Prospects for Managing Mass Tort Litigation in the State Courts

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No more than a decade ago, federal court proceedings were the accepted solution for aggregating and "controlling" mass tort lawsuits.[1] Until recently, it was assumed that cases involving the same product or event would be best managed by assembling them together under federal court aegis for preparation purposes and probable ultimate disposition. This was done through such procedures as multidistrict litigation (MDL)[2] or class actions.[3] More recent events have revealed both the limits on such federal management and the potential for management of mass tort litigation in the state courts. Thus, the theme of this paper is the prospect for handling mass tort litigation in the state system.

Those who study litigation involving the same product causing widespread injury, be they judges, professors, or others, have frequently and urgently commented on the problems caused by handling an unruly mass of cases, and have looked toward overarching solutions.[4]

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[1] *See generally* PAUL D. RHEINGOLD, MASS TORT LITIGATION §§ 1-4 (1996 & Supp. 2000). As explained at length in this treatise, a distinction is made throughout this article between a "single-situs" tort, which is a mass tort that happens in one place (such as a building explosion or airplane crash), and a "widespread" tort, which usually involves a product that caused damage all over the country. *See id.* § 1.

[2] 28 U.S.C. § 1407 (1994). *See also* RHEINGOLD, *supra* note 1, § 3. For those without experience in federal multidistrict litigation, it involves the transfer of cases arising from the same product or event to one judge who is appointed by a panel to handle all pretrial matters in the cases on a one-time, uniform basis. Should a case not be settled during this process, it is retransferred back to the district where it was filed for trial.

[3] *See* RHEINGOLD, *supra* note 1, § 3. Again, for those unfamiliar with the federal procedure for class actions, the types of classes and requirements for each are set forth in Federal Rule of Civil Procedure 23. Classes may be established for all purposes or to effectuate a settlement, and they may be set up so that potential members may opt out (a (b)(3) class), or may not (a (b)(1) or (b)(2) class).

[4] *See, e.g.*, ADVISORY COMMITTEE ON CIVIL RULES OF THE UNITED STATES, WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (1999). *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

Management in the state court systems is one, but only one, of a number of proposed solutions. Most of the other solutions revolve around increasing the effort to round up cases into the federal system, or increasing federal-state cooperation. Of course, the myriad solutions being proposed are not mutually exclusive.

Three areas that fall under the broad umbrella of state court litigation of mass torts are covered in this paper. The first is management of a group of cases solely within one state, the second is coordinated efforts between the states, and the third is state-federal management in some joint fashion.

I. MANAGEMENT WITHIN A STATE

When claims are filed in various counties within a state, how individual states react to mass tort litigation involving a widely used product has not been comprehensively studied. By studying examples, however, one can observe that the state court systems have developed a variety of ways of dealing with mass tort cases. Some employ detailed procedures, similar to those in the MDL; others adopt a total laissez faire attitude. These differences are explained, in part, by the type and volume of cases that are commonly filed in a particular state. This is often the result of the state's population, or the proclivity of its citizens (and plaintiffs' bar) to litigate. Other factors contributing to these disparate patterns are the strength of the individual state's judiciary, and the gravitation of litigation to states that are perceived to have better procedures or juries.

When examining various state court practices, the initial concern is how the cases are aggregated. It is important to examine what procedures exist and how they have been utilized, particularly when cases are aggregated for preparation or when class actions are sought in state systems.

Undoubtedly, California offers the most organized procedures for handling multi-county suits involving the same product. Since 1974, California's civil practice code has provided detailed rules for the aggregation of cases and for their management.[5] Under the code, a judicial council decides whether particular cases should be aggregated. If the decision is positive, then a judge is selected to oversee the preparation of the cases. As with the federal MDL, steering committees are appointed, document depositories established, depositions taken, and management orders issued. The steering committee's decision binds all cases.[6] Unlike

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[5] CAL. CIV. PROC. CODE §§ 404-404.8 (West 1973 & Supp. 2000).

