Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments

Mark C. Weber
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This Article discusses the respective roles of the state and federal courts in mass toxic tort cases, considering the recent tobacco litigation and other new developments and how they have influenced what those roles should be. This Article makes three basic points.

First, with regard to dispersed product injuries,1 and even with regard to many contamination-related cases, mass proceedings are increasingly likely to be brought in the state courts, rather than the federal courts. In general, this development should be applauded. I have put forward both the idea that the movement to the states is happening2 and that it is good3 in other

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1 When lawyers talk of mass toxic tort cases, they are usually referring to chemical spills (either single, all-at-once, or gradual, over a protracted time) and similar contaminations, or to dispersed product injuries, as with tobacco, asbestos, or silicone breast implants. See HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 17.06 (2d ed. 1985) (defining various forms of complex litigation). There is a wealth of scholarship on mass torts. For useful single volumes with extensive bibliographic references, see, for example, Symposium, Mass Torts, 148 U. PA. L. REV. 1851 (2000); Symposium: National Mass Torts Conference, 73 TEX. L. REV. 1523 (1995); Symposium on Mass Torts, 31 LOY. L.A. L. REV. 353 (1998).

2 See Mark C. Weber, Mass Trials in Mass Tort Cases: Some Preliminary Issues, 48 DEPAUL L. REV. 463, 476-77 (1998). Professor Linda Mullenix has noted that some states have become less hospitable to class litigation over the past several years, something that may call for some caution with regard to this prediction. Linda S. Mullenix, Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?, 74 TUL. L. REV. 1709, 1778-80 (2000) (noting that Florida continues to welcome class actions, but high courts in other gulf states now mirror federal courts in restricting class suits).

writings, and I will try in this Article simply to give the outlines of the position and discuss a few recent events that relate to it.

Second, there are a number of steps that state courts should be taking to accommodate the mass litigation that is coming their way and to adjudicate it fairly and efficiently. I have developed this point elsewhere as well, but the increasing movement of cases towards the state courts lends the problem new urgency, so I would like to stress again some of the things the state courts should be doing and elaborate on them.

Third, in my view, despite the movement of these cases to the states, there ought to remain a role for the federal courts in state court mass tort litigation. The federal courts should act as a backstop to remedy violations of due process that may take place in state court proceedings. This is the forum allocation idea I develop at greatest length here. The outline of the position is that absent class members have the due process right to representative adequacy during all stages of class action litigation, and nowhere is this right more important than if the class action involves a mass toxic tort. If there is a failure of representative adequacy, the class members who are harmed should be able to turn to the federal courts for relief for the

4 For a detailed exposition of the view that state court proceedings are superior in mass tort litigation, see Mark C. Weber, Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases, 21 HASTINGS CONST. L.Q. 215 (1994).


6 The role of the federal courts vis-à-vis state class action litigation has received significant attention recently. Not only have there been legislative proposals, see infra text accompanying notes 31-40, but there has been significant commentary about whether state court class action settlements or adjudications should preclude inadequately represented class members from collateral attack on the class action judgment in federal or other state courts. See, e.g., Patrick Woolley, The Availability of Collateral Attack for Inadequate Representation in Class Suits, 79 TEX. L. REV. 383 (2000). Professor McGovern and others have explored the possibility of cooperation between federal and state courts in mass tort litigation, see, e.g., Francis E. McGovern, Rethinking Cooperation Among Judges in Mass Tort Litigation, 44 UCLA L. REV. 1851 (1997); William W. Schwarzer et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts, 73 TEX. L. REV. 1529 (1995), but McGovern has noted the failure of most efforts in that direction, see Francis E. McGovern, Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation, 148 U. PA. L. REV. 1867, 1876-81 (2000).
violation of their due process rights, either by undoing the results of the class
action or by bringing claims for damages against those who conspired to
deprive the class members of their rights.

Part One of this Article will address the stateward movement and the
beneficial aspects of it. Part Two will discuss what state courts should be
doing to improve their response to mass tort cases. Part Three will consider
the federal role as a last-resort defender of individual rights when toxic torts
are brought as state court class actions but the representative does not
adequately protect the class members' interests. This final part will consider
recent litigation that, in my view, improperly imposes preclusion and other
doctrinal barriers on class members seeking to vindicate their due process
rights in federal court.

I. MASS TORT CASES ARE MOVING, AND SHOULD MOVE, TO THE
STATE COURTS

In the past, the federal courts have usually been viewed as the obvious
forum for class action and other large-scale litigation arising out of particular
mass torts. Several reasons supported this approach: (1) nationwide class
proceedings appeared to be easier to bring in the federal courts, and to
provide a vehicle to settle all the cases at once; (2) the Federal Rules include
a non-opt-out class provision, which seemed to permit settlement or
adjudication of literally all the cases without any holdouts to limit the reach
of the deal; and (3) even where class proceedings were not contemplated or
did not fit under the Federal Rules, the multi-district litigation mechanism
provided a means to consolidate all the cases in the federal system and to try
them in a single proceeding.

Each of these conditions has changed in recent years, and the federal
forum has correspondingly become less attractive. With regard to the first
point concerning nationwide settlement classes, the change came in Amchem

7 See, e.g., AMERICAN L. INST., COMPLEX LITIGATION PROJECT §§ 5.01-05 (Proposed Final
Draft 1993); John C. McCoid, A Single Package for Multiparty Disputes, 28 STAN. L. REV.
707 (1976); Linda S. Mullenix, Class Resolution of the Mass-Tort Case.: A Proposed Federal
Procedure Act, 64 TEX. L. REV. 1039 (1986); Thomas D. Rowe & Kenneth D. Sibley,
8 The Supreme Court approved the use of a nationwide class action in a federal statutory case
9 FED. R. CIV. P. 23(b)(1).
Products, Inc. v. Windsor\textsuperscript{11} in 1997. There the Supreme Court held that class action cases brought simply as a vehicle for settlement still needed to meet all the requirements of Federal Rule 23(a) ( numerosity, common question of law or fact, typicality of the claims of the representative parties and the class, and representative adequacy) as well as Rule 23(b)(3)'s requirement that common issues predominate.\textsuperscript{12} As the Court noted, if the law applicable to the case remains the tort law of the fifty states, subclassing may be needed on the basis of the differences in the law,\textsuperscript{13} just as it will also be required by differences among class members regarding the manifestation of the injury and its severity.\textsuperscript{14} The Court further suggested that adequate notice could never be provided to people whose injury is not manifest, and so those people could not be in any class.\textsuperscript{15}

This development certainly put a damper on the idea of filing global settlement class actions in federal court. A nationwide class consisting of claimants with all different levels of exposure and injury would be subject to the laws of fifty different states and would seem to be one impossible to represent adequately, one whose common issues do not predominate, and one to whom meaningful notice could never be given. Thus the Federal Rules' requirements bar the mass proceeding. If there were to be any advantage obtained from the nationwide jurisdictional reach of the federal courts, it would be lost in the strict application of the federal class action requirements.\textsuperscript{16}

In some litigation related specifically to tobacco products, notably the Fifth Circuit's 1996 case, Castano v. American Tobacco Co.,\textsuperscript{17} federal courts have rejected class actions, stressing variation in state law and difficulties with manageability, among other issues.\textsuperscript{18} Other decisions in non-tobacco,

