

CONGRESSIONAL INVOLVEMENT IN CLASS ACTION REFORM: A SURVEY OF LEGISLATIVE PROPOSALS PAST AND PRESENT

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INTRODUCTION

In 1997, the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*¹ significantly restricted how mass tort class action lawsuits can be resolved. The case involved the certification by the Eastern District of Pennsylvania of a class action under Rule 23 of the Federal Rules of Civil Procedure for the purpose of achieving a global settlement of asbestos claims between a set of litigating parties that never intended to bring the case to trial.² The Court in *Amchem* held that a class formed exclusively for settlement did not meet the Rule 23 certification requirements and upheld the Third Circuit's decision decertifying the class.³ While the holding in *Amchem* has significant implications for the use of the class action rule as a vehicle for settling mass tort claims,⁴ the opinion is even more significant because of the limitations it places on procedural innovation that federal courts may

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1. 117 S. Ct. 2231 (1997).

2. *See id.* at 2237.

3. *See id.* at 2252. The Court disagreed with the Third Circuit, however, over the role settlement can play in evaluating whether a class action may be certified. The Third Circuit stated that the likelihood of settlement could not play any role in the consideration of whether a class can be certified under Rule 23. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The Supreme Court decided that settlement could be a factor considered in certification, as long as settlement was not the *only* factor. *See Amchem*, 117 S. Ct. at 2248.

4. *See, e.g., Sofia Adrogué, Mass Tort Class Actions in the New Millennium*, 17 REV. LITIG. 427, 439 & n.58 (1998) (noting impact *Amchem* has had on subsequent settlement classes); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle*

employ in the administration of mass tort claims. The Court recognized that lower federal courts were utilizing procedural mechanisms not specifically authorized by statute or judicial rule, like the settlement-only class action lawsuit, “[i]n the face of legislative inaction” and Congress’s failure to create “a national toxic tort compensation regime;”⁵ however, the Court in *Amchem* rejected this inaction as a reason to approve these innovative procedures absent express congressional authorization.⁶ As a result, the opinion in *Amchem* made clear that reform of the mass tort administration system and the class action rules that are predominately used to resolve aggregate claims requires congressional intervention.

Criticism of federal class action litigation⁷ has come from several quarters, including the judiciary, the Department of Justice, the ABA, and other private and public interest groups, all of which have advocated substantial reform of the mechanisms governing class action lawsuits.⁸ The most frequent criticism is that the current system was not designed to deal with mass tort litigation claims that are often filed as class action lawsuits; as a result, calls for class action reform are almost always calls for mass tort litigation reform.⁹ Many commentators have urged Congress to create an administrative system to handle these mass claims adequately.¹⁰ Criticism has only intensified with Congress’s failure to create such a system and with the perception that Congress is making the current mass tort system less efficient by categorically limiting certain class action relief in several substantive areas of the law.

In the past, most of the discussion surrounding reform of mass tort litigation procedure has focused on various proposals to amend Rule 23 via the judicial rulemaking process.¹¹ Proponents of reform

Continues, 31 LOY. L.A. L. REV. 373, 378 (1998) (noting courts’ increased attention to due process concerns in settlement class actions after *Amchem*).

5. *Amchem*, 117 S. Ct. at 2238.

6. *See id.* at 2252 (noting Congress’s failure to adopt compensation regime but stating that such failure is not sufficient reason to ignore criteria of Rule 23).

7. Most such litigation is governed by Federal Rule of Civil Procedure 23 but, as will be illustrated in this note, is increasingly guided by statutory authority.

8. For a discussion of the reforms these groups have proposed, see *infra* Part I.

9. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995) (“As a result [of the heavy burden placed on federal courts], ‘a consensus has now emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process.’” (quoting Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 89-90)).

10. For an account of these commentators’ suggested reforms, see *infra* Part I.

11. The most significant attempt to reform class action procedure has come from the Judicial Conference of the United States Advisory Committee on Civil Rules, the

have largely discounted the possibility of congressional involvement, based on an assumption that Congress would not intervene in reform of the class action rule to make mass tort claim resolution more efficient.¹² Two recent changes in circumstance, however, make it essential to examine Congress's potential role in the reform debate. First, the *Amchem* opinion reads as a directive to Congress to reform the mass tort system by legislation. Second, in the last decade, Congress has already begun taking a decidedly more active role in legislating certain types of class action litigation.

In reforming the class action litigation regime, however, Congress has restricted the availability of class certification in several substantive areas of the law without adequately addressing the concerns raised by the *Amchem* opinion regarding class action reform for mass tort litigation. Instead of categorically restricting the use of Rule 23 by passing legislation that effectively denies relief to individual plaintiffs, Congress should heed the Court's directive in *Amchem* and create an administrative system to resolve mass claims efficiently. Failing that, Congress should, at the very least, create new procedural mechanisms that substantively enhance the judiciary's ability to resolve mass tort claims efficiently. At the same time, the mechanisms chosen must not substantially impair litigants' rights to bring claims.

body responsible for drafting the Federal Rules of Civil Procedure, holding hearings on the rules, and transmitting them to the Supreme Court. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 328-33 (1991) (detailing federal rulemaking procedure). In 1990, the Advisory Committee began an in-depth study of class action procedures, which ultimately resulted in several proposed amendments that were sent for public comment in 1996. See ADVISORY COMMITTEE ON CIVIL RULES, BACKGROUND INFORMATION ON PROPOSED AMENDMENTS TO RULE 23 vii (1997). So far, only one proposal of the Advisory Committee, a relatively uncontroversial interlocutory appeals provision, has been approved by the Supreme Court and adopted. See *infra* notes 105-110 and accompanying text.

12. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The court stated:

The most direct and encompassing solution [to reforming mass tort litigation] would be legislative action. The Congress, after appropriate study and hearings, might authorize the kind of class action that would facilitate the global settlement sought here. Although we have not adjudicated the due process issues raised, we trust that Congress would deal with futures [sic] claims in a way that would maximize opt-out rights and minimize due process concerns that could undermine its work. On the other hand, congressional inhospitability to class actions . . . and . . . [Congress's] recently expressed concern about the workload of the federal courts, might not bode well for such a prospect.

Id.

This note will survey past congressional involvement in the class action debate and recent proposals for class action reform in order to provide insight into what future legislation Congress may, and should, enact. Part I of the note focuses on reforms the judiciary and other commentators have suggested. Part II looks at how Congress has previously amended the class action rule. Part III examines the recent proposals that Congress has rejected, especially the bills introduced in the 1997-98 legislative session, and discusses reforms Congress should consider. Part IV analyzes Congress's record based on the proposals it has previously considered and evaluates legislative reforms Congress is likely to undertake, given its prior action and outside influences on legislative decision making. The note concludes with an observation regarding the proper role of Congress in enacting class action and mass tort litigation reform.

I

CALLS FOR CONGRESSIONAL ACTION

In the past, observers have frequently overlooked Congress's capacity to reform class action procedure and mass tort administration.¹³ In recent years, however, several individuals and groups have asked Congress to enact legislation and have outlined, in some form or another, legislative proposals to either amend Rule 23 or supersede it via another administrative scheme. The *Amchem* opinion is perhaps the most significant of the calls for legislative reform, not necessarily because of what the Court has asked Congress to do, but because of how directly the Court has made clear that the impetus for radical procedural reform must come from Congress and not the judiciary.

A. *Judicial Criticism of the Current Class Action Regime*

The crux of the criticism by several members of the federal judiciary, including a majority of Supreme Court Justices, the Judicial Conference of the United States Ad Hoc Committee on Asbestos Litigation, and individual judges such as Judge Jack Weinstein, is that Congress refuses to enact legislation to create an efficient mass tort regime while, at the same time, the judiciary is not empowered to create such a regime itself. The federal judiciary is empowered by the Rules Enabling Act ("REA") to promulgate rules of procedure.¹⁴ The

13. Rather, the Judicial Conference of the United States has played the leading role. See *supra* note 11.

14. See 28 U.S.C § 2072 (1994).

REA does not allow these rules, however, to “abridge, enlarge or modify any substantive right.”¹⁵

Amchem is one in a line of cases in which the Supreme Court has refused to construe broadly the parameters of Rule 23 for fear of altering substantive rights.¹⁶ The *Amchem* opinion reflects frustration at the lack of congressional direction in so-called “damages class action” lawsuits.¹⁷ Justice Ginsburg wrote:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR [Center for Claims Resolution], class counsel, and the District Court heaped upon it.¹⁸

Based on that reasoning, the Court in *Amchem* held that, even though settlement may be a relevant factor in determining class certification, a class cannot be certified solely on the basis of settlement.¹⁹ The *Amchem* holding seems to indicate the Court’s reluctance to approve more radical attempts to enhance the efficiency of mass tort

15. *Id.* § 2072(b).

16. *See, e.g.,* Zahn v. International Paper, 414 U.S. 291 (1973) (holding that each plaintiff in Rule 23(b)(3) class action must satisfy jurisdictional amount and that any plaintiff that does not must be dismissed from case); Snyder v. Harris, 394 U.S. 332 (1969) (holding that 1966 Amendments to Rule 23 did not permit claimants to aggregate their claims in class action in order to reach necessary amount in controversy for diversity jurisdiction); *see also* Thomas D. Rowe, *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 205 (1996) (“Part of my socialization process as a junior member of the Advisory Committee on Civil Rules has involved learning that the Committee tries to steer well clear of the Rules Enabling Act’s ban on abridging, enlarging or modifying substantive rights.”).