[6] *See* RHEINGOLD, *supra* note 1, § 6:3.

many other states, California seems as willing as the MDL to create aggregations, if not more so.[7]

No other state comes remotely close to California's organized management of cases. Some states, however, have at least adopted written procedures that aggregate mass tort cases before one judge. Yet these rules, whether statutory or court-ordered, are typically less detailed than those in California and have resulted in fewer aggregations. The most active states in this category are New Jersey[8] and Pennsylvania.[9]

New Jersey provides a good (and not necessarily provincial) example of this second tier of state handling. Many widespread injury mass torts have been organized under the state's procedures. Under the New Jersey rules, these cases have been managed extremely well through to resolution.[10]

Some states have used existing procedural rules to try to organize mass tort litigation within their borders, most often by formal consolidation of cases pursuant to the state court equivalent of Rule 42 of the Federal Rules of Civil Procedure.[11] Although the concept of consolidation typically applies to cases pending within one district, some states may use a consolidation rule to bring all of the cases in various counties to a judge in one county. This consolidation may be solely for preparation purposes, or for trial.

Other states have developed an aggregation process on an ad hoc basis, dealing with problems as they arise, rather than relying on statute or court rules. New York is a good example of this approach. In New York, a statewide administrative judge, usually upon request of a party or a local judge, will decide if cases pending in various counties should be transferred for preparation purposes to one judge.[12]

The smooth and successful management of mass torts in New York somewhat belies the need for rules. New York's approach is successful though because of the cooperation of the parties. Because there are no rules, the parties are responsible for working out case management orders. New York courts utilize steering committees, but unlike those in California

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[7] Recent examples are the Sulzer hip implant, the diet pill (fen phen) litigation, and latex. The Sulzer litigation was coordinated months before there was even a hearing by the federal Judicial Panel as to whether to adopt an MDL.

[8] SYLVIA B. PRESSLER, CURRENT N.J. COURT RULES 4:38 (GANN 2001).

[9] PA. R. CIV. P. 213, 213.1 (West 2001).

[10] Credit for this must go to the judge to whom these cases have been assigned, Judge Marina Corodemus of Middlesex County, herself a former tort litigator.

[11] *See, e.g.*, WIS. STAT. § 805.05 (1994).

[12] Recently, the majority of cases have been transferred to New York County (the home of Manhattan). Within New York County, the judge most frequently appointed has been Helen Freedman, who, like Judge Corodemus, has managed the litigation expertly.

or the MDL, they are not paid, and counsel for individual parties have more of a voice in case management.[13]

Although many models for aggregating cases exist, some states choose to have no rules and little or no precedent for aggregation. Less populated states may not need aggregation procedures because processing individual cases does not impose a great cumulative burden on their judiciaries. For example, New Hampshire and Wyoming handled only a handful of "fen phen" diet drug cases, and neither state required an extensive organizational structure. Because preparing a mass of cases all at once provides time and cost benefits, one must wonder why many states with large populations still lack aggregative procedures.[14]

In addition to the aggregation methods created by the procedures above, mass tort cases could be handled collectively through state court class actions.[15] There are, however, handicaps to this method: First, not all states recognize class actions based upon torts, and in those that do there is frequent opposition by both plaintiffs' and defense counsel. Second, courts are often unfamiliar with the tasks that aggregative litigation requires. Nonetheless, there have been some tort classes certified in the breast implant[16] and tobacco cases.[17] The ultimate outcome of these matters may provide a better understanding of the use of class actions in the states.[18]

II. INTERSTATE MANAGEMENT AND RESOLUTION

The prospect for case management and resolution among the states is more complex than handling mass tort cases within a state. Here, there are at least two approaches to examine: first, the use of a state court case to resolve national litigation (including existing or potential federal litigation), and, second, the possibility of states working together to handle the cases.

If the parties can establish a nationwide class action then a suit that is commenced in one state has the potential to resolve all similar litigation in

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[13] An anomaly in the handling of mass torts is Texas. This is in part because of its size, but also because of efforts by the Texas bar. In the recent diet pill (fen-phen) litigation, cases pending in various regions of the state were aggregated for preparation purposes. Thus, there were groups of cases organized in and around Dallas and Houston.

[14] For instance, although there were hundreds of diet drug suits pending in many different Florida counties, the state made no attempt to streamline the matters through aggregation.

[15] *See generally* RHEINGOLD, *supra* note 1, §§ 3:99-102. Of course, a federal court can entertain a class limited by definition to persons within the state where it sits. *See id.* § 3:27.