\textsuperscript{11} 521 U.S. 591 (1997).
\textsuperscript{12} Id. at 613.
\textsuperscript{13} Id. at 608.
\textsuperscript{14} Id. at 607-8.
\textsuperscript{15} Id. at 628.
\textsuperscript{16} If there is a jurisdictional advantage, it is far from obvious, for states have frequently permitted nationwide classes in their courts, see, e.g., Broin v. Philip Morris Cos., 641 So. 2d 888, 892 (Fla. Dist. Ct. App. 1994); Miner v. Gillette Co., 428 N.E.2d 478, 484-5 (Ill. 1981), and the Supreme Court has approved the practice without requiring minimum contacts between class members and the forum state, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-14 (1985).
\textsuperscript{17} 84 F.3d 734 (5th Cir. 1996).
mass tort class actions in the federal courts have reached similar conclusions, condemning the use of class actions in the cases and suggesting that the cases could never be tried because the *Erie*\(^{19}\) doctrine would require the use of jury instructions for subclasses for each of fifty states, or else some kind of “Esperanto instruction” somehow combining the law of all the states.\(^{20}\)

With regard to the second attraction of federal class actions for toxic tort cases, it is true that non-opt-out federal class actions remain available in theory. Nevertheless, in the 1999 *Ortiz v. Fibreboard Corp.*\(^{21}\) case, the Supreme Court overturned a class action settlement, holding that the part of Rule 23 that permits non-opt-out class actions when there is a fixed pie of assets and claims that in total exceed those assets (calling presumably for ratable reductions) does not apply when the fund consists solely of insurance proceeds and the defendant is a going concern with additional resources.\(^{22}\)

That remains so even when an offer of settlement from the insurance proceeds appears to many observers to be an exceedingly good deal for the members of the plaintiff class.\(^{23}\) The class action rules and statutes in many states do not permit non-opt-out class actions,\(^{24}\) so one reason to file federal had been to take advantage of the federal non-opt-out rule. But now it appears that the provision will apply only when the defendant is a good candidate for bankruptcy, and neither plaintiffs nor defendants seem to prefer that option over any other available solution.\(^{25}\)

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\(^{19}\) *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (requiring application of state law in diversity actions in federal court).

\(^{20}\) See *In re Rhone-Poulenc Rorer*, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (“[T]he district judge proposes . . . a single trial before a single jury instructed in accordance with no actual law of any jurisdiction—a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia.”); see also *In re American Med. Sys.*, Inc., 75 F.3d 1069 (6th Cir. 1996) (rejecting class action in light of differences of state law).


\(^{22}\) See *id.* at 829-30.

\(^{23}\) See *id.* at 866-68 (Breyer, J., dissenting) (noting advantageous characteristics of offer); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1799-1800 (1997) (describing offer and praising it).

\(^{24}\) See, e.g., *FLa. R. CIV. P. 1.220* (West 2001) (providing for class actions but only with opt-out rights); 735 ILL. COMP. STAT. ANN. 5/2-801 to -806 (West 2001) (same); PA. R. CIV. P. 1711 (West 2001) (same); TEX. R. CIV. P. 42 (West 2001) (same).

\(^{25}\) Regarding bankruptcy proceedings as a mechanism for resolving mass tort claims, see, for example, Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695 (1998); Joseph F. Rice & Nancy Worth Davis,
The final and third point on this topic relates to multi-district litigation ("MDL"). Even when class proceedings are not being used for judicial economy or global settlement, the federal forum might be a superior place to accomplish the same goal because pretrial proceedings can be consolidated under the MDL statute and the case retained for trial in the same court that can then conduct a trial or broker a settlement. That option too is no longer available due to *Lexecon*, in which the Supreme Court ruled in 1998 that the MDL court lacked the power under the statute to refer the case to itself for trial, and that it had to send the cases back to the transferor district courts for individual proceedings once the pretrial proceedings were done. Once again, the federal advantage over the states, though it might prevail to some degree due to the consolidated pretrial proceedings, is less than it had been. For many individual claimants, the consolidated pretrial proceedings may be merely a source of delay that will never advance the resolution of the case over what would happen if the case were in a state court system. The real advantage to federal court for the plaintiff's attorney—the individual who ordinarily determines the forum—was the prospect of fees in a global resolution of the case in a mass proceeding before the MDL judge.

Two recent developments have occurred that slightly alter the landscape with respect to the comparative attraction of the state and federal forum for mass tort cases such as those arising from toxic exposures. Nevertheless, the developments do not weaken the basic proposition that federal courts are much less attractive than they once appeared, and in some

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26 *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33 (1998) ("[O]ut of the 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, 279 of the 3,787 ultimately requiring trial were retained by the courts to which the Panel had transferred them."); *see also* Stanley A. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts, 78 F.R.D. 575, 583 (1978) ("[S]lightly less than five percent of the actions transferred by the Panel [for pretrial proceedings] have been remanded [for trial]. Most actions are terminated either in the transferee district (often by settlement) or are transferred by the transferee judge to the transferee district or to another district for trial . . . .").

27 523 U.S. at 34-37.
important respects they strengthen it.

First, the recently concluded tobacco class action in Florida demonstrated that at least some state courts are a viable, and, for plaintiffs, indeed a desirable forum for bringing large-scale dispersed product litigation. The $144.8 billion punitive damages judgment could still be reversed on appeal, and the compensatory damages proceedings are yet to come, so assessments about the overall success of the proceeding are premature. Nevertheless, the fact that the case was originally permitted to go forward after an interlocutory appeal increases the odds of the verdict’s survival. All eyes may be on the Florida Supreme Court (as they were for a different reason in December of 2000), but the trial’s results should give plaintiffs a reason to think ever more seriously of state courts as the forum of choice for mass torts, just as they give defendants reasons to regard the state courts seriously as a forum in which mass proceedings will be adjudicated.

Second, legislative developments may affect the stateward push, but it appears that any foreseeable changes will not take the bulk of the cases away from the states. In the last Congress, the House passed H.R. 1875-S. 353, which would have permitted the removal to the federal courts, based on minimal diversity, of nearly all class actions brought in the state courts, save those of completely local interest. The legislation died in the Senate. Opponents feared that H.R. 1875-S. 353 would have stopped dispersed product class actions altogether, at least in those circuits bound by Castano and similar cases blocking federal product liability class actions. Once the

