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THE PROPRIETY OF CLASS ACTIONS IN MASS AVIATION DISASTER LITIGATION

MARK W. HARRIS

I. INTRODUCTION

MASS aviation accidents have become an unfortunate by-product of modern technological society. As the cost of air travel decreases, more people are choosing air travel as a preferred mode of transportation; it is estimated that the number of passengers who board planes will double to more than two billion by the year 2000.1 In addition, aircraft are aging faster than they can be replaced. The average age of the United States aircraft fleet is 12.7 years, and the most elderly commercial aircraft are over 24 years of age.2 The increase in air traffic, coupled with the aging of U.S. aircraft fleets, no doubt enhances the risk of more major air accidents occurring.

Mass aviation disasters, like other mass tort claims, have many similarities: they result in the filing of many suits which produce mounds of paperwork; they produce high litigation costs for both plaintiffs and defendants; they take up significant amounts of time requiring duplicative effort and, as a result, they affect other potential users of the judicial system.3 Clearly, the use of separate litigation

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2 Id. The average age of the world fleet is 11.7 years. Id.
3 Rubin, Mass Torts and Litigation Disasters, 20 GA. L. REV. 429 (1986); see also, Tydings, Air Crash Litigation: A Judicial Problem and a Congressional Solution, 18 AM. U.L. REV. 299, 304 (1969) (arguing that the present system of mass tort litigation results in unnecessarily high costs and proposing expanded federal jurisdiction over aviation disaster cases and new substantive federal tort law for such cases).
to resolve numerous similar claims arising from a single mass air disaster involves an enormous amount of waste. The use of federal class action suits to litigate these claims would serve to eliminate this inefficiency while producing several correlative benefits. Both plaintiffs and defendants would benefit from a reduction in legal fees, a larger number of shared expert witnesses, and broader, more effective discovery. Plaintiffs would enjoy more equal bargaining power with the defendants because class counsel could speak for them. Defendants would be able to develop a clearer estimate of their economic exposure for settlement purposes, and they arguably might even be willing to provide higher settlements since their costs will be reduced by consolidated litigation. Class actions would also impose a lighter burden on nonparties affected by the suit, such as witnesses and other litigants seeking access to the courts. Finally, multiple adjudications pose the risk of inconsistent outcomes from identical fact situations; some plaintiffs may recover while others may not. Such inconsistent results should not be tolerated in a judicial system based on parity of treatment.

Given the numerous advantages of class actions, it seems odd that the judiciary has been so reluctant to certify class actions in mass air accidents. Recognized fed-

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4 See Note, Class Action—Mass Accident Litigation, 40 J. AIR L. & COM. 320, 331 (1974). Plaintiffs could retain a greater portion of any judgment or settlement, since attorney's fees are determined by the court instead of on a contingent basis. Id.


6 3 H. NEWBURG, NEWBURG ON CLASS ACTIONS at 368 (2d ed. 1985). This benefit offers protection to plaintiffs with small or insubstantial claims who may not otherwise be able to sue. Id.

7 Id.

8 Comment, supra note 5, at 1144.

9 See, e.g., McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1087 (9th Cir. 1975) (court of appeals decertified class action suit brought on behalf of the next of kin of 385 passengers killed in the crash of a McDonnell Douglas DC-10 airplane near Paris, France), cert. denied, 425 U.S. 911 (1976); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500, 502 (E.D.N.Y. 1975) (class action certification denied in an action against airline and aircraft manufacturer arising from crash of airplane which resulted in the death of 107 passengers and six crew
eral procedure scholars have continually suggested that class actions are especially appropriate in the litigation of claims arising from mass accidents. The purpose of this comment is to address some of the issues surrounding the use of class action suits in mass air disaster litigation. The comment will first address the scope of Federal Rule of Civil Procedure 23, which provides for the maintenance of federal class action suits. It will then address the various factors surrounding the prevailing judicial hesitancy to certify class actions in mass air disaster litigation. Finally, it will analyze several alternative methods of adjudication that the courts have used in mass air disaster cases, and it will suggest that the class action, despite its limitations, is ultimately a superior method of litigating the numerous claims which arise out of a mass air disaster.

members); Causey v. Pan American World Airways, Inc., 66 F.R.D. 392, 399 (E.D. Va. 1975) (certification denied in class action arising from crash of airplane in Indonesia where only 17 of the 96 passengers killed were Americans and only two decedents were residents of Virginia, where the suit was brought); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 80 (E.D. Pa. 1970) (certification denied in class action suit arising from crash of an airplane near Hanover, New Hampshire in which none of the potential class members, other than the named plaintiffs, had any connection with Pennsylvania, and where it was highly unlikely that any eyewitnesses or even key expert witnesses would find the Eastern District of Pennsylvania a convenient forum).

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

3B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 23.45[3], at 23-811 n.35 (2d ed. 1969); "The argument for class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented." 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: Civil § 1783, at 75 (2d ed. 1986).

11 See infra notes 15-53 and accompanying text.
12 See infra notes 54-95 and accompanying text.
13 See infra notes 96-130 and accompanying text.
14 See infra note 131 and accompanying text.
II. Scope of Federal Rule 23

Federal Rule of Civil Procedure 23 provides the procedural guidelines necessary for the maintenance of a federal class action suit. Rule 23 was designed to achieve efficiencies of time, effort and expense in cases involving

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15 Rule 23 provides:

CLASS ACTIONS

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

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

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

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

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

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

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

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

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be
numerous parties. In order to obtain certification, fed-

conditional, and may be altered or amended before the decision on the merits.

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

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

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

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

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

FED. R. CIV. P. 23.
eral class actions must meet the four requirements of Rule 23(a) and fit within one of the three categories of Rule 23(b).

