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Howard M. Erichson
Fordham University School of Law, erichson@law.fordham.edu

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Mass Tort Litigation and Inquisitorial Justice

HOWARD M. ERICHSON*

In the massive litigation brought by women against manufacturers of silicone breast implants, something strange is afoot. For a number of years, plaintiffs' medical experts have been opining that silicone breast implants caused the plaintiffs to suffer autoimmune disease and other systemic maladies, and defendants' medical experts have been opining to the contrary. Juries and judges around the country have weighed the evidence presented by each side. Some plaintiffs have won, some have lost. That's the adversary system.

But in 1996, Judge Robert E. Jones did an uncommon thing. Responsible for seventy breast implant cases in the United States District Court for the District of Oregon, Judge Jones appointed a panel of scientific experts to advise the court on causation. Based on the panel's advice, Judge Jones declared inadmissible plaintiffs' expert testimony concerning causation of connective tissue disease by breast implants, and dismissed plaintiffs' claims. 1 In the consolidated federal multidistrict litigation for breast implant cases, Judge Sam C. Pointer appointed a similar panel of medical experts to advise the court on scientific issues.2 The mere anticipation of that court-appointed panel's report influenced the course of breast implant litigation. Plaintiffs reached a $3.2 billion settlement with implant maker Dow Corning Corporation, driven in part by the pressure of the anticipated report.3 The panel's findings, which were issued in late 1998, will profoundly affect the future of breast implant claims.4

Something strange is happening in asbestos litigation as well. For many

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* Associate Professor of Law, Seton Hall University School of Law, erichsho@shu.edu. My thanks to Dan Burk, George Conk, Mark Denbeaux, Sara-Ann Ericson, Tracy Kaye, Judith Resnik, Michael Risinger, Benjamin Schwartz, and Jay Tidmarsh for their thoughtful comments on earlier drafts; to Paul Matey and Janine Tramontana for their excellent research assistance; and to the Seton Hall Law School faculty scholarship fund for financial support of this project.


years, plaintiffs exposed to asbestos have pursued claims against asbestos manufacturers. Juries and judges have listened to the evidence presented by the plaintiffs and defendants, mostly to determine whether the plaintiffs' injuries were in fact caused by exposure to the particular defendants' asbestos products. As in the breast implant litigation, some plaintiffs have won, some have lost. But a different model presented itself in the cases of *Amchem Products v. Windsor (Georgine)*,\(^5\) decided by the Supreme Court in 1997, and *Ortiz v. Fibreboard (Ahearn)*,\(^6\) to be decided by the Supreme Court in 1999. *Amchem* began with a momentous day on which plaintiffs filed their Complaint, defendants filed their Answer, and both filed a Joint Motion for Conditional Class Certification and a Joint Stipulation of Settlement. *Ortiz* was filed as the parties put finishing touches on an agreement that they had reached. In each case, the parties had negotiated an agreement before the suit was filed, and jointly sought the court's approval of their class action settlement. In each case, the request for class certification was conditioned on approval of the settlement. The district courts painstakingly examined the merits of the proposed settlements before approving them.

Ultimately, the Supreme Court rejected the *Amchem* settlement class action, but left the door open for future mass tort settlement class actions.\(^7\) In *Ortiz*, the Fifth Circuit affirmed the settlement class action,\(^8\) and the Supreme Court granted certiorari, then vacated and remanded for reconsideration in light of *Amchem*.\(^9\) On remand, the Fifth Circuit reaffirmed its approval of the settlement class action,\(^10\) and the Supreme Court again granted certiorari.\(^11\)

*Amchem* and *Ortiz* are not unique. In the past decade, settlement class actions have become increasingly popular in mass tort litigation, having been used successfully in cases such as the Dalkon Shield litigation,\(^12\) the Bjork-Shiley heart valve litigation,\(^13\) and the orthopedic bone screw litigation.\(^14\) Although the Supreme Court's opinion in *Amchem* has engendered some confusion over the continued viability of mass tort settlement class actions, it appears that such

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5. 117 S. Ct. 2231 (1997). In the lower courts, the case was referred to as *Carlough v. Amchem Products* and later as *Georgine v. Amchem Products*. Even after the Supreme Court's decision, the case is sometimes referred to as *Georgine*, particularly in regard to the proposed settlement itself.

6. Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995), aff'd, 90 F.3d 963 (5th Cir. 1996), vacated and remanded, 117 S. Ct. 2503 (1997), reaaff'd, 134 F.3d 668 (5th Cir.), cert. granted sub nom. Ortiz v. Fibreboard, 118 S. Ct. 2339 (1998). Although the Supreme Court granted certiorari under the name *Ortiz v. Fibreboard*, the suit was originally filed as *Ahearn v. Fibreboard* and in mass tort and class action circles is often referred to as *Ahearn*.


8. *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).


10. *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998).


settlements remain a dominant approach to resolving mass tort lawsuits. With increasing frequency, plaintiffs and defendants come to court holding hands, and courts must launch their own vigorous inquiries into the merits of the parties’ proffered settlement.

Is this how we practice tort litigation in the United States? A breast implant court launches its own investigation into the critical factual dispute? An asbestos court pursues its own skeptical inquiry into the merits of a settlement that plaintiffs and defendants have reached? What ever happened to the adversary system?

In the world of mass tort litigation,15 at least, we have sneaked away from the traditional U.S. adversarial model of justice, and towards the inquisitorial model common in the civil law countries of continental Europe and, to a lesser extent, Latin America.16 We have turned toward inquisitorial justice not by design, but by necessity and ad hoc innovation. In what appears to be a moment of significance in the episodic evolution of the adjudicatory process, some judges have turned to devices that, despite short-term resistance, may gain widespread acceptance with time.

Using a comparative perspective, this article examines two salutary trends in modern mass tort litigation: the use of court-appointed scientific experts and the use of settlement class actions with a vigorous inquiry into the merits of the settlement. Part I looks at court-appointed scientific experts, noting the growing use of such experts in mass tort cases, despite most judges’ reluctance to use such experts. Part II addresses settlement class actions, which offer an appealing path out of the morass of inefficient and inconsistent mass tort litigation, but which raise troubling fairness issues, and thus should be permitted only if the court vigorously inquires into the merits of the settlement. Part III examines the similarities between these judicial devices and the inquisitorial justice model, then considers the barriers of judicial culture and structure that hinder U.S. judges17 from making regular and effective use of such inquisitorial tools. Although court-appointed experts and well-scrutinized settlement class actions

15. “‘Mass tort’ refers to conduct of one or more tortfeasors that causes widespread injury, where the individual tort claims share some common factual basis. Most mass tort litigation can be classified either as mass disaster litigation, which involves injuries suffered by many at one time and place, or mass products liability litigation, which involves wide distribution of a defective product. The former includes plane, train and bus crashes, building collapses, hotel fires, explosions, chemical spills, gas leaks, and nuclear reactor accidents. The latter includes claims by consumers, workers and others for product-caused injuries.” Mitchell A. Lowenthal & Howard M. Ericson, Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure, 63 FORDHAM L. REV. 989, 994 (1995); see also id. at 991 n.7 (listing representative mass tort litigations). The present article focuses largely on mass products liability litigation, such as the asbestos, tobacco and breast implant cases, where the use of court-appointed experts and settlement class actions has been most pronounced.

16. “Inquisitorial,” as used in this article, refers to systems of adjudication in which the court, rather than the litigants or their lawyers, exercises primary control over the fact-gathering process. See infra text accompanying notes 133-66.

17. I do not mean “U.S. judges” to exclude state court judges. Rather, the term refers to federal and state judges in the United States, as distinguished from judges in other countries.
can help courts reach just and efficient mass tort resolutions, their inquisitorial nature renders widespread and effective adoption in this country unlikely in the short term. Nevertheless, these recent trends in mass tort litigation may hint at an evolution toward greater use of inquisitorial tools within the context of the U.S. adversary system. Thus, while Part IV considers the possibility of legislative solutions to mass torts, it concludes with skepticism regarding the prospect of congressional intervention in this arena, and with hope that courts may adapt to make more effective use of less familiar approaches.

I. INQUISITORIAL FACT-GATHERING: COURT-APPOINTED EXPERTS

The use of expert witnesses in U.S. litigation is immense. One study found expert testimony employed in eighty-six percent of civil trials, with an average of 3.3 experts per trial.\(^{18}\) Rather than exerting a neutralizing influence on adversarialism, however, expert testimony has become a fixture of the adversary system. Virtually every expert witness is retained by a litigant, testifies on behalf of that litigant, and is compensated by that litigant. Triers of fact attribute to the experts whatever credibility their expertise and reasoning seem to warrant, and at the same time attribute to them whatever bias adversary retention and preparation imply. The experts themselves, some fear, may color their testimony to advance partisan interests.\(^{19}\) Litigation centering on disputed scientific or technical issues can degenerate into a “battle of the experts,” in which a trier of fact must choose between two diametrically opposed but equally impressive-sounding expert opinions on matters beyond the fact-finder’s comprehension.

Judges in the United States have the power under Federal Rule of Evidence 706 and many state equivalents to appoint their own expert witnesses,\(^{20}\) but one

18. See Samuel R. Gross, Expert Evidence, 1991 Wis. L. Rev. 1113, 1119 (studying California civil trials); see also William T. Pizzi, Expert Testimony in the U.S., 145 New L.J. 82 (1995) (discussing the “pressures in civil cases to expand the role of experts as there seems to be almost no issue on which an expert could not be found willing to offer an opinion”). The ubiquity of experts is especially pronounced in mass torts and other complex litigation. See Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System 1347 (1998) (“A functional adversary system in complex cases would be unimaginable without expert testimony.”).

19. See Dan L. Burk, When Scientists Act Like Lawyers: The Problem of Adversary Science, 33 Jurimetrics J. 363, 368-70 (1993) (discussing possible causes and effects of “adversary science” in the courts, including seduction of scientists by the “gaming” aspects of litigation and scientists’ identifying with partisan objectives). This is hardly a new problem. See, e.g., Keegan v. Minneapolis & St. Louis R.R., 78 N.W. 965, 966 (Minn. 1899) (“Experts are nowadays often the mere paid advocates or partisans of those who employ them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.’”).

20. See, e.g., Fed. R. Evid. 706 (“The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.”); Ala. R. Evid. 706; Cal. Evid. Code §§ 730-33; Guam R. Evid. 706; Wis. Stat. Ann. § 907.06. The inherent power of trial judges to appoint their own experts was well established before the enactment of the Federal Rules of Evidence. See Fed. R. Evid. 706 advisory committee’s note (1972); Scott v. Spanjer Bros., Inc., 298 F.2d 928, 930-31 (2d Cir. 1962). As early as 1901, Learned Hand advocated the use of neutral advisors. See Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 55 (1901).
would hardly realize this by looking at actual practice. Under Rule 706, the court may select an expert agreed upon by the parties, or may select an expert of its own choosing. The court informs the expert witness of his or her duties, and the court or any party may call the witness to testify.21 Generally, the court directs the parties to pay the chosen expert's compensation.22 In addition to the use of Rule 706 court-appointed expert witnesses, a court also can appoint “special masters”23 or “technical advisors”24 to assist the court in undertaking a neutral investigation into disputed scientific facts.

Rarely do courts exercise their power to appoint neutral experts. In a 1988 survey of all active federal district court judges, researchers Joe Cecil and Thomas Willging of the Federal Judicial Center found that only twenty percent of the judges had ever appointed an expert.25 Among that twenty percent, most had appointed an expert only once in their judicial career.26 Of the hundreds of thousands of cases handled by the judges surveyed, there were only about 225 instances of experts appointed by the court.27 A study of California civil trials found 1748 appearances by partisan experts in 529 cases, but not one reference to a court-appointed expert.28 The extreme reluctance of U.S. judges to appoint

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22. See Fed. R. Evid. 706(b).
23. See Fed. R. Civ. P. 53 (providing for use of special masters in federal court); Burk, supra note 19, at 375 (favorably mentioning proposal for use of “Scientific Referees,” i.e., scientifically trained special masters to oversee collection and evaluation of scientific evidence); Margaret G. Farrell, Coping with Scientific Evidence: The Use of Special Masters, 43 Emory L.J. 927 (1994); see also Manual For Complex Litigation (Third) § 21.52 (1995) [hereinafter M.C.L.3d] (“Special masters have increasingly been appointed for their expertise in particular fields, such as accounting and finance or the science or technology involved in the litigation. Hence the distinction between special masters under Rule 53 and court-appointed experts under Fed. R. Evid. 706 has become blurred.”); Linda J. Silberman, Judicial Adjuncts Revisited—The Proliferation of Ad Hoc Procedures, 137 U. Pa. L. Rev. 2131, 2141-73 (1989) (discussing various uses of special masters). But see United States v. Microsoft, 147 F.3d 935, 955 & n.22 (D.C. Cir. 1998) (vacating Rule 53 appointment of special master in Microsoft antitrust case, and noting that “[t]o the extent that adjudication may lead the court into deep technological mysteries,” appointment of an expert witness under Federal Rule of Evidence 706 is “a far more apt way of drawing on expert resources than the district court’s unilateral, unnoticed deputization of a vice-judge [under Rule 53]”).
24. See Renaud v. Martin Marietta Corp., 749 F. Supp. 1545, 1548 (D. Colo. 1990), aff’d, 972 F.2d 304, 308 (10th Cir. 1992); Reilly v. United States, 863 F.2d 149, 154-55, 159-60 (1st Cir. 1988); Sheila L. Birnbaum & Gary E. Crawford, Why Courts Hesitate to Appoint Experts, Nat’l L.J., Oct. 26, 1992, at 16. “[T]he [technical] advisor’s role is to act as a sounding board for the judge—helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems.” Reilly, 863 F.2d at 158. One of the most useful roles for technical advisors is helping courts determine the admissibility of scientific expert testimony. See Renaud, 749 F. Supp. at 1548; see also Fed. R. Evid. 104 (concerning judge’s responsibility to make preliminary determinations of evidence admissibility and witness qualifications). But see Silberman, supra note 23, at 2171-72 (expressing concern over lack of formal procedural safeguards for use of technical advisors).
26. See id. at 1005.
27. See id. at 1004-05 & n.35.
experts has not gone unnoticed. To many observers, this reluctance is particularly worrisome in scientifically complex cases, and particularly unjustifiable in cases where the plaintiffs are many and the stakes are high.

