

Michigan Law Review

Volume 106 | Issue 6

2008

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Recommended Citation

Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 MICH. L. REV. 1213 (2008).

Available at: <https://repository.law.umich.edu/mlr/vol106/iss6/16>

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WHAT DO WE TALK ABOUT WHEN WE TALK ABOUT MASS TORTS?

Anthony J. Sebok*

MASS TORTS IN A WORLD OF SETTLEMENT. By *Richard A. Nagareda*. Chicago and London: University of Chicago Press. 2007. Pp. xx, 324. \$49.

INTRODUCTION

Twenty years ago, Deborah Hensler and a team of scholars at the RAND Corporation's Institute for Civil Justice issued a report entitled *Trends in Tort Litigation: The Story Behind the Statistics*.¹ Pressure had been mounting both in the business community and the Republican Party to "reform" tort law throughout the 1980s.² There was concern that Americans "egged on by avaricious lawyers, sue[d] too readily, and irresponsible juries and activist judges wayla[id] blameless businesses at enormous cost to social and economic well-being."³

The RAND report argued that the real risk of a torts "explosion" came from the world of mass torts.⁴ The report's authors presciently focused on asbestos and the Dalkon Shield litigation, citing these as examples of how mass latent injury suits represented a new challenge to the tort system.⁵ The study concluded that "[m]ass latent injury torts are the most volatile world of tort litigation. Costs, dynamic legal environment, and the uncomfortable fit between these cases and the tort system conspire to make the number, outcome, and future costs of these suits highly uncertain."⁶

Since these words have been written, the world of mass torts has remained much the same. Asbestos suits continue to be filed, now numbering in the hundreds of thousands. Settlements in asbestos, Dalkon Shield, and silicone breast implants have led to the bankruptcy of many major corporations. Mass tort claims have been crafted to deal with a series of potentially damaging social phenomena, including cigarettes, handguns, and fast food. The class action bar is now seen as a powerful force in American politics.

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1. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, *TRENDS IN TORT LITIGATION* 3 (1987).

2. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 719 (1998) ("Starting in the 1970s, unease among elites about the expansion of law joined with interest group concern to curtail liability and to promote campaigns deriding law and lawyers. Such campaigning intensified in the mid-1980s . . .").

3. *Id.*

4. HENSLER ET AL., *supra* note 1, at 10, 33.

5. *Id.* at 10.

6. *Id.* at 34.

Federal tort reform designed specially against it, the Class Action Fairness Act of 2005, was passed by Congress just before the midterm elections of 2006.⁷

The “volatile world” of mass torts has also spawned a cottage industry of academic scholarship. Most scholarship approaches mass torts from one of three perspectives: procedure, substance, or ethics. Proceduralists look at mass torts as an artifact of a revolution in civil procedure effected through the evolution of Rule 23 of the Federal Rules of Civil Procedure, Rule 23’s state law equivalents, and the emergence of certain practices such as multi-district litigation in the federal system and liberal rules of aggregation in state systems.⁸ Others see mass torts as a reflection of changes in substantive tort law, such as the emergence of new claims for emotional distress without physical injury.⁹ Finally, there are those who see the evolution of mass torts as a story of a change—if not a knowing abandonment—of the principles of legal ethics as well as, at its worst, a corruption of the bar’s most basic commitment to honesty in its dealings with the courts and its clients’ opponents.¹⁰

Richard Nagareda has tried to transcend these categories. *Mass Torts in a World of Settlement* is based, in part, on a series of articles he has published on specific topics in the field of mass torts. The book comprehensively presents Nagareda’s argument for taking the problem of mass torts out of the familiar framework of procedure, substance, and ethics. Instead, Nagareda grounds mass torts in “administration”—a view that the private rights of clients can be unilaterally altered by *someone else* under the right conditions. Furthermore, administration is at the heart of Nagareda’s proposal to harness the self-interest of lawyers to prevent mass torts from falling into dysfunctional settlement patterns that secure neither the legal rights of their clients nor society’s larger shared interests. An administrative agency would monitor the fees earned by lawyers from their clients and redistribute some fees to non-clients. The proposal represents a natural but critical final step in Nagareda’s academic journey since his earliest article on mass torts in 1996.¹¹

Nagareda’s project has always been normative, although he has also always been cautious never to oversell his ability to find a solution to a problem that some might consider insoluble. The book reveals Nagareda’s normative drive and natural caution. In the Introduction, he states that “the

7. 28 U.S.C. §§ 1453, 1711–15 (2006).

8. See, e.g., George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

9. See, e.g., James A. Henderson & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

10. See, e.g., Lester Brickman, *Ethical Issues In Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005); Susan P. Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

11. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996).

evolving response of the legal system to mass torts has been to shift from tort to administration” (p. viii). The distinction between tort, which values client autonomy, and administration, which maximizes social welfare, sets up Nagareda’s normative claim: the shift from tort to administration in mass torts reflects administration’s ability to maximize recovery of the social goods that mass tort litigation is intended to provide. Nagareda argues that most commentators today assume that since “autonomy remains the norm and coercion the deviation,” mass tort practices should endeavor to minimize coercion, and accept it as a regrettable shortcoming of the law—excusable, but never justified (p. 233). According to Nagareda, a close study of the real world of mass torts shows us that the truth is just the opposite: in mass torts, individual autonomy should be the exception and coercion the norm (p. 234). Understood as “peacemaking,” coercion by administration is not to be regretted but perfected, so that it provides the social ends sought by mass torts with minimum dysfunction (p. 235).

