

MASS ACCIDENT CLASS ACTIONS

On January 16, 1967, a fire destroyed the newly completed McCormick Place convention hall in Chicago, and the property of over 1,200 convention exhibitors. A federal class action alleging that negligent wiring had caused the fire was later filed on behalf of all exhibitors. The district court, in granting the class action motion, held that a class action was superior to any other procedural method of adjudicating the claims.¹ After the Santa Barbara oil spill in 1969, two class actions were brought on behalf of five distinct classes of plaintiffs harmed by the spill.² By stipulation, the court approved a consolidated class action and observed that the normal progress of litigation would not be sufficiently swift to provide prompt payment for the damage.³

These two cases are rare examples of the application of class actions to mass accident litigation. Indeed, several prominent authorities maintain that mass accidents are generally inappropriate for class action treatment. The Federal Rules Advisory Committee in 1966 suggested that a class suit for personal injury claims would degenerate into separate lawsuits.⁴ The Committee's Reporter later questioned the "superiority" of a class action when compared with other procedural devices for handling mass accident cases.⁵ Both criticisms referred to a 1960 article in which Professor (now Judge) Weinstein observed

1. *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969).

2. *Hall v. Union Oil Co.*, Civil Action No. 69-889-ALS (C.D. Cal., filed May 8, 1969); *Masterson v. Union Oil Co.*, Civil Action No. 69-331-ALS (C.D. Cal., filed Feb. 19, 1969).

3. Order *re* Class Actions, Civil Action Nos 69-889-ALS & 69-331-ALS (C.D. Cal., Dec. 16, 1969). The parties' stipulations concerned maintenance of a class action, consolidation of the two class actions, separation of individual claims for damages from injunctive claims, appointment of special masters, and waiver of punitive damages. Stipulation *re* Class Actions (C.D. Cal., filed Dec. 16, 1969); Stipulation and Order for Consolidation (C.D. Cal., filed Dec. 16, 1969); Stipulation and Order Severing Claims for Injunctive Relief and for Declaratory Relief (C.D. Cal., filed Dec. 16, 1969); Stipulation and Order Regarding Waiver of Punitive Damages and Amendment of First Amended Complaint (C.D. Cal., filed Dec. 16, 1969).

4. 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. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. FED. R. CIV. P. 23, Advisory Comm. Note, 39 F.R.D. 69, 103 (1966) [hereinafter cited as Comm. Note].

5. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

that mass accident class actions were unnecessary and might promote unethical practices.⁶ Other commentators, however, including Professors Moore, Wright and Miller maintain that class actions are particularly appropriate for disposing of the large number of cases arising out of a single disaster.⁷

This Comment argues that some mass accidents are appropriate for class action treatment while others are not. To distinguish those that are, the inquiry proceeds by analyzing how a mass accident situation fits into the requirements of the federal class action rule. Isolating those requirements which pose the greatest obstacles to a mass accident class action provides clues to the characteristics of some types of mass accidents which make them unsuitable for class litigation.

The scope of this Comment is limited in two respects. First, it is concerned only with mass accidents, not with mass torts generally. This restriction parallels the Advisory Committee's use of the more narrow term.⁸ "Mass accident" here includes harm to many persons or their property caused by a sudden, unintentional occurrence for which other persons are potentially responsible. Typical examples

6. There are, however, serious objections to using class actions where an accident has resulted in injury to many persons. The economies of the contingent fee in tort litigation—and settlement practices of public insurers and self-insurers—today insure effective legal service for any injured person who wants a lawyer. Permitting a class action would create an unseemly rush to bring the first case and provide, through notice to all injured persons, a kind of legalized ambulance chasing. As a matter of practice, disasters usually do not result in a large number of separate trials. Cases are referred to specialist attorneys who represent a number of parties, actions are consolidated, and settlement negotiations dispose of most claims. Where insurance coverage and assets of the defendant are less than prospective recoveries, the pressure to cooperate in settlement negotiations is too great to resist. Both the plaintiff's bar and defendant's bar in the negligence field are so closely knit that, as a practical matter, they can informally provide most of the advantages of class actions.

Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960) (footnotes omitted).

7. [A] mass accident appears peculiarly appropriate for class treatment. Indeed, the question of liability to all those injured in a plane or train crash is more likely to be uniform than that of liability for manipulation of the price of securities; with the introduction of such large-scale public transportation facilities as the "jumbo jets," the ability to determine liability for an accident in one proceeding will be even more desirable.

3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.45[3], at 23-811 n.35 (2d ed. 1969) [hereinafter cited as MOORE]; "The argument for class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented." 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 1783, at 117 (1972) [hereinafter cited as WRIGHT & MILLER]; Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590, 1597 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1043-44 (1967). See also C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS*, § 72, at 313 (1970) [hereinafter cited as WRIGHT].

8. See note 4 *supra*.

are airplane crashes, explosions, catastrophic fires, and oil spills.⁹ Second, it considers class actions only under revised federal rule 23. Research has failed to disclose any mass accidents litigated under state class action rules, including those states that have adopted the revised federal rule.¹⁰ Prior to revision of federal rule 23 in 1966, class actions were not appropriate for mass accident litigation because the rights of all parties, including those not before the court, could not be conclusively determined by a class suit.¹¹

I

PREREQUISITES OF ALL CLASS ACTIONS

Federal class actions must meet all the requirements of federal rule 23(a) and, in addition, fit within one of the categories of 23 (b).¹² Of the four prerequisites of 23(a), two are restated and ex-

9. Class actions are now commonly used in mass intentional torts, such as securities frauds [e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42, 43-44 (S.D.N.Y. 1966)], and nuisance cases [e.g., *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971); *Biechele v. Norfolk & Western Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969)].

10. Consideration of state class action rules would add much in complexity but little in analysis since, for the most part, the revised federal rule is more detailed and analytical in its requirements than the state rules. Compare FED. R. CIV. P. 23 with CAL. CODE CIV. PRO. § 382 (West 1970).

11. Under the old rule, a mass accident class action was "spurious" and absent class members were not bound by an adverse judgment. *Pennsylvania R.R. v. United States*, 111 F. Supp. 80, 90-92 (D.N.J. 1953); Note, *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 YALE L.J. 493, 513 (1954).

12. The federal class action rule is FED. R. CIV. P. 23.

CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Action Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) 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, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual

panded in 23(b)(3) and are dealt with below.¹³ Both remaining prerequisites of 23(a), which concern whether the representative parties are

members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

13. These are FED. R. CIV. P. 23(a)(1) (class must be so numerous that joinder is impracticable) (*see* text accompanying notes 60-64 *infra*) and (a)(2) (class must present common questions of law or fact) (*see* text accompanying notes 28-31 *infra*).

proper champions of the class,¹⁴ present no particular obstacles to a mass accident class action and are briefly considered here.

A. Adequacy of Representation

Rule 23(a)(4) requires that the named parties fairly and adequately protect the interests of absent class members,¹⁵ a due process requirement if absentees are to be bound by the judgment.¹⁶ The trial court must be satisfied that the suit is not collusive¹⁷ and that it will be vigorously prosecuted by plaintiffs with substantial claims at stake,¹⁸ resources to endure protracted litigation, and the aid of experienced counsel.¹⁹ The difficulties of assessing these factors are no greater in mass accident class actions than in class actions generally.²⁰

B. Typicality of Named Plaintiff's Claims

The claims of the representative parties must be typical of those of the entire class.²¹ This prerequisite will normally be met in mass accidents since all class members will seek compensatory damages for similar injuries caused by the same accident.²² A class action should not be permitted, however, where some, but not all, plaintiffs seek exemplary damages. The claims of those seeking exemplary damages are not typical of the others; they have a greater burden of proof,²³ and

14. See Kaplan, *supra* note 5, at 387.

15. FED. R. CIV. P. 23(a)(4).

16. *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940). While Federal Rule 23 does not explicitly provide that a judgment in a class suit binds absent class members who have not withdrawn from the action, this is the effect given to judgments under the new rule. 3B MOORE, *supra* note 7, ¶ 23.60, at 23-1201-04.

17. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

18. See, e.g., *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155, 156 (N.D. Ill. 1969) (court assumed named plaintiff's claims, exceeding \$200,000, would be pursued diligently). But cf. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968) (size of named plaintiff's claims should not decide adequacy of representation).

19. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). The amount of preparation for the case by plaintiff's attorneys prior to the class action motion is a relevant consideration. *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155, 156 (N.D. Ill. 1969).

20. See *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155, 156 (N.D. Ill. 1969) (holding twelve mass accident plaintiffs were proper representatives of a class of 1,200); *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 78 (E.D. Pa. 1970) (adequacy of representation assumed).

21. FED. R. CIV. P. 23(a)(3). This requirement is met by claims of the type "reasonably expected to be raised by the members of the class." *Technograph Printed Circuits, Ltd. v. Methode Electronics*, 285 F. Supp. 714, 721 (N.D. Ill. 1968).

22. *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155, 156 (N.D. Ill. 1969). Although claims might differ in some respects—some could be for wrongful death, others for lost earnings or medical expenses—they would be similar with regard to the class question, defendant's liability.

23. To justify punitive damages some exacerbating factor, such as recklessness or

the jury cannot decide their damages without reference to evidence of liability.²⁴

II

PREREQUISITES OF A SUBSECTION (b) (3) CLASS ACTION

As noted above,²⁵ a federal class action must come within one of the subsections of rule 23(b). Rule 23(b)(1) permits a class action where necessary to avoid creating a risk of incompatible standards of conduct for the party opposing the class, or of judgments for some class members that threaten the interests of others.²⁶ Neither of these criteria is met by mass accident suits. While separate trials of mass accident claims may result in inconsistent judgments, the defendant is not subject to incompatible standards of conduct; he merely has to compensate some plaintiffs but not others. Moreover, mass accident plaintiffs cannot be adversely affected by the judgment in another plaintiff's separate suit against the common defendant because, not having had their day in court, they cannot be bound. Rule 23(b)(2), which was intended primarily for civil rights cases, provides declaratory or injunctive relief, and is not applicable to mass accident litigation.²⁷ Since mass accident cases do not meet the criteria of 23(b)(1) or (2), the requirements of 23(b)(3) must be considered.

A. *Common Questions of Law or Fact*

Rule 23(b)(3) first requires that the common questions of law and fact, demanded as a prerequisite of all class actions by 23(a)(2),²⁸ must predominate over any questions affecting only individual members.²⁹ This predominance requirement can be met by most mass accident cases if the class action is restricted to the issue of liability³⁰ and if choice of law rules do not require the application of differing laws to individual members of the class of plaintiffs.³¹

1. *Class Action Restricted to Liability Issue*

In mass accidents the factual and legal issues of the defendants' liability do not differ significantly from one plaintiff to the next.³²

malice, must be proven as well as liability. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-10 (4th ed. 1971) [hereinafter cited as PROSSER].

24. See *id.*, at 9-11. After a large disaster there might be two classes of plaintiffs, those who seek punitive damages and those who do not.

25. See text accompanying note 12 *supra*.

26. FED. R. CIV. P. 23(b)(1)(A) and (B).

27. FED. R. CIV. P. 23(b)(2). See Comm. Note, *supra* note 4, at 102.

28. FED. R. CIV. P. 23(a)(2).

29. FED. R. CIV. P. 23(b)(3).

30. See text accompanying notes 32-41 *infra*.

31. See text accompanying notes 42-57 *infra*.

32. *E.g.*, American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D.

Separate trials of liability result in great duplication of effort by attorneys and the courts. This duplication can be avoided by trying the liability phase as a class action. However, because the damage phase of mass accident litigation involves differing issues of fact as to each plaintiff's injuries, it cannot be conducted as a class suit. The problem presented by the different procedural treatment required for the liability and damage phases of mass accident litigation is resolved by Rule 23(c)(4),³³ which allows a class action to be maintained for some issues while the remaining issues are tried separately.³⁴

Although split trials are also provided for in rule 42(b)³⁵ and they do economize court resources,³⁶ their general adoption in negligence cases has been resisted as an infringement of the right to jury trial.³⁷ Split trials save court time by avoiding proof of damages when the jury does not first find liability.³⁸ They also reduce the probability of a finding of liability, however, because the jury is unaffected by evidence of injuries when deciding that issue.³⁹ Hence, it has been argued that a split trial undermines the right to jury trial as it existed when the Constitution was adopted. Even critics of split trials agree that they are justified by the size and complexity of multiparty disaster litigation, however.⁴⁰ Moreover, splitting the trial is less likely to affect the outcome on the liability issue in mass accident cases because juries will often infer the nature of plaintiff's injuries from the notoriety and known consequences of a disaster without hearing evidence on that point.⁴¹

155, 156-57 (N.D. Ill. 1969) (fire); *Farrell v. American Flyers Airline Corp.*, 42 F.R.D. 341, 342 (S.D.N.Y. 1967) (air crash); *Rando v. Luckenbach S.S. Co.*, 155 F. Supp. 220, 221 (E.D.N.Y. 1957) (explosion and fire); *In re Silver Bridge Disaster*, 311 F. Supp. 1345 (Jud. Pan. Mult. Lit. 1970) (collapse of bridge).

33. FED. R. CIV. P. 23(c)(4).

34. Comm. Note, *supra* note 4, at 106. One commentator suggests that this feature of the new rule appears designed to accommodate mass accident litigation. Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1044 (1967).

35. FED. R. CIV. P. 42(b).

36. Zeisel & Callahan, *Split Trials and Time Savings: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

37. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961).

38. See 9 WRIGHT & MILLER, *supra* note 7, § 2388, at 279-81 (1971); Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743, 760 (1955).

39. See Weinstein, *supra* note 37, at 834. While juries are theoretically required to decide any issue on evidence relating to it alone, they are often influenced by evidence of damages in deciding liability. See *id.* at 833-34.

40. *Id.* at 840, 853 (on the present use of split trials in multiparty litigation); see Note, *supra* note 38, at 760.

41. The constitutional issue may be more serious when different juries are used in the two phases of the trial. Cf. *Hosie v. Chicago Nw. Ry.*, 282 F.2d 639, 642 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) (dictum). A federal court, however,

2. Choice of Law Rule

Changing choice of law rules governing the law applicable to torts have created problems for the mass accident class action. Until recently it was well settled that the law of the place where the harm occurred controlled litigation arising from an accident.⁴² Recent leading cases⁴³ and the *Second Restatement of Conflict of Laws*,⁴⁴ however, consider additional contacts in deciding which law to apply.⁴⁵ While a new rule has yet to emerge, it is clear that in some cases the actions of individual mass accident plaintiffs will be governed by the laws of different states.⁴⁶ If the relevant laws of these states differ, a proposed class action will not present common questions of law. Although common questions of both law *and* fact are not required for a class suit,⁴⁷ the absence of either makes it less likely that a class action motion will be granted. In addition, the confused state of the conflicts rules greatly increases the potential complexity of mass accident litigation,⁴⁸ requiring substantial effort by the parties and the courts merely to determine which law should apply.⁴⁹ Finally, uncertainty about the applicable law inhibits settlements because the parties cannot satisfactorily predict the expected recovery.⁵⁰

These considerations are of more than academic interest because state laws on accident liability and damages do differ. As to liability,

has recently ordered all related mass accident cases transferred to it for trial of the liability issue only. *In re Multidistrict Civil Actions Involving Air Crash Disaster*, 342 F. Supp. 907 (D.N.H. 1971) (these consolidated actions arise out of the same air crash in which a plaintiff's class action was denied in *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970)). If liability is established, the damages of each claimant will be determined by a jury in the district in which his action was originally brought. 342 F. Supp. at 908-09.

42. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200 (1971).

43. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

45. Among the factors considered under various theories are: the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile or place of business of the parties, the center of the relationship between the parties, (RESTATEMENT (SECOND), *supra* note 43), and the "paramount state interest" (*Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)).

46. See text accompanying notes 51-53 *infra*.

47. Both FED. R. CIV. P. 23(a)(2) and 23(b)(3) require common questions of law *or* fact.

48. See Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382, 385-86 (1968), in which the author describes the complexities of choosing the appropriate body of law under the "paramount state interest" test of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

49. Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U.L. REV. 299, 304 (1969).

50. *Id.*

they differ in the plaintiff's burden of proof, the use of certain defenses, the availability of some theories of recovery, such as strict liability, and of some doctrines which aid the plaintiff, such as last clear chance and *res ipsa loquitur*.⁵¹ In wrongful death actions, the elements of damages vary with the theory on which the action was created.⁵² More importantly, a minority of jurisdictions limit the maximum amount of damages recoverable for wrongful death.⁵³

Nevertheless, the choice of law problem should not bar mass accident class actions. There is no choice of law impediment in those states that continue to apply the traditional rule to tort actions. Even using new principles, one state's law may still govern the actions of nearly all plaintiffs,⁵⁴ or of a sufficiently large number that joinder would be impracticable.⁵⁵ Even if the laws of differing states are to be applied, a class action may still be possible because the major difference in the relevant laws relates to wrongful death limitations.⁵⁶ Since these limitations affect only the determination of damages, which would proceed on an individual basis in any case, they do not prevent a class action on the issue of liability. When differences in the substantive law governing liability do exist, the problem could be resolved by the use of special verdicts or of general verdicts accompanied by answers to interrogatories.⁵⁷

51. Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 Mo. L. REV. 215, 216 (1970).

52. PROSSER, *supra* note 23, § 127, at 905-10.

53. Seven states currently limit recovery for wrongful death: Colorado, COLO. REV. STAT. ANN. § 41-1-3 (Supp. 1969) (\$45,000 if no surviving widow or other dependent); Kansas, KAN. STAT. ANN. § 60-1903 (Supp. 1971) (\$50,000 plus costs); Massachusetts, MASS. GEN. LAWS ANN., ch. 229, § 2 (Supp. 1972) (\$100,000); Missouri, MO. ANN. STAT. § 537.090 (Vernon Supp. 1971-72) (\$50,000); New Hampshire, N.H. REV. STAT. ANN. § 556:13 (Supp. 1971) (\$120,000 if survived by spouse, child, parent or grandparent, \$30,000 otherwise); Virginia, VA. CODE ANN. § 8-636 (Supp. 1972) (\$50,000 for pecuniary loss, \$25,000 for solace, \$500 for funeral expenses, plus actual medical expenses); West Virginia, W. VA. CODE ANN. § 55-7-6 (Supp. 1972) (\$10,000 to estate, \$100,000 to dependent distributees plus reasonable medical and funeral expenses).

54. Cf. *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953) (nearly all claimants apparently were Texas residents).

55. This might well be true in any crash of a fully loaded 747 jet, or of a chartered aircraft similar to the 1962 crash at Orly, France of a 707 jet chartered by the Atlanta Art Association. N.Y. Times, June 4, 1962, at 1, col. 8.

56. L. Kreindler, statement in *Aircraft Crash Litigation, Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 2, at 257 (1969) [hereinafter cited as *Aircraft Crash Litigation*].

57. FED. R. CIV. P. 49; cf. *Farrell v. American Flyers Airline Corp.*, 42 F.R.D. 341, 342 (S.D.N.Y. 1967) (suggesting use of special verdicts when plaintiffs advance slightly different theories of recovery in consolidated airline crash cases).

B. *The Superiority Requirement*

In addition to finding that common questions of law or fact predominate, the district court must also conclude that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" before it can authorize a (b)(3) class action.⁵⁸ Alternative methods of adjudication include not only those provided in the federal rules and statutes, such as joinder, consolidation, 1404(a) and 1407 transfer, but also the less orthodox offensive use of collateral estoppel, the test case, coordination by the personal injury bar, and settlement, the latter being the usual disposition of mass accident claims.⁵⁹ Each alternative is analyzed below and compared with the class action as a solution to the mass accident litigation problem.

1. *Joinder*

Joinder is a commonly mentioned alternative to a class suit,⁶⁰ and impracticability of joinder is a prerequisite to all class actions.⁶¹ The superiority of a class action follows from the impracticability of joinder and the latter criteria is not hard to meet. Impossibility is not required⁶²—a showing of difficulty or inconvenience is often sufficient.⁶³ Classes with as few as 25 members have been recognized to avoid multiple trials of the same issue.⁶⁴ Since mass accidents often harm 100 or more potential plaintiffs, the requirement of impracticability of joinder would not be a substantial impediment to most mass accident class actions.

2. *Transfer and Consolidation*

Federal Rule 42(a) authorizes a joint trial or consolidation of any or all issues in actions involving common questions of law or fact, provided the actions are pending before the same court.⁶⁵ Since mass accident cases usually involve common questions of law or fact,⁶⁶

58. FED. R. CIV. P. 23(b)(3).

59. See Weinstein, *supra* note 6, at 469; Wolcott, *Collateral Estoppel and Other Practical Approaches to Commercial Air Crash Claims*, 13 N.Y.L. FORUM 509, 512 (1967).

60. *Dolgow v. Anderson*, 43 F.R.D. 472, 482 (E.D.N.Y. 1968).

61. FED. R. CIV. P. 23(a)(1). For the relationship between joinder in the "superiority" context and the requirement of impracticability of joinder, see *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 725 (N.D. Cal. 1967).

62. WRIGHT, *supra* note 7, § 72, at 308.

63. *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335, 339 (D. Minn. 1971).

64. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968).

65. FED. R. CIV. P. 42(a).

66. See note 32 *supra* and accompanying text.

they are often consolidated in federal court.⁶⁷ As with rule 23(c)(4), trials split between the liability and damage phases are used to reduce the complexity of the issues while preserving the advantages of consolidation.⁶⁸ Consolidation by itself, however, is a poor tool for disposing of mass accident claims since they are often brought in several districts.⁶⁹ Prior to consolidation they must all be transferred to the same district by means of 28 U.S.C. 1404(a).⁷⁰

While transfer and consolidation is a workable alternative to class actions in mass accident litigation, a class action is superior in several important respects. First, class actions are a better means of binding cases together. Federal rule 42(a) provides that cases may be either jointly tried or consolidated, suggesting that consolidation means something more than a joint trial—that the cases are merged into one by consolidation. Case law holds to the contrary, however, that consolidated actions preserve their separate identities and that the parties retain all the rights they would have had had the actions been tried separately.⁷¹ Whereas a class action would “consolidate” all claims arising from a mass accident, excepting those of plaintiffs who withdrew, 42(a) consolidation merely provides for a joint trial binding only those present and only for trial.

Second, 1404(a) limits transfers to districts where the action “might have been brought” initially.⁷² If the proposed transferee district lacks subject matter jurisdiction over the action or personal jurisdiction over the defendant, or if venue would be improper there,

67. See generally 9 WRIGHT & MILLER, *supra* note 7, § 2384, at 267-70 (1971); Comment, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373 (1963).

68. *E.g.*, *Klager v. Inland Power & Light Co.*, 1 F.R.D. 114 (W.D. Wash. 1939); 9 WRIGHT & MILLER, *supra* note 7, § 2384, at 270 (1971); Comment, *supra* note 67, at 376-78.

