Civil Case Management in the Federal Courts

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Introduction

In 1915, Harvard Law School dean Ezra Ripley Thayer delivered a speech to the Law Association of Philadelphia in which he characterized the job of a federal trial judge as reactive rather than proactive. "[E]xcept for ruling on questions of law," he lamented, a judge during trial "sits silent until something like a breach of the peace is threatened. . . . His two duties, in other words, are inactivity and ruling on law points."[1]

Compare Thayer's description to those of law professors in the 1980s and 1990s. In 1982, Professor Judith Resnik noted, "In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but are also meeting with parties in chambers to encourage settlement of disputes and supervise case preparation."[2] Similarly, Professor Paul Carrington wrote in 1996 that "the office of the U.S. District Judge is strikingly different from the office held by his or her predecessors only three decades ago. The conscious mission of many district judges is less to make decisions applying law to the facts, and more to preside over the manufacture of dispositions. The primary judicial labor is not trial, but conferring with lawyers and staff."[3]

The striking contrast between these descriptions reflects the seismic changes that the role of a federal trial judge underwent over the course of the twentieth century—from a primarily reactive role mostly confined to the courtroom to one far more proactive and frequently engaged in conference. The goal of this essay is to explain how and why those changes came about. This task requires a broad historical overview of several topics that can be grouped under the heading "case management." Case management consists of many things, but it is primarily aimed at providing judges with the tools necessary to guide cases to an early and efficient pretrial disposition. Often these efforts take the form of encouraging expeditious settlement or diverting a case to one of several types of alternative dispute resolution (ADR). Even when cases go to trial, judges are able to control the pace of discovery and preparation to avoid clogged dockets and undue expense. These aspects of the judge's role are frequently referred to as "managerial judging."

Case management emerged, in part, as a result of major societal changes. The nation's growth accelerated rapidly during the nineteenth and twentieth centuries as the United States became not only more populous but also more complex socially, politically, economically, and technologically. The expansion of statutory law and the administrative state that began in the Progressive Era, picked up steam with the New Deal, and continued apace thereafter, created more federal litigation than ever before. Many regulatory schemes, such as antitrust and securities laws, were extremely complicated. One inevitable result of this evolution was an increase in the number, size, and complexity of civil cases, putting a

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1. Ezra Ripley Thayer, "Judicial Administration," *University of Pennsylvania Law Review* 63, no. 7 (1914–1915), 589.

2. Judith Resnik, "Managerial Judges," *Harvard Law Review* 96, no. 2 (December 1982), 376–377.

3. Paul D. Carrington, "A New Confederacy—Disunionism in the Federal Courts," *Duke Law Journal* 45, no. 5 (March 1996), 943.

heavier burden on the federal courts and requiring the introduction of new methods to handle the judicial workload.

The causal factors underlying the development of case management were not solely external to the federal judicial system, however. Widespread dissatisfaction with many aspects of court procedure in the late nineteenth and early twentieth centuries produced a decades-long reform campaign culminating in the adoption of the Federal Rules of Civil Procedure (FRCP) in 1938. In addition to simplifying and unifying civil procedure, the new rules created the tools judges would eventually use to manage cases more actively.

This essay proceeds chronologically through four eras. The longest period, from 1789 to 1938, begins with the establishment of the federal courts and ends just prior to the adoption of the FRCP. During this period, federal courts were more or less independent entities rather than parts of a coherent whole, not linked by any governing body (the Judicial Conference of the United States, established in 1922 as the Conference of Senior Circuit Judges, played a largely advisory role in its earliest years) or unified procedural rules. Despite the length of time covered here, there was little fundamental change in the way the trial courts handled civil matters. Nevertheless, covering the major aspects of the judge's role during this period is necessary to provide both context for and contrast with what came later.

During the years 1938 to 1961, significant parts of the foundation for case management were laid. The most important development was the adoption of the FRCP, which standardized procedure and established measures—such as enhanced discovery tools—designed to improve trial preparation and make it more likely that cases would be resolved on their merits rather than on technicalities. In the 1950s, judicial policymakers began to consider how to handle the large and complex cases that consumed an inordinate share of judicial resources, a topic that continued to generate discussion into the 1960s and beyond.

The next period, spanning 1961 to 1980, was an era in which aggregation and centralization emerged as important case management strategies. In 1966, amendments to the FRCP improved the class action as a procedural device. The changes facilitated a significant increase in the number of federal class actions, including civil rights cases as well as suits combining a large number of damages claims too small to bring individually. The new class action device posed difficult case management challenges for federal judges while simultaneously providing tools to address them. In 1968, Congress responded to a new problem—the filing in multiple districts of large numbers of cases involving common factual questions—by establishing the Judicial Panel on Multidistrict Litigation (JPML), a body authorized to transfer related cases for centralized pretrial proceedings. Pretrial centralization via the multidistrict litigation (MDL) process eventually became a vital case management tool that only increased in importance over the ensuing decades.

The late 1960s and 1970s saw other important developments as well, motivated in part by the rapidly rising caseloads of these decades that many viewed as a crisis for the federal courts. Economic growth and technological progress from the end of World War II to the early 1970s caused a steep rise in the number of federal civil lawsuits, many of which were large and

complex. The judiciary faced additional pressure in the 1960s and beyond from a growing number of bankruptcies and increasing crime rates.[4]

In 1967, in an effort to improve judicial administration, Congress established the Federal Judicial Center (FJC) as the research and education agency of the federal judiciary. Through research, publications, and educational programs provided to judges and court staff, the FJC has played a significant role in the development of case management. For example, the discussion of large cases that began in the 1950s culminated in the FJC's publication of the *Manual for Complex* Litigation in 1969. In the 1970s, there was a notable shift in attitudes regarding judicial involvement in settlement, and judges and attorneys began to seriously discuss the prospects for alternative dispute resolution.

Finally, the 1980–2010 period, sometimes referred to as the era of managerial judging, represents the flourishing of the modern brand of case management that judges employ today. The 1980s saw a spike in mass tort cases, leading many judges to fear that such cases would eventually overwhelm the courts. During a brief but intense period in the 1980s and 1990s, courts turned to aggregation via the mass tort class action as a case management device. Before long, however, as a result of inherent difficulties in conducting mass tort cases as class actions, MDL eclipsed the class action as the preferred mass tort case management tool. Perhaps the most important development of this era was a series of significant amendments to the FRCP in 1983 that both added to and enhanced the pretrial management tools available to judges. Moreover, the seeds of judicial involvement in settlement and ADR planted in the 1970s came to fruition in this period. It was this era that witnessed the sharpest reduction in the proportion of federal civil cases going to trial.

The development of case management has not been without controversy. Judges, lawyers, and scholars have disagreed about its goals, methods, and effects, as well as the implications of the decline in trials that many associate with case management. Much of the discussion has centered on what some refer to as "the vanishing trial," reflecting the fact that in recent years, the percentage of federal civil cases going to trial has fallen below one percent.[5] This piece will conclude with a brief summary of scholarly critiques of case management and managerial judging.

4. For a general discussion of rising caseloads in the federal courts, see Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge: Harvard University Press, 1996).

5. According to data from the Administrative Office of the U.S. Courts, the percentage of civil cases reaching trial declined from 11.5% in 1962 (law professor Mark Galanter used that year as a starting point because "it is the first year that is readily comparable to present-day figures") to 1.8% in 2002. The percentage actually disposed of by trial cannot be determined precisely because the data on dispositions includes cases resolved "during and after trial." Mark Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *Journal of Empirical Legal Studies* 1, no. 3 (2004), 459–461. The trial rate continued a steady decline after 2002, and in 2025, 0.4% of all civil cases filed reached trial. Administrative Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2025.

Before the Federal Rules of Civil Procedure: 1789–1938

The Federal Courts as Independent Actors

For the first century and a half of their existence, federal courts employed no techniques bearing even a slight resemblance to modern case management. It would have been difficult for any specific methods to gain traction on a widespread basis given the lack of any administrative structure or common set of procedural rules, not to mention a prevailing ethos that the judge's sphere of action was properly limited to trial. This subsection and the one following, covering the period prior to adoption of the FRCP, provide a general picture of the procedural rules under which judges worked and the role they played in seeing cases to their conclusion.

During this period, the federal trial courts operated under procedural rules resembling those of the states in which they sat. In 1789, Congress directed the federal courts to follow state procedures as of that year in actions at law but provided some flexibility in 1792 by allowing the courts to make adjustments to those procedures as they saw fit.[6] The advent of state codes of civil procedure in the 1840s widened the gap between state and federal courts—the latter of which were still roughly following 1789 procedures—so in the Conformity Act of 1872 Congress instructed federal courts to follow "as near as may be" state procedures "existing at the time."[7] While variance between federal and state courts was diminished, federal court procedures continued to vary widely from one state to another, to the frustration of lawyers practicing in more than one federal jurisdiction.[8] The number of such attorneys increased throughout the nineteenth century as the economy grew and railroads speeded the flourishing of interstate commerce. This frustration eventually spawned the movement for a uniform code of federal procedure, which began with the American Bar Association in 1895 but made little progress in its early years.

With no uniform procedural rules in place for actions at law, no governing body, and no administrative apparatus to speak of, federal trial courts acted more or less as independent units well into the twentieth century. Individual judges lacked any institutional structure to which they could look for guidance in managing their cases. As Professor Resnik wrote:

6. 1 Stat. 93 (1789); Process Act of 1792, 1 Stat. 275 (1792).

7. Practice Conformity Act of 1872, 17 Stat. 197 (1872).

8. Adding to the potential for confusion was the fact that while federal courts were to follow state procedures in actions at law—in which remedies were typically limited to monetary damages—such was not the case in equity suits, where no adequate remedy at law was available and alternate types of relief could be granted. (State procedural codes usually abolished the distinction between law and equity, but the federal courts maintained it until the adoption of the FRCP.) Initially, the federal courts followed the procedures of the English Court of Chancery when sitting in equity. In 1822, the Supreme Court promulgated the Rules of Practice for the Courts of Equity of the United States, a limited set of rules that was supplemented with adherence to English practices where gaps existed. These rules were revised and expanded in 1842 and, more extensively, in 1912. Later, the equity rules exerted some influence over the drafting of the FRCP. Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review* 135, no. 4 (April 1987), 909–1002.

> In 1915, some 120 federal judges were dispersed across the United States, with, for example, only a single district judge in Indiana or Maryland or Massachusetts. These judges used different rules when deciding cases in their courts, and they had no institutional means of talking with each other, let alone anyone else. The Attorney General of the United States gave Congress reports on the federal courts and asked Congress for the judiciary's funds. As then Chief Justice William Howard Taft put it, each judge had "to paddle his own canoe."[9]

The Management of Trials

To contextualize the changes wrought by the FRCP, it may be helpful to highlight a few important aspects of the judge's role in the pre-FRCP world. Prior to 1938, pretrial procedure focused almost entirely on pleadings, which are formal written statements filed by counsel, typically well in advance of trial. Pleadings served a function akin to that of modern discovery, in that they were intended to draw out the facts of the case. The overriding purpose of pleading—both at common law and later during the era of procedural codes—was to make, deny, and rebut factual assertions to determine the issue or issues that would be decided at trial.[10]

In the nineteenth and early twentieth centuries, the pleading process was highly technical. To the consternation of many parties to litigation, cases were frequently won or lost based on a failure to comply with pleading rules. In a highly influential speech to the 1906 annual meeting of the American Bar Association, Dean Roscoe Pound of the University of Nebraska Law School (and later of Harvard Law School) decried what he termed "the sporting theory of justice."[11] To Pound, litigation was a game in which judges were "to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice."[12] Pound's speech helped to spark an era of reform that led ultimately to the adoption of the FRCP, a primary purpose of which was to simplify pleading to facilitate the resolution of cases on their merits rather than on technicalities.

In the pre-FRCP era, federal cases involved minimal discovery. The Judiciary Act of 1789 provided some limited discovery rights but did not permit depositions of parties or pretrial document requests in actions at law. As a result, cases generally moved to trial shortly after the exchange of pleadings was complete, and trial was, in large part, a mechanism for parties to uncover the evidence needed to prove their case. With the revelation of most evidence occurring during trial rather than beforehand, outcomes were influenced heavily by the element of surprise, a factor that limited a judge's ability to exert control over the proceedings.

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9. Judith Resnik, "Judicial Independence and Article III: Too Little and Too Much," *Southern California Law Review* 72, nos. 2–3 (January and March 1999), 662–663 (quoting William Howard Taft, "Possible and Needed Reforms in Administration of Justice in Federal Courts," *American Bar Association Journal* 8, no. 10 (October 1922), 601–602).

10. Charles E. Clark, *Handbook of the Law of Code Pleading* (St. Paul, Minn.: West Publishing Co., 1928), 11.

11. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Annual Report of the American Bar Association* 29 (1906), 404.

12. *Id.* at 405.

