FUTURE CLAIMS IN MASS TORT CASES: DETERRENCE, COMPENSATION, AND NECESSITY

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FUTURE claimants have been, until recently, the neglected stepchildren of mass tort litigation. Without actual claims themselves, and often without separate representation, they have had their claims systematically devalued and exploited by other parties more prominently represented before the court and in settlement negotiations. Academic commentary, and now judicial decisions, have protected future claimants from the excesses of what might justifiably be condemned as "litigation without representation." But in restoring to future claimants the procedural rights to which they are otherwise entitled, the current trend in protecting their interests may well leave them worse off—and the rest of us also.

This last point I take to be fundamental to Professor David Rosenberg's recent work on mass torts, which emphasizes deterrence as the single, overriding goal of mass tort litigation, to the nearly complete exclusion of compensation. Compensation counts, in his view, only as it leads to optimal deterrence. Reducing compensation to an instrumental value allows him to minimize the procedural protections that would otherwise be provided to future claimants. If followed out to its logical conclusion, Professor Rosenberg's proposal has radical implications beyond the situation of future claimants. All absent class members might see their entitlement to individual participation and compensation in the class action diminished because protecting these rights would not serve the fundamental purpose of deterring wrongdoing. Rethinking

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1 See Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 Sup. Ct. Rev. 337, 342-57 (discussing abuses of class actions certified for settlement only).

2 David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 Va. L. Rev. 1871, 1890-91 (2002) (criticizing courts and commentators for being "prepared to sacrifice optimal deterrence for merely compensating loss from unreasonable risk").

3 Id. at 1908-15.
mass tort litigation along these lines would require a reallocation of underlying property rights and corresponding procedural protections.

Defenders of the rights of future claimants might find these steps to be too drastic and too dismissive of the many problems that have arisen in representation of absent class members. Yet, fastidious concern with the rights of future claimants might leave most of them worse off than a system of less precise but more effective remedies. This Essay will seek to document this point from three different perspectives: the deterrence perspective of Professor Rosenberg; the compensatory perspective implicitly assumed by defenders of the rights of future claimants; and the perspective of necessity that justifies mandatory class actions under existing law. Each of these perspectives will be taken up in successive Parts of this Essay.

I. DETERRENCE

Professor Rosenberg cuts the Gordian Knot of compensating future claimants by a single-minded focus on deterrence as the goal of mass tort cases. All the problems of actually compensating claimants, whether present or future, are either presumed to be solved by the operation of an efficient market in tort claims or postponed for resolution by a claims facility established by any resulting settlement or judgment. To defenders of future claimants' rights, these assumptions might appear simply to beg the question: to assume away most of the disputed issues that surround litigation over future claims.

So far as it goes, this objection carries some weight. The recent decisions of the Supreme Court restricting settlement class actions and mandatory class actions, particularly as they include future claimants, emphasize the unfairness of lumping together class members with very different claims—for different injuries, matur-

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5 Rosenberg, supra note 2, at 1890-91.
6 Id. at 1896-1900.
ing at different times, and of different value. In the absence of subclasses confined to their claims alone, future claimants are likely to receive lower recoveries than claimants with more immediate and more apparent injuries. Similar arguments have been widely advanced in the law review literature. These concerns are almost wholly distributive, based on the diminished procedural rights of future claimants and the diminished recoveries that they are likely to receive as a result. In almost a zero-sum fashion, the losses to future claimants are treated as gains to present claimants (and their attorneys), who can exploit the vulnerable position of future claimants for their own benefit.

Deterrence enters into these concerns only if this competition between claimants is negative sum, and in particular, if the class attorneys can engage in a kind of reverse auction, where they obtain the defendant's support for their role as class representative by reducing any recovery that can be obtained against the defendant. If compromising the interests of future claimants reduces the defendant's overall exposure to liability, it also reduces the deterrent effect of mass tort litigation. Whether it does so, however, depends upon how skillfully the class attorneys exploit their control over future claims. What appears to be outrageous expropriation of the rights of future claimants under existing law looks quite different from the perspective of achieving optimal deterrence. Professor Rosenberg's "modest proposal" to concentrate control over all claims in the hands of the class attorneys strengthens their position by giving them the same degree of cost internalization on the plaintiff side of mass tort cases as defendants already possess on their side.