69. Actions are also often brought in state courts. These could be removed to Federal court by the defendants and then consolidated or transferred. 28 U.S.C. § 1446(a) (1970). Otherwise, neither consolidation nor transfer can reach these actions, but a timely class suit might preempt them.

70. A federal district court may transfer a civil action to any other district or division where it might have been brought originally, if the transfer is for the convenience of parties and witnesses and in the interests of justice. 28 U.S.C. § 1404(a) (1970). When related actions are pending in several districts, one of the alternatives suggested by the Manual for Complex and Multidistrict Litigation is their transfer to a single district for consolidation. COORDINATING COMMITTEE FOR MULTIPLE LITIGATION, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION, pt. I, §§ 5.3-5.4 (1969) [hereinafter cited as MANUAL].

71. 5 MOORE, *supra* note 7, ¶ 42.02, at 42-4-42-21; 9 WRIGHT & MILLER, *supra* note 7, § 2382, at 254-55 (1971). This includes presumably a separate right of appeal. See *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 581-82 (D. Minn. 1968).

72. 28 U.S.C. § 1404(a) (1970).

transfer will be denied.⁷³ This is a serious limitation, since it implies that consolidation, even when used with 1404(a) transfer, cannot combine and dispose of all the litigation resulting from some mass accidents.⁷⁴ In a class suit, by contrast, only the named plaintiffs are relevant for venue purposes and need be diverse from the defendant for subject matter jurisdiction.⁷⁵

Finally, 1404(a) Jacks efficient coordination procedures to ensure that all related cases are transferred to one court.⁷⁶ In the absence of coordination procedures, litigants are often unaware of related actions in other districts until their own cases are well developed, thereby causing needless duplication of effort.⁷⁷ The possibility of consolidation with related actions in another district favors transfer,⁷⁸ but this factor may be negative if the other actions are already near completion.⁷⁹ By contrast, the required notice to all class members assures that all potential plaintiffs would at least know of a class action and might be dissuaded from bringing their own suit.⁸⁰ Thus,

73. Comment, *The Search for the Most Convenient Federal Forum: Three Solutions to the Problems of Multidistrict Litigation*, 64 NW. U.L. REV. 188, 192 (1969).

74. This limitation is mitigated by the fact that all mass accident claims could be brought in the district where "the claim arose," which is commonly interpreted to be where the accident occurred, and thus there would always be at least one district in which all claims could be consolidated. 28 U.S.C. § 1391(a) (1970). It is further lessened by the fact that many mass accident defendants would be nationwide corporations which could be sued in any of several districts. *Id.* § 1391(c).

75. 7 WRIGHT & MILLER, *supra* note 7, § 1755, at 550-51 (1972).

76. See Comment, note 73 *supra*, at 202. A prior section 1407 transfer by the Judicial Panel for Multidistrict Litigation could serve as a means of coordinating later 1404(a) transfers, however. See text accompanying note 85 *infra*.

77. *Multidistrict Litigation, Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 18 (1966).

78. *Mayer v. Braniff Airways, Inc.*, 310 F. Supp. 149 (N.D. Ill. 1970) (actions transferred); *Popkin v. Eastern Air Lines, Inc.*, 253 F. Supp. 244 (E.D. Pa. 1966) (transfer denied where there was only a slight possibility of consolidation in the transferee court).

79. *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed, sub nom. United Air Lines, Inc. v. United States*, 379 U.S. 951 (1964).

80. Notice to all class members of the pendency of a class action is required by FED. R. CIV. P. 23(c)(2). This required notice could be used as a form of unethical solicitation in mass accident cases. See Weinstein, *supra* note 6. Of course, this is equally true of other types of class actions also. Moreover, mass accidents presently stimulate solicitation of claims by specialized firms. See Committee on Professional and Judicial Ethics, *Opinion No. 875*, 25 RECORD OF N.Y.C.B.A. 38 (1970) holding that such solicitations are unethical. If mass accident claims were tried as class actions, the communications of all counsel with the class members, and hence the risk of unethical conduct, could be overseen and controlled by the court. See *Weight Watchers of Phila. v. Weight Watchers Int.*, 53 F.R.D. 647 (E.D.N.Y. 1971); MANUAL, *supra* note 70, pt. I, § 1.61 *Preventing Potential Abuse of the Class Action*.

because of its greater power to concentrate, join, and dispose of all claims in one action and appeal, the class action is superior to consolidation and transfer in litigating mass accident claims.

3. *Transfer for Coordinated Pretrial under 28 U.S.C. 1407*

Section 1407 created the Judicial Panel on Multidistrict Litigation and authorized it to transfer related civil actions pending in different districts to one district for coordinated or consolidated pretrial proceedings.⁸¹ Since its inception, the pretrial transfer of air crash and other mass accident cases has comprised a sizeable proportion of the Panel's work.⁸² Use of section 1407 is mentioned in the *Manual for Complex and Multidistrict Litigation* as an alternative to transfer and consolidation in coordinating multidistrict cases.⁸³ Under section 1407 an action can be transferred to any federal district court, not just to one in which it might have been brought.⁸⁴ This allows centralization of all related cases in one forum. The Panel has developed procedures for identifying multidistrict cases and locating all related actions. Its power to choose the transferee district eliminates the need for district courts to coordinate their transfers of related cases as under section 1404(a). In addition to these advantages over transfer and consolidation, it is now settled that a 1407 transfer for coordinated pretrial does not preclude later transfer of the entire action under 1404(a).⁸⁵

As a technique for disposing of all litigation resulting from a mass accident, however, section 1407 has an important and obvious shortcoming: transfers only apply to pretrial proceedings.⁸⁶ Once pretrial is complete, the actions must be remanded to their transferor districts for trial unless previously terminated.⁸⁷ Thus 1407 transfer is inferior to a class action because it was designed with more limited

81. 28 U.S.C. § 1407(a) (1970).

82. Through August, 1972, sixteen of the approximately seventy reported transfer cases decided by the Panel involved mass accidents. For a debate of the usefulness of 1407 transfer in aircrash disasters see McElhaney, *A Plea for Preservation of the "Worm's Eye View" in Multi-District Aviation Litigation*, 37 J. AIR L. & COM. 49 (1971) and McDermott, *A Plea for Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423 (1971).

83. MANUAL, *supra* note 70, pt. I, § 5.32, at 65-66.

84. 28 U.S.C. § 1407(a) (1970).

85. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621, 623 n.6 (Jud. Pan. Mult. Lit. 1970); *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039, 1040 (Jud. Pan. Mult. Lit. 1969).

86. 28 U.S.C. § 1407(a) (1970).

87. This limitation can be overcome by following the 1407 transfer with a court instigated 1404(a) transfer for trial. *In re Multidistrict Civil Actions Involving Air Crash Disaster*, 342 F. Supp. 907 (D.N.H. 1971). Such a transfer, however, is restricted to districts where the transferred action could have been brought. See note 72-74 *supra* and accompanying text.

goals and consequently does not eliminate multiple trials of the same issue.

4. *The Offensive Use of Collateral Estoppel.*

When *Bernhard v. Bank of America*⁸⁸ swept away the doctrine of mutuality of estoppel in California, the possibility of asserting collateral estoppel offensively arose.⁸⁹ This possibility has been heralded by some commentators as the answer to redundant trials in mass accident cases.⁹⁰ However, offensive use of the plea troubled Professor Brainerd Currie who pointed out the unfairness of binding the defendant with what might be a fluke adverse judgment when subsequent plaintiffs, lacking their day in court, could not be bound by a defendant's judgment.⁹¹ The defendant in a mass accident would be required to litigate each case as if its outcome would determine all subsequent litigation, because if he lost it would. Professor Currie later withdrew his objection to the offensive assertion of collateral estoppel in those instances in which the defendant had received a full and fair first trial,⁹² but there are reasons other than possible unfairness for limiting the doctrine's offensive use.

