

Spring 1999

Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm

Linda S. Mullenix

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 Val. U. L. Rev. 413 (1999).

Available at: <https://scholar.valpo.edu/vulr/vol33/iss2/1>

This Monsanto Lecture is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



VALPARAISO UNIVERSITY LAW REVIEW

VOLUME 33

SPRING 1999

NUMBER 2

Monsanto Lecture

RESOLVING AGGREGATE MASS TORT LITIGATION: THE NEW PRIVATE LAW DISPUTE RESOLUTION PARADIGM

Linda S. Mullenix*

Synopsis: In one of the most famous law review articles ever written, *The Role of the Judge in Public Law Litigation*, Professor Abram Chayes in 1976 described a paradigm shift away from bipolar traditional litigation to a new model of public law litigation. More than twenty years later, at the end of the twentieth century, Professor Chayes's public law paradigm no longer accurately captures the terrain of complex disputes nor reflects the methods of private aggregate dispute resolution. In American jurisprudence, the end of the twentieth century has been the great era of aggregate private dispute resolution, a paradigm that shares some attributes of the public law model. However, the public law model differs in significant respects. Aggregate private dispute resolution has stretched the boundaries of the judicial function, arrogating to private parties and an array of judicial surrogates vast powers for resolving aggregate claims. This aggregative private dispute resolution paradigm resembles nothing so much as private legislation with wide-reaching effects, carrying the imprimatur of judicial oversight and approval, but frequently accompanied by troubling questions about fairness, adequate representation, and the subtle merger of legislative, administrative, and judicial functions.

* Bernard J. Ward Centennial Professor of Law, University of Texas School of Law. Georgetown University Law Center (J.D., 1980); Columbia University (M.Phil. & Ph.D., 1974 & 1977); City College of New York (B.A., 1971). The author wishes to thank the Monsanto Fund for sponsoring this lecture series, and the University of Valparaiso School of Law for its invitation and hospitality.

I. INTRODUCTION

In 1976 Professor Abram Chayes of the Harvard Law School published what has been deemed one of the most influential pieces of legal scholarship ever written: *The Role of the Judge in Public Law Litigation*.¹ As described by Professor Richard Marcus more than a decade later, Professor Chayes's article "was promptly embraced as a classic, perhaps an icon."² Professor Chayes's article had such impact and lasting influence because his article described a paradigm shift in American jurisprudence away from the traditional, two-party lawsuit into the modern, sprawling complex litigation.

Nearly two decades later, Professor Chayes's public law model has been embraced as the conceptual model for explaining and resolving mass tort litigation. Yet, just as Professor Chayes's public law model was dated even at the time he described it, the public law model also fails to capture the dynamics of modern mass tort litigation. Thus, the public law model is not only *not* descriptive of modern mass tort litigation, but this model also fails as a prescriptive basis for resolving these cases.

If it is true that Professor Chayes's great insight was to capture a significant paradigm shift in the litigation landscape of the 1950s and 1960s, then a new descriptive model is necessary to capture the litigation landscape of two subsequent decades since Professor Chayes wrote, that is, the 1980s and the 1990s. Although the types of complex litigation that Professor Chayes identified have remained a fixture in the federal courts, these two subsequent decades have been the era of mass tort litigation, a type of litigation that had not truly emerged at the time Professor Chayes formulated his thesis.

Accurately characterizing modern mass tort litigation is important because this litigation has generated a new, hybrid form of dispute resolution that shares attributes of both the private law and public law models. More than twenty years later, at the end of the twentieth century, Professor Chayes's public law paradigm no longer accurately captures the terrain of complex disputes nor reflects the methods of nineteenth-century private dispute resolution.

¹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For an analysis of the impact and influence of Professor Chayes's article, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 MICH. J. L. REF. 647 (1988).

² See Marcus, *supra* note 1, at 648.

In American jurisprudence, the end of the twentieth century has been the great era of aggregate private dispute resolution, a paradigm that shares some attributes of the public law model, but it also differs from the public law model in significant respects. This form of aggregate private dispute resolution has stretched the boundaries of the judicial function, arrogating to private parties and an array of judicial surrogates vast powers for resolving aggregate claims. This aggregative private dispute resolution paradigm resembles nothing so much as private legislation with wide-reaching effects, carrying the imprimatur of judicial oversight and approval, but frequently accompanied by troubling questions about fairness, adequate representation, and the subtle merger of legislative, administrative, and judicial functions.

This article first canvasses Professor Chayes's articulation of the public law model, the context in which Professor Chayes generated his thesis, and the late twentieth-century expansion of the public law model to encompass mass tort litigation. The article then explains why the public law model is an inapt explanatory paradigm for mass tort litigation.

The discussion then focuses on four dimensions of the late twentieth-century mass tort and other aggregate litigation that implicate special concerns about these cases and that suggest that the paradigm is closer to private legislation without meaningful representation. These include issues relating to solicitation, adequate representation, and the role of objectors and intervenors. This discussion also briefly canvasses problems of copy-cat litigation, forum-shopping, attorneys' fees, and other matters.

The article concludes with broad observations on the need for a new descriptive model to capture the contemporary mass tort litigation paradigm.

II. THE CLASSIC DESCRIPTION OF PUBLIC LAW LITIGATION

A. *Professor Chayes's Public Law Model*

The central thesis of Professor Chayes's article was to contrast the "traditional" civil lawsuit with the new litigation model that emerged mid-twentieth century in the federal courts. Professor Chayes identified five salient characteristics of the traditional civil case: (1) the lawsuit was bipolar; (2) the litigation was retrospective; (3) the right and the remedy were interdependent; (4) the lawsuit was a self-contained episode; and

(5) the process was party-initiated and party-controlled.³ Professor Chayes then described a new “public law” model of adjudication as one “sprawling and amorphous,” “subject to change over the course of the litigation,” “suffused and intermixed with negotiating and mediating processes at every point” with “the judge as a dominant figure in organizing and guiding the case, as well as continuing involvement in administration and implementation of relief.”⁴

Having described this paradigm shift, Professor Chayes identified the types of litigation embraced by this new public law model:

School desegregation, employment discrimination, and prisoners' or inmates' rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these field

³ See Chayes, *supra* note 1, at 1282-83.

⁴ *Id.* For Professor Chayes's morphology of public law litigation, see *id.* at 1302, reproduced below:

- (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and the parties.
- (2) The party structure is not rigidly bilateral but sprawling and amorphous.
- (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
- (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
- (5) The remedy is not imposed but negotiated.
- (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
- (7) The judge is not passive, his function limited to analysis and statement governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
- (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

display in varying degrees the features of public law litigation.⁵

As others have noted, Professor Chayes's description was dated even at the time he wrote and published his observations.⁶ Published in 1976, Professor Chayes's analysis reflected dramatic changes in the litigation landscape of 1950s and 1960s: an era marked at the outset by the Supreme Court's 1954 decision in *Brown v. Board of Education*.⁷ Significantly, his list makes no mention of mass tort litigation, and for good reason: in 1976 the modern dispersed mass tort had not yet appeared on the litigation horizon. By the end of the 1970s, after Professor Chayes published his classic description of public law litigation, the federal (and later state) courts would begin to experience the influx of the first generation mass tort cases: litigation related to Agent Orange, asbestos, the Dalkon Shield, Bendectin, and DES.

Professor Chayes's vision, then, was cabined by a backward-looking but nonetheless accurate reflection of events in the 1950s and 1960s. Of especial importance to this vision was the fact that the decade from the early 1960s to the early 1970s, when Professor Chayes would have been writing his classic article, marked an unusual convergence of both sweeping federal substantive legislation, coupled with massive federal procedural reforms. Thus, after the assassination of President John Kennedy in 1963, President Lyndon Johnson was able to effectively work with Congress to enact a sweeping domestic legislative agenda, otherwise known as "The Great Society." Among the most familiar legislation, Congress in the 1960s enacted the Civil Rights Acts of 1964⁸

⁵ *Id.*

⁶ See Marcus, *supra* note 1, at 648. Assessing the lasting impact of Chayes's article, Professor Marcus concluded that:

[T]he returns are mixed: measured in terms of doctrinal impact, a traditional yardstick for evaluating legal scholarship, the article was a failure.... But this fate may have been inevitable since the article was bereft of any doctrinal prescription. Perhaps more basically, Chayes's focus on public law litigation seems ill-conceived because the incidence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as he wrote.

Id.

⁷ 347 U.S. 483 (1954).

