THE USE OF MANDAMUS TO VACATE MASS EXPOSURE TORT CLASS CERTIFICATION ORDERS

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INTRODUCTION

In the early years following its adoption in 1966, courts and commentators generally regarded amended Rule 23 of the Federal Rules of Civil Procedure[1] as an inappropriate device for mass tort litigation.[2] This resistance stemmed from the conviction that plaintiffs seeking redress for serious personal injuries should maintain direct control over their claims[3] and the perception that individualized issues of causation, liability, and choice of law rendered such suits too complex for unitary adjudication.[4] With the onslaught of individual Agent Orange, asbestos, DES, and Bendectin cases in the 1980s, however, the "overwhelming need to create an orderly, efficient means for adjudi-

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1 Federal Rule of Civil Procedure 23 governs the maintenance of class actions. For a thorough discussion of the various provisions of Rule 23, see Richard A. Chesley & Kathleen Woods Kolodgy, Note, Mass Exposure Torts: An Efficient Solution to a Complex Problem, 54 U. Cin. L. Rev. 467, 474-85 (1985).

2 The Advisory Committee's Note accompanying the amendments explicitly stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 103 (1966). Early courts employing amended Rule 23 heeded this advice and consistently resisted certification of mass tort class actions. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1344 (1995).

As a definitional matter, the term "mass tort" encompasses a broad variety of suits, including both "single-event" and "mass exposure" cases. See Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13, 22 (1996). "Single-event" mass torts involve disasters such as plane crashes, while what this Note calls "mass exposure" torts involve injuries to dispersed individuals through exposure to toxic substances or defective products. See id. The extensive factual variations and complicated choice-of-law considerations that characterize mass exposure tort class actions render such suits more complex than single-event mass tort class actions. See Coffee, supra, at 1358. This Note focuses on mass exposure tort class actions because their complexities have had a direct impact upon the use of mandamus.

3 See 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 17.02 (3d ed. 1992).

4 See 3 id. §§ 17.02, .05.

cating hundreds or thousands of related claims" forced the courts to reconsider the feasibility of the mass exposure tort class action.[5] The first successful certification of a mass exposure tort class action in 1984[6] ushered in a new era of class action litigation.

This era has been fraught with difficulties—difficulties arising in part from the use of a procedural tool outside the context for which it was designed.[7] Maintaining mass exposure tort class actions under Rule 23 has required considerable judicial innovation.[8] As class certification rests soundly within the discretion of the district court judge,[9] this judicial activism has taken place, in the first instance, at the trial court level. As district court judges have assumed the role of inventors and experimenters, however, their procedural innovations have generated numerous new questions of law that go directly to the foundations of our adjudicatory system.[10]

In re Fibreboard Corp.[11] provides a vivid illustration. Faced with over 3000 individual asbestos personal injury cases, the *Fibreboard* district court judge certified a mass exposure tort class to determine liability and award damages.[12] Significant factual variations existed among the class members: injuries varied both in severity and type,[13] dates of exposure to asbestos differed,[14] and claims against the numerous defendants lacked uniformity.[15] Nevertheless, to avoid years of

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5 3 id. § 17.05.

6 See Roger C. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L. Rev. 811, 820 (1995) (citing In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984)).

7 See Linda S. Mullenix, Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act, 64 Tex. L. Rev. 1039, 1049 (1986) (emphasizing that mass exposure tort cases "simply do not meet the requirements for Rule 23 certification"); William W Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837, 838-39 (1995) (observing that Rule 23 was not designed for mass tort litigation).

8 See Cooper, supra note 2, at 22 (noting that "[m]any ingenious efforts have been made" to maintain mass tort class actions); Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L. Rev. 858, 872 (1995) (discussing judicial activism that characterizes mass tort class actions).

9 See In re Catawba Indian Tribe, 973 F.2d 1133, 1136 (4th Cir. 1992) (stating that class certification decisions are "committed to the 'broad discretion' of the district court" (quoting Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976))).

10 The full scope of these questions is reflected in one commentator's observation: "[Mass tort] litigation raised novel and complex legal, factual, and policy questions in such diverse legal subdisciplines as civil procedure, choice of law, liability doctrine, evidence, professional ethics, governmental immunity, insurance, bankruptcy, risk assessment and regulation, and court administration." Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 947 (1995).

11 893 F.2d 706 (5th Cir. 1990).

12 See id. at 708.

13 See id. at 710.

14 See id.

15 See id.

protracted litigation,[16] the district court sought to try eleven representative cases to determine overall liability and to use various statistical projections to allocate individual damages.[17]

As the Court of Appeals for the Fifth Circuit observed on review, one obvious problem with the plan was its loose interpretation of Rule 23's requirements of commonality and typicality.[18] More important, however, the plan's procedural innovations had serious substantive implications. Using eleven representatives to determine the asbestos manufacturers' liability to thousands of individuals would conflict with Texas tort law's required showing of individual proof of causation and damages.[19] Determining damages through statistical projections raised the possibility that some individuals might receive a greater or lesser award as class members than they would have received as individual claimants—a possibility that implicated the Seventh Amendment right to a trial by jury.[20]

These issues exemplify the substantive questions that have accompanied district court procedural innovation in mass exposure tort class actions and generate two distinct, albeit related, inquiries. The first questions the propriety of these procedural innovations—the considerable amount of legal scholarship devoted to this subject to date reveals that the appropriateness of such experimentation remains highly debatable.[21] This debate raises the second inquiry, which asks

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16 The district court calculated that trying the cases in groups of ten would require three solid years of court time. See id. at 708.

17 See id. at 708-09. This practice of trying representative cases is often referred to as "sampling."

18 See id. at 710.

19 See id. at 711-12.

20 See id. at 709. The court found that such disparities in individual awards would weigh against a finding that each individual had been represented before the jury in anything more than a theoretical sense and would stand in opposition to the view that the Seventh Amendment secures a "one-to-one adversarial engagement or its proximate." Id. For an additional argument concerning how a mass exposure tort class action can implicate the Seventh Amendment, see infra Part II.A.4.

21 Compare, e.g., Sherrill P. Hondorf, A Mandate for the Procedural Management of Mass Exposure Litigation, 16 N. Ky. L. Rev. 541, 550 (1989) (advocating abandonment of "parochial approach" in mass exposure tort class actions), Marcus, supra note 8, at 859 (stating that Rule 23 may be proper vehicle for tort reform in certain consensual contexts), David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 907, 916-17 (1984) (calling for use of proportional liability and nonindividualized damage schemes in mass exposure tort class actions), and Note, *In re* Joint Eastern & Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions, 58 Brook. L. Rev. 553, 604-05 (1992) (endorsing implementation of federal common law to deal with conflicts-of-law problems in mass tort cases), with Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev. 547, 572 (1996) (arguing that judicial modification of choice-of-law rules to facilitate consolidated treatment is inappropriate), Mullenix, supra note 7, at 1046 (arguing that "attempts to bend the existing Rule for use in suits to

who or what can control or guide district courts in making certification decisions with such serious substantive implications. This second inquiry, seldom addressed by commentators,[22] is the concern of this Note.

To date, one potential source of control over district court innovation—congressional legislation—has failed to materialize.[23] Similarly, the appellate courts, while representing the most obvious candidates for providing review of mass exposure tort certification decisions, face significant obstacles in this regard. Appellate review of certification orders is severely limited for two reasons: first, class certification orders are not immediately appealable as of right;[24] second, interlocutory appeal of certification orders under 28 U.S.C. § 1292(b) is generally difficult to obtain.[25]

These dual constraints on appellate review raise the possibility that the propriety of district court experiments could remain unexamined and that the substantive questions raised by those experiments could be left unanswered, at least until the end of a suit. This solution is unacceptable. Reaching a final judgment in these cases would require a tremendous expenditure of resources[26]—an expenditure which, once made, would make some appellate courts extremely reluctant to disturb any outcome.[27] More important, settlement may and often does follow certification of a mass tort class action suit,

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which it was not intended to apply are disingenuous, unprincipled, and largely futile"), and Schuck, supra note 10, at 957 (noting that ethical propriety and practical consequences of judicial inventiveness are subject to debate).

22 One commentator seemingly touched on this issue in noting that "[t]he centralization of power in the hands of a very few judges . . . is just-emerging [sic] as a vivid attribute of contemporary large scale litigation, not as yet accompanied by concomitant changes to guide the exercise of such authority." Judith Resnik, From "Cases" to "Litigation," Law & Contemp. Probs., Summer 1991, at 5, 55.

23 See id. at 20-21 (reviewing unsuccessful legislative attempts to facilitate mass tort litigation).

24 See infra Part I.A.

25 The trial judge in *In re Fibreboard Corp.*, for example, refused to certify his certification order for interlocutory appeal. See Linda S. Mullenix, Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation, 32 Wm. & Mary L. Rev. 475, 494 (1991). For a more detailed discussion of the provisions of § 1292(b) and the limitations on its use, see infra text accompanying notes 48-58.

26 In the *Fibreboard* case, 11 cases would have been fully tried prior to reaching a verdict. See In re Fibreboard Corp., 893 F.2d 706, 711 n.5 (5th Cir. 1990).

27 The Second Circuit's decisions in the *Agent Orange* litigation provide one clear example of such reluctance. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 163-74 (2d Cir. 1987) (upholding class certification and approving settlement despite serious doubts concerning propriety of class treatment expressed in prior opinions).

thereby precluding meaningful appellate scrutiny of district court innovation.[28]

Responding to this difficulty, the Civil Rules Advisory Committee has proposed an amendment to Rule 23 that would authorize discretionary appeal from a certification order upon petition to the court of appeals.[29] Until such an amendment is adopted,[30] however, one device can be used to prevent a decisionmaking vacuum in the mass exposure tort class certification context. This tool, utilized in *In re Fibreboard Corp.*, is the writ of mandamus.

The writ of mandamus is a common law writ by which a court of appeals may direct a district court to enter or vacate an order.[31] A class litigant can seek appellate review of an order granting or denying class certification by directly petitioning the appellate court for the writ.[32] In *In re Fibreboard Corp.*,[33] the court of appeals issued the writ to decertify the class, explicitly setting forth the perceived shortcomings of the trial court's innovations.[34] This early review enabled the district court subsequently to devise a trial plan that specifically addressed the appellate court's concerns.[35] By providing an early dialogue between the appellate and trial courts in mass exposure tort class actions involving procedural innovations, the writ of mandamus—as in *In re Fibreboard Corp.*—can play a vital role and enable litigation to go forward with the benefit of an appellate court's guidance.

