Toward An Understanding of The Mass Tort Litigation Environment: Second Line of Title if One Exists

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TOWARD AN UNDERSTANDING OF THE MASS TORT LITIGATION ENVIRONMENT

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Overview

Mass tort litigation is both quantitatively and qualitatively distinct from traditional one plaintiff-one defendant tort litigation. Mass torts are simply different from normal torts. The sheer number of cases – the quantitative difference – inevitably leads to qualitative differences. The fundamental reasons for this qualitative shift can best be understood by examining the delicate tension among the policies underlying both substantive tort law and civil procedure.

There is a consensus that tort law supports both efficiency and corrective justice policies: compensation, deterrence, punishment, fairness, efficiency. These policies do not always dictate the same outcome in any given case, and the resulting tension among them creates the source of much of our tort law jurisprudence. Should we, for example, require the manufacturer of a life-saving drug to warn of the risk of a small number of adverse reactions when the effect of such a warning will be to deter large numbers of people from using the drug and to create a net loss of life? Efficiency and fairness goals are in conflict in this situation, and the just solution is unclear.

There is also a consensus that our standardized rules of civil procedure are driven by multiple policies: efficiency, fairness, and behavioral concerns. These policy goals are also not necessarily consistent in providing us with answers. In the area of discovery, for example, there is a constant tension among efficiency, fairness, and behavioral interests in the use or limitation of interrogatories, depositions, and motions to produce.

One of the dangers in mass tort analysis is to treat all mass torts as fungible. In reality, although basically one model of procedural rules applies to all torts, there are numerous models of acceptable procedures for mass torts. A number of taxonomies have been proposed to identify the characteristics driving the variation in mass torts. These taxonomies focus on whether: (1) the plaintiffs are known or unknown, and there is a large or small number of them; (2) the defendants are known or unknown, and there is a large or small number of them; (3) the event resulting in harm is single or multiple; (4) the liability is known or unknown; (5) the specific causation is known or unknown; (6) the value of the case is known or unknown; and (7) the funding for liability is known or unknown. Interspersed among all of these factors are the litigation strategies used by plaintiffs' lawyers, defendants, insurance carriers, and courts.

The judicial system has handled, without major difficulty, mass torts involving discrete disasters, such as aircraft crashes, building collapses, and train wrecks. The process generally has involved consolidation for pretrial purposes, coordination of federal and state cases, the use of alternative dispute resolution (ADR) procedures for an individual or a global settlement, and if necessary, the trial of test cases.

Mass torts involving traditional products liability scenarios – carburetor design defects, automobile tire defects, four-wheeler rollovers – have likewise presented few problems in resolution. Courts typically have used either the model described above for discrete disasters or have treated large numbers of traditional products liability cases like other torts, perhaps streamlining the pretrial process by using discovery from other cases or consolidating small numbers of cases for trial. There are, however, other characteristics in mass torts that may engage rather different difficulties.
Elasticity

There has been limited discussion in the legal literature about what makes some torts emerge into mass torts. At a basic level, there are at least four phases to a potential plaintiff's transformation into a full-fledged tort plaintiff: (1) the perception of a harm, (2) the perceived knowledge of compensability for that harm, (3) a desire to participate in the tort system, and (4) access or an opportunity to participate in the tort system without major impediments.

Roughly ten to twenty percent of the persons who suffer actionable harms actually enter the tort litigation process. Reasons for this low percentage include the lack or cost of information, a risk aversion to engaging in litigation, the valuation of privacy more than remuneration, a lack of serious harm, the availability of alternative avenues of compensation, and other idiosyncratic and systematic reasons. Commentators have focused on the roles of the mass media, social networks, physician contacts, and plaintiff-oriented law firms in overcoming these inhibitions to entering the tort system. The more opportunities someone has to learn about a tort, the greater the chances are that the person will sue, particularly when the information comes from an authoritative source such as the government, medical community, or trusted personal associations. There is no doubt that advertising by plaintiffs' counsel also has had a major impact in informing potential plaintiffs of their opportunities for compensation. At the same time, the publicity and volume of claims can overcome individual inhibitions related to privacy and risk aversion. If it appears that a large number of similarly situated individuals are making claims, wronged parties may see no downside, and perhaps may see an obligation, to pursue a malefactor in court.

Finally, there is the issue of access to the tort system. Before compensation is possible, a lawyer must accept the representation, and a legal forum must resolve the case. The strategic aspects of the concept of elasticity become critical in this regard, and the type of lawyer handling a case can often influence the resolution of the case. Plaintiffs' lawyers can be divided into four general categories: (1) boutique, (2) wholesale, (3) class action, and (4) new breed. Boutique lawyers generally follow the traditional paradigm for plaintiffs' lawyers. They select one case at a time, usually by referral from other lawyers; pursue only those cases that, through the potential for damages, can justify the expenditure of large transaction costs associated with individual discovery, trial, and appeal; and then move on to the next case. Under this model, a lawyer commonly takes only cases that have a potential value of over several hundred thousand dollars. Trial lawyers who are successful in achieving high awards for their clients generally find that both their inventory of cases and the rate of case resolution by settlement will increase in direct relation to their reputation. The reaction of most boutique plaintiffs' lawyers to their success has not been to increase their case load, but rather to remain the same size by using more stringent case-selection criteria. Historically, plaintiffs' firms have not grown to accommodate an increased volume and flow of cases.

Wholesale plaintiffs' lawyers deal in volume litigation. If larger numbers of similar cases can be found, then economies of scale will allow a lawyer to justify handling a larger inventory of cases. Due to the high risk of no recovery at the beginning stages of any mass tort case, and the high chances of success needed to justify the investment to support a large volume of cases, these lawyers tend to be free riders on the boutique lawyers' development of litigation. Nevertheless, their fee arrangements with clients are typically identical to those of the boutique lawyers.
Wholesalers vary substantially: Some are pioneers in advancing the litigation by extensive discovery and trial, whereas others are free riders. Generally, the free-riding wholesalers are willing to resolve their cases by settlement and at a substantially reduced value compared to those wholesalers who are able to succeed at trial.

The class action category of plaintiffs' lawyers finds its origins in securities litigation. Class action lawyers typically have few individual clients, but attempt to preempt all unrepresented plaintiffs by having a court certify a class action and appoint the lawyers to a leadership role.

Once a class is certified, many of these class action lawyers actively pursue discovery and prepare for trial, but the goal of most class action lawyers is to settle the case. The tremendous investments of time and money by class action lawyers generally require a consortium to fund the litigation. If plaintiffs' counsel can obtain class action certification and thereby increase the amount in dispute, the defendant will be sufficiently averse to threats to its balance sheet and stock price that it will favor settlement. At the same time, plaintiffs' counsel often seek an alliance with a judge by agreeing to resolve the entire litigation if the judge will pressure the defendants to provide the desired funding. Class action lawyers are then compensated out of a settlement fund based on a court-determined formula. The major downside to the class action strategy is that if the case does not settle, lawyers without clients may receive little compensation.

In the last several years, a new breed of plaintiffs' firms has developed. Unlike the boutique or wholesale categories, this category of plaintiffs' lawyers is more pret-a-porter – "ready to wear" – to use the clothing industry analogy. Generally, these firms followed the traditional paradigm until they confronted a mass tort. Rather than becoming more restrictive in case selection, however, these firms decided to accommodate their larger numbers of clients by expanding their size, particularly paralegal personnel. In addition to focusing on the values of individual cases, they concentrate on the flow rate of their cases, keeping the velocity of case resolution commensurate with their case intake. Some of these firms have even expanded nationally, using referrals and branch offices to enhance their ability to maintain and process extremely large numbers of cases. Their strategic model is eclectic. They will try individual cases to maximize value, recognizing the impact of one successful trial on their remaining inventory. They will use consolidations and class actions to increase the flow rate of their cases, and they will take advantage of their success in using all of these techniques to attract new clients and develop new mass tort cases.

This neat, conceptual division of types of plaintiffs' counsel often falls apart in the real world. In multidistrict litigation (MDL), for example, there may be boutique, wholesale, class action, and new breed lawyers working together to pursue discovery. The history of infighting among these types of lawyers, however, confirms the usefulness of these distinctions. New breed plaintiffs' lawyers interested in developing a mass tort case follow a completely different strategy than the boutique lawyers, and in doing so, they implicate the concept of elasticity. What new breed lawyers care about is not just maximizing the value of each case individually, but maximizing the number of claimants they can aggregate and thereby increasing the total number and value of all of their cases. They are looking for ways to make the tort more elastic by expanding the bounds of liability, causation, and damages; by simplifying and expediting procedures; and by increasing the number of claimants and thereby increasing the total value of
the claims. Although traditional plaintiffs’ counsel also attempt to increase the value of each claim through a similar strategy, they do not focus on the aggregate number of claimants as a vehicle for increasing claim value.

Some aspects of this elasticity strategy are obvious. First is the plaintiffs’ lawyers’ attempt to expand legally actionable torts. They try to expand duties by arguing for strict liability in tort, a continuing duty to warn, a duty to warn downstream consumers, a duty as a successor corporation, a duty as a component part manufacturer, a duty as a bulk supplier, and an expanded duty as an insurer. They attempt to expand concepts of causation by arguing for market share liability, proportional recovery, presumed causation through exposure, and emerging science. They also argue for expanded recovery of damages for fear, for the risk of future harm, for the cost of medical monitoring, and for punitive damages. This attempted expansion occurs while plaintiffs' lawyers argue to minimize the scope of defenses, such as statutes of limitations, statutes of repose, and contributory negligence. The strategy, in other words, is to promote liability, causation, and damages that are not individually dependent, that apply to large numbers of people at the same time, and that can be proven by large numbers of people at the same time.

Second, according to this elasticity strategy, mass tort plaintiffs' counsel seek to develop facts that will support aggregation and apply to large numbers of claimants. They do not want to focus on individual differences, such as individual causation, but would rather focus on issues of defendant culpability and general causation. Finally, the most fertile aspect of this elasticity strategy has been procedural. Plaintiffs have had significant success in lowering the financial and legal barriers to accessing courts. Some courts allow the multiple plaintiffs to have multiple cases brought with one filing fee. Efficient pretrial discovery reduces the plaintiffs' counsel's transaction costs.

Liberal discovery rules allow the extended development of evidence, and most importantly, aggregation of cases for discovery and trial greatly reduces transaction costs.

Other aspects of an elasticity strategy are not obvious. One such aspect arises in the trial strategy of plaintiffs and defendants. A fundamental difference between a tort and a mass tort is the existence of repetitive trials. Defendants generally have an advantage during the first trial regarding a particular product because of their superior knowledge of the product. Data suggests, however, that the advantage belongs to plaintiffs if a product is the subject of multiple trials. The reason is that defendants must be consistent regardless of the number of times a case is tried, whereas the plaintiffs can change their approach each time. The defendant is always the same and is, therefore, limited by inelastic constraints of internal and longitudinal consistency. The plaintiffs are different people and therefore, have the advantage of elasticity in their stories. If one trial story does not work, mass tort plaintiffs' lawyers can use another story that may be more successful. Defendants, on the other hand, cannot afford to be caught making inconsistent arguments. Thus, the elasticity of trial strategy inherent in multiple trials gives another advantage to plaintiffs.
The Traditional Attorney Plaintiff Economic Model

Attorneys in contingent fee tort cases traditionally have decided to represent clients in trials by determining the expected amount of compensation, if any, to be awarded to the plaintiff. The trial process includes pretrial discovery, motion practice, the trial itself, and, maybe, an appeal. This process can take a number of years to resolve, with the plaintiffs' attorneys absorbing the entire cost until an award is made and the attorneys receive a fee, usually a fixed percentage contingent upon the amount of the award.

A lawyer facing the decision of whether to take a case makes an economic evaluation. In so doing, she takes into account, at a minimum, the probability of success, the amount of the anticipated award, the cost in time and money to obtain that award, and the opportunity costs of pursuing the case. A basic economic model for the attorney can be expressed as:

\[
\text{Present Value of Return} = \sum_{i=1}^{N} \sum_{j=1}^{T} \frac{(S_{ij}A_{ij} - P_{ij}C_{ij})}{(1 + r)^j}
\]

Where:
- \( i \) = Individual
- \( j \) = Year
- \( N \) = Total Number of Individual Cases
- \( T \) = Number of Years of Litigation
- \( S = \) Probability of Success
- \( A = \) Award if Successful
- \( P = \) Probability of Cost
- \( C = \) Cost
- \( r = \) Discount Rate (7%)

In a traditional case involving one plaintiff and one defendant, an attorney for the plaintiff can typically expect, for example, that the duration of a case will be three to five years. If we assume that there is no chance of settlement or trial in the first three years, the expected return is $0. It is plausible, under this hypothetical, to assume a forty-percent chance of settlement of $100,000, to pick a figure, in year four. The expected value of that amount would then be $40,000. It is also plausible to anticipate that there will be no settlement but a fifty-percent chance of a jury verdict of a hypothetical $150,000 in year five, creating an expected value of $45,000. There is, likewise, a fifty-percent chance that the plaintiffs' counsel will get nothing at all in year five.

