



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 31
Number 2 *Symposium on Mass Torts*

Article 2

1-1-1998

Reporting from the Front Line—One Mediator's Experience with Mass Torts

Kenneth R. Feinberg

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Kenneth R. Feinberg, *Reporting from the Front Line—One Mediator's Experience with Mass Torts*, 31 Loy. L.A. L. Rev. 359 (1998).

Available at: <https://digitalcommons.lmu.edu/llr/vol31/iss2/2>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

REPORTING FROM THE FRONT— ONE MEDIATOR'S EXPERIENCE WITH MASS TORTS

*Kenneth R. Feinberg**

I. INTRODUCTION

During the past fifteen years, I have been involved in various capacities in some of the most visible, provocative, and challenging mass tort litigation in the nation. Beginning with the Agent Orange products liability litigation,¹ I have served, in one capacity or another, in attempting to resolve and then implement settlements in cases involving Dalkon Shield,² asbestos,³ DES,⁴ Shiley heart valves,⁵ and silicone breast implants.⁶ More recently, I have been retained to provide some creative input into some type of global resolution of the nation's tobacco controversy.⁷ And, in attempting to provide a

* B.A., University of Massachusetts, 1967; J.D., New York University School of Law, 1970. Mr. Feinberg is a nationally recognized expert in alternative dispute resolution. In addition to establishing a law firm in Washington D.C., which specializes in mediation, he has served on two Presidential Commissions inquiring into the implications of radiation exposure to American citizens. See Exec. Order No. 12658, 3 C.F.R. 614 (1988) (establishing the Commission on Catastrophic Nuclear Accidents), amended by Exec. Order No. 12665, 3 C.F.R. 320 (1989), revoked by Exec. Order No. 12774, 3 C.F.R. 348 (1991), reprinted in 42 U.S.C.A. § 2210 (1997); Exec. Order No. 12891, 3 C.F.R. 847 (1994), reprinted in 42 U.S.C.A. § 2210 (establishing the Committee on Human Radiation Experiments).

1. See *Ryan v. Dow Chemical Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 611 F. Supp. 1452 (E.D.N.Y. 1985), rev'd, 818 F.2d 214 (2d Cir. 1987).

2. See *In re A.H. Robins*, 880 F.2d 779 (4th Cir. 1989).

3. See *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735 (E. & S.D.N.Y. 1990).

4. See *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992).

5. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

6. See *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)* No. CV 92-P-10000-S, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994).

7. See Richard B. Schmitt, *Tobacco-Suit Settlements Are Seen Becoming Tougher*, WALL ST. J., Apr. 23, 1997, at B9; see also Richard B. Schmitt, *Tobacco-Suit Pacts May Become Tougher*, WALL ST. J., Apr. 23, 1997, at B8 (W.

comprehensive list, I should note my role in two private national settlements involving thousands of property damage claims pertaining to allegedly defective polybutylene pipe,⁸ and certain types of plastic pipe attached to home furnaces.⁹

All of these cases have afforded me an opportunity to deal with the challenges associated with comprehensive resolution. Whether wearing the hat of a court-appointed Special Master, Referee, Trustee, or simply that of a private mediator retained by the parties to the dispute, the various litigations have posed interesting and unique intellectual and practical challenges to the litigants, the courts, and the public. Although each case has posed different obstacles, one overriding issue pervades all of them—how can our civil justice system provide efficient and effective relief in cases involving thousands—or even millions—of claims? A second related issue is even more acute—how does one go about resolving the inherent, inevitable tension between mass tort claims and the basic principle of individual justice? Are the two compatible? Can efficiency of resolution and justice tailored to the individual claimant stand side-by-side? Or does one inevitably succumb to the pressures of the other?

In reporting on my experiences and highlighting some of the recurring challenges that pose obstacles to mass tort resolution, I should make one additional point at the outset. Although my role in mass tort litigation often includes the function of mediator—that is, assisting the parties in attempting to facilitate a settlement of the dispute—this highly visible role has proven to be the easiest part of the job. Helping very sophisticated judges and lawyers achieve a consensual settlement of a mass tort is the easy part; the real challenge is developing and implementing creative mechanisms designed to bring justice to the litigants. For example, in most mass tort litigations, a series of intensely heated negotiations among adversaries usually results in a comprehensive settlement for a fixed amount of settlement dollars. The resolution of the controversy is announced with great fanfare, and I am asked to explain how the negotiations resulted in success. The fact is, however, that achieving global resolution almost inevitably requires the development of unique terms and conditions concerning such variables as: claimant eligibility criteria; the treatment of future as well as present claims in cases involving latent

Coast Ed.).