The use of mandamus to review orders granting or denying certification in mass exposure tort class actions is not without its complications: the Supreme Court has repeatedly held that the writ is a drastic remedy suitable only in extraordinary situations and has placed tight

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[28] See Hondorf, supra note 21, at 547 (commenting that certification of mass exposure tort class is "magical inducement to settle"); see also Resnik, supra note 22, at 43 (noting that "in the vast majority of cases, the pretrial is all there is").

[29] Proposed Rule 23(f) provides in part: "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 if application is made to it within ten days after entry of the order." Fed. R. Civ. P. 23(f) (Proposed Draft), reprinted in 167 F.R.D. 559, 560 (1996).

[30] The comment period for the proposed amendments to Rule 23 ended on February 15, 1997. See Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523, 523 (1996) (requesting comments regarding Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure). Following public comment, the proposed amendments will return to the Advisory Committee for further consideration.

[31] See Jack H. Friedenthal et al., Civil Procedure § 13.3 (2d ed. 1993).

[32] See 2 Newberg & Conte, supra note 3, § 7.42.

[33] 893 F.2d 706 (5th Cir. 1990).

[34] See id. at 710-12.

[35] See Cimino v. Raymark Indus., 751 F. Supp. 649, 665-66 (E.D. Tex. 1990). The court of appeals refused to issue the writ to review this trial plan. See Mullenix, supra note 25, at 495.

restrictions on its use.[36] To date, however, the Supreme Court has not considered the propriety of using mandamus to provide appellate review of mass exposure tort class certification orders.[37]

This Note argues that mass exposure tort class actions involving procedural innovations with serious substantive implications are among the extraordinary cases ideally suited for use of the writ. The complex issues raised in the certification of mass exposure tort class actions merit and demand early appellate review. Mandamus can and should provide additional judicial scrutiny in mass exposure tort cases involving the type of experiments discussed above.

Part I of this Note provides an overview of Supreme Court doctrine on the writ of mandamus and reviews the implementation of the Court's requirements, highlighting the tight constraints on the use of the writ but also revealing that the Court has expanded the writ's operative scope in important ways. Part II reviews mandamus decisions in mass exposure tort class actions to date, establishing that appellate courts have utilized the writ in the mass exposure tort context in a manner that differs significantly from its use in other class actions. This discussion demonstrates that courts largely have reserved the use of the writ for those mass exposure tort class certification orders that involve procedural innovations directly affecting the parties' substantive rights. Part III analyzes the propriety of the appellate courts' more expansive use of mandamus to review mass exposure tort certification orders, concluding that such use is both necessary and appropriate.

I

MANDAMUS: AN EXTRAORDINARY REMEDY FOR EXTRAORDINARY CASES

The obvious point of departure for this Note's consideration of the federal courts' use of mandamus in mass exposure tort class actions is an examination of the writ itself. Its function and the restrictions on its use provide the best starting point for evaluating the propriety of the writ's implementation in the class certification context. Moreover, a brief overview reveals the gradual shift in the Supreme Court's attitude toward mandamus that has enhanced the utility of the writ with the emergence of mass exposure torts.

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[36] See infra Part I.B.

[37] Most recently, the Court denied certiorari on a case in which an appellate court decertified a mass exposure tort class by writ of mandamus. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

A. *The Tightest Safety Valve on the Final Judgment Rule*

The utility of the writ of mandamus in general, and in the class certification context in particular, is a function of the final judgment rule of appealability.[38] Under the final judgment rule, a litigant may appeal only from a "final" decision by the district court—"finality" traditionally being defined as a decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[39]

In *Coopers & Lybrand v. Livesay*,[40] the Supreme Court held that class certification orders are not immediately appealable as "final decisions" under the final judgment rule.[41] In that case, the Court rejected the so-called "death-knell" doctrine, which had provided for immediate appeal of an order denying class certification if individual plaintiffs would be unable to pursue their claims outside of the class action context.[42] The Court held that even the profound effects of a certification decision on the parties did not exempt such orders from the congressional policy against piecemeal appeals embodied in the final judgment rule.[43]

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[38] The final judgment rule is the general rule of appealability in the federal court system. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). The statutory authority for the final judgment rule is found in 28 U.S.C. § 1291 (1994): "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

[39] Martin H. Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 90 (1975).

[40] 437 U.S. 463 (1978).

[41] See id. at 469.

[42] See id. at 469-76. This situation arose when the plaintiffs' individual claims were too small to sustain separate suits, as allegedly was the case in the securities fraud suit at issue in *Coopers & Lybrand*.

Prior to the *Coopers & Lybrand* decision, the Second Circuit and several commentators also had advocated affording defendants the right to appeal an order approving certification based on the "reverse death-knell" doctrine—the doctrine that recognized that an order certifying a class often has the practical effect of terminating the litigation, as defendants often choose to settle rather than face unlimited liability to a certified class. See, e.g., Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1007 n.1, 1019 (2d Cir. 1973) (noting that importance of class action orders warrants allowing appeal by defendants and reflecting on "*in terrorem* effects" of certification on defendants); Note, Class Action Certification Orders: An Argument for the Defendant's Right to Appeal, 42 Geo. Wash. L. Rev. 621, 625, 633 (1974) (arguing for adherence to reverse death-knell doctrine).

[43] See *Coopers & Lybrand*, 437 U.S. at 472, 474-75. In 1992, however, Congress enacted legislation authorizing the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the court of appeals that is not otherwise provided for under [§ 1292]." 28 U.S.C. § 1292(e) (1994). This power "allows the Court to create interlocutory appeal rules that include discretionary conditions . . . like those seen when seeking a writ of mandamus." Major Michael J. Davidson, A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials, 147 Mil. L. Rev. 145, 214-15 (1995). The current proposed amendment to Rule 23, discussed supra note 29 and accompanying

While the final judgment rule restricts appellate review of nonfinal orders, it does not foreclose such review entirely. Exceptions to the rule found in the Interlocutory Appeals Act,[44] the collateral order doctrine,[45] and the All Writs Act[46] permit the courts to provide for interlocutory appellate review when rigid adherence to the final judgment rule "may result in injustice."[47] Two of these exceptions—28 U.S.C. § 1292(b)[48] and the writ of mandamus—are applicable to class certification orders.[49]

Section 1292(b) permits interlocutory appellate review of a certification order at the district court's discretion if the court certifies (1) that the order "involves a controlling question of law" upon which there is "substantial ground for difference of opinion" and (2) that immediate appeal "may materially advance the ultimate termination of the litigation."[50] The court of appeals likewise has discretion in choosing whether to grant the appeal.[51] Although the *Coopers & Lybrand* Court specified § 1292(b) as an appropriate device for obtaining appellate review of certification orders,[52] in practice, it has had limited utility in the class certification context.[53]

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text, would implement such a discretionary rule. See Fed. R. Civ. P. 23(f) (Proposed Draft) advisory committee's note, reprinted in 167 F.R.D. 559, 565 (1996) ("This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e).").

44 28 U.S.C. § 1292 (1994).

45 The collateral order doctrine, set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), provides for immediate appeal of an interlocutory order that (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from (or collateral to) the merits of the action, and (3) effectively would be unreviewable on appeal from a final judgment. See id. at 545-57.

46 28 U.S.C. § 1651 (1994).

47 9 James Wm. Moore, Moore's Federal Practice ¶ 110.26 (2d ed. 1996).

48 Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1994).

49 In a companion case to *Coopers & Lybrand*, the Supreme Court held that an order denying class certification was not immediately appealable under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction. See Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 478-79 (1978) (citing 28 U.S.C. § 1292(a)(1) (providing that courts of appeals shall have jurisdiction over appeals from interlocutory orders refusing injunctions)). This decision "rejected the suggestion that any class certification decision . . . can be appealed under § 1292(a)(1)." 2 Newberg & Conte, supra note 3, § 7.40. Additionally, in *Coopers & Lybrand*, the Supreme Court held that the collateral order exception did not apply to orders granting or denying class certification. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978).

50 28 U.S.C. § 1292(b) (1994).

51 See id.

52 See *Coopers & Lybrand*, 437 U.S. at 474.

53 See 2 Newberg & Conte, supra note 3, § 7.41 (reporting skepticism regarding utility of § 1292(b) appeal of certification orders and discussing paucity of decisions granting interlocutory appeal); Note, supra note 42, at 624 (observing that "discretionary nature" of procedure and "judicial reluctance" to certify class certification orders "render 1292(b) an unsatisfactory alternative to appeal"); see also Redish, supra note 39, at 108-09 (noting

Difficulty in obtaining interlocutory review of certification orders under § 1292(b) has several sources. Some courts and commentators have asserted that the factual analysis in a certification decision makes it impossible to find a controlling question of law subject to interlocutory review.[54] Others have noted that the ability of a district court judge to revise the certification order during the litigation counsels against immediate appellate review.[55] An even more basic problem is that the trial judge may simply refuse to concede that her decision was debatable.[56] Conversely, she might resist certifying the decision for appeal as a means of encouraging the parties to settle.[57] These constraints on the use of § 1292(b) have sustained a need for use of mandamus:

> The writs remain useful not only because of the obscure limitations that may be applied by some courts to § 1292(b) appeals, but also because of the occasional need to control a district judge who will not cooperate in securing § 1292(b) review. It might be thought that § 1292(b) would at least reduce use of the writs considerably, but . . . the writs remain an actively explored path to interlocutory review.[58]

"the certificate requirement has vastly reduced section 1292(b)'s potential effectiveness as a safety valve from the rigors of the final judgement rule" both because district court is unlikely to admit it may have erred and court of appeals is unlikely to take appeal). But see Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1235 (9th Cir. 1996) (decertifying mass exposure tort class on interlocutory appeal under § 1292(b)); Castano v. American Tobacco Co., 84 F.3d 734, 740-41 (5th Cir. 1996) (same).

