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Honorable Spencer Williams [a1]

MASS TORT CLASS ACTIONS: GOING, GOING, GONE?

Did you see the story in the *New York Times* last week about the new youth pill? The Ponce de Leon Corporation of St. Augustine, Florida announced development of a wonder drug which not only retards, but *reverses*, the aging process. They call this amazing new product the "Fountain of Youth Capsule".

Well, maybe you didn't see it. But, no matter, let's jump ahead five years and look back. The product was an instant, and widespread, success. After six months of use, Tom Harmon returned as halfback for Michigan; Tip O'Neill, young and boyish-looking, almost lost reelection-his constituents unable to recognize him. Two justices of the Supreme Court have put aside plans to retire and have taken up water skiing....

Only Ronald Reagan and Lena Horne, among our more prominent citizens, eschewed the use of this drug, saying they had their own method of eluding Father Time. Worldwide sales surpassed five billion dollars in the third year, and the Russians announced that they themselves had invented the wonder drug twenty years earlier.

Suddenly, something went terribly wrong. The reverse aging process could not be stopped in approximately ten percent of the users. Tom Harmon, down to a four-foot-ten-inch, sixty-pounder, was cut from the squad. Tip O'Neill at three-feet and forty pounds was picked up by a Washington animal control officer for masquerading as a penguin. The public had serious misgivings about the Supreme Court's new preppy look.

Then came the inevitable: reports surfaced that FDA approval had been obtained by bribery, that many of the favorable tests had been falsified, and adverse reaction study results suppressed.

Needless to say, this development triggered the filing of numerous lawsuits in federal court. The allegations ran the gamut from fraud, negligence, products liability, breach of trust, breach of promise, admiralty, inverse condemnation, civil rights, lack of due process, intentional infliction of emotional distress to violations of NEPA and ERISA. Within weeks, three-hundred thousand individual lawsuits had been filed in federal courts throughout the country, and the Ponce de Leon

Corporation sought refuge under Chapter XI. The *coup de grace* in this outbreak ***324** of litigation was the anticipated disqualification of eighty-five percent of the federal judges because of their own extensive use of the drug!

Absurd? Far-fetched? Of course, but it illustrates a very real crisis in modern jurisprudence. Recently, and unprecedented in history, state and federal trial judges are being inundated with mass filings of lawsuits by individual plaintiffs, *each* seeking compensation and a share of large punitive damage awards, based on a single catastrophe or the mass production and sale by one defendant of a defective product. [1] The long arms of these "big cases": Those involving asbestos, "Agent Orange", Dalkon Shield, DES, Rely tampons, PCB and countless others, have ensnared virtually thousands of courts in this country in costly and repetitive litigation, threatening to last well into the next century. These cases are but the harbinger of the judiciary's role in an increasingly complex society, with huge multi-national corporations peddling their mass-produced consumer goods and drugs by instantaneous satellite communication. In such a society, it is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems. It is not surprising to learn that, in one year between 1980 and 1981, there was a seventeen percent increase in the filing of product liability cases in federal district courts alone [2]; this is approximately fifteen new products cases per year for each federal judge in the country.

The questions confronting the nation on the question of mass product lability actions are many and varied, and transcend more mundane concerns of calendar management and court congestion. Although more intangible in discussion, these issues are very real in every mass tort case. To what extent, if any, must the litigation preferences of each of the thousands of plaintiffs in a "big case" yield to a more socially optimal, cost-efficient form of representative adjudication? Is our traditional model, pitting one plaintiff's gladiator against one defendant's gladiator, ***325** an outmoded and overly expensive means to redress similar injuries inflicted by the same misconduct upon multiple plaintiffs? Must there be dollar-by-dollar liability accumulated by society's producers until the business, or even an entire industry, is forced into bankruptcy or, is it more sensible to have a forum in which all potential ramifications upon workers, owners and the future course of product development of the court's decision are aired? Must a single defendant be subjected to numerous and conflicting punitive damage awards, even when such awards threaten, as a legal or practical matter, to deprive future litigants of such recovery, or any recovery at all? Is it fair that a third of any recovery received in early litigation go to the early plaintiffs' attorneys, when injured later plaintiffs may be left without practical means of redress? Is it effective or efficient use of limited juridical resources to subject a judge to the tedious and frustrating task of presiding over identical lawsuits, or even to distribute these cases throughout the court system to occupy calendars in many courts? Is this one-by-one adjudication the fastest, most equitable way to permit all the injured to recover?