The circumstances surrounding mass aviation disasters easily satisfy the requirements of Rule 23(a). First, the parties are usually numerous and often reside in many different states, so joinder is impracticable. Second, since "all of the claimants are harmed by a sudden, instantaneous, and centrally located occurrence," common questions of fact and law necessarily exist, minimizing the possibility of diverse theories of recovery among claimants or individual defenses to liability among defendants. Third, because all class members are seeking

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1966 revision of Federal Rule of Civil Procedure 23 stated that "[s]ubdivision (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 undesirable results." Id.


18 See Comment, Mass Accident Class Actions, 60 Cal. L. Rev. 1615, 1624 (1972). One commentator implies that joinder will be impracticable in most mass accident situations since there are usually over 100 plaintiffs. Id. "Impracticable" does not mean "impossible," however. The representatives of the proposed class need only show that it is "extremely difficult or inconvenient to join all the members of the class." C. Wright, A. Miller & M. Kane, supra note 10, § 1762, at 159; see also Sala v. National R.R. Passenger Corp., 120 F.R.D. 494, 500 (E.D. Pa. 1988) (class certification granted in action brought by railroad passengers who were injured when an Amtrak train collided with a railroad maintenance vehicle).

19 Comment, Federal Mass Tort Class Actions: A Step Toward Equity & Efficiency, 47 Alb. L. Rev. 1180, 1190 (1983). For instance, an airplane crash would present the same liability questions for each passenger, even though the damages would depend on individual circumstances. See also In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986), in which the court stated:

Determination of the liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter "degenerates" into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again. . . . If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration. . . . In short, the trend has been for courts to be more receptive to use of the class action in mass tort litigation.

Id. at 1009-10.

20 See Comment, supra note 19, at 1191. It has been suggested that "in the typical mass accident situation, . . . the facts pertaining to liability will not differ mean-
compensatory damages for similar injuries caused by the same accident, the claims or defenses of the representative parties will normally be typical of the claims or defenses of the class. Finally, the representative parties should fairly and adequately represent the interests of the class so long as they have experienced counsel, resources to endure protracted litigation, and a substantial stake in the litigation, such that they will vigorously litigate the action to the fullest.

Once the four prerequisites of Rule 23(a) have been satisfied, the class must obtain certification under one of the three provisions of Rule 23(b). Rule 23(b)(1), the "prejudice" class action provision, authorizes class action certification if some prejudice would result to any party if members of the class were required to litigate their claims in a series of individual actions and the resulting prejudice can be obviated by using a class action. This provision has been applied successfully in a few mass accident cases, but most courts refuse to use it in such a

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21 Comment, supra note 18, at 1619. A plaintiff's claim is typical if it "arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." In re School Asbestos Litig., 104 F.R.D. 422, 430 (E.D. Pa. 1984), aff'd in part, 789 F.2d 996 (3d Cir. 1986).

22 See Comment, supra note 18, at 1619. "The difficulties of assessing these factors are no greater in mass accident class actions than in class actions generally." Id. "Adequate representation depends on two factors: (a) the [representative] plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [representative] plaintiff must not have interests antagonistic to those of the class." Sala, 120 F.R.D. at 498.


24 See, e.g., Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 562 (S.D. Fla. 1973) (class action certified under Fed. R. Civ. P. 23(b)(1)(A) and (c)(4)(A) on behalf of cruise ship passengers who became ill after being exposed to contaminated food or water while on board the ship), aff'd mem., 507 F.2d 1278 (5th Cir. 1975); In re Gabel, 350 F. Supp. 624, 650 (C.D. Cal. 1972) (class action certified under Fed. R. Civ. P. 23(b)(1)(A), (b)(1)(B) and (b)(2) on behalf of all persons having a right to be compensated as a result of a midair collision); see also Comment, supra note 5, at 1153.
context.\textsuperscript{25} The "prejudice" provision contains two separate clauses. Rule 23(b)(1)(A) permits certification of a class action where necessary to avoid creating a risk of incompatible standards of conduct for the party opposing the class. This portion of the rule was designed to avoid inconsistent rulings in identical fact situations.\textsuperscript{26} In McDonnell Douglas Corp. v. United States District Court,\textsuperscript{27} the Ninth Circuit interpreted the "incompatible standards of conduct" language of subdivision (b)(1)(A) to be the incompatible standards of conduct required of the defendant in fulfilling judgments in separate actions.\textsuperscript{28} In separate tri-

\textsuperscript{25} Comment, supra note 5, at 1153; compare McDonnell Douglas, 523 F.2d at 1085 (court of appeals expressly rejected Hernandez and Gabel, and decertified a class action brought on behalf of the next of kin of 385 passengers killed in the crash of a McDonnell Douglas DC-10 airplane near Paris, France), with In re Agent Orange, 506 F. Supp. at 789 (court refused to certify class action under FED. R. CIV. P. 23(b)(1)(A) or (b)(1)(B), but agreed to certify class action under FED. R. CIV. P. 23(b)(3) on behalf of a class of individuals claiming injuries as a result of exposure to the chemical "Agent Orange" during the Vietnam War), and Payton v. Abbott Laboratories, 83 F.R.D. 382, 389 (D. Mass. 1979) (court refused to certify action under FED. R. CIV. P. 23(b)(1)(A) or (b)(1)(B), but agreed to certify class action under FED. R. CIV. P. 23(b)(3) on behalf of a class of all Massachusetts women exposed to DES in utero).

