or the MDL aggregate. See section 14.121.[1524]

22.93 Trial[1525]

For cases transferred to a court by the MDL Panel, the initial question is whether the transferee court has authority to conduct trials of the cases at all. The Supreme Court ruled in *Lexecon* that a transferee court did not have the authority to transfer cases from another district to itself by ruling on a pretrial motion for change of venue.[1526] Nothing in that decision, however, precludes the transferee judge from presiding over cases that litigants filed in the transferee district originally, that transferor courts transferred by ruling on motions change venue, or that the parties consented to have tried in the transferee district. Section 20.132 discusses these and other practices relating to the trial of cases in transferee courts.

The structure of the trial should be addressed as early in the pretrial process as is feasible. Judges often require the parties to submit detailed trial plans early in the case and to modify the plans as the case develops. Such plans assist the court and the parties in determining what issues, claims, and defenses

1523. *See, e.g., In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Order No. 467 (E.D. Pa. Feb. 10, 1999), *at* http://www.fenphen.verialw.com/search_common.icl (last visited Nov. 10, 2003) (ordering defendants to withhold a fixed percentage from settlements and pay those amounts into a common fund); *see also In re* Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, unnumbered order (N.D. Ala. Oct. 7, 1998), *at* http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm (last visited Nov. 10, 2003) (denying attorneys' motions for relief from Order No. 13, requiring payment of 6% of settlements into a "common benefit" fund); *see also In re* Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II, 953 F.2d 162, 166 (4th Cir. 1992) (holding that fee-withholding orders in MDL cases can only be applied to cases that were within the jurisdiction of the MDL transferee court).

1524. *See also* Tidmarsh, *supra* note 951, at 14 (documenting class counsel fees in mass tort settlement class actions ranging from 3% (*Georgine/Amchem* and *Ahearn*) to 6% (silicone gel breast implants) to 10% (Bjork–Shiley heart valve litigation) and stating limits on fees to attorneys for individual class members). *See also* Rheingold, *supra* note 1271, §§ 7:40 to 7:47 (detailing fee arrangements in L-Tryptophan, swine flu vaccine, breast implant, Neptune Society, Shell Oil (Watson), MGM Grand, and Bjork–Shiley cases, a mixture of class action and MDL litigations).

1525. For discussion of complex trials generally, see *supra* section 12.

1526. Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998).

may apply across groups and how to present the proof to a jury. If a mass tort litigation is to proceed by first adjudicating individual test cases, identification of those plaintiffs and discovery into their exposure and injury should occur at the earliest opportunity. If the trial is to be of consolidated groups of claimants with comparable exposure or injuries, the composition of those groups should be defined during discovery and pretrial motions stages.

In general, a consolidated or aggregated trial must take into account defenses and the measure of damages. A joint trial of common issues may be feasible, followed by separate trials of remaining issues.[1527] To avoid inconsistent adjudications and duplicative presentation of evidence, punitive damage claims should ordinarily be tried to the same jury that determined liability and overall compensatory damages, although in most cases the issue of punitive damages is bifurcated.[1528]

Test case trials of mass torts can draw on many of the standard practices for managing complex trials. See section 12. Similarities among the cases tried and cases pending trial may allow use of a standard pretrial order and application of rulings on evidentiary and trial issues. Videotaped expert testimony and use of a standard set of exhibits can streamline presentation of evidence. See sections 12.13 and 23.345.

1527. *See, e.g.,* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1194–97 (6th Cir. 1988) (describing class trial of common liability issues, compensatory damages for representative plaintiffs, and punitive damages for class as a whole); Jenkins v. Raymark Indus., 782 F.2d 468, 470–71 (5th Cir. 1986) (describing asbestos intradistrict class trial plan for resolving liability issues, for punitive-damages liability and amount, and for state-of-the-art defense to be followed by consolidated minitrials of seven to ten plaintiffs)*; cf. In re* Copley Pharm., Inc., "Albuterol" Prod. Liab. Litig., 161 F.R.D. 456, 468–70 (D. Wyo. 1995) (discussing class trial of common liability issues followed by individual trials in transferor courts to establish individual causation, damages, and punitive damages). *See also In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1139 (9th Cir. 2002) (recommending that court "resolve the pending motions for class certification as soon as possible, and . . . consider such certification only for questions of generic causation common to plaintiffs who suffer from the same or a materially similar disease"). *See also supra* section 22.75.

1528. *See, e.g., In re* The Exxon Valdez, 270 F.3d 1215, 1225 (9th Cir. 2001) (describing trial structure starting with a stipulation of negligence and providing separate phases for jury findings regarding liability for punitive damages, class compensatory damages, and class punitive damages, followed by individual compensatory damages); *Jenkins*, 782 F.2d at 470–71; *In re* Simon II Litig., 211 F.R.D. 86, 193 (E.D.N.Y. Oct. 22, 2002) (ordering three-stage trial: (1) determination of fraud and conspiracy claims and "estimated total compensatory claims" followed by (2) punitive liability issues followed by (3) "evidence of amount of harm suffered by the class [as result of conduct warranting punitive damages]") (appeal pending); *but cf. Albuterol,* 161 F.R.D. at 467–68 (rejecting inclusion of punitive damages in common issues trial because "punitive damages and punitive conduct should be determined on an individual basis").

In pursuing traditional or test case trials, the judge may conduct a unitary trial, bifurcate liability and damages,[1529] or create other helpful trial structures. A court must identify and minimize any risk of unfairness in requiring litigants to present claims or defenses in a piecemeal fashion. For example, the judge in the Bendectin litigation found the use of a trifurcated trial plan (causation, liability, damages) to be troubling yet concluded that, on balance, the procedure served overriding purposes of efficiency and fairness.[1530] Courts have recognized "a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action."[1531] In litigation concerning HIV contamination of the blood supply, one court held that a bifurcated trial plan calling for more than one jury interfered with the right of a defendant to present comparative negligence defenses against individual plaintiffs.[1532] In general, the Seventh Amendment entitles parties to have facts decided by one jury and prohibits a second jury from reexamining those facts.[1533] The test is whether the issues can be presented separately to different juries without generating "confusion" and "uncertainty."[1534]

Another approach is reverse bifurcation or reverse trifurcation, starting with individual damages. This is generally appropriate only when the degree of injury and the amount of damages are the primary issues in dispute.[1535]

Courts have found some approaches inappropriate. For example, one court rejected nonconsensual sampling and extrapolation of causation and damages in personal injury cases because these procedures contravened

1529. *See, e.g.,* cases discussed in *supra* notes 1394–1405.

1530. *In re* Bendectin Litig., 857 F.2d 290, 306–09, 315 (6th Cir. 1988).

1531. *In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982). *See also Bendectin*, 857 F.2d at 314–16.

1532. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that a trial plan to determine defendant's negligence first while leaving determination of comparative negligence and proximate causation for a later jury would violate the Reexamination Clause of the Constitution); *see also In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 334–35 (S.D.N.Y. 2002).

1533. Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996).

1534. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931) (a new trial on the single issue of damages could not be conducted "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"). *See* discussion at *supra* section 22.75 and text accompanying notes 1394–99.

1535. *See, e.g.,* Angelo v. Armstrong World Indus., 11 F.3d 957 (10th Cir. 1993) (finding no abuse of discretion in trying issue of whether plaintiff had incurred an asbestos-related disease before liability issues); *see also* Trends, *supra* note 1077, at 102–04 (discussing use of various forms of bifurcation and trifurcation in asbestos litigation).

litigants' right to a jury trial under the Seventh Amendment and violated due process.[1536]

Courts and litigants have experimented with various trial structures to achieve greater efficiency and expedition in resolving mass tort cases. Some approaches are described below:

- *A series of individual trials against one or more defendants on all issues.* The verdicts in representative cases inform the parties as to a likely range of verdicts in other similar cases. For the most part, the silicone gel breast implant litigation and the diet drug litigation have followed this model, with most of the individual trials conducted at the state level.
- *A series of consolidated trials on all issues, if they are sufficiently common.*[1537] Each trial involves defined groups of similarly situated plaintiffs (e.g., a manageable number of coworkers from the same job site or homeowners who had the same type of siding installed by the same contractor) against one or more defendants,[1538] with special procedures, if necessary, to assist the jury in comprehending multiple claims against multiple parties. See section 12.42.

1536. *See* Cimino v. Raymark Indus., 151 F.3d 297, 319–22 (5th Cir. 1998) (holding that individual jury determinations of liability, injury, and damages are required by the Seventh Amendment in an asbestos mass tort personal injury context); *see also In re* Fibreboard, 893 F.2d 706, 711–12 (5th Cir. 1990) (holding that, as a matter of Texas product liability law, plaintiffs must show specific causation and individual injuries to establish a claim); *cf.* Hilao v. Estate of Marcos, 103 F.3d 767, 786–87 (9th Cir. 1996) (holding that, on balance, in an "extraordinarily unusual" case involving 10,000 injury claims, the use of statistical sampling and extrapolation to determine individual personal injury recoveries did not violate due process); *In re* Simon II Litig., 211 F.R.D. 86, 146–59 (E.D.N.Y. 2002) (discussing use of statistical extrapolation to establish class-wide liability and damages and concluding that statistical extrapolation comports with due process and the Seventh Amendment) (appeal pending).

1537. *See* Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993) (reversing joint trial of forty-eight asbestos cases on ground that lack of commonality resulted in jury confusion). Consolidation of fewer than ten cases has been called "extremely effective." *See* McGovern, *Mature Mass Tort, supra* note 1022, at 688.

1538. *See, e.g.,* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815 (1992). Statistical sampling, however, can be expected to yield accurate results only when the set of cases being tried is homogenous (i.e., similar injuries to similar plaintiffs under similar circumstances) and the sample is representative of the whole. Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 Law & Psychol. Rev. 43, 47 (1998). In addition, where there is a serious question as to liability, a jury's knowledge that more than one plaintiff was injured can be expected to affect a jury's decision on liability. *Id*. at 59–60.

- *A consolidated common issues trial with some plaintiffs presenting their claims against defendants on all issues, yielding findings on common issues.* This works in a single-incident mass tort case,[1539] a property damage case,[1540] or a narrowly defined aspect of a dispersed mass tort (e.g., a case involving a single product and injuries allegedly incurred in a single work site or in a single state, within a limited time period).[1541] The remaining plaintiffs would have to prove specific causation and damages in later proceedings in which the findings on common issues from the first trial would apply. The individual issues may also be resolved through the procedures discussed immediately below involving trials of representative cases. Certain issues relating to liability may be severed under Federal Rule of Civil Procedure 42(b) from issues relating to causation or damages, and then consolidated as to multiple parties under Rule 42(a) for a joint trial.[1542] Federal courts have frequently concluded that dispersed mass tort personal injury

1539. *See, e.g.*, *In re* The Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

1540. *See, e.g.,* Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) (groundwater pollution claims); *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); *but cf. In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002).

1541. *See, e.g.,* Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999) (approving certification of Jones Act common-liability issues as issues class and approving bifurcated trial with common issues trial followed by individual trials of causation and damages issues); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) (single class action trial of punitive damages and state-of-the-art defense followed by joint trials on individual issues with seven to ten plaintiffs); *see also* Watson v. Shell Oil Co., 979 F.2d 1014, 1017–20 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh'g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing; panel affirmed a trial plan for determination of liability and punitive damages in conjunction with compensatory damages in twenty fully tried sample cases to be followed by full trials of other individual claims by a different jury). In that case, the first stage of the trial plan included the apportionment of liability between the two primary defendants. *See supra* section 11.632 and discussion at notes 1529–34. State laws precluding bifurcation may not be binding on the federal courts. *See* Rosales v. Honda Motor Co., Ltd., 726 F.2d 259 (5th Cir. 1984).

1542. *See, e.g., In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 468–70 (D. Wyo. 1995) (discussing trial plan in which class representatives' individual strict liability, negligence, and breach of warranty claims would be tried along with common issues relating to general causation, followed by individual trials in transferor courts on issues of individual causation, damages, and punitive damages); *see also* Foster v. Detroit, 254 F. Supp. 655 (E.D. Mich. 1966) (treating the post-liability condemnation claims of class members as not involving new issues of law or fact and delegating their resolution to a special master presiding over claims of class members), *aff'd*, 405 F.2d 138 (6th Cir. 1968); Samuel Issacharoff, *Administering Damage Awards in Mass Tort Litigation*, 10 Rev. Litig. 463, 471–80 (1991) (discussing administrative models for apportioning damage awards in mass contract, Title VII, and tort cases).

claims, particularly those involving the law of different states, cannot generally be tried on a consolidated or aggregated basis.[1543]

- *A consolidated trial on common issues followed by a stipulated binding procedure (such as arbitration or mediation) agreed to by the parties to resolve individual issues.*[1544] This type of approach to the individual issues encompasses possible test-case trials or special master adjudications. Such an approach is more feasible in a single incident mass tort than in a dispersed mass tort.
- *A stipulated resolution of all elements of individual claims according to a formula or by a hearing before an arbitrator, special master, or magistrate judge.* The court should ensure that the parties' waiver of the right to a jury trial is knowing and intelligent.

1543. *See generally* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (nationwide class action decertified); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (also class action decertified); *In re* Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993) (consolidation of cases reversed). *Cf. In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (consolidation for bifurcated trial upheld); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) (district-wide class action trial of common issues approved).

1544. After the settlement of the class claims in *Jenkins* (discussed above), the court created a voluntary alternative dispute resolution procedure to handle future claims. The program had some initial success, but the court later judged it to be ineffective. Cimino v. Raymark Indus., 751 F. Supp. 649, 651 (E.D. Tex. 1990), *rev'd on other grounds*, 151 F.3d 297 (5th Cir. 1998).

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23.1 Introduction

A significant issue in many complex cases—particularly in areas of law such as mass tort, antitrust, environmental, and intellectual property, but increasingly appearing in other areas as well—is the admission and use of expert scientific or technical testimony. "Scientific evidence encompasses so-called hard sciences (such as physics, chemistry, mathematics, and biology) as well as soft sciences (such as economics, psychology, and sociology), and it may be offered by persons with scientific, technical, or other specialized knowledge whose skill, experience, training, or education may assist the trier of

fact in understanding the evidence or determining a fact in issue."[1545] Expert scientific testimony can add additional layers of complexity to already complex cases, and scientific and technical evidence often plays a pivotal role in litigation. In toxic tort cases, for example, excluding scientific evidence can prevent the plaintiff from establishing the prima facie elements of his or her case, thereby entitling the defendant to summary disposition.[1546] Judicial findings on the relevance of toxicological studies and their weight in relation to epidemiological studies may also significantly affect the ability of mass or toxic tort plaintiffs to prevail.[1547] Superfund cases, usually brought many years after the release of hazardous contaminants, rely heavily on scientific and toxicological evidence to establish the liability of potentially responsible parties and to evaluate remedial actions and the imminent threat presented to human health and the environment.[1548] Statistical evidence is routinely introduced and

1545. William W Schwarzer & Joe S. Cecil, *Management of Expert Evidence* [hereinafter *Expert Evidence*], *in* Reference Manual on Scientific Evidence 39, 42 (Federal Judicial Center, 2d ed. 2000). In a survey of federal judges conducted by the Federal Judicial Center examining recent trials involving expert witnesses, tort cases represented the greatest percentage (45%) of cases reported. Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol'y & L. 309, 318 (2002) [hereinafter *FJC Survey on Expert Testimony*]. This survey also provides, among other things, a breakdown of experts appearing in federal courts. *Id.* at 319–20 & tbl.2. For a breakdown of experts appearing in state courts, see Anthony Champagne et al., *Expert Witnesses in the Courts: An Empirical Examination*, 76 Judicature 5 (1992); Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113.