[54] See, e.g., Montgomery v. Aetna Plywood, Inc., No. 95 C 3193, 1996 U.S. Dist. LEXIS 9213, at *6 (N.D. Ill. June 28, 1996) (holding that "[t]he ruling on class certification is not an appropriate issue for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)" in part because it does not involve controlling question of law); Howard M. Downs, Federal Class Actions: Diminished Protection for the Class and the Case for Reform, 73 Neb. L. Rev. 646, 701 (1994) ("Class action certification rulings involve some factual analysis and thus do not qualify [for interlocutory appeal] . . . under 28 U.S.C. § 1292(b).").

[55] See 2 Newberg & Conte, supra note 3, § 7.41 (noting argument that possibility that trial judge could alter certification decision at any time counsels against use of § 1292(b) (citing cases)).

[56] See 7B Charles Alan Wright et al., Federal Practice and Procedure § 1802 (2d ed. 1986) ("The court may be less than hospitable to plaintiffs' assertion of error in the class action ruling.").

[57] See Mullenix, supra note 25, at 494 n.85 (reporting that district judge in asbestos class action felt that certifying certification order for interlocutory appeal "would undermine his settlement goals"); Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1206 (1990) (asserting that in *Agent Orange* litigation, Judge Weinstein refused to certify certain issues for interlocutory appeal because "the *uncertainty* of the appellate court's disposal of the case [operated] as an incentive to settle").

[58] 16 Charles Alan Wright et al., Federal Practice and Procedure § 3932 (1st ed. 1977) (footnote omitted).

Absent review under § 1292(b), the only alternative for interlocutory review of a class certification order is the common law writ of mandamus.[59] Unlike § 1292(b) appeals, the litigant seeking review of an otherwise unappealable order may directly petition the appellate court for a writ of mandamus.[60] Issuance of the writ is entirely within the discretion of the appellate court.[61] The scope of power accompanying the writ and its discretionary nature have led to its characterization as one of "the most potent weapons in the judicial arsenal."[62] This potency creates a danger recognized by the courts: simply put, excessive use of the writ threatens to defeat the purposes of the final judgment rule.[63]

In light of this danger, the Supreme Court has sharply restricted the use of mandamus, classifying it as a drastic remedy suitable only in extraordinary situations.[64] Other courts have characterized the writ as the safety valve on the final judgment rule with the tightest fit.[65] The following section considers the specific guidelines used to maintain this tight fit—guidelines that properly limit the use of the writ, but still allow for its use in the class certification context.

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[59] Note, however, that these two avenues to interlocutory appeal are not mutually exclusive. Parties can seek interlocutory appeal under § 1292(b) while simultaneously filing a petition for the writ.

[60] See Friedenthal et al., supra note 31, § 13.3 (distinguishing writ of mandamus from other forms of review as original proceeding in appellate court).

[61] See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943) ("The common law writs . . . may be granted or withheld in the sound discretion of the [appellate] court.").

[62] Will v. United States, 389 U.S. 90, 107 (1967).

[63] See, e.g., Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the final judgment rule]."); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1295 (7th Cir.) ("How to cabin this too-powerful writ which if uncabined threatens to unravel the final judgment rule?"), cert. denied, 116 S. Ct. 184 (1995).

[64] See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1987); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); *Kerr*, 426 U.S. at 402; Ex parte Fahey, 332 U.S. 258, 259 (1947). The Court has also counseled restraint in use of the writ because it has "the unfortunate consequence of making the judge a litigant." Id. at 260.

[65] See, e.g., Eisenberg v. United States Dist. Court, 910 F.2d 374, 375 (7th Cir. 1990) ("It is true that mandamus is one of the safety valves [on the final judgment] rule but it is one of the tightest."); see also Charles Robert Janes, Note, Mandamus as a Means of Federal Interlocutory Review, 38 Ohio St. L.J. 301, 328 (1977) ("[M]andamus represents the 'safety valve' of federal appealability, the 'last resort' remedy by which the appellate courts can exempt an interlocutory order from the final judgment rule.").

B. *Restrictions on and Evolving Uses of Mandamus*

The All Writs Act[66] provides statutory authority for appellate court issuance of the writ of mandamus.[67] The Act gives few explicit restrictions on the issuance of the writ, stating simply that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[68] The skeletal nature of this section is not surprising considering that it is the codification of a long-standing common law practice:[69] in application of the writ, courts can and do look to a wealth of case law for guidance.[70] Nevertheless, the Supreme Court has developed a set of oft-repeated guidelines which severely limit the use of mandamus.

The first such guideline requires that the petitioner lack an adequate alternative means of relief: Mandamus is not a substitute for an appeal.[71] Additionally, the writ may be issued only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[72] Mere error by the trial court does not merit issuance of the writ.[73] Rather, the trial court's actions must amount to a "usurpation of power"[74] or a

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66 28 U.S.C. § 1651 (1994).

67 See id.

68 Id. § 1651(a). The statutory requirement that the writ's issuance be "in aid of [the issuing court's] jurisdiction" is satisfied so long as the case is potentially within the issuing court's appellate jurisdiction. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). One commentator has noted that this "jurisdictional requirement" defines whether the court has the power to issue the writ. Maryellen Fullerton, Commentary: Exploring the Far Reaches of Mandamus, 49 Brook. L. Rev. 1131, 1140 n.37 (1983). Beyond this requirement, the only restrictions on the issuance of the writ are court-imposed "standards of propriety" used to identify the appropriate extraordinary situations. Id.

69 See Friedenthal et al., supra note 31, § 13.3 ("The ability of appellate courts to review interlocutory matters by way of an extraordinary writ can be traced to England.").

70 See Nathan A. Forrester, Comment, Mandamus as a Remedy for the Denial of Jury Trial, 58 U. Chi. L. Rev. 769, 771-72 (1991) (observing that common law, not statute, is source of most guidelines on availability of mandamus).

71 See Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). But see Forrester, supra note 70, at 774 (noting special circumstances under which absence of adequate alternative remedy is not required).

72 *Roche*, 319 U.S. at 26. A court action outside its proscribed jurisdiction would include an action not authorized by an applicable statute. See, e.g., Mallard v. United States Dist. Court, 490 U.S. 296, 309 (1989) (holding that mandamus would lie to vacate district court order forcing attorney to represent indigent because coercive appointment not authorized by relevant statute).

73 See *Bankers Life*, 346 U.S. at 382 ("[J]urisdiction need not run the gauntlet of reversible errors.").

74 Will v. United States, 389 U.S. 90, 95 (1967).

"clear abuse of discretion,"[75] and the petitioner must show a "clear and indisputable" right to relief.[76]

These key phrases pervade Supreme Court case law on mandamus.[77] Yet, as at least one commentator has criticized, they are "quintessentially vague" and give little guidance on what type of extraordinary situations merit issuance of the writ.[78] While the Supreme Court has yet to provide a bright-line definition of "extraordinary," its mandamus decisions over the past sixty years nonetheless demonstrate that the Court has gradually enlarged the writ's operative scope.[79]

Specifically, in this century the idea of a court acting outside of its "jurisdiction" in a way subject to mandamus review has expanded from a very literal definition to a broader one, encompassing instances in which "a district judge in a case properly cognized took some definable action he was not empowered to take."[80] Moreover, the Court has indicated that repeated erroneous practices by the trial courts[81] or

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[75] La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957); *Bankers Life*, 346 U.S. at 383.

[76] *Bankers Life*, 346 U.S. at 384 (quoting United States v. Duell, 172 U.S. 576, 582 (1899)). The Court has stated that this requirement precludes issuance of the writ to vacate a decision squarely within the discretion of the trial court. See Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 (1978). This assertion was made, however, without overturning the Court's previous holding that mandamus would lie to correct a clear abuse of discretion. See id. at 665 n.7 (citing *La Buy*, 352 U.S. at 257).

[77] It is important to note at this point, however, that the appellate courts do not always consider each of these guidelines separately. See, e.g., In re School Asbestos Litig., 977 F.2d 764, 773 (3d Cir. 1992) ("[S]ome flexibility is required if the extraordinary writ is to remain available for extraordinary situations."); Maloney v. Plunkett, 854 F.2d 152, 155 (7th Cir. 1988) (cautioning that use of writ "cannot be wholly reduced to formula"). Courts generally focus on the availability of an adequate alternative remedy and the presence of palpable error or outrageous behavior by the trial court. The courts use the phrases "judicial 'usurpation of power,'" DeMasi v. Weiss, 669 F.2d 114, 117 (3d Cir. 1982) (citation omitted), "clear abuse of discretion," In re Rhone-Polenc Rorer Inc., 51 F.3d 1293, 1295 (7th Cir. 1995), cert. denied, 116 U.S. 184 (1995), and "clear and indisputable right to relief," *Demasi*, 669 F.2d at 117, interchangeably in conducting the second part of this analysis.

[78] Fullerton, supra note 68, at 1147.

[79] This evolution has been well documented elsewhere. For a comprehensive account, see Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595 (1973); see also Robert S. Berger, The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control, 31 Buff. L. Rev. 37, 41-60 (1982); Janes, supra note 65, at 310-15.

[80] Note, supra note 79, at 599. The Supreme Court has acknowledged and encouraged this expansion with its assertion that "jurisdiction" should not be interpreted in an "unduly narrow," "technical" sense. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976).

[81] The Court's decision in La Buy v. Howes Leather Co., 352 U.S. 249 (1957), signalled this expanded use. In *La Buy*, the Court affirmed the issuance of the writ to vacate the trial court's referral of several antitrust cases to a master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure. See id. at 250-51. In its reasoning, the Court stressed

the presence of novel, important questions of law[82] may amount to extraordinary circumstances meriting issuance of the writ.[83]

With these developments, the Court has recognized that the "writ serves a vital corrective and didactic function" on issues normally outside appellate scrutiny.[84] This recognition has proved to be of fundamental importance in mass exposure tort class certification decisions, as it has enabled the appellate courts to issue the writ when district court innovation has raised important new issues of law. Part II explores this relationship.

