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Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation

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BEYOND CONSOLIDATION: POSTAGGREGATIVE PROCEDURE IN ASBESTOS MASS TORT LITIGATION*

LINDA S. MULLENIX**

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* This work is the product of a study undertaken by the author during her tenure as a 1989-90 Judicial Fellow at the Federal Judicial Center in Washington, D.C. The analyses, conclusions, and points of view are solely those of the author. The author and the William & Mary Law Review disclaim any copyright interest in this Article.

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I. INTRODUCTION

As the filing of federal asbestos personal injury and product liability cases continues, the asbestos litigation crisis is still upon the federal courts. On January 1, 1990, 29,466 asbestos cases were pending in all districts of the federal court system. Although courts have terminated a significant number of asbestos cases through various means, statistics reflect a steady flow of new cases into the system, which creates a total net increase in pending cases. In this sense, asbestos litigation has become the Sisyphean task of the federal court system: no matter how
efficiently the courts process asbestos lawsuits, additional cases continue to enter the federal system without any sign of respite.

In addition to this steady flow of new asbestos cases, statistics reveal that plaintiffs are filing asbestos lawsuits throughout the federal court system, rather than in a few clustered districts. At the time of the first Federal Judicial Center Conference on Asbestos Litigation in 1984, asbestos litigation centered in a handful of district courts: Massachusetts, the Eastern District of Pennsylvania, the Southern District of Mississippi, the Eastern District of Texas, and the Northern District of Ohio. The asbestos docket in these five districts had, and continues to have, thousands of case filings. In the last six years, however, many other districts witnessed a marked increase in new asbestos cases. For example, the Southern District of West Virginia had a total of 342 asbestos cases through 1988; in 1989, 233 new asbestos cases were filed, representing sixty-eight percent of the court’s entire previous asbestos caseload.

The Southern District of West Virginia is not alone in this phenomenon. Many other federal district courts now have multiple asbestos cases on their dockets. Whereas the asbestos litigation crisis burdened a few districts with thousands of cases in 1984, thirty-four federal district courts now have over one hundred asbestos cases pending. With the horizontal dispersion of these cases throughout the federal court system, the expeditious, inexpensive, and fair disposition of asbestos litigation is truly a systemwide problem affecting a substantial portion of the federal judiciary.

This study was prepared against this backdrop of changing asbestos demographics. In 1984, when asbestos litigation began

5. See infra Table 4 (reflecting disposition time for asbestos cases, analyzed by disposition method (such as uncontested cases, motions before trial, settlement, trial, and other dispositions)). The average time from filing to termination is close to three years, whether cases settle or go to trial. See id.

6. See generally infra Table 1 (district-by-district breakdown of pending asbestos cases).

7. This was the first of three asbestos conferences conducted by the Federal Judicial Center to inform judges, magistrate judges, clerks, special masters, asbestos attorneys, and academicians about developments in federal court administration of asbestos litigation. See generally T. Willging, Asbestos Case Management: Pretrial and Trial Procedures (1985) (report of conclusions from the first asbestos conference held in June 1984 in Baltimore, Maryland); T. Willging, supra note 1, at 3 n.4. The second Federal Judicial Center workshop, “Asbestos and Beyond: Information and Systems for Case Management,” was held on November 14-15, 1988, in Atlanta, Georgia. The third conference, “Asbestos Conference,” was held on June 25, 1990, in Washington, D.C.

8. See infra Table 1.

9. Id.

10. Id.
to emerge as a distinct judicial administration problem, the Federal Judicial Center prepared a preliminary study discussing asbestos case management techniques for pretrial and trial procedures. In 1987, with an exponential growth of asbestos cases in certain districts, the Center issued a second study, which explored innovative case management techniques, the use of alternative dispute resolution (ADR) mechanisms, and the development of asbestos litigation expertise by judges and practitioners. Of particular interest was the finding of a lack of incentives for districtwide, statewide, or nationwide consolidation of cases. At the time of this 1987 study, the circuit courts had certified and approved for class action treatment only two asbestos class actions.

While federal courts grapple daily with the real problems of asbestos cases, the broader legal community searches simultaneously for innovative solutions to mass tort litigation. Asbestos

11. See T. Willging, supra note 7.
13. Id. at 131. Willging concluded:
   In states with multiple districts, there is no incentive for a single district to use consolidation or class action procedures on a statewide basis. The Judicial Panel on Multidistrict Litigation has not used its apparent authority to divide cases into subgroups at the state level. The multidistrict procedure also lacks clear authority to consolidate cases for trial in a form other than a class action (if the transferee district is not a proper venue for all of the cases).

Id.


14. See In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986). Two other mass tort litigations involving Agent Orange and the Dalkon Shield have been certified as settlement class actions, but these settlement classes are an anomalous use of the class action rule and provide little guidance for litigants or judges proceeding with pretrial case management of mass tort litigation under class action procedures. See In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989); In re “Agent Orange” Prods. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), modified, 100 F.R.D. 718 (1983), mandamus denied sub nom. In re Diamond Shamrock Chem. Co., 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).
cases present one type of mass tort litigation that raises issues of aggregative procedure. Although complex litigation always has been a part of the litigation landscape, only since the 1980's has the distinct phenomenon of mass tort litigation engaged the attention of the academic community, the organized bar, the bench, institutional law reform groups, judicial administration

15. See generally Mullenix, Complex Litigation Reform and Article III Jurisdiction, 58 FORDHAM L. REV. 169, 169 n.1 (1990) (reviewing academic literature on mass tort litigation). As that footnote states, the academic literature on mass tort litigation is vast and continues to expand as academic commentators debate proposed resolutions for mass tort cases.


The REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, supra note 16, also contains recommendations for complex litigation reform which parallel in significant respects the recommendations of the ABA and the American Law Institute (ALI). Id. at 44-46.

The National Conference of Commissioners on Uniform State Laws is considering a Transfer of Litigation Act. At its July 1990 meeting, the National Conference of Commissioners considered a proposal that would establish a framework for transferring and consolidating cases in state courts, supplant forum non conveniens principles, and require joint consent of the transferring and receiving courts. For other detailed provisions, see Transfer of Litigation Act, Nat’l Conf. of Comm’rs on Uniform St. Laws (Draft, July 1990).
research organizations, and Congress. Each of these groups is studying alternative approaches to coping with massive disaster and products liability litigation. Taken together, their efforts represent many different avenues for possible resolution of the mass tort litigation crisis.

Without a doubt, the judicial administration problems presented by mass tort litigation are of great current concern. This study was prepared partially in response to the recommendation in the Federal Courts Study Committee Report of April 1990 that

[for the small number of instances in which extraordinarily high numbers of injuries may have been caused by a single product or event, the courts should explore, and the Federal Judicial Center should analyze and disseminate information about, tailored procedures to avoid undue re-litigation of pertinent issues and otherwise facilitate prompt, economical and just disposition of claims.]

In commenting on the deluge of asbestos cases in the federal courts, the Committee noted that some federal courts “determined that alternative procedures to reduce re-litigation are essential” and that they managed asbestos caseloads through mass trials, class certification, and heavy involvement in class-wide settlements. Citing other innovative resolution techniques, the Committee concluded that “[t]he Federal Judicial Center

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21. Professor Francis McGovern outlined seven possible solutions for mass tort litigation: (1) no judicial or legislative interference—a race to the courthouse, with early litigants overcompensated, later plaintiffs undercompensated, and attorneys handsomely compensated; (2) legislative solution, such as the Swine Flu statute; (3) legislative tinkering, exemplified by the ABA and ALI projects; (4) judicial solutions, such as Rule 23 class action certifications; (5) judicial tinkering, such as managerial techniques that expedite cases; (6) judicial consensus, by which judges choose the best tinkering techniques and combine them in a national approach, such as a claimant registry; and (7) consensus among the parties, or bringing the parties together to formulate a mutually acceptable approach. F McGovern, Remarks at the Federal Judicial Center Asbestos Conference (June 25, 1990).


23. Id.
should collect and analyze data on the new methods and, as it thinks best, disseminate information to judges before whom such litigation is pending.”

In contrast to the sweeping reforms contained in other mass tort litigation proposals, the scope of this study is narrow. It analyzes the problems and procedures utilized in two federal asbestos mass tort litigations certified for adjudication under Rule 23 class action procedures. This report examines the management techniques used by Judge Robert M. Parker in Cimmino v. Raymark Industries, Inc. and Judge James McGurr Kelly in In re School Asbestos Litigation. Cimmino and School Asbestos Litigation provide two very different examples of class action treatment of mass tort litigation. Thus, this research expands on prior Federal Judicial Center studies of alternative trial structures for handling asbestos litigation.

A. The Problem of Postaggregative Mass Tort Procedure

The major purpose of this study—to provide detailed information about consolidated handling of mass tort litigation—is achieved by identifying issues and by describing and assessing postaggregative procedure and alternative trial structures. The focus is on management techniques after aggregation of claims, either by class action rule or by Rule 42 consolidation. Because

24. Id. The Committee’s recommendation also stated that legislative solutions might result from such judicial innovation:

Studies of such alternatives might suggest wider applications for them, and at some point, Congress may wish to facilitate the resolution of mega-cases by altering the substantive terms for relief or establishing alternative remedy schemes. Such legislation might aid not only the federal courts but also state systems, which sometimes carry the lion’s share of mega-case burdens.

25. No. B-88-0458-CA (E.D. Tex. Nov. 12, 1990). This study designates all further citations to this case by document or order number, docket page number, and date. The docket entries were not assigned individual docket numbers.

26. No. 83-0268 (E.D. Pa. filed Jan. 17, 1983). This study designates all further citations to this case by document or order number, docket number, and date. The court clerk assigned consecutive docket numbers to each docket entry.

27. In his 1987 study, TRENDS IN ASBESTOS LITIGATION, supra note 1, Tom Willging observed that the Eastern District of Texas, in Jenkins v. Raymark Industries, Inc., and the Eastern District of Pennsylvania, in In re School Asbestos Litigation, were the only two federal courts to alter the trend of federal court reluctance to certify mass tort cases for class action treatment. Id. at 93-98.

28. Although originally intended to analyze the efficacy of the class action model, during the course of litigation, Cimmino was transformed from a class action into a combined class action and Rule 42 consolidation. See infra notes 72-95 and accompanying text.
of federal courts’ long-standing resistance to certifying mass tort claims under the federal class action rule, there is a paucity of information about class action management of mass tort litigation. This project is therefore a case study of two seminal examples of class action management of mass tort claims.

Until fairly recently, almost all discussion of mass tort litigation centered on joinder problems in federal and state court systems. Reformers have directed their efforts at innovative jurisdictional proposals to enhance consolidation possibilities. They have directed very little attention, if any, toward the significant issues relating to postaggregative case management. Although many federal judges have experience handling other types of complex litigation, such as antitrust suits or institutional reform litigation, very few have experience handling consolidated personal injury or property damage cases. Cimino and School Asbestos Litigation illustrate postconsolidation aggregative procedure in this substantive setting.

The first portion of this study sketches the joinder and consolidation issues involved in these two cases. It canvasses class certification problems, as well as issues relating to opt-in and opt-out litigants and subclasses. This discussion centers on district court class certification decisions and their appellate approval and explores jurisdictional issues, such as personal jurisdiction in a nationwide class action and the presence of foreign defendants with sovereign immunity defenses. This section also discusses briefly the choice-of-law problems presented in asbestos mass tort class actions.

The next sections review aspects of judicial management, including pretrial conferences and procedure, discovery plans, the role of magistrate judges, special masters, and court-appointed expert witnesses, the motivations for settlement, and the judiciary’s role in settlement. The formulation of polyfurcated trial plans implemented through reverse bifurcation or trifurcation receives special attention. This discussion also addresses techniques for aiding jury comprehension and other problems that arise during the course of these litigations, such as recourse to ADR techniques, organization of counsel and attorneys’ fees, and

29. See infra note 127.
30. Virtually no models of class action treatment of mass tort litigation exist. The few mass tort litigations that invoked the class action rule did so as part of a settlement. See P Schuck, Agent Orange on Trial (1986); supra note 14 and accompanying text.
31. See supra notes 15-21.
recusal of a magistrate judge. Finally, the study describes the broader constitutional law issues implicated by these two class actions, particularly due process concerns and seventh amendment jury trial issues.

In theory, postaggregative procedural problems in class actions are essentially the same as those in simple two-party litigation. A central question of this study is the extent to which mass tort class actions require either the adaptation of familiar procedure or the innovation of postaggregative procedure. Because Cimino and School Asbestos Litigation are the first two asbestos cases fully adjudicated under class action rules, they illustrate certain problems involved in consolidated postaggregative procedure.32

Questions relating to consolidated postaggregative procedure are the next conceptual and practical frontiers of mass tort adjudication. Rapidly changing events impel a united, aggregative approach to handling asbestos claims. On July 16, 1990, Judge Thomas D. Lambros of the Northern District of Ohio issued an interim order establishing a nationwide asbestos personal injury class action—the first of a series of orders establishing coordinated federal handling of asbestos personal injury litigation.33 Likewise, Judge Jack Weinstein of the Southern District of New York, who was assigned the Brooklyn Navy Yard asbestos cases in the spring of 1990, indicated that the need for a national uniform plan for asbestos litigation may result in class action treatment.34 In late July 1990, parties in that litigation moved

32. See M. Peterson & M. Selvin, supra note 19, at x-xi (model for aggregative procedure). Many of the conceptual questions raised in this study are pertinent: (1) What is the litigation about? (2) Who are the participants? (3) What is the formal organization of the litigation? (4) What aggregative procedures are used? (5) What are the features of those aggregative procedures? (6) What procedural actions have been taken? (7) How have those actions been carried out? (8) What informal actions have been taken? Id.

33. Interim Order Establishing and Maintaining a National Class Action in Asbestos-related Personal Injury and Wrongful Death Actions Under Rule 23(b)(1)(B) Because of a Limited Fund and to Preserve the Jurisdiction of This and Other Federal and State Courts, In re Ohio Asbestos Litig., OAL Order No. 96 (N.D. Ohio July 16, 1990); see also Ohio Asbestos Litig., OAL Order Nos. 96a-96e (July 20-Aug. 6, 1990) (establishing, among other things, a court-annexed consolidated claims center as a short-term national solution while an ad hoc committee of judges explored long-term solutions); Walsh, Asbestos Class Action is Ordered, Ruling Could Mean Judicial Tug-of-War, Wash. Post, July 17, 1990, § C, at 1, col. 2.

for certification of a nationwide class action of asbestos personal injury cases, and Judge Lambros stayed his own class action order pending a determination of the motion.\textsuperscript{35} Plaintiffs filed similar motions for nationwide class certification in the Eastern District of Texas.\textsuperscript{36} Finally, on August 10, 1990, ten federal judges issued an unprecedented joint order establishing a multicourt cooperative effort for handling personal injury asbestos cases, utilizing consolidation and class action rules to effect a national approach to this litigation crisis.\textsuperscript{37} In light of this resurgence of interest in using Rule 23 class actions as a vehicle for adjudicating asbestos claims,\textsuperscript{38} this study provides guidance to judges and litigants who may soon be involved in judicial resolution of asbestos mass tort cases in similar consolidated proceedings.\textsuperscript{39}

\textbf{B. Methodology: The Comparative Case Study}

This case study of two massive, consolidated asbestos class action litigations describes and analyzes innovative use of class
action and consolidated procedure as one alternative management technique for aggregative handling of numerous individual claims. As such, it is part of a growing literature of case studies concerning asbestos litigation and other complex mass tort cases. As Professor McGovern describes, these studies aim “to expand the analytic literature describing new case management techniques” so that “[w]ith a sufficient database of case histories, it may be possible by reasoning inductively to develop a functional approach for the judicial management of complex cases.”

Although this study analyzes Cimino and School Asbestos Litigation because they were the only two ongoing certified asbestos class action litigations at the time of the research, these cases provide good counterpoints for comparison. For example, Cimino was a districtwide class action consolidating over 3,000 individual asbestos personal injury claims, whereas School Asbestos Litigation represents a nationwide class action of over 35,000 school district claims for property damage resulting from asbestos use. The class actions implicated different questions of joinder, certification, jurisdiction, legal theory, applicable law, and damages. Moreover, the judicial management styles provide an interesting contrast: Judge Parker assumed the role of a highly activist, managerial judge, whereas Judge Kelly assumed a reactive, non-interventionist posture. Each judge used a different philosophical and practical approach to handle his respective class action, which affected the course of those litigations.

This comparative study was accomplished by resort to original records consisting of party filings and docket sheets, published and unpublished court orders, masters’ reports, and appellate decisions. In addition to written records, the author interviewed many of the judicial officers involved in these cases, including Judges Parker and Kelly, Magistrate Judges Earl S. Hines

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42. Judge Parker was interviewed several times throughout January to August 1990 to ascertain his role in pretrial case management, his goals in structuring the litigation, and his expectations concerning the trial process pursuant to his trial plan. He was
and Edwin E. Naythons, and Special Master Jack Ratliff.\textsuperscript{44} The author also discussed aspects of the cases with the judges' law clerks and court personnel in the clerks' offices of these two districts. In addition, the author interviewed ten lawyers for parties who settled and were no longer involved in the ongoing litigations.\textsuperscript{45}

Finally, the time frame in which the research was conducted limits this study and mandates that it center on pretrial case management and trial structuring. At the time of writing, Phase I of the \textit{Cimino} trial was completed. In July 1990, Judge Parker began adjudicating Phase III of \textit{Cimino}, using a reverse trifurcation procedure. Phase II will follow \textit{School Asbestos Litigation} was proceeding with expert witness discovery, with an expected trial date of spring 1991. Time constraints limited the ability to assess the outcomes of the trial plans and to examine the cluster of interesting questions surrounding final adjudication of these actions.\textsuperscript{46} Moreover, because these cases have not disposed of all claims, the study is circumscribed by a lack of ultimate appellate resolution of many of the procedural issues.

\textsuperscript{43} Judge Kelly was interviewed twice during February 1990 to discover the same information about pretrial case management. Because no trial is anticipated in \textit{School Asbestos Litigation} before spring 1991, the information learned from Judge Kelly describes pretrial management rather than trial management.

\textsuperscript{44} Special Master Jack Ratliff, Professor of Law at The University of Texas (Austin), was interviewed on February 1, 1990. Professor McGovern, retained as an expert witness for Phase III of \textit{Cimino}, declined to be interviewed because of his role as a witness in the litigation.

\textsuperscript{45} This project is somewhat unique because it involves the investigation of ongoing litigation. In general, the Federal Judicial Center avoids investigation of open cases because of concern about the reliability of data due to the parties' reluctance to divulge information in such circumstances, problems relating to privileged information, and the fear of being a possible messenger for ex parte communications. In order to preserve confidentiality among the litigants and judicial officers, neither the parties nor the lawyers involved in these cases were interviewed prior to final disposition or settlement of issues and claims involving those parties or lawyers.

\textsuperscript{46} See, e.g., \textit{M. Peterson & M. Selvin, supra} note 19, at xi (describing conceptual model for assessing outcomes in mass tort litigation, including: (1) Has the litigation been resolved? (2) Was the resolution comprehensive? (3) How was compensation distributed among plaintiffs? (4) What were the defendants' relative contributions? (5) How satisfied were the parties with the outcome? (6) How much did the litigation cost? (7) How long did the litigation take?).

As class action adjudications of thousands of individual claims, Cimino and School Asbestos Litigation have progressed along closely parallel procedural tracks. The original complaint in Cimino was filed in May 1986, and the Cimino class action was provisionally certified on February 8, 1989. The original complaint in School Asbestos Litigation was filed in 1983, and the United States Court of Appeals for the Third Circuit approved the class action in 1986. Between 1986 and 1989, the parties in both litigations engaged in routine motion practice, massive discovery, ADR, and settlement negotiations. During 1989 and 1990, both litigations centered on formulating trial plans under the class action rule. Cimino, however, illustrates how an actively managed class action can lead to expeditious resolution of thousands of consolidated cases in a fairly short time. Cimino was completely adjudicated by the end of 1990; School Asbestos Litigation is scheduled for trial in the spring of 1991.

1. Jenkins v. Raymark Industries, Inc. as Background to Cimino v. Raymark Industries, Inc.

Cimino v. Raymark Industries, Inc. is difficult to understand outside of the context of Judge Parker's handling of asbestos litigation in the Eastern District of Texas over a ten-year period. Judge Parker's evolutionary progression of asbestos case management has been reported extensively, but a brief reprise here assists in comprehending Judge Parker's innovative procedures in Cimino.

The first significant appellate decision affirming a plaintiff's victory in asbestos litigation occurred in 1973. Judge Parker

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47. In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986).
48. Chiefly motions to dismiss for lack of jurisdiction or venue under Fed. R. Civ. P 12, or for such defenses as statute-of-limitations or immunity. See infra notes 185-218 and accompanying text.
49. From provisional certification to the end of trial, Cimino will have taken approximately two years; School Asbestos Litigation is in its seventh year of proceedings, with trial almost a year away.
50. See, e.g., T. Willging, supra note 1, at 89; Arthurs, Texas Judge Rides Herd on Asbestos Suits, Legal Times, May 19, 1986, at 1.
was appointed to the federal bench in the Eastern District of Texas in 1979, and he began experimenting with different methods of processing asbestos cases in 1980. Judge Parker first tried small consolidations of three to six cases and issued rulings precluding jury consideration of common issues. In 1981, he attempted to use the collateral estoppel doctrine to prevent defendants from raising certain defenses that other defendants had raised in earlier asbestos litigation, but the United States Court of Appeals for the Fifth Circuit rejected this use of the doctrine. Judge Parker’s next experiment used five juries sitting simultaneously to hear evidence on common issues of causation and the manufacturer’s duty to warn, but the juries returned different verdicts and Judge Parker declared this experiment a failure. He then attempted to consolidate groups of thirty cases for resolution. In this format, four cases were presented to a single jury on common issues; if the jury found the defendants liable, the remaining twenty-six cases were to have minitrials on the issues of exposure and damages. After the parties tried four representative cases, the defendants agreed to settle all thirty cases for a lump sum.

Although this format proved successful, Judge Parker believed he had reached the maximum consolidation feasible, yet hundreds of asbestos cases remained on the Eastern District of Texas docket. Judge Parker therefore invited a motion to class certify all asbestos personal injury cases pending in the district. In October 1985, he certified a Rule 23(b)(3) opt-out class action for approximately 755 cases and permitted the defendants an interlocutory appeal to the Fifth Circuit, which affirmed the certification. This procedure became known as Jenkins I.

52. Judge Parker progressed in what Willging called a “step-ladder effect.” T. WILLGING, supra note 1, at 98.
55. See T. WILLGING, supra note 1, at 89.
56. Newman v. Johns-Manville Sales Corp., No. M-79-124-CA (E.D. Tex.), mandamus denied sub nom. In re Armstrong World Indus., No. 84-2690 (5th Cir. 1984). The class representatives’ cases resulted in an average of one million dollars in actual damages and one million dollars in punitive damages. Following these verdicts, the defendants agreed to settle all 30 cases for approximately $12.5 million. See M. SELVIN & L. FINGUS, supra note 19, at 22; T. WILLGING, supra note 1, at 89; Arthurs, supra note 50.
57. Memorandum and Order, Jenkins v. Raymark Indus., No. M-84-138-CA (E.D. Tex.)
The trial of Jenks I consisted of thirteen named class representatives, thirteen defendants, and a tightly organized attorney committee structure. The Fifth Circuit approved a class action to resolve common defense issues and the defendants' culpability for possible punitive damages, with individual issues of unnamed members to be resolved in later minitrials of seven to ten plaintiffs. Judge Parker appointed Professor McGovern as special master to compile information about each class member and to create an aggregate profile of the class. According to Professor McGovern, the purpose of this study was to enable the jury to analyze the proportionality of punitive damages awards and to better appreciate the typicality of the named class representatives. The Jenks I trial began in March 1986, but before the defendants began their case and after only sixteen days of trial, the litigation settled for 137 million dollars. Although Jenks I settled 755 cases, approximately 1,000 cases still remained on the Eastern District of Texas docket, and plaintiffs were filing approximately 150 to 200 new cases each month. In June 1986, Judge Parker issued a preliminary ADR order and, after the defendants' objections and appeals to modify that order, the attorneys signed an ADR agreement in September 1986. This agreement set up an ADR mechanism for handling

Oct. 16, 1985). Judge Parker believes that interlocutory appellate resolution of procedural issues raised by innovative judicial trial management techniques is useful because it induces early resolution and avoids waste if management decisions are invalidated subsequent to trial. In certifying an order for appeal, he stated, "The Court will not view any party's appeal of this Order or efforts to seek mandamus review as a tactic designed to delay or impede this litigation. In fact the Court encourages such action." Memorandum and Order at 17, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 159 (E.D. Tex. Mar. 5, 1990) (certifying trial plan for immediate appeal under 28 U.S.C. § 1292(b)).

58. For a detailed description of the Jenks I trial, see McGovern, Mature Mass Tort, supra note 40, at 660-75.
59. Jenks v. Raymark Indus., 782 F.2d 468, 471 (5th Cir. 1986). For a discussion of class certification issues, see infra notes 128-59 and accompanying text.
61. Id. at 671. McGovern reports that the settlement provided that the plaintiffs' attorneys would allocate the award money among class members, subject to Judge Parker's review. Judge Parker reviewed the award to each class member in light of the data that Professor McGovern compiled and made several changes in awards. The settlement also included a separate amount for each plaintiff's attorney, but Judge Parker limited the attorneys' fees to no more than 20%, with lead counsel receiving 1% of the settlement for his role in the trial. Id. According to McGovern, the average value of the class action cases was 25% lower than the mean of prior settlement values. Id. Judge Parker stated that one reason he prefers class action treatment of asbestos cases is that the rule enables him to exercise control over the award of attorneys' fees.
62. T. WILLGING, supra note 1, at 89, 118.
all asbestos cases filed in that district from January 1, 1985, until April 1, 1986. The agreement included cases filed after the *Jenkins I* class certification. In the fall of 1986, Judge Parker created a new class, called *Jenkins II*, for all Beaumont Division cases filed from January 1, 1985, through March 31, 1986, and issued an order staying all asbestos cases pending in the district. He viewed the ADR process as administratively efficient and beneficial to the defendants because it reduced their exposure to future damages and their transaction costs.