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29 See id. at 65.
31 H.R. 1875, 106th Cong. §§ 3-4 (1999); S. 353, 106th Cong. §§ 3-4 (1999). See generally H.R. REP. No. 106-320 (1999) (reporting on proposed Interstate Class Jurisdiction Act of 1999, denominated Class Action Fairness Act of 1999 in Senate); Stephen Labaton, House Passes Bill That Would Limit Class-Action Suits, N.Y. TIMES, Sept. 24, 1999, at A1 (discussing bill). There have been other, more temperate, proposals from the academic community, such as Professor Miller’s suggestion that when state class actions overlap they should be removed to federal court for complete resolution. See Geoffrey P. Miller, Overlapping Class Actions, 71 N.Y.U. L. REV. 514, 530-40 (1996); see also Rhonda Wasserman, Dueling Class Actions, 80 B.U. L. REV. 461, 540-42 (2000) (proposing consolidation of competing class actions in federal court in some instances). Even in this more limited form, however, federal consolidation carries the Erie-problem, federalism, majoritarianism, and resource allocation drawbacks discussed in the text.
32 Much critical commentary emerged regarding the bill. See, e.g., Class Action Fairness
case was removed from state court, the federal court would deny the class status and dismiss the case for want of jurisdiction; if the class case were refiled again in state court, it would be subject to an endless cycle of removals and dismissals. This bill has not been revived in the current Congress, at least as of this writing. What appears to be its substitute, H.R. 860, passed the House on March 14, 2001 on a voice vote after two-thirds of the members voted to suspend the rules. H.R. 860 does two things:

(1) It reverses *Lexecon* and permits the MDL court to keep the case after conclusion of pretrial proceedings, though the MDL court may remand for trial and generally is supposed to remand for determination of compensatory damages after liability and punitive damages have been determined. If this bill succeeds, it will provide an incentive to file federally if the plaintiff hopes to be part of an MDL consolidation, or to remove, if the defendant does. But removal can still be blocked by naming one non-diverse defendant in the state court case, so that which is in-state should stay in-state, except that:

(2) H.R. 860 provides new federal jurisdiction when there is minimal diversity between adverse parties and the litigation arises from a single accident in which at least 25 persons have died or been injured at a discrete location and damages exceed $150,000 per person if a defendant resides in a state and a substantial part of the accident took place in another state, or any two defendants reside in different states or substantial parts of the accident took place in other states, but not if the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens, and the claims will be governed primarily by the laws of that state. Removal jurisdiction is extended to this provision. If the mass accident case becomes an MDL case, the district court generally is to remand to the transferor district court or the state court for determination of compensatory damages, but it may try the consolidated case on the issues of liability and

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35 Id. at § 3.
36 See id.
punitive damages.\textsuperscript{37}

If this legislation passes the Senate, single-accident mass disaster litigation should stream towards the federal courts to an even greater degree than it does now. The single-accident language in the bill, however, will exclude gradual-seepage toxic contamination cases, and its proponents assure that dispersed product cases are not intended to be covered.\textsuperscript{38} They also insist that there is no intention to expand the jurisdiction in the future.\textsuperscript{39} With a somewhat mangled metaphor, one member of the House Judiciary Committee declared, "I don't want this to serve as the legislative foot in the door or nose under the camel's tent."\textsuperscript{40}

In summary, the Florida tobacco litigation should increase the momentum stateward, and legislation is not likely to change that condition, at least with regard to dispersed product injuries. I have argued elsewhere that this channeling of mass tort cases into the state courts is, on the whole, a good thing.\textsuperscript{41} There are several strands to the argument:

First, the underlying law of dispersed product cases and most of the contamination cases is going to remain state law.\textsuperscript{42} It makes more sense for the state courts to develop and apply this law than for the federal courts to make guesses under the \textit{Erie} doctrine about what it is. Even when the \textit{Erie} guesses are thoughtful ones,\textsuperscript{43} the law applied is likely to be static, for federal

\textsuperscript{37} \textit{See} id.

\textsuperscript{38} H.R. REP. No. 107-14, at 29 (2001) (statement of Rep. Sensenbrenner) ("This does not deal with cases like the asbestos case. This is a single-accident case, again, such as a plane crash or a train wreck.").

\textsuperscript{39} \textit{Id.} ("[T]his will not serve as a precedent for other types of litigation reform legislation.").

\textsuperscript{40} \textit{Id.} (statement of Rep. Conyers).

\textsuperscript{41} \textit{See}, \textit{e.g.}, Weber, \textit{supra} note 4, at 220-53.

\textsuperscript{42} One expert on mass tort litigation has noted:

[T]he underlying claims in mass tort litigation are grounded in common law tort theories or perhaps applicable state statutory schemes, such as the Texas Deceptive Trade Practices Act. Mass tort litigation, then, quintessentially is grounded in local law; that is, the determination by state courts or legislatures concerning the rights and duties of private parties in their interactions with one another.


\textsuperscript{43} Many \textit{Erie} guesses are wrong. \textit{See} Weber, \textit{supra} note 4, at 230-32 (listing erroneous predictions regarding state law). Others are impossible. \textit{See}, \textit{e.g.}, Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) ("Our principal task ... is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."), \textit{rev'd}, 365 U.S. 293 (1961).
courts are properly reluctant to innovate with another sovereign’s law.\textsuperscript{44} Mass tort proceedings, however, necessarily call for a great deal of innovation in tort law.\textsuperscript{45} Certification to the state courts, though better than nothing, has not been very successful at giving federal courts prompt and useful answers about the content of state law.\textsuperscript{46}

Second, unlike civil rights or much constitutional law, which is designed to be counter-majoritarian in nature, state tort law should be responsive to majoritarian institutions. In most states, the majoritarian institutions include elected state judiciaries.\textsuperscript{47} Political insulation is not needed to decide tort cases. Since tort law is a direct extension of a community, insulation from the community is a drawback for those charged with developing tort law.

Moreover, federal judges tend to homogenize state law by citing to federal sources for the underlying law even in diversity cases in which they should be applying the law a state court would apply to the case.\textsuperscript{48} This is

\textsuperscript{44} Judge Posner made this point in connection with a case involving mass exposure to tainted blood products:

The diversity jurisdiction of the federal courts is, after \textit{Erie}, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law . . . . No one doubts that Congress could constitutionally prescribe a uniform standard of liability for manufacturers of blood solids . . . . The point of \textit{Erie} is that Article III of the Constitution does not empower the federal courts to create such a regime for diversity cases.

\textit{In re Rhone-Poulenc Rorer, Inc.}, 51 F.3d 1293, 1302 (7th Cir. 1995).

\textsuperscript{45} Weber, \textit{supra} note 3, at 1016-20 (discussing issues in which adjudication of tobacco mass tort cases occasions development of law).

\textsuperscript{46} The \textit{Green} litigation against the American Tobacco Co. in Florida is the classic certification disaster. \textit{See} Green v. American Tobacco Co., 304 F.2d 70, 72 (5th Cir. 1962) (certifying question of state law); Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1962) (answering question); Green v. American Tobacco Co., 325 F.2d 673, 675 (5th Cir. 1963) (ignoring answer); McLeod v. W.S. Merrell Co., 174 So. 2d 736, 739 (Fla. 1965) (stating that \textit{Green} applied Florida law incorrectly); Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968) (applying Florida law as stated in \textit{McLeod}), rev’d on reh’g, 409 F.2d 1166 (5th Cir. 1969) (per curiam); \textit{see also} Mullenix, \textit{supra} note 7, at 1076 n.196 (reporting two-year delay due to certification in asbestos case).

\textsuperscript{47} Weber, \textit{supra} note 4, at 225 (noting that forty-one states use some form of popular election to choose or retain judges).

directly opposite to how state law should develop. Instead, states should be making decisions about the content of their law that reflect differences in character among the regions of the United States and their attendant cultures. Thus federalism interests are served by allowing state-by-state development of tort law.

