SETTLEMENT CLASS ACTIONS AND "MERE-EXPOSURE" FUTURE CLAIMANTS: PROBLEMS IN MASS TOXIC TORT LIABILITY

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I. INTRODUCTION

The modern phenomenon of mass product liability litigation tests the ability of Federal Rule of Civil Procedure 23 to resolve liability issues fairly with regard to future claimants who either fail to qualify as members of the class

action or opt out because of the prospect of insufficient damage awards. Mere-exposure claimants, or future claimants, may be defined as those individuals who have been exposed to a toxic substance but have yet to develop manifest detrimental physical symptoms.[1] Considered more broadly, future plaintiffs may be designated as belonging to one of three distinct categories: (i) claimants who have suffered some injury but have not yet filed suit; (ii) claimants who have been exposed to a toxin but have not suffered a manifest toxin-related injury; and (iii) claimants who have not yet been exposed.[2] This Note focuses on the second category of claimants who are often unaware of latent diseases developing within their bodies and unable to recover adequate damages for injuries and diseases manifested in the future.

The civil justice system does not resolve these mass claims effectively,[3] and often future claimants receive unfair treatment under class actions and the resulting settlements. Class actions brought under Federal Rule of Civil Procedure 23(b)(3) use the rule as a procedural device to bind future claimants to the compensation terms set forth in the settlement if they do not affirmatively opt out.[4] A fundamental problem for future claimants is their lack of knowledge about the existence, extent, and type of diseases they may possess latently because of variable exposure to a toxic substance that creates variable latency periods of disease.[5] Future claimants need more effective and adequate remedies for injuries resulting from toxic substance exposure. This Note discusses the major problems facing those future claimants who have been exposed, the ways in which courts have recently treated these obstacles, and proposed solutions that offer more beneficial provisions and options for future claimants.

In Part II, discussion focuses on the nature of mass torts and how class action certification and settlement certification affect future claimants. Federal Rule of Civil Procedure 23 and its explicit treatment of future claimants will also be explored. Discussion explores the purposes and inherent problems of settlement class actions regarding future claimants, which include whether certain subclasses are similarly situated and how the plaintiffs may receive fair treatment. Part III discusses conflicts within the class members, between class members and future claimants, and between plaintiffs and their attorneys. Con-

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1. "Toxic tort" claims involve toxic substances whose manufacture, processing, distribution, use, or disposal creates an unreasonable risk of injury to a person or the environment. *See* Toxic Substances Control Act, 15 U.S.C. § 2605(a) (1994).

2. Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 882 (1995).

3. DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 24-29 (1985).

4. FED. R. CIV. P. 23(b)(3). Subsections (c)(2) and (c)(3) allow members of the plaintiff class the opportunity to opt out from the class action. FED. R. CIV. P. 23(c)(2), (c)(3).

5. Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 451-52 (1996).

flicts between these subclasses include payment schedules and timing of the preliminary hearing. Part IV examines recent federal court decisions in the area of mass toxic torts and the implications of these decisions for pending lawsuits and settlements involving major United States tobacco companies. Part V proposes solutions to problems for exposure-only plaintiffs in settlement class actions, suggesting that in the event of class certification the parties agree to a structured settlement and that future claimants be allowed a disease-triggered running of the statute of limitations and opt-out provision. Part V further discusses the option of partial class certification and the need for congressional legislation developing a statutory approach that determines liability in mass tort cases.

II. OVERVIEW OF FUTURE CLAIMANTS' LEGAL PROBLEMS

Future claimants are an amorphous group with varying levels of exposure among its members, many of whom are unaware of their status with regard to class membership.[6] This ignorance stems primarily from the long latency periods of many toxic substances to develop disease in the human body, so that the victim's first awareness of exposure coincides with the onset of the disease.[7] The future class members generally have no manifest injury at the time the class action is filed, which creates a two-fold problem: the exposure-only members have no way of knowing whether they will ever need any of the benefits of the plan or whether their particular injuries will be covered, and they have no way of making an informed decision to opt out of the class action because the plan, barring coverage of all direct and indirect injuries, may or may not cover the types of injuries received in the future.[8] The onset of mesothelioma in asbestos-exposed victims, for example, may occur many years after even the most casual contact with the toxin.[9]

This insidious nature of toxin-related latent diseases creates several problematic legal issues for future claimants, including whether the victim will ever be able to participate in the judicial process at all. Class actions typically involve a res judicata effect to bar future recovery while paying damages to current class members.[10] In addition, even if a future claimant affirmatively opts out of a class action suit, this plaintiff then faces the daunting task of litigating independently without the resources necessary to successfully challenge the

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6. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626-27 (3d Cir. 1996).
7. *Id.* at 633; Wolfman & Morrison, *supra* note 5, at 452.
8. Wolfman & Morrison, *supra* note 5, at 452.
9. *Id.*
10. *In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995).

defendant company.[11] Such a defendant has the distinct advantage of economically utilizing a fully developed single defense litigated and presented by "repeat players."[12] The independent future plaintiff carries the burden of proving causation alone, without the benefit of other plaintiffs' attorneys. Class counsel will already have conducted extensive discovery, including the use of costly expert witnesses, to identify a liable defendant or defendants through "exposure matching,"[13] which links a particular plaintiff's injury to a particular defendant.[14] This benefit is available for all those injured who suffer the same type of injury provided for in the class action plan; it does not, however, aid future claimants whose injuries depart from the common negotiated diseases.[15]

Another problem exists regarding the adequacy of notice to the future claimant subclass.[16] At the outset, members who are asymptomatic lack notice of disease and will not have contemplated participation in any civil litigation regarding possible toxic poisoning. The individuals may have been exposed to the toxin in question, but because their exposure was either limited to one occasion or occasions on which they had no reason to believe they were exposed,[17] future claimants may miss the opportunity to join the class and be barred from recovery once an exposure-related disease becomes patent.[18]

A. *Mass Torts and Exposure-Only Future Claimants*

Mass torts differ from traditional common-law tort cases because they typically involve numerous plaintiffs, only some of whom are identified, and numerous potential defendants whose liability for damages may or may not be clearly or positively identified.[19] In the area of products liability, the uniform character of products mass-marketed in our modern industrial society tends to establish a commonality of injury resulting from large-scale distribution of a

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11. *In re* Copley Pharm., Inc., 161 F.R.D. 456, 466 (D. Wyo. 1995).

12. Heather M. Johnson, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 FORDHAM L. REV. 2329, 2368 (1996).

13. *See* GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 403-09 (1994) (discussing the problem of trying to identify indeterminate defendants).

14. *Id.*

15. *See* FED. R. CIV. P. 23(a)(3).

16. William D. Quarles, Georgine: *Will Federal Settlement Class Actions Survive?*, 10 No. 6 INSIDE LITIG. 6 (1996).

17. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 633 (3d Cir. 1996).

18. *Id.*

19. Andrew T. Berry & Gita F. Rothschild, *Mass Torts/Mass Litigation/Mass Settlements*, C947 A.L.I.-A.B.A. 215, 217-18 (1994).

defective product.[20] In such a scenario, both the plaintiff and the defendant are clearly identified.