II
MANDAMUS TO VACATE CERTIFICATION ORDERS—AN EXPANDED USE

Having broadly sketched the characteristics of mandamus and the restrictions on its use, this Part specifically examines the use of mandamus in mass exposure tort class certification decisions. The question ultimately to be addressed is whether the appellate courts have properly utilized mandamus as a means of reviewing mass exposure tort certification orders—a query that suggests that the use of the writ in the mass exposure tort context is different in a legally significant sense than its use in other class certification decisions.[85]

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that the appellate court had cautioned the trial courts repeatedly regarding the use of masters, see id. at 258, and the Court concluded that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration," id. at 259-60. As one commentator has noted, "[o]f central importance [in *La Buy*] is the implication that mandamus could and would be used to prevent or to deter the recurrence in the future of an erroneous practice a court of appeals feared might arise." Note, supra note 79, at 609.

[82] See Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (affirming that appellate court "had the power to review on a petition for mandamus the basic, undecided question" presented by case).

[83] These uses of mandamus are sometimes referred to in the legal commentary as "supervisory" and "advisory" mandamus, respectively, see Note, supra note 79, at 596-97, although courts generally have not adopted this terminology. These expansions demonstrate that the "mandamus power need not be used as sparingly as the 'traditional' tests seem to indicate and that there is a broader spectrum of special circumstances for which it may be employed." Berger, supra note 79, at 49.

[84] Will v. United States, 389 U.S. 90, 107 (1967). This recognition, however, was not without qualification. In *Will*, the Court suggested, without deciding, that the supervisory use of mandamus might be more constrained in the criminal context. See id. at 100 n.10. Consistent with this suggestion, the *Will* Court rejected the government's argument for supervisory mandamus and vacated a writ issued to strike a request made in a criminal pretrial order. See id. at 95.

[85] As discussed supra note 2, mass exposure torts constitute but one type of class action. Outside the mass tort context, two major types of class actions are suits aggregating small claims (for example, consumer class actions) and "public interest" suits in which plaintiffs seek injunctive relief (for example, civil rights cases). See Cramton, supra note 6, at 834.

In non-mass-exposure tort class actions, mandamus is rarely used—indeed, in the thirty-plus years since the adoption of amended Rule 23, the courts have issued the writ of mandamus to vacate a certification order in only three reported decisions in such cases[86] and to date have never issued the writ to compel a district court to certify a class.[87]

Each of the three decisions granting the writ addressed early attempts to apply amended Rule 23. In two of these decisions, the appellate court issued the writ because the trial court dramatically misapplied Rule 23's requirements in a way that compromised important procedural safeguards.[88] In the third case, the trial court disregarded a governing statute.[89] As a judicial action outside the authorization of an applicable statute or rule represents a "judicial usurpation of power" traditionally recognized by the Supreme

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[86] See Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976); Schmidt v. Fuller Brush Co., 527 F.2d 532 (8th Cir. 1975); McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975).

Two other decisions are worth mentioning at this point. In In re Exterior Siding & Aluminum Coil Antitrust Litigation, 705 F.2d 980 (8th Cir. 1983), the appellate court withdrew its prior issuance of the writ after a rehearing en banc. See id. at 980. The court had previously issued the writ to decertify, finding that the district court abused its discretion in certifying a class that a transferor court had refused to certify on three occasions. See In re Exterior Siding & Aluminum Coil Antitrust Litig., 696 F.2d 613, 615-18 (8th Cir. 1982). In Lusardi v. Xerox Corp., 855 F.2d 1062 (3d Cir. 1988), the Court of Appeals for the Third Circuit refused to issue the writ to compel recertification of a class but, in issuing the writ on a separate issue, urged the district court to "reconsider" its decertification order. Id. at 1064.

[87] For cases denying the writ of mandamus to certify a class, see, e.g., In re Catawba Indian Tribe, 973 F.2d 1133, 1133 (4th Cir. 1992); *Lusardi*, 855 F.2d at 1064; Monti v. Department of Indus. Relations, 582 F.2d 1226, 1226 (9th Cir. 1978). This judicial reluctance, while somewhat difficult to explain, may have its source in the *Coopers & Lybrand* holding. That case specifically addressed the appealability of orders denying certification. The Court's strong statement against special treatment for such orders may have led to judicial restraint in using the writ to certify a class.

[88] See *Green*, 541 F.2d at 1340 (issuing writ vacating erroneous certification on ground that class would not receive required notice or opportunity to opt out (citing *McDonnell Douglas*, 523 F.2d at 1083)); *McDonnell Douglas*, 523 F.2d at 1085-87 (issuing writ to decertify class in single-event mass tort on grounds that certification was "inconsistent with any tenable interpretation of Rule 23" and would effectively "render superfluous" detailed notice and opt-out provisions under Rule 23(b)(3)).

[89] See *Schmidt*, 527 F.2d at 535-36 (issuing writ to vacate class certification under Rule 23 on ground that Fair Labor Standards Act (FLSA) governed class suit, emphasizing that "two types of class actions are mutually exclusive and irreconcilable" because Rule 23 requires opt-out opportunity while FLSA requires opt-in opportunity).

Court,[90] these isolated cases do not represent a liberalized use of mandamus.[91]

Similarly, the many decisions refusing to issue the writ to vacate class certification orders in non-mass-exposure tort class actions emphasize the extraordinary nature of mandamus,[92] and thereby guard against unwarranted expansion of its use. The tension between the writ and the final judgment rule looms large in these decisions, counseling careful restraint in the use of mandamus.[93] Additionally, the Court's admonition in *Coopers & Lybrand* that class action certification orders do not deserve special treatment tends to preclude any conclusion that granting or denying class certification in a non-mass-exposure tort class action constitutes an extraordinary circumstance meriting appellate review through mandamus.[94] Generally speaking, certification orders in these class actions lack any extraordinary characteristics. The same cannot be said for certification orders in mass exposure tort class actions.

A. The Use of Mandamus to Review Innovative Mass Exposure Tort Class Actions

As discussed at the outset of this Note, the 1980s witnessed the development of mass exposure tort class actions.[95] Faced with the onslaught of mass exposure tort claims, federal courts began to attempt to litigate mass exposure tort actions using the class action device.[96] Since Rule 23 was not designed for mass exposure cases, which are typically characterized by complicated issues of causation, individualized defenses, and complex choice-of-law considerations, district courts seeking to handle mass exposure tort suits as class actions had

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[90] See supra note 72.

[91] This observation should not be surprising, considering that these cases were specifically anticipated by Rule 23 and therefore decided against a background of well-established limits on mandamus jurisdiction.

[92] See, e.g., DeMasi v. Weiss, 669 F.2d 114, 116-17 (3d Cir. 1982) (noting that mandamus is extraordinary and drastic remedy); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 691 (9th Cir. 1977) (same). For a sampling of the many decisions denying petitions for the writ to decertify a class, see, e.g., Western Elec. Co. v. Stern, 544 F.2d 1196, 1200 (3d Cir. 1976) (denying mandamus to decertify plaintiff class in Title VII suit); In re Cessna Aircraft Distributorship Antitrust Litig., 518 F.2d 213, 217 (8th Cir. 1975) (denying mandamus to decertify plaintiff class in antitrust/price discrimination suit); Interpace Corp. v. City of Phila., 438 F.2d 401, 404 (3d Cir. 1971) (denying mandamus to decertify class of plaintiffs in antitrust suit).

[93] See, e.g., Lusardi v. Xerox Corp., 855 F.2d 1062, 1069 (3d Cir. 1988) (emphasizing that importance of final judgment rule counsels restraint in use of writ).

[94] See, e.g., In re Catawba Indian Tribe, 973 F.2d 1133, 1136 (4th Cir. 1992) (explaining that *Coopers & Lybrand* decision "weigh[ed] heavily" in decision not to issue writ).

[95] See supra text accompanying notes 5-6.

[96] See supra text accompanying notes 5-6.

to assume a creative posture.[97] For example, courts began to experiment with sampling[98] and attempted to craft uniform choice-of-law standards.[99] These innovations have, in some cases, pushed the procedural and substantive safeguards present in Rule 23 to their outer limits[100] and thereby enhanced the need for immediate appellate review. As a result—with one set of innovations deserving another—the rapidly evolving context of mass exposure tort litigation has necessitated a revised and more liberal attitude toward the use of mandamus.

Mandamus has come to play a critical role in mass exposure tort class actions—a role that is qualitatively distinct from that which it plays in other class actions. As noted above, the few non-mass-exposure tort class actions in which the appellate courts issued the writ usually involved a significant misapplication of Rule 23's requirements in the face of clearly enunciated statutory and case law standards. In contrast, mass exposure tort litigation frequently has far less precedent to which to turn, and of necessity must forge new legal or procedural rules or standards. In these decisions, mandamus functions as a control mechanism over district court attempts to take Rule 23's requirements and use them as a tool for innovation. As will be demonstrated in the following case analysis, the appellate courts have seized this rationale, using mandamus as a means of reviewing lower court experimentation and providing direct guidance on judicial innovations.[101]

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97 See supra text accompanying notes 7-8.

98 See supra note 17.

99 See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (discussing district court plan to use negligence standard representing blend of numerous state negligence standards).

100 See Cramton, supra note 6, at 836 (arguing that some innovations, characterized by "lawlessness," have "stretch[ed] judicial authority and concepts of federalism beyond their traditional limits").

101 To date the writ has been issued only to decertify a mass exposure tort class. Judicial reluctance to use the writ to certify a mass exposure tort class is easier to understand than judicial resistance to use the writ to certify other class actions. See supra note 87. As previously discussed, Rule 23 was not designed for mass exposure class actions and is still regarded by some as an inappropriate device for such cases. See Mullenix, supra note 7, at 1058 (noting that "there is an uncomfortable 'fit' between the Rule 23(b)(3) action and the mass tort suit; a 'fit' achieved at some cost to judicial integrity"); see also supra note 2 and accompanying text. Given this tension, an appellate court is unlikely to find that a district court abused its discretion in refusing to certify a mass exposure tort class action. Moreover, the death-knell rationale at issue in *Coopers & Lybrand* is absent in mass exposure tort cases because each plaintiff's stake in such litigation usually is sufficient to merit individual pursuit of the claim in the face of an adverse certification decision.