17. Most so-called “damages class actions” are governed by Rule 23(b)(3) of the Federal Rules of Civil Procedure. The use of 23(b)(3) is interesting since the Advisory Committee notes to the rule expressly recommend against its use for large-scale tort litigation. *See* FED. R. CIV. P. 23 Advisory Committee’s note (“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, would be present, affecting the individuals in different ways.”); *see also* Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 30 (1991) [hereinafter Resnik, *Cases to Litigation*] (“The 1966 Advisory Committee note to Rule 23 stated that work by such committees—rather than changes in the federal rules—should be the vehicles for dealing with the burdens that mass accidents placed on federal court caseloads.”).

18. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997) (footnote omitted).

19. *See id.* at 2247-48.

claims resolution devised by judges without congressional authorization.

The Justices of the Supreme Court are not the only members of the judiciary calling for congressional involvement in reforming class action litigation. In 1990, the Ad Hoc Committee on Asbestos Litigation, a committee of federal judges appointed by Chief Justice Rehnquist, made a recommendation that Congress create a national dispute-resolution scheme to dispose of asbestos claims.²⁰ The Ad Hoc Committee proposed, *inter alia*, that Congress create a national legislative scheme to compensate present and future asbestos victims or, alternatively, that Congress consider legislation that expressly authorizes consolidation of cases over and above that authorized by the Multidistrict Litigation statute.²¹ In 1998, seven years after the Committee's proposals first appeared, some of the Committee's recommendations were finally introduced in Congress as part of House Bill 3905.²² However, the bill never made it out of committee.²³ This bill is significant despite its failure, as it may signal that Congress is ready to start examining potential regulatory schemes to supplant Rule 23(b)(3) class actions, at least in one very narrow category of claims.²⁴

Individual judges have also weighed in on the reform debate. In a recent book, Judge Jack Weinstein called on Congress to enact a national tort or administrative scheme in lieu of class action litigation.²⁵ Absent such measures, Judge Weinstein called for the establishment of a national disaster court, as well as for increased transfer powers and conflict of laws statutes that allow for greater uniformity of applicable law in consolidated proceedings.²⁶ Were Congress to

20. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (March 1991).

21. See *id.*; see also Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 431-32 (1991) (outlining effects of Ad Hoc Committee's findings).

22. See Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong. (1998). For a more detailed explanation of H.R. 3905's provisions, see *infra* Part III.B.

23. See *Thomas: Legislative Information on the Internet* (visited April 6, 1999) <<http://thomas.loc.gov/cgi-bin/bdquery/D?d105:1:./temp/~bdBohA:@@X-/-bss/d105query.html>>.

24. Rule 23(b)(3) class actions are often called "damages" class actions and most mass tort cases filed as class actions are filed pursuant to Rule 23(b)(3). For a description of the criteria necessary to file a suit as a Rule 23(b)(3) class action, see *infra*, notes 66-69 and accompanying text.

25. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 170 (1995).

26. See *id.* For an extensive discussion of the implementation of specialty courts, see Philip Richter, Note, *Considerations Relating to the Enactment of Venue Schemes as Applied to Specialty Courts*, 93 COLUM. L. REV. 1738 (1993).

fail to act altogether, Judge Weinstein remarked that “the courts can continue to utilize their equitable powers to improve court administration of mass torts.”²⁷

Indeed, the judicial rulemaking process may be able craft an adequate solution to the problems with the current class action rule without any congressional action. However, altering these procedural mechanisms is not as easy as Judge Weinstein suggests; as Justice Ginsburg pointed out in *Amchem*, the Rules Enabling Act does not permit the judiciary to promulgate rules that would modify “substantive” rights.²⁸ And while it appears that courts will stretch the interpretation of procedural rules in order to find that they do not alter substantive rights,²⁹ *Amchem* holds that courts cannot interpret Rule 23 so broadly as to permit the certification of a settlement class that would not otherwise meet the Rule’s requirements.³⁰ The Supreme Court’s decision in *Amchem* makes it clear that the federal courts and the federal rulemaking procedure alone can no longer be relied upon as the only vehicle to reform the class action regime. Congress must get involved by passing measures that enhance the administration of mass tort claims; any effective reforms, even Rule 23 reforms, necessarily will implicate the substantive rights of the litigants, in violation of the REA.

B. Calls for Action from Other Government Institutions

1. Department of Justice

Federal judges are not the only commentators who have sought a comprehensive legislative solution to supplant the use of class action procedure in mass tort litigation. In the late-1970s, the Department of Justice made the first significant proposal since the 1968 Federal Rules Amendments³¹ to reform class action litigation procedure.³² This proposal, which called for the repeal of Rule 23(b)(3) and the

27. See WEINSTEIN, *supra* note 25, at 170.

28. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997); see also 28 U.S.C. § 2072(a) (1994). The REA provides that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure . . . in the United States District Courts.” *Id.* § 2072(a). However, “[s]uch rules shall not abridge, enlarge or modify any substantive right.” *Id.* § 2072(b).

29. The Supreme Court has never found a federal rule to be unconstitutional or a violation of the Rules Enabling Act. See Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 735 (1995).

30. See *Amchem*, 117 S. Ct. at 2248.

31. The Rules Amendments and the rationale behind them are detailed in the Advisory Committee Notes to Rule 23.

32. The particular provisions of the resulting bill are discussed *infra* Part II.A.

creation of a set of procedural rules for “consumer” class actions, was introduced as a bill in Congress and represented the most significant proposal for legislative class action reform up to that point.³³ While the Department of Justice’s recommendations received the most consideration for reform of the class action system as a whole until the mid-1980s, Congress never passed legislation embodying any of the Department’s proposals.

2. *National Bankruptcy Review Commission*

Given Congress’s failure to address reform of class action procedure directly, it is important to note that Congress’s ability to craft a comprehensive mass tort resolution mechanism is not confined to amending the Federal Rules of Procedure. Congress’s inherent power to regulate the bankruptcy system, for instance, also creates an avenue for meaningful mass tort litigation reform.³⁴ In the area of mass tort litigation, the Bankruptcy Code and bankruptcy courts have assumed increased significance, especially in the realm of future claims. An increasing number of mass tort claims are being resolved in bankruptcy court,³⁵ and the Bankruptcy Code provides opportunities to resolve mass tort litigation that Rule 23, in its present form, cannot.³⁶ Congress could potentially enact mass tort litigation reform by amending the Bankruptcy Code as an alternative to amending Rule 23.

In 1994, Congress appointed the National Bankruptcy Review Commission (“NBRC”) to review the bankruptcy system as a whole.

33. The bill was first introduced as S. 3475, 95th Cong. (1978) (introduced by Senators Kennedy and DeConcini) and subsequently reintroduced in the next session as H.R. 5103, 96th Cong. (1979) (introduced by Rep. Smith of Iowa). See generally Patricia L. Wells, Note, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 HARV. J. ON LEGIS. 543, 546 n.20 (1979).

34. See U.S. CONST. art. I, § 8, cl. 4.

35. See Coffee, *supra* note 9, at 1386 (noting that eleven of twenty-five major asbestos manufacturing companies had filed for bankruptcy reorganization by 1991); Sheldon S. Toll, *Bankruptcy and Mass Torts: The Commission’s Proposal*, 5 AM. BANKR. INST. L. REV. 363 (1997) (stating that Supreme Court’s decision in *Anchem* “implies that, unless Congress approves amendments to the class action rules, bankruptcy may be a preferable alternative to class actions for the resolution of mass tort claims”).

36. See Coffee, *supra* note 9, at 1386-87. Professor Coffee explains what the typical asbestos plaintiff hopes to achieve in bankruptcy:

Facing a future of seemingly endless, repetitive, and expensive individual cases, these defendants understandably wanted a quick fix that would resolve all . . . liabilities in one proceeding. The hope was that a transfer of assets could be made to a mass tort bankruptcy trust, which could then use low-cost arbitration procedures to resolve eligibility and damage issues among the claimants.

Id.

The nine-member Commission issued more than 170 individual recommendations to Congress for reforming the Bankruptcy Code, including a recommendation to treat mass tort claims in bankruptcy proceedings.³⁷ In the introduction to its report, the Commission summarized the issues surrounding mass tort litigation and bankruptcy this way: "Mass tort cases have produced high-cost litigation that threatens adequate compensation for thousands of people with valid claims and, simultaneously, threatens the survival of businesses and jobs."³⁸ With this premise as its foundation, the Commission devoted an entire section to mass future claims.³⁹

The report proposed five specific changes to the Bankruptcy Code for cases involving mass tort claims. First, the Commission proposed that "mass future claim" be added as a subset of the definition of "claim" under 11 U.S.C. § 101(5).⁴⁰ This change would put mass future claims (claims arising out of mass torts, but not yet realized) in the same definitional categories as claims currently owed by the debtor under the Bankruptcy Code.⁴¹ Second, the Commission proposed that the Bankruptcy Code provide a mechanism whereby a judge could appoint a mass future claims representative in certain circumstances.⁴² This representative would have the exclusive power to file claims and to vote on behalf of the class in all committee proceedings requiring a vote.⁴³ Third, the Commission recommended that courts be empowered to estimate mass future claims for purposes of plan confirmation,⁴⁴ and that such an estimation be considered a core

37. See NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS iv (1997) [hereinafter NBRC REPORT]; see also Coffee, *supra* note 9, at 1387 ("From a public policy perspective, the principal lesson from the Manville [asbestos company] reorganization is that, unless restricted, present claimants will deplete virtually any settlement fund in short order, leaving future claimants empty-handed.").