When the mass tort involves exposure to a toxic substance, however, the plaintiff may not be identified until many years after the critical exposure or exposures because of the variable latency periods of different toxins.[21] The onset of mesothelioma, a disease predominantly associated with exposure to asbestos fibers,[22] takes an average of approximately twelve years to manifest.[23] Individual physiological reaction to toxins also varies because of personal history and health, thus adding another element of uncertainty with regard to correctly identifying both the proximate cause of the plaintiff's injury and the correct defendant.[24] The future claimant harbors an injury that, although it may have already occurred, will remain latent and unactionable until the onset of disease. This latency period is aptly described by Richard Nagareda as a "macabre lottery"[25] in which some people who are exposed will ultimately express the toxin-related disease, while others, perhaps even the majority, will not suffer any impairment.[26] According to Judge Wellford's concurring opinion in *Georgine v. Amchem Products, Inc.*,[27] until the onset of disease, an exposed individual does not possess the requisite injury-in-fact necessary to file a claim.[28] This injury-in-fact is the invasion of a legally protected interest which must be both concrete and particularized,[29] actual or imminent.[30] Additionally, there must be a causal connection between the injury and the conduct complained of,[31] and it must be likely that the injury will be "redressed by a favorable decision."[32] Unlike other

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20. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 905 (1996).

21. *See* David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 696 n.4, 716-17 (1989).

22. THE MERCK MANUAL 442-43 (14th ed. 1982); 4A R. GRAY & L. GORDY ATTORNEY'S TEXTBOOK OF MEDICINE § 205C, at 72 (1985).

23. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 275 (E.D. Pa. 1994) (approving use of a 12-year latency period as a criterion for compensation under the asbestos settlement agreement).

24. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996).

25. Nagareda, *supra* note 20, at 906.

26. *Id.*

27. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).

28. *Id.* at 636 (Wellford, J., concurring); *see also* Berry & Rothschild, *supra* note 19, at 220.

29. *See* Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 (1972).

30. *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (citing Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

31. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (holding the injury complained of must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of an unknown third party).

32. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

mass torts, toxic tort cases do not follow directly from an observable, discrete event effecting an immediate and discernable injury;[33] instead, exposure to toxins often defers both the injury and the plaintiff's ability to take legal action to recover damages for that injury until an unknown future date.

The legal hazards of this scenario include the exposure-only plaintiff's initial struggle simply to receive preliminary court recognition as a member of a class action group. Recently, in *In re Rhone-Poulenc Rorer, Inc.*,[34] the Seventh Circuit struck down the district court's certification of a potential exposure-only plaintiff class who had filed suit against manufacturers of AHF blood products after becoming infected with Human Immunodeficiency Virus (HIV).[35]

But even if exposure-only future claimants are included in class action settlements, they may receive unfair treatment. Recently, the court in *Asbestos Litigation v. Ahearn*[36] assembled the entire class action settlement with future claimants who had no possibility of opting out.[37] This settlement, as noted in Judge Smith's dissent, "forces asbestos victims to surrender their claims in exchange for a meager $10 million of Fibreboard's $225-250 million net worth."[38] Without knowing the full extent of their asbestos-related injuries, the exposure-only group in *Ahearn* was forced to join the settlement-only class.[39] This compromised situation, although unusually court-mandated, is typical of the realistic choices future claimants have; in this case, the future claimants had to compromise for lower damage awards and forego the right to pursue punitive damages.[40]

Many exposure-only future claimants find themselves disadvantaged in one or more additional ways: competing against the presently injured; going without notice of the class proceedings; or facing the heavy burden of proving causation independent from class counsel. A more detailed discussion of these limitations for future claimants requires a look at the provisions of Federal Rule of Civil Procedure 23, its implications for mass tort class actions, and its effect on recent exposure-only litigation and settlements.

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33. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 6-9 (enlarged ed. 1987); Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1487-88 (1992).

34. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

35. *Id.* at 1300-02.

36. Asbestos Litig. v. Ahearn, 90 F.3d 963 (5th Cir. 1996) *vacated & remanded sub nom.* Ortiz v. Fibreboard Corp., 117 S. Ct. 2503 (1997). The case was subsequently heard on remand by the Fifth Circuit. *In re* Asbestos Litig., 134 F.3d 668 (5th Cir. 1998) *cert. granted sub nom.* Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998).

37. *Id.* at 993.

38. *Id.* (Smith, J., dissenting).

39. *Id.* at 999-1000.

40. *Id.* at 1001.

B. *The* Georgine *Decision*

The court in *Georgine v. Amchem Products, Inc.* recently held that insurmountable problems existed in notifying and informing exposure-only class members in asbestos-related disease claims, in that a settlement class action would impermissibly bind persons with complete ignorance of its existence or terms.[41] The court in *Georgine* relied significantly on this inadequate notice in reaching its decision to vacate the district court order certifying the *Georgine* settlement class.[42]

If this decision establishes a trend in current settlement class actions concerning toxic substance exposure, many plaintiffs will find themselves pursuing claims independently en gross, bearing tremendous legal costs with little prospect of receiving adequate or timely damage awards.[43] In fact, many asbestos-exposed plaintiffs in the *Cimino v. Raymark Industries, Inc.*[44] case died before their cases were heard.[45] But the problems for future claimants remains the same: either they will never know if or whom they may sue, or they will be barred by res judicata from suing the responsible tortfeasor. In either scenario, future claimants lose.

C. *Federal Rule of Civil Procedure 23*

1. *Reluctance of Courts to Certify Class Actions in Mass Torts*

Courts have shown reluctance to certify class actions in the mass product liability context[46] for reasons that also control in the mass toxic tort context. Problems exist in determining applicable law, protecting litigants' interest in individual justice, ensuring adequate and fair class representation, and protecting against unjust or unethical settlements.[47] Indeed, the threshold questions for the court during the preliminary hearing for class action certification include an ini-

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41. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634 (3d Cir. 1996).

42. *Id.* at 633, 635.

43. See *infra* Part IV and accompanying text discussing *Reed v. Philip Morris, Inc.*, No. 96-5070, 1997 WL 538921 (D.C. Super. Aug. 18, 1997).

44. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990).

45. Steven L. Schultz, In re *Joint Eastern & Southern District Asbestos Litigation: Bankrupt and Backlogged–A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 562 (1992).

46. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630-31 (3d Cir. 1996) (ordering decertification of the class because absent class members were inadequately represented); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-02 (7th Cir. 1995) (ordering decertification of the class in the mass product liability context).

47. Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995).

tial evaluation of the proposed settlement's fairness, selection of class counsel, and notice plan pursuant to Federal Rule of Civil Procedure Rule 23(c) and (e).[48] The required steps preceding a class action settlement include preliminary court approval, notice of the proposed settlement to members of the class, and a hearing, after which the court determines whether the settlement is fair, reasonable, and adequate.[49] The court's initial determination of fairness should ensure that all class members whose claims are barred by the proposed settlement will not receive a zero recovery, and determine whether any allocation problems exist between plaintiff groups.[50]

It is at this early stage of class action certification that future claimants may best be protected, yet it is often when they receive the harshest treatment. Rule 23(c)(1) requires the court to determine "as soon as practicable after" commencement of the action whether the class action shall be maintained.[51] This urgency can be detrimental to exposure-only claimants because generally parties come to court with a "done deal" and file the class action complaint with the class action settlement.[52] If, as in *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*,[53] the parties come to the hearing already in agreement on the composition of the class and the specific settlement terms, the defendants will not challenge class certification; and the judge never receives the benefit of the adversarial process that provides pertinent information helpful in evaluating the adequacy of the settlement.[54] The judge, in effect, delays class certification by provisionally certifying the class for settlement only during the interim.[55] Future claimants' interests are thus largely decided, and overlooked, by the active current parties who have effectively either abridged or bypassed judicial review and possibly the future claimants' due process.

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48. Wolfman & Morrison, *supra* note 5, at 480.

49. Weinberger v. Kendrick, 698 F.2d 61, 70-73 (2d Cir. 1982); *accord, e.g.*, Malchman v. Davis, 761 F.2d 893, 900 (2d Cir. 1985); Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984); *In re* Beef Indus. Antitrust Litig., 607 F.2d 167, 179 (5th Cir. 1979); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975); 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.41, at 11-87 to 11-89 (3d ed. 1992).

50. Wolfman & Morrison, *supra* note 5, at 483.

51. FED. R. Civ. P. 23(c)(1).

52. Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 823 (1995).

53. *In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).

54. *See id.* at 789.

55. *Id.* at 786.

2. *Rule 23(a) Requirements*

The "done deal" referred to above clashes, at a fundamental level, with the requirements of Rule 23(a). The Rule details four initial requirements:

> (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 impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[56]

Satisfying Rule 23(a)(2) proved impossible for the court in *Georgine*, which held that the proposed class did not meet the requirements of typicality and adequacy of representation.[57] The court pointed to the inherent conflict between presently injured plaintiffs and exposure-only plaintiffs: "Primarily, the interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits."[58] In addition, the class members' proposed allocation of funds situated certain inter-class plaintiffs over others, asserting that those with mere asymptomatic pleural thickening receive no monetary award at all.[59] The court further noted, "[t]he settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars."[60]

3. *Rule 23(b) & (c) Requirements*

Under Rule 23(b)(3)'s superiority requirement, the *Georgine* court noted that the proposed class also failed as a superior alternate means of adjudication.[61] The court followed *Wetzel v. Liberty Mutual Insurance Co.*[62] by holding that to obtain class certification, plaintiffs must satisfy all the Rule 23(a) requirements and at least one of the Rule 23(b) requirements,[63] but it decided that the interests

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56. FED. R. CIV. P. 23(a).
57. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996).
58. *Id.* at 618.
59. *Id.* at 630.
60. *Id.*
61. *Id.* at 632.
62. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975).
63. *Id.* at 248; Georgine v. Amchem Prods., Inc., 83 F.3d at 624.

protected in Rule 23(a) were identical to those of Rule 23(b).[64] In particular, the court noted that Rule 23(a)(2) requires questions of law or fact common to the class, and that Rule 23(b)(3) requires questions of law or fact common to the class predominate over any questions affecting only individual members.[65]

The court in *Castano v. American Tobacco Co.*[66] held that the multi-state class action suit filed on behalf of all smokers and nicotine-dependent people be decertified because variations in state law destroyed the predominance and superiority requirements under Rule 23(b)(3).[67] The district court did not review how various state laws would affect the class members, and the Fifth Circuit found it impossible to rule that common issues could predominate in the case.[68] The court cited the *Georgine* decision and noted that the insurmountable problems that proved dispositive were also present in this class.[69] The *Castano* court drew a parallel between asbestos-injury class actions and smoking-injury class actions by noting that "the class members were exposed to nicotine through different products, for different amounts of time, and over different time periods . . . . Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses."[70]

Furthermore, variations in state law increase differences between members of the class, again weakening the argument that the class action is always superior to individual adjudication.[71] The court outlined numerous problematic legal issues that the district court failed to consider properly, including state law differences concerning products liability, fraud, negligent infliction of emotional distress, duty to disclose facts, and affirmative defenses.[72] The *Castano* court cited Judge Posner's analysis of superiority in *In re Rhone-Poulenc Rorer, Inc.* in supporting its decision not to certify the class.[73] The court held that when successful individual cases yield substantial recovery for the subclasses, the cost of pursuing independent litigation is cost-effective and the plaintiffs would be disadvantaged by pursuing a class action suit.[74] According to the court, choice of law complexities make individual adjudication superior to a class action because the plaintiffs can "winnow their claims to the strongest causes of action."[75] In *Castano*, variations in state law regarding causes of action, dam-

64. Georgine v. Amchem Prods., Inc., 83 F.3d at 625.
65. *Id.* at 626.
66. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
67. *Id.* at 746.
68. *Id.* at 743.
69. *Id.* at 742 n.15.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 748.
74. *Id.*
75. *Id.* at 749-50.

ages, and defenses destroyed Rule 23(b)(3) superiority requirements and forced the plaintiffs to fend for themselves in state courts with the applicable state law, however limited.

The court in *Reed v. Philip Morris Inc.*[76] denied the plaintiff's motion for class certification for many of the same reasons, as noted by the *Castano* and *Georgine* courts.[77] The court in *Reed* held that the class did not meet the stringent requirements of Rule 23(b)(3) and agreed with the defendants that the proposed class failed the predominance test.[78] The defendant cited *Amchem Products, Inc. v. Windsor*,[79] which affirmed *Georgine*, and argued that uncommon questions of fact meant that the plaintiff failed the predominance test.[80] The *Reed* court was persuaded by the analysis in *Smith v. Brown & Williamson Tobacco Corp.*,[81] which led the court to find that the plaintiff had not proffered evidence to ensure that class certification would protect the rights of litigants.[82]

The court in *Arch v. American Tobacco Co.*[83] was willing, however, to find that the plaintiff class would satisfy Rule 23(a) requirements by alleging that the defendant engaged in a "course of conduct whereby defendants have concealed their knowledge of nicotine's addictive properties and have purposefully and deliberately emphasized efforts to addict children and adolescents—resulting in an epidemic pediatric disease."[84] The court further found that, although the plaintiffs' claims may be factually different, they are based on the same legal theories and satisfy Rule 23(a)(3)'s typicality requirement.[85] Although some courts are beginning to give credence to fraud arguments against the United States tobacco companies, class actions have not been a successful vehicle for plaintiffs.

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76. Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Aug. 18, 1997).

77. *See id.* at *15; Castano v. American Tobacco Co., 84 F.3d at 747; Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626-30 (3d Cir. 1996).