The costs can be assumed to be predictable for the first four years – for example, $2,000, $3,000, $2,000, and $10,000. If it is necessary to try the case, then the cost can be assumed – say, $20,000 – discounted by a sixty-percent probability of the trial occurring (given a failure to resolve the claim in year four), resulting in an expected cost of $12,000. Under this scenario, the expected cash return is $85,000, and the cost is $29,000. With a seven-percent discount rate, the present value of the inflows and outflows is $40,293. Figure B reflects this analysis and these assumptions.
Embedded in any model of economic decision making by plaintiff’s counsel are myriad variables, both economic and behavioral. For example, the cost of capital – whether it be in a monetary, human, or mental form – must be taken into account. Assumptions are also necessary for start-up costs, operating costs, carrying costs, time to start-up, time to break even, transaction costs, maintenance costs, information costs, and so on. There are also other determinants related to litigation strategy, such as use of loss leaders and establishment of market power. Opportunity costs are critical. A decision maker must define resources, compute alternative outcomes for each case, and pick the best cases within the available pool. A complete economic model should include a host of factors related to litigation outcomes, including jurisdiction, jurors, judge, trial skill, and other variables. Plaintiffs’ lawyers may also take into account the increasing number of defendants filing for bankruptcy, and the resultant difficulty for plaintiffs to recover. There are individual counsel characteristics such as marginal costs and benefits, risk seeking and aversion, cognitive dissonance, non-monetary rewards, and additional aspects involved in any decision-making process. This is to say that the plaintiffs’ counsel’s economic formula and Figure B are extremely simplistic methods of focusing on some of the initial variables that drive a decision. They are not designed to be comprehensive but only to illustrate how changes in asbestos litigation have driven the dynamics of the propensity to sue. The assumptions contained in the models are interesting, but basically irrelevant, as long as they are internally consistent. The

<table>
<thead>
<tr>
<th>Figure B: Plaintiff Attorney Economic Model</th>
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<tbody>
<tr>
<td><strong>Return per claimant</strong>—</td>
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<tr>
<td><em>Year</em></td>
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<tr>
<td>Probability of Return</td>
</tr>
<tr>
<td>Conditional Probability</td>
</tr>
<tr>
<td>Return</td>
</tr>
<tr>
<td>Expected Return</td>
</tr>
<tr>
<td><strong>Cost per claimant</strong>—</td>
</tr>
<tr>
<td><em>Year</em></td>
</tr>
<tr>
<td>Probability of Cost</td>
</tr>
<tr>
<td>Cost</td>
</tr>
<tr>
<td>Expected Cost</td>
</tr>
<tr>
<td><strong>Net per claimant</strong>—</td>
</tr>
<tr>
<td><em>Year</em></td>
</tr>
<tr>
<td>Net Return: Annual</td>
</tr>
<tr>
<td>Net Return: Cumulative</td>
</tr>
<tr>
<td>Present Value @ 7%</td>
</tr>
</tbody>
</table>
thrust of the models, though, is undeniable: Lower costs and greater expected returns lead to an increased number of filings.

**The Mass Tort Plaintiff Attorney Economic Model (Single Defendant)**

Mass torts have altered the economic calculus of the plaintiffs' bar in deciding whether to pursue lawsuits. These alterations have occurred in at least two respects: lowering of costs by economies of scale and increasing the probabilities of early settlements by shortening the time frame of judicial case resolution. These alterations have further increased the number of case filings.

If plaintiffs' counsel has multiple claims that have overlapping discovery, it is not difficult to create significant economies of scale. If liability development costs can be prorated over multiple cases, the per-case cost to counsel decreases. The pressure the sheer volume of cases and suits brings against defendants in mass tort is another of the primary factors leading to greater economic returns to plaintiffs' counsel. As the volume of cases and claims has increased over the years, many defendants have decided that it is cheaper and less risky to settle claims than to litigate them. Consequently, defendants have offered relatively low but rapid settlement offers to plaintiffs. The courts have also played a role in changing the traditional economic calculus. As courts have become inundated with thousands of claims, judges have sought to relieve their case load burden by providing procedural vehicles for quickly resolving large numbers of cases. As a result of these and other developments, the economic decision making of the plaintiffs' bar has shifted toward filing more cases. Even if we take the same assumptions contained in the traditional model and change them only slightly in years one through three to reflect lower expected costs per claim, the economic incentives for plaintiffs' counsel to take a single mass tort case prove to be greater. These numbers are reflected below in Figure C.
If we were to change the assumptions to include a high probability of return in the early years by taking an immediate settlement, as opposed to the previous model where no return would be expected, the differential between traditional and mass tort models may be even larger, though the expected per-case return is significantly less. Figure D below reflects these assumptions.

<table>
<thead>
<tr>
<th>Year</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probability of Return</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>40%</td>
<td>50%</td>
</tr>
<tr>
<td>Conditional Probability</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>30%</td>
</tr>
<tr>
<td>Return</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$100,000</td>
<td>$150,000</td>
</tr>
<tr>
<td>Expected Return</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$40,000</td>
<td>$45,000</td>
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</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probability of Cost</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>60%</td>
</tr>
<tr>
<td>Cost</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$10,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>Expected Cost</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$10,000</td>
<td>$12,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
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<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Return: Annual</td>
<td>-$1,000</td>
<td>-$1,000</td>
<td>-$1,000</td>
<td>$30,000</td>
<td>$33,000</td>
</tr>
<tr>
<td>Net Return: Cumulative</td>
<td>-$1,000</td>
<td>-$2,000</td>
<td>-$3,000</td>
<td>$27,000</td>
<td>$60,000</td>
</tr>
<tr>
<td>Present Value @ 7%</td>
<td>$43,791</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>
In addition to a more certain and more rapid return, counsel may receive a payment after relatively little cost or risk to them. With higher volume and economies of scale, reduced scrutiny by defendants, and no necessity for expensive litigation apparatus, counsel can settle larger numbers of claims with the same staff and resources it previously took to bring only a few cases to trial. On balance, the traditional model may be preferable in any individual case because of the higher rate of return resulting from an outstanding trial verdict. If, however, counsel can take a larger number of cases for the same total cost, the mass tort model soon dwarfs the traditional model in rates of return.

**The Mass Tort Plaintiff Attorney Economic Model (Multiple Defendants)**

Multiple defendant mass torts provide for a third model. This model is similar to the single defendant model in that returns may be generated early in the case life cycle. If claims can be filed against many defendants with little additional effort, however, the overall returns increase substantially. Under this scenario, the probability and speed of returns can vary among multiple
defendants, yet the cost per claimant decreases substantially because the preparation is virtually the same for each defendant.

The following three Figures reflect three groups of five defendants, with each group pursuing a different litigation strategy. Figure E1 assumes defendants who settle early, but at lower per case costs; Figure E2 assumes defendants who require more discovery, but settle with higher per case averages; and Figure E3 reflects defendants who prefer trial or settlement immediately prior to trial.

<table>
<thead>
<tr>
<th>Figure E1: Plaintiff Attorney Economic Model</th>
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<tbody>
<tr>
<td><strong>Mass Tort — Multiple Defendants</strong></td>
</tr>
<tr>
<td><strong>Five Defendants</strong></td>
</tr>
<tr>
<td>Return per claimant—</td>
</tr>
<tr>
<td><em>Year</em></td>
</tr>
<tr>
<td>Probability of Return</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>80%</td>
</tr>
<tr>
<td>Conditional Probability</td>
</tr>
<tr>
<td>4%</td>
</tr>
<tr>
<td>Return per Claim</td>
</tr>
<tr>
<td>$2,000</td>
</tr>
<tr>
<td>Return X Number of Defendants</td>
</tr>
<tr>
<td>$10,000</td>
</tr>
<tr>
<td>Expected Return</td>
</tr>
<tr>
<td>$8,000</td>
</tr>
<tr>
<td>Cost per claimant—</td>
</tr>
<tr>
<td><em>Year</em></td>
</tr>
<tr>
<td>Probability of Cost</td>
</tr>
<tr>
<td>100%</td>
</tr>
<tr>
<td>Cost per Claim: First Defendant</td>
</tr>
<tr>
<td>$1,000</td>
</tr>
<tr>
<td>Cost of Filing with Additional Defendants</td>
</tr>
<tr>
<td>$800</td>
</tr>
<tr>
<td>Expected Cost</td>
</tr>
<tr>
<td>$1,800</td>
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<tr>
<td>Net per claimant—</td>
</tr>
<tr>
<td><em>Year</em></td>
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<tr>
<td>Net Return: Annual</td>
</tr>
<tr>
<td>$6,200</td>
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<tr>
<td>Net Return: Cumulative</td>
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<tr>
<td>$6,200</td>
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<tr>
<td>Present Value @ 7%</td>
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<tr>
<td>$6,179</td>
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**Figure E2: Plaintiff Attorney Economic Model**

<table>
<thead>
<tr>
<th>Mass Tort — Multiple Defendants</th>
<th>Five Defendants</th>
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</thead>
<tbody>
<tr>
<td><strong>Return per claimant—</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Year</strong></td>
<td>1</td>
</tr>
<tr>
<td>Probability of Return</td>
<td>0%</td>
</tr>
<tr>
<td>Conditional Probability</td>
<td>22%</td>
</tr>
<tr>
<td>Return per Claim</td>
<td>$2,000</td>
</tr>
<tr>
<td>Return X Number of Defendants</td>
<td>$10,000</td>
</tr>
<tr>
<td>Expected Return</td>
<td>-</td>
</tr>
<tr>
<td><strong>Cost per claimant—</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Year</strong></td>
<td>1</td>
</tr>
<tr>
<td>Probability of Cost</td>
<td>100%</td>
</tr>
<tr>
<td>Cost per Claim: First Defendant</td>
<td>$1,000</td>
</tr>
<tr>
<td>Cost of Filing with Additional Defendants</td>
<td>$800</td>
</tr>
<tr>
<td>Expected Cost</td>
<td>$1,800</td>
</tr>
<tr>
<td><strong>Net per claimant—</strong></td>
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<tr>
<td><strong>Year</strong></td>
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</tr>
<tr>
<td>Net Return: Annual</td>
<td>-$1,800</td>
</tr>
<tr>
<td>Net Return: Cumulative</td>
<td>-$1,800</td>
</tr>
<tr>
<td>Present Value @ 7%</td>
<td>$61,795</td>
</tr>
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</table>
If a plaintiff’s lawyer filed against fifteen defendants, the net present value—given these arguably realistic assumptions—would be higher than separately filing against each mass tort defendant. The economic calculus of a mass tort plaintiff’s lawyer, aided by the desire of the judiciary to maintain a current docket, provides enormous explanatory power to the expansion of asbestos filings. There are, however, other explanations.

**Plaintiff Attorney Financing**

Another of the unique aspects of aggregate litigation involves innovative financing techniques that enhance the ability of plaintiffs’ counsel to bring more cases. There are new types of non-traditional loans currently being made available in aggregate cases. Instead of bank lines of credit, there are hedge funds, special purpose entities, and plaintiffs’ banks offering financial instruments tailored to these types of cases. The variety includes variable or fixed

![Figure E3: Plaintiff Attorney Economic Model](image)

<table>
<thead>
<tr>
<th>Return per claimant—</th>
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<tbody>
<tr>
<td><strong>Year</strong></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td><strong>Probability of Return</strong></td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>40%</td>
<td>50%</td>
</tr>
<tr>
<td><strong>Conditional Probability</strong></td>
<td>30%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Return per Claim</strong></td>
<td>$2,000</td>
<td>$4,000</td>
<td>$8,000</td>
<td>$100,000</td>
<td>$150,000</td>
</tr>
<tr>
<td><strong>Return X Number of Defendants</strong></td>
<td>$10,000</td>
<td>$20,000</td>
<td>$40,000</td>
<td>$500,000</td>
<td>$750,000</td>
</tr>
<tr>
<td><strong>Expected Return</strong></td>
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<table>
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<td>2</td>
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</thead>
<tbody>
<tr>
<td><strong>Year</strong></td>
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<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
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<td>-$1,800</td>
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<td><strong>Present Value @ 7%</strong></td>
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interest rates; short, medium and long term loans; advanced costs, hourly fees, percentage selections, and other fee sharing mechanisms; no recourse case, inventory, and personal security, default mechanisms involving liquidated assets, unused percentage of fees, or no default penalty at all; tax, interest and cost benefits. The involvement of these new sources of funding – particularly from hedge funds – can create rather novel ethical and practical difficulties in the pursuit of litigation. Much of this financial activity is kept private and not available to clients or to courts. If a party that is not before the court is actually making the tactical and strategic litigation and settlement decisions in cases, there can be rather severe dislocations in the normal assumptions underlying attorney and judicial control in litigation.

Procedural Variables in the Mass Tort Litigation Environment

The extreme range of procedural contexts to aggregate litigation can also present rather novel ethical and practical dilemmas. They are statutory, multi-district litigation, class actions, quasi-class actions, and other aggregate backgrounds to the litigation.

Bankruptcy has become a much more favored model for mass torts, thereby creating new roles for counsel and judges and their respective relationships. There are a variety of specialty statutes that also alter the traditional tort landscape: The Oil Pollution Act, 9/11 Statute, the Class Action Fairness Act, Childhood Vaccine, and many more.