38. See NBRC REPORT, *supra* note 37, at iv.

39. See *id.* at 9-11.

40. See *id.* at 9.

41. See 11 U.S.C. § 101(5) (1994).

42. See NBRC REPORT, *supra* note 37, at 10.

43. See *id.*

44. In all Chapter 11 (business restructuring) proceedings, a plan to pay creditors, usually proposed by the debtor business, must be approved by a majority of each class of creditors (secured, junior lienholders, unsecured debtors, etc.) and acceptance must be confirmed by the bankruptcy court. See 11 U.S.C §§ 1121, 1123, 1126, 1129 (1994). The NBRC proposal would include the amount of mass future claims as part of the determination of indebtedness that must be paid under them. See NBRC REPORT, *supra* note 37, at 10.

proceeding under 28 U.S.C. § 157(b)(2)(B).⁴⁵ The fourth proposal would grant bankruptcy courts the authority to issue channeling injunctions.⁴⁶ The final proposal would allow trustees to dispose of property free and clear of mass future claims after settling all future claims.⁴⁷ Upon approval of such a sale, the court could enjoin future claims holders from suing a good faith purchaser of the property.⁴⁸

Congressional adoption of the NBRC's recommendations would affect in itself how a substantial number of mass torts claims are resolved. Corporations facing considerable potential future liability from mass tort claims are increasingly seeking relief from those claims under the Bankruptcy Code.⁴⁹

C. *The Academic Debate*

While there is extensive scholarly debate as to how Rule 23 should be amended to improve class action litigation generally, and mass tort litigation specifically, very little literature exists regarding Congress's role in such reform. However, Congress's increased willingness to reform procedural rules legislatively has prompted a few commentators to propose statutory solutions.⁵⁰ As Congress's role in reforming the class action regime becomes more apparent, academic commentary on the subject is sure to increase.

45. See NBRC REPORT, *supra* note 37, at 10. The current U.S. code allows bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11." 28 U.S.C. § 157(b)(1) (1994).

46. See NBRC Report, *supra* note 37, at 11. A channeling injunction is an injunction that "steers claimants toward a trust or pool of assets to compensate claimants as it simultaneously steers those claimants away from the reorganized entity." *Id.* at 345. Such an injunction, though not statutorily mandated, has been used by some bankruptcy courts already; it allows for the compensation of future tort claimants as their claims are established, while at the same time allowing a business that has been in bankruptcy to reorganize without the threat of future liability. See *id.*

47. See *id.* at 11.

48. See *id.*

49. Johns Manville, an asbestos manufacturer, and A.H. Robbins, manufacturer of the Dalkon shield, are two examples of companies facing these potentially massive liabilities. See Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 930 (1995) [hereinafter Resnik, *Aggregation*].

50. In the past three years, the Institute for Judicial Administration at New York University School of Law and the Institute of Law and Economic Policy at the University of Arizona School of Law have each hosted a major symposium dedicated to evaluating the problems of class action litigation and the possible reform of Rule 23. The papers presented at these symposia illustrate the major elements of the debate and are published in 71 N.Y.U. L. REV. at 1-589 (1996) and 39 ARIZ. L. REV. at 363-792 (1997), respectively. See also Samuel Estreicher, *Federal Class Actions After 30 Years*, 71 N.Y.U. L. REV. 1 (1996) (introducing symposium papers); Joel Seligman & Lindsey Hunter, *Introduction*, 39 ARIZ. L. REV. 407 (1997) (same).

Professor Thomas Rowe assembled a laundry list of possible statutory improvements to federal class actions.⁵¹ His proposals included: an amendment to the supplemental jurisdiction statute that would explicitly overrule *Zahn v. International Paper*;⁵² the possible extension of multidistrict consolidation over more than just the pre-trial phase of coordinated or consolidated litigation;⁵³ the development of national contacts jurisdiction to address the debate arising from the Supreme Court's holding in *Phillips Petroleum v. Shutts*;⁵⁴ statutory "reinforcement" of the authority federal courts have to stay actions in state court that are disruptive to federal class action litigation;⁵⁵ and the establishment of administrative authority for the creation of settlement funds, combined with a "kinder, gentler" bankruptcy administration process, that would still provide income streams to compensate future claimants.⁵⁶ Professor Rowe did not evaluate his proposals in depth, but called them "thought experiment[s]" meant to survey possible legislative avenues.⁵⁷

Professor Larry Kramer has also examined the various legislative proposals to create a uniform choice-of-law regime for complex litigation.⁵⁸ Professor Kramer acknowledged that a consensus exists "that ordinary choice-of-law practices should yield in suits consolidating

51. See Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186 (1996).

52. *Id.* at 193-96; see *supra* note 16 for the holding of *Zahn*.

53. See Rowe, *supra* note 51, at 199-200. Professor Rowe notes, however, that "multi-district-litigation transfer seems to work well enough when needed for federal class actions, and any changes to authorize transfer for trial in addition to pretrial should not require tweaking to adapt to the class context." *Id.* at 200.

54. *Id.* at 201. In *Phillips*, the Supreme Court held that state courts had jurisdiction over absent class action plaintiffs who lacked minimum contacts with the state if they had notice of the state court proceedings and the chance to opt out. See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). After *Phillips*, it is unclear whether federal courts can stay state class actions that interfere with Rule 23 class actions proceeding in federal court. See Rowe, *supra* note 51, at 201. Professor Rowe's statutory proposal would allow federal courts to stay those proceedings by providing the courts with national contacts jurisdiction. See *id.* Professor Rowe interprets the idea of providing federal courts with national contacts jurisdiction to mean "that federal courts would have the same authority over those having minimum contacts with the United States as state courts have over parties who have minimum contacts with the state." *Id.* at 201. For a further discussion of national contacts legislation see, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.08 (1994) [hereinafter ALI COMPLEX LITIGATION].

55. See Rowe, *supra* note 51, at 204.

56. See *id.* at 207-08. For discussion of NBRC recommendations, see *supra* Part I.B.2.

57. Rowe, *supra* note 51, at 208.

58. See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996).

large numbers of claims and that courts should apply a single law in such cases.”⁵⁹ However, unlike Judge Weinstein, Professor Kramer ultimately opposes a legislative proposal to create a uniform regime. He argues that choice of law principles define parties’ rights and, as a result, they should not be changed simply as a matter of administrative efficiency.⁶⁰

Several other groups, including the Special Litigation sections of the ALI and ABA, have also devised specific statutory proposals to reform the class action rule.⁶¹ These proposals, for the most part, suggest the creation of new and different administrative schemes to administer effectively Rule 23(b)(3) class actions.

Most of these calls for congressional action have been largely ignored and there is very little indication that Congress is willing to intervene as these commentators have suggested. As the next three parts of this note discuss, Congress has become more receptive to intervening in class action litigation procedure, but only to curtail the availability of group remedies in certain categorical circumstances.

There are indications that certain members of Congress may be listening to some of the commentators’ recommendations. House Bill 3905, the bill that would create a system to resolve asbestos claims, may be the first step towards meaningful reform of class action litigation.⁶² Nonetheless, the bill only attempts to resolve mass tort claims arising out of asbestos litigation. Furthermore, it is unclear whether the bill could garner sufficient support for passage given that it did not even reach the House floor for a vote in the previous legislative session.

59. *Id.* at 547.

60. *See id.* at 549.

61. *See, e.g.*, ALI COMPLEX LITIGATION, *supra* note 54; American Bar Association Section of Legislation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986) (recommending, inter alia, eliminating Rule 23(b) distinctions in favor of a unified standard, requiring a finding that class action was “superior to other methods for the fair and efficient adjudication of the controversy,” and granting more authority to judges for early judicial management of class action); *see also* Resnik, *Aggregation*, *supra* note 49, at 931-34 (critiquing the ALI proposal).

62. *See* Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong. (1998). For an explanation of the bill’s provisions, *see infra* notes 131-35 and accompanying text.

II

LEGISLATIVE CHANGES TO THE CLASS ACTION RULE AND
THEIR EFFECTS

For a long time, Congress was content to give the courts the power to make their own procedural rules with a minimum of intervention. Congress first granted courts the power to promulgate their own rules of procedure in 1933, with the passage of the Rules Enabling Act.⁶³ In 1938, the first set of Federal Rules was enacted. In the original rules, as today, Rule 23 governed class actions, but the text of the rule was substantially different. The original Rule 23 was taken from Equity Rule 38, and all of the concepts of the old rule were adopted into the new Federal Rules.⁶⁴ This version of Rule 23 made confusing distinctions between “true,” “hybrid,” and “spurious” class actions that “proved obscure and uncertain” and did not provide adequate guidelines for the notification of class members.⁶⁵

In 1966, the Federal Judicial Conference’s Rules Committee undertook a significant amendment to Rule 23. The “new” Rule 23 outlined four criteria that must be satisfied before any class action is certified: (1) the class must be so numerous that joinder is impracticable; (2) common questions of law and fact must predominate; (3) claims and defenses of the representative parties must be typical of those of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.⁶⁶ In addition, a class must meet the criteria of one of the categories outlined in the new part (b) of the rule.⁶⁷ While several proposals in Congress have dealt with the

63. 28 U.S.C. § 2072 (1994).

