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MANDATORY MASS TORT CLASS ACTIONS: LITIGATING CATASTROPHES WITHOUT CREATING LITIGATION CATASTROPHES

Chemical spills, airplane crashes, building collapses and medical misadventures have become common place.[1] Such mass torts kill or maim hundreds of thousands, giving rise to numerous common causes of action.[2] Despite their frequent occurrences which sever multitudes of lives and limbs, no procedural device exists which makes possible the expedient and efficient adjudication of mass torts.

The Federal Rules of Civil Procedure (the Rules) recognize the importance of compensating plaintiffs justly, defendants paying their just dues and conserving judicial resources and thus mandate that all of the rules should be construed to obtain the just, speedy and efficient adjudication of every action.[3] In furtherance of these goals, the Rules explicitly encourage those who suffer from a common cause to litigate their claims jointly.[4] Under the Rules as presently construed, particularly Rule 23, however, the numerous vic-

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1. *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980) (Vietnam veterans' chemical exposure); *In re* Air Crash Disaster Near Chi., Ill., 644 F.2d 594 (7th Cir. 1981) (American Airline crash); *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo. 1982), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (Hyatt Regency Hotel skywalk collapse); *In re* Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), *vacated and remanded sub nom.* Abed v. A.H. Robins Co., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (defective birth control device).

2. *See In re Federal Skywalk Cases*, 680 F.2d at 1177 [hereinafter cited as *Skywalk Cases*]; *Abed*, 693 F.2d at 849 [hereinafter cited as *Dalkon Shield*].

3. FED. R. CIV. P. 1 (scope of Rules). *See infra* note 61 (explanation of three interests).

4. *See, e.g.*, FED. R. CIV. P. 13 (counterclaim and cross-claim); FED. R. CIV. P. 18 (joinder of claims and remedies); FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 22 (interpleader); FED. R. CIV. P. 23 (class actions).

In common law courts, a plaintiff was limited in joining claims against a defendant. Only joinder of those claims which involved the same form of action was permissible. In equity courts, joinder standards were more relaxed, but were never made completely clear. T. LANDERS & J. MARTIN, CIVIL PROCEDURE 451-52 (1981).

Under the later Field Codes of Civil Procedure, joinder was allowed more readily than under common law. However, even though joinder provisions were enunciated in the Codes, they were often given a limited reading. *See, e.g.*, Bateman v. Wymojo Yarn Mills, 155 S.C. 388, 152 S.E. 675 (1930) (plaintiff not allowed to join three slander claims against the same defendant).

The Federal Rules of Civil Procedure have more liberal joinder provisions than the Field Codes had. Both joinder of claims and joinder of parties are encouraged. *See* FED. R. CIV. P. 18 (joinder of claims); FED. R. CIV. P. 19, 20 (joinder of parties).

tims of a mass tort cannot bring a joint action.[5] Instead, these victims litigate individually, wasting tremendous resources and contravening the goals of the Rules.

This comment details Rule 23's present inapplicability to mass torts and illustrates that the Rules' goals only can be achieved if mass torts are litigated as mandatory class actions. Recognizing the need for a mandatory mass tort class action, this comment advances alternative approaches which would require mass tort class action litigation. First, this article demonstrates collateral estoppel's relevance in mass tort situations which warrants class action certification. Second, this article dispells the notion that mass tort victims have a basic right to litigate their claims individually and provides the theoretical underpinnings for amending Rule 23 so that it explicitly mandates mass tort class actions.

RULE 23'S CURRENT INAPPLICABILITY TO MASS TORTS

Class actions are maintainable where Rule 23(a)'s four prerequisites are satisfied. Rule 23(a) is satisfied where there exists: a large number of claimants, common questions of law or fact, typicality of claims and adequacy of representation.[6] In addition, the class must have the characteristics required under Rule 23(b).[7] Rule 23(b)(1)

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5. *See infra* notes 6-43 and accompanying text.

6. FED. R. CIV. P. 23(a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is practicable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

7. FED. R. CIV. P. 23(b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision; (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be

mandates that litigation be pursued not by individual actions, but as a class action, if either of two standards is met. One standard is under Rule 23(b)(1)(A) where "individual actions create a risk of incompatible standards of conduct for the party opposing the class. . .,"[8] for instance, where a court enjoins a party from acting in a manner which another court explicitly ordered that party to act. The other standard is under Rule 23(b)(1)(B) where "individual actions threaten the disposition or impairment of other claimants' interests not joined in the action. . .,"[9] for instance, where one suit would bankrupt a defendant and leave similarly situated plaintiffs without remedies.

Although courts consistently have held that Rule 23(b)(1)(A) does not apply to mass torts,[10] courts have held that Rule 23(b)(1)(B) requires mass tort class certification in some instances.

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encountered in the management of a class action.

Id. Rule 23(b)(2) primarily pertains to injunctive relief in a class mode. It is not applicable "to cases in which the appropriate trial relief relates exclusively or predominantly to money damages." *Id.* Because subsection (b)(2) does not directly pertain to mass tort claims, it will not be discussed further in this comment.

8. *See* FED. R. CIV. P. 23(b)(1)(A).

9. *See* FED. R. CIV. P. 23(b)(1)(B).

10. The incompatible standards requirement was addressed in McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), where 335 people were killed in an airplane crash and their representatives brought individual actions against the airplane's manufacturer, McDonnell Douglas. McDonnell Douglas sought class certification, arguing that if it won some of the suits and lost others, it would be subjected to incompatible standards of conduct. *Id.* at 1086. The Court of Appeals for the Ninth Circuit rejected this contention, holding that a risk of inconsistent judgments did not constitute a risk of incompatible standards. *Id.* The court stated that unless the defendant would be required to fulfill mutually exclusive judgments in separate actions, each requiring the defendant to act according to different and opposite standards, class certification under Rule 23(b)(1)(A) was prohibited. Because the defendant could comply with inconsistent judgments merely by paying those plaintiffs who win and not paying those who lose, the court ruled that no risk of incompatible standards was present. *Id.* Thus, the results of individual actions may differ, but the defendant's standard of conduct as to each of those decisions would be compatible.

The following example illustrates the *McDonnell Douglas* court's reasoning. In any given lawsuit, a defendant may either have an issue decided for or against him. If suit one involves A v. B, and suit two involves Z v. B and the identical legal issues are presented in both suits, B may prevail on all of the issues in suit one and yet prevail on none of the issues in suit two. (For an explanation why B may not collaterally estop Z in suit two, see *infra* note 44 and accompanying text) The results of the two suits are clearly opposite, but, they are not incompatible. The conduct that the one judgment allows of B does not forbid the conduct that the other judgment requires. *See McDonnell Douglas*, 523 F.2d at 1086.

The *McDonnell Douglas* case is probably an incorrect interpretation of "incompatible standards." The court treats Rule 23(b)(1)(A) as requiring the equivalent showing necessary for invoking interpleader under Rule 22. *See also* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) (interpreting the interpleader rule). For a discussion of interpleader, see J. LANDERS & J. MARTIN, CIVIL PROCEDURE 501-03 (1981). Treating incompatible standards and interpleader as requiring equivalent showings makes Rule 23(b)(1)(A) surplusage, which seems erroneous because Rule 22 had been adopted 18 years prior to Rule 23's adoption.

Courts have interpreted Rule 23(b)(1)(B) to require class certification where a limited fund is available to satisfy claims arising from a common cause.[11] A limited fund exists where the applicable substantive law restricts the maximum aggregate damages that may be awarded or where the aggregate damage awards inescapably will bankrupt the defendant.[12] Absent class certification in such instances, the defendant's satisfying earlier plaintiffs' judgments would exhaust the limited fund and subsequent plaintiffs' judgments against that defendant would be unsatisfiable.