The phenomenon of multi-district litigation has probably had the most profound procedural effect on mass tort litigation both in the federal and state context. By sending federal cases to a transferee judge for pretrial purposes, the critical mass of a case is aggregated under one judge. The state cases, if not remanded, are, however, not under the aegis of the transferee judge, thereby creating a number of federalism issues. The question of how far federal-state cooperation should proceed – communication, cooperation, coordination, joint hearings, joint orders or de facto or de jure preemption – all arise. The same types of issues can also exist between and among states that have, or do not have, their own MDL procedures. For example, a case may be proceeding rapidly in a state court and a judge in an adjacent state decides to arrest the development of a singular case to await the outcome of the first case. More likely, the federal transferee judge requests the state judge to defer action or, at least, joins with the federal judge to ensure consistent and equally timely proceedings.

The class action device has become less available to state judges since the passage of the Class Action Fairness Act and less available to federal judges in personal injury cases after several recent U.S. Supreme Court Decisions. There is substantial sentiment, however, for class action settlements in federal courts even for personal injury cases. The roles of the judge and lead counsel become quite different in that context.

More recently, there have been a number of so-called “quasi-class action” settlements that seem to implicate the same ethical and pretrial responsibilities for court and counsel as class actions themselves. Lawyers have a responsibility to both individual claimants and to the group
as a whole. Judges seem to have the same oversight roles and power as in class actions. This situation seems to exist even though there is no normal rule of procedure to mandate such roles and powers.

Then there are the normal settlement procedures which may or may not implicate additional responsibilities over the traditional one-on-one litigation simply because the settlement involves more people. Likewise, a trial may raise some of the same types of problems vis-a-vis individual and group treatment.

**Maturity**

Another major concept concerning mass torts is “maturity”. The cyclical theory of mass tort litigation contemplates an initial stage in the litigation during which there are inherent advantages for the defendant in available resources, information, law, strategy, and public opinion. Plaintiffs' attorneys attempting to establish liability for a mass-produced product face substantial difficulties in locating the documents, expertise, and information necessary to present a cogent and compelling case of liability to a jury. At the same time, there are often legal barriers to establishing liability; the law may not be receptive to the particular circumstances of a newly alleged tort. The defendant, on the other hand, has a virtual monopoly on information and expertise, has a major incentive to devote sufficient resources to defending the product, and can develop a superior strategy to present its story to a fact finder. During this initial stage of the cycle, the defendant tends to win the cases it chooses to try and is often able to settle lawsuits quietly with little impact on other cases. Plaintiffs have to be particularly tenacious to overcome these barriers and establish the vitality of their claims.

If, however, the plaintiffs are able to achieve success, either by jury verdicts or major settlements, the cycle proceeds into a second phase. Here, the plaintiffs have the advantage. Their success suggests that they have discovered sufficient information and expertise to present a credible case on liability, causation, and damages; have surmounted legal obstacles or made new, more favorable law; and have developed a second-generation offensive strategy to counter the previously successful approach of the defense. This shift in momentum drives all parties to excess. Once there is a popular consensus that a particular series of outcomes is inevitable, a herd instinct generates an overabundance of support for those outcomes. The pendulum eventually swings much further than is warranted by the rational circumstances. The most significant ramification of this second phase is the creation of a heightened demand for litigation: filings of new cases increase dramatically. Although the newly created backlog of litigation does not affect the outcomes of the second-phase litigation, it creates substantial pressures on the defendant during subsequent phases in the litigation process. Typically, a third phase in the cycle develops as the plaintiffs' attorneys push the envelope of viability of existing cases and select new, marginal cases to litigate. At the same time, the defendant develops its second-generation defensive strategy to overcome its earlier lack of success and launches a counterattack on unfavorable law, evidence, and public opinion. As a result, the defendant has proportionately more success in the third phase than in the second. Even if a liability finding seems preordained by the plaintiffs' previous success, plaintiffs may receive lower verdict amounts.
The theory suggests that although subsequent cycles do occur, depending on the idiosyncrasies of the particular litigation, eventually a rough equilibrium of case values ensues as the cases become more routinized and the parties' contentions become more defined. As the law, procedure, evidence, strategy, and public perception stabilize, the case outcomes and values proceed more asymptotically. Eventually, the litigation becomes a mature mass tort. A mass tort reaches maturity when there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' intentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted. Once a mass tort has matured, the second judicial strategy of case management has a substantially greater chance of acceptability and success. Sufficient information is available, even in the litigation process, to make informed decisions, and a greater chance exists that the affected public will receive global resolutions more favorably.

*The Goals for Judges and Lawyers in this Mass Tort Litigation Environment*

Given this mass tort environment, the goals of aggregate litigation for the judiciary include a combination of equity and efficiency for both plaintiffs and defendants. Generally, these goals are more easily attained through settlement because the trial of individual personal injury cases is far more time consuming and expensive than the typical administrative distribution process contained in a global settlement.

The goals of aggregate litigation for counsel are more complex. On the one hand, there is a lawyer's responsibility to an individual client, and, on the other hand, there is a lawyer's responsibility to the entire aggregation to clients. Those responsibilities become more complicated when there are multiple attorneys involved in the litigation and there are more disparities among the characteristics of the individual clients. The above logic applies both to plaintiffs and defendants.

From the plaintiff's perspective, counsel attempts to maximize the amount of money for all plaintiffs while making sure that each individual plaintiff is compensated appropriately. At the same time, counsel should be focusing on ensuring that the conduct that underlies the cause of action is terminated and, if, possible, rectified and eliminated for the future. During the entire litigation, counsel for plaintiffs should have an obligation to ensure that their clients, themselves, are given an appropriate role.

Defense counsel also have multiple obligations. Their role is to minimize the client's financial obligation while achieving finality to the litigation by eliminating any unlawful activities while enhancing lawful conduct. When there are multiple defendants and a shared financial obligation, defense counsel should make sure that there is an equitable allocation of responsibility among defendants while assuring adequate participation for each defendant and enhancing the exercise of their substantive rights.

Judges also have a more complicated series of responsibilities in the context of aggregate litigation. Judges also have more powers to control the parties and their counsel to ensure that
parties are adequately represented both as a group and individually. Specifically, in the pursuit of adequate representation, judges may utilize a variety of legal procedures including coordination, severance, consolidation, and other innovative case management techniques. Judges may appoint lead and liaison counsel to manage their respective side of the litigation consistent with enforcing the parties’ agreements regarding the conduct of the litigation and allowing the parties with the most substantial stakes in the litigation to be heard in the litigation process. All the while, judges should enforce the fiduciary duties of clients and counsel and utilize appropriate financial and other incentives to encourage optimal performance by counsel. Another major responsibility for judges is to address the needs of multiple clients represented by lawyers. In particular, courts should use a variety of communication techniques to assure adequate information for and participation by the parties, themselves. The use of the internet with websites, frequently asked questions, 800 numbers, notice and other methods to further the information flow to clients.

Conclusion

Because the mass tort litigation environment has so many distinctive features to distinguish it from the customary setting of traditional on-on-one litigation, the first challenge of judges and lawyers is to recognize those differences in order to adjust procedural and ethical norms into that new context. The ethical and fiduciary duties of court and counsel in state mass torts and quasi-class actions have been evolving with the changing mass tort litigation landscape. It is only after appreciating the forces and dynamics in the mass tort litigation environment that those ethical and fiduciary duties can evolve into a stable set of norms. Rather than the top-down imposition of new rules and regulations, the professional responsibility aspect of mass torts has progressed more as bottom-up reform. Recognizing the reality of the mass tort world has led to a variety of ethical and fiduciary adaptations that are still the subject of major controversy.
Beyond Efficiency: A Bevy of ADR Justifications An Unfootnoted Summary

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United States District Court, Northern District of Illinois  
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The RAND Institute for Civil Justice empirical study of mediation and early neutral evaluation under the Civil Justice Reform Act of 1990 provides an ample springboard for a discussion of settlement and ADR in civil litigation.

The major dilemma presented by this rich study is in narrowing our analysis to a digestible amount, not in finding food for thought. It is particularly important to remember, however, that this discussion is limited by definition to court-annexed ADR, not ADR in general.

From the perspective of the study itself, one could conclude:

- the design of the study was acceptable and the results are consistent with most similar studies that show inconclusive or little savings in time or money attributed to court-connected ADR interventions;
- the research design was limited because of the inherent problems of studying live interventions, including similarities in judicial behavior, and the results are contrary to anecdotal and other “empirical” evidence; or
- the methodology and the results of this study reflect the inherent problems of analyzing an intervention that has so much variance in cases, their time to disposition, their outcome, and their cost; there must either be a huge difference in effect or a huge sample size with random selection in order to obtain meaningful results.

However, a more interesting and profitable inquiry may be somewhat different: Are the criteria of time and money savings in transactions used to measure the efficacy of ADR the appropriate criteria in our analysis of court-annexed ADR?

A More Complicated Calculus

There are three rationales suggesting that we should broaden our focus from a time-and-money standard to measure success with a more complicated calculus.

First, the utilitarian principles of time and money are certainly reflected in Rule 1 of the Federal Rules of Civil Procedure — “...just, speedy, and inexpensive...” There is also the “just” criterion described in the RAND study as “participants’ satisfaction and views of fairness.” “Just” may, however, refer to more than the satisfaction and fairness questions contained in the study protocol.

Second, there is evidence to suggest that ADR may initially be instituted to save time and money, but that its continued use and longevity is based more on a paradigm shift that occurs among the participants that leaves them inclined to support the use of ADR for reasons different from the initial rationale.

Third, there are arguably non-utilitarian and non-short-term satisfaction reasons to support the use of court-annexed ADR. For example, there is a rather substantial literature supporting ADR based upon theories of government and the civil society.

For these three reasons, it seems worthwhile to consider the full panoply of support for court-connected ADR. The following discussion suggests eight arguments in favor of ADR other than savings in time and transaction costs.

Better Process

First, the process of ADR is “better” than the process in normal litigation. Most empirical studies suggest that this argument has validity in that parties, their counsel, and often the communities from which they come “prefer” ADR processes.

The reasons for these results can be seen intuitively. People like the ability to participate in the resolution of their dispute, the opportunity to appear in a judicial-like setting, and the receipt of individual attention. Some litigants prefer the privacy of ADR, the less confrontational style, the “free” discovery, or the bargaining methodology over the procedural litigation process.

Better Outcomes

A second argument in favor of ADR is that the outcomes are better using ADR than those reached through standard litigation. Both empirical results and theoretical analysis suggest some support for this argument, notwithstanding the fact that an outcome may be “better” for one side or the other.

Current business, government and negotiation theories hypothesize that decision-making be decentralized, devolved and made at a lower level, where there is a greater likelihood for optimal information. Thus, these theories suggest that letting the parties decide themselves will result in a better outcome than having a distant dispute resolver find a solution. In this view, ADR professionals are in theory...
available to break down “barriers” to negotiation that may normally inhibit party resolution and “win-win” solutions will predominate over “zero sum game” solutions.

Public Justice
A third argument in favor of court-annexed ADR suggests that it will strengthen our public justice system.

If litigants prefer private ADR to public dispute resolution, we run the risk of having different dispute resolution for the rich and poor. By bringing ADR into the courts, there will be a more equivalent process for all citizens. At the same time, court-annexed ADR will promote public decision-making over a private marketplace of decision-making.

Under this argument, there is a need for public rules that apply to disputes so that there are acceptable public standards of dispute resolution. If parallel private mechanisms of dispute resolution predominate, the standards may not be sufficiently “fair” and they may even be so private as to have no precedential value.

Procedural Balance
The fourth argument suggests that ADR will preserve the adversarial system, and starts with the premise that an idea carried to its logical conclusion contains the seeds of its own destruction. Thus, if every aspect of every dispute demands full adversarial due process, there would be a revolt — similar to the current revolt over the extreme adversarialness of pretrial discovery — that would result in the replacement of the entire adversarial process.

Under this argument, then, court-annexed ADR provides a procedural antithesis — cooperation — that will lead to the retention of the adversarial process in a synthetic form. It is, therefore, a healthy balance of cooperation and adversarialness that is essential to the maintenance of our current litigation system.

Civil Process
The fifth argument, on the other hand, suggests that adversarialness should be replaced with a more cooperative civil and moral dispute resolution process, and has numerous supporters.

Many of them believe that lawyers who act in a confrontational mode are examples of agency failure reflecting their own interests and skills rather than the preferences of their clients. They support a problem-solving dispute resolution methodology, respecting community needs and shared moral values that should not be sacrificed by the extremes of adversarialness.

Studies have found that the use of ADR, the study of negotiation theory and the development of cooperative communicative styles do seem to affect the behavior of counsel. The more exposure to these styles of behavior, the more they will be assimilated, leading to an era of more humane and principled civil society.

Judicial Authority
A sixth, and increasingly abstract, argument in favor of court-annexed ADR suggests the authority of the judges in our legal system can best be preserved by having the parties resolve their own disputes rather than having judges decide, thereby depleting an increasingly sparse reservoir of authority residing in our judges. This view suggests judges should conserve their resources and become the “guardians of promises” made among individuals and polycentric authorities.