64. The new rules represented a merger of the traditional rules of law and of equity. See John G. Harkins, Comment, *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 706 (1997).

65. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1753 (2d ed. 1986) (quoting the advisory committee note to Rule 23).

66. See FED. R. CIV. P. 23(a).

67. See *id.* In order to be certified, a class must meet the criteria of one of three categories under Rule 23(b). The first two criteria are:

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

use of class certification as a whole, most of the controversy has centered on classes certified under Rule 23(b)(3)—so-called “damages” class actions—and on their use to resolve mass tort claims.⁶⁸

A class can be certified under Rule 23(b)(3) only if “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.”⁶⁹ Based on this formulation, it was not contemplated that Rule 23(b)(3) would be used to certify the mass tort class actions prevalent today.⁷⁰ As a result, much of the debate surrounding the class action system is how to reform it or replace it to better administer mass tort claims.

A. *The Role of Congress in the Early Class Action Debate*

Only on rare occasions has Congress rejected procedural rules drafted by the Judicial Conference and formally submitted by the Supreme Court.⁷¹ In fact, before 1993, Congress had rejected rules transmitted by the Supreme Court on only two occasions.⁷² Congress had not even amended a proposal until 1975, when it made extensive revisions to the newly promulgated Federal Rules of Evidence.⁷³ This deference has applied to Rule 23, and Congress has never amended the rule directly.

That Congress has traditionally deferred to proposed rules does not necessarily mean, however, that it has never attempted to alter aggregate litigation mechanisms through other legislation. In fact, just two years after the amended Rule 23 was adopted, Congress passed the Multidistrict Litigation statute (“MDL”).⁷⁴ Many observers believed that the statute would effectively foreclose the use of Rule 23

FED. R. CIV. P. 23(b). In addition, the class must meet the criteria for category (3), outlined *infra* in the text accompanying note 69. *See id.*

68. For additional description of “damages” class actions, see *supra* note 17.

69. FED. R. CIV. P. 23(b)(3).

70. *See* FED. R. CIV. P. 23(b)(3) Advisory Committee’s note; Resnik, *Cases to Litigation*, *supra* note 17, at 11 (“[The drafters of Rule 23]—who collectively had great experience with federal litigation and who were prepared to generate new forms of aggregation—did not see the class action as responsive to the problems of mass torts.”).

71. *See* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 456 (1993).

72. *See* H.R. REP. NO. 103-319, at 3 (1993) (describing the Committee’s rejection of proposed Federal Rules of Evidence in the early 1970s and a far-reaching change to Rule 4 (dealing with service of process) in the early 1980s).

73. *See* Baker, *supra* note 11, at 332.

74. *See* 28 U.S.C. § 1407 (1994).

class actions to resolve mass tort claims.⁷⁵ MDL has never completely supplanted Rule 23(b)(3) in the adjudication of mass torts. It has been used increasingly, however, in attempts to create an administrative regime in certain mass tort cases, especially asbestos claims.⁷⁶ The MDL itself is not a complete solution to the problem both because it limits transfer and consolidation to pre-trial procedural matters, and because the statute mandates that cases be returned to the districts in which they originated after pre-trial proceedings.⁷⁷ Some commentators have therefore proposed an expansion of MDL as a way to resolve the current problems with adjudicating mass tort claims.⁷⁸

Furthermore, in 1969 the Senate also considered a bill that would have given federal district courts original jurisdiction in consumer class actions, regardless of whether the parties met diversity requirements.⁷⁹ At the time, many legislators considered the newly amended class action rule such an effective mechanism for resolving litigation that they believed jurisdiction should be expanded.⁸⁰ Several similar

75. See, e.g., Maxwell M. Blecher, *Is the Class Action Rule Doing the Job?* (*Plaintiff's Viewpoint*), 55 F.R.D. 365, 366 (1972). Blecher argued:

With the advent of the Multidistrict Litigation statute there no longer is a likely prospect of different courts reaching different conclusions as to persons similarly situated. Thus the Multidistrict Litigation statute permits, without resort to class actions, uniformity of decision, and the economies of time effort and expense, originally sought via Rule 23. The Multidistrict Litigation statute should, in my view, materially narrow the application of Rule 23.

Id.

76. See Resnik, *Aggregation*, *supra* note 49, at 928-29.

77. See 28 U.S.C. § 1407(a) (1994). This is not necessarily a problem, however, because even though "these cases are only consolidated for pretrial practices, functionally MDL is the end point of many cases." Resnik, *Aggregation*, *supra* note 49, at 928. MDL is not a substitute for class action procedure, however, as the Multidistrict Litigation statute does not bring into the litigation claimants who have not filed suits, and does not allow an "opt out" of the MDL procedure—unlike Rule 23. See *id.* Thus, MDL and Rule 23 are frequently used in conjunction with each other, with several class actions being consolidated and transferred under MDL. See *id.* at 929.

78. See, e.g., Richard A. Chesley & Kathleen Woods Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 539-42 (1986) (proposing expansion of MDL power to consolidate cases for trial and appeal in addition to power to consolidate in pretrial proceedings).

79. See S. 1980, 91st Cong. (1969).

80. For example, the findings of Congress in the Jurisdiction Reform Act of 1969 were uniformly glowing in their appraisals of the class action mechanism:

(3) Congress finds further that class actions are an essential remedy for the protection of consumers, because consumer actions usually involve sums too small to justify individual litigation, whereas it is economical and just to try essentially identical claims together in one representative action. (4) Congress finds further that by consolidating numerous claims in one proceeding, class actions promote sound judicial administration.

Id.

bills were introduced in Congress in the 1970s, all of them calling for expansion of circumstances in which class relief would be available.⁸¹

The most sweeping proposal to amend Rule 23 itself came from the Department of Justice, which suggested significant amendments to many of the requirements for 23(b)(3) class actions. Although the Department of Justice's proposal became a bill, it was never submitted to either house of Congress for a vote.⁸² This bill, introduced in two separate legislative sessions, would have created special provisions for consumer class actions, consumer public actions, and class compensatory actions.⁸³ Until the Private Securities Litigation Reform Act of 1995⁸⁴ was considered and passed, the Department of Justice proposal represented the high-water mark in Congress's desire to get involved in the class action debate. With the exception of the MDL, Congress was never able to assemble a coalition sufficient to enact reform of class actions or mass tort administration. Thus, until 1995, Congress's potential role in the debate was largely ignored. This perception changed drastically, however, with the passage of the Private Securities Litigation Reform Act.

B. *The Private Securities Litigation Reform Act of 1995*

Congress made the most significant alterations to the procedural requirements of class action certification with the Private Securities Litigation Reform Act of 1995 ("PSLRA").⁸⁵ The PSLRA, which passed over a presidential veto, changed several aspects of class action procedure, but only for securities class actions filed in federal court. Passage of the Act demonstrated that Congress, if so motivated, was capable of making significant procedural and substantive changes to class action litigation.

81. See, e.g., S. 2390, 95th Cong. (1978) (permitting all plaintiffs' claims over \$25 to be aggregated for jurisdictional purposes); H.R. 2078, 94th Cong. (1975) (allowing trial court to make any order respecting size of class or creation of subclass as necessary to render such class actions more manageable); H.R. 16153, 93d Cong. (1974) (same as H.R. 2078); H.R. 1105, 93d Cong. (1973) (giving district court original jurisdiction over all class actions brought by consumer claiming an "unfair consumer practice"). *But see* H.R. 7683, 95th Cong. (1977) (disallowing aggregation of claims under \$10 for jurisdictional purposes).

82. See *supra* note 33. For a comprehensive study of the provisions of this bill, see generally Wells, *supra* note 33, at 543. See also Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 80 (1994) (discussing several critiques of Rule 23 made in the late-1970s to early-1980s).

83. See S. 3475, 95th Cong. (1978); H.R. 5103, 96th Cong. (1979) See generally Wells, *supra* note 33, at 543 (detailing the Department of Justice's proposal).

84. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

85. *Id.*

One of the most important changes is contained in the PSLRA's lead plaintiff provisions. Under this provision, a plaintiff filing a complaint in a federal securities class action must, within twenty days, provide notice in a "widely circulated national business-oriented publication" of the pendency of the action and advise members of the purported class that, within sixty days, they may move the court to serve as lead plaintiff in the case.⁸⁶ Within ninety days of the notice, the court must hold a hearing at which lead counsel is appointed in the case.⁸⁷ The court must select as lead plaintiff the class member the court determines to be most capable of adequately representing the interests of class members (the "most adequate plaintiff").⁸⁸ There is a statutory presumption that the most adequate plaintiff is the plaintiff who either filed the complaint or filed a motion in response to the notice and has the largest financial interest in the relief sought by the class.⁸⁹ Besides the heightened scrutiny given to the adequacy of the plaintiff, there are several certification requirements that the serving plaintiff must include with the complaint.⁹⁰

86. *See id.* § 101(3)(A).

