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Mass Tort Litigation: Congress's Silent, But Deadly, Reform Effort

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MASS TORT LITIGATION: CONGRESS'S SILENT, BUT DEADLY, REFORM EFFORT

MARY J. DAVIS

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I. INTRODUCTION

When Congress passed The Common Sense Product Liability and Legal Reform Act1 ("Act"), it seemingly ignored the most important category of

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products liability litigation for the past decade and for the foreseeable future: mass tort litigation. Upon closer inquiry, however, it appears that many of the Act's provisions, if enacted, would drastically affect mass tort litigation and in ways that would perversely affect the behavior of tortfeasors who cause the most harm, in terms both of actual numbers and the nature of the harm.

To the extent that tort law deters tortious behavior, it does so most effectively when the liability imposed is proportional to the magnitude of the harm caused. But the Act would turn this result on its head in the mass tort context. Many of the well-founded criticisms of the Act by the participants in this Symposium are even more profound when applied to the mass tort context. Most mass tort litigation problems are thought to be procedural, i.e. how to aggregate the claims for resolution while preserving the value of individualized litigation. Although a variety of organizations, including the American Law Institute, have meaningfully studied the procedural problems and proposed concrete changes to the current system


2. This article will address mass product liability litigation specifically. Mass accident tort litigation, such as airplane disasters, large scale building fires or collapses is certainly mass tort litigation but not of the perplexing character of the mass product use/harm cases of which medical devices, pharmaceutical and toxic substance cases are the primary examples.

3. Doctrines like causation, both actual and proximate, are intended to insure, at least in part, that culpability is proportionate to liability. This concept lies at the heart of negligence law—it is only the unreasonable behavior that we seek to deter. However, once an actor is culpable, he is liable for all harms which result, whether those consequences are foreseeable or not. This is, of course, the eggshell-skull plaintiff rule which is as old as tort law. See, e.g., Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).


5. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) [hereinafter COMPLEX LITIGATION]. For a discussion of these proposals, see infra note 9 and accompanying text.
for resolving mass torts, Congress wholly failed to address these procedural issues. Rather, Congress instead has attempted to enact substantive reforms which will detrimentally affect the very nature of the rights and responsibilities in the mass tort context.6

This article explores the ways in which the Act treats mass tort litigation issues. The Act does so both directly and indirectly. The direct methods of reform are mostly industry-specific and, thus, almost inconsequential in contrast to the indirect treatment. The indirect, almost clandestine, methods of reform are the most insidious and provide the most cause for concern as Congress once again attempts to “reform” products liability by reintroducing the Act in 1997.7 Given the President’s early indication that a reform measure could meet with his approval, but that this one in its present form did not, it is not surprising that Congress is reviving the Act this term. This action illustrates Congress’s failure to recognize the significant differences between mass tort litigation and “run-of-the-mill” products liability litigation8 and shows, at the very least, a startling lack of understanding of the complexity of current product liability litigation and, at most, a purposeful effort to immunize from responsibility those who cause the greatest harm to the largest number of people.

The original draft of this article began with the thought that in drafting and negotiating the Act, Congress simply failed to appreciate the significant differences between mass tort litigation and the run-of-the-mill products liability case. Consequently, the original goal of this article was to illuminate these differences and point out why they do or do not need atten-

6. Earlier works by this author have focused on the skewed application of tort rights and responsibilities; most recently, the Supreme Court’s contribution to a culture of irresponsibility through its recent product liability decisions. See Mary J. Davis, The Supreme Court and our Culture of Irresponsibility, 31 WAKE FOREST L. REV. 1075 (1996).
8. Run-of-the-mill is used here to mean durable goods product liability litigation—the lawn mower that cuts off a foot, the press brake that mangles an arm. “Durable goods” is defined in the Act, but neither “mass tort” nor any variation on that theme is treated. See H.R. 956, 104th Cong. § 101(7) (1996) (“durable goods”). In addition, “product” is defined as “any object, substance, mixture, or raw material” capable of delivery alone or in combination with other parts, a definition which clearly can embrace most substances which lead to mass tort cases such as asbestos, medical devices, tobacco products, and other chemicals. See id. § 107(14)(A) (“product”). Congress must have had some idea of the types of products which lead to mass tort cases because it chose to exclude blood and organ products from the definition of “products.” Id. § 107(14)(B) (except to the extent that such items are subject to a state “standard of liability other than negligence”). This exclusion is likely a result of the widespread enactment of blood shield statutes throughout the country, limiting liability to negligence, if at all. See, e.g., Roberts v. Suburban Hosp. Ass’n, Inc., 532 A.2d 1081, 1086 n.3 (Md. Ct. Spec. App. 1987) (listing 48 jurisdictions with blood shield statutes); see generally Michael J. Miller, Strict Liability, Negligence and the Standard of Care for Transfusion-Transmitted Disease, 36 ARIZ. L. REV. 473, 490 (1994).
tion. Upon closer look, however, it became clear that many provisions of the Act deal pervasively with mass tort litigation and that Congress may have purposefully written the Act so as to extend its protections to those putative tortfeasors who do the most harm. Congress could not have been unaware of the effect of the Act's provisions in such cases. Rather, the indirect effect on mass tort litigation would make needed procedural reforms and exploration of aggregation methods currently in process\(^9\) essentially irrelevant because the value of the claims would be so significantly reduced that "mass torts" as a unique category of products liability claims would virtually cease to exist.