First, the offensive use of collateral estoppel, unlike its defensive use,⁹³ induces separation rather than consolidation or joinder of actions.⁹⁴ Defensive collateral estoppel encourages a plaintiff to consolidate all his related claims against more than one defendant, because if he loses the first action, subsequent defendants can use the judgment against him. By contrast, offensive collateral estoppel encourages a plaintiff to wait for related actions to be tried, knowing he can take advantage of another plaintiff's favorable judgment but ignore one for the defendant.⁹⁵ The offensive use of collateral estoppel thus undercuts the attractiveness of a class action for mass accident plaintiffs.

88. 19 Cal. 2d 807, 122 P.2d 892 (1942).

89. Collateral estoppel is asserted offensively when a prior judgment against the defendant is held to be conclusive as to issues also raised in a later suit between a similarly situated plaintiff and the same defendant.

90. Wolcott, *supra* note 59, at 509; Comment, *Collateral Estoppel—Choice of Laws—A New Approach to Multi-Passenger Accident Litigation*, 35 J. AIR L. 289 (1969).

91. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 285-89 (1957).

92. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

93. Collateral estoppel is asserted defensively when a prior judgment against the plaintiff is held to be conclusive as to issues also raised in a later suit between the same plaintiff and a similarly situated defendant.

94. This argument is elaborated in Note, *supra* note 34, at 1019-49.

95. This tendency is mitigated by the shortness of most tort statutes of limitation. *E.g.*, CAL. CODE CIV. PRO. § 340 (West Supp. 1972) (one year for bodily injury).

Plaintiffs will not risk being bound by an adverse class action judgment when offensive collateral estoppel gives them the best of both worlds.⁹⁶

Furthermore, the offensive use of collateral estoppel has rarely been permitted by the courts in mass accident cases.⁹⁷ Its use has generally been limited to cases where the defendant had ample opportunity and incentive to contest the first trial. In the leading air crash case applying the doctrine, the first trial involved the consolidated claims of 24 plaintiffs, consumed 14 weeks of court time in exhaustive litigation, was defended by experienced counsel and was conducted by the same judge who later granted offensive use of the plea.⁹⁸ On the other hand, in a similar case in which the first trial was of a small claim that was probably not vigorously defended, the plaintiff's plea of collateral estoppel was denied.⁹⁹

The offensive use of collateral estoppel is further limited in multistate actions when a judgment obtained in one state is pleaded as conclusive in another.¹⁰⁰ First, the full faith and credit clause of the Constitution may require that a foreign judgment be given no greater effect than it would be given by the courts of its home state. This implies that if the courts of the state of decision would not allow the offensive use of the judgment, neither can another state's courts.¹⁰¹ Second, assuming both states would not apply the same body of law,

96. See Currie, *supra* note 91, at 287-88 n.15; Weinstein, *supra* note 6, at 454. In this connection it has been urged that a plaintiff who chose to withdraw from a class action should not be allowed to assert offensively a judgment for the class. WRIGHT, *supra* note 7, § 72, at 314.

97. The three leading cases are: Maryland *ex. rel.* Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967) (dictum); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed, sub nom.* United Air Lines, Inc. v. United States, 379 U.S. 951 (1964); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969). Mass accident decisions refusing to allow the offensive use of collateral estoppel: Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Price v. Atchison, T. & S.F. Ry., 164 Cal. App. 2d 400, 402-03, 330 P.2d 933, 934-35 (2d Dist. 1958); Montgomery v. Taylor Green Gas Co., 306 Ky. 256, 206 S.W.2d 919 (1947).

98. United States v. United Air Lines, Inc., 216 F. Supp. 709, 728 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed, sub nom.* United Air Lines, Inc. v. United States, 379 U.S. 951 (1964).

99. Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 538-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

100. See Tydings, *supra* note 49, at 305 (suggesting collateral estoppel cannot be used where the substantive law of the state in which the first case was decided is not the same as that of the state in which the plea is made).

101. But see Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590, 1590-96 (1968) concluding that the second state could apply its own collateral estoppel rule as an exception to the full faith and credit requirement.

namely the law of the place of the accident, the law under which the judgment was obtained may have been more favorable to the plaintiff than that of the state in which the plea is made. In such a case the plea should be denied, although it could be allowed in the reverse situation.¹⁰² Finally, when the defendant has won one of two previous trials, a subsequent court, having no reason to prefer one judgment over the other, should not permit offensive collateral estoppel.¹⁰³

These limitations suggest the advantages of a class action over offensive collateral estoppel as a device for efficiently and fairly disposing of mass accident litigation: A proper class action is fair to both sides because, knowing they will be bound by the outcome, each will vigorously prosecute its case. It is more efficient because it encourages a single disposition of all claims, does not presume the existence of later actions to test the effect of an earlier judgment, and is not affected by inconsistent prior adjudications. Finally, the offensive use of collateral estoppel has been denied as often as it has been granted in mass accident cases and so is an unreliable alternative to a class action.¹⁰⁴

5. Use of a Test Case

When many people are harmed by the same event, they may agree to expedite the litigation by trying only one claim on the liability issue.¹⁰⁵ This test case agreement is simply a private, consensual class action¹⁰⁶ and is enforceable between the parties.¹⁰⁷ The test case plaintiff is the representative of the class of similarly situated persons who agree to be bound.

Prior to 1966, a test case was the only means of binding a class of accident victims in a representative suit.¹⁰⁸ Such an agreement was particularly likely after a mass disaster in which thousands of people were injured because it was the only feasible method to adjudicate

102. See *Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 45, 304 N.Y.S.2d 810, 814 (Sup. Ct. 1969).

103. See Note, *supra* note 101, at 1598-99; Note, *Res Judicata: The Shield Becomes a Sword: Prior Adjudication of Negligence Bars Relitigation of that Issue by Other Plaintiffs in Subsequent Actions Based on Same Accident*, 1964 DUKE L. REV. 402, 404.

104. See note 97 *supra*.

105. *E.g.*, *Doherty v. Bress*, 262 F.2d 20 (D.C. Cir. 1958). A test case was apparently used in *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied* 389 U.S. 931 (1967). See L. KREINDLER, *AIRCRAFT LITIGATION*—3d 115 (1972).

106. See 3B MOORE, *supra* note 7, ¶ 23.45[3], at 23-813.

107. *Lipp v. National Screen Serv. Corp.*, 290 F.2d 321 (3d Cir. 1961).

108. *Pennsylvania R.R. v. United States*, 111 F. Supp. 80 (D.N.J. 1953) (spurious class action does not bind class members not before the court).

their claims.¹⁰⁹ However, the use of a test case in mass accident cases does not render a class action unnecessary. Rather, it suggests a contrary conclusion: Trying the liability phase as a class action is so advantageous that it is stipulated by the parties when not provided by the law.¹¹⁰ A formal class action is superior to a test case because it provides the safeguards of the articulated federal rule: mandatory notice, court supervision of settlement, and a growing body of interpretive precedent on its proper use.

6. Settlement

Although settlement is not a method of adjudicating claims, it is the means by which the great majority of mass accident claims presently are resolved,¹¹¹ and thus deserves discussion. Some plaintiffs' attorneys argue that mass settlement is necessary in mass accident cases because the courts could not possibly try all the claims.¹¹² They conclude therefore that any procedure that interferes with settlement must be avoided.

The factors that determine recovery through settlement, however, are not closely related to the factors that would govern recovery in a rational system of compensation for injury. The settlement amount in mass accident cases is based on the case's potential cost to the defendant as evaluated by his attorney.¹¹³ This judgment, in turn, is related to the intrinsic strength of the plaintiff's claim (the defendant seeks to settle strong cases to avoid adverse judgments), the quality of plaintiff's attorney's preparation (an unprepared attorney is in no position to bargain), the geographical location of possible trial (expected recovery varies with locale), and the point in time at which the case is settled (early settlements or recoveries have precedential value that drive up later settlements).¹¹⁴ While some of these factors are related to those that should determine plaintiff's compensation, his injuries and monetary loss,¹¹⁵ others that significantly affect the settle-

109. *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953) (catastrophic explosion, over 8,000 injured); *Clark v. United States*, 13 F.R.D. 342 (D. Ore. 1952) (flooding caused by broken embankment, created over 3,000 claims).