78. Reed v. Philip Morris Inc., 1997 WL 538921, at *9-10.

79. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

80. *Id.* at 2250. The Court stated: "Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard." *Id.*

81. Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997).

82. Reed v. Philip Morris Inc., 1997 WL 538921, at *12.

83. Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997).

84. *Id.* at 479.

85. *Id.*

a. *Adequate Representation.* The *Georgine* court's discussion then turned to an analysis of the wide variety of plaintiffs' claims.[86] First, the court found significant and insurmountable differences between the presently injured class members:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma—a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.[87]

Next, the court decided that the future plaintiffs had little in common not only with each other, but with the presently injured plaintiffs.[88] The court emphasized that the future claimants cannot know ahead of time whether they will develop an asbestos-related disease or what specific type it will be.[89] This uncertainty leads to a "disparate application[] of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff."[90]

This focus, on conflicting state laws destroying class certification under Rule 23(b)(3), may be traced in part to the Advisory Committee Notes (Notes) accompanying the 1966 amendment to Rule 23.[91] The court in *Georgine* cited the Notes in its decision not to certify the class pursuant to Rule 23(b)(3),[92] because questions of law or fact common to the class members did not predominate over questions affecting only individual members in mass tort contexts:

> 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 of liability, would be present, affecting the individuals in different ways. In these circumstances

86. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir. 1996).
87. *Id.* at 626.
88. *Id.*
89. *Id.*
90. *Id.* at 627.
91. Schultz, *supra* note 45, at 556 n.13.
92. *Id.*

> an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[93]

The *Georgine* court noted that "the lack of predominant common issues has been a particular problem in asbestos-related class actions."[94] The court cited *In re Fibreboard Corp.*,[95] in which the Fifth Circuit decided that 2990 asbestos personal injury class members could not be certified because of disparities among the various plaintiffs that destroyed the predominance of common issues required by Rule 23(b)(3).[96] The court in *Georgine* further noted that mass accidents involving a single event, such as an airplane crash, can be susceptible to Rule 23(b)(3) class action treatment, but that "individualized issues can become overwhelming in actions involving long-term mass torts."[97]

b. *Adequacy of Notice and Rule 23(c).* As stated by the court in *Georgine*, plaintiffs may become bound to the class action settlement even if they are unaware of the proceedings.[98] The particularly insidious nature of asbestos-related diseases contributed greatly to the court's decision not to bind exposure-only future claimants to the proposed settlement:

> To amplify, the fairness concerns created by the difficulties in providing adequate notice are especially serious because exposure-only plaintiffs may eventually contract a fatal disease, mesothelioma, from only incidental exposure to asbestos. Although only a small fraction of exposure-only plaintiffs will develop mesothelioma, the disease is presently always fatal, generally within two years of diagnosis. . . . The disease has been known to occur in persons who lived with an asbestos-exposed parent, or in household members who washed the clothes of people who worked with asbestos. . . . As a result, persons contracting the disease today may have little or no knowledge or memory of being exposed. *It is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action.*[99]

For future plaintiffs, reasonable notice of a class action is practically impossible to ensure; these people need to be able to opt out of class actions at the onset of disease if it becomes clear that the individual plaintiff would fare better pursuing independent litigation. But the *Georgine* court allowed only a

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93. FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 amendment).
94. Georgine v. Amchem Prods., Inc., 83 F.3d at 628.
95. *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).
96. *Id.* at 712.
97. Georgine v. Amchem Prods., Inc., 83 F.3d at 628.
98. *Id.* at 633.
99. *Id.* (emphasis added).

very limited number of back-ended opt-outs because of the vast numbers of future claimants.[100] Without manifest physical disease, exposure-only future claimants have no reason to take notice of class action announcements or have any way of knowing that they may be losing causes of action against a defendant[101] because other representatives in the class have bargained away their rights and recovery.

c. *Opt-Out Provision.* Under Rule 23(c)(2), a plaintiff is entitled to receive "the best notice practicable under the circumstances."[102] Adequate notice will help ensure that the plaintiff receives ample opportunity to exercise opt-out rights[103] guaranteed under Rule 23(b)(3). A problem for future claimants is that once the class action suit or settlement begins, these plaintiffs may not be able to part from the agreement's terms or free themselves from a binding judgment after suffering a toxin-related injury. This injury functions as notice to the future plaintiff and should trigger opt-out rights because awareness of class membership and understanding of the seriousness of disease may coincide and simultaneously inform the plaintiff to pursue independent counsel. All too often, however, future claimants are not allowed to exit the class at a later date.[104] As discussed later in Part V, increased use of delayed opt-out provisions according to the gravity of the toxin-related disease will help to more fairly compensate future claimants.[105]

III. INHERENT CONFLICTS IN SETTLEMENT CLASS ACTIONS

A. *Intra-Class Conflicts*

Common to toxic-tort actions, whether for litigation or settlement, is the conflict between "near" future claimants and "far" future claimants competing for the same limited recovery awards within different payment schedules.[106] The near future claimants are defined as those plaintiffs who presently suffer from a toxin-related ailment, while the far future claimants are defined as the future claimants who have merely been exposed.[107] As the court in *Georgine* noted,

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100. *Id.*
101. *Id.*
102. FED. R. CIV. P. 23(c)(2).
103. Nagareda, *supra* note 20, at 929.
104. Georgine v. Amchem Prods., Inc., 83 F.3d at 630.
105. *See infra* Part V.
106. Asbestos Litig. v. Ahearn, 90 F.3d 963, 980-81 (5th Cir. 1996) *vacated & remanded sub nom.* Ortiz v. Fibreboard Corp., 117 S. Ct. 2503 (1997). The case was subsequently heard on remand by the Fifth Circuit. *In re* Asbestos Litig., 134 F.3d 668 (5th Cir. 1998) *cert. granted sub nom.* Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998).
107. *Id.* at 981.

"[t]he interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits."[108] During the court's adequacy-of-notice analysis under Rule 23(a)(4), the court stated that "[t]he most salient conflict in this class action is between the presently injured and future plaintiffs."[109] This intra-class conflict includes disputes concerning inflation protection and causation provisions that afford exposure-only plaintiffs any and all advances made in scientific studies that may lend themselves to the future claimants' causation theories.[110] The conflict, however, destroyed adequacy of representation,[111] and would have decided the case and prevented the settlement class action to proceed.

The court in *Asbestos Litigation v. Ahearn* struggled with this inherent conflict as it determined that the district court did not err in holding that the class was adequately represented and the settlement treated all class members equally.[112] In a strong dissent, however, Judge Smith wrote that the settlement class action extinguished claims of future and present claimants over whom the court lacked jurisdiction, prohibited future claimants from opting out, but not those who had already been fortunate enough to file suit, and essentially precluded any class action recovery for both near and far future claimants who had not been hand-picked by the plaintiffs' counsel.[113] The limited recovery fund was divided up only between a highly limited, pre-approved, and pre-negotiated class approved by the district court as a common representative of all claims.[114] The *Ahearn* court recognized the problem but did nothing to alleviate it; its ruling further widened the chasm between those plaintiffs with injury-in-fact and those who are exposure-only future claimants, and it sent the message that courts would rather undercut a nebulous plaintiff class for the sake of quick settlement and litigation finality.