⁸ The Civil Rights Act of 1964 contained several titles: Titles I and VIII contained voting rights provisions; Titles III and IV dealt with school and public facility desegregation; Title IX authorized federal intervention in lawsuits claiming a denial of equal protection. See generally *The Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241-68.

and 1968,⁹ the Voting Rights Acts of 1965¹⁰ and 1970,¹¹ and in the 1970s such legislation as the Civil Rights Attorneys' Fees Awards Act of 1976.¹²

Thus, Congress in the 1960s enacted federal substantive legislation that would affect the social, political, economic, and judicial landscape for decades to come. What also is highly significant, however, is that at this same time the federal judiciary, through its constituent rulemaking committees, simultaneously rewrote many of the Federal Rules of Civil Procedure to expand the scope of the civil action. Thus, in 1966, Congress enacted a "rules package" of substantially amended rules,¹³ most notably, Rule 18,¹⁴ dealing with joinder of claims and remedies, Rule 19,¹⁵ dealing with necessary and indispensable parties and renamed "Joinder of Persons Needed for a Just Adjudication," Rule 20,¹⁶ dealing with permissive joinder of parties; Rule 23¹⁷ the class action rule, and Rule 24,¹⁸ dealing with intervention.

This historic 1966 rules package was united by an overarching philosophy. By the early 1960s, the Advisory Committee on Civil Rules—with more than twenty years experience of the original rules—had concluded that certain federal rules actually were functioning

⁹ 42 U.S.C. §§ 1983 *et seq.* (1994). The 1968 Civil Rights Act added provisions to the federal criminal laws to deal with civil rights violence, see 18 U.S.C. § 245 (1994); and Title VII provided for a comprehensive fair housing law. Other provisions related to Native American rights, see titles II-VII and provisions on civil disobedience and rioting. See generally *The Civil Rights Act of 1968*, Pub. L. No. 90-284, 82 Stat. 73-92.

¹⁰ See generally *The Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437-46.

¹¹ 42 U.S.C. § 1973 (1994); see also generally *The Voting Rights Act Amendments of 1970*, Pub. L. No. 91-285, 84 Stat. 314-19.

¹² 42 U.S.C. § 1988 (b) (1994); see also generally *The Civil Rights Attorney's Fees Awards Act of 1976*, Pub. L. No. 94-559, 90 Stat. 2641.

¹³ For commentary on the 1966 amendments to the federal rules, see generally Benjamin Kaplan, *Continuing the Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) and Sherman Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966).

¹⁴ FED. R. CIV. P. 18 ("Joinder of Claims and Remedies").

¹⁵ FED. R. CIV. P. 19 ("Joinder of Persons Needed for a Just Adjudication"). For the Supreme Court's flexible interpretation of the 1966 amendment to this rule, see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

¹⁶ FED. R. CIV. P. 20 ("Permissive Joinder of Parties").

¹⁷ FED. R. CIV. P. 23 ("Class Actions").

¹⁸ FED. R. CIV. P. 24 ("Intervention"). The Advisory Committee on Civil Rules also amended FED. R. CIV. P. 17 ("Parties Plaintiff and Defendant; Capacity," dealing with the so-called real party-in-interest rule). For the Supreme Court's liberal interpretation of the 1966 amended rule relating to intervention, see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). See also *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

contrary to the spirit of the 1938 rulemakers.¹⁹ Rather than facilitating the liberal joinder of parties and claims, by the early 1960s the federal rules had instead calcified into its own set of rigid, inflexible, and limiting principles that defeated the liberal intent of the 1938 rulemakers. Hence, the 1966 rules package was intended to correct the inflexibility that had accreted to the joinder provisions. Indeed, the Advisory Committee Notes to each amended rule reflected the problems with the original rule and the new intended liberal use for the amended rules.

Three points are in order. First, it is easy to underestimate the impact of the 1966 revisions to the federal rules. The rulemakers in the early 1960s substantially rewrote or redrafted all the joinder rules to eliminate rigid categories, vague and uncertain language, and ambiguous and uncertain terminology. Because we have lived with these rule amendments for the past thirty years, it is easy to lose sight of the fact that the 1966 amendments embodied a wholesale, sweeping rule reform intended to provide maximum flexibility to accomplish joinder of claims and parties in one civil action.

Second, the wholesale revision to the joinder rules in turn encouraged and ushered in a new age of complex litigation that essentially had not existed in federal practice prior to the 1966 amendments. There is not, for example, a large corpus of federal class action decisional law prior to 1966, chiefly because class actions were not a major portion of the federal court dockets and the original class action rule was difficult to construe and apply.²⁰

The flexibility and liberal ethos of the 1966 rule amendments basically invited complexity, encouraging attorneys to join everyone and everything into one civil action. Indeed, the amended intervention rule provided an invitation to persons who were outside the litigation to join in as well. In short, the 1966 rules package made possible modern federal complex litigation as we know it.

In the same spirit that inspired the 1966 rule amendments, Congress in 1968 enacted the federal multidistrict litigation statute²¹ that liberally

¹⁹ The Federal Rules of Civil Procedure were promulgated under the authority of the Rules Enabling Act, 28 U.S.C. §§ 2071-2072 (1994), and were enacted into law by Congress in Sept. 16, 1938. See FED. R. CIV. P. 1 advisory committee's notes.

²⁰ For an excellent analysis and discussion of the types of cases, by decades, on federal court dockets, see generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA* (1992).

²¹ See 28 U.S.C. § 1407 (1994).

provided for the transfer of cases within the federal system to one venue for coordinated pre-trial proceedings.²² The MDL statute, then, also made possible modern federal complex litigation as we know it. It also should be noted that this same period was the era in which the federal courts, led by the Supreme Court, expanded standing doctrines to liberally permit access to the federal courts—yet another factor that contributed to the burgeoning complex litigation in the 1960s and 1970s.²³

Third, and most significantly, this complete revamping of the federal joinder rules coincided with the concurrent congressional enactment of new, sweeping substantive legislation that provided American citizens with new substantive rights. Thus, 1966 marks a unique convergence in American history: the creation of a vast array of new substantive rights that could be harnessed to newly-enacted powerful procedural means for enforcing those rights.

Perhaps the centerpiece of the 1966 amendments was the complete redrafting of Rule 23, the federal class action rule. As has been often retold,²⁴ Rule 23 was entirely rewritten in 1966 to eliminate the original rule's rigid categories and to provide maxim flexibility for pursuing relief through this form of representative litigation.²⁵ After canvassing the myriad problems that the original class action rule had encountered in practice, the Advisory Committee indicated:

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in

²² The standard for creation of a multidistrict litigation, or "MDL," is quite liberal. The rule simply provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

28 U.S.C. § 1407 (a) (1994); *see also* The Multidistrict Litigation Act, Pub. L. No. 70-296, 82 Stat. 109 (1968).

²³ *See, e.g.,* United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

²⁴ *See, e.g.,* Amchem Prods. Co., Inc. v. Windsor, 117 S. Ct. 2231, 2245-47 (1997).

²⁵ *See* FED. R. CIV. P. 23 advisory committee's note (1966 amendment to Rule). *See also generally* Cohn, *supra* note 13; Kaplan, *supra* note 13.

judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.²⁶

It is no surprise, then, that the mid-1960s ushered in a decade of bustling class action activity. This decade—upon which Professor Chayes reflected—was chiefly the decade of the great Rule 23(b)(2) injunctive class action. Attorneys quickly learned to harness the Rule 23(b)(2) class action to seek remediation under the civil rights laws and related legislation. Hence, the publication of Professor Chayes's classic article in 1976, exactly one decade after the 1966 historic rules package, aptly captured the synergistic interaction of the new federal substantive law coupled with liberalized federal procedure. As Professor Chayes observed, this combination of events resulted in a paradigm shift to a new type of litigation, his public law model.

B. The Public Law Model and Mass Tort Litigation

1. The Public Law Model Applied to Mass Tort Litigation

Professor Chayes's description of the public law model is insightful, and it did captivate the essence of the paradigm shift that had occurred in the prior decade. In hindsight, however, Professor Chayes's model captured a brief historical moment; he did not anticipate the modern dispersed mass tort litigation or foresee the types of complex litigation that would vex the federal judiciary at the end of the century.

The question, then, is to what extent Professor Chayes's public law model has narrative or prescriptive power for contemporary complex litigation, particularly mass tort litigation. The salient question is whether complex mass tort cases, based as they are in the adjudication of private harms, are yet another model of civil dispute resolution anchored in the "public law" concept of the 1960s.