The *Jenkins II* ADR agreement detailed a three-stage process for handling newly filed claims in the district. In the first stage, plaintiffs' attorneys certified to an ADR monitor the asbestos cases eligible for ADR treatment, the monitor referred sixty cases a month to the defendants for an eligibility agreement, and the defendants had sixty days to consent. If eligibility was agreed upon, the parties had forty days to negotiate a settlement in the second stage of the process. If settlement did not occur, the parties had ninety days for arbitration in the third stage. If arbitration did not result in settlement, the plaintiff had the option of filing suit in district court, except that the ADR agreement permitted no discovery relating to punitive damages or the state-of-the-art defense.

The *Jenkins II* ADR process began in late 1986 and functioned until early 1988. Magistrate Judges McKee and Hines served as ADR monitors, and Magistrate Judge Hines set up an elaborate calendaring system that clustered asbestos filings into ADR groups. The original *Cimino* complaint was filed on May 12, 1986, and ultimately received a monitor's certification of eligibility as part of an ADR group. However, *Cimino* never advanced beyond the first stage of the ADR process because, by late 1988,
Judge Parker and Magistrate Judge Hines agreed that the ADR process was failing and that something needed to be done to handle the ever growing number of new asbestos filings in the district. Although Judge Parker successfully settled some 600 additional cases by the time Cimino was certified for ADR eligibility in 1988, over 2,300 asbestos cases remained on the Eastern District of Texas docket. Convinced that the Jenkns II ADR was not working and that newly filed claims were swamping the court, Judge Parker initiated the Cimino class certification by requesting plaintiff's counsel to file for class certification.

2. Cimino v. Raymark Industries, Inc.: The Districtwide Class Action

Against the backdrop of the Jenkns I class action settlement and the Jenkns II ADR process, Judge Parker initiated the Cimino class action in late 1988 by requesting a motion for certification of a districtwide class action. Once he decided to abandon the ADR structure, Judge Parker moved quickly to expedite consolidated procedure.

After the plaintiffs moved for certification under Rule 23 on December 15, 1988, Judge Parker held a hearing on February 1, 1989, giving the parties thirty days to conduct discovery on the class representatives. On February 8, 1989, he granted provisional class certification of all asbestos cases pending in the Beaumont Division and ordered the parties to submit motions for proposed subclasses no later than February 15, 1989. On

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70. Judge Parker believed that the ADR mechanism was set up primarily to benefit the defendants, but that some defendants frustrated the process by withdrawing from it.

Magistrate Judge Hines likewise noted that not all of the defendants participated in the ADR process. The slowness of the ADR program and the volume of new filings doomed the ADR; the agreement contemplated settling 60 cases a month, but only 30 cases a month settled, whereas 200 or more new cases a month were filed. Characterizing the ADR agreement as a great idea that simply did not work, Magistrate Judge Hines also indicated that some plaintiffs either never recovered damages or died before recovery because of the backlog. Initially, Magistrate Judge Hines first referred the oldest cases for ADR eligibility; but over time, in consultation with the plaintiffs' attorneys, he moved the most seriously ill plaintiffs to the head of the ADR process. Notwithstanding the court's dissatisfaction with the ADR process, Magistrate Judge Hines believed that the parties liked it.

71. Judge Parker reported that plaintiff's counsel was willing to do whatever was necessary to move the backlog of cases.

72. Motion of Plaintiffs for Certification of Class Under Rule 23, Cimino, Docket at 6 (Dec. 15, 1988).

73. Order, Cimino, Docket at 9 (Feb. 8, 1989).
February 9, 1989, Judge Parker issued a memorandum and order indicating that he contemplated a class action that would dispose of all claims in a single trial with three phases.\textsuperscript{74} The same order certified two attorneys as class counsel, appointed Professor Jack Ratliff as a special master to assist in formulating a class action trial plan, and required that the master's preliminary report be filed by May 1, 1989.\textsuperscript{75} From mid-February through fall 1989, Judge Parker heard motions for proposed subclasses, designated one additional class counsel, issued a scheduling order for motions and responses, and directed Magistrate Judge Hines to coordinate discovery.\textsuperscript{76} The plaintiffs filed second and third amended class action complaints,\textsuperscript{77} and the court approved settlements with various defendants belonging to the Center for Claims Resolution.\textsuperscript{78}

During fall 1989, Judge Parker pushed \textit{Cimmino} closer to trial through a rapid succession of events. On September 25, 1989, he received Special Master Ratliff's report outlining a proposed four-phase trial plan.\textsuperscript{79} On October 26, Judge Parker issued an order

\textsuperscript{74} Memorandum and Order, \textit{Cimmino}, Docket at 10 (Feb. 9, 1989). Judge Parker delineated the following three phases:

(a) Phase One will determine the common issues relative to the tort liability of defendants to all plaintiffs, actual damages of the class representatives, and class punitive damage claims.  
(b) Phase Two will determine issues of exposure, asbestos-related injury, and amounts of actual or compensatory damages for the remaining individual plaintiff class members.

Phase Two also will determine affirmative defenses and percentages of causation.  
(c) Phase Three will determine cross-actions and claims for indemnity and contribution among defendants.

\textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} See \textit{Cimmino}, Docket at 11-54 (Feb. 9, 1989-Sept. 22, 1989) (especially entries for Feb. 15, 16, 21; Mar. 9, 15, 17; Apr. 18, 21; June 8; July 3, 25; Aug. 24). By late spring 1989, considerable confusion had arisen over which defendants were to be part of the class action. In an attempt to clarify this confusion, Judge Parker issued an order designating which defendants would be part of the class action and severing from the class those plaintiffs who had claims pending against nonclass defendants. See Order, \textit{Cimmino}, Docket at 46 (July 25, 1989). Sixteen defendants were named for inclusion in the class action: AC & S, Inc., Asbestos Corp., Ltd., Carey Canada, Inc., Celotex Corp., Eagle-Picher Indus., Inc.; Fibreboard Corp., The Flintkote Co., H.K. Porter Co., Jim Walter Corp., Manville Personal Injury Settlement Trust; Owens-Illinois, Inc., Pittsburgh Corning Corp., Raymark Indus., Inc., Raytech Corp., Walter Indus., Inc., and W.R. Grace & Co.-Conn. A number of these defendants eventually settled with the plaintiffs.


\textsuperscript{78} Order, \textit{Cimmino}, Docket at 33 (Apr. 18, 1989).

certifying a class action of all asbestos cases pending in the Beaumont Division as of February 1, 1989, and delineated a three-phase trial plan for the approximately 3,031 pending cases. The order called for a consolidated trial on the state-of-the-art defense and punitive damages, as well as subsequent class action treatment of the exposure and actual damages issues. The trial date was set for February 5, 1990. Magistrate Judge Hines formulated a discovery plan and scheduling order that required all plaintiffs to be examined by physicians in Beaumont within thirty days and to be deposed before the trial date, limiting depositions to forty-five minutes.

In November 1989, defendants filed motions objecting to the class certification and discovery limitations and requesting that Judge Parker either vacate his ruling or certify it for interlocutory appeal. On December 29, 1989, Judge Parker overruled the defendants' objections and denied the requests to modify the order or grant certification for an interlocutory appeal. In response, defendants sought mandamus review of Judge Parker's class certification, the trial plan, and the discovery order.

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81. Id. at 5, reprinted in Mealey's, supra note 80, at A-3. This portion of the trial plan incorporated issues that the Fifth Circuit previously approved for class action treatment in Jenkins. See Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986).
82. Memorandum and Order, Cimino, Docket at 5-6, reprinted in Mealey's, supra note 80, at A-3; see also Cimino Phased to Proceed as Consolidation, Class Action, 5 Mealey's, supra note 80, at 8-10.
83. Discovery Plan and Scheduling for Deposition and Medical Examination of Plaintiffs, Cimino, Docket at 63 (Nov. 9, 1989).
84. Cimino, Docket at 63-75 (Nov.-Dec. 1989) (defendants' motions to decertify the class or modify the court order relating to consolidation action and class certification); see also Notes: Judge Parker's Class Action Ruling Challenged, Mealey's Litig. Rep. Asbestos 30-31 (Nov. 17, 1989).
85. Order, Cimino, Docket at 78 (Dec. 29, 1989). Judge Parker refused to certify his October 26th order because he thought the trial plan, coupled with a short trial date, would impel certain "hold-out" defendants to settle. He feared that in granting interlocutory appeal, he would undermine his settlement goals. In retrospect, Judge Parker thought interlocutory review was a means of letting all involved parties know whether the appellate court ultimately would approve the trial structure, rather than wasting time with a trial that the appellate court might subsequently invalidate.
86. Petition for Writ of Mandamus and Request to Consolidate, Adopt and Supplement, In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (No. 89-4945) (petition on behalf of Pittsburgh Corning Corp.); Petition for Writ of Mandamus, In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (No. 89-4937) (petition on behalf of Fibreboard Corp.). For the plaintiffs' reply in opposition to the mandamus petition, see Plaintiffs-Respondents Reply in Opposition to Petitions For Writ of Mandamus Filed by Fibreboard Corporation and by Pittsburgh Corning Corporation, In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (Nos. 89-4937, 89-4945).
The Court of Appeals for the Fifth Circuit granted the mandamus, vacated Judge Parker’s Phase II trial plan, and remanded the case for further proceedings. The appellate court found “no impediment to the trial of Phase I” and directed the district court to proceed with that trial. The trial of Phase I began in early February 1990.

On March 5, 1990, Judge Parker delineated the remaining trial phases dealing with the issues of exposure, comparative causation, and damages. He consolidated Phases II and III under Rule 42(a), trying the exposure issue by worksite group and the damages issue by a representative sampling of disease category. He appointed Professor Francis McGovern as an expert witness to evaluate the court’s statistical sample for damages. Finally, he certified the new trial plan for interlocutory appeal and invited the parties to seek mandamus review, which they did. On March 29, 1990, the Fifth Circuit denied the petitions for mandamus and interlocutory appeal without written opinion. This denial cleared the way for Judge Parker to proceed with Phases II and III.

3. School Asbestos Litigation: The Nationwide Class Action

Throughout the 1980’s, hundreds of public school districts and private schools instituted asbestos removal lawsuits after federal legislation required school asbestos hazard detection and abate-
ment. School asbestos abatement is a problem of enormous dimensions. In contrast to personal injury asbestos claims, school asbestos cases seek to recover the costs of removing friable asbestos from school buildings. School asbestos cases rely on an array of legal theories to accomplish this goal: strict liability, negligence, breach of warranty, nuisance, trespass, restitution, indemnity, unfair trade practices, conspiracy, fraud, misrepresentation, concert of action, and enterprise liability. Notwithstanding these multiple theories, tort liability is the favorite ground for recovery in school asbestos litigation because many jurisdic-


97. See, e.g., Comment, Recovery for Risk Comes of Age, supra note 96, at 512 n.5 (discussing a 1985 United States General Accounting Office (GAO) investigation of 36 school districts' efforts at school asbestos cleanup, which reported $51 million spent through 1984 and $289 million in planned expenditures).

98. Friable asbestos is asbestos that crumbles with age and emits asbestos fibers into the air. Approximately 30,000 school districts nationwide have friable asbestos, and the estimated cost of removal or abatement is as much as three billion dollars. See id. Another figure reported to Congress was that cleanup would cost almost $200 million for the 295 districts nationwide with the worst asbestos problems. Id. (GAO Report and congressional testimony on school asbestos and abatement removal estimate that cleanup would cost almost $200 million).

99. See Comment, Recovery for Risk Comes of Age, supra note 96, at 513 n.6 (survey of legal theories serving as basis for recovery for costs of abatement or removal of asbestos). See generally Comment, Asbestos Hazard Emergency Response Act, supra note 96 (theories of recovery); Comment, Economic Loss Doctrine, supra note 96 (theories of economic loss).
tions have liberal “discovery rules” relating to statutes of limitations in tort actions.  
Perhaps the most crucial distinction between asbestos personal injury lawsuits and school asbestos abatement cases centers on proving and evaluating recoverable damages. Whereas commentators characterize personal injury recovery as highly individualized and subjective, they view school asbestos recovery as more objectively quantifiable:

Abatement recovery also reduces the concern with disparity in the award of damages. Most personal injury toxic tort actions include subjective, plaintiff-specific awards for intangible damages such as pain and suffering, future medical costs, and future injury that is likely to occur as a result of present injury. In contrast, asbestos abatement costs are fixed and objectively measurable; they represent specific monetary damages. In addition, unlike personal injury damages, abatement losses are status neutral. In other words, they will not significantly change according to the relative wealth or needs of the party suffering the loss.

This distinction helps to make the school asbestos cases more amenable to consolidated proceedings than the personal injury asbestos cases.

When Judge Kelly came on the bench, the plaintiffs had already filed the complaint that would form the nucleus of the school asbestos class action. In comparison to Cimino, School Asbestos Litigation proceeded, and continues to proceed, at a more deliberate pace. Judge Kelly’s overarching philosophy has been to treat School Asbestos Litigation the same as any other class action, and he has eschewed the active managerial judging that moved

100. Comment, Recovery for Risk Comes of Age, supra note 96, at 516-17. “Discovery rules” refer to a claimant’s ability to bring an action for recovery dating from the time of discovery of an injury and are particularly pertinent in latent injury cases. In contrast, strict notice and limitations requirements typically frustrate litigation based on contract principles. Id. In addition, the flux of so-called “economic loss” or “property damage” doctrines often limits recovery to contract remedies. Id. at 518-26; see also Comment, Economic Loss Doctrine, supra note 96 (arguing in support of contract analysis of school asbestos litigation and claiming that tort analysis causes economic distortion).

101. Comment, Recovery for Risk Comes of Age, supra note 96, at 544. Judge Kelly believed that the problems that plague personal injury actions should not hamper classwide calculation of damages in the nationwide school asbestos litigation because the court and lawyers probably would be able to calculate damages based on the square footage of facilities affected by asbestos products. He did not mean to suggest that this would be the ultimate measure of damages at trial, but merely that it differentiated school asbestos cases from personal injury asbestos cases.
Although Judge Kelly admits that his nationwide class action is unique, he persistently conducts the litigation as he would any other complex litigation or class action. From Judge Kelly's perspective, school asbestos cases are distinguishable from personal injury asbestos cases because they are based on property claims. School asbestos cases could not possibly be tried on a one-by-one basis, and they are especially suited for consolidated adjudication of common issues.

In reflecting on the genesis of the class action, Judge Kelly stated that the possibility of a class action divided the plaintiffs' and defendants' attorneys, with a number of plaintiffs' lawyers wanting to proceed individually. The defendants similarly split along perceived interests. In contrast to *Ciminó*, however, the parties initiated the class action certification rather than the judge. In March 1984, some of the plaintiffs filed motions for class certification.

In 1984, Judge Kelly certified a nationwide class action pursuant to Rules 23(b)(1)(B) and 23(b)(3). His order did three things. First, the order created a mandatory class action for school districts seeking punitive damages. Second, it created an opt-out class action for school districts seeking compensatory damages. Third, the order rejected plaintiffs' requests for certifications of a Rule 23(b)(2) class. Judge Kelly also certified the class action order for interlocutory appeal. While the appeal from

102. Prior to assuming responsibility for School Asbestos Litigation, Judge Kelly presided over employment discrimination class actions, some antitrust litigation, and a lawsuit involving a multidefendant airplane crash; approximately half of his caseload consisted of personal injury asbestos cases.


104. On April 13, 1984, Judge Kelly certified a mandatory class as against three defendants and scheduled a hearing for May 11, 1984, at which time parties could appear and apply for relief from the order. Throughout the summer, he heard oral argument on the certification issue. As a result, he issued an order conditionally certifying a class under Rule 23(b)(1)(B) and Rule 23(b)(3). See In re Asbestos School Litig., 104 F.R.D. 422 (E.D. Pa. 1984). The plaintiff classes were to consist of public and private elementary and secondary schools.

105. Id. at 438.

106. Id. at 433-34.

107. Id. at 438-39.
the class certification was pending, the court constructed an attorney committee,\textsuperscript{108} issued orders governing the award of counsel fees and expenses,\textsuperscript{109} oversaw plaintiffs' drafting of the class action notice,\textsuperscript{110} and superintended a classwide settlement with two defendants.\textsuperscript{111}

In May 1986, the Court of Appeals for the Third Circuit issued its decision on Judge Kelly's class certification order.\textsuperscript{112} The appellate court decertified the mandatory punitive damages class, but upheld the Rule 23(b)(3) opt-out class action for compensatory damages.\textsuperscript{113}

From 1987 through 1989, School Asbestos Litigation progressed as a routine class action. Signal events included finalizing the class action notice,\textsuperscript{114} approving a class settlement with certain defendants,\textsuperscript{115} referring discovery matters to a magistrate judge,\textsuperscript{116} and conducting routine motion practice.\textsuperscript{117} In January 1989, the court ordered the completion of all discovery by December 31, 1989, scheduled a final pretrial conference for May 1990, and indicated that it would place School Asbestos Litigation in the June 1, 1990, trial pool.\textsuperscript{118}

Events, however, transpired more slowly. On January 23, 1990, the plaintiffs submitted a proposed trial plan based largely on

\textsuperscript{108} Order No. 24, School Asbestos Litig., Docket No. 351 (Nov. 7, 1984).
\textsuperscript{109} Pretrial Order No. 23, School Asbestos Litig., Docket No. 315 (Oct. 19, 1984).
\textsuperscript{110} Pretrial Order No. 42, School Asbestos Litig., Docket No. 566 (Mar. 25, 1985).
\textsuperscript{111} Order No. 64, School Asbestos Litig., Docket No. 783 (June 17, 1986) (preliminary approval of class settlement with Owens-Illinois, Inc. and Proko Industries, Inc. and certification of temporary settlement class); Class Plaintiffs' Motion for Preliminary Approval of Partial Settlement with Owens-Illinois, Inc. and Proko Indus., Inc., School Asbestos Litig., Docket No. 750 (Apr. 2, 1986).
\textsuperscript{112} In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); see also Comment, Asbestos Hazard Emergency Response Act, supra note 96, at 1708-09 (describing School Asbestos Litigation certification).
\textsuperscript{113} The court ruled that the punitive damages class was not valid due to insufficient factual findings and the underinclusiveness of the proposed class. School Asbestos Litig., 789 F.2d at 1005-06.
\textsuperscript{114} Pretrial Order No. 84, School Asbestos Litig., Docket No. 958 (Mar. 30, 1987) (order relating to class notice).
\textsuperscript{115} Pretrial Order No. 198, School Asbestos Litig., Docket No. 1741 (Nov. 28, 1989) (tentatively approving settlement Lac D'Amante du Quebec); Pretrial Order No. 78, School Asbestos Litig., Docket No. 1015 (July 21, 1987) (approving settlement with Owens-Illinois and Proko Industries).
\textsuperscript{117} See generally docket sheet for School Asbestos Litig. (recording various Rule 12 motions to dismiss relating to jurisdiction and venue).
\textsuperscript{118} Order No. 169, School Asbestos Litig., Docket No. 1646 (Jan. 27, 1989). This order also addressed expert witness discovery and the joint pretrial statement.
Judge Parker's original trial plan in Cimino.\textsuperscript{119} When the Fifth Circuit invalidated phases of the Cimino plan, the defendants submitted alternative trial plans to the court.\textsuperscript{120} On May 17, 1990, Judge Kelly ordered a bifurcated trial and delineated the issues to be tried in Phase I.\textsuperscript{121} In late July, he issued an order governing expert witness discovery and required the parties to submit a joint pretrial order before March 4, 1991.\textsuperscript{122}

Judge Kelly's goals for pretrial management have been to move the case along with maximum efficiency and minimum cost and to set up a litigation system that might lead to settlement as a byproduct. He has maintained a posture of reacting to counsel-initiated actions, spent little time meeting with counsel, dealt with most issues on motion without oral argument, and, whenever possible, conducted hearings by telephone conference.

\section*{II. Background: Joinder and Consolidation Issues as a Predicate to Post aggregatorative Procedure}

Both Cimino v. Raymark Industries, Inc.\textsuperscript{123} and In re School Asbestos Litigation\textsuperscript{124} resolved threshold issues of joinder and consolidation. These mass tort cases differ, however, in that Judge Parker adjudicated Cimino under both class action procedure and Rule 42 consolidation principles, whereas Judge Kelly has conducted School Asbestos Litigation solely as a Rule 23 class action.

\subsection*{A. Rule 23 Class Actions and Rule 42 Consolidations}

The reluctance of federal courts to certify mass tort litigation under Rule 23 class action procedure is well known and well documented.\textsuperscript{125} Even after appellate courts upheld class certifi-

\begin{footnotesize}
\textsuperscript{119} Plaintiffs' Motion for Order Governing Conduct of Trial, School Asbestos Litig., Docket No. 2032 (Jan. 22, 1990).
\textsuperscript{120} See, e.g., Response of Defendant GAF Corporation to Plaintiffs' Motion for Order Governing Conduct of Trial, School Asbestos Litig., Docket No. 2107 (Mar. 19, 1990).
\textsuperscript{121} Order No. 235, School Asbestos Litig., Docket No. 2225 (May 17, 1990) (describing Phase I issues and bifurcated trial). For a discussion of the trial plan, see infra notes 414-21 and accompanying text.
\textsuperscript{122} Pretrial Order No. 249, School Asbestos Litig., Docket No. 2294 (July 16, 1990); see also Stipulation and Pretrial Order No. 229, School Asbestos Litig., Docket No. 2243 (May 29, 1990) (ordering joint pretrial order by June 29, 1990). The parties' failure to comply with this order led Judge Kelly to extend the deadline in his July 16, 1990, order.
\textsuperscript{125} See, e.g., In re Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984) (grant of
\end{footnotesize}
Citations in *Cimino* and *School Asbestos Litigation*, federal court resistance to class certification continued. Courts frequently view class action procedure as inappropriate in toxic tort litigation for several reasons: the class action undermines both the perceived need for individualized proof of claims and causation requirements by relying on aggregate rather than individual proof; the calculation of compensatory, punitive, and future-claimant damages is highly problematic; the potential for applicable law complications is present in every diversity-based mass tort action; and class action procedure subverts individualized plaintiff control over the litigation by transferring autonomy from the individual claimant to the class attorney. Federal courts there-


But see *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving a Rule 23 settlement class for Dalkon Shield claimants and reviewing history of federal court resistance to use of class action rule for mass accident and mass tort litigation), cert. denied, 110 S. Ct. 377 (1989); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1158 (6th Cir. 1988) (upholding Rule 23(b)(3) class action certification for personal injury and property damage resulting from chemical waste disposal); *In re "Agent Orange" Prods. Litig.*, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (settlement class certification for Agent Orange claims).

126. See, e.g., *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (appellate court issued mandamus to vacate district court order certifying mandatory class action under Rule 23(b)(1) in asbestos litigation).

fore narrowly construe the Rule 23 prerequisites so that many attempted mass tort class actions fail to meet commonality, typicality, predominance, superiority, and other Rule 23 requirements.

1. Certification Issues in Cimino and School Asbestos Litigation

_Cimino_ and _School Asbestos Litigation_ offer two different methods of surmounting threshold joinder and consolidation issues. _Cimino_ represents a semisuccessful attempt at class action certification and procedure. In his October 26, 1989, trial plan order, Judge Parker created a three-phase format.\(^1\) The first phase consolidated 3,031 cases under Rule 42(a) for a single trial on the state-of-the-art defense and punitive damages, a phase that did “not involve class representatives or a class action.”\(^2\) Although Judge Parker tried the state-of-the-art defense and punitive damages as a class action in _Jenkins v. Raymark Industries, Inc._,\(^3\) he abandoned this use of the class action in _Cimino_ because “a jury award to class representatives would serve merely to pre-

128. See supra notes 80-82 and accompanying text.

129. Memorandum and Order at 5, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 58 (E.D. Tex. Oct. 26, 1989), reprinted in Mealey's, supra note 80, at A-3; see also _FED. R. Civ. P 42(a)_.

130. 782 F.2d 468, 470-71 (5th Cir. 1986). Judge Parker found that one class trial on defense-related questions—including product identification, product defectiveness, gross negligence, and punitive damages—could save considerable time and expense. He isolated the following issues, which later became standard _Jenkins_ class issues:

(a) which products, if any, were asbestos-containing insulation products capable of producing dust that contained asbestos fibers sufficient to cause harm in its application, use, or removal; (b) which of the Defendants’ products, if any, were defective as marketed and unreasonably dangerous; (c) what date each Defendant knew of or should have known that insulators and their household members were at risk of contracting an asbestos-related injury or disease from the application, use, or removal of asbestos-containing insulation products; and (d) what amount of punitive damages, if any, should be awarded to the class as punishment for the Defendants’ conduct.

_Id._ at 471 n.3.
udge the defendants in Phase Two of the trial." Such a class action would not achieve a fair resolution, and he could resolve the issues without trying the cases of individual class representatives.  