1546. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1314, 1321–22 (9th Cir. 1995) (affirming grant of summary judgment where plaintiff's expert testimony found inadmissible); Wheat v. Sofamor, S.N.C., 46 F. Supp. 2d 1351, 1360–61 (N.D. Ga. 1999) (with the exclusion of plaintiff's expert, insufficient evidence of defect existed to preclude entry of summary judgment for defendant).

1547. *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 144–45 (1997) (animal studies relied on by expert "were so dissimilar to the facts presented in this litigation" that district court did not abuse its discretion in excluding them). The introduction of scientific evidence in toxic tort cases, however, encompasses more than testimony by medical experts. Expert witnesses can range from experts on sampling, Trail v. Civil Engineer Corps, 849 F. Supp. 766 (W.D. Wash. 1994), to atmospheric dispersion, *In re* Hanford Nuclear Reservation Litig. (Hanford II), No. CY-91-3015, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998), to fisheries, *In re* Hanford Nuclear Reservation Litig. (Hanford I), 894 F. Supp. 1436 (E.D. Wash. 1995).

1548. *See generally supra* section 34. *See also* Freeport-McMoran Res. Partners Ltd. P'ship v. B-B Paint Corp., 56 F. Supp. 2d 823, 833–34 (E.D. Mich. 1999) (rejecting plaintiff's argument that *Daubert* requirements should be inapplicable to CERCLA cases and excluding expert testimony where none of the *Daubert* indicia of reliability are met). *See, e.g.*, Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc., 135 F.3d 526, 530–31 (7th Cir. 1998) (affirming exclusion of testimony of environmental consultant as failing to reliably link petroleum distillates on property with defendants' actions); Keum J. Park, Note, *Judicial Utilization of Scientific Evidence*

explained by experts in antitrust litigation, employment litigation, and other areas,[1549] and proof of damages suffered by plaintiffs in these cases also may rest heavily on expert testimony.[1550] The decision to admit or exclude scientific evidence and testimony thus strongly affects the ability of a party to prevail.

This section can assist judges in effectively managing expert evidence that involves scientific or technical subject matter. Part I discusses the current standards under which expert testimony is to be judged in light of *Daubert v. Merrill Dow Pharmaceuticals*[1551] and its progeny and the Federal Rules of Evidence. It examines some issues that can arise in the application of these standards and then addresses case-management issues specific to expert testimony. The discussion focuses principally on expert testimony that is scientific or technical in nature, but is equally applicable to expert testimony in Federal Rule of Evidence 702's "other specialized knowledge" category. The discussion does not address some of the issues that have frequently arisen in criminal cases, such as those surrounding DNA and fingerprint evidence.

in Complex Environmental Torts: Redefining Litigation Driven Research, 7 Fordham Envtl. L.J. 483, 492–93 (1996) (noting that the Oil Pollution Liability and Compensation Act of 1990 established "procedures for natural resource trustees to determine resource injuries").

1549. *See, e.g.*, Munoz v. Orr, 200 F.3d 291, 300–02 (5th Cir. 2000) (affirming exclusion of statistical testimony of plaintiff's expert in Title VII disparate impact claim as unreliable); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 564–67 (11th Cir. 1998) (expert testimony of statistician admissible in antitrust case); Bean v. S.W. Waste Mgmt. Corp., 482 F. Supp. 673, 677–80 (S.D. Tex. 1979) (statistical evidence showing disparate impact insufficient to prove intentional discrimination under Equal Protection Clause in environmental justice case), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

1550. For example, in employment cases, forensic psychiatrists may be called to testify on the relationship between a plaintiff's emotional harm and his or her work environment, and psychological testimony has been found probative on the question of damages and causation. *See, e.g.*, Blakey v. Cont'l Airlines, Inc., 992 F. Supp. 731, 735–39 (D.N.J. 1998). *See* EFCO Corp. v. Symons Corp., 219 F.3d 734, 739 (8th Cir. 2000) (expert testimony admissible on damages); Hurley v. Atl. City Police Dept., 933 F. Supp. 396, 408–09, 424 (D.N.J. 1996) (expert testimony on mental harm to employee resulting from sexual harassment); Bottomly v. Leucadia Nat'l Corp., 163 F.R.D. 617, 619–20 (D. Utah 1995) (expert testimony admissible on issue of damages and causation). Expert testimony relating to the amount of damages occurred in almost half of the reported trials examined in a recent Federal Judicial Center survey. *See FJC Survey on Expert Testimony*, *supra* note 1545, at 321.

1551. 509 U.S. 579 (1993).

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23.21 The Federal Rules of Evidence

Daubert v. Merrell Dow Pharmaceuticals, Inc., General Electric Co. v. Joiner,[1552] and *Kumho Tire Co. v. Carmichael*,[1553] the "*Daubert* trilogy," have made management of expert evidence an integral part of proper case management.[1554] Those decisions make the district judge the gatekeeper who must pass on the reliability and relevance of proffered evidence pursuant to Federal Rule of Evidence 702.

Rule 702, amended in 2000 with the italicized language, takes account of the trilogy:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experiences, training, or education, may testify thereto in the form of an opinion or otherwise *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is*

1552. 522 U.S. 136 (1997).

1553. 526 U.S. 137 (1999).

1554. The judge's performance of the gatekeeper function will be intertwined with his or her implementation of Federal Rule of Civil Procedure 16. *See Joiner*, 522 U.S. at 149 (Breyer, J., concurring):

> [J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific or otherwise technical evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.

> *the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*[1555]

An extensive committee note provides guidance to courts in assessing the admissibility of expert evidence. It emphasizes the breadth of the standards set forth in the rule and reiterates that its purpose is to ensure the reliability of the proffered testimony. For example, "The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."[1556] Federal Rules of Evidence 701 and 703 also were amended in conjunction with the amendments to Rule 702. Rule 701 seeks to ensure that the gatekeeping requirements of Rule 702 not be circumvented through "proffering an expert in lay witness clothing,"[1557] stating that opinions and inferences of lay witnesses may not be based on "scientific, technical or other specialized knowledge within the scope of Rule 702."[1558] Rule 703 clarifies the circumstances under which inadmissible evidence relied on by an expert witness in forming his or her opinion can be disclosed to a jury.[1559]

1555. Fed. R. Evid. 702 (emphasis added). *See also* Hon. Lee H. Rosenthal, *Strategies for Handling Expert Challenges in Federal Court*, App. Law., at 1, 8 (Houston Bar Ass'n Spring 1999) ("Counsel should . . . familiarize themselves with the recent proposed amendments to Rule 702 [which] largely codify the two major holdings of the Supreme Court's *Kumho Tire* decision.").

1556. Fed. R. Evid. 702 committee note. *See* Zic v. Italian Gov't Travel Office, 130 F. Supp. 2d 991, 999 (N.D. Ill. 2001) (amendments to Rule 702 added "three new 'reliability' requirements: reliable data, reliable methodology, and reliable application of the methodology").

1557. Fed. R. Evid. 701 committee note. Rule 701 provides the following:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue . . . .

1558. Fed. R. Evid. 701 committee note.

1559. Rule 703 directs the court to apply a balancing test when deciding whether to let the jury hear otherwise inadmissible information to assist the jury in evaluating the expert's opinion by weighing the probative value of the evidence against its prejudicial effect. Unless the probative value substantially outweighs its prejudicial effect, the evidence should not be disclosed to the jury. Unlike the balancing test in Rule 403, the test established in Rule 703 places the presumption against admission, and the committee note to Rule 703 further emphasizes that, to the extent the information is disclosed, it is not admissible for substantive purposes, and a limiting instruction should be given to the jury to that effect.

23.22 The *Daubert* Trilogy[1560]

Expert scientific evidence in the courtroom has grown in tandem with the increasing reliance on technological and scientific advances in virtually every facet of American life.[1561] This convergence of science and law has inevitably placed judges in the position of assessing the admissibility of such evidence using standards that many charged were too ill-defined to realistically separate valid scientific endeavors from science lacking any real empirical support.[1562] Prior to *Daubert,*[1563] scientific evidence was often judged according to the standard set forth in *Frye v. United States.*[1564] *Frye* set forth a test for the admission of expert testimony as one of "general acceptance," with admissibility premised on whether the scientific principle or discovery from which the testimony derived was generally accepted in the pertinent scientific community.[1565] Despite criticisms of the *Frye* test, the general acceptance criterion

1560. For an excellent discussion of the *Daubert* trilogy, see Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony* [hereinafter *Supreme Court's Trilogy*], *in* Reference Manual on Scientific Evidence 9 (Federal Judicial Center, 2d ed. 2000).

1561. *See* David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1802 n.6 (1994) (citing William L. Foster, *Expert Testimony,—Prevalent Complaints and Proposed Remedies*, 11 Harv. L. Rev. 169, 176 (1897–98) (quoting unattributed comments that "the scientific expert is a product of an advanced and rapidly advancing civilization . . . [and has acquired] a far greater frequency of employment by the recent marvelous advances in the applications of science,—applications which have increased the sphere of things to be litigated about")); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DePaul L. Rev. 355, 357–58 (1998) (citing statistics from several studies reflecting growth in number of cases in which experts testify as well as the number of testifying experts).

1562. *See*, *e.g.*, 1 David L. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony § 1-2.4, at 9–10 (2d ed. 2002).

1563. 509 U.S. 579 (1993). *See also* Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1314 & n.2 (9th Cir. 1995) (noting that prior standard for admissibility in Ninth Circuit was *Frye* test of general acceptance); Christopherson v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (overruled by *Daubert*).

1564. 293 F. 1013 (D.C. Cir. 1923). The *Frye* test initially was applied almost exclusively in criminal cases and was not relied on in federal civil litigation until 1984. Paul C. Giannelli, *Daubert: Interpreting the Federal Rules of Evidence*, 15 Cardozo L. Rev. 1999, 2008 (1994).

1565. 293 F. at 1014. *Frye* has been described as simply a relocation of the marketplace test, where expertise is judged by the success of the expert in his or her profession. "In effect, the marketplace determined whether valid knowledge existed by endowing it with commercial value." 1 Faigman et al., *supra* note 1562, § 1-2.1, at 4. However, *Frye* is also argued to have recognized a distinction between the expert and the expertise, and to have placed the assessment of the value of the expertise offered in the hands of "the people who produced the knowledge and offered it, and themselves, to the courts." *Id.* § 1-2.2, at 7.

became the most common standard for assessing the admissibility of expert testimony,[1566] even after the advent of the Federal Rules of Evidence in 1975, and in particular Rule 702.

Daubert, *Joiner*, and *Kumho Tire,* however, changed the way in which courts assess the admissibility of scientific evidence.[1567] *Daubert* explicitly rejected the *Frye* test, holding that the admissibility of expert testimony was governed by Rule 702, and that nothing in the language of the rule reflected an intent to incorporate "general acceptance" as a precondition to admission.[1568] "The drafting history makes no mention of *Frye*, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[1569] Rather, *Daubert* established that Rule 702 mandates federal courts to serve as gatekeepers, ensuring (1) that the subject of the expert testimony is scientific "knowledge" grounded "in the methods and procedures of science"[1570] and (2) that the testimony is relevant, i.e., it will assist the trier of fact in understanding the evidence or determining an issue in the case.[1571] According to *Daubert*, "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."[1572]

1566. 1 Faigman et al., *supra* note 1562, § 1-2.4, at 10. Among these criticisms were that the general acceptance standard precluded the admission of reliable evidence, it left to the scientific community the determination of validity, and it rested on the invalid assumption that jurors were unable to handle scientific evidence. 1 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence § 1-5(G), at 28–29 (3d ed. 1999). Other criticisms included that the general acceptance standard was vague and easily manipulated, was overly conservative, provided no clear demarcation or other guideline as to the point at which a proposition became "generally acceptable," lacked standards for defining the "particular field," and, more importantly, left "the law at the mercy of the practitioners of the respective fields" who may differ in degree of rigorousness. 1 Faigman et al., *supra* note 1562, § 1-2.4, at 8–9, 10.

1567. *But see* United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (foreshadowing *Daubert* by concluding that "the status of the *Frye* test under Rule 702 is somewhat uncertain").

1568. *Daubert*, 509 U.S. at 588–89. The Court noted that the rules occupied the field, and that the inability to find any reference to the common-law doctrine in Rule 702 or its drafting history clearly indicated that Rule 702 superceded *Frye*. "Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention 'general acceptance,' the assertion that the Rules somehow assimilated *Frye* is unconvincing." *Id.* at 589.

1569. *Id.* at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

1570. *Id.* at 589–90.

1571. *Id.* at 591.

1572. *Id.* at 592–93. *See* Brasher v. Sandoz Pharms. Corp., 160 F. Supp. 2d 1291, 1295 (N.D. Ala. 2001) ("The point of the gatekeeping role is to separate opinion evidence based on 'good grounds' from simple subjective speculation masquerading as scientific knowledge.").

23.23 The *Daubert* Criteria

Central to any determination of admissibility is the finding, as a threshold matter, that the witness is qualified to testify as an expert under Rule 702. The courts generally have interpreted this requirement liberally.[1573] In many fields of expertise, for example, neither formal education nor training may be necessary. It is the inquiry into the scientific validity of the underlying reasoning or methodology that presents the greatest challenge to judges. Rule 702 establishes the general standards against which expert testimony is to be judged, relying on criteria delineated in *Daubert*, as well as others that might be appropriate. It is for the trial judge to then determine whether those standards have been met.

Daubert identifies several considerations that might bear on the trial court's determination whether given testimony is scientifically valid and therefore "trustworthy": (1) whether the theory or technique had been tested; (2) whether the theory or technique can be or has been peer reviewed or published; (3) the known or potential error rate; (4) the "existence and maintenance of standards controlling the technique's operation"; and (5) the general acceptance by the relevant scientific community and the testimony's degree of acceptance therein.[1574] These considerations, however, are neither a checklist nor exhaustive, and the trial court's inquiry should be a "flexible

1573. *See, e.g.*, Alvarado v. Weinberger, 511 F.2d 1046, 1048–49 (1st Cir. 1975). Some cases decided since the *Daubert* trilogy seem to reflect a tightening of the standard against which expert qualifications are judged, a trend that may become more prominent in light of the amendments to Rule 702. *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156 (1999) ("The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors 'in deciding the particular issues in the case.'" (quoting 4 Joseph McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1] (2d ed. 1998))); Smelser v. Norfolk S. Ry., 105 F.3d 299, 303 (6th Cir. 1997) (court to examine "'not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question'" (quoting Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994))). Professor Edward Imwinkelried has suggested that the former liberality of the courts in qualifying experts as only needing to have knowledge or skill beyond the average layperson is disappearing in favor of a standard that requires a showing "that the witness has expertise highly relevant to the precise issue before the court." Edward J. Imwinkelried, *An Unheralded Change*, Nat'l L.J., Feb. 5, 2001, at A10. Professor Imwinkelried argues that recent decisions reflect a trend away from qualifying experts who are not specialists in the area relevant to the subject matter of the testimony. *Id. See, e.g.*, Berry v. Crown Equip. Corp., 108 F. Supp. 2d 743, 752–53 (E.D. Mich. 2000) (excluding testimony of plaintiff's expert witness because he was not qualified to render an opinion on defective forklift design).