These questions are easy to pose; unfortunately workable solutions are more difficult, perhaps requiring a dramatic reinterpretation of some procedural aspects of our traditional adversary system. However, the mere sensitivity and difficulty of the choices confronting us do not license

us to ignore these questions until it is too late. Perhaps legislative solutions to this problem will provide the easiest and best answers to these questions. However, until Congress addresses these questions by enacting comprehensive federal products liability law for application in new administrative courts, or makes serious adjustments to the bankruptcy and reorganization provisions as applied to manufacturers faced with numerous products liability claims, the inequities and shortcomings of the present system require that we judges work in an innovative fashion, adapting aspects of the current system to address these challenging problems.

It is my belief that the best judicial tool for managing the vast majority of products liability cases is patience. However, it is my suggestion that, for a small, but inevitable number of cases involving hundreds or thousands of persons injured in similar ways by a single nationally marketed product, or in some types of mass catastrophe [3], the class action device holds the most promise as an effective tool to accommodate competing interests. These interests: each plaintiff clamoring for his slice of a large, but finite, damage pie; defendant seeking a binding final determination of its liability for a product run amok; and of the judicial system searching for the most equitable and efficient solution for all the interests involved in such controversies, are but just the most obvious of a complicated tangle.

Class actions in the federal court are, of course, governed by Rule 23 [4], which provides a judicial mechanism to try similar individual actions ***326** either entirely together, or jointly on a piece-meal basis for common issues.

Specifically, Rule 23(a) requires, at a minimum, that all forms of class suits must involve parties too numerous for joinder [5], and that those claims share at least one common question of law or fact. [6] Furthermore, subdivision (a) presumes that this consolidation for trial satisfies due process if the representative parties will fairly protect the interests of the members of the class by adequately litigating claims which are typical. The rule also creates three categories for class suits, two of which are discussed below in more detail.

Rule 23(b)(1) permits a class action when the separate litigation of lawsuits would create a risk, either of such inconsistent results that a defendant would be forced to take inconsistent positions in opposing the individual suits, or the results in earlier lawsuits "would as a practical matter be dispositive of the interests of the other members." [7] An example of this kind of class action would be where all plaintiffs are making claims against a single fund; *e.g.*, the finite assets of a defendant, with the resolution of an early lawsuit having the practical effect of depleting the defendant's assets against which later plaintiffs' recovery could be satisfied.

Secondly, the more familiar provisions of Rule 23(b)(3) permit a class action when the common questions of law or fact "predominate over any questions affecting only individual members," and is the fairest and most efficient method available to dispose of the claims [8]. Under this subdivision the court must consider the individual factors present in the case before them to assess the need and the manageability of such a suit.

One important, but both underutilized and overlooked, aspect of Rule 23's repertoire provides the possibility of class adjudication not as an ***327** entire case, but limited to one or more issues common to a group of cases. Rule 23(c)(4)(A) provides:

> When appropriate an action may be maintained as a class action with respect to particular issues ... and the provisions of this rule shall then be construed and applied accordingly. [9]

Therefore, even when the injuries alleged, or defenses to numerous plaintiffs' claims are different, a court may still maintain a class action to adjudicate any *common* factual or legal issues. In those cases where many litigants seek recovery for one alleged misconduct of a defendant, *e.g.*, manufacture of a defective product, the court may certify a class action under subdivision (b)(1) or (b)(3), as to the common issues, regardless of how few in number, if the court feels that representative litigation will fairly and economically resolve those common issues.

In a real case the court would define the class: for example, let us define the class as consisting of 175 women injured by the same device.

The court would specify the common issues to be tried at one trial, binding for all subsequent purposes on those 175 women. Perhaps in this case such an issue might be the defendant's conduct in the product's development, testing, marketing, and in any warnings given regarding the product's use.

The court, with the plaintiffs' help, would select several, perhaps five to ten, representative plaintiffs. These plaintiffs would then try their cases to the jury from the beginning, all the way through to compensatory and punitive damages.

The court would obtain from the jury special interrogatory verdicts on each of the common issues, such as negligence, fraud, misrepresentation, product liability, intentional infliction of emotional distress and any other legal questions.

