

1-1-1998

Symposium on Mass Torts: Introduction

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Recommended Citation

Georgene M. Vairo, *Symposium on Mass Torts: Introduction*, 31 Loy. L.A. L. Rev. 353 (1998).
Available at: <https://digitalcommons.lmu.edu/llr/vol31/iss2/1>

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SYMPOSIUM ON MASS TORTS

INTRODUCTION

*Professor Georgene M. Vairo**

Over the last two decades, state and federal courts have become increasingly swamped by “mass tort” litigation. Some have written that the so-called litigation explosion is largely the result of modern cases being more complex than ever before, with mass tort cases being the most complex of all.¹ Reading and even counting the law review articles written on various mass tort topics would take a lifetime. A Westlaw search in the “Journals and Law Reviews” database for the phrase “mass torts” revealed 863 such articles. Their topics range from defining a mass tort,² to discussing whether aggregation of claims is a good thing³ or whether we ought to respect the traditional values of litigant autonomy,⁴ how to evaluate scientific evidence,⁵ and

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1. See Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 845-46 (1987); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 8 (1983); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961-62 (1993); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829-30 (1993).

2. See, e.g., AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 7-18 (1994) (discussing problem with defining “complex litigation” and describing different types of mass tort cases).

3. See, e.g., Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 104 (1989); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 581-82 (1987); Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Torts Claims Resolution*, 31 LOY. L.A. L. REV. 79, 95-110 (1997) (discussing advantages of aggregated solutions in mass tort cases).

4. See Abraham, *supra* note 1, at 846-47; Judith Resnik, *Procedural Innovations, Sloshing over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627, 1627-28 (1995); Jay Tidmarsh, *Unattain-*

how to manage and try such cases.⁶ The articles also address the complex ethical issues that arise in mass tort litigation,⁷ the complex role of and interrelationship of lawyers and judges in such cases,⁸ the use of alternative dispute resolution,⁹ and the difficult federalism,¹⁰ choice of law,¹¹ and jurisdictional¹² issues presented.

A sign of the times and the importance of the area is an 1100 page law school casebook that was published on the subject in 1996.¹³ In addition, we have witnessed an avalanche of trial court and appellate court decisions on the myriad legal issues raised in these cases. In 1996 alone, the United States Courts of Appeals decided several

able Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 GEO. WASH. L. REV. 1683, 1791-1800 (1992); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74-76 (1989); Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 43-44 (1989).

5. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 205 (1994). See generally Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172 (1992) (exploring the implications of recent tort reforms); Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*, 73 CORNELL L. REV. 469 (1988) (discussing causation issues in tort claims based on toxic substance injuries); Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987) (discussing theories of tort recovery for injuries caused by toxic substances).

6. For example, the third edition of the *Manual for Complex Litigation* provides a plethora of information on a wide variety of complex litigation management issues, such as discovery. See MANUAL FOR COMPLEX LITIGATION (3d ed. 1995).

7. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

8. See Peter Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986); Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985).

9. See, e.g., Deborah Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995).

10. See Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994); Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Litigation*, 135 U. PA. L. REV. 9 (1987).

11. See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1625-26 (1992); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985) (proposing use of federal common law).

12. See sources cited *supra* note 10.

13. LINDA S. MULLENIX, MASS TORT LITIGATION (1996).

significant mass tort cases,¹⁴ and in 1997 the United States Supreme Court decided a landmark case on the use of class action settlements in mass tort cases.¹⁵ At the same time, the Advisory Committee to the Federal Rules of Civil Procedure and the Federal Judicial Conference considered major changes to Rule 23 that could have important ramifications on the use of the class action rule as a settlement vehicle.¹⁶ The abundant articles and judicial opinions leave us convinced that there are many questions but few clear answers to the difficult socio-legal issues presented in such cases.

What no scholarly publication has attempted to capture is the informal thinking of the judges, lawyers, and law professors involved in the mass tort litigation field. This Symposium provides such a forum for many of the leaders in the field to express their personal thoughts on a number of the most difficult issues. Rather than ask our participants for their general thoughts on mass torts, we have asked them to reflect on cases they have handled. We hope to provide our readers with greater insight into the problems mass tort practitioners and judges confront as they try to resolve such cases. We cannot, in any one Symposium, hope to cover all the areas covered in the literature and case law pertaining to mass torts. The Essays presented here, however, look at many of the important problems. By sensing the reactions of our participants to these issues, we can begin to develop a better understanding of the practical problems involved in resolving mass tort claims.