1. *In re Bendectin Products Liability Litigation*

The first issuance of mandamus to decertify a mass exposure tort class was seen in *In re Bendectin Products Liability Litigation*.[102] In that case, the court had previously consolidated over 500 lawsuits brought by women claiming that the drug Bendectin, prescribed to pregnant women to alleviate morning sickness, caused birth defects.[103] Before termination of the trial, the district court certified a non-opt-out class for settlement purposes only under Rule 23(b)(1)(A) and (B).[104] The district court found that Rule 23(b)(1)(A)'s requirement that separate actions would create "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class" was satisfied because some individual plaintiffs might succeed in their suits against the defendant while others would not.[105] Similarly, the district court found that a limited fund existed, thereby satisfying Rule 23(b)(1)(B)'s requirement that separate adjudications could "'as

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[102] 749 F.2d 300 (6th Cir. 1984).

[103] See id. at 301-02.

[104] By way of background, Rule 23 sets forth four general prerequisites to all class actions and three sets of requirements specific to three types of class actions. See Fed. R. Civ. P. 23. The four prerequisites to the maintenance of a class action are numerosity of the class, commonality of questions of law or fact, typicality of the claims and defenses of the representative class member, and adequacy of representation. See Fed. R. Civ. P. 23(a). If these prerequisites are met, a class action may be maintained only if the class satisfies the additional requirements of one of the three subdivisions of Rule 23(b). See Fed. R. Civ. P. 23(b).

Rule 23(b)(1) provides that a class action may be maintained if prosecution of separate actions would create a risk of "inconsistent or varying" adjudications that would "establish incompatible standards of conduct for the party opposing the class" or if individual adjudications would "as a practical matter be dispositive of the interests" of other members of the class not parties to the litigation or would "substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

Rule 23(b)(2) allows for class treatment when the party opposing the class has "acted or refused to act on grounds generally applicable to the class" making appropriate final injunctive or declaratory relief to the class as a whole. Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is often used in the context of civil rights litigation or in other cases seeking injunctive relief.

Under Rule 23(b)(3), typically employed in securities and antitrust litigation, a class action may be maintained when common questions of law or fact "predominate" and class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(c)(2) further requires that a "reasonable effort" must be made to provide individual notice to 23(b)(3) class members—notice that includes an opportunity to opt out of the class. Id. These additional requirements do not apply to 23(b)(1) or 23(b)(2) class actions.

A given class may be certified under more than one section of Rule 23, and under Rule 23(c)(4), a trial court may certify a class "with respect to particular issues" or divide a class into subclasses. Fed. R. Civ. P. 23(c)(4).

[105] *In re Bendectin*, 749 F.2d at 302.

a practical matter be dispositive of the interests of other members [of the class] not parties to the adjudications.'"[106]

While a majority of the Plaintiffs' Lead Counsel Committee endorsed a proposed settlement by the defendant Merrell Dow, a number of the plaintiffs questioned the adequacy of the settlement and petitioned the appellate court for a writ of mandamus.[107] The Court of Appeals for the Sixth Circuit issued the writ to decertify the class.[108] The court began by noting that the unavailability of direct appeal and the possibility that waiting to appeal from a settlement order would prejudice the petitioners[109] demonstrated the lack of an adequate alternative remedy.[110] The court then concluded that the district court's findings were "clearly erroneous" as to Rule 23(b)(1), holding that "[t]he fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)."[111] The court of appeals also rejected the district court's argument that a defendant would be bound to an individual judgment against it based on the doctrine of collateral estoppel.[112] Finally, the court discounted the trial court's finding of a limited fund because no specific findings were made on the issue and "petitioners . . . were given no opportunity to dispute whether there was a limited fund."[113]

The final factor presented by the court as weighing in favor of issuing the writ was the presence of novel questions of law raised by the lower court's attempt to certify a mandatory class for settlement purposes only. The appellate court noted that "[b]ecause the issues

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106 Id. at 305 (quoting Fed. R. Civ. P. 23(b)(1)(B)).

107 See id. at 302-03.

108 See id. at 301.

109 See id. at 304. The Court found potential prejudice in several sources. First, it noted that plaintiffs forced to wait to appeal from a settlement offer would "have to expend time and resources contesting a settlement offer . . . forced on them by [the defendant]." Id. Second, the division of the class into two parts could prejudice the plaintiffs by requiring them to find new counsel unfamiliar with their cases. See id. Finally, the court found that the stay of state discovery proceedings issued in conjunction with the certification order could result in the loss of a claim. See id.

110 See id.

111 Id. at 305. The court gave little elaboration on this point, but cited *McDonnell Douglas*, discussed supra note 88, in support of its decision. See *In re Bendectin*, 749 F.2d at 305 (citing McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1086 (9th Cir. 1975)). This holding remains the general rule today. See Schwarzer, supra note 7, at 840 ("[T]he possibility of inconsistent verdicts in separate jury trials is not the kind of inconsistency that qualifies under subdivision (1)(A).").

112 See *In re Bendectin*, 749 F.2d at 305. The court noted that "this concern has been eliminated by the Supreme Court's curtailment of the use of offensive collateral estoppel in *Parklane Hosiery Co. v. Shore*." Id. (citation omitted).

113 Id. at 306.

presented in this case are new and very important . . . we believe that mandamus [is] appropriate."[114] The court concluded with an apology: "Although we shall issue the writ, we realize that the district judge has been faced with some very difficult problems in this case, and we certainly do not fault him for attempting to use this unique and innovative certification method."[115]

2. *In re Temple*

Four years later, in *In re Temple*,[116] the Court of Appeals for the Eleventh Circuit issued a writ of mandamus to decertify a class in an asbestos suit. Again at issue was the district court's certification of a non-opt-out class in a mass exposure tort action under Rule 23(b)(1).[117] The district court had found that a limited fund existed because the company did not have enough assets or insurance to cover potential liability.[118] The court of appeals rejected this conclusion as "clearly erroneous" because the district court had presented insufficient findings in support of a limited fund.[119] The court also rejected the lower court's contention that the prerequisites of typicality and commonality were met, noting that "the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposure. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common."[120] Again, the court cited the presence of new and important issues of law arising from the use of a non-opt-out class when other cases were pending in state court.[121] The court concluded by sounding a cautionary note, stating "[w]e do not hold that a products liability or mass accident suit could *never* be the proper subject of a class action, but we recognize that the prerequisites of commonality and typicality will normally be hard to satisfy."[122]

3. *In re Fibreboard Corp.*

As discussed in the Introduction, *In re Fibreboard Corp.*[123] involved the issuance of the writ in a separate asbestos action. The dis-

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114 Id. at 307.
115 Id.
116 851 F.2d 1269 (11th Cir. 1988).
117 See id. at 1270.
118 See id. at 1271.
119 Id. at 1271-72. Such flawed conclusions, the court contended, were in part the result of failing to give notice of the certification to the petitioners. See id. at 1272.
120 Id. at 1273.
121 See id. at 1271.
122 Id. at 1273 n.7.
123 893 F.2d 706 (5th Cir. 1990).

trict court certified a class of over 3000 claimants in the Eastern District of Texas.[124] The trial was to be divided into two phases: common defenses and punitive damages were to be determined in Phase I through a consolidated trial under Rule 42(a),[125] while Phase II would determine total "omnibus" liability to the entire Rule 23(b)(3) class of 3000 by trying the cases of eleven representative class members.[126] These cases were to be supplemented with evidence from an additional thirty "illustrative" plaintiffs, from which the jury would extrapolate to compute damages for all other class members.[127] The jury would first identify the "percentage of plaintiffs exposed to each defendant's products [and] the percentage of claims barred" by various defenses, and then use these numbers to assess a "lump sum" of damages "for each disease category for all plaintiffs in the class."[128] The district court felt that the scope of asbestos litigation demanded such an innovative approach.[129]

The "lump sum" calculation and apportionment of Phase II left the appellate court with "a profound disquiet."[130] The court's issuance of the writ rested on several grounds. Listing the factual disparities among the class members, the court questioned the suitability of the group for class treatment.[131] The court also held that the Phase II strategy would effectively change the applicable substantive law of Texas.[132] The elements of tort liability under Texas law, the court noted, required individual proof on the issues of causation and damage.[133] The fact that the individual claims of forty-one plaintiffs would determine the rights of the other 2990 class members, "[g]iven the unevenness of the individual claims . . . inevitably restates the dimensions of tort liability."[134] The court found that such changes represented a judicial usurpation of the legislative function.[135] It held:

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124 See id. at 707.

125 See id.

126 See id. at 708-09.

127 Id. at 709.

128 Id. at 708-09.

129 See id. at 708 ("'[T]o apply traditional methodology to these cases is to admit failure of the federal court system to perform one of its vital roles in our society . . . an efficient, cost-effective dispute resolution process that is fair to the parties.'" (quoting District Court Order)).

130 Id. at 710. This opinion dealt only with the Phase II class certification and did not consider the propriety of the Phase I consolidation under Fed. R. Civ. P. 42(a). See id. at 712.

131 See id. at 710. The court found "too many disparities among the various plaintiffs for their common concerns to predominate." Id. at 712.

132 See id. at 711.

133 See id.

134 Id.

135 See id.

> Phase II, while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority. It infringes upon the dictates of *Erie* that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches.[136]

This case, like others, closed with an apology to the trial judge: "We admire the work of our colleague, Judge Robert Parker . . . . This grant of the petition for writ of mandamus should not be taken as a rebuke of an able judge, but rather as another chapter in an ongoing struggle with the problems presented by the phenomenon of mass torts."[137]

4. In re Rhone-Poulenc Rorer Inc.

Another decision issuing mandamus in a mass exposure tort case occurred in 1995 in *In re Rhone-Poulenc Rorer Inc.*[138] The district court had certified a class of HIV-positive hemophiliacs suing the manufacturers of blood solids for negligence.[139] The case involved a novel "serendipity" theory of negligence under which the plaintiffs claimed that if the defendants had been more careful in screening for hepatitis B in the early 1980s, they could have prevented the spread of AIDS to hemophiliacs.[140] The district court found that this new theory did not bar certification of certain issues under Rule 23(c)(4)(A).[141] The court also concluded that differences in the applicable substantive state laws presented no obstacle to class treatment because any variations were minor.[142] Defendants petitioned the appellate court for a writ of mandamus to decertify the class.[143]

The Seventh Circuit Court of Appeals, in an opinion by Chief Judge Posner, granted the petition and decertified the class, based on the cumulative effect of certain findings.[144] First, the court held that

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136 Id. Later in its opinion, the court continued:

> We are told that Phase II is the only realistic way of trying these cases; that the difficulties faced by the courts as well as the rights of the class members to have their cases tried cry powerfully for innovation and judicial creativity. The arguments are compelling, but they are better addressed to the representative branches—Congress and the State Legislature. The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more.

