NATIONWIDE, STATE LAW CLASS ACTIONS AND THE BEAUTY OF FEDERALISM

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> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[1]

INTRODUCTION

Since the late 1990s, nationwide, state law class actions have received a chilly reception in federal courts.[2] At first, this hostility was aimed at class actions involving novel, nationwide mass tort claims, such as tobacco and asbestos litigation. Recently, however, federal courts have even started to question the propriety of nationwide class actions involving consumer fraud claims—the exact genre of cases class actions were intended to address. Although federal courts have put forth many legal rationales for refusing to certify such claims, in essence their rulings represent a challenge to the inherent usefulness of class action litigation for these types of claims.

Instead of eliminating these class action claims, these efforts have ironically made them more lethal. In response to the chilly reception in federal courts, plaintiffs have simply migrated to more receptive state forums.[3] Filing their claims simultaneously in numerous, sympathetic state courts, plaintiffs have found success where they previously failed in federal court. Though commentators have decried

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *See, e.g.*, Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters*, 74 TUL. L. REV. 1709, 1709 (2000) ("Since 1995, federal courts have articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes.").

3. *Id*.

these forum shopping tactics[4] and the lax certification standards employed by many states,[5] efforts to enact a comprehensive solution have failed to date.[6]

This situation has left defendants in a bind. Facing the likely prospect of at least one state certifying a nationwide class, and absent reprieve from Congress or the U.S. Supreme Court, defendants have been forced to search for alternative methods of achieving closure and avoiding costly trials. A nationwide settlement class is one such solution. Though defendant corporations would obviously prefer to have class treatment denied all together, some defendants have concluded that, absent this option, a quick, final, and preclusive agreement might be the best that can be hoped for in this situation.

For class action settlements to have preclusive effect, however, a court must still certify the class; and after the Supreme Court's ruling in *Amchem Products, Inc. v. Windsor*,[7] under Federal Rule 23,[8] a settlement class must meet almost all of the same, strict certification standards required for trial classes.[9] *Amchem*'s effect has been to make settlement classes more difficult to certify in federal courts. *Amchem*, however, does not apply to state courts. Thus, the same

4. *See, e.g.*, Edwin Lamberth, Comment, *Injustice by Process: A Look at and Proposals for the Problems and Abuses of the Settlement Class Action*, 28 CUMB. L. REV. 149, 159–62 (1997–98) (claiming that cases such as *Cox v. Shell Oil*, Civ. A. No. 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995), represent a negative trend of forum shopping by class action counsel); Thomas Merton Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507, 514–15 (2000) (arguing that empirical evidence suggesting a pattern of forum shopping by plaintiffs' attorneys demonstrates the need for some federalization of class actions).

5. *See*, *e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 160 (2001) (suggesting that certain counties and states have become magnets for nationwide class action filings); Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1217–18 (2001) (arguing that one reason for the increasing trend of state courts certifying nationwide class actions is the desire of activist judges and plaintiffs' attorneys to regulate through litigation); Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1321–23 (2000) (stating that proponents of the Class Action Fairness Act often cite examples of lax enforcement of class action procedures in certain states as a rationale for the Act).

6. *See infra* notes 98–1108 and accompanying text.

7. 521 U.S. 591 (1997).

8. FED. R. CIV. P. 23. This Note incorporates the most recent amendments to Federal Rule 23, which went into effect in December 2003.

9. *Amchem*, 521 U.S. at 620–21. The only difference between trial and settlement class actions is that the latter do not have to meet the manageability requirement that applies to trial class actions, because settlement classes will never actually be tried in court.

defendants who have criticized state courts for their alleged abuse of the class action system are now also turning to state courts for assistance. Though the number of these cases is still small, this approach represents a growing trend.

As a result, state courts increasingly face an uneasy dilemma: whether to certify a nationwide class for settlement purposes when it is unclear that the class could be approved for trial purposes. *Talalai v. Cooper Tire & Rubber Co.*[10] provides a recent example of the manner in which state courts are attempting to resolve such a dilemma. The case arose from a plaintiffs' claim that Cooper Tire had knowingly sold and marketed defective tires to customers while taking efforts to hide these defects.[11] Upon reaching a settlement, the New Jersey Superior Court certified a nationwide class for settlement purposes,[12] even though it was unlikely that a federal court, and even perhaps a New Jersey state court, would have certified such a class for trial purposes.

The case's central significance lies in its symbolic representation of an emerging dilemma facing class action defendants and state courts: how best to provide finality and closure to nationwide, state law class action suits given that the federal courts are increasingly resistant to such claims and a national solution is still elusive. This issue has been generally underemphasized by commentators,[13] who instead highlight the negative aspects of these cases, such as the potential for forum shopping, and point the finger of blame at either conniving plaintiffs' attorneys or lax state court judges.[14] In contrast, this Note attempts to provide a more balanced analysis of the problem, placing these cases within the larger context from which they have emerged. It argues that *Cooper Tire* does not symbolize the failings of overambitious state courts or conniving plaintiffs, but rather the beauty of federalism. Failing to receive guidance from the federal level, state courts have, out of necessity, begun experimenting with their own class action rules and statutes. The Note suggests that the New Jersey Superior Court took advantage of its liberal, class action statute to provide needed finality to the case. In essence, the

10. No. L-008830.00 (N.J. Super. Ct. Law. Div. Sept. 13, 2002) [hereinafter Final Order] (granting final certification of class and final approval of settlement), *available at* http://www.judiciary.state.nj.us/mass-tort/coopertire/opinion_091702.pdf.

11. *Id.* at 3–4.

12. *Id.* at 2.

13. *See infra* notes 200–208 and accompanying text.

14. *See id*.

court stretched state law, if not departed from it entirely, to craft a solution to this pressing problem.

Part I provides an overview and summary of *Cooper Tire*. Part II places the case in its larger context, describing in detail the underlying tensions motivating the *Cooper Tire* court's decision. Part III analyzes the approach taken by the *Cooper Tire* court, exploring first the legal support for its holding, and second whether such a decision is secure from collateral attack. Finally, Part IV examines and highlights the lessons to be drawn from the case. It first addresses the criticisms that various commentators have expressed concerning the growing involvement of state courts with nationwide class actions, and then proposes a solution to these concerns that also accounts for the larger problem of achieving closure for class action defendants.

More specifically, the solution is the creation of a two-tiered class action rule under Federal Rule 23: one standard for trial classes, and a more lenient standard for settlement classes. To be sure, the problem of overlapping class actions both deserves and demands a comprehensive solution, and this may not be the most comprehensive one. However, although many solutions of great merit have been proposed,[15] they have not been, and may not be, adopted. Given the failures to adopt more comprehensive solutions, a two-tiered class action rule represents the best temporary solution to the problem.

I. DESCRIPTION OF *COOPER TIRE*

The *Cooper Tire* court's certification of the settlement class and approval of the settlement agreement were the concluding notes of a contentious litigation battle that had raged over the preceding twelve months. This litigation grew to include over one-hundred law firms and a multitude of parallel cases progressing in different jurisdictions.[16] When the dust cleared, New Jersey had, for its first time, certified a nationwide class for settlement-only purposes.[17] This Part tells the story of how and why it happened.

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15. *See infra* Part II.C.

16. Pls.' Mem. of Law in Supp. of Joint Mot. for Prelim. Approval of Proposed Class Action Settlement at 4, Talalai v. Cooper Tire & Rubber Co., No. L-008830.00 (N.J. Super. Ct. Law. Div. Sept. 13, 2002) (No. L-008830.00) [hereinafter Plaintiffs' Memo] (on file with the *Duke Law Journal*).

17. A New Jersey court has, however, certified a nationwide, state law class action for trial purposes. Kropinski v. Johnson & Johnson, No. A-3979-97T1, 1999 WL 33603132 (N.J. Super. Ct. App. Div. Jan. 7, 1999).

On October 27, 2000, the plaintiffs, on behalf of the owners of approximately 170 million tires manufactured by Cooper Tire, filed a nationwide class action lawsuit in the Superior Court of New Jersey, alleging violations of the New Jersey Consumer Fraud Act (NJCFA).[18] They claimed that Cooper Tire produced tires with adhesion problems and that, instead of discarding these defective tires, Cooper Tire covered up the defects and then knowingly sold and marketed these defective tires to its customers.[19] The claim was limited solely to consumer fraud allegations—it did not include products liability or personal injury claims.

Shortly thereafter, thirty-two similar statewide class actions were filed in other states.[20] Only the New Jersey class action was brought as a nationwide class action.[21] After Cooper Tire removed all thirty-three cases to federal court, the plaintiffs were successful in remanding their claims in five of the states—New Jersey, Michigan, Pennsylvania, Maine, and North Dakota.[22]

To handle the complexity of these multiple proceedings, the state and federal judges involved embarked on a coordination plan that was precedent-setting for its level of cooperation.[23] The federal claims were consolidated in the Southern District of Ohio under 28 U.S.C. § 1407, the Multidistrict Litigation Act (MDL).[24] The state court judges also agreed that a coordinated approach was the best way to handle these cases. Therefore, they decided to stay their proceedings and defer to New Jersey for resolution of the case.[25] New Jersey was

18. Final Order, *supra* note 10, at 3.

19. More specifically, the plaintiffs alleged that Cooper Tire (1) used improper ingredients in its tires, which led to the production of tires with adhesion problems, (2) improperly decided to sell these defective tires instead of discarding or rejecting them, (3) attempted to "awl" or otherwise eliminate the manifestation of these adhesion problems prior to sale, and (4) violated consumer fraud statutes throughout the country in its efforts to cover up these adhesion problems. *Id.* at 3–4. "Awling is a process in which a tire is punctured with an 'awl' or an ice pick to eliminate visible gas bubbles or blisters that result from hot, trapped gas." *Id.* at 3 n.2.

20. *Id.* at 4.

21. *Id*.

22. *Id.* at 5.

23. *See id*. at 5–6 ("Although this cooperative practice is alluded to in the *Manual for Complex Litigation* (Third Edition 2000), this appeared to be the first case to actually implement this level of interstate coordination."). The courts constantly shared information on the status of their claims and often held joint interstate telephone hearings for the resolution of discovery issues. *Id*. Further, the courts and parties hired a special master to coordinate the pretrial proceedings and serve as mediator. *Id.* at 6.

24. *Id*.

25. *Id.* at 6–7.

chosen because it was home to Cooper Tire's largest tire distribution center;[26] it also had a broad consumer fraud act.[27]

Despite this coordinated effort, the cost of the litigation quickly blossomed. Counsel costs for both parties, prior to the negotiation of the settlement, were estimated at $57 million per year.[28] As the litigation progressed and the legal costs continued to mount, pressure for settlement grew. By October 2001, the parties reached a settlement agreement that would cover all purchasers of Cooper Tire's steel-belted radial tires in the United States from January 1, 1985, to January 6, 2002.[29] Deciding to pursue this nationwide settlement in the state courts, on October 26, 2001, the parties submitted this agreement to the New Jersey Superior Court for preliminary approval.[30] Although the settlement class was a nationwide class, it excluded all consumers who had sustained personal injury or property damage from the defective tires.[31]

The proposed settlement comprised three parts: an enhanced warranty program, an enhanced finishing inspection program, and a consumer education program.[32] The enhanced warranty program stated that the settlement class members whose tires incurred an "adjustable separation"[33] could either receive a replacement tire at no cost or cash reimbursement for the faulty tires.[34] The enhanced finishing program was designed as an overinspection program to prevent defective tires from reaching consumers again.[35] Finally, the

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26. *Id.* at 2.