Two diametrically opposed results thus emerge: in *Ahearn*, the intra-class conflicts went substantively ignored, yet those exposure-only plaintiffs who were not chosen by counsel became unwittingly bound to an agreement made in their absence.[115] Judge Smith sardonically wrote in his dissent, "I am loath to make that decision for an entire class of people who are not even aware that we are 'adjudicating' their rights."[116]

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108. Georgine v. Amchem Prods., Inc., 83 F.3d at 618.
109. *Id.* at 630.
110. *Id.* at 630-31.
111. *Id.* at 631.
112. Asbestos Litig. v. Ahearn, 90 F.3d at 982.
113. *Id.* at 994 (Smith, J., dissenting).
114. *Id.* at 994-95.
115. *Id.* at 994.
116. *Id.* at 997.

The *Georgine* court, as noted earlier, decided that this particular conflict was insurmountable to finding adequate class representation,[117] and left exposure-only plaintiffs on their own to pursue independent civil litigation. Cutting these future claimants free from class representation, however, also serves them an injustice by postponing their notice of a possible latent, life-threatening disease created by a wrongful exposure to a toxin. These people may in fact never become aware of a legitimate cause of action against a tortfeasor because the exposure-only plaintiff's disease becomes manifest at a time too far removed to successfully identify the liable party. As discussed in Part V, the unique and problematic nature of exposure-only claimants demands that the future plaintiffs remain in the settlement class action, but that they are given extended rights to opt out and special provisions while remaining in the class.[118]

B. *Conflicts of Interest Between Plaintiffs and Attorney*

Future plaintiffs may find themselves in opposition to their own attorneys who seek a quick and uncomplicated settlement with the defendant for an amount agreeable to counsel but woefully short of providing future plaintiffs with adequate compensation or even diligent legal representation. Courts have cited the temptation of unethical behavior among attorneys as a reason not to certify a class for settlement.[119] While it is not illegal, some defendants actually seek to be sued by a plaintiff's counsel with a reputation for selling out its plaintiff class[120] and eagerly reaching a modest settlement that guarantees quick payment of attractive attorney's fees.[121] But this arrangement shortchanges the class and compromises the fiduciary duty owed to the client.[122] The opposing attorneys strike a "sweetheart" deal that benefits counsel but egregiously bars plaintiffs from pursuing what might be more substantial recovery by trial or other settlement arrangements.[123] The defendant buys closure—an end to all litigation and future claims regarding the malfeasance—at a modicum of its reasonably anticipated litigation costs.[124] The effect is what John Coffee refers to as a "reverse auction,"[125] in which the defendant takes "bids" from prospective plaintiffs' attorneys until it finds the least financially damaging offer and then

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117. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630 (3d Cir. 1996).

118. *See infra* Part V.

119. 2 NEWBERG & CONTE, *supra* note 49, at 17-18.

120. Asbestos Litig. v. Ahearn, 90 F.3d at 980.

121. Johnson, *supra* note 12, at 2354.

122. *See* MANUAL FOR COMPLEX LITIGATION § 23.24, at 182-83 (3d ed. 1995).

123. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 900-05 (1984).

124. Johnson, *supra* note 12, at 2362-63.

125. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995).

wraps up its legal problems in a single and inexpensive buy-out.[126] This attorney-shopping guarantees a no-lose scenario for the defendant,[127] who either settles for a modest amount before any action is filed, or challenges the class certification after negotiations fail, thus leaving the defendant in the same position it was before engaging in any such negotiations.[128] The plaintiffs' counsel benefits as well by receiving speedy and significant fee payments,[129] especially in light of the relatively little time invested in the case, while counsel projects its conflict of interest between quick settlement and drawn out litigation as merely ensuring quick justice for its class members.

C. *Conflicts Between Plaintiffs and Defendant*

Defendants do not want to create open-ended liability to accommodate future claimants with claims that would not survive outside of the class action mechanism;[130] pro-future-claimant settlements are often doomed from the start. The defendants recognize complications for the future claimant class, such as proving causation, which make their claims weaker than those of the presently injured.[131] The uncertainty of future plaintiffs' claims lends itself to abuse by the defendant who knows the plaintiff counsel would rather agree to include all exposure-only plaintiffs in a settlement without consideration of delayed payments than try to pioneer a causation theory.[132]

As demonstrated by the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[133] plaintiffs who purport a new theory of causation with respect to a toxin-related injury must satisfy a two-prong test that determines first whether an expert witness's testimony reflects scientific knowledge, and then whether that testimony is relevant to the case.[134] On remand, the court held that the plaintiffs were unable to meet the causation requirements, notably because of the lack of epidemiological (human statistical) studies performed proving the link between the ingestion of the drug Bendectin and fetal birth defects.[135]

Another significant consideration the court gave to the plaintiffs' evidence was that the experts' research was found to have been conducted primarily for purposes of that particular litigation.[136] Although it was not dispositive, this fact

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126. *Id.*
127. *Id.* at 1378-79.
128. *Id.*
129. Johnson, *supra* note 12, at 2354.
130. Wolfman & Morrison, *supra* note 5, at 459.
131. *Id.* at 459-60.
132. *Id.* at 460.
133. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
134. *Id.* at 589-93.
135. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1314 (9th Cir. 1995).
136. *Id.* at 1317.

was considered highly suspicious by the court, which ultimately decided that the plaintiffs failed to show objectively the admissibility of the evidence.[137] The plaintiffs' inability to survive the burden of proving causation independent from litigation destroyed the plaintiffs' recovery.

The effects of facing costly or presently unfeasible causation research include the plaintiffs having their cases rejected as scientifically unfounded,[138] while the defendants "strong-arm" exposure-only plaintiffs into sacrificing the possibility of higher future recovery if and when a new causation theory later emerges.[139] Lack of epidemiological proof benefited the defendants in the Bendectin cases,[140] because of the plaintiffs' lack of epidemiological proof to support their claims. The newer the causation theory, the more advantage to the defendant,[141] creating the incentive to settle quickly before scientific inquiry catches up to the litigation.

A balance was attempted between protecting the interests of both plaintiffs and defendants in the proposed global settlement between women with silicone gel breast implants and the Dow Corning Corporation, which ultimately failed because Dow became insolvent and sought protection under Chapter 11 of the Bankruptcy Code.[142] This settlement proposal included numerous provisions that seemed to benefit future claimants, including a future payment grid developed to accommodate people suffering from five different diseases.[143] Because of the uncertainty with respect to silicone-related disease causation, a second opt-out was allowed after the onset of disease.[144] These plaintiffs were allowed to opt out at any time during the next thirty years if there were insufficient awards to pay them according to the payment grid.[145] They were not allowed to seek punitive damages, however, and cancer that developed under two different conditions was expressly precluded from the grid: cancer resulting from exposure to the silicone itself, and cancer that progressed because the implant masked mammography.[146]

Cancer was left off the grid because of the inadequacy of evidence linking silicone to breast cancer and the possibility that too many plaintiffs would stay in the settlement class action in order to be unjustly compensated for cancer that

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137. *Id.* at 1319; *see* FED. R. EVID. 702.