Cooperative Society
The seventh argument in favor of court-annexed ADR, also non-utilitarian, is founded in the civil society movement. The thesis is that “trust” or “cooperation” is the hallmark of any civilized economic power. Political science studies in Italy compared regions where citizens cooperate with each other to a greater and lesser degree and found a much higher level of economic success and behavioral satisfaction among the more cooperative societies.

Supporters of the civil society movement argue that the use of legal procedures that will force litigants to focus on the downside of their litigation conduct and, instead, learn the benefits of cooperative behavior will aid in the return to a more civil society regardless of its political form.

Democratic Governance
The final argument is also the most abstract. It suggests — along the lines of the civil society movement — that court-annexed ADR can play a significant role in promoting a superior democratic form of government.

Under this approach there is significantly more emphasis on the role of the community in a democratic society; the individual’s rights can be defined and maintained more successfully in a democratic society in the context of a more communitarian ethic with emphasis on moral values and social solidarity.

In this frame of reference, ADR promotes more communication among citizens and a greater opportunity for recognizing the role of the individual in a community whose goals are identical to those of “formative republicanism.” ADR, then, becomes a vehicle for inculcating those values that some proponents of the communitarian ethic advance.

The support for court-annexed ADR is broader based than may be suggested by the criteria contained in the RAND Report. Because of the difficulty of determining quantitative measures to test these varied rationales, empirical studies should be tailored to obtain a more complete appreciation of the many facets of our dispute resolution processes, not just look to a limited subset of factors.
Strategic Mediation: The nuances of ADR in complex cases

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Strategic Mediation

The nuances of ADR in complex cases

By Francis E. McGovern

Quantitative differences inherent in complex disputes have qualitative implications in the roles and functions of mediators.

This in part is because cases can be complex in a number of ways, such as when they involve multiple parties, a host of potential issues, a wide range of information or information needs, a menu of possible procedural or process options, or alternative settlement scenarios. In each situation, the paradigm of mediation is qualitatively different.

No 'customary' approach

The multiple permutations of possible approaches to organizing all of these variables within a single mediation process are so vast that the determination of how to proceed becomes the critical issue. There is no "customary" approach to the organization of the mediation, nor is there generally the time or energy to test multiple approaches. The mediator, therefore, engages in a strategic enterprise: engineering the optimal mix of parties, issues, information, procedure and settlement possibilities with appropriate mediation styles to enhance the opportunities for the parties to reach agreement.

In complex cases, the mediator engages in a strategic enterprise: engineering the optimal mix of parties, issues, information, procedure and settlement possibilities with appropriate mediation styles to enhance the opportunities for the parties to reach agreement.

Recent ADR literature has been quite helpful in concentrating on the remaining tactical concerns in the mediation process, primarily the mediator's style. The mediator may be facilitative, evaluative, assertive or empathetic, problem-solving or transformative. The mediator may take a narrow or a broad perspective to the mediation. In addition there is an emerging literature drawing from social and cognitive psychology to aid the mediator in more tactically efficacious decision-making.

The goal: Solving a problem or building a consensus?

In complex, non-traditional conflicts, the strategic decision-making of the mediator in complex disputes is to use both of these immediate and long-term decision-making processes to solve local problems, in a manner that increases the chances for a global solution. This mediation expertise is strategic: maneuvering at multiple levels to enhance desired ultimate outcomes.

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At the same time the mediator is at least implicitly making normative judgments about the structure of the underlying conflict. For example, many natural resource allocation lawsuits may have a limited number of legally defined parties but a large number of interested parties who have a sufficient political role to affect any outcome. Is it preferable to engage only those in the litigation or to enlarge the negotiations to include other interested parties? The decision has both a strategic component – an ultimate resolution may not be possible without expansion – and a normative component – whether currently unempowered parties should be given a seat at the table.

Another example of the normative aspect of a mediator’s strategic decisions may be found in mass tort litigation. One of the initial strategic decisions for a mediator is whether to try to seek a national resolution by centralizing the negotiation process or to disaggregate the cases and approach resolution in a sequential manner with a larger number of mini-negotiations at a more local level.

To illustrate the variety of approaches a mediator might select, the participants at the 1999 CPR 25th Annual Meeting were asked to develop a strategic model for resolving a water rights case in a western state. The suggestions included multiple different dispute resolution models with: (1) a commission model similar to the Volker Holocaust Commission, (2) a political model involving the state’s congressional delegation, (3) a problem-solving model with only the key players, and (4) a consensus building model where all interested parties participate. Clearly, the choice of model represented a determination of the mediator’s normative understanding of the dynamics of the case, as well as the strategic choice of what strategies might be effective in resolving the conflict.

Complex cases require mastering nuances of the moving parts

In complex dispute resolution there may be no obvious model for a mediation that is readily available. The six major moving parts – parties, issues, information, procedure, settlement, and style – are subject to independent analysis and may provide opportunities for creative decision making by the mediator. The following examples illustrate the strategic aspect of the roles and functions of the mediator. The mediator – even in making short-term tactical decisions – must focus on the overall and long-term consequences of those decisions in achieving an environment that is conducive to a successful settlement. At the same time the mediator must be creative in suggesting to the parties innovative positioning of variables to develop a strategy.

Parties. The Dow Corning bankruptcy (Dow Chemical Co. v. Mahlum) involved a company with two shareholders, more than 400,000 foreign and domestic tort claimants alleging injuries from silicone gel breast implants, multiple trade creditors, co-defendants such as doctors, hospitals and other silicone gel breast implant manufacturers, the U.S. government and various health care and insurance providers. After being in bankruptcy proceedings for years, the relevant courts appointed a mediator.

One of the first mediation decisions involved who should be at the negotiation table. After significant deliberation, the mediator recommended that the primary focus should be on the dispute between the debtor and the tort claimants. This decision was quite risky because any resolution of their dispute would not end the entire bankruptcy without agreement from the other parties, and the provisions in a company-tort claimant settlement might jeopardize a global agreement by mandating terms that would be unacceptable to the others.

The mediator, however, felt that the debtor-tort claimant piece of the bankruptcy was so critical and so contentious that it needed to be resolved in isolation. The anticipation was that a successful resolution of the most difficult conflict would provide an impetus for further agreement.

Then there was the question of who should be on the negotiation teams – company officers, shareholder officers, claimants, bankruptcy counsel or tort counsel. The mediator noted that the corporate officers felt quite strongly that they had been wronged by the U.S. tort system. The claimants felt equally strongly that they had been wronged by the debtor. The bankruptcy counsel had been engaged in contentious and lengthy unsuccessful negotiations. And there were many potential torts lawyers, all of whom would feel slighted if not included on the negotiation team.

The mediator eventually concluded that the complexity of the issues required a small number of negotiators and recommended five tort lawyers – two from the tort claimants and one each from the company and shareholders. The decision balanced the risk of bogging down the negotiations with too many players against the risk of a limited number of players being able to deliver an agreement from their constituents.

Issues. In United States v. Michigan, the judiciary held that the Treaty of 1836 between the U.S. and the Ottawa and Chippewa peoples reserved to the tribes the right to fish in the treaty waters of the
Great Lakes unfettered by regulation by the state of Michigan, leaving two sovereigns to govern a common natural resource. Eventually the courts were asked to allocate the treaty waters between the parties.

A literal reading of the original judicial opinion supported the tribes' view that they had a primary right to the resource and thus should be able to take whatever fish were necessary to maintain reasonable tribal living standards. Given the tribes' depressed economic state, they might obtain a virtual monopoly on Great Lakes fish stocks. The state countered that any allocation should be made on equitable grounds, taking into account not only the tribes' subsistence needs but also how best to maximize the fishery's potential economic benefits to all Michigan citizens.

Recognizing that the limited judicial tools available seemed unsatisfactory for such a complex dispute, the court appointed a mediator. One of the initial tasks in the mediation was to both simplify and expand the issues in the dispute. The resource allocation was narrowed to involve five major variables: species of fish, quantity of fish, fishing gear, geography and time.

Even with this gross simplification, a virtually infinite number of combinations of variables and numerous measuring criteria still remained. The parties were asked to narrow these issues further by proposing management plans that they would support at trial. While the parties were narrowing the allocation issues, an intensive educational effort was undertaken to broaden their horizons to include additional issues suitable for negotiation, even though they were not part of the litigation. All the parties were questioned in great detail concerning their interests – some totally unrelated to the case – to see if they would place them on the bargaining table. Examples of the expanded hundreds of interrogatories and be fully deposed. Counsel for the plaintiffs proposed that they pick 10 plaintiffs for full discovery and trial. The court-appointed special master suggested that there be a “discovery” survey, in which a joint questionnaire would be administered to each plaintiff by neutral third parties. The defendants liked the proposal because they could obtain large amounts of data directly from the plaintiffs without the filter of their counsel and then be in a much better position to select trial plaintiffs. The plaintiffs liked the proposal because the cost and the investment in time and energy was significantly less than the alternative. Not only did the discovery survey break a logjam in the pretrial process but it also provided the informational basis for an ultimate settlement.

Procedure. In Aetna Cas. & Sur. Co. v. Dow Chemical Co., an insured was suing more than 20 of its insurers for indemnity for damages paid for property damage allegedly caused by a cement additive. After several years of extensive and costly discovery under the guidance of a special master, and repeated attempts to find a consensual resolution, the parties could not agree on a settlement. Because the litigation costs were quite high and because the parties had faith in the federal district judge in the case, they finally agreed to submit all outstanding issues to the judge with an abbreviated, binding “baseball” arbitration procedure.

This process protected their privacy needs, gave them a rapid and final decision and reinforced their differences of opinion regarding the value of the claims. Although this approach contemplated a non-traditional role for the judge, the parties were able to achieve an agreement on process if not an agreement on the entire dispute.

Settlement. In Lindsay v. Dow Corning, the parties to the silicone gel breast implant litigation reached a class action settlement. The settlement contemplated a payment grid varying from $1.2 million to $200,000 depending upon the age, illness and disability of the plaintiff. There was an overall cap of $4.2 billion in nominal dollars.

The plaintiffs had two opportunities to opt out – that is, to decide not to participate in the settlement at all. The first opt-out opportunity arose immediately and the second would arise if the total value of claims qualifying on the payment grid exceeded the overall cap. In that event there would be a proration of grid amounts so the total of all payments would come under the cap. Then plaintiffs could decide to opt out of the class action settlement based upon the new payment amounts. The terms of the settlement, however, were fundamentally flawed. Given the large pot of money and the large number of potential plaintiffs, the eventual proration would have resulted in grid payments of less than 5 percent of the original amounts.

In retrospect, the structure of the settlement embodied a strategy that created its own demise. During a subsequent mediation process, the mediator opined that the aspired global resolution simply could not be achieved but that there was a settlement that could resolve the bulk of the litigation for the 400,000 plaintiffs.

Continued on page 12.
knowing the final number of claims that will be handled during each phase, deciding whether the mediator and arbitrator pools may overlap or will need to be separate, and exploring whether neutrals, and particularly arbitrators, should be precluded from serving either because they have been involved in other similar (but factually distinguishable) class action litigation or because they are associated with a panel that services the employer’s internal dispute resolution program.

Class actions are unique in systems design because many “clients” of the system often do not have a say in the design process, and because new issues are likely to arise during the implementation stage.

Unique design challenges
Two additional kinds of challenges arise in systems design related to class action settlements that are unlikely to arise in more traditional design contexts. First, some “clients” of the system — namely claimants who are not represented by class counsel and pro se claimants — cannot be part of the design process, and they may not be familiar or even comfortable with aspects of the system. Second, while the essential design issues are addressed by the parties in the settlement agreement presented to the court for approval, new design issues are likely to arise during the implementation stage, such as specific discovery issues or decisions related to neutral assignments and timeliness in meeting deadlines. At that stage, the issue is whether the parties to the class action themselves should resolve such issues or whether such decisions should be left to either the claims administrators or the individual neutrals, or a special master should be appointed for this purpose.

In sum, systems design in the context of employment class actions raises some unusual challenges, testing the mediator/system designer’s creativity as well as impasse-breaking skills. Experience with some of the models currently being created will help to inform future design efforts.

Endnotes
2 Other challenges can include opt-out problems, awards to named plaintiffs, press releases and communications matters and, sometimes, coverage issues.
3 Injunctive relief may involve such issues as goals and timetables, training, mechanisms to ensure perceived fairness in hiring and promotions, record-keeping and monitoring. 4 To avoid conflicts of interest, attorneys fees are generally not addressed until agreement on the other aspects of settlement is complete.
5 The timing of the parties’ negotiations relative to the stage of the litigation is critical. Employers are likely to pay far less, for example, if settlement occurs before the court has ruled on class certification.
6 It is also possible for these two approaches to be combined.
7 These formulas themselves may be hotly debated, particularly if the employer desires settlement but does not acknowledge the existence of the alleged discrimination.
8 Additional transaction costs associated with class action settlements involve not only costs associated with evaluating claims, but also costs of notice, implementing injunctive provisions and monitoring the decree.
9 1999 WL 342043 (D.Mass.)
12 This may be particularly true when the costs of the mediation process are borne by the employer as part of the class action settlement.