Two recent mass accident certification cases have been overturned. However, neither appellate court forbade certification completely. See In re Federal Skywalk Cases, 680 F.2d 1175, 1184 (8th Cir.) (court of appeals held that the district court erred in certifying class action on issues of liability and punitive damages under FED. R. CIV. P. 23(b)(1)(A) and 23(b)(1)(B) on behalf of a class of persons injured as a result of the collapse of a hotel skywalk where the class action effectively prevented the class members from settling actions that were already pending in state court), cert. denied, 459 U.S. 988 (1982); Abed v. A.H. Robins Co., 693 F.2d 847, 857 (9th Cir. 1982) (court of appeals held that lower court erred in certifying a nationwide punitive damage class under FED. R. CIV. P. 23(b)(1)(B) on behalf of class of women injured by using the Dalkon Shield where the court did not give out-of-state plaintiffs an opportunity to participate in prior briefings or hearings, and without establishing as a fact that Robins' assets were too limited to permit conventional litigation), cert. denied, 459 U.S. 1171 (1983).

\textsuperscript{26} See Comment supra note 5, at 1154.

\textsuperscript{27} 523 F.2d 1083 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

\textsuperscript{28} Id. at 1086; see also La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), where the court of appeals decertified a class action brought by plaintiff against all pawn brokers licensed to do business in Oregon on behalf of all customers who suffered as a result of alleged violations of the Truth in Lending Act. Id. at 462-63. The La Mar court stated:

[The] danger exists in those situations in which the defendant by reason of the legal relations involved can not as a practical matter
als of a mass air disaster case seeking damages, a judgment that the defendant was liable to one plaintiff would not require action inconsistent with a judgment that he was not liable to another plaintiff; the defendant would simply have to compensate one of the plaintiffs and not the other. Thus, certification under Rule 23(b)(1)(A) would be improper in a mass air disaster situation where damages are sought because there is no risk of subjecting the defendant to inconsistent obligations.

The second clause of the "prejudice" provisions, Rule 23(b)(1)(B), authorizes class actions when separate actions would inescapably alter the substance of the rights of others having similar claims. Since the concept of collateral estoppel does not apply to parties who have not had a "full and fair opportunity" to litigate their claims, mass accident plaintiffs will not usually be affected by unfavorable judgments in previous suits. Rule 23(b)(1)(B), however, may be useful in situations where individual judgments might practically impede the interests of other potential class members in obtaining compensation.

pursue two different courses of conduct. . . . Infrequently, if ever will this be the case when the action is for money damages. . . . [The] success [of the defendants] by its terms does not fix the rights and duties owed by the defendants to others.

Id. at 466. The court then concluded that Rule 23(b)(1)(A) did not apply to this situation. Id.

29 Comment, supra note 18, at 1620.
30 Fed. R. Civ. P. 23(b)(1)(B). In La Mar, the court noted: "[t]he focus of [Rule 23(b)(1)(B)] is upon the effect of an action on behalf of an individual on the interests of those who have rights similar to those of the individual bringing suit, rather than on the danger of imposing incompatible standards of conduct on the defendant." Id., 489 F.2d at 466-67.
31 See Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971), in which the Court reasoned:

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

Id. at 329.
32 See Comment, supra note 18, at 1620.
33 Comment, supra note 5, at 1155. For the exact language of Fed. R. Civ. P. 23(b)(1)(B), see supra note 15.
For example, suppose a defendant has limited monetary resources with which to satisfy an adverse judgment. If the court permitted individual actions to proceed against the defendant, the plaintiffs who sued first would exhaust the defendant’s resources, and subsequent plaintiffs would be left without a remedy. In this type of “limited fund” situation where either the defendant’s resources are limited or his liability is limited by statute, the satisfaction of earlier judgments will practically dispose of the interests of other similarly situated plaintiffs who were not parties to the earlier actions. Thus, certification of a class action serves to assure a fair recovery for all the class members when the defendant’s resources are limited. Rule 23(b)(1)(B) probably will not apply to commercial mass air disaster litigation, however, since the defendants in such cases are typically large national or multinational corporations with access to substantial resources.

Rule 23(b)(2) authorizes class action treatment only in situations where “a party has taken or refused to take action with respect to the class and the class seeks declaratory or injunctive relief against that party.” Rule 23(b)(2) does not apply to cases, such as mass air disasters, where final relief is sought mainly in the form of monetary damages. Rather, it applies to situations when

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54 Comment, supra note 19, at 1199. The applicability of Rule 23(b)(1)(B) in this type of situation was recognized by the Federal Rules Advisory Committee: In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. FED. R. CIV. P. 23 advisory committee’s note.

55 See Comment, supra note 20, at 403; Hernandez, 61 F.R.D. at 558.

56 FED. R. CIV. P. 23(b)(2). See supra note 15 for the text of Rule 23(b)(2).

57 FED. R. CIV. P. 23 advisory committee’s note (“[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.”).
injunctive relief or declaratory relief on which injunctive relief could be based is proper.  

Despite the opinion of the Federal Rules Advisory Committee in the notes to the 1966 amendments to Rule 23, Rule 23(b)(3) seems to be the most appropriate subsection for certifying a class action in a mass aviation disaster. In certifying a class action under Rule 23(b)(3), several requirements must be fulfilled. First, common questions of law or fact must predominate over any questions affecting only individual members. In determining whether the predomination requirement is fulfilled, most courts use a pragmatic balancing approach, focusing on whether common questions of law or fact represent a substantial part of the case and whether the claims of the group desiring certification share a common nucleus of operative facts. In mass accident cases where injuries result from common causes, this approach is not frequently challenged. Second, Rule 23(b)(3) requires the court to determine whether other alternative methods of

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38 See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), vacated on other grounds, 417 U.S. 156 (1974), where the Second Circuit stated: "[s]ubsection (b)(2) was never intended to cover cases . . . where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominately injunctive or declaratory."