Third, the federal courts have better things to do. The point is not to denigrate the importance of tort law, but to maximize the comparative advantages of federal and state courts and determine which forum ought to be developing and applying tort law. The federal court system is dramatically smaller than the combined state systems, and the optimal use of the federal courts' time is dealing with the federal statutory matters on which they have expertise and federal constitutional matters in which their political insulation is important for justice. By contrast, state judges frequently specialize in tort law, which becomes the daily subject of their work and the field in which they develop expertise. That expertise enables them to contribute to the law's development.

Thus, the movement in toxic torts matters is towards the states, and it is likely to continue to be so. And that, in my view, is not a bad thing.


\[^{51}\] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4 (1990) (“[T]oday, 90 percent of the nation’s judicial business is handled by state rather than federal courts.”).

\[^{52}\] See Weber, supra note 4, at 245-53 (explaining position in detail).

\[^{53}\] The statement of one torts scholar is revealing:

I conclude that there is nothing inherent in tort law or its common law source that makes it a subject better for state courts than federal courts. If any court system has a steady diet of legal matters to chew on, it will respond to the task. The reason the state courts in general do a better job now of dealing with tort issues is because they handle most of the cases. If it were the other way around, I am sure the federal courts would do equally well.

Roger C. Henderson, The Tort-Liability Insurance System and Federalism: Everything in Its Own Time, 38 ARIZ. L. Rev. 953, 957 (1996). Given the other demands on the federal courts, tort cases will never be one of that system’s specialties, so the advantage will continue to lie with the state courts.

What would be bad would be a failure on the part of the states to respond to
the movement by improving their ability to handle mass tort proceedings, and
that is the next topic to discuss.

II. THE STATE COURTS SHOULD IMPROVE THEIR CAPACITY TO
ADJUDICATE MASS TORTS FAIRLY AND EFFICIENTLY

That the state courts are and should be handling mass toxic torts cases
does not mean that they are doing the best job at it that they could. Five steps
would improve the states’ response to these cases:

A. Permitting Interlocutory Appeals in Class Action Certifications

A number of states permit these appeals by statute or rule, and some
others have vehicles such as mandamus or certiorari that effectively allow
them. The federal system, of course, did not permit them until 1998 and
even then made them discretionary on the part of the court of appeals. On
the whole, I believe that interlocutory review of class action status decisions
is a good idea because if class status is denied, the ruling is generally the
“death knell” of the action, and if it is granted, the impact on settlement
negotiations and the scope (and therefore cost) of trial is so great that the

55 See, e.g., Daar v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967) (permitting appeal of denial
1999) (allowing appeal of grant of class action status); Weinberg v. Hertz Corp., 509 N.E.2d
App. 1995) (allowing appeal of denial of class action status); Bell v. Beneficial Consumer
Discount Co., 348 A.2d 734 (Pa. 1975) (allowing appeal of denial of class action status);
Central Power & Light Co. v. City of San Juan, 962 S.W.2d 602 (Tex. Ct. App. 1998)
(allowing appeal of grant of class action status); see also Note, Appellate Review of Class
Standing Orders in Florida, 6 NOVA L.J. 593, 595 (1982) (discussing appeal of class
decisions in Florida through common law writ of certiorari).

56 See FED. R. CIV. P. 23(f) (“A court of appeals may in its discretion permit an appeal from
an order of a district court granting or denying class action certification under this rule . . .”).
See generally Michael E. Solimine & Christine Oliver Hines, Deciding to Decide: Class
Action Certification and Interlocutory Review by the United States Courts of Appeals Under
Rule 23(f), 41 WM. & MARY L. REV. 1531 (2000) (discussing the rule’s application).

57 Cf. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-76 (1978) (refusing to permit
interlocutory appeal of class certification denial under existing rules despite argument that
because costs of individual action exceeded recovery, denial of certification sounded “death
knell” of case).
opponents deserve review. The chance to get an appellate ruling to clarify the definition of the class and prospectively correct errors is also important. I have previously commented on how it appears that the Second Circuit affirmed the trial court decision in the Agent Orange case less because it agreed with the trial court’s dubious ruling about choice of law than because it did not want to see the trial court proceedings rerun at tremendous cost and delay. An interlocutory review mechanism might have avoided the difficulties in that case. The Florida tobacco case illustrated the benefits of interlocutory appeal by giving an authoritative ruling on the scope of the class and the claims, and particularly by narrowing the class to citizens and residents of the forum state.

B. Generally Restricting Tort Class Actions and Large-scale Consolidations to the Claims to Which the Forum State’s Own Law Will Be Applied

The state court should undertake this step to avoid recreating the *Erie* mess that exists when mass tort cases are adjudicated by a federal court. The same federalism concerns that support the movement of the cases to the state courts support the movement to the state courts whose law is actually being applied. California courts should not be developing Vermont law any more than United States courts should be. Restricting cases to claims in which the forum state’s law applies would minimize the problem. *Engle*, the Florida tobacco case, began as a nationwide class action, but the Florida Court of Appeals, on interlocutory review, narrowed the class to Florida citizens. Though its reasons were different from those advanced here (the court thought the state’s taxpayers should not have to pay the costs of trying a case for the benefit of individuals throughout the nation), the result the

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58 *Fed. R. Civ. P.* 23 advisory committee’s note (1998) (“An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”).


61 See Weber, *supra* note 3, at 1007 (recommending that tobacco product liability classes be limited to individuals with claims governed by forum state law).

62 *Engle*, 672 So. 2d at 41-42 (limiting proposed nationwide class to Florida citizens and residents).

63 *Id.* at 41.
court reached was correct. A nationwide class would have required the application of fifty different states' laws, rendering the trial unmanageable. A class limited to Floridians may properly have its claims adjudicated under Florida law, and the court is that much more free to creatively adapt Florida law to the case in the traditional common-law manner, rather than guessing at the content of other states' tort law and applying a static version of those states' approaches.

C. Using Door-Closing Doctrines to Permit Earlier-Filed Consolidations in Other States to Proceed Where Appropriate, and to Avoid Overlapping Class or Other Large-Scale Actions in Different States

State courts lack a national mechanism to coordinate potentially conflicting class actions or other mass litigation. There is no MDL that operates to consolidate and assign state cases; an American Law Institute proposal that might have led to the creation of such an entity has gone nowhere. Restricting the membership of classes to individuals whose claims are governed by forum law will avoid many of the problems that would otherwise be presented if dueling nationwide class actions were racing each other to judgment in two different state courts. Apart from that step, however, there are several doctrines and statutory mechanisms by which a state court may defer an action in its own state if there is a pending action elsewhere that will adequately adjudicate the relevant claims.

1. Forum non conveniens. In some cases—a chemical seepage in a state border community, for example—different states' courts might have legitimate grounds to assert their own jurisdiction and apply their own law to groups of people and claims that overlap with each other. To avoid duplicative and potentially conflicting proceedings, the court in the later-filed action might delay or dismiss that case, thereby allowing the litigants to take

64 See Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (limiting application of forum law to issues for which state possesses "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

65 See AMERICAN L. INST., supra note 7 (proposing elaborate plan for complex litigation including mechanism to transfer cases from federal and other state courts to state and federal magnet courts).