Professor David Rosenberg of Harvard Law School and Judge Jack Weinstein of the Eastern District of New York have been leading proponents of this view.²⁷ Judge Weinstein, famously the federal judge

²⁶ See FED. R. CIV. P. 23 (advisory committee's note to 1966 amendment).

²⁷ See, e.g., David Rosenberg, *Class Actions For Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *Toxic Tort Litigation: Crisis or Chrysalis? A Comment on Feinberg's Conceptual Problems and Proposed Solutions*, 24 HOUS. L. REV. 183

who negotiated the *Agent Orange* settlement²⁸ and has since managed numerous other mass tort cases,²⁹ readily analogized mass tort litigation to the 1960s institutional reform litigation with which he was very familiar. Thus, Judge Weinstein explained:

Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to protect constitutional rights. In dealing with such mass tort cases as *Agent Orange*, asbestos, and DES, I have sensed an atmosphere similar to that of public interest cases I have supervised, such as the Mark Twain school desegregation case, the reform of the Suffolk County Developmentally Disabled Center, and jail and prison reform litigation.

Mass tort cases and public litigations both implicate serious political and sociological issues. Both are restrained by economic imperatives. Both have strong psychological underpinnings. And both affect larger communities than those encompassed by the litigants before the court.³⁰

Applying this public law model to the mass tort context,³¹ Judge Weinstein concluded:

(1987); David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849 (1984)

²⁸ See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); see also *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

²⁹ See, e.g., *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993); *In re DES Cases*, 789 F. Supp. 552, *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E.D. & S.D.N.Y. 1990).

³⁰ Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 473-74 (1994) (internal citations to cases deleted).

³¹ Discussing the judge's role in mass tort litigation, Judge Weinstein states:

In a mass tort case, a judge's failure to appreciate the reach and importance of his or her decisions is tantamount to abdication of responsibility. Much as the President steers the ship of state at the head of the executive branch, each federal judge, with respect to each case that comes before him or her, stands watch over the judicial branch. The trial judge is in most cases the final arbiter. If the trial judge fails to respond to the needs of the public, the only recourse is to appellate judges who are narrowly confined in matters of fact and who are usually in a far worse position than the nisi prius judge to understand the full scope of a litigation. A rigid and unresponsive

Mass tort cases unfortunately do not involve the application of legislative schemes representing careful analysis of the policy problems presented. By their very nature, these cases involve unanticipated problems with wide-ranging social and political ramifications. A judge does not “legislate from the bench” simply because he or she considers the broadest implications of his or her decisions in such a case. Judges not only may take such a view; they must.³²

Thus, Judge Weinstein easily extrapolated from his 1960s experience of institutional reform litigation³³ to the 1970s and 80s phenomenon of mass tort litigation. Not only did he view these cases as akin to the sprawling, amorphous public law cases of the 1960s, but the public law model also supplied Judge Weinstein with the rationale and justification for a modern type of managerial judging that he endorses:

[J]udges, particularly in mass tort cases, cannot and should not remain neutral and passive in the face of problems implicating the public interest. In mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately. The judge cannot focus narrowly on the facts before the court, declining to take into account the relationship of those facts to the social realities beyond the courthouse door. The judge cannot

judiciary, blind to the needs of various communities and of society at large, is far more likely to cause an erosion of public confidence in legal institutions than a judiciary perceived as overly interested in resolving the problems before it.

Id. at 541.

³² *Id.* (citations deleted).

³³ In drawing the analogy, Judge Weinstein cites to classic 1960s-style institutional reform litigation, citing *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991) (action brought by United States to desegregate colleges and universities in Alabama); *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (constitutional challenge to state legislative reapportionment brought by black voters); *Ayers v. Alain*, 674 F. Supp. 1523 (N.D. Miss. 1987) (action against various state officials alleging constitutional and civil rights violations from racially dual system of higher public education), *rev'd*, 893 F.2d 732 (9th Cir.), *aff'd* 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated sub nom.* *United States v. Fordice*, 112 S. Ct. 2727 (1992). See Weinstein, *supra* note 30, at 540 n.286.

depend upon the slow creep of case-by-case adjudication to yield just results and just rules of law.³⁴

In this respect the problem is analogous to that of institutional reform litigation.

2. The Public Law Model and Mass Tort Litigation: An Inapt Paradigm

As I have indicated elsewhere,³⁵ the Chayes's public law model, while superficially appealing as a descriptive model for mass tort cases, does not translate well into mass tort litigation. In some ways mass tort cases do fit the description of the public law paradigm. Mass tort cases are "sprawling and amorphous litigation," "subject to change over the course of the litigation," and "suffused with negotiating and mediating processes at every point." In many mass tort cases the "judge is the dominant figure in organizing and guiding the case."

But the analogy ends there. In short, the modern mass tort litigation is, in significant ways, dissimilar from the public law model.³⁶ Many of these dissimilarities are crucial to understanding that modern mass tort litigation has given rise to a new form of dispute resolution that represents nothing so much as aggregative private legislation often without the benefit of meaningful representation. What is needed, then, is a new descriptive paradigm for mass tort litigation and the way these cases are resolved.

³⁴ Weinstein, *supra* note 30, at 540-41 (internal citations deleted). Judge Weinstein specifically invoked institutional law reform litigation with which he had been involved:

In the Mark Twain Junior High School desegregation cases, special master and I had to consider neighborhood ethnic relationships, housing, parks, police, transportation, and other problems. We also had to contend with diverse parents' groups and federal, state, and city authorities. I have had the same experience in other institutional reform cases, as have other judges...

Id. See also generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

³⁵ Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994).

³⁶ Professor Marcus seems to believe that there is some application of the Chayes model to certain types of aggregate tort litigation. See Marcus, *supra* note 1, at 671-75. But the type of tort litigation Professor Marcus describes (essentially injunctive litigation to protect workers against a smoked-filled environment) is more readily analogized to the public law model than other types of products or pharmaceuticals mass torts.

Also, when I speak of mass tort litigation, primarily I am referring to mass personal injury litigation such as the Agent Orange or asbestos litigation or the array of defective products and pharmaceutical litigation that courts have experienced during the last decade.³⁷ There have been other types of mass tort litigation, however, that have not been pursued based on personal injury claims, yet these cases have been swept up in the rubric of mass tort litigation.

For example, the *Castano* nicotine-addiction class, which was a nationwide class of claimants, was brought under nine separate causes of action³⁸ and explicitly excluded personal injury claims.³⁹ Nonetheless, many continue generically to refer to *Castano* as a mass tort case. The *School Asbestos Litigation*, which spanned the decade from the early 1980s through the mid-1990s, dealt with the abatement of asbestos from school buildings and was essentially grounded in breach of contract and property claims, although some tort theories were alleged.⁴⁰ Additionally, the mass tort label has been expanded to include class actions brought for alleged human rights violations⁴¹ under various theories of federal common and statutory law.⁴²

³⁷ Mass tort have been brought relating to orthopedic pedicle screws, see *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997); fen-phen, see *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 1999 WL 106887 (E.D. Pa. 1999), *Oren v. Stafford*, 34 F. Supp. 2d 906 (D. N.J. 1999); pacemaker leads, see *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997); silicone breast implants, see *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997), *In re Breast Implant Cases*, 942 F. Supp. 958 (E. & S.D.N.Y. 1996), and *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 WL 114580 (N.D. Ala. 1994); penile implants, see *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); blood products, see *In re Rhone-Poulenc, Rover, Inc.*, 51 F.3d 1293 (7th Cir. 1995); heart valves, see *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992); and lead paint, see *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 571 (S.D.N.Y. 1995), *Ashton v. Pierce*, 541 F. Supp. 635 (D.D.C. 1982).

³⁸ *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd* 84 F.3d 734 (5th Cir. 1996) (in which nine causes of action pleaded were fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, negligence and negligent infliction of emotional distress, violation of consumer protection statutes under state law, breach of express warranty, breach of implied warranty, strict products liability, and redhibition pursuant to the Louisiana Civil Code).

³⁹ *Id.* at 548 n.2 ("The Court specifically makes no findings concerning class certification involving personal injury damages at this time, as these allegations are not before the Court.").

⁴⁰ *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (in which the claims were based on negligence, strict liability, intentional tort, breach of warranty, concert of action, and civil conspiracy).

⁴¹ See *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995); see also generally *Sol Schreiber & Laura D. Weissbach, In Re Estate of Ferdinand E. Marcos, Human*

Even further removed from the personal-injury mass tort litigation are small claims consumer class actions that nonetheless may be based on various tort theories such as fraud or misrepresentation. However, many of the characteristic features of mass tort litigation—and the problems that these cases inspire—apply with equal force to small claims consumer class actions.