The last few years, however, have witnessed an increased use of court-appointed experts in mass tort litigation, as judges have struggled with the cases’ scientific complexities and grown frustrated with the battle of adversary experts. In mass tort litigation, especially cases involving exposure to allegedly toxic substances, courts cannot avoid difficult scientific questions. Traditionally, courts in the United States have handled complex scientific issues much like any other factual dispute—by allowing each side to make its adversarial pitch, and then by deciding who is right. Courts have had to determine whether certain expert evidence is admissible, but generally have addressed the admissibility question itself in adversarial terms, with the parties presenting their arguments and a relatively passive adjudicator deciding who is right.

In 1993, in Daubert v. Merrell Dow Pharmaceuticals, the Supreme Court reemphasized the duty of federal judges to serve as scientific evidentiary gatekeepers. By emphasizing judicial responsibility for scientific factfinding,

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Judicial reluctance to appoint experts extends not only to scientific matters, but also to matters requiring economic or financial expertise. The chief judge of the United States Tax Court recently stated that despite judges’ frustration with adversary expert witnesses, she “would be very reluctant to approve a court-appointed expert not suggested or agreed to by the parties.” Tax Court Chief Judge Reluctant to Appoint Own Expert Witnesses, 66 U.S.L.W. 2106-07 (Aug. 19, 1997) (quoting Chief Judge Mary Ann Cohen).

31. See In re Joint E. & S. Dist. Asbestos Litig., 830 F. Supp. 686, 693 (E. & S.D.N.Y. 1993) (explaining that “[t]he work of such [court-appointed] experts is especially critical in dealing with complex mass tort problems such as the instant case,” because, among other reasons, “the number of persons affected runs into the hundreds of thousands”).


33. See id. at 589 (“[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”); see also 1 David L. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony 13 (1997) (“Daubert ... expects judges to have a sufficient appreciation of the scientific method to make this preliminary assessment.”); Kenneth R. Foster & Peter W. Huber, Judging Science: Scientific Knowledge and the Federal Courts 252 (1997) (“Perhaps the greatest contribution of Daubert was to ... emphasize that judges must carefully scrutinize testimony proffered by scientific experts.”); 2 Stephen Saltzburg et al., Federal Rules of Evidence Manual 1224 (1994) (describing the gatekeeper function as requiring judges to “evaluate the proffered testimony to assure that it is at least minimally reliable”).
Daubert urges judges to rely less on adversarial presentation, and to involve themselves more actively in seeking out the truth in scientifically complex litigation. In mass tort litigation, some judges have exercised this responsibility by turning to neutral scientific experts.

In the breast implant litigation, in which battles over scientific questions of causation have been especially bitter, judges recently have appointed their own experts. When Judge Jones in Oregon confronted the Daubert duty to determine the scientific validity and thus the admissibility of plaintiffs’ expert testimony on causation, he sought the advice of a panel of scientific experts. First, Judge Jones appointed a medical doctor/biochemist as a special master to help the court select a panel of unbiased and well-qualified experts. With the special master’s assistance, the court appointed an epidemiologist, a rheumatologist, an immunologist-toxicologist, and a polymer chemist. The panel served the court as technical advisors “to assist in evaluating the reliability and relevance of the scientific evidence.” The panel’s input proved essential to the court’s decision to exclude plaintiffs’ expert testimony on causation of systemic disease, and therefore to dismiss the claims.

Judge Sam Pointer, handling the consolidated federal Multidistrict Litigation (MDL) in the breast implant cases, appointed a “National Science Panel” to assist the court in examining the scientific issues. After seeking recommenda-

34. Daubert, 509 U.S. at 592-93. Interestingly, although Daubert increases judges’ responsibility for scientific factfinding—a quintessentially inquisitorial activity—the judicial gatekeeping role under Daubert can be understood as an outgrowth of the adversary system. As Professor Mirjan Damask has pointed out, judicial control over admissibility of evidence goes hand in hand not only with jury trials, but also with adversary fact-gathering and presentation. See Mirjan R. Damaska, Evidence Law Adrift 84-86 (1997).


37. See id. at 1393.

38. See id.


40. See Hall, 947 F. Supp. at 1394, 1402-12. The court rejected only the claims of connective tissue disease and other systemic illness, and allowed plaintiffs’ claims of localized injury from ruptured implants to proceed to trial. See id. at 1414. Judge Jones deferred the effective date of his ruling pending the report of the national Rule 706 panel in the breast implant multidistrict litigation, but emphasized that modification of his decision was unlikely. See id. at 1394-95 & n.19, 1415.

For a case reaching the opposite conclusion on the admissibility of breast implant expert testimony, see Vasallo v. Baxter Healthcare Corp., 428 Mass. 1, 13-15 (1998), in which the Massachusetts Supreme Judicial Court upheld the trial court’s decision, upon reviewing the transcript of the Hall hearing and other evidence, to admit plaintiffs’ expert testimony identifying a causal link between silicone breast implants and systemic disease.

tions from a specially appointed “Selection Panel,” Judge Pointer named an epidemiologist, an immunologist, a rheumatologist, and a toxicologist to the National Science Panel. He directed the panel to consider whether existing scientific research provides a reasonable basis to conclude that silicone gel breast implants cause connective tissue diseases or immune system dysfunction.

The National Science Panel issued its report in November 1998. The report, which largely concluded that the scientific studies do not demonstrate a causal link between silicone breast implants and systemic diseases, will have a tremendous impact on the future of breast implant litigation. Even before the National Science Panel issued its report, the appointment of that panel in the MDL mattered enough to judges in other breast implant cases that several judges cited the panel’s pending report as a reason to decline motions for summary judgment in the meantime. In the joint Eastern District and Southern District of New York breast implant litigation, Judges Jack Weinstein and Harold Baer originally appointed three special masters—a law professor, a lawyer-physicist, and a biologist—to advise the court on candidates for its own panel of scientific experts, but then awaited the report of Judge Pointer’s

CV92-P-10000-S, MDL 926) (N.D. Ala.) (order to show cause why science panel should not be established, and appointing selection panel to recommend neutral experts); Order No. 31B, June 13, 1996 (No. CV92-P-10000-S, MDL 926) (N.D. Ala.) (confirming establishment of National Science Panel); Order No. 31E, Oct. 31, 1996 (No. CV92-P-10000-S, MDL 926) (N.D. Ala.) (giving directions to National Science Panel) <http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>.

42. See Order 31, May 31, 1996, In re Silicone Gel Breast Implants Prods. Liab. Litig. (No. CV92-P-10000-S, MDL 926) (N.D. Ala.) (appointing six members to Selection Panel to act as special masters under Federal Rule of Civil Procedure 53 and Federal Rule of Evidence 706, and requesting that Selection Panel provide the court with names of “neutral, impartial persons who have the indicated expertise” for the science panel) <http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>.


46. In the wake of the National Science Panel’s report, Professor Michael Green was quoted as saying, “It will be hard to find a Federal judge who will permit a case to be tried or who will sustain on post-trial motions a plaintiff’s claims to systemic disease.” Kolata, supra note 4, at A14.


Most notably, anticipation of the National Science Panel's report appears to have been a driving force behind the $3.2 billion settlement tentatively reached in 1998 by the Dow Corning Corporation and plaintiffs' lawyers, under the auspices of the bankruptcy court supervising Dow Corning's Chapter 11 reorganization. Although not everyone views the breast implant settlement as a mass tort success story, Judge Pointer should be credited with creating a fertile and appropriate environment for settlement negotiations. In litigation that turns on a disputed scientific question of causation, a settlement reached under the pressure of an impending report by a credible independent panel of scientists likely reflects a more legitimate settlement value than a settlement reached under the pressure of adversary expert battles and accumulating jury verdicts.

The developing use of court-appointed experts in mass torts is not limited to breast implant cases. In the asbestos litigation, Judge Weinstein and Bankruptcy Judge Burton Lifland used a panel of court-appointed scientific experts to report on the future course of asbestos claims. The three researchers on the panel

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50. *See Order Regarding Term Sheet, Scheduling Hearing Date and Re-Appointing Mediator, In re Dow Corning Corp.* (Bankr. E.D. Mich. July 8, 1998) (No. 20612) (setting forth procedures following receipt of letters from Dow Corning, the Official Committee of Tort Claimants, Dow Chemical Company, and Corning Incorporated informing the court that they had accepted the provisions of a term sheet providing $3.2 billion for settlement). On the relevance of the National Science Panel to the deal, see David J. Morrow, *Implant Maker Reaches Accord on Damage Suits,* N.Y. TIMES, July 9, 1998, at A1 (noting the comment of a participant in the negotiations that the anticipated expert report pressured both sides toward settlement because neither side wanted to risk damage from an unfavorable report).

51. *See Daniel McGinn & Karen Springen, Dow Corning's Breast-Implant Settlement Was a Victory for Junk Science—Maybe One of the Last,* NEWSWEEK, July 20, 1998, at 53 (reporting that neither the bankrupt defendant nor women's advocates celebrate the settlement, and quoting one observer as saying, "I don't see victory in this settlement for women, for the public or for scientific truth.").


worked in consultation with two medical school professors. Judge Carl Rubin used court-appointed medical experts in a number of asbestos cases to testify regarding whether the plaintiffs had asbestosis or pleural plaque. Court-appointed experts have appeared also in the massive products liability litigation against manufacturer A.H. Robins for injuries caused by the Dalkon Shield contraceptive device.

Courts have appointed scientific experts in other mass tort cases as well. In the Bendectin litigation, Michigan state court judge Susan Borman granted summary judgment for the defendant based on the causation testimony of four court-appointed medical experts. In an environmental toxic tort case against the Martin Marietta Corporation, a federal judge similarly granted summary judgment for the defendant based on the testimony of three court-appointed experts: a geochemist, a physician, and a toxicologist. Despite the general reluctance of courts to appoint their own experts, the recent use of such experts in a number of different mass tort cases suggests that at least in scientifically complex mass tort litigation, an increasing number of judges appreciate the need to move beyond adversary experts.

As judges handling mass tort litigation have overcome reluctance to appoint experts, offers of help and words of encouragement have come from various sources. The American Association for the Advancement of Science (AAAS)


Although the most prominent uses of court-appointed scientific experts have resulted in favorable rulings for defendants, Rule 706 should not be considered solely a defendant's tool. For cases in which independent expert testimony has led to plaintiff victories, see In re Complaint of the F/V Capt. Wool, Inc., 914 F. Supp. 1300 (E.D. Va. 1995); Doe v. Dolton Elementary Sch., 694 F. Supp. 440, 442 (N.D. Ill. 1988); Letoski v. United States, 488 F. Supp. 952, 960 (M.D. Pa. 1979).

60. Momentum began building in the early 1990s. A committee of lawyers and scientists formed jointly by the American Bar Association and the American Association for the Advancement of Science submitted a report in 1991 proposing ways to increase use of court-appointed experts. See AAAS-ABA National Conference of Lawyers and Scientists Task Force on Science and Technology in the Courts,
established a pilot project to help courts find capable scientists to use as independent expert witnesses or as technical advisors. Critics of court-appointed experts raise concerns that such experts wield enormous power over the outcome of cases, because court-appointed experts bear an official stamp of approval. An expert labeled "independent" or "neutral" cannot be demystified on cross-examination as readily as an expert retained by a party. To the extent this reflects a real difference in reliability between court-appointed experts and party-retained ones, it should be no cause for concern. The credibility that comes with "independence," however, presents a risk that some trial judges may try to invade the jury's province, and to evade appellate review of judgment as a matter of law. Suppose a judge favors either plaintiff or defendant, and would like to take the case away from the jury by granting judgment as a matter of law, but fears reversal because the evidence is not one-sided enough to support such a ruling. The judge might appoint an expert whom the judge has reason to believe will opine as the judge


61. See American Association for the Advancement of Science, Use of Scientific and Technical Information in the Courts (visited Nov. 11, 1998) <http://www.aaas.org/spp/dspp/sfrl/projects/courts.htm> (describing 1991 task force report, 1993 planning conference, and current design of "demonstration project that will allow AAAS to serve as the link between the courts and the scientific/technical communities"); see also Angell, supra note 35, at 205 (urging judges to appoint expert witnesses rather than relying on parties' experts, and suggesting that "[r]eputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science").


63. See, e.g., Relkin, supra note 52, at 2262-69; see also FED. R. EVID. 706 advisory committee's note (1972) (acknowledging argument "that court appointed experts acquire an aura of infallibility to which they are not entitled"); GRAHAM, supra note 52, § 706.1, at 180 (noting that use of Rule 706 can "foster excessive emphasis by the trier of fact on this witness's opinion at the expense of the adversary system"). This concern is most pronounced in jury trials in which the jury is informed of the expert's court-appointed status. See infra note 71 and accompanying text.