This article examines the ways in which the Act would significantly affect mass tort litigation to the detriment of claimants and concludes that the rights and responsibilities so dramatically juxtaposed in mass tort litigation are neither fully nor fairly addressed. As with most litigation phenomena, the alleged "crisis du jour" which Congress treats in the Act leads, as do hard cases, to bad law particularly in the mass tort context. A more focused and dispassionate review of the needs of mass tort litigation appears in order and has, in fact, been ongoing for several years.\(^10\)

One of the stated purposes behind the Act is to reduce the unacceptable costs and delays in our civil justice system associated with excessive litigation.\(^11\) A primary culprit in causing the delays has been mass tort claims which have "threatened to overwhelm the civil justice system, accounting for more than one-quarter of the entire civil caseload in certain

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10. A number of scholars, judges, and practitioners have been engaged in debate over how to treat the specific issues presented in mass tort litigation, particularly regarding aggregation techniques. For a sampling of these articles, see Symposium, National Mass Tort Conference, 73 Tex. L. Rev. 1523 (1995) (with articles by Chief Justice William H. Rehnquist; Judge William W. Schwarzer, Director of the Federal Judicial Center; Judge Sam C. Pointer, Jr., trial judge in the silicone gel breast implant litigation; Deborah R. Hensler, Senior Policy Analyst at the Rand Institute for Civil Justice who has studied mass tort litigation for at least a decade; and Professor Judith Resnik, who has written extensively on aggregation and procedural issues in mass tort litigation). Congress has also specifically addressed mass tort litigation issues in the past. The enactment of the Multidistrict Panel Litigation Statute, 28 U.S.C. § 1407(a), (c)(i)-(c)(ii) (1988), is one such recent example. Recently the House of Representatives Judiciary Committee, the same one that produced the Act which is the subject of this Symposium, has considered the Multi由中国产生的 alteration。
In addition, only ten to twenty percent of potential tort plaintiffs, and a mere two to ten percent of product accident victims pursue a claim, while 100 to 200 percent of mass tort victims actually file suit. Thus, the need for reform of run-of-the-mill products litigation is suspect in light of the claiming behavior of accident victims. Congress’s intent primarily to deal with a litigation crisis in that arena becomes more and more unlikely. Rather, it would not be farfetched to suggest that it is mass tort litigation that was a primary aim of Congress’s reform efforts because it is the most drastically affected by the Act’s attempts to correct the perceived wrongs of juries and litigants of the past decades.

II. THE UNIQUENESS OF MASS TORT LITIGATION

Crucial to understanding the importance of mass tort litigation in the bigger products liability litigation picture is a clear explanation of what constitutes a “mass tort.” A variety of circumstances can combine to give rise to what most knowledgeable observers call a mass tort. Clearly, it would be erroneous to label all types of litigation involving numerous plaintiffs with similar problems mass tort litigation. In fact, it is more likely to be true that there are many varieties of litigation that constitute mass tort litigation. It is possible that mass torts are not a unique category of product liability cases, but are simply a lot of run-of-the-mill cases resulting from the conduct of a handful of defendants. Many products liability cases could fall within this category. For example, most design defect litigation, which involves an entire product line allegedly flawed, thus, injuring a large number of people, falls in this category. In fact, the Act could well signify Congress’s belief that no torts are mass torts and, thus, there is no need to consider any unique features of that litigation in drafting product liability reform legislation. This conclusion is consistent with the instrumentalist perspective of handling litigation on an individual basis seeking to deter a specific defendant from engaging in specific conduct potentially injurious to a specific individual.

In a particularly helpful and enlightening study, Professors Hensler and Peterson define the three factors that distinguish mass torts from ordinary

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14. See McGovern, supra note 13, at 1825-26 (describing the existence of various mass torts and procedural handling of each).
15. See id. at 1824-25.
products liability personal injury litigation: "the large number of claims associated with a single 'litigation'; the commonality of issues and actors among claims within a litigation; and the interdependence of claim values." 16

The examples are well-known: Dalkon Shield intrauterine device litigation involving hundreds of thousands of claims against one defendant; silicone gel breast implant litigation, similarly involving thousands of claimants against a handful of defendants; and, if the reader will excuse a pun on an overused expression, the "mother of all mass torts," asbestos exposure litigation which will involve millions of claimants against many hundreds of manufacturers. In fact, it is the asbestos litigation which causes many observers to opine that no other litigation crisis even exists: asbestos-related suits alone accounted for approximately 60 percent of the growth in federal civil filings between 1976 and 1986. 17 If asbestos cases are excluded, the number of product liability cases in the federal courts has, by at least one account, declined, 18 and, by most accounts, the defendants are more often successful in those that are pursued. 19

Most observers of mass tort litigation use the above criteria for defining mass tort litigation and as a basis for discussing issues that are unique to it. This article will do the same. And as mentioned above, Congress has treated many issues of mass tort litigation specially, at least for management and resolution matters, so one might expect the same to be true for the substantive issues. As will be seen, that has not been the case with the provisions of the Act.

A. Numerosity

The numerosity factor is self-explanatory, but as Professor Hensler notes, there is nothing intuitively different, and thus possibly requiring

16. Hensler & Peterson, supra note 12, at 965. “Numerosity is the primary defining characteristic . . . . The high visibility of mass torts and the burdens they impose on courts and parties are direct consequences of the large numbers of claims in each litigation.” Id.


18. Id. at 59 (citing Transcript of testimony of Prof. Marc Galanter, Director, Institute of Legal Studies, University of Wisconsin Law School, before the Consumer Subcommittee, Sept. 19, 1991, at 86-87); see Michael L. Rustad, Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers, 48 Rutgers L. Rev. 673 (1996) [hereinafter Rustad, Nationalizing Tort Law] (summarizing recent studies on the awarding of punitive damages and non-economic losses). This fact becomes crucial to an understanding of why the Act’s reforms are so insidious in their potential application to mass tort litigation. For a discussion of Congress’s repeated refusal to legislate regarding asbestos personal injury litigation, see infra notes 97-98 and accompanying text.


special attention or treatment, about cases which have common characteristics just because there are a lot of them.\textsuperscript{21} The automobile accident case is the perfect example: there are thousands filed every day, yet no one would suggest automobile accident litigation is a "mass tort." The claiming behavior of mass tort litigants is what leads to the large numbers of cases.\textsuperscript{22}

B. Commonality of Issues, Defendants and Claim Values

The most crucial characteristic and the most meaningful difference with regular tort litigation and for purposes of the Act’s effect, is the combination of the commonality of issues and the unusually small number of potential culpable parties. Because the culpability in mass tort cases lies either with one defendant or a few defendants in the same industry, the course of the litigation for all defendants is drastically affected by what happens to the first few.