138. *See In re* Agent Orange, 818 F.2d 187, 190 (2d Cir. 1987).

139. Nagareda, *supra* note 20, at 925.

140. *See* Joseph Sanders, *From Science to Evidence: The Testimony of Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 11-12 (1993).

141. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660 (1989).

142. Wolfman & Morrison, *supra* note 5, at 459.

143. *Id.*

144. *Id.* at 460.

145. *Id.*

146. *Id.* at 460, 465.

may not have been causally linked to the implants.[147] Insufficient causation theories between cancer and silicone gel implants thus limited the future plaintiffs' ability to recover, and the defendant was effectively guaranteed a zero recovery for those women who developed breast cancer from any source. Future claimants who developed breast cancer would be barred from opting out, barred from independent litigation regarding the cancer, and barred within the grid from recovering compensation for arguably the most serious of silicone-related diseases.[148]

IV. SETTLEMENT CLASS ACTIONS, LITIGATION, AND THE UNITED STATES TOBACCO INDUSTRY

A. *Plaintiff Recovery: A Recent Phenomenon*

On August 9, 1996, a Florida jury reached a historic verdict: for the first time in over three decades of tobacco litigation, a court ordered a United States tobacco company, the Brown & Williamson Tobacco Corporation, to pay the plaintiffs compensatory damages for the defendant's manufacture of cigarettes[149]—a product that the jury decided was unreasonably dangerous and defective.[150] The district court's decision marked the only recovery a plaintiff has received relating to the safety of cigarettes themselves with regard to nicotine-addiction and health problems since litigation against United States tobacco companies began in the 1950s.[151] Just weeks after the decision, President Clinton announced that nicotine was an addictive drug and that cigarettes are a drug-delivery device, and he also approved new Food and Drug Administration (FDA) regulations ostensibly for the regulation of cigarettes as a drug.[152] This

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147. *Id.* at 465.

148. *Id.* at 466.

149. This decision was subsequently reversed by the Florida Court of Appeals based upon the finding that the statute of limitations had run, barring Carter's action. Brown & Williamson Tobacco Co. v. Carter, No. 96-4831, 1998 WL 323484, at *1 (Fla. Dist. Ct. App. June 22, 1998).

150. *See* Suein L. Hwang et al., *Smoke Signal: Jury's Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1. Many experts estimate that 400,000 Americans die each year from smoking, and the Surgeon General estimates that 24,000 people die annually because of inhalation of environmental tobacco smoke (ETS). J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 JAMA 2207, 2207-09 (1993).

151. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Litigation*, 44 STAN. L. REV. 853, 866 (1992).

152. Milo Geyelin, *Jury Sides with Tobacco Firms in Cigarette Suit Filed in Indiana*, WALL ST. J., Aug. 26, 1996, at B8. The pending proposed tobacco industry settlement involves four major United States tobacco companies, R.J. Reynolds Tobacco Co., Philip Morris Cos., Brown & Williamson Tobacco Co., and Lorillard Inc., paying $368.5 billion to 40 states and Puerto Rico to recover costs of Medicaid payouts to treat citizens with smoking-related ailments.

announcement, coupled with the Florida decision, lights the way for tobacco-related disease litigation and settlements based on a design defect theory to hold cigarette manufacturers liable. Such a theory of recovery has never enjoyed success in tobacco litigation, which has failed repeatedly with theories of manufacture of an unreasonably dangerous product, negligent failure to warn, breach of express warranty, and breach of implied warranty.[153] As Robert Rabin noted, the *Restatement of Torts* section 402A, comment i, stripped tobacco litigation of any foundation for recovery for decades.[154] Yet the recent announcements against cigarettes as unreasonably dangerous, and pending scientific inquiry into the link between nicotine and smoker addiction, signal a renaissance in tobacco litigation and settlement that may prove to produce the highest damage awards in the history of products liability law.

B. *The* Brown & Williamson *Decision: A "Maturing Tort"*

Attorney Norwood S. Wilner, who represented Grady Carter, pioneered a new era of tobacco litigation by successfully litigating a tobacco-related suit on legal theories claiming that cigarettes are unreasonably dangerous and defective in their design.[155] The plaintiff's case focused on internal tobacco industry documents that indicated an attorney at Brown & Williamson knew nicotine was addictive as early as 1963,[156] despite Wilner's refusal to pursue theories of fraud or industry conspiracy to hide facts pertaining to nicotine's addictiveness.[157] These documents were instrumental in convincing the jury to deliver a unanimous verdict against the company.[158] This strategy was tactically effective despite a history of plaintiffs' failure to prevail using conspiracy theories

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Milo Geyelin, *Mississippi Becomes First State to Settle Suit Against Big Tobacco Companies*, WALL ST. J., July 7, 1997, at B8 [hereinafter Geyelin, *Mississippi Becomes First State to Settle*]. This settlement would shield cigarette manufacturers from punitive damage awards and bar future class action suits. *See* Jeffrey Taylor, *Clinton Presses Tougher Deal on Tobacco*, WALL ST. J., Sept. 18, 1997, at A3. This national settlement would supersede recent state settlements, such as Mississippi's, who settled for $3.6 billion over 25 years and $136 million per year thereafter. Geyelin, *Mississippi Becomes First State to Settle*, *supra*, at B8. At least one commentator, Robert Habush, argues that plaintiffs would lose significant due process rights if the tobacco companies escape punitive damages in the national settlement, especially in light of over 800 internal tobacco industry documents indicating fraud. Milo Geyelin, *The Settlement: Punitive-Damages Ban May End Up in Court*, WALL ST. J., June 23, 1997, at B10.

153. *See* Rabin, *supra* note 151.

154. *Id.* at 863-64 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).

155. Hwang, *supra* note 150, at A4. This decision was subsequently reversed by the Florida Court of Appeals based upon the finding that the statute of limitations had run, barring Carter's action. Brown & Williamson Tobacco Co. v. Carter, No. 96-4831, 1998 WL 323484, at *1 (Fla. Dist. Ct. App. June 22, 1998).

156. *See* Hwang, *supra* note 150, at A1.

157. *Id.* at A4.