8 E.g., Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1064–78 (1995) (arguing that class attorneys negotiated better terms for clients than for the class); Wolfman & Morrison, supra note 4, at 451–56 (arguing that future claimants receive far less compensation for their injuries because of inflation and their inability to accurately assess whether class treatment is a sensible option).

Nevertheless, a focus on deterrence alone does not eliminate all problems in devising the appropriate level of liability or the procedures for ascertaining it. Wholly apart from distributing an aggregate award among all claimants and their attorneys, it is still necessary to determine the magnitude of this award in the first place. This task alone can be complicated enough, as the literature on remedies generally, and punitive damages in particular, amply illustrates. Formulating procedures that are likely to yield an appropriate level of deterrence is no simple matter. What Professor Rosenberg makes clear is that even this limited goal will be compromised by insisting, largely for reasons of compensation, that class members have many of the rights in class actions that they enjoy in individual actions.

Future claimants are unique among class members only in presenting this choice in particularly stark terms. Giving them enhanced procedural rights might disable the defendant from profiting at their expense, but at the cost of allowing the defendant to pursue a divide-and-conquer strategy that aims to defeat any form of class action by exploiting conflicts among class members. Protecting the procedural rights of future claimants always comes at some cost, not just to the other parties who might profit at their expense, but to the goals of deterrence, and as discussed in the next Part, to the interests of the future claimants themselves.

Nevertheless, Professor Rosenberg's proposal still depends on strong assumptions about the existence of a liquid market for tort claims, or alternatively, on the feasibility of an insurance fund to compensate future claimants. These assumptions may be open to dispute, especially on the evidence available in any concrete case. They presume that the overall value of claims can be approximated with some degree of certainty and that there is some upper limit on the number of claims, at least enough to determine whether all claims are likely to be compensated, either from the defendant's assets or from a pool of insurance funds. Yet both the value and number of claims are likely to change as the mass tort case pro-

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11 Rosenberg, supra note 2, at 1908-15.

12 Id. at 1883-88.
ceeds. Professor Francis McGovern, in particular, has emphasized this point, by calling attention both to the "inmaturity" of mass tort claims and to the "inflation" in the number of claims. These observations are especially true of future claims. Both the average amount of each claim might increase with time—as the consequences of exposure to a toxic substance become more apparent—and the number of claims themselves might increase—as the success of present claimants in actually obtaining a recovery becomes more apparent.

Even from a purely deterrent point of view, this uncertainty creates difficulties in setting liability at the optimal amount to prevent future wrongdoing. Without some sense of the total cost of the defendant's tortious acts, it is impossible to determine the amount of damages that is both high enough to deter similar acts in the future and low enough to avoid deterring related, but beneficial, conduct. These issues have been thoroughly explored in the analysis of punitive damages. The fundamental uncertainty over the external costs of the defendant's behavior is not diminished by moving from a compensatory to a deterrent perspective. To be sure, the information needed about the total amount of loss is less than the information needed to divide the loss among claimants. Yet it still must be sufficient to transform the uncertainty over liability into a manageable risk that could be spread through a market for claims or through some form of insurance. Otherwise, Professor Rosenberg's assumptions do not hold and the conclusion that aggregate liability can be suitably approximated must be established by other means.

The question of what those means might be quickly leads back to variations on the theme of mass tort procedures. Waiting for an appropriate sample of claims to be litigated or settled, or creating such a sample from the claims of class members, are the two most

13 See Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659, 688–91 (1989) (discussing the problems associated with mass tort claims where the publicity associated with the action and the withdrawal of products can generate an overabundance of plaintiffs including a number of false positives).