C. *The Mass Tort Public Law Misfit*

There are many ways in which mass tort litigation does not fit well within the public law paradigm.⁴³ First, mass tort cases typically involve private parties alleging private harms. Mass tort cases—at least first generation mass tort cases⁴⁴—certainly begin as a simple tort brought by an individual against a private party or, more usually, against a corporate entity. With the exception of the Agent Orange litigation, mass tort cases do not involve litigation against federal or state governments or other governmental entities.

Second, mass tort litigation also is not typically brought seeking the reform of public or quasi-public institutions, such as school systems, mental health facilities, prison systems, or legislative districting. With the recent exception of the tobacco litigation, mass tort litigation rarely is pursued by state attorney generals or other public officials acting *parens patrie* on behalf of citizens, as these officials would in antitrust litigation, for example. Thus, very little mass tort litigation is directly invested with a public purpose.

However, some small claims consumer actions may result from governmental investigations into the activities of certain regulated industries. Thus, it is not uncommon for a class action against an insurance company to originate with an investigation by a state attorney

Rights Litigation: A Personal Account of the Role of the Special Master, 31 LOY. L.A. L. REV. 475, 485 (1998).

⁴² See, e.g., *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (federal common law task of enforcing international law prohibiting torture); Alien Tort Statute, 28 U.S.C. § 1350 (1994); Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992).

⁴³ These comments are adapted and expanded from my previous article. See Mullenix, *supra* note 35, at 581-82.

⁴⁴ I characterize the “first generation” of mass torts as the paradigm mass torts that emerged at the end of the 1970s, namely, litigation involving Agent Orange, the Dalkon Shield, asbestos, and Bendectin. See Linda S. Mullenix, *Practical Wisdom and Third-Generation Mass Tort Litigation*, 31 LOY. L.A. L. REV. 551, 552-53 (1998).

general's office or a state administrative agency, such as the state insurance department.

Third, the underlying claims in mass tort litigation are grounded in common law tort theories or perhaps applicable state statutory schemes, such as the Texas Deceptive Trade Practices Act.⁴⁵ Mass tort litigation, then, quintessentially is grounded in local law; that is, the determination by state courts or legislatures concerning the rights and duties of private parties in their interactions with one another.

In contrast, the classic public law litigation involves constitutional claims or claims grounded in federal statutory schemes, such as the civil rights or voting rights laws. Such federal legislative schemes embody Congress's intention to federalize remediation across state lines. But there is no federal law of tort, and mass tort litigation remains a creature of state law. As is well-known, the state-based nature of mass tort litigation has contributed greatly to the federal courts' conclusion that multi-state mass tort litigation is not suited for resolution under the federal courts' diversity jurisdiction.⁴⁶

Fourth, the judicial system has grappled with mass tort litigation in a variety of ways, some more controversially and successfully than others. Mass tort litigation has been subjected to various procedural techniques, including consolidations, multidistrict litigation, class actions, alternative dispute resolution, bankruptcy, and the use of an array of judicial surrogates, including guardians, special masters, magistrates, and court-appointed panels and experts.⁴⁷

Viewing just the class action option, courts have certified mass tort cases under all provisions of Rule 23, including Rule 23(b)(1) limited issues classes,⁴⁸ Rule 23(b)(2) injunctive or declaratory classes,⁴⁹ and Rule

⁴⁵ TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (West 1987) (Deceptive Trade Practices Act).

⁴⁶ The Fifth and Seventh Circuits have repudiated attempts to certify multi-claim nationwide class actions that include claimants from all fifty states where choice-of-law differences in state law cannot be solved by recourse to "grouping" similar laws by homogenizing state law differences through use of "Esperanto"-style jury instructions. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

⁴⁷ *See* WEINSTEIN, *supra* note 34, at 128-46 (discussing various procedural techniques for resolving mass tort litigation); *Symposium on Mass Torts*, 31 LOY. L.A. L. REV. 353 (1998) (various articles describing methods for resolving mass tort litigation, including mediation, settlement classes, Chapter 11 bankruptcy, special masters, claims-processing facilities, and arbitration).

⁴⁸ *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997).

23(b)(3) compensatory damage classes.⁵⁰ In short, just as there is no paradigmatic mass tort litigation, there also is no paradigmatic method for resolving these cases.

The classic public law litigation, in contrast, typically was resolved either through a Rule 23(b)(2) injunctive class, or through a consent decree.⁵¹ There can be little doubt that the 1960s and 1970s was the heyday of the Rule 23(b)(2) injunctive-relief class and the great era of the consent decree.⁵² But we do not typically resolve mass torts through either of these auspices. Indeed, with the exception of medical monitoring classes, the Rule 23(b)(2) injunctive class has little or no application in the mass tort context, and no mass tort case has ever been resolved, to my knowledge, through the auspices of a consent decree.

Sixth, and this is a related point, the 1960s-style public law litigation usually involved "homogenous" classes of claimants suffering essentially a common harm, and this group homogeneity made equitable injunctive relief an appropriate form of remediation.⁵³ The modern mass tort litigation, in contrast, often attempts to aggregate "heterogeneous" claimants with highly individualized harms.⁵⁴ Hence, this difference has inspired the great debate whether certain types of mass torts can ever be certified as Rule 23(b)(3) class actions, which require additional findings of predominance of common questions and superiority.⁵⁵ This lack of

⁴⁹ See, e.g., *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992), *overruled on other grounds sub nom. In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) (medical monitoring class).

⁵⁰ See, e.g., *Jenkins v. Raymark Industries*, 782 F.2d 468 (5th Cir. 1986); see also *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

⁵¹ And much of Professor Chayes's analysis discusses the structural consent decree as one of the key features of public law litigation. See Chayes, *supra* note 1, at 1298-1302.

⁵² See, e.g., Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579; see also Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988); Thomas Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988); Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1. Academic interest in the phenomenon of consent decrees has waned in the last decade.

⁵³ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975) ("The very nature of the (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class. Since the class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff.").

⁵⁴ *Id.* at 249. ("Binding all members of a (b)(3) class, however, was not thought by the Advisory Committee to be as fair as binding all members of a (b)(2) class. By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual would not want to be included as a member of the class.").

⁵⁵ See FED. R. CIV. P. 23(b)(3).

predominance of common questions among asbestos claimants was one of the major reasons why the Supreme Court repudiated the asbestos settlement class in *Amchem Products v. Windsor*.⁵⁶

Seventh, mass tort litigation typically does not involve ongoing supervision by the courts or the presiding judge once a mass tort has been settled or otherwise resolved. If mass torts are resolved through settlement, the court's final active participation most likely involves notice to class claimants of the settlement and a fairness hearing to approve the agreement. The conclusion of a bankruptcy resolution of a mass tort operates somewhat similarly, with a process akin to a fairness hearing.

But the parties themselves will implement the settlement or bankruptcy terms, and this will be accomplished by the creation of a claims facility or perhaps a medical monitoring fund or implementation through other private-party auspices, such as mediation or arbitration. In short, in mass tort litigation once the case has been resolved, the presiding judge is out of the loop.

In the classic public law litigation, however, the judicial system may be involved for years in implementing and overseeing injunctive relief or a consent decree.⁵⁷ In addition, courts in the classic public law litigation retain continuing jurisdiction over the litigation. While this is not required by Rule 23(e),⁵⁸ some courts have claimed continuing jurisdiction to enforce the provisions of a settlement agreement.⁵⁹ At any rate, continuing court jurisdiction over a mass tort settlement is rare.

Eighth, mass tort litigation (with a few exceptions) typically is litigation seeking compensatory and exemplary damages, either on an individual or common fund basis. The classic public law litigation, in contrast, was quintessentially equitable in nature, seeking primarily injunctive or declaratory relief or other non-compensatory remediation such as a consent decree. The nature of the claim and remedy is important for Seventh Amendment reasons—thus, mass tort litigation

⁵⁶ 117 S. Ct. 2231, 2249-50 (1997).

⁵⁷ See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part & rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part & vacated in part*, 688 F.2d 266 (5th Cir. 1982).

⁵⁸ See 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1797 (1998 supp.) ("Additionally, although Rule 23(e) requires court approval of any settlement agreement, it does not require the court to retain continuing jurisdiction once the agreement has been approved to ensure that it is enforced appropriately.").

⁵⁹ *Id.*

implicates a right to trial by jury,⁶⁰ whereas the 1960s-style public law litigation, seeking equitable relief, did not.

