COMMENTARY

A RESPONSE TO PROFESSOR FRANCIS E. MCGOVERN'S PAPER ENTITLED *TOWARD A COOPERATIVE STRATEGY FOR FEDERAL AND STATE JUDGES IN MASS TORT LITIGATION*

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Professor McGovern's paper raises three fundamental issues:

(1) Whether we are sure that we have identified the problems of today and tomorrow, and not the problems of yesterday;
(2) The assumption that there are several problems with mass torts;
(3) Fundamental federal/state problems in addition to all the problems associated with case management (including cost, delay, and judicial resources).

The overarching tension is between federalism and federalization. Assuming that today there exists a massive dislocation caused by mass tort litigation, and that the dislocation can reasonably be projected in the future, we need to find a comprehensive solution to the federal/state systemic issue. The question is whether we will be able to make progress only at the margins or whether we can make a real difference. If the problem is one of continuing massive dislocation, then I see the issues breaking down into three major categories:

1. Encouraging protocols that involve cooperative strategies for joint management techniques among state and federal judges managing the same or related mass tort litigation. As Professor McGovern notes, there is some de facto cooperation that has worked well in certain instances. But do we need institu-

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tional changes?

2. Making changes in court rules to impose or encourage cooperative strategies. In the federal system, this could be done through the Rules Enabling Act process. Judge Niemeyer's Advisory Committee on Civil Rules has such work in progress. Corresponding model state rules could also be developed with the aid of the National Center for State Courts ("NCSC") and the State Justice Institute ("SJI"). Additionally, there could be accompanying changes in the Manual for Complex Litigation.[1]
3. Changing the statutory construct at the federal level. This could be problematic for a host of reasons. Perhaps emphasis at the state level through some form of model or uniform rules or laws would be more feasible.

The Report to the Chief Justice on Mass Tort Litigation of February 15, 1999 recommends a process to study these and related issues by an ad hoc working group that includes a representative of the Conference of Chief Justices ("CCJ").[2] That proposal is good, but apparently it is not currently a viable option.

Professor McGovern notes "institutional support" within the state judiciary. There are three aspects to this issue:

1. There are more resources at the state level. Over 95% of all litigation and roughly the same percentage of resources are in the state courts. This point was made persuasively (but, alas, unsuccessfully) by Judge Stapleton in his Y2K testimony to Congress.[3] It applies to other attempts at federalization or federal preemption (e.g., class actions).
2. There are problem areas or perceived problem areas in state courts:

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[1] MANUAL FOR COMPLEX LITIGATION (3d ed. 1995).

[2] *See* ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 67-70 (1999) (proposing the creation of a working group to study problems related to mass torts and to develop specific recommendations for reform in this area).

[3] *See Year 2000 Readiness and Responsibility Act: Hearing on H.R. 775 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (prepared statement of Hon. Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States), *available at* <http://commdocs.house.gov/committees/judiciary/hju62310.000/hju62310_Of/htm> (noting that state courts "today handle 95 percent of the nation's judicial business").

A. Forum-shopping, the "reverse auction," and punitive damage excesses;
B. Perceived inferiority of, or bias against, some state trial judges;
C. "Outlier" state judges in a few counties in certain states.

These problems are currently being addressed and changes are being made. Anecdotal data should not be the analytical basis for branding these state court systems as poster children forever. A national protocol that includes uniform procedures and "best practices" models would serve to correct the problems that remain.

3. The entire issue of organic authority is problematic. There is the phenomenon of federal supremacy/preemption that sometimes makes it convenient for Congress to federalize without a full appreciation of judicial impact or principles of federalism. Someone, however, needs to provide alternatives that would engage the resources of state courts on an institutionalized basis as partners with federal courts in solving these problems. Professor McGovern's point is that perhaps the SJI could fund the National Center for State Courts or the CCJ to establish an institutional vehicle to share information and provide support. In Professor McGovern's words,

> [T]here could be a permanent method of insuring a more effective state marketplace of litigation. . . . It would be particularly critical to implement the weaker version of the proposed [Multi-District Litigation] changes. State judges are currently not positioned on parity with MDL judges. Their role could be strengthened if they could act collectively.[4]

This brings me to the role that the CCJ and the NCSC might play. After study, we could provide models for the three approaches (cooperation without rule or statutory change; rule changes; statutory changes). We do have a Mass Torts Task Force of the CCJ that could facilitate such a study or suggest to state supreme courts some top-down strategies to implement. The CCJ has other committees and cooperative arrangements with the federal judicial branch. For example:

- The CCJ State/Federal Committee of the Whole

[4] Francis McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1894-95 (2000) (footnote omitted).

- Joint CCJ/Conference of State Court Administrators ("COSCA") Legislative Committee
- The Federal-State Jurisdiction Committee of the U.S. Judicial Conference (with federal judges and four state chief justices)
- State chief justice membership on U.S. Judicial Conference Committees such as Standing Committee on Rules of Practice and Procedure (on which I have the honor to serve)

Turning to SJI, I believe the Board of SJI might be interested in supporting something that the CCJ thought had a chance of imposing some order or predictability on mass tort litigation in state courts. But I think the SJI Board would have to be convinced that litigation involving mass torts is still imposing onerous burdens on state courts. I know, however, that SJI will always be interested in helping state and federal courts to establish a workable system of fairly and promptly resolving mass tort cases. Yet there is a tension between (1) the effort to fashion a long overdue, intellectually sound and coherent approach to resolving mass torts, and (2) actually reducing or improving management of state court caseloads.

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This brings me back to the examination of my original (arguendo) assumption—is there currently a grim picture of actual need to invoke state court institutional mechanisms (like CCJ and SJI) to solve the problem?

Here is my question: Should the Conference of Chief Justices and the National Center Board allocate their energies and political capital to attempt to effect this reform?