commonly discussed alternatives.\textsuperscript{16} Other procedures could no doubt be devised, but they all depend upon an analogy to litigation, such as various forms of alternative dispute resolution, or an approximation of its results, as in insurance claims adjustment. All of the plausible means for determining overall liability require first an approximation and then a summation of liability on individual claims. No mass tort case seems to come with a figure for total liability attached. Any such figure must be built up from individual claims, rather than broken down from an assessment of overall losses. Even in cases in which the defendant's net assets and insurance coverage create a ceiling on total recovery, the form that a mass tort case takes depends upon whether this figure exceeds the likely recovery of individual claimants. If there is a ceiling, then a reorganization in bankruptcy or a mandatory class action may be the appropriate procedure. If not, as the United States Supreme Court has held in \textit{Ortiz v. Fibreboard Corp.}\textsuperscript{17} and \textit{Amchem Products v. Windsor},\textsuperscript{18} then opt-out class actions or ordinary individual actions remain the preferred procedures.\textsuperscript{19}

Even from a deterrence perspective, some knowledge of the number and value of individual claims appears to be necessary. No proposal for handling mass torts will work in the presence of radical uncertainty. The procedures in mass tort cases must therefore be devised to force this information forward, particularly if these cases involve future claimants. While it may not be necessary to force the future claimants themselves to come forward, information about their claims appears to be indispensable to determining overall liability. One virtue of the existing procedures is that they accomplish this objective, even if they do so by overemphasizing the

\begin{itemize}
\item \textsuperscript{17} 527 U.S. 815 (1999).
\item \textsuperscript{18} 521 U.S. 591 (1997).
\item \textsuperscript{19} Ortiz, 527 U.S. at 838–48; Amchem, 521 U.S. at 619–28.
\end{itemize}
II. COMPENSATION

The attraction of the compensatory perspective on mass torts derives from a fundamental paradox in the law of class actions: The absent class members own the claims that are brought on their behalf, but they have little, if any, control over those claims. Compensation is the least that can be done for them in exchange for seizing control over their claims. Otherwise they would be left with nothing to show for their substantive rights to ownership of their claims or their rights to be heard under the Due Process Clause. It is hardly an exaggeration to say that they are entitled to just compensation when these rights are taken away from them. A deterrence perspective, like Professor Rosenberg's, cannot give the right to compensation the same priority that it has under existing law. Such proposals inevitably redefine the substantive rights that claimants initially possess, so that they have a right only to limited recoveries for scheduled injuries as under a worker's compensation or no-fault insurance scheme. By sacrificing the compensatory purpose of mass tort actions, deterrence proposals require a radical restructuring of the underlying substantive rights now protected by the tort system.

Despite the criticisms of such proposals, they do serve to illuminate the commitment that existing law makes to compensation. Yet this commitment is so strong that it is often self-defeating. To take only the most prominent example, the right to notice and to opt out has remained at the center of class action litigation for the last three decades, from *Eisen v. Carlisle & Jacquelin* to *Ortiz* and *Amchem*. Seemingly arcane disputes over the scope of class actions and the subdivision of Rule 23(b) under which they should be certified really concern the fundamental question whether class members have the right to opt out and to seek full compensation in individual actions. This question is often resolved, as it was in *Eisen*,

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20 *Ortiz*, 527 U.S. at 847-48 (discussing the procedural protections that class members receive because they do not actively participate in presenting their claims).


without regard to whether class members have a realistic possibility of pursuing an individual action and recovering anything at all.\textsuperscript{24}

Class members often fare no better when the adequacy of their recoveries is placed directly in issue, as it is in review and approval of settlements under Rule 23(e).\textsuperscript{25} They often receive less generous recoveries than the named plaintiffs and the class attorneys, whose fees often take a disproportionate share of the total monetary recovery from the defendant.\textsuperscript{26} Moreover, the same factors that make it difficult for class members to maintain individual actions—chiefly, the small value of claims relative to the costs of litigation—also prevent them from effectively objecting to settlements that are unfavorable to their claims.\textsuperscript{27} Future claimants, of course, present these problems in extreme form. They may not know that they have a claim, let alone what its likely value is, and by the time they finally gain this information, it is usually too late. The class action may have long since concluded, and their claims for recovery outside the class action might be barred. Even if they can bring individual actions, the defendant’s assets might be so depleted by the recoveries of other class members that they receive little or nothing. Certainly for future claimants, the right to compensation in class actions is more often honored in the breach than in the observance.