Judge Parker intended to maintain Phases II and III as class actions under Rule 23(b)(3). Phase II was to consider plaintiffs’ exposure, statutes of limitations and other defenses, and lump sum actual and punitive damages. Judge Parker initially anticipated fully adjudicating eleven representative cases, but subsequently expanded this procedure to permit presentation of thirty purely illustrative cases, with the plaintiffs and defendants each selecting fifteen cases. These cases would not go to the jury for resolution of the actual damages issue; rather, the distribution of actual and punitive damages was to occur in Phase III, a nonjury proceeding.  

Judge Parker found that proposed Phases II and III met the requirements for certification under Rule 23(b)(3) and that Rule 42(b) provided adequate legal authority to separate the consolidation issues from the class action issues. In concluding that his Cimino class action order was fully consistent with Jenkins, he indicated that the Fifth Circuit had not foreclosed “the possibility that all issues in an asbestos case could be decided in a mass tort action.”  

Denied the opportunity to appeal the class certification order, the defendants sought mandamus review of Judge Parker’s proposed trial plan. Although they conceded that the Jenkins and School Asbestos Litigation certifications suggested new inroads on the use of class actions in mass tort cases, they argued that those decisions did not permit wholesale class treatment of in-
individual issues in personal injury tort cases.\textsuperscript{140} The defendants welcomed reexamination of "the wisdom of class certification in mass tort cases"\textsuperscript{141} and attacked the proposed trial plan as abridging constitutional guarantees to a jury trial and due process.\textsuperscript{142}

The Fifth Circuit issued a mandamus invalidating proposed Phase II as a violation of \textit{Erie Railroad v. Tompkins}\textsuperscript{143} principles relating to the application of substantive Texas law on products liability.\textsuperscript{144} The court indicated that the remaining 2,990 class members could not be certified for trial under Rule 23(b)(3) because "[t]here are too many disparities among the various plaintiffs for their common concerns to predominate."\textsuperscript{145} The court tied the invalidity of the class action to Texas substantive tort law: "To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged. The procedures for Phase II do precisely that, but, as we have explained, do so only by reworking the substantive duty owed by the manufacturers."\textsuperscript{146} In response to the mandamus, Judge Parker reworked Phases II and III as Rule 42 consolidations,\textsuperscript{147} with a Phase II trial of exposure issues by worksite groupings and a Phase III trial of damages by disease categories. The Fifth Circuit denied without opinion the parties' petitions to review this plan.\textsuperscript{148}

After the second appeal to the Fifth Circuit, Judge Parker was indifferent as to whether to conduct Cimino as a Rule 42 consolidation or as a Rule 23 class action. He believed that a Rule 23(b)(3) class action was the most suitable procedure because it gave claimants the opportunity to opt out and it gave him increased control over the trial, settlement, and attorneys' fees. Nonetheless, he did not envision that a Rule 42 consolidation would greatly circumscribe his ability to control the trial in a similar fashion.

\textsuperscript{140} \textit{Id.} at 18-21.
\textsuperscript{141} \textit{Id.} at 16.
\textsuperscript{142} \textit{Id.} at 29-42.
\textsuperscript{143} 304 U.S. 64 (1938).
\textsuperscript{144} \textit{In re Fibreboard Corp.}, 893 F.2d 708 (5th Cir. 1990). For a discussion of the applicable law problem, see \textit{infra} notes 219-55 and accompanying text.
\textsuperscript{145} \textit{Fibreboard Corp.}, 893 F.2d at 712.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} Memorandum and Order, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 159 (E.D. Tex. Mar. 5, 1990) (consolidating 2,336 cases for Phase II trial of exposure issue by worksite groupings; consolidating 2,336 cases for Phase III trial of damages issues by disease categories).
\textsuperscript{148} \textit{In re Fibreboard Corp.}, No. 90-4199 (5th Cir. Mar. 29, 1990); \textit{see supra} notes 94-95 and accompanying text.
School Asbestos Litigation provides a clearer example of Rule 23 certification. In this case, the Court of Appeals for the Third Circuit rejected Judge Kelly's certification of a Rule 23(b)(1)(B) mandatory class for punitive damages, but upheld his certification of a Rule 23(b)(3) opt-out class for compensatory damages. The court also upheld Judge Kelly's refusal to certify a Rule 23(b)(2) class for incidental equitable relief on the basis that the appropriate final relief related exclusively or predominantly to money damages.

The Third Circuit rejected certification of a mandatory punitive damages class for two reasons. First, it believed that such a mandatory class implicated "serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems." Second, the court faulted the punitive damages class as underinclusive. An opt-out compensatory damages class alleviated these difficulties because "use of a voluntary class assures that only willing plaintiffs are before the court."

In reviewing Judge Kelly's certification of a Rule 23(b)(3) compensatory damages class, the Third Circuit agreed that the class action satisfied the rule's requirements of numerosity, typicality, and adequacy of representation. The court upheld Judge Kelly's finding of common factual issues in the plaintiffs' claims relating to the health hazards of asbestos, the defendants' knowledge of

149. In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); see also Note, supra note 127, at 465 (noting Third Circuit approval of Rule 23(b)(3) class action in School Asbestos Litigation).

150. School Asbestos Litig., 789 F.2d at 1008.

151. Id. at 1002; see also Anti-Injunction Act, 28 U.S.C. § 2283 (1988) (prohibiting federal courts from enjoining proceedings in state courts except in a few specific circumstances).

152. School Asbestos Litig., 789 F.2d at 1005-06 (discussing problem of the "limited generosity class" analogous to the limited fund class). The court stated that "all persons with claims upon the 'limited fund' should be included in the 23(b)(1)(B) class." Id. at 1006. Because the class did not include all potential plaintiffs, the class was underinclusive. As a result, "separate actions by those who should properly be included in the class will go forward." Id. The Third Circuit indicated, however, that it did not hold that under-inclusiveness is necessarily fatal to a class created under 23(b)(1)(B); rather, each case requires a careful assessment of the factors mentioned in Rule 19. Courts should give particular attention to the possibility of prejudice either to those omitted from the class or to those within it.

Id. at 1007; see also Comment, The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts, 38 Emory L.J. 457 (1989) (arguing in favor of mandatory punitive damages classes with neutral, uniform standards for punitive damages).

153. School Asbestos Litig., 789 F.2d at 1002.

154. Id. at 1009.
those dangers, the defendants' failure to warn or test, and the defendants' concert of action or conspiracy relating to industry practices.\textsuperscript{155} Furthermore, the court concluded that the \textit{School Asbestos Litigation} claims presented common issues that predominated over individual ones and that the class action was superior to existing alternative methods of disposition.\textsuperscript{156}

The Third Circuit had two reservations concerning the \textit{School Asbestos Litigation} compensatory damages class action. First, the court expressed concern about the applicable law problem in a nationwide class action because variations in state products liability law might create problems for adjudication of the different districts' claims. Although the Third Circuit had "some doubts on this score," the plaintiffs satisfied the district court that class certification would not present insuperable obstacles to resolution of the applicable law problem.\textsuperscript{157} Second, the appellate court opined that "at the present stage, manageability is a serious concern."\textsuperscript{158} Nevertheless, the court indicated a willingness to permit Judge Kelly to adjudicate the litigation under class action procedures. Noting that the class certification was conditional, the Third Circuit concluded that "[w]hen, and if, the district court is convinced that the litigation cannot be managed, decertification is proper."\textsuperscript{159}

\textit{Jenkins} was a good precedent for \textit{School Asbestos Litigation}, particularly with respect to class resolution of common liability

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 1009-10. The complaint alleged claims based on theories of negligence, strict liability, breach of warranty, intentional tort, concert of action, and civil conspiracy. \textit{Id.} at 1009. With regard to the commonality issue, the Third Circuit agreed with the Fifth Circuit's decision in \textit{Jenkins} that the "threshold of commonality is not high." \textit{Id.} at 1010 (quoting \textit{Jenkins v. Raymark Indus.}, 782 F.2d 468, 472 (5th Cir. 1986)).
\item \textsuperscript{156} \textit{Id.} at 1010. The Third Circuit believed that \textit{Jenkins} presented more complex issues than \textit{School Asbestos Litigation} "because of the complexity of the causation questions in personal injury suits; that phase of a property damage claim is more straightforward." \textit{Id.}
\item \textsuperscript{157} \textit{Id.} For a discussion of the applicable law problem, see infra notes 219-55 and accompanying text.
\item \textsuperscript{158} \textit{School Asbestos Litig.}, 789 F.2d at 1011.
\item \textsuperscript{159} \textit{Id.} The Third Circuit recognized that, in approving the Rule 23(b)(3) class action, it was departing from general federal court reluctance to utilize the class action rule for mass tort litigation. Nevertheless, the Third Circuit seemed more than willing to permit Judge Kelly to try this option to deal with the asbestos litigation crisis:

\begin{quote}
We acknowledge that our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.
\end{quote}
\textit{Id.}
issues. Judge Kelly believed that the School Asbestos Litigation cases were a better vehicle for class resolution of compensatory damages because the range of damages would be more predictable than in personal injury cases. For him, certifying the class for punitive damages in an aggregate sum was the real innovation—an effort that the Third Circuit repudiated.

2. Class Composition: Opt-Out and Opt-In Litigants

The problem of opt-out litigants is present in every Rule 23(b)(3) class action. The opt-out option permits prospective class claimants to exclude themselves from the class and to avoid the preclusive effect of judgment. Opt-out claimants who pursue individual relief in separate lawsuits undermine the utility of class adjudication.

Problems stemming from opt-out plaintiffs were minimal during the various reformulations of the trial plan in Cimino. When Judge Parker provisionally certified Cimino as a Rule 23(b)(3) class action, at most only five or six plaintiffs opted out of the proposed class action. In addition, with the help of information supplied by plaintiffs' and defendants' counsel, Judge Parker separated several cases that were not compatible with the class action because of the type of employment, the type of exposure, or the lack of uniformity among the defendants being sued. Because a small group of plaintiffs' lawyers represented almost


161. See generally Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 Va. L. Rev. 845, 878 (1987) (noting that opt-out class may break apart, “causing excess expense and the inequitable resolution of similar cases”); Mullenix, supra note 127, at 1069-71, 1072-73 (commenting on problems relating to opt-out litigants and proposing restrictions on ability to opt out); Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, 16 U.S.F. L. Rev. 1 (1981) (arguing that opt-out plaintiffs should be precluded from asserting punitive damage claims where classwide claims for punitive damages have already been settled or adjudicated); Rosenberg, Of End Games and Openings, supra note 38, at 705-06, 714-15 (commenting on problems of opt-out litigants and proposing imposition of conditions on opt-out litigants to eliminate abuse and enhance use of class action device); Rubin, supra note 17, at 449 (“The right to opt out should be eliminated or restricted perhaps to those who can show grave hardship or who are willing to pay the full costs of litigation in another forum.”).

all claimants, Judge Parker was able to anticipate few opt-out claimants. Had he anticipated massive defection from a proposed class action, Judge Parker would not have certified the action for class action treatment.

Similarly, opt-out plaintiffs proved not to be a problem in School Asbestos Litigation. This class ultimately included over 35,000 school districts nationwide, with notices relating to settlement with one of the defendants sent to 35,711 school districts in 1989.\(^{163}\) Two or three rounds of opt-out procedure required claimants to send an affidavit excluding themselves from the action. On March 1, 1988, the plaintiffs supplied the court with a list of timely opt-outs submitted by individual schools and school districts, a list of timely opt-outs submitted by certain states, and a list of untimely opt-outs.\(^{164}\) This list served as the basis for defining the class membership.

Once the court defined the class membership, Judge Kelly issued an order restraining certain school districts from individually litigating claims against certain defendants.\(^{165}\) As late as January 1990, a few school districts petitioned Judge Kelly for reconsideration of class membership status, arguing that they opted out in a timely fashion but were required to remain in the class. Judge Kelly held firm to the exclusion notification date, however, and barred certain school districts from individual litigation against the defendants.\(^{166}\) This satellite litigation relating to class membership led to some unorthodox party alignments, as certain defendants supported individual school districts in their attempts to opt out of the class after the final exclusion date.\(^{167}\)

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\(^{164}\) Plaintiffs' List of Requests for Exclusion from Litigation Class, School Asbestos Litig., Docket No. 1179 (Mar. 1, 1988).

\(^{165}\) Order No. 183, School Asbestos Litig., Docket No. 1709 (Mar. 29, 1989) (restraining School District of Lancaster, Pennsylvania, from litigating individual claims against National Gypsum Co.).


\(^{167}\) See, e.g., Kaiser Cement Corp.'s Response to Akron City School District's Motion to Reconsider and/or Alter or Amend Order 205, School Asbestos Litig., Docket No. 2085 (Feb. 28, 1990).
Judge Kelly also experienced the reverse phenomenon when plaintiffs who previously excluded themselves from the class petitioned to opt in to the litigation.\footnote{168} The plaintiff class supported these excluded parties, whereas the defendants opposed their efforts.\footnote{169} Judge Kelly did not permit school districts that previously opted out to rejoin the litigation class because the plaintiffs received ample time and notice in which to decide whether to participate in the class action.\footnote{170} With regard to opt-in and opt-out litigants, Judge Kelly held firm on the class composition because, with 35,000 claimants, to do otherwise would lead to chaos.

3. **Subclasses**

Rule 23(c)(4) enables a court to adjudicate certain issues and create subclasses to assist in litigation of a class action.\footnote{171} Subclasses are one method of facilitating complicated mass tort class litigation.\footnote{172} Courts use them to sever common issues such as causation and damages in order to ensure class certification.\footnote{173} Indeed, in approving the Rule 23(b)(3) compensatory damages class in *School Asbestos Litigation*, the Third Circuit specifically

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\footnote{168}{See, e.g., Berne-Knox-Westerlo Central School District's Motion to Opt Into the Plaintiff Litigation Class, *School Asbestos Litig.*, Docket No. 2222 (May 15, 1990); County of Knox, Tennessee's Motion/Petition to Opt Into the Plaintiff Class, *School Asbestos Litig.*, Docket No. 2138 (Mar. 26, 1990).}


\footnote{170}{See, e.g., Pretrial Order No. 243, *School Asbestos Litig.*, Docket No. 2276 (June 25, 1990) (denying motion of Berne-Knox-Westerlo Central School District to opt into the plaintiff class); Order No. 232, *School Asbestos Litig.*, Docket No. 2217 (May 9, 1990) (denying motion of County of Knox, Tennessee, to opt into the plaintiff class).}

\footnote{171}{"When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and, the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P 23(c)(4).

\footnote{172}{See Mullenex, supra note 127, at 1074-75; see also Note, supra note 127, at 466-69 (subclasses may help to overcome barriers to class certification); Comment, *The Use of Federal Class Actions*, supra note 127, at 284 (utility of subclasses).}

cited Rule 23(c)(4)(A) as authority for the proposition that the class action was a feasible vehicle for adjudicating aggregate claims: "Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation." 174

Subclasses have not played a part in the ongoing management of these two actions. Although Judge Parker invited motions for subclasses, 175 he did not certify subclasses as part of Phases II and III of the trial plan. 176 Rather than create subclasses, Judge Parker severed the individual cases of certain nonconforming plaintiffs, such as seamen. 177 After the Fifth Circuit invalidated the trial plan and Judge Parker restructured the trial, the plaintiffs again moved for certification of subclasses, which Judge Parker denied. 178

By organizing plaintiff groups into five disease categories, however, Judge Parker designed Phases II and III of the trial plan to have the effect of subclasses. Because the method by which parties submitted evidence to the jury in Phase II equated to subclasses, Judge Parker saw no need for formal certification. 179 Judge Parker neither attributed the Fifth Circuit's invalidation of Phase II to the lack of subclasses nor believed that the certification of subclasses would have enhanced the validity

176. Order, Cimino, Docket at 78 (Dec. 29, 1989) (denying defendants' objections to the Oct. 26 trial plan); Memorandum and Order, Cimino, Docket at 58 (Oct. 26, 1989) (certifying a class action and scheduling a three-phase trial for Feb. 5, 1990), reprinted in Mealey's, supra note 80, at A-1.
177. See, e.g., Order, Cimino, Docket at 9 (Feb. 8, 1989) (ordering plaintiffs to file motions for proposed subclasses no later than Feb. 15, 1989); Response of Plaintiffs Opposing the Celotex Corp. and Carey Canada Inc. Motion for Subclass Consisting of Plaintiffs with Nonoccupational Exposure to Asbestos, Cimino, Docket at 29 (Mar. 23, 1989); Motion of Owens-Illinois, Inc. for Division of the Provisionally Certified Class into Subclasses, Cimino, Docket at 19 (Feb. 28, 1989); Motion of Plaintiffs for Subclass and/or Special Consideration of Merchant Seamen Plaintiffs, Cimino, Docket at 13 (Feb. 15, 1989).
178. See Motion of Plaintiffs for Certification of Subclasses, Cimino, Docket at 151 (Feb. 12, 1990).
179. Judge Parker anticipated that the jury would hear testimony on the exposure issue that disease category A contained x number of people. This testimony would be location or worksite specific, with the parties asking the jury to project percentages of claimants exposed to certain products. Judge Parker believed this presentation of evidence was equivalent to a subclass presentation.
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of Phase II.\textsuperscript{180} Ironically, when Judge Parker reorganized \textit{Cimino} as a Rule 42 consolidation, he structured Phase II exposure proof according to worksite groups and organized Phase III damages by disease categories.\textsuperscript{181}

The creation of subclasses in \textit{School Asbestos Litigation} proved to be a point of some contention. After the provisional class action certification, Judge Kelly notified all potential school district class members of the opportunity to elect exclusion from three subclasses.\textsuperscript{182} After the Third Circuit validated only the compensatory damages class, Judge Kelly scheduled oral argument on the content of the new class action notice. Several defendants opposed the inclusion of subclasses in the new class action, but the plaintiffs rallied in support of them.\textsuperscript{183} Judge Kelly resolved the subclass issue by denying the plaintiffs' request to give claimants the ability to opt out of the class by subclasses, thereby removing subclasses from the action.\textsuperscript{184}

Although plaintiffs have not made any subsequent motions for subclasses, Judge Kelly has not foreclosed the possibility of certifying subclasses in the future. He suggested that there might be an opportunity for subclasses after the liability phase of the trial, with possible damage subclasses for different types of asbestos providers. With regard to pretrial class management, however, Judge Kelly did not see the need for organization by subclasses or the potential utility of subclasses related to specific state law issues, even though the plaintiffs proposed subclasses by groups of plaintiffs and applicable law.

\textsuperscript{180} In hindsight, Judge Parker said that creating subclasses would have been easy, but he did not think subclasses would have affected the trial of issues.

\textsuperscript{181} Memorandum and Order, \textit{Cimino}, Docket at 159-60 (Mar. 5, 1990) (trial of Phase II exposure issue by 13 identified worksites and presentation of Phase III damages by five disease categories).

\textsuperscript{182} Pretrial Order No. 42, \textit{In re School Asbestos Litig.}, No. 83-0268, Docket No. 566 (E.D. Pa. Mar. 27, 1983) (class action notice order, specifying three opt-out subclasses: (1) compensatory damages subclass concerning asbestos containing ceiling and fireproofing materials, (2) compensatory damages subclass concerning asbestos containing pipe and boiler insulation, and (3) compensatory damages subclass concerning asbestos property that was not specified in two other categories); Memorandum and Order No. 20, \textit{School Asbestos Litig.}, Docket No. 307 (Sept. 28, 1984) (order certifying class actions and defining the class).


\textsuperscript{184} Memorandum and Order No. 90, \textit{School Asbestos Litig.}, Docket No. 1020 (July 31, 1987).
B. Related Jurisdictional Issues

1. Federal Subject Matter Jurisdiction in Diversity-Based Mass Tort Class Actions

The class action portions of Cimino and School Asbestos Litigation are grounded in federal diversity subject matter jurisdiction. Well-established class action jurisdictional rules require complete diversity between the class representatives and the defendants, as well as satisfaction of the federal amount-in-controversy requirement for each class member. Potential problems in satisfying these requirements are magnified in multistate mass tort actions because whether each class member has a bona fide claim in excess of the jurisdictional amount may be unclear. In addition, the amount-in-controversy requirement "would appear to bar federal mass tort class actions that involve noncatastrophic injuries or indeterminate damage claims." In Cimino, the defendants challenged the subject matter jurisdiction of Judge Parker's proposed class action trial plan, arguing that the court's proposed procedure undermined the amount-in-controversy requirement that each class plaintiff must individually satisfy. In overruling this objection, Judge Parker relied on the plaintiffs' allegation that "the 'amount in controversy exceeds $50,000 per case, exclusive of interest and costs.'" According to Judge Parker, this procedure did not contravene the amount-in-controversy requirement because Phase III re-

185. See 28 U.S.C. § 1332 (1988) (general diversity statute). The amount-in-controversy requirement was $10,000 at the time the plaintiffs filed these lawsuits, but Congress raised it to $50,000 in 1988. See also Zahn v. International Paper Co., 414 U.S. 291 (1973) (every claimant in the class must meet the amount-in-controversy requirement); Snyder v. Harris, 394 U.S. 332 (1969) (the statute requires complete diversity only between the named class representatives and defendants). Like most products liability and toxic tort litigation, asbestos litigation is based on state common law theories and hence is not susceptible of federal question jurisdiction under 28 U.S.C. § 1331. See Note, supra note 127, at 482-83 (discussing the amount-in-controversy requirement in noncatastrophic mass tort actions); Comment, The Use of Federal Class Actions, supra note 127, at 249-50 n.20 (1988) (mass tort cases meeting diversity jurisdiction requirements).

186. See Note, supra note 127, at 482.

187. Id. The author concludes, "Under present law, such victims, rather than being able to take advantage of the economies of a single nationwide class action in federal court, would at best be relegated to their respective state courts for relief in state-wide class actions or individual lawsuits." Id.

188. See Order, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 78 (E.D. Tex. Dec. 29, 1989) (overruling defendants' objections to October 26th trial plan order). The challenge was based on the requirement in Zahn, 414 U.S. at 301.

quired each plaintiff to submit proof of individual damages.¹⁹⁰

Soon after the Third Circuit's approval of the School Asbestos Litigation class certification, certain defendants contested subject matter jurisdiction on similar grounds. They argued that the plaintiffs failed to plead adequately the jurisdictional amount for each class member and that complete diversity did not exist between each and every plaintiff and defendant.¹⁹¹ The court received full briefing and held oral argument on the motions.¹⁹²

In response to the extensive briefing and hearing on the motions, Judge Kelly concluded that the complaints were deficient in pleading the amount-in-controversy requirement.¹⁹³ Judge Kelly cited Zahn v. International Paper Co.¹⁹⁴ for the rule that each plaintiff must meet the amount-in-controversy requirement and stated that "'one plaintiff may not ride in on another's coattails.'"¹⁹⁵ The court found insufficient the plaintiffs' assertions that "the vast bulk of class members have claims in excess of the $10,000 jurisdictional amount requirement and that only a few class members exist that may not allege the requisite amount."¹⁹⁶ The court further faulted the plaintiffs' lack of authority in support of their allegation that the number of unnamed plaintiff class members who did not meet the jurisdictional amount was minuscule.¹⁹⁷ As a result, the court dismissed the plaintiffs' complaints with leave to amend in order to conform with the requirements of 28 U.S.C. § 1332(a).¹⁹⁸

¹⁹⁰ Id. at 22-23.
¹⁹² See, e.g., Order No. 176, School Asbestos Litig., Docket No. 1700 (Mar. 23, 1989) (scheduling oral argument on Kaiser Gypsum’s and other defendants’ motion to dismiss for lack of subject matter jurisdiction). The defendants filed the motions pursuant to Rules 12(b)(1), 12(f), 12(h)(3), and 15(a). See also Transcript, supra note 191 (transcript of oral argument on subject matter jurisdiction challenges).
¹⁹³ Memorandum and Order No. 191, School Asbestos Litig., Docket No. 1739 (May 1, 1989).
¹⁹⁵ Memorandum and Order No. 191 at 2, School Asbestos Litig., Docket No. 1739 (May 1, 1989) (quoting Zahn, 414 U.S. at 301).
¹⁹⁶ Id. at 3.
¹⁹⁷ Id. In contrast, the defendants cited to United States Environmental Protection Agency reports concluding that approximately 60% of class member school districts did not have claims in excess of the jurisdictional amount. Id.
¹⁹⁸ Id. Judge Kelly rejected the defendants’ contention, however, that Zahn required a district court to dismiss an entire action if any of the class plaintiffs failed to meet the amount-in-controversy requirement. Id. at 3; cf. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1195 (6th Cir. 1988) (district court need not make amount-in-controversy determination immediately upon jurisdictional challenge); In re “Agent Orange” Prods. Liab.
After the plaintiffs filed an amended complaint asking the court to postpone a dismissal order, the defendants renewed their objection that the complaint failed to specify the class members whose claims satisfied the amount-in-controversy requirement. The defendants also renewed a challenge based on lack of complete diversity between all plaintiffs and all defendants.

Judge Kelly resolved the second round of subject matter jurisdiction challenges by denying all motions to dismiss and deferring ultimate resolution of the amount-in-controversy dispute until trial. He concluded, “Any potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. Caselaw supports postponement.” The court rejected definitively the defendants’ challenge to complete diversity, holding that the Pennsylvania local action doctrine did not apply to monetary damage claims based on transitory tort actions. Judge

Litig., 818 F.2d 145, 163 (2d Cir. 1987) (when plaintiff makes good faith claim as to amount-in-controversy, the court need not inquire as to sufficiency absent apparent justification); Memorandum and Order No. 191 at 3, School Asbestos Litig., Docket No. 1789 (May 1, 1989).