Similarly, once liability issues are decided in even one case, the value of the remaining cases is significantly affected. Professor Hensler describes this phenomenon as the "claim value interdependence" characteristic.\textsuperscript{23} If the first claims lose, as in the tobacco cases,\textsuperscript{24} the value of all remaining cases is reduced significantly, at least according to the defendants who will settle or not depending on the success of the defense of those first cases. Similarly, as soon as one case is successful, hope springs in the hearts of remaining claimants, and of course their attorneys, that future successes are possible. The dollar value of those first successes is crucial as well. Once Rose Cipollone’s estate was successful against the tobacco industry, both defendants and plaintiffs claimed victory.\textsuperscript{25} Defendants claimed victory because the amount awarded, $400,000, and the basis of liability, express warranty, were both insignificant when compared to the earlier perceived

\begin{itemize}
  \item \textsuperscript{21} Hensler & Peterson, supra note 12, at 965.
  \item \textsuperscript{22} See McGovern, supra note 13, at 1823; see also Hensler & Peterson, supra note 12, at 1019-26 (describing the factors which facilitate a high percentage of mass tort claims being filed: mass media, social networks, physician contacts, plaintiff law firms).
  \item \textsuperscript{23} Hensler & Peterson, supra note 12, at 967-68.
  \item \textsuperscript{24} For an example of an early defendant success, see Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).
\end{itemize}
value of the first successful case. Plaintiffs claimed victory because they had a jury verdict against the tobacco industry after almost three decades, and that litigation breathed new life.

While the tobacco litigation may not seem like the best example, given the combination of political power and extraordinary dedication to fighting those cases shown by the industry, it indeed serves as an excellent illustration of what makes a "mass tort" different from an ordinary products liability case and why the Act so pervasively affects such cases indirectly. The number of claimants continues to grow, as evidenced by the many state class actions filed which allege fraud by the industry. The evidence of industry culpability increases as the years progress, not unlike the evolution in discovery of the culpability of the asbestos industry. The issues of defendant culpability are not specific to any one plaintiff's claims. Surely what the tobacco companies knew about the addictiveness of nicotine and how they handled that information is not claimant-specific. There is also a clear connection between the value of the early and later claims. If the companies lose one of the state class actions, all other actions will be worth a great deal more, for settlement evaluation, if nothing else. Consequently, all eyes are on the recently filed class fraud and state Medicaid reimbursement actions to help determine the value of future claims. The Act's cap on non-economic and punitive damages will have a detrimental effect on the

26. The recent decertification of the attempted federal class action, Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), suggests the presence of all three mass tort characteristics: (1) mass nature of the alleged harm—tens of thousands, possibly millions, of claimants were contemplated; (2) the commonality of issues and parties—the presence of ten or so members of the defendant industry whose conduct was directed at the market, not at any one plaintiff individually; and (3) the anticipated interdependence of the future claim values on what might have happened in that class—surely the defendants feared the pressure to settle that case, one that would have been costly to litigate but perhaps more costly in reduced public perception and corporate value than any actual settlement amount would be. Id. at 746-51. Plaintiffs continue to pursue fraud cases against the tobacco industry in state class actions filed since Castano was decertified. See, e.g., R.J. Reynolds Tobacco Co. v. Engle, 24 P.S.L.R. 945 (BNA Oct. 11, 1996) (Florida Supreme Court declines to review class action certification ruling). The states continue to file suits seeking Medicaid reimbursement from the tobacco companies for smoking-related health care costs. See, e.g., CCH Prod. Liab. Rep. No. 878, at 1 (Feb. 21, 1997) (twenty-one states suing to date and considering settlement).

27. For a discussion of the asbestos litigation and the evidence of industry culpability, see Paul Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985). This statement is not supported by any fact finding about the tobacco industry's culpability on any of the causes of action currently being pursued. It is rather a suggestion that the parallel to the asbestos litigation regarding the lengthy discovery process of information to support such actions may be present.

28. See Hensler & Peterson, supra note 12, at 969.
value of those claims and, hence, will fail to deter industry and others facing large-scale litigation in the future.

III. THE DIRECT TREATMENT OF MASS TORT LITIGATION IN THE ACT

A. The Definitions

The Act does not, at first blush, appear to address mass tort litigation. However, the Act’s definitions are sufficiently broad enough to include traditional cases giving rise to mass torts.

“Product” is defined as “any object, substance, mixture, or raw material” which is capable of delivery on its own or in combination with other products. The term excludes organs, blood or blood products, and electricity, presumably including electromagnetic field radiation.

The typical mass tort products of the past are represented by chemicals and toxic substances (of which asbestos is the primary example but also including Agent Orange and lead), medical devices (such as the Dalkon Shield intrauterine device and silicone gel breast implants), pharmaceuticals (such as diethylstilbestrol (“DES”) and Bendectin), and products for consumption (primarily tobacco). Each of these is a product as defined in the Act. The only other mass tort products litigation of recent years are those specifically excluded by the statute: blood and blood products (obviously including HIV-infected blood) and electricity. Consequently, all of the mass tort litigation of the last two decades would be affected by the substantive provisions of the Act.

While I have defined this aspect of the Act as a direct effect, because the definition of product includes most products which lead to mass tort litigation, the Act does not as a whole have the “feel” of a mass tort litigation reform act because it does not deal directly with the major claims processing issues and judicial management issues considered to be central to reform of such litigation. Indirect substantive effects of the Act on mass tort litigation are reserved until Part IV.

B. The Statute of Repose

The Act provides uniform statutes of limitation and repose. Given

30. Id. § 101(14)(B)(i). Note that blood products are not excluded if the applicable state standard of liability is other than negligence, id., apparently seeking to limit liability for blood products to a maximum of negligence liability.
31. Id. § 101(14)(B)(ii).
32. For a discussion of the substantive provisions and their affect on mass torts, see infra at Part IV.
33. H.R. 956, 104th Cong. § 106(a)-(b) (1996) (statute of limitation and statute of
the latent nature of many mass tort harms, a consistent characteristic of mass torts according to some observers, the effect of such a statute on mass tort victims in particular is significant. The statute of limitations begins to run from the date on which the claimant discovered, or reasonably should have discovered, both the harm and its cause. The drafters seem to have had the mass tort victim in mind in this regard. The Conference Report suggests that it would be unfair to prevent an injured party who could not discover the harm from pursuing an action, though the Report suggests that the number of persons in this category will be few. Such would not be the case regarding most mass tort products. The DES cases in particular serve as a good example of the need for a discovery-type rule for mass tort victims and the large possible number of such victims.