McGovern (Continued from page 6)

The original settlement was replaced by Lindsay II, which involved a unilateral and open-ended offer by the defendants to pay qualifying plaintiffs according to a revised payment grid. This new strategy resulted in approximately 85 percent of the plaintiffs accepting the new proposal.

Style. In the Dow Corning bankruptcy, the negotiation teams for the debtor and the tort claimants were extremely sophisticated, probably more so than the mediator. Thus the mediator’s role appeared to be purely facilitative. The parties, however, soon deferred to the mediator on the timing, participants and procedure in the mediation process while seeking no assistance in evaluating the merits of the negotiations.

At the end of the mediation period there was an impasse and the mediator decided to present a take-it-or-leave-it settlement proposal to the parties, a prospect never envisioned by any of the participants. Although not the preferred mode of achieving agreement, the change in style from facilitation beyond evaluation was acceptable to the parties and ultimately led to an agreement among them. The strategic shift in role and function of the mediator was critical to the outcome.

Developing a strategy
The task for the mediator in complex disputes is fundamentally a strategic one. The permutations of variables that must be aligned for a consensual outcome — such as parties, issues, information, procedure, settlement and style — are so numerous that a mediator explicitly or implicitly engages in developing a strategy that coalesces them in a manner that enhances rather than inhibits agreement. Oftentimes it takes enormous creativity in devising tactical solutions that resolve conflicts themselves and form the basis for overall conflict resolution. The process of unpacking all the critical elements of a dispute and repackaging them for the benefit of the disputing parties without polluting them with the mediator’s normative judgments is the challenge in mediating complex cases.

Endnotes
5 supra note 1.
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SETTLEMENT OF MASS TORTS
IN A FEDERAL SYSTEM

Francis E. McGovern*

Engle v. R.J. Reynolds Tobacco Co. raises the questions of whether and how elastic mass torts can be settled in our federal system. In particular, there is a procedural and practical dilemma: state courts provide relative ease of class action certification, but without the ability to provide global peace, while federal court provides relative difficulty of class certification, but with the power to provide closure. A wide variety of options for the parties are considered in light of the Amchem and Ortiz decisions with the conclusion that the demand for finality will drive “bottom-up” reform and lead to more flexibility in resolving those types of mass torts.

Why, in Engle v. R.J. Reynolds Tobacco Co.,¹ did the major tobacco companies choose to face a crippling jury verdict rather than

* Professor of Law, Duke University School of Law. Great appreciation goes to a number of thoughtful persons willing to engage in a discussion of the issues raised by this paper: Elizabeth Cabraser, Shelia Birnbaum, David Bernick, Jim Stengel, Joe Rice, Fred Baron, Jeff Wintner, Lisa Blue, and Steve Kadan. Thanks also to everyone involved in the editing process for ensuring that these thoughts were elevated to the law review level.

¹ No. 94-08273 CA-22 (Fla. Cir. Ct. Nov. 6, 2000).
settle with the plaintiffs before or during trial? Current wisdom among defendants is that they have no choice but to settle a mass aggregation of cases, like *Engle*, that creates a “bet-your-company” scenario. In fact, goes the current wisdom, the plaintiffs’ ability to put so many chips on the table without giving a defendant the opportunity to defend itself one case at a time is one of the great evils of class action litigation. Yet the defendants in *Engle* decided not to settle. Why not?

One answer is that the tobacco companies were acting quite rationally in not settling. Given the litigation environment discussed below—(1) the elasticity of the mass tort; (2) the state forum; and (3) the available procedural mechanisms—the alternatives to settlement were simply superior. The only feasible path was to litigate. A more complex answer is that they did “settle,” or at least established a procedure for potential settlement, albeit subsequent to the jury verdict. Notwithstanding the specific language of the agreements among the *Engle* parties, the net effect of their agreements regarding the appellate process could be viewed as a means for “settling” the case.

The dilemma faced by the tobacco defendants in Florida is not unique; virtually every other mass tort defendant confronts the same limited number of end games that the tobacco companies faced. Over the last twenty-five years, the mass tort pendulum has shifted from trial to settlement; will it now shift back to trial? Historically, mass tort cases have followed a fairly well defined cycle: a trial phase that sets the viability of the tort and its values; if the tort is viable, a settlement phase where the data points from trial are used to settle cases; and finally, if possible, a global settlement. The economic incentives associated with plaintiff control of the litigation and defendant search for certainty eventually led to a different model: early settlement. Plaintiffs and defendants began seeking a global resolution before there had been multiple trials. Courts now have begun to be more skeptical of these early settlements and have created barriers to early global resolution. The limited number of settlement options now available to the parties may lead many defendants, therefore, to prefer a litigated outcome.

**Engle v. R.J. Reynolds Tobacco Co.**

The amended *Engle* class action complaint, filed on May 10, 1994 in Dade County Circuit Court, was brought on behalf of a nationwide class of current and former smokers and their survivors who had suffered or died from diseases caused from smoking ciga-

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After discovery, legal briefing, and an evidentiary hearing on the class certification issues, on October 31, 1994, the judge entered an order certifying a national class of "all United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes." The defendants then filed an interlocutory appeal objecting to the class certification. On January 31, 1996, the Third District Court of Appeal of Florida affirmed the class certification but limited the class definition to all "Florida citizens and residents" and their survivors with a 1994 bar-date for current harms. The number of potential class members variously estimated by plaintiffs' ranged from 40,000 to 500,000. The defendants sought review of the class certification by the Florida Supreme Court, which was denied. While the class certification issue was on appeal, the defendants filed a Petition for Writ of Certiorari in the Third District Court of Appeal seeking review of an order by the trial judge that had refused to stay the Engle class action because of the pendency of a tobacco class action in federal court in New Orleans. The Petition for Writ of Certiorari was denied.

On February 4, 1998, the state court entered a trial plan order and refused the defendants' request to decertify the class. The defendants sought review of both orders before the Third District Court of Appeal and their appeals were dismissed. The trial plan provided for phases, and Phase I began on July 6, 1998 with a trial on common issues and entitlement to punitive damages, and lasted 366 days. The trial transcript exceeds 35,000 pages and includes testimony of 84 witnesses.

The Phase I verdict was rendered on July 7, 1999 following seven days of deliberation. The jury found that smoking cigarettes is the cause of various diseases and that smoking is addictive. The jury found for the plaintiff class on theories of strict liability, fraud and misrepresentation, fraud by concealment, civil conspiracy by misrepresentation, civil conspiracy by concealment, breach of implied warranty and express warranties, negligence, and intentional infliction of emotional distress. Finally, the jury found that the class potentially was entitled to punitive damages.

Following the Phase I verdict, the trial judge entered a trial plan order for Phase II. The first stage would be a trial of the claims
of 3 of 9 class representatives chosen by plaintiffs’ counsel, followed by a trial to determine a ratio of punitive damage to compensatory damages on a classwide basis.

On August 16, 1999, the defendants filed a Motion to Enforce Mandate to Obtain Other Relief including Defendants Alternative Petition for Writ of Prohibition or Certiorari before the Third District Court of Appeal. The motion challenged the trial court’s *sua sponte* modification of the trial plan order to include a lump sum determination of punitive damages and defendants argued that there had been a violation of the earlier appellate court mandate.

Defendants’ Motion to Enforce Mandate or to Obtain Other Relief was granted, set for oral argument, and then denied by the Third District Court of Appeal on October 20, 1999. The Defendants filed a Petition for Writ of Prohibition and Mandamus or, in the alternative, Request for an Extraordinary Writ under the All Writs Power in the Florida Supreme Court, which was denied in December 1999.9

On January 31, 2000, defendants filed a Petition for a Writ of Certiorari before the United States Supreme Court seeking a review of the orders of the Third District Court of Appeal, and the Petition for a Writ of Certiorari was denied on May 22, 2000.10

The Phase II-A trial on compensatory damages for the three class representatives commenced on November 1, 1999 before the same jury that had decided Phase I, and they awarded compensatory damages totaling $12.7 million. There was some debate concerning a conflict regarding the jury’s verdict on the time bar for one plaintiff, but the judge entered judgment in the plaintiff’s favor.

The Phase II-B trial on punitive damages commenced before the same jury in May 2000. On July 17, 2000, after hearing 157 witnesses, the jury awarded punitive damages in favor of the Florida class and against each of the defendants.11 The jury awarded punitive damages of $73.96 billion against Philip Morris; $36.28 billion against R.J. Reynolds; $17.59 billion against Brown & Williamson; $16.25 billion against Lorillard Tobacco; and $790 million against Liggett Group. The remainder of the $144.8 billion was to be paid by the Council for Tobacco Research and the Tobacco Institute.12

**TOBACCO AS A MASS TORT**

Tobacco litigation is an elastic mass tort.13 The potential num-

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13. For a more extended discussion of the concept of elasticity, see Francis
ber of plaintiffs is unlimited, and the number of actual cases filed, or the propensity to sue, is a function of the anticipated outcome of those filings. As the number of successful cases that move through the litigation system increases and the cost of moving them through the system decreases, the demand of new filings increases. In contrast, an inelastic mass tort such as an aircraft crash is not affected by the speed and cost of resolution; there were a finite number of people on the airplane.

The strategy for defendants facing an elastic mass tort historically has been to raise the cost of litigation and slow the speed of case resolution. If, for some reason, settlement became necessary, every attempt could be made to keep the settlement amount private; otherwise, that settlement would become a floor for all future cases. By raising transaction costs and lowering the possibility of positive outcomes for plaintiffs as much as possible, new entrants are deterred and plaintiffs’ counsel presumably would not file as many cases. Hence, defendants traditionally have opposed the aggregation of cases because it would reduce transaction costs for individual plaintiffs.

The asbestos litigation overwhelmed this defense strategy. The sheer volume of cases facing courts led judges to devise more rapid case resolution techniques culminating in consolidations, class actions, and even extrapolation. Once cases were aggregated, the incentives for plaintiffs’ counsel to file new cases were greatly enhanced and the defendants faced a strategic dilemma. If they settled cases quickly, they would soon be faced with even more filings. So, defendants began to litigate rather than settle. In the asbestos cases, the litigation option was not terribly successful; but for tobacco, it has been. The tobacco companies have not settled a single individual case. Approximately forty cases have been tried, and the plaintiffs have won only six at the trial level. All plaintiff victories have been appealed; only one has been affirmed on appeal thus far. Filings of individual lawsuits against the tobacco companies have not increased dramatically over the last ten years.

The same issue of elasticity was confronted in Engle. If the tobacco companies were to settle Engle, they would soon face multiple copycat suits in other states with a cumulative settlement value that would far exceed their assets. The economics of an elastic tort simply do not allow one by one settlements. It is all-or-nothing:


ther try each case or enter into a global settlement. In *Engle*, given
the sums involved, the former was the only option.

**ENGLE AND FEDERALISM**

As discussed above, the original *Engle* complaint sought the cer-
tification of a class of "[a]ll United States citizens and residents, and
their survivors, who have suffered or have died from diseases and
medical conditions caused by their addiction to cigarettes that con-
tain nicotine,"\(^{15}\) and the Third District Court of Appeal of Florida
then limited the class to "Florida citizens and residents."\(^{16}\) Settlement
of *Engle* would resolve only Florida, leaving the rest of the
country fair game.

Even the viability of a state class action such as *Engle* that pur-
ports to be national in scope can be problematic notwithstanding its
legal effect as binding on everyone. On one hand, there are a num-
ber of instances involving consumer cases with damages less than
the federal jurisdictional limit that have been resolved nationally
with one or more state class actions. They have succeeded in no
small part because the economic incentive for any individual plain-
tiff to challenge them has been minimal. On the other hand, when
the damages involved are significant, most defendants have been
concerned that they can buy national peace only through a federal
class action.

Yet, if the defendants could remove *Engle* to federal court it
would be possible for them to apply the more rigorous federal rules
for the trial of class actions and probably overturn the Florida
court's certification altogether. As discussed below, both *Amchem
Products, Inc. v. Windsor*\(^^{17}\) and *Ortiz v. Fibreboard Corp.*\(^^{18}\) cast seri-
ous doubts on the certification for trial of this kind of case. The op-
portunity for removal in *Engle* arose in July 2000 when the South-
eastern Iron Workers Health Care Plan filed a "motion to intervene
seeking permission to assert subrogation claims under Florida law
on behalf of itself and similarly situated funds and insurers for re-
imbursement from damages recovered by any beneficiary or insured
who is a member of the *Engle* class."\(^{19}\) Because this motion was filed
after the punitive damages verdicts but before the entry of judg-
ment, defendants removed the action to the U.S. District Court for
the Southern District of Florida.\(^{20}\)

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16. *Id.* at 42.
   Fla. 2000).
20. *Id.*
While the plaintiffs' remand motion was pending and Engle was under federal jurisdiction, the parties in another court saw a new settlement opportunity. Lawsuits on behalf of unions, health care organizations, asbestos trusts, and smokers against the tobacco companies had been filed in the Eastern District of New York. One of those lawsuits, In re Simon II Litigation, was a purported national class action on behalf of eight subclasses: (1) injured smokers; (2) their estates; (3) non-injured smokers; (4) smokers with some medical expenses; (5) smokers with pending civil actions; (6) health benefit plans; (7) other non-governmental entities seeking medical reimbursement; and (8) asbestos trusts. Notwithstanding the differences in scope with Engle, certain parties saw Simon II as a vehicle for a national punitive damages class settlement that would incorporate the punitive damages aspect of Engle. If the tobacco defendants could be convinced to settle in a national class action all punitive damages claims, they then would have mooted Engle. Since Engle was at least temporarily in federal court, there would be no problem with federal preemption of state court action.