Paradoxically, insurance proposals inspired by the deterrence perspective often do a better job of compensating class members than a rigid insistence on observing individual rights. The latter turn out to be much easier to observe in form than in substance. Compensation in an insurance model substitutes an approximate recovery with reduced costs of litigation for an attempt at a precise adjudication and valuation of individual claims. These models aggregate claims with similar characteristics and assign an average recovery for all claims within the group, however broadly or narrowly defined.\textsuperscript{28} This process permits the costs of valuation to be

\textsuperscript{24} Eisen, 417 U.S. at 175–76.
\textsuperscript{25} Fed. R. Civ. P. 23(e).
\textsuperscript{26} Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1061 (1996).
\textsuperscript{27} See id. at 1102–15 (discussing problems that absent class members face in monitoring the adequacy of settlements).
\textsuperscript{28} Rosenberg, supra note 2, at 1885–88.
spread over many claims, much as in class actions generally. Consideration of the details of what happened to each plaintiff must be subordinated to the features of each claim that yield valuations dependent upon past recoveries and settlements. The special circumstances that make one plaintiff's claim worth more or less than the average must be ignored; otherwise the savings from group valuation will be lost.

It is these losses that cause concern to advocates of the rights of individual class members. In substantive terms, the right to sue confers the opportunity for a claimant to obtain a greater than average recovery. In procedural terms, it takes the form of the right to opt out and to sue individually (or perhaps in a rare case, to take a larger role in the class action). Attorneys who represent individual class members, of course, are more than happy to assert these rights. As the rights of their clients increase, so do their opportunities to earn fees for asserting those rights. Unrepresented class members have no such advocates, so that litigation over their rights often turns into disputes between the class attorney and attorneys for other class members, arguing over the power to control the claims of unrepresented class members and to obtain attorney's fees. No matter how unsavory such disputes may seem, they are a direct consequence of increasing the procedural rights of absent class members. Protecting the latter's individual rights inevitably gives power to their individual attorneys. An insurance compensation scheme tries to short circuit this process by either inducing or requiring absent class members to give up their procedural rights.

In exchange for losing control over their claims, future claimants should receive a right to compensation that is of greater net present value to them than the claim itself. Whether they actually do, however, is another question. Future claimants are in a particularly bad position to evaluate this trade-off since the extent and nature

29 See supra note 8.
30 See Rosenberg, supra note 2, at 1887–88.
of their injuries remain uncertain. Workers exposed to asbestos, for instance, do not know whether they will suffer from mesothelioma or from moderate impairments like lung plaques.\textsuperscript{33} The extent of their ignorance raises doubts about any mechanism by which they would simply sell their claims to the highest bidder. An exchange of claims for insurance coverage seems far more plausible since it resembles ordinary decisions in everyday life about the purchase or selection of insurance policies. Yet it, too, requires an assessment of overall levels of future risk resulting from past exposure, an assessment that only experts may be confident in making.

These problems of valuation also affect the exercise of procedural rights by future claimants. The prospect of future litigation and its costs and benefits are unfamiliar to most people, creating problems for future claimants in adequately monitoring their individual attorneys. The risk of exploitation of future claimants may not be reduced, but increased, by giving them rights to opt out and to sue individually. Their individual attorneys might exploit these rights to increase the share of any recovery that goes towards attorney's fees. It is perhaps an obvious point, but one worth reemphasizing: agency costs are not necessarily reduced by changing the agent from the attorney for the class to the attorney for the individual class member. It follows that increasing the procedural rights of future claimants may not be part of the solution, but part of the problem, in mass tort cases.

This insight can be found in the class action decisions, as early as the seminal case on the rights of absent class members, \textit{Mullane v. Central Hanover Bank & Trust Co.}\textsuperscript{34} Although it was not directly concerned with a formally certified class action, that case dealt with a New York statute that consolidated all claims against trustees of a pooled trust, which combined the assets of many smaller trusts.\textsuperscript{35} There were many claimants whose rights were affected by the decision, the best known being claimants whose names and addresses were known to the trustees and who were therefore entitled to individual notice.\textsuperscript{36} The rights of other claimants, however, were also considered by the Supreme Court, including those of future or con-

\begin{footnotesize}
\begin{enumerate}
\item See Koniak, supra note 8, at 1052, 1060–65.
\item 339 U.S. 306 (1950).
\item Id. at 307–09.
\item Id. at 318.
\end{enumerate}
\end{footnotesize}
Future Claims in Mass Tort Cases