The Act’s statute of repose causes more concern for mass tort victims, though, on its face, it does not apply to many such products. It provides for a fifteen year period of repose running from the date of first delivery of the product if the product is a durable good. The statute states that no action may be filed after the fifteen year period if it concerns a durable good alleged to have caused harm “other than toxic harm.” “Toxic harm” is neither defined in the Act, nor does it appear to have any common meaning. The statute seems to suggest that a product causing such toxic harm, and is exempt from the statute, must also be a durable good. The inclusion of a reference to toxic harm seems to have been an afterthought. Does it mean that products like asbestos fibers and insulation are not included, or does it mean that durable goods, which also contain a toxin as a component, are included?

One can speculate on the type of product that could potentially cause a problem for the Act’s application since many pieces of workplace equipment might be included. The asbestos insulation is one example, though it would come closest to being a durable good that also causes toxic harm because its main function and characteristic is dependent on its toxic nature. But consider the following examples. A worker was exposed to a twenty-year-old transformer containing polychlorinated biphenyl (“PCB”) at the end of the transformer’s life during its break down and PCB disposal. The
transformer is certainly a durable good and one that, allegedly, caused toxic harm. Does the repose period apply or not? The use of PCBs in industrial equipment at one time was sufficiently widespread to justify concern that mass tort litigation might ensue. And what about other applications of the paradigm workplace toxin, asbestos? Asbestos was incorporated into so many pieces of equipment that it is very likely many still exist and are in use. For example, the manufacturer of a control panel containing asbestos in an encapsulated form incorporated into a piece of machinery is one of many defendants being sued by a worker in the plant for general asbestos exposure, and the control panel is now twenty years old. Does the repose period apply or not? Whether it is Congress's intent to include such cases needs to be made clear because they are not so farfetched in the nation's workplace. And it is proper to exclude toxic substances from the application of the repose statute given their length of life and the often latent nature of the diseases they cause.  

C. The Biomaterials Access Assurance Act ("BAAA")

The BAAA directly affects the liability of producers of many component materials of medical devices, one of the primary categories of mass tort litigation in past years. While nowhere in the BAAA or its legislative history does it so indicate, this legislation appears to be at least partially in response to the alleged liability of sellers of teflon for its inappropriate use in the temporomandibular joint ("TMJ") implants which have been the subject of many lawsuits and at least one multi-district litigation panel for discovery consolidation. This portion of the Act directly addresses a specific piece of mass tort litigation and does so in a very intriguing way.

40. See Hensler & Peterson, supra note 12, at 1001-10 (summarizing characteristics of chemical and toxic substance litigation).

It is worth noting, of course, that other medical device litigation involves implantable devices such as pacemakers and intrauterine, and other contraceptive, devices. These cases do not, to my knowledge, allege that the basic raw materials of which the implant is made are inappropriate for use in the human body. See Apperson, 41 F.3d at 1108. Silicone gel breast implant litigation involves liability for implants, though Dow Corning, the manufacturer of most of the breast implants, is also the primary manufacturer of the silicone and specifically sought a way to market silicone for implantation purposes, unlike, apparently, DuPont regarding teflon. For a summary of the allegations in the silicone gel breast implant litigation, see Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994), also see generally MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996); Heidi L. Feldman, Science and Uncertainty in Mass Exposure Litigation, 74 TEX. L. REV. 1 (1995).
First, the BAAA defines a substantive standard for the liability of suppliers of biomaterials. The standard is based wholly on the contract between the supplier and the manufacturer of the implant. The propriety of such a market-based standard is open to question on a variety of grounds, not the least of which is fairness to the entire class of unwitting claimants. However, this article's purpose is not to evaluate the merits of this portion of the Act. Rather, it will focus on Congress's chosen method of dealing generally with culpability rules in the mass tort context.

Congress must be credited with recognizing that it was defining a rule of very broad applicability given the magnitude of medical device litigation in the recent past and must similarly have been aware that it was providing virtual immunity from litigation for an entire category of potentially culpable defendants. Medical device and pharmaceutical litigation together constitute the paradigm example of the need for oversight rules of liability, rules which are intended to protect those who simply do not have the means to protect themselves from harm created by superior institutional actors. Medical device harms fall on the ill-informed consumer who relies, without choice, on the expertise of those who dispense advice, render care, and provide the means by which that advice and care can be implemented.

Congress's choice to provide a virtual wholesale immunity to a category of institutional actors to the detriment of such claimants is a glorification of

44. H.R. 956, 104th Cong. § 203(1) (1996) (definition of "biomaterials supplier"); id. § 203(5) ("implant"); id. § 203(8) ("raw material"). Interestingly, "raw material" is defined as "a substance or product that has a generic use; and may be used in another application than an implant." Id. §203(8). The prima facie overbreadth of this definition is remarkable. Does it include safety pins, zippers, thread, straws, and other such products for which even a child could devise a use in medical procedures?

45. Id. § 205(a)(2). A biomaterials supplier that is also a manufacturer of the implant is liable as under state law (e.g., Dow Corning for silicone gel breast implants). See id. § 205(b) (defining when a supplier may be considered the manufacturer or if the supplier and manufacturer are related by common ownership or continuity of business with the implant's manufacturer). Otherwise, liability to a claimant is limited to whether the supplier that provided the contracted for material complied with all specifications.

46. One need only look to the press coverage of the silicone gel breast implant litigation and the process of the settlement of the class action in that litigation to agree that Congress was fully aware of the large number of claimants in medical device litigation when drafting this legislation. See, e.g., Mark Corridan, Implant Global Settlement in Jeopardy, 81 A.B.A. J., Aug. 1995, at 34; Gina Kolata, New Study Finds No Link Between Implants and Illnesses, N.Y. Times, June 22, 1995, at A18. And everyone is on notice of the Dalkon Shield litigation in which hundreds of thousands of women claimed harm.