64. See Relkin, supra note 52, at 2264 (arguing that use of Rule 706 can result in abrogation of Seventh Amendment right to jury trial).

65. See FED. R. CIV. P. 50 (judgment as a matter of law at trial, before or after verdict); FED. R. CIV. P. 56 (summary judgment).
favors, knowing that the “independent” expert’s opinion will hold huge sway with the jury. By leaving the decision to the jury, while practically controlling it through expert appointment, the judge largely insulates the outcome from reversal.

The concern is legitimate, but answerable. In practice, courts often use their own scientific experts not to testify to a jury, but rather to advise the court on such matters as the admissibility of other scientific evidence. This was precisely how Judge Jones used his expert panel in the Hall breast implant case. When judges use experts to advise the court rather than to testify as witnesses, the court remains fully accountable for legal decisions on appellate review. It is worth emphasizing that even when the court-appointed expert witness testifies to a jury, the expert is subject to cross-examination, and the parties remain free to call their own expert witnesses. The jury need not be informed that the testifying expert was appointed by the court, although in most cases the jury is so informed. Finally, although the risk of misuse of court-appointed experts by unscrupulous judges persists, many courts have used selection processes that protect the legitimacy of the endeavor.

In a case where the stakes are low, it may make little sense to impose additional litigation costs on the parties or taxpayers by appointing experts to supplement those retained by the parties. But where the stakes are high, the scientific dispute central, and the public interest great—as in much mass tort

66. See WRIGHT & GOLD, supra note 52, § 6302, at 456 & n.17 (noting concern that court-appointed expert “may also reflect the biases of the judge”); Relkin, supra note 52, at 2265 (arguing that selection of expert can predetermine expert’s opinion, and thus be tantamount to answering the question in dispute).

67. See supra notes 24 and 39 (distinguishing between technical advisors and Rule 706 expert witnesses).


69. See Fed. R. Evid. 706(a) (“The [court-appointed expert] witness shall be subject to cross-examination by each party, including a party calling the witness.”).

70. See Fed. R. Evid. 706(d) (“Nothing in this rule limits the parties in calling expert witnesses of their own selection.”).

71. See Fed. R. Evid. 706(c) (giving the court discretionary power to “authorize disclosure to the jury of the fact that the court appointed the expert witness”); WRIGHT & GOLD, supra note 52, § 6305, at 481-83 (noting controversy over Rule 706(c), and further noting that in most cases the jury is informed of the expert’s court-appointed status).


II. INQUISTORIAL EXPLORATION OF THE MERITS: SETTLEMENT CLASS ACTIONS

"Settlement class actions" are becoming a dominant form of dispute resolution for mass torts. Because such class actions demand particularly intense and skeptical judicial inquiry into the merits of proposed settlements, their effective use depends on the court’s willingness to adopt an inquisitorial approach. Other than judicial scrutiny of the settlement, there is nothing inherently inquisitorial about settlement class actions. Class actions, after all, are largely unknown in the civil law inquisitorial systems.\(^7^5\) The settlement class action fairness inquiry, however, must be undertaken with a level of independent judicial scrutiny—and an unwillingness to rely solely on the litigants’ presentations—that is strongly suggestive of inquisitorial justice.\(^7^6\)

\(^7^4\) Although on one level it can be viewed simply as an accumulation of private tort cases, mass tort litigation has been described aptly as a species of “public law litigation.” See, e.g., Jack B. Weinstein, Individual Justice in Mass Tort Litigation 41 (1995); David Rosenberg, The Causal Connection in Mass Tort Exposure Cases: A “Public Law” Vision of the Tort System, 97 Harv. L. Rev. 849 (1984). See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (introducing concept of "public law litigation" and describing its characteristic features).


\(^7^6\) See infra text accompanying notes 111-133 (on judicial inquiry in settlement class actions); infra text accompanying notes 133-66 (on inquisitorial justice systems).

In drawing a parallel between settlement class actions and inquisitorial systems, I do not mean to suggest that settlement class actions lack adversarial aspects. There remains an adversarial tone in any settlement class action where objectors appear in opposition to the settlement. Fairness hearings in mass tort settlement class actions typically include arguments by such objectors, and can take on the appearance of an adversary proceeding between zealous supporters of the settlement and equally zealous objectors. See Jay H. Tidmarsh, Federal Judicial Center, Mass Tort Settlement Class Actions: Five Case Studies 49-51, 62-63 (1998) (describing objectors’ role in the Amchem and Ortiz settlement class actions); Robert B. Gerard & Scott A. Johnson, The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck “Side Saddle” Fuel Tank Litigation, 31 Loy. L.A. L. Rev. 409 (1998) (describing objectors’ role in the General Motors Pickup Truck settlement class action); see also Thomas E. Willging et al., Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts 57 (1996) (among class actions overall, “about half of the settlements that were the subject of a hearing generated at least one objection,” although most objections were in writing rather than through appearance at the hearing).

The possibility of zealous objectors does not alter the fundamentally inquisitorial nature of such hearings. A class action judge is obligated to consider whether a settlement should be approved, whether or not anyone argues in opposition to it. See Fed. R. Civ. P. 23(e); see also Fed. R. Civ. P. 23(e) (proposed) advisory committee’s note (1996) (urging a fairness hearing even if no party or object has requested it); Susan P. Konjak, Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc., 80 Cornell L. Rev. 1045, 1126-27 (1995) (explaining that the presence of objectors challenging a settlement “does not transform a fairness proceeding into an ordinary adversary proceeding” because, among other reasons, objectors generally are not permitted extensive discovery). Moreover, just as settlement class actions present a risk that class counsel will accept an unfair class settlement in exchange for favorable settlements on inventory claims, see infra text accompanying notes 114-15, so can vocal objectors be bought off through side deals to settle with the objectors’ clients on favorable terms, or by amending the settlement to satisfy particular objectors while leaving uncured more fundamental fairness problems with the settlement. See Gerard & Johnson, supra, at 417.
First, the terminology. Often, when plaintiffs pursue a class action toward trial, at some point they reach a settlement with the defendants. If approved by the court, this will achieve a class action settlement. That is not what I am referring to as a “settlement class action.” Rather, a “settlement class action” results from settlement negotiations completed before the court rules on class certification.

In a number of mass tort cases, plaintiffs’ counsel have reached settlements with defendants on a class action basis before the class has been certified (and often before the complaint has been filed). The parties then jointly move for class certification and simultaneously seek approval of the settlement. In such situations, the class certification motion and settlement are conditionally interdependent. The parties seek class certification solely for purposes of the settlement, not for litigation, and they agree to the settlement solely on condition that the class is certified.

It is easy to see why many courts have been willing to approve such settlements. All parties seemingly win. The court disposes of enormous, burdensome litigation on a basis that appears to satisfy both sides. The plaintiffs’ lawyers obtain compensation for their clients, and preserve their own class action franchise and the resultant fees that go with it. The defendant gains protection from further liability, because a class action settlement binds all class members. The Manual for Complex Litigation (Third) approves of settlement classes, noting among other benefits that “[t]he costs of litigating class certification are saved and litigation expense is generally reduced by an early settlement.”

Settlement class actions were virtually unheard of fifteen years ago. After several uses of settlement class actions outside the mass tort arena, mass tort litigants began using the device in the mid-1980s, and the approach caught on

Finally, “inquisitorial” need not mean “nonadversarial.” A vigorous judicial inquiry into the merits of a settlement class action reflects inquisitorial judging despite the presence of zealous objectors, just as reliance on court-appointed experts reflects inquisitorial judging despite the zealousness of the adversary parties.

77. See Fed. R. Civ. P. 23(e) (requiring court approval for settlement of class action).
78. If the class action is brought under Rule 23(b)(3), class members may avoid being bound by opting out. See Fed. R. Civ. P. 23(c)(2).
79. M.C.L.3d, supra note 23, § 30.45.
80. See Tidmarsh, supra note 76, at 21-22. Although the settlement class action emerged only recently, Professor Stephen Yeazell makes the interesting observation that in one sense the settlement class returns group litigation to its medieval roots, as a device that can be used either by or against groups of relatively powerless persons. See Stephen C. Yeazell, The Past and Future of Defendant and Settlement Classes in Collective Litigation, 39 Ariz. L. Rev. 687, 700-04 (1997).
81. See Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982) (securities); In re Beef Indus. Antitrust Litig., 607 F.2d 167 (5th Cir. 1979) (antitrust).
quickly.\textsuperscript{83} As the Supreme Court noted in 1997, “Among current applications of Rule 23(b)(3), the ‘settlement-only’ class has become a stock device.”\textsuperscript{84} Settlement class actions have proved particularly useful in mass product liability litigation. Although several mass product liability settlement class actions have been overturned on appeal,\textsuperscript{85} many others have stuck.\textsuperscript{86}

The Supreme Court declined an opportunity to close the door on settlement class actions in \textit{Amchem Products v. Windsor}.\textsuperscript{87} The Third Circuit, in an opinion by Judge Edward Becker that received much attention among mass tort practitioners, held that a class action could not be certified for settlement unless it could also be certified for trial.\textsuperscript{88} Because of the trial management problems presented by mass tort class actions, the Third Circuit’s holding, if upheld, could have rendered many mass tort settlement class actions uncertifiable.\textsuperscript{89}

the pesticide DDT). \textit{See generally Tiomarsh, supra note 76, at 20-24} (summarizing history of mass tort settlement class actions).

83. \textit{See Willging et al., supra note 76, at 34-35}. The Federal Judicial Center study found that of 152 certified class actions within the sample, 59 cases (39\%) of the certified class actions were certified for settlement purposes only. Of those 59 cases, 28 (18\%) of the certified class actions contained docket entries or other information indicating that a proposed settlement was submitted before or simultaneously with the first motion to certify. \textit{See id.} at 35. Whether the 39\% or 18\% figure better represents the frequency of “settlement class actions,” it is clear from the Federal Judicial Center data that settlement class actions comprise a significant portion of the class action activity in federal courts.

84. \textit{Amchem Prods., Inc. v. Windsor, 521 U.S. 591} (1997).

85. \textit{See Amchem, 521 U.S. 591} (overturning asbestos settlement class action for failure to meet Rule 23 requirements, including adequacy of representation and Rule 23(b)(3) predominance requirement); \textit{In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768} (3d Cir. 1995) (overturning pickup truck settlement class action on Third Circuit’s reasoning—now rejected by \textit{Amchem)—that a class cannot be certified for settlement unless it could also be certified for litigation); \textit{In re Bendectin Prods. Liab. Litig., 749 F.2d 300} (6th Cir. 1984) (using writ of mandamus to vacate certification of Bendectin settlement class action on grounds that the facts did not fit Rule 23(b)(1)).


89. Manageability matters because class certification under Rule 23(b)(3) requires that the court find “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy,” and includes among pertinent considerations “the difficulties likely to be encountered in
Although the Supreme Court affirmed on other grounds the Third Circuit’s reversal of class certification, the Court explicitly rejected the Third Circuit’s holding that a settlement class certification decision must be treated the same as a litigation class certification decision, stating, “settlement is relevant to a class certification.” 90 Specifically, settlement can facilitate class certification because it solves the concern of trial unmanageability. 91 Justice Breyer, in partial dissent, agreed with the majority’s approval of settlement class actions. 92 Some lawyers have construed *Amchem* as rejecting settlement class actions, or as requiring that any settlement class action be certifiable as well for trial; 93 their reading is plainly incorrect. 94

Just as the Supreme Court avoided rejecting *settlement* class actions generally even as it rejected this particular settlement class action, the Court also avoided the management of a class action.” *Fed. R. Civ. P.* 23(b)(3); *see*, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying enormous tobacco litigation class action under Rule 23(b)(3), in significant part because of concerns of trial unmanageability); *see also TIDMARSH, supra* note 77, at 10 (noting that the *Amchem, Ortiz*, and breast implant settlement class actions would have presented significant problems of pretrial, trial and remedial management if they were to be litigated rather than settled).

90. *Amchem*, 521 U.S. at 619.
91. *See id.*
92. *See id.* at 629 (Breyer, J., concurring in part and dissenting in part).
93. One commentator, for example, misread *Amchem* as follows:

Previously, a defendant could agree to a proposed class action settlement, while reserving the right to challenge the propriety of classwide litigation if the settlement was not approved. But the Supreme Court has now foreclosed this option—there must be a judicial finding that the lawsuit meets the Rule 23 standards for litigation as a class action. A defendant who agrees to a classwide settlement under *Amchem*’s rigorous standards now must admit (or be prepared to accept a finding) that the lawsuit could be tried as a class action as well.

Brian Anderson, *Will Supreme Court Ruling Ebb the Class Action Tide?*, 1997 ANDREWS AUTOMOTIVE LITIG. REP. 25461. Others have made the same error:

Other courts of appeals, notably the Third Circuit, have held that a class cannot be certified for settlement unless certification for trial is warranted—that is, unless Rule 23(a) and (b) are satisfied. In *Amchem Products, Inc. v. Windsor*, the United States Supreme Court sided with the Third Circuit.

Gerard & Johnson, *supra* note 76, at 413. The confusion may result from some observers’ failure to reconcile the Supreme Court’s insistence that any settlement class action meet the requirements of Rule 23(a) and (b), with the Court’s acknowledgement that Rule 23’s requirements sometimes may be met for settlement even if they are not met for trial.