200. Kaiser Gypsum Co., Inc.’s Response, With Statement of Joiner by Other Defendants, to Class Plaintiffs’ Memorandum in Support of Amended Jurisdictional Allegations and Request for Implementation of Pretrial Order No. 191 by Dismissal of Class Allegations in each Amended Complaint, School Asbestos Litig., Docket No. 1779 (June 13, 1989); Certain Defendants’ Motion to Dismiss the Claims of Unnamed Class Members, and to Strike the Allegations of Class Representation from the Amended Complaints for Failure to Plead Subject Matter Jurisdiction, School Asbestos Litig., Docket No. 1778 (June 13, 1989).

201. Certain Defendants’ Motion to Dismiss the Claims of Unnamed Class Members, and to Strike the Allegations of Class Representation from the Amended Complaints for Failure to Plead Subject Matter Jurisdiction at 3, School Asbestos Litig., Docket No. 1778 (June 13, 1989).


203. Id. at 3-4. But see Fed. R. Civ. P 12(h)(3).

204. Memorandum and Order No. 197 at 7, School Asbestos Litig., Docket No. 1977 (Nov. 15, 1989). The amended complaints alleged claims based on negligence, strict liability, breach of warranties, concert of action, civil conspiracy, intentional tort, restitution, and malicious, reckless misconduct. Id., see also sources cited supra note 199.
Kelly left open the possibility that he could dismiss some school districts later if the defendants showed that the local action doctrine applied. He refused to certify his jurisdictional rulings for interlocutory appeal.

2. Personal Jurisdiction Challenges in Diversity-Based Mass Tort Class Actions

Personal jurisdiction in federal diversity actions derives from state jurisdictional rules under the *Erie* doctrine. In *Cimino* and *School Asbestos Litigation*, respectively, the Texas and Pennsylvania long-arm statutes determined personal jurisdiction. Despite the multiparty composition of the consolidated cases,

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It is possible that questions related to ownership of some particular buildings may arise later in the litigation. It is premature for the Court to dismiss the amended complaints for lack of subject matter jurisdiction on the basis of the "local action" doctrine as the amended complaints allege claims not bound to any issues of title or possession of real property.


208. See 42 PA. CONS. STAT. ANN. § 5301 (Purdon 1990); *TEX. CIV. PRAC. & REM. CODE ANN. § 17* (Vernon 1990).
neither Judge Parker nor Judge Kelly experienced a large number of personal jurisdiction challenges. Both judges handled these challenges in a routine, similar fashion. They permitted full briefing on the issue, allowed additional discovery relating to jurisdiction, and ultimately rejected all personal jurisdiction motions to dismiss.

Of the sixteen defendants in *Cimino*, three pursued Rule 12 motions to dismiss for lack of personal jurisdiction. Judge Parker summarily denied two of these motions, finding that in personam jurisdiction was exercisable under Texas law, but permitting an additional six months to conduct personal jurisdiction discovery and to petition for reconsideration of the rulings. Judge Parker referred the challenge of one defendant, Asbestos Corporation Limited (ACL), to Magistrate Judge Hines for a report and recommendation. ACL's presence in the lawsuit complicated the action because ACL, a Canadian corporation with all of its stock owned by the Quebec government, was engaged solely in the business of mining raw materials. ACL raised the standard jurisdictional argument that its contacts with Texas

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209. The three defendants were Walter Industries, Inc., Jim Walker Corp., and Asbestos Corp. Ltd. Beginning in early 1989, these three defendants filed numerous papers in support of their motions, with responses in opposition from the plaintiffs. See, e.g., Second Brief of Defendant Asbestos Corp. Ltd. in Support of its Supplemental Motion to Quash Service of Process and Dismiss for Lack of Jurisdiction, *Cimino* v. Raymark Indus., No. B-86-0456-CA, Docket at 53 (E.D. Tex. Sept. 6, 1989); Memorandum of Law of Defendant Jim Walter Corp. in Support of its Motion to Dismiss for Lack of Jurisdiction, *Cimino*, Docket at 36 (May 15, 1989); First Amended Motion of Defendant Walter Indus., Inc. to Dismiss, *Cimino*, Docket at 32 (Apr. 10, 1989); Response of Plaintiff in Opposition To Motion of Defendant Asbestos Corp. Ltd. to Quash Service of Process and to Dismiss First Complaint for Lack of In Personam Jurisdiction, *Cimino*, Docket at 20 (Mar. 2, 1989); Motion of Defendant Walter Indus., Inc. to Dismiss for Lack of Jurisdiction, *Cimino*, Docket at 8 (Feb. 7, 1989).

210. Judge Parker later denied the petition for reconsideration of the rulings. Order, *Cimino*, Docket at 86 (Jan. 9, 1990) (denying motion of Jim Walter Corp. to dismiss on grounds of lack of in personam jurisdiction); Order, *Cimino*, Docket at 37 (May 26, 1989) (denying Walter Industries' motion to reconsider April 19 order denying motion to dismiss for lack of personal jurisdiction, refusing to certify order for immediate interlocutory appeal, and giving parties six months in which to complete discovery on personal jurisdiction and to file for reconsideration); Order That Motion of Walter Industries to Dismiss for Lack of Personal Jurisdiction is Denied, *Cimino*, Docket at 33 (Apr. 19, 1989).

211. These facts induced ACL to raise several defenses, including statute of limitations, prohibition against double recovery, immunity from suit, international law principles, and jury trial and punitive damages under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1988). Judge Parker severed ACL for a nonjury trial, but determined that Texas law applied to the plaintiffs' claims against the corporation. He also acceded to ACL's sovereign immunity defense under the Foreign Sovereign Immunities Act, ruling that the statute barred punitive damages. Memorandum and Order, *Cimino*, Docket at 336 (June 15, 1990) (section V relating to defendant ACL).
were insufficient under minimum contacts jurisprudence to support an action against it in that state. Nonetheless, Magistrate Judge Hines recommended the denial of ACL's motion to dismiss, and Judge Parker approved his recommendation.

Only two of the more than fifty defendants named in School Asbestos Litigation, Kaiser Gypsum Co. and Kaiser Cement Corporation, assiduously pursued personal jurisdiction challenges to the Pennsylvania court's authority to adjudicate claims against it in the class action. After reviewing Pennsylvania's long-arm statute, Judge Kelly construed it to permit exercise of jurisdiction to the fullest extent that the Constitution allows and concluded that Kaiser Gypsum's activities fell within the reach of state jurisdiction. Nevertheless, because Kaiser Gypsum was no longer doing business in the Eastern District of Pennsylvania at the time of the complaint, Judge Kelly dismissed the claims against Kaiser Gypsum for lack of venue.

Kaiser Cement Corporation contested personal jurisdiction because it never shipped any of its products to Pennsylvania. The class plaintiffs argued in response that Kaiser Cement's representations were incomplete and based on evasive interrogatory answers and that the plaintiffs' independent investigations revealed that the defendant's contacts with Pennsylvania were pervasive. In July 1990, Judge Kelly ruled that Kaiser Cement waived its personal jurisdiction defense through its extensive involvement in the ongoing litigation.

217. Plaintiffs' Response to Motion of Kaiser Cement Corporation to Dismiss for Lack of Personal Jurisdiction, School Asbestos Litig., Docket No. 2244 (May 30, 1990); see also Kaiser Cement Corporation's Reply to Plaintiff's Untimely Response to Motion to Dismiss for Lack of Personal Jurisdiction, School Asbestos Litig., Docket No. 2263 (June 18, 1990).
III. Applicable Law Considerations

Mass tort actions, whether litigated as class actions or consolidated proceedings, present complex choice-of-law problems. Because federal diversity jurisdiction is the basis for most multistate, multiparty mass tort actions, the *Erie* doctrine and *Klaxon Co. v. Stentor Electric Manufacturing Co.* require a federal court to apply the substantive law and choice-of-law rules of the state in which the federal court sits. Variations in state substantive law are necessary in airline disaster litigation; *Lowenfeld, Mass Torts and the Conflict of Laws: The Airline Disaster, 1989 U. Ill. L. Rev. 157* (arguing that national substantive law is necessary in airline disaster litigation); *Miller & Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1* (1986) (calling for limits on choice-of-law to prevent forum shopping, unfairness to defendants, and interference with state sovereignty); *Rosenberg, Of End Games and Openings, supra note 38, at 721-22* (proposing an applicable law solution for nationwide class action); *Torchiana, Choice of Law and the Multistate Class: Forum Interests in Matters Distant, 134 U. Pa. L. Rev. 913* (1986) (arguing that constitutional concerns can be met without destroying the class action device); *Varo, Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?, 54 Fordham L. Rev. 167* (1985) (discussing the application of federal common law in mass tort cases); *Note, Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency, 47 Alb. L. Rev. 1180* (1983) (arguing that differences in state laws should not preclude a finding of commonality of claims); *Note, Choice of Law and the Supreme Court: Phillips Petroleum Co. v. Shutts, 19 Conn. L. Rev. 171* (1986) (choice-of-law problems in state class actions); Note, *supra note 127, at 485-86* (discussing proposed choice-of-law principle for Rule 23 class action); *Note, Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse, 96 Yale L.J. 1077* (1987) (proposing that Congress enact a choice-of-law statute enabling federal courts to make choice-of-law decisions promoting equity and efficiency); *Comment, supra note 152, at 479-86* (arguing that *Klaxon* should not apply in mass tort cases); *Comment, The Use of Federal Class Actions, supra note 127, at 253* (choice-of-law problems relating to class certification).


220. 313 U.S. 487 (1941).

221. *Erie* and *Klaxon* require federal courts to apply state choice-of-law rules when determining applicable substantive law in diversity cases. Because *Cimino and School Asbestos Litigation* did not involve consolidation under federal transfer provisions, these cases did not implicate either *Van Dusen v. Barrack*, 376 U.S. 612 (1964), or *Ferens v. John Deere Co.*, 110 S. Ct. 1274 (1990). According to *Van Dusen*, the transferee court applies the law of the transferor court in defendant-initiated transfers under 28 U.S.C. § 1404(a); according to *Ferens*, the court applies the same *Van Dusen* rule in plaintiff-initiated transfers under 28 U.S.C. § 1404(a).
law are a potential impediment to class certification because they undercut the requirements of factual commonality and similarity of legal claims. At least two federal courts attempted unsuccessfully to solve the applicable law problem in mass tort cases by applying a federal common law of torts. Because most appellate courts resist the notion of a uniform federal common law, however, federal district judges in mass tort cases face difficult choice-of-law decisions.

A. Erie Problems in a Districtwide Consolidated Mass Tort Case

When Special Master Jack Ratliff recommended certifying the Rule 23(b)(3) class action in Cimino, he commented that if this aggregation of asbestos cases could not be certified for class action treatment, then no class action ever could. He based this assessment on the fact that the certification was limited to the district, the number of plaintiffs' attorneys and defendants was small, and only one law applied. Thus, complications that existed in other multistate, multiparty mass tort cases were not endemic to Cimino. Ironically, applicable law under the Erie doctrine eventually played a decisive role in the case.

The Erie doctrine affected Cimino in three ways. First, the application of Texas law defeated Judge Parker's proposed class action treatment for Phase II of the trial plan. Second, a revision in Texas tort law during the pendency of the action forced Judge Parker to group cases by date and to instruct the jury as to two different applicable Texas statutes. Third, Klaxon principles required Judge Parker to determine separately the appropriate rules of liability for the foreign defendant, ACL.

225. Jenkins v. Raymark Indus., 782 F.2d 468, 474 (5th Cir. 1986).
Erie’s most significant impact on Cimino occurred in the Fifth Circuit’s invalidation of Judge Parker’s class action trial plan.226 The appellate court rejected Judge Parker’s proposed class action treatment of liability in Phase II because the plan violated Texas law by effectuating a change in substantive duty through procedural innovation.227 Texas precedent required plaintiffs in products liability actions to prove individually both causation and damage.228 Judge Parker’s plan—to supply proof for 2,990 class members through expert testimony regarding their similarity to forty-one plaintiffs—did not comport with the requirements of Texas law: “That procedure cannot focus upon such issues as individual causation, but ultimately must accept general causation as sufficient, contrary to Texas law.”229

Texas law also affected the structure of Judge Parker’s class action and consolidated proceedings with regard to damages. Judge Parker intended for the jury to apportion responsibility for any award of actual damages among the defendants. In 1987, however, the Texas legislature changed the law regarding apportionment of damages.230 Judge Parker therefore divided the class into pre- and post-1987 claimants so that the jury could consider the two groups of cases according to the different requirements of Texas law231 This separation of pre- and post-1987 claims, originally recommended in the special master’s report,232 remained throughout all subsequent modifications of the Cimino trial plan. As for punitive damages, Judge Parker summarily dismissed the defendants’ objection that trying punitive damages before compensatory damages violated Texas law, suggesting that the court in Jenkins v. Raymark Industries, Inc.233

227. The core problem is that Phase II, while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority. It infringes upon the dictates of Erie that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches.

Id. at 711.

228. Id. at 711 n.4, 711-12 (relying on Gaulding v. Celotex Corp., 772 S.W.2d 66, 77 (Tex. 1989)).
229. Id. at 711-12.
233. 782 F.2d 468 (5th Cir. 1986).
definitely resolved the permissibility of trying punitive damages first.\(^{234}\)

The third choice-of-law problem, albeit a relatively minor one, involved the liability rules applicable to the foreign defendant, ACL. Judge Parker severed the claims against ACL because it was an instrumentality of a foreign sovereign and conducted a bench trial of the plaintiffs' claims against it. ACL contended that, as a corporation owned in part by Quebec and doing its mining business in Quebec, it was subject to Quebec law. Judge Parker first determined that the Foreign Sovereign Immunities Act governed sovereigns and their instrumentalities.\(^{235}\) Because the Act does not contain an express choice-of-law rule, he held that a federal court was bound by the choice-of-law rules in the forum state in which it sits and that Texas had adopted the "most significant relationship" approach for choice-of-law in tort actions.\(^{236}\) Applying these principles, Judge Parker determined that Texas law applied to the plaintiffs' claims against ACL.\(^{237}\)

B. Klaxon Problems in a Nationwide Class Action

As a nationwide class action involving more than 35,000 plaintiffs and nearly fifty defendants, School Asbestos Litigation presented potential problems of chaos and unmanageability. Initially, the defendants opposed the class action in part because of the multiple variations in state substantive tort law. To ameliorate this potential problem, the plaintiffs proposed creating subclasses by groups of claimants and applicable law. They abandoned this approach, however, and agreed to meet the strictest state requirements on liability issues that arose during the litigation. The Third Circuit recognized the potential problems, but nonetheless agreed to approve the class and allow Judge Kelly to work out choice-of-law questions as they developed in the case.\(^{238}\)

\(^{234}\) Order at 26-28, Cimino, Docket at 78 (Dec. 29, 1989) (relying on Jenkins, 782 F.2d at 474).

\(^{235}\) Memorandum and Order, Cimino, Docket at 336 (June 15, 1990); see also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988).

\(^{236}\) Memorandum and Order at 18, Cimino, Docket at 336 (June 15, 1990). The court also agreed with the Ninth Circuit's construction that the Foreign Sovereign Immunities Act contained no implicit choice-of-law rule with regard to claims for actual damages based on negligence. See Liu v. Republic of China, 892 F.2d 1419, 1425-26 (9th Cir. 1989).

\(^{237}\) Judge Parker determined that Texas adopted the most significant relationship approach in accordance with §§ 6 and 145 of the Restatement (Second) of Conflict of Laws (1971). Memorandum and Order at 18-19, Cimino, Docket at 336 (June 15, 1990) (relying on Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979)).

\(^{238}\) In re School Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986).
The plaintiffs represented that applicable law would not present insuperable obstacles to class action litigation,239 and, true to this representation, the plaintiffs have not opposed Judge Kelly's choice-of-law decisions by individual motions.240

Judge Kelly used Pennsylvania choice-of-law rules to decide choice-of-law questions on a motion-by-motion basis. His application of Pennsylvania choice-of-law principles combines an "interest analysis" with the "significant contacts" approach of the Restatement (Second) of Conflict of Laws.241 This approach led Judge Kelly to apply the laws of Virginia, South Carolina, Tennessee, Georgia, and other states to grant partial or complete summary judgment for defendants on liability or limitations issues.242 When the plaintiffs challenged the constitutionality of a state's statute of repose, Judge Kelly certified the question to the state's Attorney General with a request that the Attorney General file a memorandum with the court concerning the constitutionality of the challenged repose statute.243

239. To meet the problem of diversity in applicable state law, class plaintiffs have undertaken an extensive analysis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles. Although we have some doubt on this score, the effort may nonetheless prove successful.

Id. at 1010.


242. See, e.g., Memorandum and Pretrial Order No. 238, School Asbestos Litig., Docket No. 2242 (May 25, 1990) (applying Georgia statute of limitations to grant summary judgment to 31 defendants against all Georgia plaintiffs); Memorandum and Order No. 224, School Asbestos Litig., Docket No. 2128 (Mar. 20, 1990); Memorandum and Order No. 220, School Asbestos Litig., Docket No. 2124 (Mar. 20, 1990) (applying Tennessee law and granting partial summary judgment to defendant against plaintiffs' restitution claims); Memorandum and Order No. 167, School Asbestos Litig., Docket at 1644 (Jan. 27, 1989).

243. Pretrial Order No. 247, School Asbestos Litig., Docket No. 2285 (July 6, 1990) (certifying question of constitutionality of Hawaii statute of repose to Hawaii Attorney General, pursuant to 28 U.S.C. § 2403(b); see also Plaintiffs' Response to Certain Defendants Motion for Partial Summary Judgment as to the Claims of Hawaii Schools, School Asbestos Litig., Docket No. 2254 (June 8, 1990); Certain Defendants' Reply to Plaintiffs'
On first reflection, Judge Kelly's solution to the applicable law problem seems to illustrate the difficulty of multiple applicable laws in a nationwide, diversity-based mass tort action. In practice, however, the difficulty has not proved unduly burdensome to Judge Kelly. He simply has determined applicable law on a motion-by-motion basis. This method has enabled defendants to defeat liability to certain plaintiffs in certain states. It remains to be seen whether this motion-by-motion resolution under different states' substantive law will yield inconsistent results for class claimants. Judge Kelly still faces major choice-of-law questions concerning applicable law at trial.

C. Statute of Limitations Problems

Mass tort cases involving latent injuries frequently entail complicated technical and legal questions relating to proof of causation and statutes of limitations. In latent injury cases, the long period of time between the initial exposure to a toxic substance and the manifestation of injury creates an obstacle to recovery. In addition, exposure to other toxic substances during the latency period raises intervening cause defenses. Furthermore, nationwide class actions such as School Asbestos Litigation raise the spectre of disparate statutes of limitations under conflicts rules. These interrelated problems have generated debate concerning

Response to Motion for Summary Judgment Regarding Hawaii School Building Claims, School Asbestos Litig., Docket No. 2277 (June 26, 1990); Certain Defendants' Notice that Plaintiffs Have Triggered the Court's Duty Under 28 U.S.C. 2403(b) to Certify to the Attorney General of Hawaii that the Constitutionality of a Hawaii Statute has been Drawn in Question, School Asbestos Litig., Docket No. 2278 (June 26, 1990).


the ability of aggregative procedure to preserve individualized statute of limitations defenses.246

Believing that the class action frustrated their ability to raise individual statute of limitations defenses, the defendants in Cimino opposed Judge Parker's proposed class action trial plan.247 Judge Parker denied all objections to the trial plan and devised a dual approach to solve problems relating to the statute of limitations defense.248 First, the jury would address statute of limitations issues on a classwide basis during Phase II of the trial.249 Then, during proposed Phase III, the court would examine the filing date of each plaintiff's case and the evidence concerning each plaintiff's exposure to asbestos for purposes of the damages determination.250 "In this manner," stated Judge Parker, "the Court will be able to eliminate from sharing in the Jury's award of damages those Plaintiffs whose cases are barred by the statute of limitations."251 Although the Fifth Circuit invalidated Phase II of Judge Parker's proposed class action trial, the court made no mention of the proposed class damages and individualized treatment of the statute of limitations defense in Phase III.252 When Cimino finally went to trial in July 1990, Judge Parker deferred all statute of limitations defenses to postverdict motions.253

In a May 1990 pretrial order setting forth issues to be tried during Phase I of School Asbestos Litigation, Judge Kelly indicated that Phase I would include the trial of "common de-

246. See Rosenberg, Of End Games and Openings, supra note 38, at 718 (advocating the averaging of statute of limitations defenses by sampling the class to determine the frequency that the defense denies or reduces recovery). Professor Rosenberg writes, "Then, based on the probability of each successful defense, recovery would be discounted in all cases where the defense might plausibly be raised." Id.

247. See, e.g., Motion of Defendant Fibreboard Corp. to Vacate or Amend the October 26, 1989 Order or to Certify the Order of October 26, 1989, for Interlocutory Appeal, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 64 (E.D. Tex. Nov. 13, 1989); Objections of Defendant Asbestos Corp. to Court's Memorandum and Order of Consolidation and Certification of Class, Cimino, Docket at 67 (Nov. 13, 1989); Objections of Defendant Pittsburgh Corning to Court Certification of Class Action and Motion for Reconsideration, Cimino, Docket at 67 (Nov. 14, 1989).


249. Id. at 2-3.

250. Id. at 3-4.

251. Id. at 22 (court to examine medical records, medical examination results, and depositions to determine availability of statute of limitations defense).

252. See In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).

253. The defendants continued to raise limitations defenses prior to trial. See, e.g., Order, Cimino, Docket at 146 (Feb. 5, 1990) (court to make determination on defendant's motion concerning applicability of Texas statute of repose based on evidence presented at trial); Order, Cimino, Docket at 143 (Feb. 2, 1990) (same).
fenses. Whether this will include statute of limitations defenses and, if so, how this will be staged as a matter of common proof remains unanswered. During pretrial proceedings, however, Judge Kelly considered statute of limitations defenses on a motion-by-motion basis, similar to his disposition of choice-of-law issues.

IV. PRETRIAL PROCEEDINGS

Complex civil litigation involving multiple parties and multiple claims gives rise to massive, complicated discovery. Various judicial management techniques, many recommended in the Man-
assist in the judicial regulation of extensive pretrial proceedings. Numerous federal courts handle asbestos litigation through such techniques as districtwide standing pretrial orders, standard interrogatories, detailed scheduling orders, and cooperative lawyer actions limiting filings and paperwork.\textsuperscript{258} Judges Parker and Kelly used pretrial conferences and hearings to organize counsel, set scheduling orders, formulate discovery plans, and issue rulings on pretrial motions. In addition, both judges extensively used magistrate judges to handle routine motions and to resolve discovery disputes.\textsuperscript{259}

A. Pretrial Conferences, Organization of Counsel, and Attorneys' Fees

Rule 16 has five stated goals: (1) to expedite the disposition of an action; (2) to establish early and continuing control so that a case will not be protracted because of a lack of management; (3) to discourage wasteful pretrial activities; (4) to improve the quality of the trial through more thorough preparation; and (5) to facilitate case settlement.\textsuperscript{260} To achieve these goals, the rule requires the court to issue a scheduling order limiting the time to join other parties, to file and hear motions, and to complete discovery no more than 120 days after the filing of a complaint.\textsuperscript{261}

In general, Judges Parker and Kelly used pretrial conferences sparingly. They preferred to hold telephone conferences or to rule on paper motions. Both judges organized the class actions early and regulated the proceedings through scheduling orders.

\begin{itemize}
  \item \textsuperscript{257} Manual for Complex Litigation, Second § 21.41-48 (1985) (discovery recommendations).
  \item \textsuperscript{258} T. Willgeng, supra note 7, at 15-24 (standardized pretrial procedures, including motions, discovery, and rulings); T. Willgeng, supra note 1, at 47-50 (paperwork management techniques).
  \item \textsuperscript{259} 28 U.S.C. § 636(b)(1)(A) (1988) permits the referral of nondispositive pretrial matters and factual disputes to a magistrate judge for rulings, including supervision of discovery or discovery disputes. See also 28 U.S.C. § 636(b)(1)(B) (permitting magistrate judges to submit to judges findings of fact and recommendations for disposition); Manual for Complex Litigation, Second § 21.53. Judges Kelly and Parker referred motions relating to personal jurisdiction and venue to Magistrate Judges Naythons and Hines, respectively.
  \item \textsuperscript{260} Fed. R. Civ. P 16(a).
  \item \textsuperscript{261} Id. The court also may order dates for other pretrial conferences, a final pretrial conference, and "any other matters appropriate in the circumstances of the case." \textsuperscript{Id.}, see also Fed. R. Civ. P 16(c), (d), (e), (f) (delineating the subjects to be discussed at pretrial conference, governing final pretrial conference, discussing the pretrial order, and imposing sanctions for failure to obey court's pretrial orders).
Because of Judge Parker's long-standing relationship with asbestos personal injury litigation and his familiarity with most of the lawyers in *Cimino*, he had less need to meet with the attorneys. By the time *Cimino* was certified, the conduct of asbestos litigation in the Eastern District of Texas followed standardized pretrial procedures. A standing order with detailed provisions concerning the filing of papers and the regulation of discovery governed asbestos cases. A master set of interrogatories and requests for admissions supplemented this standing order. All pretrial motions filed in the Beaumont Division were referred to Magistrate Judge Hines.

Through a series of rapidfire scheduling orders, Judge Parker held the parties to tight, rigid deadlines. In order to focus the attorneys' efforts exclusively on *Cimino*, Judge Parker issued an order protecting the class counsel and the defendants' liaison counsel from having to conduct discovery or appear in any other case pending in state or federal court during the *Cimino* trial. Judge Parker also issued a series of scheduling orders detailing short deadlines for such matters as the conduct of discovery, the exchange of tentative and final exhibit lists, the designation of fact and expert witnesses, and the filing of dispositive motions.