Id. at 712.

137 Id.

138 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

139 See id. at 1294-95.

140 Id. at 1296.

141 See id. at 1297.

142 See id. at 1300.

143 See id. at 1294.

144 See id. at 1304.

refusal to issue the writ would irreparably harm the defendants because they would be "under intense pressure to settle."[145] Second, the court found a judicial usurpation of power in the district court's forcing defendants to stake their companies on the outcome of one trial when the evidence suggested that the plaintiffs' claims lacked legal merit.[146]

The court likewise found a usurpation of power in the district court's plan to use a uniform, abstracted negligence standard "that does not actually exist anywhere in the world" in its jury instructions.[147] The court held that this innovation—"a kind of Esperanto instruction"[148]—blatantly disregarded the existence of significant differences among the negligence standards of the fifty-one jurisdictions.[149] This judicial action, the court noted, was particularly inappropriate in a case advancing a novel theory of negligence liability.[150] Stressing that "[t]he diversity jurisdiction of the federal courts is, after *Erie*, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases," the court rejected the district court's experiment, concluding, "[t]he point of *Erie* is that Article III of the Constitution does not empower the federal courts to create [a uniform standard of liability] for diversity cases."[151]

Finally, the court held that the district court's plan threatened the Seventh Amendment right to a trial by jury.[152] The court noted that the Seventh Amendment guarantees the "right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact."[153] Under the district court's plan, the jury hearing the class action would decide generally if the defendants had been negligent. In subsequent suits to determine individual

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145 Id. at 1298. The similarities between this argument and the supposedly discredited reverse death-knell doctrine are striking. See supra note 42; see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1306 (Rovner, J., dissenting) (arguing that justifying issuance of writ on likelihood of settlement is irreconcilable with holding in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)).

146 See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1299.

147 Id. at 1300.

148 Id.

149 See id. at 1300-01. The class allegedly had included members from each of the 50 states and the District of Columbia. See Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 415 (N.D. Ill. 1994).

150 See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1300.

151 Id. at 1302. Seemingly, the court's decision leaves open the possibility that a court could establish subclasses reflecting the differences in state negligence laws. See Kramer, supra note 21, at 584-87 (advocating use of subclasses and citing In re School Asbestos Litigation, 104 F.R.D. 422 (E.D. Pa. 1984), as successful example of such an approach).

152 See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1302-03.

153 Id. at 1303.

damages, the Seventh Circuit reasoned, a different jury might have to revisit this issue—in a jurisdiction where the applicable system was one of comparative negligence, for example—thereby violating the Seventh Amendment.[154]

As in the previous decisions, the opinion included an apologetic note:

> With all due respect for the district judge's commendable desire to experiment with an innovative procedure for streamlining the adjudication of this "mass tort," we believe that his plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification.[155]

5. In re Diamond Shamrock Chemicals Co.

One case needs to be distinguished at this point. *In re Diamond Shamrock Chemicals Co.*[156] involved the first petition for a writ of mandamus to decertify a mass exposure plaintiff class. The class sought damages for injuries allegedly resulting from exposure to Agent Orange, a term applied to a group of similar herbicides used by the United States military in Vietnam.[157] Crafting an innovative trial plan, District Court Chief Judge Weinstein certified two classes: one under Rule 23(b)(3) and the other under Rule 23(b)(1)(B).[158]

The Second Circuit Court of Appeals expressed several concerns regarding Chief Judge Weinstein's approach, concerns that other courts would reiterate in subsequent mass exposure tort cases. The appellate court questioned whether a "common issue" of general causation existed considering the multiplicity of harms allegedly caused by Agent Orange and the varying levels of exposure.[159] The court also expressed skepticism toward Chief Judge Weinstein's finding that a "national substantive rule" of law could be distilled from the applicable substantive laws of over fifty jurisdictions.[160] Nevertheless, unlike the cases discussed above, the court denied the writ and allowed the class action to move forward.[161] The appellate court reasoned that the presence of some common issues of fact and the district court's proposal to use subclasses counseled restraint.[162] Most notably, the

154 See id.
155 Id. at 1297.
156 725 F.2d 858 (2d Cir. 1984).
157 See id. at 859.
158 See id.
159 See id. at 860.
160 See id. at 861.
161 See id. at 862.
162 See id. at 860-61.

court also expressed the belief that this unique case was unlikely to be imitated, seemingly making issuance of mandamus unnecessary.[163]

In hindsight, some courts and commentators have criticized the *Agent Orange* litigation.[164] Looking only at its use of mandamus, however, the case is important: although the appellate court denied the writ, it still seized the petition for mandamus as an opportunity to express its misgivings about the district court's experiment. Thus, the writ again served the purpose of preventing the existence of a decisionmaking vacuum in an extraordinary case by providing an early dialogue between the trial and appellate courts.

B. Restraint in Mass Exposure Tort Class Actions Without Judicial Innovation

One final observation—perhaps a nod to the final judgment rule adherents—is necessary. Whether to curtail or to counsel district courts, appellate courts have adopted a broader use of the writ of mandamus in the mass exposure tort class action context. Even this liberalization, however, does not represent a complete abandonment of traditional mandamus restraint.[165] Not all mass exposure tort class actions involve the types of procedural innovations discussed above. In those cases lacking this distinguishing characteristic, courts for the most part have remained reluctant to issue the writ.[166]

In *In re NLO, Inc.*,[167] for example, the defendant sought decertification of a class on the grounds that the court-supervised medical monitoring program sought by the plaintiffs did not constitute injunctive relief within the purview of Federal Rule of Civil Procedure

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163 See id. at 860.

164 See, e.g., In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (criticizing choice-of-law analysis in *Agent Orange* litigation); Kramer, supra note 21, at 561-64 (same). Whether or not the appellate court erred in failing to curb Chief Judge Weinstein's innovations, however, it certainly misjudged the likelihood that other courts in other "unique" cases might draw from the *Agent Orange* experiment.

165 Indeed, the Third Circuit has continued to refuse to employ the writ to review certification decisions even with the emergence of mass tort class actions. See In re School Asbestos Litig., 921 F.2d 1338, 1342 (3d Cir. 1990) (refusing to decertify nationwide class of school districts by mandamus). But see In re School Asbestos Litig., 977 F.2d 764, 778 n.14 (3d Cir. 1992) (suggesting that size and complexity of some suits might represent extraordinary circumstances supporting use of mandamus but cautioning that these factors "are not alone sufficient").

166 See, e.g., In re NLO, Inc., 5 F.3d 154, 160 (6th Cir. 1993); *In re School Asbestos Litig.*, 921 F.2d at 1342; *In re Diamond Shamrock*, 725 F.2d at 859. In an unreported decision, the Court of Appeals for the Sixth Circuit refused to issue the writ to decertify a class of women in the silicone gel breast implant litigation. See In re Breast Implant Litig., Nos. 92-3420/3462, 1992 U.S. App. LEXIS 16257, at *3 (6th Cir. May 22, 1992).

167 5 F.3d 154 (6th Cir. 1993).

23(b)(2).[168] Citing case law in support of the district court's approach, the appellate court denied the writ.[169] *In re NLO, Inc.* confirms that the mere existence of a mass exposure tort class does not merit review by way of mandamus, but that a case must exhibit some additional, extraordinary characteristic before the writ will issue.[170]

In sum, case analysis reveals that, by and large, the mass exposure tort mandamus decisions evidence a liberalized attitude toward use of the writ. In these cases, the pressures of trying to deal with mass exposure torts in a class action setting led the district courts to new extremes. Most involved innovations by the trial court that bordered on legislative acts. Most involved new questions of law. While the appellate courts used the writ to prevent the improper application of Rule 23—a trait also found in mandamus decisions outside the mass exposure tort context—the remedy also operated to curtail district court innovation that, in the appellate court's judgment, crossed the line between procedural experimentation and substantive legislation. Additionally, unlike other class actions, in mass exposure tort class actions the courts of appeals employed the writ to counsel the lower courts on permissible and impermissible means of managing an overwhelming mass exposure tort case. Having documented its use, the remaining issue to be considered is whether mandamus is the appropriate remedy in these situations.

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168 See id. at 159.

169 See id. at 159-60.

170 One recent case requires consideration, however, for it represents the lone decision in which a court of appeals used mandamus to decertify a mass exposure tort class action that did not involve considerable judicial innovation. In In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996), the district court certified a nationwide class under Rule 23(b)(3) consisting of all persons with penile implants manufactured by the defendants. See id. at 1077. The defendants petitioned for the writ, claiming, inter alia, that the class did not satisfy the factual requirements of Rule 23, particularly because of the multiplicity of implant models and injuries involved. See id. at 1078.

The appellate court accepted the defendants' arguments and issued the writ, finding the district court "clearly abused its discretion by basically ignoring the procedural requirements of Rule 23." Id. at 1086. The appellate court criticized the district court's bias in favor of certification and its "cavalier approach" to the certification decision. Id. at 1088 & n.21. "[T]he district judge . . . did more than merely misapply a rule, he acted outside of that rule and therefore outside of his prescribed jurisdiction." Id. at 1087. These statements by the court of appeals strongly suggest that this case is best understood as a traditional application of mandamus to prevent a judge from usurping his authority by acting outside a statute or rule.

III
A NECESSARY AND APPROPRIATE REMEDY IN THE MASS EXPOSURE TORT CONTEXT

Pending revisions to Rule 23, class certification orders are not immediately appealable.[171] The Supreme Court has expressly mandated that certification orders are not to be treated as special in this regard.[172] The writ of mandamus represents a distinctly special remedy, suitable for only extraordinary cases. Considering this legal backdrop, the question remaining is whether the appellate courts have abused their discretionary power in issuing the writ of mandamus to decertify mass exposure tort classes. The short answer is that they have not. As the following discussion demonstrates, appellate court willingness to vacate mass exposure tort certification orders by writ of mandamus is both necessary and appropriate because it provides critical guidance in the extraordinary case while preserving the integrity of the final judgment rule.