27. *Id.* at 7.

28. *Id.* at 56.

29. The potential size of the class was estimated at 42,500,000. *Id.* at 17.

30. To facilitate the New Jersey court's settlement of the case, the federal court to which the federal claims had been transferred stayed its proceedings. *Id.* at 8–9.

31. *Id.* at 16.

32. *Id*. The settlement also included a resolution of counsel fees. *Id*.

33. An adjustable separation means "an adjustable condition determined by and in accordance with [Cooper Tire's] standard adjustment policies, procedures and manuals." *Id.* at 20 n.7.

34. *Id.* at 22. This enhanced warranty program had an estimated value of $6 to $10 per person and thus represented a cost to Cooper Tire of approximately $1.2 billion to $1.7 billion. *Id.* at 23–25. Further, it was estimated that Cooper Tire's cost of replacing the defective tires could exceed $3 billion. *Id.* at 25–26.

35. Specifically, Cooper Tire agreed to implement monthly inspections of its plants, a physical inspection process for its tires, metering of tires to tire inspectors, and other procedures for ensuring the quality of its tires. *Id.* at 16–18. Further, Cooper Tire reaffirmed that awl venting is no longer an approved procedure for the repair of inner liner blisters on cured tires. *Id.* at 19.

consumer education program required Cooper Tire to take measures to educate the public about tire maintenance, proper actions to be taken in the event of separation, and proper troubleshooting.[36]

In return for these commitments, the settlement agreement provided Cooper Tire with a release from future claims by all class subscribers.[37] Specifically, the release stated that all class members who did not opt out of the settlement would be precluded from bringing any claim—whether under state or federal law—based on the consumer fraud claim in question.[38] The release did not preclude class members from bringing future suits for personal injuries or property damage resulting from the defective tires.[39]

Before reaching the question of certification, the *Cooper Tire* court addressed several threshold issues. First, it held that New Jersey was an appropriate forum because the defendants had agreed to it,[40] Cooper Tire had its largest distribution center in New Jersey and did significant amounts of business there,[41] the court found no evidence of any material conflict between New Jersey's consumer protection statutes and similar laws in other states,[42] and any impropriety was cured since out-of-state class members could opt out of the class.[43] Second, based upon the U.S. Supreme Court case *Phillips Petroleum Co. v. Shutts*,[44] the court held that there was "no question that this court has constitutional authority to adjudicate a nationwide

36. *Id.* at 27–28. Specifically, Cooper Tire was required to set up a telephone helpline, a website, and point-of-purchase materials information. *Id*.

37. *Id.* at 30.

38. *Id*.

39. *Id*.

40. *Id.* at 34.

41. *Id*.

42. *Id*. New Jersey employs a "governmental interest analysis" for choice-of-law determinations, which "requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation." *Id.* at 33 (quoting Gantes v. Kason Corp., 679 A.2d 106, 109 (N.J. 1996)). A choice-of-law question does not arise, however, if the court concludes that no actual conflict exists between the law of the forum state and the laws of other jurisdictions. Here, the court concluded both that New Jersey had the greatest interest in resolving this particular issue *and* that no significant conflict existed between the forum state and the laws of other jurisdictions. *Id.* at 34.

43. *Id*.

44. 472 U.S. 797 (1985). The court emphasized the *Shutts* opinion in its Final Order. Final Order, *supra* note 10, at 35 (citing *Shutts*, 472 U.S. at 811–12).

consumer fraud class action settlement, as long as due process requirements are satisfied."[45]

Turning to the issue of certification, the *Cooper Tire* court found certification to be proper. First, it emphasized New Jersey's liberal granting of class certification in cases involving consumer fraud claims.[46] Such treatment of consumer fraud claims is justified because these cases "are the very type of actions for which class certification is 'particularly appropriate.'"[47] Second, it applied the class certification standards set forth in New Jersey's class action rule and found certification to be appropriate.[48] New Jersey's class action rule contains the same basic requirements as those found in Federal Rule 23.[49] Thus, to certify a class, a court must find that the class satisfies the following four basic requirements: (1) numerosity of possible plaintiffs, (2) commonality of legal or factual issues, (3) typicality, and (4) adequacy of representation of absent class members.[50] Additionally, for money damages claims, two additional requirements must be met: (1) predominance of issues common to the class over individual issues and (2) superiority of the class action mechanism as a tool for solving the dispute.[51]

Analyzing each requirement in order, the court found such requirements satisfied, and thus it certified the class. Most relevant to the scope of this Note is the court's analysis of the predominance and superiority requirements. In regards to the predominance requirement, the court held, without further explanation, that common issues predominated over any possible individual issues.[52]

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45. Talalai v. Cooper Tire & Rubber Co., MID-L-8839-00 MT, at 9 (N.J. Super. Ct. Law Div. Oct. 30, 2001) [hereinafter Preliminary Certification] (citing, in support of this proposition, the New Jersey federal district court's order remanding the case back to the state court).

46. *Id.* at 7–8, ("As stated by the Appellate Division, '[f]or nearly thirty years, our highest court has instructed trial courts to liberally allow class actions involving allegations of consumer fraud.'") (alteration in original) (quoting Varacallo v. Mass. Mut. Life Ins. Co., 752 A.2d 807, 814 (N.J. Super. Ct. App. Div. 2000)).

47. *Id.* at 8 (quoting Delgozzo v. Kenny, 628 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1993)).

48. Final Order, *supra* note 10, at 52. New Jersey's class action certification standards—enumerated in New Jersey Court Rule 4:32—are modeled upon Rule 23 of the Federal Rules of Civil Procedure and thus are identical to the federal rule.

49. N.J. R. CIV. P. 4:32-1.

50. N.J. R. CIV. P. 4:32-1(a).

51. N.J. R. CIV. P. 4:32-1(b)(3). For a more expanded discussion of these class action certification requirements on the federal level, see 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.1 (4th ed. 2002).

52. Preliminary Certification, *supra* note 45, at 15.

Turning to the superiority element, the benefits of a class action in this case were found to clearly outweigh any problems it would create. Emphasizing that this was a prototypical negative value claim,[53] the court stressed that "class actions are particularly useful where it is unlikely that individual claimants will file an action and the rights of the members of the class would not be vindicated if the class action procedure is not used."[54]

Having certified the settlement class, the court then proceeded to approve the settlement agreement preliminarily, finding that "[n]either plaintiffs nor the court can guarantee a better result for the class if this case is tried."[55] On January 29, 2002, a fairness hearing was held, at which twenty-six persons filed objections to the settlement agreement.[56] However, only a few months later, all those who had objected through counsel withdrew their objections, leaving only seven *pro se* objectors.[57] Finally, on September 13, 2002, the court issued its final approval of the settlement agreement, effectively concluding the litigation.[58]

II. FRAMING *COOPER TIRE* IN ITS LARGER CONTEXT

To understand fully the importance of *Cooper Tire*, one must step back to see the case in its larger context, recognizing the unspoken challenges and issues that appear to be driving the court's ruling. On its face, this appears to be nothing more than a state court certifying a settlement class. However, this case can also be seen as a state experimenting with, and perhaps stretching, its own laws to provide closure to the parties involved and a solution to a problem created by federal inaction. Although many commentators have criticized such experiments, when analyzed in this larger context, a

53. A negative value claim is one in which the value of the claim to the plaintiff is so small that it would not be worthwhile for the plaintiff to bring the case individually: it would only make sense to bring the case as an aggregated class action. 2 CONTE & NEWBERG, *supra* note 51, § 5.7.

54. Preliminary Certification, *supra* note 45, at 15.

55. *Id.* at 18.

56. Final Order, *supra* note 10, at 37–40. Four main categories of objections were raised: (1) the absence of a settlement provision regarding immediate inspection and/or replacement of tires, (2) the small likelihood that the defendant would comply with the terms of the settlement, (3) the small value provided to class members in the settlement, and (4) the gross disproportionality of attorneys' fees relative to the relief afforded to class members. *Id.* at 40.

57. *Id.* at 39.

58. *Id.* at 2. The remaining objectors did not appeal the settlement.

different story emerges. This Part explores the larger context in which *Cooper Tire* was decided and explains the difficulties facing the parties and the state court alike.

A. Growing Hostility to Class Actions in Federal Courts

Underlying the *Cooper Tire* court's ruling has been the federal courts' recent attack on the application of the class action mechanism, especially in the context of nationwide, state law claims.[59] Class actions—as we know them today—were created in 1966 and are embodied in Rule 23 of the Federal Rules of Civil Procedure.[60] An underlying rationale for the class action device has long been its ability to provide relief for negative value claims.[61] Negative value claims, such as those brought in *Cooper Tire*, involve situations in which a defendant has allegedly inflicted a small injury upon a large number of persons. Absent a class action mechanism, it is unlikely that these individuals would bring suit for such injuries because individuals' litigation costs would exceed the expected damage award. Thus, class actions were created, in part, to make it possible for negative value suits to be aggregated, thereby making such claims more economically feasible.

Despite intense early opposition to the class action mechanism,[62] by the 1980s, Rule 23 had been generally accepted and was routinely applied by the federal courts in an increasingly broad range of areas.[63]

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59. This Note focuses on nationwide, mass tort, products liability, and consumer fraud class action claims. It does not discuss the application of class actions to other types of claims, such as securities litigation or antitrust litigation, where courts may be more receptive to the use of the class action mechanism. It also does not focus on class actions that are brought solely on a statewide basis.

60. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 12 (2000).

61. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) ("The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise."); Ryan P. Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837 (2000) (noting that one of the three primary goals of the class action mechanism is to "distribute greater justice by establishing a collective action vehicle for small plaintiffs lacking incentives to litigate on their own because the costs of litigation outweigh the potential value of their claims").

62. *See* HENSLER ET AL., *supra* note 60, at 15 (describing the early opposition to the revised Rule 23 and noting that "[f]rom the earliest stage of its drafting, the revised Rule 23 was enmeshed in controversy").

63. *See id.* at 22 (noting that by the 1980s "the controversy over class actions seemed to die down" and "[c]lass action practice . . . entered a period of relative tranquillity"); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action*

For example, by the mid-1980s, federal courts were using the class action mechanism for mass tort claims.[64] Strong evidence suggests that the drafters of Rule 23 did not fully anticipate the application of class actions to such claims, fearing that the individual questions raised by these personal injury claims would overwhelm the common questions of fact and law.[65] However, as the number of mass tort cases grew in the 1980s, some federal courts embraced the class action procedure as a means of handling these massive cases.[66] Some of the best known of these cases involved asbestos,[67] Agent Orange,[68] and Dalkon Shield.[69]

By the mid-1990s, however, the federal courts had become increasingly resistant to certifying nationwide, mass tort class actions and were actively attempting to restrict their use in this context, if not eliminate them entirely. Emphasizing the difficulty of resolving complex choice-of-law issues and stressing the highly individualistic factual and legal determinations on which these cases often turn, federal courts often refused to certify such classes.[70]

Problem," 92 HARV. L. REV. 664, 679–80 (1979) (arguing that by 1973, a period of "sophistication, restraint, and stabilization in class action practice" had taken hold).

64. Generally speaking, mass torts include situations where "consumers of drugs and medical devices, and workers and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with these products." HENSLER ET AL., *supra* note 60, at 22.