47. I have used the term institutional actors to define the entire category of product liability defendants including manufacturers, governments, and distributors. See Davis, supra note 6, at 1075. These defendants are characterized by their superior knowledge of risk, resources to affect product risk, and influence in society.
irresponsibility and a wholesale rejection of fairness concerns for society’s most vulnerable consumer. The rule chosen is perilously close to the now-discredited, contract-based, priority-laden rules of the late nineteenth and early twentieth centuries. This is not to suggest that liability should automatically attach to the provider of raw materials for medical device use; only that Congress’s apparent preferred method of protecting this particular class of defendants is extremely overbroad given the large quantity of harms suffered. Congress’s choice volumes regarding a culture of irresponsibility that is being perpetuated by society’s institutions of government.48 This culture of irresponsibility makes society think it is the manufacturers that are put upon for having to respond to allegations of liability and that the claimants should be ashamed for having suggested that liability should even attach. Congress’s effort to keep claimant’s hands out of this particular class of “deep pockets” is misdirected given the respective levels of information of the parties to this category of mass tort litigation. The stories of good ideas turning bad in the medical device context are simply too many to justify such a widespread protection against liability for this class of defendants.

To the extent there is a need for federal legislation in this area,49 it would have been simple to provide a mechanism by which the biomaterials supplier is given limited protection from liability. This commentator is not persuaded that a seller of a material whose primary function is a generic, non-medical use, should be given any immunity from liability for its decision to make a tidy profit on a product’s sale for a use which it has little independent reason to believe will be appropriate. The immunity is especially inappropriate given the huge potential for harm from implanting anything in the human body. In such circumstances, a very high standard of care should be in place. But if a legitimate social policy decision could be made to protect the biomaterials market and to encourage research into such appropriate uses, the supplier could be protected from liability unless the manufacturer is not subject to jurisdiction in any court in this country or is bankrupt or similarly unavailable to satisfy a judgment. The burden of the unavailability of the device manufacturer should not, in all fairness, fall on the victim when the supplier has within its power the ability to anticipate such a potential harm and impose a premium on its sale price to accommodate it. Congress has written a similar provision in the context of other product sellers in this very Act.50

If the immunity from liability were not enough protection for the institutional actors benefitted by the BAAA, the Act, secondly, provides

48. Id.
49. There will be significant debate about the need for federal intervention here. See Rustad, Nationalizing Tort Law, supra note 18, at 673; Gary T. Schwartz, Considering the Proper Federal Role in American Tort Law, 38 ARIZ. L. REV. 917 (1996).
50. H.R. 956, 104th Cong. § 103(b) (1996).
special procedural protections to insure the speedy, burden-free dismissal for
the protected defendant. The Act does not make special immunity a
defense in the traditional sense, where the defendant has the burden of proof
of the facts supporting the defense. Rather, the BAAA defines a presump-
tion of no liability that requires the plaintiff to rebut or suffer dismissal.
First, the court “shall consider a defendant to be a biomaterials supplier who
is not subject to an action for harm to a claimant.” The court is required
to grant a motion to dismiss based on this presumption unless the claimant
demonstrates that the defendant is a manufacturer under Section 205(b) or
a seller under Section 205(c).
If the plaintiff seeks to impose liability
based on a defendant’s failure to comply with the contract under section
205(d), the defendant can obtain summary judgment only if “the evidence
submitted by the claimant would be sufficient to allow a reasonable jury to
reach a verdict for the claimant if the jury found the evidence to be
credible.” This, of course, turns the usual summary judgment standard
of Rule 56 of the Federal Rules of Civil Procedure on its head since it is the
movant who must usually present evidence sufficient to support a finding of
no genuine issue of material fact, and the facts are to be considered in a
light favorable to the non-movant.

It is unclear why there should be such procedural protections in this
discrete category of litigation. It is evidence, however, of an appreciation
of the uniqueness of mass tort litigation in that most of the efforts aimed at
“reforming” mass tort litigation have involved seeking procedural methods
to streamline the litigation and to resolve it fairly and efficiently without the
judicial administration problems such huge caseloads present. The BAAA

51. Id.
52. Id. § 206(c).
53. Id. § 206(c)(3).
54. Id. § 206(c)(3)(B). The key phrase is that the claimant must demonstrate that the
defendant meets the applicable requirements for liability, turning the traditional burden of
proof of such an affirmative defense on its head. If the defendant may be liable as a
manufacturer under section 205(b), the defendant may file an affidavit demonstrating it has
not listed the implant device with the Food and Drug Administration (“FDA”). Id.
§ 206(c)(1)(A). Then, the plaintiff must respond with an affidavit rebutting all other ways
in which the defendant may be considered a manufacturer under section 205(b). Id.
§ 206(c)(1)(B). Pending this dismissal, no other discovery of the defendant can be
undertaken, protecting the defendant further from the traditional discovery process where
discovery can continue in the face of motions to dismiss or for summary judgment. Id.
§ 206(c)(2). Given the length of time it takes to resolve such motions, this could be a
lengthy delay in the process if the plaintiff successfully meets the procedural burdens.
55. Id. § 206(d)(1)(B) (emphasis added).
56. FED. R. CIV. P. 56(c). The Supreme Court has defined the summary judgment
standards in the 1986 trilogy of cases. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986);
requirement that plaintiffs will suffer summary judgment on the one basis of liability left to them in this area, unless they can prove entitlement to proceed, would certainly have the effect of dealing with the high caseload problem. While summary judgment is a good means of dealing with cases in which a plaintiff has failed to produce evidence sufficient to justify proceeding to trial, it would seem only fair that the burden to obtain such a result should be placed upon the party seeking the result, as is the case in all other evidentiary and proof matters. While it is unlikely that Congress intended its choice of procedural method to speak to its preference for resolution of other types of mass tort litigation, it does speak to its preference to favor one category of litigant over another. Thus, the institutional defendant is favored over the consumer, and the putatively irresponsible party is favored over the wholly innocent plaintiff.

IV. THE INDIRECT TREATMENT OF MASS TORT LITIGATION BY THE ACT

As mentioned earlier, the broad definition of "product" means that the Act's substantive provisions will apply to most mass tort circumstances. The highly publicized provisions dealing with caps on punitive damages and abrogation of joint and several liability for noneconomic losses are the most important in this context. Because of the detailed treatment of these provisions regarding run-of-the-mill product litigation in this Symposium, I will focus on the important effect these provisions have on mass tort litigation.