Part I will review the structure and content of the book’s argument. It will suggest that the structure adopted by Nagareda—in which he sets out a series of examples of the dysfunctions of mass torts, and only at the end of the book offers his solution to the problem illustrated by the examples—makes it hard for the reader to evaluate the book’s overall theory. The solution is complex, with a number of moving parts, and it is not clear how it would make a difference in each of the dysfunctional episodes depicted. Part II will identify the strengths of the reform that forms the last two chapters of the book. It will argue that the chief virtue of Nagareda’s proposal is that it “leverage[s] conflicts of interest” among plaintiffs’ lawyers in class actions (p. 221). It would solve the problem of fairness in class settlement between present and future plaintiffs identified by the Supreme Court in *Amchem Products, Inc. v. Windsor*¹² and *Ortiz v. Fibreboard Corp.*,¹³ the two cases that made the fair resolution of conflicts between present and future plaintiffs in a mass tort the sine qua non of due process under Rule 23. Part III will argue that the problem with the solution proposed by Nagareda is that it *only* solves the problem identified by the Supreme Court in *Amchem* and *Ortiz*. The dysfunctions identified by Nagareda in Chapters Two through Ten are not all rooted in the problems identified by the Supreme Court in *Amchem* and *Ortiz*. Neither were tort-reform criticisms based on concern that one set of plaintiffs were being treated unfairly in settlement vis-à-vis another set. Nagareda’s proposal must be judged not just by whether it solves the “local” problem in mass torts that it sets for itself, but by whether Nagareda has marginalized or ignored other issues that must be addressed if the institution of mass torts litigation is to enjoy widespread support among both American lawyers and American society.

12. 521 U.S. 591 (1997).

13. 527 U.S. 815 (1999).

I. THE STRUCTURE OF *MASS TORTS IN A WORLD OF SETTLEMENT*

Nagareda's definition of a mass tort tracks the definition that RAND adopted in 1987. Like RAND, Nagareda focuses not only on the numerosity of a mass tort but also on the absence and presence of homogeneity along different axes within the class of affected persons. These axes include factual similarity, geography, and time. Mass torts are more homogeneous than masses of car accidents or medical misadventures because classes of victims share a common factual pattern—if nothing else, a common source of injury (pp. xii–xiii). Geography can play a more complex role in mass torts. As Nagareda notes, while some mass torts may still arise from a single, geographically bounded catastrophic event, many now arise as a result of the national distribution of products. This raises the question whether similar suits—with similar factual predicates and against one or few defendants—should be consolidated into a single forum, either for the sake of efficiency of adjudication or to promote settlement (p. xiv). Finally, unlike torts arising from single accidents, the temporal dispersal of the injuries—both in when they were suffered and when they manifest themselves—is a very important axis and one which will be discussed in much greater detail below.

It must be noted that, however, that Nagareda's definition of "mass torts" includes only personal injury claims (pp. xii–xiii). Although he discusses securities fraud early in the book, it is only to develop the definition of mass tort by contrast (p. 2). Limiting the definition this way has upsides and downsides. But it should be noted what is lost and gained by this definitional maneuver. What is gained is the emphasis on the saliency of temporal dispersion. Once the set of mass torts under study excludes financial injury claims, the dysfunctions that are introduced by temporal dispersion—most notably the potential conflict between current and future injured parties—become clear. But the "physical-injury only" definition also means that Nagareda's solution may not address the problems associated with financial injury torts affecting highly numerous and geographically dispersed groups of victims. This lack of engagement with the problem of mass tort reform, as it is defined by others, limits the utility of Nagareda's work in influencing the debate over that reform.¹⁴

A. *Temporal Dispersal and Mass Torts*

With that caveat in mind, we can begin to examine the dysfunctions that Nagareda identifies in mass tort cases. The axis that seems most to separate mass torts from other large-scale claims is the temporal dispersion among

14. For example, the Class Action Fairness Act—arguably the most important tort reform in recent years—was explicitly designed to address the so-called "abuse" of class actions in financial injury cases. See, e.g., John Snow, U.S. Sec'y of the Treasury, Remarks at the American Tort Reform Association's Annual Membership Meeting (Mar. 16, 2004) (transcript available at <http://www.treas.gov/press/releases/js1237.htm> (last visited Jan. 27, 2008)) (citing a credit-card fraud case as a reason for why the Class Action Fairness Act was necessary to deal with "judicial hellholes" that abuse the rules of class certification and joinder).

victims, which RAND called the “latency” of the injury.¹⁵ In the case of latent injuries, the severity of the injury may not become apparent for many years (p. 21). Unless one is dealing with a material or activity that causes the same harm instantly to 100% of the persons exposed to it (such as a midair airplane explosion), there is a possibility that some of the persons who were exposed will never have a legally actionable claim. It is also possible that even all those with a legally actionable claim will not all have the same claim, or will not all know if they have a claim at the same time (p. 21).