The issue of attorneys' fees and the problems of financing complex class actions generated a great deal of controversy because of the high fees that plaintiffs' attorneys have received from asbestos awards and settlements.

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263. See Defendants' Master Set of Interrogatories (E.D. Tex. filed Sept. 1, 1982); Plaintiff(s) Master Set of Interrogatories and Request for Admissions (E.D. Tex. filed Dec. 8, 1982).


265. See, e.g., Order, *Cimino*, Docket at 45 (July 19, 1989) (ordering plaintiffs' and defendants' liaison counsel to meet to attempt to agree on uniform discovery requests); Order, *Cimino*, Docket at 44 (July 14, 1989) (overruling objections to plaintiffs' discovery requests and ordering defendants to comply within 30 days); Order, *Cimino*, Docket at 37 (June 28, 1989) (giving parties six months to complete discovery on jurisdictional issue).


268. See generally J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom, & M. Shanley, *Variation in Asbestos Litigation Compensation and Expenses* 628-43 (1984) (summarizing the average characteristics of asbestos claims from 1980 to 1982 and analyzing the ratio between litigation expense and compensation); Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625 (1987) (discussing the incentives to plaintiffs' attorneys in various reform proposals); Coffee, *The Regulation of Entrepreneurial Liti-
Three points characterized Judge Parker's handling of attorneys' fees. First, Judge Parker typically made fee determinations as settlements were achieved with individual defendants. Second, rather than overriding them, Judge Parker permitted contractual arrangements with the plaintiffs to govern attorneys' fees. For example, in the instance of a twenty-one million dollar settlement, Judge Parker specifically indicated that "[t]he Court does not impose a limitation of the attorney fees which are recoverable as a result of this settlement," but held the plaintiffs "bound to the terms of their contingent fee agreements" with the plaintiffs' attorneys. Third, Judge Parker permitted settle-

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269. See, e.g., Partial Judgment, Cimino, Docket at 315 (June 2, 1990) approving settlement and allowing recovery of attorney fees; Order, Cimino, Docket at 146 (Feb. 5, 1990) (approving settlement with H.K. Porter, including provision for attorneys' fees); Order, Cimino, Docket at 33 (Apr. 18, 1989) (approving settlement with Center for Claims Resolution, including provision for attorneys' fees).

ant awards to finance the ongoing class litigation and ordered the creation of an interest-bearing account to offset litigation expenses.271

Like Judge Parker, Judge Kelly organized the class action in School Asbestos Litigation very early in the case. During the past seven years of ongoing litigation, he conducted only a few, widely spaced pretrial conferences.272 Although Judge Kelly preferred to rule on motions by written submission, when he held oral hearings he consolidated argument on several motions.273 He refrained from the detailed scheduling orders and short deadlines that Judge Parker used in Cimino.

Due to the large number of litigants, this nationwide class action required a formal organization of counsel.274 At the outset of the case, Judge Kelly designated two lead counsel for the plaintiffs and a liaison counsel for the defendants.275 Sixteen months later, he set up five litigation committees: an executive committee; an administrative committee; a liability and trial committee; a legal committee; and a settlement committee.276


274. See generally E. SHERMAN & R. MARCUS, COMPLEX LITIGATION, CASES AND MATERIALS IN ADVANCED CIVIL PROCEDURE 643-54 (1985) (discussing lead and liaison organization of counsel in complex cases).


276. Pretrial Order No. 24, School Asbestos Litig., Docket No. 351 (Nov. 7, 1984). Judge Kelly directed lead counsel to cooperate with one another, to consult with the executive committee, and to receive a majority vote of the executive committee before proceeding
With few changes in personnel, this committee structure functioned throughout seven years of litigation and continues to operate as the litigation proceeds to trial.

The original executive committee was composed of ten law firms and individual lawyers. The order assigned five duties and responsibilities to this committee:

1. To coordinate briefing and arguments of motions and the filing of briefs,
2. To initiate and conduct class discovery and present the [class] position during trial,
3. To discuss settlement or negotiate with defense counsel,
4. To call meetings of counsel, providing due notice, when it is deemed appropriate; and
5. To perform such other duties as deemed necessary 277

The original administrative committee consisted of six plaintiffs' attorneys who were responsible for all administrative functions, such as receiving and distributing notices, orders, and communications that the court generally did not distribute to all lawyers.278 The liability and trial committee consisted of nine lawyers who prepared the plaintiffs' case on liability and damages.279 The legal committee's five members were responsible for briefing legal argument of all motions.280 Finally, the settlement committee, which consisted of seven members, was responsible for conducting all settlement negotiations.281 The court's directive to "make all work assignments in such a manner as to lead to the orderly and efficient prosecution of this litigation and avoid duplicative or unproductive efforts" required that the committee chairs consider "the qualifications and experience" of counsel when making assignments.282

with any major decision in the class action. The order defined "major decisions" to include decisions to enter into settlement negotiations with defendants, decisions to recommend acceptance of a settlement offer, and decisions to add lawyers to the executive committee.

Judge Kelly did not create a parallel committee structure for defendants' counsel.

277. Id. at 2-3. The liability and trial committee was to coordinate discovery; the settlement committee was to coordinate settlement negotiations. The order did "not preclude any defendant from initiating individual settlement discussions with any representative of any public or private school district unless otherwise ordered by this court."

278. Id. at 3.
279. Id. at 3-4.
280. Id. at 4.
281. Id.
282. Id.
At the outset of School Asbestos Litigation, Judge Kelly issued a pretrial order governing the award of counsel fees and expenses. This order required each attorney or law firm expecting an award of fees to file a statement under seal each month concerning the prior month's activities relating to the litigation and detailed specific information to be included in the attorneys' affidavits. Attorneys in the case have been satisfying this requirement. When the first major settlement was achieved, the class plaintiffs requested an order authorizing reimbursement of past expenses and the creation of a litigation fund to pay for contemplated future expenses. Judge Kelly granted this motion and created a litigation escrow account to finance the class action.

B. Discovery Plans and Regulation of Discovery

Both Cimino and School Asbestos Litigation entailed massive discovery efforts with hundreds of discovery events. Judges

284. Id. The information required by the court included:
   (a) A narrative summary of the specific contributions made by the attorney for the benefit of the class as well as a summary of the work [of] each attorney and legal assistant in the firm for whom compensation is requested.
   (b) The number of hours or fraction thereof and an explanation specifically describing the tasks performed by each attorney and legal assistant.
   (c) The hourly billable rate which the attorney/firm normally charges for each attorney and legal assistant for similar types of work/service.
   (d) The hours billed to other clients by the attorney and legal assistant on non-class action matters during the time period.
   (e) If the time or rate of any attorney who is not a partner or employee of the firm submitting the statement is included, the submitting attorney must include [information relating to fee allocation] together with a statement of the reasons why it was necessary to enter into such arrangements.
   (f) The initial statement for each attorney or legal assistant shall include a resume of the background and qualifications of such person.

Id. at 1-2.

The court's order also indicated that it was not applicable "to the award of counsel fees as a sanction for the filing of frivolous motions or for the failing to properly respond to discovery requests." Id. at 2. Judge Kelly also ordered that attorneys itemize expenses and support them with original documentation. Id. at 2-3.
285. Class Plaintiffs' Motion for an Order Authorizing Reimbursement of Past Expenses and the Creation of a Litigation Fund to Pay for Contemplated Future Expenses, School Asbestos Litig., Docket No. 1244 (Apr. 28, 1988) (motion to withdraw funds from settlement fund created by settlement with defendants Owens-Illinois, Inc. and Proko Industries, Inc.).
287. For commentary relating to complex litigation discovery, see supra notes 256-58.
Parker and Kelly regulated discovery through similar procedures: scheduling orders mandating discovery deadlines, referral of discovery matters to magistrate judges, and rulings on contested discovery decisions. Typical of their different case management styles, Judge Parker controlled discovery more aggressively whereas Judge Kelly permitted attorneys to proceed with discovery at their own pace with virtually no interference from the court.288

As suggested above, standing orders relating to pleading and discovery generally governed Cimino.289 Even before Judge Parker provisionally certified the class action, opposing counsel made many discovery requests.290 To deal with developing discovery contention, Judge Parker ordered plaintiffs' counsel and defendants' liaison counsel to agree upon a uniform set of discovery requests and indicated that the court would not entertain objections to such agreed-upon discovery requests.291 The court referred discovery matters to Magistrate Judge Hines, who met with the parties to resolve discovery problems.292

After provisional certification, Judge Parker streamlined discovery by eliminating notice filings for depositions,293 by referring as many discovery matters as possible to Magistrate Judges Hines and McKee, and by issuing successive scheduling orders.294 He assigned Magistrate Judge Hines the task of formulating a plan for pretrial discovery Magistrate Judge Hines' plan ordered that all depositions occur between November 17, 1989, and Feb-

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288. Only in July 1990 did Judge Kelly express impatience with the pace of discovery in School Asbestos Litigation and order attorneys to meet short discovery and pretrial deadlines. See Pretrial Order No. 249, School Asbestos Litig., Docket No. 2294 (July 16, 1990) (expressing judge's frustration at parties' failure to meet expert witness discovery and pretrial memoranda deadlines despite knowing of deadline for 17 months).

289. See supra note 262.

290. See, e.g., Memorandum and Order, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 44 (E.D. Tex. July 14, 1989) (responding to plaintiffs' motion to compel answers and overruling defendant Asbestos Corp. Ltd.'s objections to plaintiffs' discovery request); Motion of Plaintiffs for Protection from Multiple, Redundant Discovery Requests, Cimino, Docket at 35 (May 10, 1989); Memorandum of Plaintiff in Support of Motion to Compel Discovery and Sanctions, Cimino, Docket at 35 (May 9, 1989).


292. See, e.g., Hearing on the Defendant's Motion to Quash a Deposition, Cimino, Docket at 58 (Oct. 13, 1989); Request of Plaintiffs for Hearing on All Discovery Pending, Cimino, Docket at 55 (Oct. 12, 1989); Hearing to Resolve Objections, Cimino, Docket at 53 (Aug. 24, 1989).

293. Order, Cimino, Docket at 328 (June 8, 1990) (sua sponte order eliminating filing requirement for notice of deposition except when opposing party objected to the taking of the deposition).

294. See supra notes 265-67 and accompanying text.
February 3, 1990, the scheduled trial date. The depositions were to occur at plaintiffs’ offices or any other mutually agreed-upon location and were limited to forty-five minutes. The plan also permitted individual medical examinations of class claimants, but required that the examinations occur in Beaumont, Texas, and that all phases of the medical examination be completed within eight hours of the individual’s scheduled appointment time. Over the defendants’ objections, Judge Parker adopted Magistrate Judge Hines’ discovery plan and held the defendants to the discovery limitations throughout the ensuing months of pre-trial discovery. He expedited matters further by permitting the attorneys to proceed with discovery on later trial phases while Phase I proceeded.

295. Discovery Plan and Schedule For Deposition and Medical Examination of Plaintiffs, Cimino, Docket at 63 (Nov. 9, 1989). This plan proved highly controversial. The magistrate judge proposed limiting discovery to a statistically significant sample of plaintiffs, but the defendants insisted on individualized discovery for each claimant, including individual depositions and medical examinations. Magistrate Judge Hines compromised by permitting discovery of all 3,031 claimants in the class, but imposing time and place limitations on those depositions and medical examinations. Id. at 1-2.

296. Id. at 3-4. The plan anticipated completion of 704 depositions in November, 1,160 depositions in December, and 1,360 depositions in January. See id. Attachment C (45-minute plan).

297. Id. at 4-5.

298. The defendants objected that this discovery plan unconstitutionally restricted trial preparation. As a practical matter, they argued that the time limitations were infeasible and that Beaumont’s medical facilities were insufficient to handle the volume of medical examinations within the designated timetable. In sustaining the discovery plan, Judge Parker noted that

[the court’s decision to allow depositions and medical examinations of all the Plaintiffs in this action was made solely for the benefit of the Defendants. These procedural safeguards are not available in the typical class action. In the usual class action, a group of class members are allowed to represent the interests of the entire class of plaintiffs.


300. See, e.g., Order Relating to the Resolution of Certain Discovery Matters, Cimino, Docket at 251 (May 11, 1990) (ordering that the 45-minute time limit for plaintiffs’ depositions would remain in effect).

301. See, e.g., Order, Cimino, Docket at 77 (Dec. 20, 1989) (discovery deadlines); Order,
Notwithstanding all these efforts, Judge Parker was disturbed by the amount and expense of discovery, which he viewed as unnecessary. In retrospect, he regretted not limiting discovery to the 160 claimants comprising the sample for Phase III. Relatively few discovery challenges, however, accompanied the high volume of discovery conducted in the case—defendants conducted over 2,000 plaintiff depositions and 1,500 independent medical examinations.

Discovery in *School Asbestos Litigation* proceeded in a somewhat different fashion. From the initial filing of the complaint through class certification, very little discovery activity occurred, primarily because the parties were engaged in various jurisdictional motions or matters relating to class certification. Once the class was certified, however, the parties submitted a suggested comprehensive discovery plan, and the court agreed to hear oral argument on that plan. Judge Kelly issued a comprehensive discovery order setting a deadline for completion of all discovery in the action and detailing specifics relating to the conduct of discovery. The order also stated that he would schedule a final pretrial conference forty-five days after the discovery deadline. Failure to meet these deadlines prompted Judge Kelly’s expression of frustration in July 1990.

The three central components of the *School Asbestos Litigation* discovery order related to written discovery, production of documents, and depositions. For written discovery, the court ordered attorneys for each side to develop standard sets of interrogatories, requests for documents, and requests for admissions.

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Cimino, Docket at 75 (Dec. 14, 1989); Scheduling Order Phase I, Cimino, Docket at 74 (Dec. 12, 1989).

302. See, e.g., Stipulation and Order, In re School Asbestos Litig., No. 83-0288, Docket No. 1006 (E.D. Pa. June 13, 1987) (extending time in which to respond to plaintiffs' requests for admissions); Stipulation and Order, School Asbestos Litig., Docket No. 1004B (June 7, 1987) (same); Memorandum and Order No. 49, School Asbestos Litig., Docket No. 649 (June 12, 1985) (dismissing as moot defendants' request for an extension of time in which to answer plaintiffs' request); Pretrial Order No. 41, School Asbestos Litig., Docket No. 561 (Mar. 21, 1985) (denying defendants' motion for extension of time to respond to discovery requests).


305. See supra note 288.

sions, and the court required the parties to answer or object to written discovery within sixty days of service.\textsuperscript{307} For document production, the court required that all requests seeking an admission as to the genuineness of any document include a copy of the document.\textsuperscript{308} The most extensive direction concerned depositions: the order required notice to all parties in the action, including notice of changes in time or place of the deposition; for parties not present, not represented, or subsequently joining the case, the order provided for supplemental deposition testimony.\textsuperscript{309}

The order also required that counsel agree on who would conduct the examination and cross-examination of deponents.\textsuperscript{310} Judge Kelly ordered that "[n]o counsel shall be excluded from participating in the examination or prevented from exploring more fully lines of questions previously pursued, provided that counsel shall not engage in unnecessary repetition."\textsuperscript{311} The order required the parties to furnish deposition transcripts to counsel on all sides, but did not require them to file deposition transcripts with the court. If disputes arose during the course of the deposition, the parties could present them to the court by telephone.\textsuperscript{312} The court also granted leave to depose expert witnesses through interrogatories in addition to or in lieu of oral depositions. Finally, the court indicated that it would not permit any motion to compel discovery prior to a conference among the plaintiffs' co-lead counsel, the chairman of the trial and liability committee, the involved defendants' counsel, and, if requested by the involved defendants, the defendants' liaison counsel.\textsuperscript{313}

Judge Kelly referred contested discovery matters to Magistrate Judge Naythons and, after Magistrate Judge Naythons' recusal from the litigation, to his successor.\textsuperscript{314} Whenever possible,

\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id. at 3.
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 4. The dispute had to be one that could not be resolved by agreement and that would "significantly disrupt the discovery schedule or require a rescheduling of the deposition." Id.
\textsuperscript{313} Id. The order further specified requirements for contesting the sufficiency of discovery responses. Id. at 5.
\textsuperscript{314} See, e.g., Pretrial Order No. 138, \textit{School Asbestos Litig.}, Docket No. 1356 (Aug. 16, 1988) (referring motion for sanctions for failure to comply with prior order to compel answers to plaintiffs' discovery requests to Magistrate Judge Naythons); Pretrial Order No. 125, \textit{School Asbestos Litig.}, Docket No. 1285 (June 15, 1988) (referring motion for protective order staying deposition and document production to Magistrate Judge Nay-
Judge Kelly held telephone conferences on contested discovery motions, holding oral argument or a discovery conference only in rare instances. Unlike Judge Parker, Judge Kelly did not issue multiple successive scheduling orders, but he did revise discovery and trial deadlines two times after the initial discovery order.

The single distinguishing feature of discovery in School Asbestos Litigation is the parties' heavy reliance on expert witness testimony. Because the school asbestos claims are not based in personal injury tort theory, the attorneys for the plaintiff class have not been involved in deposing thousands of claimants or conducting individualized medical examinations. Rather, the focus of pretrial discovery has been on designating expert witness lists and deposing expert witnesses. Judge Kelly ordered the plaintiffs and defendants to provide the opposing side with lists of expert witnesses for common issues they intended to present at trial. Further, he issued a highly detailed order regulating expert witness discovery which ordered all such discovery to occur during a four-month period. In order to satisfy this deadline, Judge Kelly imposed time and place limitations that required


316. See, e.g., Order No. 123, School Asbestos Litig., Docket No. 1281 (June 14, 1988) (granting plaintiffs' motion for protective order requiring that depositions be held in the federal district where the deponent is located, granted after telephone conference).

317. See, e.g., Order No. 140, School Asbestos Litig., Docket No. 1370 (Sept. 1, 1988) (scheduling discovery conference regarding class plaintiffs' motion for sanctions for failure to comply with a prior order); Pretrial Order No. 124, School Asbestos Litig., Docket No. 1282 (June 14, 1988) (scheduling oral argument on defendant's motion for protective order).


parties to make their experts available for three consecutive days and required coordinating counsel to circulate the schedules of expert witness depositions.\textsuperscript{320}

Just as Magistrate Judge Hines scheduled over 3,000 depositions during the three months before the trial in \textit{Cimino}, Judge Kelly offered a mathematical measure to govern the expeditious taking of expert witness depositions. His order stated:

Up to thirty percent (30\%) of the experts listed by plaintiffs or defendants may be proffered for deposition during the same four week period, provided that on no day does the number of experts proffered exceed the proportion of days available divided by number of experts increased by fifty percent (50\%) unless agreed to by coordinating counsel.\textsuperscript{321}

Finally, Judge Kelly’s order contained provisions for proffering expert opinion testimony in reliance on unpublished studies or subsequent studies and investigations.\textsuperscript{322}

In July 1990, some defendants filed a memorandum raising a potential problem with this discovery in response to Judge Kelly’s expert witness order.\textsuperscript{323} These defendants contended that although Judge Kelly’s order was an “attempt to complete expert discovery in an orderly fashion,”\textsuperscript{324} it did not address “what will inevitably be certain defendants’ need for building-specific discovery to the extent that the named plaintiffs’ claims survive pending or soon-to-be-filed summary judgment motions.”\textsuperscript{325} They suggested that defendants “will need an opportunity to take building-specific discovery regarding buildings in which its products have been specifically identified.”\textsuperscript{326} No defendants have yet filed such motions, but if this problem materializes, it effectively could transform the discovery in \textit{School Asbestos Litigation} into the extensive discovery that characterized \textit{Cimino}.

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\footnotesize
320. Pretrial Order No. 249 at 6, \textit{School Asbestos Litig.}, Docket No. 2294 (July 16, 1990). “The proffering parties shall produce each expert for deposition during the four month discovery period in an order that will accommodate their experts’ schedules, provided that by the end of the four month period all experts will have been deposed.” Id.
321. Id. at 7 (noting “Experts/days x 1.5. Fractions shall be rounded to the nearest whole number.”).
322. Id. at 3-5. The order directed the parties to produce unpublished papers, studies, data, and other items on which the expert intended to rely in proffering the expert’s opinion.
324. Id. at 1.
325. Id.
326. Id. at 4.
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C. Use of Magistrate Judges

Under the statute governing magistrate judges, judges may refer nondispositive pretrial matters such as discovery motions and certain types of factual disputes to magistrate judges. The Manual for Complex Litigation suggests that this authority includes the referral of disputes concerning personal jurisdiction and venue, evidentiary hearings, and proposed findings and recommendations.

Judges Parker and Kelly used magistrate judges extensively to supervise discovery, resolve discovery disputes, and issue recommendations on selected jurisdictional motions. In addition, Judge Parker designated Magistrate Judges McKee and Hines as monitors of the Jenkins II ADR process, requested that Magistrate Judge Hines formulate the class action discovery plan and schedule for Cimino, and used Magistrate Judge McKee to make pretrial rulings regarding exhibits, evidence, and order of proof. In both cases, the judges routinely referred nondispositive discovery matters to the magistrate judges for rulings, subject to reconsideration when "the magistrate's order [was] clearly erroneous or contrary to law." Both judges, however, developed a pattern of validating the magistrate judges' rulings on discovery and other matters.


330. See supra notes 63-71 and accompanying text.

331. See supra notes 295-301 and accompanying text.


333. See, e.g., Order That the Court Adopts the Report and Recommendation of the U.S. Magistrate, Cimino, Docket at 123 (Jan. 11, 1990) (regarding Magistrate Judge Hines' report and recommendations on defendant's jurisdictional motion); Hearing on Motions, Cimino, Docket at 153 (Feb. 5, 1990) (sustaining Magistrate Judge McKee's ruling on exhibits and denying all other motions of appeal from Magistrate Judge McKee's rulings); Order, Cimino, Docket at 79 (Jan. 5, 1990) (adopting Magistrate Judge Hines' discovery plan and schedule); Order No. 175, School Asbestos Litig., Docket No. 1692 (Mar. 20, 1989) (upholding Magistrate Judge Naythons' rulings regarding defendant's objections to discovery requests); Order No. 114, School Asbestos Litig., Docket No. 1185 (Mar. 10, 1988) (upholding Magistrate Judge Naythons' rulings regarding defendant's objections to jurisdictional discovery).
Based on his experience as a magistrate judge handling referrals from seven of the eight judges in the Eastern District of Texas, Magistrate Judge Hines did not view his asbestos-related assignments as particularly onerous, estimating that these matters took approximately fifteen percent of his time. He was involved initially as a Jenkins II ADR monitor. Later, Judge Parker assigned him various aspects of Cimino, including drafting the provisional certification order, ruling on motions to amend the complaint, conferring with Special Master Jack Ratliff concerning the draft trial plan, formulating the discovery plan, reporting on a jurisdictional motion, resolving discovery motions, and serving as a settlement monitor with a defendant.

Magistrate Judge Hines attributes the efficient disposal of the numerous motions in Cimino to the high caliber of lawyers involved in the litigation. Whenever Magistrate Judge Hines set a hearing on a discovery motion, his order included a boilerplate warning that the court would determine whether it should impose sanctions at the conclusion of the hearing. According to Magistrate Judge Hines, the parties made very few sanction motions and the court did not impose any sanctions because the lawyers knew what they were doing and generally tried to work things out. For a litigation of the complexity and duration of Cimino, Magistrate Judge Hines believed his interaction with Judge Parker was infrequent. He understood Judge Parker’s management style and litigation goals and knew he had to determine motions by certain dates so as not to impede the trial.

Magistrate Judge Naythons functioned similarly in School Asbestos Litigation. Viewing his general role as helping to expedite cases to trial, he performed the full range of a magistrate judge’s statutory duties yet utilized a small percentage of his time as a magistrate judge on matters relating to School Asbestos Litigation. He handled all discovery motions and wrote reports and recommendations on Rule 12 motions, partial summary judgment motions, and one personal jurisdiction motion. Judge Kelly, however, ruled on the motions.

Magistrate Judge Naythons’ involvement in School Asbestos Litigation became problematic when his law clerk, who had worked as a summer associate in the plaintiffs’ class counsel’s law firm, was offered a permanent position with that firm. Per-

334. Magistrate Judge Hines did consider Magistrate Judge McKee’s assignment—handling pretrial rulings and exhibits—onerous in that it demanded one or two days of work for several weeks before trial.
ceiving a potential breach of the Code of Judicial Conduct, Magistrate Judge Naythons invited objections from counsel, consulted with Judge Kelly, and recused himself from the case. Although Magistrate Judge Naythons believed his recusal removed an experienced court officer from an ongoing complex litigation, he characterized the situation as a very unique instance not likely to occur often, even in complex cases. Although this assessment is plausible in light of the small percentage of time he worked on School Asbestos Litigation, his recusal raises the spectre of disqualification complications in multiparty litigation with a highly mobile lawyer population. The potential for disruption and delay engendered by conflicts problems is a real problem that courts must stay alert to avoid.

V. THE ROLE OF ADJUNCTS: SPECIAL MASTERS AND EXPERT WITNESSES

Another method of facilitating adjudication of complex civil litigation is the special referral of complicated factual disputes to special masters or court-appointed expert witnesses. Although these referrals involve unique procedures and consequences, the Manual for Complex Litigation suggests that “they are designed to enhance or facilitate the fact-finding process by having some complicated issue studied before trial by someone selected by

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335. CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon C3(C)(1) (“A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned”), reprinted in 69 F.R.D. 273, 277 (1975); see also 28 U.S.C. § 455 (“Any justice, judge, or magistrate shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

336. Counsel for defendants could not reach a consensus on the magistrate judge’s recusal, but counsel for plaintiffs agreed that the magistrate judge’s continued participation in the litigation was not objectionable and wanted him to remain on the case. Order No. 174 at 2, School Asbestos Litig., Docket No. 1678 (Mar. 1, 1989).