In re Agent Orange Product Liability Litigation[13] is an example of a limited fund class certification under Rule 23(b)(1)(B). In *Agent Orange*, the District Court for the Eastern District of New York determined that although the defendants' assets presently were sufficient to satisfy judgments for compensatory damages, the possibility of inconsistent punitive damage awards in individual cases established a limited fund.[14] The judge reasoned that courts adjudicating later claims might admit evidence of prior awards of punitive damages, inducing juries to reduce or to disallow punitive damage awards, thus, as a practical matter, disposing of class members' interests who were not parties to the prior litigation.[15] The court further stated that because punitive damages are extraordinary rather than compensatory in nature, they ought to be distributed among the plaintiffs on a basis other than date of trial.[16]

In re Northern District of California Dalkon Shield IUD Product Liability Litigation presented a similar situation.[17] In *Dalkon Shield*, the district court certified a limited fund class, determining that possible punitive damage awards exceeded the defendant's assets.[18] The Court of Appeals for the Ninth Circuit vacated the class certification order, reasoning that the mere *possibility* of a limited fund did not satisfy Rule 23(b)(1)(B)'s requirements.[19] The appellate court stated that Rule 23(b)(1)(B) certification is proper only where separate punitive damage claims *necessarily* will affect later

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11. *See infra* notes 13-21.

12. *See Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) [hereinafter cited as *Agent Orange*]. A limited fund may exist regardless of the number of defendants.

13. *Id.*

14. *Id.* at 724-28.

15. *Id.*

16. *Id. See also* Comment, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1155-59 (1983).

17. *Dalkon Shield, supra* note 2, at 848-51. *See also* Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.9 (9th Cir. 1976) (Rule 23(b)(1)(B) applies where aggregate claims of numerous plaintiffs exceed defendant's assets); Case Comment, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1791-93 (1983).

18. *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal. 1981).

19. *Dalkon Shield, supra* note 2, at 857.

claims.[20]

Agent Orange and *Dalkon Shield* indicate that Rule 23(b)(1)(B) class certification will be granted primarily in cases where punitive damages are sought, it is likely that punitive damages will be awarded and the defendant's assets inescapably will be insufficient to satisfy those awards.[21] Because all mass tort claimants do not seek punitive damages and because those who do cannot necessarily meet the limited fund test, few mass tort class actions will be certified under Rule 23(b)(1)(B).

Although Rule 23(b)(1)(B) does not offer a procedural alternative to wasting resources through litigating mass torts individually, nonmandatory mass tort class certification is available in some instances under Rule 23(b)(3).[22] In addition to the prerequisites of Rule 23(a),[23] Rule 23(b)(3) requires the party seeking class certification to establish that litigating in a class action is superior to litigating in other modes. The financial impact on the parties and the effect on judicial resources influence whether superiority is established.[24] Further, Rule 23(b)(3) requires a showing that class-wide common questions of law or fact predominate over questions affecting only individual class members.[25] The factors considered in establishing predomination are whether litigation already has been commenced in other forums, whether it is desirable to concentrate all of the litigation in one forum, whether considerable difficulties are likely to be encountered in managing a class action and whether class members have significant interests in controlling their own litigation.[26] Although considerations of the first three elements usually favor class certification, the fourth element has been the principal barrier to mass tort class certification under Rule 23(b)(3).[27]

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20. *Id.* at 851-52.

21. *See id.; Agent Orange, supra* note 12, at 724-28.

22. *See supra* note 7 (Rule 23(b)(3)).

23. *See supra* note 6 (Rule 23(a)'s prerequisites).

24. One method of evaluating superiority is to compare the potential amount of time that would be spent litigating common issues in a class action with the amount of time that would be needed to try individual issues. *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968).

25. *See supra* note 7.

26. *Id.*

27. *See* Causey v. Pan Am World Airways, 66 F.R.D. 392, 399 (E.D. Va. 1975) (strong individual interest due to nature of injuries suffered in plane crash and high financial value of wrongful death claims); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974) (claimants have vital interest in controlling their own litigation because asbestos exposure resulted in serious injury or death); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970) (injuries suffered in plane crash held to affect such a significant aspect of the claimants' lives to warrant individual litigation). *See also* Comment, *The Impacts of Defensive and Offensive Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1044 (1967); Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383, 397 (1977).

"[T]he most contested consideration in the predomination analysis concerns the

In denying Rule 23(b)(3) class certification, courts have reasoned that where personal injuries are involved, a plaintiff has a basic right to litigate individually. Characterizing the right to litigate individually as "basic" allows a plaintiff to seek the greatest monetary award possible.[28] Rule 23(b)(3) honors this interest with an "opt out" provision[29] which permits class members to forgo class participation and to litigate their claims individually.[30] Notice of the opt out right must be issued[31] and, where the relationship between the class and the defendant truly is adverse, the class is required to pay the issuance cost, which usually is substantial.[32]

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interest of individual class members in controlling their own separate actions." Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1215 (1983). *But cf. The Proposed Uniform Class Actions Act: The Special Committee on Uniform Class Actions Act, National Conference of Commissioners on Uniform State Laws, C.A.R. Comment*, 4 CLASS ACTION REP. 190 (1975).

The comment further states:

> Just because class members have filed individual suits or because their claims are large or, for personal injury victims, clothed with emotional attachment, it cannot be presumed that all class members so desire to control their own litigation as to forgo the substantial savings in litigation expenses and attorney fees that the class action device can confer.

Id. at 195.

28. *See infra* notes 63-82 and accompanying text (discussion of right to litigate individually).

29. A Rule 23(b)(3) class action must also fulfill the stipulations of Rule 23(c) which provides:

> (c) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23(c). For judicial acknowledgment of the conditional nature of class certification, see *Agent Orange*, *supra* note 12, at 770.

The continued objection to mass tort class certification under Rule 23(b)(3) is particularly problematic in light of Rule 23(c)'s allowance of any class member to enter an appearance of counsel. Because the rule has both an "opt out" provision and an entry of counsel provision, a class member may completely control his own litigation if he so desires or he may exercise control over part of it and enjoy the benefits of class adjudication as well. Rule 23(b)(3) essentially provides a class member with the best of both worlds, control and efficiency.

30. *See supra* note 27 (cases where similar claims were litigated individually).

31. *See supra* note 29 (Rule 23(c)'s prerequisities).

32. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

In *Eisen*, petitioner brought a class action, suing on behalf of all buyers and sellers of odd-lots on the New York Stock Exchange. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). Respondent brokerage firms Carlisle and Jacquelin and DeCoppet & Doremus together handled 99% of the exchange odd-lot business. *Id.* at 149. Petitioner alleged that respondent brokerage firms had monopolized odd-lot trading in violation of the SHERMAN ACT, 15 U.S.C. §§ 1-2 (1949).

Despite the imposing cost of issuing notice and the presumed basic right to litigate individually, federal district courts in *Agent Orange*[33] and *Payton v. Abbott Labs*[34] recently certified two mass tort class actions under Rule 23(b)(3). In *Agent Orange*, the court certified a class action to decide common issues relating to causation, warning and affirmative defenses.[35] In *Payton*, the court certi-

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Initially, the district court determined that petitioner's suit was not maintainable as a class action. *Id.* On appeal, the court of appeals issued two decisions referred to as *Eisen I*, Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966) and *Eisen II*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). *Eisen I* held that the district court's decision was a final order and consequently appealable. *Eisen*, 370 F.2d at 121. *Eisen II* remanded petitioners suit to the district court to reconsider whether a class action should be certified. *Eisen*, 391 F.2d at 559. On remand, the district court certified a class and entered orders regarding the notice required to be issued. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

The district court determined that individual notice to all identifiable class members would cost $255,000. The court reasoned, however, that due process did not require individual notice to the class members and it adopted a notice package which would fulfill due process requirements and yet only cost $21,720. *Eisen*, 52 F.R.D. at 260. The named petitioner, however, had injuries which totalled only $70.00 and was reluctant to pay the notice costs.

Rather than dismiss the suit, the court decided to impose the notice cost on respondents if petitioners could show a strong likelihood of success on the merits at a preliminary hearing. After the hearing, the district court issued an order stating that the petitioner would more likely than not prevail on the merits and, therefore, respondents should bear 90% of the notice cost ($19,548). *Id.* at 262. This decision was appealed as *Eisen III*. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973).

The *Eisen III* court ordered the dismissal of the class action, stating its disapproval of the district court's reasoning regarding notice cost. *Eisen*, 479 F.2d at 1010. The appeallate court's decision was subsequently petitioned to the Supreme Court. In affirming the Second Circuit's decision, the Supreme Court held that individual notice was required and that the class must bear the notice cost. *Eisen*, 417 U.S. at 158. The Court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), as authority requiring that individual notice be provided to those class members who are identifiable through a reasonable effort. *Eisen*, 417 U.S. at 175. The Court stated that in the case before it, 2,250,000 class members were easily ascertainable and, therefore, required notice of the class proceedings. *Id.* at 176. The Court further stated that "the usual rule is that a plaintiff must initially bear the cost of notice to the class. . . .[W]here, as here, the relationship is truly adversary [sic], the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own lawsuit." *Id.*

33. *Agent Orange, supra* note 12, at 720.