After the verdict, as to the representative plaintiffs the court would send the other members of the class back to their own courts for subsequent trial on any individual issues of causation, affirmative defenses and compensatory damages. Meanwhile, the court could order the investment of any punitive damage award on behalf of all claimants pending the resolution of all remaining actions on class members' behalf. The punitive award could then be distributed *pro rata* among all those who had either settled, or won, their cases [10].

***328** Assuming trial of the common issues were to take four weeks, this pattern can save at least four weeks trial time for each successive class member's case which proceeds to trial. The jury

in each of those successive trials will be instructed as to the findings on the common issues, [11] and advised that its sole responsibility is to resolve any open issues as to that particular plaintiff. The court could even permit the viewing of videotaped highlights of the testimony on the common issues to give the jury a flavor of the prior trial.

Even saving one week of judicial time per case would, as most trial judges know, be substantial. For example, in the Dalkon Shield litigation [12], the record disclosed that, if the usual percentage (90) of the 1000 members statewide class settled their cases, the savings of judicial resources in the trial of the remaining 100 would amount to 400 weeks, or, roughly eight years of trial time. In addition, there would be an estimated savings of $26 million in litigation expense to the parties and $7 million of court expenses [13]. The Ninth Circuit, without disclosing the source of its infinite wisdom made the following finding of fact:

> The few issues that might be tried on a class basis in this case balanced against the issues that must be tried individually, indicate that the time saved by a class action may be relatively insignificant. A few verdicts followed by settlements might be equally efficacious [14].

While the Circuit may speculate as to the effort of "a few verdicts" trial judges *know* the answer: a class adjudication, even on limited issues, which resolves questions of liability and punitive damages will have far greater influence on parties' willingness to settle, and will certainly do a better job of relieving judges of litigation "re-runs" for those who face a series of identical pending cases. Furthermore, it has been trial judges' experience that plaintiffs in this type of litigation are often reluctant to use the time-saving doctrine of *collateral estoppel* when trying their cases, *in seriatim*. This reluctance arises from the fact that *collateral estoppel* will, as a practical matter, eliminate plaintiffs' opportunity to ***329** present the "horribles" of defendant's conduct to the jury in each subsequent case [15].

It is obvious that class certification can be a valuable alternative to the traditional case-by-case adjudication in mass tort litigation. However, many courts and litigants persist in opposing the use of class actions in cases where the claims arise from a single catastrophic accident or the manufacturing and marketing of a product across the country. That opposition is typically based on either, or both, of two excuses: (1) in these "big" cases, as opposed to individual, financially insignificant, cases the individual plaintiff has a "right" to control his own case, to choose the forum and manner in which the case will be presented, as well as the attorney who will represent his interests [16]; and, (2) differing forms of injuries and slightly varied causation patterns preclude class treatment, even of the many common issues [17].

1. "Right" of Individual Plaintiffs to "Control" Their Own Case

With surprising regularity, the primary opponents of class treatment of mass tort litigation are the plaintiffs' lawyers. These lawyers argue that the class action device was intended for situations when individual litigants would be incapable or unlikely to bring their own suit, [18] due either to difficulties or expense of proof [19] or the insubstantiality of the potential recovery [20] on individual claims. Of course, this argument is totally specious; the critics' stake obvious. *Every* member of a federal class certified under Rule 23 must have a claim for recovery in excess of $10,000.00 [21] . Moreover, such an interpretation ignores the primary justification offered by Rule 23's drafters *i.e.*, that the class action device was ***330** intended to foster judicial economy and efficiency [22] . In fact, litigants are often deprived of this so-called "right" to control their own case by many of life's, as well as the law's harsher realities [23] .

2. Different Injuries and Causation Patterns

Litigants and court opinions rejecting application of the class action device in the mass tort context have also argued its use inappropriate, in light of variant plaintiffs' injuries [24] , causation [25] , and affirmative defenses [26] . These resistors further exhort any attempted class action in this context as futile, in light of the potentially large number of subclasses necessary to accommodate different factual patterns of causation or injuries, or both. Considering that Rule 23 clearly envisions class actions on *any* common *issues*, an argument that a single, unique issue should foreclose certification entirely is both wholly disingenuous and overly simplistic. The sensibility of using the class action device to adjudicate any significant common issues in mass tort cases, as discussed *supra*, and re-routing those cases for trial of any remaining individual issues is obvious. To the extent that subclassing is helpful, it would only be necessary for broad questions of liability; *e.g.*, all individuals who had been given one of the company's three or four warnings, but not the others. Plainly, this type of modification does not render an issue-only class action unmanageable. This is clearly evidenced by judicial management of securities fraud cases, in which liability-only issue class actions are routinely certified [27] . Despite cosmetic differences in appearance, and differences in methods of assessing damages, securities fraud and mass tort actions are indistinguishable in both scope and effect, making the vastly different fate of the class action in each incongruous [28] .