[16] Spitzfaden v. Dow Corning Corp., 619 So. 2d 795 (La. Ct. App. 4th Cir. 1993), *cert. denied*, 624 So. 2d 1237 (La. 1993).

[17] Broin v. Phillip Morris Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 3d Dist. 1994). The case was ultimately settled.

[18] In only a few instances has a state's worth of mass tort cases been resolved within the state, through available class action or trial procedures.

the country. The Supreme Court in 1996 established that a state court class action could control and conclude nationwide litigation in *Matsushita Electric Industry Co. v. Epstein*,[19] a securities action. In the mass tort field, only a small number of state court class actions have been certified that purported to cover all claims in the country. To date, there have not been any such actions involving widespread personal injuries.

It is not surprising that little use, let alone success, has been achieved through a state-based nationwide class action. First, many judges would not welcome the work. Many would likely interpret their laws as not allowing such a broad scope, or declare it legally unmanageable. Second, although lawyers in one state might dream of taking over all of the claims nationally, they will be competing with lawyers who are working in the federal system, as well as lawyers who are organized in other states and do not want to lose control of their cases.

Turning to other means of interstate organization, there is today no statutory method of achieving interstate aggregation, even though a task force of the American Law Institute suggested it as a potential means of handling the mass tort problem.[20]

The recent "fen phen" diet drug litigation,[21] the largest mass tort in recent years, was conducted under an ad hoc method of cooperation between the states. Thus, it is worth examining in some detail, especially since it may have set precedents for future litigation. In the diet drug litigation, a strong impetus to work cooperatively between states arose because many attorneys wanted to keep their cases out of federal courts, where the cases would be transferred to the MDL operating in Philadelphia.[22] There were several reasons why many lawyers shunned the federal system: some feared that they would lose control of their clients; others objected to the inherent delays involved in MDL preparation work.

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[19] 516 U.S. 367 (1996). *See also* Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997) (effecting finality to the state court resolution); Geoffrey P. Miller, *Class Actions and Jurisdictional Boundaries: Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996).

[20] COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (A.L.I. 1994). The ALI Complex Litigation project was a long-term study by a committee composed of highly knowledgeable professors, judges, and practitioners. In the end, the group came up with "solutions" including legislation, which have proved to be unacceptable, if not utopian. One such solution was to transfer all federal and state cases to one state for national litigation management. Picking that state and determining the law that would be applied are only two of the many problems the plan raised.

[21] The diet drug litigation is described in detail in ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN (2001). The battle between state and federal attorneys is one of the author's main themes.

[22] *In re* Diet Drug Prods. Liab. Litig., No. 1203, 1997 U.S. Dist. LEXIS 21333 (J.P.M.L. Dec. 17, 1997).

Many attorneys sought to prevent their cases from being subsumed into a class action. Most importantly, a share of the fee (known colloquially as a "tax") would have to be paid for the work of the plaintiffs' steering committee.[23]

Discovery against the chief defendant in the diet pill litigation was commenced in the Texas state courts (within a few months of the recall of the product in 1997), and soon spread to other states. Attorneys in Pennsylvania and New Jersey began to work on state court cases by 1998, utilizing their own discovery and employing that of the Texas lawyers. Soon, New York lawyers joined in, and for a while there was an assemblage of lawyers in these three states known quite informally as "the Mid-Atlantic group."[24] Completed discovery was shared, and, by stipulations with the defendants, it was applied to new cases. The same arrangement was made for future discovery as it came into existence.

In time, the use of this large discovery product was extended to cases in other states. A New York lawyer, for example, who had a case in North Carolina, could, by stipulation, apply his earlier work product to that case. And lawyers in other states could enter into agreements with law firms who had completed discovery to utilize the product in their states. This was with the approval of the chief defendant, since it avoided repetitive discovery. Only the federal lawyers were unhappy with this arrangement, as their profitable "tax" would not apply.[25]

The sharing of work product between law firms in various states would be most difficult if the defendant did not voluntarily agree to the arrangement. It is generally in the defendant's interest to agree, as it avoids repetitive depositions of employees, which not only consume time but also create the risk of contradictory statements. On the other hand, it is surprising how often defendants do agree, and actually foster such arrangements when they are handing potentially valuable work product to a plaintiffs' attorneys who would otherwise not be able to obtain this discovery on their own.

