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Melissa A. Waters

COMMON LAW COURTS IN AN AGE OF EQUITY PROCEDURE: REDEFINING APPELLATE REVIEW FOR THE MASS TORT ERA

MELISSA A. WATERS*

From expansion of tort liability rules, to novel claims aggregation and settlement techniques, to statistically derived liability and damages assessments, mass tort litigation is producing unprecedented innovations at every level of the federal legal system. What is particularly striking about these innovations is that they are almost exclusively the product of a handful of federal trial judges who specialize in mass tort cases. Because appellate courts lack the necessary tools to supervise their decisions, these few mass tort trial judges are shaping the rules that govern the mass tort legal regime with little or no appellate supervision. The result is a dramatic imbalance of power between trial and appellate courts, one that hinders the proper development of the mass tort regime. This Article explores the historical reasons for this phenomenon, as well as its consequences for mass tort litigation. It argues that federal trial and appellate procedure have become increasingly uncoupled, with appellate courts relying on a common law-based procedural model while trial courts have adopted a much more flexible equity-based model. The Article examines the gradual evolution of appellate review in response to this phenomenon, as some appellate courts begin to shift from a common law-based model of appellate procedure to an equity-based model that recognizes the need for flexible interlocutory

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review in mass tort cases. It argues that further development of an equity-based model is essential to ensure a strong appellate voice in shaping the mass tort regime. In addition, the Article offers strategies for encouraging the continued development of an equity-based model, as well as guiding principles in choosing appellate review mechanisms for mass tort litigation. It concludes that a deliberate and systematic approach to interlocutory review, utilizing the writ of mandamus, can restore the proper balance of power between trial and appellate courts and ensure a strong appellate voice in the development of the mass tort regime.

From the asbestos and breast implant cases of earlier decades, to today's tobacco and Fen-Phen litigation, to nascent class actions against the manufacturers of cell phones and genetically modified food, mass tort litigation is producing unprecedented innovations at every level of our legal system. Few legal subdisciplines have remained immune from this urge to innovate. From expansion of tort liability rules, to novel claims aggregation and settlement techniques, to statistically derived liability and damages assessments, the mass tort regime is producing what Professor Peter Schuck calls "some of the most far-reaching innovations in judicial history."[1] These

1. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80

innovations have dramatically altered the legal landscape not just for mass tort cases, but increasingly for other complex cases as well.

What is particularly striking about these innovations is that they are almost exclusively the product of a handful of so-called "mass tort trial judges": federal trial judges who have become specialists and repeat players in the mass tort arena, their own caseloads mirroring the changes in the mass tort landscape.[2] Working in unusually close concert with one another and with an equally small number of mass tort scholars, the work of mass tort trial judges "constitute[s] a firm, self-conscious judicial commitment to the project of systematizing and refining mass tort litigation into a distinctive genre with its own rules and practices."[3]

Yet for the most part, mass tort trial judges are creating, systematizing, and refining the genre alone, without the guidance of appellate courts. In shaping the new rules that govern the mass tort regime, these trial judges rely heavily on the flexible equity practice that has long dominated federal trial procedure—one that encourages disposition of claims (and thus the creation of new, controversial devices for handling those claims) through pretrial rulings and settlement rather than trial. But in attempting to review these innovations, appellate courts are still constrained by the inflexible rules of traditional common law practice, which discourages appellate involvement in the pretrial process in favor of post-trial review upon final judgment. Because mass tort litigation almost exclusively emphasizes pretrial maneuvering and settlement, appellate courts

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CORNELL L. REV. 941, 956 (1995). "These innovations include novel claims aggregation techniques, statistically-derived outcomes, administration of discovery, damages assessments, advanced courtroom technologies, more systematic alternative dispute resolution efforts, and coordinated federal-state court proceedings." *Id.* at 956–57. *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (discussing innovations in civil procedure, including the controversial settlement class action).

2. *See infra* Part II.B (discussing the rise of the "mass tort trial judge"). While this Article focuses on innovations at the federal level, interesting changes are occurring in both trial and appellate procedure at the state court level as well, partly in response to mass tort litigation. *See, e.g.*, Fred Misko, Jr. & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 BAYLOR L. REV. 1001, 1068–72 (1996) (discussing a Texas Supreme Court ruling potentially signaling relaxed rules regarding mandamus in the mass tort context); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 991 & n.471 (1990) (discussing state courts experimenting with case tracking for different case types); David Scheffel, Comment, *Interlocutory Appeals in New York—Time Has Come For a More Efficient Approach*, 16 PACE L. REV. 607, 638–45 (1996) (proposing changes to the New York rules regarding interlocutory appeals).

3. Schuck, *supra* note 1, at 958.

never effectively review many of the most controversial rulings and innovations of mass tort trial judges. The consequences of this phenomenon, which I refer to as "procedural uncoupling,"[4] are twofold. First, the mass tort regime has experienced an unprecedented reallocation of power in favor of mass tort trial judges. Second, appellate courts lack the necessary tools to exercise their proper role in supervising the development of the mass tort regime.

Part I of this Article explores the historical reasons for the modern disconnect between mass tort trial judges and appellate courts.[5] It discusses how and why trial and appellate procedure became uncoupled in the federal system, with appellate courts continuing to follow the common law model while trial courts adopted a much more flexible equity-based model. Part II examines the special relevance of procedural uncoupling in the mass tort context, and discusses one of its major consequences on the mass tort regime: the dramatic reallocation of power to mass tort trial judges.[6] Part III examines the evolution of appellate review of mass tort litigation in response to this phenomenon, and identifies three distinct generational stages in that evolution.[7] It argues that the increased willingness of appellate courts to grant interlocutory review in mass tort cases reveals a gradual shift from a first-generation common law-based model of appellate procedure to a third-generation equity-based model. Additionally, Part III argues that further development of an equity-based model is essential to ensuring a strong appellate voice in shaping the substantive and procedural law that defines the mass tort regime as a whole. Part IV suggests ways to encourage the further development of an equity-based model.[8] It enumerates certain guiding principles in choosing appellate review mechanisms for mass tort litigation, and examines recent initiatives for reform of appellate review in light of these principles.

4. Professor Stephen Yeazell first noted the phenomenon of "procedural uncoupling" in his 1994 article, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 641 (stating that trial and appellate procedure have become "uncoupled").

5. *See infra* notes 9–46 and accompanying text.

6. *See infra* notes 47–107 and accompanying text.

7. *See infra* notes 108–268 and accompanying text.

8. *See infra* notes 269–323 and accompanying text.

I. TAKING COMMON LAW APPEALS FROM EQUITABLE DECISIONS: THE MODERN UNCOUPLING OF TRIAL AND APPELLATE PROCEDURE

The modern power imbalance between mass tort trial judges and appellate courts has its roots in a striking historical phenomenon that, although it has received scant attention from legal scholars, has had a dramatic impact on modern civil process. Throughout the twentieth century, trial and appellate procedure in the federal system have evolved along two divergent paths: Procedural law at the trial level increasingly draws upon the flexibility and expansiveness of the equity model, while at the appellate level the law clings to a relatively strict, inflexible common law model. In this Part, I trace this phenomenon, first noted by Professor Stephen Yeazell, which I shall refer to as "procedural uncoupling."[9] While Professor Yeazell described procedural uncoupling as dating from the creation of the 1938 Federal Rules of Civil Procedure,[10] I posit a more expansive view of procedural uncoupling, tracing its origins to the Judiciary Act of 1789 that established the federal court system.[11]

A. The Relationship Between Trial and Appellate Procedure in the Early American Legal System

Until the twentieth century, trial and appellate procedure in Anglo-American jurisprudence worked in tandem to ensure a reasonably efficient allocation of resources and a rough balance of power between trial and appellate courts.[12] By the early sixteenth century, for example, the English common law and equity courts had developed two distinct approaches to appellate review, in keeping with their distinct procedural systems and jurisprudence.[13] The English common law courts handled relatively simple cases derived from a limited number of writs.[14] Appeal from a common law cause

9. *See* Yeazell, *supra* note 4, at 641 (stating that trial and appellate procedure have become "uncoupled").

10. *See id.* at 660–64 (discussing how the Federal Rules of Civil Procedure created a new set of important pretrial rulings that were effectively unreviewable by appellate courts still applying the common law final judgment rule).

11. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

12. *See, e.g.*, Yeazell, *supra* note 4, at 642 (describing the "reciprocal relationship between trial and appellate courts"); *id.* at 644 (noting that the nineteenth century's "symbiotic relation between trial court process and appellate review was a powerful force").

13. For a summary and comparison of English common law and equity procedure, see Subrin, *supra* note 2, at 914–21.

14. *See id.* at 914–18.

of action was available only upon entry of a final judgment—the so called "final judgment rule."[15] The historical common law rule made no formal provision for interlocutory appellate review of trial court decisions; interlocutory review was available only by extraordinary writ, and only in very limited circumstances.[16] Because common law causes of action were fairly simple, and most often characterized by a single judicial decision produced at a single hearing before the lower court, appellate courts could rely on the final judgment rule to provide adequate supervisory authority over the lower courts.

By contrast, the equity branch of the English legal system, the Court of Chancery, permitted virtually unlimited interlocutory appellate review.[17] Because most of the cases in the Court of Chancery involved complicated disputes unsuited to the simple common law forms of action, equity jurisprudence developed a number of flexible procedural devices and equitable remedies to handle these complex cases.[18] Thus, the lower equity courts enjoyed far greater power and latitude in decision-making than their common law counterparts. Easier access to interlocutory appellate review provided the necessary counterbalance to this increased flexibility at the lower court level. In short, adherence to the common law's final judgment rule would not have made sense in the equity context; "equity had a more elastic procedure, and also required a less rigid

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15. The source for the final judgment rule lay in common law writ of error practice. The appellate court, King's Bench, corrected errors in the other common law courts only by writ of error upon termination of the original suit. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 (7th ed. 1956); 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3906, at 266–67 (2d ed. 1992) (quoting McLish v. Roff, 141 U.S. 661, 665–66 (1891)); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541–43 (1932).

The purposes behind the final judgment rule must be left largely to conjecture. The original motives behind the rule may have been merely formalistic. *See* Crick, *supra*, at 543–44. Professor Yeazell finds another possible justification for the existence of the final judgment rule in "the divided jurisdictions that long marked the common law." Yeazell, *supra* note 4, at 660 n.97. Yeazell argues that "[so] long as there were even vestiges of local or feudal courts, a royal writ of error implicated not just a bureaucratic but also a political line, one that it would be prudent to cross as infrequently as possible." *Id.*

16. *See* Crick, *supra* note 15, at 553–57 (analyzing four extraordinary writs as means to escape the application of the final judgment rule: mandamus, prohibition, certiorari, and habeas corpus).

17. *See* 1 HOLDSWORTH, *supra* note 15, at 438; Crick, *supra* note 15, at 547.

18. Equity courts utilized joinder devices, such as the "bill of peace" and "quasi-consolidation," and had the power to order pretrial discovery and to fashion equitable remedies. These equitable devices did not exist in the common law courts. For a discussion of various procedural devices used in historical equity practice and their comparison to modern devices used in mass tort litigation, see *infra* Part II.A.

practice on appeal to review the many and varied steps taken below."[19]

From the outset, however, the American legal system abandoned the sharp distinction between common law and equity that characterized English appellate procedure. Instead, the United States adopted a single common law model for appellate review of both common law and equity cases. In the Judiciary Act of 1789, Congress decreed that *all* appeals, whether arising out of common law or equity, could be taken from "final judgments" or "final decrees" only, thus abandoning the flexible interlocutory appellate review that characterized the equity model.[20]

Thus in the American system, trial and appellate procedure were formally uncoupled from the outset. The effects of this uncoupling, however, went largely unnoticed until well into the twentieth century.

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19. Crick, *supra* note 15, at 548. In addition, Crick identifies a formalistic justification for equity's policy of free resort to interlocutory review. He notes that in comparison to appeals from common law courts, appeals to the House of Lords from the Court of Chancery were established relatively late in legal history, during the latter half of the seventeenth century. *See id.* at 547. For the first three centuries of equity practice, the chancellor was considered the sole judge in chancery, and he passed on all decrees and interlocutory orders issued by the masters. When the House of Lords asserted appellate jurisdiction over chancery proceedings, it may simply have adopted the policy of free resort to interlocutory review that already existed. *See id.* at 547–48.

20. Judiciary Act of 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83–87 (1789). The United States Congress's application of the final judgment rule to both common law and equity cases was part of a larger trend in American civil procedure: As early as 1779, states began to enact statutes applying the common law final judgment rule to cases arising out of equity. *See* Crick, *supra* note 15, at 550.

The decision to limit equity appeals by applying the common law rule in all proceedings was a strange departure from historical practice. Unfortunately, because of the sparse legislative history regarding the appellate provisions of the Judiciary Act of 1789, the original motives behind this decision are uncertain. *See* 15A WRIGHT ET AL., *supra* note 15, § 3906, at 264–68; Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 727 (1993); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 101–05 (1923).

One possible reason for the American departure from English practice is the general failure of early American jurisdictions to maintain a distinction between law and equity. At the lower court level, some states did establish separate equity courts; but many others simply combined the two legal systems by permitting their common law courts to hear equity cases or to grant equitable remedies. *See* Crick, *supra* note 15, at 550.

In addition, some commentators view the application of the final judgment rule to equity cases as evidence of the early American distrust of equity practice in general. They suggest that colonial Americans hoped to avoid the interminable delays that characterized English chancery proceedings by eliminating opportunities for interlocutory review. *See, e.g.*, Subrin, *supra* note 2, at 926–28; Yeazell, *supra* note 4, at 660–61. *But see* 15A WRIGHT ET AL., *supra* note 15, § 3906, at 264 n.4 (offering several other explanations for the limitations on equity appeals).

Throughout this early period, the common law final judgment rule generally provided sufficient appellate supervision of trial courts for two reasons. First, equity played a relatively unimportant role in the early American legal system. Early Americans distrusted equity,[21] and their laws reflected a decided bias in favor of common law jurisprudence and procedures.[22] As a result of this bias, the first several decades of federal jurisprudence were dominated by the common law writ system, and by the fairly simple cases that writ practice produced.[23] In this context, the common law final judgment rule operated reasonably efficiently as a supervisory mechanism, ensuring a rough balance of power between trial and appellate courts.[24]

Second, as the common law writ system began to disintegrate in the nineteenth century, dramatic changes in trial procedure ensured that the final judgment rule continued to be an effective supervisory tool. As the writs decayed, a new body of procedural law (developed largely by appellate courts) refocused attention and judicial resources on the trial itself rather than on pleading or pretrial activities.[25] From

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21. To early Americans, equity courts represented interminable delays, needless expense, and, most importantly, unfettered judicial discretion. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54–55 (2d ed. 1985) (discussing early American distrust of equity courts); Subrin, *supra* note 2, at 926 n.90 (citing various sources for the proposition that colonists distrusted equity courts because of the delays, expense, and uncontrolled judicial discretion).

22. The earliest colonial courts, for example, exercised general jurisdiction over many different kinds of disputes that would have fallen into the separate jurisdiction of English common law or equity courts. *See* Subrin, *supra* note 2, at 927 & n.91. Some states simply combined the two legal systems by permitting their common law courts to hear equity cases or to grant equitable remedies. *See* FRIEDMAN, *supra* note 21, at 54. Moreover, whether operating as a separate court system or combined with the common law courts, the reach of equity was quite limited in many of the early state legal systems. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 657 (4th ed. 1996).

23. *See* Subrin, *supra* note 2, at 927–28 (noting that although the "writ system never developed the degree of sophistication in America that it achieved in England[,]" the American legal system relied heavily on common law forms and procedures from its inception through the 1820s).

24. *See* Crick, *supra* note 15, at 553. According to Professor Crick:

> In simple actions such as those which composed most of the litigation before the original common law courts, when the case is begun and finished in a short time, the limitation of appeal to the last or final judgment works with a fair degree of convenience, but when confronted with a long and complicated case such as often characterized the old chancery litigation, it breaks down completely.

Id.

25. *See* Yeazell, *supra* note 4, at 642. As Professor Yeazell notes:

> Because trials had become more important as the writs decayed, the new procedure naturally focused on trial. Its chief ingredients were tightened control over the proof (the law of evidence), increased stress on precision in legal

the age of common law, civil litigation in the federal system had entered a new era—the age of trial[26]—where the trial itself had become the focal point of civil process.

In the nineteenth-century age of trial, an appellate procedure based on the common law model continued to ensure close appellate supervision of trial courts. In this system, "procedure had concentrated itself on the trial, and trials by their nature yielded judgments that were subject to prompt appellate review."[27] The common law final judgment rule permitted rapid review of decisions made at trial, enabling appellate courts to supervise closely the procedural and substantive law developed in the course of those trials.[28] In the nineteenth-century age of trial, then, the operation of the final judgment rule on a trial-oriented system resulted in a powerful role for appellate courts,[29] and in a strong link between trial and appellate procedure that endured until well into the twentieth century.[30]

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guidelines (the law of jury instructions), and increased control over the relationship between evidence and verdicts (directed verdicts and new trial orders).

Id.; *see also* FRIEDMAN, *supra* note 21, at 399 (discussing the emergence of these new branches of procedure and their effect on the relationship between trial and appellate courts in the nineteenth century).

26. Yeazell, *supra* note 4, at 646.

27. *Id.* at 644.

28. On the rare occasions when interlocutory appellate review might be necessary, whether in cases arising out of common law or equity, federal appellate courts could issue one of a number of traditional "extraordinary writs." These writs provided a sort of escape valve, easing application of the final judgment rule where strict application of the rule might work injustice. One of these writs, the writ of mandamus, is still used with some frequency by modern appellate courts as an interlocutory review device. The increasing use of mandamus has been the source of much recent controversy in the context of mass tort litigation. *See infra* Parts III & IV. For a discussion of the extraordinary writs and their historic use as interlocutory appellate review devices, see generally Crick, *supra* note 15, at 553–57 (discussing mandamus, prohibition, certiorari, and habeas corpus as "escapes" from the final judgement rule).

29. *See* FRIEDMAN, *supra* note 21, at 398–403; Yeazell, *supra* note 4, at 642. According to Professor Yeazell:

> Nineteenth- and early twentieth-century litigation operated under a degree of appellate scrutiny probably greater than had ever been known in the common law world. . . . If they were so disposed, appellate courts of that era could, as a practical matter, assure not only that the trial court conducted the trial according to law, but also that the outcome was consistent with the appellate judges' vision of justice.

Id. at 646.

30. Yeazell, *supra* note 4, at 645–46. Of course, like both the English common law and equity approaches that had preceded it, the nineteenth-century approach to civil process suffered from its own serious weaknesses. *See* FRIEDMAN, *supra* note 21, at 398–403 (discussing problems and complexities in nineteenth-century procedure). On many

Different though they were, the English equity model and the nineteenth-century American approach to civil procedure had something in common. Both models reflected a rough attempt to link appellate and trial procedure—that is, to give appellate courts powerful tools to review the decisions and supervise the activities of trial judges. In English equity practice, this tool was virtually unlimited interlocutory appellate review.[31] In the American system, until the twentieth century, the common law final judgment rule served a roughly analogous purpose.[32] In both systems, trial and appellate procedure worked in tandem to ensure that the supervisory power of appellate courts matched (in the case of English equity) or even exceeded (in the case of nineteenth-century America) the power of trial courts.[33] This close appellate supervision of rules and outcomes is precisely what is lacking in the modern federal system, and in the mass tort regime in particular.

B. The Twentieth-Century Resurrection of Equity-Based Trial Procedures: Trial and Appellate Procedure Become Increasingly Uncoupled in the Modern Age of Litigation

In the twentieth century, the strong link between trial and appellate procedure disintegrated, and the formal uncoupling created by the Judiciary Act's application of the final judgment rule to all appeals became increasingly problematic. The engine of change was the 1938 Federal Rules of Civil Procedure, which extended the reach of equity in trial procedure far beyond what previous reformers had envisioned, while leaving intact the common law model in appellate procedure. The drafters of the Federal Rules used trial procedures that had been designed specifically for federal equity cases as the

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levels, the new trial procedure that the system produced could be "a monster of technicality," and the heightened appellate scrutiny of lower court decisions "tended to reduce trial judges to a ministerial position." Yeazell, *supra* note 4, at 645–46. As Professor Yeazell points out, however, the following can be said in defense of the regime: "[I]t matched the creation of rules with the supervision of their application. . . . [I]ts virtue is that it insured close supervision of both rules and outcomes." *Id.*

31. *See supra* notes 17–19 and accompanying text.

32. *See supra* notes 20–30 and accompanying text.

33. *See, e.g.*, Yeazell, *supra* note 4, at 646–47 ("During the [nineteenth-century] age of trial, the final judgment rule resulted in rapid and searching review of procedure. The system kept a tight rein on trial judges."); *see also id.* at 640–41 (describing the "tight connection" between trial and appellate procedure).

basis for a new uniform system of procedure that attempted to "merge" common law and equity.[34]

A true merger of the two very different models proved impossible, however, and the 1938 Federal Rules transformed trial procedure by creating a set of flexible equity procedures that dominated and virtually obliterated the common law.[35] The effects of

34. The Federal Equity Rules of 1912 served as the basis for the unified procedure established by the 1938 Federal Rules of Civil Procedure. *See* Subrin, *supra* note 2, at 953, 970–71.

In attempting to "merge" common law and equity, the drafters of the Federal Rules shared the goals and built upon the work of nineteenth-century jurists who had attempted to simplify and codify civil procedure in a number of states. The codification reforms began with New York's 1848 Code of Civil Procedure (known as the "Field Code"), and by the turn of the century, only three states still clung to traditional common law pleading. *See generally* FRIEDMAN, *supra* note 21, at 391–411 (discussing the history of the Field Code and its reception in various state jurisdictions). The goal of the nineteenth-century reformers, however, was not the wholesale abandonment of the common law, but rather the merger of common law and equity—"to put an end to all special pleading, forms of action and writs, and to close the chasm between law and equity." *Id.* at 392. While the nineteenth-century codes drew heavily upon equity practice, *see* FRIEDMAN, *supra* note 21, at 393–94; Subrin, *supra* note 2, at 933, Professor Subrin points to powerful evidence that the reformers relied heavily upon the common law tradition for many of their reforms, as well. *See* Subrin, *supra* note 2, at 934–39. He argues that the code reformers were deeply concerned about limiting judicial discretion, and they therefore incorporated a number of reforms rooted in common law procedure into the codes in order to "make equity more like common law." *Id.* at 938. *See generally id.* at 933–39 (discussing the procedural reforms instituted by the Field Codes).