Some of the plaintiffs and two of the defendants seriously negotiated to reach a comprehensive settlement. The principal objections came from Engle plaintiffs' counsel who objected to federal preemption and the other defendants who felt that such a class settlement would not withstand appellate scrutiny and that a failed national settlement would establish a floor for various state cases. These and related concerns are discussed below in connection with Amchem and Ortiz. These settlement efforts ended when Judge Ungaro-Benages remanded the case. The next day, judgment was entered for the punitive damages.

The federalism dilemma for mass tort class actions involving individual cases with significant value can be summarized, overly simplistically, as follows: classes are relatively easy to certify in state court, but cannot be settled nationally; cases are difficult to certify in federal court, but can be settled nationally. A more complex rendition of the dilemma is that some state courts will readily certify state or national class actions and approve state or national class settlements. Defendants, however, typically cannot afford to settle a class action for only one state and are unwilling to undertake the risks associated with collateral attacks and opt-outs involved in settling a state class that is national in scope. Federal courts, on the other hand, have become reluctant to certify these types of cases for a class action trial and have recently made the certification of class action settlements significantly more rigorous and more expensive. As a result, mass tort class actions in federal court are now viewed with skepticism by many parties. If, however, it is

possible to have a settlement class certified in federal court, the state court problems of finality can be overcome by federal jurisdiction.

PROCEDURES AND STRATEGIES FOR RESOLUTION

Personal injury torts have historically been resolved one by one. The notes of the Advisory Committee on the Federal Rules of Civil Procedure to Rule 23 comment:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.22

The pressure of one mass tort after another and of the asbestos litigation in particular led trial courts to certify mass tort class actions, only to have their opinions rejected by courts of appeals. Finally, there were several breakthroughs in Dalkon Shield, DDT, asbestos, and others. The U.S. Supreme Court changed direction in Amchem and Ortiz.

What did Amchem and Ortiz do?

Amchem and Ortiz have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive, and, in certain circumstances, improbable. These opinions have also prompted substantial introspection at a more conceptual level regarding fundamental questions of fairness and efficiency in the tort compensation system. One of the most interesting discussions generated by Amchem and Ortiz has involved the strategic reactions of judges and lawyers to the role of class action settlements in personal injury mass torts. These discussions involve the initial distinction between certification for trial and certification for settlement.

At the doctrinal level, Amchem and Ortiz addressed a number of issues raised under Rule 23 of the Federal Rules of Civil Procedure and avoided constitutional and statutory issues presented by the parties. In Amchem, the Court stressed that the "dominant concern" is "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."23 This concern manifested itself in both the Rule 23(b)(3) predominance requirement and the Rule 23(a)(4) adequacy of representation.

22. FED. R. CIV. P. 23 advisory committee's note.
standard. The Court rejected the argument that asbestos exposure, compensation, and settlement fairness were sufficient to establish "class cohesion" to satisfy the predominance requirement.\footnote{Id. at 622-25.} The Court also rejected the argument that the same counsel and class representatives could adequately represent plaintiffs with current injuries and plaintiffs with future injuries as well as plaintiffs suffering different harms.\footnote{Id. at 625-26.} In particular, the Court noted that similarly situated plaintiffs might be affected differently with regard to inflation, loss of consortium, exposure-only damages, access to the litigation system through opting-out, and caps on damages.\footnote{Id. at 626-27.}

The Court did not require a settlement class to be certified as a trial class but did impose heightened scrutiny "to protect absentees by blocking unwarranted or overbroad class definitions."\footnote{Id. at 620.} Justiciable case or controversy,\footnote{Id. at 613 n.15.} standing,\footnote{Id.} amount in controversy,\footnote{Id. at 628.} notice,\footnote{Id. at 613.} and Rules Enabling Act\footnote{Id. at 620.} issues were reserved. The Court did, however, express skepticism that "legions so unselfconscious and amorphous" could pass muster as a class once these issues were confronted.\footnote{Id. at 628.}

Like Amchem, the Ortiz opinion did not address the justiciability of the case,\footnote{Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).} the Rules Enabling Act,\footnote{Id. at 845-46.} the Seventh Amendment,\footnote{Id.} due process of notice, or in personam jurisdiction.\footnote{Id. at 846.} In this context, the court found the settlement lacking in its proof of a limited fund,\footnote{Id. at 848.} in its disparate treatment of class and non-class members,\footnote{Id. at 854.} and in its Rule 23(a) prerequisites.\footnote{Id. at 848, 858-59.} In particular, the opinion noted that "Fibreboard was allowed to retain virtually its entire net worth" but left open whether this alone would be fatal or could be mitigated by the savings in transaction costs created by a settlement.\footnote{Id. at 859.} Seemingly more important to the Court was the issue of arms-length bargaining over the limit and insufficiency of the fund in light of the incentives of class counsel and the Rule 23(a) standards for adequacy.
of representation.\textsuperscript{42} The opinion also stressed equity among class members and described a variety of potential conflicts and disparities among class members based upon previous settlements, exposure rates, disease progression, litigation status, and other facts.\textsuperscript{43} These points also underscored the \textit{Amchem} prerequisites related to commonality and typicality, and the insufficiency of a common interest in receiving compensation to overcome these inherent factual differences. Fundamentally, the opinion noted that "the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b)."\textsuperscript{44} Like \textit{Amchem}, \textit{Ortiz} did not foreclose the possibility of a class action settlement, but the opinion narrowed the size of the window of opportunity to do so.

\textit{Fundamental Issues Raised by Amchem and Ortiz}

The \textit{Amchem} and \textit{Ortiz} opinions raise some of the more fundamental issues implicated by torts in general and mass torts in particular. At the same time, the opinions unite ideological positions in a counterintuitive manner. Arguably, the opinions reflect efficiency, pragmatism, and instrumentalism pitted against corrective justice, principle, and deontological approaches. On the one side, there are the merit-based arguments that assert the perfect is the enemy of the good and focus on the propriety of rough justice. These arguments reinforce the policy-based goals of compensation in our tort system. On the other side, there are the process arguments that uphold the sanctity of certain principles that are inviolate. This position reinforces a view of tort law based upon individualized justice.

Disaggregating these positions reveals rather unusual coalitions of rationales. The instrumentalist position contains both pro-plaintiff and pro-defendant justifications. The plaintiffs would benefit in the aggregate because of the present value of monies paid and the defendants would benefit because they would receive global peace. The arguments based upon principle are equally disparate. There are both individual autonomy and equality concerns favoring defendants coupled with concerns that the institution of the courts should be the vehicle for social reform.

This variety of rationales presents exquisite ironies. The individual fairness position produces actual outcomes in \textit{Ortiz}, for example, that conflict with some of the aspirational outcomes being sought. The default agreement creates: (1) less aggregate dollars for the plaintiffs; (2) greater attorney fees for the plaintiffs' counsel; (3) more conflict of interest in counsel's representation of clients; (4) more disparate treatment of plaintiffs; (5) less compensation for future plaintiffs; and (6) less compensation for more seriously harmed

\textsuperscript{42} \textit{Id.} at 852.
\textsuperscript{43} \textit{Id.} at 856-59.
\textsuperscript{44} \textit{Id.} at 863-64.
plaintiffs. Thus, the desire to protect the rights of plaintiffs resulted in a disadvantage to those same plaintiffs.

The argument for a principled status quo of first-come-first-served in the litigation process unless altered by the legislature has its own irony. The legislature is being told that it is the only institution available to fix the “problem,” when the “problem” was created in the courts. There has been no legislation addressing mass torts; there are, however, substantive and procedural decisions by courts that have altered the legal landscape to make it conducive for mass torts.

The pro-defendant pragmatists present their own irony. They are advocating a legal procedure that will have the effect of imposing substantial costs on defendants. In *Ortiz*, for example, the insurance carrier demanded a Rule 23(b)(1)(B) settlement, thereby enabling it to spend more than $2 billion to terminate an insurance policy that cost less that $10,000. Adding insult to injury, it was plaintiffs’ counsel who insisted in the negotiations that the back-up plan be included.45

Another ironic position is that of the pro-plaintiff pragmatists. In *Ortiz*, this is in part the product of the practical effects of the plurality opinion. The winners are: the company and its shareholders; the insurance carriers; the plaintiff’s counsel; and the current and near future plaintiffs, particularly those less seriously involved. The losers are the future plaintiffs in general and the more seriously injured in particular.

One of the more interesting residual questions lingering after *Amchem* and *Ortiz* is whether the U.S. Supreme Court will allow any bulk discount settlement of mass torts at all. The reality in the litigation trenches is that plaintiffs’ counsel accept a discount on case values in order to receive larger aggregate sums of money more quickly. Defendants are willing to spend huge sums of money if: (1) they receive a discount for paying that money sooner than the litigation system usually requires; and (2) they can receive global peace. The economic principles in this sense are simple—the more you buy at the same time, the less you pay per item. Can this type of transaction—formal or informal—ever withstand arguments based solely upon fairness principles? Will the Court recognize the time value of money created by a lengthy judicial process?

Another related but unanswered question is whether the idea of individualized justice is so important to our social fabric that it must be maintained even though it has become largely fictional. As with other fictions in our legal system, its presence may have independent value. Likewise, there is the unanswered question of whether the tort system would ever countenance the contracting away of per-
sonal rights. Just as tort law frowns upon general waivers of access to the judicial system when there is physical harm, there may be a parallel limitation to even partial de facto waivers in mass tort settlements. The current debate over the interpretation of Rule 23 is arguably a surrogate for a conversation on these and other more fundamental issues.

Reviewing the Strategic Alternatives

Given the depths of the uncertainties plumbed by Amchem and Ortiz, some of the most interesting questions for the current mass tort environment involve how the parties will cope in their efforts to find strategies for settlement. Are there alternatives, either long term or short term, available to defendants like the tobacco companies? What room do defendants have for maneuvering in an Engle-type situation? A brief review of the strategic landscape suggests that there were few options given the available time frame for resolving Engle.

1. Modification of Amchem and Ortiz by Rule Changes

There will be efforts to strengthen the possibilities for class action settlement by modifying Rule 23. There will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny. These modifications may include enhanced review of proposed settlements by endorsing discovery of the settlement merits, settlement negotiation, and any ex ante or ex post incidental agreements. Other possible factors for inclusion in Rule 23(e) include: the maturity of the tort; the extent of participation in settlement negotiations by non-class counsel; the cost and probable outcome of trial on the merits; the total potential resources available for trials or settlement; litigation market values; opt-out rights; reasonableness of attorneys' fees and the division thereof; claims processing procedures; previously rejected settlements; fairness of settlement terms; and, the presence of third party evaluation of settlement.

2. Restriction of Class Actions by Rule Changes

There are proposals by the Advisory Committee on Rules to allow federal preemption of state class actions when: (1) a class action is not certified by a federal court; (2) a class action settlement is not approved by a federal court; and (3) while a federal court is considering class action certification. The net effect of these changes would be to impose Amchem and Ortiz on the states, thereby restricting their use.

3. Education of the Supreme Court

Most observers of the appellate court review of mass tort noted
a rather prolonged education process of mass torts and of due process. Probably the best examples are the asbestos litigation in the Fifth Circuit and the Judicial Panel on Multi-District Litigation (J.P.M.L.). Time and time again, the Fifth Circuit rebuffed efforts to resolve cases more expeditiously until the court finally relented in *In re Raymark Industries, Inc.* and the cases involved settled. The J.P.M.L. finally transferred the federal asbestos docket to Philadelphia on the eighth try. Perhaps this educational process of the marketplace of litigation will generate some alternative Supreme Court thinking. If litigants continue to have economic incentives to seek appellate review because the current system creates substantial inefficiencies, there may be some modification of *Amchem* and *Ortiz*.

4. Adaptation to *Amchem* and *Ortiz*

In some mass torts the parties will attempt to negotiate a settlement that will satisfy the dictates of *Amchem* and *Ortiz*. The most notable current examples of this strategy are in the Prudential and the fen-phen litigation, with the Holocaust litigation not far behind.

*In re The Prudential Insurance Company of America Sales Practices Litigation* approved Rule 23(b)(3) settlement class on behalf of over 8,000,000 life insurance policy holders alleging a variety of deceptive sales practices. Although this was not a personal injury case, this opinion is important, in general, for allowing the settlement, and, in particular, for focusing on the value of an open-ended settlement amount.