34. 83 F.R.D. 382 (D. Mass. 1982) (DES case).

35. *Agent Orange, supra* note 12, at 720, involved claims for relief for injuries sustained in Vietnam from the use of Agent Orange. Agent Orange was a chemical defoliant which the defendants manufactured and sold to the United States government. *Id.* The plaintiffs sought class certification of two classes pursuant to Rule 23. They contended that the many issues presented would best be determined, thereby avoiding duplicative litigation, if the suit proceeded as a class action. *Id.* at 723.

The court found that common questions of law and fact predominated over other issues which were present and that class adjudication was superior to other available methods for fair and efficient litigation. *Id.* at 722-28. Therefore, it certified a Rule 23(b)(3) class. *Id.*

The district court also certified a Rule 23(b)(1)(B) class because it determined that probable punitive damages awards established a limited fund. *Agent Orange, supra* note 12, at 722-28. The certification orders were later challenged through a writ of mandamus, but the petition was denied. *In re* Agent Orange Prod. Liab. Litig., 635

fied a class action to resolve the issues of whether and when the defendants knew or should have known of the dangers of DES exposure.[36] Both courts, however, emphasized the conditional nature of a Rule 23(b)(3) class certification and stipulated that neither class-wide liability issues nor damage issues would be determined in the class action.[37]

Notwithstanding these two recent class certifications, Rule 23(b)(3) does not provide a satisfactory means to litigate mass tort class actions. Even where Rule 23(b)(3)'s "predominance" and "superiority" requirements are met, the cost of issuing notice usually is insurmountable.[38] Additionally, where certification is warranted and cost of issuing notice is not prohibitive, the notion that each plaintiff has the right to litigate his claim individually,[39] and thereby receive the highest possible damage award, lures many class members to opt out of the class, dissipating the class action's benefits.[40] Consequently, courts certify few Rule 23(b)(3) mass tort class actions, and those few which are certified do not offer expedient or efficient means to litigate mass torts.[41]

With courts certifying few mass tort class actions, most mass tort victims individually litigate their claims, causing duplicative actions and wasting tremendous resources. This comment offers two alternatives to this duplication and waste: Rule 23 should be either liberally construed as presently drafted, thereby recognizing collateral estoppel effects and requiring mass tort class certifications,[42] or amended, expressly mandating mass tort class actions.[43]

F.2d 987 (2d Cir. 1980).

36. *Payton*, 83 F.R.D. at 391-92.

37. *Agent Orange*, *supra* note 12, at 720; *Payton*, 83 F.R.D. at 394.

Rule 23(c)(1) provides that all class certifications are conditional. "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1). For a discussion of Rule 23(c), see *supra* note 29.

38. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

39. *See infra* notes 63-82 and accompanying text (discussion of claimants' interests in individually litigating claims); *see generally Dalkon Shield*, *supra* note 2, at 848-50. In *Dalkon Shield*, the district court certified Rule 23(b)(1)(B) and Rule 23(b)(3) class actions on a motion raised *sua sponte*. *Id.* at 852. Subsequently, both the plaintiffs and the defendant challenged the certification order. *Id.* at 849-50. The court designated lead counsel resigned and no new counsel was appointed. *Id.* at 851. After the resignation, the court seemed dismayed at the thought of selecting adequate counsel and questioned whether any counsel would be adequate. However, seven law firms were named in the appellate record. *Id.* at 848.

40. If a significant number of class members chose to opt out of the class proceedings, litigation of numerous individual suits would follow, which would render continuing the class proceeding relatively useless.

41. *See infra* notes 98-102 and accompanying text (discussion of the resources litigating mass tort claims individually wastes).

42. *See infra* notes 44-57.

43. *See infra* notes 58-103 and accompanying text.

CHANGES IN RULES 23'S CONSTRUCTION

The use of nonmutual offensive collateral estoppel in mass tort situations renders decisions in earlier lawsuits dispositive of claims in later lawsuits.[44] This effect falls squarely within Rule 23(b)(1)(B) mandatory class certification.[45]

The United States Supreme Court first recognized nonmutual offensive collateral estoppel ("offensive collateral estoppel") in *Parklane Hosiery Co. v. Shore*[46] where the plaintiffs sought to col-

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44. The doctrines of collateral estoppel and res judicata, though distinct legal principles, are often mistakenly used interchangeably. Res judicata bars parties to a prior action or their privies from relitigating the same cause of action. *See* Palmer v. Clarksdale Hosp., 213 Miss. 611, 57 So. 2d 476, 478 (1952). Res judicata is often referred to as claim preclusion. Collateral estoppel, in contrast, bars parties to a prior action or their privies from relitigating an issue dicided in the previous action. *See* Bernhard v. Bank of Am., 19 Cal. 2d 807, 22 P.2d 892 (1942). Collateral estoppel is referred to as issue preclusion.

Res judicata is nondiscretionary in nature because, without it, judgments would lack conclusiveness and finality. James v. Gerber Prods. Co., 587 F.2d 324, 327 (6th Cir. 1978). The application of collateral estoppel is discretionary in nature because it primarily serves to promote judicial economy, an important, but nonessential, commodity. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Collateral estoppel, although discretionary in nature, has a broader scope than res judicata in jurisdictions where mutuality of estoppel is not required.

Mutuality of estoppel requires two conditions to be fulfilled before collateral estoppel may be applied. First, the party against whom collateral estoppel is being asserted must have been a party to or in privity with a party from the prior lawsuit where the issue sought to be estopped was decided. Second, the party asserting collateral estoppel would have been bound by a contrary decision on the issue sought to be estopped in the prior suit.

Mutuality can be illustrated as follows:

(1) First Action: Plaintiff v. Defendant - Judgment for Plaintiff. Second Action: Plaintiff v. X - because X was neither a party nor in privity with a party to the first action, due process prohibits the use of the prior judgment in the action against X.

(2) First Action: Plaintiff v. Defendant - Judgment for Defendant. Second: Plaintiff v. X - X wants to use the prior judgment against Plaintiff as a defense. Mutuality prevents X from using the prior judgment because X would not have been bound if the judgment in the first action had been for Plaintiff.

(3) First Action: Plaintiff v. Defendant - Judgment for Plaintiff. Second Action: X v. Defendant - X wants to use the prior judgment against Defendant to preclude Defendant from relitigating an issue previously decided against him. Mutuality prohibits X from seeking to benefit from an earlier action to which X was not a party.

45. Rule 23(b)(1)(B) provides for class certification where individual litigation would impair or dispose of claimants' interests not joined in the litigation. For a discussion of the current judicial interpretation and application of Rule 23(b)(1)(B), see *supra* notes 6-43 and accompanying text.

46. 439 U.S. 322 (1979). *Parklane* involved a stockholder's class action against a corporation, its officers, directors, and stockholders who allegedly had issued a materially false and misleading proxy statement in violation of §§ 14(a), 10(b) and 20(a) of the SECURITIES EXCHANGE ACT of 1934. The case presented the question whether a party who had issues decided adversely to it in an equitable action could be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. *Parklane*, 439 U.S. at 324.

The Court noted that its previous decision in *Blonder-Tongue*, 402 U.S. at 328-29, had involved the use of defensive collateral estoppel, whereas the case before it involved the use of offensive collateral estoppel. The Court stated that the use of

laterally estop the defendant from rearguing an issue it had lost in a previous lawsuit involving different plaintiffs. The Court estopped the defendant from rearguing the issue, but emphasized that considerations of fairness to the defendant would prohibit using offensive collateral estoppel if the plaintiff could have intervened easily in the earlier action, but simply chose not to.[47] Thus, under *Parklane*, a plaintiff may not "wait-and-see" an action's result and then use favorable findings to collaterally estop the defendant from relitigating those decided issues.