The merger of common law and equity envisioned by nineteenth-century reformers proved to be an elusive goal, however. *See* FRIEDMAN, *supra* note 21, at 398. In fact, it may have been the codes' failed attempt to achieve a true merger of common law and equity that motivated the drafters of the 1938 Federal Rules to try a bolder approach. As an early critic of the Field Code, Justice Samuel Selden of the Court of Appeals of New York, had argued, "It is possible to abolish [either common law or equity], but it certainly is not possible to abolish the distinction between them." FRIEDMAN, *supra* note 21, at 393–94 (quoting Reubens v. Joel, 13 N.Y. 488, 493 (1856)). Subsequent experience with the codes may well have suggested to the Federal Rules' drafters that this early assessment was correct, and they therefore abandoned the attempt to achieve a true merger of common law and equity. *See* Yeazell, *supra* note 4, at 648 (arguing that "[t]he Rules' drafters intended to end the battles over pleading that . . . to the disappointment of Code enthusiasts, had continued under the Field Codes"). Whatever the reasons behind the shift in favor of equity, the 1938 Federal Rules represented the final triumph of equity procedure over the common law. *See* Subrin, *supra* note 2, at 974. As such, the Federal Rules extended the reach of equity much farther than the nineteenth-century code reformers had proposed, and probably much farther than they would have wished. *See generally id.* at 943–1001 (explaining the historical background of the 1938 Federal Rules).

35. *See* Subrin, *supra* note 2, at 974 ("The Federal Rules were the antithesis of the common law and the Field Code. Through the Federal Rules, equity had swallowed common law."). For example, the Federal Rules brought an end to the pleading system that had characterized the common law period. Pretrial discovery had long been known in equity practice; the Federal Rules substantially expanded the scope of discovery and made

equity's triumph were quite dramatic. As Professor Yeazell notes, "[p]leading, which the Rules essentially abolished as a procedural hurdle, ended few cases. Trials, as matters turned out, would rarely occur. The Rules substituted a series of intermediate stages in place of trials—discovery, joinder, and judicial encouragement of settlement."[36]

Thus from the nineteenth-century age of trial, the federal legal system in 1938 entered a new era: the modern age of litigation.[37] In today's age of litigation, trial procedure is dominated by the Federal Rules' equity-based procedures—procedures that focus the energies and resources of trial judges, lawyers, and litigants on pretrial and settlement, rather than on the trial itself. Moreover, the system gives trial judges broad equitable powers and a flexibility previously unknown in the American legal system.[38]

At the federal appellate level, however, the twentieth-century story unfolded in a very different manner. Not only did the traditional common law rules governing appellate procedure remain the same; apparently, the drafters of the 1938 Federal Rules did not even consider the possibility of reforming appellate procedure in order to match the reforms that were taking place in trial procedure.[39] Instead, equity-based trial procedures have continued to grow and develop alongside an appellate procedure still firmly rooted in the

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it available in all types of cases. The common law permitted only narrow joinder of parties and claims; here, too, the Federal Rules adopted and even extended the equity approach by establishing very broad joinder rules with respect to both parties and claims. *See* Yeazell, *supra* note 4, at 648–54.

36. Yeazell, *supra* note 4, at 647; *see also* Subrin, *supra* note 2, at 913 (noting the "revolutionary character" of the changes brought about by the implementation of the Federal Rules).

37. *See* Yeazell, *supra* note 4, at 648.

38. One of the characteristic features of the age of litigation is the development of modern public law litigation. In his classic article identifying this phenomenon, Professor Abram Chayes describes public law litigation as follows: "[T]he dominating characteristic . . . is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). Classic examples of public law litigation are cases involving school desegregation, employment discrimination, and prisoners' rights, as well as some antitrust, securities, and environmental cases. *See id.* Professor Chayes points out the importance of equity-based trial procedures and equitable remedies in the growth of public law litigation. *See id.* at 1292–96.

39. Professor Yeazell explains the problem as follows: "Because the new sphere [of litigation] lay between pleading and trial, many of the new disputes would evade immediate appellate review unless we changed the principles of appellate jurisdiction. We did not; indeed, no one seems to have considered the question." Yeazell, *supra* note 4, at 660.

common law. In other words, twentieth-century federal civil procedure adopted equity's pretrial procedures without adopting equity's flexible interlocutory review.[40] Thus arose the phenomenon of procedural uncoupling, which began with Congress's decision in 1789 to apply the common law final judgment rule to equity cases, and was solidified by the 1938 Federal Rules' dramatic expansion of equity at the trial level. This phenomenon plays a key role in shaping the modern mass tort regime.[41]

C. *The Effects of Procedural Uncoupling*

In the modern age of litigation (and particularly in the modern mass tort regime), the common law final judgment rule operates in a vastly different legal universe and thus has very different consequences. As Professor Yeazell notes:

> [T]he power of the final judgment rule depends on the structure of the process preceding appeal. During eras in which a substantial proportion of trial court rulings produced judgments, the rule yielded prompt appellate review and tight appellate control. . . . By contrast, operating on processes that produce numerous rulings that do not result in judgment, the rule will decrease appellate control.[42]

In the nineteenth-century age of trial, the operation of the final judgment rule resulted in an extraordinarily high degree of appellate scrutiny of lower court rulings. By contrast, in the modern age of litigation, with its focus on equity-based pretrial procedures, the application of the common law final judgment rule has resulted in a decrease in appellate control over trial court rulings, and a concomitant rise in the power of trial court judges.[43]

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40. *See id.* at 661 ("Or, to put matters another way, it was the adoption of equity's pretrial processes *without* equity's interlocutory review that reallocated power to the trial courts.").

41. *See infra* Part II.

42. Yeazell, *supra* note 4, at 661.

43. *See id.* at 646–47 ("During the age of trial, the final judgment rule resulted in rapid and searching review of procedure .... Today, in the dawning age of litigation, the final judgment rule results in late and little review."). Professor Carrington has also decried the decrease in appellate control in the modern federal system. *See* Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & POL. 515, 521–22 (1999). According to Professor Carrington:

> Because the institutional concerns animating the creation of the courts of appeals are everyone's business, they are no one's special concern. There is, therefore, no political constituency for reform facing squarely the erosion of the quality of the federal appeal as an assurance that district judges and administrative agencies are accountable for the exercise of their vast powers.

Id.; *see also id.* at 526 (agreeing with early twentieth-century reformer Roscoe Pound's

An equally important point, one that Professor Yeazell does not discuss, is that in the age of litigation, the phenomenon of procedural uncoupling has a more dramatic impact on some kinds of cases than others. In cases that are likely to proceed to final judgment, the final judgment rule presents fewer problems; though the rule may indeed result in "late and little review,"[44] the opportunity for appellate review remains available. In the ever-increasing categories of cases where settlement prior to judgment is the norm, however, the final judgment rule (absent interlocutory review possibilities) results in no appellate review at all.[45] In other words, the more a particular category of litigation is centered around equity-based pretrial procedures, the less effective the final judgment rule will be to ensure adequate appellate review. In such cases, the consequences of procedural uncoupling are particularly dramatic, and the availability of interlocutory review mechanisms is crucial in ensuring adequate appellate review.[46]

II. PROCEDURAL UNCOUPLING AND THE MASS TORT REGIME

Nowhere is the phenomenon of procedural uncoupling more striking, or its consequences clearer, than in the shaping of the modern mass tort regime. Mass tort trial judges have taken the experiment in equity trial procedures begun in the 1938 Federal Rules in new directions that the drafters of those Rules surely never envisioned. Despite equity's triumph in mass tort trial procedures, appellate courts continue to rely heavily on the common law final judgment rule to supervise the activities of mass tort trial judges. The result is that a handful of mass tort trial judges are creating, shaping, and refining the rules that govern the mass tort regime, without substantial guidance from the appellate courts.

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view that "the appeal, if it does nothing else, is necessary to assure the litigants and the public that the judicial power is not vested in a single individual, but is exercised only by a larger institution," and noting that "We are so far from the attainment of that purpose that we now hear serious proposals to make even the first level of review discretionary.").

44. Yeazell, *supra* note 4, at 647.

45. *Cf. id.* at 648 ("[M]any of the Rules' innovations do not produce a trial court ruling at all, and of such trial court rulings, most do not result in a final judgment."). This phenomenon explains the growing concern over improving existing interlocutory review mechanisms to ensure adequate appellate review in these kinds of cases. *See infra* Parts III & IV.

46. In addition to mass tort litigation, one might expect procedural uncoupling to have a dramatic impact on other categories of litigation in which equity plays an important role—for example, litigation involving certain kinds of large group civil rights, securities, or environmental claims.

A. *The Influence of Equity in the Mass Tort Regime*

Historical equity practice has heavily influenced the modern mass tort regime.[47] Equity's influence is most prominent in four major areas: aggregation devices, the use of equitable remedies, discovery, and judicial encouragement of settlement.[48] In some of these areas, the techniques that courts have developed in response to the mass tort phenomenon trace their roots directly to historical equity practice.[49] Others are representative of the general twentieth-century shift in judicial mood to one that favors flexible approaches to procedural law that are consonant with historical equity's goals.[50]

Regardless of their historical roots, in each of these four major areas, the procedural devices used in modern mass tort litigation take equity practice far beyond what historical English equity judges, or even the drafters of the 1938 Federal Rules, would have dreamed possible. In addition, because these devices (like all equity-based trial procedures) tend to shift the focus of activity from trial to pretrial and settlement, they often remain immune from appellate review upon final judgment.[51] The result has been a decided power shift in favor of mass tort trial judges.

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47. *See* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 270. According to Weinstein and Hershenov:

> Considerations long associated with equity jurisprudence have driven the creative procedural and substantive responses of American courts to the many problems posed by complex multi-party, multi-issue mass tort cases.... [I]t is in toxic tort litigation that we can most clearly see equity at work in 'its traditional roles of adjusting legal rules that do not work well, providing a moral force, and shaping new substantive law.'

Id. (quoting Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 345 (1988))); *see also* Schuck, *supra* note 1, at 968 n.121 ("The common law of mass torts has borrowed extensively from equity jurisprudence, which empowers courts to exercise broad discretion in tailoring old doctrines, procedures, and remedies for application to the new, perplexing problems posed by mass torts.").

48. Novel forms of trial, such as bellwether cases, mini-trials, and the use of statistical sampling methods, is another area in which the influence of equity can be identified. *See generally* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993) (analyzing statistical sampling from outcome-oriented and process-oriented viewpoints); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998) (discussing statistical sampling as a possible solution to the "numbers problem" in mass tort litigation).

49. For example, the class action device, consolidation, and pretrial discovery trace their roots to historical equity practice. *See infra* Parts II.A.1, 3.

50. The use of equitable remedies and judicial encouragement of settlement are examples of this flexible approach. *See infra* Parts II.A.2, 4.

51. *See supra* notes 42–46 and accompanying text (discussing the operation of the final judgment rule on a system dominated by equity-based pretrial procedures).

1. Aggregation Techniques

The goal of historical equity practice was to bring all parties whose rights or property were involved in a particular controversy into the same forum in order to ensure a full, complete, and final adjudication of the dispute.[52] In the mass tort regime, this historical goal of equity has taken on a whole new meaning, as modern aggregation devices rooted in equity practice make possible the aggregation, adjudication, and settlement of thousands of individual claims in the same action.[53] Mass tort litigation has achieved this result largely through two aggregation devices: (1) the class action, and (2) consolidation through multidistrict litigation. Both devices trace their roots to English equity practice.[54]

The class action undoubtedly has been the most powerful aggregation technique in mass tort litigation to date.[55] Most trial judges have overcome their initial reluctance to use the class action device in mass tort cases, and many judges now enthusiastically embrace the device.[56] In addition, the creation of the settlement class action has resulted in a significant change in the mass tort procedural

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52. *See* Weinstein & Hershenov, *supra* note 47, at 281–82 ("The traditional aim of equity was 'to have in court all persons whose rights or property are involved in any particular litigation and to render a complete decree adjusting all the rights and protecting all the parties against future litigations.' " (quoting CHARLES W. BACON & FRANKLYN S. MORSE, THE REASONABLENESS OF THE LAW: THE ADAPTABILITY OF LEGAL SANCTIONS TO THE NEEDS OF SOCIETY 204 (1924))).

53. *See id.* at 281–302.

54. The modern class action has its roots in the English equity courts' "bill of peace," which enabled a plaintiff to join all claims and defendants in a single suit. *Id.* at 284. Consolidation traces its roots to the English procedure known as "quasi-consolidation." *Id.* at 292. Under quasi-consolidation, a court could stay actions pending against a defendant, and then try all common questions of law and fact in a single suit. *Id.*

55. *See, e.g.*, Coffee, *supra* note 1, at 1345 & n.3. According to Professor Coffee:

> By the end of the 1980s, . . . the tide began to turn in favor of class certification, as the advocates of aggregative techniques increasingly gained the upper hand over the defenders of individual litigant autonomy. Already, some have described this transition as a paradigm shift, signaling a fundamental movement away from the traditional bipolar organization of litigation to a new, more collectivized structure.

Id. at 1344–34.

Federal Rule of Civil Procedure 23 sets forth the requirements for certification of a federal class action. *See* FED. R. CIV. P. 23.

56. *See* Schuck, *supra* note 1, at 957–58. Professor Schuck points out that "[s]igns of judicial, scholarly, and professional acceptance of the use of class actions in mass tort litigation can also be seen in the current proposals to revise Rule 23 which, by setting forth explicit authority to certify mass tort class actions, are likely to make it easier for judges to do so." *Id.* For a general discussion of class action issues in mass torts, see Coffee, *supra* note 1; Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943 (2000).

landscape.[57] As a result of the settlement class action, the class action device itself—once the exclusive (and enormously powerful) weapon of the mass tort plaintiffs' bar—has now become a powerful tool in the hands of defendants.[58] The settlement class action did suffer brief setbacks when the Supreme Court rejected global class settlements of asbestos injury claims in *Amchem Prods., Inc., v. Windsor*[59] and *Ortiz v. Fibreboard Corp.*[60] In both cases, however, the Court upheld the validity of the mass tort settlement class action itself.[61] Moreover, recent case law and scholarly commentary suggest that the mass tort settlement class action has survived and even thrived in the post-*Amchem*, post-*Ortiz* era.[62]

Consolidation through multidistrict litigation ("MDL") is another aggregation device that has proven particularly successful in the mass tort context.[63] Although the rules governing MDL

57. In a settlement class action, plaintiffs for a proposed class and defendants together present the court with a sort of "fait accompli"—a class action complaint, along with a proposed settlement of the action. The parties agree beforehand to the composition of the class, and the court certifies the class (as defined by the parties) for settlement purposes only. *See generally* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995) (discussing settlement class actions).

58. According to Professor Coffee:

> Originally, the class action was viewed by both sides as the plaintiffs' weapon, a technique for extorting settlements even in non-meritorious cases.... But [over the past decade],... [d]efendants have not only adopted the class action as their preferred means of resolving their mass tort liabilities, but have also actually begun to solicit plaintiffs' attorneys to bring such class actions (as a condition of settling other pending litigation between them).... [T]his transformation is of historic significance: once a sword for plaintiffs, the modern class action is in some contexts increasingly becoming a shield for defendants.

Coffee, *supra* note 1, at 1349–50; *see also* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 601 (1997); Ian Gallacher et al., *Back to the Future? Product Liability Class Actions and Proposed Rule 23 Changes*, 64 DEF. COUNS. J. 195, 208 (1997) ("Indeed, there are indications that more large businesses are looking to the class action as a friend rather than a foe as long as the correct settlement can be negotiated.").

59. 521 U.S. 591 (1997).

60. 527 U.S. 815 (1999).

61. *See Ortiz*, 521 U.S. at 848–50; *Windsor*, 521 U.S. at 619–22.

62. *See* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 924–25 (1998). *See generally* Elizabeth J. Cabraser, *Class Action Update 2001: Mass Tort Trends, Choice of Law, Rule 23(f) Appeals, and Proposed Amendments to Rule 23*, ALI-ABA CONTINUING LEGAL EDUCATION COURSE OF STUDY, Feb. 28, 2001, *at* WL SF42 ALI-ABA 757 (discussing post-*Amchem* and *Ortiz* case law and analyzing the impact of these decisions on class action jurisprudence).

63. *See* Weinstein & Hershenov, *supra* note 47, at 292–300. The multidistrict litigation statute authorizes the mandatory transfer of all "civil actions involving one or more common questions of fact ... pending in different districts" for consolidated pretrial proceedings before a single district judge. 28 U.S.C. § 1407(a) (1994). The transfer must

consolidation appear to be quite different from those governing class certification, in practice aggregation of mass tort claims through MDL shares much in common with aggregation through class certification.[64] For example, while the MDL statute formally authorizes consolidation for pretrial proceedings only, the MDL device, like the class action device, most often results in settlement or other disposition of the transferred cases before the transferee judge.[65] In some instances, transferee judges have even presided over a mass trial of the consolidated claims.[66] In fact, MDL consolidation often proves to be an even more powerful aggregation technique in mass tort litigation than the class action device: Individual claimants have no right to opt out of the MDL consolidation, as they typically do in a mass tort class action.[67]

The drafters of the 1938 Federal Rules would scarcely recognize the dramatic innovations in aggregation techniques that the Federal Rules' liberal joinder policy made possible. They could not have foreseen, for example, that a federal judge would one day attempt to

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be "for the convenience of the parties and witnesses" and must "promote the just and efficient conduct of such actions." *Id.*

According to Professor Judith Resnik, "in the first six years of the MDL [enacted in 1968], about a quarter of the MDL litigations certified were mass torts. In the following ten years, about a third of the cases certified were mass torts." Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 929 (1995). Professor Resnik also points out that MDL and the class action device are often used in conjunction to aggregate a mass tort: "[I]n four of the last five years, half of the cases certified as MDLs included class action allegations." *Id.*

64. For an intriguing analysis of the interrelationship between class action and MDL, see Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 46–50. Professor Resnik points out that although both devices "have had a great impact on federal courts' capacity to treat cases in the aggregate and on contemporary understandings of when aggregation is appropriate, . . . the 1966 class action rules were greeted with controversy, while the 1968 MDL statute was met with warm praise." *Id.* at 46. She explains that "class actions were expressly aimed at 'enabling litigation,' " while "the MDL statute was set forth as a vehicle only to 'expedite' litigation already filed." Thus in Professor Resnik's view, MDL "has been a 'sleeper'—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments." *Id.*

65. *See id.* at 35 (pointing out that most cases are disposed of in the transferee district, often by settlement). Professor Resnik quotes a member of the MDL panel, who stated in 1977 that "[i]n point of fact, slightly less than five percent of the actions transferred by the Panel have been remanded [to the transferor districts]." *Id.* (alteration in original); *see also* Resnik, *supra* note 63, at 928 ("While technically these cases are only consolidated for pretrial practices, functionally MDL is the end point of many cases.").

66. *See* Weinstein & Hershenov, *supra* note 47, at 292. In *Lexecon, Inc. v. Milberg*, 523 U.S. 26, 27 (1998), the Supreme Court ruled that a transferee court lacks authority to assign transferred cases to itself for trial over the objections of a party. It remains to be seen what effect, if any, *Lexecon* will have on MDL consolidation in the mass tort context.

67. *See* Resnik, *supra* note 64, at 47; Weinstein & Hershenov, *supra* note 47, at 294.

join potentially millions of individual smokers nationwide into a single class action against several tobacco company defendants.[68] Nor could they have envisioned a class action purporting to settle the claims of potentially thousands of victims of asbestos before those individuals were even aware that they had asbestos-related injuries.[69] Both of these class actions eventually failed; however, despite some recent setbacks for proponents of the mass tort class action, courts are only beginning to map out the possibilities and limitations of aggregation in the mass tort context. Creative mass tort trial judges and lawyers may well have merely scratched the surface of the possibilities for innovation in this important aspect of equity trial procedure.

2. Use of Equitable Remedies

Another hallmark of historical equity practice was the ability of equity courts to fashion equitable remedies—that is, specific relief tailored "both to undo past wrongs and to regulate future conduct."[70] Here, too, the modern mass tort regime has greatly expanded the use of equitable remedies in innovative ways.

One increasingly prominent example of such innovation is the use of medical monitoring. In medical monitoring cases, rather than ordering defendants to pay a lump sum for claimants who may become injured at some future date, trial courts order the creation of an interest-bearing fund to compensate those claimants for the costs of monitoring their medical conditions.[71] The fund pays a portion of the claimants' "damages"—the costs of medical monitoring—as the costs accrue.[72]

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68. *See* Castano v. Am. Tobacco Co., 160 F.R.D. 544, 560–61 (E.D. La. 1995), *rev'd*, 84 F.3d 734, 737 (5th Cir. 1996).

69. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 381 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610, 620–24 (3d Cir. 1996), *aff'd*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 591 (1997).

70. Subrin, *supra* note 2, at 919. Common law courts, on the other hand, generally awarded only money damages. *Id.*

71. Thus, for example, the court might create a fund for cigarette smokers who, while not currently suffering from tobacco-related illnesses, want their medical conditions monitored so that they can take appropriate action in the event that such illnesses develop in the future. *See, e.g.*, Barnes v. Am. Tobacco Co., 984 F. Supp. 842, 852–53, 870–73 (E.D. Pa. 1997) (analyzing whether liability should attach for medical monitoring claims when the smoker knew or should have known the risks that smoking posed for development of serious latent diseases), *aff'd*, 161 F.3d 127 (3d Cir. 1998). For a general discussion of medical monitoring, see Weinstein & Hershenov, *supra* note 47, at 316.

72. *See* Weinstein & Hershenov, *supra* note 47, at 316.

A related equity-based innovation is the use of court-ordered settlement funds and distribution plans, often with the ongoing supervision of the fund by the trial court or by a court-appointed committee.[73] The classic example of this technique is the settlement and distribution plan created by Judge Weinstein in the Agent Orange litigation.[74] The settlement plan established two separate funds—a "Payment Program" to provide cash payments to individual veterans and their families, and a "Class Assistance Plan" to provide grants to veterans' organizations that provide various kinds of services to the veterans and their families.[75] As Judge Weinstein and Eileen Hershenov note: "This kind of arrangement would not have been possible under strict tort law. It is an example of a court attempting, with limited resources, to fashion an equitable remedy to a pressing problem."[76]

Finally, the equity-oriented bankruptcy laws have played a key role in mass tort litigation. According to Weinstein and Hershenov, "the strategy employed by some mass tort defendants of seeking corporate reorganization under the bankruptcy laws ... has introduced into the mass tort field corporate-insolvency remedies that

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73. *See* Weinstein & Hershenov, *supra* note 47, at 319 ("Some examples of mass tort resolutions that moved away from the tort system and instead set up administrative, insurance-type installment payment plans supervised by the courts already exist. In these plans matters of equity—namely, the value of removing great burdens on the courts and of achieving closure for the parties and for society—were elevated above the concerns of giving individual due process or of following strict rules of law.").

74. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 206–23 (enlarged ed. 1987); *see also* Weinstein & Hershenov, *supra* note 47, at 320 (discussing Agent Orange plan as equitable remedy). Another prominent example is the Dalkon Shield Claimants Trust, a personal injury compensation trust fund established as part of the A.H. Robins Bankruptcy Reorganization Plan to compensate women injured by the Dalkon Shield IUD device. *See* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 287–325 (1991).

The Agent Orange litigation began in 1978, when several veterans of the Vietnam War and their families filed suit in the Eastern District of New York against the chemical companies that had produced the herbicide Agent Orange, used by the United States military throughout the war as a defoliation agent. By the time the parties settled the litigation six years later, it had become possibly the largest personal injury litigation in U.S. history. In May 1984, Judge Weinstein approved the settlement of the Agent Orange class action, comprising a class of 2.4 million U.S. Vietnam veterans exposed to Agent Orange, their wives and children, and exposed Vietnam veterans from New Zealand and Australia. A network of hundreds of plaintiffs' lawyers from around the country represented the class. For an analysis of Judge Weinstein's approach to managing and settling the Agent Orange litigation, see *infra*, Part III.B.1. *See generally* SCHUCK, *supra* (discussing the Agent Orange litigation in detail).

75. *See* SCHUCK, *supra* note 74, at 212–13, 220; *see also* Weinstein & Hershenov, *supra* note 47, at 320–21.

76. Weinstein & Hershenov, *supra* note 47, at 320.

developed in the courts of equity."[77] In the mass tort context, bankruptcy serves several purposes. First, it serves as a powerful mandatory aggregation device, bringing together all claimants to a defendant's funds in one forum[78] and in some cases putting enormous pressure on those claimants to accept class certification.[79] Second, bankruptcy proceedings place considerable equitable powers of supervision in the hands of the trial court.[80] A judge may stay all federal and state actions while the bankruptcy is pending; in addition, in the federal system the district court can take over the bankruptcy and conduct the proceedings itself.[81] Finally, mass tort bankruptcies tend to result in the creation of settlement funds and distribution plans—plans that are "essentially administrative compensation programs designed to continue for some years."[82]

3. Discovery

The broad equity-based discovery rules introduced by the 1938 Federal Rules have played a key role in the growth of the modern mass tort regime.[83] The broad language of the discovery rules gives trial judges enormous discretionary power and flexibility in shaping pretrial discovery in complex cases. Through the use of innovative discovery rulings, trial judges presiding over mass tort litigation are,

77. *Id.* at 305. Professor Schuck notes that "[i]n the asbestos field alone, fourteen companies had [declared bankruptcy] as of July 1991." Schuck, *supra* note 1, at 947 n.27.

78. In this sense, bankruptcy is similar to MDL consolidation and "limited fund" class certification under Rule 23(b)(1)(B), neither of which allows plaintiffs to opt out of the class.

79. *See* Weinstein & Hershenov, *supra* note 47, at 290–91 (citing the Dalkon Shield litigation as an example).

80. *See id.* at 291, 305.

81. In the Dalkon Shield litigation, for example, Judge Merhige canceled the assignment of the A.H. Robins bankruptcy to the bankruptcy judge and reassigned the bankruptcy to himself. *See* SOBOL, *supra* note 74, at 60–63.

82. Weinstein & Hershenov, *supra* note 47, at 320. Weinstein and Hershenov argue that the reach of equity should be extended much farther in the mass tort context by treating all mass tort cases as bankruptcy-type proceedings. *Id.* at 303. For an opposing view, see ALI, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 12 (1994) ("Serious questions . . . can be raised as to whether bankruptcy courts can cope with the massive litigation ancillary to a complex reorganization proceeding, as well as whether they can achieve equity between early- and late-filing claimants."). *See generally* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) (examining how an otherwise solvent company can use the bankruptcy system to protect itself from massive tort liability).

83. Pretrial discovery was a well-established procedural device in historical equity practice. *See* Yeazell, *supra* note 4, at 649 (citing GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL (1932)); *see also* Subrin, *supra* note 2, at 919 (noting that the defendant's response to each sentence of the petitioner's bill, as well as to the chancellor's own questions, was the precursor to modern pretrial discovery).

to a large extent, able to shape that litigation in the ways that they see fit.[84] Moreover, discovery rulings are virtually immune from appellate review.[85] Appellate courts' traditional reluctance to interfere in pretrial discovery is even more likely to be true in mass tort litigation, where appellate courts are keenly aware of the severe difficulties that trial courts face in supervising discovery.[86] Thus, the ability to shape the litigation through discovery rulings, with little or no appellate supervision, can be an especially powerful tool in the hands of creative mass tort trial judges.[87]

4. Judicial Encouragement of Settlement

Federal trial judges have long used the pretrial conference authorized by Rule 16 of the Federal Rules of Civil Procedure as an occasion for discussing settlement possibilities.[88] While judicial

84. In mass tort litigation, the trial judge becomes an active manager of discovery—a "player" in the process, rather than a neutral umpire. *See In re* San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1015 (1st Cir. 1988) ("In [managing discovery in the mass tort context], the vista is not exclusively head-to-head, A against B, plaintiff versus defendant; the relationship is triangular, with the court itself as a third, important, player."). For a discussion of discovery in mass tort litigation, see, for example, Linda S. Mullenix, *Beyond Consolidation: Post Aggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 531–37 (1991) (discussing discovery procedures in two prominent mass tort cases: *Cimino v. Raymark Indus., Inc.* and *In re School Asbestos Litigation*).

85. As Professor Yeazell points out, "[a]ppellate review of trial court discovery rulings is rare; when review does occur, the appellant must demonstrate that the trial court 'abused its discretion,' a standard guaranteeing substantial insulation from appellate supervision." Yeazell, *supra* note 4, at 651–52.

86. For an example of an appellate court's reluctance to overturn a discovery order in a mass tort case, see *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d at 1020 (affirming the discovery order and noting that "[m]indful of the enormity of the litigation, and of its complexity, the fashioning of a more serviceable judicial handle on the case seems a consummation devoutly to be wished").

87. Another example of trial court power over discovery in mass tort cases is the discovery scheduling order approved by Judge Robert Parker in *Cimino v. Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex. 1989) (stating the discovery plan and schedule for depositions and medical examinations of the plaintiffs), *reprinted in* LINDA S. MULLENIX, MASS TORT LITIGATION: CASES AND MATERIALS 500–03 (1996). In *Cimino*, Magistrate Judge Earl S. Hines placed severe limits on the amount of discovery that defendants could obtain from over three thousand individual plaintiffs. *See id.* In addition, he limited the depositions of those plaintiffs to forty-five minutes each, on an expedited calendar schedule. *Id.* Judge Robert Parker approved Magistrate Hines's plan, *id.*, and the defendants sought a writ of mandamus from the Fifth Circuit Court of Appeals to overrule the district court. *In re* Fibreboard Corp., 893 F.2d 706, 707 (5th Cir. 1990). The court of appeals refused to reach the discovery issue altogether, despite the defendants' arguments that the discovery order violated due process and the Seventh Amendment right to a jury trial. *Id.* at 709. Although the Fifth Circuit reversed Judge Parker's trifurcated trial scheme, the pretrial discovery orders remained intact. *See id.*

88. Rule 16 was revised in 1983, and again in 1993, to explicitly encourage judicial

efforts to encourage settlement have greatly expanded throughout federal civil litigation,[89] judicial encouragement of settlement has played a particularly crucial role in mass tort litigation.[90]

Again, the classic example is Judge Weinstein's role in the settlement of the Agent Orange litigation. As Professor Peter Schuck notes: "From the moment Weinstein entered the Agent Orange case, the goal of settlement was uppermost in his mind."[91] To achieve that end, Judge Weinstein took the highly unusual step of appointing special masters specifically for the purpose of facilitating settlement negotiations.[92] Throughout the settlement process, however, Judge Weinstein himself remained intimately involved in the details of hammering out a settlement, even ordering plaintiffs' and defendants' counsel to attend an around-the-clock weekend negotiating session on the eve of trial in an attempt to "break the logjam."[93] Rather than merely acting as a settlement facilitator, Judge Weinstein exerted tremendous pressure on the parties to settle the case.[94] "Weinstein exploited whatever leverage he could muster over the lawyers. While not actually threatening retribution if they refused to settle, he did use the ambiguity of his roles—as mediator and as ultimate decision maker—to play upon their fears, magnify the risks, and whittle down their resistance."[95]

Judge Weinstein's actions in the Agent Orange settlement may well represent the most powerful example to date of judicial encouragement of settlement in the mass tort context. But he is

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participation in settlement conferences. *See* FED. R. CIV. P. 16 advisory committee's note.

89. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. §§ 471–482 (1994)), contributed greatly to this movement by ordering every federal judicial district to consider the advisability of settlement conferences when drafting the "civil justice expense and delay reduction plans" required by the Act. *See* 28 U.S.C. §§ 471, 473 (1994).

90. For a general discussion of the role of the judge in settling mass tort and other complex cases, see Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

91. SCHUCK, *supra* note 74, at 143. For a discussion of the settlement process in the Agent Orange litigation, see *id.* at 143–67; Schuck, *supra* note 90, at 337–65.

92. SCHUCK, *supra* note 74, at 144. In fact, Judge Weinstein relied on the equity basis of mass tort class actions, and of the Federal Rules of Civil Procedure generally, to justify this unprecedented action: "Despite the fact that Rule 53 does not expressly contemplate the use of special masters as we have used them, for example to mediate settlement negotiations, such uses are within the liberal spirit of the rules and the tradition of equity from which they arose." Weinstein & Hershenov, *supra* note 47, at 302.

93. SCHUCK, *supra* note 74, at 150.

94. *Id.* at 160–61. Both plaintiffs' and defendants' counsel later complained that Judge Weinstein had exploited their fatigue and anxiety about the upcoming trial, and had exerted enormous pressure on both sides to settle the case. *Id.*

95. *Id.* at 163.

certainly not alone in his belief that this is the proper role for a mass tort trial judge.[96] Furthermore, with recent legislative efforts to encourage judges to take a more active role in settlement,[97] the legal system can undoubtedly expect to see much more of this type of judicial activity in future mass tort cases.[98]

B. *The First Consequence of Procedural Uncoupling: The Rise of the Mass Tort Trial Judge*

The use of flexible, equity-based trial procedures such as those discussed above has had an enormous impact on the development of the mass tort regime. As a result of these procedural devices, the major battles in mass tort cases occur well before any trial. Indeed, in the vast majority of cases, the trial judge and counsel for the parties understand from the outset of the litigation that a trial is extremely unlikely.[99]

Thus, the increasing prominence of equity-based trial procedure in mass tort litigation has resulted in a dramatic shift in focus from trial to pretrial maneuvering and settlement, and in a concomitant shift in power from appellate courts to trial courts. The vast majority

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96. *See* Peter Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 491 (1998) (identifying other mass tort trial judges who have "employed a broad range of managerial tactics in order to shape the litigation so as to discourage weak claims, avoid jury trials, and forge settlements"); *id.* (arguing that "mass tort judges have sometimes used what might be called strong-arm tactics in order to pressure lawyers into reaching agreement in cases that might otherwise have gone to trial").

97. *See supra* note 89 and accompanying text (discussing the Judicial Improvement Act of 1990).

98. Of course, judicial control over all of the procedural devices discussed above—aggregation, discovery, bankruptcy—can transform these devices into powerful tools in inducing settlement of a mass tort case. For example, Judge Weinstein stated that one of his major reasons for certifying the Agent Orange litigation as a class action was to increase the pressure on the defendants and on the government to settle the case. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983) ("Third, certification may encourage settlement of the litigation."), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *id.* at 723 ("Finally, the court may not ignore the real world of dispute resolution .... [A] classwide finding of causation may ... enhanc[e] the possibility of settlement among the parties and with the federal government.").

In addition, trial judges may use the unavailability of interlocutory review to increase litigant uncertainty, thus helping to induce a settlement. *See infra* note 124 and accompanying text (discussing trial court refusal to grant interlocutory appellate review as a means to place pressure on parties to settle).

99. In this regard, Professor Schuck notes: "At a recent conference on class actions, none of the large group of knowledgeable participants could think of a single nationwide products liability or property damage class action that had gone to trial." Schuck, *supra* note 1, at 958–59 n.85. In settlement class actions, by definition, trial is not even a possibility.

of pretrial rulings are not subject to any appellate review at all; for the handful of rulings that are subject to review, the great deference accorded to trial judges in pretrial matters virtually ensures that those rulings will stand.[100] Indeed, in mass tort cases, the problem is compounded. Inadequate interlocutory review mechanisms ensure that many highly controversial pretrial rulings will not be reviewed until a final judgment or settlement is entered.[101] When a mass tort case does eventually reach appeal, however, even very doubtful trial court rulings that would not have survived interlocutory review are much more likely to be upheld at this late stage. A carefully crafted settlement represents months or even years of trial court time, resources, and energy, and an appellate panel will be extremely reluctant to overturn such a settlement on any but the most compelling grounds.[102]

As a result, one dramatic consequence of procedural uncoupling has been the emergence and relative independence of "mass tort trial judges"—that handful of judges who have become specialists and repeat players in the mass tort arena.[103] By employing an amazing variety of flexible and innovative approaches to both procedural and

100. *See* Yeazell, *supra* note 4, at 651–52.

101. *See infra* Part III. Of course, I do not suggest that appellate courts should review every single pretrial ruling in mass tort cases, or even every highly controversial ruling. Rather, appellate courts must have access to adequate interlocutory review mechanisms to enable them to review key pretrial rulings when they believe it is necessary—for example, to provide guidance to lower courts in adjudicating particular disputes, or to shape the rules governing the mass tort regime generally.

102. *See infra* notes 161–68 and accompanying text (discussing the Second Circuit's decision upholding settlement of the Agent Orange litigation, despite its skepticism as to the validity of key pretrial rulings); *see also* Schuck, *supra* note 1, at 973–74 & n.146 (noting that appellate review is a "particularly weak coordinating mechanism[] in the tort context," and "[t]his point applies a fortiori to mass tort litigation, where the trial judge's managerial imperatives are so compelling, and where the appellate court is often presented with a fait accompli that, however legally defective, may be effectively irreversible.").

103. They include Judge Thomas Lambros of the Northern District of Ohio, Judge Samuel Pointer of the Northern District of Alabama, Judge Charles Weiner of the Eastern District of Pennsylvania, and Judge Jack B. Weinstein of the Eastern District of New York. Schuck, *supra* note 96, at 491. According to Professor Schuck, "These judges have dominated the [mass tort] field almost since its inception, often jockeying to gain control of the most challenging and notorious cases." *Id.*; *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1838–41 (1995) (discussing the transition of the judge's role in mass tort cases "[f]rom umpire to manager to player" and noting that "judge-shopping has developed into a fine art, and the incentives for judges to be viewed as gurus of mass torts have become strong"). Professor Schuck further points out that mass tort trial judges "have even established professional organizations and informal consultations that actively facilitate learning and coordination in mass tort cases." Schuck, *supra* note 1, at 957.

substantive law, these specialists have become "adept at routinizing the extraordinary."[104] Moreover, as a result of the modern uncoupling of trial and appellate procedure, mass tort trial judges have created and refined the majority of these innovations with minimal appellate supervision.

The purpose of this Article is not to enter the highly charged debate over the appropriateness of the activities of mass tort trial judges.[105] Nor do I wish to focus on the appropriate limits of current innovations in discovery, aggregation, equitable remedies, or settlement techniques. Rather, my argument is a narrower one: If dramatic innovations in procedural and substantive law are to take place as a result of the mass tort regime, mass tort trial judges, specialists though they may be, must be able to look to the appellate courts for guidance as to the appropriate limits of such innovation.[106]

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104. Schuck, *supra* note 1, at 957; *see also id.* at 974 n.148 (speculating that "some judges in mass tort cases, such as Jack Weinstein, Robert Parker, and Thomas Lambros, sometimes compete to be the most innovative").

105. For example, Professor Mullenix has been a particularly harsh critic of Judge Weinstein's conception of the trial judge's proper role in mass tort cases. *See* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 580 (1994). She argues:

> Indeed, as Judge Weinstein discusses the various functions he believes that the good judge ought to perform in mass tort cases, one senses that Judge Weinstein's vision is indeed for the judge to be an instrument of the Lord. Judge Weinstein's good judge not only knows what constitutes the communitarian good, but armed with this knowledge, the good judge induces lawyers, claimants, expert witnesses, court-appointed adjuncts, and the public toward a transcendental resolution of mass tort cases.

Id. at 590. She concludes, "[a]s for me, I prefer judges in their robes, and on the bench." *Id.* at 591.

On the other hand, Judge Weinstein's supporters are equally enthusiastic in championing his cause and methods. For example, Judge James Oakes, Senior Circuit Judge for the Second Circuit, comments:

> I am a person sufficiently old-fashioned . . . who, like Judge Weinstein himself, still believes that a federal judge *can* make a difference, and . . . should make a difference when the rest of our political structure bogs down. To be sure, this requires judicial independence . . . . If that be "activism," let them make the most of it; praise Jack Weinstein and pass the ammunition!

James L. Oakes, *Jack Weinstein and His Love-Hate Relationship with the Court of Appeals*, 97 COLUM. L. REV. 1951, 1957 (1997). For further debate on the proper role of the mass tort trial judge, see Weinstein & Hershenov, *supra* note 47, at 275–77, 321–26 (discussing and responding to various criticisms of the activities of mass tort trial judges and of the heavy influence of equity in the mass tort regime).

106. Judge Weinstein admits that innovation in mass torts is in need of limits, and would look in part to federal legislation to address the problem: "Without federal legislation too much depends on the views of the individual trial judge—in others words, on the 'size of the chancellor's foot.' " Weinstein & Hershenov, *supra* note 47, at 318 (citation omitted). He adds: "We are beginning to address the problem through pending

Professor Schuck has argued: "However one evaluates these changes, ... they constitute a firm, self-conscious judicial commitment to the project of systematizing and refining mass tort litigation into a distinctive genre with its own rules and practices."[107] My argument, then, is that if such a project is to be legitimate, it must proceed with the active involvement and supervision of the appellate courts.

III. THE APPELLATE COURTS RESPOND TO PROCEDURAL UNCOUPLING: MASS TORT APPELLATE REVIEW AND THE SEARCH FOR A MASS TORT INTERLOCUTORY REVIEW DEVICE

There is a slowly developing sense among mass tort scholars and judges that the mass tort regime is in need of a heightened supervisory role for appellate courts, and that appellate review in mass tort cases must come earlier in the litigation rather than awaiting final judgment.[108] Recognition of the need for heightened appellate

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legislation .... Meanwhile, until the law settles down, equity will be available with its flexibility to fill the breach." *Id.*

While I agree that some institution is needed to draw appropriate boundaries around innovations in the mass tort regime, I am skeptical that Congress is the proper institution to fill this role. Innovation in the mass tort regime occurs at every level of the legal system, affects virtually every substantive area of the law, and is in a constant state of evolution as it adapts to the needs of the mass tort case of the moment. As such, it presents the sort of "moving target" that is rarely amenable to adequate treatment by legislative reform alone. *See also* Schuck, *supra* note 1, at 985–88 (discussing advantages of judicially-reviewed mass tort settlements over legislatively-enacted administrative compensation schemes). According to Professor Schuck:

> When legislators address controversial subjects like compensation, they employ a variety of strategic behaviors: ambiguous drafting, deferring difficult issues, hiding or underestimating costs, and delegating norm elaboration and implementation tasks to agencies and courts. These behaviors magnify the notoriously high monitoring costs that any legislature faces in delegating authority to an agency.

Schuck, *supra* note 1, at 988.

In addition, I disagree with Judge Weinstein's characterization of equity's role as a stopgap measure. Rather, equity itself is responsible for much of the arbitrary and uncontrolled nature of the mass tort regime; as Professor Subrin has pointed out, equity is an "uncontrolled and uncontrolling procedural system." Subrin, *supra* note 2, at 944. The solution is a heightened role for appellate courts in reviewing the innovations of mass tort trial judges and controlling the excesses of equity-based trial procedures. *See infra* Part IV. The appellate courts are uniquely qualified to fill such a role.

107. Schuck, *supra* note 1, at 958.

108. For example, both the American Law Institute (ALI) and the American Bar Association (ABA) offered reform proposals that included brief discussions of appellate review techniques in the mass tort context and made some recommendations for reform of appellate procedures. *See* ALI, COMPLEX LITIGATION PROJECT § 3.07 (Tentative Draft No. 1 1989); ABA, COMMISSION ON MASS TORTS REPORT TO THE HOUSE OF DELEGATES 71 (1989). The increasing use of the writ of mandamus and the promulgation of Federal Rule of Civil Procedure 23(f), which permits discretionary interlocutory review

review of mass tort cases, however, is only the first and simplest step toward reform. The real difficulties come in determining what shape interlocutory appellate review should take—that is, whether existing interlocutory review devices can be adapted to the mass tort context, or whether new mechanisms designed specifically for use in mass torts are needed. The effort to create interlocutory appellate review techniques specifically designed for mass tort litigation is still in its initial stages. But the response of appellate courts to the phenomenon of procedural uncoupling in these cases has been particularly interesting. The evolution of appellate review in mass tort cases indicates a gradual shift in appellate procedure away from its common law roots to a more flexible equity-based model.[109]

A. The Second Consequence of Procedural Uncoupling: The Growing Complexity of Finality Jurisprudence

Appellate courts attempting to develop a mass tort interlocutory review mechanism must overcome an exceedingly difficult problem: the incredibly complex nature of modern jurisprudence regarding the timing of appeals. Because strict adherence to the final judgment rule would be inefficient and unjust in many cases (particularly in equity-based cases), a large number of statutory and judicially-created exceptions to the rule have developed in a piecemeal fashion over the last hundred years. These exceptions attempt to permit interlocutory review in a limited number of cases, while clinging to the final judgment rule in principle. The result is our modern finality jurisprudence—a hopelessly complicated tangle of law that scholars, judges, and practitioners agree has become "a jurisprudence of unbelievable impenetrability."[110]

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of class certification decisions, also indicate a growing consensus that mass tort litigation requires more flexible interlocutory review of trial court decisions. *See infra* Parts III & IV.

109. *See infra* Part III.B.

110. Luther T. Munford, *Dangers, Toils, and Snares: Appeals Before Final Judgment*, 15 LITIG., Spring 1989, at 18, 19; *see also* Martineau, *supra* note 20, at 729 ("[T]he unanimous view of commentators is that the rule has either too many or too few exceptions, but in any event requires revision."); Michael E. Solomine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1166 (1990) (describing interlocutory review procedure as a complex combination of doctrine and statutes). In a 1988 opinion discussing interlocutory appellate review, Justice Scalia described the myriad problems surrounding the application of the final judgment rule and added his voice to the growing number of critics of this aspect of appellate procedure. *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring). For a summary of the statutory and judicially-created exceptions to the final judgment rule, and the problems created by them, see Martineau, *supra* note 20, at 729–47.