A. Punitive Damages Caps

One need only look at the history of asbestos litigation to see the significant impact that punitive damages caps would have on the course of all future mass tort litigation. The Act provides for a limit on punitive damages of either two times the amount awarded for compensatory damages or $250,000, whichever is greater. The given reasons for this limitation

57. See supra notes 29-32 and accompanying text.
59. Id. § 110.
61. Id. § 108(b)(1).
include the excessive nature of punitive damages awards over the last two decades in particular, the runaway, speculative nature of jury verdicts, and the disastrous affect on the American economy. There is significant debate over the facts behind the assertions regarding the excesses and uncertainties of punitive damages awards. In fact, mass tort litigation involving asbestos has accounted for most of the punitive damages awards of the last three decades. Though the data suggesting no litigation crisis in this area is persuasive, it is the purpose of this article to identify the detrimental effect the Act will have on mass tort litigation regardless of the basis of the underlying facts.

One has to have some theoretical and practical sense for the purpose of punitive damages. Theoretically, punitive damages punish a seriously culpable defendant and thus are expected to act as both a specific and a general deterrent. They also have a retributive effect as between the individual victim and the tortfeasor. Practically, they may encourage some claimants to proceed when they would not otherwise pursue a claim that entails low compensatory damages but allegedly egregious defendant conduct.

1. Effect of Punitive Damages Availability on Claiming Behavior

Most plaintiffs tend not to pursue claims, even legitimate ones.
When the likelihood of success is made known, through the mass media or otherwise, and a claimant is encouraged to believe that another entity may be responsible for his or her harm, the combination of knowledge of culpability and the potential for damages recovery, including punitive damages, increases the likelihood of a legal claim. The knowledge of potential culpability alone without the potential for damages recovery, would arguably decrease the chance that a claimant would indeed pursue a claim. This is especially so given the negative impression most citizens have about the litigation process. Taking away the opportunity to obtain some meaningful retribution and to effect some behavioral changes will likely have the effect of chilling what little chance there is for pursuit of meritorious claims.

The current tobacco litigation comes to mind as an example of the significant negative effect the punitive damages reform will have on the behavior of both claimants and putative tortfeasors. The fraud complaints now being pursued may not have very significant dollar values in terms of economic losses, but accepting the best case of liability for plaintiffs, the conduct may be deserving of very significant censure that only comes with the sting of a meaningful monetary award. The Act's provisions would significantly lessen the chance for claim-encouraging recovery in these cases. It would take many cases in which punitive damages were awarded to achieve some even moderate level of censure, not to mention to the same level which exists under the current system. This is because of the combined effect of fewer claims being filed, reduced awards in those that are actually litigated to judgment, and the fact that so few punitive damages awards are actually meted out.

Another link between damages and claiming behavior must be accepted: the likelihood that a plaintiff's law firm will take a case is directly related to the likelihood of success and the value of that success if it is achieved.

[F]ewer than one in five injured Americans even considered the possibility of obtaining compensation from others for their accidental injuries. Only one in ten took any action to attempt to obtain such compensation. Only about one third of these or less than three percent of all injured persons filed a liability lawsuit. A primary factor explaining these low rates of claiming is an individual’s tendency to attribute causation and blame for their injuries to themselves or natural forces.

Id. Professors Hensler and Peterson attribute the recent increase in mass tort claims, in part, to the increased availability of plaintiff law firms who have increased advertising, joined to coordinate mass tort litigation, and who seem increasingly willing to take on mass torts because of their increasing ability to handle the load. Id. at 1025-26. The willingness is at least in part because of the expectation that the litigation “has some value that is great enough to warrant a significant investment of time and capital in the litigation.” Id. at 1032.

67. Id. at 1033, 1040-42.
68. See supra notes 25-28 and accompanying text.
69. See Rustad, Nationalizing Tort Law, supra note 18, at 702-04 (summary of study of punitive damages data concluding that punitive damage awards are rare).
70. See Hensler & Peterson, supra note 12, at 1025-27, 1033.
It must be acknowledged that in many circumstances, the likelihood that a meritorious claim will be pursued is directly connected to the chance that punitive damages may be awarded so that plaintiff's counsel can be compensated for the time, money, and labor invested in mass tort claims generally. The huge outlay of capital in the early stages of such litigation is made tolerable only by the hope for success as the litigation progresses. This hope for success and financial reward is made more likely by the chance for punitive damages.

The Act's reform of punitive damages is very likely directly related to the desire to make it less desirable for plaintiff's firms to undertake the representation of product liability plaintiffs, especially mass tort plaintiffs. The value of mass tort cases is extremely uncertain at the outset, and until a value has been set by the judicial system, these claims have little value given the combination of infant discovery, speculative causation, and the dependence on punitive damages. If that value is artificially set by this legislation, the entire course of mass tort litigation will be affected because of the interdependence of the value of the later claims with the earlier claims. That may not be undesirable, but it is a result that should at least be acknowledged in the drafting of any such corrective legislation.

The uncertainty of the amount or likelihood of a punitive damage award in the current system rests on plaintiffs as well as defendants, and to the extent that this uncertainty should be corrected, it should be corrected equitably for plaintiffs as well as defendants. If the uncertainty is corrected on the side of reducing an award to some static or fixed sum, fewer claims will be pursued by plaintiffs firms inclined to put up the capital necessary to discover and prepare such claims. This is possibly the exact goal of the legislation, but it is a result that limits the availability of the judicial system for all members of society affected by these issues.

2. Effect of Punitive Damages Cap on Deterrence of Culpable Conduct

The overall effect of the punitive damages cap will be to reduce the punishment meted out to wrongdoers who cause the most significant harm to a totally arbitrary value which is wholly unrelated to the egregiousness of the conduct. Congress says it seeks to restore some certainty and predictability to punitive awards and that such damages are not intended to compensate claimants with a windfall. Punitive damages are not to be related to compensatory damages because they are for punishment and not compensation. Yet Congress has defined a value to be placed on the

71. Id. at 1040.
72. Id.
73. Id. at 1041-42.
74. H.R. 956, 104th Cong. § 2(b) (1996).
conduct of the most egregious wrongdoers which is directly related to compensatory damages;\textsuperscript{76} this is a totally contradictory result and one that affects mass tort victims in a disproportionate way given the interdependence of claim values discussed above.