87. *See id.* § 101(3)(B)(i).

88. *See id.*

89. *See id.* § 101(3)(B)(iii). To be presumed the most adequate plaintiff, a party must satisfy the requirements of Rule 23 as well. *See id.* Note that this procedure is very different from the appointment of lead counsel under a standard Rule 23 class action. Under Rule 23, counsel must satisfy only the provisions of section 23(a)(1)-(4) to be considered adequate. For a discussion of class certification requirements, see *supra* note 66 and accompanying text.

90. The PSLRA provides:

(2) Certification filed with complaint:

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

It may be too early to determine what effect the Private Securities Litigation Reform Act will ultimately have on federal securities class actions. The preliminary indication is that the Act, while shifting several securities class actions to state court, has had no effect at all on the overall number of lawsuits filed in federal court.⁹¹ Undeterred, Congress, relying on a report that the PSLRA was pushing securities class actions into state courts,⁹² passed a proposal during the 1998 session that grants the district courts exclusive jurisdiction over securities class actions in some instances and removal jurisdiction in almost all other cases.⁹³

In addition to limiting the use of the class action mechanism for securities lawsuits, Congress has also curtailed the availability of class actions in other substantive areas or for particular parties. For example, Congress has restricted the certification of certain class actions involving immigrants.⁹⁴ As part of the Omnibus Consolidated Appropriations Act of 1997 ("OCA"), class action lawsuits can no longer be brought "in any action for which judicial review is authorized," in habeas corpus proceedings, as challenges to the validity of the immigration system, or in any case determining the citizenship status of an immigrant in immigration proceedings.⁹⁵

Congress has also placed restrictions on the Legal Services Corporation ("LSC"), preventing legal services organizations that receive LSC funds from bringing class action lawsuits on behalf of their clients.⁹⁶ Congress substantially reduced the ability of legal services providers to assist a large number of clients efficiently and to effect systemic change. While this provision does not eliminate a substan-

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court. . . .

15 U.S.C.A. § 77z-1(2)(A) (West 1997).

91. See Joseph A. Grundfest et al., *Securities Class Action Litigation in Q1 1998: A Report to NASDAQ from the Stanford Law School Securities Class Action Clearinghouse*, 1070 *PLI/Corp.* 69, 71-72 [hereinafter *Securities Class Action Report*] ("The volume of securities class action activity in federal court has grown substantially since the earliest days of the [Securities] Reform Act If the Q1 1998 rate is maintained for the remainder of the year, then the total volume of litigation would actually be 49.2% higher than the average volume of litigation in the five years preceding passage of the Act.")

92. For a discussion of the PSLRA, see *infra* note 112 and accompanying text.

93. For a discussion of this amendment to the PSLRA, see *infra* notes 111-14 and accompanying text.

94. See Pub. L. No. 104-208 § 306(a)(2), 110 Stat. 3009-610 (1996).

95. See *id.*

96. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321-53.

tive category of class actions per se, it seems very clearly designed to discourage certain types of civil rights class actions.⁹⁷

The Prison Litigation Reform Act of 1995 ("PLRA") makes it much more difficult for courts to issue consent decrees regarding overcrowded or unsafe prison conditions.⁹⁸ The effectiveness of consent decrees, essentially another type of group remedy, is significantly diminished by certain of the Act's provisions.⁹⁹ Under the PLRA, a court is not permitted to enter or approve a consent decree without a specific finding that such relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."¹⁰⁰ The court must also "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."¹⁰¹ Furthermore, any consent decrees regarding prison conditions, including consent decrees in existence prior to the PLRA's enactment, are automatically terminated after two years upon motion of any party in interest or intervenor in the case, absent a judicial finding that prospective relief remains necessary.¹⁰²

The pattern visible in these legislative initiatives is that Congress is "dealing" with the problems of class actions by curtailing access to the procedure in specific substantive categories where it has found that the remedy has been "overused."¹⁰³ At the same time, Congress has

97. See John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 454 (1997) (explaining how limitations on Legal Services effectively discourage welfare and disability benefits class actions).

98. See Pub. L. No. 104-134, §§ 801-809, 110 Stat. 1321-66 (1996) (codified at 18 U.S.C.A. § 3626, 28 U.S.C.A. § 1932).

99. See Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275, 1276 (1997) ("In the context of prison condition cases, consent decrees are a form of settlement in which the defendants, without admitting to any wrongdoing, agree to correct allegedly unconstitutional conditions in exchange for which the plaintiffs agree to discontinue a pending lawsuit.") (citing BLACK'S LAW DICTIONARY 410-11 (6th ed. 1990)).

100. 18 U.S.C.A. § 3626(a)(1), (c)(1) (1998).

101. *Id.* The statute also does not permit the court to order prospective relief that requires a state government official to exceed his or her authority under state law unless: (1) permitted by federal law; (2) the relief is necessary to correct the violation of a federal right; and (3) no other relief will correct the violation of the federal right. See *id.* § 3626(a)(1)(B).

102. See *id.* § 3626(b)(1)(A)(i), (iii).

103. In addition to the laws discussed *supra*, Professor Leubsdorf lists other legislation that Congress has passed restricting class action relief in other substantive areas. See Leubsdorf, *supra* note 97, at 454. Professor Leubsdorf provides various examples, including laws binding nonparties to consent decrees in employment discrimination cases when the nonparties are given adequate notice and a reasonable opportunity to present objections, see Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n) (1994),

seemed to ignore the problems of mass tort and consumer damages class actions altogether. The most recent proposals contained in bills introduced in the 105th Congress seem to continue the trend. Although there appears to be an effort by certain legislators to address some of the procedural deficiencies of the current Rule 23, these efforts had not borne fruit as of the conclusion of the 105th Congress.

III

PROPOSALS INTRODUCED DURING THE 105TH CONGRESS AND SUGGESTIONS FOR THE FUTURE

The 105th Congress saw an enormous number of bills that would have restricted the use of class actions in new substantive categories or have placed further restrictions on class certification in categories in which Congress has previously legislated. The only proposal to emerge from the 105th Congress continued to expand the restrictions placed on class certifications in securities cases.¹⁰⁴ The vast majority of bills also contained provisions restricting the use of different types of aggregate litigation, largely by restricting the use of class action certifications. However, there was some indication that certain members of Congress were beginning to address the concerns associated with the administrability of the current class action regime.

Two separate bills were introduced that would have provided for an interlocutory appeal of class certification at the discretion of the court of appeals.¹⁰⁵ At the time these bills were introduced, a determination regarding the appropriateness of class certification was appealable only by permission of the district court, since decertification is not appealable as a "final judgment."¹⁰⁶ Because denial of certification can result in the effective dismissal of a class action lawsuit,

and laws authorizing states to bring *parens patriae* actions (actions on behalf of the citizens of the state) in antitrust cases, effectively precluding class actions and limiting damages in those suits, see 15 U.S.C. § 15c (1994). See Leubsdorf, *supra* note 97, at 454. Professor Leubsdorf also notes that Congress amended the Truth in Lending Act in 1974 to limit the recovery of liquidated damages in class action suits brought under the statute. See *id.* (citing Pub. L. No. 93-495, 88 Stat. 1518 (1974) (codified at 15 U.S.C. § 1640(a) (1994)).

104. See *infra* notes 111-14 and accompanying text.

105. See H.R. 660, 105th Cong. (1997) (introduced February 10, 1997 by Rep. Canady); H.R. 1252, 105th Cong. (1997) (introduced April 9, 1997 by Rep. Hyde). Note that the Advisory Committee has also proposed an amendment to Rule 23 that would give the courts of appeals discretion to hear class certification decisions. See *infra* notes 109-10 and accompanying text.

106. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (holding that denial of class certification is not appealable as of right under 28 U.S.C. § 1291 despite effectively ending the case).

decertification can result in an unappealable dismissal of the suit.¹⁰⁷ Provision for an interlocutory appeal of class certification determinations would address the concern that denials of class certification are very often effectively unreviewable.

While these two bills appear to be a step toward addressing perceived procedural inadequacies of the current Rule 23, the federal judiciary's rules committee has beaten Congress to the punch on this particular measure. Pursuant to the Rules Enabling Act and a newly added amendment to the interlocutory appeals statute (28 U.S.C. § 1292)¹⁰⁸ the Supreme Court approved Rule 23(f), which subsequently went into effect December 1, 1998, without congressional objection.¹⁰⁹ The rule provides for the same interlocutory appeal mechanism proposed in Congress.¹¹⁰ As a result, the bills' inclusion of the interlocutory appeals provisions was unnecessary.