110. See Note, *supra* note 51, at 219.

111. See Weinstein, *supra* note 6, at 469; Wolcott, *supra* note 59, at 512.

112. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 19.01, at 609-12 (1963); S. SPEISER, *Airline Passenger Death Cases* § 20, in AVIATION ACCIDENT LITIGATION ARTICLES (1965), reprinting 8 AM. JUR. TRIALS 173-357 (1964).

113. See S. SPEISER, *supra* note 112, at § 15.

114. *Id.*; Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 131, 137-39 (1968).

115. See generally W. PROSSER & J. WADE, CASES AND MATERIALS ON TORTS, 1057-76 (5th ed. 1971).

ment amount are not. Therefore, practically indistinguishable claims may be settled for radically differing amounts.¹¹⁶ If plaintiff's recovery were determined individually by a jury after a class suit on liability, his compensation would be more closely related to his harm, the only issue on which evidence would be introduced.¹¹⁷

Settlement does provide quick cash for needy plaintiffs—something that separate trial of claims cannot do. Of course, some plaintiffs may sacrifice full recovery of justified claims to obtain a quick recovery. Moreover, that only settlement can provide reasonably speedy recovery under the present system is merely another indication of the problem, not evidence that a better solution is not needed. A class action is superior to mass settlement because it results in more equitable recoveries. Furthermore, because individual damages are quickly determined once liability is established,¹¹⁸ a class action provides quick adjudication of full compensation.

7. *Coordination of Cases by the Personal Injury Bar*

Coordination of cases by the closely knit negligence bar supposedly obviates mass accident class actions.¹¹⁹ The litigation resulting from the marketing of MER/29, a prescription drug to lower body cholesterol which, it was later discovered, caused cataracts and hair loss, exemplifies the limitations of this informal coordination, however.¹²⁰ Of approximately 5,000 people injured by the drug, more than 1,500 eventually filed suit against the manufacturer while hundreds of claims were disposed of without suit.¹²¹ A plaintiffs' group of attorneys was formed to expedite the litigation and save expenses.¹²² Economy was important because the claims were small in comparison to the cost of preparing each case individually.¹²³ The plaintiffs' group, operating through a trustee, issued a newsletter to keep members informed on "trials and settlements, the proof being

116. See Rheingold, *supra* note 114, at 138.

117. Even if individual claims were settled after liability was determined, some of the extraneous factors which influence settlement before trial would have been removed.

118. *Aircraft Crash Litigation*, *supra* note 56, pt. 1, at 21; *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 716 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed, sub nom. United Air Lines, Inc. v. United States*, 379 U.S. 951 (1964).

119. See Weinstein, *supra* note 6, at 469.

120. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

121. *Id.* at 121.

122. *Id.* at 122. The group ultimately consisted of 288 member plaintiffs' attorneys or firms, including nearly all the specialists in personal injury cases involved. *Id.* at 123.

123. *Id.* at 122.

assembled by the [g]roup, [and] new medical knowledge"¹²⁴ In addition members received copies of depositions, medical analyses, transcripts of prior trials, and a "trial package" containing many of the materials necessary for trial.¹²⁵

Group members were not interested in consolidating their cases for trial, however, and by the fall of 1967 there had been 11 separate trials on the liability issue.¹²⁶ Three of the four cases lost by plaintiffs were tried by nonmember attorneys, while six of seven victories were won by group attorneys.¹²⁷ This suggests that great resources—which would also be available to plaintiffs in a class action—increased the probability of an even contest and, in this case, of plaintiff's recovery. In the same time period, over 1,000 cases were settled¹²⁸ but, as suggested by the analysis of settlement,¹²⁹ the amounts received varied greatly.¹³⁰

These multiple trials illustrate that this form of coordination is limited to pretrial, that it generates its greatest savings by centralization of discovery,¹³¹ but misses entirely the greater economies of a single trial on liability followed by individual determination of damages. Plaintiffs lose in two ways: they ultimately bear the higher litigation costs, and the great majority of their recoveries are determined by settlement rather than by a jury.¹³²

In sum, a class action is superior to other methods of adjudicating mass accident liability because it alone can dispose of all claims in one suit while providing the resources and commitment necessary to ensure a fair trial.¹³³

124. *Id.* at 122-23.

125. *Id.* at 123-24. For this extensive assistance, group members paid on the average \$300. *Id.* at 123.

126. *Id.* at 132.

127. *Id.* at 133.

128. *Id.* at 132.

129. See text accompanying notes 113-16 *supra*.

130. See Rheingold, note 120 *supra*, at 137-39.

131. *Id.* at 127.

132. This case is not typical of those dealt with in this Comment. Products liability cases differ from mass accident cases in that the claimants are injured by separate but similar events rather than by a single event. Their claims are, therefore, less likely to present common questions of fact than those of mass accident victims. When the separate events creating liability are similar enough, however, a class suit is possible. Consider, for example, the analogy of securities fraud cases when all plaintiffs separately relied on the same allegedly false information. *Dolgow v. Anderson*, 43 F.R.D. 472, 489-91 (E.D.N.Y. 1968); *Kronenberg v. Hotel Governor Clinton*, 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

133. Two other possible solutions to the problem of mass accident litigation deserve mention. First, several bills before both the 90th and 91st Congress would have created federal jurisdiction over all air crash cases with nationwide service of process and a federal common law of liability and damages. By expanding the power of the Judicial Panel on Multidistrict Litigation in air crash cases to include consolida-

C. Other Findings Pertinent to a (b)(3) Class Action

The second sentence of rule 23(b)(3)¹³⁴ enumerates several likely components of the superiority and predominance criteria.¹³⁵ While none of these factors alone is determinative of a class action motion, they should be considered by the ruling judge.¹³⁶

1. The Individual's Interest in Controlling His Own Action

Whenever individual class members have claims of high value, their interest in controlling the prosecution of those claims is increased and the propriety of a class action decreased.¹³⁷ When the claim represents recovery for the death of a loved one and carries with it the future financial security of the family, this psychological weight added to the individual's monetary interest in controlling his own suit may preclude a class action.¹³⁸

Another reason why plaintiffs may prefer to control their own actions is suggested by the variation from district to district in the amount a jury will award for any given injury.¹³⁹ Obviously, plaintiffs prefer to have their damages tried in a high-award district, and, assuming the defendant is a nationwide corporation, they can meet jurisdiction and venue requirements in almost any district they want. Defendants of course will seek to transfer the suit to a low-award dis-

tion for trial purposes, the latest form of the bill would have achieved most of the procedural advantages of a federal class action. Unfortunately, these bills died in committee and with the departure of their foremost advocate, Senator Tydings, there is little chance of their revival. S.3305, S.3306 and S.4089, 90th Cong., 2d Sess. (1968); S.961, 91st Cong., 1st Sess. (1969).

When total claims from a mass disaster greatly exceed the combined assets of defendants and their insurance coverage, congressional relief legislation may provide the only means of compensating the injured. Special legislation is particularly likely when, as in the Texas City Disaster, the federal government is at least partially responsible, although claims against it are barred by the Federal Tort Claims Act. See Texas City Relief Act of 1955, ch. 864, 69 Stat. 707; *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961); *Hollister v. Ulvi*, 199 Minn. 269, 271 N.W. 493 (1943) (discussing congressional legislation to compensate property owners for losses from fire caused by negligent operation of railroad by Director General of Railroads). For an analysis of the many possibilities for federally created mass disaster see A. ROSENTHAL, H. KORN & S. LUBMAN, *CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS* (1963).