When pressed about the effect on many product liability claimants, such as women and blue collar workers who may not have very large amounts of economic loss and whose pain and suffering is traditionally undervalued,\textsuperscript{77} Congress responds that punitive damages are not compensatory and should not take the place of those damages for a claimant whose compensatory loss is small.\textsuperscript{78} The combined effect of this premise with the use of compensatory damages as the benchmark for valuing punitives is especially perverse in the context of mass torts. Persons who have relatively small compensatory harm from a callously indifferent actor will lack the ability to affect any meaningful punishment or retribution.

The Act fails to accommodate the mass tort claimant's circumstance, especially given that it is the mass tort claimant who is most likely to be able to prove the substantive standard, particularly given the importance of the extent of the harm in determining such entitlement.\textsuperscript{79} Indeed, the Act supports the conclusion that the greater the aggregate harm, the less likely it is a wrongdoer will be punished because of the interdependence of mass tort claims. The lower the initial claim values, the lower future claim values will be and thus the less likely that punitive damages will be meaningful.

The Act further supports this underdeterrence argument in its provision for a method by which a trial judge can add to an award of punitives considered to be insufficient.\textsuperscript{80} The list of factors a judge may consider in increasing an award includes the following:

\begin{quote}
[T]he cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected, including—

(I) compensatory and punitive damage awards to similarly situated claimants.\textsuperscript{81}
\end{quote}

that the proportionality requirement unfairly affects women and other groups, report states that "punitive damages have absolutely nothing to do with compensating an individual for a loss").

\textsuperscript{76} See supra note 61 and accompanying text.

\textsuperscript{77} See Rustad, Nationalizing Tort Law, supra note 18 at 734-35, 743-47 (discussing disparate of tort reform on women and blue collar workers); see also S. REP. NO. 104-69, at 39 (1995).


\textsuperscript{79} See H.R. 956, 104th Cong. § 108(3)(B) (1996) (factors such as likelihood of serious harm, degree of awareness, and duration of misconduct relevant to increasing award).

\textsuperscript{80} Id. § 108(b)(3).

\textsuperscript{81} Id. § 108(b)(3)(B)(viii) (emphasis added).
Though compensatory awards are unrelated to deterrence, the Act specifically acknowledges that they can be considered as such in evaluating the cumulative deterrent effect of all awards. This statement is by its very nature inconsistent and has its most pernicious effect in mass tort cases. Punitive damages are not to be considered compensatory but compensatory damages are to be considered punitive. And because of the interdependence of claims, the effect on mass tort litigation is profound because the value of early punitive damage awards directly affects the value of subsequent, similarly situated claims. Thus, the existence of low early awards will have an exponential effect on later claim values, and therefore, on any real or imagined deterrent effect on the tortfeasor. If those early awards are artificially established, the spiral toward fewer claims and fewer damage awards begins.

B. Several Liability for Noneconomic Loss

Usually, only a few defendants are involved in most mass tort cases, asbestos litigation being the exception. The joint and several nature of the liability in many jurisdictions is one method by which plaintiffs are assured full compensation, as was the intent of that doctrine given the truly indivisible nature of most tort harms. The provisions of the Act which make liability for noneconomic loss several and apportioned would fall hard on mass tort claimants. As this topic is discussed generally in this Symposium, I will comment on it only regarding the effect on mass tort claimants.

One obvious reason for the disparate impact of this provision on mass tort litigation claimants is that mass tortfeasors often escape the burdensomeness of mass tort litigation by resorting to bankruptcy protection. A.H. Robins Pharmaceutical Company (Dalkon Shield litigation), Johns-Manville Corporation (asbestos litigation), and Dow Corning (silicone gel breast implant litigation) are three primary examples. While there may be one primary defendant in these cases, as with A.H. Robins and Dow Corning, in most product liability cases there are many defendants other than the manufacturers who are involved. If several liability were to apply to cases involving these defendants, plaintiffs would very likely recover nothing of their pain and suffering and loss of enjoyment damages because of the major contribution these wrongdoers have to the harm. Apportionment and several

82. _Id._
83. _Id._ 110(a) & (b).
85. See supra notes 16-19 and accompanying text.
liability doctrines do not mean the remaining defendants are not culpable, but rather that culpability will have been established. Further, apportionment of tort damages is rarely accomplished by some logical or meaningful method related to culpability as the Act implies.\(^{86}\) Rather, it has often been the case that apportionment seems to be totally arbitrary.\(^{87}\)

Noneconomic losses are very often the most important and valuable damages a tort plaintiff has since they are arguably the most deeply felt: who would trade places for even a nanosecond with someone who has cancer from a toxic exposure or who cannot bear children because of a defective contraceptive device? These damages are what constitute the general harm that the tort seeks to redress and this is why medical expenses and lost wages are called “special damages”; they are unique to each individual and do not constitute the very nature of the tort.\(^{88}\) The risk of making such damages unrecoverable because a tortfeasor has caused so much harm that it files bankruptcy is, at the very least, unfair to the injured victims.

The Act requires the jury to apportion responsibility to all persons responsible for the claimant’s harm, whether or not such person is a party to the action.\(^{89}\) As to mass tort claimants, the burden of bankruptcy now clearly falls on the victim, even though it is as a result of the widespread harm that the bankruptcy occurred.\(^{90}\) In fact, mass tort defendants have proved to be closely connected to one another in their wrongdoing, with the DES and asbestos cases serving as the main examples. To apportion liability in this context would be a fortiori meaningless and arbitrary and would render the recovery of damages unprincipled.

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90. See Eggen, supra note 87, at 1745-46 (discussing future of joint and several liability in mass torts; stating “the problem of involvency looms large in mass torts and concluding “it would be imprudent to automatically adopt several only liability as a palliative for nonsettling defendants”).
Even if one could feel confident that apportionment would be fairly and reasonably accomplished, Congress has entirely failed to identify the effect of a settling defendant on the recovery of the plaintiff or the liability of the nonsettling tortfeasors. This issue has proved a thorny one in most state efforts at reform of this area.\(^9\) The magnitude of the harms, the interdependence of the claims, and the common settlement of these actions is inadequately explored.