158. *Id.* at A1.

involving top tobacco executives hiding internal documents attesting to nicotine's addictiveness.[159] As the court stated in *Castano*, the defendants' alleged fraud in failing to notify smokers of nicotine's addictiveness was a "novel and wholly untested theory"[160] of recovery—characterizing the case as involving "an immature tort."[161] Mr. Wilner, however, limited the plaintiff's theories to product defect and negligence, abandoning theories previously used in tobacco litigation that allege fraud, misrepresentation, or conspiracy,[162] and limited his damages to compensatory only; he sought no punitive damages.[163] Notably, the plaintiff admitted to contributory negligence, stating that he continued to smoke cigarettes despite being aware of its dangers.[164] Jurors later commented that they were impressed that the plaintiff was willing to admit to some responsibility, and that he was seeking only a modest $1.5 million for all damages.[165]

The question now centers on which direction the *Brown & Williamson* decision will lead tobacco litigation—will internal tobacco company documents pave a new way for the reemergence of fraud, misrepresentation, and conspiracy theories, or will such documents bolster the credibility of product defect theories, allowing plaintiffs to prevail by labeling cigarettes unreasonably dangerous? The internal documents that indicate tobacco executives' knowledge of nicotine as an addictive drug, or show willful cigarette "spiking" (manipulation of nicotine levels) changes the rules of the game, and necessitates a rewriting of *Restatement of Torts* section 402A, comment i.

As currently drafted, comment i states, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . ."[166] This comment suggests that there may exist "bad tobacco"—tobacco that does not measure up to standard—but that begs the question of which standard is being used. The drafters of comment i necessarily had less clinical information about

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159. *See* Kurzweil v. Philip Morris Co., Fed. Sec. L. Rep. (CCH) ¶ 98,865, at 93, 192-95 (S.D.N.Y. Sept. 11, 1995) (holding that representations of nicotine's nonaddictiveness are mere statements of opinion and may not be relied upon, despite conflicting information contained within internal company documents).

160. Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

161. *Id.* at 747.

162. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 509-12 (1992).

163. *See* Hwang, *supra* note 150. The *Castano* plaintiffs, on the other hand, sought "compensatory damages for fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, breach of express and implied warranty, strict products liability, and redhibition," and sought "punitive damages for fraud and deceit, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress." Castano v. American Tobacco Co., 84 F.3d at 737 nn.4-5.

164. Hwang, *supra* note 150, at A4.

165. *Id.*

166. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

tobacco products and their effects on the human body than scientists have now; the issues of nicotine drug addiction and nicotine manipulation beyond consumer expectations demand a reexamination of exactly what tobacco products are or are not unreasonably dangerous. Because many states interpret the term "unreasonably dangerous" to generate a consumer expectations test,[167] any cigarette that contains a manipulated amount of nicotine should necessarily fail such a test. How can "good tobacco" include cigarettes containing an unknown amount of nicotine or an amount of nicotine that greatly exceeds national standards and community expectations? How can "good tobacco" contain a drug that the President now concludes is addictive and requires FDA regulation?

Additionally, the highly influential holding in *Barker v. Lull Engineering Co.*[168] established that a two-prong test controls in product defect cases.[169] The first prong involves a consumer expectations test, while the second prong shifts the burden of proof to the defendant to show that the utility of the product outweighs the risks.[170] With the proposed tobacco settlements and pending litigation, billions of dollars are earmarked to help states treat victims of smoking-related diseases[171]—such high costs may help defeat a defendant's risk-utility analysis.

C. *The* Castano *Decertification: No Addiction Class Action*

On May 23, 1996, the Fifth Circuit decertified a massive tobacco class action because the previously certified *Castano* class suffered from the same difficulties of the *Georgine* class.[172] The plaintiffs were exposed to the toxic substances through different products, over different periods of time, and in different doses, and variations in state law effectively defeated predominance required by Rule 23(b)(3);[173] both factual and legal differences among plaintiffs led to the class action's demise.[174] The plaintiffs brought the class action on behalf of "all nicotine-dependent persons in the United States . . . who have purchased and smoked cigarettes manufactured by the defendants."[175] The court defined those that are nicotine dependent in a footnote at the beginning of its

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167. *See, e.g.*, Heaton v. Ford Motor Co., 435 P.2d 806, 808 (Or. 1967).
168. Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978).
169. *Id.* at 455-56.
170. *Id.*
171. Milo Geyelin & Suein L. Hwang, *Appeals Court Throws Out Tobacco Class-Action Suit*, WALL ST. J., May 24, 1996, at A3; *see also* Milo Geyelin, *Tobacco Faces Year of Courtroom Drama*, WALL ST. J., Feb. 10, 1997, at B1.
172. Castano v. American Tobacco Co., 84 F.3d 734, 742-45 (5th Cir. 1996).
173. *Id.* at 746-47.
174. *Id.* at 740, 744, 750.
175. *Id.* at 737.

opinion,[176] but never discussed this issue because the class action failed at the outset to pass Rule 23 muster. Differences in state law pertaining to causes of action, tort liability, and affirmative defenses destroyed the plaintiffs' claims essentially before they had a chance to be heard.[177]

The *Castano* court sent a message that plaintiffs must look to their own individual state courts to find relief, not to federal class actions. In the words of Wall Street observer Gary M. Black, "Forget addiction class action—it's gone."[178] Columbia University law professor John Coffee further noted that tobacco class action suits will now be pursued at the state level only—"Now it's going to go from one global war to 50 local wars."[179] Absent a universalized body of law governing tobacco litigation, the battle involving nicotine-addicted plaintiffs seems to have followed the court in *Georgine*. Even if such a body of law were developed and utilized in tobacco litigation, the factual hurdles involving length and intensity of exposure, as discussed earlier, may nevertheless preclude class certification and force plaintiffs to individual adjudication. If the *Georgine* decision remains dispositive in toxic tort cases involving a plaintiff group with diverse exposure, as the *Reed* decision indicates, courts will continue to refuse certification and direct plaintiffs to individual claims at the state level.

D. *The Liggett Group Settlement: Breaking the Tobacco Industry's United Front*

The United States tobacco company Liggett & Meyers, Inc. (Liggett Group) recently removed itself from the *Castano* litigation and settled for less than $2 million a year over twenty-five years,[180] dwarfing its average annual legal costs of nearly $10 million to defend itself in tobacco-related suits.[181] This settlement was beneficial to the Liggett Group not only in reducing their legal fees, but also by avoiding FDA regulations with its own suggested limitations on advertising to youth, thus enhancing its public image.[182] Perhaps most importantly, however, the settlement prevents the Liggett Group from having to admit

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176. *Id.* The court defined "nicotine-dependent" as:

> (a) All cigarette smokers who have been diagnosed by a medical practitioner as nicotine–dependent; and/or (b) All regular cigarette smokers who were or have been advised by a medical practitioner that smoking has had or will have adverse health consequences who thereafter do not or have not quit smoking.

Id. n.1.

177. *Id.* at 743-44.

178. Geyelin & Hwang, *supra* note 171, at A3.

179. *Id.* at A4.

180. Suein L. Hwang, *Tobacco Settlement: Will Liggett Deal Split Big and Small Rivals?*, WALL ST. J., Mar. 14, 1996, at B1.

181. *Id.*

182. *Id.*

any wrongdoing while stipulating that if the other tobacco companies in the *Castano* suit win, the Liggett Group will pay nothing at all.[183] This stipulation to remain unaccountable for any wrongdoing, parallels the overriding concern of every United States tobacco company—to escape FDA regulation of nicotine as a drug.