65. *See, e.g.*, Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1569 (2000) ("[T]he advisory committee clearly did not envision the routine use of class actions in mass tort litigation."). Though the drafters of the revised Rule 23 did not address mass torts in the Rule's text, the committee stated that the class action mechanism would most often not be appropriate in the context of mass accidents "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." Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966) (Advisory Committee's note).

66. *See* Darren M. Franklin, Note, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat or Just a Phantom Menace?*, 53 STAN. L. REV. 163, 170 (2000) ("From the mid-1980s through the mid-1990s, however, courts began to embrace the class action as a means to dispose of duplicative mass tort litigation.").

67. *See, e.g.*, Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (affirming a district court order certifying a class in Texas asbestos litigation).

68. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (affirming a district court order certifying a Rule 23(b)(3) class in Agent Orange Litigation).

69. *See In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (affirming a class action suit against the Dalkon Shield product liability insurer in litigation related to the A.H. Robins Chapter 11 proceeding).

70. For instance, in *In re American Medical System, Inc.*, 75 F.3d 1069 (6th Cir. 1996), the Sixth Circuit ordered the district court to decertify a nationwide class action against two different manufacturers of inflatable penile prostheses. *Id.* at 1074. Taking note of a "national trend to deny class certification in drug or medical product liability/personal injury cases," *id.* at 1089 & n.24, the court denied certification on the ground that "in medical device products

The hostility toward class actions has not been limited to nationwide, mass tort claims however. Rather, several recent rulings illustrate that federal courts have become more resistant to certifying classes involving nationwide, state law negative value claims—claims for which class actions were intended. For instance, in *Bridgestone/Firestone*,[71] the Seventh Circuit decertified a nationwide class of sport utility vehicle owners whose cars were equipped with defective tires. The class, as in *Cooper Tire*, was limited to those persons whose tires had *not* failed and who were only seeking compensation for the *risk* of failure, as reflected in the diminished resale value of the vehicles and mental stress.[72] Thus, this was a consumer fraud claim, *not* a personal injury claim. The Seventh Circuit, with Judge Easterbrook writing for the panel, ordered decertification of the class, employing similar arguments to those used in cases decertifying mass tort claims—predominance, superiority, and choice-of-law concerns.[73] For instance, noting the choice-of-law issues, the court held that "[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."[74]

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liability litigation . . . the factual and legal issues often *do* differ dramatically from individual to individual," *id*. at 1084. Further, the court found that individual trials would be superior to a nationwide class given the complexity of the claim. *Id*. at 1085. Using similar reasoning, in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit decertified a nationwide class of cigarette smokers because the trial court "failed to consider how variations in state law affect predominance and superiority" under Rule 23. *Id*. at 740. The court concluded that "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Id*. at 741. *See also In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 779 (3d Cir. 1995) (reversing a district court's certification of a nationwide settlement class and ordering the court on remand to focus on the "commonality and typicality problems" with the class and to "determine whether the national scope of the class litigation and plethora of defenses available in different jurisdictions prevent these requirements from being met"); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1295–1302 (7th Cir. 1995) (ordering the district court to decertify a nationwide class action against the manufacturer of blood solids due to choice of law concerns and a determination that the class action procedure was not the fairest and most efficient method for trying such a case).

71. *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002).

72. *Id*. at 1014–15.

73. *Id*. at 1015.

74. *Id*. at 1018. Of course, a federal court could, theoretically, bifurcate such a claim and create a two-phase trial. Phase I would try the issues of fact common to the entire class (e.g., defendant's negligence). Phase II would then try, in individual trials, all of the issues and defenses particular to each individual (e.g., causation, injury, reliance, etc.). This approach has been adopted by many, including Judge Easterbrook, in employment discrimination cases. *See* Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1865 (2000) (discussing Easterbrook's practice of

This hostility toward nationwide, consumer fraud class action claims does not appear to be limited to the *Bridgestone/Firestone* decision. Even more recently, using almost identical arguments to those in *Bridgestone/Firestone*, the Southern District of New York refused to certify a nationwide class of individuals who had consumed Rezulin, a drug intended to combat diabetes.[75] As in *Bridgestone/Firestone*, the plaintiffs framed the issue as one of consumer fraud, rather than personal injury, and focused their claims for damages on restitution of the drug's price rather than actual injuries suffered.[76] The *Rezulin* court did not accept this argument, finding that "[t]he pretense that there are no damage claims asserted on behalf of plaintiffs and class members [was] inconsistent with the pleading."[77] However, comparing this case to *Bridgestone/Firestone*, the court held that, even if viewed as a consumer fraud claim, the proposed class failed the predominance and superiority requirements.[78]

Taken as a whole, these cases represent, at a minimum, a challenge to the use of the class action procedure for nationwide, state law claims. However, they can also be read as a larger challenge to the concept of class actions generally. Though the courts have focused on specific reasons for refusing to certify the various cases, their comments reflect larger and deeper misgivings about the appropriateness of the class action concept, especially on this large, nationwide scale. For instance, in *In re Rhone-Poulenc Rorer,* Judge Posner expressed grave concerns that "[o]ne jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand."[79] According to Judge Posner, this should "not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers."[80] Judge Easterbrook in *Bridgestone/Firestone* was even more

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bifurcating employment discrimination classes). Likewise, this approach has been employed by some courts in products liability cases. *See* Elizabeth J. Cabraser, *Products Liability Class Actions: Essential Jurisprudence*, *in* PRODUCTS LIABILITY: ALI-ABA COURSE OF STUDY 213, 238–42 (2003) (discussing the trend of bifurcating products liability class actions). However, this approach is time intensive, and it has not been adopted by a majority of federal courts for these nationwide, mass tort or state law class actions.

75. *In re* Rezulin Prod. Liab. Litig., 210 F.R.D. 61 (S.D.N.Y. 2002).

76. *Id*. at 62.

77. *Id.* at 68.

78. *Id.* at 71.

79. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

80. *Id*.

explicit in condemning the underlying rationales of class actions. He asserted that a class action model that consolidates the trying of such cases would suppress information vital to accurate resolution and that any benefits of such a model would be "elusive."[81] He argued instead for a market model: "Markets instead use diversified decisionmaking to supply and evaluate information. . . .This method looks 'inefficient' from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. When courts think of efficiency, they should think of market models rather than central planning models."[82] As one author notes, these cases "serve[] as a bookend to the class action litigation over the previous twenty years, resurrecting . . . the dogged dedication to the individual case-by-case adjudication model as the only means of securing fair, efficient case resolution."[83] Further, "[f]or the most part, federal trial and appellate courts alike have taken cues from these and other recent opinions that seem to decline class certification based not so much on the language of Federal Rule 23, but on a palpable judicial antipathy toward the class action device."[84]

These recent decisions are symbolic of a larger and deeper undercurrent of dissatisfaction with the underlying concept of the class action mechanism. For instance, in 1996, the Federal Civil Rules Advisory Committee proposed a new factor (F) to be added to Federal Rule 23(b)(3), which would require judges entertaining a class certification motion to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[85] Support for this proposal was spurred by several reported cases where large class actions resulted in little or no gain for the actual class members. In the most notorious of the cases, *Kamilewicz v. Bank of Boston Corp.*,[86] absent class members actually lost money as a result of the approved settlement.[87] This proposed factor (F),

81. *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002).

82. *Id*.

83. Danas, *supra* note 5, at 1318.

84. *Id.* at 1319.

85. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 559 (1996).

86. 92 F.3d 506 (7th Cir. 1996).

87. The suit challenged the manner in which the bank calculated the amount of surplus each member of the class was required to maintain in their escrow accounts. *Id.* at 508. While the settlement approved by the state court resulted in an award of up to $8.76 for class members, their award was reduced by up to $90 as a result of the attorneys' fees awarded to the

therefore, represented an attack on one of the central, underlying rationales for the class action procedure—the small negative value claims. Although the Advisory Committee eventually tabled this proposal,[88] opponents of the class action procedure continue to advance these arguments today.[89] Thus, the combination of these cases and reform efforts seem to bespeak an unease and hostility to the concepts justifying the class action mechanism as a whole; at a minimum, they highlight the federal courts' recent efforts to restrict the use of class actions in nationwide, state law claims.

B. Migration of Nationwide Class Actions to State Courts

The federal courts' growing hostility to this genre of class actions, however, was not a death knell for these claims. Instead, plaintiffs have simply started filing their nationwide class actions in state courts.[90] Although it was unclear at first whether a state court's certification of a nationwide class inherently violated due process principles, the Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*[91] opened the door to such cases. In *Shutts*, the Supreme Court held that state courts could certify a multistate class action and assert jurisdiction over absent class members so long as certain minimum due process requirements were met.[92] Further, a state could properly apply its own laws to the entire multistate class, so long as the state had "significant contact or significant aggregation of contacts, creating state interests, such that choice . . . is neither arbitrary nor fundamentally unfair."[93]

As a result, the 1990s saw a massive increase in the number of nationwide class actions filed in state court. According to one study, "class action activity has grown dramatically [since the mid 1990s]"

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plaintiffs' attorneys. *Id.* at 508–09. The result was a net loss of money taken from their bank accounts.

88. Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 141–42 (Spring/Summer 2001).

89. *See* H.R. REP. NO. 107-130, at 8 (2002) (citing the Bank of Boston case as a prime example justifying support for the passage of the Class Action Fairness Act of 2002, a bill that would essentially federalize nationwide class actions).

90. *See infra* notes 94–95 and accompanying text.

91. 472 U.S. 797 (1985).

92. *Id.* at 811–12.

93. *Id.* at 818.

and the growth was "concentrated in the state courts."[94] Another study indicated that while federal court class actions increased by 340 percent during the 1990s, state court class action filings increased 1,315 percent.[95] Not only were plaintiffs moving to state courts in greater numbers, but they were finding success there. As plaintiffs filed their nationwide claims in states with lax class action standards, classes often got certified when they would have failed in federal courts.[96]

C. The Dilemma

This chain of events has created a problem for class action defendants in nationwide mass tort or consumer fraud cases. Often, plaintiffs will now file class actions in several different states. Accordingly, the likelihood that at least one of the states will certify the class is enhanced. Further, defendants are oftentimes unable to remove these claims to federal courts because the claims involve state law claims (instead of federal questions), and diversity jurisdiction usually does not apply.[97] As a result, defendants in these cases are left with the unappealing prospect of facing overlapping class actions.

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94. DEBORAH HENSLER ET AL., PRELIMINARY RESULTS OF CLASS ACTION LITIGATION 15 (1997), *quoted in* Beisner & Miller, *supra* note 5, at 157.

95. *Analysis: Class Action Litigation—A Federalist Society Survey, Part II*, CLASS ACTION WATCH (Federalist Society, Washington D.C.), Spring 1999, at 3 fig.2, *available at* http://www.fed-soc.org/Publications/classactionwatch/classaction1-2.pdf, *noted in* Beisner & Miller, *supra* note 5, at 157.

96. As the congressional report accompanying the Class Action Fairness Act of 2002 asserts:

> Although class action certification standards do not differ radically throughout America's Federal and State courts, certain county courts in the State systems have shown very lax attitudes towards class certification. . . . Indeed, the record contains examples of cases in which Federal Courts denied class certification based on due process concerns, but State courts subsequently certified classes anyway.