Recently, several courts dissatisfied with the piecemeal, one-by-one litigation of these virtually identical mass tort lawsuits, have answered ***331** these time-worn objections to class actions in mass tort by certifying classes of injured plaintiffs in litigation as diverse as "Agent Orange" and mass disasters [29] . These courts have concluded that, notwithstanding such helpful devices as multidistrict litigation, test cases, consolidation, and expanded use of collateral estoppel, the class action emerged as a superior method to fairly address similar claims and issues, without necessitating repetitious and narrow-sighted litigation.

Two recent cases particularly illustrate both the power of the class action, and the unarticulated antipathy and aversion appellate courts display towards its use, in the mass tort context. Like many innovations, use of the class action in the Hyatt Regency Skywalk case in Kansas City [30] and the Dalkon Shield IUD litigation [31] in my cases in California, perhaps proved too much, too soon for our respective Circuits, each of which vacated the orders.

1. Federal Skywalk Cases

On January 25, 1982, Judge Scott Wright of the Western District of Missouri faced the following judicial nightmare: five months earlier, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City collapsed, killing 114 persons and injuring many others. Following the disaster, hundreds of virtually identical lawsuits were filed both in state court, and before Judge Wright [32].

Against most plaintiffs' and the defendants' objections, Judge Wright certified a "non-opt out" class action, under both Rule 23(b)(1) and (b)(3), [33] on all issues of liability for compensatory and punitive damages, including all business invitees at the hotel at the time of the accident as the class members [34].

In his opinion, Judge Wright stated that, "the interests of all parties concerned" would best be served by "the avoidance of wasteful, repetitive litigation," [35] and that such litigation could be avoided by "trying the issues of liability for compensatory damages, liability for punitive damages and amount of punitive damages only once." [36]

Dissatisfied plaintiffs petitioned the Eighth Circuit for its review of the decision. In what can be charitably labelled an astonishing lack of candor or consideration for the hard issues of the opinion, the majority reversed on an arcane procedural point, curiously holding that the effect of Judge Wright's non-opt out class was "to enjoin pending state proceedings", ***332** thus violating the Anti-Injunction Act, 28 U.S.C. § 2283. [37] For its reasoning, the majority fastened on an obscure section of Wright's opinion that prohibited class members, including those with pending state court cases, from settling their punitive damage claims for fear of endangering attempts at a single, binding determination of the defendants' liability for punitives [38]. To its credits, the court did commend Judge Wright for, "his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of ... the disaster."

In a scholarly and powerful dissent, [39] Judge Heaney disagreed, pointing out that the district court had not enjoined any state court actions, [40] that class actions inevitably have some effect on other proceedings, [41] and a "non-opt out" class was necessary [42] in the context of punitive damages

to prevent "overkill"[43]. Judge Heaney concluded that the district court's order represented an important step towards solving the difficult probles posed by repetitive mass tort litigation[44].

2. Dalkon Shield Class Action

In the slightly different context of mass products liability, a little over year ago[45], I certified a class for a nationwide products liability suit[46]. Litigants from all over the country, including 160 in my court, were suing the manufacturer of the "Dalkon Shield" intrauterine device for injuries caused by the same alleged misconduct; *i.e.*, defective design, inadequate testing and failure to warn. After the trial of one case, lasting some two-and-a-half months, and extensive briefing, it seemed obvious that the repetitive, tedious inefficient and time-consuming retrial of 160 cases w? ith a vast majority of identical questions was neither sensible, nor fair those plaintiffs last to queue at the courthouse door-possibly to face no recovery against a defendant with its pockets turned out, due either to the effect of a barrage of lawsuits, or to its refuge in Chapter XI bankruptcy proceedings, a course recently chosen in the asbestos litigation by Johns-Manville.

Faced with this prospect, and armed with the responsibility and ability, unlike individual litigants and their attorneys, to assess the *collective* interest of all present and prospective parties, I *sua sponte* certified a nationwide class under (b)(1) on the punitive damage issue and a statewide class under (b)(3) to litigate all common issues of liability[47].