An important point that most critics overlook, however, is that modern finality jurisprudence is in fact a twentieth-century creation—a direct consequence of procedural uncoupling.[111] The final judgment rule endured virtually unchanged for the first hundred years of the federal courts' existence.[112] During that time, courts relied exclusively on the occasional use of a handful of common law "extraordinary writs" to review the decisions of trial judges.[113] But as equity's influence has grown over the past one hundred years, so too has the need for historical equity's easy access to interlocutory appellate review. Congress and the courts have responded not by abandoning the common law final judgment rule, but by carving out more and more exceptions to the rule.[114] The result is the dizzying array of statutory and judicially-created exceptions to the final judgment rule that make up modern finality jurisprudence.

For mass tort litigants seeking interlocutory review of a controversial pretrial ruling, modern finality jurisprudence offers at least four possible routes.[115] First, an interlocutory appeal is permitted as a matter of right from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[116] Second, a pretrial order may fall within the judicially-created "collateral order doctrine," a small class of orders

111. The exception is Professor Yeazell, who makes this point very clear: "One can see the extent of the reallocation of power [as a result of procedural uncoupling] and the strength of the pressures against it by contemplating the tortured history of exceptions to the final judgment rule." Yeazell, *supra* note 4, at 662.

112. The first statutory provision for interlocutory appellate review appeared in 1891. Interestingly, it allowed immediate appeal from an interlocutory decree of a lower court granting or continuing an injunction—an *equitable* remedy. *See* Act of March 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (1891).

113. Historically, the available writs were the writs of mandamus, prohibition, certiorari, and habeas corpus. In modern practice, however, the technical distinctions among different writs are generally considered unimportant. *See* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3932.2, at 513–16 (2d ed. 1996).

114. For example, Professor Yeazell points out the following:

> After just a decade's experience with the [equity-based] Federal Rules, the Supreme Court found itself pressed to invent [the collateral order doctrine as an] escape category.... One can thus see the collateral order doctrine as a result of the Rules' creating new stages of pretrial process without changing the final judgment rule."

Yeazell, *supra* note 4, at 662–63; *see infra* Part III.B.2.a (discussing the collateral order doctrine).

115. In addition to the exceptions enumerated here, there are a host of other statutory and judicially-created exceptions to the final judgment rule. For a summary of these exceptions, see Martineau, *supra* note 20, at 729–47. These additional exceptions have not played a significant role in interlocutory appellate review of mass tort litigation, however, and I do not address them here.

116. 28 U.S.C. § 1292(a)(1) (1994).

that are treated as final and thus immediately appealable even though final judgment has not yet been reached in the entire case.[117] Third, interlocutory review may be available as a discretionary matter through one of the extraordinary writs, in particular the writ of mandamus.[118] Fourth, under the so-called "permissive" interlocutory appeal provision, 28 U.S.C. § 1292(b), a district judge may certify certain pretrial orders for interlocutory appellate review, and the court of appeals then exercises its discretion to grant or deny the appeal.[119] Mass tort litigants have used all of these devices to obtain interlocutory review of trial court rulings, with mixed success.[120] The courts, especially the Supreme Court, have severely restricted use of the devices,[121] and each device has its own serious limitations in the mass tort context.[122]

Even section 1292(b), the permissive interlocutory appeal provision, has been less successful than its drafters might have hoped. Section 1292(b) was specifically designed to address the problems created by strict application of the final judgment rule in complex

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117. The collateral order doctrine arose out of the Supreme Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1941). Under the collateral order doctrine, an order is final and appealable if it: (1) conclusively decides a disputed question; (2) resolves an important issue that is collateral to the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *See generally* Martineau, *supra* note 20, at 739–43 (discussing the collateral order doctrine as an exception to the final judgment rule).

118. In the English common law courts, the extraordinary writs were the writs of mandamus, prohibition, certiorari, and habeas corpus. The courts of appeals derive their modern authority to grant extraordinary writs from 28 U.S.C. § 1651(a), which permits all federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a) (1994). For a discussion of the extraordinary writs and their historic use as interlocutory appellate review devices, see Crick, *supra* note 15, at 555–57.

119. *See* § 1292(b). For a general discussion of permissive interlocutory appeals under section 1292(b), see 16 WRIGHT ET AL., *supra* note 113, § 3929, at 362–400; Martineau, *supra* note 20, at 732–34.

120. *See infra* Part III.B. In addition, the new Rule 23(f) permits interlocutory review, at the sole discretion of the appellate courts, of district court orders granting or denying class certification. FED. R. CIV. P. 23(f). Although no mass tort case to date has utilized Rule 23(f), the provision will likely figure prominently in future appeals of mass tort class actions. *See infra* Part IV.B.

121. For a discussion of judicial interpretation limiting each of these devices, see Martineau, *supra* note 20, at 730–32; Munford, *supra* note 110, at 18–21. A possible exception to this trend is the steady expansion in appellate courts' use of the writ of mandamus, *see* Munford *supra* note 110, at 22, despite the Supreme Court's increasingly restrictive attitude toward use of this device to escape the final judgment rule. *See* Martineau, *supra* note 20, at 747; *infra* Parts III.B.2.b & III.B.3 (discussing second- and third-generation approaches to mandamus).

122. *See infra* Part III.B.

cases involving prolonged pretrial activity.[123] But its usefulness in the mass tort context is undermined by the fact that it permits interlocutory review only if the trial judge agrees to certify the order to the court of appeals. Mass tort trial judges have powerful incentives *not* to certify pretrial orders for interlocutory appellate review. These judges often use the unavailability of interlocutory review mechanisms to increase litigant uncertainty, thus placing additional pressure on the parties to settle the litigation.[124] Section 1292(b) is rendered useless in such cases.

Whatever their limitations, the myriad statutory and judicially-created exceptions to the final judgment rule are themselves evidence of an interesting trend in the "tortured history"[125] of finality jurisprudence. Modern finality jurisprudence has witnessed the gradual expansion of interlocutory review devices in response to the growing influence of equity and the complex cases that equity produces. In other words, finality jurisprudence has slowly evolved.[126] The first stage was the gradual shift from a fairly strict adherence to the common law final judgment rule to a series of statutory and judicially-created exceptions carved out of the final judgment rule—thus *implicitly* recognizing the heightened need for interlocutory review in certain kinds of cases.[127] The second stage was the enactment of section 1292(b). By permitting interlocutory appellate review without regard to the "finality" of a pretrial order, section 1292(b) *explicitly* recognizes the need for interlocutory review in certain kinds of complex, equity-oriented cases. The addition of Rule 23(f) to the Federal Rules of Civil Procedure[128] and the

123. *See* 16 WRIGHT ET AL., *supra* note 113, § 3929, at 363–69.

124. *See* SCHUCK, *supra* note 74, at 124–25 (noting that in the Agent Orange litigation, Judge Weinstein avoided interlocutory appeals by "avoid[ing] formal opinions and [giving] many informal signals from the bench," and by refusing to certify interlocutory appeals); Mullenix, *supra* note 84, at 494 n.85 (reporting that the district judge in an asbestos class action was reluctant to certify a class certification order for interlocutory appeal because it "would undermine his settlement goals"); Solomine, *supra* note 110, at 1206 (stating that in the Agent Orange litigation, Judge Weinstein refused to certify various issues for interlocutory appeal in order to encourage a settlement).

125. Yeazell, *supra* note 4, at 662.

126. For a discussion of the evolutionary tradition in legal theory, see E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985). For an application of evolutionary legal theory to modern civil procedure, see E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

127. For example, the exceptions to the final judgment rule are applied more liberally in bankruptcy cases, implicitly recognizing the need for heightened review in such cases. *See infra* notes 193–99 and accompanying text.

128. Rule 23(f) permits immediate appeal, at the sole discretion of the appellate courts,

expansion of the writ of mandamus represent a third stage in the evolution of finality jurisprudence.[129] Both devices permit interlocutory appellate review of certain kinds of pretrial orders without requiring certification of the issue by the district judge. These modern interlocutory review devices thus recognize that even section 1292(b)'s more flexible conception of appellate review—one in which the district judge acts as "gatekeeper" to protect the appellate courts from frivolous appeals—may be inadequate in many modern complex cases.

B. From Common Law Courts to Equity Courts: Three Generations of Mass Tort Appellate Review

To some extent, the evolution of interlocutory appellate review of mass tort litigation mirrors the evolution of interlocutory appellate review generally, with appellate courts gradually shifting their approach from a strict common law model to a flexible equity model. Thus interlocutory appellate review of mass tort litigation generally falls within one of three distinct, yet occasionally overlapping, evolutionary stages, or, as I refer to them here, "generations." In first-generation appellate review, characterized by the Second Circuit's approach in the Agent Orange litigation, appellate courts fail to recognize that mass tort cases may require more aggressive interlocutory review techniques than other kinds of cases. First-generation courts tend to treat mass tort cases just as they would any other case, relying primarily on the final judgment rule, or on occasional section 1292(b) appeals, to review the decisions of mass tort trial judges.[130]

In second-generation appellate review, appellate courts implicitly recognize the heightened need for interlocutory review in mass tort litigation. Second-generation courts accordingly attempt to fit controversial pretrial rulings into one of the exceptions to the final judgment rule (in particular, the collateral order doctrine or the writ of mandamus), thus rendering those pretrial rulings eligible for interlocutory review. Characteristic of the second-generation approach are the appellate courts' decisions in the *Pan Am*,[131] *Dow Corning*,[132] and *Bendectin*[133] cases, among others.[134]

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of district court orders granting or denying class certification. FED. R. CIV. P. 23(f).

129. *See infra* Part IV (discussing Rule 23(f) and the writ of mandamus as potential mass tort interlocutory review devices).

130. *See infra* Part III.B.1 (discussing first-generation appellate review).

131. *In re* Pan Am Corp., 16 F.3d 513 (2d Cir. 1994).

132. *In re* Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996).

In third-generation appellate review, characterized by the Seventh Circuit's decision in *In re Rhone-Poulenc Rorer, Inc.*,[135] appellate courts explicitly recognize that mass tort cases require heightened interlocutory review of certain kinds of pretrial decisions. Like second-generation courts, third-generation courts rely on the writ of mandamus to grant interlocutory review. But in justifying their decisions to grant the writ, third-generation courts focus the discussion on the special, equity-based characteristics of mass tort litigation rather than on the formal requirements of the writ. In my view, a third-generation approach to interlocutory review is key to the development of a strong appellate voice in the ongoing dialogue among mass tort trial judges, practitioners, and scholars.[136] Absent the broad adoption of such a flexible approach, the shaping of the mass tort regime will continue, as it has for so many years, without substantial appellate court supervision.

1. First-Generation Appellate Review: The Agent Orange Example

The Agent Orange litigation provides the most dramatic example of procedural uncoupling—that is, a common law-oriented appellate court attempting to review the actions of an equity-oriented trial court. The litigation began in 1978, when several veterans of the Vietnam War and their families filed suit in the Eastern District of New York against chemical companies that produced the herbicide Agent Orange, a defoliation agent used by the United States throughout the war.[137] Overseeing the litigation at the trial level was Judge Jack Weinstein, who, as one commentator noted, may "justifiably lay claim to the title of King of Mass Torts."[138] No mass

133. *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984).

134. *See infra* Part III.B.2 (discussing second-generation appellate review).

135. 51 F.3d 1293 (7th Cir. 1995).

136. *See infra* Part III.B.3 (discussing third-generation appellate review).

137. *See* SCHUCK, *supra* note 74, at 3. For additional background on the Agent Orange litigation, see *supra* note 74.

138. Mullenix, *supra* note 105, at 580. Judge Weinstein inherited the Agent Orange litigation from Judge Pratt, who had been elevated to the Second Circuit Court of Appeals, in October 1983. *See* SCHUCK, *supra* note 74, at 110. In addition to the Agent Orange litigation, Judge Weinstein, now a senior judge on the U.S. District Court for the Eastern District of New York, has presided over all or part of virtually every major mass tort during the past two decades. *See, e.g.*, Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46 (E.D.N.Y. 2000) (tobacco); Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (handguns); Gonzalez v. Digital Equip. Corp., 8 F. Supp. 2d 194 (E.D.N.Y. 1998) (computer keyboards); Braune v. Abbott Labs., 895 F. Supp. 530 (E.D.N.Y. 1995) (diethylstilbestrol, or DES); *In re* Joint E. and S. Dists. Asbestos Litig., 878 F. Supp. 473 (E.D.N.Y., S.D.N.Y. 1995) (consolidated asbestos litigation), *aff'd in part and vacated in part*, 78 F.3d 764 (2d Cir. 1996). Judge Weinstein has also published and lectured widely

tort specialist in the country is more sanguine than Judge Weinstein about the possibilities and potential of equity-based procedures in mass tort cases,[139] and perhaps no other mass tort trial judge has taken innovative equity-oriented approaches to mass tort litigation further than Judge Weinstein. His approach to the Agent Orange litigation was certainly no exception.[140]

From the very outset of his involvement in the litigation, Judge Weinstein was the quintessential mass tort trial judge, boldly "press[ing] all the levers [of judicial control]"[141] in order to induce the parties to settle the case. For example, he put the case on a "Draconian trial schedule"[142] and appointed a special master to accelerate the pace of discovery.[143] In addition, through highly questionable pretrial rulings on choice-of-law,[144] governmental

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on mass torts. *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECTS OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995) (discussing reforms intended to provide individual justice in mass tort cases); Jack B. Weinstein, Keynote Address, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165 (2001) (introducing solutions to the problems of mass torts in multinational settings); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994) (discussing the special ethical considerations facing both judges and attorneys in the mass tort context); Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439 (2001) (describing the continuing role for tort law, rather than administrative regulations or criminal statutes, in redressing injuries in mass tort cases). He also served as advisor to the American Law Institute's Complex Litigation Project, which proposed various reforms designed to facilitate consolidation of mass tort claims. Mullenix, *supra* note 105, at 580 n.5. The November 1997 issue of the Columbia Law Review was devoted to a series of articles reflecting on Judge Weinstein's approach to managing and adjudicating cases. *See generally A Special Issue Dedicated to Judge Jack B. Weinstein*, 97 COLUM. L. REV. 1947 (1997). For an entertaining look at Judge Weinstein's unconventional approach to judging, and the informal way in which he runs his courtroom, see *The Talk of the Town: Benchmark*, THE NEW YORKER, May 3, 1993, at 33, 34–36.

139. As I noted earlier, Judge Weinstein argues that equity-oriented procedures and remedies, especially bankruptcy-type proceedings, are most appropriate and effective in mass tort cases. *See* Weinstein & Hershenov, *supra* note 47, at 277–303. In addition, Judge Weinstein has argued that "[m]ass tort cases are akin to public [law] litigations involving court-ordered restructuring of institutions to protect constitutional rights." Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472 (1994). For a discussion of the equity basis of public law litigation, see Chayes, *supra* note 38, at 1292–96.

140. *See* SCHUCK, *supra* note 74, at 111–252 (discussing Judge Weinstein's prominent role in the Agent Orange litigation); Schuck, *supra* note 90, at 341–65 (discussing Judge Weinstein's role in settling the Agent Orange litigation). The following discussion draws heavily on Professor Schuck's account.

141. SCHUCK, *supra* note 74, at 265.

142. *Id.* at 123.

143. *See id.* at 122–24.

144. *See id.* at 128–31.

immunity,[145] and class certification,[146] he shaped the substantive and procedural law of the case to create additional pressure on the parties to settle. Most importantly for present purposes, Judge Weinstein cleverly immunized many controversial pretrial rulings from interlocutory appellate review by avoiding formal opinions in favor of "informal" or "preliminary" rulings from the bench, and by refusing to certify key issues for interlocutory appeal.[147]

The Second Circuit, however, could not have been more traditional in its approach to the Agent Orange litigation. Despite Judge Weinstein's efforts to avoid interlocutory review, the Second Circuit did have significant opportunities, through mandamus petitions and collateral order appeals, to review key rulings on interlocutory review. In every instance, the Second Circuit rejected these appeals, insisting that interlocutory review was inappropriate, and noting that it would revisit the issues on appeal from a final judgment.[148]

A classic example of the fundamental disconnect between the trial court and appellate court approaches to Agent Orange was the treatment of Judge Weinstein's ruling on class certification. Class certification was essential to Judge Weinstein's settlement goals,[149] and he wasted no time in entering an order certifying a global plaintiff class.[150] The class certification ruling was highly controversial,

145. *See id.* at 131–38.

146. *See id.* at 125–28.

147. *See id.* at 124–25. Professor Schuck notes that these "informal signals from the bench . . . revealed [Judge Weinstein's] 'preliminary' thinking to the lawyers without really committing him to a position or inviting time-consuming appeals." *Id.* at 125.

148. *See In re* "Agent Orange" Prod. Liab. Litig., 745 F.2d 161, 163–66 (2d Cir. 1984) (holding that the U.S. Government's appeal of a pretrial ruling that the *Feres/Stencel* governmental immunity doctrine did not bar the third-party complaints of the servicemen's wives and children was not within the "collateral order" exception to the final judgment rule); *In re* "Agent Orange" Prod. Liab. Litig., 733 F.2d 10, 12–14 (2d Cir. 1984) (denying the mandamus petition of the U.S. Government regarding the district court's decision to vacate governmental immunity); *In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 859–62 (2d Cir. 1984) (denying the mandamus petition of the defendant chemical manufacturers to compel class decertification).

149. Judge Weinstein admitted as much in his decision granting class certification. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983) ("Third, certification may encourage settlement of the litigation."), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *id.* at 723 ("Finally, the court may not ignore the real world of dispute resolution .... [A] classwide finding of causation may ... enhanc[e] the possibility of settlement among the parties and with the federal government."); *see also* SCHUCK, *supra* note 74, at 125–28 (discussing Judge Weinstein's motives for granting class certification).

150. Judge Weinstein entered the order certifying the class in December 1983, only two months after he inherited the case from Judge Pratt. *See* SCHUCK, *supra* note 74, at 111. The class included all American, Australian, and New Zealand veterans who claimed

however, for several reasons. First, the class certification order was largely without precedent; as Professor Schuck points out, "[n]o previous class certification had ever been upheld in such broad terms in a mass toxic tort case."[151] In addition, to avoid choice-of-law problems in certifying the class, Judge Weinstein developed a brilliant but highly controversial theory of "national consensus law"[152] that was likewise without precedent.[153] Finally, Judge Weinstein's approach to class notice, while "innovative," was "highly questionable as a matter of law."[154] Despite the unprecedented nature of his class certification order, however, Judge Weinstein refused to grant the defendants' motion to certify the issue for interlocutory appellate review.[155] The defendants were forced to petition the Second Circuit for a writ of mandamus to review the ruling.[156]

While Judge Weinstein's class certification decision might well have been overturned on final appeal,[157] the defendants' attempt to obtain interlocutory review of the order received short shrift from the court of appeals. The court expressed its "considerable skepticism"[158] regarding Judge Weinstein's findings on causation, as well as his

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injuries from exposure to Agent Orange, as well as family members who claimed injuries as a result of the veterans' exposure. Judge Weinstein also certified a Rule 23(b)(1)(B) mandatory class on punitive damages. *In re "Agent Orange,"* 100 F.R.D. at 725–28.

151. SCHUCK, *supra* note 74, at 125.

152. Because the tort laws of different states were inconsistent with respect to critical issues in the Agent Orange litigation, Judge Weinstein attempted to aggregate a "national consensus" among the different jurisdictions in order to proceed with the diversity-based class action even though no such consensus existed. *Id.* at 130.

153. Indeed, Professor Schuck argues, "Conjure as he might, no 'national consensus law' existed on these issues." *Id.*; *see also id.* at 128–131 (discussing Judge Weinstein's resolution of the "national consensus law" issue). Again, Judge Weinstein attempted to shield his choice-of-law ruling from appellate review by noting that his opinion was merely " 'preliminary' and 'provisional,' 'a first general guide to the parties of the court's present thinking.' " *Id.* at 130. He further explained that a thorough analysis of his novel "national consensus law" theory was "a subject for another memorandum." *Id.*

> While highly critical of the approach, Professor Schuck notes the following:
>
> In a stroke, then, Weinstein had accomplished three extraordinary things. He had emasculated a higher court's ruling. He had created an entirely new choice-of-law doctrine, one of infinite plasticity that he could use to shape the substantive law—and thus the outcome—of the case. And he had practically immunized his highly questionable ruling from appellate court review. Not a bad day's work for a district judge.

Id. at 130–31; *cf. infra* notes 260–64 and accompanying text (discussing national consensus law in *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995)).

154. SCHUCK, *supra* note 74, at 127. For a description of the notice plan approved by Judge Weinstein, see *id.* at 125–28.

155. *See In re "Agent Orange,"* 100 F.R.D. at 735–36.

156. *See In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 859 (2d Cir. 1984).

157. *See* SCHUCK, *supra* note 74, at 127.

158. *In re Diamond Shamrock*, 725 F.2d at 861.

"national consensus law" theory.[159] Nevertheless, it denied the mandamus petition, emphasizing the narrow scope of review available on mandamus and concluding that appellate review would be more appropriate "when the ramifications of each aspect of the rulings will be evident."[160]

In fact, the Second Circuit's next opportunity to revisit the class certification ruling was not until final appeal. Predictably, the court upheld the ruling, but not without expressing its continued skepticism of Judge Weinstein's novel theories.[161] Both at oral argument and in its opinion upholding class certification, the appellate panel expressed clear misgivings regarding the appropriateness of the class action device in the Agent Orange litigation.[162] For example, the court squarely rejected Judge Weinstein's reliance on "generic causation" as a common issue of fact justifying class treatment, and it dismissed Judge Weinstein's finding of a "national consensus law" on liability as "patently speculative."[163] The court further observed that the case "justifies the prevalent skepticism" regarding the propriety of class actions in the mass tort context, and it proceeded to devote three pages of its opinion to a detailed discussion of the reasons why class certification was not ordinarily appropriate in such cases.[164]

In the end, the Second Circuit upheld Judge Weinstein's class certification ruling; but it seemed distinctly uncomfortable with Judge Weinstein's approach, and it reluctantly did so only by relying on very different theories from those that Judge Weinstein himself had used.[165] The fact that the court of appeals would find a way to uphold the class certification order (and other controversial pretrial rulings) at this final stage of the litigation is not surprising. At this stage of the

159. *Id.* at 860 (addressing causation); *id.* at 861 (addressing the national consensus law theory).

160. *Id.* at 862. The court of appeals' reliance on the opportunity for subsequent appellate review of the class certification decision seems particularly odd given Judge Weinstein's statement in the class certification order itself that settlement was uppermost in his mind, and that class certification was in part a means to achieve that goal. *See In re Agent Orange*, 100 F.R.D. at 721.

161. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 151 (2d Cir. 1987).

162. For a discussion of the oral argument and subsequent appellate opinions in the Agent Orange litigation, *see* SCHUCK, *supra* note 74, at 301–14.

