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Introduction

Anthony J. Scirica

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ANTHONY J. SCIRICA†

Arguably the most vexing issue in modern civil litigation is the problem of personal injury mass torts—the accumulation of thousands (even millions) of claims through class actions or through aggregation in grouping individual lawsuits. Especially problematic are personal injury suits that are truly national in scope, implicating primarily state law, involving unresolved issues of causation and the possibility of latent injury. In many cases, these claims compete for a limited fund or insufficient assets and may threaten the financial stability of the defendants. Multiple individual filings threaten prompt adjudication of legitimate claims. Unreasonable delay, limited funds, and disparate verdicts on liability and damages raise serious questions of fairness. But aggregation has its price. It threatens individual consideration of cases and undermines the traditional lawyer/client relationship. Which prompts the question—how much aggregation, at what point in the litigation, and for what purpose?

In November 1999, the University of Pennsylvania Law School sponsored a Mass Torts Symposium to discuss these and other issues. The Symposium drew on and continued the work of the Judicial Conference's Mass Torts Working Group.[1] Symposium participants—including federal and state judges, litigators and corporate general counsel, academicians, and public interest lawyers—deliberated on federal/state issues, the problems of claims that may be made in the future, certification, settlement and closure of national mass tort actions, the unique problems of bankruptcy, and the costs and benefits of mass tort litigation.

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† United States Court of Appeals for the Third Circuit. Judge Scirica also served as Chair of the Judicial Conference's Mass Torts Working Group.

[1] As discussed *infra* at text accompanying notes 13-16, the Mass Torts Working Group was commissioned in 1998 to identify the most serious issues of the mass torts phenomenon, analyze the most promising solutions, and report back in one year. Spearheaded by the United States Judicial Conference's Advisory Committee on Civil Rules and its chair, Judge Paul Niemeyer; the Group also comprised select members of the Judicial Panel on Multidistrict Litigation, and the Judicial Conference Committees on Bankruptcy, Court Administration and Management, Federal-State Jurisdiction, and Magistrate Judges. It received invaluable assistance from the Federal Judicial Center and from many committee staff and academicians, including Professors Edward Cooper, Geoffrey Hazard, and Francis McGovern.

Not all mass claims are problematic. Since the 1966 revision of Rule 23, the federal legal system has, to a greater or lesser degree, satisfactorily accommodated class actions in antitrust, securities, consumer fraud, and employment discrimination. The adoption of the Multidistrict Litigation ("MDL") statute[2] and the discerning and resourceful actions of the MDL panel and transferee judges have permitted the fair and expeditious resolution of many mass claims.

When over time serious mass claim problems were perceived, Congress and the Supreme Court Rules Committees responded with changes in substantive and procedural law.[3] In securities fraud, for example, Congress responded to perceived abuses of strike suits in private securities actions by amending both substantive and procedural law. The principal procedural changes raised the bar in bringing suit and gave parties with the highest stakes an opportunity to control the outcome of the litigation.[4] The principal substantive change provided a safe harbor for forward-looking statements.[5]

Similarly, the Judicial Conference Rules Committees responded to the risk of improvident and largely unreviewable class certification decisions by amending Rule 23. Granting or denying class certification is the defining moment in many class actions, for it may sound the death knell of the litigation or create irresistible pressure to settle. Accordingly, Rule 23 was amended to provide for an interlocutory appeal by permission of the court of appeals.[6] In addition, the amendment will facilitate development of the law on class certification.[7]

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[2] 28 U.S.C. § 1407 (1994).

[3] Of course, the MDL statute was a congressional and judicial response to mass claims.

[4] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 743, 743-49, (codified at 15 U.S.C. § 78u-4(b) (Supp. II 1996)). The congressional amendments in procedure represented a departure from the uniform and transsubstantive nature of the federal rules and constituted a deviation from the procedures set forth in the Rules Enabling Act. 23 U.S.C. §§ 2071-2077 (1994).

[5] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 102, 109 Stat. 737, 749-56 (codified at 15 U.S.C. §§ 77z-2, 78u-5 (Supp. II 1996)).

[6] *See* FED. R. CIV. P. 23(f).

[7] Of course, class certification is not the only procedural issue implicated by mass claims. The Rules Committees continue to study other facets of Rule 23, including the advisability of settlement-only classes after *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999); strengthening the requirements for notice; appointment of class counsel; class counsel's fiduciary responsibilities; and setting standards for judicial approval of settlements and attorney fee awards.