*In re: Diet Drugs Products Liability Litigation* differs from *Amchem* and *Ortiz* in the following respects: (1) no inventory settlements; (2) no future unfiled cases; (3) no latency; (4) subclasses; (5) four opt-outs; (6) medical monitoring; (7) inflation, consortium, and other damages; and (8) some serious injuries excluded altogether. On a negative note, there have been no trials to set case values and there was no third party or judicial mediator. On the positive similarity front there is: (1) accelerated payment option; (2) comeback for more serious diseases; (3) lengthy negotiations; (4) numerosity; (5) tolled statute of limitations; and (6) sophisticated claims process-

47. 831 F.2d 550 (5th Cir. 1987).
49. 148 F.3d 283 (3d Cir. 1998).
Negative similarities include: (1) medical criteria more restrictive than common law; (2) medical criteria excluding certain diseases; (3) no method for modifying medical criteria; (4) filing of complaint and settlement virtually simultaneously; (5) limitation on rights with later opt-outs; and (6) more individual plaintiff variations. The most critical aspect of the fen-phen settlement was the succession of opt-out rights granted to class members as they obtained additional information concerning their medical condition.

5. Creation of an Alternative Class Action Settlement Model

The most recent effort to use the class action device to settle a mass tort has occurred in the Sulzer hip replacement litigation. In re Inter-Op Hip Prosthesis Products Liability Litigation involves a Rule 23(b)(3) settlement that provides all the assets of the defendant for class members for a period of six years, thereby reducing financial incentives to opt out. The intent is to take advantage of the arguments that favor an opt-out class while benefiting from the reality of a mandatory class.

6. Co-option of the Opposition

In the bone screw and the silicone breast implant litigation, there were three successful class action settlements that arguably would not meet Anchem or Ortiz muster. The strategy on the part of the settlement proponents was to co-opt the opposition, thereby eliminating any appeal. This preemption of opposition was accomplished either by including objecting counsel into the class settlement or by convincing potential objectors that the merits of the settlement deserved their support. It appears that a similar strategy was followed in the fen-phen cases as well.

7. Invention of Surrogates to Class Action Settlements

In lieu of a class action settlement, a defendant might decide to create a class action surrogate. The defendant could, for example, make a unilateral and irrevocable settlement offer to all plaintiffs hoping that the number of acceptances would be sufficiently high to reduce the scope of the mass tort to a manageable size. The net effect could be similar to the outcome in a multiple opt-out class like fen-phen. Some aspects of the settlement strategy in Hyatt Sky-
Another surrogate could be to negotiate long term settlements with individual plaintiffs' counsel by resolving current claims and by establishing a settlement formula for that attorney's future cases. This would be analogous to the Prudential settlement.

A third surrogate could be to negotiate a settlement trust fund created by all defendants for all plaintiffs to resolve all cases. The trust fund could be voluntary or mandated by legislation as discussed below.

8. Legislation

Statutory changes could take various forms: (1) federalizing class actions; (2) enhancing settlement classes; (3) creating a new form of bankruptcy; (4) eliminating all or part of a tort; (5) streamlining or otherwise altering civil procedure; (6) establishing an alternative compensation system; or (7) establishing hybrid options to tort.

Legislation could effectively eliminate any future Engle by federalizing state class action rules, or, at the opposite end of the spectrum, by expanding the concept of a settlement class to allow global resolution of mass torts. Much thought also has been given to creating a new type of bankruptcy that also would allow a global solution without forcing a defendant to endure the entire bankruptcy process.

Much political capital has been spent on attempts to reduce the impact of tort law and to limit the effects of procedures for resolving tort cases. These efforts have included product liability reform, asbestos reform, tobacco reform, and others.

Another legislative model contemplates a completely different alternative to the tort system and resembles the black lung childhood vaccine or workers' compensation systems. Such a compensation scheme could be implemented through party or federal funding and administrative claims processing.

A hybrid approach would involve a voluntary alternative to tort law similar to the claims resolution facilities created to administer settlements. In re: A.H. Robins Co., for example, involved a series of options for claimants—a single quick pay, a streamlined benefit schedule, tailored ADR, and litigation—to receive benefits from a fixed fund determined by a court's estimate of total liability. The

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59. 880 F.2d 709 (4th Cir. 1989).
60. Id. at 717.
United Nations Compensation Commission has a similar approach, only with open-ended, rather than capped, liability.  

Similarly, the Air Transportation Safety and System Stabilization Act has a “September 11th Victim Compensation Fund of 2001” that caps airline liability for some claims at the value of their insurance and provides for an alternative claims process to be administered by a special master.

9. Litigation

Using either an aggregation or a divide-and-conquer strategy, a defendant may seek to litigate its way out of a mass tort. Aggregation without a class action provides the opportunity for a global resolution of pending cases in a given jurisdiction or J.P.M.L., and, perhaps, of specific issues that may limit the litigation. A single issue trial on causation, for example, has been attempted, as well as Daubert motions and Rule 706 experts.

The strategy historically favored by the automobile manufacturers and, most recently, in the repetitive stress cases contemplates coping with a mass tort by forcing plaintiffs to develop and proceed to trial case by case. The theory is to avoid the spillover effect among plaintiffs and plaintiffs’ counsel and to create disincentives to filtering cases because of increased transaction costs.

10. Bankruptcy

Johns-Manville, A.H. Robins, Dow Corning, and, most recently, at least eight asbestos manufacturers have been exploring bankruptcy as an alternative to a class action settlements. If there is no possibility of a class action settlement to bring finality to their litigation, these defendants have to change the legal landscape by pursuing bankruptcy. Within bankruptcy there have been three strategies: (1) turn over the keys to the company in return for control and equity considerations; (2) attempt to re-write history by showing that liability does not exceed assets; and (3) piggy-backing on another bankruptcy by using “related to” jurisdiction. In its most simple form, the settlement strategy would contemplate a pre-packaged bankruptcy plan. The litigation strategy typically involves challenges to the plaintiffs’ medical evidence on exposure and disease by Daubert and Rule 706 experts and revision of legal standards of exposure and corruption. The “related to” strategy has been successfully implemented by Aetna in the A.H. Robins bankruptcy and the shareholders in the Dow Corning bankruptcy.

11. Reduction of Assets

Some defendants have despaired of finding any acceptable mechanism for achieving global peace and are simply removing equity from the defendant, liquidating insurance assets, and running up the white flag for the residue. This has variously been accomplished by stock buy-backs, increased dividends, exchanging debt for equity, securitizing debt, and transfer of assets.

"SETTLEMENT" OF ENGLE

The Engle trial court entered judgment in the amount of $144.8 billion in a 68-page opinion issued the day after the case was remanded to state court. As a result, the defendants faced an appeal bond of 115% of the judgment—approximately $167 billion. The bond amount arguably exceeded the valuation of all the defendants by far more than $80 billion.

Anticipating precisely this scenario, the tobacco defendants had prompted Florida legislation limiting appeal bonds to $100 million. The legislation was enacted into law before the entry of judgment but during the trial of the case. Some media pundits suggested that the legislation was favored by the Florida legislature in order to protect the defendants from filing for bankruptcy and thereby jeopardizing the more than $13 billion over 25 years the tobacco companies owe Florida in accordance with the $246 billion national tobacco settlement reached in 1998.

After the entry of judgment, the defendants posted $403 million in bonds to preempt a court order to collect the entire judgment. Three of the defendants, Philip Morris, Lorillard, and Liggett, reached an agreement with the plaintiffs to increase the bonds to $2 billion and to set aside $709,763,077 of that amount to settle the issues of the applicability of the exceptions language, the duration of the stay, and the constitutionality of the new bond statute. In return for that payment, plaintiffs agreed not to increase the settling defendants' bonds, even if the statute is held to be unconstitutional. In addition, the plaintiffs will not challenge dividend payments while the case is under appeal.

The settlement, then, was over the issues related to the statute: for example was it unconstitutional because it was written specifically for the tobacco industry, because it was passed during the trial, or for some other reason? Since the settled issues were unique to the Florida situation, there was less of a problem with elasticity. At the same time, the appellate court now knew that there would be

63. FLA. STAT. ANN. ch. 768.733(2) (2000).
64. Mary Ellen Klas & S.V. Date, State Law Designed to Protect Settlement; $13 Billion for Florida Could Still Dwindle But Not During Appeals, PALM BEACH POST, July 15, 2000, at 9A.
over $700 million for the benefit of the class if the case is overturned on appeal. If a court is focusing on the outcome money to Florida smokers or potential reversal by the U.S. Supreme Court, the "settlement" may be attractive notwithstanding the explicit language in the agreement that there was no settlement.

CONCLUSION

The settlement of elastic mass torts is problematic in our federal system. Not only is there the difficulty inherent in elasticity—the undefined nature and number of plaintiffs—but also there are the procedural barriers related to the relative ease of certification in state courts with no ability to obtain global closure, and the difficulty of certification in federal court that could provide the level of closure sought by parties. Defendants do not feel comfortable settling piecemeal because each settlement that leaves open the opportunity for new plaintiffs to file suit simply establishes a floor for the next settlement. Defendants demand global peace and are willing to pay a premium for that peace. Outside of bankruptcy or litigation victory, the finality defendants seek is either difficult to obtain or quite costly.

There are, however, quite inventive middle paths with less finality and less cost that are offering new opportunities for a healthy resolution of mass tort litigation. If recent history is a guide, future strategies will be "bottom-up,"—created by lawyers and judges facing the reality of overburdened courts and unrequited plaintiffs. For them, the perfect is the enemy of the good; they are seeking pragmatic solutions to immediate problems. For the United States Supreme Court, however, the perspective is somewhat different and longer term. There will be a point, however, when the pressure for a more acceptable outcome will become too great. The legislature, the courts, and the juries will then be forced to reach a more balanced solution, neither perfectly principled nor overly pragmatic. Rigid interpretation of Amchem and Ortiz will give way to a more flexible approach to dispute resolution. The model of claims resolution facilities that represent a hybrid of tort and administrative approaches have worked too well to be ignored. The need for a procedural vehicle to provide embattled defendants an opportunity to flourish outside of bankruptcy will keep the pressure on the legal system for another generation of approaches.
The Ethical & Fiduciary Duties of Court & Counsel in State Mass Tort & Quasi-Class Actions:

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ABA Conference for Litigators
Chicago - April 24-26, 2013
OUTLINE

❖ Organize analysis
❖ Point out areas of ethical concern
❖ Three sources of ethical problems in class actions, quasi-class actions & aggregate cases
❖ Trilemma
LITIGATION MODELS

- Traditional models
- Simple aggregate model
- Complex aggregate model
**Aggregation**

- **Formal:**
  - MDL
  - Class action
  - Quasi-class action

- **Informal:**
  - Parallel
  - Consolidated
  - Dispersed
LITIGATION STAGES

- Counsel organization
- Pre-trial
- Trial selection
- Trial strategy
- Settlement negotiations
- Settlement
- Attorney funding/Attorney fees
Competence & diligence
Allocation of authority between client & attorney
Communication
Confidentiality
Conflict of interest
ETHICS STANDARDS (cont.)

- Loyalty
- Fees
- Duties to prospective clients
- Expediting litigation
- Relationship with tribunal
- Truthfulness
- Misconduct
Restatement of the Law, Third, the Law Governing Lawyers

ABA formal opinions

ABA Code of Judicial Conduct
COUNSEL ORGANIZATION

- Lead
- Liaison
- Plaintiff steering committee
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  - Formal
  - Informal
PRE-TRIAL

• Document depository
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• Depositions
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Formal
Informal
TRIAL SELECTION

- Random
- Plaintiff selection
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- Hybrid

- Formal
- Informal
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- Case management order
- Trial briefs
- Witness selection & order
  - **Formal**
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- Settlement counsel
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- Formal
- Informal
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- Notice
- Hearing
- Objectors
- Appeal

Formal
Informal
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- Common benefit fund
- Assessments
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  - Formal
  - Informal
THREE SOURCES OF ETHICAL PROBLEMS IN CLASS ACTIONS, QUASI-CLASS ACTIONS & AGGREGATION CASES

• Plaintiff business models
• Plaintiff financing
• Aggregate settlements
  ✓ Distribution of settlement
  ✓ Attorney Fees
plaintiff business model

Boutique
PLAINTIFF BUSINESS MODEL

Class Action/Aggregation
PLAINTIFF BUSINESS MODEL

Full Service
PLAINTIFF BUSINESS MODEL

Partnership/Coalition
PLAINTIFF BUSINESS MODEL

Under radar screen
PLAINTIFF BUSINESS MODELS

Market share/Monopoly
PLAINTIFF BUSINESS MODELS

- Wholesaler
- Advertiser
- Affiliate
- Free Rider
PLAINTIFF BUSINESS MODELS

Professional Objectors
PLAINTIFF BUSINESS MODELS

Funding
Self-financing

Traditional loan

Sale

- Patent
- Bankruptcy
- Economic loss
- Punitive damages
NON-TRADITIONAL LOAN

Source
• Plaintiff counsel
• Hedge fund
• Special purpose entity

Interest
• Variable
• Fixed
Non-traditional Loan

Length
- Short
- Medium
- Long

Other Terms
- Referrals
- Hourly fee
- Advance costs
Non-traditional loan

**Security**
- No recourse
- Case
- Inventory
- Personal

**Default**
- None
- Contract enforcement
- % of Case(s)
- % of Fee(s)

**Benefits**
- Interest deductible
- Interest paid as cost by client
- Principle paid as cost by client
§ 3.16 Definition of a non-class aggregate settlement

- Interdependent
- Not individual case-by-case
§ 3.17 Circumstances required for aggregate settlements to be binding

- Informed consent in writing
  - All claimants or formula
  - Attorneys’ fees

OR
§ 3.17 CIRCUMSTANCES REQUIRED FOR AGGREGATE SETTLEMENTS TO BE BINDING

- **Ex ante substantial/majority vote**
  - Claimants only
  - Informed consent
  - Procedures
  - Alternative above
  - Substantial amount, number & majority
  - Fair & Reasonable
§ 3.18 LIMITED JUDICIAL REVIEW FOR NON-CLASS AGGREGATE SETTLEMENTS

- Right to challenge non-waivable
- Challenge based on requirements of §3.17
- Challenge based on fairness of settlement
- Successful challenge paid by negotiating lawyer
Sticky Situations in Mass Tort Settlements:

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Sticky Situations in Mass Tort Settlements

By Adam J. Levitt
Class actions often become something else—mass tort cases. This transformation is occurring because proposed classes are more frequently being denied class certification as the standards of Rule 23 of the Federal Rules of Civil Procedure are being more stringently applied. But a class certification denial is not a reflection of the underlying merits of the plaintiffs’ claims; rather, it is one judge’s conclusion, without the benefit of briefing on a complete discovery record, that individual issues predominate over common issues or that the proposed class otherwise fails to satisfy Rule 23’s requirements.