94. *See Amchem*, 521 U.S. at 619-21. In a similar vein, some media reports wrongly spun the *Amchem* decision as a death knell for settlement class actions. *See*, e.g., Christopher Drew, *Ruling Could Jeopardize Class-Action Settlements*, N.Y. TIMES, June 27, 1997, at D2; Marianne Lavelle, *Court Rejects Settlement Class Actions*, NAT’L L.J., July 7, 1997, at B1. The Court’s opinion clearly left open the possibility of mass tort settlement class actions, as long as the classes are defined with care to ensure adequate representation, *see Amchem*, 521 U.S. at 623, 628, and post-*Amchem* settlement class actions have borne that out. *See infra* text accompanying notes 99-103. Other commentators, however, probably overstated the case by suggesting that *Amchem* not only does not preclude settlement class actions, but facilitates them. *See* Herbert E. Milstein & Gary E. Mason, *The Reaction to Class Action*, 149 N.J.L.J. 624, 625 (1997) (“[Amchem] will make certification of settlement classes more likely by assuring that the courts will consider the settlement itself as a factor in determining the propriety of certification.”).
rejecting *mass tort* class actions generally even as it rejected this particular mass tort class action. Citing the influential 1966 Advisory Committee on Civil Rules note, Justice Ginsburg made it clear that *Amchem* should be taken neither as encouragement for mass tort class actions nor as a prohibition:

> Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. But the text of the rule does not categorically exclude mass torts cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great.\(^95\)

What is clear from the Supreme Court's rejection of the *Amchem* settlement class action is this: if parties want to use settlement class actions to resolve mass torts, they must avoid predominance problems\(^96\) by defining classes and subclasses with precision, and they must avoid adequacy of representation problems\(^97\) by ensuring that groups with divergent interests, such as present and future claimants, are represented by separate counsel.\(^98\)

Since *Amchem*, settlement class actions have remained a viable approach to resolving mass tort litigation. After the Supreme Court remanded the *Ortiz* asbestos settlement class action for reconsideration in light of *Amchem*,\(^99\) the

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95. *Amchem*, 521 U.S. at 625.
98. See *Amchem*, 521 U.S. at 623-27; see also Judith Resnik, Postscript: The Import of Amchem Products, Inc. v. Windsor, 30 U.C. Davis L. Rev. 881, 884 (1997) ("Amchem directs district judges to insist that members of classes be linked in a variety of ways other than sharing in a settlement, to be leery of mass-tort aggregates with widely varying degrees of injury and differing forms of exposure, and to search for means of creating subclasses when possible.").
99. For an example of a settlement class action approved under *Amchem* because the class was defined with precision to avoid intra-class conflicts, see *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming Rule 23(b)(3) settlement class action of claims for defective minivan liftgate latches, noting that in contrast to the *Amchem* class, this class was "narrowly circumscribed").

Experienced class action litigators are endeavoring to redefine and subdivide otherwise unacceptable settlement class actions to satisfy the Supreme Court’s requirements. After the Liggett Group’s tobacco settlement class action was rejected following *Amchem* by a West Virginia federal court, see *Walker v. Liggett Group*, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997), Liggett and a group of plaintiffs’ lawyers pursued a revised settlement class action in Alabama state court that, according to one report, attempts to address the *Amchem* concerns. See Schmitt, *supra* note 86. Among other things, the revised Liggett settlement class action divides the plaintiffs into subclasses to give separate legal representation to current and future claimants. See id.

Fifth Circuit reaffirmed its approval of the class action in a short *per curiam* opinion, asserting that the reasoning of *Amchem* does not apply to a Rule 23(b)(1)(B) class action such as *Ortiz*. In the orthopedic bone screw product liability litigation, a federal court approved a settlement-only Rule 23(b)(1)(B) class action several months after the *Amchem* decision. A Rule 23(b)(3) settlement class action concerning defective minivan latches received approval by the Ninth Circuit using a careful analysis of the Supreme Court’s *Amchem* guidelines. Another post-*Amchem* mass tort settlement class action received preliminary approval in a case involving claims by families of cancer patients subjected to clandestine radiation testing in the late 1960s. Settlement class actions remain viable outside the mass tort area, as well. Nevertheless, by demanding greater class and subclass precision, *Amchem* has made it more difficult to use settlement class actions to resolve such sprawling mass tort matters as the tobacco litigation.

To whatever extent *Amchem* may make certain class actions more difficult in federal court, some parties will take their class actions to state court. In *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).


102. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).


105. See *Walker v. Liggett*, 175 F.R.D. 226 (S.D. W. Va. 1997) (rejecting proposed settlement class action of tobacco claims, finding the class too broad and diverse to permit certification under *Amchem*).

106. See *Conference Report: High Court’s Amchem Ruling Raises Issues on Scope of Class Settlements, Panelists Say*, 66 U.S.L.W. 2122 (Aug. 26, 1997) (reporting prediction of leading class action lawyers John Aldock and Sheila Birnbaum that “*Amchem* will accelerate the trend of bringing class actions in state courts”); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 Loy. L.A. L. Rev. 373, 386-94 (1998) (discussing migration of class actions from federal to state court); Elizabeth J. Cabraser, *Recent Developments in Nationwide Products Liability Litigation*, SC33 AII-ABA 1, 27 (1998) (“it is reasonable to predict that the trend toward increased multi-state product liability activity in the state courts will continue” as plaintiffs react to federal resistance to nationwide class actions); John C. Coffee Jr., *After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, Nat’l L.J., July 21, 1997, at B4 (“The migration of class actions to state courts, which began in the wake of the Private Securities Litigation Reform Act, is unlikely to cease”)).
current class action litigation in which plaintiffs seek class certification and defendants oppose it, following the forum feels rather like watching a tennis match. Plaintiffs file their class action in state court. Defendants remove to federal court. Plaintiffs move to remand to state court, arguing that the federal court lacks subject matter jurisdiction or that removal was otherwise improper.\(^\text{107}\)

In 1996, the federal Advisory Committee on Civil Rules circulated a proposal to create a Rule 23(b)(4) category for settlement class actions.\(^\text{108}\) The Committee intended the rule to override the Third Circuit’s position that under Rule 23, a class action cannot be certified for settlement unless it could also be certified for litigation.\(^\text{109}\) In the wake of \textit{Amchem}, the Advisory Committee has not pursued that provision, because the Supreme Court’s rejection of the Third Circuit interpretation rendered the proposed rule change unnecessary. With or without their own subsection of the federal rules, settlement class actions present a significant, developing approach to resolving mass torts.

Unlike with most other settlements, a court in a settlement class action must undertake a searching inquiry into the merits. Most nonclass litigation requires no court inquiry whatsoever into the substantive propriety of a settlement. If litigants reach a negotiated settlement, they simply memorialize their settlement in a written agreement providing for the release of claims, and they stipulate to

\begin{footnotesize}
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\item Litigation Reform Act of 1995, is also likely to accelerate after \textit{Amchem}.
\item For two recent class actions following this pattern, see \textit{Doe v. Interstate Brands Corp.}, No. 98 C 1075, 1998 WL 196456 (N.D. Ill. Apr. 17, 1998) and \textit{Augillard v. Cytec Indus.}, No. Civ. A. 97-913, 1997 WL 411572 (E.D. La. July 18, 1997).
\item The proposed rule would allow a class action where “the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.” Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23(b)(4) (August 1996).
\item \textit{See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure}, Fed. R. Civ. P. 23(b)(4), advisory committee’s note (August 1996) (explaining that the amendment was designed to resolve the “newly apparent disagreement” between courts that permit settlement class actions even if the class could not be certified for trial, and the recent Third Circuit decisions, citing \textit{Georgine v. Amchem Products, Inc.}, 83 F.3d 610, 626 (3d Cir. 1996), \textit{aff’d on other grounds sub nom. Amchem Prods., Inc. v. Windsor}, 521 U.S. 591 (1997); and \textit{In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.}, 55 F.3d 768, 799 (3d Cir. 1995)).
\end{itemize}
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a voluntary dismissal of the lawsuit.\textsuperscript{110} A class action settlement, by contrast, requires court approval.\textsuperscript{111} The court examines the proposed class action settlement in order to protect the interests of the absent class members. To some extent, then, a court’s inquiry into the merits of a settlement class action reflects the need in all class actions for the court to rule on the fairness of a settlement.

Settlement class actions, however, raise special concerns not present in ordinary class actions. Settlement class actions present a powerful risk of collusion between defendants and plaintiffs’ counsel, inadequate representation of the class, and inadequate bargaining power on the plaintiffs’ side.\textsuperscript{112} Three concerns stand out as particularly troubling. First, settlement class actions may allow defendants, in essence, to auction off the class action franchise to the lowest bidder among potential plaintiffs’ class counsel. If a would-be class lawyer agrees to settle on terms favorable to the defendant, the lawyer gets the chance to earn the substantial fees that accompany successful class representation. If the would-be class lawyer demands better terms for the plaintiffs, then the defendant can simply initiate talks with a different lawyer, who may be willing to agree to the defendant’s terms.\textsuperscript{113} Second, class counsel may be subject to conflicts of interest that call into question the adequacy of class representation. In particular, if class counsel represents a number of individual plaintiffs with claims against the defendant,\textsuperscript{114} the defendant may be willing to pay a premium on those individual claims in order to secure class counsel’s assent to a less attractive settlement of the class claims.\textsuperscript{115} Third, if a settlement class action would not be certifiable for purposes of litigation,\textsuperscript{116} the plaintiff class loses a critical bargaining chip—it cannot threaten to go to trial. Thus, the plaintiff class negotiating a settlement class action can find itself inadequately represented and at a bargaining disadvantage.\textsuperscript{117} The leading solution to these

\textsuperscript{110} See Fed. R. Civ. P. 41(a) (providing for voluntary dismissal).

\textsuperscript{111} See Fed. R. Civ. P. 23(e) (requiring court approval of any class action dismissal or compromise).

\textsuperscript{112} These concerns have been addressed forcefully by other commentators. See, e.g., John C. Coffee Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995); Koniak, supra note 76; Brian Wolfman & Alan B. Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. Rev. 439 (1996).

\textsuperscript{113} See Coffee, supra note 112, at 1379; John C. Coffee Jr., Rule of Law: The Corruption of the Class Action, Wall St. J., Sept. 7, 1994, at A15 (“In short, settlement class actions permit defendants to run a reverse auction, seeking the lowest bidder from a large population of plaintiffs’ attorneys.”).

\textsuperscript{114} Such plaintiffs are sometimes referred to as “inventory plaintiffs,” part of a particular lawyer’s “inventory” of claims, to distinguish them from class members who are not individually represented by class counsel.

\textsuperscript{115} See Coffee, supra note 112, at 1373; Koniak, supra note 76, at 1064-85.

\textsuperscript{116} This can occur if a class action satisfies all of Rule 23’s requirements given the settlement, but without the settlement would fail Rule 23(b)(3)’s superiority requirement because of trial manageability problems. See supra note 89.

\textsuperscript{117} See Coffee, supra note 112, at 1379. But see Judith Resnik, Aggregation, Settlement, and Dismay, 80 Cornell L. Rev. 918, 938 (1995) (pointing out that mass torts may not be uniquely disabling of plaintiffs’ attorneys, because even in other types of cases attorneys may have limited ability or inclination to take a case to trial).
problems may be inadequate, but is without doubt a necessary minimum: the
court must undertake a searching, skeptical inquiry into both the adequacy
of representation and the fairness of the resulting settlement.

Procedural policy-makers appreciate the importance of a vigorous inquiry
into the substantive merits of settlement class actions. The Federal Judicial
Center’s Manual for Complex Litigation (Third), for example, emphasizes
the importance of scrutinizing the merits of settlement class actions. After noting
the permissibility of settlement classes, the Manual warns: “Approval under
Rule 23(e) of settlements involving settlement classes, however, requires closer
judicial scrutiny than approval of settlements where class certification has been
litigated.”118 Professors Judith Resnik and John Coffee have proposed a Rule
23 revision that would explicitly impose higher burdens for certifying settle-
ment classes, in order to ensure adequate representation and fair settlement
terms.119

As to class settlements generally, the federal Advisory Committee on Civil
Rules, in its notes on a recent proposed revision of Rule 23(e), urged the
importance of judicial inquiry into the fairness of class settlements.120 The
committee pointed out that parties to a settlement “cease to be adversaries,” and
that “[j]udicial responsibility to the class is heavy.”121 Even if there are no
objectors to the settlement, and even if no one has requested a hearing, the
committee noted, the court should nevertheless hold a hearing to inquire into the
fairness of the proposed settlement.122 The embarrassing inadequacy of some
recent class settlements drives home the importance of skeptical judicial scruti-
ny.123

Some courts have taken quite seriously their responsibility to investigate the
proposed settlement. They have rejected settlement class actions on the grounds
of inadequate settlements.124 Several courts have noted that approval of a

118. M.C.L.3d, supra note 23, § 30.45.
121. Preliminary Draft of Proposed Amendments, supra note 120.
122. See id.
123. See Marcel Kahan & Linda Silberman, The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 785 & n.87, 786 (1998) (recounting a number of widely criticized state court class settlements, including one in which a class member recovered $4.38 but was charged $80.00 toward the attorneys’ fee).
124. See, e.g., Clement v. American Honda Fin. Corp., 176 F.R.D. 15, 24-32 (D. Conn. 1997) (rejecting settlement class action upon finding that settlement was not fair and reasonable compromise of plaintiffs’ claims, after thorough examination of settlement terms); see also In re Ford Motor Co.
settlement class action requires a higher standard of fairness than the usual approval of a class settlement.\(^{125}\) In the *Amchem* asbestos settlement class action, the district court appointed a special master to investigate aspects of the fairness of the proposed settlement.\(^{126}\) The district court's fairness hearing concerning the settlement in that case lasted eighteen days over the course of five weeks, and involved testimony from medical, financial, and legal experts.\(^{127}\) In *Ortiz*, Judge Parker appointed a guardian *ad litem* to analyze the adequacy of the settlement from the point of view of members of the class.\(^{128}\) The fairness hearing lasted eight days spread over two weeks and, as in *Amchem*, involved testimony from numerous experts and others.\(^{129}\)

Not all judges have taken their responsibility so seriously, however.\(^{130}\) Some judges have approved settlement class actions upon troublingly limited inquiries. The fairness hearing for a settlement class action in a contaminated blood case, for example, lasted only one day, during which the court heard no expert testimony and allowed no cross-examination.\(^{131}\) In one empirical study of

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125. See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e)"); In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995) ("We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified.").