Eleven distinguished lawyers, judges, and law professors have participated in this Symposium. All of their submissions share a common characteristic: an exploration of the meaning of a fair settlement and the role that attorneys, judges, and alternative dispute

14. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court order certifying nationwide cigarette litigation class action); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (reversing district court order certifying asbestos settlement class action); *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996) (vacating the district court's order certifying penile prostheses class action); see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing district court order certifying class action in hemophiliac/HIV contamination litigation), *cert. denied sub nom. Grady v. Rhone-Poulenc Rorer, Inc.*, 116 S. Ct. 184 (1995).

15. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

16. The Advisory Committee considered several major amendments to Rule 23; however, the only amendment passed on to the Supreme Court by the Judicial Conference was the addition of Rule 23(f), which would permit the interlocutory review of class certification determinations. See Susan J. Becker, *Has the Supreme Court Negated Need for Rule 23 Amendment?*, 22 LITIG. NEWS 7-8 (Sept. 1997).

resolution, broadly defined, play in the process. The first Essay is by Ken Feinberg, who is well-known in the mass tort area for his participation in the settlement or implementation of many of the best-known mass tort cases, including the Agent Orange cases, the Breast Implant litigation, the Dalkon Shield case, asbestos litigation, and most currently, the proposed tobacco settlement. It is appropriate to lead off with Mr. Feinberg's Essay because he explores the most serious obstacles to achieving a settlement and explains how he has tried to cope with these challenges. He shares with us his ideas about how he has been successful in working with parties to settle some of the most intractable cases.

Second, Elizabeth Cabraser, a partner in a prominent plaintiff's class action law firm, shares her thoughts about the Supreme Court's recent case, *Amchem*. Her Essay shows her firm conviction that without class actions the victims of mass torts will not receive timely compensation. She argues that the Supreme Court's decision is not intended to prevent lower federal courts from certifying mass tort class actions, but that even if the federal courts do shy away from such certifications, the state courts are increasingly willing to certify them.

As Ms. Cabraser points out, the Supreme Court affirmed the Third Circuit's reversal of the asbestos class action because of its concerns about the fairness of the settlement.¹⁷ The next three Essays zero in on the problem of obtaining fairness and they propose solutions. First, Paul Rheingold discusses a critical ethical issue for lawyers in class actions: whether and how a plaintiff's lawyer with multiple clients may allocate settlement proceeds. He reviews the various techniques he and others have used to resolve the problems raised by aggregated settlements. Next, Robert Gerard details his experiences as objector's counsel in the GM coupon case and makes a strong argument for the increased role of objectors in Rule 23(e) fairness hearings. Finally, Judge Manuel Real, who has handled numerous complex class actions, reminds us that the district court has a duty to carefully scrutinize class settlements to protect the interests of the class members.

Next, the Symposium turns to the mechanics of resolving mass torts. Much of the controversy about mass torts has centered around the use of class actions to resolve them. Barbara Houser, Chapter 11 counsel for Dow Corning in the Breast Implant litigation, discusses

17. See *Amchem*, 117 S. Ct. 2231.

the procedural advantages available to a debtor who seeks to resolve mass torts through the use of Chapter 11. Sol Schrieber, formerly a Magistrate Judge for the United States District Court for the Southern District of New York and Special Master in the Agent Orange case, shares his experience in working with the parties to determine damages in the *Marcos* case. Arvin Maskin, who has represented defendants in numerous mass tort cases, examines the effect punitive damages has on their resolution. He also discusses the practical considerations attorneys must keep in mind when litigating cases involving punitive damages.

The next two Essays explore the workings of a dispute resolution facility. Tom Florence has been involved in most major mass tort cases, and I had the pleasure of working with him in my capacity as Chairperson of the Dalkon Shield Claimants Trust in developing our claims resolution facility. Mr. Florence discusses the elements necessary to insure the success of a claims resolution facility. The Dalkon Shield Claimants Trust stands as testimony to the value of his ideas.¹⁸ Professor Carrie Menkel-Meadow then describes her experiences as a neutral third party in the Trust's successful alternative dispute resolution program.

Last, but certainly not least, we present Professor Linda S. Mullenix's reflections in which she comments on the ideas raised by the articles just introduced to you. We have not provided our readers with easy answers because the area does not lend itself to easy solutions. Nonetheless, these Essays should provoke our readers to think carefully about the best ways to resolve mass torts without sacrificing the dignity of those claiming injury or those who participate in the process.

18. See Vairo, *supra* note 3, at 123-56 (discussing the success of the Dalkon Shield Claimants Trust).