Beyond ruling on objections to pleadings, which could dispose of a case, the judge's role prior to 1938 was mostly limited to trial.[13] In the early years of the republic, judicial control over trials was weak in some respects. Over the course of the nineteenth century, however, power shifted away from civil juries and toward trial judges as a result of judicially created trial management tools. An important one was the practice of ordering a new trial when a jury returned a verdict contrary to the law as handed down by the court.[14] Other tools that facilitated this process included the directed verdict, evidentiary rules, and the law of jury instructions.[15] As law professor Stephen Yeazell has pointed out, most of these tools were originally created by state appellate courts,[16] and their use was subject to appellate review, giving appellate courts greater authority over trial courts.[17]

The extent to which federal judges were supposed to apply state court trial management tools was not always clear. In some instances, federal courts followed state practices—embodied in statutes or common-law rules—pursuant to the Conformity Act. The Supreme Court sometimes found the use of state procedure improper, however, on the grounds that "[t]he function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court."[18] In several cases, state laws regulating jury instructions were held inapplicable to federal courts on this basis.[19] Federal courts generally followed state evidentiary rules, adhering more closely to statutorily created rules than to common law ones.

In short, federal trial judges generally followed state procedures unless they were superseded by federal law, which created its own complications—when, exactly, did a federal law override a state procedural rule? In *Slocum v. New York Life Ins. Co.* (1913), for example, the Supreme Court held that a federal court's entry of a judgment notwithstanding the verdict[20] pursuant to a Pennsylvania statute violated the Seventh Amendment right to a jury trial (which did not apply to the states). In federal court, the proper remedy was the granting of a

13. Richard L. Marcus, "Reining in the American Litigator: The New Role of American Judges," *Hastings International and Comparative Law Review* 27, no. 1 (Fall 2003), 10.

14. Matthew P. Harrington, "The Law-Finding Function of the American Jury," *Wisconsin Law Review* 1999, no. 3 (Summer 1999), 379.

15. Stephen C. Yeazell, "The Misunderstood Consequences of Modern Civil Process," *Wisconsin Law Review* 1994, no. 3 (Summer 1994), 642; see also Jonathan T. Molot, "An Old Judicial Role for a New Litigation Era," *Yale Law Journal* 113, no. 1 (October 2003), 77–83; "The Changing Role of the Jury in the Nineteenth Century," *Yale Law Journal* 74, no. 1 (November 1964), 170–192; Kenneth Vinson, "Tort Reform the Old-Fashioned Way: By Trial and Appellate Judges," *Detroit College of Law Review* 1987, no. 4 (Winter 1987), 998.

16. While the U.S. circuit courts (which served as the primary federal trial courts from 1789 to1911) had limited appellate jurisdiction over the U.S. district courts, the federal judiciary had no true appellate courts other than the Supreme Court until Congress established the U.S. circuit courts of appeals in 1891.

17. Yeazel, *supra* note 15, at 643–644.

18. *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931).

19. See, e.g., *Nudd v. Burrows*, 91 U.S. 426 (1875).

20. The judgment notwithstanding the verdict or JNOV (for "judgment *non obstante veredicto*") was a powerful tool developed in the early twentieth century to further transfer power from juries to judges. It protected against unreasonable or irrational jury behavior by permitting a judge to set aside a verdict (instead of granting a new trial) upon a finding that no reasonable jury could have reached such a verdict. Laura Gaston Dooley, "Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury," *Cornell Law Review* 80, no. 2 (January 1995), 333.

new trial.[21] The *Slocum* decision ended the practice of granting judgment notwithstanding the verdict in federal court until FRCP 50 established a similar mechanism in 1938.

The Foundation for Case Management is Laid: 1938–1961

The Federal Rules of Civil Procedure

The adoption of the Federal Rules of Civil Procedure in 1938 brought about a dramatic change in the way federal courts handled civil cases and laid the foundation for modern case management.[22] Of special significance were the merger of law and equity in the federal courts and the establishment of uniformity in federal civil procedure.[23]

The FRCP was the first step in what many observers have called the transition from "trial" to "litigation," the latter term referring to an adversarial process of legal maneuvering that frequently ends, in any of several ways, before a trial is held. The seeds of case management were contained in the rules' stated purpose of facilitating "the just, speedy, and inexpensive determination of every action."[24] In addition to providing uniformity, the rules included a strong emphasis on pretrial preparation, including the establishment of modern discovery.

The FRCP established three particularly important case management tools: the pretrial conference, the summary judgment motion, and expanded discovery. These innovations did not have an immediately transformative effect, instead taking several decades to mature. As Professor Stephen Burbank has noted, "[I]n the aftermath of the 1938 Federal Rules federal judges were slow actually to exercise many of the powers they had under those rules and other sources," having become "accustomed to a relatively passive role in common law cases."[25]

21. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

22. This essay will detail the ways in which the FRCP facilitated the development of modern case management but will not recount the story of the rules' creation and adoption, which is available in the FRCP essay (https://www.fjc.gov/history/work-courts/rules-federal-rules-civil-procedure) in the Rules of Practice and Procedure in the Federal Courts feature (https://www.fjc.gov/history/work-courts/rules-practice-and-procedure-in-federal-courts).

23. The uniformity provided by the FRCP was not absolute, as Rule 83 permitted each district court, by a majority vote of its judges, to "make and amend rules governing its practice not inconsistent with these rules."

24. FRCP 1.

25. Stephen Burbank, "Procedure and Power," *Journal of Legal Education* 46, no. 4 (December 1996), 514. Later, pretrial procedure was aided by the federal trial courts' transition from a master calendar system, under which any judge could be assigned to pretrial matters, to a system under which a single judge took responsibility for a case from start to finish. (In contrast to the early days of the federal judiciary, when most districts had but a single judge, many districts now had multiple judges. The largest, the Southern District of New York, had twenty-four authorized judgeships by 1961.) The transition to single-judge assignment, which nearly every trial court had completed by the late 1960s, ensured that trial judges would have the maximum degree of familiarity with each of their cases, allowing for more effective management. Steven S. Gensler, "Judicial Case Management: Caught in the Crossfire," *Duke Law Journal* 60, no. 3 (December 2010), 674–675.

The Pretrial Conference

The Rule 16 pretrial conference, which was not mandatory[26] but could be called at the judge's discretion, was aimed at simplifying the issues to be tried, addressing potential amendments to the pleadings, considering evidentiary issues, and "[s]uch other matters as may aid in the disposition of the action."[27] Broadly speaking, the drafters of Rule 16 hoped that the pretrial conference would provide a roadmap for the trial, dispense with extraneous aspects of the suit, and eliminate the surprises that were a hallmark of earlier trials.

The pretrial conference was foundational but not entirely novel. Some judges had already been calling the parties together for informal discussions after a case was filed and found it to be a useful practice. In 1934, Judge George McDermott, formerly of the U.S. District Court for the District of Kansas and then of the U.S. Court of Appeals for the Tenth Circuit, advised judges to follow suit and urged including the pretrial conference in the forthcoming procedural rules. Judge McDermott found that such meetings were useful for "getting at the nub of a case at the beginning of the litigation instead of at the end of it," as well as for weeding out "sham suits and fake defenses."[28]

Edson Sunderland, a law professor at the University of Michigan who had been a member of the Supreme Court Advisory Committee on Rules for Civil Procedure[29] and one of the primary drafters of the FRCP, distributed a paper to district judges in the early 1940s that provides a window into the early use of the pretrial conference. Because no formal system of reporting had yet been established, Sunderland drafted the paper to tell judges how their colleagues were using the new procedure. He provided details as to how judges were facilitating agreement with counsel at the conference in identifying the matters actually in dispute, easing and simplifying the admission of evidence, and helping the parties to reach agreement on the scope and nature of the information to be exchanged in discovery.[30]

Despite the efforts of Sunderland and others to promote the practice, many attorneys and judges were slow to embrace the pretrial conference. (While judges had the ability to call a pretrial conference at their discretion, some judges did not do so if the attorneys opposed it.)

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26. Federal courts could use their authority under Rule 83 to make pretrial conferences compulsory by local rule. See, e.g., "Pre-Trial Procedures in the Federal Court," *Record of the Association of the Bar of the City of New York* 11, no. 4 (April 1956), 184 (referencing the Southern District of New York).

27. FRCP 16 (1938).

28. George T. McDermott, "Just What is Your Defense?" *Journal of the American Judicature Society* 18, no. 4 (December 1934), 100–101.

29. After passage of the Rules Enabling Act of 1934, which authorized the Supreme Court to make uniform rules of civil procedure for the federal courts, the Court appointed an advisory committee of lawyers, scholars, and judges to draft the rules. Attorney General William Mitchell chaired the Advisory Committee, and Dean Charles E. Clark of Yale Law School served as its reporter. Clark, who became a judge of the U.S. Court of Appeals for the Second Circuit in 1939, is generally regarded as having had the greatest influence over the form, scope, and philosophy of the FRCP. The original Advisory Committee remained in existence until 1956 to propose amendments to the rules. In 1958, Congress authorized the Judicial Conference of the United States to "carry on a continuous study" of federal procedural rules. The Judicial Conference established the Committee on Rules of Practice and Procedure, which in turn created the Advisory Committee on Rules of Civil Procedure. The new Advisory Committee continues to propose FRCP amendments.

30. Edson R. Sunderland, "Procedure for Pretrial Conferences in the Federal Courts," *Journal of the American Judicature Society* 28, no. 2 (August 1944), 46–49.

At a meeting of the New York City Bar in 1956, Judge Irving Kaufman of the Southern District of New York, a member of the Judicial Conference Committee on Pretrial Procedure, called the pretrial conference "the long-neglected stepson of the federal rules," remarking that many attorneys resisted it because of an initial negative experience or dislike of change generally. On a similar note, Judge Harold Medina of the U.S. Court of Appeals for the Second Circuit asserted that the pretrial process "has been fought by the judges much more bitterly than it has been fought by the lawyers."[31]

Judge Alfred P. Murrah, first a U.S. district judge in Oklahoma and later a judge on the U.S. Court of Appeals for the Tenth Circuit, was the most vigorous advocate of the pretrial conference and worked diligently to convince judges of its benefits. Judge Murrah served on the Committee on Pretrial Procedure for its entire existence (1943–1968), including twenty years as its chair, and soon thereafter became the second director of the Federal Judicial Center (1970–1974). In 1953, he prepared a summary of pretrial procedure for newly appointed U.S. district judges in which he emphasized the importance of taking trials "out of the realm of surprise and maneuvering," "the elimination of the necessity of proving facts which are not disputed," the limitation of expert witnesses, and the referral of especially complex cases to a special master or commissioner for simplification before trial.[32] Of Rule 16's "such other matters" catch-all provision, he wrote, "The utility and flexibility of this section is limited only by the imagination of the pre-trial judge." Murrah's views on case management became the foundation for many of the seminars and materials the FJC later provided to both experienced and newly appointed trial judges.[33]

Summary Judgment

Like the pretrial conference, the summary judgment motion provided by FRCP 56 did not initially have a large impact but became tremendously important as a case management device in future decades. A method of disposing of some cases without trial, summary judgment originated in nineteenth-century England and had been adopted by a few states during the first third of the twentieth century.[34] Under the Conformity Act of 1872, a federal court could grant summary judgment if the procedure existed in courts of the state. In its initial pre-FRCP use in state courts, summary judgment was designed primarily as a plaintiff's motion—a way to weed out frivolous defenses. The device was intended to allow plaintiffs, especially those without much money, to quickly obtain judgments to which they were clearly entitled before wealthy corporate defendants could impose delay, exhausting plaintiffs' resources and clogging dockets.[35]

31. Pre-Trial Procedures, *supra* note 26, at 181–182, 193.

32. Alfred P. Murrah, "Pre-Trial Procedure: A Statement of its Essentials," 14 F.R.D. 417, 417–419 (1953).

33. Steven Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," *Justice System Journal* 4, no. 2 (Winter 1978), 148.

34. Judicial Conference of the United States, Advisory Committee on Rules of Civil Procedure (hereinafter Advisory Committee), note to FRCP 56 (1937); Ilana Haramati, "Procedural History: The Development of Summary Judgment as Rule 56," *New York University Journal of Law and Liberty* 5, no. 1 (2010), 177.

35. Haramati, *supra* note 34, at 174.

This philosophy played a role in the drafting of Rule 56, although unlike some state rules, the federal rule was made equally applicable to both plaintiffs and defendants.[36] Rule 56 established the motion as an element of federal procedure, providing that summary judgment could be issued in favor of either a plaintiff or defendant, as to all or part of the action, "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Charles Clark, the reporter to the Advisory Committee, viewed summary judgment as a case management tool from the outset. The device, he wrote, "affords a means by which judgments may be more speedily secured, particularly where court dockets are congested. . . . It also furnishes an easy and direct way of disposing of a large amount of important litigation."[37]

Disposing of some cases before trial was not the only effect of the summary judgment mechanism. The threat of having one's case foreclosed through summary judgment provided attorneys with an early motivation to make prompt and full use of the discovery tools available to them to gather the evidence needed to survive such a motion. In the early years of the new civil rules, however, many judges were reluctant to grant summary judgment motions. Clark, then a U.S. court of appeals judge, remarked in 1943 that courts had been too hesitant to resolve cases in this way.[38] Some appellate courts interpreted Rule 56 narrowly, and district judges could be wary of granting summary judgment because of the perceived likelihood of being reversed.[39] Supreme Court jurisprudence in the 1980s resulted in a significant increase in the number of cases resolved by summary judgment, however.