Although allowing plaintiffs to "wait-and-see" would in theory defeat offensive collateral estoppel's theoretical purpose: promoting judicial economy,[48] proving that a plaintiff adopted a "wait-and-see" approach is extremely difficult.[49] The consequences of this practical

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offensive collateral estoppel "does not promote judicial economy in the same manner as defensive use does." *Parklane*, 439 U.S. at 329. The use of defensive collateral estoppel precludes a plaintiff from relitigating identical issues by merely switching adversaries. *See Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895. Thus, the use of defensive collateral estoppel encourages joinder of all potential defendants in the first action; offensive collateral estoppel creates precisely the opposite incentive.

Because a plaintiff will be able to rely on a previous judgment against the defendant but will not be bound by a judgment if the defendant wins, the plaintiff has an incentive to adopt a "wait-and-see" attitude. *See, e.g.*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115 (1958); Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965). Although the *Parklane* Court recognized arguments regarding the negative aspects of allowing the use of nonmutual offensive collateral estoppel, it determined that none of the circumstances that might justify reluctance to adopt it were present. The Court applied the doctrine of nonmutual offensive collateral estoppel and barred the defendant from relitigating those issues previously decided against it.

47. *Parklane*, 439 U.S. at 331-32.

48. For a discussion on the purpose of collateral estoppel, see *infra* note 51. *See also* Byassee, *Collateral Estoppel Without Mutuality: Accepting The Bernhard Doctrine*, 35 VAND. L. REV. 1423 (1982); Maedgen & McCall, *Current Problems, Tools and Theories in Multiparty Products Liability Cases*, 18 FORUM 117 (1982); Comment, *Collateral Estoppel: One Full an Fair Opportunity to Litigate Common Facts*, 39 J. Mo. B. 405 (1983).

49. "More difficult to apply than the fairness criteria is that portion of the *Parklane* rule prohibiting the use of offensive collateral estoppel by a plaintiff who could have easily joined the first suit. The Supreme Court [in *Parklane*] did not define the type or degree of case which is relevant or necessary." Collins v. Seaboard Coastline R.R., 516 F. Supp. 31, 33 (2d Cir. 1981). The *Collins* court went on to reason that because the plaintiff did not have everything to gain and nothing to lose by not intervening in the prior action, the use of offensive collateral estoppel should not be precluded. *See id.* Ironically, in reaching its conclusion that the defendant should be estopped, the court stated that "it will not speculate why plaintiff decided not to join her husband's [prior] suit. . . ." *Id.* This reluctance to speculate indicates that the burden of persuasion as to establishing the existence or nonexistence of a "wait-and-see" approach is on the defendant. The result of this allocation of burden is that the defendant must prove a negative: the plaintiff did not have a bona fide purpose for failing to intervene. This is a difficult burden to establish. *See* Starker v. United States, 602 F.2d 1341, 1342 (9th Cir. 1979) (use of offensive collateral estoppel permitted despite opportunity to intervene).

Even if the three *Parklane* criteria are satisfactorily met: incentive to fully litigate in prior suit, other inconsistent judgments and additional procedural opportuni-

difficulty are important in mass tort settings where a large number of similarly situated claimants may adopt a "wait-and-see" approach with little risk of being discovered.

Courts have reasoned that because "waiting-and-seeing" theoretically is prohibited, determinations in one action will not impair the interests of claimants who were neither parties to nor in privity with parties to that action.[50] Consequently, certification for reason of impairment under Rule 23(b)(1)(B) has been foreclosed. However, courts erroneously have concluded considering offensive collateral estoppel's effects at this point, rather than separately considering its dispositive effects.[51]

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ties, the use of offensive collateral estoppel has important practical consequences. *See Parklane*, 439 U.S. at 331-32. *See also infra* notes 52-57 and accompanying text.

Because the initial focus is on the defendant's due process rights, and the subsequent focus is on the reason why the plaintiff did not intervene, judicial economy is not adequately considered. Although the *Parklane* Court reasoned that estopping a defendant on issues previously litigated provided efficiency, it was not deciding a mass tort case. In a mass tort setting, there are numerous plaintiffs who may wait for a desirable decision and then bring their suit. It may well be true that allowing the later suing plaintiffs the use of offensive collateral estoppel is more efficient than relitigating all of the issues previously decided, but it is also less efficient than adjudicating the entire group of plaintiffs in a class action. *See infra* notes 99-103. A mass tort setting was not present in *Parklane* and therefore its decision is not dispositive of whether class certification is necessary in mass tort settings.

50. *See, e.g., Dalkon Shield, supra* note 2, at 857.

51. Discussion of collateral estoppel for class action purposes is pertinent to the issue of disposition under Rule 23(b)(1)(B). Taking as true the premise that plaintiffs may not adopt a "wait-and-see" approach, disposition of future suing plaintiff's claims does not occur and, therefore, class certification is denied.

The problem, however, is that this premise is often taken for granted without the specific instances of each case being scrutinized. One commentator stated that "[c]learly, res judicata or collateral estoppel cannot be used in such a situation." Comment, *Federal Mass Tort Class Action: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1198 (1983). Acceptance of this premise as a given, as that commentator did, can only result in an increase in the number of persons adopting a "wait-and-see" approach rather than joining in the current litigation. A solution to this dilemma would be a mandatory mass tort class action. *See infra* notes 58-103 and accompanying text.

Rule 23(b)(1)(B) requires class certification wherever separate actions would either impair the ability of later suing plaintiffs to protect themselves or would be dispositive of the interests of others not participants in the adjudication. *See* FED. R. CIV. P. 23(b)(1)(B). Therefore, two questions must be answered in the negative for Rule 23(b)(1)(B) not to apply. The initial suit must not impair, and the initial suit must not be dispositive of, later claims of nonparties. *Id.* Furthermore, the named parties must adequately represent the claims of the entire class. Adequacy of representation depends, for the most part, on the qualifications and interests of counsel for the representatives. *Agent Orange, supra* note 12, at 788. It should be the smallest impediment to class certification because of the many able law firms which surely would accept the notoriety and fees which a mass tort class action would provide. If finding adequate counsel did prove to be a problem, a system could be established whereby the court would appoint counsel, as is presently done in the criminal law area.

Furthermore, if a class were certified and a decision rendered on the merits, the findings may not bind a party who is subsequently determined not to have been adequately represented. To bind such a party would be a deprivation of that party's

The following example illustrates the relevant difference between impairment and disposition and why they must be considered separately.[52] Assume an airplane crash in which hundreds of people are killed and no one survives. Further, assume A, a passenger's surviving spouse, brings a suit against B, the airplane's designer, and B loses on all issues, including liability. C, also a passenger's surviving spouse from the same mass tort that spurned A's lawsuit, may later initiate suit two (C v. B), and effectively use offensive collateral estoppel to bind B on any issue B lost in suit one (A v. B.).[53] None of the determinations in suit one bind C because C was neither a party to suit one nor in privity with A.[54] Therefore, C's interests are held

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right to due process. *See* Hansberry v. Lee, 311 U.S. 32 (1940) (prohibiting use of collateral estoppel against a party not adequately represented in a prior class action).

52. For the purpose of this example, nonmutuality of estoppel is presumed the applicable law. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (approving the use of nonmutual offensive collateral estoppel).

53. For a discussion of the operation of collateral estoppel, see *supra* notes 44 and 51.

54. In denying the use of collateral estoppel against nonrepresented claimants, focus is on the due process requirements which are not honored if a person not a party to, or in privity with a party in a prior lawsuit, is bound by determinations made in that suit. *See* Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 320-28 (1971) (due process would be violated if prior action were binding on a claimant who was not adequately represented in a class); *Hansberry*, 311 U.S. at 40-41.

In *Hansberry*, the defendants, a black family, bought land in an area of Chicago which was allegedly covered by a racially restrictive covenant. The plaintiff, representing other landowners, brought a class action to enjoin the breach of the covenant. Lee v. Hansberry, 372 Ill. 369, 370, 24 N.E.2d 37, 39 (1939). *See* FED. R. CIV. P. 23(b)(2) (class action certification for injunctions). In a previous action, the Hansberry's vendors had been members of a class of plaintiffs which successfully enforced the covenant against the other defendants.