A. Mandamus Provides Necessary Appellate Guidance in the Mass Exposure Tort Context

Appellate review by way of mandamus is essential in the mass exposure tort class action context. The emergence of the mass exposure tort class action has raised critical questions of procedural and substantive law—questions that directly implicate our individual-oriented adjudicatory system and the scope of judicial authority.

The mandamus cases analyzed in Part II illustrate this point. The district court's proposal to blend the substantive law of multiple jurisdictions to facilitate class treatment in *In re Rhone-Poulenc Rorer Inc.* might have had the effect of changing the substantive rights of the individual claimants.[173] The implementation of aggregation techniques and litigation of representative cases as proposed by the district court in *In re Fibreboard Corp.* might have required the forfeiture of an individual class member's Seventh Amendment right

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171 See supra text accompanying notes 40-41.

172 In Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the Court stressed, "[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals." Id. at 470.

173 See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (reasoning that differences among state negligence standards affect outcome and therefore cannot be disregarded for sake of class treatment); see also Kramer, supra note 21, at 572 (arguing that judicial disregard of choice-of-law considerations improperly alters substantive rights of parties).

to a jury trial.[174] Allowing certification of a mandatory settlement class in *In re Bendectin* could have bound plaintiffs seeking individual relief to an unsatisfactory settlement.[175] Certifying classes characterized by the multiplicity of factual differences present in *In re Temple* and *In re Fibreboard Corp.* might have required a permissive posture toward, or potentially a total disregard of, the Rule 23 prerequisites of commonality and typicality.[176]

These possibilities raise difficult questions—questions that require an examination of the appropriate role of the judiciary in mass exposure tort adjudication. As noted previously, courts and commentators continue to disagree as to whether the unique characteristics of mass exposure tort litigation and congressional failure to legislate in this area justify allowing such judicial activism.[177] The purpose of this Note, however, is not to enter into the debate over the propriety of district court innovation in mass exposure tort class actions. Rather, the point of directing attention to these questions is to show that district court innovation in certifying mass exposure tort classes raises issues that may directly impact the substantive rights of the parties. Decisions with such profound effects should not be made in isolation, when early appellate scrutiny could identify the flaws in a proposed trial plan before either a great expenditure of resources or a forced settlement.

This need for immediate review is enhanced by the recognition that the district court "in the trenches" faces clear obstacles to "adapting and reshaping the procedural and substantive law of mass torts."[178] Specifically, federal courts are bound by the *Erie* Doctrine[179] and the Rules Enabling Act.[180] The former precludes judicial disregard of applicable state law in favor of a general federal common law in diversity cases.[181] The latter invalidates a procedural rule that

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174 See In re Fibreboard Corp., 893 F.2d 706, 709 (5th Cir. 1990) (noting that aggregation and determination of omnibus liability implicate traditional understanding of Seventh Amendment right to jury trial).

175 See In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 304-05 (6th Cir. 1984).

176 The reviewing courts in both In re Fibreboard Corp., 893 F.2d 706, 710 (5th Cir. 1990), and In re Temple, 851 F.2d 1269, 1273 (11th Cir. 1988), criticized the lower courts' expansive interpretations of Rule 23's "commonality" and "typicality" requirements.

177 See supra note 21 and accompanying text.

178 Schuck, supra note 10, at 957.

179 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts are constitutionally required to apply state law in diversity cases).

180 28 U.S.C. § 2072 (1994).

181 See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300-02 (7th Cir.) (holding that *Erie* Doctrine precluded certification of nationwide class in negligence suit because of diversity of applicable state laws), cert. denied, 116 S. Ct. 184 (1995). As one commentator has acknowledged, "[w]henever state law dictates the rule of decision, *Erie*'s constitutional

"abridge[s], enlarge[s] or modif[ies] any substantive right."[182] In light of these constraints, the district court that assumes a creative posture with regard to a mass exposure tort case treads on shaky ground. The parties directly affected by its decisions should not be deprived of appellate review.

Through careful use of the writ in cases implementing such judicial innovation, the appellate courts can review certification orders and, early in the litigation, advise the trial courts on the complicated issues inherent in mass exposure tort class actions. Issuance of the writ may end class litigation, but it may also enable the district court to devise a workable trial plan.[183] Additional review is essential considering the weight of the issues raised by experimental procedures and the legal constraints on trial courts. District courts should not make decisions of such import without some mechanism to control their behavior. Mandamus, properly utilized, prevents such decisions from being made in a vacuum by providing an early dialogue between the appellate and trial courts on these substantial issues of first impression.

Indeed, without mandamus, this need for appellate review might never be satisfied. The Supreme Court's holding in *Coopers & Lybrand*, as repeatedly emphasized, severely limits the availability of appellate guidance on certification orders. Interlocutory appeal under 28 U.S.C. § 1292(b)[184] is available, but requires certification by the district court that issued the contested decision and willingness on the part of the appellate court to hear the appeal.[185] Proposed Rule 23 would "finally, authorize[ ] the court of appeals to permit an appeal from an order granting or denying certification,"[186] but the Civil Rules Advisory Committee only recently passed the "midstream point" in its consideration of the proposed amendments.[187] Until the enactment of

predicate stands as an obstacle to modifying substantive law to facilitate class action treatment." Marcus, supra note 8, at 873-74.

182 28 U.S.C. § 2072 (1994).

183 Decertification by writ of mandamus ended class litigation in In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984), and In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995). In both In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990), and In re Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir. 1984), the petition for mandamus gave the appellate court the opportunity to provide guidance on the district court's trial plan. See supra Part II.A.3, .5.

184 28 U.S.C. § 1292(b) (1994).

185 See id. (requiring district court to submit controlling question of law "as to which there is substantial ground for difference of opinion" only when immediate appeal would "materially advance the ultimate termination of the litigation"). As discussed above, such willingness may not be forthcoming. See supra text accompanying notes 50-58.

186 Cooper, supra note 2, at 35; see supra note 29 and accompanying text.

187 Cooper, supra note 2, app. B at 68 (identifying submission of earlier draft to Advisory Committee in January 1996 as midpoint in Committee's considerations).

such amendments or other legislative action, the writ of mandamus remains the only direct route to appellate guidance on these extraordinary questions.

This need for appellate guidance by way of mandamus is enhanced by a simple fact: without appellate review by way of mandamus, certification orders embodying these innovations most likely would end the suit.[188] In *In re Rhone-Poulenc Rorer Inc.*, the Seventh Circuit cited the likelihood that the defendants would be forced to settle if the suit proceeded as a class action as evidence that the defendant would suffer "irreparable harm" without issuance of the writ.[189] Considering that the certification orders that may prompt these settlements may involve inappropriate procedural innovations, the failure to provide appellate review by way of mandamus comes at too a great cost to both defendants and the legal system.

The cost to the defendants arises from the aforementioned demonstrable compulsion to settle and avoid liability to a massive class even when faced with claims of dubious merit.[190] At first blush, this argument may appear problematic. Specifically, the rationale seems to mark a return to the "reverse death-knell" approach which afforded defendants an appeal from certification orders based on the likelihood of settlement.[191] *Coopers & Lybrand* specifically rejected the death-knell rationale as it applied to plaintiffs.[192] This holding

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188 See sources cited supra note 28; see also Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle . . . . The risk of facing an all-or-nothing verdict presents too high a risk . . . ."). But see Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 142-46 (1996) (reporting class actions in four-district study more likely to settle than noncertified cases with class allegations, but noting other variables that could factor into higher settlement rate).

189 In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); see also Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971) (stating oft-cited argument that class actions are "legalized blackmail" because defendants invariably settle rather than face unlimited liability to class).

190 For one commentator's pointed critique of this possibility, see George M. Newcombe, RSI Defendants Fight for Due Process: "Mass Torts" Needn't Always Be Massive, 63 Def. Couns. J. 36, 36 (1996) ("Something is terribly wrong with a system of civil justice in which a major corporation, Dow Corning, is forced to file for bankruptcy as a result of being named as a defendant in a horde of product liability claims that have no basis in science."); see also *Castano*, 84 F.3d at 746 (noting "certification dramatically affects the stakes for defendants" because it "magnifies and strengthens the number of unmeritorious claims").

191 See supra note 42.

192 See supra text accompanying notes 40-42.

likely precludes challenges by defendants to orders granting certification as well.[193]

Several points can be made to counter such an assertion. First, much more is at stake in mass exposure tort class actions than in most other class actions. In mass exposure tort class actions, the question is not just whether the defendant will settle because of the lack of opportunity for appeal; the issue also is whether, given the scope of the action, the defendant will potentially bankrupt itself because of its inability to appeal certification.[194] Unlike the typical class action at the time the reverse death-knell doctrine first emerged, mass exposure tort class actions may often require defendants to "stake their companies on the outcome of a single jury trial" and allow one jury to "hold the fate of an industry in the palm of its hand."[195] Such greatly enhanced risks demonstrate the necessity and propriety of providing appellate review of certification orders by way of mandamus.

Moreover, the certification orders in non-mass-exposure tort class actions generally lack the procedural innovations that characterize the certification orders in many mass exposure tort class actions. Defendants should not be forced into a ruinous settlement when the certification order itself may be of questionable legal propriety. In sum, the distinctive characteristics and effects on defendants of mass exposure tort class certification limit the strength and applicability of arguments against the reverse death-knell doctrine and support the use of mandamus to provide appellate review of innovative mass exposure tort certification orders.

More important, without appellate review through the use of mandamus, the legal system itself would suffer because many of the pressing issues attending the maintenance of mass exposure tort class actions would never receive appellate scrutiny.[196] The cases discussed in Part II.A vividly illustrate the multiplicity of new questions of law

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193 See 3b Moore, supra note 47, ¶ 23.97 ("The Supreme Court's reasoning in *Coopers & Lybrand* would seem to apply a fortiori to orders granting class certification . . . .").

