Comments on Aggregation: Some Unintended Consequences of Aggregative Disposition Procedures

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Conventionally, it is thought that class actions and other procedural aggregative mechanisms benefit those possessing small individual economic claims which, collectively, demand that attention must be paid.[1] But because, as Professor Hensler's study discloses, aggregated claims generally are settled,[2] it may be tangentially useful for a work-a-day lawyer (navigating without the compass of a specific client's legitimate interests) to note that events occur which were not necessarily contemplated by the drafters of Federal Rule of Civil Procedure 23. As Professor Erichson has correctly observed, "Litigation aggregates itself. Formal procedural mechanisms do not always do it, but aggregation happens anyway."[3]

When such aggregation happens, no defendant fairly can complain if representatives of individuals suffering relatively minor, common, but unarguably real losses make a collectivized claim. That's what Rule 23 is all about:

> Whatever the intention of the 1966 class action amendments, the effect of Federal Rule 23(b)(3) was to facilitate the aggregation of relatively small claims that were not otherwise individually economically viable to pursue into a group claim. As a result, the availability of class action litigation dramatically increased. [4]

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[1] H. NEWBERG, NEWBERG ON CLASS ACTIONS §1.06, at 1-16 (3d ed. 1992) ("The last-noted objective [to Rule 23], i.e., the spreading of litigation costs, has also been characterized as a recognition that the class action serves to afford individual claimants with small claims access to judicial relief that otherwise would be economically unavailable by means of individual litigation."); ARTHUR MILLER, DEATH OF A SALESMAN 56 (Gerald Weales ed., Viking Press 1967) (1949).

[2] *See* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001).

[3] Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 469 (2000).

[4] Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999).

I. I'M A DEFENDANT BUT I CAN USE IT

In fact and in practice, claims aggregation also has the unintended consequence of benefiting corporations accused (justifiably or not) of committing mass torts or other widespread wrongs. Efficient market analysis of corporations tends to focus on "forward earnings" rather than "trailing earnings." That is, the market capitalization (the number of outstanding shares times per share price) of a given mass tort/class action defendant will reflect the future more strongly than the past. Guided by the requirements of accounting conventions and the federal securities laws,[5] defendants facing liabilities arising out of aggregated claims frequently have a significant interest in (apparently) quantifying projected mass tort losses and creating a financial reserve for those losses which is charged against current ("trailing") earnings, thus "getting the problem behind us."[6]

Putting to one side the efficacy of so-called "global settlements,"[7] a mass tort defendant which accurately assesses its future liabilities by using an aggregated legal proceeding to "capture" a large number of claimants makes Wall Street happy. Certainty has value in the capital markets' analysis of a company; apparent certainty is almost as good. A company which plausibly consigns mass tort liabilities to the past by, for example, settling a comprehensive class action or announcing a "global settlement" (no matter how expensive) may be rewarded by an *increase* in its market capitalization.[8] That increase, in turn, makes the defendant better able to initiate and conclude advantageous business transactions and combinations where per-share price can be a critical factor in, for example, who acquires and who gets acquired.

All of this economic analysis merely illustrates a first-order point about aggregative dispositions: the aggregated mega-cases settle not just because of their huge economic threat to a defendant; they settle (at a reasonable price) because binding all (or most) claimants in one place at the time to one settlement process permits a defendant to take its hit,

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[5] FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 5, ACCOUNTING FOR CONTINGENCIES; SECURITIES AND EXCHANGE COMMISSION, STAFF ACCOUNTING BULLETIN 92; 17 C.F.R. § 210.5-02 (2001).

[6] Richard B. Schmitt, *Judge Backs AHP Plan for Diet-Drug Settlement*, WALL ST. J., Aug. 29, 2000, *available at* 2000 WL-WSJ 3041720.

[7] AHP took a reserve of $4.75 billion for the class Fen-Phen settlement trust, but a $7.5 billion fourth-quarter charge for opt-outs. *Id.*

[8] On October 7, 1999, defendant American Home Products announced a "national settlement program" to pay off plaintiffs which was estimated to cost $4.8 billion. On October 8, 1999, the day after the settlement was announced, its stock rose 11.19 percent. *See* Sam Jaffe, *Street Wise*, BUSINESSWEEK ONLINE: DAILY BRIEFING (Oct. 11, 1999), *at* http://www.businessweek.com:/bwdaily/dnflash/oct1999/sw91011.htm (last visited Oct. 11, 2001).

declare victory, and move on. It seems rather unlikely that the Rule 23 drafters were concerned about such a result.

II. FUNCTION FOLLOWS FORM

The availability of aggregation techniques is exemplified by state or federal class actions designed to encourage small-damage claims asserting traditional tort or contract causes of action that would be uneconomic to pursue individually.[9] Currently, however, one sees some evidence that judicial decisions framing the shape of Rule 23 (form) are causing it to be used for untraditional causes of action (function) asserted solely to meet its requirements. From the famous Rules Committee comment of 1966[10] through the decisions in *Ortiz* and *Amchem*,[11] traditional personal injury tort claims (even if settled) are not amenable to class action treatment, because the individualized nature of the personal injury is thought to predominate, foreclosing reliance on Rule 23.[12] But class action treatment may be available where the relief requested is injunctive.[13]

Accordingly, one increasingly sees quasi-personal injury claims being framed in terms of "medical monitoring" class action allegations. This phenomenon is perhaps less attributable to a genuine medical need for monitoring than it is to a requirement for aggregation. And aggregation, in this context, allows evidence of personal injuries as "proof" of the need for medical monitoring of the class of exposed plaintiffs, even though a class seeking traditional tort recovery for the same injuries would not be certified. In order to avoid the class certification problems arising from "individualized" personal injury issues, the class representatives typically plead that they do not suffer from any such injury. The class representatives then may plead a litany of the defendant's bad acts which have created excess health risks. This is followed by a request for "injunctive relief" requiring a defendant to give specific notice of the alleged adverse health effects, and the establishment of funds to pay for medical research and monitoring of the allegedly exposed class members.[14]

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[9] *See generally* NEWBERG ON CLASS ACTIONS §1.06; *see also* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2147 (2000) (noting "Rule 23(b)(3) was specifically designed to correct a market impediment to access and rights enforcement for certain kinds of small claims, but not for ones sounding in tort").