Pretrial Discovery

In addition to the pretrial conference and the summary judgment motion, the FRCP introduced the most liberal discovery rules yet seen in the United States, embodied in Rules 26 to 37. Rule 26 set forth a broad scope for depositions of "any person, whether a party or not," covering "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party." Similarly broad was Rule 34's provision for the production of documents and other tangible things "not privileged, which constitute or contain evidence material to any matter involved in the action." While depositions and document production were the most important discovery tools, the rules also permitted interrogatories, mental and physical examinations, and requests for admission (provided for by Rules 33, 35, and 36, respectively).[40]

36. *Id.* at 189, 207.

37. *Id.* at 189.

38. William W Schwarzer, et al. *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* (Washington, D.C.: Federal Judicial Center, 1991), 3.

39. The FJC's 1991 publication on summary judgment noted that language in some courts of appeals opinions "led trial courts to err in favor of allowing cases to reach the jury; courts of appeals were perceived as rarely affirming summary judgment." That perception, the FJC asserted, "is not borne out by the facts." *Id.* at 3–4, n.13.

40. In 1970, the rules relating to discovery were reorganized. Several provisions of Rule 26 were transferred to other rules for the purpose of establishing Rule 26 as governing discovery in general.

Rule 37 contained mechanisms to compel recalcitrant parties to comply with discovery requests. If a party refused to answer a question in a deposition, the judge could order that party to answer and pay the costs associated with obtaining the order if the refusal was unjustified. Further disobedience could result in a citation for contempt of court. In other situations, such as the refusal to produce documents or allow an examination, judges had wide discretion in choosing a remedy. Options included considering facts to be established against the refusing party, disallowing claims or defenses, striking parts of pleadings, and excluding evidence. In extreme circumstances, a judge could issue a default judgment against the disobedient party.

The expansion of discovery rights had several purposes, among them to make evidence more readily available to parties so that trial proceeded in an orderly fashion and victory was not so heavily dependent on surprising one's opponent. The new rules were also meant to help with the framing of issues for trial and to allow attorneys to better understand the strengths and weaknesses of their cases. Discovery proponents hoped that improved access to evidence would eliminate uncontested issues from the case, encourage settlement, and allow better preparation for trial so that cases that did wind up in the courtroom would proceed more smoothly.

Discovery quickly became widely used in the federal courts and was credited with improving trials and allowing the vindication of rights that could not otherwise be litigated for lack of proof. Early on, however, some expressed dissatisfaction with certain elements of the discovery process. Attorneys and litigants frequently complained that discovery was expensive and time-consuming, was often used to pry into private matters not relevant to the litigation, and could be employed as a tool to harass one's opponent into a favorable settlement. Discovery disputes, it was said, occupied too much of the court's time, led to inconsistent rulings, and unduly delayed the disposition of cases.[41]

The complaints about the wide-open nature of the discovery process and the potential for its abuse were especially acute with respect to large or complex cases that might involve many more documents and witnesses than usual. A comment in *Yale Law Journal* lamented the absence of adequate safeguards in the rules against discovery abuse—meaning a lack of sufficient tools for judges to curb it—asserting that "[a]buse, when it does occur, generally appears in complex litigation where the resources of time, money and counsel make it practicable as a litigation tactic."[42] The high cost of depositions—including representation by counsel, copies of transcripts, and time lost from work—could be especially effective in coercing settlements from parties. This factor came into play most frequently when one party was much wealthier than the other and could compose a long list of potential witnesses to depose with little fear of retaliation.[43] Depositions could also be dragged out unnecessarily to impose delay and hamper an opponent's ability to prepare for trial, which had a similar

41. William H. Speck, "The Use of Discovery in United States District Courts," *Yale Law Journal* 60, no. 7 (November 1951), 1132–1133.

42. "Tactical Use and Abuse of Depositions Under the Federal Rules," *Yale Law Journal* 59, no. 1 (December 1949), 125–126.

43. *Id.* at 126–131.

coercive effect.[44] Moreover, the "virtually unrestricted examination" allowed by Rule 26 opened the door to "malicious, as well as over-extended, questioning" in the form of "a long series of annoying questions used to harry the deponent," "probing into personal matters possessing a blackmail value," or "gather[ing] valuable trade secrets from the deponent."[45] The author urged that the rules be amended to give trial judges more oversight and better tools to halt abusive discovery practices.[46]

The Big Case

While the pretrial conference, summary judgment, and expanded discovery were all beneficial to the administration of justice in the federal courts, there was one area in which many deemed the FRCP to be lacking. Complex litigation, consisting frequently of antitrust, patent, or shareholders' derivative suits, became known to attorneys and judges in shorthand as "The Big Case".[47] The big case posed significant problems for all involved—perhaps most acutely with respect to discovery. It generated a great deal of discussion between the 1940s and 1960s and ultimately became a permanent object of study by the federal judiciary. At a 1951 symposium chaired by Judge Clark, attorneys and judges vented their frustrations about discovery in the big case. One attorney articulated what seemed to be the prevailing view: "In what I have called the 'average' case, it seems to me reasonably clear that the Rules have operated effectively and well, generally speaking. . . . In the field of the big case, I do not think it can be successfully asserted that the Rules have operated effectively. The practically unlimited scope of discovery under the federal rules has proved expensive and time-consuming beyond any reasonable benefits to be derived from them."[48] It was not only the litigants who suffered. William Speck, an attorney working for the Administrative Office of the U.S. Courts, pointed out that broad discovery was putting a heavy burden on federal judges because of the large number of discovery disputes on which they had to rule.[49]

As Judge Clark's symposium was being held, the Prettyman Report had been completed and was awaiting approval. The Judicial Conference had appointed the Prettyman Committee, chaired by Judge Elijah Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit, in December 1949 to study procedural problems in antitrust and other large cases. The report summarized the issue thus:

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44. *Id.* at 131–134.

45. *Id.* at 136–138.

46. *Id.* at 138. The author acknowledged that Rule 30(b) allowed courts to order that depositions not be taken, limit the scope of a deposition, or make other orders necessary "to protect the party or witness from annoyance, embarrassment, or oppression." They asserted, however, that establishing the prerequisites for such orders was difficult, and even when judges acted under Rule 30(b), they tended to tread lightly in terms of prohibiting or limiting the scope of examinations. *Id.* at 123–124.

47. The term appears to have been first used in this context by New York attorney Breck McAllister. Breck P. McAllister, "The Big Case: Procedural Problems in Antitrust Litigation," *Harvard Law Review* 64, no. 1 (November 1950), 27–61.

48. "The Practical Operation of Federal Discovery: A Symposium on the Use of Depositions and Discovery Under the Federal Rules," 12 F.R.D. 131, 141–142 (1951).

49. *Id.* at 139.

> Cases of this sort, especially in the anti-trust and patent fields, while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice. Unnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money are among the vices resulting from the circumstances described, but the principal vice is that such conditions cause confusion, magnify uncertainty, multiply the possibilities of error, and otherwise tend to make less certain and less accurate the judicial determination of disputed issues.[50]

The report proposed specific solutions designed to make large-scale litigation more manageable while making clear that the primary responsibility for doing so rested on the trial judge. The committee recommended making extensive use of pretrial conferences to particularize the issues to be tried, set the permissible bounds of discovery, and ensure that evidence was well organized before trial. Pretrial conferences could include elements such as opening statements to crystallize the issues, elimination of uncontested or irrelevant issues, authentication and exchange of exhibits so that each side would be familiar with the evidence to be proffered by the other, stipulations on points of agreement, advance exchange of testimony of expert or technical witnesses, and creation of a detailed trial plan.[51]

The Prettyman Report, adopted by the Judicial Conference in 1951, was very influential within the judiciary. It later served in significant part as the basis for the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, which was prepared by a Judicial Conference study group chaired by Judge Murrah and adopted by the Conference in 1960.[52] As one scholar noted years later, the *Handbook* "endorsed all of the tenets of what we now consider typical case management."[53] The *Handbook* eventually evolved to become the *Manual for Complex Litigation*, first published by the Federal Judicial Center in 1969 and still widely used in updated form.

The Ascendancy of Aggregation and Centralization: 1961–1980

In the 1960s, two important case management devices emerged: the aggregation of claims via an improved class action device and the centralization of multidistrict litigation for pretrial proceedings. Major revisions to the class action rule (FRCP 23) in 1966 fixed technical defects in the old rule, leading eventually to a flood of class actions that posed special case management challenges while also providing judges with specific tools to make those cases more manageable. In 1968, to address the emerging phenomenon of related cases filed in federal districts across the country, Congress created the Judicial Panel on Multidistrict Litigation, a group of judges empowered to improve the handling of such cases by centralizing

50. Judicial Conference of the United States, Prettyman Committee, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1952).

51. *Id.* at 68–72.

52. Judicial Conference of the United States, Study Group on Procedure in Protracted Litigation, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 373–374 (1960).

53. Andrew D. Bradt, "'A Radical Proposal': The Multidistrict Litigation Act of 1968," *University of Pennsylvania Law Review* 165, no. 4 (March 2017), 853.

them for consolidated pretrial proceedings. Eventually, multidistrict litigation eclipsed the class action as a favored management device for certain types of litigation.

The New Rule 23 Class Action

In 1966, the Advisory Committee transformed federal class action practice to increase judges' ability to manage large-scale litigation. It did so by replacing the original, unwieldy and confusing Rule 23 with one that aimed to improve the class action as a procedural device without altering substantive law. The new rule had far-reaching consequences, and litigants began to use it in ways its drafters had neither anticipated nor intended. The number of class actions brought in federal court increased as a result, spurring the need for increased case management using the very tools authorized by the new rule.

The new Rule 23 set out general prerequisites for maintaining a class action—a sufficiently numerous class, questions of law or fact common to the class, and class representatives possessing claims typical of the class and able to adequately protect the interests of the class.[54] The rule also defined three types of class actions, each with distinct requirements above and beyond those applying generally.[55] An action could be brought under subsection (b)(3), for example, if questions of law or fact common to the class predominated and a class action would be the superior method of resolving the controversy.[56] Superiority depended on several factors, including "the difficulties likely to be encountered in the management of a class action."[57] Subsection (b)(3) cases—sometimes called "damages class actions" and frequently involving tort claims—were the biggest source of the post-1966 class action boom. Substantive legal changes brought more tort cases into the federal courts, while (b)(3) allowed for the aggregation of large numbers of claims for damages too small to bring individually.[58]

The 23(b)(3) class—a mass of people collected together under a "class definition" (defining their one common trait, an alleged legal claim to damages) crafted by lawyers most of them would never meet—created special managerial concerns.[59] A successful damages class action would bind non-litigants to a judgment, creating the risk of unfairness or prejudice to absent class members. To address this concern, subsection (c) included two significant structural protections for absent class members. The rule required the court to inform class members

54. FRCP 23(a) (1966).

55. FRCP 23(b) (1966).

56. Subsection (b)(1) provided for class treatment when separate actions would create a risk of establishing "incompatible standards of conduct for the party opposing the class" or where adjudications with respect to some class members could be "dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Subsection (b)(2) applied when "the party opposing the class has acted or refused to act on grounds that apply generally to the class," making injunctive or declaratory relief appropriate for the entire class.

57. FRCP 23(b)(3)(D) (1966).

58. As the Advisory Committee's note explained, "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

59. Arthur R. Miller, "An Overview of Federal Class Actions: Past, Present and Future," *Justice System Journal* 4, no. 2 (1978), 209.

of the action by the best notice practicable and provided all class members with the opportunity to opt out of the class, thereby preserving their individual right to bring suit. Class members not opting out would be bound by any judgment entered.

The large number of damages class actions placed a heavy burden on federal judges and greatly increased their case management responsibilities. As the FJC's *Manual for Complex Litigation* explained, "Because the stakes and scope of class action litigation can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation."[60] The trial judge's most important case management responsibility was to "certify" (approve) the class, as required by subsection (c), by determining that it satisfied all applicable conditions, a potentially complex and time-consuming task. It was also typically fiercely disputed by the parties, because denial of class certification—that is, a finding that the case could not proceed as a class action—usually meant the end of the litigation.[61] The judge's work could be complicated by the tendency of some attorneys to file what should have been a Rule 23(b)(3) action under subsections (b)(1) or (b)(2) in an attempt to avoid the costly and inconvenient notice and opt-out provisions of (b)(3).62

Before class certification, however, there were preliminary case management tasks to perform. These included threshold dispositive motions (such as a motion to dismiss or for summary judgment), appointing counsel to represent the asserted class(es), and determining whether any discovery was necessary on issues affecting class certification. Judges typically held a certification hearing to ensure the record was complete before ruling.[63] A certification order defined the class, identified class issues, claims, and defenses, and appointed class counsel and representatives to act on behalf of the class. On occasion, judges redefined a class to make the suit more manageable. As Professor Arthur Miller (who assisted Advisory Committee reporter Benjamin Kaplan with the 1966 rule revisions) noted in 1979, "More judges are aware that there are possibilities other than an across-the-board grant or denial of certification. Instead of wielding a meat axe, courts increasingly are operating with a scalpel."[64]

While subsection (c) gave judges some flexibility in defining a class, subsection (d) of Rule 23 gave judges broad administrative powers to manage class actions.[65] Though slow to

60. *Manual for Complex Litigation, Fourth* (Washington, D.C.: Federal Judicial Center, 2004), §21, 243.

61. As will be discussed below, one scenario in which class certification was not hotly disputed was when the parties sought to have a class certified solely for purposes of settlement.

62. John K. Rabiej, "The Making of Class Action Rule 23—What Were We Thinking?" *Mississippi College Law Review* 24, no. 2 (Spring 2005), 345–347.