A. *Bills Restricting the Use of Class Actions in Certain Categories of Litigation*

In the area of class action litigation, Congress appears most concerned with tightening the provisions of the Private Securities Litigation Reform Act of 1995. A bill to strengthen the PSLRA, entitled the Securities Litigation Uniform Standards Act of 1998 (the "Uniform Standards Act"), was the only bill enacted into law during the 1998 legislative session involving either class action or mass tort litigation.¹¹¹ This proposal was introduced to counteract the migration of such suits from federal to state courts after the enactment of the

107. *See id.*

108. Section 1292(e) allows the Supreme Court to prescribe rules under the Rules Enabling Act that provide for appeal of interlocutory decisions of the courts of appeals not otherwise permitted under the general interlocutory appeals provisions of section 1292. *See* 28 U.S.C. § 1292(e) (1992). It is interesting to note that this new amendment, in effect, works as a congressionally-derived solution to a problem with class action procedure. Perhaps greater delegation of rulemaking authority to the federal judiciary will ultimately be how Congress deals effectively with mass tort reform.

109. *See* FED. R. CIV. P. 23(f).

110. The text of the rule reads:

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Id.

111. *See* Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. §§ 77-78).

PSLRA.¹¹² The law expands the restrictions of the Act in several ways. First, it prohibits certain class actions based upon state statutory or common law.¹¹³ Second, the Act allows for certain securities class actions filed in state courts to be removed to federal court in the district in which the action is pending. The defendant is thereby permitted to challenge class certification under the applicable restrictions of the PSLRA in any case which the defendant chooses to remove.¹¹⁴ The passage of the Uniform Standards Act, which theoretically gives the PSLRA more “bite,” indicates that Congress’s preferred method for reforming class actions remains the further restriction of the procedure’s availability.

This is not to say that restrictions on discrete categories of class action litigation are intended as general reform of class actions. An examination of the bills considered but not passed during the 1998 legislative session reveals a congressional willingness to deal with problems of class actions and mass tort litigation on an ad hoc basis, passing category-specific limitations that often have broader ramifications. For instance, the proposed Real Estate Settlement Procedures Act Class Action Relief Act did not seem to have a significant impact on class action litigation as a whole.¹¹⁵ Nonetheless, the bill is representative of the way Congress seems most inclined to deal with class action reform—simply restricting the availability of the procedural mechanism. The bill would have placed a one-year moratorium on class action certification of lawsuits in both federal and state courts arising under the Real Estate Settlement Procedures Act of 1974.¹¹⁶

112. See 143 CONG. REC. S4813 (daily ed. May 13, 1998) (comments of Sen. Domenici upon introduction of S. 1260 (citing Grundfest and Perino study finding a 26 percent shift in securities class actions from federal to state courts)). *But see* Grundfest, *Securities Class Action Report*, *supra* note 91, at 71 (noting overall increase in securities class action litigation filed in federal court).

113. See Pub. L. No. 105-353 § 101.

114. See *id.*

115. See H.R. 1283, 105th Cong. (1997); S. 2223, 105th Cong. (1998).

116. See H.R. 1283 § 2(2); S. 2223 § 2(2). The provisions specify that:

- (1) no party shall serve or cause to be served, or be required to respond to, any discovery concerning any class certification issue;
- (2) no State or Federal Court may enter any order—
 - (A) certifying any class, except an order certifying any class directly in connection with the settlement and compromise of any action; or
 - (B) imposing any sanctions on any party for failing to comply with any discovery seeking information concerning any class certification issue;and
- (3) all State and Federal Courts shall stay all further proceedings in any such action in which an order certifying any class has been entered on or after January 1, 1996, for any purpose other than indirect connection with the settlement and compromise of any such action.

Reminiscent of earlier efforts, the bill's primary effect would have been to restrict the availability of the class action remedy for a particular category of substantive claims.¹¹⁷

The bills introduced in connection with the proposed global tobacco settlement also would have restricted the filing of subsequent class actions in all future cases related to the use of tobacco products.¹¹⁸ Another proposal would have placed additional limitations on prospective relief for poor prison conditions.¹¹⁹ This latter measure would have required a court to approve an order granting prospective relief based on specific findings that the relief was appropriate.¹²⁰ These provisions would further narrow the ability of courts to approve consent decrees without elaborate justifications.¹²¹ Taken together, these bills would have further restricted the use of aggregate litigation in the substantive categories of tobacco lawsuits and prison litigation cases.

The Class Action Fairness Act of 1997 also contained provisions restricting class action use, especially to settle mass tort claims.¹²² The bill would have required that the Department of Justice and state attorneys general be provided with notice of settlement or certification in every class action lawsuit.¹²³ The notice requirement would have

H.R. 1283 § 2(2); S. 2223 § 2(2).

117. The motivation behind this moratorium is a mystery, however, as no mention of why this bill was introduced was ever made in the Congressional Record.

118. *See* S. 1414, 105th Cong. § 702 (1997); S. 1530, 105th Cong. § 257 (1997).

119. *See* S. 2163, 105th Cong. § 15 (1998).

120. *See id.* These requirements include stating: (1) the federal right the court finds to have been violated; (2) the facts establishing the violation; (3) the particular plaintiff or plaintiffs who suffered the actual injury; (4) justifications for why such relief is necessary in the light of the defendant's actions that caused the violation; and (5) why more narrowly tailored relief would not accomplish the same goals. *See id.*

121. The bill would also have softened the effects of the PLRA to a certain degree by allowing plaintiffs the right to oppose termination of consent decrees on the grounds that the relief remained necessary to correct a "current and ongoing violation of a Federal right." *See id.* The right to oppose termination would be restricted, however, by requiring that the motion contain several specific allegations justifying continued relief, similar to the findings a court must make to order such relief in the first instance. *See id.*

122. *See* S. 254, 105th Cong. (1997).

123. This bill would provide, in relevant part, that:

- (c) No later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Department of Justice as if they were parties in the class action with—
 - (1) a copy of the complaint and any materials filed with the complaints;
 - (2) notice of any future scheduled judicial hearing in the class action;
 - (3) any proposed or final notification to class members of—
 - (A) their rights to request exclusion from the class action; and

applied not only to plaintiffs' class actions under Rule 23, but to every other state or federal court with jurisdiction over a plaintiff class action.¹²⁴ The result of this provision would have been to greatly increase the scrutiny class action settlements receive. While this would not, by itself, limit the availability of the remedy, the restriction would have imposed another set of procedural obstacles to all class actions, making it harder for classes of plaintiffs to obtain settlements.¹²⁵

B. Bills That Would Potentially Improve Mass Tort Administration

Another bill that failed in the House of Representatives would have removed the "amount in controversy" requirement for federal diversity jurisdiction.¹²⁶ While this change at first seems to expand the availability of class action procedural mechanisms, other provisions provided for mandatory abstention by the district court if the substantial majority of all proposed plaintiff class members were citizens of the same state as the defendant, and if the claims would be governed primarily by the laws of that state.¹²⁷ The bill would have also authorized the district court to voluntarily abstain from hearing actions in which the aggregate sum of the plaintiffs' claims was less than \$1 million, the number of class members was less than 100 people, or the primary defendants were states or other entities immune from suit.¹²⁸ Furthermore, the bill would have allowed a plaintiff

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- (B) a proposed settlement of a class action;
 - (4) any proposed or final class action settlement; . . .
 - (6) any final judgment or notice of dismissal;
 - (7) (A) if feasible the names of class members who reside in each State attorney's general respective state and their estimated proportionate claim to the entire settlement; or
 - (B) if not feasible, a reasonable estimate of the number of class members residing in each attorney general's State and their estimated proportionate claim to the entire settlement. . . .

S. 254, 105th Cong. § 2(a) (1997) (proposing to amend §1711(c)(1)-(7)).

124. *See id.* (proposing to amend §1711(b)(1)-(2)). The bill defines a "class action" as "a lawsuit filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State rules of procedure authorizing a lawsuit to be brought by 1 or more representative individuals on behalf of a class" *Id.* Thus, any class action brought under the Private Securities Litigation Reform Act or under state rules would be subject to the notice provisions. *See id.*

125. Under the provisions of S. 254, a hearing to consider final approval of a proposed settlement could not be held until at least 120 days after notice was served on the attorney general. *See id.*

126. *See* Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong.

127. *See id.*

128. *See id.*

class member who is not named as a representative of the class or any defendant to remove the action to district court.¹²⁹

While it is unclear what effect this bill would have had on the administration of mass tort class actions,¹³⁰ it at least indicated a willingness by some legislators to consider new procedural rules to remedy the substantive difficulties of class action administration. The measure passed the House Judiciary Committee, but failed in the full House. However, the fact that Representative Henry Hyde, the House Judiciary Chairman, sponsored the bill indicates that influential members of Congress may have begun to focus on class action reform. It is also possible, however, that this proposal would have foreclosed more class actions than it would have facilitated, given its abstention and removal provisions.

Another bill introduced by Representative Hyde, House Bill 3905, would have created a system to administer asbestos claims—the Asbestos Resolution Corporation.¹³¹ The Corporation would have had exclusive authority to adopt rules for cost recovery, physician qualification, alternative dispute resolution, exceptional medical cases, and disease eligibility.¹³² The Corporation also would have had the power to appoint a Medical Advisory Board to evaluate claims submitted to the Corporation for payment.¹³³ The bill set forth criteria for eligibility, directed the Corporation to determine the eligibility of asbestos claimants, and provided for district court review of the Corporation's eligibility determinations.¹³⁴ Furthermore, the measure would have foreclosed the use of class actions in asbestos claims in favor of this regulatory scheme.¹³⁵

House Bill 3905 responded to the Ad Hoc Committee on Asbestos Litigation, which called for the establishment of a national legislative scheme to “achieve timely appropriate compensation of present and future asbestos victims.”¹³⁶ While it is unclear whether the procedures enumerated in the bill would have adjudicated claims fairly, the proposal at least responded to the concerns of the federal judiciary

129. *See id.* § 3.