As a general principle, the idea of allocating responsibility in some proportion to culpability is intuitively appealing.\(^2\) In fact, the American Law Institute is currently working on a project dealing with apportionment of responsibility.\(^3\) This issue has received various forms of treatment from the states, evidencing that there does not appear one logically or intuitively correct conclusion. Before reaching any consensus, the effect on mass tort claimants should be directly and fully addressed.

C. Workers' Compensation Subrogation

The workers' compensation subrogation provision\(^4\) may be important in mass tort cases given that much of the toxic exposure is in the workplace setting (e.g., asbestos). Many states already provide subrogation of the insurer or employer to a products liability judgment against a manufacturer or seller, though there is significant difference among the states in this practice. This provision of the Act has been thoroughly treated elsewhere in this Symposium,\(^5\) so my observations will be few.

Rights between employees, employers, and manufacturers in the toxic substances context continue to be problematic. The employer who has control over the workplace may often be at least negligent for failing to distribute risk information, maintaining a safe workplace generally and/or providing proper safety equipment. Occupational disease compensation under the workers' compensation systems in this country has been erratic at best.\(^6\)

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91. Id. at 1746.
The asbestos litigation is the one piece of mass tort litigation where Congress has repeatedly been asked to intervene to insure compensation for those occupationally exposed and where Congress has repeatedly refused.97 When one thinks of mass tort litigation and the possible solutions needed, some form of compensation scheme seems to cry out in this area. The private parties seek to settle these claims en masse, but there is significant resistance.98

It is difficult to determine why no compensation scheme has been devised for asbestos claimants. However, there are a variety of possible explanations. First, none of the parties have as their self-interest the resolution of these claims by legislative enactment, or at least some of the parties with influence have no interest in seeing such legislation. Second, the judicial system is adequately, efficiently, and fairly adjudicating these claims so there is no need for intervention although this explanation would seem to fly in the face of reality.99 Third, Congress's other legislative agenda has not, to date, included an asbestos compensation plan for some other political reasons.

The current reform Act has taken decades to produce and it took a Republican victory at the polls to effect it. It does seem incongruous that Congress has attempted to address the product liability litigation "crisis" and the supposed inefficiency and unfairness that "crisis" has wrought, but it has failed to deal directly with the one piece of litigation that has contributed enormously to the very "crisis" under consideration. Asbestos litigation has led to the most punitive damage awards, the imposition of liability on product sellers for asbestos products made by others, the unfair apportionment of liability to defendants who have managed to avoid bankruptcy, and the imposition of liability on product sellers for asbestos products made by others, the unfair apportionment of liability to defendants who have managed to avoid bankruptcy, and the imposition of liability on product sellers for asbestos products made by others, the unfair apportionment of liability to defendants who have managed to avoid bankruptcy.


99. Most participants agree that the judicial system is doing an abysmal job at keeping pace with the claims filed and processing them fairly. See, e.g., Deborah Hensler, Asbestos Litigation in the United States: A Brief Overview 6 (1991).
product misuse by workers and their employers, and unfair allocation of responsibility under state workers' compensation schemes. Creating a compensation scheme for asbestos claimants would indeed be a daunting task, as the failure of the Wellington Group's efforts in the 1980s will attest, but it is an alternative worth considerable exploration given the complex nature of that litigation and the seemingly ineffective application to it of traditional rules and procedures. Perhaps, given Congress's concern with the over-compensation of product liability claimants, Congress is unable to digest the idea that many claimants will be compensated under a legislative compensation scheme which would not be under the current traditional litigation model.

D. Other Provisions

The Act's provisions regarding product seller liability and defenses do not appear to impact mass tort litigation in any specific way as a result of the uniqueness of that litigation. Product sellers are certainly sued in mass tort cases, but there does not seem to be anything special about the presence of product sellers in mass tort cases. In aggregated mass tort cases, as in class actions or through consolidation procedures, the category of defendants is likely to be similar in nature given the commonality of issues that bring such cases to aggregation. For example, tobacco manufacturers, not distributors or retailers, were sued in the recent tobacco class action. And the same is true in most recent class actions.

The misuse and intoxication defenses, dealing as they do with individual claimant circumstances, would similarly not impact mass tort litigation in ways relevant to the differences in mass torts. This by no means should be taken as an approval of those provisions; but rather that they do not affect mass tort litigation in meaningfully different ways than other products cases.

V. Conclusion

This article has explored the recent product liability reform measure enacted by Congress in 1996 and evaluated its effect on the very important

103. H.R. 956, 104th Cong. §§ 104, 105 (1996). It would appear that the misuse and intoxication defenses would likely be irrelevant in most mass tort cases.
product liability cases known as mass torts. While the Act seems on its face not to deal very meaningfully with mass tort litigation, the reality is that it deals very significantly with such cases, and all to the significant detriment of claimants. The interdependent nature of the value of mass tort claims, the large quantity of them and their commonality between the liability issues and the defendants combine to suggest that the Act’s reforms would cause a significant artificial reduction in the value of the aggregated claims and not just on individual claims. This result unfairly and unevenly poses a burden on claimants to the great benefit of those irresponsible institutional actors who have caused the greatest harm.  

While there may well be a need for federalizing much of the law which complicates mass torts, the Act’s provisions deal with product liability litigation as an integrated whole when there are meaningful normative differences between most ordinary product liability cases and what I have defined here as mass tort cases. While calls for federalizing choice of law rules, reforming class action procedure reforms, and other studies of aggregative measures have been discussed for the last decade, Congress has nevertheless chosen to treat mass torts as any other product liability case. This myopic vision, whether through benign neglect or willful misunderstanding, evidences a dangerous lack of appreciation for the unique characteristics of the most puzzling litigation problem facing the nation’s courts. While there might be much to be reformed in the processing of mass torts, Congress’s recent effort is not the vehicle.


106. See Proposed Amendments to Fed. R. Civ. P. 23 (calling for specific authority to certify classes for settlement only).