63. The first edition of the FJC's *Manual for Complex Litigation* advised that "the determination that the action is or is not maintainable as a class action cannot ordinarily be made without affording the parties: '. . . a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequacy of representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.'" *Manual for Complex Litigation, First* ((Washington, D.C.: Federal Judicial Center, 1969), §1.6, 21 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 570 (2nd Cir. 1968)).

64. Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem,'" *Harvard Law Review* 92, no. 3 (January 1979), 680.

65. Rule 23(d) permitted judges to "make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

embrace these tools, by the late 1970s, judges were actively employing the "arsenal of procedural powers" derived from subsections (c) and (d). Specifically, Miller was finding that

> district judges frequently redefine classes to improve manageability; grant partial certification when appropriate to take advantage of the economics of group adjudication on at least some issues; bifurcate the adjudication of liability from the remedy phase in certain cases to improve efficiency; insist on a high level of legal skill to improve the quality of representation, which serves to reduce the risk of collateral attack; establish subclasses when antagonisms or conflicts exist within the group; and employ efficient management techniques during the precertification period to achieve an early determination of that issue.[66]

Class certification did not end a judge's managerial responsibility for a class action. Significant post-certification case management tasks included supervising the discovery process (including deciding the extent to which individual class members would be subject to discovery), approving or disapproving a proposed class settlement, and reviewing petitions for attorneys' fees.[67] The judge's obligation to make sure that both class representatives and class counsel were fairly and adequately representing the class continued throughout the litigation.[68] The review of a proposed settlement agreement—a crucial step that would determine a defendant's obligations and the benefits to which class members would be entitled—was complicated by the lack of adversariness between the two sides once a settlement had been reached. The judge was required to conduct a detailed inquiry, without the benefit of argument, to ensure that a settlement was fair, adequate, and reasonable. This typically entailed holding a fairness hearing, of which class members were formally notified, to ensure that any decision was based on a sufficient record.[69] The review of a settlement could also include review of attorneys' fee petitions, which judges were to evaluate based on the actual benefits an attorney conferred upon the class.[70]

While class actions brought under subsection (b)(3) placed the heaviest burden on federal judges, class actions brought under subsection (b)(2)—dealing with injunctive relief against defendants whose action or refusal to act affected members of a class the same way—posed additional managerial challenges. The drafters of the 1966 Rule 23 had foreseen correctly that

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(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters."

66. Miller, Frankenstein, *supra* note 64, at 680–681.

67. Subsection (e) of the 1966 rule provided: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

68. Miller, Overview, *supra* note 59, at 220.

69. In 2003, the Advisory Committee revised Rule 23 to make mandatory "the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class." Advisory Committee, note to FRCP 23 (2003). This revision was part of a larger revision of subsection (e) designed to strengthen the settlement review process. Rabiej, *supra* note 62, at 375.

70. *Manual for Complex Litigation, Fourth*, *supra* note 60, at §21.71, 336.

subsection (b)(2) would be used for civil rights class actions inspired by the Supreme Court's 1954 ruling in *Brown v. Board of Education* declaring racially segregated public schools unconstitutional. While *Brown* was limited to the school context, the Civil Rights Act of 1964 and Voting Rights Act of 1965 had been enacted by the time the new Rule 23 went into effect, and the Age Discrimination in Employment Act of 1967 appeared shortly thereafter. These statutes opened the door to an unforeseen flood of class actions seeking relief for racial, sexual, and age discrimination in terms of employment, voting, and access to public facilities.[71]

In the 1970s, the scope of 23(b)(2) class actions widened dramatically as a result of what Harvard Law School professor Abram Chayes, in a widely cited 1976 article, characterized as "public law litigation."[72] Public law litigation included civil rights but extended to many other public policy contexts, including conditions in state prisons, mental hospitals, and public housing projects, and against local police departments alleging constitutional violations.[73] Antitrust, securities fraud, consumer fraud, electoral apportionment, environmental, and many other types of cases could be included in this category as well.[74] While civil litigation was thought of traditionally as addressing disputes between private parties, public law litigation was aimed at "the vindication of statutory or constitutional polices" and involved equitable forms of relief.[75] Chayes highlighted what made this kind of litigation unique for trial judges:

> The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.[76]

Public law litigation played a significant role in the emergence of managerial judging. Judges were required to make prospective judgments and often participated in negotiations over relief.[77] In many cases, parties reached settlements and entered into consent decrees specifying the remedial steps to be taken. In some cases, judges participated in crafting what Yale Law professor Owen Fiss referred to as "structural injunctions," so named because they required structural change to defendant institutions.[78] Managerial tasks could continue indefinitely as judges retained oversight over the implementation of a consent decree or injunction to ensure compliance and make further orders as needed.[79]

71. Miller, Frankenstein, *supra* note 64, at 671.

72. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89, no. 7 (May 1976), 1281–1316.

73. Owen M. Fiss, "Dombrowski," *Yale Law Journal* 86, no. 6 (May 1977), 1149.

74. Chayes, *supra* note 72, at 1284.

75. *Id.* at 1284.

76. *Id.* at 1284.

77. *Id.* at 1300.

78. Fiss, Dombrowski, *supra* note 73, at 1144.

79. Chayes, *supra* note 72, at 1301.

Public law litigation peaked in the 1970s and then declined in the 1980s for a variety of complex reasons.[80] Damages class actions, however, remained abundant and became more complex as attorneys attempted to use them for purposes never imagined by the drafters of the 1966 Rule 23. The increase in class actions brought about by the revised rule had massive implications for case management. As Professor Miller concluded, "class action suits impose unique demands on a trial judge. The judge must supervise a class action more closely than other cases, and must be an active participant to a degree unknown to many types of litigation. Not only must a judge serve throughout as an active systems director, [the judge] has affirmative obligations to intervene."[81]

The Origins of the Judicial Panel on Multidistrict Litigation

In 1960, the U.S. Department of Justice indicted several large manufacturers of electrical equipment under the Sherman Antitrust Act of 1890, alleging conspiracies to divide business and fix prices. While the criminal cases were resolved quickly, the episode led to a flood of civil litigation. Beginning in 1961, plaintiffs alleging overcharges for equipment filed more than 1,900 cases in thirty-five federal judicial districts across the country. These numbers only hinted at the scope of the litigation, however, as those cases involved more than 25,000 individual claims.

In February 1962, the Judicial Conference formed the Coordinating Committee on Multiple Litigation—chaired by Judge Murrah for the first two years of its existence—to study problems associated with discovery in cases filed in different districts but sharing common witnesses and exhibits. While it had no formal powers to compel judicial action, the committee proved to be effective in gaining the cooperation of the district judges to whom the electrical antitrust cases were assigned. Its primary tactics were devising uniform pretrial orders that shifted control over discovery from attorneys to trial judges and coordinating discovery on a national level, including creating a national schedule for depositions, centralized document depositories, and uniform sets of interrogatories. Most of the judges to whom the cases were assigned used these tools while also taking an active part in settlement negotiations.[82]

While some defense attorneys claimed that the accelerated pace of discovery had pressured their clients into expensive settlements, most federal judges reacted positively to the Coordinating Committee's work. As a result, the committee continued into the mid-1960s to help coordinate multidistrict litigation in antitrust and patent cases as well as actions arising from mass accidents, such as airplane crashes. The committee's work ultimately led to the drafting and passage of the Multidistrict Litigation Act of 1968, which created the

80. Law professor David Marcus has attributed the marked decline in civil rights class actions to several factors, including an unsustainable pace of litigation in the 1970s, the elimination through earlier litigation of many overtly discriminatory policies, a dearth of adequate resources among public interest organizations, and a lack of incentive for private lawyers to pick up the slack until Congress authorized the recovery of compensatory and punitive damages in Title VII suits in 1991. David Marcus, "The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994," *Fordham Law Review* 86, no. 4 (March 2018), 1797–1801.

81. Miller, Overview, *supra* note 59, at 219.

82. Bradt, *supra* note 53, at 854–859.

JPML.[83] While the Coordinating Committee could not require judges to act, and could not transfer cases for any purpose, Congress endowed the JPML with authority to issue orders, making it a much more powerful body.

The JPML, composed of seven district or appellate judges appointed by the chief justice of the United States, was empowered by statute to transfer to a single district cases with "one or more common questions of fact . . . for the convenience of parties and witnesses" and to "promote the just and efficient conduct of such actions."[84] Once the MDL district became involved, the transferee judge had jurisdiction over all pretrial aspects of the cases, including discovery, dispositive motions such as summary judgment, and the approval of settlements. Because the parties could be represented by thousands of attorneys, the MDL judge typically appointed some of the lawyers to steering committees to manage the litigation on behalf of all parties.

While MDL proceedings were primarily centered on the pretrial phase, transferee judges could select one or more cases for "bellwether trials," conducted to help gather information about the strengths and weaknesses of claims and defenses and to permit valuation of cases to facilitate settlement talks. Bellwether trials were binding only as to the particular parties involved and had no determinative effect on other parties to the MDL.[85] Transferee courts frequently took an active role in settlement negotiations in the hopes that a global settlement would be reached, and settlement was the most frequent outcome for MDL cases. While the MDL statute provided for cases to be remanded to their original districts for trial, the vast majority of cases were resolved during the pretrial phase and were therefore not remanded.[86] The centralization of MDL for pretrial proceedings proved to be a powerful case management tool for the federal judiciary. As is explored below, the JPML and its work only increased in importance over the ensuing decades. While MDL was from its inception used frequently for antitrust and securities cases, the emergence of mass tort litigation—beginning with the asbestos cases of the 1970s—increased the courts' reliance on the MDL process considerably.

83. *Id.* at 861–863.

84. Multidistrict Litigation Act of 1968, Pub. L. No. 90–296, 82 Stat. 109 (1968) (codified at 28 U.S.C. §1407 (2024)).

85. According to a Lexis search, the earliest published opinion referring to a bellwether trial in the context of MDL was *In re Ampicillin Antitrust Litigation*, 88 F.R.D. 174 (D.D.C. 1980). In *Lexecon v. Milberg Weis*, 523 U.S. 26 (1998), the Supreme Court ruled that a transferee court could not transfer an MDL case to its own district for trial (as opposed to remanding the case to its original district)—a ruling that affected MDL judges' ability to hold bellwether trials involving cases originally filed in other districts. Since *Lexecon*, transferee courts may hold bellwether trials of cases originally filed in the MDL district or obtain "*Lexecon* waivers," by which parties to cases filed in other districts consent to trial in the transferee district and waive any objections based on improper venue. See Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges* (Washington, D.C.: Federal Judicial Center and Panel on Multidistrict Litigation, 2019), 11.

86. Martin H. Redish and Julie M. Karaba, "One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism," *Boston University Law Review* 95, no. 1 (January 2015), 118–129.

The Rise of Modern Case Management: 1980–2010

Amendments to the FRCP and the Rise of Managerial Judging

The 1980s were the decade in which managerial judging truly came to fruition. The concerns of the 1960s and 1970s about increasing and potentially overwhelming caseloads culminated in a sweeping institutional effort to increase speed and efficiency and reduce costs in the 1980s. This effort took the form of urging judges to manage their cases more actively, to take a bigger role in encouraging parties to settle, and to divert some cases to ADR.

Of particular importance to case management was the change in judges' attitude toward settlement that solidified in the 1980s. Traditionally, judges believed their job was solely to adjudicate cases, and that active judicial promotion of settlement was improper. This view began to shift during the 1960s in response to the increasing docket pressure that created a swell of interest in case management. While many judges believed that case management was intended only to prepare cases for trial, others viewed involvement in settlement as a legitimate managerial pursuit. By the 1970s, a large number of federal judges were in favor of facilitating settlement of their cases. This growing sentiment was reflected in the FJC's inclusion of settlement as a topic in its educational materials for judges from its inception in 1968. In 1986, the FJC published *Settlement Strategies for Federal District Judges*, and settlement was covered extensively in the third edition of the FJC's *Manual for Complex Litigation*, published in 1995.[87]

Amendments to the FRCP between 1980 and 1993, particularly those to Rule 26 regarding discovery and Rule 16 on the pretrial conference, contributed strongly to the emergence of managerial judging. In 1980, the Advisory Committee added subsection (f) to Rule 26 to give judges a more active role in preventing abuse of discovery. The new subsection empowered the judge to call the parties to a discovery conference and provided that counsel on either side could request such a conference if they had made a good faith effort but failed to resolve discovery disagreements with opposing counsel. Rule 26(f) was intended to address major discovery disputes rather than disagreements on narrow issues, provisions for which were included elsewhere in the rules.[88]

In 1993, the committee noted that the Rule 26(f) conference had been used sparingly, as was expected, with most judges handling discovery issues via scheduling orders or rulings on discovery motions. The committee reiterated the importance of judicial supervision of discovery, while moving provisions for a court-ordered discovery conference to Rule 16, making discovery one of the matters that could be addressed at the pretrial conference.[89] At the same time, the committee amended Rule 26(f) to make it mandatory for the parties to meet on their own early in the pretrial process to discuss the possibility of settlement, arrange for required disclosures, and develop a discovery plan. The parties were required to submit to the court a written report outlining the plan within ten days of the meeting.