8. See *Cox v. Shell Oil Co.*, No. 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995) (final order approving the class action settlement).

9. See J. Wheeler, *The Inescapable Lesson of the Plastic Vent-Pipe Ban*, SUPPLY HOUSE TIMES, Nov. 1994, at 43.

disease; thorny issues of scientific and medical causation; complex debate over the distribution of settlement proceeds—lump-sum versus installment payments; and the development of administrative procedures in the event that an individual claimant is unhappy with the amount allotted. These issues are rarely publicized, but their resolution often determines success or failure.

To label my work “mediation” is, therefore, a misnomer. That part of my assignment would be better titled “creative problem solver.” The development of solutions to the difficult problems which arise in the context of a mass tort settlement is what most tests the mettle of the courts, the lawyers, and the public. This challenge is the most exciting and difficult.

The following is an informal summary of my work and a discussion of the most difficult issues which arise in the course of my role as mediator and problem solver. It is neither an exclusive list, nor is it offered in careful detail with all ramifications considered. Instead, I have tried to provide a detailed blueprint, developed over the past fifteen years, which helps elucidate the obstacles to success which tend to repeat themselves despite the differences in the litigation and the obvious variations in allegedly harmful products, culpability, and nature of the tort claims.

Finally, it may prove useful to divide my work in the world of mass torts into two phases. Phase I begins with my role in the *Agent Orange* case and continues through the settlement of the heart valve class action. This can be viewed, in one important respect, as the high-water mark of the effective use of Rule 23 in securing comprehensive mass tort settlements.¹⁰ Phase II includes my work in breast implants, tobacco, and the private pipe mediations. Phase II has proven to be a period of retrenchment when it comes to the global resolution of mass tort litigation. It culminates, of course, in last term’s Supreme Court decisions in *Amchem Products, Inc. v. Windsor*,¹¹ and *Metro North Commuter Railroad Co. v. Buckley*.¹²

10. Rule 23 permits a class action if the plaintiffs/parties satisfy the prerequisites of the rule’s subdivisions. See FED. R. CIV. P. 23(b).

11. 117 S. Ct. 2231 (1997).

12. 117 S. Ct. 2113 (1997).

II. WEARING THE APPROPRIATE HAT: COURT-SPONSORED VS. PRIVATE MEDIATION

Initially, it is important to distinguish between mediation assignments initiated by the court and those which result from purely private decisions mutually arrived at by mass tort adversaries. It is of fundamental importance whether a court has requested me to attempt to facilitate a resolution of pending litigation—the Agent Orange, asbestos, and DES experiences—or whether the parties have agreed to mediation with or without the approval, or even the knowledge of the court—the situation in polybutylene pipe. Also, if it is true that creative negotiation and settlement discussion is a form of alternative dispute resolution—this is the separate role I played in the heart valve, tobacco, and breast implant cases—then a particular company may retain me to act as settlement counsel or consultant in trying to secure some degree of national resolution of the controversy.

The roles I play help define the nature of the process. In a court-sponsored mediation, such as that for Agent Orange, the mediator acts as a type of quasi-judicial official and enjoys the benefit of important leverage associated with such court sponsorship. The parties participate knowing that the entire process has the imprimatur and encouragement of the court. This has advantages and disadvantages. On the plus side, court sponsorship instills in the parties the knowledge that a settlement is sought and cooperation expected.¹³ A real concern in such cases is that advocates not incur the unhappiness of the court in working diligently towards a settlement. As a court-designated mediator, I also enjoy additional leverage in suggesting that certain terms and conditions will meet with court approval. On the negative side, parties who are compelled to mediate, despite, perhaps, a desire not to do so are more reluctant to make concessions or offer flexible alternative terms and conditions. They often hide behind the argument that they are engaged in settlement negotiations with the mediator only because of court directive. They warn that they are under no illusion that a settlement is likely and repeat the admonition that they are mediating only because ordered to do so by the court.

A privately agreed-upon mediation is marginally better and more likely to succeed than one involving the court. In a private

13. See, e.g., PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 12 (1986).

mediation entered into willingly by the parties themselves, the litigants have a stake in the venture—a desire to achieve success. Such a process usually leads to a more satisfactory—if not quicker—consensus than in those situations where the mediation is mandated by a court.