39 The committee stated:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23 advisory committee's note.

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

41 See Comment, supra note 19, at 1211; see, e.g., Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967) (court noted that although a complete identity of issues was lacking, the circumstances concerning a conspiracy formed a "common nucleus of operative facts" which constituted substantial questions of law or fact common to all parties); Eisen, 391 F.2d at 565 (court noted the "common nucleus of operative facts" standard in holding that the predomination requirement was fulfilled); Gabel, 350 F. Supp. at 629 (court relied on same set of operative facts to certify class action of people suing as a result of an airplane crash).

42 Comment, supra note 19, at 1211.
adjudication would be superior to a class action.\textsuperscript{43} Finally, the court must weigh four factors in considering the predomination and superiority prerequisites of a Rule 23(b)(3) class action.

The first factor that the court must consider is whether other litigation has already been commenced and is pending.\textsuperscript{44} If a substantial number of actions are already pending prior to certification, the use of class action suits may not avoid multiple litigation.\textsuperscript{45} In any event, the court should determine the potential efficiency to be achieved by the class action by comparing the number of suits actually pending to the size of the proposed class.\textsuperscript{46} Because pending litigation is only one factor to be considered in the certification decision, a class action should not be denied solely on this ground.

A second factor to be considered is the desirability of concentrating the litigation in one particular forum.\textsuperscript{47} In making this determination, the court should consider the convenience to the parties and witnesses, the location of relevant evidence, and the court's familiarity with the case.\textsuperscript{48} In mass accident situations, it has been suggested that the situs of the accident is the most logical forum because of the uniformity of the injuries inflicted on the

\textsuperscript{43} FED. R. CIV. P. 23(b)(3). For a discussion of the superiority of various alternatives to class actions, see infra notes 96-130 and accompanying text.

\textsuperscript{44} See FED. R. CIV. P. 23(b)(3)(B).

\textsuperscript{45} Comment, supra note 19, at 1212; see also 3B J. MOORE, supra note 10 ¶ 23.45[4.2], at 23-336. If the number of suits already commenced is substantial, then the efficiencies achieved through the use of a class action would be minimal.

\textsuperscript{46} Comment, supra note 19, at 1212. In Payton, 83 F.R.D. at 392, the court held that the existence of ten previously instituted suits was insignificant in comparison to the estimated size of the class. The significance of other pending suits may be further reduced if it is likely that the individuals in the previously commenced action would join in the class action. \textit{Id.}; see also Technograph Printed Circuits, Ltd. v. Methode Elec., Inc., 285 F. Supp. 714, 724 (N.D. Ill. 1968) (pending litigation was not a bar to class certification where 74 individual suits had already commenced and the estimated size of the class was in excess of 240 members).

\textsuperscript{47} FED. R. CIV. P. 23(b)(3)(C).

\textsuperscript{48} Comment, supra note 19, at 1213; see also 3B J. MOORE, supra note 10, ¶ 23.45[4.3], at 23-340. The presence of a backlog on the court in question is also a pertinent factor. \textit{Id.}
class.\textsuperscript{49}

The third consideration for the court involves the potential for difficulties in managing the class action.\textsuperscript{50} Difficulties surrounding the notification of class members, the presence of individual issues, and general administrative problems associated with large numbers of litigants are inherent in any class action.\textsuperscript{51} The courts should always balance these difficulties, however, with the benefits gained from a class action.\textsuperscript{52} The final and perhaps most substantial consideration involves determining the extent of an individual's interest in controlling his own litigation.\textsuperscript{53}

III. Judicial Hesitancy to Certify Class Actions in Mass Disasters

The courts frequently cite four special problems in refusing to certify class actions in mass accident situations: (1) individualization of issues;\textsuperscript{54} (2) conflict of laws;\textsuperscript{55}

\textsuperscript{49} See Comment, supra note 19, at 1213; see also Comment, supra note 18, at 1637; Comment, Choice of Law in Mass Tort Litigation, 56 J. Air L. & Comp. 203, 211 (1990).

\textsuperscript{50} Fed. R. Civ. P. 23(b)(3)(D).

\textsuperscript{51} Comment, supra note 19, at 1214. These problems are no more pervasive in mass tort cases than in other areas where class actions have been certified. For example, in Eisen, 391 F.2d at 555, the court certified a class of 3.75 million purchasers and sellers of securities who had been harmed by the defendant's alleged monopolization of the market. \textit{Id.} at 570. This case illustrates that while classes may become extremely large, class size alone should not prevent certification. Furthermore, if the class action becomes unmanageable during the course of the suit, Rule 23(c)(1) permits the court to dismiss the class action. \textit{See} Fed. R. Civ. P. 23(c)(1). Thus, management difficulties should not stand as a barrier to certification.

\textsuperscript{52} Obviously, as the class becomes larger the management problems increase. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968). The larger the class size, however, the greater are the benefits to be gained from a common resolution of the issues. \textit{Id.} As Professors Wright and Miller have noted: "[i]ronically, those Rule 23(b)(3) actions requiring the most management may yield the greatest pay-off in terms of effective dispute resolution." C. WRIGHT, A. MILLER & M. KANE, supra note 10 § 1780, at 583.

\textsuperscript{53} Fed. R. Civ. P. 23(b)(3)(A). For a discussion of this consideration see infra notes 82-95 and accompanying text.