87. Robert G. Bone, "Settlement and the 'Good' Judge," *Review of Litigation* 38, no. 2 (2019), 215–218.

88. Advisory Committee, note to FRCP 26 (1980).

89. Advisory Committee, note to FRCP 26 (1993).

A broad package of additions and amendments to the FRCP enacted in 1983 included significant revisions to Rules 26(a) and (b) aimed at limiting the scope of discovery.[90] In subsection (a), setting out methods of discovery, the sentence "Unless the court orders otherwise . . . the frequency of use of these methods is not limited" was deleted. In the same vein, the title of subsection (b) was changed from "Scope of Discovery" to "Discovery Scope and Limits." The revised section provided that the court could limit the scope of discovery if it found the information sought to be "unreasonably cumulative or duplicative"; easily obtained elsewhere more conveniently; or "unduly burdensome or expensive." A discovery request could also be denied on the basis that the party making the request had already had sufficient opportunity to obtain the information sought.

The pretrial conference procedure established by Rule 16, which had not been modified since it took effect in 1938, was amended extensively in 1983. The new Rule 16, the Advisory Committee noted, "makes scheduling and case management an express goal of pretrial procedure."[91] To that end, the rule made issuing a pretrial scheduling order mandatory and broadened the pretrial conference from one focused mainly on the trial to one encompassing the entire pretrial process, including motions and discovery. Also of major significance were the additions of "establishing early and continuing control" and "facilitating the settlement of the case" to the list of purposes of the pretrial conference. As Professor Miller put it, "Recognizing that judicial intervention should occur shortly after commencement, Rule 16 was transformed into a provision that encouraged—and in time effectively mandated—judicial management throughout the pretrial proceedings."[92] The revision was a foundational step in the flourishing of modern case management and the "transform[ation] of the presiding judge's role from that of neutral arbiter to case supervisor."[93] Broadly speaking, the revisions made to the FRCP that began in the early 1980s greatly enhanced federal judges' case management abilities.

Dispositive Pretrial Motions: Summary Judgment and Dismissal

Between the 1980s and the 2000s, jurisprudential developments strengthened two dispositive pretrial motions—Rule 56 motions for summary judgment and Rule 12 motions to dismiss—as factors in case management by allowing judges to end more cases before trial or, in some instances, before discovery began.

Prior to the 1980s, summary judgment was not easy for defendants to obtain. Scholars have pointed to *Poller v. CBS, Inc.* (1962) as significant in limiting the use of Rule 56. In *Poller*, an antitrust case, the Supreme Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof

90. On the 1983 amendments to the FRCP generally, see George K. Walker, "The Other Amendments to the Federal Rules of Civil Procedure—Pleadings and Motions; Pretrial and Discovery; U.S. Magistrate Cases," *Wake Forest Law Review* 20, no. 4 (August 1984), 819–882.

91. Advisory Committee, note to FRCP 16 (1983).

92. Arthur R. Miller, "The Pretrial Rush to Judgment: Are the Litigation Explosion, Liability Crisis, and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?" *New York University Law Review* 78, no. 3 (June 2003), 1004.

93. *Id.*

is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." The credibility of such witnesses could be fairly evaluated only when they were cross-examined in front of a jury, the Court asserted.[94] As Professor Miller pointed out, "*Poller* had a decidedly dampening effect on summary judgment in the federal courts; indeed, the reported decisions reveal very few cases of any complexity adjudicated under Rule 56 during the succeeding two decades."[95]

Summary judgment remained largely disfavored in the federal courts until the Supreme Court issued three decisions in 1986—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett* (often called the "*Celotex* trilogy")—that expanded its use.[96] The decisions were meant to clarify rather than alter the existing standards for summary judgment but nevertheless had a significant impact. *Matsushita* permitted the granting of summary judgment where the moving party produced evidence demonstrating the implausibility of the claim at issue. *Anderson* held that summary judgment was proper when the standard for judgment as a matter of law—that no reasonable jury could find for the nonmoving party—was met. *Celotex* specified that the moving party did not necessarily need to show the absence of a genuine issue of material fact; summary judgment was appropriate if the nonmoving party could make no showing in support of a claim on which it would bear the burden of proof at trial.[97] These decisions favored the moving party and, because defendants had become the most frequent users of the summary judgment motion, made summary judgment primarily a defendant's remedy.[98]

Justice William Rehnquist's majority opinion in *Celotex* echoed Judge Clark's 1940s vision of summary judgment as a case management tool for the federal courts. Justice Rehnquist described Rule 56 as a screening mechanism, a primary purpose of which was to "isolate and dispose of factually unsupported claims or defenses."[99] In 2010, Judge Patrick Higginbotham attributed the decline in federal trials largely to jurisprudential developments that began with the *Celotex* trilogy. "The phenomenon," he wrote, "is fueled by the centrality of the motion for summary judgment, which has displaced the trial as the destination point for litigation."[100]

Two twenty-first-century Supreme Court decisions led to a further increase in the granting of dispositive motions. FRCP 12 governs defenses asserted by pretrial motion that, if successful, will result in dismissal of the plaintiff's case. Subsection (b) contains seven such defenses, including that the court lacks jurisdiction over either the subject matter of the suit or the defendant. Rule 12(b)(6), a frequently employed provision, provides for dismissal when a plaintiff has failed to state a claim upon which relief can be granted. The standards by which federal courts decide 12(b)(6) motions have changed over time. In *Bell Atlantic Corp. v. Twombly*

94. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962).

95. Miller, Pretrial Rush, *supra* note 92, at 1023–1024.

96. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

97. Miller, Pretrial Rush, *supra* note 92, at 1041.

98. Haramati, *supra* note 34, at 174.

99. 477 U.S. at 323–324; Miller, Pretrial Rush, *supra* note 92, at 1040.

100. Patrick E. Higginbotham, "The Present Plight of the United States District Courts," *Duke Law Journal* 60, no. 3 (December 2010), 745–746.

(2007) and *Ashcroft v. Iqbal* (2009), the Court arguably heightened pleading standards in a way that caused more cases to be terminated under 12(b)(6) before pretrial discovery could be conducted.[101] Prior to these decisions, federal courts had interpreted FRCP 8—which required "a short and plain statement of the claim showing that the pleader is entitled to relief"—to permit "notice pleading," a style of pleading sufficient to put the defendant on notice regarding the nature of the suit without the inclusion of detailed facts. Notice pleading was usually sufficient to allow the plaintiff to survive a motion to dismiss for failure to state a claim. Broad discovery rules then permitted the plaintiff to uncover the factual information needed to prove their claim.[102]

In *Twombly*, a case involving allegations of an antitrust conspiracy, the Court highlighted the problem of discovery abuse, asserting that even careful case management had failed to curb it sufficiently. Plaintiffs with weak cases were still able to extract lucrative settlements by threatening defendants with a lengthy and expensive discovery process. The Court had this in mind when it addressed the standard an antitrust complaint must meet to avoid being dismissed under 12(b)(6) before pretrial discovery. In the case at hand, the plaintiff had alleged parallel conduct by the defendants but had not pleaded facts which, if true, amounted to conspiratorial behavior. Without the pleading of such facts, the Court ruled, the complaint must be dismissed because its allegations were insufficient to give rise to a reasonable hope that discovery would yield evidence to support the claim.[103]

Two years later, the Court made clear in its *Iqbal* decision that the standard it articulated in *Twombly*—that a plaintiff must plead facts sufficient "to state a claim to relief that is plausible on its face"[104]—applied beyond the antitrust context to all civil cases.[105] The result was a reduction in the number of cases that proceeded beyond the pleading stage to the conduct of broad pretrial discovery.[106] *Twombly* and *Iqbal* had implications for case management by creating a stronger pretrial screening mechanism for weeding out cases that could otherwise consume substantial judicial resources. These cases, combined with the 1980s *Celotex* trilogy, provided judges with more power to end litigation they did not believe was sufficiently meritorious to proceed.

The Growth of Mass Tort Litigation

In the 1960s, mass tort lawsuits began to appear in the federal courts with increasing frequency. Most of them could be characterized as either mass accident cases—arising from

101. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

102. George Shepherd, "Failed Experiment: *Twombly*, *Iqbal*, and Why Broad Pretrial Discovery Should Be Further Eliminated," *Indiana Law Review* 49, no. 2 (2016), 479.

103. The *Twombly* Court did not purport to be establishing a new standard for evaluating a complaint in light of a 12(b)(6) motion. The majority opinion asserted that the oft-quoted statement in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) that a 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" had frequently been interpreted too literally and taken out of context. The "no set of facts" language, "after puzzling the profession for 50 years . . . has earned its retirement," the Court concluded. 550 U.S. at 563.

104. *Id.* at 570.

105. 556 U.S. at 684.

106. Shepherd, *supra* note 102 at 481.

airplane crashes, fires, building collapses, or similar disasters—or mass products liability cases, based on injuries from use of or exposure to dangerous products. These suits increased in number partly as a result of the country's rapid modernization after World War II, including significant advances in medicine and technology and a major expansion of the nationwide market. During a brief but intense period during the 1980s and 1990s, the federal courts, recognizing the need for some type of aggregation to handle what had become a deluge of cases, turned somewhat reluctantly to the class action as a mass tort case management device. Mass tort class actions often caused more problems than they solved, however, and MDL eventually eclipsed the class action as the preferred aggregation device for mass torts.

By the early 1980s, mass tort suits were beginning to pose serious case management problems for the federal judiciary, in large part because of their sheer number. Tort claims based on exposure to a popular prescription drug, for example, could involve millions of potential claimants. If even a small fraction of them filed suit against the manufacturer, district courts throughout the country could be overwhelmed. In 1983, Judge Spencer Williams of the Northern District of California worried that courts were being "inundated with mass filings of lawsuits by individual plaintiffs . . . based on a single catastrophe or the mass production and sale by one defendant of a defective product." Judge Williams believed that "to try these virtually identical lawsuits, one-by-one" could have disastrous consequences for the judicial system.[107] The judge expressed disappointment that most courts had up to that point been unwilling to embrace his preferred solution, which was to permit mass tort cases to proceed as class actions.[108]

Although mass tort suits were not nearly as numerous as they would later become, the drafters of revised Rule 23 in the early 1960s thought plaintiffs might attempt to bring mass accident cases as class actions but did not expect them to do so in "dispersed" mass tort cases involving large, scattered, and amorphous groups of claimants.[109] Most Advisory Committee members had significant concerns about the possibility of mass accident class actions, primarily because of the new requirement of subsection (b)(3) that factual and legal questions common to the class "predominate over any questions affecting only individual members." The committee's note to the revised rule included the following caveat: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."

Despite the committee's cautionary language, federal judges occasionally found mass accident cases appropriate for class treatment in the first few years after the new rule took effect.[110] In *American Trading and Production Corp. v. Fishbach and Moore, Inc.*, for example, the U.S. District Court for the Northern District of Illinois found all of Rule 23's requirements to be satisfied by a plaintiff class seeking compensation for property damage resulting from a fire at an exhibition hall. Among other things, the court found that common issues predominated

107. Spencer Williams, "Mass Tort Class Actions: Going, Going, Gone?" 98 F.R.D. 323, 324 (1983).

108. *Id.* at 329.

109. David Marcus, "The Short Life and Long Afterlife of the Mass Tort Class Action," *University of Pennsylvania Law Review* 165, no. 7 (June 2017), 1567–1568.

110. *Id.* at 1568 n.16.

because for each exhibitor who sustained a loss, "identical evidence will be required to establish the fire's origin, the parties' responsibility, and proximate causation."[111] In 1972, the U.S. District Court for the Central District of California certified a class in a case arising from a plane crash—the first class action involving wrongful death claims.[112] Many other courts denied certification in mass accident cases, however.[113]

Dispersed mass torts involving product liability claims were a different matter. While aggregating such claims in class actions made them more manageable in some ways, it posed serious case management challenges in others. The number of claimants was potentially overwhelming, their identities largely unknown, and their injuries possibly varying in timing, type, and severity. Because state law governed tort claims even when brought in federal court, the laws of many different states could be involved in the case.[114] Moreover, many mass product liability cases included disputed scientific evidence and complicated proof of causation. For these reasons, most trial judges declined to certify mass product liability classes from the 1970s to the mid-1980s, and the few that did so were usually reversed by appellate courts.[115] Judge Williams, for example, granted class certification in 1981 in litigation regarding the Dalkon Shield, an intrauterine device that caused severe injuries to many women, but the U.S. Court of Appeals for the Ninth Circuit vacated his decision.[116]

Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York certified the first mass product liability class to be upheld by a federal appellate court.[117] In 1983, Judge Weinstein certified an opt-out class under Rule 23(b)(3) against the makers of the herbicide Agent Orange, which was used extensively during the Vietnam War. The chemical mixture contained dioxin, exposure to which was later linked to a variety of serious diseases in Vietnam veterans. Weinstein certified a separate class, with no opt-out provision, on the issue of the defendants' liability for punitive damages. The judge was motivated in part by one of the strongest justifications for mass tort class actions—distributional equity. If the law capped a defendant's liability for punitive damages, those first to the courthouse would unfairly enjoy

111. *American Trading and Production Corp. v. Fishbach and Moore, Inc.*, 47 F.R.D. 155, 157 (N.D. Ill. 1969).

112. Case Notes, *Journal of Air Law and Commerce* 40, no. 2 (Spring 1974), 324; *Petition of Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972). Somewhat confusingly, the court certified the class pursuant to Rule 23(b)(1) and (b)(2) rather than (b)(3). The Ninth Circuit rejected the district court's approach in a later case. *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976).