Tingent beneficiaries of the trust. These future claimants were not entitled to individual notice if their identities and location could not be easily ascertained.\textsuperscript{37} Giving them individual notice would have defeated the entire purpose of the pooled trust, which was to achieve economies of scale in administering the smaller trusts consolidated through its creation.\textsuperscript{38} This observation, little noticed in light of the main holding in the case, can be readily applied to future claimants in mass tort cases. They, too, are often difficult to identify or to locate and the cost of giving them full procedural rights often defeats the purpose of consolidating their claims in a class action.

Even if compensation is taken to be a fundamental goal of mass tort class actions, it might be better achieved by mandatory class actions that yield "global peace" than in class actions in which individual claimants can opt out and continue the litigation by other means. In the theoretical terms that Professor Rosenberg uses, even lifting the veil of ignorance so that individuals know whether or not they have claims (and if so, of approximately what value) may still lead them rationally to prefer mandatory class actions. They might discover, as did many of the claimants in the Dalkon Shield case, that they were better off pursuing their claim without an attorney under the procedures established by the Dalkon Shield Claimants Trust than with an attorney who might take the case to trial and who would, in any event, receive a contingent fee that would come out of their recovery.\textsuperscript{39} Any well-designed insurance scheme should attract the support of at least a majority of claimants, since the transaction costs of pursuing individual claims through litigation consumes about half of the costs expended in the tort system.\textsuperscript{40}

\textsuperscript{37} Id. at 317.
\textsuperscript{38} Id. at 318.
\textsuperscript{39} I discuss this experience in George Rutherglen, Distributing Justice: A Case Study of the Dalkon Shield Claimants Trust, 66 Law & Contemp. Probs. (forthcoming 2003).
\textsuperscript{40} Lester Brickman et al., Rethinking Contingency Fees: A Proposal to Align the Contingency Fee System with Its Policy Roots and Ethical Mandates 13–14 (1994) (finding that contingency fees reached up to 50%); James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation 93–94 (1988) (finding that plaintiffs received 50% of funds expended in tort litigation generally, but 71% in aviation torts); James S. Kakalik et al., Costs of Asbestos Litigation 39–40 (1983) (finding that plaintiffs received 37% of funds expended in early stages of asbestos litigation).
Of course, not all claimants will make this decision, as the experience of the Dalkon Shield Claimants Trust also reveals. Some of the claimants in that case, although less than one percent, decided to take their claims to trial or to full-fledged arbitration, even after exhausting all of the procedures made available by the Trust.  

As a general matter, lifting the veil of ignorance so that claimants have greater knowledge of the value of their claims makes it virtually impossible to achieve unanimity among the claimants on any system of compensation according to insurance principles. Any such system must average the value of their claims over some broader or narrower category, and in doing so, discourages anyone with an above-average claim from supporting that system of compensation. If the deviations above average are large enough, the claimant would reject any alternative to individual litigation, either in general, or in a particular case, by exercising the right to opt out.

To put this point in theoretical terms, the distinction between the ex ante perspective that Professor Rosenberg adopts and an ex post perspective that allows claimants some knowledge of the approximate value of their claims depends upon a fairly thick veil of ignorance. As the veil becomes thinner, so does the difference between the ex ante and ex post perspectives. In the limiting case, in which claimants have perfect knowledge of the value of their claims, the difference between these perspectives disappears altogether. Yet it remains an open question whether we need a veil of ignorance as thick as the one that Professor Rosenberg postulates.

As a formal matter, a thick veil of ignorance assures unanimity among all those who make rational choices subject to its constraints. In Professor Rosenberg's version of the original position, as in the version made famous by Professor John Rawls, the combination of the veil of ignorance and the requirement of choosing rationally in the face of uncertainty yields only a single conclusion to which everyone must agree.  