As Nagareda notes, temporal dispersal due to latency can cause tremendous uncertainty concerning settlement. The uncertainty could, in theory however, be diminished if a defendant resolved to take every plaintiff’s claim to trial (p. 24). Nagareda treats this strategy with more respect than it often gets, because lawyers have long assumed that the only way to deal with latent injuries is to treat them as “black boxes” to be valued probabilistically and settled (p. 24). Settlement is the dominant approach to the resolution of civil litigation whether individual or mass tort claims; the high costs of litigation far exceed the discounted value of success.¹⁶ The uncertainty of outcome is only magnified in the case of latent injuries, which is why many scholars feel that settlement is an especially rational strategy in this context.¹⁷ Nagareda notes other, more subtle explanations. Specifically, he discusses the way that the cognitive psychology of rational defendants might lead them to overpay to settle latent cases, and the way that the “stacking” of insurance policies leads rational defendants to overspend other people’s money to settle latent risks (pp. 25–27).

Nagareda adds to latency another source of temporal dispersal, which is based on his observation that in adjudication involving complex events such as toxic torts, the parties may gain access to relevant information at different times (pp. 12–16). In any lawsuit, information is a resource. The ability of a plaintiff to (a) locate an expert willing to testify as to general or specific causation and (b) to afford that expert, can be affected by a number of factors. Some of these factors—such as whether they have cash on hand to invest in experts—are within the control of the plaintiff. Other factors are not within the plaintiffs’ control: for example, sometimes the science has not yet developed to the point where causation can be proven.

Nagareda calls the resources that create temporal dispersal “generic assets” (p. 14). He points out that in a mass tort there is great uncertainty over

15. HENSLER ET AL., *supra* note 1, at 3.

16. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

17. See, e.g., David Rosenberg, *The Causal Connection In Mass Exposure Cases: A “Public Law” Vision Of The Tort System*, 97 HARV. L. REV. 849, 852 (1984). It is possible that mass tort defendants have an even greater incentive to settle than defendants in single-injury cases. In part because a corporation has to report to its shareholders on the existence of and potential risk posed by all outstanding litigation, the uncertainty of liability may affect their ability to pursue other business strategies. See Glenn Collins, *Hungry Shareholders vs. Wary Managers*, N.Y. TIMES, Nov. 4, 1995, § 1, at 37.

the settlement value of claims at two distinct points. Here he borrows from Francis McGovern's pioneering work on how immature mass torts develop into mature torts.¹⁸ During the immature stage, the generic assets of the case are unclear. Both plaintiffs and defendants have to decide whether delay will work in their favor. Time might help facts favorable to the defendant emerge; therefore going forward with debatable facts might generate a favorable trial and settlement environment that could erode with the passage of time (pp. 14–15).

If generic assets create temporal dispersal when mass torts are immature, latency can create temporal dispersal when mass torts are mature. In the mature stage, the facts that created uncertainty have been clarified (p. 13). For example, contests over theories of general causation may have been resolved, either by new science or new law. Similarly, other contested issues—for example, whether certain tort claims are or are not preempted by federal legislation—may have been conclusively settled. In the mature stage of a mass tort, the plaintiff's general case has been accepted by the courts and now the firm that invested in developing the case will seek "the maximizing of its returns from that investment" (p. 16). It does this by adding as many additional clients as it can to its existing inventory of cases (p. 16). In a mature tort, the problem of latency works for and against the plaintiff firm. The task of adding plaintiffs is made considerably easier as the only criteria for filing a claim against a defendant is exposure, not injury, since difficult factual questions like specific causation cannot, by definition, be addressed until the injury caused by the defendant becomes actual. On the other hand, since the victims of a tort that has not yet manifested itself in an injury are not suffering, they are unlikely to be seeking legal representation and may be difficult to locate. Conversely, defendants will find it difficult to know how to value a latent claim for purposes of settlement, and they may not be willing or able to invest very many resources in trying to defeat the claim of a plaintiff with a latent injury. After all, it is clear to a defendant what the payoff would be of winning an argument about a generic asset, such as general causation. It is much harder for a defendant to be willing to invest heavily in investigating and defeating the claims of individual plaintiffs, especially when they may number in the tens of thousands and the extent of their injuries are not yet known. Nagareda notes that the problem facing parties in the mature stage is that they are not sure how to value the "specific assets" of the case—the individual claims themselves, especially when those claims are based on latent injuries (pp. 18–20).

Nagareda's analysis of the mass tort system concludes that the rules we have do a very bad job helping plaintiffs and defendants evaluate and bargain over the settlement value of their generic and specific assets. To put it another way, the current rules of civil procedure and tort do nothing to alleviate temporal dispersal in mass torts. Uncertainty based on the paucity of "generic assets" might lead parties to settle for amounts out of line with the

18. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

actual value of the plaintiff's claim.¹⁹ Uncertainty based on the latency of an injury (assuming general causation) can also lead to inaccurate valuation of a claim. Depending on the substantive tort doctrine of a jurisdiction, an "exposure only" case with no further injury should result in a judgment of zero or nominal damages, while an injury that tragically develops in the most unlucky way possible could oblige the defendant to pay large damages for a very long period of time (in the case of a young person who is injured but not killed by the defendant's wrongful act).