Personal injury mass torts, however, are another matter.[8] They have proved less amenable to similar substantive and procedural solutions. In some mass torts—like asbestos—delay and extraordinary transactions costs (approaching two-thirds of recovered damages)[9] diminish the value of legitimate claims. Ten years ago, Judge Robert Parker pointedly described one impact of the massive asbestos litigation: "Four hundred and forty-eight members of the class have died waiting for their cases to be heard."[10] Judge Parker also noted that even if the court then could have closed thirty cases a month, it still would have taken six and a half years to try the cases in that 3000-member class action, during which time 5000 more cases would have been filed.[11] A decade later, asbestos litigation problems persist.[12] In another mass tort case—breast implants—defendants have paid billions of dollars for claims not as yet supported by verifiable scientific evidence.[13]

Two years ago, the Judicial Conference Working Group on Mass Torts, under the guidance of the Advisory Committee on Civil Rules, commenced its inquiry. The Working Group considered concepts central to the mass tort issue: maturity and elasticity, centralization versus devolution, and the incentives and disincentives in bringing suit. The Working Group also delved into many of the finer points of

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[8] For example, unlike many class action claims, these torts often involve individual claims for substantial damages; accordingly, these claims feasibly may be pursued as stand-alone cases.

[9] *See* JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION (1983). Although the study reporting on these figures is somewhat dated, the trend appears to continue. *See, e.g., Amchem*, 521 U.S. at 598 (noting that costs exceed recoveries by two to one).

[10] Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

[11] *See id.* at 651-52.

[12] For example, asbestos cases continue to swamp courts. In the past five years, nearly 40,000 new asbestos cases were filed in federal courts alone. *See* Administrative Office of the Courts Statistics, *U.S. District Courts Civil Cases Commenced by Nature of Suit*, (Table C-2A) (Feb. 2000) <http://www.uscourts.gov/judbus1999/c02asep99.pdf>. And plaintiffs are suing a broader range of defendants, from hospitals that installed asbestos ceiling tiles to "banks that financed asbestos-contaminated properties." Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1. Although precise numbers are unavailable, significant numbers of asbestos cases have been and continue to be filed in state courts.

[13] *See, e.g.*, MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST CANCER CASE (1996) (concluding that breast implants do not substantially increase the risk of breast cancer); Hans Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED. 1649 (1992) (same); Heather Bryant & Penny Brashen, *Breast Implants and Breast Cancer—Reanalysis of a Linkage Study*, 332 NEW ENG. J. MED. 1535 (1995) (same).

mass tort litigation: the race to the courthouse for limited assets; the allocation of limited funds; the allocation of settlements by lawyers; unreasonably high transaction costs, including attorney's fees; collusive settlements; reverse auctions; forum shopping for trial or settlement; overlapping and competing class actions; "home cooking" in certain state courts and counties; fraudulent joinder to defeat diversity; choice of law issues; multiple punitive damages; resolving causation where the science is unclear; and the unique problems with futures claimants—asymptomatic plaintiffs in unlimited numbers, the difficulty in estimating damages in futures claims, and statute of limitations problems with the exposure-only plaintiff. The Working Group also was informed about duplicative and wasteful discovery; premature aggregation; the advisability of individual verdicts to ascertain liability and the range of damages; the need for closure of a mature tort; collateral litigation over insurance coverage; back door opt-outs; the "full faith and credit" significance and other consequences of overlapping class actions; efficiency and aggregation as compared with congestion and individual consideration; and the need for cooperation between federal and state courts.[14]

Throughout its study, the Working Group encountered ways attorney conduct appeared to shape the incentives in bringing suit, the course of litigation, and settlement. The identified issues included selection of counsel; the first-filed rule; solicitation of plaintiffs; the basis for determining attorney's fees;[15] the fiduciary responsibility of counsel; conflicts of interest; ethical considerations; charging contingent fees after settling cases on administrative grid-like schedules; "scorched earth" and "stonewalling" tactics by defense counsel; and "piling-on" strategies by plaintiffs' counsel with marginal claims. Underlying the inquiry into the impact of attorney conduct is an unresolved question: the concept of the "private attorney general," and the extent to which private attorneys should be able to vindicate the claims of persons with whom they have no direct relationship. Correspondingly, this concern raises the issue of the proper role of the federal and state attorneys general in litigating these broad-scale claims.

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[14] *See generally* ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999) [hereinafter REPORT ON MASS TORT LITIGATION]. *See also* Thomas E. Willging, *Mass Torts Problems & Proposals, in* REPORT ON MASS TORT LITIGATION, *supra*, app. C.