163. *In re "Agent Orange,"* 818 F.2d at 173; *see also* SCHUCK, *supra* note 74, at 309 (discussing the Second Circuit's criticism of Judge Weinstein's ruling on "national consensus law").

164. *See In re "Agent Orange,"* 818 F.2d at 164–67.

165. The court of appeals relied on the centrality of the military contractor defense, an issue to which Judge Weinstein in fact had devoted very little attention throughout the litigation, to justify class certification. *See* SCHUCK, *supra* note 74, at 309–10.

game, the court of appeals had every incentive to affirm all but the grossest trial court errors. As Professor Schuck comments:

> Confronted by a case this complex, proceedings this protracted, a record this massive, and a trial judge this distinguished, any appellate court would be extremely reluctant to try to untangle all of the intricacies of the case, much less disturb a delicate, arduously negotiated settlement.... The Supreme Court was free to hurl that thunderbolt when the case eventually reached it; but an intermediate court like the Second Circuit would not feel so bold.[166]

The dynamic between Judge Weinstein and the Second Circuit throughout the Agent Orange litigation is characteristic of the interaction between an equity-oriented mass tort trial judge and a common law-oriented appellate court using first-generation appellate review techniques. In the early stages of the litigation, the appellate court refused to grant interlocutory appellate review on key trial court rulings.[167] Its insistence on a strict interpretation of the final judgment rule seems unrealistic (and disingenuous), however, given the likelihood that Judge Weinstein's early rulings in the case would force a settlement that would be virtually invulnerable on final appeal. As Professor Schuck notes, "In a sense, [Judge Weinstein] played a massive game of chicken in which he made highly questionable decisions while working for a settlement that would render them invulnerable to appeal."[168] Judge Weinstein's strategy worked; but it was in part the passivity of the Second Circuit judges, and their refusal to intervene in the early stages of the litigation, that ensured the success of his strategy.

Are first-generation approaches to appellate review always to be avoided, however? After all, from one perspective, the Second Circuit's passive first-generation approach to the Agent Orange litigation enabled an accomplished trial judge to negotiate an extraordinarily difficult settlement that was, in my view, fair and reasonably efficient. Indeed, appellate "interference" at earlier stages of the litigation might well have placed that settlement in jeopardy. I certainly do not intend to imply that appellate courts should be constantly peering over the shoulders of trial judges in mass tort cases, or even that the availability of interlocutory review

166. *Id.* at 304.

167. *See supra* note 148 and accompanying text (discussing the Second Circuit's repeated refusals to grant interlocutory review on key rulings).

168. *See* SCHUCK, *supra* note 74, at 259.

generally should be greatly expanded in such cases. There is clearly a need for restraint on the part of appellate courts, and deference to trial judges in most pretrial matters is an essential element in the efficient operation of the mass tort regime, just as it is in the legal system as a whole.

In my view, however, there are two reasons to be skeptical of passive first-generation approaches to appellate review in mass tort cases. First, trial judges managing mass tort litigation may not always be as accomplished as Judge Weinstein, and the results they achieve may not always be as fair to all parties involved.[169] In such cases, heightened interlocutory appellate review of pretrial rulings is essential to ensuring fairness to the parties.

Second, and most importantly, in making key rulings on controversial issues of law, mass tort trial judges are not only shaping the law governing a particular case; they are shaping the substantive and procedural rules that govern the mass tort regime as a whole. The courts of appeals have the unique responsibility to supervise the development of the legal rules governing the mass tort regime to ensure that these rules fit within the larger legal fabric. When the majority of these rules are developed through pretrial rulings that subsequently become virtually invulnerable on final appeal (as Judge Weinstein's rulings did), the appellate courts will have very little influence over the development of those rules unless they change their approach to interlocutory appellate review.

2. Second-Generation Appellate Review: Interlocutory Review Through the Exceptions to the Final Judgment Rule

In second-generation appellate review, appellate courts recognize implicitly the heightened need for interlocutory review in mass tort cases. They accordingly attempt to fit controversial pretrial rulings into one of the exceptions to the final judgment rule, thus rendering those rulings eligible for interlocutory review. In most cases, however, the "fit" is quite awkward, and the appellate courts' attempts to explain why they may take jurisdiction over an appeal do not withstand much scrutiny.

a. Collateral Order Cases

This awkward fit is evident in the cases that attempt to squeeze pretrial rulings into the collateral order doctrine. Under the

169. *See id.* at 265–66 (pointing out that qualified judges will not always be presiding over such complex cases).

collateral order doctrine, a small class of orders are treated as final and thus immediately appealable even though final judgment has not yet been reached in the case.[170] The requirements of the doctrine are quite strict, however. A pretrial ruling qualifies as a collateral order only if it: "(1) conclusively determines the question presented, (2) resolves an important issue that is completely collateral to the merits, and (3) concerns a right that would be effectively unreviewable after a final judgment on the merits."[171] This final requirement is applied literally; as Professor Martineau points out, "[t]he only orders the [Supreme] Court has found to satisfy the collateral order doctrine are those that involve a right that will be 'irretrievably lost' absent an immediate appeal."[172] The "right" at stake must be a legal right; thus, for example, courts may not consider the added delay or expense of unnecessary litigation in determining whether a ruling qualifies for collateral order treatment.[173]

These stringent limitations, particularly the "effectively unreviewable" requirement, would seem to rule out the use of the collateral order doctrine for interlocutory review of most controversial pretrial rulings in mass tort cases. First, few pretrial rulings in mass tort cases "conclusively" determine a disputed issue; a trial judge may easily label controversial rulings as "preliminary," as Judge Weinstein did in the Agent Orange litigation. Second, many rulings are in fact "enmeshed in the factual and legal issues

170. The collateral order doctrine arose out of the United States Supreme Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1941). *See* Martineau, *supra* note 20, at 739–43 (discussing *Cohen* and its subsequent limitations); *see also* Munford, *supra* note 110, at 19 (discussing the erosion of the collateral order doctrine). Professor Martineau notes that prior to 1978, the collateral order doctrine was "a frequent device of courts of appeals to avoid the strictures of the final judgment rule. There were few orders that a determined court of appeals could not qualify under the *Cohen* opinion." Martineau, *supra* note 20, at 740 (footnote omitted). Beginning with its 1978 decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), however, "the Court in a series of cases sent a clear message to the courts of appeals that [the collateral order doctrine] was to be applied narrowly." Martineau, *supra* note 20, at 741. For discussion of the Supreme Court's decision in *Coopers & Lybrand*, and its impact on appellate review in mass tort cases, see *infra* notes 201–206 and accompanying text.

171. *In re* Pan Am Corp., 16 F.3d 513, 515 (2d Cir. 1994) (citing Gulfstream v. Mayacamas Corp., 485 U.S. 271, 276 (1988)).

172. Martineau, *supra* note 20, at 742 (quoting Richardson-Merrell, Inc. v. Koeller, 472 U.S. 424, 430–31 (1985)). An example of an order qualifying for collateral order treatment is a decision regarding immunity from suit. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (addressing qualified immunity); Nixon v. Fitzgerald, 457 U.S. 731, 741–43 (1982) (addressing absolute immunity).

173. *See* Martineau, *supra* note 20, at 742.

comprising the . . . cause of action,"[174] and thus do not qualify under the second requirement of the doctrine. Finally, and most importantly, the vast majority of pretrial rulings do not qualify as collateral orders because they are, in the literal sense in which the Supreme Court has interpreted the phrase, "subject to effective review after final judgment,"[175] even though that review may come after years of costly litigation.

Despite the apparent lack of fit, however, litigants have utilized the collateral order doctrine successfully to obtain interlocutory review of controversial pretrial rulings in at least two mass tort cases.[176] In *In re Pan Am Corp.*,[177] over five hundred victims of the air disaster over Lockerbie, Scotland, filed suit against Pan Am in a Florida state court.[178] After Pan Am filed for bankruptcy in the Southern District of New York, it moved for an order transferring the plaintiffs' actions from Florida to the Southern District.[179] The district court granted the transfer order, and the plaintiffs appealed.[180] The Second Circuit held that the district court's order qualified for treatment as a collateral order, and thus it could properly exercise appellate jurisdiction over the order.[181]

The second case, *In re Dow Corning Corp.*,[182] also concerned a transfer order. In *In re Dow Corning*, Dow Corning and other manufacturers of breast implants moved for a transfer of all opt-out claims pending nationwide against the manufacturers to the Eastern District of Michigan, where Dow Corning had recently filed for bankruptcy.[183] The district court refused to grant the motion, and the manufacturers appealed the ruling.[184] The Sixth Circuit, citing *In re*

174. *Coopers & Lybrand*, 437 U.S. at 469 (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

175. *Id.*

176. In a third case, *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit ruled that a district court order denying intervention to a group of plaintiff class members did not qualify for immediate appellate review under the collateral order doctrine. *Id.* at 714.

177. 16 F.3d 513 (2d Cir. 1994).

178. *Id.* at 514.

179. The plaintiffs' motion to transfer was made pursuant to 28 U.S.C. § 157(b)(5). *Id.* at 516–17.

180. *Id.* at 514–15.

181. *Id.* at 516.

182. 86 F.3d 482 (1996).

183. *Id.* at 486–87. The manufacturers' goal in requesting transfer of the opt-out claims was to conduct a consolidated trial in the Eastern District of Michigan on the issue of causation. *See id.*

184. *Id.* at 487.

Pan Am, ruled that it could properly exercise appellate jurisdiction over the transfer order under the collateral order doctrine.[185]

How did the courts of appeals in these cases circumvent the strict requirements of the collateral order doctrine? First, both courts interpreted these requirements, particularly the third "effectively unreviewable upon final judgment" requirement,[186] much more flexibly than Supreme Court jurisprudence would seem to allow.[187] For example, the *Pan Am* court admitted that the third requirement was "problematic,"[188] and conceded that "the plaintiffs *could* get review of the transfer order after final judgment is entered on their tort claims."[189] But the court dismissed such a rigid interpretation of the collateral order doctrine in this particular case, noting that it "would encumber Pan Am with more costly and time-consuming litigation."[190] Instead, the court adopted a more practical, equity-oriented analysis of the "effectively unreviewable" requirement, concluding simply that "[a]llowing the plaintiffs to appeal the order now is far more consonant with principles of efficiency and fairness."[191]

The *Dow Corning* court was even more cursory in its analysis of the "effectively unreviewable" requirement. Like the *Pan Am* court, it relied on a functional, equity-based approach to this requirement. It stated simply that "due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered."[192]

A second, crucial factor enabled the *Pan Am* and *Dow Corning* courts to employ a functional, equity-oriented approach to these appeals—the fact that both appeals arose out of bankruptcy

185. *Id.* at 488. The court of appeals also held that the transfer order was immediately appealable as a "final decision" pursuant to 28 U.S.C. § 1291. *Id.* For a discussion of the tug-of-war between the district court and the Sixth Circuit in the Dow Corning bankruptcy, see *infra* note 318.

186. *See In re* Pan Am Corp., 16 F.3d 511, 515 (2d Cir. 1994); *In re Dow Corning*, 86 F.3d at 488.

187. *See supra* notes 170–75 and accompanying text (discussing the Supreme Court's narrow construction of the collateral order doctrine).

188. *In re Pan Am Corp.*, 16 F.3d at 515.

189. *Id.* at 515–16.

190. *Id.* at 516.

191. *Id.*

192. *In re* Dow Corning Corp., 86 F.3d 482, 488 (6th Cir. 1996).

proceedings.[193] In both cases, the courts of appeals relied on the more flexible interpretation of the collateral order doctrine applicable in bankruptcy cases to justify their decisions.[194] The *Dow Corning* court explained the basis for the "more relaxed rule of appealability in bankruptcy cases"[195] as follows:

> Bankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.[196]

Thus the law recognizes that the more flexible, equity-based nature of bankruptcy proceedings may require more relaxed rules regarding interlocutory appellate review, as well.[197] In *Dow Corning* and *Pan Am*, the courts of appeals were able to rely on the equity-oriented bankruptcy rules to obtain interlocutory review of controversial pretrial rulings.[198] But this basis for a more relaxed rule of interlocutory review applies equally in all mass tort cases, whether or not those cases involve a bankrupt defendant. The equity basis of the proceedings inheres in the very nature of mass tort litigation itself, not merely in those mass tort cases that happen to involve a bankrupt defendant.[199] Because of equity's influence on the mass tort regime, virtually all mass tort cases involve "protracted proceedings with many parties participating,"[200] and many cases culminate in complex global settlement and distribution plans, akin to bankruptcy reorganization plans. The rules governing interlocutory appellate review, however, recognize the equitable nature of bankruptcy proceedings, but not of mass tort litigation generally. As a result, the flexible interpretation of the collateral order doctrine utilized by the

193. For a discussion of the role of bankruptcy in mass tort litigation, see *supra* notes 77–82 and accompanying text.

194. *In re Dow Corning Corp.*, 86 F.3d at 488; *In re Pan Am Corp.*, 16 F.3d at 515.

195. *In re Dow Corning Corp.*, 86 F.3d at 488.

196. *Id.* (quoting A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1009 (4th Cir. 1986)).

197. 16 WRIGHT ET AL., *supra* note 113, § 3926.2, at 270–327 (discussing the "flexible finality" concept in bankruptcy jurisprudence).

198. Appellate courts have relied on the more relaxed rule of appealability in bankruptcy proceedings in other mass tort cases involving bankruptcy. *See In re* Johns-Manville Corp., 824 F.2d 176, 179 (2d Cir. 1987); A.H. Robins v. Piccinin, 788 F.2d 994, 1009 (4th Cir. 1986).

199. *See supra* Part II.A (describing the influence of equity jurisprudence on the mass tort regime).

200. *In re Dow Corning Corp.*, 86 F.3d at 488 (quoting A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1009 (4th Cir. 1986)).

Pan Am and *Dow Corning* courts will be unavailable, or at least much more problematic, in mass tort cases that do not involve bankruptcy.

b. The Second-Generation Approach to Mandamus

In an important category of pretrial decisions that have proven particularly controversial in the mass tort context—class certification decisions—the United States Supreme Court has ruled out the use of the collateral order doctrine altogether. In *Coopers & Lybrand v. Livesay*,[201] the Supreme Court in a unanimous decision held that class certification decisions do not fall within the collateral order doctrine.[202] At issue in *Coopers & Lybrand* was an appeal from a denial of class certification; the Court made it clear, however, that orders granting class certification are also interlocutory and not immediately appealable under the collateral order doctrine.[203]

Undeterred by the Supreme Court's ruling, many courts of appeals found another path for interlocutory review of class certification decisions—the age-old common law writ of mandamus.[204] Despite the strict requirements that have traditionally given the writ narrow application,[205] appellate courts increasingly rely on mandamus to obtain interlocutory review over class certification decisions and other controversial pretrial rulings. As flexible, equity-oriented techniques continue to proliferate at the trial level, the need for a flexible, equity-oriented interlocutory review device has become increasingly apparent. Ironically, appellate courts have turned to the

201. 437 U.S. 463 (1978). As I noted earlier, the Supreme Court's decision in *Coopers & Lybrand* marked the beginning of the Court's two-decade-long effort to curtail the appellate courts' reliance upon the collateral order doctrine to escape the requirements of the final judgment rule. *See supra* notes 170–75 and accompanying text.

202. *Coopers & Lybrand*, 437 U.S. at 469.

203. *See id.* at 476 ("[T]he Courts of Appeals have correctly concluded that orders granting class certification are interlocutory.").

204. The Second Circuit's decision in *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993), serves as an example of this judicial transition from use of the collateral order doctrine to use of the writ of mandamus. In reviewing a petition to grant immediate appellate review of a consolidation order under the collateral order doctrine, the Second Circuit ruled that consolidation orders were too similar to class certification orders and thus, under *Coopers & Lybrand*, did not qualify for collateral order treatment. *Id.* at 372. However, the Second Circuit treated the collateral order appeal as a petition for writ of mandamus, and accordingly issued a writ of mandamus vacating the trial court's consolidation order. *Id.* at 373.

205. Traditionally, mere error by the trial court was insufficient for an appellate court to grant a writ of mandamus. Instead, an appellate court generally issued the writ when a trial court had exceeded its lawful jurisdiction, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943), or the trial judge's actions amounted to "a clear abuse of discretion," La Buy v. Howes Leather Co., 346 U.S. 379, 383 (1953), or a "usurpation of power," De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

traditionally strict, narrow common law writ of mandamus to fill that need—in the process, transforming modern mandamus into a flexible, equity-oriented device.[206]

At first glance, mandamus seems to be an unlikely tool for interlocutory appellate review of class certification orders. First, after *Coopers & Lybrand*, there is a serious question whether interlocutory review of class certification rulings is appropriate at all (other than by means of the new Rule 23(f)),[207] even by writ of mandamus.[208] Second, the Supreme Court has severely limited the use of the writ itself, holding that "[mandamus] is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial."[209] Nevertheless, the courts of appeals have consistently used mandamus to obtain interlocutory review of class certification decisions in mass tort cases.[210] Moreover, they have relied precisely on the "hardship" likely to result from delay or from an unnecessary trial to justify the use of mandamus, just as the *Pan Am* and *Dow Corning* courts did in justifying the use of the collateral order doctrine.[211]

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206. *See infra* notes 255–68 and accompanying text (comparing the three generations of appellate review and noting the shift toward a more flexible, equity-oriented use of mandamus in the third-generation approach).

207. FED. R. CIV. P. 23(f) (permitting immediate appeal, at the sole discretion of the appellate courts, of district court orders granting or denying class certification); *see infra* Part IV.B (discussing Rule 23(f)). Of course, the promulgation of Rule 23(f) moots the question whether interlocutory review of class certification decisions is appropriate under *Coopers & Lybrand.*

208. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304–07 (7th Cir. 1995) (Rovner, J., dissenting).

209. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (citations omitted). As I discuss in Part IV, however, in practice the issuance of writs of mandamus is much more flexible than Supreme Court jurisprudence would suggest. *See infra* Part IV.C.

210. *See, e.g., In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1090 (6th Cir. 1996); *In re Rhone-Poulenc*, 51 F.3d at 1304; *In re* Temple, 851 F.2d 1269, 1273 (11th Cir. 1988); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 307 (6th Cir. 1984). *But see* Baxter Healthcare Corp. v. United States Dist. Court, 121 F.3d 714, No. 96-70243, 1997 U.S. App. LEXIS 21047, at *4 (9th Cir. 1997) (denying a petition for writ of mandamus to vacate a class certification order because the petitioner had an alternative ground for relief). Mandamus has been used to obtain interlocutory appellate review over other kinds of pretrial orders in mass tort cases as well. *See, e.g., In re* Asbestos Sch. Litig. (Pfizer), 46 F.3d 1284, 1296 (3d Cir. 1994) (issuing a writ of mandamus to vacate a district court order denying defendant's motion for partial summary judgment); *In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (issuing a writ of mandamus to reverse a district court order consolidating cases); *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (issuing a writ of mandamus to reverse a district court order consolidating cases).

211. *See, e.g., In re Rhone-Poulenc*, 51 F.3d at 1297–98; *In re Bendectin*, 749 F.2d at 304.

A classic example of this technique is the Sixth Circuit's decision in *In re Bendectin*.[212] In *In re Bendectin*, the district court certified a non-opt out, limited fund settlement class action for all persons who had been exposed to the drug Bendectin.[213] Several individual plaintiffs petitioned the Sixth Circuit for a writ of mandamus to vacate the trial court's certification order.[214] In ruling on the petition, the Sixth Circuit applied a five-factor test to determine whether mandamus was appropriate.[215] Like the *Pan Am* and *Dow Corning* courts, however, the *Bendectin* court rejected a rigid application of the test in favor of a flexible, equity-oriented approach.

For example, the second factor of the Sixth Circuit's test for mandamus required a showing of "irreparable harm"—in the court's words, that "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal."[216] Like the *Pan Am* and *Dow Corning* courts' interpretations of the "effectively unreviewable upon final judgment" requirement for collateral orders, the *Bendectin* court rejected a literal interpretation of the "irreparable harm" requirement in favor of a functional one. To the defendants' argument (clearly correct in the literal sense) that "the plaintiffs can challenge the certification order by appealing the settlement,"[217] the court responded simply: "The petitioners in this case clearly would be prejudiced by having to wait for an appeal from a settlement order. If this class certification is allowed, these plaintiffs would have to expend time and resources contesting a settlement offer that is being forced on them by [the defendants]."[218] In short, the court

212. 749 F.2d 300 (6th Cir. 1984).

213. *Id.* at 302.

214. *Id.* at 303.

215. The *Bendectin* court adopted the five-factor test for mandamus developed by the Ninth Circuit in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). *In re Bendectin*, 749 F.2d at 304. The five factors are:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.... (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. (citing *Bauman*, 557 F.2d at 654–55). For analysis of the *Bauman* factors and their application in the mass tort context, see *infra* Part IV.D.1.

216. *In re Bendectin*, 749 F.2d at 304.

217. *Id.*

218. *Id.*

ruled, "the petitioners would be prejudiced by having to wait for such an appeal, and therefore such an appeal is an inadequate remedy."[219]

In addition, the *Bendectin* court explained that the unique character of the litigation, and the novelty of the issues raised by it, justified the writ of mandamus:

> Several of the issues raised by the class certification are of first impression in this Circuit. This Court has never been faced with a non-opt out class certification for settlement purposes only. Moreover, the sheer magnitude of the case makes the disposition of these issues crucial as several hundred litigants are waiting for a decision before proceeding with their cases.[220]

For these reasons, the court issued the writ of mandamus and ordered the trial court to vacate the class certification order.[221]

In *In re Fibreboard Corp.*,[222] the Fifth Circuit did not even pretend to perform a rigorous analysis of the mandamus requirements before issuing the writ. In *In re Fibreboard*, Judge Robert Parker attempted to try more than three thousand asbestos cases pending in the Eastern District of Texas in a single, mass trial.[223] He developed an unprecedented three-phase trial procedure. Phase I was to be a single, consolidated trial proceeding under Rule 42(a), in which the jury would return a verdict on common defenses and punitive damages.[224] Phase II was to be a single class action trial

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219. *Id.*

220. *Id.* at 307.

221. *Id.* In a more recent opinion, the Sixth Circuit used an even more flexible approach in issuing a writ of mandamus to vacate a class certification order. *See In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1077–78 (6th Cir. 1996). The *American Medical Systems* court used the same five-factor test, noting that these factors were "considerations to be balanced, not prerequisites that must all be met." *Id.* at 1078. Unlike the *Bendectin* court, however, the court in *American Medical Systems* focused its analysis almost exclusively on the third factor—whether the district court's order was "clearly erroneous as a matter of law." *Id.* This approach enabled the court to focus its energy almost exclusively on the substantive issues in question rather than the procedural requirements of the writ of mandamus. As for the "irreparable harm" requirement, the court essentially interpreted the requirement out of existence, making it synonymous with the question of district court error:

> Although it is difficult to quantify irreparable harm, we believe the district judge's numerous errors in this case display an utter disregard for the judicial process, and suggest such a strong bias in favor of class certification, that petitioners' rights to fair process throughout the course of the litigation in the trial court can only be protected by issuance of the writ.

