Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation

Edward F. Sherman
Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation

Edward F. Sherman*

How to overcome the expense, delay, and possible inconsistency of mass duplicative litigation is one of the most pressing issues in civil procedure today. Mass duplicative litigation arises when a large number of related cases are based on the same transaction, conduct, condition, or product and are pursued separately.1 The primary mechanisms for reducing mass duplicative litigation are the procedural devices used to aggregate similar cases—joinder,2 consolidation,3 and class action. These aggregative devices, however, are not themselves capable of preventing all duplicative litigation that can interfere with the disposition of the aggregated case. A court may need, for example, to enjoin the parties, or nonparties with similar claims, from prosecuting their cases in other courts if those suits would undermine the resolution of the aggregated case. A court may also desire to ensure that nonparties with similar claims who have been given an

---


1. Examples would include mass accidents (e.g., plane crashes), harm to the environment (the escape of toxic substances), injury from defective products (the unanticipated effects of taking prescription drugs or using products), and damage caused by the same wrongful conduct (stock investors subjected to security fraud or consumers to illegal financial practices).

2. See FED. R. CIV. P. 19 (mandatory joinder); FED. R. CIV. P. 20 (permissive joinder).

3. See FED. R. CIV. P. 42(a) ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.").
opportunity to join the aggregated case cannot later challenge the judgment, thus preventing future duplicative litigation. These results may be accomplished through two complementary procedural devices—the antisuit injunction and notice of intervention and preclusion. Both devices are incorporated into the aggregative scheme proposed by the American Law Institute's Complex Litigation Project.\(^4\)

The ALI Proposal relies on the aggregative scheme of consolidation, supplemented by expanded opportunities for using "removal"\(^5\) and "transfer"\(^6\) to bring similar cases into the jurisdiction of a single court where consolidation can occur. The Proposal also sets out specific procedures for invoking the two complementary devices—the antisuit injunction and preclusion—in recognition of their importance for enhancing the effects of aggregation. These are not new devices, although the manner in which the Proposal would use them contains some innovative features. They are proposed as an integral part of the ALI consolidation scheme, but they also have significant applications to other kinds of aggregative mechanisms not adopted by the Proposal. This article will examine the application of these devices both as contemplated by the Proposal in its consolidation scheme and in their current use in the context of class actions.

I. ANTISUIT INJUNCTIONS

The purpose of an antisuit injunction is to prevent interference with the litigation pending before a court. The injunction forbids the parties, and possibly other persons over whom the court has jurisdiction, from litigating outside that court any claims arising out of the same matters as the suit before it. The propriety of one court's issuing an injunction to

---

\(^4\) AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) [hereinafter COMPLEX LITIGATION PROPOSAL].

\(^5\) Federal-state intersystem consolidation of cases pending in both federal and state courts would be enhanced by expanding the existing provisions for removal of state cases to federal court. 28 U.S.C. §§ 1441-1452 (1988). Through a grant of supplemental jurisdiction, state actions arising from the same transaction as a pending federal action could be removed to federal court where they could then be consolidated. COMPLEX LITIGATION PROPOSAL, supra note 4, §§ 5.01-.03.

\(^6\) Federal intrasystem consolidation of cases pending in different federal courts would be enhanced by expanding the scope of the existing "multidistrict litigation" transfer provision, 28 U.S.C. § 1407(a) (1988), to include transfer for trial as well as pretrial disposition. COMPLEX LITIGATION PROPOSAL, supra note 4, §§ 3.01-.08.
prevent duplicative litigation in another court has long been recognized in appropriate cases.\textsuperscript{7} Injunctions are directed against the parties who are before the court, rather than against other courts.\textsuperscript{8} The threat of sanctions under the contempt power serves to enforce the injunction.\textsuperscript{9}

Both federal and state courts may issue antisuit injunctions. Like other injunctions, an antisuit injunction must satisfy the equitable requirements of irreparable injury and lack of an adequate remedy at law.\textsuperscript{10} The general rule, although susceptible of various exceptions, "is that as a principle of sound judicial administration, 'the first suit should have priority, absent the showing of balance of convenience in favor of the second action.'"\textsuperscript{11} When a federal court enjoins prosecution of a suit in another federal court, principles of comity require that courts of coordinate jurisdiction exercise "forbearance" by "avoiding interference with the process of each other."\textsuperscript{12} Injunctions by federal courts against prosecution of suits in state courts face the additional constraints of the Anti-Injunction Act, which forbids injunctions against state prosecutions subject to three narrow exceptions.\textsuperscript{13} Injunctions by state courts against the prosecution of suits in other state

\footnotesize{7. See Applestein v. United Board & Carton Corp., 173 A.2d 225, 228 (N.J. 1961) (stating that to "render complete and final justice, . . . and to protect parties from the vexation and oppression of litigating the same controversy in different states," "a court of equity has the power to restrain a party over which it has personal jurisdiction from prosecuting judicial proceedings in another state" (citations omitted)); see also Gannon v. Payne, 706 S.W.2d 304, 305 (Tex. 1986) ("[S]tate courts do have the power to restrain persons from proceeding with suits filed in other courts of [the] state.").


9. See 11A \textsc{Charles A. Wright et al.}, \textsc{Federal Practice and Procedure} § 2960 (2d ed. 1995).


13. 28 U.S.C. § 2283 (1988) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").}
courts also face comity barriers since they cross jurisdictional lines.\textsuperscript{14} Although state courts may enjoin suits in other state courts, "[t]hey cannot interfere with the continued prosecution of pending federal actions nor can they bar commencement of a federal suit in the future."\textsuperscript{15}

\textbf{A. The ALI Proposal's Antisuit Injunction Provision}

The Proposal provides that when actions are transferred and consolidated,

the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.\textsuperscript{16}

The Proposal recognized that even when cases are consolidated, some of the parties may pursue parallel litigation in other courts. Such a situation arises, for example, when plaintiffs whose actions have been removed and consolidated "file anew in state court in the hope of outracing the transferee court to judgment."\textsuperscript{17} The antisuit injunction is thus "necessary to provide for situations in which parties refuse to cooperate and the result is duplicative litigation that interferes with the transferee court's ability to manage or resolve expeditiously the claims before it."\textsuperscript{18}

The Proposal sets out procedures and standards to be followed by a court in issuing an antisuit injunction. Many provisions are essentially codifications of existing antisuit injunction practice, but there are some distinctive touches that may

\textsuperscript{14} See James v. Grand Trunk W. R.R., 152 N.E.2d 858, 862 (stating that while an equity court "has power to restrain persons within its jurisdiction from instituting or proceeding with foreign action, . . . exercise of such power . . . has been deemed a matter of great delicacy, invoked with great restraint to avoid distressing conflicts and reciprocal interference with jurisdiction") cert. denied, 358 U.S. 915 (1958); see also J. E. Macey, Annotation, Injunction by State Court Against Action in Court of Another State, 6 A.L.R.2d 896 (1949).
\textsuperscript{15} CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 296 (5th ed. 1994). However, "[s]ince the states cannot limit the jurisdiction of the federal courts, they cannot enjoin proceedings in federal courts, except to protect the jurisdiction of the state court over property in its custody or under its control." \textit{id}.
\textsuperscript{16} COMPLEX LITIGATION PROPOSAL, \textit{supra} note 4, § 5.04(a).
\textsuperscript{17} \textit{id}., § 5.04(a) cmt. a, at 264.
\textsuperscript{18} \textit{id}.
affect the use of the device in other contexts such as in class actions, which will be discussed later in the article.

