A Federal Cause of Action Under Superfund: 
Case Management Considerations

In 1978 the area of Love Canal, New York, became a focal point of media attention. The homes and schools of Love Canal, it was discovered, had been built on land contaminated by hazardous wastes and residents of the area were suffering from debilitating illnesses due to exposure to the wastes. Publicity of this specter of disease provoked widespread concern regarding the existence of other toxic waste disposal sites and the effects of hazardous wastes on health and the environment. The most significant legislative response to these concerns was the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund").

CERCLA requires cleanup of toxic waste sites but fails to address the needs of individuals who incur damages due to exposure to wastes. Several bills, therefore, have been introduced that would amend CERCLA to provide a federal cause of action for damages resulting from the disposal of hazardous substances. One such proposal, introduced in the 98th Congress, would permit injured individuals to seek compensation for medical and rehabilitation costs, lost income, pain and suffering, and economic loss to their property. Past and present owners or operators of disposal sites, and generators and transporters of waste, could be sued and held strictly, jointly and severally liable for injuries resulting from their activities. Furthermore, they could assert only three narrow defenses. A similar amendment was recently introduced in the Senate for consideration by the 99th Congress.

3. H.R. 5640, supra note 2. The House of Representatives voted to strike Title II (the federal cause of action) from the bill by a vote of 208 to 200. See id. at H8854-55.
4. Liability could be avoided under H.R. 5640 only if the damages resulted from an act of God, an act of war, or an act or omission of certain third parties if the defendant established by a preponderance of the evidence that he exercised due care and took precautions against foreseeable acts or omissions of those parties. H.R. 5640, supra note 2, at H8848 (§ 202(b)(3)).
5. S. 51 provides a federal cause of action and differs from H.R. 5640 with respect to the standard of liability (strict but not joint and several). The defenses are the same as
Two principal reasons are advanced in support of a federal cause of action for mass torts. First, state tort law is thought to be an inadequate mechanism to redress the injuries that result from exposure to hazardous substances. These injuries often do not manifest themselves until years after the statute of limitations has run. Moreover, scientists have been unable to establish a causal relationship between the exposure and the injuries that satisfies the requirements of traditional tort law. In addition, mass tort actions are typ-

are the compensable damages. In addition, S. 51 specifically allows for punitive damages in certain circumstances. Moreover, S. 51 delineates the kinds of evidence that shall be admissible and explicitly states that "it is the policy of Congress to encourage certification of class actions" in suits brought pursuant to the federal cause of action. S. 51, 99th Cong., 1st Sess., 131 CONG. REC. S361 (daily ed. Jan. 3, 1985)(Amendment No. 3).

6. The term "mass tort" can be used to describe two different types of litigation. The first, mass accident litigation, usually arises following a single catastrophic event in which many individuals are immediately injured or killed. See, e.g., In re Air Crash Disaster at Florida Everglades, 549 F. 2d 1006 (5th Cir. 1977); In re Federal Skywalk Cases, 95 F.R.D. 479 (W.D. Mo.), cert. denied, 459 U.S. 988 (1982). The second, mass products liability litigation, also concerns the injuries of numerous individuals, though not those resulting from a specific one-time occurrence. Rather, the latter usually arises when many persons have been exposed over time to a harmful product that may have been produced by a number of manufacturers. "Toxic tort" litigation and "mass exposure" litigation are probably best included in the latter category. Such actions typically involve multiple exposures to hazardous substances or harmful drugs such as dioxin, DDT, asbestos, DES or the "Dalkon Shield" intrauterine devices. See, e.g., Ryan v. Eli Lilly Co., 84 F.R.D. 230 (D.S.C. 1979)(DES); In re Northern District of California "Dalkon Shield" I.U.D. Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981), vacated and remanded, 693 F. 2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983) [hereinafter cited as Dalkon Shield Litigation]; In re "Agent Orange" Products Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983), cert. denied, 104 S. Ct. 1417 (1984)[hereinafter cited as Agent Orange II].