126. *See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 258 (E.D. Pa. 1993)* (noting appointment of Professor Stephen Burbank as special master, on joint motion of the settling parties); *see also In re Combustion, Inc., 978 F. Supp. 673, 673-75 (W.D. La. 1997)* (using special master to advise on disbursement of settlement funds in toxic tort litigation class action, in consultation with medical expert). The use of special masters to review settlements does not appear to be commonplace in class actions generally. *See Willging et al., supra* note 76, at 64 (reporting that of 126 proposed settlements in class action study, only two were assigned to special masters, and neither of those involved reporting to the judge on the settlement's merits).

127. *See Tidmarsh, supra* note 77, at 50.


130. In a thorough study of five mass tort settlement class actions, Professor Jay Tidmarsh concluded, "In none of the cases, in my estimation, did the courts adequately analyze the factors that were identified as being relevant [to the fairness inquiry]." *Tidmarsh, supra* note 77, at 6. The Tidmarsh study included the *Amchem* and *Ortiz* asbestos cases, the *Bowling v. Pfizer* heart valve case, a *Silicone Gel Breast Implant* settlement class action that later unraveled, and the *Factor VIII or IX* contaminated blood case. Interestingly, Professor Tidmarsh observed that the district courts' opinions tended to emphasize whichever fairness factors favored approval of the particular settlement class action. For example, the *Ortiz* court emphasized maturity as a factor and approved the settlement in part because asbestos is a mature mass tort, whereas the *Bowling* court deemphasized the maturity factor and approved the settlement despite the immaturity of the heart valve litigation. *See id.*

131. *See id.* at 93 (describing fairness hearing in *Walker v. Bayer Corp.*); *see also id.* at 35 (describing fairness hearing in *Bowling v. Pfizer*, the Bjork-Shiley heart valve settlement class action, in which objectors were not allowed to cross-examine presenters, and were allowed only limited discovery
federal class actions in four districts, eighty-six percent of settlement class actions were approved by the district court without any changes to the settlement.\textsuperscript{132} Given the risks inherent in settlement class actions, and the stakes involved in mass torts, no mass tort settlement class action should be approved without an extensive fairness hearing and a vigorous independent judicial inquiry into the propriety of the settlement terms.

III. INQUISITORIAL JUSTICE IN THE UNITED STATES

When a judge turns to a court-appointed expert in a scientifically complex mass tort litigation, or investigates the merits of a proposed settlement class action, the judge is simply trying to resolve a massive dispute justly and efficiently. The judge, most likely, is not thinking about comparative systems of adjudication. But if we step back from the urgencies of each particular mass tort litigation, and examine the trends more broadly, we cannot help but see emerging patterns of an inquisitorial justice system, such as the legal systems of Germany,\textsuperscript{133} France,\textsuperscript{134} Italy,\textsuperscript{135} Brazil,\textsuperscript{136} Chile,\textsuperscript{137} South Korea,\textsuperscript{138} into alleged collusion between defendant and class counsel); \textit{id.} at 77-78 (describing limited fairness hearing in the breast implant settlement class action, and court’s approval of revised settlement without any fairness hearing). In fairness to Judge Spiegel, who handled the \textit{Bowling v. Pfizer} heart valve case, it should be noted that although the hearing was relatively limited, Judge Spiegel did prompt various changes to the settlement. See \textit{Bowling v. Pfizer}, Inc., 143 F.R.D. 138, 139-41 (S.D. Ohio 1992) (continuing fairness hearing pending parties’ response to court’s concerns about proposed settlement); \textit{Bowling v. Pfizer}, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) (approving settlement after amendments to address some of court’s concerns); Wolfman & Morrison, \textit{supra} note 113, at 490 n.110 (discussing this aspect of \textit{Bowling v. Pfizer} as a positive example of courts’ ability to effect changes to problematic settlements).

132. See \textit{Willging et al.}, \textit{supra} note 76, at 35 (of 28 clear settlement class actions, 24 settlements were approved unchanged).


134. See \textit{James G. Apple & Robert P. Deyling}, \textit{A Primer on the Civil-Law System} 1 (1995); Liebesny, \textit{supra} note 133, at 308-26. According to Liebesny, the French judicial system has become more inquisitorial since a 1973 decree that enhanced the position of the judge and strongly emphasized the establishment of the truth. See Liebesny, \textit{supra} note 133, at 312-13. Nevertheless, Liebesny suggests that the French system is not truly “inquisitorial rather than adversary,” although French judges take a more active role than their counterparts in the United States or United Kingdom. \textit{id.} at 308-09.

135. See Angelo Piero Sereni, \textit{Basic Features of Civil Procedure in Italy}, 1 Am. J. Comp. L. 373 (1952).


Egypt, and other civil law countries throughout continental Europe, Latin America and elsewhere.

A. THE INQUISITORIAL APPROACH

At the risk of oversimplification, and courting the disapprobation of serious scholars of comparative law, I think a few generalizations about civil law systems will serve well here as a foil for examining the handling of mass tort litigation in the United States. Although the "inquisitorial" systems of the various civil law countries differ from each other in significant ways, they share certain attributes that give the adversary parties less control over the adjudication process than in the United States, and that give the court correspondingly greater control.

The inquisitorial court has primary responsibility for investigating the facts, a load borne primarily by litigants in the United States through both the formal discovery process and informal investigation. As Professor John Langbein wrote in his influential but controversial study of German procedure, The German Advantage in Civil Procedure, "the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work . . . Digging for facts is primarily the work of the judge." The contrast between the civil


140. For one of many possible examples, while civil law countries typically use a noncontinuous trial and emphasize written evidence, see infra text accompanying notes 158-60, Brazilian procedure uses a concentrated trial at which oral evidence predominates. See Othon Sidou, supra note 136, at B54. On the whole, the German and Austrian legal systems, and those based on them, tend to employ the most clearly inquisitorial procedures. The "Romanist" legal systems of France, Italy and a few of their neighbors deviate a bit more from the inquisitorial model. The Iberian systems and the Spanish and Portuguese-based systems of Latin America, while based on civil law traditions, allow somewhat greater party control over proceedings. See Mauro Cappelletti & Bryant Garth, A Comparative Conclusion, in 16 International Encyclopedia of Comparative Law 6-436, 6-439 - 6-444 (1984). See generally John Henry Merryman, The Civil Law Tradition 1 (2d ed. 1985) (using term "legal tradition" rather than "legal system" to emphasize commonalities within civil law tradition despite diversity among specific civil law systems).

141. Langbein, supra note 133, at 826-27. Germany often serves as the prototypical example of an
law “inquisitorial” approach and the United States “adversarial” approach, while by no means absolute, is profound: “The inquisitorial court’s unqualified obligation to ascertain the truth has no counterpart in American courts. That would contravene the party-control feature of the adversary system.” A Portuguese commentary captures the essential characteristic, describing PortugaL’s procedural system as “a moderately inquisitorial system which serves the public interest, because judicial powers of investigation to ascertain the objective truth predominate over party control of the proceedings.”

Civil law judicial systems rely heavily on experts, but consistent with the notion that the judge has primary responsibility for investigating the facts, they do not rely much on experts chosen by the litigants. Rather, they rely on experts sought, selected, and supervised by the court. Unlike in the United States, where court-appointed experts remain a rarity, court-appointed experts in civil law countries are the norm. In Germany, for example, the court may seek expertise on its own motion or at a party’s request. Typically, the court nominates and selects the expert. A litigant can challenge the expert’s appointment only on certain narrow grounds. Not only does the court seek and select the expert, the court formulates the expert’s task. German courts, unsurprisingly, tend to place more weight on the opinion of the court-appointed expert than on the opinion of an expert selected by a party. Likewise, French courts choose their

inquisitorial system, and this article will use it as such, with occasional references to other civil law countries to fill out the description. In the French tribunal de grande instance, the judge has the power to investigate the facts. See LIEBESNY, supra note 133, at 312-13, 317-18. In Colombia, “[t]he judge is empowered to order the presentation of necessary evidence . . .” H. Devis Echandía & Carlos Bueno-Guzmán, Colombia, in 1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW C63, C69 (1976). In Brazil, “[t]he important role of the judge in the direction of the case explains why Brazilian procedure received from Portugal the ‘conclusive opening order’ (despacho saneador), which establishes the terms of the dispute and the opening of the investigatory phase.” Othon Sidou, supra note 136, at B54. Similarly, Chilean “judges operate in an inquisitorial rather than adversarial model. This model places the management and development of the case in the hands of the judge. . . . It removes the case from control of the parties and distances the parties from the judicial process.” Vaughn, supra note 137, at 582.

144. See Langbein, supra note 133, at 836 (“European legal systems are, by contrast [to the United States], expert-prone.”) (citing INSTITUT DE DROIT COMPARE DE PARIS, L’EXPERTISE DANS LES PRINCIPAUX SYSTEMES JURIDIQUES D’EUROPE (1969)).
146. See Langbein, supra note 133, at 829, 835-41, citing Zivilprozessordnung (Code of Civil Procedure) § 404 [hereinafter ZPO] (concerning expert evidence (sachverständigenbeweis)).
147. See id. at 837.
148. See id. at 839, citing ZPO, supra note 146, § 406(l).
149. See id.
150. See LIEBESNY, supra note 133, at 336 (in Germany, “[e]xperts are considered, as in France, the court’s rather than the parties’ experts. They are appointed by the court . . . Either party may submit an opinion by an expert of its own choosing. However, the court will not place much weight on the opinion of such an expert and will prefer that of a court-appointed expert.”).
own impartial experts, and in Italy an expert is considered an "auxiliary of the court." 

Unlike in United States trials, where witnesses are examined and cross-examined primarily by the litigants' lawyers, witnesses in inquisitorial systems are examined primarily by the court. The German judge, for example, serves as examiner-in-chief of the witnesses. Counsel may pose additional questions, but counsel's opportunity to examine is quite limited, and is not permitted to cover the same ground covered by the court's questioning. As to witness selection, German lawyers may nominate witnesses, but they may not prepare or coach those witnesses. In France, a court may order an enquête and hear the witness. The witness testifies in narrative form, and then the judge asks questions. Although parties and lawyers may suggest questions to the judge, they may not question the witness directly.

Moreover, inquisitorial systems generally use a noncontinuous, issue-separated trial. By taking testimony on particular issues, rather than taking the testimony for the entire case during a single trial, an inquisitorial court can focus initially on those issues most likely to be dispositive. As Professor Langbein puts it, because the German court has no sequence rules and no separation of discovery and trial, "the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case." Thus, in a products liability case where there is serious doubt about whether the product in fact caused the alleged injury, the court can examine the potentially dispositive issue of causation before burdening itself

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151. See id. at 317.
152. See Sereni, supra note 135, at 383 n.52.
153. United States judges have the power to question witnesses directly, see Fed. R. Evid. 614(b), but it is not the norm.
154. See Liebesny, supra note 133, at 335; Langbein, supra note 133, at 828, citing ZPO, supra note 147, §§ 395-97.
155. See Liebesny, supra note 133, at 335.
156. See Langbein, supra note 133, at 834; see also Arthur Taylor von Mehren, Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 Notre Dame L. Rev. 609, 619 (1988) (observing that some contact between attorneys and witnesses is allowed under current German rules, but that "[i]t still remains true . . . that German judges are suspicious of witnesses who have been examined by a lawyer prior to giving their testimony in court").
157. See Liebesny, supra note 133, at 315-16, 335.
158. See Strier, supra note 142, at 111; see also Apple & Deyling, supra note 134, at 27 ("In contrast to the progressive unfolding of evidence—under near complete control of the parties—that occurs through the discovery process in the American common-law system, there is no formal civil-law counterpart to discovery. Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial.").
159. Langbein, supra note 133, at 830; see also Liebesny, supra note 134, at 326, 345 (describing French and German approaches); Sereni, supra note 135, at 385 (describing the lack of a concentrated trial in the Italian system). Although the U.S. concentrated trial system does not lend itself to "looking for the jugular," courts handling mass tort cases occasionally use bifurcation or trifurcation of trial as a technique to allow the factfinder to determine first the issue most likely to be dispositive. See, e.g., In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988); see also Fed. R. Civ. P. 42(b).
with testimony about product defect, fault, warnings, or other matters.\(^{160}\)

A system in which the court proactively investigates the issue most likely to be dispositive? This resembles the approach taken by Judge Jones in the *Hall* breast implant litigation, in which he dismissed plaintiffs’ claims after seeking neutral expert advice on whether plaintiffs’ systemic causation theory had scientific validity.\(^{161}\) A system in which courts rely on experts sought, selected, and supervised by the court, rather than on experts hired by the litigants? This resembles the approach taken not only by Judges Jones and Pointer in the breast implant litigation, but also by Judges Weinstein, Lifland, and Rubin in the asbestos litigation, and by Judge Borman in the Bendectin case.\(^{162}\) This also resembles what Justice Breyer and the American Association for the Advancement of Science have been urging judges to do in order to address the scientific difficulties of complex litigation.\(^{163}\)

A system in which courts actively inquire into the merits of a dispute, rather than passively reacting to the presentations of the adversary parties? This resembles the approach of Judges Reed and Parker in the *Amchem* and *Ortiz* asbestos settlement class actions, holding lengthy hearings and even appointing a special master to inquire into the fairness of settlements negotiated by the adversaries.\(^{164}\) In fact this seems like the proper course for any judge faced with a settlement class action, given the risks of injustice inherent in such cases.\(^{165}\)

In their efforts to tackle the intractable problems of modern mass tort litigation, careful and innovative U.S. jurists have borrowed tools from the

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\(^{160}\) As one scholar has stated:

The civil law judge’s inquiry is not “What evidence should be heard to understand the whole case?” but “What evidence do I require to reach a justifiable decision?” The information needed to decide a case could concern only one or two issues . . . . Considerations of efficiency would lead the civil law judge to approach complicated litigation in precisely this fashion—that is, issue by issue.