H.R. Rep. No. 107-370, at 15–16 (2002). *In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), is a prime example of such a case. In this case, a Louisiana state court certified a nationwide class for settlement purposes even after the Texas Supreme Court and the Third Circuit respectively refused to certify an identical claim. *See* White v. General Motors Corp., 718 So. 2d 480, 484 (La. Ct. App. 1998) (certifying the class); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 465–70 (describing the General Motors case).

97. Diversity jurisdiction often does not apply because the Supreme Court has determined that the criteria stated in 28 U.S.C. § 1332 are met only if all of the class members are seeking damages in excess of the statutory minimum—$75,000. Zahn v. Int'l Paper Co., 414 U.S. 291, 293 (1973); *see also* Danas, *supra* note 5, at 1332. There is currently an entrenched circuit split among the federal courts of appeals as to whether *Zahn* has been overruled by the adoption of the supplemental jurisdiction statute, 28 U.S.C. § 1367. *See* Stromborg Metal Works, Inc. v.

In response, class action defendants have pushed several proposals in recent years that would address this problem. However, to date, none of these efforts have been successful. Most prominently, legislation has been introduced in Congress that would amend 28 U.S.C. § 1332 to expand federal diversity jurisdiction over interstate class actions. The Class Action Fairness Act of 2003 is the most recent example.[98] The Act would permit defendants to remove state court class actions to federal courts when there is minimal diversity (that is, when any member of the proposed class is a citizen of a state different from any defendant) and the aggregate amount in controversy among all class members exceeds $5 million.[99] Though the United States House of Representatives approved the bill by a vote of 253-170 on June 12, 2003,[100] the bill appears stalled in the Senate. On October 22, 2003, supporters of the bill failed to defeat a filibuster by one vote,

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Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996) (holding that section 1367 did overrule *Zahn* and thus that if at least one named plaintiff meets the amount-in-controversy requirement, that is sufficient to satisfy the requirement); *In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) (same); Gibson v. Chrysler Corp., 261 F.3d 927, 933–34 (9th Cir. 2000) (same); Leonhardt v. W. Sugar Co., 160 F.3d 631, 641 (10th Cir. 1998) (disagreeing with the Fifth and Seventh Circuits and holding that section 1367 *does not* overrule the *Zahn* requirement that each individual class member must meet the amount in controversy requirement); Meritcare Inc., v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218 (3d Cir. 1999) (same). The Supreme Court granted certiorari on this issue in *In re Abbott Labs.*, but after the recusal of one Justice, it affirmed without opinion by an equally divided Court. Free v. Abbott Labs., 529 U.S. 333 (2000). Thus, the matter has yet to be resolved. Regardless of the outcome of this string of cases, removal of state law class actions will continue to be difficult to accomplish, because diversity jurisdiction will not exist if a named plaintiff is a citizen of the same state as the defendant, regardless of the citizenship of the rest of the class. Snyder v. Harris, 394 U.S. 332, 340 (1969). Therefore, class action plaintiffs are easily able to avoid diversity jurisdiction simply by naming a nondiverse plaintiff as the class representative.

98. In the House, the Class Action Fairness Act of 2003 is listed as H.R. 1115, 108th Cong. (2003). In the Senate, the bill has been introduced several times, first as S. 274, 108th Cong. (2003), and later as S. 1751, 108th Cong. (2003). The discussion here will refer to the most recent form of the bill.

99. H.R. 1115 § 4(a)(2); S. 1751 § 4(a)(2) (2003). However, to ensure that the new rule would not apply to truly local cases, the bill exempts from its reach (1) class actions in which two-thirds or more members of the proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed, (2) class actions involving fewer than 100 class members, and (3) cases in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief. H.R. 1115 § 4(a)(4); S. 1751 § 4(a)(4). Further, it gives the district court discretion, based upon several enumerated factors, whether to assert jurisdiction over class actions in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. H.R. 1115 § 4(a)(3); S. 1751 § 4(a)(3).

100. *House Bill Aims to Limit Awards in Class Actions*, CHI. TRIB., June 13, 2003, at C2.

losing their cloture motion on a vote of 59-39.[101] Previous attempts at legislative reform have met similar fates.[102]

With success in Congress elusive, the Advisory Committee on Civil Rules has considered other, more modest reform efforts, consisting of proposed rule changes to the federal rules of civil procedure.[103] These proposed rule changes, however, failed to win approval from the Civil Rules Advisory Committee.[104]

Finally, other proposals have called on states voluntarily to enact uniform legislation that would permit interstate transfer and consolidation of overlapping class actions.[105] Although this would not provide a complete solution to class action defendants, it would

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101. Helen Dewar, *GOP is Blocked on Court Award Limits*, WASH. POST, Oct. 23, 2003, at A4. Despite this defeat, there are ongoing efforts to win passage of this bill before the end of the 108th Congress. To date, however, these efforts have not been successful.

102. Similar bills were introduced in the 105th, 106th, and 107th Congresses as well. Though support for these bills has consistently grown over the years, the efforts to pass such a bill have fallen short each year, usually stalling in the Senate. *See* Class Action Fairness Act of 2001, H.R. 2341, 107th Cong. (2001) (passed House by vote of 233-190, but never passed in Senate); Class Action Fairness Act of 2001, S. 1712, 107th Cong. (2001) (never made it out of committee); Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999) (reported out of Judiciary Committee, but never voted on by full Senate); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999) (passed House of Representatives by 222-207 vote); Judicial Reform Act of 1998, H.R. 1252, 105th Cong. (1998) (passed House of Representatives but never made it out of Committee in Senate); Class Action Fairness Act of 1998, S. 2083, 105th Cong. (1998) (never made it out of committee). The day is drawing near when such a bill may have the necessary support to win passage through the House of Representatives and Senate, but that day is not here quite yet.

103. For instance, one proposal would have given district court judges discretion to halt parallel class litigation in state court if they concluded, on a motion to certify or decertify the federal class, that class litigation is inappropriate under federal standards. *See* Brian D. Boyle, *Parallel State and Federal Court Class Actions*, 31 THE BRIEF 32, 38 (2002) (discussing the proposed Rule 23(c)(1)(D)). The proposed language reads:

> A court that refuses to certify—or decertifies—a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.

Id. A different proposal would have allowed district courts to halt competing state court class action litigation before it ever started—by enjoining purported class members from commencing any such litigation. *See id.* at 38–39 (discussing Proposed Rule 23(g)).

104. *Id*. It is true that amendments to Rule 23 regarding settlement class actions have recently been approved and went into effect in December 2003. However, these amendments do not address problems of overlapping class actions or the question of what standards or requirements should be applied to certifying settlement classes. Rather, the amendments focused on amending the process for reviewing settlement classes to provide more procedural protection to absent parties. Thus, these recent amendments are not relevant to this Note's topic.

105. *See* Wasserman, *supra* note 96, at 534 (discussing these reform efforts).

provide potential relief from multiple state court claims proceeding simultaneously. Both the National Conference of Commissioners on Uniform State Laws[106] and the reporters of the ALI Complex Litigation Project[107] have proposed such measures. However, neither of these proposals to date has been adopted by the states.[108]

In mentioning these various reform efforts, this Note does not attempt to critique the merits of these proposals, many of which are very appealing. This Note mentions them solely to demonstrate the dilemma that class action mass tort, product liability, and consumer fraud defendants are currently facing and the current political impossibility of adopting any of these proposed solutions.

D. A Measured Response to the Problem

In light of the failure of these and many other proposals, class action defendants, and the state courts in which these nationwide claims are filed, have been forced to seek alternative avenues for bringing finality and closure to such claims. One such solution, as demonstrated by *Cooper Tire*, has been to seek certification of a class for settlement purposes. Though it is not an ideal or long-term solution, defendants have started to embrace this course as the best option given the circumstances.[109]

Under federal law, in *Amchem Products, Inc. v. Windsor*,[110] the Supreme Court affirmed the use of settlement classes under Rule

106. *See* UNIF. TRANSFER OF LITIG. ACT § 103, 14 U.L.A. 191–94, 201 (Supp. 1999) ("A . . . court . . . may transfer all or part of the action to a court . . . which consents to the transfer and can exercise jurisdiction over the matters transferred.").

107. *See* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 4.02, at 201 (1994) (recommending the "formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act").

108. *See* Wasserman, *supra* note 96, at 534 ("Currently, no vehicle exists for transferring a case from the court of one state to the court of another state, making consolidation of state/state dueling class actions pending in different states impossible.").

109. *See* 4 CONTE & NEWBERG, *supra* note 51, § 11:1 (noting that the complexities and uncertainties of class litigation have sometimes made settlement of these class actions an attractive option to defendants, because a settlement would have the effect of bringing closure and finality, through the application of res judicata, to the issue); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 601–02 (1997) (noting the trend of defendants seeking to use class action settlements as a means of achieving "global peace"); Wendy S. White, *Creative Uses of State Class Actions*, 612 PLI/Lit 379, 381 (1999) (noting the significant increase in the number of mass tort settlement classes filed in state courts following *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

110. 521 U.S. 591 (1997).

23.[111] However, the court placed severe restrictions on their use, holding that settlement classes must meet the same requirements for certification as if the class were being approved for trial.[112] In fact, the Court stated that Rule 23's requirements "demand undiluted, even heightened, attention in the settlement context."[113] The sole exception to this rule, the Court stated, was that courts, when confronted with a request for a settlement-only class, "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."[114] Thus, *Amchem* was a mixed verdict for settlement classes. Although it endorsed the concept of settlement classes and created a somewhat more relaxed standard for their certification by holding that the manageability of the class at trial need not be considered by a court, it also ruled that settlement classes must satisfy all the remaining requirements for class certification, such as commonality and superiority, on an "undiluted, even heightened" standard.

The result of *Amchem*'s mixed verdict has been to restrict severely the availability of the settlement class as a tool for bringing finality and closure to class action claims in federal courts.[115] Given the federal courts' recent hostility to the class action mechanism in the mass tort, products liability, and consumer fraud context, many federal courts have latched onto the "heightened attention" language of *Amchem* to justify decisions to refuse certification to nationwide, mass tort settlement classes; the result is that federal settlement classes of this genre often encounter significant disfavor.[116]

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111. *See id.* at 618 (noting that "all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes").

112. *Id.* at 620–21.

113. *Id.* at 620.

114. *Id*.

115. *See* John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims After* Amchem Products, Inc. v. Windsor, 33 TORT & INS. L.J. 905, 914 (1998) (reviewing federal court decisions following *Amchem* and concluding that "the decisions to date . . . suggest that the class certification issue will receive greater scrutiny than was the case prior to *Amchem*"); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1999 (1999) (noting that, although settlements classes have remained a viable approach to resolving mass tort litigation after *Amchem*, the ruling has made the application of settlement classes much more difficult for the large mass tort matters).

116. *See, e.g.*, Clement v. Am. Honda Fin. Corp., 176 F.R.D. 15, 21–24 (D. Conn. 1997) (refusing to certify nationwide class of plaintiffs who had alleged violation of the Consumer Leasing Act and state unfair trade practices laws and making special note of the heightened attention required by *Amchem*); Laughman v. Wells Fargo Leasing Corp., No. 96 C 925, 1997 WL 567800, *4–5 (N.D. Ill. Sept. 2, 1997) (refusing to certify a settlement-only class in a

Amchem, however, does not apply to state court classes.[117] Therefore, class action defendants seeking finality and resolution of these pending nationwide claims have started to turn to state courts for certification of nationwide settlement classes.[118] And some state courts, seeking a way to bring closure to these claims, have begun to embrace the nationwide settlement class.