8. Proof of causation is perhaps the greatest obstacle to recovery in mass products liability litigation (including "toxic tort" and "mass exposure" litigation). The products and substances involved in such suits are often produced by several manufacturers and there may be a resultant problem of tracing the injury to a specific defendant. Moreover, the plaintiffs' injuries often cannot be causally linked with sufficient certainty to the product at issue. An individual suffering from leukemia, for instance, may well have contracted the disease from chemicals in the groundwater. He may, however, be ill for a number of other reasons, including hereditary tendencies or poor dietary habits. A federal cause of action cannot itself overcome the causation barrier, although the law could be written so as to alleviate the problem. For example, the traditional causation standard could be relaxed or altered. In addition, a broadening of the evidentiary rules could help the plaintiff in proving causation. Currently, courts deem much of the evidence tending to show a causal relationship between injuries and exposure to certain substances to be unreliable and therefore inadmissible at trial. See S. 51, supra note 3, at § 124(c) (relevant evidence that is admissible in actions for damages under the federal
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ified by delay, expense and unequal distributions of legal resources between victims and defendants.9

Second, many proponents of a federal cause of action believe that compensation of toxic tort victims is better achieved through private law adjudication of claims rather than through administrative mechanisms similar to the Federal Black Lung program.10 They reason that adjudication is superior because victims receive their "day in court"11 and risk-takers are better deterred from engaging in unacceptably dangerous activities in the future.12

This Comment offers a third—and previously unconsidered—reason for the adoption of a federal cause of action for damages resulting from the disposal of toxic substances: A federal cause of action will facilitate more efficient case management of toxic tort litigation. Such actions are particularly difficult to manage because they often involve many victims, several defendants and the laws of more than


9. Defendants in these actions are generally capable of pooling their resources to present a unified and powerful defense. Plaintiffs, on the other hand, are often barred by jurisdictional barriers from obtaining economies of scale.

10. Part B of the Federal Coal Mine Health and Safety Act of 1969 created a black lung claims system. This was amended in 1972, 1978 and again in 1981. The 1978 amendments substantially eased the burden of claimants and, as a result, the Social Security Administration in that year had an 81 percent approval rate of claims. Eighty-eight percent of those were reportedly "not based on adequate medical evidence." The 1981 amendments were designed to counteract the negative results of the 1978 amendments and significantly tightened the eligibility formula for claims filed after January 1, 1982. See Logatto, The Federal Black Lung Program: A 1983 Primer, 85 W. VA. L. REV. 677, 693-694 (1983).

11. See, e.g., Rosenberg, supra note 8, at 927-928 ("There is value in affording victims an opportunity to initiate claims. . . . [T]he tort system provides a greater sense of representation than is usually possible in agency rulemaking or even adjudicatory proceedings."); Michelman, The Supreme Court and Litigation Access Fees: TheRight to Protect One's Rights—Part I, 1973 DUKE L.J. 1153, 1172-1175 (access to courts for redress of injury contributes to dignity of injured and sense of participation in community).

12. Cf. Rosenberg, supra note 8, at 855 ("[M]ass exposure torts are frequently products of the deliberate policies of businesses that tailor safety investments to profit margins. Such risk-taking policies should be especially amenable to control through threats of liability."); id. at 927; Corash, Evaluating the Effects of Alternative Compensation Systems, 14 ENVTL. L. REP. 10121, 10122 (1984) ("I believe . . . that the tort system is truly conduct-affecting in a way that a fund or a system which does not allocate blame to those who are in fact responsible and whose conduct caused the injury is not and cannot be.").
one jurisdiction.  

Additionally, this Comment suggests that Congress recommend the extensive use of class actions in such federal litigation. Class treatment could be the most efficacious case management tool. Furthermore, the class mechanism could allow victims to benefit from economies of scale in prosecuting their cases and could provide a vehicle for making small claim actions— that are unmarketable under existing mechanisms—marketable to the plaintiff’s bar.

I. Case Management and the Federal Cause of Action

All civil suits in the U.S. district courts are governed by the Federal Rules of Civil Procedure. Rule 1 provides that the Rules “shall be construed to secure the just, speedy, and inexpensive determination of every action.” This goal has become increasingly difficult to achieve as the dockets of the federal courts have become more crowded. The presence of mass tort suits has only exacerbated the backlog. Consequently, increasing attention has been paid by both plaintiff and defense attorneys to developing case management techniques for streamlining legal procedures and thereby lowering the costs of litigation.