113. Marcus, Short Life, *supra* note 109, at 1568 n.17.

114. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Some federal judges declined to allow nationwide class cases to proceed on the basis that the application of multiple states' laws made the cases unmanageable. Arthur R. Miller, "The American Class Action: From Birth to Maturity," *Theoretical Inquiries in Law* 19, no. 1 (January 2018), 16.

115. The first mass products liability class, based on an increased risk of cancer in women exposed to diethylstilbestrol (DES) (a synthetic form of the hormone estrogen), was certified by the U.S. District Court for the District of Massachusetts in 1979. The court later decertified the class, however, on the grounds that the state supreme court had rejected the theory that manufacturers of DES could be held jointly liable for the claims of plaintiffs who could not demonstrate which company had caused their exposure. Marcus, Short Life, *supra* note 109, at 1572; *Payton v. Abbott Labs*, 100 F.R.D. 336, 338–339 (D. Mass. 1983)).

116. *In re Northern District of California Dalkon Shield "IUD" Products Liability Litigation*, 521 F. Supp. 1188 (N.D. Cal.), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

117. Marcus, Short Life, *supra* note 109, at 1573–1575; *In re "Agent Orange" Products Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

a windfall at the expense of other plaintiffs.[118] Class certification in the *Agent Orange* case was controversial, and while the U.S. Court of Appeals for the Second Circuit upheld the certifications in 1987, it expressed the belief that Judge Weinstein's actions were not likely to inspire other district courts to follow suit.[119]

Between the mid-1980s and the early 1990s, mass tort class actions transitioned from a strongly disfavored procedural vehicle to a largely accepted part of federal litigation. The primary driver of this attitudinal shift was litigation that began in the 1970s against the manufacturers of asbestos—a widely used fireproof insulation material, exposure to which was eventually linked to high rates of a lung cancer called mesothelioma and other diseases. As law professor David Marcus summed up the situation, "[T]he federal judiciary committed as an institution to Rule 23's use to resolve dispersed mass tort litigation. A fear of total institutional breakdown, prompted chiefly by asbestos litigation, moved the class action from the periphery to the center of the mass tort stage."[120]

The Federal Judicial Center conducted an asbestos case management conference in 1984 and published an asbestos case management guide the following year.[121] The guide acknowledged that some observers had written of "a 'flood of litigation' that has been likened to a 'tidal wave.'"[122] The publication struck a calming tone, however, assuring judges that "[a]sbestos cases, however complex they may have been at first, have become relatively routine product liability cases that involve a large number of parties."[123] Acknowledging that a multiplicity of parties and issues could still pose challenges, the guide pointed to case management strategies—not involving aggregate litigation—being used in several districts to speed disposition of asbestos cases.[124] The guide also noted that judges had taken widely varying approaches to settlement, ranging from ignoring settlement in favor of a sole focus on trial preparation to "intense participation in case evaluation and allocation of payments among the parties."[125]

As the 1980s progressed, asbestos filings continued to increase rapidly, convincing many lawyers and judges that tort litigation would eventually flood the dockets of every federal trial

118. Marcus, History Part II, *supra* note 80, at 1827.

119. *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 860 (2nd Cir. 1984). In this opinion, the Court of Appeals declined to review Judge Weinstein's class certification orders by writ of mandamus. It affirmed the orders three years later.

120. Marcus, Short Life, *supra* note 109, at 1575.

121. Thomas E. Willging, *Asbestos Case Management: Pretrial and Trial Procedures*, Washington D.C.: Federal Judicial Center, 1985.

122. *Id.* at 1.

123. *Id.* at 5.

124 . These tactics included assigning all asbestos cases to a single judge for standardized pretrial proceedings; designating a magistrate or special master to supervise discovery; appointing "liaison counsel" on each side to coordinate the scheduling of hearings, discovery motions, court appearances, and other matters; establishing standardized pleadings and discovery documents; and eliminating the filing of routine motions by deeming such motions to have been made and in some instances (such as summary judgment motions based on defenses that had been repeatedly rejected) to have been ruled upon. *Id.* at 15–22.

125. *Id.* at 28.

court in the nation, paralyzing the judicial system.[126] The federal courts were facing what was perceived to be the biggest case management challenge in their history. After a group of district judges failed in their 1990 attempt to aggregate asbestos cases informally,[127] Chief Justice Rehnquist established the Judicial Conference Ad Hoc Committee on Asbestos Litigation, which reported in 1991 that "[w]hat has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."[128] At its next meeting in March 1991, based on the committee's conclusion that the scope of asbestos litigation had "resulted in a denial of justice and fundamental unfairness to litigants," the Judicial Conference called for congressional action.[129] When Congress declined to act, the JPML, despite having refused similar requests before, transferred all asbestos cases to the Eastern District of Pennsylvania for consolidated pretrial proceedings.

The MDL proceedings came before Judge Charles Weiner, who in 1993 certified a settlement class, a precursor to his eventual approval of a global settlement.[130] The settlement class was a case management device used when parties agreed to settle a case before a judge had decided whether or not to certify a class for litigation (and sometimes before a motion for class certification or even a class action complaint had been filed). The parties' agreement would stipulate that the judge could certify a class, as defined in the agreement, strictly for the purpose of settlement.[131] Federal courts initially disfavored the settlement class because of the possibility for collusion between plaintiffs' and defendants' counsel. If the plaintiffs' attorneys refused a settlement offer, defense counsel could then negotiate with a different set of plaintiffs' attorneys—a circumstance that reduced plaintiffs' negotiating leverage and could create incentives for attorneys to accept lower settlements.[132]

The second edition of the FJC's *Manual for Complex Litigation*, published in 1982, cautioned judges against the use of settlement classes:

> In such situations, the fairness of the settlement may be very difficult to assess. No one may know how many members are in the class, how large their potential claims are, what the strengths and weaknesses of the parties' positions are, or how much the

126. A major cause of the increase was that Johns-Manville, one of the largest asbestos manufacturers, was failing to meet its obligations to pay asbestos claims pursuant to a bankruptcy reorganization plan. The plan, approved in 1988, involved the creation of a trust fund for paying claims, but the company, which had underestimated its liability, was unable to supply the fund with enough money to pay claims in full. In response, plaintiffs' attorneys began filing more suits (some of dubious merit) against other companies, hoping to recover before those companies went bankrupt as well. Marcus, Short Life, *supra* note 109, at 1578–1579.

127. In 1990, a group of federal district judges with the largest numbers of asbestos cases on their dockets met at the Federal Judicial Center, where they established a "national ad hoc coordinating committee," which later issued an order to consolidate the asbestos cases into one proceeding in the Northern District of Ohio. The Sixth Circuit quickly put a stop to this attempt at informal aggregation, however, ruling that the judges lacked the jurisdictional authority to carry out their plan. Marcus, Short Life, *supra* note 109, at 1582.

128. John C. Coffee, Jr., "Class Wars: The Dilemma of the Mass Tort Class Action," *Columbia Law Review* 95, no. 6 (October 1995), 1363, n.69 (quoting Judicial Conference of the United States, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (March 1991), 2).

129. *Proceedings of the Judicial Conference of the United States* (March 1991), 33.

130. Marcus, Short Life, *supra* note 109, at 1586–1587.

131. *Manual for Complex Litigation, Fourth*, *supra* note 60, at § 21.132, 250 (footnotes omitted).

132. Coffee, *supra* note 128, at 1378–1380.

> parties will benefit under the settlement. Lacking this information, the court should be wary of presenting the settlement to the class.[133]

Settlement classes were particularly controversial in the dispersed mass tort context, in part because evaluating the fairness and adequacy of a settlement with respect to future claimants (such as individuals exposed to a harmful product but not yet having manifested signs of disease) was a complex and extremely difficult task.[134] Nevertheless, as mass tort cases began to clog federal court dockets in the 1980s, courts began to approve settlement classes with increasing frequency.[135]

The asbestos settlement class in the Eastern District of Pennsylvania ultimately led to a Supreme Court ruling that put a damper on the settlement class as a viable case management device, particularly in dispersed mass tort cases. In 1996, the U.S. Court of Appeals for the Third Circuit vacated Judge Weiner's order approving the settlement class. In doing so, the court expressed disagreement with other courts that had viewed the fairness of a settlement as the predominant issue affecting the class, ruling that a settlement class had to fulfill all of Rule 23's requirements (except manageability for trial) as if the case were going to be tried.[136] The Supreme Court affirmed the Third Circuit's ruling in *Amchem Products, Inc. v. Windsor* (1997).[137] As the Court put it, "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper."[138]

The Court noted that the members of the settlement class had significant differences between them. Despite the fact that none of them had yet sued the asbestos manufacturers,[139] some had already manifested physical injuries from exposure to asbestos and some had been exposed but had not yet shown signs of injury (the latter members known as "exposure only" class members). No subclasses were delineated in the settlement agreement. The differences between class members were too great to justify a conclusion that common questions predominated in the case, the Court explained, and their interests were sufficiently different that the named plaintiffs could not adequately and fairly represent absent members of the class.[140] "Rule 23," the Court concluded, "cannot carry the large load . . . heaped upon it."[141]

Some scholars identified *Amchem* and another important case, *Ortiz v. Fibreboard Corp.*,[142] as signaling the end of the mass tort class action in the federal courts. While this conclusion

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133. *Manual for Complex Litigation, Second*, (Washington, D.C.: Federal Judicial Center, 1992), §30.45, 243.

134. Coffee, *supra* note 128, at 1376–1380.

135. *Id.* at 1380.

136. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996).

137. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

138. 521 U.S. at 622.

139. The proposed *Amchem* settlement provided for non-class settlement of all pending asbestos cases and the establishment of a fund to compensate a settlement class composed entirely of future claimants.

140. 521 U.S. at 622–628.

141. *Id.* at 629.

142. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Ortiz* imposed more stringent requirements for the use of the "limited fund" class action settlement—a widely used device by which a fund consisting of all a defendant's available assets was established to compensate present and future claimants.

was somewhat exaggerated, the decisions did make the popular device of the settlement class more difficult to use while also pointing up the inherent problems with certifying mass tort classes generally, particularly concerning the predominance of common questions and adequacy of representation.[143]

The fourth edition of the *Manual for Complex Litigation* (2004) cautioned that while *Amchem* dealt with a settlement class, the issues the Court identified were equally relevant to the certification of classes for litigation. While *Amchem* did not "categorically preclude" class certification in a mass tort case, a number of district courts had refused to certify classes or had decertified classes in such cases, "finding that varying state laws and individual issues of exposure, causation, and damages defeat the predominance requirement of Rule 23(b)(3), making trial unmanageable."[144] The adequacy of class representatives and the typicality of their claims was also of great importance. *Amchem* highlighted the need for courts to "find a fair mechanism for representing the different interests of present and future claimants."[145]

The manual noted the fact that certification of mass-tort class actions had fallen out of favor in federal courts to a significant degree:

> Federal courts have "ordinarily" disfavored—but not ruled out entirely—using class actions in dispersed mass tort cases. After experimentation with class treatment of some mass torts during the 1980s and 1990s, the courts have greatly restricted its use in mass torts litigation. Mass tort personal injury cases are rarely appropriate for class certification for trial.[146]

In the 2000s, use of the MDL procedure, including in mass tort cases, increased dramatically, with *Amchem* as a contributing factor. The passage of the Class Action Fairness Act of 2005 (CAFA) contributed as well. In the wake of *Amchem* and *Ortiz*, plaintiffs' lawyers increasingly filed class actions in state courts. In response to complaints that some state courts were overly plaintiff-friendly, Congress passed CAFA to expand federal jurisdiction over class actions and make it easier for defendants to remove such cases to federal court. As law professor Andrew Bradt observed, CAFA created a "catch-22" whereby federal courts had greater jurisdiction over class actions, but many of them could not be certified as such. This "created a vacuum for aggregate mass-tort litigation" eventually filled by MDL.[147] Bradt asserted in 2017 that "MDL has become the leading mechanism for resolving mass torts." More than one-third of all filed federal civil cases were part of a pending MDL as of 2014, which represented a 16% increase over the previous twelve years. "The vast majority," Bradt noted, "are mass-tort matters, including products liability or defective drugs—cases that had been

143. In 1995, the Seventh Circuit reversed the certification of a class of hemophiliacs who had contracted the AIDS virus from blood solids manufactured by drug companies, and in 1996 the Fifth Circuit did the same with respect to a class of smokers suing tobacco companies for causing their nicotine addiction. Marcus, *supra* note 109, at 1588; *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub nom. Grady v. Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

144. *Manual for Complex Litigation, Fourth*, *supra* note 60, at §22.72, 419.

145. *Id.* at §22.55, 393.

146. Thomas E. Willging and Emery G. Lee III, "From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After *Ortiz*," *University of Kansas Law Review* 58, no. 4 (May 2010), 786 (quoting *Manual for Complex Litigation, Fourth*, *supra* note 60, at § 22.7, 413–414.