For instance, in *Cox v. Shell Oil Co.*,[119] a pre-*Amchem* case involving leaky polybutylene pipe installed in hundreds of thousands of homes, a Tennessee court certified a settlement-only class in order to bring closure to longstanding litigation. As in *Cooper Tire*, several nearly identical class actions had been filed in various state courts, including Alabama, California, Tennessee, and Texas.[120] After a Texas court refused to certify a settlement class, the Alabama, California, and Tennessee state judges worked in tandem to push the case towards a global settlement.[121] In its opinion certifying the class and approving settlement, the Tennessee court suggested that the claims contained legal issues that might generally make litigation of the claims difficult, if not impossible.[122] However, the court approved the

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consumer fraud case and making reference to *Amchem*'s insistence on heightened scrutiny for certification of such classes); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 377–78 (1998) (noting that some courts have seized upon *Amchem* as a justification to deny class certification). Of course, the settlement class does continue to remain an option post-*Amchem*, and federal courts do continue to certify some settlement classes. *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019–24 (1998) (upholding certification of nationwide settlement class after thorough analysis of the *Amchem* decision). However, *Amchem*'s language calling for "heightened" scrutiny of settlement class certification motions has made it more difficult to receive certification of such classes in many federal courts.

117. *See Amchem*, 521 U.S. at 619 (deciding specifically the role settlement plays under Federal Rule 23 in determining the propriety of class certification).

118. *See* Cabraser, *supra* note 116, at 378 (noting the migration of state law class actions to the state courts and arguing that the "migration has in large part been one of necessity, as federal courts have denied certification or decertified classes that in earlier practice would have gone forward to the federal system"). Similarly, Professor McGovern notes that:

> The class action investment engine and the defendants' drive for global peace are still moving apace, but on different tracks. Class actions rejected for trial in federal courts are now being filed in state courts—and proposed class action settlements rejected by federal courts are being refiled in state courts.

McGovern, *supra* note 109, at 602.

119. Civ. A. No. 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995).

120. *See* Erik Milstone, *Lawsuit Pipeline: Dueling Polybutylene Class Actions Make Choices Plumb Difficult for Homeowners*, 81 A.B.A. J. 20, 20–21 (Dec. 1995) (describing the numerous lawsuits filed).

121. *See Cox*, 1995 WL 775363, at *1 (making reference to the "unprecedented effort" by the Tennessee, Alabama, and California judges to guide this settlement process to a global settlement).

122. *See id.* at *3:

settlement class anyway, stressing heavily the value and importance of closure. Striking a different tone from *Amchem*, the court noted that

> [c]ompromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. . . . Closure is not only appropriate, but timely.[123]

This trend has continued since *Amchem*. For instance, in *7-Eleven Owners for Fair Franchising v. Southland Corp.*,[124] a California appeals court upheld a trial court's certification of a nationwide settlement class despite strong objections that the case did not meet the certification requirements and that the trial court had failed to apply the certification standards of *Amchem*.[125] The case centered on a nationwide class of present and former 7-Eleven franchisees, who alleged that 7-Eleven had breached its financial agreements with them by refusing to share in the "returns, discounts, and allowances" over a period of several years.[126] While acknowledging *Amchem*, the court upheld the certification of the settlement class.[127] In its opinion, as in *Cox v. Shell Oil*, the court stressed both that the case had been litigated continuously for several years and the strong need for finality and closure.[128]

Most recently, this trend has been highlighted by the litigation over the faulty Bridgestone/Firestone tires.[129] In 2001, plaintiffs sought certification of a nationwide consumer fraud class in federal court.[130] Despite winning initial approval in the district court, the nationwide class was decertified by the Seventh Circuit, in an opinion written by Judge Easterbrook.[131] Following the Seventh Circuit's ruling, plaintiffs

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> The claims . . . have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability and other measures of damages.

123. *Id*. at *2.

124. 102 Cal. Rptr. 2d 777 (Cal. Ct. App. 2001).

125. *Id*. at 795 (noting that though the trial court did not make specific findings on the class certification standards, its findings could be read so as to satisfy such an inquiry).

126. *Id*. at 780.

127. *Id.* at 795.

128. *Id.* at 787.

129. *See supra* Part II.B.

130. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 155 F. Supp. 2d 1069 (S.D. Ind. 2001).

131. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002).

shifted strategies, filing similar nationwide class actions in numerous different state courts.[132] Attempting to bring closure to this ever-burgeoning litigation, the defendants agreed to a settlement and sought certification of a nationwide class for settlement-only purposes in Texas state court.[133] On March 15, 2004, the Texas state court certified the $149 million nationwide settlement class.[134] Although it is unclear why the parties sought certification of the settlement-only class in state court as opposed to federal court, these actions suggest that the parties believed that it would be difficult, if not impossible, to receive such closure in the federal courts.[135]

These cases, taken together, represent an emerging pattern of state courts certifying nationwide settlement classes.

III. ANALYSIS OF THE *COOPER TIRE* DECISION

This Part analyzes the *Cooper Tire* court's holding against the backdrop of jurisprudence discussed in Part II, advancing two specific arguments: First, this Part proposes that *Cooper Tire* is the latest example of the growing trend of state courts approving a nationwide settlement class when a federal court would probably not have granted certification. Second, this Part considers whether such an approach can be successful—that is, whether the holding can withstand collateral attack. It concludes that it probably can.

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132. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 333 F.3d 763, 765 (7th Cir. 2003).

133. *Firestone Settlement Is Approved*, N.Y. TIMES, July 25, 2003, at C18.

134. *Texas Judge Approves Settlement of Bridgestone-Firestone Suits*, WALL ST. J., March 16, 2004, at D4.

135. One reason why the parties may have agreed to pursue the settlement in state court, consistent with this Note's argument, is that the parties believed that the Seventh Circuit would not certify even a nationwide settlement class. However, Justice Easterbrook explicitly left that option open. In his opinion granting the plaintiffs' request for an order enjoining the certification of any nationwide class in either federal or state court absent the defendant's consent following the Seventh Circuit's decertification, Judge Easterbrook explicitly noted that the Seventh Circuit did "not consider the possibility of settlement classes, which pose different issues." *In re* Bridgestone/Firestone, 333 F.3d at 766. Further, earlier Seventh Circuit opinions have approved nationwide, settlement-only class actions, noting that the variations in state law issues are not as problematic in this area. *See, e.g.*, *In re* Mex. Money Transfer Litig., 267 F.3d 743, 746–47 (7th Cir. 2001). Nonetheless, the fact remains that the parties chose to pursue the settlement-only class in state, rather than federal, courts, indicating that they thought their chance for approval was greater there than in federal courts.

A. An Alternative Reading of the Cooper Tire *Court's Holding*

In many ways, the dispute in *Cooper Tire* is extremely suitable for class action treatment. First, the dispute involves a negative value claim, because the remedy sought—up to $600 per class member—would be far outweighed by the cost of individual litigation. Second, the dispute involves only consumer fraud claims, which the Supreme Court has held to be particularly apt for class certification.[136]

However, federal courts would probably refuse to certify this class for several reasons. First, conflict-of-law concerns might prevent common questions of law from predominating. The choice-of-law inquiry is often the determinative factor in the class certification analysis: If a court concludes that it must apply the laws of fifty states to the claim, it is unlikely to certify the class because common legal issues would not predominate.[137]

The *Cooper Tire* court attempted to avoid this problem by applying New Jersey's choice of law doctrine and finding that New Jersey law applied to the entire class. After *Phillips Petroleum Co. v. Shutts*,[138] a court attempting to apply its own law to nationwide class actions must show either (1) that there is no conflict between its law and other states' laws,[139] or (2) that it has "'significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'"[140] Here, interpreting its own choice-of-law rules, the *Cooper Tire* court claimed both that there was no conflict between state laws *and* that New Jersey had significant contacts with the claim.[141]

Although *Shutts* does imply that a single state's law can be applied to a nationwide class in proper circumstances, federal courts, as a whole, have been reluctant to do so, even in a consumer fraud

136. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer . . . fraud . . . .").

137. *See* Rory Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 479 (2002) (stating that the "aggregate nationwide state-law class action decisions" suggest that "[i]f the laws of fifty states apply in a nationwide state-law class action, absent extraordinary circumstances, the class is uncertifiable under rule 23"). Although manageability issues are also implicated by the choice-of-law problem, these issues do not apply to settlement classes after *Amchem*. *See supra* notes 110–116 and accompanying text.

138. 472 U.S. 797 (1985).

139. *Id.* at 816.

140. *Id.* at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

141. *See supra* notes 44–45 and accompanying text.

class.[142] In fact, the holdings of several recent federal cases suggest that a federal court's ruling would differ from the *Cooper Tire* court's ruling on both prongs of the choice-of-law analysis. First, several federal courts have rejected the argument that consumer protection laws do not vary from state to state.[143] Furthermore, federal courts have recently been resistant to finding that one state's interests predominate, emphasizing federalism concerns about the intrusion upon other states' interests.[144] For instance, in *In re Ford Motor Co. Ignition Switch Products Liability Litigation*,[145] a federal district court refused to certify a nationwide class of car purchasers who were suing Ford over the alleged presence of faulty ignition switches.[146] One of the proposed subclasses, as in *Cooper Tire*, was a purely economic-damages class, alleging consumer fraud.[147] In its holding, the court found that the necessity of applying fifty different state laws to the

142. *See* Phair, *supra* note 61, at 835 (noting that the federal appellate courts have created a strong presumption against certifying a nationwide state law class action because of the necessity of applying fifty state laws to the claim). Of course, some federal courts have applied a single state's law to a nationwide class. *See, e.g.*, Bunnion v. Consol. Rail Corp., No. 97-4877, 1998 U.S. Dist. LEXIS 7727, at *29–30 (E.D. Pa. May 14, 1998) (holding that forum law governed nationwide class); Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D. Pa. 1987) (finding a selection of forum law constitutional in securities litigation when defendant maintained its principal place of business in the forum and auditing and financial statement preparation occurred there). As a whole, the Supreme Court's choice-of-law jurisprudence has been far from clear on this subject. *See* John C. Anderson, Note, *Good "Brick" Walls Make Good Neighbors: Should a State Court Certify A Multistate or Nationwide Class of Indirect Purchasers?*, 70 FORDHAM L. REV. 2019, 2031–32 (2002) ("[C]hoice-of-law has historically been an area of some difficulty for the Supreme Court, with the resultant failed emergence of a clear constitutional mandate."); Phair, *supra* note 61, at 844 (noting that "the Supreme Court has yet to provide any clear guidance on the issue"). This confusion has resulted in much literature on this subject, with authors arguing both for and against the view that a single state law can apply to a nationwide class. *See, e.g.*, *id*. at 836 (arguing that the application of a single state law to a nationwide class is permissible given the proper circumstances); Ryan, *supra* note 137, at 469 (arguing that application of forum law to nationwide class action is most likely not permitted).

143. For instance, in *Bridgestone/Firestone, Inc.*, the court held that "[s]tate consumer protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002). I elaborate further upon this trend among federal courts in Part II.A.