It is quite likely that there are many other reasons why modern mass tort litigation does not resemble the public law paradigm, but where does this leave us? Judge Weinstein's point (and those who agree with him that the public law paradigm is a useful model for thinking about mass tort litigation) is that the public law paradigm justifies a 1960s-style activist judiciary when resolving these cases. The public law paradigm also justifies expanding traditional doctrine for the community good, as defined by the managerial judge. For example, Judge Weinstein endorses a more restrictive view of protective orders in mass tort cases that affect the community. Thus, he favors more public disclosure of and less protection for corporate secrets.⁶¹

But if mass tort litigation does not resemble the public law model in most significant respects, then what are the lessons from this paradigm for the resolution of mass tort cases? Because I view mass tort litigation as quite dissimilar from the classic public law litigation of the 1960s, I think that it is difficult to draw any instructive lessons. More importantly, I do not believe that the 1960s public law model can be used to justify creative expansion (or contraction) of traditional doctrine in mass tort cases. If judges wish to abrogate tradition doctrine (as for example, Judge Weinstein's view of protective orders), then this mass tort activism must be justified on some other reasoned basis than merely the suggestion that mass tort cases are the 1990s version of public law litigation.

Even more troubling, most mass tort litigation is not resolved in any fashion remotely resembling the way in which public law litigation was resolved in the 1960s and 1970s. In reality, the judiciary is much less involved with either the resolution or the implementation of remedies in

⁶⁰ *Castano v. American Tobacco Co.*, 84 F.3d 734, 751 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

⁶¹ See WEINSTEIN, *supra*, note 34, at 69-72:

[I]n cases dealing with sociopolitical problems, the court must look to the effect on the community. The individual litigant's needs cannot be the court's sole concern. The mass tort case is, as already noted, similar to an institutional reform case in its impact. The public, which created and funds our judicial institutions, depends on those institutions to protect it. Sometimes the needs of individual members of the community must yield to those of the community as a whole.

See also Weinstein, *supra*, note 30, at 511-19.

mass tort cases. Admittedly, there are several prominent and well-known "mass tort judges" throughout the federal judiciary. But there also are many mass tort cases where the judge, having received the mass tort on his or her docket, then structures a litigation bureaucracy and sends the attorneys forth to broker a settlement and does not see the attorneys again until a settlement is accomplished. Rather, we have moved to some other model that is chiefly characterized by a privatization of mass tort dispute resolution.

In this model, the parties—through an array of private surrogates—negotiate some compromised resolution of aggregate claims. In this model, the judge is involved to the extent of conferring a judicial imprimatur on a negotiated resolution of the mass claims. After the conferral of the judicial imprimatur, private auspices then administer claims relief. Notwithstanding a great deal of rhetoric to the contrary, in this model the role of the judiciary is quite minimal; it serves as a kind of filing office for grievances, a brokerage house for structuring attorney committees, and a blessings-office for compromised claims.

III. MASS TORT LITIGATION: PRIVATE AGGREGATE CLAIM RESOLUTION

My thesis is this: mass tort litigation at the end of the twentieth century has engendered a shift in the litigation landscape away from 1960s-style public law litigation. Modern mass tort litigation represents a kind of privatization of aggregate claims resolution. What is confusing is that this litigation *looks as though* it is resolved through traditional judicial auspices, but in reality little of mass tort litigation actually is filtered through judicial process.

The modern mass tort paradigm instead involves the wholesale resolution of aggregate private claims through private auspices without the significant involvement of the very people whose claims are being resolved in wholesale fashion. Thus, the mass tort paradigm resembles more closely private legislation implemented through private administrative means but still sanctioned with a judicial imprimatur.

Mass tort litigation and late twentieth-century small claims consumer class actions support the thesis that we have moved to a model of the privatization of aggregate claim resolution. It is difficult to map the terrain of mass tort litigation, in part because no two mass tort litigations are alike.⁶² Nonetheless, these cases illustrate interesting

⁶² See Mullenix, *supra*, note 44, at 553.

cracks along the fault lines of aggregate dispute resolution. A discussion of some of these problems illuminates the ways in which modern mass tort and other aggregate litigation have exacerbated issues relating to adequate representation and fairness in resolving these cases.

A cautionary note is in order. The following discussion, similar to Professor Chayes's seminal article, describes "shifts in activities and suggests implications."⁶³ Like Professor Chayes's musings, these comments are highly impressionistic, not authoritative, nor a source of empirical data. Indeed, they are not based on any empirical data. Similar to Professor Chayes's article, it is hoped that a description of these issues will serve as a stimulus to others "that will give content to these musings."⁶⁴ Finally, I reach no *normative* conclusions about the activities that I will describe. I intend only to provide observations about the development, progress, and prosecution of these cases in the federal and state judicial systems.

A. *Solicitation of Claimants*

There is no doubt that many, if not most, mass tort litigations begin with a plaintiff who has been wronged and who is suffering from some harm, injury, or disease. Many, if not most, of the first and second generation mass torts also began with an injured plaintiff seeking the services of an attorney. But as the mass tort phenomenon has seeped into the public consciousness and has permeated throughout the legal culture over the last twenty years, we now have third-generation mass tort litigation that is sometimes not initiated by an individually-injured plaintiff. Instead, we sometimes now have attorneys conceiving of the

⁶³ Marcus, *supra*, note 1, at 652. Professor Marcus characterizes Professor Chayes's article as a "distinctive piece of scholarship for several reasons":

First, it is almost bereft of traditional doctrinal analysis. At most, it describes ways in which doctrine does not fit shifts in activity and suggests implications. Second, the article is highly impressionistic. Although it cites cases, it uses them neither as authority nor as a source of empirical data. Third, it is far from specific on how the rules that are discussed should be regauged to accommodate the shift Chayes described in the character of litigation. At most, the article might act as a stimulus for work by others that would give content to these musings. Finally, it tied the characteristics of "mundane" procedural rules to broad issues of social policy, hardly the norm of much procedural scholarship at the time.

Id.

⁶⁴ *Id.*

mass tort and then finding the client or, in the context of mass tort litigation, finding the thousands of clients.

A few points are in order. In many jurisdictions there is generally nothing wrong with this,⁶⁵ or at least there are few sanctions for transgressing solicitation rules, except for egregious violations.⁶⁶ Some states have enacted statutes to curb in-person direct solicitation after mass accidents, such as airplane crashes.⁶⁷ But these rules do not apply to personal-injury dispersed-mass torts. Nor they do they apply to other types of aggregate litigation, such as small claims consumer classes. Indeed, the Model Rules of Professional Conduct were not drafted with complex litigation in mind and certainly not with the concept of the modern mass tort.⁶⁸

Thus, if a client has already contacted an attorney and entered into a professional relationship, then no solicitation rule is breached if the attorney solicits other clients with similar claims.⁶⁹ In Texas, for example, an attorney who does not even have an initial client may place a State Bar-approved advertisement in the newspapers or broadcast a solicitation on television, seeking persons who have taken a pharmaceutical or used a particular product.

As the breast implant litigation has demonstrated, modern advertising techniques can effectively expand classes exponentially beyond the original estimates of possible claimants. Thus, expansive attorney advertising techniques, coupled with virtually negligible enforcement of solicitation rules, has fostered the creation of enormous

⁶⁵ See generally 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §§ 7.1 *et seq.* (2d ed. 1990) (communications concerning a lawyer's services); see also Eric S. Roth, *Confronting Solicitation of Mass Disaster Victims*, 26 *Geo. J. Legal Ethics* 967 (1989).

⁶⁶ See, e.g., *Musslewhite v. State Bar of Texas*, 786 S.W.2d 437 (Tex. Ct. App. 1990) (affirming attorney suspension for various violations of the Texas Code of Professional Responsibility for improper solicitations of clients following mass disaster).

⁶⁷ See, e.g., *Florida Bar v. Went For It*, 515 U.S. 618 (1995) (upholding Florida statute forbidding targeted mail advertising to prospective clients if the cause of action relates to personal injury, wrongful death, or other accidents or disasters); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 437 (1978); *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317 (W. Va. 1996).

⁶⁸ Weinstein, *supra* note 30, at 481-85.

⁶⁹ See HEBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 1504 (3d ed. 1992) (citing *Zauderer v. Office of Disciplinary Counsel*, 436 U.S. 412 (1978) (truthful newspaper advertising, including illustration of a Dalkon intrauterine device, by an attorney seeking representation of IUD claimants, was a protected right)).

mass tort cases, or small-claims consumer actions, inspired by the considerable financial incentives to pursue these litigations.