Id. at 1087–88 (footnotes omitted).

222. 893 F.2d 706 (5th Cir. 1990).

223. *Id.* at 708.

224. *Id.*

based on certification of a Rule 23(b)(3) class.[225] The court would try the cases of the class representatives; the jury would also hear evidence and testimony from thirty additional "illustrative" claimants (fifteen chosen by each side), as well as expert testimony using statistical sampling to extrapolate the total damage award.[226] Based on this evidence, the jury would make classwide findings on the issues of exposure and actual damages.[227] In Phase III, the court would distribute the jury's actual and punitive damages.[228] Defendant asbestos companies petitioned the Fifth Circuit for a writ of mandamus to vacate Judge Parker's pretrial consolidation and class certification orders.[229]

The *Fibreboard* court began its opinion by dutifully laying out the stringent requirements for issuance of the writ of mandamus.[230] But the court never made any attempt to demonstrate how the pretrial orders at issue met these requirements. Instead, the court's opinion focused exclusively on the novel issues of procedural and substantive law raised by Judge Parker's unprecedented, highly controversial trifurcated trial scheme.[231] The court rejected Judge Parker's approach, but not without an apology of sorts to the trial judge:

> We admire the work of our colleague, Judge Robert Parker, and are sympathetic with the difficulties he faces. This grant of the petition for writ of mandamus should not be taken as a rebuke of an able judge, but rather as another chapter in an ongoing struggle with the problems presented by the phenomenon of mass torts.... We encourage the district court to continue its imaginative and innovative efforts to confront these cases.[232]

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225. *Id.* at 708–09.

226. *See id.* at 709.

227. *Id.*

228. *Id.* at 707.

229. *Id.*

230. *See id.* at 707.

231. *See id.* at 708–12. The court held that Phase II could not proceed because it did not meet Rule 23(b)(3)'s predominance requirement. *Id.* at 712; *see* FED. R. CIV. P. 23(b)(3) (requiring that "questions of law or fact common to the members of the class predominate over any questions affecting the individual members"). The court pointed out that the plaintiffs "suffer from different diseases, some of which are more likely to have been caused by asbestos than others." *In re Fibreboard*, 893 F.2d at 712. It also pointed to the plaintiffs' differing circumstances regarding exposure and lifestyle. *Id.* It concluded, "There are too many disparities among the various plaintiffs for their common concerns to predominate." *Id.* The court also suggested that Phase II might be a violation of the defendants' right to a trial by jury, but it did not decide that issue. *Id.*

232. *In re Fibreboard*, 893 F.2d at 712. The Fifth Circuit noted with sympathy Judge

Other appellate courts issuing writs of mandamus in mass tort cases have concluded their opinions with similar expressions of sympathy for the trial court.[233] Such expressions of sympathy, highly unusual in mandamus opinions generally, speak to the fundamental tension underlying the use of mandamus in mass tort cases. Historically, issuance of a writ of mandamus was appropriate only in the most extreme cases, when it was required "to confine an inferior court to a lawful exercise of its prescribed jurisdiction."[234] Mere error by a trial court was not sufficient for issuance of the writ; rather, the trial judge's actions had to amount to a "clear abuse of discretion"[235] or a "usurpation of power."[236]

As litigation at the trial court level has become more and more equity-based, however, appellate courts have increasingly turned to the writ of mandamus as a flexible interlocutory review device capable of meeting the growing need for equity-based interlocutory appellate review. But the old, strict requirements for mandamus have remained. And while second-generation appellate courts dutifully cite those old requirements, their decisions reflect a clear sense of

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Parker's observation that "the trial of these cases in groups of 10 would take all of the Eastern District's trial time for the next three years." *Id.* at 708. It also acknowledged Judge Parker's concern that "to apply traditional methodology to these cases is to admit failure of the federal court system to perform one of its vital roles in our society ... an efficient, cost-effective dispute resolution process that is fair to the parties." *Id.* at 709. But it concluded:

> We are told that Phase II is the only realistic way of trying these cases; that the difficulties faced by the courts as well as the rights of the class members to have their cases tried cry powerfully for innovation and judicial creativity. The arguments are compelling, but they are better addressed to the representative branches—Congress and the State Legislature. The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more.... [T]he procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.

Id. at 712.

233. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995). The Seventh Circuit offered the following statement:

> With all due respect for the district judge's commendable desire to experiment with an innovative procedure for streamlining the adjudication of this 'mass tort,' we believe that his plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification.

Id.; *see also In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 307 (6th Cir. 1984) ("Although we shall issue the writ, we realize that the district judge has been faced with some very difficult problems in this case, and we certainly do not fault him for attempting to use this unique and innovative certification method.").

234. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

235. La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957).

236. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

discomfort with them, and a decided tendency to ignore the requirements or to interpret them out of existence—all evidence of the fact that those requirements no longer fit the modern, equity-based use of the writ of mandamus as a pure interlocutory review device.

Whether relying on the collateral order doctrine or the writ of mandamus, appellate courts using second-generation appellate review techniques tend to employ much more flexible, equity-oriented interpretations of the various exceptions to the final judgment rule than Supreme Court jurisprudence would seem to allow. By their willingness to "bend" the final judgment rule in this way, second-generation courts implicitly recognize the equity-based nature of mass tort litigation and the heightened need for interlocutory appellate review in those cases. In addition, they seem much more cognizant than first-generation courts of the importance of their own role in providing supervision and guidance to trial judges in shaping the rules of the mass tort regime.

3. Third-Generation Appellate Review: *In re* Rhone-Poulenc Rorer, Inc.

By explicitly addressing both the need for heightened interlocutory review in mass tort cases, and the inadequacy, or lack of "fit," of existing mechanisms, the Seventh Circuit's opinion in *In re Rhone-Poulenc Rorer, Inc.*[237] marks a new approach in interlocutory appellate review of mass tort cases. In *In re Rhone-Poulenc*, over four hundred hemophiliacs filed suit nationwide against drug companies that manufactured blood solids, alleging that the defendants' products had infected them with the AIDS virus.[238] After the suits were consolidated for pretrial discovery in the Northern District of Illinois, the MDL district judge certified a nationwide class action to try the sole issue of the defendants' negligence.[239]

Under the trial court's scheme, the jury would render a classwide special verdict on the negligence question. If the special verdict found the defendants negligent, individual members of the class would then use the special verdict, in conjunction with the collateral estoppel doctrine, to establish negligence in subsequent individual tort suits.[240] Not surprisingly, the defendants petitioned the Seventh

237. 51 F.3d 1293 (7th Cir. 1995).
238. *Id.* at 1296.
239. *Id.* at 1297.
240. *Id.*

Circuit for a writ of mandamus to vacate this unprecedented class certification order.[241]

In an opinion by then-Chief Judge Posner, the *Rhone-Poulenc* court began its analysis as any second-generation appellate court would—by dutifully citing the narrow scope of mandamus and the strict requirements for issuance of the writ.[242] But there are telling differences in the *Rhone-Poulenc* court's approach. First, as previously noted,[243] second-generation courts, in granting mandamus to vacate a class certification order, do not address at all the potential conflict with the Supreme Court's decision in *Coopers & Lybrand v. Livesay*.[244] Rather than ignoring the *Coopers & Lybrand* problem, the *Rhone-Poulenc* court directly confronted the issue. It attempted to carve out an exception to the Supreme Court's rule that "orders granting class certification are interlocutory,"[245] a rule that would appear to admit no exceptions. But the *Rhone-Poulenc* court quickly found a way of distinguishing *Coopers & Lybrand*:

> The point of cases like *Coopers & Lybrand* is that irreparable harm is not enough to make class certification orders *automatically* appealable . . . not that mandamus is never appropriate in a class certification setting. There is a big difference between saying that *all* class certification rulings are appealable as of right because they are final within the meaning of section 1291 (the position rejected in *Coopers & Lybrand*) and saying that a handful are—the handful in which the district judge committed a clear abuse of discretion.[246]

Second, the *Rhone-Poulenc* court adopted a very different approach to the "irreparable harm" requirement. Second-generation appellate courts typically rely on vague notions of "prejudice" or "hardship" resulting from delay or from an unnecessary trial (impermissible under a strict reading of Supreme Court precedent)[247] to satisfy the "irreparable harm" requirement; or, alternatively, they ignore the "irreparable harm" requirement altogether in issuing the

241. *Id.* at 1294.
242. *Id.* at 1294–95.
243. *See supra* Part III.B.2.b.
244. 437 U.S. 463 (1978).
245. *Id.* at 476.
246. *In re Rhone-Poulenc*, 51 F.3d at 1295.
247. The Supreme Court has held that "[m]andamus is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); *see supra* Part III.B.2.b.

writ of mandamus.[248] By contrast, the *Rhone-Poulenc* court offered a detailed analysis of the "irreparable harm" requirement. First, it noted that even if a final judgment was entered in the case, "it will come too late to provide effective relief to the defendants .... [because of] the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them."[249]

The risk to the defendants, the court explained, was directly related to the case's status as a mass tort—the problem of the "elasticity" of mass torts.[250] According to the court: "[I]f the class certification stands[,] ... [a]ll of a sudden [defendants] will face thousands of plaintiffs."[251] As a consequence, the defendants might "easily be facing $25 billion in potential liability ... and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[252] Finally, the court reached the crux of the problem: "If [the defendants] settle, the class certification—the ruling that will have forced them to settle—will never be reviewed."[253] Thus, the court concluded, the class certification order would inflict "irreparable harm" on the

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248. *See, e.g., In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1087–88 (6th Cir. 1996) (employing a relaxed standard of "irreparable harm"); *In re* Temple, 851 F.2d 1269, 1273 (11th Cir. 1988) (granting mandamus, but not discussing the irreparable harm requirement).

249. *In re Rhone-Poulenc*, 51 F.3d at 1297.

250. In an article that first identified the elasticity problem, Professor McGovern described the "elasticity strategy" of mass tort plaintiffs' lawyers as follows:

> What [these] lawyers care about is not just maximizing the value of each case individually, but maximizing the number of claimants they can aggregate and thereby increasing the total number and value of all of their cases. They are looking for ways to make the tort more elastic by expanding the bounds of liability, causation, and damages; by simplifying and expediting procedures; and by increasing the number of claimants and thereby increasing the total value of the claims.

McGovern, *supra* note 103, at 1831. Plaintiffs' lawyers utilize several techniques to accomplish these goals. First, they "attempt to expand legally actionable torts" by relying on theories such as strict liability. *Id.* Second, they "seek to develop facts that will support aggregation and apply to a large number of claimants" by focusing on issues of defendant culpability and general causation rather than individual causation and liability. *Id.* at 1832–33. Finally, they have succeeded in "lowering the financial and legal barriers to accessing courts" and lowering their own transaction costs by employing efficient pretrial discovery techniques. *Id.* at 1833. Defendants, of course, have developed their own strategies to combat elasticity. *See id.* at 1834–36. For a discussion of the concept of elasticity in the mass tort context, see McGovern, *supra* note 103, at 1827–36.

251. *In re Rhone-Poulenc*, 51 F.3d at 1298.

252. *Id.*

253. *Id.*

defendants, and issuance of the writ of mandamus to vacate the order was appropriate.[254]

Like the appellate courts applying second-generation appellate review techniques, the *Rhone-Poulenc* court used the writ of mandamus as a pure interlocutory review device. But while second-generation courts *implicitly* recognize the equity-based nature of mass tort litigation and the heightened need for interlocutory appellate review in those cases, the *Rhone-Poulenc* court was much more *explicit* in recognizing these factors. In justifying the issuance of the writ, the court focused its analysis on the equity-based realities of mass tort litigation. It recognized the elasticity problem in mass torts, that the vast majority of mass tort cases settle prior to final judgment, and that the pretrial rulings of mass tort trial judges have enormous influence in determining the outcome of those settlements.[255] Given these realities, as the court correctly held, strict adherence to the final judgment rule simply does not make sense in the mass tort context.

By explicitly recognizing the equitable nature of mass tort litigation at the trial level, the *Rhone-Poulenc* court made a much more convincing argument in favor of the need for heightened interlocutory review in such cases generally, and of the issuance of the writ of mandamus in this particular case. Thus, ironically, in granting the common law writ of mandamus, the *Rhone-Poulenc* court acted as an equity appellate court, weighing the equities involved in the timing of appeal and concluding that immediate intervention was required.

As the previous analysis illustrates, the evolution of interlocutory appellate review of mass tort litigation has been characterized by three distinct "generations." Each generation represents a different tactical approach by appellate courts, but all are attempting to grapple with the broad problem of applying common law-based appellate procedure to an equity-oriented mass tort regime. By explicitly confronting this problem, third-generation courts are more successful in defending their decisions to grant interlocutory review in particular cases. More importantly, the third-generation approach addresses the broader problem by contributing to the development of a flexible, equity-oriented interlocutory review device. Utilizing a more conservative, indirect approach, second-generation courts must rely on unconvincing legal contortions to justify their decisions to grant interlocutory review; moreover, the "ad hoc" quality of the

254. *Id.* at 1299.
255. *Id.* at 1298–1300.

second-generation approach does not address the broader need for a flexible interlocutory review device in mass tort litigation generally.

Of course, the most significant contrast in approach (and in outcome) is found not between second-generation and third-generation appellate courts, but between appellate courts applying common law-oriented first-generation techniques, and those applying equity-oriented third-generation techniques. A classic example is the very different treatment accorded to the "national consensus law" issue confronted by both the first-generation *Agent Orange* court, and the third-generation *Rhone-Poulenc* court. As mentioned earlier, on mandamus the *Agent Orange* court expressed its "considerable skepticism as to the existence of a 'national substantive rule' " on product liability.[256] Using a strict first-generation interpretation of the mandamus requirements, however, it refused to find the district court's ruling in that regard to be "a palpable error remediable by mandamus."[257] But on appeal from final judgment, the *Agent Orange* court found other grounds on which to uphold the class certification.[258] In fact, it devoted only a scant paragraph to the "national consensus law" theory, rejecting the theory, but with virtually no analysis of the issue.[259]

Using third-generation appellate review techniques, the *Rhone-Poulenc* court's thorough analysis of the "national consensus law" theory stands in sharp contrast to the *Agent Orange* court's cursory treatment of the issue. The *Rhone-Poulenc* court first noted that "[t]he Second Circuit was willing to assume *dubitante* that [a national consensus law existed in regard to] the issues certified for class determination in the Agent Orange litigation."[260] But, the court continued, "[w]e doubt that it is true in general, and we greatly doubt that it is true in a case such as this."[261] The *Rhone-Poulenc* court then devoted three pages of its opinion to a careful analysis and rejection of the "national consensus law" theory.[262] It rejected the district court's attempt to condense the negligence law of so many jurisdictions into one jury instruction, holding that in this regard, "the

256. *In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 861 (2d Cir. 1984); *see supra* notes 153–60 and accompanying text.

257. *In re Diamond Shamrock*, 725 F.2d at 861.

258. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166–67 (2d Cir. 1987) (upholding the class certification order based on the "centrality of the military contractor defense" to the litigation).

259. *Id.* at 165.

260. *In re Rhone-Poulenc*, 51 F.3d at 1300.

261. *Id.*

262. *Id.* at 1300–02.

district judge exceeded the bounds of permissible judicial discretion. He propos[ed] to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world."[263] The court also suggested that the "national consensus law" approach would amount to a violation of the *Erie* doctrine.[264]

By relying on first-generation appellate review techniques and refusing to use the writ of mandamus to rule on the national consensus law question at an early stage of the litigation, the *Agent Orange* court allowed a key, highly controversial issue in mass torts to evade appellate review. As a result, the court sent mixed messages to mass tort lawyers and trial judges regarding the likely validity of the theory in future mass tort cases. By contrast, in *Rhone-Poulenc*, the application of third-generation appellate review techniques enabled the appellate court to rule on this controversial theory at an early stage of the litigation. In so doing, the *Rhone-Poulenc* court sent a clear signal to mass tort trial judges that the "national consensus law" theory went too far in attempting to solve the choice-of-law problem inherent in diversity-based mass tort class actions.

Not only did the *Rhone-Poulenc* court address the controversial choice-of-law problem; the court also took the opportunity to express its views on other key substantive and procedural issues in mass torts. First, the court addressed the "economic blackmail" problem that often confronts defendants in mass tort class actions.[265] Second, the court discussed Seventh Amendment limitations to bifurcation.[266] Finally, the court urged district courts to exercise caution in using aggregation techniques such as class certification on "immature" mass

263. *Id.* at 1300. Then-Chief Judge Posner suggested that the district court's proposed jury instruction would require the use of "Esperanto," and he concluded that the variations in state law would render the class unmanageable. *Id.*

264. *See id.* (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78–80 (1938)) (suggesting that because a national consensus law would require aggregation of the negligence laws of all fifty states, an *Erie* violation would result because this technique would amount to the application of federal common law).

265. *Id.* at 1298–99. The court expressed its concern that even though the defendants had won 92.3% of cases that had proceeded to trial, a class action would nonetheless force them to settle because a jury of six persons would "hold the fate of an industry in the palm of its hand." *Id.* at 1299.

266. *Id.* at 1302–03. The district court's trial plan called for bifurcation of class issues of the defendants' negligence from individual issues of comparative negligence and proximate causation. *Id.* at 1303. The appellate court held that these issues are inseparable, and as a result multiple juries would be examining the issue of the defendants' negligence in violation of the Seventh Amendment. *See id.* at 1302–03. It noted that while certain issues may be separated for class consideration, "the district judge must carve at the joint." *Id.* at 1302.

torts.[267] Not surprisingly, the *Rhone-Poulenc* opinion has become a seminal decision in mass torts, sparking a spirited debate in the courts and among scholars on all of these issues.[268]

A third-generation approach to interlocutory appellate review not only enables appellate courts to play a vital role in shaping the

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267. *See id.* at 1299–1300. The court noted the following:

> With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.

Id. at 1300; *see infra* Part IV.D.2 (discussing the concept of "maturity" in mass torts, and arguing that appellate courts should take maturity into account in deciding whether to grant interlocutory review of pretrial rulings).

268. *Rhone-Poulenc* has invigorated debate about numerous issues surrounding mass torts. First, the decision has greatly contributed to the dialogue regarding the importance of choice-of-law issues in class certification decisions. *Compare, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 741–43 (5th Cir. 1996) (concluding that a district court must consider variations in state law before certifying a class), *and* Fisher v. Bristol-Myers Squibb Co., 181 F.R.D. 365, 368–69 (N.D. Ill. 1998) (stating that variations in state law make crafting understandable jury instructions nearly impossible), *with In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 459, 460–61, 464–66 (D. Wyo. 1995) (holding that the decision to manage a class under differing state laws falls within the discretion of the trial court). Second, *Rhone-Poulenc* has raised debate about "economic blackmail" concerns. *Compare, e.g.*, Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 385–86 (1996) ("[T]he certification of such tenuous claims can lead to settlements that are very unfair to defendants."), *with* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996) (rejecting the "economic blackmail" argument), *and In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 275–76 (S.D. Ohio 1997) (disagreeing strongly "with those Circuit Courts which have allowed their apparent economic biases to influence" their class certification decisions). Third, *Rhone-Poulenc* has influenced the debate regarding whether courts should examine the underlying merits of plaintiffs' claims in ruling on class certification motions. *Compare* McGuire, *supra*, at 381–85 (supporting the examination of the underlying merits of the plaintiffs' claims in deciding whether to certify a class), *with Valentino*, 97 F.3d at 1232 (rejecting the argument that courts should consider the merits of plaintiffs' claims before determining class certification), *and In re Copley*, 161 F.R.D. at 460 (holding that consideration of the merits of a claim is prohibited when deciding whether to certify a class). Fourth, *Rhone-Poulenc*'s analysis of the Seventh Amendment limitations to bifurcation of mass tort class actions has sparked contrasting opinions. *Compare Castano*, 84 F.3d at 751 (agreeing with *Rhone-Poulenc* that Seventh Amendment concerns are raised when issues are bifurcated because there is a chance that a second jury will reexamine issues tried by the first jury), *with Valentino*, 97 F.3d at 1232 (stating that *Rhone-Poulenc*'s Seventh Amendment concerns regarding bifurcation "may not be fully in line with the law of this circuit"), *and In re Copley*, 161 F.R.D. at 461 (holding that bifurcation of mass tort class actions is valid and necessary). Finally, *Rhone-Poulenc* has sparked debate regarding the use of aggregation techniques on immature mass torts. *Compare In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (stating that the use of aggregation techniques "to resolve immature mass tort actions has been disfavored"), *and Castano*, 84 F.3d at 745–50 (concluding that aggregation of immature mass torts may be necessary to promote fairness to the defendant).

litigation at hand. More importantly, as the Seventh Circuit's decision in *Rhone-Poulenc* demonstrates, a third-generation approach gives appellate courts an important voice in the ongoing dialogue among mass tort trial judges, practitioners, and scholars. This dialogue is shaping the substantive and procedural law that governs the mass tort regime as a whole, and it is one from which a strong appellate voice has been absent for far too long.

IV. CHOOSING AN INTERLOCUTORY REVIEW MECHANISM FOR THE MASS TORT REGIME: AN ANALYSIS OF TWO INITIATIVES FOR REFORM

Appellate review of mass tort litigation is slowly evolving in response to the phenomenon of procedural uncoupling—from a strict, common law-oriented first-generation approach to a flexible, equity-oriented third-generation approach. This evolutionary process is still in its earliest, most tentative stage of development, however. It remains to be seen whether the interlocutory review devices that appellate courts have utilized thus far are really best suited to the special demands of mass tort litigation, or whether they can be improved. Over the past two decades, numerous proposals have offered various reforms of the rules governing appellate review.[269]

269. Various scholars have proposed a wide variety of reforms in appellate review techniques. The proposed reforms run the gamut, from modest initiatives to reduce appellate caseloads to bold proposals that would introduce sweeping structural and systemic changes in the federal court system itself. For commentary on reform of the final judgment rule and interlocutory review, see, for example, Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 165, 165–70 (proposing a federal statute governing interlocutory appeals); Edward H. Cooper, *Timing As Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 157, 163 (arguing in favor of a "more openly discretionary system of interlocutory appeal"); Martineau, *supra* note 20, at 748–70 (analyzing proposals for reforming the final judgment rule); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 91–92 (1975) (arguing that the final judgment rule should be relaxed through the "increased intelligent use of the pragmatic approach to the appealability of interlocutory orders"); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 171, 171–79 (commenting on the interlocutory review reforms advanced by Carrington and Cooper); *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS., Spring 1984, at 13, 13–248 (attempting to restructure statutory and case law regarding the final judgment rule and interlocutory appeal provisions into a "Restatement" based on an analysis of existing case law). For commentary on appellate review generally and structural reform of the appellate system, see, for example, Thomas E. Baker, *A Generation Spent Studying the United States Court of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 395–422 (2000) (collecting and analyzing studies and recommendations of previous scholarly and judicial commissions focusing on appellate reform); Carrington, *supra* note 43, at 525–29 (discussing early

While the majority of these proposals are not designed specifically for use in mass tort cases, they do address the problem of appellate review of complex litigation generally, and may be adaptable to the mass tort context. The final part of this Article suggests criteria for choosing among the competing proposals. It then examines the two initiatives for reform that have thus far received the most attention and are the most promising for use in the mass tort context: the new Rule 23(f), and the expanded use of the writ of mandamus.