The Illinois Supreme Court concluded that the initial lawsuit was a class action and that in a class suit, "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the result in the case unless it is reversed or set aside. . . ." *Lee*, 372 Ill. at 371, 24 N.E.2d at 40. The court further reasoned that because the Hansberry's vendors had been members of the plaintiff class in the prior suit which upheld the covenant, the Hansberrys were, in effect, in privity with the prior plaintiff class. The court reached this conclusion even though the class had argued the validity of the covenant and the Hansberrys were arguing against the validity of the covenant. *Id.*

The Supreme Court reversed the lower court's holding determining that the Hansberrys were not successors in interest to or in privity with any of the losing parties in the earlier suit. *Hansberry*, 311 U.S. at 35. It found that it is a basic principle of Anglo-American jurisprudence that one is not bound by a judgment rendered in litigation where he was not a party or in privity with a party. *Id.* at 40. The Court further noted that a class action is an exception to this basic principle. However, the Hansberrys were arguing the exact opposite position than the position the class had in the prior suit. Because the Hansberry's interests differed from the class's interest, the class did not adequately represent the Hansberry's and, consequently, the prior judgment did not bind the Hansberrys. *Id.* at 41.

The *Hansberry* case was similar to the following example. Suppose case one involved A v. B with B winning on all issues and case two involves Z v. B litigating the same issues. B may not use defensive collateral estoppel to bar Z from arguing the issues. To allow B to do so would violate Z's right to due process because he would be

not to have been impaired.

Although suit two leaves C unimpaired, it is dispositive of B's interests because B is estopped from relitigating those issues that were decided adversely to him in suit one. Because those issues are adversely dispositive of B's interests, conversely, they also are positively dispositive of C's interests, as well as the interests of all the other crash victims who were not parties to that initial adjudication. Offensive collateral estoppel's inherent dispositive nature causes these results and should result in mandatory mass tort class certification under Rule 23(b)(1)(B).[55]

Rule 23(b)(1)(B) mandates class certification where individual actions would be dispositive of or threaten the impairment of later lawsuits as a *practical* matter.[56] Rather than adhering to this plain wording, courts have misconstrued Rule 23(b)(1)(B) to require a showing that separate actions *inescapably* will be dispositive of nonparty claimants' interests.[57] This more stringent requirement disre-

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denied a full and fair opportunity to litigate his claim. *See generally* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979). However, if case one involved A v. B with B losing on all issues and case two involves Z v. B and the same issues are present, Z may use offensive collateral estoppel to bar B from rearguing those issues. Therefore, foreclosure of the use of defensive collateral estoppel does not *ipso facto* mean that the use of offensive collateral estoppel is foreclosed as well. In essence, the availability of offensive collateral estoppel coupled with an adverse decision for the defendant results in case one being dispositive of the defendant's interests in case two and all subsequent cases involving the same issues.

Even if one were to accept the position that the prevalent use of offensive collateral estoppel constitutes disposition in some instances, Rule 23(b)(1)(B) only requires certification in those instances where disposition will "as a practical matter" result. FED. R. CIV. P. 23(b)(1)(B). Thus, certification would not be required in those suits which could not satisfy the "as a practical matter" requirement. *See Parklane*, 439 U.S. at 324.

55. For a discussion of Rule 23(b)(1)(B), see *supra* notes 10-21 and accompanying text. Because of the dispositive nature of offensive collateral estoppel, mass torts ought to be certified as class actions. Application for a certification order may be initiated by the plaintiffs, the defendants or the judge *sua sponte*. *See Dalkon Shield*, *supra* note 2, at 849-50. (judge certified class on own motion, defendant joined motion the next day).

56. Rule 23(b)(1)(B) mandates class certification if adjudications by individual litigants would "as a practical matter" be dispositive of other claimants' interest. FED. R. CIV. P. 23(b)(1)(B). In *Dalkon Shield*, the court noted the Rule's express language and yet adopted a stricter standard. *See Dalkon Shield*, *supra* note 2, at 851. The court stated that Rule 23(b)(1)(B) certification is prohibited in "mass tort actions unless the record establishes that separate punitive damages awards *inescapably* will effect later awards." *Id.* (emphasis added). *See also* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466-67 (9th Cir. 1973) (party proposing certification must show that individual actions "inescapably alter the substance of rights of others. . .").

57. An example of a case which interpreted Rule 23(b)(1)(B) as requiring a showing far less than inescapable effect is Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976). In *Green*, all of the plaintiffs' claims for damages exceeded the assets of the defendant. Certification was granted to avoid any detrimental effect of earlier individual claims upon later claims even though such an effect was only a possibility. *Id.* at 1340 n.9.

Another reason courts should interpret Rule 23(b)(1)(B) liberally is that to do

gards the plain meaning doctrine of statutory construction, circumvents the practical and liberal goals of the Rules and dissipates offensive collateral estoppel's dispositive effects.

The purpose of the Rules will not be fulfilled unless they are construed in a malleable, liberal manner. Such an interpretation would recognize the ineffective constraints on the use of nonmutual offensive collateral estoppel in mass tort situations and would mandate mass tort class actions.

CONSIDERATIONS OF AMENDING RULE 23

Although a liberal interpretation of Rule 23 would mandate

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otherwise may often require a mini-trial on the issue of whether disposition will occur. In Eisen v. Carlisle & Jacquelin, the Supreme Court denounced such hearings. 417 U.S. 156, 177-78 (1974). The Court stated, "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing [one] to secure the benefits of a class action without first satisfying the requirements for it." *Id.* at 177.

Not only does the plain meaning doctrine of statutory construction support the premise that only a showing of practical disposition is required under Rule 23(b)(1)(B), but the purpose of the Rules does as well. *See* FED. R. CIV. P. 1. The scope of the Rule provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.* This scope indicates that the Rules are to be construed liberally and not in a fixed, static manner. *See Eisen*, 417 U.S. at 177. *See also Skywalk Cases, supra* note 2, at 1177. ("[T]he magnitude of the litigation challenges this court to administer these cases with flexibility and imagination").

In *Dalkon Shield*, 521 F. Supp. 1194, the common issues of fact and law which satisfied Rule 23(b)(3)'s requirements for class certification were "issues of negligence, strict products liability, the adequacies of warnings at relevant time periods, breach of warranty, fraud and conspiracy." The district court judge stated: "[a]s this court knows from its own experience in trying a nine-week case in 1980, any attempts to try all these cases would bankrupt the district court's calendar and result in a tedium of repetition lasting well into the next century." *In re* Northern Dist. Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981).

The appellate court vacated the California class' certification under Rule 23(b)(3) because both the typicality requirement and the superiority requirement of Rule 23(a) were not met. *Dalkon Shield, supra* note 2, at 857. The appellate court further reasoned that the district court had erred in certifying a Rule 23(b)(1)(B) nationwide punitive damages class without determining that separate early punitive damages awards would inescapably affect later awards. *Id.*

In a typical mass tort situation, such as an airplane crash or a cruise ship food poisoning, it has been presumed that, "when personal injuries are involved, each plaintiff should have a right to prosecute his own claim and to be represented by the lawyer of his choice." *Id.* at 853. Courts' reluctance to certify mass tort class actions is explained in part by the advisory comments to Rule 23 which provide:

> 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 damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted normally as a class action would degenerate in practice into multiple lawsuits separately tried.

39 F.R.D. 103 (1966).

mass tort class actions, the judicial interpretations and applications of Rule 23 have erected such precedential impediments to certifying mass tort class actions that the Rule's amendment is justified. Nevertheless, amending Rule 23 to sanction mass tort class actions has not been considered because it has been presumed that mass tort victims have a basic right to litigate individually.[58] This presumption is erroneous because the right to litigate individually is not a basic right, rather, it is an ordinary right. This comment will illustrate the distinction between basic and ordinary rights and identify the interests and goals that must be balanced in considering whether Rule 23 should be amended.[59]

The Rules' three primary goals, the just, speedy and inexpensive determination of every action,[60] correspond to the three interests which are at stake in every lawsuit: the plaintiff being justly compensated, the defendant paying his just due and conserving judicial resources.[61] Fulfillment of these goals directly corresponds to

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58. *See supra* notes 10-21 and accompanying text (setting forth Rules 1 and 23(b)(1)(B)). In Yandler v. P.P.G. Indus., Inc., the court listed several reasons why mass torts are not certified as class actions, 65 F.R.D. 566, 571-72 (E.D. Tex. 1974). The court stated:

> The policy reasons for the disallowance of class actions in mass tort cases generally fall into three categories. First of all there is the general feeling that when personal injuries are involved each person should have the right to prosecute his own claim and be represented by the lawyer of his choice. Secondly, that the use of this procedure may encourage solicitation of business by attorneys. And finally that individual issues may predominate because the tort-feasor's defenses may depend on facts peculiar to each plaintiff.