194 The fate of the defendants in the asbestos and silicone breast implant class actions illustrates this likely result.

195 In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299, 1300 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

196 Taking one step beyond this Note's argument in favor of appellate review of innovations in mass exposure tort class certification decisions, one commentator recently made a forceful call for the Supreme Court to resolve the uncertainty in mass tort litigation. See Linda S. Mullenix, High Court Should Review Mass Torts, Nat'l L.J., Oct. 7, 1996, at A19 ("In struggling with these sprawling cases, federal judges have created ingenious devices aplenty, without a clue from the Supreme Court concerning what passes muster. The time has come for the Supreme Court to speak."). For a more general argument in support of the need for closer appellate review of some discretionary trial court decisions, see generally Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747 (1982).

raised by innovative orders certifying mass exposure tort class actions. If appellate courts had not issued mandamus in those cases, history suggests that the suits most likely would have settled and those issues would have been left unresolved. Thus, mandamus enables the courts to engage in a full dialogue concerning the immense challenges presented by mass torts, a dialogue that benefits the entire legal system.

C. Use of Mandamus in Mass Exposure Tort Certification Decisions Protects Goals of the Final Judgment Rule

Under this Note's proposal, if a mass exposure tort certification order represents a reshaping of the substantive law through the class action device or raises novel, important questions of law, mandamus should be utilized to review the certification order. A key component of this Note's discussion of the writ, however, has been the awareness that frequent use of mandamus to vacate certification orders may be in conflict with the final judgment rule and its interpretation in the *Coopers & Lybrand* holding. This awareness raises an important question: Could an alternative means of providing appellate review be crafted that would avoid such concerns? The following discussion suggests that available alternatives cannot replicate the beneficial balance exhibited in mass exposure tort mandamus decisions. Specifically, it suggests that mandamus is the preferable route to appellate scrutiny in this context, for in allowing for selective, highly discretionary appeals in limited circumstances, it promotes the goals underlying the final judgment rule and maintains rather than detracts from the vitality of *Coopers & Lybrand*.

Continued use of mandamus in innovative mass tort class actions is obviously not the only way to address the difficulties in such litigation. For example, the Court could overrule *Coopers & Lybrand*'s holding that certification decisions are not final judgments, or Congress could pass legislation to the same effect. Such action is highly unlikely, however, for it would, in effect, throw out the baby with the bathwater. Because many class actions do not present difficult certification issues,[197] making every class certification subject to immediate appeal could flood the appellate courts with needless appeals and gen-

[197] See Willging et al., supra note 188, at 89 (observing that high certification rates of securities and civil rights class actions "could indicate that these are 'easy applications' of Rule 23, at least with respect to the certification decision").

erate the piecemeal litigation that the final judgment rule was designed to avoid.[198]

Similar detrimental effects could follow any amendment to 28 U.S.C. § 1292(b) eliminating the district court certification requirement, thereby giving the courts of appeals discretionary review of interlocutory orders. The restrictive structure of § 1292(b) preserves the integrity of the final judgment rule while allowing for interlocutory appeal in the rare instance when the interests of administrative efficiency and justice are better served by immediate appellate review. To alter this structure in response to a problem of limited scope could disrupt the full spectrum of litigation in the courts and perhaps unnecessarily strain relations between district and appellate court judges.[199]

Even the more focused solution afforded by proposed Rule 23(f)—allowing appeal of certification decisions at the discretion of the appellate court—presents difficulties. The primary obstacle is time: adoption of the proposed Rule remains potentially years away,[200] while the need for review of mass exposure tort certification orders is immediate and pressing. Additionally, at least one commentator has noted an overarching problem with creating exceptions to the final judgment rule for specific orders that is relevant to proposed Rule 23(f): "In many cases the exceptions are not necessary to avoid unduly harsh effects of the rule, while often the exceptions do not reach all cases in which strict enforcement of the rule is unduly harsh."[201] Creating one exception also can lead to a gradual proliferation of exceptions,[202] a trend that will only increase collateral litigation of finality issues and render the final judgment rule doctrine more and more incoherent.[203]

These general concerns with creating exceptions to the final judgment rule by statute or rule become more salient with the recognition that proposed Rule 23(f) apparently is designed to afford appeal only in the types of cases in which mandamus has already effectively pro-

198 See id. at 175 ("Some believe that, since certification is a settlement-significant event, if parties can seek appeal, they will—especially defendants challenging the grant of certification.").

199 See Solimine, supra note 57, at 1179 (noting that "delegitimizing effect of interlocutory appeals" is tempered by district court certification requirement under § 1292(b)).

200 See supra text accompanying notes 186-87.

201 Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. Pitt. L. Rev. 717, 771 (1993).

202 See id. at 774 ("An additional problem created by the listing power is the potential for an ever expanding list."); see also Solimine, supra note 57, at 1211 ("I would favor an amendment resting largely on guided discretion rather than on a series of rules specifying which orders could be subject to interlocutory appeal.").

203 See Martineau, supra note 201, at 786 (noting that increasing set of exceptions will only generate more litigation and increase complexity in finality analysis).

vided such review. The Advisory Committee's Note to the proposed rule cautions that "[t]he expansion of appeal opportunities effected by subdivision (f) is modest"[204] and that the appellate courts should exercise "restraint" in its application.[205] More important, the note stresses that "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law."[206] Considering that the writ has already enabled the appellate courts to review such unsettled questions, without leading to an unwarranted and undesirable expansion of exceptions to the final judgment rule, it represents the preferable route to appellate review of certification decisions where it is critically needed—in innovative mass exposure tort class actions.

Indeed, in the limited context of mass exposure tort class actions, the writ ensures the efficient administration of justice by providing a direct route to appellate review and conserving judicial resources, thereby promoting the primary goal of the final judgment rule.[207] Looking back to cases such as *In re Fibreboard Corp.* and *In re Rhone-Poulenc Rorer Inc.*, the efficiency of the writ becomes quite apparent. In each case, the district court's approach to maintaining a mass exposure tort class action required an involved management plan.[208] Indeed, in *In re Fibreboard Corp.*, eleven cases would have to be fully litigated before reaching an appealable final judgment.[209] In the unlikely event that the parties did not settle first, reaching final judgment in those cases would have required the expenditure of an enormous amount of resources. Had the writ of mandamus not been issued to decertify those classes, those resources might have been wasted.

The availability of the writ in such extraordinary cases thereby serves the interests of efficient judicial administration. As one court explicitly noted, issuing mandamus to formulate guidelines on new issues saves "judicial resources by avoiding numerous later appeals."[210] Accordingly, decertification of a mass exposure tort class—a class that presumably never should have been certified—by writ of mandamus,

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[204] Fed. R. Civ. P. 23(f) (Proposed Draft) advisory committee's note, reprinted in 167 F.R.D. 559, 566 (1996).

[205] Id. at 565.

[206] Id. at 566.

[207] See, e.g., Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 351 (1961) (stating that "basic rationale" of final judgment rule is "conservation of judicial resources").

[208] See discussion supra Part II.A.3, .4.

[209] See In re Fibreboard Corp., 893 F.2d 706, 711 n.5 (5th Cir. 1990).

[210] J.H. Cohn & Co. v. American Appraisal Assocs., Inc., 628 F.2d 994, 999 (7th Cir. 1980).

rather than by appellate review after final judgment, ultimately protects the values behind the final judgment rule.

Similarly, this selective use of mandamus poses no threat to the holding in *Coopers & Lybrand* that class certification orders are not immediately appealable as "final decisions." Instead, issuance of the writ in the mass exposure tort context in many ways preserves the essential holding in that case. In *Coopers & Lybrand*, the Supreme Court exhibited a strong aversion to interpretive innovations that enabled the judiciary to expand the scope of the final judgment rule beyond that which Congress intended.[211] The Court prohibited such interpretive expansions because they effectively usurped legislative authority.[212]

This vice is distinct from that presented by the use of mandamus. As noted repeatedly, strict guidelines govern the use of mandamus.[213] One commentator has expanded on this point, concluding that "discretionary review by mandamus is to be preferred to enlarging by judicial interpretation the categories of interlocutory orders that are appealable by right."[214] The availability of the writ of mandamus avoids the temptation to create inappropriate interpretive techniques like those at issue in *Coopers & Lybrand* or otherwise impermissibly expand appealability rules.

As a final matter, the applicability of *Coopers & Lybrand* to the mass exposure tort context may be limited. The universe of class actions with which the Supreme Court was concerned in *Coopers & Lybrand* was quite different than the universe that exists today. The majority of class actions at that time involved aggregated small claims or public interest suits on behalf of plaintiffs seeking injunctive relief—the class actions for which Rule 23 was designed.[215] The Court could not foresee the evolution of the mass exposure tort class action and the problems that would accompany its emergence. While the holding is directly relevant to class actions not involving mass torts, the Court's discussion proves to be less than illuminating in the mass exposure tort class action context.

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211 See Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978) (identifying potential for "indiscriminate" interlocutory appeals in direct contravention of congressional policy as "principal vice" of death-knell doctrine).

212 See id. at 472.

213 See supra Part I.B.

214 9 Moore, supra note 47, ¶ 110.26. Professor Moore continues by asserting "if the line is to be held, the genial current of mandamus cannot be frozen. Review by mandamus should indeed be restricted to the exceptional, unusual case, but such cases do arise, and the courts should be alert to respond to them." Id.

215 See Cramton, supra note 6, at 824.

CONCLUSION

The challenge of mass exposure tort class actions has forced the district courts to assume an experimentalist role. The innovations developed by these courts in their attempts to certify mass exposure tort class actions have raised a steady stream of new and important issues of procedural and substantive law. The certification orders embodying these innovations are not immediately appealable. Consequently, the writ of mandamus has provided, and should continue to provide, a valuable means of obtaining appellate review at the earliest stages of these complex litigations. The writ is essential to ensuring that serious decisions made at the certification stage that impact the substantive rights of the parties are not made in isolation. The extraordinary nature of these cases makes the writ a necessary and appropriate remedy in this regard. Moreover, the limited use of the writ in these contexts serves and enhances the goals of the final judgment rule of appealability—traditionally the largest obstacle to the interlocutory appeal of class certification orders. By providing procedural and substantive guidance while maintaining the central goals of our individualistic adjudicatory system, the writ of mandamus represents the extraordinary measure in the extraordinary case.