1. **Injunction should be as narrow as possible**

The Comments published with the Proposal caution that “[t]he injunction should be as narrow as possible to meet its objective of protecting the transferee court from undue intrusion.”\(^\text{19}\) The fact that the Proposal allows enjoining of “portions” of actions in other courts enables a court to tailor an injunction to address the particular actions taken in the other court that interfere with the pending suit. For example, when discovery in another court impinges on the ability of the consolidated suit to accomplish orderly and efficient discovery, the injunction can be tailored to forbid the discovery deemed to threaten interference, and should remain in force only until discovery in the consolidated case is completed and the threat of interference ends.\(^\text{20}\)

2. **Transactionally related test**

The Proposal restricts application of injunctive power to “transactionally related proceedings,” which is consistent with current antisuit injunction law. However, the standard can be devilishly hard to apply in particular cases. The Reporter’s Notes say that “[a]ntisuit injunctions should be used against those cases that are truly duplicative, and not those only tangentially related.”\(^\text{21}\) The example given is the classic interpleader case, *State Farm Fire & Casualty Co. v. Tashire*,\(^\text{22}\) in which the Court limited the availability of injunctions to actions involving the interpleader fund itself, and not to actions that simply related to the fund in some way. *Tashire*, however, did not attempt to elucidate the boundaries of the relationship test. The Proposal’s transactionally related test is similarly general.

Difficult questions arise when parallel suits involve some parties and claims that are different from the aggregated suit. For example, a parallel suit may leave out some previously named parties, add some previously unnamed parties, or assert

\begin{itemize}
\item \(^\text{19}\) *Id.* at 265.
\item \(^\text{20}\) *Id.* at 264-65.
\item \(^\text{21}\) *Id.* § 5.04 cmt. d, n.11, at 274.
\item \(^\text{22}\) 386 U.S. 523, 533-37 (1967).
\end{itemize}
some different claims. A clever party seeking to avoid the constraints of consolidation may purposely shape a parallel case to contain such differences. In the situation where there has been a decision to remove or transfer and then consolidate such parallel cases, there would already have been a determination of a relationship between the cases that should normally satisfy the transactionally related test for an antisuit injunction. But when an antisuit injunction is sought against prosecuting a case that has not yet been consolidated, on the ground that it immediately interferes with disposition of the consolidated action, the transactionally related test will have to be independently satisfied.

3. Factors to be considered

The ALI Proposal sets out four factors to be considered in granting an antisuit injunction. They are referred to as "discretionary" in the Comments, suggesting a balancing approach. These factors share some similarities with the three exceptions in the Anti-Injunction Act, but the legislation contemplated by the Proposal is intended to function as an additional, express exception to the Act. The Comments state that the proposed statute accords "express injunctive power" to the transferee court "to avoid the possibility of restrictions imposed by the Anti-Injunction Act." Indeed, the Comments assert a strong federal court interest, overriding the deference to state interests in the Anti-Injunction Act, that warrants such an exception:

As with interpleader, no one state may have the power to effect a solution that will reach across state boundaries; a national solution requires the assertion of federal power. Thus, in addition to the federal judicial system's interest in conserving its own resources, the federal government has an

---

23. COMPLEX LITIGATION PROPOSAL, supra note 4, § 3.01 (providing for transfer and consolidation of actions commenced in different federal district courts); id. § 5.01 (providing for removal to and consolidation in federal court of civil actions pending in one or more state courts).
24. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.04(b).
25. Id. § 5.04 cmt. d, at 271.
26. See supra note 13 and accompanying text.
27. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.04 cmt. b, at 267. Although a statutory exception need not expressly mention injunctions, see Mitchum v. Foster, 407 U.S. 225 (1972), the drafters felt explicit authority would avoid uncertainty.
interest, if not an obligation, to provide a procedure to remedy this interstate problem. This interest necessarily may over-
come the interests of an individual state in providing a forum for its litigants in appropriate circumstances, particularly when the allowance of the state action prevents the federal court from effectuating its legitimate federal objectives.  

a. How far the individual actions have progressed. The factors to be considered in granting an antisuit injunction are reflective of existing practice, with some useful clarifications. The first—"how far the actions to be enjoined have pro-
gressed" goes to concerns of both comity and efficiency. Nothing is more disruptive of existing expectations than issuance of an antisuit injunction by the judge in a newly aggregat-
ed case that prevents further proceedings in cases that have long been on the docket and are ready to go to trial. Take, for example, an injunctive dispute between two federal district courts involving the school asbestos litigation. The U.S. Dis-

At that time, two suits by Texas school districts had been pending for three years in the U.S. District Court for the Eastern District of Texas and were set for trial in three months. Upon learning of the Pennsylvania court’s injunction, the plaint-

28. COMPLEX LI~GATION PROPOSAL, supra note 4, § 5.04 cmt. c, at 270.
29. Id. § 5.04(b)(1).
30. The dispute is described in more detail in Edward F. Sherman, Class Ac-
solidated Mar. 22, 1983).
above styled and numbered cause.\textsuperscript{33} The order noted that the cases before the Texas court were first in time, but expressed reluctance "to determine choice of forum by rigid mechanical application of a general rule."\textsuperscript{34} It relied instead on "practical and equitable realities" including the considerable investment of time and effort in holding pretrial conferences and hearings, the trial settings, and the fact that subsuming these two cases under the class action "would cause prodigious delay and thwart justice."\textsuperscript{35} A month later, the Pennsylvania court modified its injunction to exclude existing suits.\textsuperscript{36}

Clearly, the two Texas cases should not have been subjected to the antisuit injunction. They had progressed too far to justify requiring them to join an aggregated case that might be years away from settlement or trial. However, antisuit injunctions are often issued as a prophylactic measure against pending and future litigation without judicial consideration of all the individual pending cases. The class in the asbestos school litigation was estimated at 8,500 schools, and the Pennsylvania court was probably unaware of the particular circumstances of the Texas cases, or indeed, of other pending cases.

If, as the ALI Proposal contemplates, antisuit injunctions may be a normal complement to consolidation, careful scrutiny of the status of pending cases is necessary. A court should require parties moving for an injunction to report on the status of all known pending cases and should assess whether allowing them to go forward would really interfere with the proper disposition of the consolidated action. If time is truly of the essence—for example, if there is reason to believe that irreparable actions will be taken in pending cases if an injunction does not issue immediately—a court might be required to issue an injunction and to allow parties whose cases are enjoined to petition within a reasonable time for exclusion from the injunction.

There is another aspect of mass duplicative litigation that may, however, undermine the rationale for not enjoining the pending Texas cases. Aggregation of all similar cases through

\textsuperscript{34} Id. at 3.
\textsuperscript{35} Id. at 4-5.
consolidation or class action can provide a window of opportunity for settlement that would not exist if the cases were individually litigated. Defendants may be willing to make a global settlement of all claims against them only if they can be assured that the settlement will resolve their total liability. In addition, if individual cases are allowed to be tried outside the aggregated action, substantial funds to pay damages may be siphoned off. If the defendants are shaky financially, releasing individual cases from aggregate treatment could result in bankruptcy. Such circumstances may be grounds for certifying a mandatory class action in which the plaintiffs may not opt out.

In consolidated cases of the type contemplated by the Proposal, the antisuit injunction may serve as a sort of surrogate for a mandatory class action by prohibiting individual litigation that would disrupt the resolution of the aggregated case.