Some commentators have noted a trend away from litigation involving the private rights and duties of two individual parties and

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14. See S. 51, supra note 5, at § 124(d) (“It is the policy of the Congress to encourage certification of class actions in actions under [the federal cause of action] involving common issues of fact or law. In furtherance of that policy, the Congress finds that the requirements of Rule 23 of the Federal Rules of Civil Procedure are met in actions under such [federal cause of action] arising from the same release and presenting common issues of fact or law and involving thirty or more potential claimants.”).

15. Cf. Rosenberg, supra note 8, at 908-909 (“By aggregating mass exposure claims, class actions could enable mass exposure victims to litigate both in the numbers and with the adversarial strength necessary . . . ”).


17. This comment specifically discusses three procedural devices in terms of their increased effectiveness as case management tools under the federal cause of action—multidistrict litigation, Rule 42 consolidation and bifurcation, and Rule 23 class actions. Other procedural devices used as case management tools include: test cases used in conjunction with collateral estoppel, see Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980); and special masters and magistrates, see Hazard & Rice, Judicial Management of Pretrial Process in Massive Litigation: Special Masters as Case Managers, 1982 A. B. FOUND. RESEARCH J. 375.
toward litigation designed to “further the collective interests of society.” 

Professor Abram Chayes originated the term “public law litigation” to describe actions of the latter variety. “Public law” litigation is characterized by “sprawling and amorphous” party structures, and an adversary relationship “suffused and intermixed with negotiating and mediating processes.” In addition, it is “often extraordinarily complex and extended in time.” This litigation, therefore, requires effective case management if its “just, speedy and inexpensive determination” is to be secured.

Toxic tort litigation generally satisfies Chayes’ paradigm for “public law” litigation. The consequences of exposure to toxic substances are seldom limited to a discrete plaintiff class. Moreover, society’s interest in maximum deterrence requires that manufacturers be held fully accountable for the injuries inflicted by hazardous wastes. Leakage from a single dump site can produce hundreds, even thousands, of injuries of various kinds and degrees of severity. The accident may implicate many generators and transporters of waste as well as several past and present owners and operators of the disposal site. Litigation will be complex and prolonged not only because of the many parties involved, but also because of the extended latency periods of the injuries and the complex and often inconclusive evidence regarding the effects of toxic agents on health and the environment.

These actions are likely to multiply as the disposal of toxic wastes generates additional media attention and scientific investigation, as more sites are discovered and created and as latent injuries begin to manifest themselves. Richard Willard, the Chief of the Justice Department’s Civil Division, estimated in 1984 that “toxic tort claims against the Federal Government over the next ten years, excluding asbestos claims, will top $200 billion.” A federal cause of action may remove some of the barriers to effective management of cases that arise following exposure to toxic wastes and thus promote the

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20. Id. at 1298.
21. Cf. Lauter, Footing the Bill for Toxic Torts, Nat’l L. J., Jan. 31, 1983, at 1, 40. (“‘There is going to be a lot of activity in the toxic tort area whether Congress acts or not.’”).
22. Recovery for Exposure to Hazardous Substances: The Superfund § 301(e) Study and Beyond, 14 ENVTL. L. REP. 10098 (1984). Many of these claims would not be covered by the proposed legislation.
just and efficient resolution of these suits that otherwise threaten to overwhelm the courts.

A. Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation is empowered to transfer related civil actions pending in different district courts to a single district for coordination and consolidation of pretrial proceedings, provided the actions "involv[es] one or more common questions of fact." For example, in a products liability action involving the "Dalkon Shield" intrauterine device, the Panel transferred fifty-seven actions pending in twenty-three different districts to the centrally located district of Kansas. The seven-judge Panel may deny transfer, however, if it determines that many factual questions unique to each action predominate over common questions.