This agreement, however, has nothing to do with democratic principles of government since it is entirely hypothetical, and indeed, could be achieved by a single individual, like Professor Rosenberg, who analyzes the demands of

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41 Rutherglen, supra note 39.
rationality under the assumptions he makes. The model of choice behind a veil of ignorance, even if it yields the conclusions that Professor Rosenberg hopes for, does not yield any actual agreement. If successful, it only displaces disagreement from the inferences drawn behind the veil of ignorance to the reasons for imposing the veil in the first place. All of this is well known from the literature criticizing the use of this device by Professor Rawls in *A Theory of Justice*.

As applied to mass torts, it leads to the conclusion that claimants who would do better through litigation have as much reason to dispute Professor Rosenberg's veil of ignorance as they do to question the insurance system of compensation that results from it. In other words, the democratic credentials of unanimous choice behind a veil of ignorance are nil.

By the same token, however, in abandoning a thick veil of ignorance, we do not lose anything in terms of democratic legitimacy. What we gain is both a role for compensatory values in framing insurance systems of recovery, and at the same time, some insight into the institutional limits on judicial reform of the tort system. The role of compensatory values follows from the need to assure at least a majority of claimants that they will receive some approximation of a full recovery for their injuries. As suggested earlier, given the dismal performance of the tort system, this goal should not be too difficult to achieve. What concerns Professor Rosenberg, however, is not the majority of average and below-average claims, but the minority of above-average claims. He worries that these claimants will demand a right to opt out of any insurance system, dissipating the advantages of consolidating all claims against the defendant, restoring the defendant's superior position in bargaining and litigating against separate plaintiffs, and diminishing the efficiencies achieved by the legal system as a whole. But that worry presumes that above-average claimants have a veto power over any insurance system, at least as it applies to their own claims. They no longer do if the requirement of unanimous choice is abandoned along with a thick veil of ignorance.

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43 E.g., Reading Rawls: Critical Studies of *A Theory of Justice* 1–80 (Norman Daniels ed. 1976) (discussing whether decisions made under the veil of ignorance provide a non-circular justification for *A Theory of Justice*).

44 Rosenberg, supra note 2, at 1909–10.
Moving from unanimity to majority support among claimants does raise the issue of institutional roles: whether reform of the tort system in mass tort cases should be undertaken by the courts or the legislature. If the unanimity requirement in Professor Rosenberg's model confers no democratic legitimacy on his proposals, neither does a requirement of majority support (or even supermajority support) in a model with a thinner veil of ignorance. The agreement reached under either model is still entirely hypothetical. This model does suggest, however, that judicial reform is probably the wrong vehicle for changing the law. If all claimants would not rationally choose to abandon their claims under the tort system in exchange for compensation under an insurance system, then it is doubtful that judges can impose this solution upon them. Under any such solution, some above-average claimants will not receive full compensation. Even if this loss does not amount to a taking without just compensation, it still may lie beyond the power of judges to impose by acting on their existing authority.

In the procedural literature, this limitation on judicial power is usually derived from the substantive law. In the federal judicial system, where many mass tort cases end up, this limitation brings with it the difference between state and federal law. Professor Rosenberg is probably right to avoid such narrow restrictions on reform. The inquiry, as he frames it, is to minimize all the costs of mass torts, including the cost of injuries and precautions, which overwhelm the expenses of litigation. Yet even if we enlarge the focus from procedural reforms to changes in substantive tort law, it remains doubtful that judges can achieve these changes acting by themselves. The incremental process of common law decisionmaking is fundamentally inconsistent with systematic substitution of one system of remedies for another. Judicial lawmaking within the tort system is commonplace. A judicial decision to overthrow it entirely would be revolutionary. Undoubtedly for this reason, judges have turned to insurance systems of compensation only when they have been forced to do so, and even then, they often have had the support of additional powers conferred by the bankruptcy laws. As

47 E.g., Rosenberg, supra note 42, at 840.
the next Part discusses in more detail, necessity has been the condition of judicial invention in mass tort cases.