Having set up the problem, Nagareda then offers nine examples where the problem of temporal dispersal—of either variety or a blend of both—produced suboptimal results.²⁰ By suboptimal I take Nagareda to mean that the "wrong" result was generated from the perspective of the underlying principles of private law. The source of the suboptimal result in these nine cases is either the interaction of the tort system with the incentives produced by the temporal dispersal, or a settlement plan created by the parties that was impossible to achieve under current legal principles. Each example is worth reading not only for the contribution it makes to the larger theory, but simply because Nagareda has a keen eye for strategy and a remarkable ability to discern patterns among litigants' decisions that reveal the reasons for their actions, regardless of whether these reasons are ever stated in their pleadings.

B. Patterns in the Examples

Given the constraints and goals of this Review, I will not treat each example individually. Rather, I will look at them across two dimensions. First, I will divide them into problems about (i) uncertainty over generic assets or (ii) uncertainty over specific assets. Second, I will divide them into failures of (iii) the internal incentives created by temporal dispersal or (iv) created by proffered solutions incompatible with the legal status quo.

19. See p. 20 ("Simply put, the claims of exposed but presently unimpaired persons can start to exhibit settlement values *out of line* with current tort doctrine." (emphasis added)).

20. The examples are (1) the silicone breast implant litigation; (2) HIV blood bank litigation (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995)); (3) the use of sampling in early asbestos litigation (*Cimino v. Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998)); (4) settlement of futures claims (*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)); (5) government compensation funds (the 9/11 Victims Compensation Fund and the failed federal Office of Asbestos Disease Compensation); (6) mandatory class actions (*In re Simon II Litigation*, 211 F.R.D. 86 (E.D.N.Y. 2002), *rev'd*, 407 F.3d 125 (2d Cir. 2005)); (7) maximizing/minimizing opt-outs in a class (*In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, MDL No. 1203, Civ. No. 99-20593, 2000 U.S. Dist. LEXIS 12275 (E.D. Pa. Aug. 28, 2000), *aff'd without opinion*, 275 F.3d 34 (3d Cir. 2001)); (8) bankruptcy (*In re Combustion Engineering, Inc.*, 295 B.R. 459 (Bankr. D. Del. 2003), *rev'd*, 391 F.3d 190 (3d Cir. 2004)); and (9) government as plaintiffs (tobacco and handgun reimbursement and nuisance suits).

1. *Latent Injuries and Generic Assets*

It turns out that six of Nagareda's examples illustrate problems generated by specific assets and describe torts with predominantly latent injuries. As noted above, uncertainty over specific assets becomes an issue only for mature mass torts. The problem for the parties in the asbestos cases discussed in Chapters Four, Five, Six, and Seven was not whether the underlying theory of liability would be upheld by a jury or on appeal. Similarly, by the time the pharmaceutical and medical products suits discussed in Chapter Eight were settled, the question had turned into one of latency—who would develop the most severe valve regurgitation or who would require a new hip implant and how soon.

In a minority of his examples, the problem to be solved arose from the immaturity of the tort itself. In the example of Judge Posner's uncertainty in the wisdom of aggregating the HIV blood bank cases in Chapter Three, the expense, or radical incalculability, of the generic assets that either side needed to be confident of victory undermined the desired outcome. The government reimbursement suits in Chapter Ten might appear at first to be an example of a mature tort because the general causal link between tobacco use and disease and addiction were well known by the time these cases were brought. I would classify them as immature torts, however, since the source of uncertainty in these cases was the fact that the applicable law was in flux.²¹

2. *Internal Incentives and External Legal Constraints*

Along the second dimension, Nagareda's examples can be categorized by how they failed to reach an optimal result. Some illustrate choices by the parties that reflect flawed judgments about how to weigh internal incentives; others reflect a clash between the parties' incentives (properly conceived) and the substantive law.

Internal incentive problems are clearest in the immature torts. The examples from Chapters Three and Ten thus are easiest to understand along this dimension. Nagareda seems to agree with commentators such as David Bernstein that, in retrospect, neither society nor the defendant were well-served by Dow Corning's decision to go into bankruptcy in order to end the breast implant litigation, even though the decision appeared rational from the ex ante perspective.²² Nagareda also seems to agree with Charles Silver that Judge Posner's analysis of the ex ante settlement pressure that firms like

21. While some scholars have suggested that it would have been obvious to anyone who knew something about the law of unjust enrichment that the state claims for reimbursement from the tobacco companies were groundless, the fact remains that the parties did not view it that way. In that sense the torts were "immature" in the same way they would have been had the medical evidence of smoking's harm still been in doubt. See, e.g., Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999).