Technically, these actions must be remanded to the courts from which they were transferred following the pretrial proceedings. Therefore, the benefits of consolidation would appear to be limited to discovery and, perhaps, settlement negotiations. Most actions are not in fact remanded, however, but instead are retained for trial by the judge to whom they were transferred. The transferee judge also has the authority to vacate, modify or expand prior orders of the original courts and to decide all pretrial motions, including those that are dispositive of the actions. Consequently, there is concern that the parties may be disadvantaged because substantial portions of their case may be litigated outside their chosen forum.

A second problem associated with multidistrict litigation results from the requirement that transferee judges apply the substantive laws of the various districts in which the actions originated. This may cause the case to be delayed while the judge determines which states' laws to apply to which aspects of the consolidated case. In

27. The transferee judge has the power to order transfer of the actions for trial pursuant to 28 U.S.C. § 1404(a) or § 1406. See Weigal, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 583 (1977); In re Bendectin Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio 1984).
28. The transferee court may determine motions for judgment approving a settlement, for dismissal, for judgment on the pleadings and for summary judgment. See Weigal, supra note 27, at 583.
29. Id. at 584.
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addition, transferee judges must invest a great deal of time in acquainting themselves with the substantive laws of foreign jurisdictions. A federal cause of action would overcome most of these choice of law problems. Variations in state substantive law would become irrelevant. A federal cause of action that clearly specified the potentially liable parties, the compensable damages, and the available defenses would curtail the transferee judge's discretion and mitigate the parties' concern about transfer out of the original forum. In addition, a single federal standard might encourage more Panel findings that unique factual questions do not predominate over common questions and thus more orders of transfer for pre-trial consolidation.

B. Rule 42 Consolidation and Bifurcation

Rule 42 of the Federal Rules of Civil Procedure allows federal district courts to order joint hearings or trials of actions pending before them that involve "a common question of law or fact." Judges have been urged to consolidate such cases "in order to expedite the trial and eliminate unnecessary repetition and confusion." The courts may order consolidation despite opposition from the parties. They may also "order a separate trial of any claim . . . or issu[e]" for reasons of convenience, efficiency, or avoidance of prejudice.

Rule 42 consolidation has been increasingly used by federal trial judges as a means of managing multiparty tort litigation. Courts have consolidated mass plaintiff accident actions involving a single defendant and mass plaintiff products liability actions involving one or more manufacturers of an allegedly harmful drug or sub-

30. This comment recommends that the federal cause of action be exclusive and preempt any contrary state law. Such preemption would provide uniformity and predictability as to future conduct as well as eliminate the choice of law problems in multidistrict litigation. Cf. The Superfund Improvements Act of 1984, H.R. 5640: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. (1984) (Statement of George C. Freeman, Jr.).
31. See, e.g., H.R. 5640, supra note 3 and accompanying text; S. 51, supra note 5.
35. See, e.g., In re Air Crash Disaster at Florida Everglades, 549 F. 2d 1006 (5th Cir. 1977); Kershaw v. Sterling Drug, Inc., 415 F. 2d 1009 (5th Cir. 1969); In re Federal Skywalk Cases, 95 F.R.D. 479 (W.D. Mo. 1982), cert. denied, 459 U.S. 988 (1982); In re Three-Mile Island Litigation, 95 F.R.D. 164 (M.D. Pa. 1982).
36. See, e.g., In re Air Crash Disaster at Florida Everglades, 549 F. 2d 1006 (5th Cir. 1977); In re Federal Skywalk Cases, 95 F.R.D. 479 (W.D. Mo. 1982), cert. denied, 459 U.S. 988 (1982).
The consolidation of actions for trial assures a single uniform determination of the common issues that is binding on all parties. Thus, dockets are cleared of duplicative suits. In addition, more actions are settled before trial because any uncertainty as to the application of any judgment obtained on the common issues has been eliminated.

Courts have also found that some cases involving multiple plaintiffs or defendants can be disposed of efficiently by bifurcating the trial on certain outcome-determinative issues. For example, the statute of limitations defense may be tried before the liability issues. Or a trial on the issue of causation may be held before the trial on all other issues raised by the suit. The outcome of the first trial may encourage settlement before the follow-up trials or may eliminate the need for future trials altogether. Of course, bifurcation may also lead to greater congestion of the courts if used indiscriminately. Therefore, "[a] trial judge should try issues separately only when separation aids expedition and economy."