144. *E.g.*, Stirman v. Exxon Corp., 280 F.3d 554, 563–66 (5th Cir. 2002); Castano v. Am. Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996); Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 532–34 (N.D. Ill. 1998); *see also* Phair, *supra* note 61, at 840 (stating that federal courts have been resistant to applying one state's law to a nationwide class because "they place a heavy emphasis on the plaintiff's domicile as the relevant factor in determining the applicable law").

145. 174 F.R.D. 332 (D.N.J. 1997).

146. *Id.* at 336.

147. *Id.* at 336–38.

claim precluded a finding that common issues of law predominated.[148] Applying New Jersey's choice-of-law test, the court found that a single state law could not apply to the entire class because the interest of "[e]ach plaintiff's home state . . . in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws" outweighed those of a single state.[149] In so holding, the court explicitly rejected arguments later relied on by the *Cooper Tire* court as reasons justifying the application of a single state's laws. Specifically, the court held that the fact that Ford's headquarters were located in Michigan and that the cars were manufactured there did not justify the application of Michigan law.[150] Therefore, it is likely that a federal court would have concluded that the *Cooper Tire* class action did not contain common legal issues that predominated because of the necessity of applying multiple state laws to the claim.

Just as a federal court would probably find that common questions of law did not predominate in the *Cooper Tire* case, it would likely find that common issues of fact also did not predominate. Whereas the New Jersey Consumer Fraud Act does not require a showing of reliance on the improper conduct,[151] other states' consumer fraud laws do require such a showing.[152] Thus, if a federal court determined that it could not apply New Jersey law to the entire class, the necessity of showing individual reliance would probably convince many federal courts to refuse to certify the class.[153] For these

148. *Id.* at 351.

149. *Id.* at 348.

150. *Id*.

151. N.J. STAT. ANN. § 56:8-2 (West 2002).

152. *See* Sandra Benson Brantley & Beverly C. Moore, Jr., *Commonality of Applicable State Law in Nationwide or Multistate Class Actions—Deceptive Trade Practices*, 18 CLASS ACTION REP. 188, 198–99 (1995) (compiling a list of several states, such as Arizona, Georgia, Indiana, and Wyoming, that require a showing of individual reliance under their unfair and deceptive practices statutes).

153. *See, e.g.*, *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 346 (D.N.J. 1997) (refusing to certify a nationwide class of car owners with allegedly defective ignition switches under fraud theory because, in part, the necessity of proving individual reliance would swamp common questions of fact). Additionally, several courts have found that, in class actions against automobile companies involving numerous makes and models of a particular car or part, common questions of fact do not predominate. *See, e.g.*, *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 372–73, 376 (E.D. La. 1997) (denying certification of a nationwide class of purchasers of Ford Broncos asserting, among other claims, a fraud claim arising from alleged deception about the car's stability because the Bronco was sold over seven years in varying configurations). Here, at least seven different brands of tires were implicated, as well as several other brands that were manufactured by defendants but

reasons, combined with the recent skepticism toward nationwide class actions among this genre of cases, a federal court would likely not have certified this class.[154]

New Jersey, however, has a more liberal class action rule than Federal Rule 23.[155] Although New Jersey's class action rule, Rule 4:32 of the Rules Governing Civil Procedure,[156] largely mirrors Rule 23(a) and (b) of the Federal Rules, New Jersey courts have consistently preferred a more liberal reading, especially in consumer fraud cases.[157]

When *Cooper Tire* came before the New Jersey Superior Court, however, it was still undetermined to what extent New Jersey favored certification of such a large, nationwide class action. Although the *Cooper Tire* court correctly acknowledged the Supreme Court's decision in *Shutts* that a state could certify a nationwide class, a review of New Jersey cases shows that New Jersey courts have been hesitant to do so. Though the *Cooper Tire* court claimed in its decision that "New Jersey has allowed certification . . . involving national and multiple state cases,"[158] the case it cited in support,

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marketed and sold as private brands. Plaintiffs' Memo, *supra* note 16, at 48. Though it is not clear from the record whether the differences in brands would be important in this case, federal courts would likely have analyzed these individual factual inquiries closely.

154. Of course, it is true that some federal courts have certified nationwide, state law class actions. *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024–25 (9th Cir. 1998) (upholding the certification of a nationwide class of minivan owners alleging defectively designed rear liftgate); Elkins v. Equitable Life Ins. Co., No. CivA96-296-Civ-T-17B, 1998 WL 133741, at *3, 11 (M.D. Fla. Jan. 27, 1998) (certifying nationwide class of life insurance owners on, among other things, negligent misrepresentation allegations). However, the prevalent hostile trend makes this result unlikely.

155. Philip Stephen Fuoco & Robert F. Williams, *Class Actions in New Jersey State Courts*, 24 RUTGERS L.J. 737, 744 (1993).

156. N.J. CT. R. 4:32-1.

157. *E.g.*, *In re* Cadillac V8-6-4 Class Action, 461 A.2d 736, 747 (N.J. 1983) ("[W]e are mindful that the class action rule should be construed liberally in a case involving allegations of consumer fraud."); Delgozzo v. Kenny, 628 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1993) ("New Jersey courts . . . have consistently held that the class action rule should be liberally construed. Indeed, a class action 'should be permitted unless there is a clear showing that it is inappropriate or improper.'"). New Jersey's liberal interpretation of its rule is predicated upon its strong favoring of aggregation mechanisms—a stark contrast to the federal courts' distrust of such procedures. *See, e.g.*, Riley v. New Rapids Carpet Ctr., 294 A.2d 7, 10 (N.J. 1972):

> If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit . . . . If there is to be relief, a class action should lie unless it is clearly infeasible.
>
> . . . .
>
> To that end, a court should be slow to hold that a suit may not proceed as a class action.

158. Final Order, *supra* note 10, at 36.

Delgozzo v. Kenny,[159] does not clearly support this proposition. In *Delgozzo*, the plaintiffs sought at the trial level to certify a nationwide class of over 35,000 individuals who had purchased "Blue Flame" gas heaters that allegedly were defective.[160] The claim was predicated on allegations of consumer fraud, and was limited solely to claims for economic damages.[161] On appeal, the New Jersey Superior Court reversed the trial court's refusal to certify the class.[162]

In its ruling, the *Delgozzo* appeals court addressed the question of whether it could certify a nationwide class. On the one hand, the court stated that "[t]he problems inherent in certifying a class presenting conflict of laws issues are not unsurmountable."[163] The *Cooper Tire* court emphasized this point.[164] On the other hand, the court continued on to state:

> [B]ut, as we acknowledge, as the geographical diversity grows, the management problems increase commensurately.
>
> Certainly, however, a class limited to those who have sufficient contacts with New Jersey, could have been certified. Significantly, plaintiffs' position at the hearing on their motion was to accept a class certification consisting solely of New Jersey purchasers if that was the only way to "get a class certified."[165]

Therefore, the court directed "the trial judge to certify a class to include *at least the New Jersey purchasers or users of defendants' products*."[166] Thus, despite suggestions to the contrary, *Delgozzo* does not stand clearly for the proposition that New Jersey courts are willing to certify a nationwide class.

Adding further credence to this point is the fact that, since *Delgozzo* and prior to *Cooper Tire*, the New Jersey courts have only once approved a nationwide trial class, despite being confronted by the issue on several occasions.[167] *Kropinski v. Johnson & Johnson*[168] is

159. 628 A.2d 1080 (N.J. Super. Ct. App. Div. 1993).

160. *Id.* at 1082.

161. *Id.* at 1083–84.

162. *Id.* at 1094.

163. *Id.* at 1092.

164. Final Order, *supra* note 10, at 36.

165. *Delgozzo*, 628 A.2d at 1092.

166. *Id.* at 1094 (emphasis added).

167. *See* Cartiglia v. Johnson & Johnson Co., No. MID-L-2754-01, 2002 WL 1009473, at *16 (N.J. Super. Ct. Law Div. Apr. 24, 2002) (refusing to certify a nationwide, non-personal injury class of plaintiffs in suit against a prescription drug company for violations of the Consumer Fraud Act, because plaintiff had not demonstrated requisite ascertainable loss); Carroll v.

the one prior instance in which a New Jersey court certified a nationwide, state law trial class.[169] In that case, which involved a nationwide consumer fraud suit alleging deceptive advertising and cost practices in marketing two brands of contact lenses, the New Jersey Superior Court recognized that its courts had refused to certify similar nationwide class actions, but found this case distinguishable because the common issues predominated to a greater extent than in the previous cases. The court noted specifically that this case involved allegations of deceptive cost practices of a prescribed product, as opposed to false advertising claims involving multiple different representations made by defendants at different times.[170] *Cooper Tire* arguably falls closer to the latter genre of cases because it included allegations of deceptive trade practices involving at least seven different brands of tires and varying representations over an extended period of time.[171]

Thus, the *Cooper Tire* court's decision to certify a nationwide settlement class represents, at the least, an aggressive use of the state's liberal class action statute. Relying heavily upon (1) New Jersey's liberal interpretations of the class action requirements, (2) the fact that this was a case well suited for class action treatment because it was a negative value, consumer fraud claim, and (3) an aggressive reading of its own choice-of-law rule, the court decided to certify the settlement class.[172] However, even given New Jersey's liberal class action rule, New Jersey case law does not clearly suggest that New Jersey courts would have certified this class for trial. Instead, the court's holding can be read as creating a more lenient standard for the approval of settlement class actions so as to bring closure to the case, given the lack of such avenues on the federal

Cellco P'ship, 713 A.2d 509, 513–14 (N.J. Super. Ct. App. Div. 1998) (overturning certification of nationwide class of cellular telephone service purchasers who had brought a state Consumer Fraud Act, common law fraud, and common law negligent misrepresentation claim against defendant, citing conflict-of-law concerns); Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 696 A.2d 793, 799–800 (N.J. Super. Ct. Law Div. 1997) (refusing to certify nationwide class of Pepcid users who had brought a consumer fraud and common law fraud claim against defendant for falsely advertising product, because questions of ascertainable loss and causation prevented certification).

168. No. A-3979-97T1, 1999 WL 33603132 (N.J. Super. Ct. App. Div. Jan. 7, 1999).

169. *Id.* at *2.

170. *Id.* at *1–2.

171. The allegations in *Cooper Tire* involved at least seven different brands of tires, as well as several other brands that were manufactured by defendants but marketed and sold as private brands. Plaintiffs' Memo, *supra* note 16, at 48.

172. *See supra* Part I.

level. Though not stated by the court, one can read this case as refusing to follow the holding of *Amchem* and applying a more lenient standard to the certification of settlement-only classes.

Did the court improperly certify this nationwide class? Did it too loosely apply the state's choice-of-law requirement? As shown above, it could indeed be argued that the answer to both of these questions is yes. The beauty of this settlement, however, is that it is unlikely that either side will appeal this decision because both sides supported the settlement. Additionally, it is unlikely that many absent class members will attempt to attack the decision because not enough money is at stake. Thus, so long as this ruling can withstand collateral attack by any class members who did wish to challenge this decision, the approval of this settlement class will bring closure to this claim.

B. Is the Ruling Protected from Collateral Attack?

The *Cooper Tire* court's goal was to bring finality to this controversy. Was it successful? To explore this question, one must consider whether the approved settlement can withstand collateral attack. If this decision is vulnerable to collateral attack, the *Cooper Tire* court's approach to bringing closure to such claims would be of limited value. For several reasons, this ruling would most likely withstand collateral attack.