\textsuperscript{54} See, e.g., Yandle v. PPG Indus. Inc., 65 F.R.D. 566 (E.D. Tex. 1974) (class action certification denied in suit brought on behalf of 570 employees who were exposed in varying degrees to asbestos dust over a ten year period). \textit{But see} Dol-
(3) collateral estoppel;\textsuperscript{56} and (4) claimant’s interest in individual control.\textsuperscript{57}

A. Individualization of Issues

The Advisory Committee on the Federal Rules of Civil Procedure has suggested that class actions in mass accident cases are inappropriate because different damage and liability issues exist with respect to each individual plaintiff, and these differences severely limit a court’s ability to make a uniform, class-wide resolution of such issues.\textsuperscript{58} These differences should not preclude maintenance of a class action, however, since the federal rules provide that a class action may be limited to litigation of certain issues common to the class as a whole.\textsuperscript{59}

\textsuperscript{56} Gow v. Anderson, 43 F.R.D. 472, 490 (E.D.N.Y. 1968), in which the court noted: "[t]he fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible." \textit{Id.}

\textsuperscript{57} See Causey v. Pan American World Airways, Inc., 66 F.R.D. 392, 398 (E.D. Va. 1975) (class action certification was not appropriate in action brought in Virginia where the accident occurred in Indonesia, only 17 of the 96 passengers were Americans, and of the 17 American citizens, only plaintiff's two decedents were residents of Virginia and the others were residents of several different states); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 80 (E.D. Pa. 1970) (air crash was not appropriate for class action certification in the Eastern District of Pennsylvania where, other than the named plaintiffs, none of the potential class members had any connection with Pennsylvania, and it was highly unlikely that any eyewitnesses or even key expert witnesses would find the Eastern District of Pennsylvania a convenient forum).

\textsuperscript{58} See Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1973) (court found that it was "conceivable that the defendants would be taken to task by one passenger after another until a judgment against the defendants was obtained," and at that point, future plaintiffs could rely on the doctrine of collateral estoppel to bind the defendants on the issue of negligence), \textit{aff'd mem.}, 507 F.2d 1278 (5th Cir. 1975).

\textsuperscript{59} See Hobbs, 50 F.R.D. at 79, in which the court stated:

[I]t is clear that each claimant in this situation may properly be regarded as having a legitimate interest in litigating independently. Not only do the claims vitally affect a significant aspect of the lives of the claimants (unlike the usual class action, where individual claims are somewhat peripheral to the lives of the claimants), but there is a wide range of choice of the strategy and tactics of the litigation.

\textit{Id.}

\textsuperscript{58} See \textit{supra} note 39 for a precise statement of the committee's position on this issue.

\textsuperscript{50} FED. R. CIV. P. 23(c)(4)(A) provides that "an action may be brought or main-
Thus, even when individual damage issues are present with respect to each plaintiff in a mass aviation disaster case, these issues may simply be reserved for individual treatment, and the question of liability may be tried as a class action.

In certain mass accident situations there will be "significant questions relating to the issue of liability which affect individuals in such different ways that as a practical matter the class action will amount to nothing more than a set of individual lawsuits." In the typical mass aviation disaster, however, the facts pertaining to liability will not differ meaningfully from one individual to another and there is little likelihood of any individual defenses to liability. The liability of the defendant to each individual passenger will depend upon precisely the same facts and circumstances, and the defendant will not have individual defenses to any claims. One scholar has even suggested that "the advisory committee's admonition against class actions in mass accident situations 'seems strange,' because certain features of Rule 23, namely, the privilege of exclusion and the provision that the action may be limited to particular issues, look as if they were especially designed to accommodate a mass accident." Other commentators also suggest that class actions are particularly appropriate for disposing of a large number of cases...
arising out of a single disaster.\textsuperscript{64}

B. Conflict of Laws

Since claimants in mass air disasters usually reside in a number of different jurisdictions, choice of law rules present some difficulties for federal courts in certifying class actions. Even so, the obstacles presented by these differing state substantive laws may be overcome. The traditional choice of law rule with respect to tort claims has been "the law of the place where an alleged tort was committed."\textsuperscript{65} In recent years, however, a number of states have abandoned this traditional approach for a governmental interest approach in which the courts give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."\textsuperscript{66} Under this approach, a federal court may be required to apply differing laws to different class members in a multistate mass accident situation because applicable state law may differ on the issue of liabil-

\textsuperscript{64} See, e.g., 3 H. NEWBURG, supra note 6, at 373. Several prominent scholars have spoken in favor of using actions in mass accident litigation:

I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that it is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon.

\textit{Id.} (quoting Prof. Charles Alan Wright, \textit{In Re School Asbestos Litig.}, Master File 83-0268 (E.D. Pa.) Class Action Argument, July 30, 1984, Tr. 106); see also supra note 10.

\textsuperscript{65} Comment, \textit{supra} note 20, at 390; see also Comment, \textit{Choice of Law Issues in Mass Tort Litigation}, 56 J. Air L. & Com. 203 (1990) for a comprehensive discussion of various choice of law rules.

Some courts have cited this issue as an impediment to certification of class actions. At first, the conflict of laws impediment may seem substantial; however, the problem may not even exist in certain situations. First, in forum states which follow the traditional rule, that of applying the law of the state in which the accident occurred, the same law will apply to each class member and thus no impediment will exist. Furthermore, other circumstances may reconcile the traditional rule with the rationale of the modern governmental interest rule, since the jurisdiction in which the accident occurred will arguably have the greatest interest in the issue of liability due to its legitimate concern with the regulation of conduct within its borders. Second, even if the forum state follows the modern rule, no obstacles exist where all of the victims reside in the same state, because the state's substantive law will apply equally to all resident victims. Third, if differences between the various state standards of liability are immaterial, no problems are presented. Finally, if substantial differences in the substantive law governing liability do exist, the problem could be resolved by the use of special ver-

State law, which ordinarily controls the resolution of substantive issues [such as liability], may vary as to the use of certain defenses, the burden of proof, the availability of certain theories of recovery such as strict liability, and the use of certain doctrines which ease the plaintiff's burden of proof or which help to overcome certain affirmative defenses.


For a summary of such cases, see supra note 55.