[15] Some have asked whether it is possible to construct a procedure to provide both an incentive and a reasonable return, other than percentage of common fund or lodestar.

The Mass Torts Working Group issued its Report in 1999.[16] Recognizing that the essential components for change were legislation, procedural rules, case management, and judicial education, the Working Group identified the principal problems in mass torts, proposed different models for resolution, recommended further study, and prepared the ground for further action. This Symposium builds on those efforts.

Congress is also involved in mass tort issues.[17] Both the House and Senate Judiciary Committees have held hearings on class actions. And in both houses, bills have been introduced to address class actions in general[18] and to resolve the outstanding asbestos cases.[19] After passing the federal Y2K Act,[20] Congress is actively considering class action removal legislation based on minimal diversity.[21] Another pending bill, in response to the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[22] would permit MDL transferee judges to try transferred cases.[23]

As we work to identify and resolve these problems of mass torts, we should keep in mind that all of these concerns implicate competing

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[16] REPORT ON MASS TORT LITIGATION, *supra* note 14.

[17] In 1991, the Judicial Conference proposed that Congress consider a national legislative scheme to streamline asbestos case resolution. *See Amchem*, 521 U.S. at 598-99 (citing Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991)). This proposal was based on the recommendation of the Conference's Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist. *See id.* Notably, in its most recent class action decisions, the Supreme Court specifically urged Congress to deal with the "elephantine mass of asbestos cases." *Id.* (citing recommendation by Judicial Conference Ad Hoc Committee on Asbestos Litigation for federal legislation creating a national asbestos dispute resolution scheme); *see also Ortiz*, 119 S. Ct. at 2302-03 n.1 (1999) (reiterating the call for national legislation and noting Congress's failure to respond).

[18] *See, e.g.*, Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999) (requiring, for example, plain-language notices to class members and advance notice of settlements to state and federal attorneys general).

[19] *See* Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. (1999) (establishing an Office of Asbestos Compensation to determine if an asbestos claimant is entitled to compensation, and if so, how much); S. 758, 106th Cong. (1999) (paralleling H.R. 1283).

[20] Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999). The Act provides that a Y2K class action may be tried in federal court if the amount in controversy exceeds $10 million, and the plaintiff class consists of at least 100 members.

[21] *See* Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999) (passed by U.S. House of Representatives, Sept. 23, 1999).

[22] 523 U.S. 26 (1998).

[23] *See* Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (1999). The same bill also provides for removal of mass torts arising from single situs accidents. *See id.* § 3.

principles and cross many lines: most significantly, the distinction between substantive and procedural law, and the principles of federalism—the proper allocation of jurisdiction between state and federal courts. In mass torts, the line between substance and procedure can be blurred. We know that procedure influences outcome. Few would deny that the aggregation of claims has a profound effect on the substantive rights of the parties—both aggregation under Rule 23 and aggregation in grouping individual claims.

One way to look at the problem is to ask how receptive the federal courts should be to nationwide causes of action that largely involve state law, and if so, should their jurisdiction extend through the entire proceeding, including trial? Or, to put it another way, should tort actions national in scope be handled in state court, and if so, for what purposes? From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because in a constitutional sense, they implicate interstate commerce and foreclose any state bias. Arguably, a legal system that permits robust litigation of mass tort claims should also provide ways to fairly and efficiently resolve those claims. Nationwide class actions appear to promote at least one aspect of fairness—similarly situated claimants receive similar treatment.[24]

Conversely, if state bias can be eliminated and a way can be found to preserve defendants' assets from multiple compensatory and punitive damage awards that will deplete the funds available for all claimants,[25] then state courts—which greatly outnumber federal courts—may be the more suitable fora for trials and to ascertain liability and range of damages. Furthermore, state and federal court cooperation and coordination may be able to mitigate problems of discovery duplication and overlapping class actions.

The excellent Symposium papers and the proposed models address the key issues, and are crucial to the debate. As we continue, we must keep in mind the aim of our inquiry: a just process in which a person with a legitimate claim (where liability can be proven) is able to get appropriate relief without undue delay and without undue costs. The papers presented at the Mass Torts Symposium, and the

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[24] It is usually helpful to compare alternative approaches. In certain cases, the prospect of high costs, long delays, and limited assets for recovery may negate any realistic alternative to class actions.

[25] These goals also may be accomplished in a bankruptcy proceeding, which brings before the bankruptcy court all of the debtor's assets and all claims against those assets, then seeks to treat equally all similarly situated claimants.

ensuing discussion by the Symposium participants, move us closer to the goal.

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