147. Bradt, *supra* note 53, at 844–845.

considered by some courts, at least for a brief period, as appropriate subjects for class actions."[148]

The vast majority of MDLs have been resolved by settlement rather than remanded for trial. While some MDL proceedings involve class claims, many do not. The latter can be, and typically are, resolved by a non-class aggregate settlement, which is not subject to the same requirements governing settlements of Rule 23 class actions.[149] In 2010, researchers at the FJC observed that several high-profile MDL settlements involving prescription drugs and medical devices "suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements" in the mass tort context.[150] As settlement classes in mass tort actions became disfavored, MDL non-class aggregate settlements became the preferred method of resolution. The shift to MDL, while lauded by many, has also been the subject of scholarly criticism, as is explored below.[151]

The rapid growth of mass tort litigation beginning in the 1980s posed a serious case management challenge for the federal judiciary, sparking concerns that courts would be overwhelmed with cases. In response, the courts turned, with reservations, to aggregation via the Rule 23 class action as a management device. Before long, however, the inherent difficulty of certifying classes in dispersed mass tort cases limited the effectiveness of the class action in this context. The result has been the rise of multidistrict litigation and the non-class aggregate settlement as a preferred mass tort case management tool. While some believe it to be flawed, MDL has proved a more enduring solution than the mass tort class action.

Alternative Dispute Resolution

Alternative dispute resolution has been a vital case management tool for the federal judiciary for nearly half a century, reducing docket pressure and facilitating the resolution of many cases without judicial intervention. While ADR became a major presence in federal litigation in the 1980s, its roots stretch back to the 1970s. The concept of diverting some disputes away from the courthouse and toward other methods of resolution first gained prominence during

148. *Id.* at 833.

149. The Multidistrict Litigation Act does not require transferee judges to review settlements for fairness as Rule 23 mandates for class actions, for example. The rationale for such review under Rule 23 is that class actions include absent class members who will be bound by a settlement. By contrast, a non-class MDL settlement involves separate claims and permits individual plaintiffs to opt out. Although they are not required to do so by statute, some MDL judges review settlements for fairness. The lack of a settlement review requirement in MDL proceedings has been criticized by some scholars. See, e.g., Elizabeth Chamblee, "Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements," *Louisiana Law Review* 65, no. 1 (Fall 2004), 157–253.

150. Willging and Lee, *supra* note 146, at 801. See also Miller, American Class Action, *supra* note 114, at 35 ("multidistrict litigation has displaced resort to the class action in certain substantive areas—such as mass torts—because class certification has become difficult or nearly impossible to secure or in order to bypass the costly, risky, and time-consuming certification prerequisites").

151. Bradt, *supra* note 53, at 835–836.

the 1976 Pound Conference—held to address rising caseloads and access to the courts—sponsored by the Judicial Conference, the Conference of Chief Justices,[152] and the ABA.[153]

One speech at the Pound Conference did more than any other to spark thinking about ADR: "Varieties of Dispute Processing," by Harvard Law professor Frank Sander.[154] Professor Sander argued that the legal profession had been too "single-minded" in considering the courts to be "the natural and obvious dispute resolvers."[155] The courts could not continue to operate effectively, he believed, without some alternative procedures to ease the ever-increasing demands put upon them.[156] In response to this problem, Sander advocated "a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes)." He imagined that future courthouses might contain a "Dispute Resolution Center" at which a screening clerk would direct a claimant to the process most appropriate to their grievance.[157] The goal was "to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities."[158] Sander dubbed his idea the "multi-door courthouse."[159]

In 1978, three federal judicial districts—the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut—began a pilot program to experiment with court-annexed arbitration.[160] In 1985, the Administrative Office of the U.S. Courts obtained funding from Congress to expand the pilot program to eight additional districts. Congress then authorized an additional ten districts in the Judicial Improvements and Access to Justice Act of 1988.[161] While these early programs varied according to each court's local rules, they had some features in common. Certain types of cases were mandatorily referred to arbitration before a single arbitrator or a panel of three. After a hearing, the arbitrators would issue a decision and make an award. Either side had the right to request a trial de novo,

152. The Conference of Chief Justices was founded in 1949 by the chief justices of several state supreme courts with the assistance of the ABA Section of Judicial Administration. *The History of the Conference of Chief Justices* (Williamsburg, Va.: Conference of Chief Justices and National Center for State Courts, 2009), 10.

153. The formal name of the gathering was the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. The 1976 conference commemorated the seventieth anniversary of Dean Roscoe Pound's 1906 speech of the same title and was thus referred to in shorthand as "the Pound Conference." *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

154. Frank E.A. Sander, "Varieties of Dispute Processing," *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 111–134 (1976).

155. *Id.* at 112.

156. *Id.* at 114.

157. *Id.* at 131.

158. *Id.* at 132.

159. Frank E.A. Sander, "The Multi-Door Courthouse," *Barrister* 3, no. 3 (1976), 18–21.

160. Court-annexed ADR programs involve the diversion of cases already filed in court, as opposed to private arbitration or mediation, which are used when no lawsuit has been filed.

161. Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Washington, D.C.: Federal Judicial Center, 1990), 14–15; Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100–702, 102 Stat. 4642 (1988).

but if no such request was made, the arbitrators' award would become final and unappealable.[162]

A 1983 amendment to FRCP 16 reflected the growing focus on ADR, requiring consideration at the pretrial conference of "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." A 1993 amendment modified this language to read "using special procedures to assist in resolving the dispute when authorized by statute or local rule."[163] The Advisory Committee elaborated by noting, "Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration."[164] The committee pointed out that statutes or local rules might authorize the use of some of these procedures without the parties' consent.[165]

The Civil Justice Reform Act (CJRA) (part of the Judicial Improvements Act of 1990) was a congressional effort to boost case management, in part by encouraging courts to use ADR more extensively. The statute required every federal judicial district to establish a civil justice expense and delay reduction plan. In doing so, courts were directed to consider including court-sponsored ADR, such as "mediation, mini-trial, and summary jury trial" in their plans.[166] The Alternative Dispute Resolution Act of 1998 went a step further, requiring that each district court provide litigants with at least one court-sponsored ADR program, defined as any procedure not involving traditional litigation "in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial and arbitration."[167] The Act provided that arbitration could be authorized in civil cases with the parties' consent except in cases involving the alleged violation of constitutional or civil rights and cases in which more than $150,000 was at stake.[168]

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162. Meierhoefer, *supra* note 161, at 3.

163. Professor Resnik argued that the elimination of the word "extrajudicial" indicates that ADR "became *part* of the judicial portfolio rather than *external* to it." Judith Resnik, "Seeing 'the Courts': Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy, from the 1980s to the 2020s," *Review of Litigation* 43, no. 2 (Spring 2024), 226 (emphasis in original).

164. A summary jury trial is a condensed pretrial procedure in which each side presents its case to a mock jury and receives a nonbinding advisory verdict as an aid in settlement negotiations. In early neutral evaluation, a neutral third party provides an assessment of the strength of each side's case, also as an aid to settlement. A minitrial is a procedure in which each side presents its case to a panel of mediators who then attempt to reach a settlement, typically nonbinding, without the involvement of the parties or their attorneys in negotiations.

165. Advisory Committee note to FRCP 16 (1993).

166. Civil Justice Reform Act of 1990, Pub. L. No. 101–650, Title I, 104 Stat. 5092 (1990) (codified at 28 U.S.C. §471 et seq. (1994)). The Civil Justice Reform Act expired in 1997. While it was initially unclear whether the section providing for expense and delay reduction plans had expired along with other provisions, Congress added a proviso to the Federal Courts Improvement Act of 2000 indicating that it had. Carl Tobias, "The Expiration of the Civil Justice Reform Act of 1990," *Washington and Lee Law Review*, 59 no. 2 (Spring 2002), 543. In its final report to Congress on the Act, the Judicial Conference stated that "[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation." Gensler at 680.

167. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105–315, 112 Stat. 2993 (1998).

168. 112 Stat. at 2995–2996.

A U.S. Department of Justice compendium last updated in 2016 summarized the local rules of each U.S. district court as they pertained to ADR.[169] The summaries displayed a wide range of policies regarding the voluntariness of ADR. In some jurisdictions, participation in ADR was entirely voluntary, while in other courts, cases were assigned to ADR automatically, with limited exceptions. Many jurisdictions had policies falling between these two poles, such as those providing that the parties must "consider" whether ADR may be helpful in resolving their dispute and those authorizing judges to order parties to participate in nonbinding ADR in certain circumstances. In every district, nonbinding mediation was available to the parties upon their agreement. In a widely followed decision, the First Circuit ruled in 2002 that federal courts could make mediation compulsory by local rule but, even in the absence of such a rule, could order parties to mediate by virtue of the court's inherent authority to manage its docket.[170] The constitutional right to a jury trial prohibits courts from compelling parties to use binding ADR processes, however.

While Frank Sander's concept of the multi-door courthouse did not come to fruition exactly in the way he envisioned, the substantial growth of ADR has brought about conditions not dramatically different from his ideas. As Resnik noted in 2000, "In addition to clerical and administrative workers, a host of auxiliary personnel—bearing titles such as 'court-annexed arbitrators,' 'early neutral evaluators,' 'mediators,' 'parajudicial officers,' and 'staff attorneys'—also work under the aegis of judges to provide advice to litigants and sometimes to make decisions about disputes."[171] The Administrative Office of the U.S. Courts emphasizes the use of ADR in materials intended to educate the public about the federal courts, illustrating the importance of ADR as a tool to bring cases to a speedy resolution without the need for judicial intervention.[172]

U.S. Magistrate Judges

The rise of modern case management in the 1980s and beyond relied heavily on an expanded role for U.S. magistrate judges. The Federal Magistrates Act of 1968 established the position of U.S. magistrate (renamed U.S. magistrate judge in 1990) to replace the office of U.S. commissioner. The Act provided the magistrates with greater powers than the commissioners had possessed, including the authority to conduct misdemeanor trials with the consent of the defendants, to serve as special masters in civil actions, and to assist district judges in pretrial and discovery proceedings as well as appeals for post-trial relief. The judges

169. Office of Legal Policy, U.S. Department of Justice, *ADR in the Federal District Courts—District-by-District Summaries* (last revised March 2016) (accessed at https://www.justice.gov/archives/olp/compendium-federal-district-courts-local-adr-rules).

170. *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002).

171. Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," *Harvard Law Review* 113, no. 4 (February 2000), 953.

172. "To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute. In particular, the courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, or 'ADR,' designed to produce an early resolution of a dispute without the need for trial or other court proceedings. As a result, litigants often decide to resolve a civil lawsuit with an agreement known as a 'settlement.'" Administrative Office of the U.S. Courts, "Understanding the Federal Courts," 11; https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf.

of the U.S. district court appointed magistrates to full-time terms of eight years or part-time terms of four years.[173]

Congress expanded the authority of U.S. magistrates in 1976 and again in 1979. The 1976 amendments to the statute significantly increased magistrates' participation in case management. The amending act authorized magistrates to hear and determine a variety of pretrial matters. For example, they could decide non-dispositive motions, conduct hearings such as evidentiary hearings, and submit to a U.S. district judge proposed findings of fact and a recommended result for dispositive motions.[174] The 1979 amendments went further, authorizing magistrates to conduct any or all proceedings in civil cases if all parties consented.[175]

The specific duties of U.S. magistrate judges are determined by the judges of each U.S. district court. While magistrate judges therefore do not perform identical functions in every court, district judges have, over time, generally increased their reliance on them to assist in pretrial case management. Magistrate judges participate regularly in all aspects of civil case management, including scheduling, resolving discovery disputes, overseeing settlement conferences, conducting mediations, and sometimes managing ADR programs.[176]

The passage of the CJRA in 1990 resulted in even greater magistrate judge participation in case management.[177] In its report on the Act, the Senate Judiciary Committee stressed that magistrate judges "can and should play an important role, particularly in the pretrial and case management process."[178] Judge Philip Pro, who served as both a U.S. magistrate judge and a U.S. district judge in Nevada, noted that when magistrate judges were relied upon heavily in pretrial case management, "their pretrial rulings helped define the parameters of the case for both the parties and the assigned district judge." Their decision-making, he continued, "would seem to influence the parameters of summary judgment motions later filed, the scope of trial before the district judge, and the boundaries of potential settlement."[179] Judge Pro's observations highlighted how the expanded role of magistrate judges and their increased influence over the course of civil cases was a boon to case management, helping to streamline even those cases not resolved before trial.

173. Federal Magistrates Act, Pub. L. No. 90–579, 82 Stat. 1107 (1968) (codified at 28 U.S.C. §631 et seq).

174. Pub. L. No. 94–577, 90 Stat. 2729 (1976).

175. Federal Magistrate Act of 1979, Pub. L. No. 96–82, 93 Stat. 643 (1979).

176. Anthony Marcum, "Why Federal Magistrate Judges Can Improve Judicial Capacity," *University of Cincinnati Law Review* 88, no. 4 (2020), 1023–1024.

177. Philip M. Pro, "U.S. Magistrate Judges: Present but Unaccounted for," *Nevada Law Journal* 16, no. 3 (Summer 2016), 810.

178. Tim A. Baker, "The Expanding Role of Magistrate Judges in the Federal Courts," *Valparaiso Law Review* 39, no. 3 (Spring 2005), 668 (quoting U.S. Senate Committee on the Judiciary, *Report on S. 2648, The Judicial Improvements Act of 1990*, Sen. Rpt. 101-416 (1990), 21).

