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SETTLEMENT OF MASS TORT CLASS ACTIONS: ORDER OUT OF CHAOS

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Why do we worry so much about mass tort class actions? It is not simply that they involve many injured parties and large sums of money, but rather that it seems to be extremely difficult to bring the money to bear to compensate injured parties in fair and rational ways. Personal injury claims arising out of single accidents or disasters have of course long been with us but the new kinds of claims arising from exposure to toxic or otherwise harmful products or substances present a new and more difficult set of issues and problems in the context of class actions. The observations in this paper are directed primarily at those issues and problems, but they are not irrelevant to other kinds of class action litigation.

Any resolution of mass tort litigation should seek to accomplish four objectives:

1) A fair determination—whether by agreement or adjudication—of liability and damages;
2) Reasonable assurance that parties entitled to compensation will be able to collect it;
3) Minimum adverse impact on enterprises and the related economy consistent with achieving deterrence of objectionable conduct; and
4) Minimum transaction costs.

But a series of obstacles stand in the way of attaining those objectives. They are created by the defining characteristics of this kind of mass tort litigation which, aside from the sheer number of claims, include at least the following:

1) Duplicative litigation activity: because claims to varying degrees share common issues of fact and law, much discovery and adjudication is duplicative;
2) Multiple trials: though claims share common issues, individual issues of causation and damages coupled with the Seventh Amendment right to an individual (though not necessarily separate) jury trial require numerous separate adjudications, resulting not only in duplication, as noted, but in cost and delay that may as a practical matter deny relief to many;

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3) Inconsistent outcomes: multiple jury trials in numerous jurisdictions having different rules of law lead to inconsistent outcomes, complicating the evaluation of cases;
4) Punitive damages: the threat of punitive damages, which can greatly expand the range of possible outcomes in unpredictable ways, further complicates evaluation and distorts the settlement calculus;
5) Uncertainty of causation: even when general causation may be established with reasonable certainty, specific causation of particular injuries is frequently speculative, both because of the limits of science knowledge and the nature of the disease;
6) Impact of federalism: the dispersion of cases in state and federal forums severely limits the ability of courts to coordinate and manage the litigation;
7) Uncertainty about the number and identity of claimants: the full array of present and potential claimants may not be identifiable, and potential (future) claimants may themselves not be aware of their status and may not become aware of it for some years;
8) The magnitude of defendants' potential exposure: the full measure of claims against a defendant may force it into bankruptcy;
9) Attorney control: by their nature, cases comprising mass tort litigation tend to be controlled by a small number of attorneys, and that can affect the adequacy of representation of individual claimants, the dynamics of settlement, and the magnitude of attorneys' fees; and
10) The effects of vast amounts of money at stake: because individual damage claims tend to be large, and enormous in the aggregate, they create incentives that distort the operation of traditional legal processes.

The attempts to overcome these obstacles, or find ways to accommodate them, in the resolution of mass tort litigation by resort to class actions have caused considerable debate and disagreement (reflected, among other places, in the papers included in this issue of the *Cornell Law Review*). While some welcome the mass tort class action as a savior, others view it like the sorcerer's apprentice which, once having been put to work, may be running amok.

It is clear enough that when Rule 23 was adopted in its present form in 1966, it was not intended to apply to mass tort litigation. The notes of the advisory committee state that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."[1] If that could be said of mass accidents, today's mass tort litigation, involving exposure of

1 FED. R. CIV. P. 23 (advisory committee's note).

claimants under many different circumstances and often latent injuries, presents the a fortiori case. Moreover, the purpose of the amended rule, to enable litigation when community or solidarity of interest is strong, is not particularly relevant to mass tort litigation where individual claims generally are sufficiently large to sustain separate actions and interests can be quite disparate.

Thus the reasons for using Rule 23 in mass tort litigation are not those that were said to have motivated its adoption. Those reasons come down to the conviction held by many attorneys, judges, and informed observers that aggregation of claims is a logical, if not an indispensable, method for managing mass tort litigation. To be sure, not all agree. Many judges recognize that aggregation extracts a price of its own; it can lead to insuperable management difficulties and to premature, unwise, or just plain wrong dispositions. Some attorneys are concerned over loss of individual autonomy and of the full realization of claimants' rights to compensation. Moreover, alternatives may exist, such as consolidation, bellwether trials, and statistical sampling and adjudication, that could, when used with care and ingenuity, avoid some of the pitfalls of class actions. Nevertheless, the pressures generated by mass tort litigation are driving the justice system toward comprehensive aggregation procedures and, apart from bankruptcy, Rule 23 offers the most readily available tool.

The dangers of uncritical acceptance of Rule 23 for the purpose of large-scale aggregation, however, warrant a hard look at the operation of the Rule in mass tort litigation, and particularly in settlements. Putting aside, for the moment, the special cases that may fall under Rule 23(b)(1) or (2), class actions are authorized by subdivision (b)(3) when "the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy."