Rule 42 consolidation was designed to provide the courts a means of managing their dockets to obtain "trial convenience and economy in administration." A federal cause of action for damages resulting from toxic waste disposal would provide greater opportunities for courts to consolidate related actions under the Rule. These suits would then have the question of federal law, including the specified liability and defenses, in common.

C. Class Actions

Rule 23 of the Federal Rules of Civil Procedure allows trial judges to certify classes of plaintiffs or defendants if the number of people involved is so large that it would be impracticable to join each individual as a party to the suit. There must, however, be questions of law or fact common to the class. The Rule also requires that the

39. Id. at 819. See also In re Air Crash Disaster at Florida Everglades, 549 F. 2d 1006 (5th Cir. 1977) (consolidated mass accident action settled shortly before trial).
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class representatives present claims or defenses that are typical of the class and that they "fairly and adequately protect the interests of the class." Section (d) of the Rule grants the courts broad managerial powers to "make appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument." Additionally, the courts have discretionary authority to bifurcate the class action with respect to particular issues and subclasses.

Class actions could be extremely useful to courts in managing mass tort cases. The single determination of an issue could be made binding on all class members, not only the present litigants but also persons whose injuries have not yet manifested themselves. Class actions could therefore prevent duplicative trials and inconsistent results.

Class treatment could also be the fairest means of managing these suits. In some cases class certification could protect defendants from the possibility of insolvency resulting from meeting multiple claims against them. In addition, if mass tort classes were certified under section (b)(3) of Rule 23, all readily ascertainable members of the class would be notified of the action and given the opportunity to opt out and thereby be excluded from the judgment. The notification provision could alert potential plaintiffs of their legal rights and the opt-out provision could allow members of the class to litigate their cases individually. Furthermore, certification of a plaintiff class could equalize the bargaining power of the plaintiffs and defendants. The aggregation of claims and resources, moreover, could result in the compensation of small claimants who might otherwise be precluded from bringing suit.

44. FED. R. CIV. P. 23(a)(4).
45. FED. R. CIV. P. 23(d).
46. FED. R. CIV. P. 23(c)(4).
47. For views by commentators who have advocated the use of class actions for mass tort litigation, see generally Rosenberg, supra note 8; McGovern, supra note 18; Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323 (1982); Note, Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency, 47 Alb. L. Rev. 1180 (1983); Wright & Collusi, The Successful Use of the Class Action Device in the Management of the "Skywalk" Mass Tort Litigation, 52 UMKC L. Rev. 141 (1984).
48. See infra note 68 and accompanying text.
49. Rule 23(c)(2) provides that "in any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable. . . . The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion. . . ."
50. See infra note 69 and accompanying text.
Courts, however, have seldom allowed class treatment of mass tort cases.\textsuperscript{51} This reluctance may be due, in part, to the Advisory Committee's comment that a "mass accident" is "ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."\textsuperscript{52} Other commentators, however, have suggested that the mass accident is "peculiarly appropriate for class treatment."\textsuperscript{53} They argue that such actions are likely to involve complex questions requiring expert testimony that need not be repeated "time and time again."\textsuperscript{54} Moreover, the defense and liability issues may be as uniform in mass tort cases as in the many securities and antitrust cases that are routinely treated as class actions.\textsuperscript{55}

Few courts have specifically referred to the Advisory Committee's admonition when denying mass tort class certification. Rather, courts have denied such certification on the ground that the parties failed to meet the prerequisites of Rule 23. These include the four above-mentioned conditions that joinder be impracticable, common questions of law or fact be present and the class representatives present typical claims and protect the interests of the class as a whole. A class action may be maintained only if one of the following tests is also satisfied: (1) separate actions would create a risk of incompatible standards of conduct for the defendant, or individual determinations would impair or impede or be dispositive of the interests of other members not parties; (2) injunctive relief is appro-


\textsuperscript{53} 3B J. MOORE & J. KENNEDY, MOORE’S FEDERAL PRACTICE ¶23.45[3] at 23-353 n. 40 (2d ed. 1984); see also, 7A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 1783 at 117 (1972) ("The argument for class action treatment is particularly strong in cases arising out of mass disasters . . . .") [hereinafter cited as WRIGHT & MILLER].