With respect to the California liability class, there was a *factual* finding, based on observations of the previous trial and a review of all ***333** complaints filed across the state, that common issues of *fact* (and, of course, law, since the class was limited to California) existed and predominated as to the limited issues certified. Importantly, an "issues" class was certified under subdivision (c)(4)(A) only as to the common questions of liability, such as the facts concerning testing, design and warnings[48]. In fact, the order was conditional, and anticipated remitting each case to its court of origin for the trial of individual issues such as proximate cause, injuries and affirmative defenses[49]. In essence, this class action simply would avoid the relitigation of any issue already determined in the lead suit. To the extent that different facts were applicable to particular sets of plaintiffs; *e.g.*, warning periods, period of use, types of injuries, *et cetera*, subclassing decisions were reserved for later determination upon more discovery[50].

With respect to the nationwide class on punitive damages, a *factual* finding was made that early awards of punitive damages, if large enough, could result in the actual or constructive bankruptcy of the defendant, or in a ruling prohibiting the assessment of such future awards[51]. It seemed obvious (and, after many hours of hindsight, still seems obvious) that an award of punitive damages to a plaintiff in one case affects the potential recovery of a plaintiff in a later case. For, after an award of punitive damages to one plaintiff, subsequent plaintiffs face the increasing risk that the defendant will have been found to have been sufficiently punished. Obviously, the greater the

number of plaintiffs, the more serious and inescapable this risk became. In the absence of a single class determination, widely varying punitive damage awards promised some plaintiffs (and their attorneys!) varying windfalls, but may have also insured some plaintiffs with the same cause of action no recovery.

Accordingly, a "limited fund" class action was certified on the basis that individual adjudication of punitive damage claims created a "risk that, as a practical matter" the rights of future litigants would be compromised [52]. This approach was based squarely on the statement of a prior Ninth Circuit case which concluded that the assets of a company, if less than the aggregate claim of plaintiffs constituted a "limited fund" for purposes of Rule 23(b)(1)(B). [53]

The appellate court, disregarding the abuse of discretion standard of review, substituted its factual conclusion for that of the trial court, holding, *inter alia*, that the attorney selected by the trial court to represent the class was inadequate [54]. The absurdity of this conclusion is that the individual selected as class counsel was a former president of the State Bar, of California, and widely acclaimed as one of the best plaintiff's lawyers in the country. The Circuit's rejection of the attorney's "adequacy" does not discuss his qualifications, but rather, cryptically ***334** states that the panel "is hesitant to force unwanted counsel upon plaintiffs on the assumption that appointed counsel will be adequate." [55]

Also, the Ninth Circuit added a restrictive gloss to the class action rule which cannot be traced to the language of Rule 23. The Circuit precluded the conclusion that a "limited fund" faced potential plaintiffs, unless it w?ere established that separate punitive damage awards "*inescapably*" would affect later awards [56]. Of course, the rule does not require this "inescapable" effect, but only that separate actions would create a *risk* that these first adjudications would "as a practical matter" dispose of the interests of the later claimants. Applying this novel, restrictive version of this rule, the appellate court concluded that the present state of the record was insufficient to establish the existence of such a "limited fund" [57].

With respect to the liability class, the court continually emphasized that the factual differences between the various cases: different damages, injuries and proximate cause precluded class certification [58]. Careful comparison of the Circuit's opinion with my opinion suggests that the Circuit may not have understood my order to create an "issues-only" class action, and to exclude from its scope these individual issues [59]. The Circuit made the ambiguous factual conclusions that "individual issues *may* outnumber common issues," [60] and that "different questions of law and fact *could* apply to various plaintiffs...." [61] Incredibly, the Circuit stated that "although [there were] common factual questions, the court should have balanced these concerns with the greater number of questions affecting individual class members" [62] -a factual conclusion which appears irrelevant in an "issues only" class action. Particularly, since these issues were explicitly to be excluded

from consideration during the class action, and reserved for individual trials, this criticism seemed teleological.

Well, as you may have surmised, a funny thing happened to my classes on the way to the forum-the Circuit reversed.