Whether findings of predominance and superiority (or for that matter, of commonality and typicality) could be made in the typical mass exposure litigation, involving many claimants each offering his or her proof of individual causation and consequent damages and each having a right to an individual jury verdict (though not necessarily a separate trial), raises difficult questions. While the trials of individual claims comprising the class could be consolidated, there are practical limits to how many separate claims supported by different evidence can be given to a single jury to decide.

Because a mass tort class action may, however, present some truly common issues, most likely legal issues, Rule 23(c)(4) may support aggregation to resolve those issues. That rule provides that "[w]hen

appropriate (A) an action may be brought or maintained as a class action with respect to particular issues." But resolving the common issues in a class action does not eliminate the problem of how to deal with the individual claims of class members that remain.

Some effort has been made to find support for mass tort classes in Rule 23(b)(1)(A), which permits a class action to be maintained where separate actions "would create a risk of inconsistent . . . adjudications . . . which would establish incompatible standards of conduct for the party opposing the class." But it is quite clear now that the possibility of inconsistent verdicts in separate jury trials is not the kind of inconsistency that qualifies under subdivision (1)(A). A more difficult question is whether in a case where the claims are likely to exceed a defendant's assets, a class can be certified under subdivision (1)(B) on the theory that "adjudications with respect to . . . [some] members of the class would as a practical matter . . . substantially impair or impede . . . [other nonparty members'] ability to protect their interests." The original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them, much less where the claimants may have a right to individual jury trials, a right that is protected in a (b)(3) opt-out class but not in a (b)(1)(B) mandatory class. In effect, the use of subdivision (1)(B) might be seen as an end run around the bankruptcy law, giving the defendant some of the benefits of bankruptcy without its burdens (although even in bankruptcy an injured plaintiff's right to a jury trial would be preserved).

These observations suggest reasons to question the authority of courts to certify class actions in mass exposure cases and the validity of orders certifying such classes. One might speculate about other sources of authority for class actions in federal courts, perhaps inherent authority, equity, or the common law. But the issue of judicial authority has in fact received little attention, perhaps because none of the participants in the process has had an incentive to raise it. The tendency seems to be to avoid it by simply not making findings on the prerequisites of Rule 23, or by doing so only perfunctorily.

These problems concerning the court's authority to proceed under Rule 23 in mass tort litigation are compounded where a class is certified as what is known as a settlement class, though that term is not found in Rule 23. A settlement class is one which the parties have agreed is an integral element of their settlement agreement. The court is asked to certify the class (as the parties have defined it) as a part of the proceedings in which the court approves the settlement under Rule 23(e). This is quite different from certifying a class in the course of adversary proceedings. If the issues are genuinely contested,

the court may arrive at a bona fide ruling, even if it turns out to be erroneous. But here the court is asked to certify a class at the behest of the parties, essentially for their benefit in binding absent parties to the settlement and with little regard to the requirements of the Rule since litigation is not contemplated. It could of course be that, even in the absence of a controversy over certification, the parties could make a bona fide demonstration that the proposed class sufficiently meets the prerequisites of the Rule to enable the court to enter the appropriate findings, but that is not invariably the case. Since it is improbable that the court would be able to make the requisite findings of predominance and superiority (and perhaps of commonality and typicality) in these situations, the requirements of the Rule tend to be ignored and findings may simply not be made when settlement classes are certified.

In the mass tort settlement context, then, the class action is becoming a creature that resembles a cross between an equity receivership and a bill of peace. It has moved far from the text and from the purpose of Rule 23. One way to see this is as a commendable example of the law's adaptability to meet the needs of the time in the best tradition of the Anglo-American common law. But another interpretation might be that it is an unprincipled subversion of the Federal Rules of Civil Procedure. True, if it is a subversion, it is done with good intentions to help courts cope with burgeoning dockets, to enable claimants waiting in line for a trial to recover compensation, and to allow defendants to manage the staggering liabilities they face. But as experience suggests, good intentions are not always enough to ensure that all relevant private and public interests are protected. The siren song of Rule 23 can lead lawyers, parties, and courts into rough waters where their ethical compass offers only uncertain guidance.

It is not only that settlement classes rest on shaky legal grounds, but also that they confront courts charged with passing on those settlements with issues for the resolution of which the law provides few standards. This paper is not intended to explore those issues other than to point out that to a large extent the issues revolve around multifaceted questions of fairuess which in turn implicate to some degree professional ethics. But if judicial approval of a settlement is made to turn on the outcome of a battle of ethicists, then the legal process is truly at sea.

In fact—and surprising as it may seem on reflection—Rule 23 contains no standards at all governing judicial approval of class action settlements. Subdivision (e) simply states that "a class action shall not be dismissed or compromised without the approval of the court." The advisors' notes shed no additional light. For all that one can tell from the text, it may have been intended only as protection against abuse

or misuse of the Rule by ensuring that the procedural requirements relating to the certification of the class and notice to the members have been met. If that were the correct interpretation, a class settlement could not be approved (no matter how fair and reasonable) unless the class were entitled to certification. On the other hand, the Rule could be interpreted to give the court a free hand to make approval turn on its own independent valuation of the claims and the settlement consideration. Appellate courts have simply read a "fair and equitable" standard into the rule, but their concerns have mostly been directed at fairness between the class respresentatives and the unnamed members, and the general adequacy of the consideration.