See Comment, supra note 20, at 392; see also Babcock, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743, in which the court held:

Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

Id. at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

Comment, supra note 20, at 391.

Id.
dicts or general verdicts accompanied by answers to interrogatories.  

A number of scholars have even suggested the development of a special federal common law to apply specifically to mass air disasters. Creation of a new federal common law rule would enable the courts to apply a single law in deciding the issue of liability for all class members. Such a unified application of the law would abolish the conflict of laws impediment to the certification of class actions in mass air disasters, and would promote the overall policy objective of Federal Rules of Civil Procedure: efficient and just adjudication. Thus, with some judicial and legislative creativity, the conflict of laws problem should not stand as an insurmountable barrier to the certification of class actions in mass air disaster litigation.

C. Collateral Estoppel

The traditional collateral estoppel rule provides that a party may not assert a judgment as conclusive on a particular issue against a nonparty to the action unless the nonparty would be able to assert it against the party. In recent years, many jurisdictions have abandoned the doctrine of mutuality of estoppel, creating the possibility of the offensive use of collateral estoppel against parties to

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74 Fed. R. Civ. P. 1 states:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Id. (emphasis added).

75 Comment, supra note 20, at 393.
Some commentators herald the possibility of offensive use of the collateral estoppel doctrine as an answer to redundant trials in mass accident cases. The offensive use of collateral estoppel, however, inhibits the desirability of a class action for mass accident plaintiffs because of the “opt out” provision of Rule 23(c)(2)(A). Under this provision, class members may avoid being bound by an adverse judgment against the class by simply excluding themselves from the action. The availability of this “opt out” provision in conjunction with the doctrine of offensive collateral estoppel encourages plaintiffs to take a wait-and-see attitude, knowing that they may take advantage of another plaintiff’s favorable judgment while ignoring any adverse judgments. Since this “opt out” provision tends to discourage plaintiffs from participating in class actions, at least one scholar has suggested that members who opt out should be denied the offensive use of any favorable judgment in the class action.

An alternative solution to this problem would be to amend Rule 23 to allow the court to preclude plaintiffs

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76 Id.
78 FED. R. Civ. P. 23(c)(2) provides in pertinent part: In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specific date.
79 Id.
80 Comment, supra note 18, at 1628.
81 See 3 H. NEWBURG, supra note 6, at 432. If plaintiff could have joined in the first action, but instead chose to “wait and see” how the first suit turned out, the court should consider denying the use of offensive collateral estoppel. Id. See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) where the Court stated: “If the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive [collateral] estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.” Id. at 331.
from opting out under those circumstances which would foster such wait-and-see attitudes. In any event, in the interest of fairness to the class, "opt out" plaintiffs should be prevented from taking advantage of opportunities which were unavailable to the class members during the class actions.

D. Interest in Individual Control

A claimant's interest in individual control over his or her lawsuit in a mass accident situation is frequently cited as an impediment to certification of a class action. See, e.g., Daye v. Pennsylvania, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972) (class action inappropriate for wrongful death actions arising out of a bus accident), aff'd on other grounds, 483 F.2d 294 (3d Cir. 1973), cert. denied, 416 U.S. 946 (1974); Hobbs, 50 F.R.D. at 80 (class action inappropriate where airplane crash resulted in multiple deaths); Causey, 66 F.R.D. at 999 (class actions inappropriate for wrongful death actions arising from an airplane crash). Claims in mass aviation disasters often involve severe injury or death and huge monetary claims. Furthermore, the plaintiffs usually place great psychological and emotional emphasis on individually vindicating their claims against the responsible parties. Thus, individual interest in controlling the strategic and tactical direction of the lawsuit may be great. For example, since significant differences in jury awards for particular injuries are perceived to exist among judicial districts, individual plaintiffs will likely attempt to file their claims in "the most convenient, high award district that the applicable venue and jurisdictional rules permit." If the plaintiffs

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*83 Trangsrud, Joiner Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779, 820 (1985). "The importance of a family's control over its claim for the wrongful death of its sole provider, for example, cannot be gainsaid." Id.

*84 Comment, supra note 20, at 397; see also Hobbs, 50 F.R.D. at 79 in which the court states:

[I]t is clear that each claimant in this situation may properly be regarded as having a legitimate interest in litigating independently. Not only do the claims vitally affect a significant aspect of the lives of the claimants (unlike the usual class action, where individual claims are somewhat peripheral to the lives of the claimants), but there is a wide range of choice of the strategy and tactics of the litigation.

*85 Trangsrud, supra note 83, at 820.
request a class action however, the court would decide the proper forum for the trial, usually basing its choice upon considerations of convenience to the parties and witnesses, and/or the situs of the accident.\textsuperscript{86} If a class action is certified, the individual plaintiff may find the state law applied by the forum court to be less favorable than the law of the forum that he otherwise might have selected.\textsuperscript{87}

The representative parties in a class action may also decide to proceed on liability theories that are better suited for class treatment at the expense of theories that would be more favorable to individual plaintiffs.\textsuperscript{88} Furthermore, class counsel must proceed based upon an estimation of the interests of the class as a whole, rather than considering the interests of individual plaintiffs, because no internal procedures exist by which a class can make these types of decisions.\textsuperscript{89} Conflicts between lawyers and the class members can, however, usually be kept to a minimum by intensive judicial scrutiny of the conduct of the litigation.\textsuperscript{90}

Despite these limitations, one commentator has suggested that the courts should try to "balance the interest in individual control against the interest in conserving judicial resources and reducing costs for litigants."\textsuperscript{91} In weighing these interests, the courts should consider the costs and benefits of a class action to all parties of the litigation.\textsuperscript{92} The courts should not necessarily assume that class members would overlook the time, effort, and cost benefits of a class action determination of liability simply