22. See David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999).

Rhone-Poulenc face is not a rational basis for settlement.²³ Nagareda's discussion of J.B. Heaton's formal theories of the behavior of risk-averse defendants does suggest, however, that he has at least some sympathy for general counsel in the real world who claim that settlement of class actions is inevitable even if it is not rational from an *ex post* perspective.²⁴ Nagareda notes that to recognize that "settlement pressure" results from the massing of civil litigation into a single proceeding is not the same thing as condemning this phenomenon (p. 48).

The normative question of whether to allow such pressure to come into existence can only be answered by looking at the consequences of allowing the pressure and the practicality of trying to prevent it. As for the consequences, Nagareda grants that any system of rules which systematically burdens one group (defendants) over another (plaintiffs) is *prima facie* worrisome (p. 48), but he believes that any final answer depends on the existence of alternatives. Nagareda notes that if Heaton is correct, it is very unlikely that increased focus on summary judgment will make a difference (p. 51). However, Nagareda also notes that if there were some way to (1) push mass torts into the mature stage and (2) settle the value of specific assets at the mature stage, then there would be no reason to view the settlement pressure identified by Heaton and others (p. 53) with indifference. This observation motivates his proposal at the end of the book.

In a few of Nagareda's examples arising from mature torts, the dysfunction arises from self-interested actions in response to certain realities created by the legal system (especially the highly individualistic tort system). The Fen-phen settlement described in Chapter Eight, for example, failed because the defendants did not anticipate how many and how expensive the back-end opt-outs would be, and this led to what Nagareda describes as the "unraveling of the fen-phen deal" (p. 147). Even if the original terms of the deal are honored, the ballooning cost of the plan (from an estimated \$3.75 billion to \$21 billion as of 2006) ensures that the plan will not be used again. Further, there is reason to believe that, as with asbestos, the structure of the plan attracted some extremely dubious medical diagnoses (p. 145). Nagareda suggests that Wyeth, Fen-phen's manufacturer, probably regrets what, at one time, Nagareda and others lauded as a very clever deal—buying plaintiffs' option of seeking punitive damages in exchange for allowing the plaintiffs' to pursue compensatory damages far into the future (p. 143). But Nagareda describes a serious dysfunction set into motion by this "Field of Dreams" Problem (if you build it, they will come to collect). "Any private administrative regime that does not foreclose resort to the tort system in relatively short order—either by its own mandatory nature or through the operation of the single, front-end opt-out process required by procedural rule—carries a

23. See p. 46; Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

24. Pp. 47–48. Heaton demonstrates that settlement pressure on defendants is greatest where defendant perceives plaintiff's risk of success as only moderately low, not extremely low. See J.B. Heaton, *The Risk Finance of Class Action Settlement Pressure*, J. RISK FIN., Spring 2003, at 75, 78.

serious potential for instability” (p. 147). Wyeth thought that the rule they sought to establish as a minimum baseline for any future settlement—no punitive damages—would be enough. They were wrong. Leaving the back-end opt-out actually ensured that their liability would remain uncertain.

The “*Field of Dreams*” problem also doomed Congress’s proposed asbestos legislation, described in Chapter Six. The Fairness in Asbestos Injury Resolution Act was supposed to create a fixed schedule of payments by the federal government for any person who had filed a suit as a result of an asbestos-related injury, in exchange for extinguishing that suit in state or federal court.²⁵ The funding was to have come from the defendant companies and their insurers and would have been administered by the federal government. But the total cost of the program was not controlled by a “hard cap” and the cost to the private sector could have gone up. Any deal that commits one party to an open-ended commitment will fail unless they can be confident that the scope of that commitment will be limited by an ascertainable rule. The asbestos defendants, through their lobbyists, told Congress that as long as money for the fund was coming out of the defendants’ (and their insurers’) pockets, they wanted to see rules that would, ex ante, insure that costs at every level would be controlled by someone other than the plaintiffs and their lawyers. When they could not get that guarantee, they refused to support the bill (p. 107).

An important set of Nagareda’s examples includes cases where the solution to the settlement of a mature tort was thwarted because a court held that the mechanism agreed upon by the parties was inconsistent with certain core legal principles. These innovative approaches to mature torts form the core of Nagareda’s empirical story. He explores an innovative asbestos settlement, a new use of statistical sampling, an attempt to develop actions based only on punitive damages, and pre-pack bankruptcies, among others. He clearly does not view all four of the legal innovations struck down by the courts with equal sympathy.²⁶ But he thinks that the courts’ convoluted approach to these cases reflects a deep confusion about the role that law should be playing in the resolution of mass torts.

In different ways, each of the failed legal responses to the problem of settling a mature mass tort shares the same structure. In cases like *Amchen*, *Ortiz*, and *Combustion Engineering*, the defendant faced radical uncertainty about future liability. They sought to treat that future uncertainty as if it were knowable by setting up limits that were cloaked as predictions but, from some of the plaintiffs’ point of view, were just arbitrary limitations on liability. By contrast, in *Cimino* and *Simon II*, the *plaintiffs* faced radical uncertainty about their future recovery and sought to treat that uncertainty as

25. See Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 CONN. INS. L.J. 517, 520–38 (2006).

26. One gets the impression that Nagareda thinks the settlement proposed in *Amchen* and *Ortiz* was a pretty good solution for the future plaintiffs, but that the punitive-damages-only class action certified by Judge Weinstein was a bad idea for reasons having less to do with class actions and more to do with the peculiar demands of due process in regard to punitive damages. It is hard to get a sense of what he thinks about pre-packs in general.

if it were knowable by setting up assumptions that were cloaked as predictions. For the defendants, these predictions were highly speculative assumptions about what might happen if the same case was tried over and over again.