Releasing the pending Texas cases from the injunction was not likely to interfere with the resolution of the school asbestos litigation. However, if a large number of such cases went forward outside the class action, the possibility of settling the class litigation might have been imperiled. The ALI Proposal does not address these kinds of considerations relating to the propriety of antisuit injunctions, perhaps in the belief that they are germane only to class actions. Yet consolidation is in many ways the functional equivalent of a class action, and the role of the antisuit injunction in holding together an aggregated case to enhance settlement should not be ignored.

b. Degree of duplication. The second factor to be considered in granting an antisuit injunction under the Proposal is the degree to which the actions pending in other courts are duplicative of the consolidated proceedings. This factor serves both economy/efficiency and inconsistent outcome con-

---

37. See infra part I.B.3.b.
38. See In re Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 789-90 (E.D.N.Y. 1980) (finding a mandatory Rule 23(b)(1)(B) class action appropriate if there is a substantial probability that the limited fund represented by defendants' assets would be exceeded), rehg denied in part, 534 F.Supp. 1046 (E.D.N.Y. 1982), and modified in part, 100 F.R.D. 718 (E.D.N.Y. 1983), and mandamus denied, 725 F.2d 858 (2d Cir.), and cert. denied, 465 U.S. 1067 (1984). But see In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) (barring Rule 23(b)(1)(B) certification "unless separate actions 'inescapably will alter the substance of the rights of others having similar claims'" (citations omitted)), cert. denied, 459 U.S. 1171 (1983)).
39. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.04(b)(2).
cerns, and therefore overlaps with the threshold question as to whether the cases are transactionally related. The Comments warn that "[b]ecause issues vary in significance, this inquiry into the level of duplication cannot be reduced to some formulaic determination of minimum commonality." Thus, the savings resulting from unitary adjudication of a single, vital issue might warrant an injunction, while the existence of a number of common issues of lesser importance might not justify prohibiting individual adjudications. The focus would seem to be on whether the individual cases are closely enough related to the consolidated case that there would be a significant repetition of evidence and witnesses.41

c. Whether there are issues of federal law. The third factor in determining the propriety of an antisuit injunction focuses directly on federalism concerns—whether the actions to be enjoined involve issues or claims of federal law.42 If state suits involve predominantly state issues, comity and abstention may dictate against an injunction. The Comments call on the judge to "weigh the benefits of aggregation against the potential intrusion on state sovereignty."43 The greater the significance of federal issues, the less likely it is that an injunction would intrude on legitimate state interests. But if cases are dominated by state issues, "enjoining their prosecution in a state court should require a strong finding that the benefits of consolidation in the transferee court [otherwise] would be undermined."44 Such a finding might be justified if the state action were parallel or if the plaintiffs had filed the action after the order to transfer and consolidate "in an effort to engage in a race to judgment or to avoid the governing law chosen under the applicable federal choice of law standards."45

d. Interests of nonparties. The last factor in the decision whether to issue an antisuit injunction relates to the interests of persons whose cases were not consolidated. Normally, nonparties to the consolidated litigation would not be subject to an injunction. However, the ALI Proposal contemplates the possibility that nonparties will be enjoined so long as the con-

40. Id. § 5.04 cmt. d, at 272.
41. Id.
42. Id. § 5.04(b)(3).
43. Id. § 5.04 cmt. d, at 273.
44. Id.
45. Id.
solidating court has personal jurisdiction over them. The jurisdictional requirement can easily be met because the Proposal would expand the jurisdictional power of the transferee court to assert jurisdiction wherever the nonparties may be located.\textsuperscript{46} In support of this expansion, the Reporter's Notes cite the interpleader statute that affords similar nationwide jurisdiction to federal courts and empowers them to enjoin all suits brought by adverse claimants to a fund, obligation, or res.\textsuperscript{47}

Exclusion of a case from consolidation would reflect an initial determination that individual litigation would not endanger the aggregated proceeding. However, the aggregation decision may sometimes be neither as comprehensive nor as far-sighted as it should be. In addition, matters may arise later concerning nonparty litigation that would undermine the effective disposition of the consolidated case. For example, discovery undertaken in an individual suit may interfere directly with discovery management in the consolidated litigation. The Reporter's Notes indicate that in such a case, "an injunction prohibiting certain discovery for a short time until the parties in the consolidated suit have completed it might be appropriate."\textsuperscript{48}

\textbf{B. Antisuit Injunction Practice in Class Actions}

The provision for antisuit injunctions in the ALI Proposal is focused on the transfer-removal-consolidation scheme that the Proposal has adopted. However, the greatest need for antisuit injunctions in mass duplicative litigation today is probably in class actions. Although the Proposal does not address class actions, its rationale for the use of antisuit injunctions and its procedures and standards for their issuance are relevant to class actions. The class-action context poses additional and sometimes different issues with which the federal courts have wrestled during the past several years.

\textit{1. Traditional Anti-Injunction Act constraints}

The expansion of the antisuit injunction in the class-action context has been the product of necessity, particularly arising from mass duplicative litigation in federal courts in which the

\begin{flushright}
\textsuperscript{46} Id. \textsection 5.04 cmt. b, n.7, at 268-69. \\
\textsuperscript{47} Id. at 269 (citing 28 U.S.C. \textsection 2361 (1988)). \\
\textsuperscript{48} Id. \textsection 5.04 cmt. d, at 273.
\end{flushright}
risk of interference by state-court suits is particularly vexing. Constraints on antisuit injunctions in class actions arise from the Anti-Injunction Act, principles of federalism, and limitations on the equitable injunctive power.

The Anti-Injunction Act imposes the most serious constraint on the use of antisuit injunctions by class-action courts. There is no express "class-action" exception to the Anti-Injunction Act in Rule 23.49 This contrasts with statutory interpleader which provides that a district court may restrain all claimants "from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action."50 The ALI Proposal's provision of an express exception to the Anti-Injunction Act for antisuit injunctions under its consolidation scheme might also serve as a model for an exception for class actions.51 In the absence of an exception, however, antisuit injunctions in class actions have had to be shoe-horned into one of the three exceptions in the Act.

49. It might be argued that Rule 23(d), which allows a court to "make appropriate orders" to determine the course of proceedings, should be construed as an express exception. See Steven M. Larimore, Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Act, 18 GA. L. REV. 259, 274-84 (1984); Sherman, supra note 30, at 528-33. This position has not been accepted by the courts. See In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985); Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980). "This is probably the correct result, because Rule 83 commands that the Federal Rules of Civil Procedure are not to affect basic jurisdictional statutes, and the 'jurisdiction' to be protected in these class actions is actually made possible by Rule 23 itself." Diane P. Wood, Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act, 1990 B.Y.U. L. REV. 289, 315.

50. 28 U.S.C. § 2361 (1988). However, a court may only exercise this authority when a deposit has been made or a bond provided by the stakeholder as required by the statute. Austin v. Texas-Ohio Gas Co., 218 F.2d 739, 745 (5th Cir. 1955).

51. Professor (now Judge) Wood proposed amending 28 U.S.C. § 2283 to add an exception that would allow antisuit injunctions "when necessary to ensure the effectiveness of a class action certified under federal statutes or rules, or multidistrict litigation ordered pursuant to 28 U.S.C. § 1407, or court-ordered arbitration, or in aid of a claim for interpleader." Wood, supra note 49, at 320. The standard for this exception ("when necessary to ensure the effectiveness of a [certified] class action") is vague, as is the standard in the ALI Proposal ("whenever [the court] determines that the continuation of those actions substantially impairs or interferes with the consolidated actions"). The federalism concerns expressed in the Anti-Injunction Act might be better served by a narrower exception. One might attempt, for example, to tailor an exception to those precise situations in which duplicative state-court suits truly interfere with the effectiveness of a federal-court aggregated case and in which the federal interest should clearly be given prominence. Drafting such a rule, however, would not be an easy task.
The second exception—"necessary in aid of its jurisdiction"—holds the most promise for avoiding the Act in mass duplicative litigation. It might seem to apply if duplicative suits by class members would disrupt a class action by siphoning off class members. However, this exception "has often been construed with the greatest nineteenth century rigor the courts can muster." The Supreme Court's 1922 decision in Kline v. Burke Construction Co. distinguished between in rem and in personam actions, finding that historical equity practice would only permit enjoining of duplicative litigation when necessary to prevent interference with a court's jurisdiction over a res. Duplicative in personam actions, in contrast, had to be allowed to proceed concurrently, and "an injunction could not issue to restrain a state action in personam involving the same subject matter from going on at the same time." Although school desegregation cases were analogized to in rem actions to justify enjoining state suits that would undermine the remedy and effective compliance by the parties, the Supreme Court stated with assurance in 1977 that it had "never viewed parallel in personam actions as interfering with" a court's jurisdiction.