1574. *Daubert*, 509 U.S. at 593–94 (1993).

one," consistent with the "permissive backdrop" of the Federal Rules.[1575] The committee note similarly states that there may be circumstances in which the *Daubert* factors are inapplicable and other criteria more probative; however, in each case the court is to use criteria to achieve the standards set forth in the rule.[1576] Once the judge determines that proposed scientific testimony is valid (i.e., trustworthy or reliable), the inquiry turns to whether the evidence is relevant to the facts of the case, or its "fit."[1577]

Daubert dealt specifically with scientific expert testimony. In response to the conflict among the lower courts as to *Daubert*'s reach, *Kumho Tire* clarified that the gatekeeping obligation of Rule 702 applied not just to expert scientific testimony but to all expert testimony: "This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge . . . Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope."[1578] The Court further held that it was proper, where appropriate, to apply the *Daubert* factors to nonscientific evidence, recognizing, however, that other factors might be of greater assistance in light of the "many different kinds of experts, and many different kinds of expertise."[1579] The Court expressly declined to establish a definitive list of factors that would apply to all cases.[1580] Instead, it remains for the district court to apply those factors it deems appropriate in order to ensure that the expert "employs in the court-

1575. *Id.* at 593. "[Rule 702's] overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of principles that underlie a proposed submission." *Id.* at 594–95. *See also* Heller v. Shaw Indus., Inc., 167 F.3d 146, 155 (3d Cir. 1999) ("[N]ot only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.").

1576. Fed. R. Evid. 702 committee note.

1577. *See, e.g.*, Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir. 1999) (noting that "an expert does not assist the trier of fact in determining whether a product failed if he starts his analysis based upon the assumption that the product failed (the very question he was called upon to resolve)").

1578. *Kumho Tire*, 526 U.S. at 147.

1579. *Id.* at 150. The Court cited to the amicus brief filed by the United States referencing a wide variety of cases in which nonscientific expert testimony had been offered, from handwriting analysis, to agricultural practice, to attorney fee valuation. *See also* Elcock v. Kmart Corp., 233 F.3d 734, 747 (3d Cir. 2000) (analogizing two of the *Daubert* factors in reviewing testimony of vocational rehabilitation expert, noting "[v]ocational rehabilitation is a social science that does not exactly mirror the fundamental precepts of the so-called harder sciences"); Ohio *ex rel.* Montgomery v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1252 (S.D. Ohio 1996) (noting reasoning and general framework of *Daubert* applied to economic and statistical evidence).

1580. *Kumho Tire*, 526 U.S. at 150–51.

room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[1581]

23.24 Opinions and Conclusions Under *Daubert*

One issue that has caused debate is the appropriate degree of inquiry into the conclusions of an expert. In making the *Daubert* inquiry, some courts have examined not only the appropriateness and reliability of the methodology used by the expert,[1582] but whether the expert's conclusions are supported by the methodology used.[1583] The *Daubert* Court cautioned that the focus of the inquiry under Rule 702 is not on the conclusions reached by the expert but on the principles adduced and methodologies used.[1584] *Joiner*, decided several years later, blurred *Daubert*'s distinction between methodology and conclusion, stating that "conclusions and methodology are not entirely distinct from one another."[1585] Indeed, *Joiner* implies that to find an expert's proffered testimony reliable, the district court must not only conclude the expert followed proper methodology for the science, but also that the conclusion reached was supported by the methodology used. The *Joiner* Court noted that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district

1581. *Id.* at 151–53.

1582. Allen v. Pa. Eng'g Corp., 102 F.3d 194 (5th Cir. 1996).

1583. Jahn v. Equine Servs., PSC, 233 F.3d 382, 393 (6th Cir. 2000) (expert methodology can be reliable even where matter might be in debate because of other testimony); Smith v. Ford Motor Co., 215 F.3d 713, 720–21 (7th Cir. 2000) (district court abused discretion in relying on single, potentially irrelevant criterion in finding expert conclusions were based on unreliable methodologies, did not consider other factors, and failed to explain connection between factor selected by court and reliability under the circumstances); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043–44 (2d Cir. 1995); United States v. Martinez, 3 F.3d 1191, 1197–98 (8th Cir. 1993); Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1150 (N.D. Ill. 2001) (court's gatekeeping function focuses on methodology, leaving the correctness of expert's conclusion or soundness of facts on which conclusion is based to fact-finder).

1584. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993). *See* NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 788–89 (7th Cir. 2000) ("The district court did not abuse its discretion in concluding that the common and official acceptance of photographic analysis made it sufficiently reliable."); Clark v. Takata Corp., 192 F.3d 750, 758–59 (7th Cir. 1999) (expert opinion properly excluded where based only on experience or training with no scientific data or supporting research material or other rigorous methodology).

1585. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Justice Stevens, concurring in part and dissenting in part in *Joiner*, questioned "When qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible?" *Id.* at 154.

court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."[1586]

The amendment to Rule 702, which became effective after *Daubert*, *Joiner*, and *Kumho Tire*, provides some guidance. The rule contemplates, among other things, that in making a reliability determination, the court will "scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."[1587] In light of *Joiner* and Rule 702, *Daubert*'s caution against inquiring into the expert's conclusion appears to have lost some of its authority, although the degree to which the conclusion must be supported by the methodology and supporting reasoning remains unclear.[1588] Where the expert's conclusion is drawn from a reliable methodology, however, the correctness of that conclusion is still an issue for the finder of fact. The original intent of Rule 702 in 1975 was to liberalize, not restrict, the admission of expert evidence.[1589] Accordingly, a judge must be cognizant of the constraints imposed by the Seventh Amendment and not preclude the jury from hearing an opinion that, although in the minority, is nonetheless responsibly grounded in the science and reliable even if the judge does not believe the conclusion to be "correct."[1590] Presumably, cross-examination and presentation of contrary evidence by the opposing party, as suggested in *Daubert*, would identify for the jury the shakiness of the foundation on which the conclusion is based.

1586. *Id.* at 146.

1587. Fed. R. Evid. 702 committee note. *See, e.g.*, Pride v. BIC Corp., 218 F.3d 566, 578 (6th Cir. 2000) (excluding testimony where, among other things, experts failed to timely conduct replicable experiments); Moore v. Ashland Chem., Inc., 151 F.3d 269, 279 (5th Cir. 1998) (where wide analytical gap existed between expert opinion and scientific knowledge, opinion would be excluded as unreliable).

1588. Ruiz-Troche v. Pepsi Cola of P.R., 161 F.3d 77, 81 (1st Cir. 1998) ("[W]hile methodology remains the central focus of a *Daubert* inquiry, this focus need not completely pretermit judicial consideration of an expert's conclusions.").

1589. *See* Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999) (courts should be mindful of the intent to liberalize the introduction of expert testimony while also recognizing the potential of expert witnesses to "'be both powerful and quite misleading'" (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993))).

1590. *See, e.g.*, Bonner v. ISP Techs., Inc., 259 F.3d 924, 929 (8th Cir. 2001) (evidence should be admitted where there are good grounds for the expert's conclusions, even though the judge may believe there are better grounds for alternative conclusions); Jahn v. Equine Servs., PSC, 233 F.3d 382, 391 (6th Cir. 2000) (district court improperly weighed testimony of expert against pathologist testimony in finding expert's opinion suspect).

23.25 The *Daubert* "Fit" Test

Rule 702 has always required that expert testimony "assist the trier of fact" to understand evidence or resolve issues in the case, and the second prong of the *Daubert* test reiterates the necessity of such a determination. The *Daubert* Court discussed this inquiry as one of relevance, noting that if "it is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[1591] Since *Daubert*, however, courts have differed on their interpretation of "fit" in assessing expert scientific evidence. This disagreement has turned in part on whether the inquiry under Rule 702 looks only at the admissibility of the expert evidence (whether it is reliable and relevant) separate from any inquiry into its sufficiency.[1592] In some cases the courts have excluded expert testimony as lacking relevance where it was insufficient to prove the matter for which the party sought its introduction.[1593] Other courts have held that the evidence need only meet a low threshold of "relevance" to be admissible.[1594] These decisions limit the trial court, once the methodology underlying expert testimony is found to be appropriate or reliable, to determining whether the testimony is pertinent to an issue in the case in order to be admissible.[1595] Courts adhering to this latter view have

1591. *Daubert*, 509 U.S. at 591. *See also* Amorgianos v. Nat'l R.R. Passenger Corp., 137 F. Supp. 2d 147 (E.D.N.Y. 2001).

1592. *See, e.g.*, *In re* Joint E. & S. Dists. Asbestos Litig., 52 F.3d 1124, 1132 (2d Cir. 1995) (stating that admissibility is a threshold inquiry as to whether a certain piece of evidence ought to be admitted at trial, whereas a "sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the litigational road").

1593. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319–20 (7th Cir. 1996) (expert opinion excluded where it failed to establish how nicotine overdose can precipitate a heart attack in person with heart disease). *See also* Blevins v. New Holland N. Am., Inc., 128 F. Supp. 2d 952, 957–59 (W.D. Va. 2001) (seemingly conflating both admissibility and sufficiency inquiries). For example, in some toxic tort cases, if the expert's evidence, considered by itself, did not meet the legal standard of causation, it would be inadmissible as lacking relevance. *See, e.g.*, Wheat v. Sofamor S.N.C., 46 F. Supp. 2d 1351, 1357–58 (N.D. Ga. 1999) (where expert could not state to reasonable degree of medical certainty as to either a general or specific causal relationship between product and harm, testimony "is unhelpful and irrelevant").

1594. *See, e.g.*, Adams v. Ameritech Servs., Inc., 231 F.3d 414, 425 (7th Cir. 2000) ("First, the question before us is not whether the reports proffered by the plaintiffs prove the entire case; it is whether they were prepared in a reliable and statistically sound way, such that they contained relevant evidence that a trier of fact would have been entitled to consider."); Md. Cas. Co. v. Therm-O-Disc, Inc., 137 F.3d 780, 783 (4th Cir. 1998) ("prescribing fluid and general standards for the admission of scientific testimony"); Ambrosini v. Labarraque, 101 F.3d 129, 135–36 (D.C. Cir. 1996).

1595. Smith v. Ford Motor Co., 215 F.3d 713, 719 (7th Cir. 2000).

maintained that litigants need only "demonstrate by a preponderance of the evidence that their opinions are reliable,"[1596] and they are not required to "prove their case twice . . . ."[1597] Under this view of the fit test, an expert's testimony, even though insufficient to prove causation when viewed alone, would be admissible for consideration by the jury collectively with all the other evidence in the case.[1598]

In addition to the conflict in the circuits on the proper interpretation of *Daubert*'s second prong, the fit test has also been used to exclude evidence based on the nature of the science at issue or the degree to which the science sought to be introduced differs from the facts at issue in the case.[1599] In some instances, the very unreliability of the expert testimony has supported the conclusion that the evidence therefore did not fit the case.[1600] *Daubert* articulated the relevant inquiry as whether the testimony offered is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute,"[1601]

1596. *See* City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562–63 (11th Cir. 1998).

1597. *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994); *see, e.g.*, *In re* TMI Litig., 193 F.3d 613, 665 (3d Cir. 1999) (quoting *In re Paoli*, 35 F.3d at 744). The *TMI* court noted that there was a distinction between the evidentiary requirement of reliability and the higher standard of whether the expert's conclusions were correct on the merits, commenting, "The distinction is indeed significant as it preserves the fact finding role of the jury." *In re TMI Litig.*, at 665 n.90.

1598. *See, e.g.*, Bonner v. ISP Techs., Inc., 259 F.3d 924, 929 (8th Cir. 2001) ("[N]either Rule 702 nor *Daubert* requires that an expert opinion resolve an ultimate issue of fact to a scientific absolute in order to be admissible."); *City of Tuscaloosa*, 158 F.3d at 565 ("As circumstantial evidence, McClave's data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.").

1599. *See, e.g.*, Savage v. Union Pac. R.R. Co., 67 F. Supp. 2d 1021, 1035–39 (E.D. Ark. 1999) (excluding expert testimony where no scientific evidence was introduced as to whether the chemicals to which plaintiff was exposed were implicated in the type of cancer suffered by plaintiff). One issue of significance is the threshold necessary to maintain a science-based claim. This conflict is probably most prominent in mass and toxic tort cases, where the ability to prove causation typically relies on inferences and hypotheses about an unknown causal mechanism, but arises in other areas as well. *See* Michael D. Green et al., *Reference Guide on Epidemiology* [hereinafter *Epidemiology*], *in* Reference Manual on Scientific Evidence 333–400 (Federal Judicial Center, 2d ed. 2000).

1600. *See, e.g.*, Bourne v. E.I. DuPont De Nemours & Co., 189 F. Supp. 2d 482, 499 (S.D. W. Va. 2002) (finding methodologies used by experts in extrapolating from animal studies to humans was unsound and therefore "a poor 'fit' for the facts of the case").

1601. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993) (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). *But see* Mattis v. Carlon Elec. Prods., 114 F. Supp. 2d 888, 895 (D.S.D. 2000) (examining whether testimony demonstrates level of exposure hazardous to humans and plaintiff's actual level of exposure in terms of "fit" under *Daubert*).

with the determination as to what constitutes a "sufficient" relationship clearly left to judicial discretion.[1602]

23.26 The Scope of Appellate Review

Joiner addressed the scope of the district court's discretion in applying Rule 702. The Court held that the standard of review of evidentiary rulings by the district court, including rulings pursuant to Rule 702, is abuse of discretion.[1603] *Kumho Tire* clarified the extent of the trial court's discretion, holding that the abuse-of-discretion standard applied not just to the ultimate conclusion on admissibility, but to all of the findings on admissibility. Thus the district court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[1604] This includes determinations on the best way to proceed as well as what factors are reasonable measures of reliability of the particular expert testimony proffered.[1605] *Kumho Tire* rejected any suggestion that specific criteria must be

1602. *See, e.g.*, Textron, Inc. *ex rel.* Homelite Div. v. Barber-Colman Co. (Textron I), 903 F. Supp. 1546, 1558 (W.D.N.C. 1995) (The court rejected expert testimony that relied on studies of household solid waste, concluding that such substances were hazardous where the expert was unable to demonstrate that the "studies relied upon [were] sufficiently similar to the households connected to Burlington's wastewater system to merit comparison."). *See also* Mitchell v. Gencorp., Inc., 165 F.3d 778, 782 (10th Cir. 1999) (affirming exclusion of expert testimony as unreliable: "[W]ithout scientific data supporting their conclusions that chemicals similar to benzene caused the same problems as benzene, the analytical gap in the expert's testimony is simply too wide . . . ."); Bradley v. Armstrong Rubber Co., 130 F.3d 168, 176–78 (5th Cir. 1997) (court considering admissibility under Rule 703 found expert opinion could be properly excluded as irrelevant where facts on which opinion was based were wrong); Textron, Inc. *ex rel.* Homelite Div. Co. v. Barber-Colman Co. (Textron II), 903 F. Supp. 1558, 1568–69 (W.D.N.C. 1995).

1603. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997). A *de novo* standard of review applies, however, to the initial inquiry into whether the district court properly followed *Daubert*'s framework. *See* Walker v. Soo Line R.R. Co., 208 F.3d 581, 590 (7th Cir. 2000) ("We review de novo 'whether the district court properly followed the framework set forth in *Daubert*.'" (quoting United States v. Hall, 165 F.3d 1095, 1101 (7th Cir. 1999))); United States v. Call, 129 F.3d 1402, 1405 (10th Cir. 1997).