In mature torts where the defendant is trying to limit plaintiffs' future recovery, the defendants' ability to alter the legal rights of the plaintiffs can come from one of two sources: securing a settlement class that covers all potential plaintiffs or legislation that reforms the plaintiffs' rights. In mature torts where the plaintiff argues that the defendant's obligation is a priori set at some limit, the plaintiff's ability to do this could come from one of three sources: the concept of the "limited class" (as in *Simon II*), the idea of adjudicative efficiency (as in *Cimino*), or the sovereign (as in Congress's aborted asbestos compensation fund paid for by the defendants and their insurers). Of course, as Nagareda points out, every effort to control uncertainty by altering the rights of an adversary in adjudication, whether by class action or legislation, has failed.

II. WHAT IS RIGHT ABOUT *MASS TORTS IN A WORLD OF SETTLEMENT*

As I wrote in the Introduction, the ten chapters covered thus far are brilliant accounts of mass torts. They are designed, however, to lead the reader to the last two chapters of the book, where Nagareda sets out his reform proposal.

The examples teach us that there is a huge desire on the part of all parties to secure "comprehensive peace in mass tort litigation" (p. 219). So far, every credible nonlegislative proposal for securing comprehensive peace has been struck down because it illegally coerces one side or the other. That is to say, it alters the rights of parties, a power reserved to the legislature (p. 219). Nagareda agrees with the proposition that no private litigant's rights can be altered without legislation; but he goes on to suggest that the goals of comprehensive peace can be secured if the plaintiffs' *lawyers* are coerced (p. 219). "What is needed," argues Nagareda, "is coercive law reform . . . for mass tort lawyers" (p. 222).

The proposal is simple:

[It] link[s] the rewards for plaintiffs' lawyers from the representation of present claimants to the viability of the peace arrangement for future ones. Specifically, the contingency fee to be gained by a plaintiffs' lawyer from representation of a present claimant would involve application of the agreed-upon fee percentage *to the lesser of what that claimant receives and what similarly situated claimants receive . . .* [for] a specific number of years in the future. (p. 237; emphasis added)

We could call this the "Leveraging Proposal." Nagareda means it when he says this is "coercive law reform for lawyers." Class action plaintiffs' attorneys will not readily agree to put their fees into escrow for some "number of years" (p. 238). Certainly the idea that an administrative agency will determine whether a lawyer's client was "similarly situated" to another's

lawyer's client might also make a few plaintiffs' lawyers immediately reject the Leveraging Proposal. On the other hand, Nagareda has thought very carefully about how the proposal could be "sold" to the plaintiffs bar and how it could be implemented without too much coercion. His last chapter offers a persuasive account of how, through "negotiated rulemaking," an administrative agency could get the mass tort bar to voluntarily accept the proposal.

The Leveraging Proposal strikes me as sound. According to Nagareda, "[t]he central enterprise of peacemaking in the mass tort setting . . . involves prospective rulemaking to regulate the compensation of claimants years into the future" (p. 235). I certainly agree that a goal of peacemaking in the mass tort setting is to regulate the compensation of claimants into the future. And this proposal does exactly that. It does it in a way that is effective *and* does not directly alter the rights of a plaintiff one iota.

If administered consistently, a plaintiffs' lawyer would have no incentive to ever knowingly trade away a similarly situated future client's interest in exchange for their own present (or future) client. This would solve the Supreme Court's problem in *Amchem* (pp. 228–30). In *Amchem*, the Court was concerned that the global peace achieved between the lawyers for hundreds of thousands of asbestos plaintiffs and twenty asbestos companies might not have been the best deal possible for the plaintiffs who would be compensated in the future. Under the terms of the settlement, the plaintiffs' lawyers negotiated a separate, more generous settlement for their clients who were currently ill, and an arguably less generous settlement for the proposed class of "futures" plaintiffs. The proposed class consisted of people who had yet to file suit, likely because they were not yet sick, and who would only become the lawyers' clients if the settlement was approved by the district court.²⁷

Nagareda's Leveraging Proposal addresses this disparity between current and future plaintiffs. Under the proposal, the plaintiffs' lawyers in *Amchem* would have had to give back some of their fee if similarly situated "future" plaintiffs received less in compensation than the clients who had retained the lawyers before the lawyers decided to represent the class. Under the Leveraging Proposal, there would simply be no incentive for the lawyers to *knowingly* prefer one set of clients over another.