So what's new? It happens to all trial judges. It's part of the system-*they* get reversed, too. I think we all know that passing sense of frustration. But, more importantly: Where did they-or I-go wrong? In their defense, I suspect that my opinion in 526 F.Supp. did not reach them-and thus was not read-until after the case was argued to them and their opinion rendered. Additionally, since the limited issues class was declared *sua sponte* no one argued on its behalf before the Circuit. Overwhelmed by the enormity of the concept, despite Professor Charles Alan Wright's superb brief in support, the Circuit rejected both proposed classes.

***335** A comparison of the Circuit's opinion with mine might lead one to conclude that the Circuit did not fully grasp the limited-issues class concept. Evidence of such a misunderstanding was the preoccupation with individual issues predominating, notwithstanding the explicit provision for reserving individual issues for individual trials! This is evident from its language, explaining that "(a)lthough there are common factual questions, the court should have balanced these concerns with the greater number of questions affecting individual class members."

In addition, a reading demonstrates the Circuit's needless concern with choice of law questions on the punitive damage issue. Choice of law was not a significant matter, since the record disclosed that defendant had stipulated to the application of California law on punitive damages, which is the most liberal in the Nation.

The opinion of the Ninth Circuit in the Dalkon Shield case caused many legal scholars and jurists great dismay. It appeared that the salutory concept of class actions in the mass tort concept had been dealt a fatal setback. However, as we meet here today, there is cause for hope.

First, the Ninth Circuit conceded that, under appropriate circumstances (presumably with the agreement of the plaintiffs, and without any substantial question of choice of law), a limited class action could be certified to adjudicate the defendant's liability for punitive damages[63]. Furthermore, even as to Dalkon Shield, the Circuit stated that it "did not preclude further consideration" of a more limited class action under subdivision (b)(3).[64]

Thus, the door would not appear slammed to other trial courts' pursuit of imaginative solutions to the problems raised here. District courts have certified class actions in Massachusetts in the DES litigation,[65] and in New York in "Agent Orange".[66] Moreover, Judge Wright in Missouri has taken the Eighth Circuit at its word, certifying a new (b)(3) class in the Skywalk case, deferentially providing an appropriate opt-out provision[67]. In the Dalkon Shield litigation, the pending 133 cases have been consolidated on all common liability and punitive damages issues, while awaiting

a decision by the Supreme Court on the defendant manufacturer's petition for a *writ of certiorari* [68] . Clearly, despite the few recent appellate setbacks, the impetus for future class actions is growing, not abating, at the trial court level; judges are acutely aware of the need for innovative treatment of these mass filings. But the battle is far from won. Vigorous challenging objections to any certification of classes with multi-state plaintiffs are to be expected, and such questions as personal jurisdiction, [69] ***336** choice of law [70] and forum selection, [71] all discussed in detail in my district court opinion in Dalkon Shield, pose and answer only a few of the challenging issues to be considered by future courts.

And as we proceed with this continuing saga, it may be helpful to keep the following thought in our mind:

> The system and its managers must pay the price for every effective and societally equitable solution to a demanding problem. Finding a fair and efficient treatment for the thousands of identical lawsuits filed in mass tort litigation is a result so precious that diligent thought, research, hard work and boldness are justified expenditures in its pursuit.

Footnotes

a1 United States District Court Judge for the Northern District of California. I gratefully acknowledge the contributions of my former law clerk, James M. Wagstaffe, Esq., in the preparation of this speech to the Multi-District Litigation Panel, Carefree, Arizona, December 9, 1982, upon which this note is based.

1 In just the past fifteen years, a new type of litigation has bloomed under the moniker "mass tort". *Cf., Payton, et al. v. Abbott Labs*, 83 F.R.D. 382, 390 (D.Mass.1979). Mass tort litigation can be further divided into two kinds: mass accident and mass products liability. These two types are best kept separate when evaluating the appropriateness of class certification for each raises its own unique considerations. Scrutiny of mass accident class actions is beyond the scope of this speech, however, it merits mention that many of the rote objections made to mass accident class certification: state sovereignty-10th amendment; Erie Doctrine; due process-*in personam* jurisdiction, are inapposite to considering the merit of certification in product liability suits. *See Yandle v. PPG Industries*, 65 F.R.D. 566, 571 (E.D.Tex.1974); *Causey v. Pan American Airways*, 66 F.R.D. 392 (E.D.Va.1975). This is supported by the instructions accompanying Rule 23. A careful examination reveals that, although, "a 'mass accident' resulting in injuries to numerous persons is *ordinarily* not appropriate for a class action ...", there is no similar *caveat* regarding its application to the product liability context. *Advisory Committee note to 1966 Amendment to Rule 23*, 39

F.R.D. 69, 103 (1966), *emphasis added; but see*, Comment, *Mass Accident Class Actions*, 60 Cal.L.R. 1615, 1616, n. 7 (1972).