The limitations that this view imposes on the ability of a federal court to prevent interference with a pending class action can be seen in the In re Federal Skywalk Cases. There, the district court certified a mandatory class of all persons with claims arising out of the collapse of skywalks in the Hyatt Regency Hotel in Kansas City in 1981. The court also issued an antisuit injunction preventing class members from settling their punitive damage claims in existing suits until the class-action trial was concluded. The court reasoned that the first litigants to obtain punitive damages might exhaust the fund of available resources or might curtail the ability of other litigants to receive punitive-damage awards. The Eighth Circuit found that the mandatory class certification constituted an injunction that violated the Anti-Injunction Act, rejecting anal-

52. Wood, supra note 49, at 301.
54. Sherman, supra note 30, at 532 (quoting 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.92, at 23-570 (2d ed., 1985)).
55. WRIGHT, supra note 15, at 303 n.50.
eties to federal interpleader jurisdiction and finding that the risk of exhausting the resources of a defendant by individual punitive damages did not warrant invoking the "in aid of its jurisdiction" exception.59

2. A modest expansion of antisuit injunctive powers

In the last decade, there has been a modest expansion of federal courts' antisuit injunctive powers through application and interpretation of the Anti-Injunction Act and the All Writs Act.60 Two situations have emerged in which courts have allowed resort to antisuit injunctions to prevent class members from litigating their suits individually.

The first occurs when cases that were consolidated in a federal court under Multidistrict Litigation (MDL) proceedings61 have progressed to the stage of imminent settlement. For example, in In re Corrugated Container Antitrust Litigation,62 the district court certified as a mandatory class action fifty-two private antitrust suits previously consolidated under MDL. The Fifth Circuit upheld the mandatory class action and the court's injunction which prevented the class members from filing suit in state courts. The circuit court invoked both the "in aid of its jurisdiction" and "to protect or effectuate its judgments" exceptions of the Anti-Injunction Act,63 stressing that the district court had approved the settlements with most of the defendants at the time it issued the injunction.

In re Baldwin-United Corp.64 further extended the doctrine that an antisuit injunction was justified to protect imminent settlement of consolidated cases. In In re Baldwin, over one hundred federal securities suits by 100,000 holders of annuities issued by the now bankrupt Baldwin-United had been

59. Skywalk, 680 F.2d at 1182-84. There is a similarity between the requirement for a mandatory "limited fund" class action under Rule 23(b)(1)(B) (see infra note 70 for requirements of a "limited fund") and for the "in aid of its jurisdiction" exception to the Anti-Injunction Act. Both can be seen as requiring an essentially in rem action. However, it would be a mistake to conclude that only mandatory class actions can satisfy that exception under the Anti-Injunction Act. Courts have upheld antisuit injunctions even in Rule 23(b)(3) opt-out class actions. See In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985).
61. See supra note 4 and accompanying text.
63. Corrugated Containers, 659 F.2d at 1334-35.
64. 770 F.2d 328 (2d Cir. 1985).
consolidated under MDL. After two years of negotiations and with the parties nearing settlement, the federal district court approved a nationwide opt-out class action on behalf of all holders of the annuities for the purpose of settlement. When certain state attorneys general threatened to sue in state courts on behalf of resident class members who were opposed to the settlements, the court enjoined such suits. The Second Circuit upheld the injunction under the “in aid of its jurisdiction” exception, finding the imminent settlement to be “the virtual equivalent of a res.” It found the settlement was close to finalization and that “the potential for an onslaught of state actions . . . threatened to ‘seriously impair the federal court’s flexibility and authority’ to approve settlements in the multi-district litigation.”

A similar approach was taken in the mass torts case of In re Asbestos School Litigation. There, the Third Circuit upheld an antisuit injunction against prosecuting suits outside the class action, pending the district court’s ruling on a proposed settlement. “[T]his court’s ability to oversee a possible settlement,” it said, “would be ‘seriously impaired’ by the continuing litigation of parallel actions.”

The second situation warranting the issuance of an antisuit injunction arises out of class actions related to bankruptcy. The bankruptcy of Johns-Manville led to a settlement and the creation of a trust for the benefit of asbestos victims. When unexpectedly large claims and transaction costs threatened the viability of the trust, Judge Jack Weinstein, who had continuing jurisdiction due to the bankruptcy, certified a mandatory “limited fund” class of claimants to the trust to facilitate a settlement that would revise the trust arrangement. He also issued a nationwide injunction against prose-

---

65. Id. at 337.
66. Id. at 337 (citations omitted).
68. Id. at *6.
70. Id. A “limited fund” class is the paradigm of a Rule 23(b)(1)(B) class action in which individual adjudications would as a practical matter impair the ability of the putative class members to protect their interests. A “limited fund” exists “where the claims of all plaintiffs exceed[] the assets of the defendant and hence to allow any group of individuals to be fully compensated would impair the rights of those not in court.” Green v. Occidental Petroleum Corp., 541 F.2d 1335,
cution of any claims against the trust, relying on the "imminency of settlement" rationale to invoke the "in aid of its jurisdiction" exception to the Anti-Injunction Act:

The courts are in the process of reviewing the stipulation of settlement of the proposed class action encompassing the claims of all beneficiaries of the Trust. At this critical juncture, the courts must be able to continue—confident that the assets available to settle the case will remain intact. An injunction of all proceedings is necessary to implement the terms of the settlement and to protect the courts' jurisdiction over the class action.

Judge Weinstein also invoked the All Writs Act, "whether viewed as an affirmative grant of power to the courts or an exception to the Anti-Injunction Act," as authority for courts "to certify a national class action and to stay pending federal and state cases brought on behalf of class members."

3. **Injunctive developments in global class-action settlements**

The extension of class-action treatment to mass torts

---

71. In re Joint E. & S. Dists. Asbestos Litig., 120 B.R. at 653-54. A mandatory class action was also certified for claimants against Eagle-Picher, a major manufacturer of asbestos which was in severe financial difficulty, and all actions against it were similarly enjoined nationwide. In re Joint E. & S. Dist. Asbestos Litig. (In re Eagle-Picher Indus.), 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

72. See In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985); Standard Microsystems Corp. v. Texas Instruments Inc., 916 F.2d 58, 60 (2d Cir. 1990) (stating that a stay of proceedings in state court is appropriate under the "in aid of its jurisdiction" exception "where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective"). Noting the analogy drawn between class-action litigation and in rem actions in *Baldwin-United*, Judge Weinstein found the analogy even stronger in the Manville litigation "since the Trust constitute[d] a res that ha[d] been created in a bankruptcy proceeding to compensate all injuries resulting from Manville asbestos-containing products." In re Joint E. & S. Dist. Asbestos Litig., 120 B.R. at 657.


74. 28 U.S.C. § 1651(a) (1988). The All Writs Act reads: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*


76. The 1966 Advisory Committee Notes to Rule 23 state: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." 39 F.R.D. 69, 103 (1966). "While the initial trend appeared to
DUPLICATIVE LITIGATION

has led to a number of global settlements aimed at buying peace for the defendants against all present (and in some cases future) claimants. Three prominent global class-action settlements have been approved by federal courts in the last two years, and in all three cases, antisuit injunctions were a critical, bargained-for feature. The injunctive issues involved complicated questions of jurisdiction, due process, opt-out rights, and judicial authority under the Anti-Injunction Act and All Writs Act.

a. Georgine: Fending off duplicative suits from every quarter. The first of the global class actions, Georgine v. Amchem Products, involved a settlement with a consortium of twenty asbestos manufacturers. As has become the practice in a number of mass-tort settlements, motions for stipulation of settlement and for certification of a settlement class were filed simultaneously. These motions sought certification of a nonmandatory Rule 23(b)(3) class, with opt-out rights, defined as all persons in the U.S. who had been exposed occupationally or derivatively in the household to defendants' asbestos products, and who had not yet filed suit, as to all claims of injury whether or not disease had been manifested. The defendants were obviously seeking and, in fact, obtained as a condition for paying the $1.2 billion settlement that all claims present and future would be extinguished by the class-action judgment. The stipulation of settlement likewise provided that once the court approved the settlement, all class members would be enjoined from instituting or maintaining any claim or action for asbestos-related injuries against a defendant.