The Full Faith and Credit Clause mandates that sister states give judgments rendered by other states at least the same preclusive effect as given in the judgment-rendering state.[173] Similarly, the Full Faith and Credit Act mandates that the judicial proceedings of any state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."[174] In *Matsushita Electric Industrial Co. v. Epstein*,[175] the Supreme Court held that "a judgment entered in a class action . . . is presumptively entitled to full faith and credit under the . . . Act."[176]

The Court in *Matsushita* held that a class action settlement approved by a state court—whether it released state or exclusively

173. Durfee v. Duke, 375 U.S. 106, 109 (1963) ("Full faith and credit thus generally requires every State to give to a judgment *at least* the res judicata effect which the judgment would be accorded in the State which rendered it.") (emphasis added).

174. 28 U.S.C. § 1738 (2000).

175. 516 U.S. 367 (1996).

176. *Id.* at 374.

federal claims—deserves preclusive effect so long as the state in question would have granted such a claim preclusive effect.[177] Therefore, the *Cooper Tire* court's release of claims, including exclusively federal claims, has preclusive effect so long as a New Jersey court would have granted such a claim preclusive effect.

In *Matsushita*, the Court's analysis of whether Delaware would grant preclusive effect to settlements was made easy by the fact that Delaware courts had addressed that issue directly. Previous Delaware court opinions had held that "when the Court of Chancery approves a global release of claims, its settlement judgment should preclude ongoing or future federal court litigation of any released claims."[178] New Jersey courts, however, have not ruled directly on the issue of whether they would grant preclusive effect to a settlement releasing exclusively federal claims. The Court in *Matsushita* recognized this potential difficulty, stating that the "inquiry into state law would not always yield a direct answer."[179] In such a situation, the Court directed a federal court to "find guidance from general state law on the preclusive force of settlement judgments."[180] New Jersey courts have long articulated a strong public policy of enforcing settlement agreements.[181] As a result, New Jersey courts "'will strain to give effect to the terms of a settlement whenever possible.'"[182] Based upon this strong preference for enforcing settlement judgments, and absent more direct language from New Jersey courts, a court would thus probably conclude that New Jersey would have granted preclusive effect to this settlement class.

Even if a state's judgment would otherwise deserve preclusive effect, "absent class members may avoid the preclusive effect of a judgment entered in one such action if they were not afforded due process therein."[183] In nationwide, state law class actions for money

177. *See id.* at 386–87 (holding that a Delaware ruling approving a class action settlement that released an exclusive federal claim deserved preclusive effect because Delaware courts would have granted it preclusive effect and no exceptions to § 1738 applied).

178. *Id.* at 377.

179. *Id.* at 375.

180. *Id*.

181. *See* Tabaac v. City of Atlantic City, 417 A.2d 56, 65 (N.J. Super. Ct. Law Div. 1980) ("Settlement of litigation of all kinds is to be encouraged; public policy supports its amicable disposition.").

182. Boardwalk Regency Corp. v. Dir., Div. of Taxation, 18 N.J. Tax 328, 333 (N.J. Tax Ct. 1999) (quoting Dept. of Pub. Advocate v. N.J. Bd. of Pub. Util., 503 A.2d 331, 333 (N.J. Super. Ct. App. Div. 1985).

183. Wasserman, *supra* note 96, at 494.

damages being adjudicated in state courts, due process requires that the absent parties lacking minimum contacts with the state (1) be adequately represented by the named plaintiffs, (2) receive notice of the action, and (3) be given an opportunity to be heard and to opt out.[184] In certifying the class and approving the settlement, however, courts already will have found these to be present.[185] Thus, a question is raised whether the absent members are barred, as a matter of issue preclusion, from relitigating these issues. There is no clear answer to this question, as courts have taken various approaches.[186]

Even assuming that an absent class member challenging the ruling in *Cooper Tire* does have the right to relitigate the due process requirements, it is unlikely that he would succeed. First, the class members were granted the option to opt out and to be heard.[187] Second, the record indicates that adequate notice was provided to the class members. In *Phillips Petroleum Co. v. Shutts*,[188] the Supreme Court described the notice required to bind an absent class member in these nationwide, money-damages class actions brought in state court, stating that "[t]he notice must be the best practicable,

184. *Id.* at 494–95. These due process protections were imposed for these types of class actions claims by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

185. Wasserman, *supra* note 96, at 495.

186. Some courts have addressed collateral challenges to the adequacy of representation without mentioning issue preclusion. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67, 72–73 (5th Cir. 1973) (finding the representation of a prior class to be inadequate without mentioning issue preclusion at all). Other courts have expressly stated that issue preclusion does not bar absent class members from relitigating the issue of adequacy of representation. *See, e.g.*, Battle v. Liberty Nat'l Life Ins. Co., 770 F. Supp. 1499, 1512–13 (N.D. Ala. 1991) (stating that an absent class member is "not bound by the initial court's determination that she received due process"), *aff'd*, 974 F.2d 1279 (11th Cir. 1992). Still other courts have held that class members who appear at a hearing in the first action and contest the adequacy of representation are bound by the court's finding. *See, e.g.*, *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 142–43 (3d Cir. 1998) (refusing to vacate a Louisiana court judgment when appellants did not exercise their opt-out rights and actively participated in the settlement approval process). Finally, other courts have held that absent class members are bound by the finding of adequacy of representation even if they did not participate in the fairness hearing. *See, e.g.*, Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1560–61 (3d Cir. 1994) (holding that Delaware court had personal jurisdiction over the plaintiff who did not appear so that plaintiffs were bound by the release approved by the court). Recently, the U.S. Supreme Court granted certiorari to consider whether Agent Orange class members could pursue individual claims by bringing collateral attack on the adequacy of representation, but the Court split 4-4 and issued no opinion. Stephenson v. Dow Chem. Co., 539 U.S. 111 (2003). Thus, the issue remains unsettled.

187. *See* Final Order, *supra* note 10, at 8–10 (noting that defendants were informed of their right to opt out and had the right to voice opinions at a fairness hearing held on January 29, 2002).

188. 472 U.S. 797 (1985).

'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' The notice should describe the action and the plaintiffs' rights in it."[189] When a potential class member's address is available through reasonable efforts, some form of direct notice is generally required.[190] However, when direct notification is unreasonably burdensome, publication and representative notice is sufficient.[191]

In *Cooper Tire*, based upon the report of class action notice specialists, the court ruled that direct notice to class members would be impracticable given the high cost and difficulty of providing direct notice to each class member.[192] Instead, the court approved a notice plan that combined various methods to reach the absent class members, including (1) bilingual—English and Spanish—notices in more than 900 Sunday newspapers throughout the United States,[193] (2) the use of a toll-free information line, (3) Internet advertising, and (4) a website to disseminate information.[194] After reviewing the parties' notice plan, the *Cooper Tire* court held in its final approval of the settlement agreement that "the comprehensive Notice Program satisfied the requirements of due process by apprising the class members of their rights pursuant to the settlement."[195] Given these factual findings, it is unlikely that a subsequent court would find the provided notice violates due process requirements.

Finally, it is doubtful that an absent class member could successfully claim that he did not receive adequate representation. A showing of adequate representation requires that (1) the named plaintiffs do not have interests antagonistic to those of the class, and (2) the plaintiffs' attorney be qualified, experienced, and generally

189. *Id.* at 812 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950)).

190. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 176 (1974).

191. Sulcov v. 2100 Linwood Owners, Inc., 696 A.2d 31, 42 (N.J. Super. Ct. App. Div. 1997).

192. Final Order, *supra* note 10, at 31. Specifically, the parties concluded that Cooper Tire could only identify approximately 3 percent of the putative class members, because only 3 percent of tire purchasers registered their tires with the defendant. Plaintiffs' Memo, *supra* note 16, at 48. Further, given the manner in which the registrations were stored, the parties estimated it would cost about $420,000 to compile the addresses for the 3 percent. *Id.* at 49.

193. Final Order, *supra* note 10, at 31.

194. *Id.* at 32. As designed, Cooper Tire owners would see the notice an average of 3.5 times. *Id*. "Including repeat exposures, the notice appeared in print media . . . more than 562 million times." *Id*.

195. *Id*.

able to conduct the proposed litigation.[196] Both of these requirements appear to have been met in *Cooper Tire*. First, the named plaintiffs' claims were essentially the same as those of the other class members because they spring from the same legal theory.[197] Additionally, because the claim involved only economic damages—the loss in the value of the tire—nothing in the nature of the injuries materially separated the named plaintiffs from the class.[198] Second, the court found the class counsel to be "highly experienced" class action attorneys who are "known for [their] willingness to try class actions to verdict."[199] Thus, it is unlikely that an absent plaintiff would succeed in challenging the adequacy of representation. Therefore, the approach taken by *Cooper Tire* would likely withstand collateral attack.

IV. THE LESSONS LEARNED FROM *COOPER TIRE*

Cooper Tire represents a state court experimenting with its own laws to find a solution to a growing problem facing numerous class action defendants—how to bring closure and finality to nationwide, state law class actions. This Part first discusses and responds to the various critiques of the *Cooper Tire* court's approach. It then sets forth the central lesson gleaned from the *Cooper Tire* court's experiment—the necessity of creating, at least until a more permanent solution is able to be implemented, a settlement-only class within Federal Rule 23, whereby nationwide settlement-only classes would be reviewed under more relaxed standards.

A. Critiques of the Cooper Tire *Approach*

One legitimate response to *Cooper Tire* might be the following: Even if the approach taken by the *Cooper Tire* court produced a good result in this case, and even if *Cooper Tire* represents a state court truly seeking to do the right thing by solving a legitimate problem facing both the defendants and plaintiffs, not all courts are as pure-intentioned as the *Cooper Tire* court. What is to say that *Cooper Tire* represents a majority result, and what would prevent a more corrupt

196. 1 CONTE & NEWBERG, *supra* note 51, § 3.22.
197. Preliminary Certification, *supra* note 45, at 13.
198. *Id*.
199. *Id.* at 14.

state court, or more conniving plaintiffs or defendants, from using this technique to further much less noble goals in the future?

Much truth lies behind this concern, although it is limited, of course, by the possibility that unlike the *Cooper Tire* settlement, less noble settlements are more easily attackable collaterally on grounds of inadequate representation. Numerous commentators have written on the growing trend of state courts certifying nationwide class actions, and their comments have been, for the most part, decidedly negative. For example, some commentators have focused on the role of class counsel, emphasizing (a) the growing problems of judge and forum shopping,[200] (b) the danger of collusion among defendants and plaintiffs' attorneys,[201] (c) the growing trend of inventory settlements,[202] (d) the threat of plaintiffs extorting settlements by threatening defendants with ruinous liability,[203] and (e) the trend of plaintiffs' attorneys benefiting from the allegedly lax review standards to prosper at the expense of the absent class members.[204] Other commentators, focusing on the negative repercussions that have and will continue to emerge from this trend, highlight (a) the increased pressure on plaintiffs' attorneys to settle,[205] (b) the danger that settlements will deny courts and absent parties critical information,[206]

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200. *See supra* note 4.

201. *See, e.g.*, John C. Coffee, Jr., *Class Wars*: *The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364–67 (1995) (suggesting that defendants will often work out agreements with certain plaintiffs' attorneys offering above-average attorneys' fees in return for lower-than-average settlement agreements).