It is important, however, not to overemphasize these concerns. The real challenge is to get the competing adversaries to the negotiation table. Whether accomplished by court directive or through private agreement, the fact that a formalized settlement process is initiated increases the likelihood of success.

III. LABORING IN THE VINEYARD: THE MOST SERIOUS OBSTACLES TO MASS TORT RESOLUTION

Each mass tort is different—different products, different allegations of culpability, differing claims of injury arising out of thorny disagreements over problems of medical causation and varying claims of damage. The quantity and quality of the claims will vary from case to case. Mass tort litigation and attempts at comprehensive resolution pose a series of recurring problems which more often than not appear as major obstacles thwarting settlement. During the past fifteen years, despite the unique characteristics of each mass tort, a pattern has developed concerning a number of issues which stand out time and time again as major obstacles confronting the court, the adversaries, the litigants, and neutral parties attempting to facilitate a comprehensive settlement.

A. Aggregation

All mass torts, by definition, involve hundreds, thousands, or even millions of individual claims located throughout the nation and, occasionally, the world. No problem looms larger in the trial or resolution of such litigation than the inability on grounds of efficiency and practicality to aggregate all such claims in one forum. Indeed, perhaps the most obvious and pointed debate over the past two decades concerns this issue of aggregation.¹⁴ Is there a procedural mechanism that can be used effectively to aggregate individual mass tort claims in one court to promote ease of trial, certainty of

14. See, e.g., *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. at 2231; *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

settlement, and consistency in the treatment of various claimants?

This issue has bedeviled the courts since the *Agent Orange* case. At various times, and in various courtrooms, the courts have looked favorably on Rule 23 of the Federal Rules of Civil Procedure as the best device to accomplish the goal of aggregation.¹⁵ The courts in such cases as *Agent Orange*, heart valves, and breast implants, applied the class action provisions of Rule 23 creatively and effectively in order to aggregate the claims. The result created consensual settlement classes resolving the mass tort litigation in its entirety.¹⁶ More recently, other courts, in cases such as *In re Rhone-Poulenc Rorer, Inc.*,¹⁷ the *Castano v. American Tobacco Company*¹⁸ class action, and finally, the Supreme Court's recent decision in *Amchem Products, Inc. v Windsor*,¹⁹ have criticized liberal use of Rule 23 as a device to promote global resolution. Today, this favorite device for promoting aggregation and resolution is under fire and very much open to doubt.

This is unfortunate. Without some vehicle or mechanism for consolidating all mass tort litigation in one court, any attempt at comprehensive resolution is seriously undermined. Indeed, in my experience, without effective aggregation there can be no truly comprehensive settlement. Defendant corporations, confronting present and future litigation in various state and federal jurisdictions, often see Rule 23 as the most effective vehicle for securing total peace. Without it, regional or state-by-state settlements are viewed as Band-Aids, often providing fuel for continued litigation in other jurisdictions. Why throw good money at a settlement in one jurisdiction only to confront additional litigation in another? Indeed, without the availability of Rule 23, settlement in one jurisdiction often simply clears the docket of pending cases, thereby permitting additional new filings. Most importantly, the inability to make creative use of Rule 23 leaves open the serious problem of latent future claims. Without a procedural device to terminate or at least contain future litigation

15. See Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1153 n.41 (1983).

16. See, e.g., *Lindsey v. Dow Corning Corp.* (*In re Silicone Gel Breast Implant Prods. Liab. Litig.*) No. CV 92-P-10000-S, 1994 WL 114580, at *1 (N.D. Ala. Apr. 1, 1994); *Bowling*, 143 F.R.D. at 157-60; *Ryan v. Dow Chemical Co.* (*In re "Agent Orange" Prod. Liab. Litig.*), 611 F. Supp. 1452, 1461 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 214 (2d Cir. 1987).

17. 51 F.3d 1293 (7th Cir. 1995).

18. 84 F.3d 734 (5th Cir. 1996).

19. 117 S. Ct. 2231 (1997).

based upon latent injury, the defendants in mass tort litigation often see very little value in the resolution of current litigation.