Within two weeks after the stipulation of settlement and class certification motions were filed, the district court provi-

preclude the use of class actions in mass torts, the overwhelming burden of these cases in the twenty years since the Advisory Notes were published has revived efforts to utilize the device to fashion equitable and efficient remedies." In re Joint E. & S. Dist.s. Asbestos Litig., 129 B.R. 710, 807 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), and modified on rehg, 993 F.2d 7 (2d Cir. 1993).

77. For a criticism of the three global class-action settlements which are discussed in this article, see John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995).


80. Id. at 194-95.

sionally approved the class action, but there was considerable opposition to the settlement by putative class members. Two months after filing, and before the court had established a period for opt-out, some absent class members filed a class-action complaint in a West Virginia court seeking to represent class members who had been exposed in West Virginia.82 They sought a declaratory judgment that the proposed global settlement in federal court was not binding on the class members because of lack of jurisdiction and other defects.83 In response, the defendants obtained from the federal court a preliminary injunction forbidding the West Virginia class members from prosecuting their suit or from pursuing "duplicative litigation" in any other forum.84

On appeal of the injunction, the Third Circuit held that the district court lacked power to enjoin parallel litigation when the absent class members, at the time the injunction was issued, had not been given the opportunity to opt out.85 Applying the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*,86 the court found that absent class members can only be bound by a class-action damages judgment,87 in the absence of minimum contacts, if they are provided timely notice and an opportunity to opt out. By the time the appeal was decided, however, the district court had established an opt-out period and the class members still had an opportunity to opt out. The circuit court found that the opportunity of the class members to opt out remedied the *Shutts* problem.88 The cir-

82. See Carlough, 10 F.3d at 195-96 (describing Gore v. Amchem Prods., No. 93-C-195 (Cir. Ct. of Monogalia County, W. Va.)).
83. Carlough, 10 F.3d at 195. See infra note 98 for the argument against jurisdiction.
84. Carlough, 10 F.3d at 196.
85. Id. at 200.
86. 472 U.S. 797 (1985).
87. The Court in *Shutts* limited its holding to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and expressed "no view concerning other types of class actions, such as those seeking equitable relief." Id. at 811-12 n.3. A prominently held view is that in Rule 23(b)(1) and (2) class actions, a court can assert jurisdiction over absent plaintiff class members who lack minimum contacts with the forum even though there is no opt-out right. See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts*, 96 YALE L.J. 1, 54 (1986). But see Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 114 S. Ct. 1359 (1994) (finding that class members in a Rule 23(b)(1) and (2) class action were denied due process by not being allowed to opt out).
88. Carlough, 10 F.3d at 199-201.
cuit court went on to approve the antisuit injunction as necessary to protect the court's jurisdiction to accomplish the proposed settlement. \(^{89}\) It found authority in the Anti-Injunction Act and All Writs Act, endorsing the approach taken in the Asbestos School Litigation and Baldwin-United that the imminency of a class-action settlement warranted an injunction "in aid of its jurisdiction." \(^{90}\)

One might ask what was accomplished by enjoining the West Virginia class action when the persons who brought that suit, as well as other putative class members, could still opt out of the global class action. The answer lies in the fact that the West Virginia suit sought much more than just the right of individual class members to opt out. It sought to prevent both a global settlement that would include future claimants and a nationwide class action by carving out a state class action. \(^{91}\) The right to opt out need not be fatal to a global settlement if, as actually did occur here, the bulk of the class members choose not to opt out. But the West Virginia suit sought to undermine the viability of the class-action structure and settlement, thereby satisfying the rigorous standard of the "in aid of its jurisdiction" exception that an injunction must be necessary "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." \(^{92}\) Enjoining the West Virginia action thus helped to preserve the global character of the federal class and the attendant efficacy of the settlement.

---


90. Carlough, 10 F.3d at 201-03.

91. "The stated purpose of the Gore suit is to challenge the propriety of the federal class action, which the district court characterized as a preemptive strike against the viability of the federal suit, and to obtain rulings from the West Virginia state court regarding the West Virginia class members' right to opt out of the federal action." Id. at 203.

Despite success in thwarting the West Virginia suit, the global settlement in *Georgine* faced further threats of duplicative litigation. Within the first half-year after the opt-out period ended, some 2,500 individual suits were filed in courts around the country by class members who had not timely filed their opt out. The defendants, rather than seeking to enforce the antisuit provision of the settlement agreement, sought a class-wide injunction forbidding class members from initiating or prosecuting asbestos-related claims in duplicative proceedings. The court granted the injunction, finding that the existence of 2,500 suits "demonstrates a strong likelihood that these state court proceedings would seriously impair this Court's authority to preside over the *Georgine* settlement. According to the court such suits would force the defendants "to defend the settled claims of class members in multiple jurisdictions," would "undercut the financial planning and claims procedures provided in the Stipulation," and would "jeopardize the security of the existence of a fund to compensate class members for their injuries."

The final chapter in the *Georgine* attempt to curb duplicative litigation was written when Casimir Ballonis filed suit in a Maryland state court ten months after the opt-out period ended. Mr. Ballonis alleged that he had only recently been diagnosed as having mesothelioma (a probably fatal cancer) resulting from exposure to the defendants' asbestos. He had not opted out of the class, being unaware of his asbestos-related disease. Mr. Ballonis' claim was precisely the type of claim that had concerned those who had opposed inclusion of potential claimants in the *Georgine* class. The defendants

94. *Id.; see supra text accompanying note 81.*
95. *Id.* at 722.
96. *Id.*
98. These opponents argued that "the 'exposure only' plaintiffs lacked standing to invoke the jurisdiction of the district court to decide their claims based on mere exposure to asbestos." Initial Brief of Appellants on Appeal from Preliminary Injunction at 36, *Georgine v. Amchem Prods.*, (3d Cir. 1995) (filed Feb. 6, 1995) (No. 94-1925). Because exposure only plaintiffs had sustained "no physical harm as a result of their exposure, [they] sought relief only for their increased risk of developing asbestos-related disease, their fear of contracting such a disease, and their need for medical surveillance to allow the early detection of an asbestos-related illness," demonstrating that these plaintiffs lacked a judicially cognizable claim or injury. *Id.* Second, the opponents of including future claimants noted that
moved to hold Mr. Ballonis and his lawyer in contempt for prosecuting his suit in violation of the court's antisuit injunction. Citing its prior findings that the notice to the class by publication was adequate and the settlement was fair, the court rejected Mr. Ballonis' argument that it should lift the injunction because it was unfair to him (he would have to settle his case within the $37,000 to $60,000 range in the settlement schedule while verdicts in mesothelioma cases generally exceed a million dollars). Instead, the court granted the defendants' motion, holding Mr. Ballonis and his attorney in contempt for pursuing the Maryland suit by seeking discovery and ordering them to cease all prosecution.

The Ballonis holding is a logical extension of the use of antisuit injunctions in the global settlement of "futures" class actions. If defendants are really to be accorded peace by global settlements, even apparent injustice to a class member who may not have had actual notice of the right to opt out and who was unaware that he had a present medical condition is to be countenanced. It was the "futures" class that particularly dictated this harsh result in Georgine; members of a "futures" class who have not manifested an injury are less likely to get actual notice because they may not realize that a published notice applies to them. However, even without a "futures" class, the antisuit injunction can be Draconian. "Present" class members who have manifested disease may also not see the published notice and may miss their opportunity to opt out. Once an antisuit injunction is issued, judges tend to admit few exceptions. If the injunction were lifted for Mr. Ballonis, "it arguably would have to be lifted for countless other plaintiffs who are similarly situated or who claim that they would be better

The gross unfairness of allowing named plaintiffs to bargain away the rights of absent class members with respect to claims which are outside the scope of their capacity as class representatives is particularly severe when the claims being released do not even yet exist. If the 'exposure only' class representatives wish to trade their own unaccrued, potential asbestos claims for the terms of the proposed settlement, that is their business and their choice. But the district court cannot mandate that all persons who have ever been exposed to the CCR members' asbestos-containing products must also give up their unaccrued, potential future rights.