Id. at 569 (citing 7A A. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1783 (1982).

59. *See infra* notes 60-62 and accompanying text.

60. *See* FED. R. CIV. P. 1 (goals of the Rules).

61. Benjamin Kaplin, Royal Professor of Law, Harvard Law School and reporter to the Advisory Committee on Civil Rules in 1966 described the drafting of Rule 23. Kaplin, *Continuing Work of The Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1966) [hereinafter cited as *Kaplin*]. Kaplin stated that the drafters were in general agreement to adopt Rule 23(b)(1) and Rule 23(b)(2). However, there was criticism by some that the rule should be confined to FED. R. CIV. P. 23(b)(1) and FED. R. CIV. P. 23(b)(2) and stay out of the difficult area which 23(b)(3) now addresses. *Id.* at 394. "This timid course was unthinkable in the face of the insistent need to improve the methods of handling litigation affecting groups." *Id.*

Although those opposed to an adoption of Rule 23(b)(3) in any form lost their argument, it was not a total defeat. Rule 23(b)(3) is the only section which has mandatory notice and voluntary "opt out" provisions for class members. *See* FED. R. CIV. P. 23(c)(2). The apprehension which was expressed at expanding the rule into the Rule 23(b)(3) area explains why the rulemakers did not venture further and adopt a Rule 23(b)(4) mandatory mass tort class action. In the words of Professor Kaplin, "[t]he object [in formulating a class action procedural device] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." *Kaplin, supra,* at 390. Thus, the three interests which the committee implicitly balanced in adopting Rule 23 were the class members' rights to compensation, (procedural safeguards for members of the class), the defen-

the degree of satisfaction of these interests. These goals currently are not fulfilled in mass tort situations because concern for the plaintiff's compensation overshadows concerns for the defendant's paying only his just due and for conserving judicial resources. In defense of favoring the interest of the plaintiff over the interests of the defendant and the judiciary, it is asserted that mass tort victims have a basic right to litigate individually.[62] This assertion disregards an important distinction made in philosophic literature between basic rights and ordinary rights.[63]

Basic rights have corresponding duties.[64] A duty exists, which indicates that a corresponding basic right exists, when an obligation is owed *from* one person *to* another. When one owes something to another, that other has a basic right to what he is owed. Immanuel Kant stated that basic rights have a supreme kind of worth, which he called "moral worth," because an action that honors a basic right derives its whole motivating power from the thought that duty requires it.[65]

Natural law is the source of basic rights.[66] Basic rights are discernible from man's very being. When a basic right is exercised, and its corresponding duty is discharged, justice is done.

In a case where liability is not at issue, the plaintiff's interest in being justly compensated is a basic right because it corresponds to the defendant's duty to make amends for the injuries he caused to that plaintiff. Thus, in civil litigation, the plaintiff's basic right and the defendant's duty are equal to, in monetary terms, an amount which is manifested in an award of damages. The concurrent pay-

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dant paying only his just dues (procedural safeguards for the opposing party), and judicial economy (cases where important advantages of economy of effort will result). In determining whether a Rule 23(b)(4) class action for mass torts should be established, these three concerns must be considered.

62. *See supra* notes 27-32, 58 and accompanying text (discussion of the right to litigate individually).

63. While the word "right" is often used in different contexts, for the purpose of this discussion it is necessary to distinguish between some rights and others. In a natural law context, *basic* rights are distinguishable from rights of a *lesser* order. *See* Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 179, 182 (1955). Basic rights are distinguishable from rights of a lesser order because basic rights in one person always have corresponding duties in another person; whereas, lesser rights in one person have no such corresponding duties in another person. These lesser rights will be referred to as ordinary rights.

64. Joel Feinberg recognized the distinction between duty-owed privileges and duty-less privileges and termed a privilege without a corresponding duty a claim. *See* J. FEINBERT RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 130-42 (1979) [hereinafter cited as J. FEINBERG]. "A duty. . .moreover, entails a right of a very specific kind, called in the jargon of jurisprudence, a positive *in personam* right. That is, a right against one specific person requiring him to perform a 'positive act,' not a mere omission." *Id.* at 131.

65. I. KANT, THE SCIENCE OF RIGHT 435-58 (W. Hastie trans. 1952).

66. *Id.* at 435 (definition and division of "Public Right").

ment and receipt of that amount constitutes justice.

Ordinary rights, in contrast to basic rights, have no corresponding duties. Ordinary rights are privileges or rewards.[67] If an ordinary right at times is bestowed, but at other times is not, the intermittent recipient should have no complaint; he only deserved the reward, as opposed to having a basic right to it or grounds for claiming it as his just due.[68]

Institutions are the sources of ordinary rights.[69] The aggregate of institutionally created rights is positive law. The exercise of ordinary rights, unlike the exercise of basic rights, has no *per se* effect on justice.[70]

The difference between basic and ordinary rights is one of "kind." Basic rights are of a higher order and, because their source is natural law, they persist until their corresponding duties are discharged. Ordinary rights are of a lower order and, because their source is an institution, that institution may extinguish them without injustice.[71]

The difference between the two types of rights and their interplay is apparent in civil litigation. Assume A injures B, giving rise to a basic right in B to compensation from A. In earlier times, B could have sought compensation through self help or force. He may have adopted a maxim such as survival of the fittest[72] or "an eye for an eye" to implement his basic right.[73] In short, imagination and re-

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67. Joel Feinberg used a master servant scenario to depict the difference between a right and a claim. For example, a master or a lord who is not under an obligation to reward his servant for especially good service still might feel that there would be a special fittingness in giving a gratuitous reward as a grateful response to good service. If the deserved reward were not given the servant, he would have no complaint, "since he only deserved the reward, as opposed to having a right to it or claim to it as his due." J. FEINBERG, *supra* note 64, at 145.

68. *Id.*

69. Lawrence Kohlberg puts forth a theory of "justice as fairness" in which he discusses the institutional source of ordinary rights and the importance of legal rights to moral order. *See* Kohlberg, *Moral Stages and Moralization: The Cognitive-Development Approach* in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 31-53 (T. Lickona ed. 1976).

70. The exercise of ordinary rights alone has no effect on justice because ordinary rights are of form as contrasted to basic rights which are of substance. In order to effect "justice," some substance must be at stake. *See generally* Kohlberg, *Education for Justice: A Modern Statement of the Platonic View* in MORAL EDUCATION 69-70 (N. Sizer ed. 1970).

71. Because the legal institution legitimately may promulgate ordinary rights, it follows *ipso facto* that it legitimately may extinguish them as well.

72. C. DARWIN, THE ILLUSTRATED ORIGIN OF SPECIES 18 (intro. by R. Leakey 1979). Darwin's theory of evolution was that all species of plants and animals developed from earlier forms by hereditary transmission of slight variations in successive generations. The forms of all species which survive are those that are best adapted to the environment (the "fittest"). Darwin's theory is often referred to as evolution by natural selection. *Id.*

73. S. MERCER, BABYLONIAN KINGS & RULERS 101 (1946). Hammurabi was a king

sources were the only limits to a person's means of redress.

Today, it cannot be disputed that society may justly prescribe in what manner one may seek redress. For instance, if A injures B, society may justly prohibit B from taking A's oldest daughter as settlement of his claim. The legal institution promulgates ordinary rights which circumscribe B's basic right to compensation. As long as some means of just compensation exists, the institution may dictate the process through which it is obtained.[74] Thus, the institution may legitimately require that B either resort to a legal forum to obtain a remedy or forgo his claim altogether.

Just procedures, whose moral legitimacy is not questioned, often circumscribe basic rights. For example, once a claim or issue is litigated, the same parties may not relitigate that claim.[75] Further, a plaintiff may be prohibited from bringing the same claim against the same defendant 100 times.[76] It is morally legitimate to limit basic rights in such manners because only the form of asserting the rights is being controlled; the substance of the rights still can be asserted justly.