1604. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

1605. *Id.* at 152–53. *See also* Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003) (holding that (1) witness qualified as an expert by virtue of extensive education, training, and experience; (2) expert's methods and results were discernible and rooted in real science, and therefore were empirically testable; and (3) expert's testimony was relevant and would assist the jury); Bourelle v. Crown Equip. Corp., 220 F.3d 532, 537–38 (7th Cir. 2000) (district court did not abuse its discretion in excluding testimony of expert who failed to test or observe vehicle, conduct computer analysis, or otherwise satisfy *Daubert*); Clay v. Ford Motor Co., 215 F.3d 663, 668 (6th Cir. 2000) ("The District Court, in its discretion, could have

applied to certain types of expert testimony;[1606] however, Justice Scalia emphasized in a concurring opinion that although the *Daubert* factors "are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."[1607]

In addition, the Supreme Court in *Weisgram v. Marley Co*.[1608] resolved any uncertainty surrounding the scope of appellate courts' authority to enter judgment as a matter of law under Federal Rule of Civil Procedure 50 where expert testimony has been improperly admitted. The Court held that an appellate court, upon concluding that the district court abused its discretion in admitting expert testimony at trial, has the authority to overturn a jury verdict and enter judgment as a matter of law where the exclusion of the evidence renders the proof legally insufficient.[1609] The Court commented that "[s]ince *Daubert*, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail."[1610]

decided that [the expert's] failure to test his theories went to the weight of his testimony regarding defects in the *Bronco II*, not to its admissibility.").

1606. "[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." 526 U.S. at 150. The Court also rejected any interpretation of Rule 702 that would "[map] certain kinds of questions to certain kinds of experts." *Id.* at 151.

1607. *Id.* at 159 (Scalia, J., concurring). *See* Black v. Food Lion, Inc., 171 F.3d 308, 311–12 (5th Cir. 1999) (stating "[I]n the vast majority of cases, the district court first should decide whether the [*Daubert* factors] are appropriate . . . . [It] then can consider whether other factors . . . are relevant to the case at hand," and suggesting failure to apply *Daubert* factors may be an abuse of discretion). The danger of establishing criteria that must be applied is that the validity of the science turns on being shoehorned into the correlative criteria, regardless of whether the science involved was amenable to such a qualification, rather than being measured against scientific work outside the courtroom.

1608. 528 U.S. 440 (2000).

1609. *Id.*

1610. *Id.* at 455 (citations and footnote omitted). Although the Court's decision in *Weisgram* and its earlier decision in *Neely v. Martin K. Elby Construction Co.* recognized that the authority to enter judgment on appeal was afforded by Rule 50, the Court did caution that in exercising its discretion, the court of appeals should take into consideration the rights of the verdict winner as well as the trial judge's firsthand knowledge of the case. "'Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case.'" *Weisgram*, 528 U.S. at 451 (quoting Neely v. Martin K. Elby Construction Co., 386 U.S. 317, 325 (1967)).

Subsequent circuit court decisions, following the rationale in *Weisgram*, have entered judgment under Rule 50 where expert testimony was admitted in error.[1611] Accordingly, the *Daubert* trilogy, together with *Weisgram*, clearly indicates not only the significance of the gatekeeping inquiry, but the potential prejudice to a party should that inquiry be superficial or inadequate and expert testimony subsequently deemed unreliable and therefore inadmissible on appeal. At the same time, parties are placed on notice that borderline expert testimony may be excised on appeal to their detriment. One possible effect of *Weisgram* is that parties might attempt to identify extra experts to minimize the negative impact on their case should an appellate court find the testimony of one expert was erroneously admitted—with extra experts, the subsequent excision of one would not be fatal to the verdict. Such an approach would result in increased time and costs, both to the parties as well as the trial court, and the court should discourage multiple expert identification.

23.27 Emerging Issues in the Use of Scientific Evidence

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As amended, Federal Rule of Evidence 702 establishes general standards for the judge to use in determining the reliability of expert testimony. Rule 702 not only requires that the testimony be relevant, but also that it be based on sufficient facts or data, that it be the product of reliable principles and methods, and that the witness applied those principles and methods reliably to the facts of the case. The rule contemplates judicial analysis of various factors, including but not limited to those set forth in *Daubert*, to assess whether the proposed testimony meets these standards. However, the court should avoid interpreting these factors (and others deemed appropriate) so rigidly that valid science is excluded because it does not neatly fit within the confines of the criteria selected by the court as indicia of reliability.

There are several issues that have emerged as the district courts have wrestled with their role as gatekeeper, including the issues discussed below.

1611. *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000) ("It cannot be said that the verdict would have been the same without the expert testimony, and its admission affected Brunswick's substantial rights.").

23.271 The Validity of Toxicological Evidence Versus Epidemiological Evidence

The courts have had little difficulty admitting expert testimony based on epidemiological studies.[1612] In order for toxicological studies to be admissible to prove causation in humans, however, a number of courts have required that sufficient grounds exist to support the extrapolation from animals to humans, "just as the methodology of the studies must constitute good grounds to reach conclusions about the animals themselves."[1613] As a result, and particularly in cases where either no epidemiological evidence is offered by the proposing party or epidemiological evidence is unavailable, some courts have been inclined to exclude toxicological evidence based on lack of "fit."[1614]

23.272 Aggregation of Scientific Evidence

Another concern is whether the aggregation of scientific evidence undermines the reliability of expert testimony based on such evidence. For example, epidemiological studies are often small and lack sufficient independent

1612. Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1115 (5th Cir. 1991) ("[O]nly when . . . critically inaccurate or incomplete, as determined by what other experts would or would not be willing to base opinions upon, would the facts and data lack the necessary requisites of Rule 703."); DeLuca *ex rel.* Deluca v. Merrell Dow Pharms., Inc., 911 F.2d 941, 953 (3d Cir. 1990), *aff'd*, 8 F.3d 778 (3d Cir. 1993); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1240 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987); Cook v. United States, 545 F. Supp. 306, 307–16 (N.D. Cal. 1982) (whether swine flue vaccine led to Guillain-Barre disease). *See also* Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 593 (D.N.J. 2002) ("[A]nimal bioassays are of limited use in determining whether a particular chemical causes a particular disease, or type of cancer, in humans."); Bourne v. E.I. DuPont De Nemours, 189 F. Supp. 2d 482, 496 (S.D. W. Va. 2002) (noting jurisdictions where extrapolating human teratogenicity from in vivo animal studies and in vivo test found unreliable). *But see* Villari v. Terminix Int'l, Inc., 692 F. Supp. 568, 570–71 (E.D. Pa. 1988) (finding substantial portion of scientific community relied on animal studies of the type offered by plaintiff to assess human health risks). *See also* Brock v. Merrell Dow Pharms., Inc., 874 F.2d 307, 313 (5th Cir.) ("This circuit has previously realized the very limited usefulness of animal studies when confronted with questions of toxicity."), *modified*, 884 F.2d 166, 167 (5th Cir. 1989) (court changing its holding that the plaintiffs' case was undermined by "the lack of conclusive epidemiological proof" to a "failure to present statistically significant epidemiological proof").

1613. *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 743 (3d Cir. 1994).

1614. *See, e.g.*, Allen v. Pa. Eng'g Corp., 102 F.3d 194, 197 (5th Cir. 1996) ("In the absence of scientifically valid reasoning, methodology and evidence supporting these experts' opinions, the district court properly excluded them."); Turpin v. Merrell Dow Pharms., Inc., 959 F.2d 1349, 1360–61 (6th Cir. 1992).

statistical significance to support definitive conclusions.[1615] Furthermore, several studies may differ or disagree in whether or not an association is found or in the magnitude of the association.[1616] As a result, a formal technique ("meta-analysis") was developed to aggregate these studies, which would derive a single figure to represent the totality of the studies reviewed.[1617] At issue is whether this technique renders the conclusion "unreliable" for purposes of *Daubert* if the individual studies alone would not satisfy a *Daubert* inquiry. There are valid concerns with the aggregation of empirical studies under these circumstances.[1618] At the same time, the mere fact that the studies have been aggregated to make an assessment should not automatically disqualify the conclusion or serve as the basis for excluding epidemiological evidence.[1619]

Questions regarding the reliability of aggregated evidence can arise in more informal contexts as well, such as where the expert considers several studies, none of which would support the expert's conclusions by itself, but when taken together form the basis for the proffered opinion.[1620] This "weight of the evidence" methodology was rejected as unreliable by the district court in *Joiner*, at least as presented by the proffered experts, but the court of appeals

1615. *See, e.g.*, Moore v. Ashland Chem., 151 F.3d 269, 281 (5th Cir. 1998) (en banc) (Dennis J., dissenting) (noting that "[t]he quantity of persons who sustain this type of exposure was simply too small for a plaintiff to be able to provide epidemiological, animal testing or other hard scientific evidence linking the particular chemical compound to reactive airways disease").

1616. *Epidemiology*, *supra* note 1599, at 380. The criteria used to determine whether an observed association is causal are known as the Hill criteria, after their author Sir Austin Bradford Hill. For a list of these criteria, see, e.g., *Magistrini*, 180 F. Supp. 2d at 592–93 (D.N.J. 2002).

1617. "In meta-analysis, studies are given different weights in proportion to the sizes of their study populations and other characteristics." *Epidemiology*, *supra* note 1599, at 380.

1618. *Id.* In many instances, the "differences among the individual studies included in the meta-analysis and the reasons for the differences are important in themselves and need to be understood." *Id.* at 381. And, as meta-analysis generates a single estimate of risk, it could "lead to a false sense of security regarding the certainty of the estimate." *Id.* at 381 (citing John C. Bailar III, *Assessing Assessments*, 277 Science 528, 529 (1997)).

1619. *See id.* at 381 (discussing criteria that may be more appropriate in assessing the reliability of meta-analysis).

1620. *See* Brasher v. Sandoz Pharms. Corp., 160 F. Supp. 2d 1291, 1296 (N.D. Ala. 2001) (noting that although evidence of animal studies, medical texts, and a limited number of case reports do not "establish conclusively that Parlodel can cause [injury], taken together they present a compelling picture, one which can support a scientific inference"). A variation of this approach would occur where information from different kinds of studies across different fields is considered in reaching the expert's conclusion. *Supreme Court's Trilogy*, *supra* note 1560, at 33.

found the approach scientifically acceptable.[1621] Justice Stevens, in a concurring and dissenting opinion in *Joiner*, commented that "[i]t is not intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence—this is not the sort of 'junk science' with which *Daubert* was concerned."[1622] Some courts, however, have required experts to use a "weight of the evidence" methodology to demonstrate how each study or piece of evidence was valued by the expert and the methodological basis upon which the expert may have discounted some pieces of evidence while relying more heavily on others in reaching his or her conclusion.[1623] The uncertainty surrounding the reliability of aggregated studies or evidence is inextricably tied to the debate on the distinction between methodology and conclusion,[1624] as well as the disagreement among the courts on the admissibility versus the sufficiency of expert evidence under the second prong of *Daubert*.[1625]

23.273 Clinical Medical Judgment

Many tort cases involve the introduction of expert evidence through the use of clinical treating physicians, relying on a methodology referred to as

1621. Joiner v. Gen. Elec. Co., 864 F. Supp. 1310, 1320–26 (N.D. Ga. 1994), *rev'd*, 78 F.3d 524, 532 (11th Cir. 1996) (according to the Eleventh Circuit, "opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply"). *See also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 153–54 (1997) (Stevens, J., concurring in part and dissenting in part) (noting approvingly the court of appeal's acceptance of the "'weight of the evidence' methodology"). Where the data permit a reasonable scientist to make a probabilistic statement with regard to effect, even though lacking statistical significance, these judgments should not be automatically discarded as legally insufficient simply because of epistemological or proof problems as long as they can be expressed with a level of confidence that meets or exceeds the demands of Federal Rule of Evidence 104(a). The court should allow consideration of all methodically sound studies with the focus on whether the studies reliably permit the inference sought to be drawn.

1622. 522 U.S. at 153. In *Joiner*, the district court had examined various animal studies offered by the plaintiff and found that none of them supported the experts' conclusions that the plaintiff's cancer was caused by PCB exposure. The majority opinion did not specifically address whether the experts properly could have aggregated these studies to reach their conclusion that there was a causal relationship between the plaintiff's cancer and PCB exposure. Rather, the Court pointed to *Joiner*'s failure to explain "how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies . . . ." *Id.* at 144.

1623. *See, e.g.*, Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 602 (D.N.J. 2002).

1624. *See supra* section 23.24.

1625. *See id.*

"differential diagnosis" to establish a causal relationship between the plaintiff's harm and an allegedly injurious substance.[1626] Differential diagnosis seeks to establish specific causation by ruling out other causative factors, leaving the exposure to the harmful agent as the likely explanation for plaintiff's harm. Although a number of judges have permitted expert testimony based on differential diagnosis, others have held such testimony to be inadmissible where the expert was unable to show general causation or otherwise rule out alternative causes that might also explain all of the plaintiff's symptoms.[1627] This has hampered the ability of plaintiffs to prove causation through clinical physicians in cases where, for example, the relevant science has not clearly established a known etiology for the disease in question.[1628] The apparent split in approach is based in part on a disagreement regarding the degree to which the expert must rely on more than the traditional methodology of clinical medical reasoning to support his or her opinion, and the extent of the court's inquiry into the evidence forming the basis for the clinical medical judg-

1626. For a discussion of medical testimony and differential diagnosis, see Mary Sue Henifin et al., *Reference Guide on Medical Testimony* [hereinafter *Medical Testimony*], *in* Reference Manual on Scientific Evidence 441–84 (Federal Judicial Center, 2d ed. 2000).

1627. *Compare* Glastetter v. Novartis Pharms. Corp., 252 F.3d 986 (8th Cir. 2001) (finding differential diagnosis presumptively admissible and only those diagnoses that are scientifically invalid should be excluded), *and* Heller v. Shaw Indus., Inc., 167 F.3d 146, 154–57 (3d Cir. 1999) (discussing the different components to differential analysis and stating, where properly done, that it will support expert medical opinion on causation), *and* McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995) (differential analysis requires "listing possible causes, then eliminating all causes but one"), *with* Raynor v. Merrell Pharms., Inc., 104 F.3d 1371, 1374–76 (D.C. Cir. 1997) (where contradictory epidemiological evidence was "overwhelming" relating to Bendectin, and expert opinion on causation based in part on differential diagnosis was inadmissible). *See also* Mattis v. Carlon Elec. Prods., 114 F. Supp. 2d 888, 893 (D.S.D. 2000) (noting that a number of cases have accepted differential diagnosis as reliable, but that "[d]ifferential diagnosis of RADS . . . have not fared so well in the federal courts"); Gary Sloboda, *Differential Diagnosis or Distortion?*, 35 U.S.F. L. Rev. 301 (2001) (discussing differential diagnosis and issues of causation).