Id. at 68.

100. Id.
101. Id. at *10.
off litigating their individual claims," which "would lead to the disintegration of the Georgine settlement with substantial prejudice to the . . . defendants and the class generally." 102

b. Breast Implant Litigation: Trying to hold the class together for settlement possibilities. The second global class action in which antisuit injunctions have been invoked is the In re Silicone Gel Breast Implant Products Liability Litigation. 103 In this litigation, pending federal court cases against the manufacturers of breast implants were consolidated under MDL in the federal court in the northern District of Alabama. 104 A global class-action settlement was preliminarily approved by Judge Sam Pointer for all claims, present and future, arising from a breast implant manufactured by the settling defendants. 105 Judge Pointer ordered notice by publication and established an opt-out period during which putative class members were enjoined from going to trial in any other court. 106 Upon approving the settlement after the opt-out period expired, Judge Pointer enjoined class members from instituting or prosecuting any claims against the settling defendants. 107 The viability of the Breast Implant Litigation settlement was subsequently undermined by an unexpectedly large number of claimants, 108 but the antisuit injunction remained in effect while negotiations and maneuvering continued.

Unlike Georgine, there was no substantial direct disobedience of the antisuit injunction by class members. The antisuit injunction played a less significant role than in Georgine, and the opt-out class action was not as all-inclusive (due in part to the inability to remove and consolidate with the MDL action many state-court cases as to which there was no diversity jurisdiction). 109 However, despite the demise of the original global

102. Id. at *11.
104. Id. at 1101.
106. Id. at *6-*8. There was also to be a unique, second opt-out period after an evaluation of available resources following receipt of claims.
107. Id. at *7.
settlement, the antisuit injunction helped to hold the federal settlement class action together while alternatives were explored.

c. Ahearn: Buttressing a mandatory class action. The third recent global class action in which antisuit injunctions have been used is Ahearn v. Fibreboard Corp. Ahearn illustrates a different approach to the prevention of duplicative litigation. A settlement as to both present and future claims was reached between the defendant Fibreboard and the attorneys representing a class of all persons exposed to Fibreboard's asbestos products. As in Georgine, the motion to certify a class action was filed simultaneously with the proposed settlement agreement. Shortly thereafter, the district court judge, Robert M. Parker, provisionally certified the class and issued an expansive antisuit injunction. He enjoined all class members from initiating any personal injury claims against Fibreboard in any court, "whether by way of commencing litigation, intervening in existing litigation to which Fibreboard is a party, joining Fibreboard in any existing litigation, or in any other manner asserting any such claim . . . not pending before the effective time of [the] temporary restraining order."

In contrast to the classes in Georgine and the Breast Implant Litigation, the class in Ahearn was certified as a mandatory class under Rule 23(b)(1)(B) without opt-out rights. Certification of a mandatory class was ordered because a sizable part of the funds to be paid under the multibillion dollar settlement came from insurance companies whose liability was uncertain because of pending appeals from a judgment in a coverage case against them. Judge Parker found that there was "a significant risk" that Fibreboard would lose on one or more issues in the coverage case and that available funds under Fibreboard's current settlement program would be inadequate to pay all claims. Thus he concluded that the case

111. Id.
112. Id. at *2.
113. In Breast Implant, however, claimants against two defendants who were in bankruptcy, Mentor and Bioplasty, were certified as non-opt-out subclasses. In re Breast Implant Prods. Liab. Litig., 1994 WL 114580 at *3 (N.D. Ala. April 1, 1994).
115. Id. at 526.
was a "limited fund" case justifying a mandatory class action (which ruling has been appealed to the Fifth Circuit).

The certification of a mandatory class action is a powerful mechanism for preventing duplicative litigation. The appellate court in *Skywalk* found that it has the effect of an injunction and therefore must come under an exception to the Anti-Injunction Act. Judge Parker’s mandatory class certification was buttressed by an antisuit injunction providing class members a powerful disincentive, enforceable by contempt, to litigate their cases in any fashion outside the class action. The defendant in *Ahearn* was thus assured, as much as is possible in the complex world of mass torts, of "total peace."!

There are costs for such peace—the loss of parties’ autonomy over their own cases and possible unfairness to individual class members due to the "leveling effect" of a settlement. But the billion-dollar terms of the three global settlements just discussed arguably reflects a much greater willingness by defendants to make reasonable settlements if they can thereby buy peace. For purposes of the narrow issues surrounding mandatory class actions and the constraints of the Anti-Injunction Act, these global settlement cases reflect a growing willingness of courts to squeeze cases into the "limited fund" and "in aid of its jurisdiction" categories to effect a pending settlement.

Federal courts have been struggling mightily to find a way to hold together class-action settlements of mass related cases. The tortured course of these rulings contrasts with the supposed simplicity of the antisuit injunction provision in the ALI Proposal. However, some of the problems that have arisen in the class-action context might also have to be faced in applying the antisuit injunction in the consolidation scheme of the ALI Proposal. Conversely, as an analogical development the Proposal might offer insights and examples to class-action courts in exploring the appropriate boundaries of the antisuit injunction.

---

116. *See supra* text accompanying note 59; *In re Joint E. & S. Dists. Asbestos Litig.*, 120 B.R. 648, 655 (E. & S.D.N.Y. 1990) ("The effect of conditional class certification [under Rule 23(b)(1)(B)] will be for all pending state and federal cases to become part of the mandatory class and cease to exist as independent cases.").

117. "[I]n return for the monies to be paid under the Global Settlement, Fibreboard and the Insurers would receive 'total peace' with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members." *Ahearn*, 162 F.R.D. at 517.
II. NOTICE OF INTERVENTION AND PRECLUSION

The second complementary device in the ALI Proposal—notice of intervention and preclusion—involves quite different procedures and incentives than the antisuit injunction. While the antisuit injunction is a threshold device prohibiting the pursuit of litigation in other courts, the notice-of-intervention device focuses on precluding future similar claims by persons not parties to the aggregated suit. It contemplates potentially expanding the size of the aggregated suit by identifying parties with an interest and notifying them of their right to intervene and of the preclusive effect of the suit.

A. Unsuccessful Attempts to Curb Duplicative Litigation with Preclusion

Preclusion has long been recognized as a possible way to reduce duplicative litigation. Over the years there have been various challenges to the general rule that persons may not be precluded by a judgment if they were not joined as parties. These challenges have taken the form of attempts to expand the doctrines of "privies," "virtual representation," and other exceptions to the general rule.\[^{118}\] Even these nonparty preclusion rules have been criticized as unduly narrow and as failing to recognize that there are situations in which individuals should be precluded without a right to participate as parties.\[^{119}\] After the 1979 decision in Parklane,\[^{120}\] which rejected the requirement of "mutuality" in cases of "offensive collateral estoppel" as to defendants who had a full and fair opportunity to litigate, some hoped to see an expansion of nonmutual preclusion.\[^{121}\] In mass related cases, however, attempts to preclude a common defendant from contesting jury findings such as product defectiveness have foundered due to lack of identity as to such matters as time, place, and evidence.\[^{122}\]

---

119. See Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 288 (1992) (concluding that courts should "ask whether the absentee has any normative claim to participate at all, and, if she does, how strong her claim is and what sort of participation opportunities it demands").
122. See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 343-45 (For-
Finally, hopes of precluding persons who choose to "sit on the fence" and not seek to intervene in a suit in which their interests might be affected were dashed by the Martin v. Wilks decision prohibiting preclusion without formal party status. In response to Wilks, the ALI Proposal seeks to create a modest vehicle for expanded nonparty preclusion.