The positive view is that attorneys are acting in 1960s-style as private attorney-generals to police corporate wrong-doing and to vindicate the rights of injured persons who otherwise might not seek or obtain legal redress for their harms. The negative view is that the modern mass tort case (and its cousin, the small claim-consumer class action) is lawyer-generated and lawyer-driven litigation. Hence, in this view, the common law concepts of barratry and champerty have virtually been written out of modern aggregate litigation.

It is difficult, for example, to find a reported decision where a proposed class action has been denied certification because of the improper solicitation of class representatives.⁷⁰ Although the solicitation of class representatives is not unknown, this fact will not vitiate certification of a class.⁷¹ Nor will it render either the class representative or the class counsel "inadequate" for due process purposes.⁷²

Concededly, it might be argued that there is nothing wrong with attorney solicitation of class clients because even if these claimants did not seek out legal advice on their own, they are nonetheless truly interested in the action—they simply did not have the energy or wherewithal to seek legal assistance. Perhaps in absence of having initiated contact with an attorney, these persons *subsequently* developed an interest in the litigation once they learned of the action and the prospect of legal relief.

But at the extreme, what then are we to make of an aggregate litigation where virtually *no one* except the lawyers seems to have an interest in the claims? This possibility is not as far-fetched as it sounds. Recently, attorneys in south Texas sought certification of a class of Remington rifle owners based on claims relating to an alleged defect in

⁷⁰ See NEWBERG & CONTE, *supra* note 69, at § 1504 (solicitation in class action litigation).

⁷¹ See *id.* (citing *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982) (no abuse of discretion in certifying class even if employer possibly solicited lawsuit; solicitation by parties is not prohibited and decertification of class might "impair the associational rights of employers and employees").

⁷² See NEWBERG & CONTE, *supra* note 69, at § 1504 (citing to *Dupont Glove Forgan, Inc. v. American Tel. & Tel. Co.*, 69 F.R.D. 481 (S.D.N.Y. 1975); *In re Nissan Motor Corp. Litig.*, 22 Fed. R. Serv. 2d (Callaghan) 63 (S.D. Fla. 1975); *cf.* *Kraus v. Paterson Parchment Paper Co.*, 65 F.R.D. 368 (S.D.N.Y. 1974) (solicited plaintiff found inadequate)).

Model 700 fire controls and bolt locks.⁷³ At first blush this litigation appears a somewhat odd congregation of unlikely litigants—stereotypical views suggest that gun owners are most likely to favor tort reform, to oppose over-litigiousness, and to disapprove of class actions. What, then, were these Texas riflemen doing in a class action seeking damages for an alleged rifle defect?

As it turns out, the appellate court was not buying this attempted class action, because the court reviewing class certification determined that neither were the riflemen. The appellate court concluded that “a careful reading of the entire record suggests a lack of interest beyond the four named plaintiffs and even some indifference among them.”⁷⁴ Even more interesting, the court deflected the usual negative-value justification for small claims consumer class actions (that is, that the value of the defect to each class claimant is so small as to make it not worthwhile for individuals to pursue separate claims).⁷⁵

The point about solicitation is this: some mass tort and small claims consumer class actions are now a long way removed from the concept of party-initiated litigation. Instead, the last twenty years seem to have inspired a free-ranging class of entrepreneurial lawyers who seek to create the newest mass tort and/or small claims consumer class action based on the abstract concept of a claim.

Indeed, in some extreme instances, the parties-plaintiff appears to be almost superfluous or an afterthought: a necessary cipher for the attorneys to develop the litigation and subsequently structure a negotiated settlement of aggregated claims. The concept of the party-plaintiff has been diluted, and this in turn contributes to the idea that the attorneys in these litigations essentially are free agents who identify the problem, broker and draft the legislative compromise, and then seek ratification of the court.

⁷³ *Remington Arms Co., Inc. v. Luna*, 966 S.W.2d 641 (Tex. App. 1998) (review denied).

⁷⁴ *Id.* at 643.

⁷⁵ *Id.* “According to the plaintiffs’ brief in support of certification, this absence of litigation demonstrated the claimants’ inability to pursue individual claims. According to [the defendant], the same absence of litigation demonstrated a lack of interest in resolving the claim, if any. No evidence was introduced before the trial court about the interest of potential class members in pursuing a class action or their ability to pursue individual claims.” *Id.*

B. *Adequate Representation*

The concept of adequate representation is at the heart of the problem of aggregate litigation and is a topic too broad and complex to examine in any detail in this paper. However, some salient points relating to the concept of adequate representation, the rhetoric surrounding this topic, and the realities of modern aggregate litigation are in order.

At the outset, the concept of adequate representation has different significance depending on the procedural technique used to aggregate claims. As indicated above, claims may be aggregated in consolidations, multidistrict litigations, class actions, or other forms of joinder (including simple joinder). Aggregate claims also may be resolved through alternative dispute resolution or through bankruptcy. What constitutes representation (or adequate representation) in each of these contexts may have different meanings. But it is important to understand that class action litigation is the only form of aggregate litigation that *requires*, as a matter of due process, the adequate representation of claimants.

Class action litigation has recently inspired a debate over the concept of adequate representation. This debate has been propelled, in part, by the Supreme Court's determination in 1997 that the class action settlement in *Amchem* should not have been approved because of a lack of adequacy of the class representatives.⁷⁶

The debate over adequacy arises because the class action, unlike other procedural means for aggregating claims, is quintessentially grounded in the theory of *representational litigation*. That is, in contrast to traditional litigation, individual claimants are not *actually present* to oversee the conduct of the litigation, to supervise the lawyers, and to be actively involved with the prosecution of their claims. The law evocatively labels these faceless claimants the "*absent class members*" or "*unnamed class members*," because they are truly absent and unnamed.

Instead, the class representatives and class counsel are the guardians of the interests of these absent class members. But, as many commentators have observed, the interests of the class representatives, absent class members, and their own class attorneys may not always be congruent. Self-dealing class action lawyers may act in ways that are adverse to the interests of the clients that they are supposed to be

⁷⁶ See *Amchem Prods., Inc.*, 117 S. Ct. at 2250-52.

vigorously representing. Thus, courts must separately determine the adequacy of the class representatives and class counsel,⁷⁷ although some courts have suggested that competent class counsel alone is sufficient to satisfy the requirement of adequacy.⁷⁸

Until fairly recently, most courts did not pay much attention to adequacy, simply paying lip-service to this requirement. In many class certification decisions courts merely recite that adequacy is satisfied or note that class counsel is competent to undertake the representation. But in recent years some courts have manifested an increased interest in conducting a more serious inquiry into the factual basis for the adequacy finding and have elaborated lists of factors that courts should consider when evaluating adequacy.⁷⁹

Yet, in spite of this newly inspired interest in factually ascertaining the adequacy of class representatives, in reality many if not most class representatives know little about the litigation, even less about the concept of the class action, and almost nothing about the role and duties of a class representative as a fiduciary. The phenomenon of the know-nothing class representative is pervasive. Here, for example, is a colloquy between an attorney and a class representative taken during a deposition:

Q. Have you spent any time trying to think through or determine possible distinctions in the class that you're seeking to represent?

A. I don't understand the question.

Q. Well, let me be more basic. Do you know or understand what obligations in law you're undertaking when you seek to be a representative of a class action?

A. I'm not a lawyer.

Q. Well, as a layperson and someone who is asking the Court to represent a class of individuals, do you know or have an understanding of your obligations?

A. I guess I don't clearly understand that, no.

⁷⁷ See, e.g., *Southwestern Bell Yellow Pages, Inc. v. Waterin' Hole, Inc.*, 1997 WL 124110 (Tex. Ct. App. 1997) (unpublished opinion).

⁷⁸ See, e.g., *Health & Tennis Corp. v. Jackson*, 928 S.W.2d 583, 589 (Tex. Ct. App. 1996); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 614 (Tex. Ct. App. 1995) (cited by *Southwestern Bell Yellow Pages*, 1997 WL 124110, at *3 n.2.).

⁷⁹ See, e.g., *Southwestern Bell Yellow Pages*, 1997 WL 124110; *Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146 (Tex. Ct. App. 1995).

Q. Do you know who it is that you are seeking to represent as a representative of this —of a class?

A. Not completely.

Q. Do you have an understanding of who it is you're asking the Court to represent?

A. Repeat the question, please.

Q. Do you have an understanding of who it is you're asking the Court to represent?

A. No, that's why I have attorneys.

Q. To this point, how much time—before the start of this deposition, how much actual time have you spent learning the background of this case or your obligations in this case or the facts of the case?