A. Criteria for the Ideal Interlocutory Review Device: Providing Flexibility and Limiting Access

The ideal interlocutory review device for mass tort litigation is one that enables appellate courts to establish and maintain a delicate balance between two equally important, yet conflicting, goals. On the one hand, the ideal interlocutory review device must *provide flexibility* by permitting interlocutory review, at the sole discretion of the courts of appeals, of a wide variety of lower court decisions. Equity practice has exerted a powerful influence on the development of the mass tort regime in at least four distinct areas: aggregation devices, the use of equitable remedies, discovery, and judicial encouragement of settlement.[270] To address adequately the problem

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twentieth-century reformer Roscoe Pound's proposal that federal appeals be conducted by oral hearing before a three-judge panel sitting in the district court, and suggesting that modern reformers adopt some version of Pound's proposal); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 93 (1985) (proposing a "straightforward cert. (or partial cert.) system" in which only certain types of cases would be entitled to an appeal, and the remaining cases would be appealed at the discretion of the appellate court); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 15 n.19 (summarizing various reform proposals); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1151–58 (1981) (arguing in favor of a complete abandonment of appeal of right); J. Dickson Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS., Spring 1984, at 1, 1–12 (examining the goals and values served by a formal approach to appellate review as opposed to a flexible approach). These authors do not specialize in mass torts, however, and they do not discuss the unique problems presented by mass tort litigation or apply their reform proposals specifically to the mass tort context.

The first significant appellate reform proposals specifically geared toward mass tort litigation appeared in 1989, in reports published by the American Bar Association and the American Law Institute. The reports made a variety of recommendations for procedural reforms geared toward mass torts and other complex litigation; both reports also included brief discussions of appellate review techniques in the mass tort context and made some recommendations for reform of appellate procedures. *See* ALI, *supra* note 108, § 3.07; ABA, *supra* note 108, at 1–87. For a discussion of these reform proposals, see Martineau, *supra* note 20, at 760–64.

270. *See supra* Part II.A.

of procedural uncoupling, an interlocutory review device must enable appellate courts to intervene in any of these areas in order to provide guidance to trial courts and to participate in the development of new substantive or procedural law.

On the other hand, the ideal interlocutory review device must do an adequate job of *limiting access* to interlocutory appellate review. Although heightened interlocutory appellate review is, in my view, crucial to the proper development of the mass tort regime, appellate courts should not be constantly peering over the shoulders of mass tort trial judges, ready to pounce on any questionable pretrial ruling. In the first place, such an approach is simply not practicable in light of the much-lamented (and much-debated) caseload crisis already facing the courts of appeals.[271] More importantly, excessive appellate oversight of mass tort trial judges would hinder the development of the mass tort regime itself, which depends on the ingenuity and creativity of enterprising trial judges for its lifeblood. Additionally, trial judges presiding over complex mass tort litigation must retain a substantial amount of power to conduct the litigation as they see fit. The ideal interlocutory review device, then, must preserve the traditional gatekeeping function of the final judgment rule itself: It must limit access to appellate review, enabling appellate courts to reject quickly frivolous appeals on matters insignificant to the final outcome of the litigation or to the development of the law.

B. *A First Attempt at Reform: Interlocutory Review of Class Certification Orders Under Rule 23(f)*

In 1998, the Supreme Court amended the Federal Rules of Civil Procedure to add a new Rule 23(f).[272] This rule permits immediate appeal, at the sole discretion of the appellate courts, of district court orders granting or denying class certification.[273] Unlike the other

271. *See* Dragich, *supra* note 269, at 12–17, 25–28 (describing the acute caseload crisis facing the federal courts of appeals), and sources cited therein; Martineau, *supra* note 20, at 719–26 (discussing "dramatically increasing [appellate] caseloads" and Congress's response to them).

272. FED. R. CIV. P. 23(f), 523 U.S. 1223 (1998).

273. The rule provides the following:

> (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.

FED. R. CIV. P. 23(f). The Advisory Committee's note accompanying Rule 23(f) explains that under the new rule,

> [t]he court of appeals is given unfettered discretion whether to permit the appeal,

proposed amendments to Rule 23, which failed to be enacted, Rule 23(f) proved surprisingly uncontroversial from the beginning, generally receiving the approval of scholars and practitioners alike.[274] Thus far, the First, Seventh, and Eleventh Circuits have issued opinions articulating standards for granting interlocutory review under Rule 23(f).[275]

While the case law interpreting Rule 23(f) is in an early developmental stage, some preliminary observations can be made. The First, Seventh, and Eleventh Circuits generally agree on the broad categories of cases in which interlocutory review under Rule 23(f) may be appropriate. First, a Rule 23(f) appeal may be appropriate when the class certification decision will effectively end the litigation by creating a "death knell" situation for either the plaintiff or the defendant.[276] Second, the circuits agree that a Rule

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akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.... Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.

FED. R. CIV. P. 23(f) advisory committee's note. *See generally* Michael E. Solomine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000) (examining the history of Rule 23(f) and proposing criteria for granting appeals under Rule 23(f)).

274. *See, e.g.*, Gallacher et al., *supra* note 58, at 211–12 (arguing that if the proposed amendments to Rule 23 were adopted, "a body of appellate law defining the acceptable parameters of class certification will begin to develop more reliably"); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 619 (1997) ("On the merits, this amendment is a sound rulemaking solution to the burgeoning problem of using mandamus as a back-door method to obtain interlocutory review of orders granting class certification."). *But see* Amy Schmidt Jones, Note, *The Use of Mandamus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U. L. REV. 232, 263–64 (1997) (criticizing the proposed Rule 23(f) and arguing that the increased use of mandamus is a better solution). For a summary of the other proposed amendments to Rule 23, see Mullenix, *supra*, at 619–24.

275. *See* Prado-Steiman v. Bush, 221 F.3d 1266, 1274–77 (11th Cir. 2000); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293–94 (1st Cir. 2000); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834–35 (7th Cir. 1999). Interestingly, none of the Rule 23(f) appeals thus far has involved mass tort litigation.

276. *See Prado-Steiman*, 221 F.3d at 1274; *Mowbray*, 208 F.3d at 293; *Blair*, 181 F.3d at 834. Thus, a Rule 23(f) appeal may be available in the classic "death knell" situation, in which class certification is denied and the plaintiffs' claims are too small to justify the costs of individual litigation. *Blair*, 181 F.3d at 834. Conversely, Rule 23(f) may be available to review a "reverse death knell" situation, in which a grant of class status raises the stakes of the litigation, thus placing pressure on defendants to settle (the situation faced by the defendants in *In re Rhone-Poulenc*). *See Prado-Steiman*, 221 F.3d at 1274; *Mowbray*, 208 F.3d at 293; *Blair*, 181 F.3d at 834. The circuits also agree that a petitioner seeking to invoke a "death knell" situation to justify the appeal must "demonstrate that the district court's ruling on class certification is questionable." *Blair*, 181 F.3d at 835; *see also Prado-Steiman*, 221 F.3d at 1274 ("[A] court should consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely

23(f) interlocutory appeal may be appropriate in certain cases that present important, unsettled legal issues.[277]

But these appellate decisions also suggest that the Seventh Circuit, consistent with its third-generation approach to interlocutory appellate review, may be more aggressive than the First and Eleventh Circuits in granting petitions for review under Rule 23(f). For example, while all three circuits would review cases involving important legal issues, the Seventh Circuit's standard is much more lenient than those of the First and Eleventh Circuits. The Seventh Circuit appears to be willing to grant all Rule 23(f) appeals that "facilitate the development of the law," in particular fundamental issues relating to class actions and the proper interpretation of Rule 23 generally.[278] The First and Eleventh Circuits would grant only those appeals that "will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself."[279] Moreover, the First and Eleventh Circuits state clearly that they will limit interlocutory review under Rule 23(f) to the exceptional case,[280] but the Seventh Circuit's opinion includes no such

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constitutes an abuse of discretion."); *Mowbray*, 208 F.3d at 295 ("[N]o matter how strong the economic pressure to settle, a Rule 23(f) application . . . also must demonstrate some significant weakness in the class certification decision."). This approach is consistent with the Advisory Committee's notes to Rule 23(f), which endorse the use of Rule 23(f) appeals to address both "death knell" and "reverse death knell" situations. *See* FED. R. CIV. P. 23(f) advisory committee's note. The Advisory Committee discussed both of these situations as follows:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

FED. R. CIV. P. 23(f) advisory committee's notes.

277. *See Prado-Steiman*, 221 F.3d at 1275; *Mowbray*, 208 F.3d at 294; *Blair*, 181 F.3d at 835.

278. *See Blair*, 181 F.3d at 835.

279. *Mowbray*, 208 F.3d at 294. The First Circuit expressed concern that the *Blair* rule might "encourage too many disappointed litigants to file fruitless Rule 23(f) applications," because "a creative lawyer almost always will be able to argue that deciding her case would clarify some 'fundamental issue.' " *Id.*; *see also Prado-Steiman*, 221 F.3d at 1275 (adopting *Mowbray* interpretation).

280. *See Prado-Steiman*, 221 F.3d at 1273 (noting that given the large numbers of class actions filed each year, "routinely granting interlocutory appellate review of class certification decisions is simply not practicable"); *Mowbray*, 208 F.3d at 294 (emphasizing that "interlocutory appeals should be the exception, not the rule[,]" as "many (if not most) class certification decisions turn on 'familiar and almost routine issues' ") (citation omitted). The First and Eleventh Circuits emphasize that a class certification decision is provisional, and that in the typical case a district court should have the opportunity to amend that decision as the litigation progresses. *See Prado-Steiman*, 221 F.3d at 1273–74

restrictive language.[281] If the Seventh Circuit continues to apply a more liberal standard than other circuits in reviewing Rule 23(f) petitions, the result will likely be a more highly developed jurisprudence not only on the proper application of Rule 23(f), but more importantly, on the fundamental legal issues surrounding class actions.

Rule 23(f) is an important first attempt at reforming interlocutory appellate review, but it is inadequate to address the general need for heightened interlocutory review in mass tort litigation. On the one hand, the standards outlined in these early appellate decisions effectively limit the possibility for frivolous appeals under Rule 23(f), while ensuring the Rule's availability to review the most important class certification decisions. Rule 23(f) should prove to be a useful device for interlocutory review of class certification decisions, an important category of pretrial rulings that have proved particularly problematic in the mass tort context. In addition, by limiting its reach to class certification decisions, Rule 23(f) meets one of the criteria that I identified: It does a reasonably good job of limiting access to interlocutory review to a narrow class of pretrial rulings.

On the other hand, Rule 23(f) fares less well under the second criterion: providing flexibility. Class certification decisions certainly are not the only pretrial rulings that may require heightened interlocutory review. Controversial, innovative pretrial rulings in mass tort cases run the gamut, from consolidation orders to discovery rulings to summary judgment rulings on matters of substantive law.[282]

("[I]nterlocutory appellate review of a class certification decision may short-circuit the district court's ability—or at least willingness—to exercise its power to reconsider its certification decision .... This possibility is troubling, because class certification determinations are so fluid and fact-sensitive that district courts should be encouraged rather than discouraged from reassessing [the class certification decision]."); *Mowbray*, 208 F.3d at 294 ("We should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order, rather than opening the door too widely to interlocutory appellate review.") (citation omitted).

281. In fact, the Seventh Circuit suggests that courts should be less reluctant to grant interlocutory review pursuant to Rule 23(f) than pursuant to section 1292(b), because delay in litigation is less problematic under Rule 23(f). It notes that "[j]udges have been stingy in accepting interlocutory appeals by certification under 28 U.S.C. § 1292(b), because that procedure interrupts the progress of a case and prolongs its disposition." *Blair*, 181 F.3d at 835. But the court points out that "Rule 23(f) is drafted to avoid delay. Filing a request for permission to appeal does not stop the litigation unless the district court or the court of appeals issues a stay .... Because stays will be infrequent, interlocutory appeals under Rule 23(f) should not unduly retard the pace of litigation." *Id.*

282. *See supra* Part III. *See generally* 7B CHARLES A. WRIGHT ET AL., FEDERAL

In short, Rule 23(f) performs its gatekeeping function too well, and as a result suffers from underinclusiveness. By carving out a narrow exception to the final judgment rule for class certification decisions, Rule 23(f) leaves many other equally controversial pretrial rulings untouched.

In addition, with two Supreme Court decisions and several influential appellate court decisions on the books,[283] courts have already made a great deal of progress in mapping out the proper boundaries of mass tort class actions. Moreover, if courts continue to restrict the innovative use of mass tort class actions, the locus of innovation (and controversy) at the trial level will shift to other areas of procedural and substantive law, such as consolidation, multidistrict litigation, or bankruptcy proceedings.[284] Thus, long after courts have

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PRACTICE AND PROCEDURE § 1802.1, at 489–93 (2d ed. 1986) (discussing appealability of orders in class actions other than rulings on class certification); 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2006, at 76–93 (2d ed. 1994) (discussing appellate review of discovery orders); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2386, 2392, at 466–69, 515–18 (2d ed. 1995) (discussing appellate review of orders granting or denying consolidation or separate trials); 9A *id.* § 2615, at 707–09 (discussing appellate review of orders of reference to special masters); 16 WRIGHT ET AL., *supra* note 113, § 3935.3, at 604–19 (discussing interlocutory appellate review of discovery orders); 16 *id.* § 3935.4, at 619–26 (discussing interlocutory appellate review of orders granting or denying transfers of venue).

283. *See, e.g.*, Ortiz v. Fibreboard, 527 U.S. 815, 821 (1999) (determining "the conditions for certifying a mandatory settlement class on a limited fund theory under [Rule 23]"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (holding that a "class-action certification [seeking] to achieve global settlement of current and future asbestos-related claims" failed to satisfy Rule 23); Valentino v. Carter-Wallace, 97 F.3d 1227, 1233–34 (9th Cir. 1996) (holding that the district court's decision to grant class certification was an abuse of discretion where plaintiffs failed to meet some of the key requirements of Rule 23); Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (decertifying a multistate class because the district court failed to consider differences in state law and how a trial on the merits would be conducted); *In re* Am. Med. Sys., 75 F.3d 1069, 1090 (6th Cir. 1996) (granting mandamus and decertifying a class because the district court disregarded the requirements of Rule 23); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995) (granting mandamus and decertifying a class because the district court exceeded its authority in attempting to streamline the mass tort adjudication).

284. In fact, evidence indicates that such a shift is already occurring. A case in point is *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), which involved the consolidation in the Eastern District of Texas of over 3,000 claims for damages arising from the alleged improper handling of a crude oil storage waste pit. *Id.* at 1017. Judge Robert Parker ordered a unitary trial on general causation issues, as well as a trial on the individual claims of a "bellwether" group of thirty claimants. *Id.* The Fifth Circuit granted the defendant's request for a writ of mandamus on the ground that Judge Parker had failed to make a finding that the bellwether group was representative of the larger group of claimants from which they were selected. *Id.* at 1019–20.

An example of an issue arising in the context of multidistrict litigation proceedings is the controversial practice of Judge Charles Weiner of the Eastern District of Pennsylvania as MDL judge presiding over the consolidated federal asbestos cases. He

resolved the difficult class certification issues that Rule 23(f) was designed to address, mass tort litigation will still require heightened interlocutory review in these other areas. The underlying problem lies not (as Rule 23(f) suggests) in a particular procedural device such as the class action; rather, the problem lies in the equitable nature of mass tort litigation itself. Rule 23(f)'s piecemeal approach to interlocutory review will therefore be of limited usefulness in enabling appellate courts to address the many controversial issues that are sure to develop in the future of the mass tort regime.

C. *A Better Solution: The Expanded Use of Supervisory and Advisory Mandamus*

To address effectively the problem of procedural uncoupling in the mass tort context, courts must adopt a bolder approach. In order to gain the flexibility necessary to ensure a strong appellate voice in the development of the mass tort regime, appellate courts should continue to loosen some of the restrictions on access to interlocutory appellate review in appropriate cases. In other words, more courts need to adopt a third-generation equity-oriented approach to mass tort litigation. Courts should therefore consider a second alternative for reform of interlocutory review in the mass tort context: the continued expansion of the writ of mandamus.

In some respects, the common law writ of mandamus is not an obvious candidate for a third-generation approach to interlocutory review. Under the traditional formulation, an appellate court may issue a writ of mandamus only in extraordinary circumstances, when a district court has improperly exercised its jurisdiction.[285] Traditionally, mere errors by a district judge, no matter how egregious, were insufficient to justify use of the writ.[286]

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severed punitive damages claims from actions remanded for trial and retained jurisdiction over those claims. *See In re* William Lee Roberts, 178 F.3d 181, 183 (3d Cir. 1999). The Third Circuit denied an asbestos claimant's mandamus petition seeking to halt the practice on the ground that the plaintiff should have sought relief from the Judicial Panel on Multidistrict Litigation, which has sole authority to remand claims to a transferor court. *Id.* at 183–84. In both of these cases, Rule 23(f) would have been useless to appellate courts wishing to hear the issues on interlocutory appeal.

285. 16 WRIGHT ET AL., *supra* note 113, § 3933.1, at 540. An early Supreme Court case, for example, explains that mandamus is appropriate only where it is absolutely necessary in order "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

286. *See, e.g.*, Will v. United States, 389 U.S. 90, 103–04 (1967).

While modern mandamus opinions often give lip service to the traditional formulation, however, there is no question that the traditionally narrow conception of mandamus practice has expanded significantly over the past few decades.[287] Modern courts have long recognized a much more flexible conception of the writ, one that acknowledges its role as a pure interlocutory review device, without regard to traditional inquiries into district court jurisdiction. A court may, for example, issue a writ of mandamus to correct a practice of repeated error by a district court—the so-called "supervisory mandamus."[288] In addition, a court may use the writ of mandamus to address novel, important questions of law—the so-called "advisory mandamus."[289] The Supreme Court has approved the supervisory and advisory uses of mandamus, explaining that these modern uses of the writ "serve[] a vital corrective and didactic function" by permitting appellate courts to address issues that might otherwise elude appellate review.[290]

In many respects, supervisory and advisory mandamus practice seems tailor-made for use in mass tort cases—in a sense, the ideal mechanism for a third-generation approach to appellate review. Supervisory and advisory mandamus practice is certainly flexible enough to meet the need for heightened interlocutory review wherever that need might arise in the mass tort regime. In order to reign in an overly ambitious mass tort trial judge or to address a novel legal issue, an appellate court may, at its sole discretion, use the writ of mandamus to review any pretrial ruling on any issue of procedural or substantive law. In fact, the inherent flexibility and discretionary nature of supervisory and advisory mandamus have led the Supreme Court to characterize mandamus as "one of the most potent weapons in the judicial arsenal."[291] It is not surprising, then, that when appellate courts began searching for an interlocutory review device

287. *See generally* 16 WRIGHT ET AL., *supra* note 113, §§ 3933–3934.1, at 527–88 (discussing the traditional use, development, and expansion of the writ of mandamus).

288. Supervisory mandamus grew out of the Supreme Court's 5–4 decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), which expressly approved the use of mandamus to exercise "supervisory control of the District Courts by the Courts of Appeals." *Id.* at 259–60.

289. The Supreme Court approved advisory mandamus in *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). For a discussion of supervisory and advisory mandamus, see 16 WRIGHT ET AL., *supra* note 113, §§ 3934–3934.1, at 565–88. It is important to note that while the terms "advisory" and "supervisory" are often employed in the scholarly literature, the courts seldom use the terms. 16 *id.* § 3934, at 566.

290. *Will*, 389 U.S. at 107.

291. *Id.*

for use in mass tort cases, many of them found what they were looking for in supervisory and advisory mandamus practice.[292]

At the same time, in its strength also lies the inherent danger of supervisory and advisory mandamus practice: Over-utilization of the writ may lead to the weakening of the traditional gatekeeping function that is so essential to any interlocutory review device. If used indiscriminately, supervisory and advisory mandamus practice threatens to "expand[] into a method of permissive interlocutory appeal,"[293] overwhelming the appellate courts with frivolous petitions and impeding the resolution of mass tort litigation at the trial level.

The crucial question, then, in determining whether mandamus should be the interlocutory review device of choice in mass tort litigation, is this: Can courts find ways to avail themselves of the superior flexibility of modern supervisory and advisory mandamus practice, while at the same time preserving the gatekeeping function of the traditional writ? I am convinced that they can do so. By adopting the following strategies in utilizing the writ of mandamus, appellate courts can achieve both goals.

D. Strategies for Mapping Out the Boundaries of Mandamus Practice in the Mass Tort Context

1. Develop Existing Standards Governing Supervisory and Advisory Mandamus

The first strategy that appellate courts can employ in developing mandamus for use in mass tort cases is a straightforward one: the

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292. *See supra* Parts III.B.2.b and III.B.3 (discussing the use of mandamus in second- and third-generation approaches to interlocutory appellate review). Interestingly, while these courts clearly employed modern supervisory and advisory uses of mandamus to reverse controversial pretrial rulings in mass tort cases, none of their opinions acknowledged this fact or labeled their uses of the writ as "supervisory" or "advisory." In fact, ironically, while the Seventh Circuit in *Rhone-Poulenc* has adopted the boldest use to date of mandamus in the mass tort context, it is unclear whether that circuit even recognizes supervisory mandamus practice in general. *See* First Nat'l Bank of Waukesha v. Warren, 796 F.2d 999, 1004–05 (7th Cir. 1986) (concluding that the supervisory mandamus rule approved in *La Buy* "is defunct.... The dissenting Justices in *La Buy* argued that mandamus should be reserved for truly extraordinary cases.... In the last 20 years this view has prevailed"). As Professors Wright, Miller, and Cooper point out, however, just three years after the Seventh Circuit announced the death of supervisory mandamus, the Supreme Court ruled that mandamus could be used to correct an erroneous order compelling counsel to represent in forma pauperis plaintiffs—clearly a "supervisory" use of the writ. *See* 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 571 & n.1 (citing Mallard v. United States Dist. Court, 490 U.S. 296, 309 (1989)).