B. ALI Proposal for Notice of Intervention and Preclusion

The ALI Proposal creates a new procedure to notify nonparties, who might be affected by the judgment, of their right to intervene. The notice provision builds on Justice Harlan's comment in Provident Tradesmens that a person who fails to intervene in an earlier lawsuit might "be bound by the previous decision because, although technically a nonparty, he ha[s] purposely bypassed an adequate opportunity to intervene." As the ALI Proposal notes, some courts flirted with a rule of "nonparty preclusion," finding that nonparties who did not take the initiative to intervene, despite knowledge that the suit would affect their interests, would be precluded by the judgment. However, the decision in Wilks—which held that nonparty white fire fighters were not bound by a judgment between the department and a plaintiff class of black fire fighters, and that there is no duty to intervene to avoid preclusion—rejected such nonparty preclusion. In a footnote, however, Wilks left open the possibility of preclusion based on formal notice.

1. Notice procedure

The ALI Proposal creates a procedure for notifying nonparties that they have a right to intervene, and that they will be precluded by the judgment whether they do so or not. The Proposal also details what the notice should con-
tained. Nonparties must be informed of each of the following: the nature of the claims to be resolved in the consolidated suit, their right to intervene and the time period for doing so, that whether they intervene or not they will benefit from the determinations made and will be precluded from relitigating issues, and that they may contest whether the notice standards have been satisfied. Upon receipt of notice, a nonparty can obtain a hearing on his claim that the standards have not been satisfied and on whether the order should be confirmed, modified, or vacated.

The Proposal seems to contemplate only individual notice. In so doing, it excludes some important potential uses of the preclusion procedure. Individual notice may be feasible in an employment discrimination suit of the Wilks variety. In such cases, it is usually possible to obtain the names of white fire fighters whose rights might be affected by a judgment. But the raison d'être for the ALI project was to deal with mass related litigation such as consumer rights, product liability, and toxic torts cases. It is often impossible to identify by name and address all persons whose rights might be affected in such cases. Such suits might be better resolved by a class action, but even under the Proposal's consolidation scheme, notice of intervention might in some cases play a useful role in facilitating effective resolution through consolidation.

The question is whether notice might be given to a group or organization or to a representative of a definable group of persons in such a way as to adequately put members of the group on notice of their right to intervene. Put another way,

42 U.S.C. § 2000e-2(n)(1). In response to Wilks, that Act amended Title VII of the 1964 Civil Rights Act to provide that "an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination" may not be challenged, under certain circumstances, by a person who received the specified form of notice and an adequate opportunity to object or who was adequately represented. Id. The specified form of notice that must be received is:

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain.


129. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.05(b).
130. Id. § 5.05(c).
131. See infra part II.C.
could a class of nonparty potential intervenors be created which would be notified through a named class representative? Perhaps this is simply another form of class action that should not be confused with the notice-of-intervention device. But since the ALI Proposal eschews consideration of class actions, one wonders whether a broadened form of group, class, or representative notice of intervention should be explored for cases in which individuals cannot easily be identified.

The Comments assert that it is expected that the notice "procedure will be used only infrequently or for a small number of litigants [as] most parties to complex litigation are likely to have filed suit." 132 This is a curious statement that sells short the notice procedure's potential for preventing relitigation in mass related cases. The largest mass related cases are often protracted over many years, with suits continually being filed over the life of the litigation. 133 Even late in the life of mass related litigation, there are often a sizable number of unfiled claims. The notice-of-intervention procedure need not be limited to consolidating or precluding claims that have already been filed; the Comments state that the procedure "may be used to gather the as yet unasserted claims of nonparties without regard to whether those claims otherwise would have been filed in state or federal court." 134 The Comments, however, also say that the procedure is limited to "existing claims and thus does not provide a mechanism for addressing the problems of duplication or inconsistency that may occur when claims mature later that involve the adjudication of some of the identical facts." 135

Could the notice-of-intervention device be used for claims that have not yet matured? As was discussed in the previous section, "futures" claims pose serious problems in aggregated cases, and the fairness of resolving them through a representative action is being contested on appeal in Georgine and Ahearn. Including "futures" claims in an aggregation or preclusion scheme raises serious questions as to the adequacy of notice. Arguably, notice by publication is insufficient to satisfy

132. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.05 cmt. a, at 278.
134. COMPLEX LITIGATION PROPOSAL, supra note 4, § 5.05 cmt. a, at 277.
135. Id.
due process when the potential claimants are unaware of their condition. This problem is magnified under the demanding due process requirements of Wilks, if notice of intervention is used as a basis for preclusion. On the other hand, in some cases, notice by publication is likely to result in actual notice. For example, persons exposed to a toxic substance may be well aware of their exposure, and, through an effective publication campaign or common knowledge, may also be aware of the dangers incident to that exposure. Breast Implant Litigation provides a good illustration; every class member was surely aware that she had had an implant, and it is hard to believe that, after the extensive media publication campaign, any class member could have been unaware of the medical conditions allegedly associated with an implant.\textsuperscript{136} In cases such as the Breast Implant Litigation, in which class members are aware of their potential claims, it might be possible to give as effective notice by publication to future claimants as to present claimants. Thus, if an adequate form of notice of intervention by publication could be devised in a proper case consolidated under the ALI Proposal, the notice procedure might be an effective device for dealing with one of the most vexing problems of duplicative litigation—"futures" claims.

2. Rights upon intervening

Although the Proposal requires notice to potential intervenors, it does not address what rights persons will have if they choose to intervene. Will intervenors be accorded full party status with its attendant right to be represented by individual counsel, to submit separate pleadings and motions, and to address the court? If so, one would expect the notice-of-intervention procedure to be rarely invoked because intervenors could quickly complicate a case and make it unmanageable. Courts have not, in fact, granted full party status to intervenors. In \textit{United States v. Reserve Mining Co.},\textsuperscript{137} for example, the judge ruled that various environmental, civic, business, and governmental groups could intervene as of right. However, each

\textsuperscript{136} See \textit{In re Silicone Gel Breast Implant}, 1994 WL 578353, at *3 (N.D. Ala. Sept. 1, 1994) ("[U]nlike some latent toxic-tort cases, this notice did not have to serve the purpose of informing members of the public about whether they might have claims. With rare exceptions, persons would know whether they were breast-implant recipients.").

\textsuperscript{137} 56 F.R.D. 408, 411 (D. Minn. 1972).
side was required to "name a spokesman who will act as their representative" and to work in unison to prevent duplication in discovery, motions, calling of witnesses, and presentation of evidence. The attorneys for the original parties were designated as liaison counsel, controlling access to the court. In *Stringfellow v. Concerned Neighbors in Action*, the Supreme Court rejected arguments that the district court's grant of permissive intervention contained too many restrictions. These included prohibiting the intervenors from asserting a claim for relief not already raised and from filing motions or discovery without first conferring with the parties and obtaining permission from at least one of them.

Restrictions of this kind would seem to be essential in the mass related cases to which the ALI Proposal is intended to apply. However, at some point restrictions could amount to a denial of due process, depriving the intervenor of litigant autonomy and effective control over the development and presentation of his case. Significant restrictions are even more troubling when, as under the ALI Proposal, the intervenor has been coerced into intervening on threat of being bound by the judgment, in contrast to the usual intervenor who intervenes on his own motion.

A notice of intervention may not always have the expected effect that a person will either intervene or choose not to and accept the fact that he will be bound by the judgment. Instead, notice may prompt a person to file suit in the forum of his choice. Notice of intervention could thus have the unintended effect of causing duplicative litigation. To prevent this result, a court may have to resort to the other complementary device, the antisuit injunction. In fact, it might be prudent for a court to issue, simultaneously with notices of intervention, an antisuit injunction forbidding all potential intervenors from litigating in another forum any claims arising out of the same matters.