\textsuperscript{80} Id. at 821.
\textsuperscript{86} Id.
\textsuperscript{80} Trangsrud, supra note 83, at 822.
\textsuperscript{80} McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981) (Court of Appeals affirmed district court's denial of class certification due to the lack of competency displayed by the attorney for the proposed class. The attorney made no attempt at discovery, and thus failed to adequately prepare for trial on behalf of the class).
\textsuperscript{81} Comment, supra note 20, at 399.
\textsuperscript{92} See generally 3 H. Newburg, supra note 6, at 367; see also Trangsrud, note 83 at 781-83.
because their claims are substantial. Class members may, in fact, be willing to sacrifice their individual control in order to gain the advantages provided by a class action. For those class members who insist on exercising individual control over their suits, the "opt out" provision of Rule 23(c)(2)(A) allows them to exclude themselves from the class. If it can be determined beforehand, however, that a significant number of class members would utilize the "opt out" provision, the court would then be correct in refusing to certify a class action because certification would amount to "an exercise in futility."

IV. ALTERNATIVES TO CLASS ACTIONS IN MASS DISASTERS

In order to certify a class action under Rule 23(b)(3), a court must first determine if a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." As one commentator has observed, "[a] major reason for the parsimonious use of the class action [suit] in personal injury tort cases has been a judicial tradition approving alternative procedures." Alternative methods of adjudication which have been used by the courts in mass accident situations include: (1) joinder of claims; (2) transfer and consolidation; (3) transfer for coordinated pretrial; and (4) use of a test case. As will be shown, however, these alternative methods of adjudication are not necessarily superior to class actions.
A. Joinder of Claims

The impracticability of joinder is a prerequisite to the certification of all class actions under Rule 23. Thus, if joinder of claims would be practical, a class action would not be necessary. In a typical mass aviation accident involving hundreds of people, the claimants will likely reside throughout the country and joinder would be impractical. In deciding whether or not joinder is impractical for purposes of certifying a class action, a showing of impossibility is not required. Instead, a showing of difficulty or inconvenience often suffices. Since mass aviation disasters will usually involve over one hundred potential plaintiffs, joinder will not be a suitable method for the adjudication of these claims.

B. Transfer and Consolidation

Federal Rule of Civil Procedure 42(a) allows for a joint trial or consolidation of any or all issues in actions involving common questions of law or fact. Mass accidents usually involve common questions of law or fact. Consequently, they are often consolidated for trial in federal court. Claims in mass accident cases, however, are often brought in several different districts. Therefore, it is first necessary to transfer them to the same district before the claims may be consolidated. Section 1404(a) of Title 28, United States Code, provides the means for such a transfer. Since section 1404(a) requires the unanimous cooperation of all transferor judges, a transfer

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103 C. WRIGHT, A. MILLER & M. KANE, supra note 10, § 1762, at 159.
104 See Comment, supra note 18, at 1624.
105 Fed. R. Civ. P. 42(a) provides:
   (a) Consolidation. 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.
106 Comment, supra note 18, at 1624-25.
107 Section 1404(a) provides: "[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other
under this section may be difficult to achieve. Assuming that the transferor judges do in fact cooperate, transfer and consolidation may be a workable alternative to class actions in a mass disaster context; however, class actions still serve as a superior method of binding cases together for trial.

First, class actions can consolidate all claims arising from a mass accident (except for those plaintiffs who choose to opt out) and bind them with a final adjudication on the merits. On the other hand, a Rule 42(a) consolidation merely provides for a joint trial which is binding only on those claimants who are present for trial. Second, section 1404(a) specifically limits transfers to districts where the action "might have been brought" initially. If the proposed transferee district lacks subject matter jurisdiction over the defendant, or if venue would be improper there, the court will deny the transfer. This may be a formidable limitation; it implies that consolidation, even in conjunction with a section 1404(a) transfer, may not enable combination and disposition of all the litigation resulting from some mass accidents. In a class action, by contrast, only the named plaintiffs (representative parties) are relevant for venue and subject matter jurisdiction purposes. Careful choice of representative parties may prevent venue and subject matter jurisdiction

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108 Trangsrud, supra note 83, at 803.
109 Comment, supra note 18, at 1625.
111 Comment, supra note 18, at 1625-26 (citing Comment, The Search for the Most Convenient Federal Forum: Three Solutions to the Problems of Multidistrict Litigation, 64 Nw. U.L. Rev. 188, 192 (1969)).
112 Comment, supra note 18, at 1626. However, the comment notes that this limitation "may be mitigated by the fact that all the mass accident claims could be brought in the district where the 'claim arose', . . . and thus there would always be at least one district in which all claims could be consolidated." Id. at n.74. Furthermore, it is suggested that in a mass aviation accident, the defendants would most likely be national or multinational corporations which could be subject to suit in any of several districts. Id.
113 Comment, supra note 18, at 1626.
problems. Finally, section 1404(a) provides no efficient coordination procedures which can ensure that all related cases are transferred to a single court. In the absence of such coordination procedures, litigants are often unaware of related actions in other districts until their own cases are well developed, thereby causing needless duplication of effort. By contrast, the required notice to all class members under Rule 23(d)(2) assures that all potential plaintiffs would at least be informed of a class action and thus might be dissuaded from bringing their own suits. Because of this greater power to consolidate, bind, and dispense with all claims in one action and appeal, the class action is superior to consolidation and transfer in the litigation of claims arising from mass aviation accidents.