2 *1981 Annual Report of the Administrative Office of the United States Courts* at 218. In 1981, over 9000 new products liability suits were filed in federal district courts alone, representing a 17% increase over 1980, continuing a steady upward trend which began in 1974.

3 *See* fn. 1, *supra*.

4 *FRCP* provides, in pertinent part:
23(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common ..., (3) the claims or defenses of the representative parties are typical ..., and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) *Class Actions Maintainable* .... if the prerequisites of subdivision (a) are satisfied, and ...

1 *the prosecution of separate actions by or against individual members or the class would create a risk of:*
(A) inconsistent or varying adjudications with respect to individual members....
(B) *adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;* or

3 the *court finds that the questions of law or fact common to the members of the class predominate* over any questions affecting only individual members,
(C) Determination by Order Whether Class Action ...; Actions *Conducted Partially as Class Actions*.

4 When appropriate (A) an *action may be brought or maintained as a class action with respect to particular issues*, or (B) a class may be divided into *subclasses* and each ... treated as a class, and the provisions of this rule ... construed ... accordingly.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 This pattern attempts a solution for what has been, up to this point, an intractable and amorphous issue: to what extent a defendant could be liable for multiple punitive damage

awards. *See, e.g., Roginsky v. Richardson-Merrill, Inc.* 378 F.2d 832, n. 11 (2d Cir.1967), where Judge Friendly first posed this question of limiting punitive damages to prevent "overkill". Most recently, Judge Heaney of the Eighth Circuit noted, in the Hyatt Regency Skywalk litigation, that latecomers may have any punitive damage recovery reduced or eliminated by prior awards, since there "certainly" is a limit, either under state law (there, Missouri) or as a practical matter by the defendant's insolvency. *In re Federal Skywalk* Cases, 680 F.2d 1175 at 1188 (8th Cir.1982) (Heaney dissent). This dissent raised the difficult questions of what the proper role of punitive damages should be in mass tort litigation, whether there ought to be a rule regarding multiple awards of punitives, and whether such a "prior award" rule was consistent with other aspects of presenting such litigation. For further discussion of the issue of punitive damages in mass tort litigation, *see, e.g.*, Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chi.L.R. 1 (1982); Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F.L.R. 1 (1981); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hast.L.J. 639 (1980); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hast.L.J. 1797 (1979); Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 Trial L.Q. 46 (1978).

11 *See generally*, G. Kornblum, *Videotape in Civil Cases*, 24 Hast.L.J. 9 (1972).

12 *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 521 F.Supp. 1188, *modified* 526 F.Supp. 887 (N.D.Cal.1981), *rev'd*, 693 F.2d 847 (9th Cir.1982), *reh'g denied en banc*, Aug. 26, 1982; hereafter, the district court opinion at 526 F.Supp. 887 referred to as "*Dalkon Shield I*", and 9th Circuit's opinion referred to as "*Dalkon Shield II*".

13 From a report prepared at Williams, J.'s request by the Chief Clerk of the District Court for the Northern District of California.

14 *Dalkon Shield II*, at 856.

15 This is certainly an example of routine trial stratagems in this genre of suits employed to emphasize plaintiffs' suffering.

16 *See, e.g., Yandle*, 65 F.R.D. at 569; *Causey*, 66 F.R.D. 392; *Rose v. Medtronics*, 107 Cal.App.3d 150, 155, 166 Cal.Rptr. 16 (1980).

17 *See, e.g., Rose v. Medtronics*, 107 Cal.App.3d at 156-57, 166 Cal.Rptr. 16.

18 This is frequently the reason given for permitting use of the class action in consumer fraud suits, as well as for denying its use in mass tort suits.

19 Frequently, the cost of retaining experts, collecting medical or technical data and collecting hundreds of depositions and affidavits preclude the vigorous maintenance of a complex product liability suit by an individual plaintiff. *See, e.g., In re Federal Skywalk Cases, supra*, Chen, *Product Safety, Liability Suits: Few Guidelines*, L.A. Times, Oct., 6, 1982, p. 19,

26-27; *McDonnell-Douglas Corp. v. U.S.D.C.*, 523 F.2d 1083, 1085 (9th Cir.1975). Compare filings of several plaintiffs before the No. Dist. of Cal. in Dalkon Shield, which maintained that "(a)ttorneys representing only one Dalkon Shield plaintiff will be unable to economically compete with the legal Juggernaut that represents Robins."