337. He believed that, regardless of whether any of his decisions actually affected the law clerk, “her continuing participation with this Court in a case in which her future employer is counsel for plaintiffs gives rise to an appearance of partiality.” Id. at 3. Further explaining the perceived problem, Magistrate Judge Naythons stated:

Law clerks are not merely the judge’s errand runners. They are sounding boards for tentative opinions and legal researchers who seek authorities that affect decisions. Clerks are privy to the judge’s thoughts in a way that neither parties to the law suit or his most intimate family members may be. I agree that the clerk is forbidden to do all that is prohibited to the judge.

Id. at 3-4 (citing Price Bros. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981); Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593, 596 (5th Cir. 1977)).
the court because of his or her objectivity, expertise, or other special qualifications." Although Judge Kelly has neither used a special master nor designated a court-appointed expert witness, Judge Parker appointed both a special master and an expert witness to assist in Cimino.

A. The Special Master as Trial Planner

Rule 53 governs the appointment, duties, and responsibilities of court-appointed special masters. The rule is vague concerning what matters a court may refer to a master, indicating that in jury trials "a reference shall be made only when the issues are complicated" and that a court's reference order "may specify or limit [the master's] powers and may direct [the master] to report only upon particular issues or to do or perform particular acts or to receive and report evidence only."

Until recently, courts used special masters for limited ministerial functions, such as accountings, calculations of damages, or administration of class action settlement funds. With the advent of complicated mass tort litigation, federal judges increased their use of special masters. Their responsibilities have been expanded greatly to include such diverse functions as ruling on assertions of privilege, narrowing issues for trial, creating and supervising ADR processes, mediating or negotiating settlements, implementing court-ordered institutional reforms, and conducting statistical studies, data collection, and computer modelling. Many of these innovative uses

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339. He has not, however, ruled out the possibility of a court-appointed expert as the litigation moves closer to trial.
341. Fed. R. Civ. P 53(c). See generally W Brazil, G. Hazard, Jr., & P Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983) (arguing that a neutral manager is needed in complex litigation and assessing the use of special masters in various capacities during discovery); Brazil, supra note 256 (arguing that the Federal Rules of Civil Procedure do not provide authority for assigning pretrial discovery tasks to special masters and calling for a rule guiding their pretrial use); Hazard & Rice, Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers, 1982 Am. B. Found. Res. J. 375 (reporting on the experience of special masters appointed to regulate pretrial phases of complex antitrust litigation).
343. See generally Nathan, The Use of Masters in Institutional Reform Litigation, 10 U. Tol. L. Rev. 419 (1979) (use of masters in implementing court-ordered reform of correctional and mental health institutions); Brazil, supra note 342, at 395-417 (discussing use of masters in Ohio asbestos litigation, Alabama DDT litigation, early neutral evaluation
of special masters are lauded for assisting in the resolution of complex cases. Some, however, criticize this expansion of duties as an encroachment upon proper judicial functions.

Judge Parker created an innovative role for a special master in *Cimino*. At the same time he declared that *Cimino* would proceed as a class action, Judge Parker appointed Professor Jack Ratliff as special master. His order detailed dates for interim and final reports and required the parties to deposit funds with the court to pay for the master's expenses. Instead of specifying certain duties, Judge Parker directed Special Master Ratliff to formulate a class action trial plan and to issue a report with...
recommendations concerning the conduct of the asbestos cases pursuant to class action procedure. His chief interest was learning whether a mass trial was possible and whether a lump sum damages award was permissible.

Judge Parker and Special Master Ratliff agreed that the special master would proceed with complete independence. From the time of Special Master Ratliff's appointment until the issuance of his report, Judge Parker adhered to this understanding. Although Judge Parker outlined general problems with the litigation, Special Master Ratliff commented that he carefully refrained from suggesting any solutions throughout the process. If the special master had returned a report indicating that consolidation and adjudication of the cases under class action procedure was not feasible, Judge Parker would have given that conclusion great weight and abandoned the class action format.

Some defendants objected strenuously to the appointment of a special master and argued that no authority existed for a special master to formulate a trial plan. Judge Parker overruled these objections and refused to revoke the reference to a special master. This set the stage for the initial resistance to Special Master Ratliff's efforts; early joint consultations failed to produce cooperation or candor. Special Master Ratliff therefore consulted with counsel in separate ex parte meetings and telephone conversations. The defendants continually resisted his role and protested the evolving trial plan. After the eventual elimination of

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349. At the time he gave these directions to the special master, Judge Parker had no predetermined ideas concerning how to stage the trial. He wanted the special master to make detailed recommendations concerning the feasibility of adjudicating the asbestos cases under the class action rule and to address the seventh amendment implications of attempting to use the class action rule to adjudicate aggregated personal injury cases.

350. See, e.g., Objections of Defendant Celotex Corp. to the Appointment of Special Master and Motion for Revocation of the Reference to a Special Master, Cimino, Docket at 25 (Mar. 9, 1989); Objection of Defendant Fibreboard Corp. and Pittsburgh Corning Corp. to the Appointment of a Special Master and Motion for Revocation of the Reference to a Special Master, Cimino, Docket at 18 (Feb. 27, 1989); Objections of Defendant Owens-Illinois, Inc. to the Appointment of a Special Master and Motion for Revocation of the Reference to a Special Master, Cimino, Docket at 16 (Feb. 21, 1989). Other defendants requested that the judge at least clarify the order of reference. See Motion of Defendants H.K. Porter Co., Eagle Picher Indus. Inc., Fibreboard Corp., and Pittsburgh Corning Corp. for Clarification of Order Appointing Special Master and Amendment Thereto, Cimino, Docket at 18 (Feb. 24, 1989). Special Master Ratliff suggested that Owens-Illinois objected because the judge asked the special master to determine the application of rules and law, which was outside the scope of a special master's authority.

351. See, e.g., Order That Defendant Owens-Illinois, Inc.'s Objection to Appointment of a Special Master is Overruled and Motion to Revoke Reference is Denied, Cimino, Docket at 19 (Mar. 1, 1989).
the group meetings, however, liaison counsel began to assist constructively in formulating a class action trial plan. In addition to talking with the parties, Special Master Ratliff discussed trial plan issues with other academics and special masters.

After receiving written comments regarding a preliminary report, Special Master Ratliff reformulated his recommendations. The final master’s report recommended a four-phase Rule 23(b)(3) opt-out class action. The first phase isolated the issue of class-wide liability based on the class representatives’ cases and was to include “individualized proofs of exposure, causation, damages, and affirmative defenses.” The second phase proposed a class-wide trial of damages through the presentation of expert and statistical proof. The third phase apportioned the plaintiffs’ damages, allowing each defendant to develop its own theory of apportionment. The fourth phase, a nonjury phase, consisted of an administrative distribution of proceeds among the plaintiffs, through either a special master or the creation of a claims-handling facility. The master’s report also contained myriad pretrial procedural details, including recommendations for non-conforming settlers, plaintiffs with different disease and worksite exposure, standing issues, conspiracy claims, punitive damages, the contents of the opt-out notice, expert testimony on classwide damages, limitations problems, selection of class representatives, interim argument to the jury, and distribution of proceeds to claimants.

Special Master Ratliff’s research revealed that few litigations had made any attempt to use the class action rule for adjudication of mass tort claims, and none were good models for Cimino. His model for Cimino derived from class action precedent, particularly employment discrimination, civil rights, and antitrust class actions. In his opinion, these cases provided analogs for determination of classwide damages, although their application

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354. Id. at 5, reprinted in Mealey’s, supra note 79, at G-3.
355. Id. at 15-16, reprinted in Mealey’s, supra note 79, at G-8.
356. Id. at 16-17, reprinted in Mealey’s, supra note 79, at G-8 - G-9.
357. Id. at 7-10, reprinted in Mealey’s, supra note 79, at G-4 - G-5.
358. He identified the California IUD Dalkon Shield cases (failed Rule 23 certification), Agent Orange (largely a settlement class action), and the Bendectin cases (failed class action).
to a personal injury class was a new proposal. Selecting class representatives to truly represent the range of claims in the class was crucial to Special Master Ratliff. He indicated that the expert witnesses recommended for the damages phase were to permit statistical presentation of damages on a representative basis, with extrapolation to the entire class. Upon submission of his report, Special Master Ratliff's role ended, and Judge Parker did not consult him again as special master for the remainder of the *Cimino* proceedings.

Judge Parker's innovative use of a special master raises questions concerning the appropriate limitations of such court-appointed adjuncts. The special master in *Cimino* performed a function different from the narrow functions traditionally assigned to special masters: he formulated the trial plan, a judicial function that the parties argued could not be delegated. Furthermore, by conducting ex parte discussions with the parties, the special master eliminated the adversarial presentation of arguments on issues relating to his structuring of the trial.

Nevertheless, Judge Parker exercised final authority over setting the trial plan. One month after receipt of the master's report, he certified a class action of all asbestos cases pending in the Beaumont Division and consolidated the cases under Rule 42 for trial of the state-of-the-art defense and punitive damages.369 His order of a three-phase trial modified the master's report in a number of details. The special master's report remained a set of recommendations, not binding on the judge or the parties. In one sense, Judge Parker expanded the role of the special master by creating a new task for a master in *Cimino*. On the other hand, the purely advisory nature of the master's work product limited this expansive role.

**B. The Court-Appointed Expert Witness**

Another method to assist the court in cases involving complex scientific and technical evidence is the use of court-appointed expert witnesses.360 Federal Rule of Evidence 706 gives federal judges the authority to appoint expert witnesses.361 A recent

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359. For a discussion of the various trifurcated trial plans in *Cimino*, see *infra* notes 384-413 and accompanying text.

360. Dealing with complex scientific and technical evidence has been problematic for the courts. See generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 16, at 97 (recommending "a comprehensive examination of how courts handle scientific
study of court-appointed expert witnesses suggests that federal courts use such witnesses infrequently and that such appointments are for varied, idiosyncratic purposes.\textsuperscript{362}

Mass tort litigation repeatedly demonstrates that the parties need assistance in presenting technical testimony because their own experts are not always sufficient. In particular, toxic tort litigation raises complex issues relating to causation, epidemiological proof, and statistical evidence.\textsuperscript{363} Many issues involved in
mass tort litigation are so complicated that some commentators have urged the use of special science panels or special juries of scientific and medical experts to adjudicate these cases.364

Judge Parker decided to use a court-appointed expert to testify during Phase III after the Fifth Circuit invalidated his original proposal for Phase II.365 Under the revised trifurcated trial plan, with a new Phase III for damages,366 150 (subsequently 160) representative cases were to present damages in five disease categories.367 At the conclusion of their presentation, the court

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364. See, e.g., Brennan, Helping Courts with Toxic Torts, supra note 363 (recommending use of science panels for scientific evidence issues in mass tort cases and increased use of court-appointed experts, with limited use of special masters); Drazan, The Case for Special Juries in Toxic Tort Litigation, 72 JUDICATURE 292 (1989) (advocating use of special juries of scientific and medical experts and arguing that the seventh amendment does not bar such use).

365. See supra note 87 and accompanying text.


367. The five disease categories were pulmonary asbestosis cases, pleural asbestosis
would “conduct a hearing to determine whether the [160] cases are truly representative of the 2336 consolidated cases. Specifically, a court appointed expert witness will testify as to whether the Court’s samples for each disease category accurately comprise statistically significant samples of each one of the disease categories.”

The court appointed Professor Francis McGovern “to evaluate the Court’s procedure and to compare the experience of the [160] damage case trials with the class as a whole.” In appointing an expert witness to perform this function, Judge Parker recognized the innovative nature of a sampling technique to prove consolidated damages:

The sample sizes selected by the Court reflect a measure of subjectivity. That subjectivity is influenced by ten years experience with these type cases. The Court’s subjectivity built into the sample sizes will be tested by the scientific method after the jury verdicts are received in these [160] cases. These [160] sample cases will be chosen at random by the Court. The Court will try the damage issues in the sample cases and will obtain jury verdicts for all [160] cases. The Court will, then, determine an average jury award for each disease category and will apply this award to all the cases in that particular disease category. The Plaintiffs in the [160] cases, however, will receive judgments for the specific amount of the jury verdicts in those cases.

368. Id. at 9.
369. Id. at 10. Judge Parker chose Professor McGovern as his expert witness because he was well known, had served as a special master in Jenkins v. Raymark Industries, Inc., and had experience with the Dalkon Shield and Cleveland asbestos litigations. Id. at 11. Judge Parker subsequently issued a series of orders concerning compensation of the court-appointed expert witness that directed the plaintiffs and defendants to deposit funds with the court for payment of the expert’s services and expenses. See Order, Cimino, Docket at 443 (July 30, 1990); Order, Cimino, Docket at 327 (June 7, 1990); Order, Cimino, Docket at 306 (May 30, 1990).
370. See, e.g., Rosenberg, Class Actions For Mass Torts, supra note 38, at 570 (discussing the use of damage schedules created by averaging); Rosenberg, Toxic Tort Litigation, supra note 268, at 190-98 (discussing and approving proportional liability, causal probability, and statistical proof in mass toxic tort litigation); see also Bush, Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury, 33 UCLA L. REV. 1473 (1986).
371. Memorandum and Order at 8-9, Cimino, Docket at 159, (Mar. 5, 1990). In describing his experience determining the appropriate sample size, Judge Parker stated:

Experience has taught that the mesothelioma cases are all terminal and
This approach raised some fundamental problems. Alternatively, Judge Parker might have appointed the expert to create the sample, rather than appointing the expert to test the validity of a judicially selected sample. In addition, Judge Parker's approach linked the anticipated size of damage awards to representativeness in the class—not necessarily a logical relationship.

Judge Parker also recognized the need for independent expert testimony to support and verify the methodological soundness of adjudicating aggregate claims in this fashion:

Whether the Court's expert witness will deem it advisable to extend the evaluation beyond the pure statistical approach and to perform a class analysis to determine actual variance between the sample and the class remains to be seen. After the experience generated with these [160] cases, the Court will examine the evidence and either discard the approach, approve the procedure, or modify some or all of the sample groups—all with a view of satisfying the Court that the approach has, in fact, achieved a fair result and satisfied due process requirements.\textsuperscript{372}

After issuing the appointment order and discussing the assigned task, Judge Parker did not confer with Professor McGovern. As a witness in the case, the court-appointed expert was subject to deposition and cross-examination. As a part of the Phase III damages determination, McGovern was scheduled to

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\textsuperscript{372} \textit{Id.} at 10. Judge Parker indicated that the expert would testify after the presentation of the 160 cases because the Court recognizes that a purely statistical approach would lead the Court to hear evidence concerning proper sample sizes for each disease category then litigate damages for that sample size. The Court is persuaded that a higher level of reliability can be achieved by delaying the hearing until the [160] cases are decided. This approach will permit the Court to examine the process with the benefit of experience of not only the jury results, but also an evaluation of how the variables in these damage cases actually impact on the process.

\textit{Id.} at 9-10.
give his expert testimony to the bench after the presentation of damages evidence in the 160 individual cases. He was to give his testimony to the bench rather than the jury because Judge Parker believed that the expert's testimony concerned issues of law for the judge rather than issues of fact for the jury.

At the completion of the 160 sample cases, however, Judge Parker abandoned the idea of using a court-appointed expert to validate the statistical methodology. Instead, he permitted plaintiffs and defendants to use their own experts to testify to the validity of the sample cases. After the defendants declined to present evidence on the point, the court ruled that the samples were representative at a ninety-nine percent confidence level and that the court should award the plaintiffs in each disease category the average verdict for the category.  

VI. SETTLEMENT

In his 1987 study on asbestos litigation, Tom Willging reported that from 1977 through 1986, seventy-three percent of all terminated asbestos cases concluded by settlement. At that time, settlement was the single most important feature of asbestos litigation, with a handful of case verdicts supporting hundreds of settlements. Willging concluded that "[t]he primary asbestos case management decisions facing federal courts concern the settlement of cases," with wide variation in the interventionist role of federal judges in the settlement process. Settlement continues to be the prevalent mode of disposition in asbestos cases, with seventy-nine percent of all terminated cases through 1989 concluded by settlement.

Willging's study surveyed modes of judicial intervention and focused on the types of judicial assistance, the effects of judicial intervention in achieving settlement, and the quality of settlements. Among many findings, the study reported that the setting of a firm trial date generally controlled the settlement process.

373. Opinion and Order at 36-38, Cimino (Nov. 12, 1990).
374. T. Willging, supra note 1, at 55; see also id. at 26, Table 4 (Procedural Progress at Termination of Federal Asbestos Cases).
375. Id. at 55-56. As a result, "[d]iagnosis of the need for settlement intervention, selection of the most efficient mechanism to achieve the court's goals, and reevaluation of these interventions are continuing issues for courts with substantial asbestos case-loads." Id.
376. See infra Table 3 (method of disposition of terminated federal asbestos personal injury/product liability cases).
377. T. Willging, supra note 1, at 59.
Judges also encourage settlement through other techniques. For example, a federal court in Ohio, working with a special master, created an elaborate computer-assisted early settlement program which still functions as the settlement vehicle for Ohio asbestos cases. A few districts encourage early settlements through the imposition of sanctions on late-settling cases. Settlement practices vary widely among judges and a range of judicial actions have produced settlements in asbestos cases.

A. Judicial Role in Settlements in the Asbestos Class Actions

In Cimino and School Asbestos Litigation, the judges remained relatively detached from settlement negotiations. They were not actively involved in settlement discussions, did not monitor the progress of negotiations, and were not involved in evaluation of the cases. Neither judge invited parties into chambers to assess the level of agreement or to analyze case strengths, weaknesses,

378. Id. at 60-69. Although other districts have not adopted the computer model in its entirety, they have adopted features of the plan. Id. at 63; see also McGovern, Functional Approach, supra note 40, at 479-91 (case study of Ohio asbestos litigation and development of computer-assisted settlement model). But see Brazil, supra note 343, at 400-01 (criticizing McGovern's computer-assisted techniques in Ohio asbestos litigation).

379. See T. Willging, supra note 1, at 69-70.

380. Id. at 71. For discussion of settlement techniques in complex litigation, see generally W. Brazil, Settling Civil Suits (1985) (discussing litigators' views about appropriate roles and effective techniques for federal judges); Manual for Complex Litigation, Second § 3327 (1985) ("Settlement") (outlining the levels of settlement that might be achieved in mass tort cases, and discussing the use of structured settlements to pay future benefits to plaintiffs); A. Talbot, Settling Things: Six Case Studies in Environmental Mediation (1983) (describing the use of mediation to negotiate resolutions of site-specific environmental disputes); Coleman & Silver, Justice in Settlements, 4 Soc. Phil. & Pol'y 102 (1988); Craft, Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation, 46 J. Air L. & Com. 895 (1981) (emphasizing the need to curtail excessive fees, unnecessary delays, and unreliable advice to clients to maximize settlement options); Green, Marks, & Olson, Settling Large Case Litigation: An Alternative Approach, 11 Loy. L.A.L. Rev. 493 (1978) (arguing in favor of the use of nonbinding minitrals as a means to inform parties as to the relative strengths of their cases and to expedite settlement); Innovative Techniques, supra note 17 (discussing Hyatt Skywalk Collapse settlement); Peterson & Redick, Innovations and Considerations in Settling Toxic Tort Litigation, 3 Nat. Resources Env't. Spring 1988, at 9 (discussing the complexities of drafting enforceable settlement agreements); Sand, How Much Is Enough? Observations on Light of the Agent Orange Settlement, 9 Harv. Envtl. L. Rev. 283 (1985) (discussing the weaknesses in plaintiffs' case and factors that led to defendants' decision to settle); Schuck, supra note 40 (identifying the risks involved in an active judicial role in settlement and assessing the ways in which judges' knowledge, power, and other resources control the course of litigation); Tornquist, The Active Judge in Pretrial Settlement: Inherent Authority Gone Aury, 25 Willamette L. Rev. 743 (1989) (suggesting reforms in the current system of judically managed settlement).
and settlement values. In Cimino, Judge Parker played no role at all in early settlements, but was available to listen to settlement offers as the litigation progressed towards trial. In School Asbestos Litigation, Judge Kelly channelled settlement discussions through the special settlement committee and became involved only when the parties agreed upon a tentative settlement to present to the court for approval. Likewise, the magistrate judges and special master played no role in mediating settlement agreements.

Settlement negotiations in Cimino began before provisional certification of the class in 1989 and continued through the trial in 1990. By the time of trial, approximately a dozen defendants had settled, but four defendants did not reach settlement. One of Judge Parker's goals throughout the pretrial preparation was to induce the parties to settle; he hoped to accomplish this indirectly through the trial staging rather than directly through mediation of settlement negotiations. Judge Kelly also referred to settlement as a goal in School Asbestos Litigation. Of fifty-two original defendants, three settled and a fourth presented a settlement to the court in September 1990. All School Asbestos Litigation settlements involved notice to the class plaintiffs for hearing and approval. Despite the massive number of class claimants, over 35,000 class members received notice without incident.

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383. See Transcript of Feb. 12, 1990: Oral Argument on Proposed Settlement Re: Lac D'Amiante du Quebec, Ltee., School Asbestos Litig., Docket No. 2063 (Feb. 13, 1990). At the hearing for this class settlement, class counsel reported that the settlement notice had been sent to 35,711 members of the class and that only 120 notices had been returned as undeliverable. Id. at 11-12. According to counsel, additional effort would be made to reach these 120 class members, who were chiefly private schools. Id. at 12. School districts that had excluded themselves from the class were not sent notice. Id.

Only three class members objected to the settlement, and one of the three withdrew its objection before the oral hearing. Id. The Akron school district objected on the ground that it had wanted to opt out of the class, but was made part of the class and settlement against its will because it had failed to opt out in a timely manner. Id. at 13. The Redmont City schools entered a general objection that they thought the amount of the settlement
In both litigations, the parties presented settlements to the court for approval in oral hearings and the judges approved them all.384

B. Motivations For Settlement

Counsel for defendants who settled identified an interrelated array of reasons for settlement in the two litigations.385 Because almost all of the attorneys who discussed settlement have been involved in asbestos litigation for many years, they viewed the settlements in Cimino and School Asbestos Litigation in the context of more than fifteen years of nationwide asbestos litigation and disposition of asbestos claims. The three most common reasons the lawyers offered for settlement in these two cases were broad calculations of the risks of litigating versus the benefits of settling, preexisting relationships with plaintiffs' counsel, and the sense of being a peripheral defendant to the class action.

With regard to calculations of risk, the defendants' attorneys expressed similar views regarding the desirability of avoiding trial. Many attorneys thought it more cost effective to settle claims than to incur the expense of litigating hundreds of cases individually. Defense attorneys suggested that clients generally should be increased. Id. at 13-14. The class settlement money had been available since January 31, 1989, and had accrued interest for almost one year to the time of the settlement hearing. Id. at 14.

384. See, e.g., Memorandum and Judgment Pursuant to Fed. R. Civ. P 54(b) and Pretrial Order No. 212, School Asbestos Litig., Docket No. 2073 (Feb. 20, 1990) (finally approving class settlement with defendant Lac D'Amiante du Quebec, Ltee); Judgement Pursuant to F.R. CIV. P 54(b) and Pretrial Order No. 88, School Asbestos Litig., Docket No. 1015 (July 21, 1987) (finally approving class settlement with defendants Owens-Illinois, Inc. and Proko Industries); Order No. 64, School Asbestos Litig., Docket No. 783 (June 17, 1986) (preliminarily approving settlement agreement with defendants Owens-Illinois, Inc. and Proko Industries); see also Partial Judgment, Cimino, Docket at 315 (May 2, 1990) (terms of class settlement); Order, Cimino, Docket at 306 (May 2, 1990) (court approval of class settlement with Manville Settlement Trust); Final Judgment, Cimino, Docket at 157 (Feb. 26, 1990) (class settlement with Owens-Illinois, Inc.); Order, Cimino, Docket at 150 (Feb. 7, 1990) (court approval of settlement with AC & S); Order, Cimino, Docket at 146 (Feb. 5, 1990) (approval of settlement with H.K. Porter); Final Judgement, Cimino, Docket at 127 (Jan. 18, 1990) (class settlement with W.R. Grace & Co.); Orders, Cimino, Docket at 42 (July 3, 1989) (court approval of settlements with nine defendants); Order, Cimino, Docket at 33 (Apr. 18, 1989) (approving settlements with defendant members of the Center for Claims Resolution).

385. The author conducted telephone interviews with counsel for 10 settling defendants during August 1990. The interviews were conducted with assurance of nonattribution to the interviewed attorneys and nondisclosure of the clients. Settlement information relating to School Asbestos Litigation is a matter of public record and the author was present at the February settlement with Lac D'Amiante du Quebec.
knew the extent of their insurance coverage and were willing to settle within those limits. Many attorneys involved in *Cimino* stated that the prospect of the class action encouraged settlement negotiations because of their clients' desires to avoid potential liability for a class judgment that included punitive damages determined by a jury-set multiplier. Settlement often permitted defendants to resolve claims with plaintiffs based on individualized proof of injury.

Many defense attorneys in *Cimino* suggested that an additional reason for settlement was to avoid trial before Judge Parker because of his management techniques. These attorneys viewed Judge Parker as a managerial judge who held the parties to tight deadlines and pushed pretrial and trial procedures expeditiously. One lawyer stated that Judge Parker liked to keep his docket cleared and would push the asbestos cases to accomplish this. Another attorney said that Judge Parker's management style encouraged settlement because defendants wished to avoid Judge Parker's everchanging procedural innovations and their potentially catastrophic results. More than one attorney stated that defense counsel had little notice as to what instructions or novel orders Judge Parker might impose as the litigation progressed, thus making settlement preferable to being caught up in novel procedural innovations.