179. Pro, *supra* note 177, at 804.

Scholarly Critiques of Case Management

The preceding sections have demonstrated that case management is a complex and multi–faceted subject. As one would expect of such a topic, there is a wide variety of views of case management among judges, attorneys, litigants, scholars, and others. This section describes some of the critiques of case management that have been made in the academic community. There are two primary reasons for a focus on scholarship. One is that the views of scholars are those best represented in the literature on case management. The second is that academia has been the foremost source of case management criticism. Both of these facts flow naturally from legal scholars' mission to "assess, critique, and improve laws and legal institutions."[180]

The following critiques are presented not to endorse or refute them but instead to provide a flavor of some of the concerns case management has sparked in observers outside the judiciary. These concerns have included societal benefits lost to the sharp reduction in federal trials (the exact causes of which are a subject of disagreement), the performance by district judges of non-adjudicative tasks, the non-public nature of much of the judge's managerial role, and the imposition of further distance between the federal courts and the people they are meant to serve. There is no criticism of case management on which all observers have agreed, and each of those presented here has been the subject of dispute.

It should not be inferred from the focus on scholarly critiques here that those within the judiciary are of one mind regarding case management. Institutionally speaking, the federal courts have embraced case management as a vital and necessary set of tools. That said, some individual judges have expressed criticisms of case management,[181] and even those in favor are not necessarily in complete agreement in every particular. The judiciary has made a constant effort to improve case management practices with the advice of the Judicial Conference Committee on Court Administration and Case Management.

Academic critiques of case management began in earnest in the early 1980s, when the modern form of the phenomenon was still fairly new. Professor Resnik set herself apart as the most visible critic of the practice with her 1982 article "Managerial Judges"—a piece raising issues that are still discussed today. Resnik expressed concern that "[m]anagerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions and out of reach of appellate review."[182] In Resnik's view, managerial judging enhanced the power of trial judges while stripping litigants of procedural safeguards meant to protect their rights.[183] "The judge," she wrote, "has vast influence over the course and eventual outcome of the litigation."[184] Resnik's broadest worry was that the rise of modern case management might mean the prioritization of speed, efficiency, and control over the quality of adjudication.[185]

180. Martha Minnow, "Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities," *Harvard Law Review* 130, no. 9 (2017), 2279.

181. See, e.g., Higginbotham, *supra* note 100, at 745–764.

182. Resnik, Managerial Judges, *supra* note 2, at 378.

183. *Id.* at 380.

184. *Id.* at 413.

185. *Id.* at 430.

As case management has expanded, scholars have continued to express concerns similar to those Resnik and others voiced in the 1980s. One critique has been that the rise of modern case management has significantly weakened the link between trial courts and appellate courts. While appellate courts still exercise substantial power when examining trial records, there are important aspects of pretrial procedure that escape appellate review. By lengthening the pretrial process while keeping the scope of appellate review—generally available only from a final judgment—the same, the FRCP delegated more authority to trial courts. New procedures created more opportunities for pretrial rulings that did not produce a judgment and were therefore unlikely to be reviewed. And, of course, no appeal can result from a case that has settled.[186] Law professor Steven Yeazell argued, "[T]he system has decentralized; trial judges rather than appellate judges have the last word in a higher proportion of cases than was the case a century ago."[187]

Some critiques of case management have focused on the extent to which it has altered the role of a federal trial judge. Traditionalists viewed the ideal judge as one who would remain above the fray and bring his or her influence to bear only in the courtroom to ensure orderly and fair trials. In this paradigm, the judge's role was primarily to make evidentiary rulings, supervise and instruct the jury, and adjudicate issues of law. Few would argue that this description—resembling Dean Thayer's of 1915—adequately covers the job of a modern trial judge. Case management tasks that bear the least resemblance to these functions, such as judicial management of pretrial practice and judicial review of class action settlements, have caused discomfort in some. As law professor Jonathan Molot has noted, scholars who have been critical of these functions "ultimately would like to see judges hew more closely to the adjudicative role that prevailed in this country for its first two centuries."[188] Critics have also argued that because case management requires the judge to intervene very quickly after a case is filed, it creates a risk that the judge will begin to form impressions without full knowledge of the case and thereby become biased.[189]

The issue of the "vanishing trial" has been central to debates over case management, based on the claim that the emphasis on settlement, ADR, and summary judgment has been largely responsible for the decline in trials over the past several decades (although there has been wide disagreement regarding the precise nature and extent of the asserted cause and effect relationship).[190] Many scholars have taken a critical tone in describing the judiciary's tendency to dispose of cases other than by trial.[191] Professor Galanter has summarized

186. Yeazell, *supra* note 15, at 656, 661.

187. *Id.* at 667.

188. Molot, Old Judicial Role, *supra* note 15, at 31, 37.

189. Daisy Hurst Floyd, "Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement," *Arizona State Law Review* 26, no. 1 (Spring 1994), 48.

190. As mentioned earlier (see *supra* note 5), the percentage of federal civil cases declined sharply from 11.5% in 1962 to 1.8% in 2002 and was 0.4% in 2025. Moreover, the absolute number of federal court trials declined by 60% between 1985 and 2002. Galanter, Vanishing Trial, *supra* note 5, at 459–461.

191. See, e.g., Yeazell, *supra* note 15, at 636 ("Federal courts have almost gone out of the business of trying civil cases, but they have not stopped adjudicating them. Instead of trials, judges are making rulings on other dispositive motions: dismissals on the pleadings, summary judgments, and similar rulings that end a case."); Samuel Isaacharoff and Troy A. McKenzie, "Managerialism and its Discontents," *Review of Litigation* 43, no. 1 (Fall

academics' concerns about the vanishing trial by dividing them into three categories: effects on judicial process, effects on outside institutions, and effects on public and litigant perceptions. Included in the first category is a lack of the judicial precedent that helps to shape public standards for conduct and provides guidelines for settlements. An example of the second category is a failure to hold institutions to account in public forums. Third-category concerns include a decline in public perceptions of fairness and judicial authority.[192]

One critic of the vanishing trial, Professor Stephan Landsman, wrote of the role jury trials play in establishing public trust in the justice system, citing Alexis de Tocqueville's observation that the jury is a "republican" institution that "places the real direction of society in the hands of the governed." "Even the fairest and most appropriate results are likely to provoke suspicion and resistance" wrote Landsman, "if arrived at by means that fail to satisfy litigant and societal expectations of due process."[193] Landsman explained further that facts established at trial help to ground legal rules, validate decisions, and "may be the foundation on which justice stands." Such evidence also benefits the public at large, such as that derived from mass tort cases regarding harmful products or substances.[194]

The judicial involvement in settlement brought about by the rise of case management was immediately a special point of contention among scholars. As early as 1984, Professor Fiss spoke out against the growing view that settlement was always preferable to trial. Settlement, he asserted, was "a highly problematic technique for streamlining dockets" and "a capitulation to the conditions of mass society."[195] Settlements were not always just, Fiss explained, because consent was often coerced and sometimes given without proper authority, and the terms were strongly influenced by the relative resources of the parties, making settlement "at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."[196] Fiss believed not only that settlement was flawed but agreed with other scholars that adjudication provided societal benefits through the interpretation and enforcement of constitutional provisions and statutes—something affecting many beyond the parties to a single case.[197]

In a similar vein, Professor Molot expressed concern that aggressive judicial management could actually burden attorneys—by tasking them with complying with a large number of pretrial orders, for example—and increase costs to litigants, thereby motivating settlements based on factors unrelated to the merits of a case. "Indeed," he wrote, "managerial styles that

2023), 2 (noting the shift to "a federal court system now marked by vast consolidated proceedings, court-driven settlement of cases, closely monitored docket-clearance metrics, and increasingly structured phases of pretrial practice, with trials all but virtually extinct"); Resnik, Seeing, *supra* note 163, at 271 ("Instead of preserving adjudication, the new procedures of the last forty years have contributed to a world in which high-end litigants get a form of [] decision-making unavailable to others, and much of judicial work goes unseen and unrecorded.").

192. Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," *Stanford Law Review* 57, no. 5 (April 2005), 1273, n.64.

193. Stephen Landsman, "So What? Possible Implications of the Vanishing Trial Phenomenon," *Journal of Empirical Legal Studies* 1, no. 3 (November 2004), 974, 976.

194. *Id.* at 977.

195. Owen M. Fiss, "Against Settlement," *Yale Law Journal* 93, no. 6 (May 1984), 1075.

196. *Id.* at 1076.

197. *Id.* at 1085.

focus on clearing dockets may promote settlement without regard to whether the resulting settlements are just."[198] As a result, managerial judging, to the extent it promotes substantive justice, does so "in a haphazard way" because of the degree to which it depends on "the management skills of particular judges, rather than judicial application of substantive law rules."[199] Like Resnik, Molot was wary of managerial judging because "it relies on discretion, rather than law, to control litigation outcomes."[200]

A fair number of scholarly critiques have focused on the multidistrict litigation process. As is explained above, MDL has largely supplanted the class action as the case management device of choice for mass tort litigation. It is also widely used for other types of civil cases, including antitrust and consumer fraud. The prominence of MDL has concerned some observers who have noted that it reduces the autonomy of the individual claimant in much the same way a class action does but lacks similar safeguards to ensure that claimants are treated fairly. Perhaps the biggest single point of controversy relates to the difference in how class actions and MDL proceedings are settled. In the former, Rule 23(e) requires court approval for any settlement that will bind class members after the judge holds a hearing and makes a finding that the proposed settlement is "fair, reasonable, and adequate." By contrast, the MDL statute includes no requirement that a transferee judge review a proposed settlement for fairness (although some have done so on their own initiative). As a 2010 article framed it, a shift from class actions to non-class aggregate settlements via MDL entailed a change "from a process in which a judge decides if a proposed settlement is fair, reasonable, and adequate for the class into one in which counsel for the parties, without judicial review of the settlement, make a binding determination that the settlement is fair, reasonable, and adequate for their clients."[201]

The rationale for the differing treatment of settlement is that a claimant whose case is part of an MDL remains represented by their own attorney (as opposed to class counsel) and retains the right to opt out of a settlement. Scholars have asserted, however, that in reality the MDL claimant has little more control of their claim than does a member of a plaintiff class. They have no right to opt out of the MDL and have their case returned to the court in which it was filed prior to the conclusion of pretrial proceedings. The plaintiffs' lawyers who are primarily responsible for managing the litigation and negotiating a global settlement are those appointed to a "steering committee" by the MDL judge. Moreover, some settlement agreements have been criticized as coercive.[202]

Some scholars have gone as far as to assert that MDL is unconstitutional because it deprives plaintiffs of due process rights.[203] As law professor Martin Redish and attorney Julie Karaba asserted of MDLs, "[T]he substantive rights of litigants are adjudicated collectively without any possibility of a transparent, adversary adjudication of whether the claims

198. Jonathan T. Molot, "How Changes in the Legal Profession Reflect Changes in Civil Procedure," *Virginia Law Review* 84, no. 6 (September 1998), 1023.

199. *Id.* at 1025.

200. *Id.* at 1024.

201. Willging and Lee, *supra* note 146, at 777.

202. Bradt, *supra* note 53, at 836–837.

203. Redish and Karaba, *supra* note 86, at 115.

grouped together actually have a substantial number of issues in common, whether the interests of the individual claimants will be fully protected by those parties and attorneys representing their interests, or whether the individual claimants would have a better chance to protect their interests by being allowed to pursue their claims on their own."[204] While no party can be compelled to participate in a global settlement, attorneys have a strong incentive to encourage their clients to do so, as they will immediately receive a contingent fee without having to conclude the case on their own.[205]

Conclusion

While there has never been and likely never will be universal consensus on case management, there is no question that it has become an integral part of the work of the federal judiciary. Institutional efforts to promote managerial practices date back to the enactment of the FRCP and have only intensified over time. Law professor Steven Gensler, who was a member of the Judicial Conference Advisory Committee on Civil Rules from 2005 to 2011, has noted that since the early 1990s, "the federal judiciary's commitment to case management has . . . manifested itself in the policies and practices promoted by the institutional arms of the federal judiciary."[206] This commitment was evidenced in the 1990 report of the Federal Courts Study Committee, authorized by Congress in 1988 to study problems facing the federal courts, as well as the *Long Range Plan for the Federal Courts*, published by the Judicial Conference of the United States in 1995. Programs and publications the Federal Judicial Center has prepared for federal judges stress the benefits of case management and suggest managerial practices. In 1991, for example, the FJC published *The Elements of Case Management*, further editions of which were released in 2006 and 2017. The preface remarks that the goal of FRCP 1, that is "the just, speedy, and inexpensive" resolution of disputes, "depends on engaged and active judicial case management."[207]

Case management in all its forms—conducting pretrial conferences, overseeing discovery, ruling on potentially dispositive motions, diverting cases to ADR, and aggregating or centralizing claims via class actions or multidistrict litigation—has had a transformative effect on the federal courts and the job of a federal trial judge. It has resulted in a substantial increase in pretrial activity, fewer trials, the emergence of alternatives to traditional litigation and, of course, the assumption by federal trial judges of administrative and managerial tasks in addition to adjudicative ones. This essay has not attempted to make a comprehensive account of case management but instead has aimed to provide a broad historical overview of this complex and multifaceted subject. For those who wish to delve deeper, a list of suggested readings, including selected FJC publications, follows.

204. *Id.* at 111.

205. *Id.* at 114–115.

206. Gensler, *supra* note 25, at 683.

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