[10] FED. R. CIV. P. 23 advisory committee's note.

[11] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[12] *Ortiz*, 527 U.S. at 815; *Amchem*, 521 U.S. at 591; Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[13] FED. R. CIV. P. 23(b)(2).

[14] *See, e.g.*, Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475 (W.D.N.Y.

Finally, and perhaps most importantly in explaining why these cases are brought, the proposed medical monitoring fund and future class benefits form a basis for the award of potentially substantial class counsel fees.

Perhaps the drafters of Rule 23 would find this entire process somewhat curious: the requirements of the Rule (actual personal injury claims not permitted) creating or at least encouraging a new substantive cause of action (risk of future personal injury claims permitted.)

III. "I'M FROM THE FEDERAL GOVERNMENT AND I'M HERE TO HELP YOU."

The third and final observation on the unintended consequences of aggregation relates to the federal government's attempts to extract some recovery out of class action settlements of personal injury/medical monitoring claims.[15]

Pursuant to the Medical Care Recovery Act, the United States can seek reimbursement for medical treatment expenses paid on behalf of individuals arising from injuries attributable to a third-party tortfeasor.[16] Similarly, the Medicare Secondary Payer Act, permits the government to seek recovery from a "primary" healthcare plan when Medicare has paid medical expenses as a "secondary" payer.[17]

Relatively recently, the creation of large mass tort aggregated settlements has stimulated the federal government's activity under both Acts. For example, in the breast implant[18] and diet drugs[19] global settlements, the United States has sought recovery from, or in addition to the settlement funds. No one seriously has suggested that the government would, for example, spend its resources initiating recovery from an alleged tortfeasor manufacturer for medical expenses of one allegedly injured person. It is almost as unlikely that the government would do so even if there were many such persons scattered about the country. But an entirely different situation is presented when there is an aggregative "global" settlement involving funds or trusts. Now, the government simply can try

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1995); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D. Cal. 1984).

[15] The liability claims of the United States filed against the tobacco companies may not be subject to the same analysis because those claims can be seen as the executive branch's attempt to use the judicial branch to regulate comprehensively an industry not so regulated by the legislative branch.

[16] 42 U.S.C. § 2651 (1994).

[17] 42 U.S.C. § 1395y(b) (1994).

[18] *See In re* Dow Corning Corp., 250 B.R. 298 (Bankr. E.D. Mich. 2000).

[19] *See In re* Diet Drugs Prods. Liab. Litig., 2001 WL 283163 (E.D. Pa. Mar. 21, 2001).

to intervene or otherwise make its interests known in one place, at one time, for a potential large return.[20]

The government's claims in these aggregated settlement cases are at best disruptive. In the diet drug case, at a point when the tort claimants and the defendant American Home Products Corporation sought distribution of the settlement proceeds, the government filed a "statement of interest" under 28 U.S.C. § 517. It contended that it was, on a priority basis, entitled to recovery of its claims before the settlement fund was distributed. Moreover, it threatened the Settlement Trust with the imposition of double damages under the Medicare Secondary Payer Act.[21]

Judge Bechtle, who had actively managed the diet drug MDL case and approved the global settlement, rejected the government's claims in the context of an assumed preliminary injunction standard. He concluded that the government had not shown the necessary likelihood of success on the merits and permitted distribution of the settlement proceeds as "a reasonable and proper exercise of the duties of the Trustees."[22]

The point is not that the government's claims apparently have (to date) not materially succeeded against any global settlement;[23] it is that the government never would have asserted the claims unless an aggregated funded solution of a mass tort litigation had occurred.

CONCLUSION

Professor Hensler makes a nearly-unassailable case that aggregated claims are almost always resolved by settlement. That conclusion is wholly unsurprising when one considers the risk/reward calculus on both sides of the caption: class counsel get paid, but not if the class is uncertified or unsuccessful on the merits; defendants get manageable certainty when the danger of a catastrophic mega-judgment on class claims is replaced by a quantified lesser liability.

In the face of those circumstances, the effects of new derivative claims, including class medical monitoring and federal government

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[20] Potential recovery under the Medicare Secondary Payer Act depends, in part, on the existence of a "self-insured plan" as a primary payer. The government asserted (unsuccessfully) in *In re Diet Drugs*, that the Settlement Trust or the entity funding the Trust was a self-insured plan. *Id.* at *10-11.

[21] *Id.* at *2.

[22] *Id.* at *14. The Court did, however, direct the Trust to set aside $7,000,000 as a reserve to cover the unlikely event that the government might later succeed in its claims. *Id.*

[23] On September 23, 2001 the MDL judge in the breast implant litigation dismissed the government's reimbursement claims in all respects. *In re* Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926), CV 00-N-0837-S (N.D. Ala. Sept. 23, 2001).

reimbursement, may seem insignificant. But for the present, Epimetheus has not persuaded Pandora to return them to her box, and we have not fully felt the effect of their existence.