130. In fact, the bill directs the comptroller general to conduct a study of the effects the bill would have on the workload of the federal courts. *See id.* § 5.

131. *See* Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong.

132. *See id.* § 101.

133. *See id.* § 102.

134. *See id.* §§ 205-207.

135. *See id.* §§ 401-403.

136. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 33 (March 1991).

surrounding the administrability of asbestos claims.¹³⁷ What the bill would not have done, however, is create a regulatory scheme to revamp the whole of the mass tort regime. Furthermore, it is unclear what degree of support this limited scheme might garner in Congress; the bill was not reported out of the Judiciary Committee. As a result, the introduction of the Fairness in Asbestos Compensation Act does not necessarily indicate a sea change in the attitude of Congress toward class action reform.

The best evidence of Congress's attitude is the Bankruptcy Reform Bill. During the 1998 term, both the Senate and the House of Representatives approved bills to reform the Bankruptcy Code radically, but failed to pass a single version reconciling the differences between the House and Senate measures.¹³⁸ The bills neither addressed the National Bankruptcy Review Commission's concerns regarding future claims nor contained any provision addressing mass future tort claims. The absence of such provisions is further evidence of Congress's unwillingness or inability to address the problems of mass tort litigation.

C. *Suggestions for the Future*

Congress's reluctance to take more comprehensive action is the major obstacle to mass tort reform. A more aggressive and thorough approach is necessary for effective change. Based on the line the Supreme Court drew in *Amchem* and the calls for statutory reform from other commentators, the best way that Congress could improve the administrability of mass tort claims is to create a regulatory scheme or specialty court similar to that contemplated in Representative Hyde's Fairness in Asbestos Compensation Act.¹³⁹ This scheme should provide a mechanism whereby claims from anywhere in the country can be heard efficiently and expeditiously; the decisions of the regulator or court should be subject to Article III review, much like the enforcement actions of contemporary administrative agencies. Congress seems unlikely to consider such a comprehensive scheme in the near future.¹⁴⁰ Nonetheless, Congress could improve administra-

137. For a discussion of the judiciary's concerns about the administrability of class actions, including asbestos claims, see *supra* Part I.A.

138. See Bankruptcy Reform Act of 1997, S. 1301, 105th Cong.; Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong.

139. See Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong.

140. For more detailed discussions about how such administrative schemes might look, see the plans cited *supra* Part I.

tive efficiency short of the establishment of a new administrative system.

Congress should enact procedural reforms in order to enable the federal courts as they are currently composed to administer mass tort claims. Greater use of lead plaintiff provisions may be one way to accomplish this. A statute more precisely defining the role settlements should play in the certification of classes would also promote efficiency.

1. Expanded Use of Lead Plaintiff Provisions

The apparent success of lead plaintiff provisions in decreasing the number of class actions filed in federal court in the securities litigation context may very well encourage Congress to enact more adequate plaintiff provisions on other Rule 23(b)(3) class actions. Of course, it appears that in the securities context these provisions have merely shifted class action lawsuits to state courts.¹⁴¹ It is unclear what would happen to these suits if state courts with more lenient certification requirements were no longer available to hear them, but such data will be readily available as the Securities Litigation Uniform Standards Act goes into effect. Such incomplete data makes it unclear that imposing lead plaintiff restrictions on all damages class actions would aid in the administration or coordination of these types of suits.¹⁴²

Nonetheless, if Congress is truly concerned with striking a balance between preventing frivolous mass tort lawsuits while, at the same time, not legislating them out of existence altogether, statutory requirements defining what constitutes an “adequate” plaintiff may enhance mass tort administration in two ways: (1) they would eliminate the “race to the courthouse” to file class action lawsuits that the current Rule 23 encourages and thus allow for better coordination of class action suits related to the same event;¹⁴³ and (2) they would help promote greater supervision of counsel by plaintiffs. By ensuring that a plaintiff or set of plaintiffs would have a sufficiently significant stake

141. See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(2) to (3), 112 Stat. 3227 (“[S]ince enactment of [the Private Securities Litigation Reform Act of 1995], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts . . . this shift has prevented the Act from fully achieving its objectives.”).

142. For a discussion of the preliminary impact of the PLRA, see *supra* notes 91, 112 and accompanying text.

143. See H.R. REP. NO. 104-369, at 33 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 732 (noting “race to the courthouse” as reason for implementing lead plaintiff provisions).

in the outcome to monitor lead counsel's representation, the potential for collusive settlements with tort defendants would decrease.¹⁴⁴ Thus, expanding the use of lead plaintiff provisions in other class action contexts would be a method by which Congress, while still limiting the use of the class action remedy to some extent, could also enhance the efficiency and fairness of the system.

2. *The Exact Role of Settlement*

Another way to enhance administrability is to define the role settlement considerations should play in certifying class actions. Given the logistics of the typical modern damages class action, if a plaintiff class is certified, the defendants almost invariably will settle.¹⁴⁵ Thus, no substantive "reform" of the regime can occur until the reality of modern class action litigation is addressed and the proper role of settlements is defined.

From the tone of the opinion in *Amchem*, the Supreme Court appears unwilling to craft too radical a solution without guidance from Congress. Thus, Congress is primarily responsible for substantive reform of class action procedure by providing a standard to evaluate the likelihood of settlement and to determine whether a class should be certified. Such a standard should not go so far as to overrule *Amchem* and allow for a class to be certified only for the purposes of settlement. Doing so would increase the suspicion, at least, that class actions are employed only for collusive settlements.¹⁴⁶ However, a

144. See *id.* at 34, reprinted in 1995 U.S.C.C.A.N. 730, 733 (noting desire to have institutional investors and other large stakeholders as lead plaintiffs as reason for implementing lead plaintiff provisions).

145. See Sheila Birnbaum, *Class Certification—The Exception, Not the Rule*, 41 N.Y.L. SCH. L. REV. 347, 350 (1997) (arguing that combination of uncertainty, high potential liability, and residual damage leads defendants to settle once class is certified).

146. Professor Coffee lays out the advantages of a collusive settlement of future claims this way:

[B]oth sides have an incentive to trade a settlement of the plaintiffs' attorney's [inventory of tort lawsuits] (on terms favorable to the attorney) for a global settlement in a class action of all future claims. . . . [P]laintiff's attorneys are almost invariably compensated on a contingency basis . . . [and] can expect to receive a substantial fraction . . . out of the aggregate amount received by the clients. . . .

. . . By definition, a settlement class "action" cannot go to trial, and thus defendants need not fear litigation in the event the two sides have a subsequent falling out.

Coffee, *supra* note 9, at 1373-74. Professor Judith Resnik explains:

Settlement in group litigation is . . . problematic. We know that it is lawyers who offer consent on behalf of those they represent. We know that, in many kinds of cases, lawyers are the largest stakeholders—with more

standard that would encourage courts to consider the likelihood of settlement when deciding certification could allow for greater administrative flexibility while reflecting the reality of modern mass tort litigation—most often, both parties would rather settle than litigate.

In order to protect future claimants in the settlement process, Congress should also create mechanisms whereby fiduciaries for future claimants may participate, both in mass tort class action and mass tort bankruptcy claims. Given Congress's previous record on class action reform, the prospects that it will adequately address the issues of settlement and protecting future claimants seem slight.

IV

OBSTACLES TO CONGRESSIONAL ACTION

An analysis of the sum total of the 105th Congress's effort to reform class action litigation, produces some broad, yet consistent, generalizations. First, Congress either will not or cannot provide the substantive reforms that would adequately address the concerns raised by several institutions, including the courts. Second, the sole respect in which Congress is addressing class action litigation reform is by making the remedy unavailable in an increasing number of substantive areas.¹⁴⁷ This approach fails to respond to the concerns expressed by the judiciary, other public institutions, the academic community, or other interested parties and essentially ignores warnings about the inability of the current system to resolve mass tort claims.

Congress has previously passed measures, such as the Multidistrict Litigation statute, to enhance judicial efficiency.¹⁴⁸ If it wishes to do so, Congress has the power to effectuate a sweeping reform of the class action regime. However, opposition by influential interest groups decreases the likelihood of this outcome.¹⁴⁹

riding on costs and fees than any individual plaintiff (even one sustaining massive injuries) will recoup. Further, we know that it is meaningless to speak of the discipline of clients monitoring attorneys when 'the clients' number in the thousands.

See Judith Resnik, *Litigating & Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 854 (1997).

147. Cf. Leubsdorf, *supra* note 97, at 454 (referring to "the decline of a single, transsubstantive system of civil procedure" in the case of class actions).