\(^{161}\) *See supra* text accompanying notes 37-40 (describing Judge Jones’ appointment of a panel of scientific experts to advise the court on the scientific validity of plaintiffs’ causation theory, and the resulting dismissal of plaintiffs’ claims).

\(^{162}\) *See supra* text accompanying notes 35-59; *see also* Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL‘Y REV. 480, 497 (1988) (“[T]he use of court-appointed experts may be viewed as a deviation from the adversarial nature of a trial employed in order to further the truth-seeking goal of the system.”).

\(^{163}\) *See supra* text accompanying notes 60-62.

\(^{164}\) *See supra* text accompanying notes 126-27 (discussing fairness hearing and special master in *Amchem*, and fairness hearing in *Ortiz*).

\(^{165}\) *See supra* text accompanying notes 112-15 (discussing settlement class action risks of collusion, inadequate class representation, and inferior class bargaining power). The difference between settlement class actions and traditional adversarial litigation is driven home by the argument, advanced by objectors to some recent settlement class actions, that such actions fail to present any justiciable case or controversy under Article III. The petitioners in *Ortiz*, for example, argued that a federal court lacks power to adjudicate a matter “brought by plaintiffs who do not in good faith plead claims they intend to litigate, but who bring suit as a friendly joint venture with the defendants . . . .” Brief for Petitioners at i, *Ortiz* v. Fibreboard Corp., 118 S. Ct. 2339 (June 22, 1998) (No. 97-1704).
inquisitorial toolbox. They have dug into scientific facts and substantive merits, unwilling to rely solely on adversary presentations. Their efforts have been valiant and their successes important, but we must remain realistic about the obstacles to effective inquisitorial judging in the United States, even as we applaud the trend toward greater use of inquisitorial tools in mass tort litigation.

**B. THE POORLY EQUIPPED UNITED STATES INQUISITORIAL JUDGE**

Many U.S. legal commentators have urged broad adoption of aspects of the inquisitorial system. Perhaps these commentators are heartened by the shift taking place in modern mass tort litigation. Perhaps court-appointed experts, settlement class actions with intense judicial oversight, and other inquisitorial approaches are exactly what mass torts need. Perhaps these developments are something of a culmination of the twenty-year trend of managerial judging in the United States.

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166. In his exhaustive analysis of attempts to define “complex litigation,” Professor Jay Tidmarsh explains from a number of angles that complex litigation can best be understood in terms of the inability of courts to resolve the disputes without taking on powers traditionally reserved for such other actors as the parties and their lawyers. See Jay H. Tidmarsh, Unattainable Justice: The Forms of Complex Litigation and the Limits of Judicial Power, 60 GEO. WASH. L. REV. 1683 (1992). Of particular relevance here, Tidmarsh discusses the work of Mirjan Damaška and Lon Fuller showing that “certain cases poorly fit the form of adversarial adjudication prevalent in the United States today.” Id. at 1722. “The relevance of Damaška’s work to the problem of complex litigation lies in the intriguing possibility that some cases (i.e., the ‘complex’ cases) within our society might not fit the dominant mode of process, and must therefore be resolved under procedures different from those governing the vast majority of cases.” Id. at 1724. From Fuller, Tidmarsh derives a closely related definition of complex—or to use Fuller’s somewhat different term, “polycentric”—cases: “those cases in which the interests of all persons significantly affected by a controversy cannot be definitively resolved through the parties’ adversarial presentation of proofs and reasoned argument to a neutral arbiter.” Id. at 1729. Given these attributes of such complex or polycentric matters as mass torts, it is hardly surprising that judges have borrowed inquisitorial approaches. As Tidmarsh concludes in part of his universal definition, “complex litigation involves the inability of a properly functioning adversarial system to guarantee reasoned judgment, a reality that provokes a nonadversarial exercise of judicial power designed to preserve reasoned judgment.” Id. at 1755; see also TIDMARSH & TRANSKRUD, supra note 18, at 82, 86 (defining complex litigation roughly as “those cases that the modern American adversary system is ill-equipped to handle,” and then more precisely as cases in which one or more of the adversary system participants cannot function properly, and in which “the dysfunction [is] curable by the non-adversarial application of judicial power”).

167. See, e.g., Hein Kötz, The Reform of the Adversary System, 48 U. CHI. L. REV. 478, 486 (1981); Langbein, supra note 133, at 866 (“The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.”); Stiefel & Maxeiner, supra note 133 (advocating reform in the direction of inquisitorial systems, and criticizing American lawyers for their unwillingness to adopt foreign ideas); Strier, supra note 142, at 109 (arguing that some inquisitorial practices “could beneficially be imported into our trial procedure”); Ellen E. Sward, Values, Ideology, and the Evolution of the Adversary System, 64 IND. L.J. 301, 302-03 (1989) (concluding that nonadversarial elements in U.S. litigation, especially in complex litigation, “promote sound values and contribute to a more effective system,” but that perhaps adoption of these non-adversarial elements requires abandonment of adversary ideology).

168. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982) (discussing and criticizing development of managerial judging); Langbein, supra note 133, at 858-62, 865-66 (arguing that managerial judging is irreconcilable with adversary theory, and viewing trend toward managerial
judging, innovations, appointments, describe, punctuated, litigation; JAPANESE adversary, the decided, commission (generally mass evolutionary, even and dramatic they approaches, enabling a system, we prove fit to survive in the episodic evolutionary development of the adjudicatory process.\textsuperscript{169}

Judicial culture plays a powerful role. Whatever the urgencies of modern mass tort litigation, U.S. judges for the most part continue to behave in accordance with deeply ingrained notions concerning the judicial role. Although generalizations belie the wide range of approaches and attitudes among U.S.

judging as a sign of convergence with inquisitorial systems). \textit{See generally} M.C.L.3d, \textit{supra} note 23 (generally urging judges in complex cases to manage the cases actively). In her critique of managerial judging, Professor Resnik notes that pretrial management “breaks sharply from American norms of adjudication.” Resnik, \textit{supra}, at 413. She concludes with a plea “to take away trial judges’ roving commission and to bring back the blindfold. . . . Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model.” \textit{Id.} at 445.


judges, it is possible to offer a few contrasts between most U.S. judges and their counterparts in civil law countries.

First, U.S. judges tend to view their role in the context of an adversary system. On this view, the judge is an umpire who must above all resolve the dispute presented. In the words of one U.S. commentator, “the role of the judge is to decide between competing presentations of evidence and law that are tendered by the advocates.” The umpireal self-image presents a barrier to effective inquisitorial judging. If the judge’s perceived role is to decide between competing presentations, and if the parties’ prerogative and responsibility is to make those presentations, then appointment of an independent expert must seem to exceed the judge’s role and trample on the role of the adversary parties and their lawyers. Similarly, if the judge’s perceived role is to resolve the dispute presented, then digging into the merits of a settlement embraced by the adversaries seems to make little sense.

When asked to explain their reluctance to appoint neutral experts, U.S. judges point to their esteem for the adversary system. In the words of one federal judge, “We’re conditioned to respect the adversary process. If a lawyer fails to explain the basis for a case, that’s his problem.” Another judge explained, “In general, it conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.” A third judge cited her “great respect for the adversarial process” in declining to use Rule 706 in a Dalkon Shield case. In Justice Breyer’s 1998 speech to the American Association for the Advancement of Science, he speculated on why judges rarely appoint their own scientific experts: “They may hesitate simply because the process is unfamiliar, or because the use of this kind of technique inevitably raises questions. Will use of an independent expert . . . inappropriately deprive the parties of control over the presentation of a case?” Faced with conflicting scientific opinions from the partisan experts, judges almost always prefer to allow the factfinder to choose between the conflicting positions, rather than to appoint an independent expert.

170. See Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031 (1975); John C. Reitz, Why We Probably Cannot Adopt the German Advantage in Civil Procedure, 75 IOWA L. REV. 987 (1990); see also Carrie Menkel-Meadow, The Trouble With the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. REV. 5, 40 (1996) (“Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it.”).

171. Hazard, supra note 160, at 1019.

172. See Cecil & Willging, supra note 25, at 1018-19; see also Stier, supra note 142, at 111 (“Conforming with adversarial precepts of party control and judicial passivity, American judges rarely exercise their prerogative to call expert witnesses.”).


174. Id.


to offer additional input.\textsuperscript{177}

Second, U.S. judges tend to place justifiable significance on their lawmaking role, unlike civil law judges, for whom lawmaking is not a major responsibility.\textsuperscript{178} Civil law countries have comprehensive statutory codes.\textsuperscript{179} Thus, although statutes inevitably require interpretation, judicial lawmaking in civil law countries appears negligible compared to judicial lawmaking in common law countries, where vast areas of law are left to common law development, and where stare decisis holds sway.\textsuperscript{180} Because judicial lawmaking figures prominently in the American judge’s job description, judicial fact-gathering plays a correspondingly smaller role than it does for the civil law judge.\textsuperscript{181}

The lawmaking role of the U.S. judge presents two barriers to effective inquisitorial judging—one of propensity, the other of time. As a matter of judicial propensity, a judge with important lawmaking responsibilities as a player in common law development and as an interpreter of statutes and constitutions may lack the inclination to devote vast amounts of time and energy to factual investigation. Even if they had the inclination, judges with the responsibility of sorting out the law lack the time to devote to detailed court-driven factual investigation. For effective inquisitorial judging, the United States either would need to remove the focus on judicial lawmaking, or would need to hire many more judges.\textsuperscript{182} Given the importance of common law

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\textsuperscript{177} See, e.g., Hiern v. Sarpy, 161 F.R.D. 332 (E.D. La. 1995) (holding that mere disagreement between parties’ experts does not warrant appointment of neutral expert); Mallard Bay Drilling v. Bessard, 145 F.R.D. 405 (W.D. La. 1993) (declining to appoint neutral expert to resolve conflicting medical opinions, reasoning that “yet another expert” is unlikely to “enlighten or enhance” the court’s determination); Gallagher v. Latrobe Brewing Co., 31 F.R.D. 36 (W.D. Pa. 1962) (holding that mere divergence in adversary experts’ opinions is not sufficient basis for appointment of neutral expert where court finds the conflicting opinions reasonable).

The AAAS-ABA National Conference of Lawyers and Scientists Task Force on Science and Technology in the Courts concluded that “[t]he Task Force is by no means convinced” that courts would be willing to use the assistance of court-appointed scientists and engineers. “Since many judges have had previous careers as trial attorneys, some of them believe that judges should not actively participate in eliciting evidence, and regard this as usurping the traditional role of the litigator.” AAAS-ABA NATIONAL CONFERENCE OF LAWYERS AND SCIENTISTS TASK FORCE ON SCIENCE AND TECHNOLOGY IN THE COURTS, ENHANCING THE AVAILABILITY OF RELIABLE AND IMPARTIAL SCIENTIFIC AND TECHNICAL EXPERTISE TO THE FEDERAL COURTS: A REPORT TO THE CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT 6 (1991).

\textsuperscript{178} See Reitz, supra note 170, at 999; APPLE & DEYLING, supra note 134, at 36-38.


\textsuperscript{180} See APPLE & DEYLING, supra note 134, at 36-37.

\textsuperscript{181} See id. at 37-38 (discussing difference in attitudes between common law judges, who emphasize lawmaking role, and civil law judges, who view themselves more as technical appliers of law to fact); Reitz, supra note 170, at 999 (noting that judicial reelection or reappointment in United States focuses on “the political function of judges, that is, their law-making function, and not on details of court administration”). But see Langbein, supra note 133, at 855 (rejecting notion that “cultural differences” make inquisitorial judging impossible in the United States); Stiefel & Maxeiner, supra note 133, at 161-62 (challenging Reitz’s conclusions).