66 See generally Weber, supra note 4, at 267-68 (advocating use of deferral doctrines).
advantage of an opportunity to intervene in the first-filed litigation.\(^\text{67}\) A continuance or dismissal without prejudice in this situation fits well within the limits of the forum non conveniens doctrine, which permits courts to defer or dismiss cases in favor of litigation elsewhere when doing so advances the convenience of the witnesses and the parties.\(^\text{68}\) Obviously, the court should not delay or dismiss the case if relief is not practically available in the first-filed action, but significant economies may be achieved in many instances by allowing the case that first gets control of the plaintiffs and defendants to proceed to judgment.\(^\text{69}\)

2. Abatement on account of prior pending claim. Another doctrine that a court may use to dismiss without prejudice claims that are covered by litigation in other states is that of abatement on account of a prior pending case on the same cause of action among the same parties.\(^\text{70}\) Although this doctrine is and should be discretionary,\(^\text{71}\) dismissal or deferral under it may well be appropriate in overlapping mass tort actions. Since not every state will have sufficiently flexible doctrines under either forum non conveniens or abatement for prior pending claims, some state courts might be more successful using one or the other approach.

3. Full faith and credit. A third vehicle by which coordination of litigation can be achieved is simply through the application of full faith and credit in those instances when one case covering the claims of a given person has reached final judgment.\(^\text{72}\) Like federal full faith and credit, however, state-to-state full faith and credit should not be applied when the members of a class have been denied adequate representation or other essentials of due process.\(^\text{73}\)

\(^{67}\) See Miller, supra note 31, at 528-33 (endorsing application of forum non conveniens and abstention to avoid conflicting class actions); Wasserman, supra note 31, at 519-21 (suggesting use of stay orders, but questioning effectiveness of reliance on voluntary action).

\(^{68}\) See Jack H. Friedenthal et al., Civil Procedure § 2.17, at 86-94 (3d ed. 1999) (describing doctrine).


\(^{71}\) See, e.g., Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 821 (9th Cir. 1975); Barapind v. Reno, 72 F. Supp. 2d 1132, 1144 (E.D. Cal. 1999), aff'd, 225 F.3d 1100 (9th Cir. 2000).

\(^{72}\) See U.S. Const. art. IV, § 1 (requiring states to give full faith and credit to other states' "public Acts, Records, and judicial Proceedings").

\(^{73}\) World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("A judgment
This latter topic is developed in Part III, below.

4. Uniform Transfer of Litigation Act. The National Conference of Commissioners on Uniform State Laws has promulgated a model law providing for interstate transfer of litigation, which would permit states to send cases from one to another so as to coordinate among themselves proceedings that have interstate dimensions. The states would thus cooperate in their own substitute for a national MDL process. Despite the clear virtues of such a law for interstate judicial economy and fairness, the proposal has languished; no state has adopted it. As more and more complex cases, particularly mass toxic torts, gravitate to the state courts, the merits of the proposal have become progressively more obvious. An alternative to a state law transfer mechanism would be a federal law requiring states to defer to one another, along the lines of 28 U.S.C. § 1738A; however, a federal statutory solution is both unlikely as a political matter to gain the support for passage and unlikely as a practical matter to embody the flexibility needed to enable courts to defer when they ought to and to stand their ground when they should not.

All these various door-closing doctrines or statutes will permit courts to act appropriately when competing mass tort litigation appears. The first step is that of restraint in framing classes or large-scale consolidations so as to have each state litigate what its own laws apply to. The next step is to keep from treading on the ground that other states' courts have properly staked out.

D. Developing means to permit consolidation and transfer of cases within the state to a magnet forum with a carefully selected judge.

States may encounter multiple conflicting, or at least closely related, mass tort cases filed in different counties or circuits. Economy and fairness rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.

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75 See id. (failing to list any current adoptions).
76 See Wasserman, supra note 31, at 534 (discussing benefits of Act); see also Edward H. Cooper, Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act, 54 LA. L. REV. 897 (1994) (same).
demand that there be some process by which those cases can be consolidated and transferred to a single judge for consolidated pretrial proceedings. In some instances, consolidated trials may make sense as well. What states need is something that mimics the MDL process within their own jurisdictions. States that currently lack either rules or statutory authority are well advised to take action before multiple mass tort cases appear.

The rule or statute that is adopted should provide that the panel given the responsibility for consolidating the cases will receive the additional responsibility to select a specific judge to handle the consolidated case. The judiciary of any state is necessarily large and inevitably uneven in quality. In a case that is a potential bet-the-company action, the parties deserve careful selection of a skilled judge. If selections are made carefully, the quality of justice may well exceed that administered by a randomly selected federal judge, even though the average federal judge may have more experience with complex cases than the average state judge does.

E. Requiring Individual Consent for a Party to be Precluded by a Class Action Settlement

In other work, I have proposed that all class members should be given the individual opportunity to accept a class action settlement or reject it. If a class member rejects the settlement, that person should be able to bring an individual action or bring a new class action comprising the claims of the former class members rejecting the settlement. The only exception should be for the rare class action in which the fund of recovery is limited (under the strict standards articulated in Ortiz), but the case is somehow not in the bankruptcy courts. I believe that individual consent is the only means by which the judicial system can assure fair treatment of class members in class settlement. Because the arguments are developed elsewhere, they will not be reiterated here.

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79 See ILL. SUP. CT. R. 384 committee cmt. (establishing state court rule modeled on 28 U.S.C. § 1407); see also CAL. JUD. ADMIN. STANDARDS § 19 (West 2000) (providing for designation and assignment of complex litigation).
81 Id. at 1208-09.
82 See id. at 1218-20 (making point without benefit of Supreme Court decision in Ortiz).
The five proposals discussed here, interlocutory appeals of class certifications and denials; restriction of mass tort classes to claims governed by in-state law; application of door-closing doctrines; intrastate transfer and consolidation; and a requirement of individual class member consent for settlement, will go far towards improving justice in the state courts. State courts will thus remain the forum of choice for mass toxic tort litigation. These proposals will not solve every problem, however, and no one can be certain whether any or all of them will be adopted. When state court judicial disasters of constitutional magnitude occur, federal means of rescue should be available.

III. IF A STATE COURT DENIES CLASS MEMBERS DUE PROCESS IN TOXIC TORT CASES, RELIEF SHOULD BE AVAILABLE FROM THE FEDERAL COURTS

The denial of due process to class members is more than a theoretical problem, although at the moment more denials appear to have occurred in federal than in state courts. To illustrate, Amchem and Ortiz involved settlements reached by representatives who did not have the interests of all class members at heart and who had incentives to sell out at least part of the class.\(^3\) The Supreme Court used Federal Rules language to reaffirm the constitutional requirement that an adequate representative exist at all times during the litigation.\(^4\) Had it not been for the intervention of the Court, the class members would have suffered a deprivation of due process on account of the lack of adequate representation.\(^5\)

\(^3\) Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (invalidating settlement on basis, inter alia, of lack of representative adequacy); see also Ortiz, 527 U.S. at 848 (invalidating settlement).