Other defense attorneys indicated that their clients settled because of venue considerations. With fifteen years of experience in asbestos litigation in the Eastern District of Texas, many defendants perceived local juries as sophisticated, pro-plaintiff, and hard on defendants. Many defendants believed that a fair trial and verdict in the district was impossible and preferred to settle in order to have more control over awards. Some believed that the local pro-plaintiff bias would be exacerbated and the jury deliberations skewed if a very small number of class representatives consisting of very sick plaintiffs presented thousands of claims in a consolidated action.

Another driving factor behind settlement in *Cimino* was the familiarity with the plaintiffs' counsel and ongoing settlement discussions. By the time Judge Parker began thinking about certifying a new class action in the eastern district, the asbestos lawyers knew each other well. Three plaintiffs' attorneys were handling almost all the class claims, and most of the defendants' lawyers had been involved in previous asbestos litigation with the plaintiffs' counsel. A number of defendants had previously negotiated block settlements with groups of plaintiffs and had
negotiated settlement case values for types of injuries or diseases. Many defendants were involved in the *Jenkins II* ADR process, the Asbestos Claims Facility, or its successor, the Center for Claims Resolution.\(^8\)

Thus, many defendants viewed settlement in *Cimino* not as a discrete event, but rather as part of a continuum of asbestos litigation in the district. For many lawyers, the key event prompting settlement was the collapse of the *Jenkins II* ADR process and the unravelling of the Asbestos Claims Facility, followed by the defendants' withdrawal from the Center for Claims Resolution. As one attorney indicated, settlement negotiations assumed new urgency when it became clear that the ADR process was falling apart and when Judge Parker announced his intention to certify a new class action for pending asbestos cases. Another attorney said that Judge Parker leaked enough information about his intentions with regard to the class action to persuade some defendants to avoid this new consolidated action. Yet another defense attorney believed that the collapse of the ADR process impeded settlement at that point because the defendants had negotiated hard for the *Jenkins* ADR process and its dismantlement served to harden the parties in their positions. All agreed, however, that it was obvious from the time of the breakdown of the ADR that a class would be certified, and those defendants who ultimately settled indicated that they never stopped negotiating from that point.

Moreover, a number of defense attorneys in *Cimino* noted that although settlement negotiations in the district were ongoing, the plaintiffs' lawyers often initiated and pursued settlement negotiations after the collapse of the ADR process. Some defense counsel suggested that the plaintiffs' lawyers were just as anxious to settle before class certification because the judge would be able to adjust and monitor attorneys' fees once a class action was certified. The preservation of plaintiffs' attorneys' contingent

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8. See generally Comment, *The Asbestos Claims Facility—An Alternative to Litigation*, 24 Duq. L. Rev. 833 (1986) (analyzing reasons for creating the facility and describing the expectations of and reactions to its establishment). The Asbestos Claims Facility, consisting of a group of defendants who wished to settle asbestos claims, was organized in 1985, at about the same time that the *Jenkins* class action was certified, and was involved in the *Jenkins II* ADR process. McGovern, *Mature Mass Tort*, supra note 40, at 665. When the *Jenkins* ADR process began to fall apart, a number of defendants withdrew from the Facility, which was then succeeded by the Center for Claims Resolution. Feder, *Asbestos: The Saga Drags On*, N.Y. Times, Apr. 2, 1989, § 3, col. 4, at 1.
fee contracts therefore became, sub rosa, a negotiating element. 387

The third factor inducing some defendants in Cimino and School Asbestos Litigation to settle was the self-evaluation that they were peripheral parties to the litigation and that settlement, rather than inclusion in a large class or consolidated action, was in their best interest. For example, one Cimino defendant identified itself as a "modest, fringe defendant" that settled before Cimino was provisionally certified because not much money was involved and the lawyers easily worked out an agreement. In School Asbestos Litigation, a settling defendant informed the court in its settlement presentation that it considered itself a peripheral defendant that made the policy judgment to settle because of the expense of remaining a litigating defendant in the class action. 388

In the settlements accomplished in Cimino, counsel negotiated using historical numbers known to each side from previous asbestos personal injury cases that had been settled or adjudicated with that defendant. The parties reached agreements concerning classifications of diseases, levels of exposure and medical proof for a disease, and resulting claim values. One attorney suggested that a defendant was most likely to settle if a plaintiff came forward with proof of product exposure and medical proof of disease; such cases were futile to litigate. For defendants involved in large numbers of prior cases, claim settlement is now fairly routine.

387. One defense attorney indicated that all of the plaintiffs' lawyers had 40% contingent fee contracts with the plaintiffs and wanted to settle as many of these cases as possible before the class certification. This percentage fee seems very high and is only one defense lawyer's surmise. The lawyer did, however, believe it gave defendants a negotiating advantage because they believed the plaintiffs' lawyers wanted settlements to assure high contingency fees. For a discussion of the problem of class settlement and attorneys' fees, see generally Biscuit, Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult, 1 GEO. J. LEGAL ETHICS 817 (1988) (arguing that the class action should be reformed by increasing the ethical requirements placed upon the class attorney and by giving class members an increased role in terminating suits); Note, Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations, 84 MICH. L. REV. 308 (1985) (arguing that courts should appoint neutral third-party guardians to oversee pretrial negotiations).

388. See supra note 385. In urging approval of the settlement, the defendant conceded neither liability nor that it would have lost at trial. Rather, the defendant stated that it mined and milled fiber, but as an ingredient supplier it had not manufactured the products allegedly used in the case. It argued that two-thirds of the schools involved in the action were built before 1958, but the defendant did not ship its products before then. The defendant further urged that as an ingredient supplier it would benefit from many state laws that no longer make suppliers liable to class plaintiffs and that the defendant had achieved many summary judgments on these grounds in other cases. Id.
VII. TRIAL STAGING

With the failure of universal settlement, Judges Parker and Kelly focused their attention on the staging of these complex cases. Both judges resorted to trial management procedures already used in other complex cases: reverse bifurcated trial phases. In addition, Judge Parker used many trial techniques to aid jury comprehension in Cimino.

A. Polyfurcated Trial Plans

Rule 42(b) permits a separate trial of any claims or issues “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.” The Manual for Complex Litigation notes that “[a] single trial of all issues is rarely feasible in multiple tort litigation” and that the court may sever issues of defendant culpability from causation and damages and then consolidate them for joint trial under Rule 42(a). Federal courts have adjudicated mass tort claims using bifurcated or polyfurcated trial procedure in hotel fire litigation, the Agent Orange case, bendectin litigation, and asbestos cases. Defendants have challenged such multiphase trial procedures, however, on the grounds that they violate the seventh amendment right to a jury trial by separating general causation from other trial issues. Whereas defendants have voiced constitutional objections to polyfurcated trials, some plaintiffs have expressed dissatisfaction with multiphase trial staging that first focuses on the weakest aspects of their case.

389. FED. R. CIV. P 42(b). The rule further requires that in ordering such separate trials, the court must “always preserve[] the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.” Id.

390. MANUAL FOR COMPLEX LITIGATION, SECOND ¶ 33.26 (1985); see also FED. R. CIV. P 42(a) (consolidation).

391. See T. WILLING, supra note 1, at 102-04 (bifurcation and trifurcation in asbestos litigation); Comment, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, 17 B.C. ENVTL. AFF. L. REV. 123, 139-47 (1989) (prior uses of bifurcated trials under Rule 42(b) and trial plans in Beverly Hills Hotel fire, Agent Orange, bendectin, and Anderson v. W.R. Grace litigation).

392. See T. WILLING, supra note 1, at 102-04; see also Comment, Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems and a Solution, 36 SW. L.J. 743, 746-47, 758-59 (1982).

1. The Cimino Trifurcated Trial Plans

Three major points characterized trial planning in Cimino. First, from the earliest formulation of the class action through the actual consolidated proceedings, Judge Parker had a basic concept of a trifurcated trial plan consisting of (1) presentations of Jenkins issues such as common defenses and liability for punitive damages, (2) exposure, and (3) compensatory damages. Second, trial planning was an ongoing process of reformulation, modification, and amendment which continued throughout the trial itself. Third, Judge Parker's chief challenge was to formulate a method for presenting exposure and compensatory damages issues in consolidated trial format.

From the time Judge Parker issued the initial class action order and appointed a special master, he contemplated a three-phase trial. The original concept was first to try common issues of tort liability, class punitive damages, and actual damages of class representatives; second, to try exposure issues, amounts of actual or compensatory damages for remaining individual class plaintiffs, affirmative damages, and percentages of causation; and third, to try cross-actions, indemnity claims, and contribution among defendants. All successive trial plans in Cimino were variations on these themes, moving the issues around and developing means for representative proof on common issues. Judge Parker did not seek briefing from counsel, but rather appointed Special Master Jack Ratliff for the explicit purpose of developing a class action plan. The special master's four-phase trial plan was an intricate elaboration of these same issues, with a core recommendation that proof of classwide damages be presented through expert and statistical proof of aggregate damages.

Of the many trial plans formulated in Cimino, two are most significant: the October 1989 trial plan, which the Fifth Circuit partially invalidated, and the March 1990 trial plan, which the Fifth Circuit upheld and which became the basis for the actual Cimino trial. The October plan suggests a trial staging that will not withstand appellate scrutiny, whereas the March 1990 plan suggests a consolidated trial staging that will.

394. See Memorandum and Order, Cimino v. Raymark Indus., No. B-86-0456-CA, Docket at 10 (E.D. Tex. Feb. 9, 1989) (order delineating three-phase class action); Memorandum and Order Appointing Special Master, Cimino, Docket at 10 (Feb. 9, 1989) (appointing Professor Jack Ratliff as special master).

a. October 1989 Trial Plan

The October 1989 trial plan outlined three phases. Phase I was a consolidated trial of Jenkins issues under Rule 42(a), namely the state-of-the-art defense and punitive damages. The jury was to award punitive damages on the basis of a multiplier. Findings in this stage were binding on the parties. Phase II was to be presented as a class action trial of the cases of the class representatives. Using statistical and testimonial evidence, the jury was to determine the makeup of the class, the percentage of the plaintiffs exposed to the defendants' products, and the percentage of claims barred by affirmative defenses.

Then, the jury was to determine actual damages in a lump sum for each disease category and to apportion responsibility among the defendants. After the award of actual damages, the jury could award punitive damages against defendants found liable for gross negligence in Phase I. Phase III was to be a nonjury proceeding in which the court distributed actual and punitive damages to the plaintiffs.

In December 1989, Judge Parker modified this proposed trial plan in three ways. First, during Phase II the court would allow the plaintiffs and defendants to introduce the testimony of fifteen claimants chosen by each side, in addition to the presentation of

396. Memorandum and Order, Cimino, Docket at 58 (Oct. 24, 1989), reprinted in Mealey's, supra note 80, at A-1. The so-called Jenkins issues included the following questions:
(a) which products, if any, were asbestos-containing insulation products capable of producing dust that contained asbestos fibers sufficient to cause harm in its application, use, or removal; (b) which of the Defendants' products, if any, were defective as marketed and unreasonably dangerous; (c) when each Defendant knew or should have known that insulators or construction workers and their household members were at risk of contracting an asbestos-related injury or disease from the application, use, or removal of asbestos-containing insulation products; and (d) whether each Defendant's marketing of a defective and unreasonably dangerous product constituted gross negligence.

Id. at 4, reprinted in Mealey's, supra note 80, at A-2.

397. Id. at 5, reprinted in Mealey's, supra note 80, at A-3. Among the affirmative defenses to be tried in this phase were statute of limitations defenses and adequate warnings.

398. Id. at 6-7, reprinted in Mealey's, supra note 80, at A-3 - A-4. This portion of the trial plan also included directions for dealing with apportionment of responsibility under Texas law. Id.

399. Id. at 7, reprinted in Mealey's, supra note 80, at A-4. The court indicated that the defendants did not have standing with regard to the issues raised in this phase; this determination was consistent with the special master's recommendation for Phase IV in the master's trial plan. See supra note 356 and accompanying text.
the individual cases of the class representatives. Second, the court would allow the jury to award lump sum punitive damages rather than use the Phase I multiplier. Third, in awarding actual and punitive damages, the court would determine the validity of each plaintiff's claim based on individualized proof of damages. Through these procedures, Judge Parker afforded the litigants opportunities to present both representative and individualized claims.

The defendants objected to this plan and appealed to the Fifth Circuit. They argued that the proposed trial plan violated the seventh amendment right to a jury trial, procedural due process, and controlling Texas substantive tort law. Although the Fifth Circuit addressed the seventh amendment and due process concerns at length, the court invalidated Phase II because of the Erne doctrine, vacating the order for Phase II and remanding the case to Judge Parker:

The core problem is that Phase II, while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority. It infringes upon the dictates of Erne that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches.

Texas products liability law required plaintiffs to prove that the defendant supplied the product that caused the injury—a standard that focused on individuals, not on groups. The court stated that the proposed collective presentation of proof in Cimmino was a procedural innovation that impermissibly effected a change in substantive duty. The court further viewed the proposed use of statistical proof as dealing only with general causation, not with the individual causation that Texas law required.

400. Order at 2-4, Cimmino, Docket at 78 (Dec. 29, 1989). With regard to individualized proof in Phase III, Judge Parker indicated that “[i]n this manner, the Court will ensure that, before receiving a share of the damages in this action, each individual Plaintiff has been exposed to the defendants’ asbestos products and has suffered actual damages.” Id. at 4.
401. See supra notes 84-86 and accompanying text.
402. See In re Fibreboard Corp., 893 F.2d 706, 709-11 (5th Cir. 1990).
403. Id. at 711.
404. Id.
405. Id. at 711-12.
406. Id.
The Fifth Circuit's decision is significant not only for its invalidation of the proposed Phase II in Cimino, but also for what it left unsaid with regard to consolidated mass tort procedure. For example, although the court expressed great concern over the proposed procedural innovations, it did not hold that the proposed procedures violated the right to trial by jury or due process. The appellate court never invalidated the class action per se, but rather suggested that "[t]here were too many disparities among the various plaintiffs for their common concerns to predominate." Nor did the court repudiate the use of statistical proof of damages, stating instead that it was "uncomfortable" with the analogous use of statistical proof in title VII and securities cases. Finally, the Fifth Circuit gave no guidance to Judge Parker on how to restructure Cimino in light of the mandamus opinion.

b. March 1990 Trial Plan

Judge Parker restructured a trial plan for Cimino that withstood a second appeal. Again, he ordered a three-phase trial. Phase I consisted of a Jenkins-style class action of the state-of-the-art defense, gross negligence, and punitive damages. Phase II consolidated the remaining 2,336 cases under Rule 42(a) for a single trial on the exposure issue and required findings specific to job site, craft, and time. Phase II organized evidence of exposure by ten-year intervals for submission to the jury. The court was to make a nonjury determination concerning which claimants worked for a sufficient period at each worksite so as to be a proper member of that site's group and craft, and the jury was to apportion responsibility among settling and nonsettling defendants.

Phase III, also a Rule 42(a) consolidation, dealt with compensatory damages. As before, Judge Parker proposed to present damages through representative sampling and statistical extrapolation to the group of consolidated cases. He divided claimants into five disease categories and ordered the presentation of a random sample from each disease category to the jury, for a

407. Id. at 712.
408. Id. at 710.
409. See supra note 94 and accompanying text.
total of 150 individual cases. Prior to the trial of Phase III, Judge Parker increased this sample to 160 cases. At the conclusion of the sample cases, Judge Parker proposed to hear testimony from his court-appointed expert concerning the methodological validity of the sampling technique and statistical approach. With minor modifications, this basic plan governed the trial in *Cimano*.

In restructuring the trial plan after the Fifth Circuit mandamus, Judge Parker sought to address that court's concerns about individualization of proof under Texas products liability law. With regard to the revamping of Phase II, he felt "persuaded that a satisfactory level of individualization can be achieved by asking the jury in Phase Two to make findings on exposure that are specific to job site, craft and time." Furthermore, Judge Parker sought to validate his most innovative proposal, the compensatory damage sampling technique, through the testimony of an expert witness. The defendants appealed this revised trial plan, and the Fifth Circuit denied the appeal without opinion. The lack of a second Fifth Circuit opinion supplies little information concerning the validity or invalidity of the details of Judge Parker's revised trial plan.

2. *The School Asbestos Litigation Bifurcated Trial Plan*

In May 1990, after massive briefing from the parties on proposed trial plans, Judge Kelly issued a bifurcated trial plan for *School Asbestos Litigation*, without oral argument or supporting memoranda. By then, Judge Kelly had the benefit of Judge Parker's experience with various proposed trial plans and the

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411. Id. at 7-11.
412. Id. at 2.
413. See supra note 94 and accompanying text.
Fifth Circuit's reaction to those plans. Judge Kelly ordered a bifurcated trial, with Phase I to include seven issues:

- (A) the level at which various kinds of friable asbestos are hazardous in school buildings.
- (B) defendants' knowledge of the health hazards of asbestos.
- (C) defendants' failure to properly warn or test.
- (D) defendants' fraudulent concealment of knowledge of the dangers of asbestos.
- (E) the defendants' conspiracy to suppress knowledge of the dangers of asbestos.
- (F) punitive damages.
- (G) common defenses.

He deferred outlining any other trial phase until the completion of Phase I.

Judge Kelly's trial plan is notable for two reasons. First, it substantially tracks the trial plans in *Jenkins v. Raymark Industries, Inc.* and *Cimino*. In *Jenkins*, the Fifth Circuit validated a bifurcated class action plan with a Phase I trial of the state-of-the-art defense and punitive damages. The first four issues in *School Asbestos Litigation* relate to the state-of-the-art defense. Similar to *Jenkins* and *Cimino*, the punitive damages issue is scheduled for Phase I. In addition, Judge Kelly will try common defenses during this phase, as Judge Parker did in *Cimino*. The only new Phase I issue in *School Asbestos Litigation* will be a common conspiracy claim. Thus, Judge Kelly adopted an appellate-approved bifurcated trial plan, in which trial of common defenses and punitive damages occurs first, and that of product identification, exposure, and actual damages occurs later. He left open the structure and presentation of these latter issues in a class action format.

Second, Judge Kelly's trial plan orders the parties to submit "proposed factual interrogatories to the jury ... and a list by
jurisdiction of which interrogatories are applicable to the law of that jurisdiction." Judge Kelly intends to apply the law of multiple jurisdictions to the legal theories in the case.

B. Reverse Bifurcation

Courts use Rule 42(b) bifurcation in many complex cases to separate trial of liability and damages. In *Jenkins*, Judge Parker used reverse bifurcation first to try the common state-of-the-art defense and punitive damages issues and later to address causation and compensatory damages. The Fifth Circuit upheld his trial order against the defendants' challenge that reverse bifurcation violated Texas law regarding the relationship of punitive damages to compensatory damages. Two justifications for this reverse bifurcation procedure apply to mass asbestos litigation. First, if the defendants prevail on the state-of-the-art defense, then no need exists for further trial of either causation or damages. Furthermore, if the plaintiffs do not prove gross negligence, then the court will eliminate punitive damages from the case. Second, the award or threatened award of punitive damages induces defendants to settle prior to trial.

Judge Parker took the reverse bifurcation technique one step further in *Cimino* when he reversed all phases of the trial. First, Judge Parker tried the Phase I *Jenkins* issues of common affirmative defenses, punitive damages, and gross negligence. At the completion of Phase I, Judge Parker reversed Phases II and III and tried the damages portion before the exposure phase in the hope that forcing the parties to try damages first would induce settlement. When such settlements were not forthcoming, the damages phase began in July 1990.

In staging the presentation of the 160 representative cases in Phase III, Judge Parker used another innovative procedure. In

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422. See Comment, *supra* note 392, at 744-47 (tracing the history of bifurcation in personal injury cases and describing the debate surrounding bifurcation).

423. *Jenks*, 782 F.2d at 474-75.


order to reduce duplicative testimony on common medical issues, he tried the initial portion of this phase simultaneously before two juries. The two juries then split, with one jury trying fifteen individual cases before Judge Parker and the other jury trying twenty-five individual cases before another judge. At the completion of these forty cases, the juries adjourned for deliberation and their verdicts were not announced publicly.427 The two juries reconvened to continue separate trial of individual cases until each jury heard eighty cases in various disease categories. Following this sampling of 160 individual cases, Judge Parker permitted adversarial expert testimony concerning the sampling methodology. Judge Parker scheduled Phase II, dealing with exposure by worksite, to begin after conclusion of the damages phase.428

C. Jury Comprehension Issues

The trial of complex litigation involving highly technical or scientific testimony raises a debate concerning whether such cases ought to be tried to a jury at all.429 Although some com-

427. See Trials: Verdicts Under Seal in Cimino; Values Rumored, 5 Mealey’s Litig. Rep. Asbestos 13 (Aug. 3, 1990) (reporting on sealed verdicts in first 40 Phase III verdicts and indicating that the court would unseal verdicts after the trial of all 160 cases). Judge Parker tried 15 mesothelioma cases and received 15 verdicts for plaintiffs. Judge Schell’s jury heard lung cancer cases and returned jury verdicts for 18 plaintiffs and 7 defendants. When the juries reconvened, Judge Parker was scheduled to try “other than lung cancer” cases, and Judge Schell was scheduled to try a mixed group of cancer, asbestosis, and pleural cases.

428. See Order, Cimino, Docket at 195 (Apr. 11, 1990) (scheduling Phase II immediately after the conclusion of Phase III).

429. See generally J. Cecil, E. Lind, & G. Bermant, Jury Service in Lengthy Civil Trials (1987) (study of jurors in long and short civil cases); M. Selvin & L. Pincus, supra note 19 (comparing the characteristics and experiences of jurors in lengthy civil trials and jurors in similar trials of shorter duration); Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980) (asserting that historically parties could not avoid a jury trial in cases involving complicated facts); Blecher & Daniels, In Defense of Juries in Complex Antitrust Litigation, 1 Rev. Litig. 47 (1980) (defending use of juries and offering suggestions for improving courtroom procedures in complex civil trials); Lempert, Civil Juries and Complex Cases: Let’s Not Rush to Judgment, 80 Mich. L. Rev. 68 (1981) (advocating changes to the way in which juries operate in complex cases); Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv. L. Rev. 899 (1979) (suggesting ways of dealing with jury incompetence, such as viewing certain issues as equitable and thus outside the scope of the seventh amendment); Comment, Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial, 51 U. Chi. L. Rev. 581 (1984) (arguing that a complex case may fall outside of the seventh amendment).
mentators urge the use of special juries for complex cases,\textsuperscript{430} opponents of special juries believe they violate the seventh amendment. Apart from such constitutional concerns, empirical researchers are investigating whether procedural changes in complex cases affect jury decisions.\textsuperscript{431}

Asbestos mass tort litigation is somewhat anomalous because the trial of individual asbestos claims is fairly simple now that the law surrounding them is settled.\textsuperscript{432} The central problem with asbestos litigation is not the presentation of individual cases but the repetition of thousands of highly similar cases involving duplicative proof of claims. What renders asbestos litigation complex is the consolidation of thousands of similar cases presented against multiple defendants. In mass asbestos litigation, the jury must hear common testimony on issues of negligence, affirmative defenses, and punitive damages, and must apportion responsibility for injury among the defendants.

Federal judges use a number of procedures for improving jury comprehension in complex multiparty civil litigation, such as bifurcated trials, preliminary and interim jury instructions, interim summations, juror notetaking and questions, detailed jury instructions, and special verdicts.\textsuperscript{433} Although some criticize these techniques for improperly affecting jury deliberations, these devices generally are recognized for helping jury deliberation in complex cases rather than prejudicing results.

Judge Parker used many of these devices to guide jury deliberations and verdicts in \textit{Cimino}. At the outset of Phase I, each

\begin{footnotesize}
\textsuperscript{430} See, e.g., Drazan, \textit{The Case for Special Juries in Toxoc Tort Litigation}, 72 \textit{Judicature} 299 (1989) (advocating use of special juries of scientific and medical experts in toxic tort litigation); Luneberg & Nordenberg, \textit{Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Copying with the Complexities of Modern Civil Litigation}, 67 \textit{Va. L. Rev.} 887 (1981) (delineating the circumstances in which cases would appropriately be tried before a nonjury tribunal or specially qualified jury); Note, \textit{The Case for Special Juries in Complex Civil Litigation}, 89 \textit{Yale L.J.} 1155 (1980) (arguing that special juries can meet the constitutional requirements of the seventh amendment and the due process clause).

\textsuperscript{431} See, e.g., Bordens & Horowitz, \textit{supra} note 393 (empirical study on experimental jury results in mock mass tort trials).

\textsuperscript{432} T. Willging, \textit{supra} note 1, at 18.

\textsuperscript{433} For a discussion of these various techniques, see generally Comm. on Fed. Courts of the N.Y. State Bar Ass'n, \textit{Improving Jury Comprehension in Complex Civil Litigation}, 62 St. John's L. Rev. 549 (1988) (discussing techniques available to increase the likelihood that a jury verdict will reflect the evidence and the judge's instructions); Heuer & Penrod, \textit{Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking}, 12 L. & Hum. Behav. 231 (1988) (reporting that allowing jurors to take notes and ask questions increased juror satisfaction and confidence in the verdict and did not slow the trial).
\end{footnotesize}
A juror received a jury notebook containing definitions of legal terms and concepts, such as the preponderance of the evidence standard, negligence, ordinary care, proximate cause, gross negligence, punitive damages, unreasonably dangerous product, producing cause, marketing defect, and adequate warnings and instructions. The notebook defined the concept of gross negligence separately for cases filed before and after the change in applicable Texas tort law. Separate sections of the notebook supplied information concerning the products about which the jurors would hear testimony during the trial. For the four defendants remaining in the case and the seventeen defendants settling, the court supplied product lists and the years the defendants manufactured those products. The final portion of the jury notebook contained reproductions of the defendants' product warnings.434

In addition to the jury notebook, Judge Parker instructed the jury concerning the nature of the case and legal standards at the outset of trial, permitted interim lawyer summations during trial, and issued lengthy jury instructions at the conclusion of trial.435 The court supplied the jurors with final jury instructions after the attorneys for both sides had an opportunity to comment on the judge's instructions. To help refresh their recollections of the witnesses, the jurors also received photographs of the witnesses.