The legal institution also legitimately established workmen's compensation laws to govern worker's tort claims.[77] These laws are legitimate because they circumscribe, but do not extinguish, the worker's basic right to compensation. Similarly, the institution legitimately changed jury size from twelve to six jurors.[78] For identical reasons, it is neither argued that statutes of limitation are illegitimate nor disputed that issues may not be raised on appeal that were not raised in a lower court proceeding.[79]

The institution additionally may legitimately restrict the forum or mode[80] of litigation. For example, a remedy for a tort that occurred between two parties who, like the tort, are totally unconnected with New York City, cannot be obtained in that city simply

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of Babylon in the 18th century B.C. He formulated what is known as the Code of Hammurabi which held as a maxim for attaining justice, "an eye for an eye, a tooth for a tooth. . . ." *Id.*

74. So long as a claimant's constitutional due process rights are protected, he should have no complaint regarding the procedural means that avail him. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV (procedural and substantive due process guarantees).

75. *See supra* notes 44-57 and accompanying text (discussion of collateral estoppel).

76. *Id.*

77. *See generally* Wilkonson, *Alternative Theories to Worker's Compensation: Serving the Injured Worker Better*, 19 TRIAL 90, 96 (1983).

78. *See* Duncan v. Louisiana, 391 U.S. 145 (1969) (discussion of what "jury right" means).

79. *See* FED. R. APP. P. 4 ("Appeal as Right—When Taken"). *See generally* F. WIENER, EFFECTIVE APPELLATE ADVOCACY 28 (1950).

80. *See* 28 U.S.C. §§ 1331, 1332 (1937) (jurisdictional requirements).

because that forum offers the highest damage award.[81] Rule 23 illustrates this concept in mandating class actions in certain circumstances, regardless of whether the class members would rather litigate their claims individually.[82]

The common theme connecting the aforementioned examples is that so long as the plaintiff's basic right can be asserted fairly, the legal institution may dictate the procedural means for that right's assertion. In dictating procedural means, the legal institution balances the three interests present in all litigation: the plaintiff being justly compensated, the defendant paying only his just due, and judicial resources being conserved. These three interests were weighed when the current doctrines of collateral estoppel, workmen's compensation, jury size, statutes of limitation, appealability of claims, choice of forum, and choice of litigation mode were being considered for adoption.[83] Because the three interests were deemed properly balanced under the proposed rules, the rules were enacted.

In a mass tort context, the three interests must be weighed in light of the purpose of civil litigation—compensation.[84] Ideally, compensation is an award of a dollar amount which represents the plaintiff's physical or emotional injury in concrete terms.[85] Amounts, however, are not awarded with certainty that the amount awarded actually compensates the plaintiff for his injury. Thus, plaintiffs attempt to bring individual suits in forums which offer the "best" re-

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81. *See id.; see also* 28 U.S.C. § 1391 (1937) (venue generally).

82. *See* FED. R. CIV. P. 23(b)(1)(B) (mandatory class action with no right to opt out).

83. *See supra* note 61 (discussion of how the three interests were balanced in formulating Rule 23).

84. "The prime purpose of damages in tort actions is to compensate a person for injury caused by another's wrongful conduct and, to the extent possible, restore the injured party to the position that would have been occupied had the wrong not occurred." D. AXELROD, R. GOLDSTEIN, C. KIMBALL, M. MINZER, & J. NATES, DAMAGES IN TORT ACTIONS § 1.02 (1984) [hereinafter cited as DAMAGES]. *See* Tucker v. Calmar S.S. Corp., 656 F. Supp. 709 (D. Md. 1973) (fundamental goal of tort recovery is compensation of the victim); Adams v. Dem, 173 N.W.2d 100 (Iowa 1969) (principle underlying tort damages is compensation).

In Sampson v. Missouri Pac. R.R., 560 S.W.2d 573, 588 (Mo. 1978), the court stated, "[t]he ultimate test for [the appropriateness of an award of] damages is whether the award will fairly and reasonably compensate the plaintiff for his injuries. . . ." At common law, damages were awarded for different reasons than they are today. Remedies were issued "to secure the social interest in peace and order, not to vindicate an individual private right." Pound, *Interests of Personalty*, 28 HARV. L. REV. 343, 356 (1915).

The remedy was termed the *composition* and it was paid to the *kindred*. In the case of a killing, a *wer* was payable to the *kindred* to satisfy vengeance for an insult to the *kindred*. Out of the social interest in peace and order grew the idea of "an individual interest secured by an individual right." *Id. See also* W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 51 (1903). Holdsworth stated, "[t]he main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for." *Id.*

85. *See* DAMAGES, *supra* note 84, at § 1.02.

covery possible; an opportunity mistakenly believed to be a basic right.[86] Therefore, it is possible that an award will either overcompensate or undercompensate the plaintiff for his actual injury.

If the plaintiff were awarded a windfall (overcompensated), the defendant would have exceeded his duty to justly compensate the plaintiff; if the plaintiff were awarded a deprivation (undercompensated), the defendant would not have fully discharged his duty to justly compensate the plaintiff. In essence, were a deprivation awarded, a portion of the plaintiff's basic right to compensation would be unexercised and a portion of the defendant's corresponding duty to compensate would be undischarged.[87]

An award may be issued, simultaneously satisfying the plaintiff's basic right and discharging the defendant's duty to compensate, justice thus being done, in any judicial forum despite the fact that awards may differ between forums. This is a necessary tenet of a multidistrict judicial system.[88] Justice in such a legal system cannot demand an exact award of a precise judgment equal in amount to the plaintiff's injury. Rather, a judgment of an award within a particular range of possible "just amounts," which could be called an award of an abstract amount, constitutes just compensation for a plaintiff's injuries.[89]

This range of possible "just amounts" of judgments explains the

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86. *See supra* notes 64-84 and accompanying text. The belief that such an opportunity is a basic right is mistaken because a plaintiff's basic right is to receive just compensation, regardless of what forum or tribunal issues the award.

87. No similar offsetting right and duty pertain to a windfall because a plaintiff does not have a basic right to an award of a windfall.

88. Allocating cases to different forums based on reasons such as personal jurisdiction, subject matter jurisdiction and venue would not make sense if justice were only available in some, but not all forums. If some forums were bankrupt in terms of justice, a basis for constitutional due process claims would exist.

89. *See* E. KAMENKA & A. TAY, JUSTICE 1-5 (1980). Kamenka and Tay describe justice as a concept sliding between two poles: positive law and morality. The positive law pole equates justice with conformity to law. "This concept of justice rules out, as a contradiction in terms, the concept of an unjust legal system or procedure. . . ." *Id.* at 3. This concept tends to place special emphasis on procedure and treating parties equally according to the law. *Id.* This view of justice is sometimes referred to as comparative justice.

"Comparative principles all share the form of the Aristotelian paradigm that justice requires that relatively similar cases be treated similarly and relatively dissimilar cases be treated dissimilarly in direct proportion to the relevant difference between them." *Id.*

The other pole is much broader. At it lie the concepts of distributive justice and universal justice, with their conflicts over merit and the fundamental basis of entitlement. *Id.* According to John Stuart Mill, justice is a name for a certain class of moral rules which embodies the essentials of human well-being and, therefore, demands a greater absolute obligation than any other rule for the guidance of life. Mill, *Utilitarianism*, in THE PHILOSOPHY OF JOHN STUART MILL 321, 342-44 (M. Cohen Ed. 1961); *see also* H. SIDWICK, THE METHODS OF ETHICS 252 (7th ed. 1907); *cf.* D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965) (emphasizing shortcomings of the Utilitarianism principle); S. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1979).

difference in awards from one forum to another. Accordingly, there is no relevant difference between satisfying the plaintiff's interest (receiving the highest award possible) and satisfying the plaintiff's basic right (just compensation).[90] Thus, allowing a plaintiff to litigate individually and to forum shop are not defensible on the ground that justice so demands, because, although damage awards may differ as between forums, justice nevertheless is done in all forums.