Nagareda also argues that the Leveraging Proposal could solve the "*Field of Dreams*" problem (p. 240). In the Fen-phen settlement, the defendants were surprised at how the creation of a generous back-end opt-out seemed to encourage more claims. Of course, they simply could have been wrong about how many people they had originally harmed through their negligence. Wyeth's reaction is not unique. The Owens Corning National Settlement Program—which was designed to offer reasonable "peace" deals to firms that controlled a large inventory of present and future claims—backfired and resulted in a renewed rush of asbestos filings (pp. 111–12). According to Nagareda, under his reform, the incentive of any current attor-

27. See Koniak, *supra* note 10.

ney to file more cases would be mitigated by the attorney's reluctance to "give back" some of the fee she received from the earlier clients. An attorney will therefore have an incentive to manage the flow of her "inventory" of clients so that they all receive the same amount over time (p. 240).

Some problems remain in the details of Nagareda's reform. For example, what happens to a lawyer's fee if the amount a defendant pays a similarly situated future plaintiff drops because of exogenous factors, such as poor management or foreign competition? While it might be rational for a lawyer to manage her inventory of cases to prevent a "*Field of Dreams*" problem, what is to prevent new entrants into the market from rushing a lot of new plaintiffs into the market? Under Nagareda's proposal, a lawyer who just started representing clients would have no reason to limit the number of clients he represents since he has no money in escrow to lose. Finally, what happens if a defendant goes bankrupt and pays nothing to future plaintiffs? Does the lawyer who received a fee in earlier years have to give back all of the earned fee in escrow, or none of it?

III. WHAT IS WRONG ABOUT *MASS TORTS* IN A WORLD OF SETTLEMENT

But even if Nagareda is correct and the Leveraging Proposal could be adopted, and it could solve the problems he identifies with *Amchem* and the "*Field of Dreams*" dynamic illustrated by the Fen-phen settlement, he achieves victory only by solving a much smaller problem than he purports to address in his book. The problem he identifies in *Mass Torts* is one that spans all types of mass torts; the problem he solves with the Leveraging Proposal is one that arises only from mature torts.

There are two curious features of the Leveraging Proposal, given everything that Nagareda argues in the first ten chapters of his book. The first is that the proposal focuses on the plaintiff's lawyer, not the plaintiff. Recall that one of Nagareda's chief insights is that the problems he so fully illustrated in his book with the resolution of mass torts arose from a civil justice system that overemphasized the rights of the individual plaintiffs and did not allow for the forced sale of those rights by an administrator who could be trusted to compensate the plaintiff for the elimination of her claim and her rights in tort. The Leveraging Proposal does not confront the centrality of the right to redress in contemporary tort law; it does not compromise that right at all. All it does is harness the lawyer for the right-holder as an agent to help the right-holder sell that right back to the defendant before trial. But the system allows that already.

Second, the Leveraging Proposal focuses entirely on solving a problem that exists only in the world of mature mass torts. The problem that Nagareda identified with immature torts, such as the problem that arose in the breast implant litigation or which currently characterizes the *Vioxx* litigation, would not be affected by the Leveraging Proposal.²⁸ The proposal

28. It is possible that *Vioxx* will soon no longer be an immature tort. On November 7, 2007, lawyers representing the vast majority of the approximately 27,000 cases filed around the country

works only because it forces the plaintiff's lawyer to monitor the price paid to settle like causes of action. So no settlement of "present" litigants will pay more to client or lawyer than the settlements offered to "futures" litigants. But what if the problem with the mass tort settlement is that the defendant should not have paid anything at all, or should have paid less to the first-round plaintiffs (and, by extension, the "futures" plaintiffs, too)? The Leveraging Proposal, as far as I can tell, says nothing about a very large portion of the book for which it purports to be a solution.

Nagareda may well reply that the escrow into which the breast implant plaintiff lawyers would place their fees could be returned to plaintiffs whose settlement values decline because of new science. That assumes, however, that after new evidence is generated, the plaintiffs' cases still have a positive settlement value. What if the plaintiffs are dismissed on summary judgment? There would be no reason for a plaintiff's attorney who received fees from a case that was decided in favor of her client in 2009 to share those fees with a plaintiff who loses her case in 2010. Perhaps Nagareda could reply that the escrow into which the breast implant plaintiff lawyers would place their fees could be returned to the *defendant* if, after the tort matured, it was revealed that the causation case upon which the fees were earned was groundless.

But there is another way in which the Leveraging Proposal is silent on a very important problem identified in the first ten chapters of *Mass Torts*. The insight behind the Leveraging Proposal comes directly from the argument offered by the Supreme Court for striking down the settlement in *Amchem*. Recall that the difficulty settling the mature tort in *Amchem* was that no one could accurately price the value of the latent individual claims of all the exposed plaintiffs. The indeterminacy was not based on the uncertain value of generic assets—like the recognition of a novel legal claim involving emotional distress.²⁹ The question was, at least superficially, how much to pay to

signed an agreement with the defendant, Merck. See Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto Dated As Of November 9, 2007, <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> (last visited February 11, 2008).