138. *Id.* at 420.
140. *Id.*
C. Developments in the Use of Preclusion in Global Class-Action Settlements

The recent global settlements reveal increasingly sophisticated use of preclusion doctrines to estop nonparties from filing future claims against the settling defendants. The ALI notice of intervention and preclusion device has no direct relevance to the use of preclusion in these global class-action settlements. However, the ALI’s recognition of a role for preclusion, accomplished through adequate notice, is consistent with the objectives of global settlements.

The three recent global settlements of massive class actions discussed in the previous section took different approaches to the use of preclusion. All three were mass tort suits against the primary manufacturers of defective products. The reality in each was that the settlement might not have been achieved if the manufacturers could have been subjected to later contribution claims by nonparties found liable to class members on future claims arising out of exposure to the manufacturers’ products. How to resolve this concern became a key aspect of achieving the global settlements.

1. Georgine: Precluding contribution claims of nonparties

One section of the Georgine settlement agreement prohibits all nonparty contribution claims against the settling asbestos manufacturers.\(^{141}\) This provision precludes nonparties, such as owners of premises containing asbestos, from seeking contribution from the defendants if the nonparties are sued by class members for injuries resulting from exposure to defendants’ asbestos. Precluding the contribution rights of nonparties violates the principle that one who is not a party cannot be bound by a judgment. This is one of the many possible grounds on which Georgine might be appealed on the merits.\(^{142}\) It is possible that there will be few contribution cases to raise an effective challenge to the preclusion provision because once class members have received the benefits of the global settlement, they may not be inclined to pursue more questionable claims

---

142. The case has been appealed interlocutorily to the Third Circuit on limited grounds related to claimed error in the granting of the preliminary injunction. See Georgine v. Amchem Prods., 1995 WL 422792, at *3 (E.D. Pa. April 1, 1995); see also supra note 98, and accompanying text.
against third parties. Nevertheless, the purported loss of contribution rights is no small matter for nonparties. The desire to free the settling defendants from the risk of contribution suits is an understandable goal of the global settlement, but it is hard to imagine how it can be upheld under these circumstances.

2. Breast Implant Litigation: A questionable bar order necessary to effect the settlement

The global settlement agreement in the Breast Implant Litigation\textsuperscript{143} also sought to preclude future claims by nonparties. The original agreement contained a sweeping “bar order” precluding contribution or indemnity claims against the settling defendants by nonparties who were sued by class members.\textsuperscript{144} Such nonparties would include doctors and nonsettling manufacturers and suppliers. The agreement would also preclude subrogation claims against the defendants by nonparties such as insurance companies, hospitals, health maintenance organizations, and governmental bodies which had made payments to plaintiff class members. Prior to the fairness hearing, Judge Pointer invited the nonparties to comment on or object to the proposed bar order. Several filed objections or moved to intervene.

In his final approval of the global settlement, Judge Pointer modified the bar order in relation to nonparties. He noted that the agreement “shall not be viewed as precluding such non-settling defendants from taking advantage of any rights of setoff or credit, or similar rights to limit or reduce claims by class members, otherwise available to them ... under applicable state laws based on payments made to or for the benefit of class members under this settlement.”\textsuperscript{145} Thus nonparties could claim set-off rights against class members who might sue them, but they remained subject to the bar order that precluded them from seeking contribution from the settling defendants in the future. “[T]he bar order,” Judge Pointer wrote, “is essential to the settlement, is fair and equitable, is supported by adequate consideration, and is within the court’s powers even though these other manufacturers, suppliers, and health-care

\textsuperscript{143} See supra notes 103-08 and accompanying text.
\textsuperscript{145} Id.
providers have not agreed to the order or been named [as] parties."\(^{146}\)

Judge Pointer likewise denied the nonparties' motion to intervene. He conceded that "having been denied intervention," the nonparties could "be entitled to argue against any preclusive effect under the doctrine set forth in Martin v. Wilks."\(^{147}\) But he clearly believed the bar order was critical to obtaining the defendants' agreement and was willing to leave "the merits of [the Wilks] argument" to be "determined ... by the court in which it is raised."\(^{148}\) Obviously the bar order might not be upheld against the nonparties, but apparently the defendants also preferred to defer that question until a later time.

On a note more positive for the nonparties, Judge Pointer did refuse to approve provisions in the agreement precluding the subrogation claims of nonparties against the settlement fund and class members. The nonparties, he observed, could not be deprived of their rights to present their claims or "to pursue and perhaps intercept" the "benefits that may become payable to individual members of the class."\(^{149}\) Nonetheless, he approved the preclusion of all future subrogation claims against the defendants, again favoring total peace for the settling defendants over nonparty rights.

3. Ahearn: Accomplishing preclusion through a third-party class action

The global settlement in *Ahearn*\(^{150}\) seems to have benefited from the experience of the prior settlements in *Georgine* and the *Breast Implant Litigation*. It recognized that to ensure certain and effective preclusion of contribution claims, the potential claimants should be before the court. The settlement accomplished this by providing for a third-party defendant class of all persons and entities that might have claims for contribution and indemnity against the defendant Fibreboard. This class included owners of premises containing Fibreboard asbestos, manufacturers of materials containing Fibreboard asbestos as component parts, and others who might be sued in the future by persons exposed to Fibreboard asbestos. A large corpo-

---

146. *Id.* at *19.
147. *Id.*
148. *Id.*
149. *Id.*
ration, Owens-Illinois, was named as class representative and ultimately, on behalf of the class, it agreed to settle all future claims the class might have against Fibreboard. In exchange the third-party defendant class received certain benefits and concessions.\textsuperscript{151}

Use of a third-party class action to preclude future contribution rights seems a wise choice. Of course, the class representative may not find it in the class’s interests to agree to the preclusion of contribution rights as the representative did in \textit{Ahearn}. Nonetheless, the third-party procedure is beneficial because it empowers the third-party class representative to bargain for terms that would benefit the class members.

Under the settlement in \textit{Ahearn}, third-party class members’ rights under state law to set-offs and credits against any asbestos victim who sued them would be preserved. The lengthy settlement agreement contained provisions to assure that the varying requirements of state laws for set-offs and credits would be satisfied. Thus, if a third party were sued by a plaintiff class member and found liable, the third party would be entitled to set off against the judgment, if the state law so provided, any money the class member had received from the Fibreboard Trust under the settlement. Similarly, if a plaintiff class member obtained a judgment against a third party before the plaintiff had obtained payment from the trust, the third party would succeed to the plaintiffs’ interests against the trust. In addition, the agreement contained provisions intended to assure that the trust would not be depleted: caps on the plaintiff class’s attorneys’ fees, prohibitions against punitive damages and prejudgment interest, and spendthrift provisions to keep the trust solvent. Further, the agreement ensured that if third-party class members were sued by a plaintiff, they would be entitled to obtain discovery free of charge from the Fibreboard trust as to any evidence relating to the plaintiff’s claim against the trust.\textsuperscript{152}

At a fairness hearing, Judge Parker found that these provisions were reasonable and fair to the third-party class and that the benefits gained by the class justified precluding its members from filing future suits for contribution against

\textsuperscript{151} \textit{Id.} at 518-20.

\textsuperscript{152} These provisions are contained in the Submission of Global Settlement Agreement, Trust Distribution Process and Defendant Class Settlement Agreement (Dec. 23, 1993), in Ahearn v. Fibreboard Corp., Civ. Ac. No. 6:93cv526 (E.D. Tex.).
Fibreboard. The Ahearn agreement is the kind of arrangement that other global settlements might look to as a model. It goes far in establishing the settlement class action as a suitable device for buying defendants true peace in mass related suits without compromising the rights of third parties.

III. CONCLUSION

The ALI Proposal's provisions for antisuit injunctions and notice of intervention and preclusion are appropriate and necessary complements to its aggregation scheme. The procedures are reasonable, although consideration has not been given to a number of problems and potential uses. The Proposal seems unlikely to become law soon, but it provides a useful example of creative applications of devices which might be looked to by courts faced with mass duplicative litigation. In the end, the application of these and similar devices in the class-action context seems the most promising way to deal with the problem of duplicative litigation.