\textsuperscript{182} See Reitz, supra note 170, at 997; see also Daniel J. Meador, Appellate Subject Matter Organization: The German Design from an American Perspective, 5 HASTINGS INT’L & COMP. L. REV. 27, 38 (1981) (noting that Germany, to accomplish effective inquisitorial judging, has many more
\end{footnotesize}
development and stare decisis in this country, removing judicial lawmaking is not a realistic option. Increasing the number of judges, while more feasible, may be resisted not only as a matter of resource allocation, but also because expanding the judiciary raises concerns about quality, accountability, and bureaucratization. 183

Beyond judicial culture, there are differences in judicial career incentives and training. In most civil law countries, the judiciary and the practice of law represent divergent career paths. Law graduates in civil law countries make a career choice to enter the judiciary, typically in their late twenties and with no prior law practice experience. 184 In the United States, by contrast, lawyers typically enter the judiciary after substantial careers as practitioners. Treating the judiciary as a separate career track, civil law countries generally provide institution-alized training for new judges. 185 In the words of one experienced U.S. judicial administrator, most countries in the world are ahead of the United States on judicial training “because most have a more professionalized judiciary.” 186

Career incentives in the civil law judiciary reinforce the inquisitorial approach. In Germany, according to Professor Langbein, tenure, promotion, and salary grades depend on meritocratic review, including effective and diligent fact-gathering. 187 U.S. judges, whether appointed or elected, hardly expect their tenure, compensation, reelection or reputation to rise or fall based on fact-gathering. To some extent, especially in the federal judiciary, judicial independence insulates judges from some of these career incentives. Moreover, the careers and reputations of U.S. judges depend more on legal rulings and efficient case dispositions than on diligent factual investigation. The United States judicial career—typically the capstone to a successful career of advocacy, rather than a separate civil service career track with training and incentives geared toward investigation—does not foster ideals of fact-gathering as a civil servant. 188

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183. See, e.g., TIDMARSH & TRANGSRUD, supra note 18, at 74 (questioning whether Americans would “tolerate the bureaucratization of the judiciary that adoption of the German model would entail”).


185. See APPLE & DEYLING, supra note 134, at 38.


187. See Langbein, supra note 133, at 850-51.

188. Professor Langbein does “not believe that we would have to institute a German-style career judiciary in order to reform American civil procedure along German lines . . . .” Id. at 854. He nonetheless acknowledges that civil law judiciary career incentives provide a safeguard against “the dangers inherent in the greatly augmented judicial role.” Id. at 861.
Finally, most civil law countries have specialized courts for different types of cases. A judicial structure featuring specialized courts goes hand in hand with the civil law approach of having separate statutory codes for separate areas of law. Germany has specialized court systems for administrative law, tax and fiscal matters, labor and employment law, and social security, and each specialized court has its own appellate system. Specialized courts, by enabling judges to acquire greater familiarity with a particular substantive area, can facilitate more proactive judicial involvement in fact-gathering.

This differs from the United States, where there are fewer specialized courts, and where appeals from specialized courts such as tax courts go to the regular courts of appeal. The rise of specialized courts appears unlikely for the United States in the foreseeable future. The Federal Courts Study Committee noted in 1990 that “most American lawyers find the idea of specialized courts repugnant,” and that specialized courts would face a host of other problems in this country, including the danger of “capture” of the court by the interest group most affected by the court’s specialized business.

The steps that U.S. courts ought to take to deal sensibly with mass tort litigation are steps that do not mesh neatly with the U.S. judicial role. Because appointing neutral experts runs counter to the deeply ingrained sensibilities of U.S. judges, courts have not made widespread use of court-appointed scientific experts, even though that is what is needed to deal with scientific complexity and the risk of truth-defeating by adversary experts, and even though the stakes in mass tort litigation more than justify the expense of additional expertise. As to settlement class actions, U.S. courts must overcome a natural resistance to scrutinizing the merits of settlements, in order to address the risks of collusion and inadequate representation inherent in such settlements. For judges acculturated to an adversary system, who view their role largely in terms of resolving disputes based on the competing presentations, launching an independent investigation into the merits must seem an odd way to spend resources after disputants have already resolved their differences through negotiation. Whether it is possible for large numbers of U.S. judges eventually to overcome these barriers of role, to make widespread and effective use of inquisitorial tools, remains to be seen.

IV. INSTITUTIONAL CHOICES

Our judges are steeped in the adversary system, and lack the civil law supports that enable and encourage inquisitorial judging. If our judges are unable or unwilling to use the tools needed for effective handling of mass torts,

189. See Apple & Deyling, supra note 134, at 37.
190. See Langbein, supra note 133, at 851 & n.100. In addition, Germany’s ordinary courts of first instance contain special divisions or chambers for crime, probate, domestic relations, and commercial law matters. See id. at 852 (citing Gerichtsverfassungsgesetz (GVG) §§ 93-95). This latter aspect of the German system does not differ markedly from many state court systems in the United States.
should we turn to the legislature and administrative agencies as institutions better suited to inquisitorial methods?

In mass torts, the adversary system of litigation has performed dismally. For one thing, it has proved a remarkably inefficient method for compensating victims. Too much money has gone to litigators, too little money has gone promptly to victims, and too many defendants have gone bankrupt. In the asbestos litigation, for example, it is widely reported that only thirty-nine percent of money paid by defendants to resolve asbestos claims has gone to claimants; the bulk of the money has gone to litigation fees and expenses on both the plaintiff and defense sides.\footnote{192 See Deborah R. Hensler, Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 CARDozo L. REV. 1967, 1977 (1992) (citing JAMES A. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION (1983) ("RAND Study"). The RAND Study’s 39% compensation figure dates back to the early 1980’s, and reflects transaction costs from a period when asbestos litigation had not fully matured as a mass tort litigation. See Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. REV. 659 (1989) (developing concept of maturity of mass torts). Current asbestos litigation proceeds on a foundation of previously resolved issues and along well-worn paths of argument, and therefore presumably involves somewhat lower transaction costs. Nevertheless, the RAND Study finding reflects an atrocious level of transaction costs at least at the immature stage, and thus continues to inform the debate over resolution of mass torts through litigation.

I am cognizant of Francis McGovern’s warning not to allow the uniquely gigantic case of asbestos to “taint our understanding of other mass torts.” Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 TEX. L. REV. 1821, 1836-37 (1995). Yet I believe lessons can be learned from the asbestos saga. First, Dalkon Shield, breast implants, and above all tobacco—along with yet unimagined mass litigation—suggest that asbestos is not so unique as an enormous mass tort. Second, for purposes of the inquisitorial devices discussed in this article, there may be little difference between the extraordinarily huge mass tort and the merely ordinarily huge one.}

Inefficiency might be tolerable if it came with some assurance of consistent justice. Individual outcomes for mass tort plaintiffs, however, can be haphazard. Similarly situated plaintiffs may win or lose depending on individual juries, lawyers, and experts.\footnote{193 Compare, e.g., Raulerson v. R.J. Reynolds Tobacco Co., No. 95-01820-CA, 1997 WL 406340 (May 5, 1997 FJVR) (jury verdict for defendant in Florida wrongful death tobacco suit) with Widdick v. Brown & Williamson (jury verdict awarding plaintiff $500,000 compensatory damages and $450,000 punitive damages in Florida wrongful death tobacco suit) (reported in Barry Meier, Cigarette Maker Is Liable in Smoker’s Death, N.Y. TIMES, June 11, 1998, at A26). See also Eric D. Green, Advancing Individual Rights Through Group Justice, 30 U.C. DAVIS L. REV. 791, 802-03 (1997) (comparing a plaintiff who recovered $3 million with a similarly situated plaintiff who received nothing).

194 See, e.g., O’Gilvie v. International Playtex, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitive damages verdict in toxic shock syndrome case). Although occasional huge punitive awards exacerbate the inconsistencies of individualized litigation, punitive damages are awarded only in about 3% of all civil jury verdicts, and the median punitive award is about $50,000 (the mean is substantially higher). See Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. LEGAL STUD. 623, 633 (1997).} Add to this inconsistency the rare but occasionally enormous punitive damages award,\footnote{194 See, e.g., O’Gilvie v. International Playtex, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitive damages verdict in toxic shock syndrome case). Although occasional huge punitive awards exacerbate the inconsistencies of individualized litigation, punitive damages are awarded only in about 3% of all civil jury verdicts, and the median punitive award is about $50,000 (the mean is substantially higher). See Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. LEGAL STUD. 623, 633 (1997).} and the system can take on the appearance of a lottery.

Observers of particular mass tort litigations have commented on courts’ inability to deal with them. The Agent Orange litigation of the early 1980s has been called a “perfect example of the inadequacy of our traditional procedural
system to cope with mass disasters." The Bendectin litigation, too, "demonstrates that the tort system can go awry." Courts have faced severe criticism for their handling of the scientific aspects of the breast implant litigation. As one court lamented in the context of the breast implant litigation, "the traditional tort system simply does not work in mass tort situations."

No mass tort litigation, however, has received more intense criticism than the litigation concerning exposure to asbestos. A recent legislative proposal for an asbestos compensation system catalogues the concerns plainly:

1. Asbestos personal injury litigation is unfair and inefficient, and imposes a crushing burden on litigants and taxpayers alike.

2. Asbestos litigation has already led to the bankruptcy of more than 15 companies.

3. The extraordinary volume of asbestos litigation is straining State and Federal courts.

4. Asbestos litigation has resulted in arbitrary verdicts, with individuals receiving widely varying recoveries despite similar medical conditions.

5. Litigation has not been able to provide compensation to claimants swiftly.

6. Litigation has also proved to be an extraordinarily costly means of resolving claims of asbestos-related disease. Less than 50 percent of the total cost of asbestos litigation actually goes to compensate claimants, while the remainder is eaten up in attorneys' fees and other litigation costs.

Given the nature of complex multiparty litigation, as well as the clash between scientific and judicial inquiry, it is hardly surprising that courts in an adversary system find it almost impossible to address mass torts effectively.

Many judges, lawyers and litigants caught up in mass tort problems have attempted admirably to find solutions. In scientifically complex mass tort cases, seeking input from court-appointed experts makes good sense. Too many courts,
however, seem unable to overcome their reluctance to intrude on adversarial presentations. Settlement class actions may offer the most feasible and efficient method for achieving global resolutions of mass torts. Settlement class actions, however, carry serious drawbacks including the risk of collusion or inadequate representation. They offer a satisfactory resolution only if courts can overcome their adversary system sensibilities, and take seriously their obligation to protect absent plaintiffs by launching vigorous independent investigations into the merits.

Given the barriers that have prevented U.S. judges from making widespread use of inquisitorial devices, perhaps a legislative solution to mass torts, creating an administrative compensation scheme, would make a better approach. There is some logic to the argument that in the United States, the legislative branch and administrative agencies may be better suited structurally than the courts for inquisitorial factfinding. Unfortunately, it is far from clear that Congress would do any better than the courts. Shifting from litigation to a legislative-administrative solution may simply trade one set of institutional problems for another.

Several commentators have urged a legislative-administrative approach to mass torts, to remove mass torts from the inefficiencies and inconsistencies of litigation. Judge Jack Weinstein, with a wealth of experience in such mass tort cases as Agent Orange, asbestos, DES, and breast implants, has written sympathetically about proposals for legislative compensation schemes. Professor Richard Nagareda advocates an administrative approach to mass torts, drawing upon features of the tort system. In particular, he proposes that Congress enact a statutory framework that would allow individual claimants to initiate agency action with regard to mass torts, and under which agencies could take action such as the resolution of particular disputed issues. "In a world in

201. See Robert A. Dahl, Democracy in the United States 131 (4th ed. 1981) (congressional “committee hearings produce a prodigious amount of information”); see also Tidmarsh, supra note 166, at 1805 (“Irreducible injustice may thus explain the often-expressed view that complex cases are not suited to the judicial process; after all, the allocation of benefits and burdens among persons seems a peculiarly legislative matter.”). Professor Judith Resnik has analogized judicial handling of mass torts to legislative and administrative functions: “Increasingly, the line between agency and court . . . blurs. Further, in aggregative cases, courts start structuring new adjudicatory structures, delegate to mini-agencies (called ‘claims facilities’), are lobbied by special interest groups (called ‘lawyers’ committees’), and thus mimic efforts by legislatures to construct decisionmaking systems.” Judith Resnik, From “Cases” to “Litigation”, 54 Law & Contemp. Probs. 5, 63 (1991). Professor Resnik has not, however, advocated removing mass torts from judicial handling. See id. at 64-68.


206. See Weinstein, supra note 74, at 28-29, 33-34.

which mass torts blur the conventional dividing lines between tort and administration,” Professor Nagareda argues, “the administrative state is better positioned to facilitate social consensus in an area typified by scientific indeterminacy and political controversy.”

Others have urged legislation to address asbestos claims. After its Ad Hoc Committee on Asbestos Litigation reported that the delays and costs of asbestos litigation “have resulted in a denial of justice and fundamental unfairness to litigants,” the Judicial Conference agreed with the committee’s recommendation “that Congress consider a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes.”

The Supreme Court, in a recent foray into mass tort litigation, did not hide its preference for a legislative solution. In striking down the asbestos settlement class action in Amchem Products v. Windsor, the Court noted that Congress could address the problem legislatively: “The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” The Court stressed its understanding of the lower courts’ predicament in trying to resolve the asbestos crisis through piecemeal litigation: “In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation.”

Following the Court’s Amchem decision, a group of six asbestos manufacturers hired a lobbying firm to explore the possibility of federal legislation to resolve asbestos claims. In May 1998, Rep. Henry Hyde introduced legislation that would establish a federal asbestos compensation administration to be funded by asbestos defendants. It remains to be seen whether anything will

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208. Nagareda, Aftermath, supra note 207, at 300.
212. Id. at 628-29; see also id. at 622 (“The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration . . . .”). In this regard, the Court agreed with Judge Becker of the Third Circuit, who had written approvingly of the concept of “compensation-like statutes dealing with particular mass torts.” Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634 (1996), aff’d sub nom. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
213. 521 U.S. at 599.
come of this proposal. 216
The most significant effort, by far, to achieve a legislative solution to a mass tort, is the sprawling set of negotiations and halted legislative attempts to address tobacco liability. In 1997, after years of defendant victories in tobacco litigation but with a sense that the momentum was beginning to shift in plaintiffs’ favor, 217 tobacco companies negotiated a settlement with plaintiffs’ lawyers and state attorneys general. 218 Pursuant to the settlement, the tobacco industry would submit to advertising restrictions and government regulation, and would pay approximately $368 billion, but would be protected from class action lawsuits and certain other litigation. 219 To effectuate such a settlement, however, the parties needed Congress to enact it as federal law. 220 The parties, in short, sought a legislative solution to a mass tort. 221

Although it sought a legislative solution, the tobacco pact bore a striking resemblance to a mass tort settlement class action. The adversaries reached a

prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure.” Id. It was introduced by Representative Hyde on May 20, 1998, and sent to the House Judiciary Committee. Since then, the bill has been cosponsored by Representatives Bryant, Conyers, Sensenbrenner, Pascrell, Norwood, Deal, Chambless, Gekas, McIntosh, Kingston, Weller, and Barr.