\(^4\) See Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 SUP. CT. REV. 337, 352 ("The fundamental strength of Amchem and Ortiz inheres in the subtle revisitation of the law governing due process in the resolution of representative actions.").

\(^5\) If, as I suggest in this Part, the cases are reinforcing due process minima for class actions, they are binding both on federal and on state courts, and so they provide less of an incentive to file in the state courts than Part I might imply. To provide an incentive to file in the state forum, however, the cases need simply appear to make the federal courts more restrictive. Plaintiffs filing in the state courts or defendants electing not to remove when able to do so may be calculating on the chances that the requirements will not be applied in the state courts and that Supreme Court review will be practically unavailable to impose what I am describing as due process standards on the state court class action. State courts may, of course, apply the Amchem or Ortiz interpretations of Rule 23 to their own class action rules.
The problem, however, is more general than reference to Amchem and Ortiz might suggest. Many commentators, including Professors Coffey, Issacharoff, Mullenix, and Nagareda, have commented on the problem of the “reverse auction,” or “plaintiff shopping,” in which defendants who have been hit with class action litigation select among rival representatives (or sometimes even invite new class suits by rival representatives) for the one offering the best deal. There is a strong incentive to maximize the fee award and minimize the class recovery in those situations. Trial courts, eager to get potentially protracted cases off their dockets, have little incentive to investigate too carefully whether the members of the plaintiff class are getting adequate representation and receiving fair compensation. Plaintiff class members who have been sold out in a state court settlement should be able to sue in a federal court without the obstacle of res judicata, as embodied in 28 U.S.C. § 1738, or, alternatively, to sue the class representative and attorneys for fraud or malpractice in a subsequent federal action without confronting another doctrinal obstacle, the federal courts’ Rooker-Feldman doctrine.

A. Properly Applying Section 1738 and Full Faith and Credit

The federal courts should, of course, afford full faith and credit to judgments of state courts in mass toxic tort cases, just as they should in other cases. But in the rare instances in which a party has not been afforded due process, section 1738 should not bar a collateral attack on the judgment in the federal courts. That, of course, would be what all law students memorize or statutes, but there remains the possibility that they will not.

88 See Mullenix, supra note 42, at 444-45.
89 See Richard A. Nagareda, Turning from Tort to Administration, 94 MICH. L. REV. 899, 960 (1996).
90 Coffee, supra note 86, at 1354.
92 Id. at 239.
94 See Geoffrey P. Miller, Full Faith and Credit to Settlements in Overlapping Class
in first year Civil Procedure: no preclusion without due process.\textsuperscript{95} The problem is most likely to arise with regard to absent class members claiming inadequate representation, saying their due process rights were not observed and so they are not bound by the class action judgment. Most likely, they will be protesting a state court class action settlement, saying that under \textit{Hansberry v. Lee},\textsuperscript{96} \textit{Phillips Petroleum Co. v. Shutts},\textsuperscript{97} or any number of other cases, they are not bound by the settlement. But the application of the basic rule is in some jeopardy because of \textit{Epstein v. MCA, Inc.},\textsuperscript{98} a Ninth Circuit decision from 1999.

\textit{Epstein} involved class action securities litigation arising out of an acquisition, in which actions were filed in both state and federal courts, reflecting, respectively, the alleged violations of state law and of the securities acts, for which federal jurisdiction is exclusive.\textsuperscript{99} The state court approved a settlement that resolved not only the state claims but also the federal claims over which it lacked jurisdiction. In 1996, the Supreme Court ruled in \textit{Matsushita Electric Industrial Co. v. Epstein} that the settlement agreement had to be given the same full faith and credit that a state court of

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\textsuperscript{95} \textit{See supra} note 73 and accompanying text.

\textsuperscript{96} 311 U.S. 32 (1940).

\textsuperscript{97} 472 U.S. 797 (1985).

\textsuperscript{98} 179 F.3d 641 (9th Cir. 1999).

that state would afford it, exclusive jurisdiction of the federal courts for
securities acts claims notwithstanding, and it reversed a Ninth Circuit Court
of Appeals decision permitting the federal action to proceed.\textsuperscript{100}

On remand, the Ninth Circuit accepted the Supreme Court's
determination, but ruled that the plaintiff class in the state case had not had
adequate representation because of a conflict of interest between the class
counsel in the state court action and the class, and because of the counsel's
failure to pursue the class members' federal claims adequately.\textsuperscript{101} The court
also found that the issue of adequate representation had not been fully and
fairly litigated by the class members in the state court so as to impose a
binding effect.\textsuperscript{102} The court thus found that the state court judgment did not
bind the class members before the federal court, and that their action could
proceed, the state court decision notwithstanding.\textsuperscript{103}

Judge Norris's decision was consistent with established doctrine.
Adequate representation is, according to Shutts, an independent, minimum
due process requirement that must be afforded absent class members for a
judgment to be binding on them.\textsuperscript{104} However, Judge Norris resigned two
days after the ruling came down, and the Ninth Circuit, on rehearing two
years later, withdrew his panel opinion and stopped the collateral attack.\textsuperscript{105}

The court found an implied determination by the Supreme Court that due
process had been met with regard to the settlement,\textsuperscript{106} then hedged its bets by
saying that the issue was fully and fairly litigated in the Delaware court.\textsuperscript{107}
I do not read the Supreme Court opinion as saying that due process was met,
and Justice Ginsburg filed a concurrence just to note that the Court had not
said that.\textsuperscript{108} But more important than the various possible readings of the

\textsuperscript{100} 516 U.S. 367.
\textsuperscript{101} Epstein v. MCA, Inc., 126 F.3d 1235, 1248-55 (9th Cir. 1997), withdrawn, 179 F.3d 641
(9th Cir. 1999).
\textsuperscript{102} Id. at 1240-48.
\textsuperscript{103} Id. at 1255-56.
\textsuperscript{105} Epstein, 179 F.3d at 643-44 (giving procedural history).
\textsuperscript{106} Id. at 645-47.
\textsuperscript{107} Id. at 647-50.
concurring). The 1997 opinion by Judge Norris discussed the issue in detail, and relied for
the contrary conclusion not only on the concurrence but also on the grant of certiorari, the
Supreme Court's statement of the question in the case, a footnote of the Supreme Court
opinion reserving the question ("We need not address the due process claim . . . because it
is outside the scope of the question presented in this Court," id. at 379 n.5), and Matsushita's
Supreme Court’s tea leaves is the Ninth Circuit’s revised view that full and adequate litigation of the due process issue occurs when volunteer objectors to a settlement present random objections in a fairness hearing. That result, in my opinion, is clearly wrong. There is no duty to intervene in the class proceeding if one later wishes to challenge it, as long as one is a class member and has not in fact had adequate representation due to a conflict of interest, which is what the disgruntled class members alleged. To say that there is a duty on the part of the class member to intervene would turn *Phillips Petroleum Co. v. Shutts* on its head.