134. FED. R. CIV. P. 23(b)(3).

135. 3B MOORE, *supra* note 7, ¶ 23.45[4.-0], at 23-851-52.

136. *Id.*

137. *Cf.* Comm. Note, *supra* note 4, at 104.

138. This was an important factor in *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970) (noting that claims affected a significant aspect of the claimants' lives, and the existence of a wide range of choice of the strategy and tactics of litigation).

139. The amount depends primarily on the district's level of urbanization; see Rheingold, *supra* note 120, at 132.

trict, possibly the district where the claim arose. Since the court may consider the convenience of the parties in deciding a transfer motion,¹⁴⁰ the plaintiff who resides in a high-award district will have a greater chance of defeating a transfer motion than one who resides elsewhere. A high-award forum resident will thus not care to join a class action that includes foreign plaintiffs, because the probability of his claim remaining in the high-award district can only be diminished.¹⁴¹ If all class members reside in the same judicial district, however, their interests in joining a class action will be the same, as will the court's view of the propriety of transferring their actions.

A mass accident class action should not be foreclosed whenever individual claims are substantial or plaintiffs diverse, however. Rule 23(c)(2) permits individual class members to withdraw from a class action.¹⁴² This preserves the freedom of separate suit while allowing those class members willing to sacrifice some individual control to achieve economies of scale.¹⁴³ Moreover, a rule of thumb which denies class actions when individual claims are substantial, plus the rule of *Snyder v. Harris*¹⁴⁴ that class damages cannot be aggregated to achieve jurisdictional amount, would together bar most diversity class actions in federal courts.¹⁴⁵

140. 28 U.S.C. § 1404(a) (1970).

141. Trying the liability issue as a class action in one district but allowing plaintiffs to have their damages determined by a jury in the district in which their claim would have been brought, as was done in *In re Multidistrict Civil Actions Involving Air Crash Disaster*, 342 F. Supp. 907 (D.N.H. 1971), would remove this disincentive to participation in a class action. On the constitutional issue raised by this practice see note 41 *supra*.

142. FED. R. CIV. P. 23(c)(2).

143. Where the group members have requested representative treatment, it would be improper for a judge to conclude that they overlooked their individual interests in making their procedural election; absentees who are unwilling to relinquish control over their claims will have a chance to exclude themselves from the class.

3B MOORE, *supra* note 7, ¶ 23.45[4.-1], at 23-861.

144. 394 U.S. 332 (1969).

145. The few federal question cases requiring jurisdictional amount would be barred as well. See WRIGHT, *supra* note 7, § 32. The effect of *Snyder* on mass accident class actions is illustrated by a recent pollution case. Plaintiffs sued as representatives of lakefront property owners to enjoin the fouling of Lake Champlain. The class action motion was denied because it had not been shown that each class member's claim exceeded \$10,000. The court held that *Snyder* clearly required all class members to meet the jurisdictional amount requirement, although other authorities have disputed that point. *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971). *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969), skirted the jurisdictional amount impediment by assuming that each class member's right to a pollution free environment was worth more than \$10,000 and holding that that was the amount in controversy.

Even though *Snyder* may restrict mass accident class actions in federal courts, the analysis of this Comment applies equally to class actions brought in those states that have adopted the revised federal class action rule (*e.g.*, Arizona, 16 ARIZ. REV.

2. *The Extent and Nature of Related Pending Litigation*

After a mass accident, claims are often brought in many state and federal courts. The existence of parallel lawsuits may demonstrate the futility of then attempting to use a class action to avoid multiple litigation and conflicting adjudications.¹⁴⁶ Moreover, once the litigation has progressed substantially, the alternative methods of adjudication may become superior to a class action.¹⁴⁷

However, the existence of related actions does not preclude their fusion into a class action. If related actions are transferred to a single court for consolidation, a class action motion may be maintained there. Similarly, the transferee court in a 1407 transfer may decide class action motions,¹⁴⁸ and cases that arrive separately may emerge as a single representative suit.¹⁴⁹ Finally, related cases pending elsewhere do not preclude a class action when the remaining members of the class are too numerous for joinder, and when the other requirements of a (b)(3) class action are met.¹⁵⁰

3. *The Desirability of Concentrating the Litigation in the Particular Forum*

In granting a (b)(3) motion, the trial court must conclude that it is a proper forum to adjudicate the controversy.¹⁵¹ It will consider factors similar to those used to determine the proper court for consolidated pretrial of mass accident cases:¹⁵² the location of wit-

STAT. ANN., RULES OF CIV. P. 23 (West Supp. 1971-72)) or use it as a guide in the implementation of their own class action rule (e.g., California, *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971)). At least some of those states will avoid the jurisdictional amount trap. See *Paley v. Coca Cola Co.*, — Mich. App. —, 197 N.W.2d 478 (Ct. App. 1972). In any case, the *Snyder* obstacle may yet be overcome by legislation. See, e.g., note 133 *supra*.

146. 3B MOORE, *supra* note 7, ¶ 23.45[4-2], at 23-871.

147. *Id.* at 23-872.

148. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493-94 (Jud. Pan. Mnlt. Lit. 1968). 1407 transferee courts do commonly decide class action motions. L. KREINDLER, *AIRCRAFT LITIGATION*—3d 102 (1972).

149. Although there are no cases yet, this is the clear implication of the transferee court's power to decide class action motions. See L. KREINDLER, *supra* note 148, at 102. Parties are often unaware of related actions in other districts, and by bringing cases together, even if only for pretrial, 1407 transfer promotes their further fusion. See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 16 (1971); *Pre-Trial Consolidation in Complex Federal Multi-District Litigation*, 6 COLUM. J.L. & SOC. PROB. 433, 447 (1970) (noting that 1407 transfer facilitates settlement).

150. *Kronenberg v. Hotel Governor Clinton, Inc.*, 281 F. Supp. 622, 624-25 (S.D.N.Y. 1967).

151. FED. R. CIV. P. 23(b)(3)(C).

152. Professor Moore notes the similarity between the factors relevant in deciding a 1404(a) transfer motion and in deciding whether a proposed court is proper for a class action. 3B MOORE, *supra* note 7, ¶ 23.45[4-3], at 23-881.

nesses, evidence and documentation;¹⁵³ the convenience of the parties;¹⁵⁴ and whether the proposed court has any special familiarity with the case.¹⁵⁵ These factors almost always point to the situs of the accident for consolidated pretrial.¹⁵⁶

However, the appropriate court for consolidated pretrial of mass accident cases is not necessarily a proper one to try a class action on the same facts. The relevant factors should be weighed differently because the location of trial is of greater significance to the parties than the site of pretrial. There may not be a single court in which it is appropriate to concentrate all the claims resulting from a mass accident.¹⁵⁷ This is particularly likely when plaintiffs are diverse and have an interest in suing on home ground.¹⁵⁸ Even when it is appropriate to concentrate the litigation somewhere, a court may conclude that it is not a proper forum.¹⁵⁹

4. Class Action Management Difficulties

Class action decisions reveal several common sources of management difficulties: the possibility that an unmanageably large number of class members may seek to participate in the action,¹⁶⁰ the required notification of a very large class,¹⁶¹ and apportionment of re-

153. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621, 622 (Jud. Pan. Mult. Lit. 1970); *In re Air Crash Disaster at Cincinnati Airport*, 295 F. Supp. 51, 52 (Jud. Pan. Mult. Lit. 1968); *In re Air Crash Disaster at Ardmore (Gene Autry)*, Okl., 295 F. Supp. 45, 46 (Jud. Pan. Mult. Lit. 1968).

154. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621, 622 (Jud. Pan. Mult. Lit. 1970); 28 U.S.C. 1407(a) requires that any transfer be for the convenience of parties and witnesses and in the interests of justice.