Such a standard is no longer adequate, especially for dealing with the complex situations presented by mass tort class settlements. It leaves the parties operating in the dark and the court unable to define either the measure of its responsibility or the limit of its power. As a result, the rule of law is replaced by standardless administration, and legal proceedings of great moment suffer instability and unpredictability.

For all the reasons discussed, there is a compelling need to facilitate the settlement of mass tort litigation. As it is, the opposing parties often find themselves in the situation of two tarantulas in a bottle, each able to inflict fatal injury on the other; insistence on individual jury trials will deny many plaintiffs compensation while the aggregate compensatory and punitive damage awards can bankrupt a defendant. As noted above, Rule 23 is not the only available vehicle for aggregation to facilitate settlement. That it may be the vehicle of choice for this purpose does not justify its subversion and acceptance of the adverse consequences that may follow. Legal guidelines for approval of settlements are essential to protect all of the interests at stake and to preserve the integrity of the judicial process.

While the focus of this discussion has been on mass tort litigation, Rule 23 is transsubstantive; as such it applies to other kinds of litigation as well. Settlement classes may be used in all of them, and some of the problems that arise in mass tort cases can arise there too, even if in less acute form. Potentially, any class action settlement could involve questions about the over- or under-inclusiveness of the class definition, fairness as between different categories of claimants, the adequacy of notice and opt-out rights, and the protection of future claimants, to name a few. Thus, the lack of guidelines to govern the approval of class action settlements is a Rule 23 problem cutting across all actions subject to the Rule.

For these reasons, it is time to consider amending subdivision (e) to provide guidelines to courts for the approval of class action settlements. Those guidelines should meet certain criteria: they should

be transsubstantive, suitable for any action subject to Rule 23; they should be neutral, avoiding substantive ethical rules and principles; they should not dictate the terms of settlements or stifle creativity and adaptation to unique circumstances; they should be practical and flexible; and they should be reasonably comprehensive but not so detailed that they lead to a failure to see the forest for the trees. Finally, guidelines should not be prescriptive but should give direction that would lead the court to give the settlement the consideration necessary to bring to light any serious defect and ensure that it is truly fair and equitable. Precedent for such an approach is found in Rules 16(c), 19(b), 26(b), and 26(c) of the Federal Rules of Civil Procedure, all of which enumerate factors or items to be considered by the court in particular contexts.

Relying merely on appellate decisions for such guidelines has drawbacks: the law may vary across circuits, decisions are ad hoc, and their precedential effect will be circumscribed by the unique facts of the case. Amendment of Rule 23(e) is therefore worthy of consideration. The thrust of such an amendment would be to require the court to make findings, and hence to ensure its consideration of a number of factors relevant to the fairness and reasonableness of a settlement. The statement of such factors should be sufficiently specific to provide guidance but not so elaborate as to defeat the utility and flexibility of the rule.

The following formulation is suggested as an addition to the current text of Rule 23(e):

> When ruling on an application for approval of a dismissal or compromise of a class action, the court shall consider and make findings with respect to the following matters, so far as applicable to the action:
>
> (1) Whether the prerequisites set forth in subdivisions (a) and (b) have been met;
>
> (2) Whether the class definition is appropriate and fair, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive or underinclusive, and whether division into subclasses may be necessary or advisable;
>
> (3) Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;
>
> (4) Whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them;
>
> (5) Whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;

> (6) Whether opt-out rights are adequate to fairly protect interests of class members;
> (7) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;
> (8) Whether the settlement will have significant effects on parties in other actions pending in state or federal courts;
> (9) Whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;
> (10) Whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and
> (11) Whether the claims process under the settlement is likely to be fair and equitable in its operation.

In identifying these factors relevant to most class action settlements, the rule would establish neither substantive requirements nor minimum standards for approval. Rather, it would set out guidelines—a kind of checklist—for the consideration and evaluation of settlements. Each factor relates to matters that could bear on the fairness and equity of the settlement and present a possible obstacle to approval, but none of them ipso facto defines the terms for approval or disapproval. Rule 23 would continue to leave the decision whether to approve or disapprove a settlement to the discretion of the trial judge, but the exercise of that discretion would no longer be unguided. However, so long as the trial court record reflects consideration by the trial judge of each of these factors (to the extent relevant under the circumstances of the litigation), and any others related thereto, and findings with respect to each, the court's ruling should be entitled to a presumption of reasonableness on appeal. By lending structure to the process of approval of class action settlements, this proposed rule would also provide guidance to parties in negotiating settlement agreements. While this rule would not set limits on what is permissible, it would inform them of the issues they must address.

Amending Rule 23(e) along the lines suggested would help bring order out of the present chaos, enhance predictability and stability, increase the utility of class actions, and serve the interests of justice.