216. If such legislation is enacted, it would not be the first time that Congress had entered the mass torts fray. In the late 1960’s, Congress enacted the Black Lung Benefits Act, 30 U.S.C. § 901-945 (1994). Pursuant to that statute, coal workers with pneumoconiosis can bring claims before the Office of Workers’ Compensation. Hearings are held by Administrative Law Judges, and appeals are brought to United States Courts of Appeals. See, e.g., Collins v. Director, Office of Workers’ Compensation Programs, 932 F.2d 1191 (7th Cir. 1991); Consolidation Coal Co. v. Hage, 908 F.2d 393 (8th Cir. 1990). By some accounts, the history of the black lung legislation has not been encouraging. See, e.g., HENSNER ET AL., supra note 209, at 118 (noting “heated political battles” in Congress, and that “[d]epending on one’s perspective, it has ranged from too little compensation for too few people, to too much for too many, and perhaps back again”). The repealed National Swine Flu Immunization Program Act, 42 U.S.C. § 247b, used a different approach. Unlike black lung claims, swine flu claims were brought in District Courts. Thus, the swine flu legislation arguably did not constitute a legislative-administrative rather than a judicial solution, although it established certain parameters for liability. See In re Swine Flu Immunization Prods. Liab. Litig., M.D.L. No. 330, 89 F.R.D. 695 (D.D.C. 1981); Kennedy v. United States, 815 F. Supp. 926 (S.D. W. Va. 1993); see also Jones v. Wyeth Laboratories, 583 F.2d 1070 (8th Cir. 1978) (upholding constitutionality of Swine Flu Immunization Program Act). A third piece of mass tort legislation, the 1986 National Childhood Vaccine Program Injury Act, 42 U.S.C. §§ 300aa-34 (1994), established a no-fault compensation program for vaccine-related injuries. The program compensates victims according to a set schedule of limited damages, along the lines of Workers’ Compensation. See Dan L. Burk & Barbara A. Boczar, Biotechnology and Tort Liability: A Strategic Industry at Risk, 55 U. Pitt. L. Rev. 791, 850-52 (1994).

217. See Lowenthal & Erickson, supra note 15, at 1006 n.88 (discussing 1994 formation of powerful group of plaintiffs’ attorneys who agreed to coordinate efforts and fund a multimillion dollar war chest for litigation against tobacco defendants).


219. See Pear, supra note 218, at D1.


221. Some commentators applauded the shifting responsibility as a welcome end to mass injury litigation. "When a case includes millions of victims, the focus has to broaden beyond personal injury to social injury as well... Those are judgments best made by legislators... and not courts." Philip K. Howard, Congress Must Be Judge and Jury, N.Y. TIMES, June 24, 1997, at A19.
negotiated settlement, satisfying the plaintiffs’ demand for compensation and other relief, and satisfying the defendants’ demand for a global resolution with some protection from future litigation. The parties then went hand in hand to the locus of power for governmental approval and enforcement. At that point, the relationship between the original parties was no longer adversarial.\textsuperscript{222} Faced with former disputants now speaking with one voice, the government actor took up the responsibility of launching its own inquiry into the merits to determine whether the negotiated resolution was satisfactory. Whereas settlement class actions make the court the relevant government actor to inquire into the fairness of a settlement, the tobacco negotiations made Congress the relevant actor. Congress played the role with gusto—too much gusto, in the end—vigorously investigating, revising, and ultimately rejecting the proposed terms of the negotiated agreement.\textsuperscript{223}

As a mass tort too vast to be solved by individual adjudications but apparently unsolvable as well by class actions,\textsuperscript{224} and as a major public policy issue, tobacco liability might appear well-suited for congressional handling. When tobacco opponents and the tobacco industry approached Congress in 1997 with a negotiated resolution that offered, if not the ultimate solution, then at least a plausible starting point for legislative consideration, one might have believed that the tobacco litigation was moving quickly toward a legislative solution. One might even have believed that the tobacco controversy’s fast-approaching resolution, compared with the course of the asbestos, breast implant and other mass tort litigations, would be relatively efficient and just. In the end, however, Congress did not prove itself capable of resolving the controversy at all. As

\textsuperscript{222} "How closely the state attorneys general, public health groups and cigarette makers will work together is unclear. But they share a common objective, translating their agreement into an enforceable Federal law. ... Together, they may become a new sort of lobby, prodding Congress to bless the agreement they forged." \textit{Id.} Although the original disputants no longer maintained an adversarial posture, the problem retained some adversarial aspects, as objectors to the settlement played an adversarial role. \textit{See supra} note 76.


legislative efforts came to focus on the bill introduced by Sen. John McCain,\(^{225}\) under which tobacco companies would have paid $516 billion over twenty-five years, faced a $1.10-per-pack increase in cigarette taxes, and lost some of the litigation protection included in the negotiated agreement,\(^{226}\) the tobacco industry launched a vigorous campaign to defeat the bill.\(^{227}\) The industry’s efforts paid off in a maneuver by Senate Majority Leader Trent Lott that effectively removed the bill from consideration,\(^{228}\) despite the bill’s overwhelming bipartisan support from the Senate Commerce Committee.\(^{229}\) Despite progress in resolving government claims to recoup tobacco-related health care expenditures, the huge core of the tobacco litigation—individual and class claims by private plaintiffs injured by tobacco—remains unresolved.\(^{230}\)

The tobacco experience points to the leading argument against leaving mass torts to legislative-administrative solutions—the politicization of justice and the risk of capture by regulated industries.\(^{231}\) Whatever the courts’ problems, they

\(^{227}\) See Jeffrey Taylor, RJR’s Chief Says Tobacco Deal Is Dead, WALL ST. J., Apr. 9, 1998, at A3 (reporting tobacco companies’ decision to fight McCain bill, and to cease negotiating with Congress and others on the tobacco settlement).
\(^{228}\) In June 1998, Senator Lott urged fellow Republicans to vote against ending floor debate through cloture, see David E. Rosenbaum, Tobacco Bill on Edge as Partisan Fight Erupts in Senate, N.Y. TIMES, June 5, 1998, at A15 [hereinafter Rosenbaum, Tobacco Bill on Edge], and characterized the legislation as a “spending bill” that should be withdrawn. See David E. Rosenbaum, Lott Wants Tobacco Bill Withdrawn, N.Y. TIMES, June 9, 1998, at A14. Assured that the bill lacked the 60 votes needed for cloture, Lott called for the cloture vote. Three votes short, the bill was sent back to committee, and supporters acknowledged that there was little chance of reviving the bill within the year. See David E. Rosenbaum, Senate Drops Tobacco Bill With ’98 Revival Unlikely, N.Y. TIMES, June 18, 1998, at A1.
\(^{229}\) The Senate Commerce Committee had approved the bill by a 19-to-1 bipartisan vote. See Rosenbaum, Tobacco Bill on Edge, supra note 228, at A15.
\(^{230}\) In late 1998, five tobacco companies reached an historic $206 billion settlement with the attorneys general of 46 states, having settled already with the other four states. The settlements ended lawsuits filed by the states against the tobacco industry to recover public health costs attributable to smoking. The deal does nothing, however, to resolve the tobacco claims of tens of millions of potential private plaintiffs, either as individual lawsuits or as class actions. See Milo Geyelin, Forty-Six States Agree to Accept $206 Billion Tobacco Settlement, WALL ST. J., Nov. 23, 1998, at B13. Likewise, the federal government’s planned lawsuit against the tobacco industry, see Barry Meier, Tobacco Industry Shocked by Clinton’s Plan to Sue, N.Y. Times, Jan. 20, 1999, at A20, will not determine any private plaintiffs’ claims against cigarette manufacturers, and thus leaves unaddressed a vast portion of the tobacco mass tort litigation.
\(^{231}\) This concern is powerfully expressed with regard to products liability law in Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 1 (1995). Professor Bogus suggests that legislators have neither the time nor the political incentive to “reach a considered judgment” about products liability law:

This is precisely the kind of issue on which a legislator is most vulnerable to political pressure—a matter that may seem relatively minor in the grand scheme of things and will be invisible to the electorate. If [a member of Congress] received a call from the chief executive officer of the prefabricated home company or the truck factory in his district asking him to vote for a products liability bill, he would be hard pressed to say no.

Id. at 67.
remain more independent of interest-group pressure than either Congress or administrative agencies. Traditionally, tort defendant lobbyists have been countered by the trial lawyer lobby, in particular the Association of Trial Lawyers of America, but a shift from judicial to legislative-administrative handling of mass torts may remove some of the trial lawyer lobby’s incentives.\textsuperscript{232} Legislative removal of mass torts from the courts may simply trade judicial disadvantages for legislative and administrative ones.\textsuperscript{233}

I am mindful, of course, of the overwhelming question when evaluating mass tort resolutions or anything else: “compared to what?”\textsuperscript{234} Resolution of mass torts by a judiciary largely unprepared for inquisitorial responsibilities may be troubling, but no more so than resolution of mass torts by an agency or legislature subject to capture or political pressure. And if recent trends portend an evolution toward greater willingness to adopt inquisitorial methods when circumstances so warrant, then perhaps in the long term judicial handling of mass torts need not be so troubling after all.

**CONCLUSION**

There is cause for optimism, I believe, in the initiative of some mass tort courts to employ independent scientific experts. I am impressed, as well, by the efforts of some courts to take advantage of the thoroughness of settlement class actions while carefully probing the settlement to protect the interests of absent class members. In fact, the logic of using court-appointed experts to help resolve essential scientific disputes in high-stakes litigation, and the logic of vigorously delving into the merits of settlement class actions, seems so clear that one wonders why such judging is not more widespread.

A comparative perspective helps to explain the under-use of these devices. The tools of inquisitorial justice, after all, do not rest within their toolbox disconnected from other characteristics of the civil law systems. A look at inquisitorial fact-gathering in civil law countries shows that it functions within a

\begin{footnotesize}
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\item\textsuperscript{232} Cf. Nagareda, *Aftermath*, supra note 207, at 364-65 (acknowledging concerns about agency capture by mass tort defendants, but arguing that the plaintiffs’ bar, victim support groups, and other organizations can counteract the defendants’ influence).

\item\textsuperscript{233} See Tidmarsh, *supra* note 166, at 1814-15 (supporting legislative rulemaking for judicial procedure in complex cases, but not legislative removal of complex cases from the judicial process: “Because legislative or administrative resolution can at best substitute one form of discrimination against like claims or claimants for another, the claim for legislative or administrative resolution of complex cases is not compelling.”).

\item\textsuperscript{234} The question echoes through the literature. See, e.g., Coffee, *supra* note 112, at 1347 (“Easy as it is to point out that mass tort litigation involves high transaction costs, one must move on to the inevitable next question: ‘compared to what?’ ”); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. Rev. 1257, 1257 (1995) (noting, as to objections to the fairness of global asbestos settlements, “The question, of course, is ‘fair as compared to what?’ ”); Resnik, *supra* note 98, at 885 (commenting that the *Amchem* opinions on the fairness or goodness of the agreement “reflect the ever-present question: fair or good (in terms of both outcome and process) as compared to what?”); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1000 (1995) (“Pronouncing such [mass tort litigation] costs ‘too high’ begs the question, ‘compared to what?’ ”).
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judicial culture and structure quite different from our own, and significantly better suited than our own to enabling and encouraging independent judicial inquiry into the merits of a dispute. Even as we press U.S. judges to appoint their own scientific experts where necessary and to launch their own inquiries into the fairness of settlement class actions, we should be realistic about the barriers judges must overcome if they are to embrace such inquisitorial methods effectively or dependably. The U.S. judge is steeped in noninquisitorial justice. The ingrained assumptions of the adversary system, the judicial self-image as umpire and lawmaker rather than as investigator, the judicial appointment as capstone to a successful career of advocacy rather than as civil service career track, the absence of training in investigative techniques, career incentives that largely ignore fact-gathering, the lack of specialized courts—all these characteristics of the U.S. legal system stand as barriers to effective inquisitorial judging in general, and to effective use of court-appointed experts and settlement class actions in particular.

It is tempting to sidestep these hurdles of judicial culture and structure by embracing proposals for legislative-administrative solutions. But Congress has problems of its own. The recent history of the tobacco dispute provides little reason for optimism, at least in the short term, that mass torts will find just and efficient solutions on Capitol Hill.

Moving forward, armed with a clear understanding of the cultural and structural barriers that must be overcome, we can try to enable U.S. judges to use inquisitorial devices adeptly in mass tort litigation, as some courts have begun to do. So far, neither the judiciary nor the legislature has proved itself very effective, on the whole, at handling mass torts. But we can be cheered by glimpses of what may be formative moments in an evolution toward more effective inquisitorial judging in mass tort litigation.