G. Transfer for Coordinated Pretrial

Section 1407 of Title 28, United States Code, provides for the transfer and consolidation of actions whenever (1) "civil actions involving one or more common questions of fact are pending in different districts," (2) the transfer of these actions will promote the just and efficient conduct of these individual suits, and (3) the transfer will be convenient to the parties and the witnesses. Section 1407 of Title 28, United States Code, provides for the transfer and consolidation of actions whenever (1) "civil actions involving one or more common questions of fact are pending in different districts," (2) the transfer of these actions will promote the just and efficient conduct of these individual suits, and (3) the transfer will be convenient to the parties and the witnesses.

114 Id.
115 Id. (citing Multidistrict Litigation Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 18 (1966)).
116 28 U.S.C. § 1407 (1988). This section provides in pertinent part: (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been
1407 has proven to be a popular alternative to mass aviation accident class actions.\textsuperscript{120} Section 1407, however, contains an important and obvious shortcoming often overlooked by courts and commentators.\textsuperscript{121} Both the language of section 1407 and the legislative history confirm that the transferee court should maintain transferred cases only for pretrial purposes.\textsuperscript{122} Following pretrial, the cases must be remanded back to the transferor court for trial.\textsuperscript{123} In order to circumvent this requirement, courts consistently hold that a transferee court may transfer the case to itself for trial pursuant to section 1404(a),\textsuperscript{124} asserting that this practice is consistent with both the text of section 1407 and its legislative history as well.\textsuperscript{125} Thus, as

\begin{itemize}
  \item previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
  \item Id. § 1407(a).
  \item See Trangsrud, supra note 83, at 803; see generally Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001, 1002-17 (1974).
  \item See Trangsrud, supra note 83, at 804.
  \item Congress has expressly stated that “subsection [1407(a)] requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.” H.R. Rep. No. 1130, 90th Cong., 2d Sess. 4 (1968); see generally S. Rep. No. 454, 90th Cong., 1st Sess. 5 (1967).
  \item Trangsrud, supra note 83, at 804. Section 1407(a) provides: “[E]ach action so transferred shall be remanded by the [judicial] panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . .” 28 U.S.C. § 1407(a) (1988) (emphasis added).
  \item See supra note 107 for the language of 28 U.S.C. § 1404(a).
  \item Two appellate courts and the Judicial Panel on Multidistrict Litigation have approved the use of 28 U.S.C. § 1404(a) by a transferee judge to retain a case for trial. See, e.g., In re Fine Paper Antitrust Litig., 685 F.2d 810, 819-20 (3d Cir.
one commentator concludes, "it seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: [they have amended] Section 1407 to allow transfers for trial as well as pretrial purposes." Since Congress has never empowered the judicial panel or transferee judges with the authority to order joint trials in the transferee forum, transferee courts should not allow this practice to continue in mass disaster cases. When section 1407 transfers are properly limited to the purpose of dispensing with pretrial matters, a class action will emerge as a superior method of adjudicating mass air disaster claims because it will provide for a just and efficient trial on the issue of liability in one convenient forum.

D. Use of Test Cases

Test case agreements are simply "private, consensual class action[s] [that are] enforceable between the parties." For example, in a mass accident situation where many people are harmed by a single event, the parties may agree to expedite the litigation by trying only one claim on the issue of liability. A test case plaintiff would serve as a representative of the class of similarly situated persons who agree to be bound by the judgment. The decision in the test case creates a precedent which lays the groundwork for future collateral estoppel.

Prior to the 1966 amendments to the federal rules...
which provided for class actions, a test case was the only means of binding a class of accident victims in a single representative suit.\textsuperscript{130} With the advent of Rule 23, however, formal class actions proved superior to test cases because they required certain safeguards which were now articulated in a federal rule: mandatory notice to all parties affected, court supervision of any settlement, and a growing body of interpretive precedent on proper use of such actions.

V. Conclusion

A fundamental aspect of our judicial system is parity of treatment. Persons in similar situations with similar causes of action should be treated alike. Plaintiffs in mass aviation disasters should be no exception to this general rule. The plaintiffs, who are often numerous and geographically dispersed, can hardly expect consistent treatment to flow from the traditional model of litigation which has evolved to settle disputes between a single plaintiff and defendant.\textsuperscript{131}

In mass aviation disasters, where all the alleged injuries arise from a common nucleus of operative facts, the court should be willing to certify a class action on behalf of all plaintiffs similarly situated. As Professors Wright, Miller and Kane have noted: "When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative [class basis] rather than on an individual basis."\textsuperscript{132}

The economies of a class action will benefit all parties in mass aviation disaster litigation. Plaintiffs would benefit

\textsuperscript{130} Cf. Pennsylvania R.R. v. United States, 111 F. Supp. 80, 90 (D.N.J. 1953) (spurious class action does not bind class members not before the court).
\textsuperscript{132} C. WRIGHT, A. MILLER & M. KANE, \textit{supra} note 10, § 1778, at 528.
by having access to greater resources than they normally would have in an individual suit. They would be entitled to broader and more effective discovery which would allow them to pursue litigation on an equal footing with the defendant. Plaintiffs would also benefit by presenting an "organized front" against the large corporate defendants which are typical of mass aviation disaster litigation.

Conversely, defendants would be spared the effort of having to respond to the multitude of duplicative pleadings and motions presented by individual suits. They would also be able to develop a clearer estimate of their own economic exposure for settlement purposes, and if a settlement could not be reached, at least they would be faced with only one major suit, as opposed to a plethora of individual suits.

Finally, the already overburdened judicial system would benefit from the use of class actions in mass aviation disaster litigation. A consolidation of the plaintiffs' claims into a single proceeding would serve to reduce the tremendous amount of time, energy and expense involved in a series of identical individual suits. Thus, the present judicial hesitance surrounding the use of class actions should be abandoned in favor of a more open-minded approach that recognizes the advantages of class actions as both effective and efficient tools in the adjudication of claims arising from mass aviation disasters.