III. NECESSITY

Judicial authority to impose "global peace" upon all the parties to mass tort litigation has been clearest in "limited fund" cases, in which the defendant either is in bankruptcy or otherwise lacks the resources to pay all the mass tort claims against it. The former results in consolidation of all claims by creditors under the bankruptcy laws and the latter justifies certification of a mandatory class action under Rule 23(b)(1)(B). These sources of law have imposed important doctrinal restrictions on mandatory class actions that both seek damages and deprive class members of the right to opt out. As the Supreme Court went out of its way to emphasize in Ortiz, extension of Rule 23(b)(1)(B) to mass torts generally would raise substantial questions of authority under the Rules Enabling Act and constitutionality under the Due Process Clause and the Seventh Amendment. Handling these cases under the bankruptcy laws, where it is appropriate to do so, would avoid both these questions of authority, and through the developed law of bankruptcy, the questions of constitutionality as well.

The content and criticism of these concerns already are familiar. The source and consequences of these concerns, however, bear reexamination and reveal why they can only be overcome by a showing of necessity. The allocation of tort claims to the individuals who are injured is a fundamental feature of tort law that distinguishes it, for instance, from administrative regulation. The tort

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48 Consolidation in bankruptcy is achieved mainly by the automatic stay of all proceedings against the debtor outside of bankruptcy. 11 U.S.C. § 362(a) (2000).
49 Fed. R. Civ. P. 23(b)(1)(B). Certification is also possible under Fed. R. Civ. P. 23(b)(1)(A) because payment to some claimants out of the limited fund might prevent the defendant from fulfilling its obligations to pay other claimants. Under both subdivisions of Rule 23, however, class members have no right to opt out. See Fed. R. Civ. P. 23(c)(2) (limiting the right to opt out to class actions certified under subdivision (b)(2)).
system confers upon claimants ownership and control over their claims, which can be taken away only in two ways: radically, through a wholesale change in the law that substitutes another system of regulation; or conventionally, through retail litigation that guarantees them notice and opportunity to be heard. Nothing inevitably requires claims to be handled in the tort system, but the decision to do so has fateful consequences. These cannot be evaded except in the extreme cases in which it is impossible to satisfy all the claims that might be brought against a bankrupt defendant or against a limited fund for compensation. In these cases, compulsory joinder of all claimants is necessary to determine the fair share that any claimant has against the defendant’s limited resources.

In mass tort cases, the consequences of individual control over claims immediately affect the certification and scope of class actions, and if the case reaches a settlement or judgment, the likelihood of collateral attack. In *Ortiz* and *Amchem*, the Supreme Court concentrated on the effects at certification and settlement, but the effects on collateral attack are equally important, and in the case of future claimants, more difficult to manage. Class members with above-average claims, especially claims whose value becomes apparent only after the class action has concluded, have as much reason to challenge a decision that purports to be binding upon them as to file an independent action in the first place. They receive all the benefit of hindsight, augmented for future claimants by the argument that they have had little opportunity to exercise any foresight. Either they did not know that they had a claim covered by the class, or if they did, they were not aware that it was of sufficient value to participate actively in the class action or to object to its outcome. Moreover, their attempt to reassert control over their claim is made in an independent action, in which the judge is not subject to the pressure to bring a complex piece of litigation to a conclusion. On the contrary, all the fundamental principles of the tort system favor individual control over individual claims.

Any procedure for mandatory class actions must therefore have enough authority behind it to prevent collateral attack in circum-

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53 Koniak & Cohen, supra note 26, at 1149-71 (discussing collateral attack through malpractice actions against class attorneys).
stances unfavorable to finality. The bankruptcy laws provide a good model for the scale and detail of the legislative authorization that is needed. The judgment of a bankruptcy court usually achieves global peace, even in the face of occasional arguments that a particular claim against the debtor, usually within a few narrowly defined categories, has not been discharged in bankruptcy. Mandatory class actions, if they are to be generally available and effective in mass tort cases, must achieve a similar degree of acceptance. The minimal conditions for doing so are explicit statutory authority and protection for claimants, either substantive or procedural, that give them a fair chance to recover on their claims. These prerequisites to genuinely binding judgments cannot be extracted from the general provisions of Rule 23 or added by rulemaking within the terms of the Rules Enabling Act.