The relevant authority is, of course, *Shutts*. In that case, the Court ruled that although due process did not require minimum contacts over all the members of a plaintiff class for a state court to assert jurisdiction over their claims, at least the monetary claims of out-of-staters (a blending of territorial and other procedural due process requirements) had to be protected by notice and the right to opt out, adequate representation, and a determination of fairness of any compromise. The adequacy of representation must exist at all times. The requirements are not disjunctive. They reinforce the lesson of basic cases on Rule 23, such as *Martin v. Wilks*, that an individual cannot be precluded by mere notice of the existence of an action in which he or she is not a party. An invitation to intervene is an invitation, not a command performance. As *Shutts* said, minimum contacts are not needed because the burden of litigation on the absent class member is less. He or she need not monitor the litigation, but may rely on the adequate class representative.

I for one am persuaded by the original opinion’s view that the representation in the state court *MCA* case was not adequate. The class counsel in the state action originally offered to settle for a $1 million fee and

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109 See Epstein, 179 F.3d at 647-50 (finding state court’s determination of representative adequacy conclusive).
111 Id. at 811-12.
112 Id. at 812 (requiring “adequate[ ] represent[ation]” “at all times”).
114 Shutts, 472 U.S. at 810.
115 Id. (stating that “an absent class-action plaintiff is not required to do anything” and class members may rest “content in knowing that there are safeguards provided for [their] protection”). The arguments developed on this point by Professors Monaghan and Woolley are particularly compelling. See Monaghan, *supra* note 94, at 1179-87; Woolley, *supra* note 6, at 395-97.
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no relief for the shareholders, and had to be pushed by the Delaware court into demanding a small sum for the shareholders from which fees would be deducted.\textsuperscript{116} The class members who tendered their shares, unlike those who sold on the market, had no state claim, and the class counsel had no leverage to press their claims (or to get a fee from pressing them, which would have aligned their interests with the class members), for they were litigating only in the state courts.\textsuperscript{117} The question of the conflict of interest among the groups of individuals within the class was not even mentioned in the state court's fairness hearing.\textsuperscript{118}

If federal courts receiving challenges to state court settlements or other determinations in mass toxic torts cases follow the latter Epstein \textit{v. MCA} decision, they will be shirking their duty to protect the federal constitutional right of due process that each class member possesses. They will be using a strained interpretation of section 1738 to avoid doing the federal job of enforcing the United States Constitution. Forum use should conform to sense and responsibility. In the class action context, the \textit{Shutts} case establishes that inadequate representation subverts due process. Section 1738 should not be used to undermine due process. The federal courts should hear and adjudicate class action claims when the members of the class have not had their interests protected adequately in state court settlements.

\textbf{B. Limiting the Application of the Rooker-Feldman Doctrine}

The \textit{Rooker-Feldman} doctrine is the seemingly innocuous rule that the proper way to appeal a state judgment is through the state courts, rather than by starting over in district court.\textsuperscript{119} It thus looks like a simple, perhaps

\textsuperscript{116} Epstein \textit{v. MCA}, Inc., 126 F.3d 1235, 1250 (9th Cir. 1997).
\textsuperscript{117} \textit{Id.} at 1248-50.
\textsuperscript{118} \textit{Id.} at 1240 ("[T]he objectors who did appear at the settlement hearing did not litigate the adequacy of their representation.").
\textsuperscript{119} See \textit{Rooker v. Fidelity Trust Co.}, 263 U.S. 413 (1923) (holding that lower federal courts lack jurisdiction to entertain appeals from state court judgments); \textit{see also} District of
redundant, application of section 1738 and federal full faith and credit. The problem with the doctrine's potential application to toxic tort class actions arises because of a court of appeals decision extending the doctrine into the class action context. In the 1996 decision, Kamilewicz v. Bank of Boston, the Seventh Circuit required the dismissal of a case brought by class members who alleged that the settlement of a state court class action had been brought about by fraud and malpractice. In fact, in the underlying litigation regarding overcharges for mortgage escrow accounts, the court apparently awarded an attorneys fee based on a fraction of the whole amount held in escrow, rather than the amount recovered by the settlement, with the result that far from receiving a recovery, class members actually had to pay charges against their accounts. The class members did not realize what had happened until they saw the charges suddenly appear on their escrow statements, long after the state court fairness hearing. The Seventh Circuit's reason for barring the action against the lawyers and other defendants was the Rooker-Feldman doctrine, applied against what the court characterized as the calling into question of the validity of the state court decision in the underlying litigation.

Effectively, what the Seventh Circuit did was preclude class members despite a failure of adequate representation, the precise error of the latter Epstein opinion and exactly what the Supreme Court forbade in Shutts.

Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (holding that lower federal courts lack jurisdiction to hear challenges to state court decisions in particular cases arising out of judicial proceedings or to decide matters inextricably intertwined with state court judgments).

92 F.3d 506 (7th Cir. 1996), reh'g denied, 100 F.3d 1348 (7th Cir. 1996).

Id. at 511.

Kamilewicz, 100 F.3d at 1349 (Easterbrook, J., dissenting from denial of rehearing en banc) ("Problem: the fees, equal to 5.32 percent of the balance in each account, were debited to the accounts. For many accounts the debit exceeded the credit. Dexter J. Kamilewicz, for example, received a credit of $2.19 and a debit of $91.33, for a loss of $89.14."). See generally Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 VA. L. REV. 1051, 1270-80 (1996) (discussing facts of Kamilewicz and criticizing result).

Koniak & Cohen, supra note 122, at 1274-75.

Kamilewicz, 92 F.3d at 511.


The Kamilewicz opinion has been widely condemned by commentators.\(^{127}\) As Judge Easterbrook noted in dissent from the denial of rehearing, the court’s approach allows the bungling or corrupt attorney to use the failure of the underlying litigation to ward off the client’s claims of corruption and incompetence.\(^{128}\) Claims for malpractice or fraud, like claims on the merits of the claim itself, should remain available in instances where the representation is fraudulent or marked by conflict of interest.\(^{129}\)

Professor Suzanna Sherry has defended the Rooker-Feldman doctrine on the ground that it fill gaps in res judicata doctrine.\(^{130}\) Among the situations she describes are when judgments are entered by the courts of states that do not give full preclusive effect to judgments that are on appeal.\(^{131}\) Section 1738 does not bar an identical federal action filed after judgment but before conclusion of the appeals in such a state.\(^{132}\) She also advocates having a federal doctrine to bar nonparties to state proceedings who pass up the opportunity to intervene in the state case and then file a federal action whose practical effect, if it succeeded, would be to nullify a state court judgment.\(^{133}\)

Other commentators question Professor Sherry’s approach, noting that any gaps that may exist between abstention doctrines and preclusion under section 1738 ought to exist so that federal courts can protect federal rights.\(^{134}\) If a state does not afford full preclusive effect to judgments on


\(^{128}\) Kamilewicz, 100 F.3d at 1353 (Easterbrook, J., dissenting from denial of rehearing en banc). Significantly, the Court relied on the Kamilewicz dissent from denial of rehearing en banc in the majority opinion in Amchem. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

\(^{129}\) Kamilewicz, 100 F.3d at 1352-53.


\(^{131}\) Id. at 1092-93.

\(^{132}\) See id. at 1092.

\(^{133}\) See Sherry, supra note 130, at 1103.