1628. *See, e.g.*, Mitchell v. Gencorp, Inc., 165 F.3d 778, 781 (10th Cir. 1999); Black v. Food Lion, Inc., 171 F.3d 308, 314 (5th Cir. 1999); Allen v. Pa. Eng'g Corp., 102 F.3d 194, 199 (5th Cir. 1996); Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1106 (8th Cir. 1996) (plaintiffs have burden of proving "the levels of exposure that are hazardous to human beings generally as well as plaintiff's actual level of exposure"); Siharth v. Sandoz Pharm. Corp., 131 F. Supp. 2d 1347 (N.D. Ga. 2001). *But see* Meister v. Med. Eng'g Corp., 267 F.3d 1123 (D.C. Cir. 2001) (overwhelming epidemiological evidence finding no causal relationship between breast implants and scleroderma overcame plaintiff's evidence to the contrary based on asserted differential diagnosis). *See also Supreme Court's Trilogy*, *supra* note 1560, at 26; Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 Law & Contemp. Probs. 107 (2001); *Sloboda*, *supra* note 1627.

ment.[1629] A lack of epidemiological or other studies demonstrating an objective, scientifically established association between the disease and the causative agent has led some circuits to reject some clinical medical testimony as unreliable.[1630] However, all methodologically sound studies should be considered, with the focus on whether the studies reasonably permit the inference or conclusion sought to be drawn. "While an epidemiological study may be the best or ideal evidence, *Daubert* requires only that reliable evidence be presented . . . ."[1631] It is unclear whether *Kumho Tire*'s admonition that no specified set of factors will apply to every case, and that each case must be considered in light of the circumstances, will affect how the circuits consider clinical medical evidence.[1632]

23.274 Research as a Result of Litigation

Another area of concern is whether an inordinate focus on independent research and peer review as indicia of reliability may lead to the exclusion of research conducted as a result of litigation, even though the science is valid. The committee note to Rule 702 offers as a possible relevant factor whether the

1629. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 264 (4th Cir. 1999) (evidence of exposure and temporal proximity to plaintiff's injury was sufficient to "rule in" talc as a causal agent, even though physician had no scientific literature upon which to rely); Ruiz-Troche v. Pepsi Cola of P.R., 161 F.3d 77, 86 (1st Cir. 1998) (finding district court had improperly imposed requirement that expert be able to "declare that a precise quantity of cocaine in the bloodstream produces an equally precise degree of impairment"); Brasher v. Sandoz Pharms. Corp., 160 F. Supp. 2d 1291 (N.D. Ala. 2001) (finding that "animal studies, the medical literature reviews, the ADRs reported to the FDA, and the 'general acceptance' of the association between stroke and Parlodel, reflected in several neurology and toxicology textbooks and treatises" constituted reliable evidence on which a conclusion could be drawn); Hollander v. Sandoz Pharms. Corp., 95 F. Supp. 2d 1230 (W.D. Okla. 2000) (lack of controlled epidemiological studies reflecting association between stroke and Parlodel, reliance on anecdotal case reports, and the dissimilarity of the animal studies and the experts' methodologies failed to establish reliability of methods used by plaintiffs' experts); Savage v. Union Pac. R.R. Co., 67 F. Supp. 2d 1021, 1033–34 (E.D. Ark. 1999) (expert testimony excluded where plaintiff introduced no evidence of the nature of creosote exposure necessary to lead to basal cell carcinoma, the level of exposure needed, or the level of his own exposure with any degree of scientific certainty). *Compare* Heller v. Shaw Indus., Inc., 167 F.3d 146 (3d Cir. 1999), *with* Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999), *and* Moore v. Ashland Chems., Inc., 151 F.3d 269 (5th Cir. 1998).

1630. *See, e.g.*, Hollander v. Sandoz Pharms. Corp., 95 F. Supp. 2d 1230 (W.D. Okla. 2000); *Black*, 171 F.3d at 313–14. *But see* Nat'l Bank of Commerce v. Associated Milk Producers, Inc., 191 F.3d 858, 864 (8th Cir. 1999) (affirming exclusion of expert testimony based on differential diagnosis in absence of scientific studies correlating aflatoxin M-1 with laryngeal cancer).

1631. *Brasher*, 160 F. Supp. 2d at 1298.

1632. For an example of an opinion issued after *Kumho Tire*, see *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999).

expert is proposing to testify about matters growing naturally and directly out of research independent of litigation, and the Ninth Circuit on remand in *Daubert* stated "If the proffered expert testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'"[1633] The Supreme Court in *Daubert* said that a corollary indicator of reliability could be whether the research had been subject to peer review or published.[1634] Although in some instances a failure to satisfy these two criteria may justifiably call into question the reliability of the science, in other cases there may be a dearth of scientific evidence as to the existence of a causal relationship between exposure to a chemical, product, or contaminant and adverse health effects, because the relationship has not been sufficiently tested or because the substance is new.[1635] The Court noted in *Kumho Tire* that the "particular application at issue may never previously have interested any scientist,"[1636] or the issue may not have been one to generate any interest among editors of scientific publications. In such cases there are no established studies on which experts can rely, and often it is the harm which gave rise to the litigation that spurred whatever research exists.[1637] Such research may be both credible and reliable, even though it has neither grown "naturally and directly out of research independent of litigation,"[1638] nor yet been published. Rigid application of these criteria might preclude a party's ability to prove causation simply because the question as to whether there was a causal relationship had never arisen before.

1633. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1317–18 (9th Cir. 1995).

1634. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993); *Ruiz-Troche*, 161 F.3d at 84 ("The publication of these pieces and their exposure to peer review serve as independent indicia of the reliability of the . . . technique . . . [and] also demonstrate a measure of acceptance of the methodology within the scientific community.").

1635. *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995).

1636. 526 U.S. at 151. *See, e.g.*, Lauzon v. Senco Prods. Inc., 270 F.3d 681, 691 (8th Cir. 2001) (lack of peer reviewed information on dangers associated with pneumatic nailers a result of the fact that only recently had there been an increase in popularity of pneumatic-fire nailers and concomitant increase in injuries).

1637. The Bendectin litigation seems to provide an example of research spurred by litigation. *See* Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 Hastings L.J. 301 (1992). *See also* Bourne v. E.I. DuPont De Nemours, 189 F. Supp. 2d 482, 484 n.2 (S.D. W. Va. 2002) (parties engaged in studies of benomyl and its relationship to plaintiff's birth defects during pendency of case).

1638. *Daubert*, 43 F.3d at 1317.

23.3 Case Management[1639]

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23.31 Preliminary Considerations in Assessing Expert Testimony

Although *Kumho Tire* clarified that the gatekeeping requirement extends to "technical or other specialized knowledge" and reemphasized that the test for determining reliability is a flexible one, nuances of *Daubert* and its proper interpretation remain a subject of debate.[1640] In ruling on the admissibility of scientific evidence under the *Daubert* standard, and in light of the amendments to Rule 702, the court must still consider the following questions:

What factors should apply to ensure the reliability of expert testimony? The *Daubert* Court set out several factors as indicia of scientific reliability, but also recognized that these factors might not be pertinent in every case. Rather, different types of expert scientific evidence might require application of different indicia of reliability.[1641] Moreover, *Kumho Tire* did not set forth any factors that would be more appropriate than others in assessing expert evi-

1639. Portions of the following subsections were adapted from and substantially incorporate the text of *Management of Expert Evidence*, *supra* note 1545, at 39.

1640. 526 U.S. at 147 (quoting Fed. R. Evid. 702). *See, e.g.*, Ned Miltenberg, *Step Out of the Fryeing Pan and into the Fire, and Out Back Again—or "Back to the Future,"* 2 Ann. 2000 ATLA-CLE 2645, § I (2000) ("Although nearly a decade has passed since *Daubert* was decided, its meaning is still sufficiently unclear that each year it inspires scores of precedent-setting interpretations and new law review articles . . . . Thus, *Daubert* and its progeny have been the subject of nearly 2,800 published opinions and 3,300 law review articles.").

1641. *See, e.g.*, City of Tuscaloosa v. Harcros Chem., Inc., 158 F.3d 548, 566 n.25 (11th Cir. 1998) (factors other than "testability" may have more bearing on methodologies employed by economic and statistical experts).

dence that fell under the rubric of "technological or other specialized knowledge."[1642] The possible fields of such nonscientific evidence were simply considered too diverse. As a practical matter, as it relates to testimony to which the *Daubert* factors do not easily apply, the selection of criteria appropriate to judge the reliability of a particular type of expert testimony will be a coordinated effort between the judge and the parties. Even nonscientific testimony, however, must be measured against the standards reflected in the amendments to Rule 702. Thus, underlying any *Daubert* inquiry is the manner or method by which the court determines first the appropriate criteria necessary to fulfill its gatekeeping role, and then how the testimony is judged against those criteria. Commentators have expressed varying views on when, and how, *Daubert's* gatekeeping obligation is triggered.[1643]

The *Reference Manual on Scientific Evidence* provides a good starting place for determining how to structure an inquiry into the process and methods used by an expert in order to establish whether the testimony or evidence is sufficiently reliable to be admitted.[1644] In addition, the committee note to amended Rule 702 details additional factors beyond the *Daubert* criteria that may be relevant in making reliability determinations in various types of cases. Below are some examples:

- whether the expert is proposing to testify about matters growing naturally and directly out of research independent of litigation (a matter discussed immediately above);

1642. *See* Robert J. Goodwin, *Roadblocks to Achieving "Reliability" for Non-Scientific Expert Testimony: A Response to Professor Edward J. Imwinkelried*, 30 Cumb. L. Rev. 215 (1999–2000) (asserting that cases involving hard sciences are more likely to include testability as factor, and that soft science or nonscientific evidence might not be subject to similar constraints); *see also* McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2d Cir. 1995) (concluding that the consulting engineer's "background and practical experience qualif[ied] as 'specialized knowledge'" and that expert had practical experience and necessary academic training to reach conclusion).

1643. *See, e.g.*, Andrew I. Gavil, *Defining Reliable Forensic Economics in the Post-Daubert/Kumho Tire Era: Case Studies from Antitrust*, 57 Wash. & Lee L. Rev. 831, 849 (2000) (The party seeking exclusion bears the initial burden of demonstrating the unreliability of the evidence, presumably utilizing *Daubert*, which would then shift the burden to the proponent to provide a "defense" of the testimony by proffering alternative factors as the "right" criteria and that his or her expert's testimony is reliable when judged by that criteria.). *See also* Blevins v. New Holland N.A., Inc., 128 F. Supp. 2d 952, 956–57 (W.D. Va. 2001) (noting that all of the *Daubert* factors will not apply in every case and finding expert's testimony admissible based on all the circumstances).

1644. *Expert Evidence*, *supra* note 1545, at 39–66.

- whether the expert has engaged in improper extrapolation (i.e., drawing an unsupported conclusion from an accepted premise);[1645]
- whether the expert took into account possible alternative explanations (for example, an important element of differential diagnosis is that the expert take into account other potential causes);[1646]
- whether the expert is being as careful as he or she would be in regular professional work, outside of paid litigation consulting; and
- whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Courts also have considered

- whether the expert relied on anecdotal evidence, basing an opinion solely on personal experience with patients or a few case studies—this issue can arise when considering expert testimony based on clinical medical judgment or differential diagnosis;[1647]
- whether there is a temporal relationship between the exposure to the event and the subsequent injury—this factor is premised on requiring a conclusion as to causation to be based on more than just temporal proximity;[1648]

1645. *See, e.g.*, Black v. Food Lion, Inc., 171 F.3d 308, 313–14 (5th Cir. 1999) (expert opinion based in "fallacy of post-hoc propter-hoc reasoning" was unsupported by specific reliable methodology and contradicted by general level of medical knowledge); Moore v. Ashland Chem., Inc., 151 F.3d 269, 279 (5th Cir. 1998) (expert testimony would be excluded where expert drew unsupported extrapolations).

1646. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 265 (4th Cir. 1999) (alternative causes affect weight, not admissibility of the testimony unless the expert cannot explain why she concluded that a proffered alternative was not the sole cause). *See also* Fed. R. Evid. 702 committee note; Claar v. Burlington N. R.R. Co., 29 F.3d 499, 502 (9th Cir. 1994) (expert opinion excluded for failing to "rule out other possible causes for" plaintiffs' injuries); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 764–65 (3d Cir. 1994) (expert opinion based on differential diagnosis not inadmissible where it failed to account for all possible causes, as long as the expert considered alternative causes and can explain the soundness of the opinion in the face of alternative causes proposed by the opposing party).

1647. *See, e.g.*, Antoine-Tubbs v. Local 513, 50 F. Supp. 2d 601, 609–11 (N.D. Tex. 1998) (testimony of physician practicing less than two years, who had seen only one case of preeclampsia and had not seen medical literature or studies on whether work-related stress can cause illness, was unreliable and not grounded in traditional clinical medical knowledge).

1648. *See, e.g.*, Mattis v. Carlon Elec. Prods., 114 F. Supp. 2d 888, 894 (D.S.D. 2000) ("[O]pinion based solely on the temporal relationship between exposure and the onset of symptoms is not generally enough to qualify as scientifically valid under *Daubert*."). Although temporal proximity can be considered, there also must be some established connection between the injury-producing substance and illness. Temporal proximity can then be used to confirm the causal connection but, although there are some exceptions, it is generally considered unreliable

- the relationship of the technique used by the expert to established methodologies;[1649]
- the qualifications of the expert witness to use the methodology;[1650] and
- the nonlitigation uses to which the method has been put.[1651]

Is there consistency within the circuit, as well as the district, on the factors used to assess similar types of expert evidence? One of the questions surrounding *Daubert* inquiries is whether there is a need to ensure consistency and predictability in the factors applied to different types of expert evidence, both in the district and within the circuit. *Kumho Tire*'s admonition regarding the deference afforded trial court's determination as to the appropriate factors to apply in a given case could result in one court within a district applying different factors than another court applies to similar expert testimony.[1652] Variation across the circuit is also likely.

23.32 The Initial Conference

The probability that expert testimony will play a prominent role in a case often is apparent from the face of the complaint. Where the expert evidence promises to be protracted or controversial, or to address novel subjects that will challenge the comprehension of the judge and the jury, management of expert testimony should be part of a coordinated case-management strategy. The initial conference presents a good opportunity to explore preliminarily the nature and extent of the need for judicial management of expert evidence in

to explain the result in a particular case. *Moore*, 151 F.3d at 278 ("In the absence of an established scientific connection . . . or compelling circumstances . . . the temporal connection between exposure to chemicals and an onset of symptoms, standing alone, it is entitled to little weight in determining causation."). *But see Westberry*, 178 F.3d at 265 ("[D]epending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation.").

1649. Oddi v. Ford Motor Co., 234 F.3d 136, 145 (3d Cir. 2000) *and In re* TMI Litig., 193 F.3d 613, 665 (3d Cir. 1999) (both cases citing *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994)). *See* Braun v. Lorillard, Inc., 84 F.3d 230, 234–35 (7th Cir. 1996) (excluding testimony of expert with no previous experience testing human or animal tissue for asbestos fibers before being hired by plaintiff and who, to test such tissues, used test method that was designed for use on building materials).

1650. *In re TMI Litig.*, 193 F.3d at 665. "However, 'the level of expertise may affect the reliability of the expert's opinion.'" *Id.* at 664 (quoting *In re Paoli*, 35 F.3d at 741).

1651. *In re TMI Litig.*, 193 F.3d at 665.

1652. Justice Breyer emphasized that "[t]oo much depends on the particular circumstances of the particular case at issue" and declined to identify factors that would be applicable to all cases or "subsets of cases categorized by category of expert or by kind of evidence." 526 U.S. 137, 150 (1999).

the case.[1653] Areas that can be explored, either at the initial conference or, depending on the complexity of the litigation, in subsequent case-management conferences once the issues have been more refined, include the kinds of evidence likely to be offered, the technical and scientific subject matter, and anticipated areas of controversy. The court should inquire into whether the science involved is novel and still in development, or whether the scientific issues for which expert testimony will be offered are well settled.[1654] To the extent the conference discloses that a particular scientific issue is relevant but not in dispute, such as whether exposure to asbestos is capable of causing lung cancer and mesothelioma (i.e., general causation), the court should encourage the parties to stipulate to its admission. (Judges take different positions on use of collateral estoppel to preclude relitigation of facts based on scientific evidence.[1655])

One approach to handling the issue of expert evidence at the initial pretrial conference is to advise counsel in advance to be prepared to respond to inquiries into the nature of the claims and defenses together with any underlying assumptions, into the nature of expert evidence expected to be offered, and, if known, into the areas of disagreement among experts.[1656] Additional areas that may be appropriate for discussion during the initial conference, depending on the complexity of the case, include the following:

1653. The committee note states that the rule is intended to "clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony . . . ." Fed. R. Civ. P. 16(c)(4) committee note. *See also* Med. Consultants Network, Inc. v. Cantor & Johnson, P.C., No. CIV.A. 99-0528, 2001 WL 10788 *3 (E.D. Pa. Dec. 27, 2000) (expert accounting testimony unnecessary where all accountant did was multiply each employee's hours by his or her hourly rate, which does not require accounting expertise).