A. Probably less time than we've been in this deposition.

Q. Okay, for the record, it 9:56, and we got a late start, about 8:30 or 8:40; so, generally, about an hour?

A. Maybe two.

Q. All right. Tell me what you know about the previous history of this case prior to your being involved.

A. Nothing.

Q. Have you spoken with any of the other plaintiffs in this case?

A. No.

Q. Do you know any of the other plaintiffs in this case?

A. No.

Q. Do you know who the other plaintiffs are?

A. No.

Q. Have you spoken with any other advertiser who has expressed an interest in wanting to be a plaintiff in this case?

A. No.⁸⁰

The attorney in this deposition goes on to examine the class representative concerning the class representative's knowledge of the claims, the obligation for expenses, as well as recoverable damages: topics on which the deponent had the same level of incomprehension. In

⁸⁰ Deposition of Mike D. Maddox, *Waterin' Hole, Inc. v. Southwestern Bell Yellow Pages, Inc.*, No. 95-03809 (250th Jud. Dist., Travis Cty. Texas 1998) (on file with author).

the dozens and dozens of class representative depositions that I have read, class representatives rarely if ever understand what a class action litigation is, or what their duties are as fiduciaries for the absent class members.

Furthermore, crucially for the due process concerns that are central to the adequacy requirement, most class representatives have no concept of the problem of intra-class conflicts among class members, the central problem for the *Amchem* Court. Nor do most class representatives have any concept that their role as guardian of the class requires that they protect the absent class members from the possibility of self-dealing or otherwise collusive behavior between class counsel and the opposing attorneys. Thus, it is not at all uncommon for class representatives to justify their complete lack of knowledge about the case, or their lack of active involvement in the lawsuit, on the grounds that they have left the litigation of the case to their attorneys.

Yet, in spite of this extreme type of testimonial evidence about the guardians of the class, most courts simply look the other way, paying nothing more than rhetorical homage to the necessity for the adequate class representative. Thus, in modern mass tort and other forms of aggregate litigation, including the small claims consumer class action, there is dissonance between the rule requirement for adequacy and the actual plaintiffs who assume this role. In much of this litigation the class representative usually is little more than a figurehead, with class counsel actually carrying the burden of adequate representation. That makes the class attorneys the guardians of the absent class members, and the answer to the question "who is guarding the guardians" becomes "not the class representatives."

The class representative is supposed, in theory, to stand in the place of the individual actual litigant who is actively supervising the attorney and participating in the lawsuit. In most class litigation, however, the class representatives do not do this, and thus the lawyers in the litigation—counsel for the class and the opposing attorneys—are given fairly free reign to control the conduct of the case and to broker a deal affecting the interests of large numbers of people. Like the corpse of Jeremy Bentham, class representatives are ceremonially wheeled out at class certification hearings, not to be heard from again until a class settlement is brokered, or perhaps never.

Thus, plaintiff and defense attorneys have become private brokers of private disputes without meaningful client input or interaction. Indeed,

the client may not even have instigated the lawsuit in the first place. The lawyers then negotiate the deal, the consequences of which will affect hundreds, thousands, or even hundreds of thousands of people. In essence, once an aggregate litigation has been created and sanctioned by a court, a dynamic is set in motion in which attorneys will work toward creating private legislation with broad-reaching effects. In this model no one elects the legislators and the representatives are not really representatives.

C. Objectors and Intervenors

If the class representatives do not in any practical sense operate as guardians of the class, and if we have justifiable reasons to be worried about the activities of class counsel, and if it is a given that the defendants are not highly motivated to protect class claimants, then who is actively representing and protecting the interest of unnamed class claimants?

At the end of the twentieth century, an important hero rides into the picture: the intervenor or the objector. Objectors come in at least two styles: as a dissident class member⁸¹ or as a stranger to the suit who must formally intervene in order to have standing to present an objection. The Supreme Court this Term, in a case styled *California Public Employees' Retirement System v. Felzen*,⁸² is presented with an interesting variation on the objector-standing issue in the context of shareholder derivative litigation.

In theory, at least, the objector is yet another layer of protection for the interests of class claimants. Appearing at the eleventh hour, the objector is the white-hat cowboy whose self-designated role is to ferret out self-dealing, collusive attorney behavior, and bad settlements. Ironically, in this tableau, the white-hat objector turns the plaintiff's counsel into the black-hat cowboy. As we have seen in recent years, objectors have indeed played a crucial role in keeping all the players honest. In both the *Amchem* and the *Ahearn*⁸³ global asbestos settlements, the same attorney, as an objector, litigated challenges to those

⁸¹ See Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409 (1998) ("In the context of class-action litigation, an 'objector' is a class member who formally challenges a proposed class action settlement on the ground that the settlement is not in the best interests of some or all of the class members.").

⁸² 119 S. Ct. 1023 (1999).

⁸³ *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

settlements all the way to the Supreme Court. As a consequence, it is probably fair to say that class action attorneys who broker settlements now operate in the shadow of potential (but yet unknown) objectors.

Notwithstanding this positive vision of the role of the objector, the subtext to the objector-as-hero story is often somewhat more complex and nuanced. As it turns out, pure-hearted and pure-motivated objectors often have their own self-interests at stake in derailing negotiated settlements, and these self-interests are apart from the interests of class claimants. Thus, even Judge Weinstein, who believes that mass tort cases are like public law litigation, has noted that “[m]ass tort cases usually are driven by more obviously venal influences; that is to say, payment of money is more clearly at issue.”⁸⁴

It is not uncommon for an objector to appear at the eleventh hour to challenge a negotiated settlement for the ostensible purpose of protecting class claimants but for the actual purpose of protecting the objector's own inventory cases or for a cut of the action, meaning attorneys' fees. This phenomenon has led to the somewhat unseemly practice of the objector buy-out, in which the plaintiffs and the defendants unite in their interests to offer and guarantee the objector a piece of the action in return for withdrawal (or modification) of the objections to the settlement. This buy-out often works.⁸⁵

The buy-out phenomenon inspires the next obvious question: who is guarding the interests of class claimants from the potential self-dealing of self-appointed objectors who appear upon the settlement scene claiming to be defending the interests of the class? In theory, at least, the

⁸⁴ Weinstein, *supra* note 30, at 476. To give Judge Weinstein his due, the entire quotation reads as follows:

While the resolution of public institutional litigation depends upon the availability of cash, the improvement of living conditions underlies the litigation. Mass tort cases usually are driven by more obviously venal influences; that is to say, payment of money is more clearly at issue. Nevertheless, mass tort litigations often have an underlying...purpose which goes beyond mere transfers of wealth—the health and sense of security of many individuals and the viability of major economic institutions.

Id.

⁸⁵ One of the most compelling tales of an objector reversing positions in the context of the same litigation concerns the role Public Citizen, a consumer activist group founded by Ralph Nader, played in the General Motors Corp. Fuel Tank Products Liability Litigation. This reversal was motivated, in part, by attorney's fees. See Gerard & Johnson, *supra* note 81, at 427-33.

last bastion of class protection is the court, which ultimately must scrutinize and approve any class settlement. But more often than not, if there has been an objector buy-out negotiated and agreed to by all the players, the court will also approve the buy-out in the interests of bringing closure to a complex litigation.⁸⁶ At least two attorneys writing about the sell-out potential inherent in the self-interests of objectors have suggested instituting various reforms that include "monitoring of objectors to proposed settlements to assure that any proposed payment to them by class counsel and the settling defendant is fair, based on some tangible added value to class members."⁸⁷

D. Copy-Cat Litigation, Forum-Shopping, Attorney Fees, and Other Problems

The portrait of the contemporary aggregate litigation would not be complete without discussion of an array of other characteristics, including block settlements, aggregate damages, attorneys' fees, and use of judicial surrogates. But the subject is too vast to be encompassed here. Mass tort and small claims consumer class actions seem to have rebottled an array of old problems in new and unique ways.

Moreover, these cases tend to be sprawling in a different sense than Professor Chayes contemplated. Thus, mass tort and small claims consumer actions geographically sprawl all over the country, spreading across state lines and between federal and state court systems. These cases also are characterized by temporal sprawl; in the mass tort arena, a class of claimants may aggregate currently-injured clients as well as exposure-only future claimants, allowing these cases to extend backwards and forwards in time.