\textsuperscript{54} WRIGHT & MILLER, supra note 53, at 117. See also, Note, Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency, supra note 47, at 1182.

\textsuperscript{55} See WRIGHT & MILLER, supra note 53, at 117.
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appropriate to the entire class; or (3) common questions of law or fact predominate over questions affecting individual members and a class action is the superior method for the “fair and efficient adjudication of the controversy.”56 Mass tort cases would be most appropriately certified as 23(b)(3) class actions and therefore would have to meet the requirements of the final category.57

Courts have typically refused to grant 23(b)(3) class certification for victims of mass torts although to do so could promote efficient, economical and consistent adjudication of their claims.58 The requirement that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” has generally been the major obstacle to certification. Courts have thus denied class certification on the ground that the liability issue is too entangled with injury and causation issues unique to each plaintiff.59 Or they have held that the interests of the parties in controlling their individual cases override any interests in the “fair and efficient adjudication” that would be served by class certification.60 In addition, courts have found that common issues do not predominate in cases that involve the different laws of a number of jurisdictions.61

Nevertheless, a few federal trial courts have used the class action to manage mass tort litigation.62 These courts have recognized the

57. Because the plaintiffs in such litigation typically seek damages rather than injunctive relief, 23(b)(2) is generally inapplicable. Members of both a 23(b)(2) and a 23(b)(1) class are bound by the judgment whether they are aware of the action or not because Rule 23(c)(2) provides that “the judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.” Therefore, use of Rule 23(b)(3), whereby members are allowed to opt out of the action, is perceived to be fairer to class members and more likely to alert potential plaintiffs of their legal rights.
58. See, e.g., supra note 51.
62. See, e.g., Agent Orange II, 100 F.R.D. 718 (E.D.N.Y. 1983), cert. denied, 104 S. Ct. 1417 (1984) (certifying class for all issues under Rule 23(b)(3) and on issues of punitive damages under Rule 23(b)(1)(B)); In re Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.) (certifying Rule 23(b)(1)(A) class on issues of liability for compensatory and punitive damages and a Rule 23(b)(1)(B) on issues of liability for and amount of punitive
usefulness of Rule 23(b)(3) in efficiently disposing of mass tort cases. They have made flexible and innovative use of their powers under 23(c)(4) to certify classes as to particular issues and to divide classes into subclasses. Thus, "an apparently unmanageable class action could be converted to a manageable one" because the courts have the flexibility to "treat common things in common and to distinguish the distinguishable." Because the trial on the common issues binds the class members, the jury in each subsequent trial will only be responsible for determining unique issues. The successive trials, therefore, will correspondingly be shortened by the amount of time spent on the trial of the common issues. Thus, the determinations of the actions could be more speedily and inexpensively secured.

Some commentators and trial judges have also found that class certification under 23(b)(1) rather than 23(b)(3) may be advantageous on the separate issue of punitive damages. Members of a 23(b)(1) class may not opt out of the class and thereafter bring a separate action. This "mandatory" class treatment will preclude repeated litigation on the issue of punitive damages. Moreover, defendants with finite assets will be protected from possible insolvency and the plaintiffs will have equal priority in their claims to the

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64. See Williams, supra note 47, at 328.
65. The primary obstacle to 23(b)(3) certification of mass tort classes is the predominance of uniquely individual causation questions. See supra note 8. A federal cause of action will not eliminate the presence of individual causation questions. The requirement of Rule 23(b)(3) that common questions of law or fact predominate over questions affecting individual members, however, may be more easily met under a federal cause of action. To the extent the federal cause of action would increase the overall number of common questions (such as statute of limitations, rule of liability, and defenses), courts might be more willing to find that common questions do predominate over the individual causation questions. Moreover, specification of a clear congressional intent that it is the policy of the Congress to encourage class certification of these suits, see supra note 14, when read in conjunction with the federal cause of action may lead to increased willingness to grant class certification of mass plaintiff classes.
67. See supra note 57 and accompanying text.
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defendants' limited funds. 68