1654. The court may also want to determine whether the scientific issues in the case before it are also pending in other litigation.

1655. *Compare* Ezagui v. Dow Chem. Corp., 598 F.2d 727, 732–33 (2d Cir. 1979) (estopping litigation on the issue that vaccination package inserts inadequately apprised doctors of known hazards), *with* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 341–48 (5th Cir. 1982) (disallowing collateral estoppel to preclude relitigation of the fact that asbestos products are unreasonably dangerous and that asbestos dust causes mesothelioma). For an interesting discussion of the application of collateral estoppel, see *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 544–45 (D. Minn. 1982) (holding it is "clear" that the court should collaterally estop litigation on the specific fact that "asbestos dust can cause diseases such as asbestosis and mesothelioma . . . ." because "[t]his proposition is so firmly entrenched in the medical and legal literature that it is not subject to serious dispute," but declining to apply collateral estoppel to the more disputable use of the "state of the art" defense and the claim that asbestos is "unreasonably dangerous").

1656. The object of this exercise should be education, not argument; all participants should be given an opportunity to learn about the case. By infusing the conference with a spirit of inquiry, the court can set the tone for the litigation, encouraging clarity, candor, and civility.

- *Do the parties anticipate retaining testifying experts?* In cases where settlement is likely, the parties may wish to defer retaining experts and thereby avoid unnecessary expense.[1657] Where the case can make progress toward settlement without early identification of experts (for example, if nonexpert discovery could provide a basis for settlement), consider deferring expert evidence issues for some period.[1658] In more complex cases, the resolution of a conflict over expert testimony may be dispositive and deferral of expert discovery might impede, rather than facilitate, resolution of the case. In cases where discovery is proceeding in phases, consider discussing with the parties the feasibility of identifying experts in a similarly staged fashion, or whether the case would best be served by delaying all expert discovery until all other discovery has been completed.
- *Should there be a limit on the number of expert witnesses?* Some judges limit parties to one expert per scientific discipline. Ordinarily this is sufficient; however, as a science increases in sophistication, subspecialties develop. In addition, experts in a single specialty may bring to bear a variety of experiences or perspectives relevant to the case. If a party anticipates offering testimony from more than one expert in what appears to be a distinct discipline, it is advisable for the court to inquire whether multiple experts are warranted. Discourage efforts by attorneys to try to bolster the weight of their case by cumulative expert testimony, even where multiple parties are represented on one or both sides.[1659] Consider whether to impose a set limit on the number of expert witnesses that may be offered by a party, subject to modification as the case develops should it appear that multiple experts are necessary.
- *When should the parties exchange experts' reports?* Federal Rule of Civil Procedure 26(a)(2) provides that the timing and sequencing of expert disclosures is at the discretion of the trial court. The rule generally requires that expert disclosures be made not less than ninety days before

1657. Deferral may be inappropriate, however, in class-action contexts.

1658. On the other hand, deferring identification of experts until the eve of trial can be costly. In a medical malpractice case, for example, expert evidence is essential to resolve the threshold issue whether the defendant conformed to the applicable standard of practice; without such evidence, the plaintiff has no case.

1659. *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 637 (N.D. Ill. 1996) (transferee court in multidistrict litigation has authority to limit the number of expert witnesses who may be called at trial). *See supra* section 23.26 for a discussion of *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

trial or at such other time as the judge may order.[1660] The parties are to make detailed written disclosures with respect to each expert retained to testify at trial, including a complete statement of all opinions to be expressed, the basis and reasons supporting the opinions, and the data or other information considered by the witness in forming the opinions.[1661] Although experts' reports obviously will be helpful in identifying issues, financial considerations generally mandate that they not be required until issues have been narrowed to the greatest extent possible. In some cases, however, consider scheduling disclosures in accordance with the sequence in which issues are addressed. For example, in patent cases, expert disclosures relating to claims construction[1662] may be called for early in the case, whereas disclosures relating to infringement and damages may be deferred. In toxic tort cases, submission of expert reports may not be appropriate until factual discovery has been completed. It is best to discuss at the conference when and in what sequence these disclosures should be made.

- *Is the case appropriate for referral to a magistrate judge?* Many district judges routinely refer the pretrial management of civil cases to magistrate judges.[1663] Others believe that there are advantages in having the judge who will try the case manage its pretrial stages to promote familiarity with the issues and avoid delay caused by appeals of the magistrate judge's rulings.[1664]
- *Should the court appoint a special master or an outside expert?*[1665] In many cases it may be helpful for the court to be educated at the outset about the science or technology involved, particularly where the expert evidence will involve science and technology that use language foreign to the uninitiated. Arrangements for initial education can be made pursuant to court order or by stipulation between the parties. In addition, the court should establish whether any tutorials should be

1660. Fed. R. Civ. P. 26(a)(2)(B).

1661. *Id.* Usually the party bearing the burden at trial should make the first disclosure, and the other party should respond.

1662. *See infra* section 33.22; Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

1663. Rule 16(c)(8) makes the referral of matters to a magistrate judge or a special master a subject for consideration at the initial pretrial conference.

1664. *See supra* section 11.53.

1665. The American Association for the Advancement of Science's "Scientific Freedom, Responsibility and Law" program launched a demonstration program, "Court-Appointed Scientific Experts," to help federal judges locate qualified individuals to serve as court-appointed experts. More information is available at http://www.aaas.org/spp/case/case.htm (last visited Nov. 10, 2003).

videotaped or transcribed for review by the judge as the litigation proceeds. If there is a need for judicial education, consider raising the matter at the initial conference and discussing the available options with the parties (e.g., the use of tutorials or neutral court-appointed advisors).[1666] The techniques discussed by Justice Breyer in his concurring opinion in *Joiner* may be appropriate in some cases to help the court meet its gatekeeping obligations: using court-appointed experts, special masters, and specially trained law clerks.[1667] These appointed experts could be asked to assess the methodology used by the testifying experts and whether the conclusion reached is supported by that methodology, short of any inquiry into the validity or "correctness" of that conclusion. The primary focus is on determining what mechanisms would assist the court in its gatekeeping function under Rule 702.[1668] The utility of outside advisors or experts depends on their ability to maintain objectivity and neutrality in their presentation. Among other things, the elements of the advisor's relationship to the judge should be defined, such as prohibitions on *ex parte* communications, if any, and limits on discovery. Always consider the costs and additional time associated with these procedures.[1669] In addition to this discussion, more information can be found at sections 11.51–11.54 and in several Federal Judicial Center publications on the use of special masters and court-appointed experts.[1670]

1666. For a discussion of considerations involved in the appointment of special masters and neutral expert witnesses, see *supra* section 11.5.

1667. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 148–50 (1997). For excellent discussions of the issue, see also Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 Or. L. Rev. 59 (1998); Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 Ind. L. Rev. 225 (1998); Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 Emory L.J. 995 (1994).

1668. *See, e.g.*, Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1243 (10th Cir. 2000) ("The purpose of *Daubert* gatekeeping function is not to measure every expert by an inflexible set of criteria . . . ."); Hall v. Baxter Healthcare, 947 F. Supp. 1387, 1392–93 (D. Or. 1996) (In view of the complicated scientific and medical issues involved, the court appointed independent advisors in "epidemiology, immunology/toxicology, rheumatology, and chemistry" to assist in "evaluating the reliability and relevance of the scientific evidence.").

1669. Expert compensation should also be discussed and appropriate fee-sharing arrangements made.

1670. FJC Study, Neutral Science Panels, *supra* note 1059; FJC Study, Special Masters, *supra* note 704; Cecil & Willging, *supra* note 1435.

23.33 Disclosures

Federal Rule of Civil Procedure 26(a)(2) sets out required disclosures for parties presenting expert testimony and requires disclosure not only of the data and materials on which the expert relied but also those that the expert "considered . . . in forming the opinions."[1671] Parties need adequate time for experts to be retained and to prepare their reports before the required disclosures are due. The court should impress on counsel the critical importance of Rule 26(a)(2)(B) requirements to the judge's gatekeeping obligations, and the seriousness of the disclosure requirement and any accompanying deadlines.[1672] Counsel should be informed that opinions and supporting facts not included in the disclosure may be excluded at trial, even if they were testified to on deposition.[1673] The judge should remind the parties that destruction of materials furnished to or produced by an expert in the course of the litigation (such as test results, correspondence, or draft memoranda) may lead to sanctions[1674] and that an expert's disclosure must be supplemented if it turns out that any information disclosed was, or has become, incomplete or incorrect.[1675] Failure of a party to comply with the disclosure requirements of Rule 26(a)(2) may

1671. Fed. R. Civ. P. 26(a)(2)(B). Litigants may therefore no longer assume that materials furnished to an expert by counsel or the party will be protected from discovery. Fed. R. Civ. P. 26(a)(2)(B) committee note. Courts are divided on the extent to which they require disclosure of attorney work product provided to a testifying expert. *Compare* Karn v. Ingersoll-Rand Co., 168 F.R.D. 633, 639 (N.D. Ind. 1996) (holding that work-product protection does not apply to documents related to the subject matter of litigation provided by counsel to testifying experts), *with* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (holding that "data or other information" considered by the expert, which is subject to disclosure, includes only factual materials and not core attorney work product considered by the expert).

1672. *See, e.g.*, Dura Automotive Sys. v. CTS Corp., 285 F.3d 609 (7th Cir. 2002) (affirming trial court's exclusion of untimely filed disclosure of additional expert witnesses); Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776, 786 (7th Cir. 2000) (district court did not abuse its discretion in excluding expert testimony on supplemental report where party failed to timely file the report under Rule 26); *In re* Hanford Nuclear Reservation Litig., No. CY-91-3015, 1998 WL 775340, *172–*73 (E.D. Wash. Aug. 21, 1998) (expert who discovered flaw in model should not change model to conform to estimate after deadline for submission of expert reports).

1673. Santiago v. Furniture Chauffeurs, Piano Movers, Packers & Handlers Local 705, No. 99C 2886G, 2001 WL 11058, *5 (N.D. Ill. 2001) (damage expert barred from testifying on lost goodwill where report was limited to lost profits).

1674. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 81 (3d Cir. 1994) (sanctions for spoilation of evidence arising from inspection by an expert must be commensurate with the fault and prejudice arising in the case).

1675. Fed. R. Civ. P. 26(e)(1).

lead to exclusion of the expert's testimony at trial, unless such failure is harmless.[1676]

Once the disclosures are in hand, a follow-up Rule 16 conference may help further identify and narrow disputed issues. The court should attempt to identify the bases for any disagreements that disclosure reveals between experts on critical points. Frequently, differences between experts rest on tacit assumptions, such as choices among policies, selection of statistical data or databases, judgments about the level of reasonable risk, or the existence of particular facts. In addition to narrowing the substantive issues, consider the need to address the process by which the expert reached his or her conclusions or the purpose for which the testimony is being offered. The conclusions of a witness offering scientific testimony generally will be the product of multistep reasoning. By breaking down the process, the judge may be able to narrow disputes relating to the testimony to a particular step in the process, and thereby facilitate a resolution.[1677]

1676. Rule 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2) is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." *See, e.g.*, S.W. Whey, Inc. v. Nutrition 101, Inc., 126 F. Supp. 2d 1143, 1148–49 (C.D. Ill. 2001) (declining to impose sanction of exclusion under Rule 37 for failure to timely disclose expert report where exclusion would result in large monetary loss that was disproportionate to circumstances surrounding violation and where failure to comply was harmless); *In re* Brand Name Prescription Drugs Antitrust Litig., MDL No. 997, Docket No. 94C897, 2001 WL 30454 (N.D. Ill. Jan. 11, 2001) (precluding plaintiffs from introducing expert evidence of any kind under Rule 37 in light of failure to comply with Rule 26); Bastys v. Rothschild, No. 97 Civ. 5154, 2000 WL 1810107, *26–*27 (S.D.N.Y. 2000) (finding plaintiff's failure to identify and disclose expert warranted sanction under Rule 37 striking affidavits of plaintiff's experts submitted in response to defendant's motion). *See also* Pride v. BIC Corp., 218 F.3d 566, 578 (6th Cir. 2000) ("District courts have broad discretion to exclude untimely disclosed expert-witness testimony."); Kostantopoulos v. Westvaco Corp., 112 F.3d 710, 719 (3d Cir. 1997) (expert testimony would be excluded where there was a violation of pretrial discovery order); Coastal Fuels, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 202–03 (1st Cir. 1996) (finding no abuse of discretion in district court's exclusion of expert testimony in price discrimination and monopolization case where party failed to produce expert report in accordance with the court's scheduling order). Appellate courts seem cautious about precluding expert testimony where such testimony is an essential element of the case. *See* Freeland v. Amigo, 103 F.3d 1271, 1276 (6th Cir. 1997) (district court abused its discretion by precluding expert testimony in a medical malpractice case as a sanction for failing to comply with a pretrial order setting the deadline for discovery where such preclusion would amount to a dismissal of the case).

1677. For example, proffered survey research may be subject to a hearsay objection. *See* Shari Seidman Diamond, *Reference Guide on Survey Research* [hereinafter *Survey Research*], *in* Reference Manual on Scientific Evidence 233 n.12 (Federal Judicial Center, 2d ed. 2000). Thus, it

The Federal Judicial Center's *Reference Manual on Scientific Evidence* includes subject-specific reference guides to assist the court in narrowing issues and understanding the applicable scientific criteria within the context of scientific, as opposed to legal, conclusions.[1678] The *Reference Guide on Survey Research*, for example, facilitates narrowing a dispute over proffered evidence by breaking the inquiry into a series of questions about the following topics: the purpose of the survey; identification of the appropriate population and sample frame; the structure of the questions; the recording of data; and reporting.[1679] The *Reference Guide on DNA Evidence* summarizes scientific principles that underlie DNA testing; basic methods used in such testing; characteristics of DNA samples necessary for adequate testing; laboratory standards necessary for reliable analysis; interpretation of results, including the likelihood of a coincidental match; and emerging applications of DNA testing in forensic settings.[1680] Other reference guides in the *Reference Manual on Scientific Evidence* deal with statistics,[1681] multiple regression,[1682] estimation of

is critical to determine whether the purpose of the particular survey is to prove the truth of the matter asserted or only the fact of its assertion.

1678. The reference guides are not primers on substantive issues of scientific proof or normative statements on the merits of scientific proof. *See Preface*, *in* Reference Manual on Scientific Evidence v–vii (Federal Judicial Center, 2d ed. 2000).

1679. Each of these issues is then broken into a series of suggested questions that will enable the judge to explore the methodology and reasoning underlying the expert's opinion. For example, the questions concerning identification of the appropriate population and sample frame are as follows: "Was an appropriate universe or population identified?"; "Did the sampling frame approximate the population?"; "How was the sample selected to approximate the relevant characteristics of the population?"; "Was the level of nonresponse sufficient to raise questions about the representativeness of the sample?"; "What procedures were used to reduce the likelihood of a biased sample?"; and "What precautions were taken to ensure that only qualified respondents were included in the survey?" *Survey Research*, *supra* note 1677, at 239–48.

1680. David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Testing*, *in* Reference Manual on Scientific Evidence 485–576 (Federal Judicial Center, 2d ed. 2000).

1681. The guide identifies three major issues in the field of statistics: the design of the data-collection process; the extraction and presentation of relevant data; and the drawing of appropriate inferences. David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence 85 (Federal Judicial Center, 2d ed. 2000).