293. 16 WRIGHT ET AL., *supra* note 113, § 3933, at 527.

expansion and development of existing standards governing supervisory and advisory mandamus practice. The majority of the courts of appeals have agreed upon a set of guidelines—the "*Bauman* factors"—that are designed to limit the use of supervisory and advisory mandamus to those extraordinary cases that truly merit it. As articulated by the Ninth Circuit in *Bauman v. United States Dist. Court*,[294] the factors are:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal .... (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.[295]

Two decades' worth of experience with the *Bauman* factors indicates that when they are properly applied, they do a good job of limiting interlocutory appeals and controlling the expansion of supervisory and advisory mandamus.[296] Moreover, as the following discussion demonstrates, in many ways the *Bauman* factors are perfectly suited for application in the mass tort context.[297] But all too

294. 557 F.2d 650 (9th Cir. 1977).

295. *Id.* at 654–55 (citations omitted). In addition to the Ninth Circuit, the Sixth, Eighth, Tenth, and Eleventh Circuits have adopted the *Bauman* factors, and some other circuits rely on the same or similar factors. *E.g.*, *In re* Temple, 851 F.2d 1269, 1271 (11th Cir. 1988) (adopting the *Bauman* factors); 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 577–87 (citing other courts and jurisdictions that recognize the *Bauman* factors or a derivation thereof). Ironically, given its more liberal approach to both mandamus review in mass tort cases and Rule 23(f) analysis, the Seventh Circuit relies on a more restrictive, traditional two-part test. To grant a writ of mandamus, the Seventh Circuit requires a finding of irreparable harm, and a finding that the district judge's order "so far exceed[ed] the proper bounds of judicial discretion as to be legitimately considered usurpative in character." *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995).

In my view, the more flexible *Bauman* standard is superior to the Seventh Circuit's traditional formulation. The *Bauman* standard recognizes irreparable harm and district court error as factors to be considered; but unlike the traditional formulation, it does not require that both factors exist in order to grant the writ. The *Bauman* standard is also superior in that it recognizes that mandamus may be appropriate to address a novel issue of law. In both respects, the *Bauman* standard is more consistent with the emerging standards relied on by the courts of appeals in analyzing Rule 23(f) petitions. *See supra* Part IV.B (analyzing Rule 23(f) case law).

296. *See* 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 586–87. According to Wright, Miller, and Cooper, "[t]he *Bauman* factors emphasize the special nature of the extraordinary writs, and application of the factors often counsels refusal of relief." 16 *id.* § 3934.1, at 586.

297. *See infra* Parts IV.D.1.a–c.

often appellate courts reviewing mandamus petitions in mass tort cases fail to perform a thorough analysis of these guidelines or even to acknowledge that they are in fact employing supervisory or advisory uses of the writ.[298] Instead, they attempt to control the expansion of mandamus by stressing repeatedly its extraordinary nature and by adopting a vague "I know it when I see it" standard when issuing the writ.[299] Such a short-sighted approach places appellate courts in a classic Catch-22: Their reluctance to utilize supervisory and advisory mandamus and their failure to articulate clear standards for its development ensure that the practice remains more dangerous and uncontrolled than it needs to be.[300] Moreover, this conservative approach guarantees that supervisory and advisory mandamus practice remains a much less effective tool for interlocutory review in mass tort cases than it could be.

A better approach is for courts to state clearly in their mandamus opinions that they are relying on supervisory and advisory mandamus practice. In doing so, courts should utilize the *Bauman* factors, or similar guidelines, to articulate carefully reasoned justifications for a decision to grant or deny a mandamus appeal in a particular mass tort case. As these guidelines are consistently applied, a solid body of law will develop that will help to define the contours and proper use of supervisory and advisory mandamus as an interlocutory review device for mass tort litigation.

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298. *See supra* Parts III.B.2–3. In this respect, the approach of appellate courts reviewing mass tort litigation is typical of the modern approach to mandamus generally. *See* 16 WRIGHT ET AL., *supra* note 113, § 3934, at 566 (stating that appellate opinions "often avoid the supervisory and advisory labels, but . . . cumulatively show extraordinary writ review in an active and almost flourishing state").

299. A case in point is *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), in which the Fifth Circuit used mandamus to reverse a bellwether trial plan. The majority opinion never mentioned supervisory or advisory mandamus; it merely stressed that mandamus is an extraordinary remedy, and then proceeded to grant the writ without discussing any standards for the grant of mandamus. *Id.* at 1018–21. A concurring opinion noted this deficiency and attempted to remedy it. *Id.* at 1021 (Jones, J., specially concurring) ("This court has a duty not only to encant the proper standard of review applicable to the extraordinary remedy of mandamus, but also to show why that remedy is appropriate in the circumstances before us."). But the concurring opinion, too, attempted to rely on the traditionally narrow conception of mandamus and failed to acknowledge that this was in fact a supervisory use of the writ. *Id.* at 1021–22.

300. *Cf.* Will v. United States, 389 U.S. 90, 107 (1967) (asserting that the failure to provide an opinion explaining a grant of mandamus deprived district courts of the necessary guidance or instruction regarding the proper practice in the future, and noting that "[a] mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court").

Courts applying a *Bauman* analysis in the mass tort context might pay particular attention to the following factors in deciding whether to grant mandamus. It is important to keep in mind that these factors are simply guidelines that should be employed flexibly. A proper analysis requires the careful balancing of these and perhaps other factors, and no one factor is likely to be dispositive in any particular case.[301]

a. Irreparable Harm

The first two *Bauman* factors essentially amount to a familiar irreparable harm standard: The party seeking a writ of mandamus has no other means of relief, and he or she will be damaged in a way that is not correctable on appeal from final judgment.[302] A careful irreparable harm analysis is particularly important in the mass tort context because so many pretrial orders effectively end the litigation, with no opportunity for appellate review. In particular, a pretrial ruling denying class certification, consolidation, or other aggregation is often fatal to a mass tort plaintiff's case. Litigation in such cases is often too expensive for plaintiffs to pursue in their individual capacities—the classic "death knell" situation.[303]

But the importance of the irreparable harm analysis is certainly not limited to situations in which mass tort plaintiffs seek mandamus review. Mass tort defendants often face a "reverse death knell" situation.[304] In *In re Rhone-Poulenc*, for example, the court relied on irreparable harm to a mass tort defendant as a justification for granting a writ of mandamus.[305] The court held that because the district court's trial plan would place enormous pressure on the defendant to settle, the pretrial order would effectively end the litigation with no opportunity for the defendants to seek appellate review.[306]

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301. Appellate courts relying on the *Bauman* factors emphasize that these guidelines are intended to be used flexibly, and that courts may take into account other factors as well. *E.g.*, Star Editorial, Inc. v. United States Dist. Court, 7 F.3d 856, 859 (9th Cir. 1993) ("The guidelines are not susceptible to mechanical application, but are a useful analytic framework regarding propriety of mandamus relief."); *see also* 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 577 & nn.14–15 (stating that the *Bauman* factors should be balanced against each other in a flexible fashion).

302. *Cf.* Bauman v. United States Dist. Court, 557 F.2d 650, 654 (9th Cir. 1977) (noting that the first two factors are "closely related").

303. *See supra* note 276 and accompanying text (describing the "death knell" situation).

304. *See supra* note 276 (describing the "reverse death knell" situation).

305. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297–99 (7th Cir. 1995).

306. *Id.* For additional discussions of *In re Rhone-Poulenc*, see *supra* Part III.B.3.

I do not suggest that appellate courts should grant mandamus review in every mass tort case in which a pretrial order may inflict irreparable harm on one of the litigants, even when that harm is so severe that it effectively signals the end of the litigation. On the contrary, the trial court's bell *should* toll the deaths of many mass tort cases before they ever reach the appellate stage, because either the plaintiffs' claims or the defendants' proffered defenses are meritless.

Instead, I suggest that in most mass tort cases, a finding of irreparable harm will be a necessary, but not a sufficient, condition for mandamus review. In most cases when a district court's decision does *not* signal the end of the litigation for one of the parties, courts should be reluctant to grant mandamus review unless the other factors discussed below indicate very strongly a need for such review. But in a small number of cases when "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial,"[307] mandamus review may well be appropriate. This is especially so if other factors also indicate a need for such review.

b. Errors by the District Court

The third and fourth *Bauman* factors address error on the part of the trial judge. They provide that supervisory mandamus may be appropriate in some cases when a pretrial order is "clearly erroneous" or an "oft-repeated error."[308] The careful application of these factors will assist appellate courts in using mandamus to shape the development of the mass tort regime. For example, as procedural innovations and novel legal theories continue to be developed and refined at the trial level, appellate courts can rely on the *Bauman* error factors to permit some of these innovations to go forward, while rejecting others as improper expansions of existing legal doctrine. Thus, when an appellate court wants to contract the boundaries in a particular area where it believes that innovation has gone too far, it can accomplish this goal by issuing a writ of mandamus based in part on a finding that the trial judge's innovation was clearly erroneous. On the other hand, if an appellate court believes that experimentation with another innovation or novel theory should go forward, it can permit this development by refusing to grant

307. Blair v. Equifax Check Serv., Inc., 181 F.3d 832, 835 (7th Cir. 1999) (holding that in such situations, an appeal under Rule 23(f) is appropriate).

308. *Bauman*, 557 F.2d at 654–55.

mandamus in such cases.[309] It can base its decision in part on a finding that the trial court's order is not clearly erroneous and must therefore await appeal from final judgment. By utilizing this flexible approach to the *Bauman* error factors, appellate courts can encourage and contribute to the healthy development of the mass tort regime. At the same time, such an approach will build a body of law that will assist in developing the writ of mandamus into a suitable interlocutory review device for mass tort cases.

c. New and Important Problems or Issues of Law of First Impression

The final *Bauman* factor instructs courts that mandamus review may be appropriate when a district court's order raises "new and important problems," or legal issues of first impression—the "advisory" use of the writ of mandamus.[310] Relying on this factor, an appellate court can use mandamus review to shape emerging issues of procedural or substantive law in mass tort litigation. Because mass tort cases tend to settle long before final judgment, many fundamental issues in mass torts remain poorly developed at the appellate level. Mandamus petitions raising such issues are ideal candidates for a grant of review based on a finding that they raise "new and important problems" or "issues of first impression."[311] On the other hand, an appellate court can reject a mandamus petition on an issue of less importance to the development of the mass tort regime, based on a finding that it does not meet the final *Bauman* guideline. In this way, appellate courts can employ the writ of mandamus strategically to rule on the "big issues" in the developing mass tort regime, while preserving the gatekeeping function of the traditional writ.

2. Add a "Maturity" Factor

In addition to the elaboration of existing guidelines governing supervisory and advisory mandamus, a second important step in developing mandamus as a mass tort interlocutory review device is the addition of a sixth factor.[312] This factor, one that is uniquely

309. In some cases, appellate courts may utilize the *Bauman* error factors to encourage, or even compel, reluctant, overly conservative trial judges to use aggressive techniques to resolve mass tort cases. The Sixth Circuit adopted this approach in the *Dow Corning* litigation, granting a writ of mandamus based in part on a finding that the trial court had erred in refusing to employ aggressive aggregation techniques. *See infra* note 318.

310. *Id.* at 655.

311. *Cf. Blair*, 181 F.3d at 835 (applying similar logic to appeals under Rule 23(f)).

312. *Cf.* United States v. Harper, 729 F.2d 1216, 1221–24 (9th Cir. 1984) (stating that the *Bauman* factors serve as the starting point in analysis rather than a rigid formula, and

tailored to the mass tort context, calls for courts to take into account the relative maturity of the mass tort at the time of the mandamus petition.

When Frances McGovern first identified the "maturity" concept in mass torts, he expressed the view (now widely adopted by mass tort scholars and courts) that aggressive, innovative judicial techniques could be particularly beneficial in resolving "mature" mass torts.[313] Professor McGovern describes a "mature mass tort" as one

> where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.[314]

He proposes aggressive consolidation, claims resolution, and settlement techniques to resolve mass torts that have reached this advanced stage of development.[315] "Maturity" has since become a commonplace term among mass tort scholars and judges, who have adopted the concept as a helpful way of thinking about certain issues in mass torts.[316]

A decade later, however, "maturity" remains an elusive, if useful, concept. At what stage in the life of a particular mass tort should a trial court employ aggressive aggregation and settlement techniques, and at what stages are such techniques likely to result only in further confusion of issues or unfairness to one or more of the litigants?

In fact, an underlying theme in many of the appellate decisions discussed in this Article is the appellate courts' apparent concern that some mass tort trial judges may be failing to take maturity into proper account in managing mass tort litigation. Trial court decisions have erred on both sides of the line. On the one hand, some overly aggressive trial judges have applied aggregation and settlement techniques to immature mass torts that, in the judgment of the courts

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additional factors may be considered), *cited in* 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 577 n.15.

313. *See* Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688–64 (1989).

314. *Id.* at 659.

315. *Id.* at 690–94.

316. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.26 (1995) (noting that " 'mature' mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals").

of appeals, were not ready for the application of such techniques.[317] On the other hand, some trial judges handling mature mass tort cases have appeared reluctant to use any sort of innovative procedures, even in the face of clear signals from the appellate courts that they would approve the use of such techniques.[318]

317. *See, e.g., In re* Chevron U.S.A., 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (reversing the trial court's proposed "bellwether trial" plan in light of the immaturity of the mass tort action "in which the defendant's liability has not even been tested, much yet firmly established"); *id.* (noting that "[t]he use of innovative judicial techniques particularly to resolve immature mass tort actions has been disfavored"); *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (reversing a class certification order on the ground that "it is entirely feasible to allow a final, authoritative determination of [defendants'] liability ... to emerge from a decentralized process of multiple trials"); *id.* at 1300 ("For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury, ... [which] will hold the fate of an industry in the palm of its hand."); *cf.* Castano v. Am. Tobacco Co., 84 F.3d 734, 746–50 (5th Cir. 1996) (ruling on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), reversing a class certification order on the ground that the mass tort was too immature to permit class certification). In both *Rhone-Poulenc* and *Castano*, the appellate courts expressed particular concern that the trial courts had attempted to use aggressive aggregation techniques on mass tort actions involving claims based on novel, largely untested theories of substantive law. *See Castano*, 84 F.3d at 747–49; *Rhone-Poulenc*, 51 F.3d at 1300–01.

318. A case in point is the tug-of-war between Judge Denise Page Hood of the Eastern District of Michigan and the Sixth Circuit regarding Judge Hood's refusal to employ aggressive aggregation techniques as part of the Dow Corning bankruptcy proceeding. *See generally* Alison Frankel, *Dow Corning Goes for Broke*, THE AMERICAN LAWYER, Jan./Feb. 1996, at 78 (discussing the Dow Corning bankruptcy proceeding and appeals). Shortly after the bankruptcy proceeding began, Dow Corning, its shareholders (Dow Chemical and Corning Incorporated), and the other breast implant manufacturers moved to transfer to Judge Hood's court all opt-out claims pending against them nationwide—that is, all claims that were not a part of the global settlement then pending in Alabama. *See id.* at 79–80. By this time (mid-1995), the scientific and medical community had reached a virtual consensus that breast implants did not cause the autoimmune diseases of which the plaintiffs complained. *Id.* at 82. The manufacturers hoped that Judge Hood would bring an end to the breast implant litigation once and for all by permitting a single jury trial on the issue of causation. *See id.*

Although the breast implant litigation seemed ripe for resolution by the use of such aggressive techniques, Judge Hood refused to transfer the opt-out claims against the nondebtor defendants, holding that she did not have jurisdiction under the bankruptcy laws over those claims. *In re* Dow Corning Corp., 187 B.R. 919, 932 (E.D. Mich. 1995). The manufacturers appealed, and the Sixth Circuit reversed and remanded the case. *In re* Dow Corning Corp., 86 F.3d 482, 498 (6th Cir. 1996). The Sixth Circuit adopted a broad interpretation of the bankruptcy code's transfer provisions, and it discussed with approval the Fourth Circuit's decision upholding the aggressive aggregation techniques adopted by the district court in the Dalkon Shield bankruptcy. *See id.* at 496 (citing A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986)). The Sixth Circuit clearly stated that it was inviting, and indeed encouraging, Judge Hood to wield the bankruptcy code's aggregation provisions aggressively in order to bring an end to the entire breast implant litigation. *See id.* at 495–97.

On remand, however, Judge Hood declined a second time to exercise jurisdiction over the claims against the nondebtor defendants. *See In re* Dow Corning Corp., 1996 WL

Experience indicates, then, that mandamus review will be most important in cases in which there is this sort of disconnect at the trial level between the judicial technique to be applied, and the maturity of the mass tort in question. Appellate courts can gauge the importance of mandamus review in a particular case by examining whether a district court has applied appropriate techniques, given the relative maturity of the mass tort at the time of the petition. In this way, appellate courts can use the writ of mandamus to address both of the problems described above: They can grant mandamus review to control overly aggressive trial court attempts to resolve *immature* mass torts, or to compel trial judges to take more aggressive action to resolve *mature* mass torts.

The addition of a maturity factor to the existing mandamus guidelines is yet another means to develop mandamus into a useful tool for mass tort interlocutory review. By using the writ of mandamus to apply and develop the maturity concept in mass tort litigation, appellate courts will be providing much-needed guidance to the trial courts on the proper application of aggressive aggregation and settlement techniques in a variety of mass tort settings. At the same time, the addition of this factor will assist appellate courts in limiting the reach of mandamus to appropriate cases.[319]

3. Adopt a "Certiorari" Approach to Mandamus Review

Finally, in developing mandamus for use in mass tort cases, appellate courts can employ a third strategy: To the extent possible, they should restrict mandamus review to cases where it is clearly needed to establish or clarify important legal rules governing the mass tort regime as a whole. As Professors Wright, Miller and Cooper have noted:

511646, at 3–4 (E.D. Mich. July, 30 1996). The Sixth Circuit responded swiftly. In a mandamus opinion that was sharply critical of Judge Hood, it ordered the transfer of all claims pending against Dow Corning's shareholders. *See In re* Dow Corning Corp., 113 F.3d 565, 572 (6th Cir. 1997). But it declined, without explanation, to order the transfer of claims pending against other nondebtor defendants, thus ending the manufacturers' hopes of using Dow Corning's bankruptcy to bring a quick end to the entire breast implant litigation. *See id.*

319. At least one court has already utilized the maturity concept to assist it in ruling on the propriety of mandamus review. In the pedicle screw MDL, the Third Circuit denied mandamus petitions filed by the defendants, in part on the ground that the litigation was "fully mature and ready for remand," and the issues raised by the defendants could be better addressed by individual trial courts in the transferor districts. *See In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (3d Cir. Nov. 10, 1997), *cited in Plaintiffs in Pedicle Screw MDL Defeat Mandamus Motion*, MEDICAL/LEGAL ASPECTS OF BREAST IMPLANTS, November 1997, *at* WL 5 No. 12 MLABI 1.

> One of the special advantages of review by extraordinary writ is that it is possible to respond to a perceived need to provide occasional appellate guidance on matters that often elude ordinary appeal, without establishing rules of appealability that bring a flood of less important appeals in their wake.[320]

Appellate courts can accomplish these goals by "warning that issuance of a writ to settle an important question in a particular case does not mean that orders of the same descriptive character will be suitable for writ review in the future."[321] In other words, once an appellate court establishes guidelines regarding an important legal issue, it need not grant mandamus review every time a litigant claims that a trial judge incorrectly interpreted or applied those guidelines.

Instead, in the mass tort context, appellate courts should approach petitions for mandamus review much as the Supreme Court approaches petitions for a writ of certiorari.[322] For example, an appellate court could, in the first instance, grant mandamus review on a particular issue in order to establish the general contours or guidelines that trial courts should follow. The appellate court might then choose to deny subsequent mandamus petitions (or other requests for interlocutory review) on that issue for a period of time, in order to permit further trial court experimentation and fleshing out of those guidelines. Finally, the court could grant interlocutory review again, when necessary, to provide further guidance and to incorporate into existing guidelines the knowledge and experience gained by subsequent trial court experimentation.

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320. 16 WRIGHT ET AL., *supra* note 113, § 3934.1, at 572.

321. *Id.* In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the Supreme Court expressed a similar view. In granting a writ of mandamus to overturn a district court order requiring the physical and mental examination of a defendant, the Court cautioned that once its opinion had established guidelines for the lower courts, litigants should not assume that mandamus would be an appropriate remedy for "any future allegation that the District Court was in error in applying these guidelines .... The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' " *Id.* at 112 (quoting Parr v. United States, 351 U.S. 513, 520 (1956)).

322. In promulgating Rule 23(f), the Advisory Committee also urged the appellate courts to adopt a "certiorari" approach. The Advisory Committee's note accompanying Rule 23(f) explains that under the new rule, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.... Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." FED. R. CIV. P. 23(f) advisory committee's note.

CONCLUSION

In this Article, I have explored the phenomenon of procedural uncoupling and its dramatic impact on the development of the emerging mass tort regime. I have argued that the widening gap between equity-oriented trial procedures and common law-oriented appellate procedures has resulted in a growing power imbalance between mass tort trial judges and the appellate courts. In addition, I have examined the increasing willingness of appellate courts to grant interlocutory review in mass tort cases in response to this problem—evidence of a growing realization among appellate courts that if their rulings are to have a real impact on the development of the mass tort regime, they can no longer cling to the common law final judgment rule. These appellate decisions demonstrate the gradual evolution of appellate procedure from a first-generation common law-based model to a third-generation equity-based model, as appellate courts search for ways to become active participants in shaping the substantive and procedural rules governing the emerging mass tort regime.

Finally, I have argued that the common law writ of mandamus is the ideal candidate for development as a third-generation, equity-oriented mass tort interlocutory review device. The body of law regarding the use of mandamus in mass tort cases indicates a growing appellate awareness of mandamus's powerful potential for application in mass tort cases, as well as its powerful potential for misuse. Thus far, however, appellate courts' ad hoc attempts to strike a balance between the flexibility and gatekeeping functions of mandamus have been inadequate, and the guidelines governing the use of mandamus in the mass tort context remain severely underdeveloped as a result. The strategies that I have identified in this Article invite courts to engage in a more mature, principled review of mandamus petitions, and thus represent a far superior method of developing mandamus into a suitable interlocutory review device for mass torts.

Professor Moore assessed the proper role of the common law writ of mandamus as follows: "[I]f the [final judgment] line is to be held, the genial current of mandamus cannot be frozen. Review by mandamus should indeed be restricted to the exceptional, unusual case, but such cases do arise, and the courts should be alert to respond to them."[323] Mass tort litigation epitomizes the "exceptional

323. 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.26, at 32 (2d ed. 1996).

case" that requires a flexible device for heightened interlocutory appellate review. If it is carefully developed through the use of the strategies discussed in this Article, the common law writ of mandamus is uniquely qualified to fill that role.