In either scenario, the tobacco companies are judicially allowed to continue a wrong so long as they pay a fee to compensate those affected by the malfeasance, much like the defendant in *Boomer v. Atlantic Cement Co.*,[184] as noted in Judge Jasen's dissent.[185] The plaintiffs are paid off and thereafter rendered powerless to pursue further claims. The Liggett Group settlement highlights the inherent hypocrisy in paying millions of dollars to help states treat the victims of smoking-related diseases, yet avoiding responsibility for its actions. Despite President Clinton's announcement that nicotine is an addictive drug, the FDA has yet to declare it so, and United States tobacco companies have been able to escape FDA jurisdiction, which remains the paramount element in any proposed settlement. The Liggett Group settlement involved token acquiescence to FDA involvement and regulation—a transparent attempt to prevent wholesale FDA regulation by adopting benign limitations on its sales that serve to improve the company's public image.

V. PROPOSED SOLUTIONS

A. *Delayed Opt-Out Triggered by Onset of Disease*

One of the most logical solutions to reaching fair resolutions to toxic tort claims by future claimants is to delay the plaintiffs' ability to opt out of a binding class action suit or settlement until disease becomes manifest. The court in *Georgine* expressly referred to the delayed opt-out provision[186] utilized in *Bowling v. Pfizer, Inc.*,[187] in which the plaintiffs who suffer heart valve fractures in the future may choose to reject guaranteed compensation and sue for damages independently when the product defect becomes manifest.[188] In the toxic tort context, this delayed opt-out would mean that future claimants would reserve the right to pursue independent litigation upon the discovery of any disease or injury related to the toxin in issue.[189] The opt-out rights would need to be expanded to

183. *Id.*

184. Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 873-74 (N.Y. 1970) (holding that the defendant cement company could legally continue to operate a nuisance if defendant compensated plaintiffs for permanent damages).

185. *Id.* at 876 (Jasen, J., dissenting).

186. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996).

187. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 150 (S.D. Ohio 1992).

188. *Id.*

189. Georgine v. Amchem Prods., Inc., 83 F.3d at 631.

allow the plaintiffs to benefit from advances in science by allowing them to sue for diseases yet unknown to be linked causally to the toxin;[190] such diseases would obviously not be covered in the terms of the present settlement. This scenario would compromise the defendant's benefit of buying peace through the settlement, but in fairness, the plaintiff should not be required to bear the cost of injuries received from the defendant's use of a deleterious substance that helped generate profit for the company. Delayed opt-outs alleviate the perennial problem of future claimants achieving adequate notice of a class action or settlement because physical disability or injury becomes the means by which the plaintiff is notified of toxic exposure. But the exposure-only group may not receive any recovery at all, if a damages time table is not introduced from the beginning of class certification. This payment grid would help ensure that even those plaintiffs who suffer injuries twenty years after exposure to the toxin will receive some compensation, although much lower than those with whom the toxin-related diseases becomes manifest at an earlier time. Proof of causation would necessarily become more burdensome for a plaintiff twenty years after exposure, and a thorough factual examination of the plaintiff's exposure would be necessary before a causal link could be determined. A pool of funds, however, would need to be set aside from the funds immediately available to the presently injured. Although this procedure increases the conflict between presently injured and exposure-only plaintiffs, it avoids zero recovery for the latter subgroup.

This set-aside plan would need to be reserved for application only in such cases involving an insidious toxin such as asbestos. The risk is that the funds set aside for the exposure-only group may never be used, and the payouts to the presently injured remain lower. But any funds remaining after the generation of possible future claimants die could be left to their estates. Potential exposure-only claimants would not be quick to join the class because each such plaintiff will have to prove the causal link between their disease or injury and those scientifically linked to the toxin in issue. Any disbursement of damage funds would follow a scientific inquiry into the type of injury and require proof of exposure to the toxin. If a plaintiff failed to show adequately such a causal link because of shortcomings in scientific discovery or knowledge, he or she could remain in the delay opt-out group until such time as a link were proved.

A key feature in delayed opt-out provisions for future toxic tort claimants is the inclusion of paid medical monitoring,[191] which gives the exposure-only plaintiffs the best possible notice of positive or negative class membership under the circumstances. This monitoring should be provided for those plaintiffs who can positively establish exposure to the toxin, even if they later decide to opt out

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190. *Id.* at 630-31.

191. *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

of the class action. The exposure-only plaintiffs may choose, however, to file a second claim after disease becomes manifest. As the court in *Georgine* noted, the inclusion of "comeback" rights provides exposure-only claimants with a significant benefit.[192] The exposure-only plaintiffs suffering from nonmalignant conditions were allowed under the proposed settlement to file for further compensation should they develop a malignant asbestos-related cancer.[193]

B. *Partial Certification Option*

In cases which lack commonality of issues, courts may partially certify those subclasses of plaintiffs sharing common factual issues in an attempt to save class certification. The use of a preliminary hearing can help the court decide which subclasses are properly included in the class and which are not. This hearing would first need to determine whether the class action involved an insidious toxin and then separate the presently injured from the exposure-only plaintiffs. With a universal body of law applicable to cases involving exposure to the toxin in question, the Rule 23 requirement of commonality of legal issues would be effectively avoided as part of the class action certification calculus.

C. *Universal Laws Applicable to Toxic Substance Exposure*

As the *Georgine* court suggested, congressional legislation that developed a statutory approach to determine liability in mass tort cases could greatly simplify such litigation.[194] This proposed statute would provide those injured by toxins with a uniform legal framework within which to bring their claims, thus bypassing a major hurdle for toxic-tort subclasses that face varying state laws governing a tortfeasor's liability. The statute would effectively remove the victims from the realm of traditional tort law, creating a unique body of law governing exposure to insidious toxic substances. This approach would need to be highly limited to those cases involving only the toxins that have the propensity to generate a recognizable group of future plaintiffs. As noted earlier, the preliminary court hearing would decide if the proposed class action or settlement involved such a substance as defined in the statute described above.

VI. CONCLUSION

The problems exposure-only future claimants face warrant the development of a unique body of law governing insidious toxins. A single choice of law

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192. Georgine v. Amchem Prods., Inc., 83 F.3d at 620-21.

193. *Id.*

194. *Id.* at 634 (citing JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995)).

for tobacco-related class actions and settlements, for example, could prevent costly, time-consuming independent litigation for injuries that subclasses of plaintiffs suffer in common. Rule 23 hurdles of superiority of adjudication and choice of law determinations could be effectively kept out of a court's decision of whether or not to certify a given class.

Before any positive outlook can be achieved for plaintiffs suffering from tobacco-related diseases, the FDA must regulate nicotine as a drug so that United States tobacco companies account for their delivery of the drug through tobacco products. Punitive damages must also be preserved in any industry settlement, or tobacco companies will be allowed to "pay off" all their liability by using only a few years' profits. The tobacco litigation may likely involve the most significant case of consumer fraud in the history of the United States, and the tobacco industry's actions must not be dismissed or condoned by allowing it to continue its wrong against citizens' health.

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