202. *See, e.g.*, *id.* at 1373–75 ("[B]oth sides have an incentive to trade a settlement of the plaintiffs' attorney's entire inventory (on terms favorable to the attorney) for a global settlement in a class action of all future claims (on terms favorable to the defendants).").

203. For an early, yet typical, view, see 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) (describing the threat of litigation to compel settlements as a "form of legalized blackmail"). *See also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 C

and (c) the danger of an invasion of the entrenched concept of separate sovereignty.[207] Still other commentators have argued that some state judges employ extremely lax certification standards so as to apply their state law to a nationwide class, thereby essentially creating magnet states and a "race to the bottom."[208]

Based upon these critiques of the current system, many commentators would most likely argue that the best solution to the problem of overlapping class actions is to eliminate, or at least severely restrict, the ability of state courts to certify nationwide, state law class actions, rather than to hold up states that do so as examples of the "beauty of federalism."

This critique, however, underemphasizes the importance of closure and finality. Additionally, although cases such as *Cooper Tire* may be the minority, and the negative portrait painted by these commentators may be largely accurate, the point this Note underscores is that, to date, reformers have not been able to put in place a comprehensive solution to this problem.

Because of this failure to enact a comprehensive solution, many nationwide, state law class action defendants *do* face a legitimate problem of figuring out how to bring closure to such claims. Even if their situation is the minority one, and even if the norm in class action treatment by state courts is characterized by the deep flaws described above, this does not detract from the legitimacy of the problem these defendants face. Seeking a way to bring closure to the *Cooper Tire* case, the plaintiffs, defendant, and state court settled on what they must have believed to be the best choice under the circumstances. By focusing solely on the negative trends and troubling problems raised by state courts certifying nationwide, state law classes, commentators have ignored the reality that at least some portion of these settlements arise from a legitimate desire to achieve closure.

Thus, in light of this present reality, it is important to consider whether any temporary solution is available to facilitate the interest of closure. Does the approach taken in *Cooper Tire* suggest the

206. *See, e.g.*, *id.* at 475–83 (noting that the growing trend of dueling class actions and pressure for quick settlements often leads to absent class members, judges, and even class counsels being deprived of critical information regarding the case because there are no true adversaries in settlement).

207. *See* Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. Rev. 514, 515–16 (1996) (recognizing that the trend of overlapping class actions threatens the concept of separate sovereignty).

208. *See supra* note 5.

existence of a temporary fix that could ameliorate the problem of achieving closure facing these class action defendants? Section B discusses whether a rule change could permit and encourage the increased use of the approach taken in *Cooper Tire*—the settlement class—for "legitimate" purposes, while minimizing the "abusive" application of such an approach.

B. A Proposed Change to Rule 23

Based upon the lessons learned from *Cooper Tire*, this Note proposes that Federal Rule 23 be amended to create a more lenient standard for certifying settlement-only classes on the federal level—to federalize, essentially, the *Cooper Tire* approach. This suggestion is not novel. In fact, in 1996, the Civil Rules Advisory Committee proposed amending Rule 23(b) to create a fourth type of class—the so-called settlement class.[209] The language of this proposal provides a strong starting point for this Note's proposed rule amendment. The 1996 proposal would have permitted a district court to certify such a class if "the parties to a settlement request certification under subdivision (b)(3) for the purposes of settlement even though the requirements of subdivision (b)(3) might not be met for trial."[210] Thus, a money-damages settlement class would still be required to meet the requirements of Rule 23(a), but would not be required to meet the requirements of Rule 23(b)(3)—the predominance and superiority tests. This language would incorporate the *Amchem* holding that trial manageability issues need not be considered when reviewing a settlement class, but would extend *Amchem*'s holding further, creating a more relaxed and easily attainable certification standard. The predominance and superiority requirements are often the two largest roadblocks to class certification,[211] so removal of these requirements would greatly ease the certification of such classes.

This Note's proposed rule would go even further, however, and would explicitly state that settlement classes should be viewed favorably by courts and that, to promote the use of settlement classes

209. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 622 (1997).

210. *Id.* (quoting Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Request for Comment, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure (1996)).

211. *See* Martin L.C. Feldman, *Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?*, 74 TUL. L. REV. 1621, 1623 (2000) (noting that the Federal Rule 23(b)(3) inquiry is much more demanding than the Rule 23(a) commonality requirement).

for providing closure, courts should apply more relaxed standards when reviewing whether a settlement-only class meets the Rule 23(a) requirements. Given the federal courts' resistance, even after *Amchem*'s removal of the manageability inquiry, to certifying nationwide settlement classes, any proposed settlement-class rule should contain explicit language directing federal courts to apply a more lax standard to reviewing settlement-only class certifications. Although not all claims will be able to take advantage of this rule, because not all claims can be brought within federal jurisdiction, many of these types of claims can be structured so as to fall within federal jurisdiction if the parties so choose.

This rule would have several advantages. First, as demonstrated by *Cooper Tire*, given the atmosphere in Congress, this approach is arguably the best one as it did provides significant benefits to all parties involved. As in *Cooper Tire*, it would provide the defendant with finality and closure to a costly and damaging litigation process and would allow it to avoid the frightful prospect of a high-stakes trial. For the plaintiffs, settlement would provide them with compensation and enable them to access these benefits much sooner than if they were forced to litigate this claim all the way through to trial. Although the plaintiffs may be able to win more generous terms by not settling, there is no certainty of that. Finally, the court system would also benefit from this rule, because the settlement allows it to provide an efficient enforcement of the law (deterrence) and also compensate a large class of individuals. In light of the dangers that critics of settlement classes constantly raise, perhaps this approach would not be the perfect solution in an ideal world. However, given the problems of overlapping class actions, and the lack of other viable alternatives for bringing closure to such claims, it would be a defendable temporary solution.

Second, making this approach available on the federal level would facilitate greater use of such settlement classes. As a result of the federal courts' recent hostility to the certification of nationwide classes, it has been difficult for parties to gain approval of nationwide settlement classes on the federal level.[212] Further, despite the examples of *Cooper Tire* and a few other recent cases, the use of this

212. *See* Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871, 877 (2001) ("Federal courts . . . have become reluctant to certify these types of cases for a class action trial and have recently made the certification of class action settlement significantly more rigorous and more expensive.").

approach on the state level has been constrained by the difficulty of coordinating a truly global settlement among various state courts. As the *Cooper Tire* court emphasized, it took a unique level of interstate coordination to reach the global settlement. Such coordination between state courts, though becoming more common, is still rare.[213] The implementation of a more lenient standard for settlement classes on the federal level—where the ability of federal courts to consolidate claims among various jurisdictions through MDL is unmatched on the state level[214]—may encourage more pervasive use of this potentially advantageous procedure.

At the same time, providing for a more lenient settlement-class standard on the federal level would provide some level of safeguard against the state court abuses alleged by many in regards to nationwide, state law class actions. The federal courts are not subject to the same claims of corruption and lax treatment of procedural concerns as are state courts.[215] Likewise, federal courts, in general, have more procedural safeguards than state courts.[216] Thus, by encouraging the parties to coordinate these nationwide settlement-class agreements on the federal level, one can encourage the "legitimate" use of nationwide, state law settlement classes, while at the same time providing a mechanism to control the "abusive" use of this procedure on the state level.

A valid response to this argument might go as follows: If states were still free to certify these nationwide, state law settlement classes (or trial classes), would providing this approach on the federal level really achieve anything? Why would a rational class action plaintiffs' attorney agree to pursue a nationwide settlement class in the federal courts if he or she felt that a state court with less procedural protections is equally available?

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213. *See* Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 913–16 (describing efforts to increase interstate cooperation in nationwide class actions and highlighting a few models to follow).

214. *See* Miller, *supra* note 207, at 541 ("The reasons for federal-state court centralization are straightforward. The courts in the several states do not have sufficient centralizing power to ensure the orderly and efficient disposition of large-scale class action cases.").

215. For authors who have alleged that certain state courts have been applying excessively lax class action standards for various improper purposes, see *supra* note 5.

216. *See* John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 505–08 (2003) (reviewing the various state law class action rules and finding that a significant number of states have "explicitly rejected the modern formulation of Rule 23 and chosen a certification procedure far less imposing").

There are several reasons why parties would take advantage of a more lenient settlement-class standard provided on the federal level. Defendants, obviously, would prefer to pursue a nationwide settlement agreement in federal court, given the additional procedural safeguards and protections on the federal level. Further, although plaintiffs might prefer to be in state court, pursuing settlement in federal court does have certain advantages for them, namely, the additional tools with which to coordinate nationwide and overlapping cases on the federal level. Finally, even assuming that, despite the benefits offered by MDL on the federal level, plaintiffs would still rather pursue such agreements in a state court, it is likely that, in at least some circumstances, class action defendants will be able to drive the plaintiffs to the federal forum. This could be done by using either the "carrot" or the "stick" approach. Defendants could use the "carrot" approach by offering more attractive settlement offers if the plaintiffs agree to pursue the certification in federal court. Alternatively, they could use the "stick" approach by attempting to influence who is selected as lead attorney for the settlement class. Certain plaintiff firms practice predominantly in either federal or state courts. By pushing for the selection of a lead plaintiffs' attorney who predominately practices in federal courts, the defendants can increase their odds of driving the nationwide settlement efforts to the federal courts.

The 1996 proposal was tabled when the Supreme Court granted certiorari in *Amchem*, the hope being that *Amchem*'s holding would resolve the issue.[217] However, this hope did not come to pass, as many federal courts continue to scrutinize harshly settlement-class certifications after *Amchem*, often refusing to certify them.[218] As cases like *Cooper Tire* demonstrate, this resistance to certifying nationwide, state law settlement classes on the federal level continues to cause significant problems for plaintiffs, defendants, and state courts alike, forcing the parties to state court in seek of finality and closure. Thus, *Cooper Tire*, as well the larger context from which the case emerged, suggests that it might be beneficial to revisit this idea.

217. *Class Action Reform Gets a Shot in the Arm,* 69 DEF. COUNSEL J. 263, 266 (2002).

218. *See supra* notes 115–116 and accompanying text.

CONCLUSION

When understood in its larger context, *Cooper Tire* provides an example of state courts, plaintiffs, and defendants alike seeking to solve a difficult problem: how to best provide closure and finality to a nationwide, state law, class action claim, given that federal courts remain hostile to such claims and at least one state is likely to certify such a claim for trial purposes. In the absence of a solution emerging on the federal level, a few state courts, like the *Cooper Tire* court, have used the freedom of applying state class action rules to search for a solution. These cases should be viewed as a demonstration of the beauty of federalism. Justice Brandeis described the states as laboratories of democracy in which different jurisdictions adopt differing rules and the citizens of other states and the nation at large can observe the rules' effects.[219] Here, New Jersey was serving as such a laboratory.

When considered in this light, *Cooper Tire* is an important case for two reasons. First, it clearly demonstrates the vexing dilemma currently facing many state courts. Second, it provides those in search of a more comprehensive solution to this dilemma with an important example from which to learn. Although valid criticisms can be made about the approach taken by the *Cooper Tire* court, in the end, its decision to certify a nationwide settlement class, even when it may not have certified such a class for trial purposes, was the best choice given the circumstances. The lessons from its experiment support another temporary solution to the problem of bringing closure to such nationwide, state law class actions: the creation of a more lenient standard for certifying settlement-only classes under Federal Rule 23.

219. *See* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").