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[23] The amount for the MDL cases was set at nine percent of the gross recovery, the sum coming out of the attorney's fee share, and not off the top or out of the client's share. However, if a state court case was participating through a state that was coordinating with the MDL, the rate was six percent.

[24] Details on this arrangement are in Paul D. Rheingold et al., *Courts Provide New Forum for Mass Torts*, NAT'L L.J., Feb. 22, 1999, at C28. For a larger discussion on the role of the plaintiffs' bar in aggregating cases, see Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

[25] In general, if a state court case utilizes the work product of the plaintiffs' steering committee in federal court, it has to pay for it. *See* RHEINGOLD, *supra* note 1, § 7:36. The court sets the amount, sometimes in private negotiations with the steering committee. *See id.* Often, the amount is the same as in federal cases. *See id.*

The matter of costs and fees was of great importance to the development of interstate cooperation in the diet drug cases. Though the lawyers who took discovery in the first state could have sold their product to lawyers in other states, this situation rarely occurred. Lawyers in other states conferred a benefit on the group by adding to the package. For example, the Mid-Atlantic group added to the value of the product by undertaking to optically scan documents from the files of the defendants, thus making them more searchable by other lawyers. In many instances, there was free-skating with the use of the documents, perhaps because those who performed the work did not know a way to prevent it from being used.

The interstate cooperation discussed here did not prevail in every state. Judges in some states ordered lawyers to participate in federal discovery, and pay for it.[26] In that fashion, the state judge avoided much work in supervising fresh discovery. In other state cases, local plaintiffs' counsel chose to participate voluntarily in the MDL work product and pay the fees for that service, again avoiding any liability development efforts on their part. Another group signed on to the federal discovery, probably because the members did not know what the state court lawyers were doing cooperatively.

It remains to be seen whether future mass tort litigation will be modeled under the diet pill cases. While there have been several recent mass tort actions, none has yet reached the volume where it would be profitable to create interstate cooperative efforts. In any case, the cooperation of the defendant is not always guaranteed. Still, all in all there is some basis to claim that the diet pill cases set up a "new paradigm," or a "second front," and that this is the wave of the future.[27]

III. STATE-FEDERAL COORDINATION

A complete analysis of the prospect for state court management of mass tort cases requires an examination of state-federal cooperation and coordination. The state-federal relationship has two modes: passive state court case participation in federal-directed litigation, and cooperation carried on by relatively equal entities.

Federal-directed litigation was the standard model for many years and is still used on occasion. The cases are managed by the federal litigation and steering committee as if they were federal cases either by voluntary participation by a plaintiff, or with direction from a state court judge. The

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[26] This was true for the California cases congregated under their local code.

[27] *See* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

type of discovery that is done in the MDL is applied by agreement between the defendant, the steering committee, and counsel to the state court cases.[28]

In the past decade, federal judges managing MDLs have made a special effort to deal with state court cases, often by appointing a special master or a state court liaison committee to interface with the state judges handling the same cases, or to interface with the parties' attorneys. The aim of the federal judges is to persuade state court judges to order the participation of the cases in the MDL. In this respect, the silicone breast implant litigation can be contrasted with the more recent diet pill cases. In the former, Judge Sam Pointer made an extensive effort to become involved with the state court cases, and met with moderate success aggregating the cases.[29] With the breast implant litigation fresh in mind, Judge Louis Bechtle set out to establish a similar rapport, if not control, in the diet pill MDL. Unfortunately, he met with considerable resistance from state court lawyers and from judges who had come into their own in handling their own dockets.[30]

Further, if a class action develops in federally organized litigation, the state court cases and claims are handled under Federal Rule of Civil Procedure 23. Rule 23 devices are greatly weakened at present, however, because the Supreme Court created doubt whether one can have a viable limited fund action if not all assets of the defendant are put into the plan,[31] and when it held that a settlement class, if valid at all, must provide for opting out.[32] Thus, in the diet pill litigation, which provided for an opt-out

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[28] One method whereby a federal court managing a tort class action may seek to control state court cases is to enjoin their prosecution. While this has been rarely done, except where there is a final settlement and the court wants to control state court cases for a limited period of time, it was recently ordered in the Sulzer hip implant litigation. *In re* Inter-Op Hip Prosthesis Liab. Litig., MDL No. 1401, N.D. Ohio (2001). A settlement class action filed jointly by counsel for the defendant manufacturer and certain plaintiffs was tentatively certified by the MDL court. This was premised under the All Writs Act, 28 U.S.C. § 1651 and found not to be in violation of the Anti-Injunction Act, 28 U.S.C. § 2283.