Finally, Judge Parker gave the jury a jury form and a twenty-four-page special verdict form which he went over page-by-page during jury instructions.436 The jury form listed each of the ten class plaintiffs separately and required the jurors to find either for the plaintiff or for the defendant, to assess compensatory damages, and to apportion causation among the plaintiff, the four nonsettling defendants, and the settling defendants.437 The special verdict form consisted of several interrogatories, four of which required the jurors to determine dates from which each of four defendants engaged in manufacturing and marketing activity relating to their products and a fifth that related to tortious conduct. Another interrogatory required the jurors to determine whether to assess punitive damages upon a finding of gross

436. For a copy of this verdict form, see Jury Verdict, Cimino, Docket at 173 (Mar. 29, 1990).
437. Id.
negligence. If the jury decided to impose punitive damages as part of its verdict, the form directed the jury to determine the multiplier for punitive damages measured against each dollar of actual damages.

D The Trial Results in Cimino

Judge Parker tried Phase I of *Cimino* from February 6 through March 22, 1990. The trial lasted twenty-nine days, and the jury deliberated for three days. The jury found in favor of nine of the ten class plaintiffs, awarding compensatory damages as well as assessing punitive damage multipliers against each of four defendants. In response to the special interrogatories, the jury determined that the defendants knew or should have known as early as 1935 that insulators exposed to asbestos products were at risk for contracting asbestos-related diseases. In addition, the jury indicated dates from which the defendants knew or should have known of product risks to household members, craft members working near or with asbestos products, and household members of those craft workers. In April, Judge Parker heard postverdict motions relating to the Phase I trial and verdicts.

In June 1990, Judge Parker ruled on postverdict motions concerning Phase I of *Cimino*. He dismissed all claims for compensatory damages against one defendant but nonetheless permitted the assessment of punitive damages against that same defendant. He upheld the jury-assessed multipliers for other punitive damages and ruled that the jury answers to three of the first four special interrogatories were immaterial and would be disregarded. Judge Parker also invalidated jury findings re-

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440. Order Setting Hearing to Consider Post-Verdict Motions, *Cimino*, Docket at 195 (Apr. 11, 1990) (setting posthearing date for Apr. 27, 1990, and setting out five matters for attorneys to brief). Judge Parker invited argument on the following issues: 1) whether the jury's answers to Special Interrogatories 2, 3, and 4 are surplusage; 2) the significance, if any, of the jury's answer to special interrogatory 6; 3) whether there was a basis for a contributory negligence finding on certain individual plaintiffs other than smoking; 4) the proper date to be utilized and procedure for calculating prejudgment interest on individual plaintiff cases; 5) the effect of prior settlements in calculating the punitive damage multiplier. *Id.*
441. *See Memorandum and Order, Cimino*, Docket at 336 (June 15, 1990); *see also Punitive Multipliers Upheld; Claims Against Carey Dismissed*, 5 Mealey's Litig. Rep. Asbestos 3 (July 6, 1990).
garding certain plaintiffs' contributory negligence, holding that
the record contained little or no evidence to support the jury's
contributory negligence findings. In late July 1990, Judge Parker
ordered that he would consider the appropriateness of a remit-
titur for the amount of punitive damages assessed against the
defendants, and he invited counsel to brief this issue.

During July and August 1990, Judges Parker and Schell ad-
judicated the 160 representative cases on the compensatory dam-
ages issue. They tried these cases in groups. In the first round
of trials, forty cases were tried to two juries, with Judge Parker
hearing fifteen mesothelioma cases and Judge Schell hearing
twenty-five lung cancer cases. The juries reached mixed verdicts
for plaintiffs and defendants, and the court placed the verdicts
under seal until completion of the entire sample of 160 cases.
Schell continued trying a group of “other than lung cancer” cases,
and Judge Parker tried a mixed group of cancer, asbestosis, and
pleural claims. The judges finished the trial of these cases
during fall 1990.

VIII. EVALUATIONS AND CONCLUSIONS

Resolving mass tort litigation in a just, equitable, and efficient
fashion is the major civil litigation problem of the 1990's. This

442. Memorandum Opinion and Order, Cimino, Docket at 336 (June 15, 1990). Judge
Parker dismissed the claims for compensatory damages against defendant Carey Canada,
but found sufficient evidence in the record to support an award of punitive damages
against that defendant. In so ruling, Judge Parker stated:

In Texas, punitive damages must bear a reasonable proportion to actual
damages. Nevertheless, the Court finds that, under the circumstances
of this action, Texas courts would carve out an exception to the general rule
and allow punitive damages without proof of actual damages. The peculiar
facts of this case create the rare circumstance under Texas law where
punitive damages are recoverable and actual damages are not.

Id. at 7. The order also contained lengthy rulings regarding the calculation of prejudgment
interest.

443. Order, Cimino, Docket at 406 (July 16, 1990) (requesting defense counsel to supply
the court with specific factual information relating to remittitur of the punitive damages
awards). The juries awarded plaintiffs a total of $1,806,250 for past damages and $1,721,250
for future damages. The average past damage award was $200,694, with $750,000 the
high award and $50,000 the low award. The average future damage award was $191,250,
with future damage awards ranging from $50,000 to $500,000. Opinion and Order, Cimino
(Nov. 12, 1990).

444. See, e.g., Cimino, Docket at 397 (July 10, 1990) (transcript of trial proceedings
before Judges Parker and Schell). Judge Parker reported that the 15 mesothelioma cases
he tried returned verdicts for the plaintiffs averaging approximately $1,350,000 per case.
Schell's 25 cases split with 18 verdicts for the plaintiffs, whose collective awards totaled
$14 million, and 7 verdicts for the defendants. See Trials: Verdicts Under Seal in Cimino;
Values Rumored, supra note 427, at 13-14 (reporting on the first verdicts in this phase of
Cimino).
study explores the feasibility of a judicial model that permits consolidation of thousands of cases for disposition under judicial auspices. Although other legal reformers pursue solutions through legislative or administrative means, this project focuses on a judicial approach to resolving mass tort litigation. The historical backdrop to this study is the federal courts' pervasive resistance to adjudicating personal injury claims in an aggregative setting. Jenkins-Cimino and School Asbestos Litigation suggest some inroads on judicial reluctance to handle mass tort litigation in a consolidated fashion. Clearly, the success or failure of these litigations, and approval or disapproval by appellate courts, will determine the efficacy of their use as models for future mass tort litigation.

Because the two litigations that this study describes are ongoing, definitive conclusions concerning the legal validity of many of the procedures used in these cases are impossible to draw. Any final judgment concerning the possibility of federal consolidated mass tort litigation must await appellate scrutiny. At this juncture, however, courts have resolved some issues with certainty, and patterns concerning the conduct of these cases are apparent. To be sure, Jenkins-Cimino and School Asbestos Litigation established that certain common issues can be certified for class action adjudication. For asbestos cases, these common issues include gross negligence, conspiracy to suppress knowledge of dangers, and common defenses. The Third Circuit upheld the validity of a compensatory damages class action, and the Fifth Circuit upheld the validity of a punitive damages class action. These cases instruct that the presentation of such classwide issues in reverse bifurcated proceedings does not violate seventh amendment jury trial rights or implicate due process concerns.

Apart from the legal validity of these procedures, one may draw some assessments regarding the judges' goals and their trial management techniques in Cimino and School Asbestos Litigation. A major goal of both judges was to induce the parties to settle without recourse to trial. Both judges viewed the repetitious litigation of thousands of similar asbestos claims as inefficient, wasteful, and unnecessary. Both hoped to spur the attorneys to settle their claims by the threat of consolidated treatment of the asbestos cases, and this prospect was a major impetus for the judges' desire to certify the class actions. Yet neither judge assumed an active, interventionist role in settlement; instead, the judges pursued indirect encouragement through pretrial management of the cases. In Cimino, approximately a
dozen defendants settled during various stages of pretrial proceedings, but four insisted on litigating the consolidated action. In *School Asbestos Litigation*, this approach resulted in very few pretrial settlements. Both judges view the failure to achieve universal settlement as a major frustration in the cases.

With regard to pretrial proceedings, issues that theoretically might have been problematic proved not to raise insuperable difficulties during the course of these litigations. After provisional certification and appellate approval of the two class actions, the courts and the parties dealt with many class-related issues in a routine, noncontroversial fashion. Class notice was not a problem in either case, nor did opt-in and opt-out litigants present significant difficulties. Although defendants raised subject-matter jurisdictional challenges in both instances, the courts either rejected or deferred these challenges until trial for determination of the amount-in-controversy requirement. For multiparty litigations involving thousands of claimants and a large number of defendants, personal jurisdiction challenges were few, and the courts simply resolved them through the application of standard jurisdictional principles. In *Cimino*, the court severed problematic defendants and nonconforming plaintiffs from the consolidated litigation for separate adjudication.

Both judges exercised standard pretrial judicial management techniques for complex litigation. They designated lead and liaison counsel early in both proceedings. Both judges permitted the use of settlement funds to finance the consolidated proceedings. The judges used pretrial conferences and hearings sparingly, preferring to deal with most matters by written motion or telephone conference. Both judges used scheduling orders to direct the course of pretrial proceedings and relied extensively on their magistrate judges to handle routine pretrial discovery matters, nondispositive motions, and some jurisdictional questions.

Judge Parker expressed great disappointment with the volume of discovery in *Cimino*. He indicated that, were he to preside over another class action or consolidated proceeding, he would limit discovery to the class representatives rather than permit discovery of every claimant in the case. In *Cimino*, he made a number of attempts to limit the scope and duration of discovery; his most innovative order limited depositions to forty-five minutes and restricted medical exams to an eight-hour period. These orders remained during the course of pretrial proceedings, and the Fifth Circuit did not invalidate the orders in either appeal. Similarly, Judge Kelly imposed time and place restrictions on
expert witness discovery in *School Asbestos Litigation*. Because expert testimony will be the primary means of presenting this case, the effect of these discovery limitations remains to be seen.

In addition to the extensive use of magistrate judges, Judge Parker made innovative use of a special master to formulate a class action plan. Special Master Ratliff's report supplied Judge Parker with independent advice concerning the feasibility of a class action disposition of asbestos personal injury claims and provided an outline of trial staging that informed Judge Parker's thinking in his subsequent trial plans.

With regard to actual trial staging, *School Asbestos Litigation* is to proceed with a reverse bifurcated trial plan used previously in other mass tort cases, whereas Judge Parker innovatively staged *Cimino* as a reverse trifurcated proceeding. By presenting the damages phases first, prior to exposure issues, Judge Parker expected to induce settlement. When settlement did not occur, Judge Parker utilized the class action rule to try common defenses, gross negligence, and punitive damages, and demonstrated that a mass tort class action of these issues is feasible.

A second structural innovation in *Cimino* was the use of two juries simultaneously to hear common medical testimony and separately to hear individual cases on compensatory damage claims. Trying groups of cases, sending juries to deliberate, and returning juries to hear further cases is a new technique for staging multiple cases in a short period. The impact and validity of these procedures remains to be seen. In addition to these structural innovations, Judge Parker used almost every known technique for aiding jury comprehension, including extensive pretrial and posttrial jury instructions, jury notebooks, notetaking, interim summations, and witness photographs to refresh the jury's memory.

These litigations present at least two major unresolved procedural problems. The first concerns the relationship of applicable substantive law to the viability of consolidated or class action procedure. Although not pellucidly clear, the Fifth Circuit mandamus decision in *In re Fibreboard Corp.* suggests that the requirements of substantive state tort law override a federal judge's attempts at various procedural innovations in handling mass tort litigation. The two *Cimino* mandamus decisions, however, suggest that substantive state law does not restrain federal district judges from experimenting with new ways of consolidat-

445. 893 F.2d 707 (5th Cir. 1990).
ing proceedings in personal injury cases. Viewed conservatively, the first Cimino mandamus decision implies that appellate courts will invalidate procedural innovation when such innovation trenches on the margins of state substantive law. The task of federal judges seeking consolidated solutions to mass tort litigation is to walk the fine line between permissible federal procedure and impermissible substantive state law restrictions.

Whether the compromise solution concerning applicable law in School Asbestos Litigation is workable also remains to be seen. Although applying the different laws of different states to different issues does not trouble Judge Kelly, the spectre of inconsistent results looms large. Moreover, the parties have yet to resolve definitively the applicable law questions. It is too soon to know whether the most stringent standard will prove to be workable for a nationwide class action, but School Asbestos Litigation at least provides a model for this choice-of-law experiment in a diversity-based nationwide class action.

Second, the aggregate determination of damages remains a highly problematic feature of mass tort class action procedure. Cimino is the first case to attempt an aggregate presentation of compensatory damages using sampling methods and statistical extrapolation to the universe of claimants. Because courts have never before used this technique in consolidated personal injury cases, Judge Parker’s attempt to present damages in this fashion is at the frontier of known procedural law. Expert witness testimony concerning the validity of this methodology is crucial to support any future trial of damages in an aggregate manner. Appointing an expert to construct the representative sample before the trial of the cases, rather than using an expert’s testimony to validate the sample after the fact, might have improved Judge Parker’s handling of the statistical sampling approach. This approach removes the judge from the process of selecting the sample and makes the process less vulnerable to challenges of lack of scientific and hence legal validity.

Two final points. A number of defense attorneys believed that the nonsettling defendants in Cimino remained in that case in part to challenge Judge Parker’s procedural innovations on appeal after final judgment. Yet, given the magnitude of the judgments already rendered and the defendants’ exposure to punitive damages, the nonsettling defendants ironically might be unable to post bond to bring appeals from the judgments. Finally, the parallel progress of these two cases suggests a need for better judicial communication concerning adjudication of mass tort cases.
During the course of these litigations, particularly at the trial planning stages, the courts might have benefitted from each other's experience with trial planning. Some method for sharing this information and experience might help to provide useful models for judges, lawyers, and litigants involved in future complex mass tort litigation.
### Incidence of Federal Asbestos Personal Injury/Product Liability Cases

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Table 2

Summary of Federal Asbestos Personal Injury/Product Liability Cases

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<th>Count of Asbestos Cases</th>
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<th>During 1985</th>
<th>During 1986</th>
<th>During 1987</th>
<th>During 1988</th>
<th>During 1989</th>
<th>Total</th>
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<td>1200</td>
<td>2638</td>
<td>4379</td>
<td>7660</td>
<td>5252</td>
<td>21853</td>
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<td>Net Increase in Pending Cases (Filed Terminated)</td>
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<td>2391</td>
<td>4145</td>
<td>4589</td>
<td>29466</td>
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<td>Before or During 1984 (%)</td>
<td>During 1985 (%)</td>
<td>During 1986 (%)</td>
<td>During 1987 (%)</td>
<td>During 1988 (%)</td>
<td>During 1989 (%)</td>
<td>Total (%)</td>
</tr>
<tr>
<td>----------------------------------------</td>
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<td>----------------</td>
<td>----------------</td>
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<td>1200 (2)</td>
<td>2638 (2)</td>
<td>4379 (2)</td>
<td>7660 (2)</td>
<td>5252 (2)</td>
<td>21853 (2)</td>
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<td>122 (2)</td>
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<td>Dismissed/settled</td>
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<td>3129 (71)</td>
<td>6694 (87)</td>
<td>3953 (75)</td>
<td>17312 (79)</td>
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<td>41 (1)</td>
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<td>5 (0)</td>
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<td>31 (0)</td>
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<td>1027 (23)</td>
<td>574 (7)</td>
<td>1072 (20)</td>
<td>3115 (14)</td>
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Note: Percentages shown in parentheses may not add to 100% in each column due to rounding.
Table 4
Disposition Time of Terminated Federal Asbestos Personal Injury/Product Liability Cases
(Average Time from Filing to Termination in Days)

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<th>Disposition Method</th>
<th>Before or During 1984</th>
<th>During 1985</th>
<th>During 1986</th>
<th>During 1987</th>
<th>During 1988</th>
<th>During 1989</th>
<th>Total</th>
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<td>896</td>
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<td>416</td>
<td>336</td>
<td>781</td>
<td>573</td>
<td>673</td>
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<td>1305</td>
<td>749</td>
<td>239*</td>
<td>261*</td>
<td>1151*</td>
<td>906</td>
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<td>Motions before Trial</td>
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<td>900</td>
<td>682</td>
<td>668</td>
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<td>907</td>
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<td>953</td>
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<td>1715</td>
<td>1117</td>
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<td>775</td>
<td>990</td>
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<td>812*</td>
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<td>574</td>
<td>498</td>
<td>730</td>
<td>1238</td>
<td>817</td>
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*Note: Fewer than ten cases were used to compute this average.
The Alternate Dispute Resolution Agreement is applicable to all asbestos personal injury cases filed by Walter Umphrey and Marlin Thompson in the United States District Court for the Eastern District of Texas from January 1, 1985 through April 1, 1986. If any party wishes to terminate or modify the Alternate Dispute Resolution provisions, a motion must be made to the District Court and a hearing held upon the intention of any party to discontinue the Alternate Dispute Resolution.

I. Monitor. The Court shall designate a special Monitor to oversee the ADR procedure. The plaintiffs' attorneys shall certify to the Monitor those cases on the individual plaintiff attorney's case list which are in compliance with paragraphs I.a through g of the standing order for asbestos cases in the Eastern District of Texas dated July 7, 1982.

II. Negotiation Eligibility. The Monitor shall provide to Wellington attorneys a list of fifty (50) Walter Umphrey and ten (10) Marlin Thompson cases per month eligible for the negotiation process. The list of cases eligible for negotiation shall be compiled by the Monitor after reviewing plaintiffs' attorney certification. Wellington shall have sixty (60) days from the date determined by the Monitor for each case that such case is eligible for negotiation to review said case in preparation for the negotiation. At the time of certification, plaintiffs' attorneys shall provide Wellington attorneys all information deemed appropriate for proper evaluation of the case including not only the plaintiff's examining physician's narrative report, but also pulmonary function studies and the underlying data in connection therewith, the x-rays, the results of any other tests ordered by such examining physician, and authorizations for the medical records from other physicians and hospitals at which plaintiff has been treated including company medical files where applicable. Copies of medical records will be furnished to plaintiff's attorney within thirty (30) days. Additionally, if Wellington attorneys deem it necessary, the plaintiff shall be made available for a thirty (30) minute personal videotaped interview.

During the sixty (60) days following the cases being provided by the Monitor as eligible for the negotiation, the defendants may have the plaintiff examined by a physician of their choice.
at the defendant's expense with a travel allowance to plaintiff. The results of any such examination shall be provided to the plaintiff's attorney.

III. Negotiation Period. The negotiation period shall be forty (40) days. During such negotiation period, plaintiff's attorneys shall personally confer with a designated attorney or representative of Wellington. Plaintiff's attorney and Wellington attorney, or its designated representative, shall during such period of time negotiate in good faith and make a bona fide effort to resolve each case by negotiation. At the conclusion of the negotiation period, plaintiff's attorneys shall notify the Monitor in writing for each particular case whether the case has been settled by negotiation. Upon receipt of such written notice for cases not settled by negotiation, the Monitor shall prepare a list of cases which shall be submitted to arbitration for resolution by Arbitrators.

IV. Arbitration Period. The arbitration period shall be ninety (90) days from the date certified by the Monitor that a particular case is eligible for submission to the Arbitrator.

V. Arbitrator Selection. The defendants and the plaintiffs shall each select one person as an arbitrator selector. The two selectors designated will then meet independent of the attorneys who chose them, and they will agree on the individual number of and the Arbitrators who will ultimately decide the cases in the arbitration phase. The parties shall jointly negotiate with the individuals selected regarding agreement to serve and compensation for their services. In the event an agreement is not reached regarding compensation, the parties shall notify the court of an early date and the court shall enter an appropriate order.

VI. Cases Subject to Stay Orders. In any case that the medical evidence of a particular plaintiff demonstrates that the plaintiff is not suffering at the time of evaluation from the disease of asbestosis or cancer, such as plaintiffs with only pleural plaques for pleural thickening without restrictive impairment by pulmonary function studies, the Monitor shall place such cases on the Court's administrative docket and stay these cases for a period of two years. At any time during the two year period of time, plaintiff's attorney may, with proper medical justification, move the Monitor to remove such case from the administrative stay; at which time the case would immediately be placed on the active ADR docket. If there is no evidence of asbestosis or other asbestos-related disease at the end of the two year stay, plaintiff shall have the option of either dismissing the suit, receiving a
green card from Wellington which will toll limitations, or requesting that
the case be placed on the Court's active docket where it will proceed through
negotiation and arbitration and ultimately, to trial if so requested.

VII. Cases Submitted to the Arbitrator. Within the ninety (90)
day time period for determination of cases submitted to the
Arbitrator, the parties shall by agreement and in cooperation
with the Arbitrator schedule presentation of cases. In the event
an agreement is not possible, the Monitor shall be promptly
notified and the Monitor shall provide the parties with such
schedule. The cases will be submitted to the various arbitrators
on a rotating basis. The Arbitrator shall conduct a hearing and
receive evidence in each case. The matters presented to the
Arbitrator are not controlled by the Federal Rules of Evidence
and may be presented in summary or affidavit form, or by
deposition or live witness, but shall include evidence as to product
exposure, whether the plaintiff suffers from an asbestos-related
injury or disease and any damages to which the plaintiff may be
entitled. The parties may by agreement modify the method of
presentation or establish an agreed procedure concerning the
trial or presentation to the Arbitrator. However, any such agree-
ment shall be first submitted to the Court for approval.

To assist the Arbitrators in making consistent determinations,
there will be seven categories of evaluation on which the arbi-
trator would decide the award amount of damages, if any. The
cases to be considered by the arbitrator would be all those cases
not placed on the pleural inactive docket by the Monitor. The
seven potential findings by the Arbitrator are as follows:

(1) No asbestos-related disease and therefore no recovery by
the plaintiff;
(2) Pleural changes with restrictive impairment;
(3) Pulmonary asbestosis;
(4) Asbestos-related cancer cases;
(5) Confirmed Mesothelioma;
(6) That it is a pleural case with no restrictive impairment
and recommending that it be placed on the pleural inactive
docket.
(7) That a particular case does not fit in any of the enumerated
categories and making an appropriate determination or award.

In determining the appropriate award in each category, the
Arbitrator should consider such factors as age of the plaintiff,
degree of asbestos related disability, extent and type of exposure
to asbestos, smoking history, significant non-asbestos health prob-
lems relating to any disability, lost wages, dependents, medical records and other reports, increased risk of cancer, progression of asbestos-related injury, and pain and suffering. The plaintiffs shall file with the Arbitrator the amounts and parties of any prior settlement in a particular case and shall furnish a copy of such information to the defendants prior to any hearing before the Arbitrator. Defendants shall receive a credit for all amounts paid by such settlements and the defendants shall subtract the total amount of prior settlements from the Arbitrator's award, if any. The arbitrator shall also make percentage findings relating to participating, non-settling manufacturers and suppliers in the arbitration and to non-participating, non-settling defendants. To determine the effect of the percentage findings on the final award, the parties shall apply the doctrine of *Duncan v. Cessna*. The Arbitrator shall have thirty (30) days from the date of hearing to render a decision based upon a review of the evidence.

Upon receipt of the decision of the Arbitrator, the parties shall have twenty (20) days to notify the Monitor whether they accept or reject the award of the Arbitrator. In the event the award is accepted, the parties shall provide the Court with an appropriate order the case shall be dismissed. In the event the award is not accepted, the Monitor shall assign the case to the docket of the individual judge to whom the case would originally have been assigned to take its place on the trial docket. If the case is to be tried, the plaintiffs waive any claim for punitive damages and the defendants waive state-of-the-art defense. The matters to be tried would include product exposure by the plaintiffs, whether the plaintiff suffer an asbestos-related injury or disease, and actual damages, if any. The procedure to be followed would be similar to that in *Hardy v. Johns-Manville*, 681 F.2d 334 (5th Cir 1982). The jury, however, will make the appropriate percentage findings as set out in the decisions of *Duncan v. Cessna*, 665 S.W.2d 414 (Tex. 1984) and *Moore v. Johns-Manville Sales Corporation*, as those cases apply the law of the State of Texas.

Should any cases not be settled after proceeding through the arbitration stage, then each party shall be authorized to conduct all discovery allowed by the applicable Federal and State Rules of Civil Procedure except that there shall be no discovery related to punitive damages or state-of-the-art. No evidence shall be admitted regarding the amount of any award by the Arbitrator or that an appeal was taken therefrom.

VIII. Cases which are disposed of by settlement or through an arbitrator's award shall be paid by defendants within thirty
(30) days after settlement agreement is negotiated or, where not appealed, within 30 days after receipt of arbitrator's decision.

IX. Order of Presentation. The parties shall prepare and present cases through each phase of the Alternate Dispute Resolution Procedure in the chronological order of their filing. Exceptions will be allowed by the Monitor where in the judgment of the Monitor sufficient evidence of hardship exists.

SIGNED and AGREED to on this the ___ day of September, 1986.

________________________________________
Attorney for Asbestos Claims Facility

________________________________________
(signature here)

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(signature here)