1682. This section deals with issues concerning the analysis of data bearing on the relationship of two or more variables, the presentation of such evidence, the research design, and the interpretation of the regression results. Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* Reference Manual on Scientific Evidence 179–227 (Federal Judicial Center, 2d ed. 2000).

economic losses in damages awards,[1683] epidemiology,[1684] medical testimony,[1685] and engineering practice and methods.[1686]

These reference guides, although limited in scope, suggest analytical approaches and opportunities that judges can use in identifying issues. For example, following the general outline of the reference guides, a judge could ask counsel for both sides to exchange and provide to the court a step-by-step outline of the experts' reasoning processes for use at the Rule 16 conference at which issue definition and narrowing is discussed. In addition, after the exchange of written statements of expert opinions (required by Federal Rule of Civil Procedure 26(a)(2)), the judge could direct each side to identify each part of the opposing expert's opinion that is disputed and to state the specific basis for the dispute. To facilitate later *Daubert* inquiries, consider having the parties submit a written critique of the reasoning and methodology utilized by opposing experts prior to beginning expert depositions. Any supplemental submissions necessary to respond to the critique offered by the opposing party could then be disclosed, reducing the need for a second round of depositions that normally would be sought when supplemental reports are disclosed after depositions have occurred.

1683. This guide identifies issues concerning expert qualification, characterization of the harmful event, measurement of loss of earnings before trial and future loss, prejudgment interest, and related issues generally and as they arise in particular kinds of litigation. Robert E. Hall & Victoria E. Lazear, *Reference Guide on Estimation of Economic Losses in Damages Awards*, *in* Reference Manual on Scientific Evidence 277–332 (Federal Judicial Center, 2d ed. 2000).

1684. This guide identifies issues concerning the appropriateness of the research design, the definition and selection of the research population, the measurement of exposure to the putative agent, the measurement of the association between exposure and the disease, and the assessment of the causal association between exposure and the disease. *Epidemiology*, *supra* note 1050, at 333–400.

1685. This section describes the various roles of physicians, the kinds of information that physicians consider, and how this information is used in reaching a diagnosis and attributing causation. *Medical Testimony*, *supra* note 1051, at 439–84.

1686. This section describes the nature of engineering, including the issues that must be considered in developing a design, the evolution of subsequent design modifications, and the manner in which failure influences subsequent design. Henry Petroski, *Reference Guide on Engineering Practice and Methods*, *in* Reference Manual on Scientific Evidence 577–624 (Federal Judicial Center, 2d ed. 2000).

23.34 Discovery Control and Management

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23.341 Discovery of Testifying Experts

Parties may depose experts who have been identified as trial witnesses under Federal Rule of Civil Procedure 26(b)(4)(A), but only after those experts make their disclosure required under Rule 26(a)(2)(B).[1687] Although the judge may relieve the parties of the obligation to exchange these disclosures, it will rarely be advisable to do so; it is also inadvisable to permit the parties to stipulate around the obligation, for a number of reasons:

- Preparation and exchange of the expert disclosures compels parties to focus on the issues and the evidence supporting or refuting their positions. Moreover, the cost and burden of preparing disclosures forces parties to consider whether to designate a particular person as an expert witness and may discourage or limit the use of excessive numbers of experts.
- Exchange of the disclosures may lead the parties to dispense with the opposing experts' depositions. Some attorneys believe that depositions tend to educate the expert more than the attorney when disclosures have been made as required by the rule.
- The disclosures will inform the consideration of any limitations and restrictions on expert evidence.
- The disclosures will compel an expert's proponent to be prepared for trial. Because the proponent must disclose all opinions to be expressed and their bases, surprise at trial will be eliminated, the opponent's trial

1687. Fed. R. Civ. P. 26(b)(4)(A). The report under Rule 26(a)(2)(B) is presumptively required of any "witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). This would normally exclude a treating physician, but the rule extends to other areas of expertise. Riddick v. Wash. Hosp. Ctr., 183 F.R.D. 327, 330 (D.D.C. 1998). Courts have looked to the nature of the testimony rather than to the employment status of the witness to determine if such a report is required. Sullivan v. Glock, Inc., 175 F.R.D. 497, 500 (D. Md. 1997). The court may by order, or the parties may by stipulation, exempt a case from this requirement. Rule 26(a)(2)(B) also gives the parties the right to modify, without court order, the procedures or limitations governing discovery, except for stipulations that would interfere with any time set for completion of discovery, hearing of a motion, or trial.

preparation will be improved, and cross-examination will be more effective and efficient.

- The disclosures will aid in identifying evidentiary issues early so that they can be resolved in advance of trial.
- The disclosures may encourage early settlement.

23.342 Discovery of Nontestifying Experts

Under Federal Rule of Civil Procedure 26(b)(4)(B), the court may permit discovery by interrogatory or deposition of consulting nontestifying experts "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[1688] Exceptional circumstances may exist where a party has conducted destructive testing,[1689] the results of which may be material, or where the opponent has retained all available qualified experts.[1690] In the absence of such circumstances, a party should not be penalized for having sought expert assistance early in the litigation, and its opponent should not benefit from the party's diligence.[1691]

23.343 Discovery of Nonretained Experts

Parties may seek the opinions and expertise of persons not retained in the litigation. However, Federal Rule of Civil Procedure 45(c)(3)(B)(ii) authorizes the court to quash a subpoena requiring "disclosure of an unretained expert's

1688. *See generally* Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1151–52 (N.D. Ill 2001) ("[C]ourts have consistently held that a party may not discover the identity of, facts know by, or opinions held by an informally consulted expert.").

1689. Deterioration in the evidence may occur through other means than destructive testing. *See* Delacastor, Inc. v. Vail Assoc., 108 F.R.D. 405 (D. Colo. 1985) (expert who observed site the day after a mudslide was subject to discovery).

1690. *See Spearman Indus.*, 128 F. Supp. 2d at 1152 (restating and applying the "destructive testing" and "available experts" tests); Disidore v. Mail Contractors, Inc., 196 F.R.D. 410, 417 (D. Kan. 2000) ("Plaintiff has failed to show exceptional circumstances justifying discovery of Defendant's non-testifying expert."); Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 175 F.R.D. 34, 44 (S.D.N.Y. 1997) ("Courts and commentators have commonly identified two situations where the exceptional circumstances standard has been met."); Queen's Univ. at Kingston v. Kinedyne Corp., 161 F.R.D. 443, 447 (D. Kan. 1995) (parties have to meet heavy burden to demonstrate existence of exceptional circumstances (quoting Ager v. Jane Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496, 502 (10th Cir. 1980))); exceptional circumstances have also been found to exist when the costs of replacing the testimony are "judicially prohibitive." *Bank Brussels Lambert*, 175 F.R.D. at 44.

1691. *See Spearman Indus.*, 128 F. Supp. 2d at 1152 (rule regarding nontestifying experts designed to protect party from having its experts' testimony used by the opponent).

opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party."[1692] In ruling on such a motion to quash, consider whether the party seeking discovery has shown a substantial need that cannot be otherwise met without undue hardship, whether party will reasonably compensate the subpoenaed person, and whether to impose appropriate conditions on discovery.[1693]

23.344 Discovery of Court-Appointed Experts

Federal Rule of Evidence 706 contemplates that the deposition of a court-appointed expert witness may be taken by any party. Technical advisors or other nontestifying experts appointed under the inherent authority of the courts are not necessarily subject to the discovery requirements of Rule 706, permitting the court greater discretion in structuring the terms and conditions for access to such experts for discovery.[1694] The order appointing the expert should discuss the extent to which the parties may seek such discovery from the expert.

23.345 Use of Videotaped Depositions

Videotaping expert depositions is particularly appropriate for several reasons: It preserves the testimony of an expert who may be unavailable for trial or whose testimony may be used in more than one trial or in different

1692. Fed. R. Civ. P. 45(c)(3)(B)(ii). *See also Spearman Indus.*, 128 F. Supp. 2d at 1152 (exceptional-circumstances standard similarly applies to discovery of notes, reports, and records of nontestifying expert developed in anticipation of litigation).

1693. The committee notes on Rule 45(c)(3)(B)(ii) point out that this provision was intended to protect the intellectual property of nonretained experts:

> The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash…; that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation.

For a discussion of issues arising with a subpoena for research data from unretained scholars, see *In re American Tobacco Co.*, 880 F.2d 1520, 1527–30 (2d Cir. 1989); see also Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 Law & Contemp. Probs. 51 (1996); Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 Brook. L. Rev. 381 (1991); Mark Labaton, Note, *Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 Duke L.J. 140.

1694. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1393 n.8 (D. Or. 1996) ("To keep the advisors independent of any ongoing proceedings, I appointed them under FRE 104, not FRE 706, which requires court-appointed experts, in effect, to act as additional witnesses subject to depositions and testifying at trial.").

phases of a single trial; it also permits demonstrations (for example, of tests or of large machinery not feasible in the courtroom); and it provides a more lively and interesting presentation than reading a transcript at trial. Federal Rule of Civil Procedure 30(b)(2) permits a party to videotape a deposition unless otherwise ordered by the court. The judge should establish in advance the ground rules for videotaping, such as the placement and operation of the camera, off-camera breaks, lighting, procedures for objections, and review in advance of use at trial.[1695]

23.35 Motion Practice

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Challenges to expert testimony are likely.[1696] The court can take several approaches to them. Rule 26 requires the disclosure of not only the full opinions to be offered by certain experts, but also the bases for the opinions.[1697] The right to depose experts further allows for the exploration by the parties of the bases for opinion, thereby allowing the parties to identify weaknesses in the methodologies employed in order to raise objections to the admissibility of the testimony or evidence. Consider making some preliminary determinations during the initial pretrial conference, not just on the timing of expert discovery and disclosures, but also on appropriate deadlines for any challenges to the reliability and credibility of proposed testimony once disclosures are made. It is helpful to decide objections to expert evidence relating to admissibility, qualifications of a witness, or existence of a privilege in advance of trial whenever possible.[1698] Exclusion of evidence may in some cases remove an essential element of a party's proof, providing the basis for summary judg-

1695. *See* William W Schwarzer et al., Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice 3-15 to 3-17, app. 79 (2d ed. 1994).

1696. A Federal Judicial Center survey determined that the admissibility of expert testimony was not disputed in 46% of the reported cases. *FJC Survey on Expert Testimony*, *supra* note 1545, at 4.

1697. *See* Fed. R. Civ. P. 26(a)(2).

1698. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993) (Before admitting expert testimony, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.").

ment.[1699] In other cases, the ruling on an objection may permit the proponent to cure a technical deficiency before trial, such as clarifying an expert's qualifications.

23.351 Initiating a *Daubert* Inquiry

Rule 702 directs a court faced with a proffer of expert testimony to determine preliminarily whether the testimony is reliable and scientifically valid. Most courts agree that these gatekeeping obligations do not require a formal Federal Rule of Evidence 104(a) hearing.[1700] Rule 702 requires only that the determination as to the reliability of expert testimony be made prior to its admission into evidence. Some courts have required expert challenges to be made early in the litigation. Failure to raise an objection could be considered a waiver, although *Daubert* suggests the court may still have an obligation to ensure the reliability of the testimony prior to its admission, even in the absence of a formal challenge. At least one court permitted a party whose expert witness was stricken following an early *Daubert* hearing to hire a new expert, although other judges disagree with that approach.[1701] *Kumho Tire* noted that a trial court could "avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted,"[1702] which suggests that the trial court is to engage in at least a cursory assessment, however minimal, to ensure reliability.[1703] At the same time, however, *Kumho Tire* also stated that "where such testimony's factual basis, data, principles, methods, or their application are *called sufficiently into question*,"[1704] the trial judge should determine whether that testimony is reliable. *Kumho Tire* does not specify whether that challenge must come from a party or may be raised *sua sponte.* Thus, despite the "broad latitude" it provided judges in determining how to test reliability, *Kumho Tire* provided no real guidance as to when the court's gatekeeping obligations attach. As a result,

1699. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319–20 (7th Cir. 1996); Wheat v. Sofamor, S.N.C., 46 F. Supp. 2d 1351, 1357–58 (N.D. Ga. 1999) (expert testimony excluded because it was not relevant).

1700. *See* Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000); United States v. Nichols, 169 F.3d 1255, 1263 (10th Cir. 1999); Kirstein v. Parks Corp., 159 F.3d 1065, 1067 (7th Cir. 1998).

1701. *See* Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 605 (10th Cir. 1997) (permitting plaintiff to locate new experts after first expert stricken).

1702. 526 U.S. 137, 152 (1999).

1703. "Indeed, the Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t] determin[ation]' of proceedings." *Id.* at 152–53 (citing Fed. R. Evid. 102).

1704. *Id.* at 152 (emphasis added).

there is disagreement as to whether such a preliminary assessment is triggered by the proffer of expert testimony, or only on an objection from the opposing party that calls the testimony sufficiently into question. Considering *Daubert*'s mandate for trial judges to exercise their obligation as gatekeeper, the better view is that judges have an independent duty to challenge expert testimony whenever questions of validity and reliability exist.

23.352 Timing of Challenges to Expert Testimony

The judge can require the parties to present objections to expert testimony at any point during the case. One option is to require challenges to be made shortly after the close of expert discovery. At that time, the parties will have had an opportunity to depose opposing experts and determine whether there are any weaknesses in the experts' qualifications or methodologies. This approach facilitates the disposition of summary-judgment motions, to the extent those motions rely in whole or in part on expert evidence. A second option is to require that motions seeking to strike or limit expert testimony be made shortly before trial. Many cases settle before trial, thereby obviating the need to hold a hearing at all. A third option is to require any challenges to expert testimony to be presented during trial.[1705] Holding a *Daubert* hearing during trial, following formal objection, helps minimize the expense of bringing the expert to court twice, and the judge is likely to better understand the testimony in the context of the case. Reserving consideration of the reliability of expert testimony until trial, however, probably carries more disadvantages than advantages. Cases that could have been resolved at the summary-judgment stage instead proceed to trial, with its attendant time and expense. In addition, because of the demands of trial, the judge may not have as full an opportunity to consider the merits of the motion.[1706] On balance, the best approach is to require that challenges to expert testimony be made during pretrial proceedings, either at the close of expert discovery or through in

1705. *See* United States v. Alatorre, 222 F.3d 1098, 1103–04 (9th Cir. 2000) (district court did not abuse discretion in reserving ruling on admissibility of expert testimony until voir dire at trial); United States v. Nichols, 169 F.3d 1255, 1262–64 (10th Cir. 1999) (affirming district court decision to reserve ruling on expert evidence until trial). *But see* Alfred v. Caterpillar, Inc., 262 F.3d 1083, 1087 (10th Cir. 2001) (characterizing *Daubert* objections made at the close of evidence as litigation by "ambush," but finding it unnecessary to reach the issue of the timing of the objection).

1706. Other disadvantages include keeping the jury waiting while the *Daubert* issues are resolved and, should the expert be stricken, "judicial resources, taxpayer money, and juror time may be wasted because the striking of an expert will in some cases be tantamount to a directed verdict." Judge Harvey Brown, *Procedural Issues Under Daubert*, 36 Hous. L. Rev. 1133, 1144 (1999). *See* Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 133 (11th Cir. 2003).

limine or other motion immediately prior to trial. In cases involving multistage discovery, motions challenging expert witnesses can be presented in a similarly staged manner, if necessary.