20 *See* Notes to Rule 23, "interests (of individuals in conducting separate lawsuits) may be theoretic rather than practical; ... the amounts at stake for individuals may be so small that separate suits would be impracticable"; *In re Federal Skywalk Cases, supra*.

21 *See* 28 U.S.C. § 1332; *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) (Aggregation of separate claims will not satisfy jurisdictional amount); *Zahn v. International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973) ("each plaintiff in Rule 23(b)(3) class action must satisfy the jurisdictional amount").

22 *See* Notes to Rule 23.

23 Almost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation. *See, e.g.*, Chen, *Products* ..., L.A. Times, *supra* at 19, 26-7.

24 *But c.f., Oellette v. Intern'l Paper*, 86 F.R.D. 476, 480 (D.Vt.980) ("differences in the degree of harm suffered or even ... the ability to prove damages do not vitiate the typicality of a representative's claim.").

25 *C.f., Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C.1979).

26 *C.f., Yandle, supra.*

27 *See, e.g., Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir.1976); *In re LTV Securities Litigation*, 88 F.R.D. 134 (N.D.Tex.1980); *In re Itel Securities Litigation*, 89 F.R.D. 104 (N.D.Cal.1981).

28 The theoretical inconsistency is vividly illustrated by two cases arising from Robins' unwarranted optimism for the efficacy and safety of the Dalkon Shield. In a federal suit seeking recovery for a class of aggrieved investors for Robins' violations of the federal securities laws in touting the Dalkon Shield, the class action device was implicitly upheld, *Ross v. A.H. Robins*, 465 F.Supp. 904 (S.D.N.Y.1979), *rev'd on other grounds*, 607 F.2d 545 (2d Cir.1979). However, in a state action in New York, class certification was denied for a group of aggrieved plaintiffs who had relied on Robins' misrepresentations in using the Dalkon Shield. *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 407 N.Y.S.2d 196 *Appeal dismissed*, 46 N.Y.2d 731, 413 N.Y.S.2d 374, 385 N.E.2d 1301 (1978).

29 *In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.1980); *In re Federal Skywalk Cases*, 680 F.2d at 1184.

30 *In re Federal Skywalk Cases, op. cit.*

31 *Dalkon Shield I.*

32 *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D.Mo.1982).

33 *Id.* at 424.

34 *Id.* at 421.

35 *Id.* at 423.

36 *Id.*

37 *In re Federal Skywalk Cases*, 680 F.2d 1175 at 1180 (8th Cir.1982).

38 *Id.*

39 *Id.* at 1184-93.

40 *Id.* at 1191-93.

41 *Id.* at 1193.

42 *Id.* at 1191-92.

43 *Id.* at 1188.

44 *Id.* at 1191.

45 *Dalkon Shield I.*

46 *Dalkon Shield I*, at 897.

47 *Id.* at 903.

48 *Id.* at 902-3.

49 *Id.* at 897.

50 *Id.*

51 *Id.*

52 *Id.* at 897-98.

53 *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340, n. 9 (9th Cir.1976).

54 *Dalkon Shield II*, at 850, 857.

55 *Id.* at 850.

56 *Id.* at 851.

57 *Id.*

58 *Id.* at 850, 852-854.

59 *Dalkon Shield I*, at 902, 919-20.

60 *Dalkon Shield II*, at 853.

61 *Id.*

62 *Id.* at 856.

63 *Id.* at 856.

64 *Id.*

65 *Payton, et al. v. Abbott Labs*, 83 F.R.D. 382 (D.Mass.1979).

66 *In re "Agent Orange" Litigation, supra.*

67 Order filed November, 1982.

68 Petition for *writ of certiorari* filed November, 1982, *denied*, ___ U.S. ____, 103 S.Ct. 817, 74 L.Ed.2d 1015.

69 *See Dalkon Shield I* at 903-9, for its consideration of this issue.

70 *Id.* at 915-17.

71 *Id.* at 911-15, for a discussion of the certification of a matter which has been remanded from the Judicial Panel on Multidistrict Litigation.

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