When class certification is denied, litigants’ claims may have sufficient value to merit individual prosecution in the mass tort context. This shift, however, presents plaintiff lawyers with a host of ethical issues in settlement negotiations. An aggregate settlement in a mass tort case resolves the claims of several cases with one offer of money. It is up to plaintiff counsel to allocate those funds among his or her individual clients. Unlike court-approved class action settlements governed by the mandates of Rule 23, mass tort settlements generally are governed by contract and occur outside the bounds of the federal rules and the judicial process.

Virtually every state has adopted ethical rules regarding aggregate settlements. Each state’s rules vary slightly, but nearly all follow Rule 1.8(g) of the ABA Model Rules of Professional Conduct:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.8(g) itself does not actually define “aggregate settlement,” but the trend is toward broadly defining the term. At its core, the aggregate settlement rule requires each client’s informed consent to the settlement terms, essentially requiring each plaintiff to formally “opt in” to a settlement. That is, each client must decide whether to accept or reject the proposed settlement, and each client is entitled to complete disclosure of the agreement’s essential terms before making a decision.

Client Options

Unlike the class action context, in which class members who do not opt out are automatically bound by a court-approved settlement, a mass tort settlement mandates a decision by each client; neither the court nor counsel may decide the issue. That limitation raises challenges in the settlement negotiation process because plaintiff counsel may reach only an “agreement in principle” with defendants, the terms of which must then be fully conveyed to each client for final approval.

You must strike a delicate balance in negotiations, taking care to avoid reaching what may be construed as a firm settlement offer before you are ready to communicate such an offer to your clients. This balance is largely driven by practical considerations, including the logistical difficulties of communicating with and advising thousands of individual plaintiffs about a prospective mass tort settlement. For the same reason, you must also work to ensure that the defendants do not artificially and improperly
In a mass tort, attorneys appointed to multidistrict litigation leadership roles owe a hybrid duty to their own clients and to the collective interests of the other plaintiffs in the MDL.

interject a firm offer into the case that you must communicate to all your clients sooner than you might otherwise prefer.

If clients are to give valid informed consent, you must provide them with sufficient information so they understand all the variables that were taken into account in allocating settlement amounts. They must know where they stand in the settlement, particularly as to the total amount of the settlement, how much other clients will receive, and how much they will receive. This stands in stark contrast to the traditional class action settlement, in which class representatives, acting on behalf of the entire class and with the advice of class counsel, make decisions about settlements that bind absent class members, provided that the court deems the settlement to be fair, reasonable, and adequate.

The process for obtaining clients' consent depends on the circumstances of the mass tort settlement. Informed consent requires acceptance, typically evidenced by a signed written statement containing the settlement’s essential terms and the client’s acceptance of those terms. Most attorneys send a letter to each client that includes all the required disclosures for the aggregate settlement and asks each client to sign and return a copy of the letter if he or she accepts the settlement.

When negotiations result in an agreement as to the overall settlement terms but the particular allocations and individual settlement amounts require a special master, you can obtain informed consent in a two-step process. First, an initial letter informs the clients of the general settlement terms and asks for their consent to go forward with determining their individual settlement amounts. Second, after the allocation process is formally concluded, another letter informs the clients of settlement amounts, reiterates the terms of the aggregate settlement, and asks for each client’s informed consent as to the final allocation.

This approach differs drastically from class action settlements, in which all class members are bound by the settlement and its terms. Such terms include, but are not limited to, the class relief obtained through the settlement (i.e., monetary or other compensation) and scope of the class-wide release of the claims asserted in the litigation. Moreover, in a class action, class counsel’s primary fiduciary duties run to the class as a whole, rather than to any individual class member, and Rule 23 requires court approval of all settlements, thus fostering transparency in the settlement process.

Although dissatisfied class members may challenge a proposed settlement by filing an objection, if the court concludes that the settlement furthers the entire class’s collective interests, it will approve the settlement notwithstanding those individual objections. The objectors are bound by the settlement’s terms. Communicating a settlement agreement to absent class members is also somewhat easier in class actions because it takes the form of a court-ordered class notice—another marked difference from mass tort cases.

In mass tort litigation, the roles of the plaintiff lead counsel and members of the plaintiffs’ executive committee differ from those in class actions. In class actions, the lead counsel’s primary fiduciary obligations are to the class members, and settlements can occur even when the named plaintiffs oppose them.

That is not the case in a mass tort, where attorneys appointed to multidistrict litigation (MDL) leadership roles owe a hybrid duty to their own clients and to the collective interests of the other plaintiffs in the MDL. Usually, the interests of the MDL leadership’s clients coincide with the interests of other litigants on the same side of the litigation.

Troublesome Clauses
Because mass tort settlements are opt-in agreements, rather than opt-out agreements, in most class settlements the plaintiff lawyer must be prepared to deal with different considerations and concerns of class members.

Restrictions on attorney practice.
Mass tort defense counsel often demand,
as a settlement negotiation tactic, that the settling plaintiff lawyers agree not to represent other plaintiffs with similar claims in the future. This type of demand is rarely, if ever, made in a class action, due to the “opt out” nature of such settlements and the scope of the release they contain. This type of demand, however, when made in any aggregate litigation context, raises serious ethical questions because it is improper for plaintiff counsel to agree to such a restriction on practice, and it is improper for defense counsel to make such a demand. Indeed, ABA Model Rule of Professional Conduct 5.6(b) prohibits settlement terms that restrict a lawyer’s right to practice.

While such demands by the defense implicate ethical issues, there are ways for you to give defense counsel some assurance of finality after settlement. For example, there is nothing improper in listing all your clients with the same claims against the defendant (whose claims would be encompassed by the proposed settlement) and stating that you have no present intention to go forward with those claims after the settlement. Nor would it be improper for you to represent that you have no present intention to take on additional clients with such claims against the defendant.

“All or nothing” and “walkaway” clauses. Certain provisions in mass tort settlements can raise additional ethical issues. “All or nothing” clauses allow the defendant to walk away from the settlement unless all plaintiffs opt in and accept the agreement. “Walkaway” provisions give the defendant the choice of walking away from the settlement or renegotiating the terms unless a certain set percentage of plaintiffs accept it. Of the two, walkaway clauses present fewer ethical issues for plaintiff counsel.

All-or-nothing clauses can create a “holdout” problem if a client withholds consent in the hope of obtaining a more individually lucrative settlement. This situation forces counsel into an impossible position and a clear conflict of interest between the holdout client and the other clients. Walkaway clauses, on the other hand, allow for flexibility because they do not require 100 percent participation; some clients may decline the settlement without destroying the entire deal. Further, the parties always have the option of returning to the negotiating table and possibly modifying the proposed agreement’s terms.

The class action corollary to the mass tort walkway clause is the so-called
“blow provision.” A blow provision allows defendants to walk away from a settlement agreement if the percentage of opt-outs reaches a certain specified level. But, unlike walkaway clauses that must be disclosed to clients as part of the informed consent process, the details of blow provisions tend to be confidential and usually take the form of private letter agreements between class counsel and defense counsel.

Successful resolution of a case—whether in a class action or a mass tort—is the goal of litigation. Recognizing and abiding by the applicable ethical and substantive obligations in the settlement context is of paramount importance—even if your case ends in a different posture than when it started.

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Notes
1. Current jurisprudence requires a party seeking certification to “affirmatively demonstrate” compliance with Rule 23 and the district court may only certify a class after a “rigorous analysis” of each Rule 23 requirement, even if it entails delving into the underlying merits of the party’s claim. See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551–52 (2011); see also In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) (holding that a district court must make a “definitive assessment of Rule 23 requirements” and resolve “factual disputes relevant to each Rule 23 requirement”).

2. An example is the recently settled In re Genetically Modified Rice Litigation, No. 4:06-MD-1811-CDP, 2011 WL 5024548 (E.D. Mo. Oct. 21, 2011). The case arose out of the contamination of the U.S. rice supply with unapproved, genetically modified rice seeds. After class certification was denied, the case proceeded as a mass tort because the merits of the case were strong and the damages of many plaintiffs were substantial. Following a series of bellwether trials, all of which resulted in plaintiff verdicts or midtrial settlements, the defendants settled the cases as a mass tort for $750 million. See E. Dist. Mo., U.S. Dist. Cts., Genetically Modified Rice Litigation, www.moed.uscourts.gov/node/115.


6. This applies to class action settlements of Rule 23(b)(3) classes. In contrast, settlements arising under Rule 23(b)(1) or Rule 23(b)(2) are generally “non-opt-out” settlements.

7. See Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894–95 (10th Cir. 1975) (finding attorney could not enter into a final settlement that was binding on non-consenting plaintiffs).

8. See e.g. In re World Trade Ctr. Disaster Site Litig. v. In re Bank Am. Corp. Secs. Litig., 131 S.Ct. 1348, 185 (S.D.N.Y. 2011) (noting that “a substantial number of plaintiffs of those eligible to settle were not communicating with, or accepting communications from, their counsel, and therefore would not, or could not, exercise choice whether to settle or continue with their lawsuits”).


10. See e.g. In re Class A Corp. Secs. Litig., 350 F.3d 747, 752 (8th Cir. 2003) (court granted final approval of class action settlement over class representative’s active opposition).

11. See e.g. In re Guidant Corp., 2009 WL 5195841 at *11–12.

12. See e.g. Rodriguez v. W. Publig. Corp., 563 F.3d 948, 968 (9th Cir. 2009).


15. See Fed. Jud. Ctr., supra n. 13, §10.22 (“Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.”). Section 13.21 of the manual also notes that the “fiduciary obligations” of leadership counsel “may survive the dismissal of their own clients.”

16. See id., §13.24 (“Defendants have attempted to condition settlement on an agreement that plaintiff’s counsel will not represent other persons with similar claims, but it is an ethical violation for an attorney to enter into or propose such an agreement.”); see also Comm. on Ethics & Prof. Resp. Formal Op. 93-371 (ABA 1993) (“A lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context.”).

17. Model R. Prof. Conduct 5.6(b) (ABA 2011) (“A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”); see e.g. Tradewinds Airlines, Inc. v. Soros, No. 08 Civ. 5901 (JFK), 2009 WL 1231695 at *9 (S.D.N.Y. May 12, 2009) (noting that settlement agreement does not restrict attorney from representing other clients against defendant in the future and that such a restrictive covenant would violate ethical rules); see also Hu-Friedy Mfg. v. Gen. Elec. Co., No. 99 C 0762, 1999 WL 528545 at *2–3 (N.D. Ill. July 19, 1999) (declining to interpret confidentiality provision as restricting the use of information obtained in the prior action because it would be contrary to the policy of Rule 5.6(b)).

18. See e.g. Nilson v. Prudential Secs. Inc. (In re Prudential Secs. Inc. Ltd. Partnership Litig.), Nos. 95-9209(L), 96-7147(C), 96-7159(C), 96-7235(C), 96-7199(C), 96-7197(C), 96-7277(C), 1996 WL 739258 at *1 (2d Cir. Dec. 27, 1996) (noting that a blow provision allowed defendants to withdraw from settlement if class members asserting more than $10 million in claims opted out of the class).

19. See In re HealthSouth Corp. Secs. Litig., 334 F. Appx. 248, 250 n.4 (11th Cir. 2009) (per curiam) (“The threshold number of opt outs required to trigger the blow provision is typically not disclosed and is kept confidential to encourage settlement and discourage third parties from soliciting class members to opt out.”).