The inability to aggregate using Rule 23 and the ineffectiveness of alternative mechanisms in resolving all present and future mass tort litigation, has led some defendants to look to federal bankruptcy law as the only alternative for global resolution and financial certainty.²⁰

Nor is it particularly realistic to expect Congress to intervene to solve the problem. Judicial critics of Rule 23 as a device to resolve mass tort litigation have failed to learn from history. The likelihood of Congress acting to resolve the problem of aggregation outside of Rule 23 by providing special legislation to end asbestos or breast implant litigation is exceedingly small. Congress has never exhibited any particular interest in getting involved in what has historically been viewed as a tort problem for individual states to resolve.²¹

As a front line observer, I am troubled by the failure of judicial critics of Rule 23—including the Supreme Court—to appreciate fully the importance of aggregation and Rule 23 in resolving mass tort litigation.²² I am a firm believer that whatever criticisms can be levelled at the use of Rule 23—and there are many—can be addressed by the diligent, sure, and certain power of district court oversight. A hands-on federal judge making effective use of Rule 23 subclasses and ever vigilant to the ethical problems of conflict of interest and dual allegiances, can assure that due process considerations are not ignored. The alternatives—distorted, inefficient, and ideological battles in the bankruptcy court or piecemeal settlements in various regions of the nation which do not provide total peace and promote inconsistency of awards and accompanying unhappiness and mistrust among litigants—have proven to be unsatisfactory.

B. Determining the Value of Mass Tort Claims

A second problem confronting the parties and the court in mass tort litigation concerns placing a monetary value on the claims at issue.

20. See *In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978 (Bankr. E.D. Mich. Aug. 9, 1995); *In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

21. See generally *Amchen*, 117 S. Ct. 2231. The tobacco debate is different and unique. The pervasive use of tobacco, its health implications resulting in a well defined federal regulatory history, and its impact on the economy all help to place the subject on a separate plane when it comes to the increasing likelihood of congressional action.

22. See *id.* at 2248-50.

If the parties are to resolve their mass tort litigation, they need to know what their claims are worth in order to negotiate settlement dollars. But the massive number of claims, the often immature nature of the litigation, and the ever-present problem of latent future claims all pose serious obstacles to securing global resolution.

First, there is the problem concerning the number of claimants. In any mass tort litigation, the claimant population is extremely diverse and varied. Some claimants experience very serious injuries, while others allege moderate physical and/or mental impairment. Many of the remaining plaintiffs exhibit only minor or nonexistent injuries. Determining how many claimants fall into various categories of disability and death is a major problem in mass tort litigation. As a practical matter, the defendant company is unwilling—or unable without adequate insurance—to negotiate a huge lump-sum aggregate payment designed to encompass all mass tort claimants. The aggregate is simply too great and presumes the validity of each and every claim.²³ On the other hand, any attempt to resolve mass tort litigation on a traditional case-by-case basis leads to unacceptable overhead costs associated with individual medical evaluations and accompanying document corroboration. As a result, a formula is usually negotiated, providing a major discount based upon the number of less serious claims. The problem, of course, is the inability of the parties to agree—or even know—how many claimants fall into each category of injury.

Second, there is the problem of litigation immaturity. Very often, mass tort litigation negotiations commence well before a historical track record is developed concerning the quality and value of the claims. The defendant companies, determined to avoid a “bet the company” class action litigation or consolidated trial, agree to negotiate a global settlement. But neither party to the litigation has any real indication, based on courtroom experience, of the true value of the claims. As a result all parties, including the court and the mediator, are negotiating in the dark, with expectation rather than hard evidence determining the different negotiating postures. This problem did not arise in litigation involving asbestos or DES, where there

23. No article describing my personal experiences in dealing with mass tort litigation can ignore the ever present problem of insurance coverage. It is often *the* most serious obstacle to settlement, since, without insurance proceeds, the defendant policyholder may not be able to pay for the settlement. *See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047-52 (D.C. Cir. 1981); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988).

was a long historical track record of financial value;²⁴ nor was the problem particularly acute in cases such as *Agent Orange*, where the court warned the claimants that their individual claims were largely without merit.²⁵ But in cases such as heart valves and breast implants, it is extremely difficult to place a value on the claims—particularly when the product's history evidences little or no problem with its use. The solution in such cases lies in the negotiation of a fair price, in which both sides—negotiating at arms length—agree upon the settlement value of the case. This takes into account the litigation track record—as bare as it may be—as well as other elements of settlement: litigation uncertainty; transaction costs; adverse publicity; and other business considerations. These variables are not as concrete or certain as extensive verdict and settlement history, but everything is relative in the world of mass torts. Third, there is the huge problem of latent future claims associated with so much toxic tort litigation. The court and the parties simply do not know how many claims will manifest themselves in the future. In addition, there is little or no certainty as to the quality of such claims if and when they arise.