\(^{134}\) See Bandes, supra note 127, at 1206-07; see also Jack M. Beermann, Comments on Rooker-Feldman or Let State Law Be Our Guide, 74 NOTRE DAME L. REV. 1209 (1999) (advocating curtailment or abandonment of Rooker-Feldman doctrine); Barry Friedman & James E. Gaylord, Rooker-Feldman, From the Ground Up, 74 NOTRE DAME L. REV. 1129 (1999) (advocating abandonment and substitution of limited form of abstention for some cases).
appeal, the federal courts should respect that decision and act likewise. It is
an abdication of responsibility for a federal court to fail to accept jurisdiction
on the basis of an ill-defined deference to state decision making that exists
apart from the careful balance created by federal abstention and preclusion
law. 135

Whatever position one adopts on the commentators’ challenges to
existing Rooker-Feldman doctrine 136 and Professor Sherry’s defense of it,
Rooker-Feldman should not be extended to bar a federal action by a class
member who has been denied due process in the state class proceeding.
Several circuits follow the rule that Rooker-Feldman does not apply at all to
subsequent suits by nonparties to the first proceeding. 137 An absent class
member is not a party, and can only be considered to be in privity with a party
if his or her interests are adequately represented and he or she has received
notice and the opportunity to opt out. 138 The adequate representation standard
thus operates to limit the doctrine in the same fashion that it limits the reach
of section 1738 and full faith and credit in general. In other circuits and in
Professor Sherry’s analysis, Rooker-Feldman may bar nonparties if they have
notice and the opportunity to intervene.139 But placing the obligation to
intervene on an absent class member who has every reason to rely on
supposedly adequate representation is precisely what Shutts insisted could not
be required.140

A forebear of the Shutts case, Hansberry v. Lee, 141 demonstrates that
point. The Hansberry family wanted to buy property, but a restrictive

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135 Bandes, supra note 127, at 1203.
136 It should be noted that the doctrine is almost entirely a creature of the lower federal
courts. The Supreme Court has decided only Rooker and Feldman. Justice Scalia has
referred to the line of lower court cases applying those two precedents as the “so-called
Rooker-Feldman doctrine.” Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18 (1987) (Scalia, J.,
concurring).
137 E.g., Bennett v. Yoshina, 140 F.3d 1218, 1223-24 (9th Cir. 1998), cert. denied sub nom.
Citizens for a Constitutional Convention v. Yoshina, 525 U.S. 1103 (1999); United States
v. Owens, 54 F.3d 271, 274 (6th Cir. 1995); Valenti v. Mitchell, 962 F.2d 288, 297-98 (3d
Cir. 1992); see 18 CHARLES A. WRIGHT ET AL, FEDERAL PRACTICE & PROCEDURE § 4469.1
(Supp. 1999) (supporting position). Contra Lemonds v. St. Louis County, 222 F.3d 488,
494-96 (8th Cir. 2000); T.W. & M.W. v. Brophy, 124 F.3d 893, 898 (7th Cir. 1997).
139 Lemonds, 222 F.3d at 496; Sherry, supra note 130, at 1103.
140 Shutts, 472 U.S. at 812.
141 311 U.S. 32 (1940).
covenant running with the land barred sales to African-Americans.\textsuperscript{142} The covenant was effective only if a specified percentage of the landowners in the area adopted it.\textsuperscript{143} In a state court class action, a court ruled (apparently contrary to fact) that the specified number of landowners had adopted the covenant and so it was enforceable.\textsuperscript{144} The Supreme Court, however, ruled that a subsequent action could not enforce the covenant against the Hansberrys, who did not receive adequate representation in the earlier state court class proceedings.\textsuperscript{145}

Extending \textit{Rooker-Feldman} to class actions in which the class members lack adequate representation would bar individuals like the Hansberrys from going to federal court to assert their rights to buy the property and would leave unjust (and in the \textit{Hansberry} case, also incorrect) state class action judgments free from any attack. The Court never even entertained the idea that the Hansberry family had an obligation to intervene in the earlier class case; instead, it declared that "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."\textsuperscript{146} The denial of due process on account of inadequate representation meant that the judgment did not operate in any fashion against the absent class members.

General considerations about the reach of the Fourteenth Amendment's Due Process Clause also support maintenance of a federal court option for subsequent litigation. When the Supreme Court ruled that the Anti-Injunction Act does not apply to actions under 42 U.S.C. § 1983, it stressed that section 1983's legislative history made clear that the statute was to enforce the Fourteenth Amendment "against state action, . . . whether that action be executive, legislative, or judicial."\textsuperscript{147} The Fourteenth Amendment's protection against denials of due process by state courts would be gravely weakened if the only remedy available to an absent class member was intervention in the state court action itself and the lottery of certiorari to the United States Supreme Court. Existing precedent, apart from such a stray

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{142} \textit{Id.} at 38.
\item\textsuperscript{143} \textit{Id.}
\item\textsuperscript{144} \textit{Id.}
\item\textsuperscript{145} \textit{Id.} at 45.
\item\textsuperscript{146} \textit{Id.}
\item\textsuperscript{147} \textit{Mitchum v. Foster}, 407 U.S. 225, 240 (1972) (quoting \textit{Ex parte Virginia}, 100 U.S. 339, 346 (1879)).
\end{enumerate}
\end{footnotesize}
and dubious case as Kamilewicz, supports the idea that subsequent federal actions are available to the class member whose rights were violated. The Rooker-Feldman doctrine should be not be extended to afford invulnerability to judgments of state courts that abuse class members' due process rights. Otherwise, in Professor David Shapiro's memorable words, the Rooker-Feldman doctrine "justifies only the purchase of the powder needed to blow it up."\(^{148}\)

To a greater degree than is true for state tort law, due process issues are ones that federal courts should know something about. Moreover, state judges might well be reluctant to call their colleagues on due process denials in class cases. Given the expertise and political insulation of the federal tribunal, allocating cases that hinge on due process in state court class actions to the federal courts makes eminent sense. Neither section 1738 nor the Rooker-Feldman doctrine should operate as an obstacle to federal justice when state courts have denied class members due process in previous litigation.\(^{149}\)

**CONCLUSION**

The state courts have much to contribute to the task of providing justice in mass toxic torts. They will have and should have their opportunity to fill the role as primary adjudicators of those claims. The improvements that they should make to fill the role better are clear and, for the most part, easily obtainable. The federal courts, however, must remain available for

\(^{148}\) Thomas D. Rowe, Jr., Rooker-Feldman: Worth Only the Powder to Blow It Up?, 74 NOTRE DAME L. REV. 1081, n.* (1999) (quoting e-mail from David Shapiro, Professor, Harvard Law School (Jan. 2, 1999) (on file with Thomas D. Rowe, Jr.)).

\(^{149}\) A hybrid solution might be the best one for mass tort cases. Ideas of this type have been discussed in other contexts:

[I]t is time to depart from the history of dichotomous alternatives (of either a state or federal domain) and of essentialized images (of both states and the federal government), so as to investigate ongoing, and to imagine new, institutional arrangements that embody the interdependence of participants within the United States.

violations of due process that prejudice the rights of absent class members in toxic tort class actions adjudicated in the state courts. That crucial but secondary role is the appropriate one for the federal judiciary in this field.