The sprawl problem has another dimension that also is characteristic of end-of-the-century aggregate litigation; these cases tend to inspire almost instantaneous copy-cat litigation. No sooner has one attorney filed a mass tort action in one jurisdiction (or a small claims consumer class action) than within days or weeks copy-cat versions will be filed in multiple jurisdictions throughout the country. The consequences of copy-cat litigation are profound, not the least of which are the immense transaction costs to the parties and the judicial system simultaneously supporting such duplicative litigation.

⁸⁶ See *Bowling v. Pfizer*, 922 F. Supp. 1261 (S.D. Ohio 1996), *aff'd*, 102 F.3d 777 (6th Cir. 1996) (approval of attorney fee petition, including provision for payment of fees to, and future employment of, "special counsel").

⁸⁷ Gerard & Johnson, *supra* note 81, at 434.

Copy-cat litigation is simply a modern variation on an old theme; that is, the race to the courthouse and the race to judgment. In complex mass tort litigation, though, the stakes involved are exponentially increased. Contemporary aggregate litigation has inspired interesting and innovative variations on the copy-cat theme; for example, the attempt to certify a state class action consisting of the opt-outs of claimants from a federal class. Is it possible to certify a state class consisting of federal opt-outs, which would be the very people who did not want to be involved in the federal class action?⁸⁸

In the federal system, at least, the problem of copy-cat litigation is alleviated somewhat by the existence of the multidistrict litigation statute, because it allows the federal courts to transfer and consolidate all actions sharing common facts into one venue. In recent years the MDL procedural mechanism has been used more aggressively to create mass tort and small claims consumer MDLs.

But the MDL procedure does not cure problems by aggregating separate cases into one forum. The next step in this dance is the incredible squabbling for designation as MDL counsel or a place on the MDL litigation committees. This, essentially, is an exercise grounded in the prospect of attorneys' fees and also constitutes the fertile garden for cultivating the seedlings of future objectors. The MDL, in turn, creates a giant bureaucratic structure—the mass tort meets Max Weber—that eventually, in most instances, morphs into a class settlement of claims. But the drama does not necessarily end there. The possibilities for subverting, derailing, or abandoning a negotiated settlement are endlessly various.

The creation of federal MDLs also does not deal with state copy-cat litigation, and there is no authority or mechanism to effectively deal with multiple simultaneous state copy-cat lawsuits scattered throughout the country. The sprawling nature of contemporary mass tort and small claims consumer class actions has inspired an array of inconsistent decisions relating to the propriety of certifying proposed classes based

⁸⁸ See, e.g., *Richardson v. The Prudential Ins. Co.*, Cause No. 95-113114 (53rd Jud. Dist. Travis City, Texas 1997). In *Richardson*, the Texas state court declined to certify a state class consisting of opt-outs from the federal class that had settled claims against the Prudential Insurance Co. in a New Jersey federal district court. However, other state courts have permitted certification of classes of opt-outs. See, e.g., *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450 (D.N.J. 1997) (approving class settlement), *aff'd*, 148 F.3d 283 (3d Cir. 1998); *Polaris Pub. Income Funds v. Einhorn*, 625 So. 2d 128 (Fla. Dist. Ct. App. 1993); *In re MCA, Inc., Shareholders Litig.*, 598 A.2d 687 (Del. Ch. 1991).

on the same facts or legal theories. Unhappy lawyers or claimants can simply abandon the federal system and broker a more favorable deal someplace else.

Thus, one of the most striking complications of the mass tort and consumer class action sprawl is the phenomenon of forum-shopping settlements between systems. Perhaps the most evocative description of this problem has been drawn by Robert B. Gerard and Scott A. Johnson, two mass tort practitioners. They use the following hypothetical as an explanation:

ABC, a large automobile manufacturer, becomes the target of numerous class actions which allege that some of its vehicles have a design defect that makes them prone to burst into flames in a collision. ABC denies any such defect, but because it has sold millions of the vehicles, it faces potentially ruinous liability if it must recall or repair the vehicles.

To avoid this result, ABC approaches the plaintiffs' lawyers in one of the class actions and proposes a nationwide settlement. In exchange for dismissal of all claims related to the alleged safety defect, ABC will give each class member a coupon, good for \$1000 off the price of a new ABC vehicle. Additionally, ABC will agree to award plaintiffs' attorneys a little more than \$9 million in fees. The plaintiffs attorneys agree to this settlement.

Troubled because ABC has made no attempt to remedy the safety defect and has made no cash payment to class members, and troubled by the apparent conflict of interest created by ABC's willingness to pay such staggering fees to class counsel, some of the class members object to the settlement. They eventually convince a court of appeals to throw out the settlement and remand the case for further proceedings. ABC and class counsel decide to take the settlement to a new forum.

Specifically, they go to a small court in another state where one of the other class actions against ABC has been filed, and where they believe the judge favors class action settlements. ABC then agrees to increase the

attorneys' fee award so that the counsel in the new state can be included, and so that counsel for the objectors can share in the award. Faced with smiling attorneys, all of whom praise the settlement, and with many objectors now acting as proponents, the state court issues a judgment approving the settlement. ABC can then take that judgment to all the other states where the class actions were filed and argue that it must be given full faith and credit, thereby disposing of all claims against it throughout the country.

This arrangement works for almost everyone. ABC has extinguished potentially massive liability, and in so doing has helped encourage future sales of its vehicles to class members who will feel obligated to use the coupons. Class counsel have reaped an award of millions of dollars, without significant work or risk, and counsel for the previous objectors share in that award. The courts have unwieldy and time-consuming litigation removed from their already congested calendars.

This leaves only the class members without any substantial benefit, but no one remains to speak for the class's interests—no one except the objector.⁸⁹

IV. THE NEW MASS TORT PARADIGM

Obviously, we are now quite some distance from Professor Chayes's description of the public interest law paradigm. Mid-way through his analysis, Professor Chayes pauses to offer a "morphology of the public law litigation," a model consisting of eight characteristics.⁹⁰ The challenge for the contemporary commentator, then, is to formulate a "morphology" of the complex litigation that is now prevalent throughout the federal and state court systems.

⁸⁹ See Gerard & Johnson, *supra* note 81, at 410. The description of these "machinations" is based on *In re Pickup Truck Fuel Tank Prods. Liab. Litig.*, 1996 WL 683785 (E.D. Pa. Nov. 25, 1996) and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

⁹⁰ See Chayes, *supra* note 1, at 1302.

Both the American Law Institute and the RAND Corporation,⁹¹ in the late 1980s and early 1990s, made attempts to describe the morphology of mass tort litigation. Both descriptions are quite similar, but the ALI's description is more succinct:

From the process perspective, the salient features defining characteristics of a mass tort include:

- (1) numerous victims who have filed or might file damage claims against the same defendant(s);
- (2) claims arising from a single event or transaction, or from a series of similar events or transactions spread over time;
- (3) questions of law and fact that are complex and expensive to litigate and adjudicate—frequently questions that are scientific and technological in nature;
- (4) important issues of law and fact which are identical or common to all or substantial subgroups of the claims;
- (5) injuries that are widely dispersed over time, territory, and jurisdiction;
- (6) causal indeterminacy—especially in cases involving toxic substance exposure—that precludes use of conventional procedures to determine standards to measure any causal connection between the plaintiff's injury and the defendant's tortious conduct; and
- (7) disease and other injuries from long delayed latent risks, especially in

⁹¹ MARK A. PETERSON AND MOLLY SELVIN, INSTITUTE FOR CIVIL JUSTICE, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES vii, 31-37 (1988).

cases involving toxic substance
exposure.⁹²

This is a fine start, but this description does not capture the texture, nuance, and grit of the ways in which these cases actually are processed. The description fails to capture the bureaucratization and privatization of aggregate claims resolution. The description fails to capture the problems with adequate representation and forum-shopping. The description fails to capture the core essence that, to use Judge Weinstein's words, "these cases are driven by more obviously venal influences," rather than the operation of public policy.

Contemporary mass tort litigation needs another Professor Chayes to weave together all these strands. After setting forth his morphology of the public interest law litigation, Professor Chayes concluded: "In fact, one might say that, from the perspective of the traditional model, the proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge." That insight applies with equal force to contemporary aggregate tort litigation. But we need a theoretician with greater analytical power and a more descriptive vocabulary than me to accurately capture the new mass tort paradigm.

⁹² American Law Institute, *Enterprise Responsibility for Personal Injury* (Reporters' Study 1991), reprinted in, LINDA S. MULLENIX, MASS TORT LITIGATION 26 (1996).