As a result, any *current* negotiation designed to bring an end to the litigation must deal with the uncertainties and question marks associated with latent *future* claims. It is not simply a question of uncertain numbers. The longer the latent time period between exposure to the allegedly harmful product and the manifestation of injury, the more likely the presence of intervening or multiple medical causation. Attempting to secure a comprehensive settlement *today*, which will also bind all *future* claimants as they arise, not only raises important legal questions, but also poses serious practical problems to the litigants, the court, and the mediator.²⁶

In my experience there are three answers to the dilemma. First, in mass tort litigation involving a relatively finite number of claims—where the number of claims, the nature of the defective product, and a relatively short latency period permit the parties to determine the maximum period of future manifestation—parties can negotiate an aggregate sum to cover all present and future claims. This is the solution in cases like Dalkon Shield and heart valves; the biological

24. See *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735 (E. & S.D.N.Y. 1990).

25. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 753 (E.D.N.Y. 1984).

26. See, e.g., *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113, 2122 (1997).

clock is ticking when it comes to the potential claimant population. Second, aggregate sums can be paid in installments, with certain payments held back pending the quantity and quality of future manifested claims. The actual amount received by any claimant will depend upon the number of future claimants, along with that claimant's confirmed injury. This is basically what Judge Weinstein did in *Agent Orange* and the Manville Trust bankruptcy reorganization.²⁷ Third, a procedural mechanism created in the current settlement can allow future claimants to opt out of the settlement as their illness manifests itself or when the settlement dollars anticipated at the time of the original settlement have diminished because of the number of subsequent claims. Under this approach, a future claimant is not bound to accept the settlement amounts offered. Rather, the claimant may use an alternative forum if the settlement dollars at the time of his or her future claim are deemed inadequate. This was the approach taken in the heart valve, Dalkon Shield, and breast implant settlements. The problem with this latter alternative, of course, is the danger that the defendant company will not achieve total peace at the time of the settlement; there is always the specter of a flood of opt-out future claims.²⁸ This concern—although more apparent than real since most claimants are risk averse—can be an obstacle to achieving a current settlement.

C. Claims Administration

Little public attention is paid to the problem of claims administration in mass tort settlements. Once a settlement is achieved in principle—the aggregate dollars are agreed upon and a creative formula is put in place for the processing of individual claims—both the press and public seem to lose interest. Claims administration has, however, proven to be a major obstacle to effective implementation of otherwise very creative settlements. The very same variables that pose such a problem in the litigation and settlement of mass torts—the huge number of claims, the immaturity of the litigation, the costs associated with evaluating each and every claim, and the issue of

27. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 120 B.R. 648, 670-77 (E. & S.D.N.Y. 1990); *In re "Agent Orange" Prod. Liab. Litig.*, 595 F. Supp. 740, 858-62 (E.D.N.Y. 1984), *rev'd*, 818 F.2d 214 (2d Cir. 1987).

28. See *In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978 (Bankr. E.D. Mich. Aug. 9, 1995); *Lindsey v. Dow Corning Corp.* (*In re Silicone Gel Breast Implant Prods. Liab. Litig.*), No. CV 92-P-10000-S, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994).

latent disease—also can thwart well-intentioned efforts to process claims. Additionally, in cases lacking aggregation, how does one deal with future claims as they arise without returning to the negotiation table?

One objective is to eliminate the less serious or the fraudulent individual claims. This can be done in a number of ways, ranging from a small payment to those claimants possessing weak or non-existent claims of injury—the Dalkon Shield²⁹, heart valve³⁰ and, most recently, breast implant³¹ experiences—to requiring extensive medical corroboration for those claimants seeking substantial payments.³² In addition, various procedural devices can be put in place permitting dissatisfied claimants to challenge the amount of their award as was implemented in the Agent Orange,³³ Dalkon Shield,³⁴ and heart valve cases³⁵.

In cases involving the absence of aggregation, courts have established some creative mechanisms to avoid reactivating formal negotiation as future claims manifest themselves. In particular, in both the asbestos and DES litigation, a series of creative future deals were negotiated, whereby future claims would be administratively processed pursuant to an agreed upon current settlement formula. Of course, no lawyer negotiating the current agreement can ethically guarantee that a future claimant will be bound by the formula. As a practical matter, though, few future claimants who manifest disease reject the immediate payment schedule. Again, in my experience, claimants who have the opportunity for an immediate payment accept the money; these claimants prove to be risk averse. Such administrative arrangements—designed to bring an end to both present and future litigation—work effectively in promoting the same comprehensive result as a Rule 23 class action settlement.

29. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 633 (1992) (explaining that the Dalkon Shield trustees adopted a simple procedure to offer a small settlement in return for a signed release by the claimant for future claims).

30. See generally *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (establishing a fractured compensation program for settlements).

31. See generally *In re Silicone Gel Breast Implants*, 1994 WL 114580 at *1 (noting that certain stipulations excluded some breast implant recipients from the class).

32. See *In re A.H. Robins Co.*, 86 F.3d 364, 369 (4th Cir. 1996).

33. See *Ryan v. Dow Chemical Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 611 F. Supp. 1452 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 214 (2d Cir. 1987).

34. See *In re A.H. Robins*, 880 F.2d 779 (4th Cir. 1989).

35. See *Bowling*, 143 F.R.D. at 141.

D. Ethics

Judge Weinstein has written extensively in recent years about the ethical problems associated with mass tort litigation and settlements.³⁶ Lack of communication between lawyers and their clients, conflict of interest, divided loyalties, and problems of attorneys' fees have all been well documented in both the literature and court decisions.³⁷ One problem, however, recurs in the course of my efforts to settle mass tort litigation—in an aggregate settlement involving a fixed amount to be distributed to hundreds or even thousands of claimants—how does the plaintiff lawyer representing so many claimants decide how much of the aggregate each receives? It is not practical for the lawyer to communicate with each and every one of his clients, informing each of them how much they will receive relative to others similarly situated. Occasionally, the problem does not arise; the aggregate amount is determined through a negotiation where every claim is evaluated, leading to a computed aggregate amount—the so-called “bottom up” determination. Each claimant can either accept or reject a specific amount earmarked during the course of the negotiations. But in a “top down” deal, in which the aggregate is negotiated without regard to how much each individual claimant will receive pending some type of claims evaluation process, serious conflict of interest issues arise. How does the lawyer representing multiple claimants decide how much each receives?

Enter the mediator. As an independent, detached, and objective observer, the mediator may often be asked by the lawyer—and the court—to determine a fair allocation formula, which will be presented to the lawyer's clients. Each client will have an opportunity to accept or reject the allocated amount. Although, in theory, any individual claimant can reject the award or demand an additional portion of the aggregate settlement amount, in practice such rejection is very rare. It is the mediator rather than the lawyer who determines how to allocate the aggregate, based upon a well-publicized, principled allocation formula tied to such variables as seriousness of illness or degree of disability.³⁸ Interposing a neutral third party into the

36. See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

37. See, e.g., *In re "Agent Orange"*, 611 F. Supp. at 1453-55.

38. The development of such eligibility criteria may prove extremely problematic, at least in those cases where traditional tort concepts governing evidence of causation and relative degree of damage are absent. Compare the asbestos, Dalkon Shield, and heart valves cases where causation evidence was available to

allocation mix goes a long way toward resolving a serious ethical dilemma.

IV. CONCLUSION

I have not attempted in this brief Essay to analyze at length all of my experiences as a mediator in mass tort litigation and settlements. I aimed to provide an overview of some of the practical problems which arise in attempting to resolve such litigation and the pragmatic solutions offered to deal with these problems. What should be emphasized is the importance placed by the mediator on the cooperation of the court and, even more importantly, the parties. Once negotiations begin, once the parties come to the negotiation table with the understanding that an attempt will be made to resolve the controversy, I find that it is more than likely that resolution will be achieved. The problem is getting the parties to the table! The most serious obstacle to the resolution of mass tort litigation is the reluctance of the litigants to negotiate or even attempt to do so.³⁹ For every mass tort in which the court or the parties seek the assistance of a neutral party to structure and guide the negotiations, there are many more where a litigation war of wills is the preferred course of action. This is both unfortunate and frustrating. Negotiation can develop very creative, cost-effective settlement terms and conditions if the parties—both the lawyers and their principals—will see the wisdom and pragmatic value of working out their differences.

This is my greatest challenge—getting the parties to opt into the mediation process. Once they do so, success is usually certain.

0

the Agent Orange and breast implant cases where causation evidence was dubious and uncertain.

39. In my experience, plaintiffs' counsel representing allegedly injured claimants are always prepared to engage in nonbinding alternative dispute resolution, such as mediation. It is the defendant companies, fearing extortionate demands and a proliferation of claims if any sign of weakness is demonstrated, that usually balk at such settlement initiatives. This poses an interesting strategic dilemma for such companies: at exactly what point in the litigation process do settlement discussions make strategic and tactical sense—a discussion reserved for another mass torts symposium.