A plaintiff is not given mode and forum choices because he has a basic right to them, but because the legal institution has declared in a grant of ordinary rights that he may so choose. This declaration neither bestows nor creates any basic rights. Rather, this declaration simply grants ordinary rights which the legal institution may extinguish.[91]

Granting the plaintiff these choices in any given setting is justifiable only if it results in a balance among the three interests present in all litigation.[92] Thus, concerns for the plaintiff's compensa-

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90. *See supra* notes 90-95 and accompanying text (discussion of basic rights and their corresponding duties). *See also* R. BAUER, ESSENTIALS OF THE LAW OF DAMAGES 147 (1919). Bauer stated that "[t]he amount of damages assessed in favor of the plaintiff. . .is usually intended to commensurate with the amount of damage actually and certainly suffered by the plaintiff as a result of [the] defendant's wrong. . . ." R. BAUER, ESSENTIALS OF THE LAW OF DAMAGES 147 (1919). The requirement that actual damage be suffered is consistent with the term abstract amount. It is not until the abstract amount is certainty shown, however, that any amount is awarded. The degree of difficulty in proving damages with certainty further explains why awards may differ between forums. This difficulty also explains why at times the abstract amount is not awarded and the plaintiff, despite a seemingly "valid" claim, goes remediless.

If a plaintiff had a right to a windfall, the defendant would in effect be subject to punitive damages. An indiscriminate policy of awarding punitive damages would contravene their purpose. "Exemplary or punitive damages are assessed in order to punish the defendant for malicious, wanton and reckless conduct and to deter future wrongdoing by setting an example for the benefit of the public. Punitive damages are not intended to compensate the injured party for loss. . . ." DAMAGES, *supra* note 84 at § 1.03.3.

A distinction has been made between the right to seek punitive damages and the right to collect punitive damages. *See* Comment, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1157 (1983). The stated distinction is that while a plaintiff "may not have a right to collect punitive damages, he may initially have a right to seek them." *Id. But cf. Skywalk Cases, supra* note 2, at 1176. ("a claimant's interest in exacting punishment against a deserving defendant is recognized by the law and must be protected").

91. *See supra* notes 69-82 and accompanying text. In the words of Justice Holmes, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-59 (1897). Justice Holmes's "judgment of the court" refers to justice. *See id.* Because institutions do bestow claims and privileges, it follows *ipso facto* that they may extinguish those same claims. Thus, the legal institution drafts and adopts statutes and laws, and later may abolish those very laws. *See, e.g., Proposed Amendments To the Rules of Civil Procedure For the United States Dist. Cts.*, 39 F.R.D. 73, 74-167 (1966) (adopting new procedural rules and abolishing old procedural rules).

92. *See supra* note 61 and accompanying text.

tion, the defendant's liability and judicial economy, play key roles in the determination whether mass torts demand a fresh policy declaration limiting a plaintiff's choice to litigate individually and to forum shop.[93] These interests properly can be viewed as a three-variable equation, the solution of which governs society's policy determinations concerning ordinary rights.[94]

The first variable—the plaintiff's just compensation—may be satisfied in every forum.[95] The second variable—the just amount due from the defendant—directly corresponds to the first variable and, therefore, may be satisfied in every forum as well.[96] Therefore, although the plaintiff's interest and the defendant's interest appear somewhat antagonistic, they really are not. Rather, their interests are compatible because their rights and duties are simply inverse of one another.[97] Consequently, in the three-variable equation that should determine the proper policies in all litigation situations, a perfect balance is struck between two of the three variables. Accordingly, in mass tort settings, the third variable is the sole criterion governing whether individual or class litigation is proper. The third variable is the final interest: conserving judicial resources.[98]

Aggregating many individual suits in a mass tort class action clearly would conserve tremendous judicial resources. As noted in *Dalkon Shield,* litigating mass tort claims individually would bankrupt most courts' calendars and clog judicial circuits into the next century. Undoubtedly, one large suit initially would burden a court.[99] But, in comparison to the aggregate time and expense ex-

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93. The Federal Rules of Civil Procedure are an example of how balancing the three interests manifests itself in institutional mandates. Different situations which strike different balances among the three interests explain how there can be several different rules pertaining to joinder of claims and joinder of parties. *See supra* note 4 (listing joinder provisions).

94. The appropriateness of a mass tort class action can be shown in a mathematical equation. The three concerns of all litigation, the plaintiff's compensation, the defendant's liability and judicial economy would be represented by the primary variables X, Y and Z. The nature of the litigation situation would be secondary variables a, b and c. Thus, a basic equation may be formulated, the solution of which should dictate how the legal institution is to govern. The sum $X + Y + Z$ renders different results in differing situations and, therefore, requires that different standards apply. The secondary variables pertain to the different situations for which the equation must be calculated to its conclusion. In a mass tort situation, different secondary variables are present which affect the sum of the primary variables. The difference in the sum in a mass tort situation as compared to an ordinary tort situation mandates that mass torts be litigated in class actions, not individual suits.

95. *See supra* notes 87-90 and accompanying text (discussion of the first variable).

96. *See id.*

97. *See supra* notes 64-67, 87-90 and accompanying text (discussion of rights and duties).

98. *See supra* note 61 (identifying the three interests at stake in every action).

99. *See Dalkon Shield, supra* note 2, at 851. For a discussion of *Dalkon Shield,* see *supra* note 57.

pended litigating many small suits, mass tort class actions indisputably would better promote judicial economy.[100] As a result, the resources of presently over-crowded circuits could be reallocated.[101] At a time when the Chief Justice of the highest court of the land has suggested a special addition to the Supreme Court to combat the strain on judicial resources, the benefits mass tort class actions offer judicial economy hardly can be reasonably debated.

The onslaught of mass torts, such as the Bhopal and Agent Orange catastrophes, has created unique litigation problems which demand a solution. Examining the effect on the three interests present in every lawsuit indicates that in a mass tort setting a different interplay is struck than is struck in either individual litigation or in ordinary class action litigation. This difference calls for a re-evaluating of Rule 23's proficiency.[102] Such a re-evaluation has been shunned heretofore, however, because of the widespread belief that a plaintiff has a basic right to litigate individually and to choose his forum.[103]

Becoming aware of the distinction between basic rights and ordinary rights is the most important step in considering whether mass tort lawsuits are so extraordinary in comparison to other lawsuits as to warrant establishing a mandatory mass tort class action. If an awareness of the distinction between basic rights and ordinary rights permeated the legal community, a plaintiff's right to litigate individually and to choose a forum would be recognized as distinctly lower in order than his basic right to compensation. Only when this distinction is recognized will it be possible to apply the three-variable equation and determine that the basic right to compensation could be adequately protected through a mass tort class action.

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100. *See* Comment, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1147 (1983) ("[a]ny effort to define and coordinate the interests of a large class of plaintiffs requires significant time and energy. Yet this additional cost is more than offset by the associated elimination of waste").

101. "[A]lthough the burden on judicial resources and unrelated litigants might be greatly increased in the court in which all claims are centralized, the aggregate cost to the judicial system would be reduced." *Id.*

102. In discussing the nature of how the law works, Justice Benjamin Cardozo stated:

> "[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars. . . .Every new case is an experiment and *if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.*"

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22-23 (1921) (emphasis added).

In a similar vein, Monroe Smith said, "[t]he principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined." M. SMITH, JURISPRUDENCE 21 (1909).

103. *See supra* notes 62-82 and accompanying text (discussion of the right to litigate individually).

CONCLUSION

Tremendous resources are wasted because mass torts are not litigated in class actions. Recognizing offensive collateral estoppel's inherent dispositive effects coupled with a liberal interpretation of Rule 23's requirements would mandate mass tort class certification and eliminate this waste. Furthermore, abandoning the current misconception that a plaintiff has a basic right to litigate individually and to choose his forum would permit consideration of amending Rule 23 to expressly sanction mass tort class actions. Either alternative would conserve the valuable judicial resources which presently are being wasted.

The manner by which mass tort class certification is achieved, whether through a liberal interpretation of Rule 23 or its amendment, is not of particular importance. Of paramount importance is that the mode of litigating mass torts properly balances the three interests which are at stake in every lawsuit and thereby fulfills the goals of the Federal Rules. When the interests of justly compensating plaintiffs, defendants paying only their just dues, and conserving judicial resources are weighed, it is evident that in a mass tort context, the plaintiff's and the defendant's interests offset each other regardless of whether claims are individually or jointly litigated. However, litigating mass tort claims in a class action clearly conserves valuable judicial resources in comparison to litigating mass tort claims individually. This relevantly different effect on judicial resources, coupled with the concurrent satisfaction of the plaintiff's basic right and discharge of the defendant's duty in either mode, indicate that the time has come to litigate mass torts in mandatory class actions—to litigate catastrophes without creating litigation catastrophes.

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