148. See 28 U.S.C. § 1407 (1994).

149. See Leubsdorf, *supra* note 97, at 455. As Professor Leubsdorf argues: The congressional origin of most class action changes links with their substantive impetus. . . . Because so many groups have conflicting interests in class action rules, no consensus supporting significant class action changes of transsubstantive impact has arisen. Interest groups seeking

In general, the effectiveness of class action litigation lies in its capacity to remove obstacles faced by individual litigants and thus to increase their ability to bring claims.¹⁵⁰ Class actions allow individuals to sue collectively, thus lowering the per-litigant cost of recovery.¹⁵¹

The class action mechanism theoretically removes significant obstacles to individual suits. However, there is no similar mechanism to aggregate the interests of *potential* class action plaintiffs. As a result, efforts to enact class action reform face an arduous road, because the benefit of reduced litigation costs would be diffused over a broad group of potential class action litigants. Prior to bringing a class action lawsuit, this group lacks incentive to act as an organized lobby in favor of reform.¹⁵² The problem is consistent with certain legislative process theories often referred to as "public choice." Public choice theories posit that legislative proposals that diffuse their benefits over the general populace,¹⁵³ but concentrate costs on particular parties, stand a very poor chance of enactment.¹⁵⁴

Class action reform fits the description of legislation with diffuse benefits and concentrated costs. Class action reform that expands the availability of the remedy to mass tort victims potentially lowers the cost of litigating claims by injured plaintiffs.¹⁵⁵ On the other

narrower [i.e. more restrictive] changes have found Congress a more receptive audience

Because most of the recent changes originated with interest groups working through Congress, they have usually aided defendants. It was defendants who felt the impact of class actions, and who enjoyed access to recent conservative Congresses

Id.

150. See Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 563-65 (1996).

151. See *id.* at 563-64.

152. See 143 CONG. REC. S897 (daily ed. January 30, 1997) (statement of Sen. Kohl) ("[T]he client in a class action is a diffuse group of thousands of individuals scattered across the country.").

153. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY* 55 (2d. ed. 1995) (reproducing James Q. Wilson's chart of costs and benefits and effect on demand for legislation).

154. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 91-92 (1981) (arguing that concentrated costs will generate more organizational activity); ESKRIDGE & FRICKEY, *supra* note 153, at 54 ("The extent to which an interest group is formally organized is a key to its effectiveness in demanding legislation.").

155. However, this theory is disputed. Commentators on mass tort reform point to "free-rider" problems that are not easily eliminated. See, e.g., Grundfest & Perino, *supra* note 150, at 564:

hand, categorical restriction of class action relief generally benefits narrower and better defined interest groups—potential defendants in future mass tort claims. These groups exert significant influence via lobbying and campaign contributions.¹⁵⁶ In the absence of a counterweight to the influence of potential mass tort defendants, legislation perceived to favor potential plaintiffs is disadvantaged in Congress.¹⁵⁷ While administrative improvements in the resolution of mass torts may benefit both plaintiffs and defendants, categorical restriction of class certification benefits only potential defendants. These restrictions eliminate plaintiffs' ability to overcome the collective action problems Professor Coffee identifies.¹⁵⁸ Therefore, public choice theory predicts the difficulties that administrative reform legislation faces and also predicts the ease with which class certification restrictions pass. In order to enhance the administrability and efficiency of the mass tort regime, a sufficient number of legislators would have to act contrary to their theoretical preferences.

This not to say, however, that Congress will never pass legislation enacting an efficient scheme for mass tort administration, or that the tenets of public choice theory will necessarily hold indefinitely. On the contrary, the passage of the MDL statute and the push in the 1970s to increase the use of class action procedure¹⁵⁹ seem to indicate, as an empirical matter, that the present view of class action procedural

[N]o injured individual has an incentive to undertake the costs of organizing the affected class because any individual who attempts to join together the claims will have no method for taxing the costs of aggregation to the other injured parties. If, as is often likely, those costs exceed the individual's pro rata share of any damages, then each injured party would rationally prefer to allow the others to undertake the costs of bringing a claim while she reaps the benefits for free. Indeed, even if it is individually rational for one party to cause the class to form, each litigant would rather see someone else bear the costs.

Id.; see also Coffee, *supra* note 9, at 1346 (“[E]fficiency claims made for the mass tort class actions are problematic because . . . claim aggregation through class actions systematically tends to disfavor certain identifiable, but underrepresented, classes of tort victims.”). Regardless of the validity of these criticisms, reforming the class action system to enhance the administration of mass tort claims would not further aggravate these problems.

156. See Leubsdorf, *supra* note 97, at 455.

157. Some commentators argue that the plaintiffs' bar serves this function; it appears, however, that the political resources that this interest group can expend are outweighed by the capabilities of potential tort defendants to expend political resources. See *id.* (“[E]ven the plaintiffs' bar has had more success in resisting some [class action] legislative proposals it opposes than in promoting those it favors.”).

158. See *id.* (describing impact of procedural restrictions on plaintiffs); see also *supra* note 155 (Prof. Coffee's quote).

159. For an additional discussion of the increased use of the class action mechanism, see *supra* note 81 and accompanying text.

reform has not always prevailed and may not prevail in the future—the influence of different interest groups waxes and wanes with the changing composition of Congress.¹⁶⁰ Furthermore, some commentators believe that legislators do have an interest in creating “good” public policy. This interest may produce legislation counter to the outcomes predicted by public choice theory, especially on issues with a certain amount of visibility.¹⁶¹ Some commentators also believe that public choice theory only considers legislators as individual actors and discounts the use of integrated policy making, coalition building, compromise, and logrolling that are hallmarks of the American legislative system.¹⁶²

Even though public choice theory may not predict perfectly whether class action legislation will be adopted, it does explain why such legislation has faced difficulty in Congress. It would appear that, for class action reform to succeed, a significant coalition of legislators would have to look beyond their narrow interests to a broader conception of “good” public policy. At least in the class action reform context, this seems unlikely in the near term.

CONCLUSION

While Congress slowly chips away at the use of class action procedure to provide for efficient litigation, the erosion of access to the class action mechanism is reducing significantly the kinds of claims people may file. Congress’s current solution to the problems of class action litigation is to do away with the mechanism altogether in an increasing number of substantive contexts.

Significant questions exist about the degree to which class action litigation is driven by the financial interests of the plaintiffs’ bar. However, the complete denial of access to a class action remedy is tantamount to saying potential defendants may be as negligent as they please so long as they only harm people in small amounts.¹⁶³ Repre-

160. See ESKRIDGE & FRICKEY, *supra* note 153, at 58 (quoting KAY SCHLOZMAN & JOHN TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 317 (1986)) (“Depending on the configuration of a large number of factors . . . the effects of organized pressure on Congress can range from insignificant to determinative.”) (ellipsis in original).

161. See *id.* at 59 (citing RICHARD FENNO, *CONGRESSMEN IN COMMITTEES* (1973)) (“While reelection is certainly a powerful motivating factor, legislators also want to have ‘status’ within government and to make some positive contribution to what they consider good public policy.”).

162. See *id.* at 57-59.

163. See Coffee, *supra* note 9, at 1348-49:

[T]he possibility of opportunistic behavior . . . is not, standing alone, a sufficient basis for rejecting mass tort class actions . . . [I]ndividual tort

sentative Hyde's recent proposals indicate that Congress may soon consider other, more effective methods to reform class actions. However, political preferences suggest that these proposals may face the same fate as the 1970s proposed reforms to expand the availability of class action remedies.

It is possible, notwithstanding the Supreme Court's admonitions, that courts could act without congressional involvement. Many judges feel they are acting as the fiduciaries for the absent plaintiffs in these sorts of cases,¹⁶⁴ and Judge Weinstein's comment about the judiciary's commitment to administer class action litigation if Congress does not create an administrative agency is telling.¹⁶⁵ Even the Supreme Court has left the door open. *Amchem*, after all, does not say that settlement cannot be a significant factor in class certification, merely that it cannot be the only factor.¹⁶⁶

It may very well be that, barring a transsubstantive reform of class action procedure, the judiciary will craft its own solution through the rulemaking process, which, notwithstanding the mandate of the Rules Enabling Act, will have significant substantive implications. This is not a desirable solution. When the judiciary makes rules that potentially conflict with the REA's prohibition against rules affecting substantive rights, it faces the risk of creating rules with questionable constitutionality under separation of powers doctrine.¹⁶⁷ Congress has the power to intervene in a positive and effective way in reforming class action litigation. However, Congress's current approach to dealing with the problem by simply curtailing access to the remedy does not constitute an effective use of that power.

litigation is notoriously expensive and arguably threatens to inundate the federal docket. Mass tort class actions could then be a more effective system, at least in terms of their ability to deliver compensation to victims, even if they are characterized by much self-interested behavior and a resulting high rate of suspicious settlements.

Id.

164. See FEDERAL JUDICIAL CENTER, MANUAL (THIRD) FOR COMPLEX LITIGATION 211-12 (1995) (noting the courts' "residual responsibility to protect the interests of class members").

165. See WEINSTEIN, *supra* note 25, at 170. Professor Judith Resnik also notes circumstances in which the Multidistrict Litigation statute has been used to create "de facto mandatory class actions" to increase mass tort administrability. See Resnik, *Aggregation*, *supra* note 49, at 930-31.

166. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997).

167. See Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 46 & n.20 (1988) (noting limits to judicial rulemaking theoretically imposed by separation of powers doctrine).