155. Based on pending cases (*In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621, 622 (Jud. Pan. Mult. Lit. 1970)), or completed trials or settlements conducted by that court (*Id.*; *In re Air Crash Disaster at Ardmore (Gene Autry)*, Okl., 295 F. Supp. 45, 46 (Jud. Pan. Mult. Lit. 1968)).

156. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621, 622 (Jud. Pan. Mult. Lit. 1970); *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039, 1040 (Jud. Pan. Mult. Lit. 1969); *In re Air Crash Disaster at Cincinnati Airport*, 295 F. Supp. 51, 51-52 (Jud. Pan. Mult. Lit. 1968); *In re Air Crash Disaster at Ardmore (Gene Autry)*, Okl., 295 F. Supp. 45, 46 (Jud. Pan. Mult. Lit. 1968). When the mass accident occurs outside the United States, related cases have been transferred to the district in which the most suits were pending. *In re Air Crash Disaster at Hong Kong on June 30, 1967*, 298 F. Supp. 390 (Jud. Pan. Mult. Lit. 1969); Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REV.* 41, 58 (1972).

157. Cf. Comm. Note, *supra* note 4, at 104.

158. See text accompanying notes 139-41 *supra*.

159. *In Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970), the court recognized that "major disasters involving large numbers of claims could be appropriate for class-action treatment," but held that a Pennsylvania court was not proper for litigation involving predominantly New England claimants, a New Hampshire crash, and defendants located in Massachusetts and Maryland. *Id.* at 80.

160. 3B *MOORE*, *supra* note 7, ¶ 23.45[4.-4], at 23-891.

161. *Id.*

lief or damages among thousands of small, unsubstantiated claims.¹⁶²

None of these problems would arise in the typical mass accident class action. The class of victims is small, at least in comparison to those in securities fraud cases for instance.¹⁶³ Each class member can be individually identified and notified, and each has a demonstrable injury on which individual damages can be based. In addition, 23(c)(4) and (d)¹⁶⁴ give the court broad powers of control over a class action, including the power to divide the class into subclasses,¹⁶⁵ to allow a class action only as to certain issues,¹⁶⁶ and to restrict the class to manageable size.¹⁶⁷ These powers ensure the manageability of a mass accident class action.

III

CHARACTERISTICS OF MASS ACCIDENTS INAPPROPRIATE FOR CLASS ACTION TREATMENT

In retrospect, the three potential obstacles to a mass accident class action are the applicability of differing laws to individual class members,¹⁶⁸ a strong individual interest in controlling separate actions,¹⁶⁹ and the lack of a proper court in which to concentrate the litigation.¹⁷⁰

Diversity of the class members causes the choice of law problems in mass accident cases. If all plaintiffs are from the same state, their claims will probably be governed by the same law, even though the forum does not apply the traditional choice of law rule. The relevant contacts, under any theory of choice of law, of each claimant with every state whose law might possibly govern would be the same as those of every other claimant.¹⁷¹ The forum will have no basis to

162. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) involves all three sources of management difficulties. The class was very large (3.75 million odd-lot investors), individual class members could not be easily identified and notified, and it was not apparent how damages could be proved and distributed. Nevertheless, a class action was permitted.

163. *Id.*

164. FED. R. CIV. P. 23(c)(4), (d).

165. FED. R. CIV. P. 23(c)(4)(B). This power was used by the court in the Santa Barbara oil spill litigation to identify five separate classes of plaintiffs. See note 3 *supra* and accompanying text.

166. FED. R. CIV. P. 23(c)(4)(A); see notes 32-41 *supra* and accompanying text.

167. FED. R. CIV. P. 23(d)(4).

168. See text accompanying notes 42-57 *supra*.

169. See text accompanying notes 137-45 *supra*.

170. See text accompanying notes 151-59 *supra*.

171. Under any choice of law theory, only certain contacts between the litigants and a state are relevant for determining if that state's laws are applicable. See, e.g., note 45 *supra*. In a mass accident, most of the relevant contacts will be the same for all plaintiffs, just as all the questions of fact will be the same. See note 32 *supra*.

apply the law of differing states to their claims.

A plaintiff may have a strong interest in controlling his own suit either because separation of claims increases the probability of his claim remaining in a high-award district, or because his action has high financial or emotional value.¹⁷² Whether the desire to remain in a high-award district will discourage participation in a class action also reduces to whether all plaintiffs are residents of the same judicial district.¹⁷³ Moreover, when plaintiffs are co-residents, there will be at least one forum convenient for all of them, and in which it would be proper to concentrate the litigation.¹⁷⁴

As to the value of claims, a personal injury claim will usually be of higher financial value than a property damage claim, just as a wrongful death claim will usually be of higher financial and emotional value than a claim for lesser personal injuries. Whether a claim will be of such high financial and emotional value as to preclude joining a class action reduces to whether it is for personal injury rather than property damage, for wrongful death rather than a lesser harm.

Therefore, the two critical characteristics of mass accidents that make some less appropriate for class action treatment than others are whether the class members are of diverse citizenship and whether their claims are for high value personal injuries or wrongful death.

Neither characteristic, nor their combination, absolutely precludes a class action. A choice of law problem might be avoided by the use of special verdicts.¹⁷⁵ Plaintiffs' interests in quick and inexpensive litigation may outweigh their interest in individually controlling even large claims or the convenience of a home forum.¹⁷⁶ Claimants may feel confident that, under the particular circumstances of their case, their diversity will not affect the probability of remaining in the district in which they have chosen to concentrate their claims. Where either characteristic is present, however, a class action is less likely to be sought and less likely to be granted.

CONCLUSION

Some types of mass accidents are more likely to exhibit these critical characteristics than others. An airplane crash will more

One contact that can vary is the state of their domicile, residence, etc., and this variation might cause the law of different states to govern their claims. However, when mass accident plaintiffs are from the same state, all their relevant contacts with the various states whose law might be applied under different choice of law theories will be identical, so the same law should be applied to all of them.

172. See text accompanying notes 137-41 *supra*.

173. See text following note 141 *supra*.

174. See text accompanying notes 151-59 *supra*.

175. See text accompanying note 57 *supra*.

176. See text accompanying notes 139-43 *supra*.

likely involve diverse plaintiffs than a flood caused by a broken dam or an explosion. A shipboard fire or the collapse of a new building during an earthquake is more likely to result in claims for personal injury and wrongful death than is an oil spill.

These conclusions are supported by the two cases that have tried mass accidents as class actions. Both involved property damage, and hence comparatively low-value claims, and in both either plaintiffs were not diverse or the traditional choice of law rule was applied to diverse claims.¹⁷⁷ By contrast, the one mass accident case that denied a class action sought under revised rule 23 involved both wrongful death actions and diverse plaintiffs.¹⁷⁸

This does not mean that class actions are never appropriate for airplane crashes, the most typical mass accident with both negative characteristics. In *Hobbs v. Northeast Airlines*, a case that rejected a class action, the court of decision was not a proper forum for the class action, and 16 suits had already been filed in other jurisdictions. An air crash class action filed in a proper forum and supported by the class members could well be granted. The need for a more efficient procedural device for disposing of air crash claims is great and widely recognized, and there is no other likely candidate.

A class action is superior to any method presently available for the fair, efficient and economical trial of mass accident claims. Most mass accident cases meet all the requirements for class action treatment of federal rule 23(b)(3). Although diverse class members with large claims present obstacles to a class suit, they can be overcome if the courts, and the class members themselves, are willing.

David F. Boyle

177. *Hall v. Union Oil Co.*, Civil Action No. 69-889-ALS (C.D. Cal., filed May 8, 1969); *Masterson v. Union Oil Co.*, Civil Action No. 69-331-ALS (C.D. Cal., filed Feb. 19, 1969); *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969).

178. *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970).