23.353 Handling a Challenge to Expert Testimony

As discussed previously, *Kumho Tire* affords trial judges wide discretion in deciding "whether or when [a] special briefing or other proceedings are needed to investigate reliability."[1707] The challenge may take the form of a motion to strike or exclude evidence during any pretrial phases or a motion in limine immediately before or during trial, although the failure to correctly characterize a motion should not necessarily preclude its consideration or otherwise impact its disposition.[1708] Such motions often will be accompanied by a motion for summary judgment. Regardless of the form, the movant should set forth specific deficiencies in the expert's report or proposed evidence so that the motion may be handled in an economic and expeditious fashion.[1709] Consider requiring that any expert affidavits or declarations supporting dispositive motions include specific facts that would help to determine the reliability and validity of the data relied on in reaching the opinions and conclusions contained in the declaration. The court can either rule on the motions on the basis of the papers submitted[1710] and the argument by counsel or hold a *Daubert* hearing under Federal Rule of Evidence 104(a) where those issues can be more

1707. *Kumho Tire*, 526 U.S. at 152. *See supra* section 23.351. *See also Expert Evidence*, *supra* note 1545, at 53.54.

1708. *See, e.g.*, *Kumho Tire*, 526 U.S. at 145 (motion to exclude expert testimony accompanied by summary-judgment motion); Ruiz-Troche v. Pepsi Cola of P.R., 161 F.3d 77, 82 (1st Cir. 1998) (motions in limine to exclude expert testimony filed immediately before trial). Typically these motions are presented as in limine motions. The type of motion presented may, however, effect whether objections are preserved for appeal or must be reasserted during trial. Blevins v. New Holland N. Am., Inc., 128 F. Supp. 2d 952, 954 (W.D. Va. 2001) (motion in limine); Zic v. Italian Gov't Travel Office, 130 F. Supp. 2d 991, 994 (N.D. Ill. 2001) (motion to strike damages expert); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1392 (D. Or. 1996) (defendants filed motions in limine to exclude testimony on silicone gel breast implants after initial trial dates set). *See Brown*, *Procedural Issues*, *supra* note 1706, at 1145–48 (discussing cases where parties failed to preserve objection for appeal).

1709. *See generally Supreme Court's Trilogy*, *supra* note 1560, at 9–38; Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994) [hereinafter *Procedural Paradigms*]; Goodwin, *supra* note 1642; *see also Kumho Tire*, 526 U.S. at 152–53 (the Federal Rules of Evidence "seek to avoid 'unjustifiable expense and delay' as part of their search for truth and the 'just determination' of proceedings" (quoting Fed. R. Evid. 102)).

1710. *See Procedural Paradigms*, *supra* note 1709, at 1373–75.

fully explored.[1711] Where the case-management order requires the parties to provide written critiques of the reasoning and methodology of opposing experts that would form a basis for a *Daubert* challenge prior to the beginning of expert depositions, the parties have the opportunity to explore—and the challenged expert to defend—whether *Daubert* requirements have been met, perhaps facilitating resolution of any subsequent *Daubert* motions on written materials and eliminating the need for an evidentiary hearing.

The *Daubert* Court noted that a Rule 104(a) hearing is necessary only where the opposing party, in response to a prima facie showing of admissibility, can point to a material dispute as to the expert's methodology. The Third Circuit, for example, has held that "when the ruling on admissibility turns on factual issues, . . . at least in the summary judgment context, failure to hold [an in limine] hearing may be an abuse of discretion."[1712] Although a number of judges have provided for extensive *Daubert* hearings in some cases, the general consensus seems to be that neither the party proffering the testimony nor the party opposing it is entitled to a Rule 104(a) hearing.[1713] One alternative is to hold an evidentiary hearing only where, despite the affidavits and evidence submitted by the parties, there are still questions that have not been addressed.[1714]

There is some disagreement as to whether a full-blown evidentiary hearing is ever appropriate. Some courts have afforded an expanded *Daubert* hearing that has taken the form of a minitrial, focused solely on the question of expert admissibility. The Third Circuit has stated that the decision to grant a hearing does not entitle the party to "an open-ended and never-ending opportunity to meet a *Daubert* challenge until [the party] 'gets it right.'"[1715] If an evidentiary

1711. *See, e.g.*, Oddi v. Ford Motor Co., 234 F.3d 143, 154 (3d Cir. 2000) (the most efficient procedure is an in limine hearing, but where evidentiary record is well developed it is within court's discretion to conclude hearing may not be necessary). "The facts of the case and the consequences of losing the in limine motion will determine the extent of the opportunity the proponent of the expert must be given to present its case. When a hearing is held, it is important that its limits be well defined and its progress carefully controlled." *Supreme Court's Trilogy*, *supra* note 1560, at 29.

1712. Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999); *see also In re* TMI Litig., 199 F.3d 158, 159 (3d Cir. 2000) (in limine hearing is important where evidentiary challenge is in context of summary judgment or where exclusion will eventually result in summary judgment being granted). For a more thorough discussion of the interplay between a Rule 104(a) hearing and a motion for summary judgment, see William W Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* Reference Manual on Scientific Evidence 39, 54–56 (Federal Judicial Center 2d ed. 2000).

1713. *See Oddi*, 234 F.3d at 154–55.

1714. *See, e.g.*, *Padillas*, 186 F.3d at 418.

1715. *In re TMI Litig.*, 199 F.3d at 159.

hearing is necessary, the extensiveness of the hearing will be determined by the nature of the case and the type of expert testimony being offered. Obviously, expanded proceedings can consider a broader range of issues and delve more deeply into the underpinnings of expert testimony. However, the court should take care to avoid assessing the credibility of expert testimony and should ensure that it is not encroaching into the province of the jury in deciding factual disputes among the parties.[1716] In all cases, consider whether extensive *Daubert* hearings are an effective use of both judicial and party resources.

When a hearing is appropriate, the court should precisely define the hearing's scope and control its progress; otherwise, hearings may take on a life of their own, resulting in a lengthy, expensive, and unnecessary preview of the trial. It is best to rule on motions by written order or on the record, stating specifically the effect of the ruling and the grounds for it.[1717] It is also advisable to indicate whether the ruling is final or might be revisited at trial. Parties are entitled to know whether they have preserved the issue for appeal or whether an offer or objection at trial is necessary. It is helpful if the judge indicates whether the ruling might be affected by evidence received at trial.[1718]

1716. "This gatekeeping role is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. It is not intended to turn judges into jurors or surrogate scientists." Joiner v. Gen. Elec. Co., 78 F.3d 524, 530 (11th Cir. 1996), *rev'd*, 522 U.S. 136 (1997). *See* Jahn v. Equine Servs., PSC, 233 F.3d 382, 393 (6th Cir. 2000) ("[T]he district court erred by mischaracterizing the methodology employed by Jahn's experts and by weighing their testimony against that of pathologists . . . ."); *see also* Anthony Z. Roisman, *The Courts, Daubert, and Environmental Torts: Gatekeepers or Auditors*, 14 Pace Envtl. L. Rev. 545 (1997).

1717. *Jahn*, 233 F.3d at 393 ("A district court should not make a *Daubert* ruling prematurely, but should only do so where the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance."); United States v. Call, 129 F.3d 1402, 1405 (10th Cir. 1997) (although *Daubert* does not require a hearing, the district court should ensure the record is sufficiently developed to allow appellate "determination of whether the district court properly applied the relevant law").

1718. *See In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 854–55 (3d Cir. 1990) (proponent of expert witness entitled to notice of grounds for exclusion and opportunity to remedy deficiency); *see also Padillas*, 186 F.3d at 418 (court abused its discretion in entering summary judgment after excluding expert evidence without holding an in limine hearing to consider shortcomings of the expert's report); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1392–95 (D. Or. 1996) (convening Rule 104(a) hearing to determine admissibility of evidence of harmful effects of silicone gel breast implants); *Procedural Paradigms*, *supra* note 1709, at 1380–81 (calling for fully developed record in challenges to scientific evidence to permit a basis for trial court ruling on summary-judgment motion and for appellate court review). Federal Rule of Evidence 103(a) was recently amended to preserve a claim of error for appeal once the court makes a definitive ruling on the record admitting or excluding evidence either at or before trial without the party's renewing the objection. Fed. R. Evid. 103(a) committee note.

23.354 Summary Judgment

When a ruling excludes expert evidence offered to meet an essential element of a party's case,[1719] or where the court rules that expert evidence is too conclusory to raise a genuine issue of fact,[1720] the ruling may provide a basis for summary judgment. Summary-judgment motions frequently will be submitted in conjunction with motions under Federal Rule of Evidence 104(a). Issues determinative of admissibility under Rule 104(a), however, will not necessarily be dispositive of the issues under Federal Rule of Civil Procedure 56 (i.e., the absence of a genuine issue of material fact), although they may lay the foundation for summary judgment. The judge is advised to discuss with counsel their intentions with respect to such motions at an early Rule 16 conference and to consider whether there are likely to be grounds for a meritorious motion.[1721] However, it is best to discourage the filing of proposed motions where triable issues clearly appear to be present; voluminous and complex motions unlikely to succeed simply delay the litigation and impose unjustified burdens on the court and parties.[1722]

Declarations filed in opposition to summary-judgment motions must present specific facts that would be admissible in evidence and that show a genuine issue for trial.[1723] At trial an expert is permitted to state an opinion

1719. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 320 (1986) (district court excluded plaintiff's submitted evidence in defense of summary judgment regarding her deceased husband's exposure to defendant corporation's asbestos products).

1720. In his dissenting opinion in *American International Adjustment Co. v. Galvin*, Judge Posner stated the following:

> [A] party cannot assure himself of a trial merely by trotting out in response to a motion for summary judgment his expert's naked conclusion about the ultimate issue . . . The fact that a party opposing summary judgment has some admissible evidence does not preclude summary judgment. We and other courts have so held with specific reference to an expert's conclusional statements . . . The Federal Rules of Evidence permit 'experts to present naked opinions,' but 'admissibility does not imply utility . . . An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process,' and his 'naked opinion' does not preclude summary judgment.

86 F.3d 1455, 1464 (7th Cir. 1996) (Posner, C.J., dissenting).

Parties must be given an adequate opportunity for discovery to develop the evidence necessary to oppose a summary-judgment motion. *See Celotex*, 477 U.S. at 322 (the opponent of the motion is entitled to "adequate time for discovery" needed to oppose the motion); William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 Hastings L.J. 1, 17 (1993). The disclosures required under Rule 26(a)(2) should help in developing an adequate record.

1721. *See* Fed. R. Civ. P. 16(c)(5).

1722. *See generally Procedural Paradigms*, *supra* note 1709, at 1376–81; Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. Davis L. Rev. 93 (1988).

1723. *See* Fed. R. Civ. P. 56(e).

without first testifying to the underlying data. (Federal Rule of Evidence 705, as amended in 1993, permits an expert "to testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise." This eliminated the much criticized practice of asking experts hypothetical questions, leaving it to cross-examination at trial to bring out relevant facts.[1724]) A declaration containing conclusory statements of opinion by an expert, however, unsupported by facts, is insufficient to raise a triable issue.[1725] The sufficiency of an expert's declaration is logically intertwined with the admissibility of the expert's testimony at trial. Thus, it makes sense, as noted above, to combine the Rule 104(a) and Rule 56 proceedings. The reliability and validity of the expert evidence should be assessed prior to resolving the issues presented on summary judgment.

23.36 Final Pretrial Conference

The goal of the final pretrial conference is to formulate the plan for trial, including a program for facilitating the admission of evidence.[1726] Issues should at this point be defined with precision and finality to the extent they can be resolved prior to trial. This includes ruling on pending objections to expert testimony by motions in limine or otherwise, and trying to arrive at stipulations of facts and other matters to streamline the trial. The following techniques can aid this process:

- direct the parties to submit statements identifying the disputed portions of the opposing experts' reports;
- require the submission of a joint statement specifying the matters on which the experts disagree and the bases for each disagreement;
- rule on the admissibility of all exhibits and demonstrations to be offered by experts at trial, such as films, videos, simulations, or mod-

1724. Fed. R. Evid. 705 committee note; *see also id.* 703 (requiring court to balance the probative value of inadmissible evidence relied on by an expert in forming his or her opinion, with its prejudicial effect if it were to be disclosed to the jury).

1725. *See* First United Fin. Corp. v. United States Fid. & Guar. Co., 96 F.3d 135, 140–41 (5th Cir. 1996) (according to circuit precedent, expert affidavits should include some indication of the reasoning process underlying the expert's opinion); Mendes-Silva v. United States, 980 F.2d 1482, 1488 (D.C. Cir. 1993). *But see* Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985) (per curiam) (holding that expert opinion is admissible and may defeat a summary-judgment motion if it appears that the affiant is competent to give expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning on which the opinion is based are not).

1726. Fed. R. Civ. P. 16(d).

els—the judge should give opposing parties a full opportunity to review them in advance of trial and to raise any objections;

- encourage cooperation in presenting scientific or technical evidence, such as joint use of courtroom electronics, stipulated models, charts or displays, tutorials, and a glossary of technical terms for the court and jury; and
- encourage stipulations on relevant background facts and other noncontroversial matters.

23.37 Trial

Attorneys and witnesses in scientific and technological cases tend to use the jargon of the discipline, which is a language foreign to others. From the outset, it is advisable to require the attorneys and the witnesses to use plain English to describe the subject matter and present evidence so that it can be understood by laypersons. Consider reminding experts from time to time that they are not talking to each other, but are there to communicate with the jury and the judge.[1727] The court also may explore at the pretrial conference the use of techniques to facilitate presentation of evidence so that the trier of fact can understand the subject matter and make informed decisions. Practices that, singly or in combination, are worthy of consideration include the following:[1728]

- *Structuring the trial.* One of the main obstacles to comprehension is an excessively lengthy trial. The court may limit the trial's length by limiting the scope of the issues, the number of witnesses and documents, and the time for each side to conduct direct examination and cross-examination. Some cases can be bifurcated, and some can be segmented by issues so that the jury retires at the conclusion of the evidence on each issue to deliberate on a special verdict.[1729] Such sequential approaches to the presentation of a case to the jury may be useful for the trial of severable issues, such as punitive damages, general causation, exposure to a product, and certain affirmative defenses. On the other hand, such approaches make it more difficult to predict for the jurors how long the trial will last.
- *Jury management.* Consider giving preliminary instructions that explain what the case is about and what issues the jury will have to de-

1727. *See generally supra* sections 11.6, 12.2–12.4; William W Schwarzer, *Reforming Jury Trials*, 1990 U. Chi. Legal F. 119.

1728. *See also* 1998 ABA Civ. Trial Prac. Stand. 26.

1729. *See* Fed. R. Civ. P. 42(b).

cide. Jurors may be permitted to take notes, and they may be given notebooks with key exhibits, glossaries of complex terms, stipulations, lists of witnesses, and timelines or chronologies. Permitting jurors to ask questions, usually submitted through the court, can also aid their comprehension. Some judges have found interim summations (or interim opening statements) helpful to juror comprehension; the attorneys are allotted a certain amount of time to introduce witnesses and point out the expected significance of their testimony (e.g., "The next witness will be Dr. X, who will explain how the fracture should have been set. He will give you his opinion about the proper use of screws.").

- *Tutorials.* A neutral expert can be retained to present a tutorial for the judge and jury before the presentation of expert evidence at trial begins, outlining the fundamentals of the relevant science or technology without touching on disputed issues. Consider having the parties' experts testify back-to-back at trial so that jurors can get the complete picture of a particular issue at one time rather than getting bits and pieces at various times during the trial.
- *Presentation of evidence.* Various technologies can facilitate the presentation of exhibits. Some technologies are computer based and some simply facilitate projection of documents on a screen, which allows all jurors to follow testimony about a document. Counsel should be advised to use summaries of voluminous data; stipulated summaries of depositions in lieu of a reading of the transcript are helpful. Charts, models, pictures, videos, and demonstrations can all assist juror comprehension.

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