In one way the proposed Vioxx settlement fits nicely into Nagareda's argument. If the settlement succeeds, it will provide yet another case study in how mass torts inevitably become mass settlements. Furthermore, Nagareda might even argue that the settlement came about at exactly the point he would have predicted—when the temporal dispersal of the cases' generic assets were spread evenly between the plaintiffs and defendants. Vioxx was never temporally dispersed as a mature tort because it did not have the latency problem that characterized asbestos.

But the Vioxx settlement does not support the Leveraging Proposal. It does not operate on the basis of rewarding lawyers for treating different classes of plaintiffs equally. In fact, it has the potential of doing just the opposite. The MSA is a contract between the plaintiffs' lawyers and Merck, not between the plaintiffs and Merck. The plaintiffs' lawyers have promised Merck that they will encourage their clients to register, and they promise to refuse to represent their clients any further if they do not accept Merck's offer. *Id.* at 2. Leaving to one side the ethical problems with such an agreement, it seems that the agreement might create incentives that work exactly opposite to those created by the Leveraging Proposal: lawyers will have an incentive to sit on their hands when clients with the strongest and most lucrative cases decline to register, which will in turn create an incentive for those lawyers to sell registration to their remaining clients even more vigorously, since everyone will lose unless eighty-five percent of the clients who register.

29. Such questions were still being litigated as late as 1997. See, e.g., *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

settle claims whose characteristics might change over time—that is, given the fullness of time, some persons might “really” turn out to have serious asbestosis, while other might have a non-impairing plural thickening.

The question the Supreme Court asked is why the “present” plaintiffs were receiving more than the “futures” and the answer they hinted at was that the former were represented when the deal was made and the latter were not (in any effective sense). The question that the Court did not ask, but which could be asked, is why were the defendants willing to pay more for the “present” plaintiffs than the “futures”—why didn’t the defendants hold out to pay the former as little as the latter? The answer to this question is important for the Leveraging Proposal, since its attractiveness is based in part on how it solves the “*Amchem* problem.” But as some have argued, the deal offered by the defendants in *Amchem* was not about pricing latent injuries, but about trying to buy their way out of the settlement pressure under which they operated with regard to the thousands of “worthless” unimpaired claims that had been filed and which, for reasons Nagareda seemed to endorse, they felt coerced to settle.³⁰ As Brickman indelicately puts it:

The settling lawyers in *Amchem* and *Ortiz* received huge rewards, fees totaling several hundred million dollars, in part, for purporting to sell out the interests of future “exposure only” claimants by agreeing to a procedure which valued those claims at zero unless and until actual injury was manifested. That zero value is correct because the “futures” claimants have not suffered any injury and therefore ought not to be entitled to any compensation.³¹

My point is not that Brickman is necessarily correct, although he does provide an explanation of the defendants’ motives in *Amchem* that is missing in the Supreme Court’s analysis. Rather, I simply point out that there is another, completely plausible reading of how the settlement struck down by the Supreme Court in *Amchem* “solved” the mass tort dysfunction identified by Nagareda. The defendants paid something for the worthless claims of a fixed set of present plaintiffs in order to insure that they would not be obliged to pay anything for the identically worthless claims of an indeterminate (and potentially much larger) set of futures plaintiffs. This rationale for the settlement struck down by *Amchem*, if accepted, would provide yet another example of how the solution offered by Nagareda seems to have little to do with a major problem he identifies in the current world of mass torts—settlement pressure—and in this case, it is a problem within the mature mass tort of asbestos, the very mass tort he takes as the paradigm problem which the Leveraging Proposal is designed to solve.

This critique of the Leveraging Proposal raises another question: Would the threat of returning any portion of fees—whether to another plaintiff or a defendant—dissuade plaintiffs’ attorneys from investing in mass tort

30. See Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 294–95 (2001).

31. *Id.* at 295–96 (footnote call number omitted).

litigation? Nagareda discusses how the escrow itself might become an attractive vehicle for investors who would want to securitize its value during the years that the money is inaccessible to the lawyers who earned it, thus providing those lawyers with a source of income (p. 239). This assumes that lawyers will see the risk-reward ratio of mass tort work as attractive, notwithstanding the new hurdles that the Leveraging Proposal will place before them. Nagareda seems confident that the Leveraging Proposal will do no more than protect the interests of one set of plaintiffs vis-à-vis another, and leave the net amount of compensation paid by defendants to plaintiffs as a class untouched. This assumption must be examined because if it turns out that the Leveraging Proposal reduces the attractiveness to the plaintiffs' lawyer of investing in mass tort litigation, then by necessity plaintiffs will be adversely affected, since their access to litigation resources will be reduced.

CONCLUSION

Nagareda's decision to propose a solution far more modest than the problem he identifies must be justified, and it is hard to find an attempt in the book itself. It is possible that the real purpose of the book is to identify a problem, not to solve it, and the Leveraging Proposal is not the main point of the book. I think it would not be fair to criticize Nagareda for crafting a proposal that had a broader scope than the Leveraging Proposal, since it may be that no such innovation is possible within the broad constraints of the current rules of tort and civil procedure. But that does not mean that the Leveraging Proposal's "success"—as far as it goes—should lead us to believe that the problems which motivated Nagareda to write *Mass Torts* have been solved, or can be solved.