[29] *See* McGovern, *supra* note 27, at 1881.

[30] *See* Erichson, *supra* note 24. Judge Bechtle, in his final pretrial order number 1962 commented on his attempts to reach out to the state courts and state court cases. *In re* Diet Drug Prods. Liab. Litig., No. MDL 1203, 2001 WL 497313 (E.D. Pa. May 9, 2001). He concludes that the coordination effort "met with considerable, if not total, success." *Id.* at *4. This does not comport with the observations of the author. The great majority of diet pill cases were filed in state courts, and the great majority of these in no way coordinated with the federal cases. Those in New Jersey, New York, and Pennsylvania alone outnumbered the federal litigation by far.

[31] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

[32] Even with the right to opt-out there is still doubt about the propriety of a settlement class under Rule 23(b)(3). Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (decertifying a large asbestos settlement class and questioning generally whether Rule 23 permits settlement classes in tort cases).

class under Rule 23(b)(3), many state court cases opted out of the settlement plan.[33]

Because lawyers and courts often resist joining federal litigation when there is a tax to pay or a loss of control, there has been an ad hoc practice of cooperation between state and federal parties involving the same mass tort. To a large extent, these have involved single-situs mass torts, such as building explosions or airplane crashes.[34] There are a few examples of such cooperation involving products causing widespread injury, but these have generally involved a state and federal court in one locale handling cases in their territory.[35]

Few would question the wisdom of encouraging state-federal cooperation.[36] At least in the single-situs type of mass tort, the cases have worked extremely well, avoiding duplication of effort and often leading to a resolution of all the litigation. Where there is widespread national damage from a product, however, it does not appear that this type of cooperation, as valuable as it is, is a solution to the perceived existing problems.

CONCLUSION

Contrary to assertions that have fueled multiple suggestions for "reform," there is not much concrete evidence that there is a crisis in the handling of mass tort cases. Perhaps some of the impetus for change arises less from a justifiable worry about the costs to the judicial system and the parties, and more out of a conservative desire to curb mass tort litigation. That may be, but given the current reality of a two-court system in this country, the much smaller question posed in this article is to what extent mass tort litigation can be, and in fact is being, managed in the state courts. And the further issue is whether it is being managed efficiently.

A review of the current landscape indicates that state court processing of mass tort litigation is increasing in volume and is increasingly successful in meeting the goals of aggregating and disposing of litigation in a fair and timely method. It is also submitted that a number of legislative and other

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[33] *See* RHEINGOLD, *supra* note 1, § 14:27.

[34] *See* William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992). Judge Schwarzer's article remains the best case study of such events.

[35] *See* RHEINGOLD, *supra* note 1, § 6:17. Examples are the asbestos and DES litigation in New York.

[36] There are tracts put out by various courts on how to encourage state-federal cooperation and coordination. The most notable of these works is JAMES G. APPLE ET AL., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS (1997). Apple's work, however, is not particularly thoughtful or helpful. Other efforts at setting up manuals or information for state-federal cooperation are reviewed by McGovern, *supra* note 27.

proposals to centralize mass tort litigation in the federal system are unnecessary and probably would create more problems than they would solve. This includes currently proposed federal litigation to move single-situs accident litigation to the federal system on the showing of very minimal diversity jurisdiction.[37] Even less necessary would be a similar procedure for the widespread type of product liability cases considered here. Although litigation in the state courts does not cure all of the perceived problems, it moves toward a solution.

[37] Legislation has been pending in both the United States House and Senate for several years which, in one formulation or another, would cause the removal of class actions started in state courts to the federal court, on the showing of the most minimal diversity. Present bills apply only to single-situs suits, not the widespread mass tort.