Class treatment of toxic tort actions not only benefits the courts in effectively managing these suits but also tends to promote the fair adjudication of the actions. Plaintiffs in mass tort litigation often face practical barriers to recovery. Individually they are often unable to engage in the discovery and trial techniques needed to overcome preponderance of the evidence and causation rules. Toxic tort litigation typically requires costly expert testimony and technical evidence. The problems with delay (loss of witnesses, information and, perhaps, parties) that usually result from the long latency periods of injury manifestation add to the extremely high transaction costs. 69

By allowing plaintiffs to pool their resources, class treatment can overcome some of the practical obstacles to fair litigation.

One of the most expansive classes of toxic tort plaintiffs was certified in the “Agent Orange” products liability litigation. 70 Judge Weinstein recognized the desirability of class treatment in that case because of the potential size of the plaintiff class, the likelihood that a single class-wide determination on the issue of causation would bring the issue to the attention of federal policymakers, and the possibility of encouraging settlement. 71 In certifying the class under 23(b)(3), 72 he undertook a “pragmatic” evaluation of whether common questions of law or fact predominated over questions affecting only individual class members. 73 Weinstein found that the “general causation” issue and common defenses were likely to be “applicable to the plaintiffs’ class as a whole.” 74 Furthermore, he conceded that ordinarily the “need to apply the law of dozens of different states

68. The “limited fund” problem calls for 23(b)(1)(B) certification to protect against adjudications which would “substantially impair or impede” the ability of others to recover. See Fed. R. Civ. P. 23(b)(1)(B) advisory committee note to 1966 amendment. See also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (recognizing the drawbacks of “overkill” as multiple punitive damages that may bankrupt a corporate defendant and continuous and repeated punishment for the same error that may not be appropriate).

69. See generally Rosenberg, supra note 8, at 909; Note, Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency, supra note 47, at 1187; Note, Common Law Liability for Toxic Torts: A Phantom Remedy, supra note 7, at 925, 929.


71. Id.

72. The court certified a 23(b)(1)(B) class on the issue of punitive damages and a 23(b)(3) class on all other issues.


74. General causation included the defense that “the substances manufactured could not have caused the injuries claimed.” In addition, the plaintiffs “indicated that there [were] a number of types of injuries which Agent Orange allegedly caused,” a further impetus to certify a class on the causation issue. Id. at 723.
would preclude certification.” 75 However, there was in this case a “consensus among the states with respect to the rules of conflicts and applicable substantive law that provide[d], in effect, a national substantive rule. . . .” 76

The Court of Appeals for the Second Circuit refused to compel Weinstein to vacate the certification order. 77 The appellate court, however, expressed skepticism as to both the existence of a “national substantive rule” 78 and the significance of the issue of “general causation.” 79

A federal cause of action for damages resulting from the disposal of hazardous substances would eliminate the need for courts to take similar “pragmatic” approaches in applying Rule 23 to such actions. These suits would invariably involve common questions of federal law, including questions of liability and defenses, that would permit the use of class actions. Moreover, a uniform federal standard would reduce the need for separation of issues under subdivision (c)(4).

II. Conclusion

Toxic tort litigation will undoubtedly increase as more individuals become aware of the injuries they may have suffered as a result of their proximity to hazardous waste dumps. These suits are likely to involve numerous plaintiffs and defendants. Traditional tort doctrines have been unsatisfactory in achieving “just, speedy and inexpensive” determinations of these actions. There is a need for innovative approaches to the management of such cases. One such approach would be the adoption of a federal uniform cause of action for injuries resulting from the disposal of hazardous substances. This would render more workable the class action and the other procedural devices commonly used by the federal courts to achieve judicial economy and efficiency in complex litigation.

Alison J. Freeman

75. Id. at 724.
76. Id.
78. Id. at 861. Judge Weinstein himself later commented that “the probability of appeal and possible reversal or modification” of his theory of a “national consensus substantive law” was “substantial, making settlement more appropriate.” In re “Agent Orange” Products Liability Litigation, 597 F. Supp. 740, 755 (E.D.N.Y. 1984).