That conclusion does not eliminate the role of mandatory class actions in mass tort cases because they can still be certified as a matter of necessity under Rule 23(b)(1)(B). In cases in which the narrow requirements of a limited fund have been met, class members can still be denied the right to opt out. The rule, especially as it is interpreted in Ortiz, defines necessity in terms that go beyond efficiency. More than a gain in efficiency, however large, is needed for certification of mandatory class actions under Rule 23(b)(1)(B). Instead, the required gain is framed largely in terms of fairness to claimants who would be prejudiced by the depletion of a limited fund through individual actions. Consolidating all these individual claims into a single class action would achieve gains in efficiency by preventing a wasteful race to recover from the limited assets of the defendant that are available to claimants. But a more specific inquiry than an assessment of overall efficiency is necessary under the Rule. It focuses, instead, on the interests of individual claimants and how they would be prejudiced by the maintenance of separate actions.

Professor Rosenberg presumably would frame the rule in broader terms that more liberally allow mandatory class actions, taking as his model the procedures developed in the exceptional cases in which mandatory class actions are now available. In the absence of such

55 Ortiz, 527 U.S. at 833.
reform, the law in mass tort cases reflects an uneasy compromise between the opt-out class actions available in most cases and the special procedures in bankruptcy and under Rule 23(b)(1)(B) for limited fund cases. Future claimants cannot be bound in the typical case because they cannot be deprived of their right to opt out. Like other class members in actions certified under Rule 23(b)(3), they have a right to opt out, which they cannot be forced to exercise before they know whether they have a viable individual claim. In the exceptional case, however, they can be bound because there is no alternative to imposing "global peace" upon all the interested parties. Otherwise, some claimants will be unable, regardless of the merits of their claims, to recover anything at all because the defendant's assets will be depleted by earlier recoveries. Yet even in these cases, future claimants receive little explicit protection in the rule, or in the bankruptcy laws for that matter. Neither Rule 23 nor the bankruptcy code guarantees them a realistic chance to present their claims when they eventually discover that they have them. Judicial innovations in responding to this problem when it cannot be avoided provide some basis for testing proposals, like Professor Rosenberg's, for insurance systems that might be applied more generally.

The use of mandatory class actions as a last resort, however, does not automatically translate into using them as a matter of course. To return to an issue discussed earlier, any approximation of the defendant's liability and of the value of individual claims must achieve a greater degree of accuracy in ordinary damage class actions than in limited fund cases. In the latter, the fund itself provides a limit on how much claimants, whether present or future, can receive, and so diminishes the need for an accurate approximation of the total value of their claims. A proportionate assessment of how much each claimant or class of claimants should receive is sufficient. In the absence of this upper limit, a more accurate assessment of the value of claims is necessary, both to determine the defendant's overall level of liability (as discussed in Part I), and to assess the proportionate shares of different class members (to implement the compensatory values discussed in Part II). In the absence of a fairly accurate approximation, future claimants have every incentive to collaterally attack any resulting judgment. Unlike defendants in limited fund cases, defendants in other mass
tort cases have assets from which the future claimants can seek a recovery, and the inadequacy of any compensation that they received can be used to argue that they were not adequately represented in the underlying class action. Procedures alone cannot eliminate the risk of collateral attack. A factually accurate basis for compensating claimants, and particularly future claimants, is necessary as well.

CONCLUSION

Mandatory class actions deserve more attention, partly for the reasons of efficiency that Professor Rosenberg focuses on, but not only or even mainly for those reasons. It is possible to agree with his conclusions, at least in making mandatory class actions more widely available, without accepting his premises. There is no need to assume that the only goal of mass tort litigation should be overall efficiency in the form of optimal deterrence or that the only justification for reform places claimants behind a veil of ignorance that hides both the existence and the value of their claims. More widely shared assumptions about the desirability of compensating victims of mass torts and about the choices that these victims would make if they had some idea of the value of their claims lead to much the same conclusions. Reasoning from these assumptions does not yield the deductive certainty of a single rational decision that would be embraced by all claimants. Some claimants would prefer the existing system that preserves individual control over tort claims through the right to opt out. These more widely shared assumptions, however, are more likely to generate the democratic support that ultimately is necessary for legislative reform in this area of law.