

1-1-1998

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Linda S. Mullenix

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## Recommended Citation

Linda S. Mullenix, *Practical Wisdom and Third-Generation Mass Tort Litigation: Conclusion*, 31 Loy. L.A. L. Rev. 551 (1998).  
Available at: <https://digitalcommons.lmu.edu/llr/vol31/iss2/12>

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# PRACTICAL WISDOM AND THIRD- GENERATION MASS TORT LITIGATION

## CONCLUSION

*Linda S. Mullenix\**

The debate over mass tort litigation has become especially shrill in recent years, as members of the academic community have attacked alleged ethical improprieties, judicial overreaching, and worse. The authors of these Essays, however, present an altogether different and even optimistic view of mass tort litigation at the end of the twentieth century. These practitioners in the field tell us that mass tort litigation can be resolved—however imperfectly—by various means.

While the academicians contemplating mass tort litigation have labored diligently to intellectualize it—constructing paradigms grounded in public interest law, social choice theory, communitarianism, and law-and-economics—the practitioners have been working just as diligently to find real-world solutions to compensate mass tort victims in appropriate circumstances. In addition, while the academic community heaps scorn and criticism on mass tort settlements, lawyers and judges quietly continue to develop various means to resolve mass tort claims.

Thus, in contrast to the unabated pessimism from the academic community, these Essays convey much good news from workers in the field. These Essays also embody a good deal of common sense and practical wisdom. These Essays tell us that the lawyers and judges who work on mass tort cases acutely perceive the complex problems embedded in mass tort litigation—the difficult issues involved in globally resolving thousands of similar claims grounded in highly individualized personal injuries. These Essays tell us that the practitioners also are acutely aware of the constitutional, statutory, and doctrinal limits on their ability to resolve mass tort claims in the aggregate. These Essays tell us that the practitioners understand the

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\* Bernard J. Ward Centennial Professor of Law, University of Texas.

weaknesses, imperfections, and failures in their efforts. And, finally, these Essays tell us that the lawyers and judges who work on mass tort litigation are not ethical dullards.

It is worth noting how much mass tort litigation has developed in the last quarter century. Twenty-five years ago, the legal lexicon did not include the term "mass tort litigation." No one knew what a mass tort case was. Not only did we not have a label for these massive cases, but we also did not have the concept. In 1966 the rulemakers amending the class action rule knew about mass accident cases—the airplane crash, for example—but they did not and could not envision contemporary mass tort litigation. Hence, the rulemakers wrote their now-famous Advisory Committee Note, eschewing class certification of mass accident cases. This singular lack of vision subsequently enabled their Note to take on a life of its own, fulfilling the law of unintended consequences in the realm of mass tort litigation.

It is striking, then, to realize that twenty-five years later we have an entire legal practice and academic field devoted solely to mass tort litigation. Attorneys now identify themselves as mass tort lawyers and mass tort litigation is taught in law schools. Twenty-five years ago there were no published works on mass tort litigation. Today there is entire literature—a treatise and casebook, trade books, empirical studies, symposia, and hundreds of articles—on mass tort litigation.

As recently as a decade ago, business and legal reporters did not use the term "mass tort litigation." Now "mass tort litigation" has passed into the general vocabulary and is routinely discussed in the media. Indeed, we have an entire vocabulary derived from mass tort litigation. We speak of mature and immature mass torts; future claimants; indeterminate plaintiffs and defendants; punitive damages overkill; limited generosity classes; litigation and settlement classes; and global peace. Mass tort litigation has passed into the public consciousness.

As mass tort litigation has emerged, developed, and matured, so too has the sophistication of the practicing bar and its academic critics. These Essays collectively suggest that after a quarter century, we are entering an era of third-generation mass tort litigation. The seminal mass tort cases—Agent Orange, asbestos, and the Dalkon Shield—gave way to a second generation of mass torts: Bendectin, DES, defective heart valves, tainted blood products, and repetitive stress injuries. This second wave seamlessly segued into the current third-generation mass torts: those gargantuan cases emerging fully

blown onto the litigation landscape—breast implant, tobacco, and human rights litigation.

These symposium Essays thus embody the collective, incremental practical wisdom of those who have actually developed the field of mass tort litigation. Given the diversity of that experience, there is, strikingly, consensus in the practitioners' understanding of the problems of mass tort litigation, and their qualified, optimistic endorsement of various possible solutions.

First, these laborers in the vineyard appreciate the essential fact that every mass tort case is different, and that no two mass tort litigations are alike. While it is possible to generically describe what "mass tort litigation" is, practitioners fundamentally understand that any such definition must be tempered by—indeed riddled with—qualifications and exceptions. There is no one-size-fits-all mass tort case. Every mass tort is *sui generis*. Mass tort practitioners in the real world know that sweeping generalizations—and sweeping conclusions—about all mass tort litigation are ridiculous, and rarely will a mass tort lawyer make such pronouncements. None of these writers have; their observations generally are limited to particular cases, particular scenarios, particular configurations of facts and experience.

Thus, the practitioners know that attempts to describe mass tort litigation must be qualified by an array of considerations. Do the facts involve a mature or immature mass tort? Are the claims located in one particular place, or are they geographically dispersed throughout the country or the world? Does the mass tort involve a single-site, single-event accident, or temporally diverse products liability claims? Are the number of claimants known and finite, or does the litigation involve latent injuries and future claimants? Can the defendant or defendants be positively identified? Can they be connected in a legally significant way to the product or the alleged injury? Have the cases been filed in state or federal court, or both? In what way have the claims been aggregated, and how has the litigation progressed?

Second, these practitioners consequently understand that, just as there is no such thing as generic mass tort litigation, there is no generic mass tort solution. During the last twenty-five years, well-intentioned academicians, judges, think-tank wonks, legislators, and others have intensively sought the mass tort holy grail, the one-size-fits-all universal mass tort solution. The practitioners tell us that there isn't one. And, in their practical wisdom, they thoughtfully suggest that they aren't especially disturbed by that. The practitio-

ners capably understand that there is and cannot be one universal solution.

Third, these practitioners and judges believe in and support aggregate resolution of mass tort litigation. These practitioners recognize and understand the fundamental jurisprudential debate underlying mass tort litigation—the tension between the sanctity of individual tort claims as opposed to group resolution of such claims. They recognize the very compelling human stories and human needs embedded in individual tort claims. Nonetheless, having considered this debate and the consequences of group resolution of tort claims, these practitioners universally endorse aggregate methods for attempting to resolve fairly thousands and thousands of claims.

None of these practitioners postures at the extreme, insisting that justice can only be accomplished through individual trial of each and every tort claim. Instead, these practitioners, in their practical wisdom, have struck the balance for aggregate justice, acknowledging the imperfections of this choice at the margins. The practitioners' sense of justice has informed them that various methods of mass resolution of tort claims are often preferable to delaying or denying justice altogether through individual litigation.

Fourth, and significantly in light of the recent heated debates over litigation and settlement classes, the lawyers and judges have not given up on the class action as a possible means, among many, for resolving mass tort litigation. Quite sensibly, the practitioners understand that the Supreme Court's pronouncements in its *Amchem* decision have not eliminated either the litigation class or the settlement class as a means for aggregating and resolving mass tort litigation. As Elizabeth Cabraser succinctly suggests in her Essay and its title, there is and will be life for class action mass tort settlements after *Amchem*. As a practicing lawyer who works with judges and other mass tort lawyers, she understands that the *Amchem* decision did not repudiate settlement classes; rather, *Amchem* was the Supreme Court's prod to the profession's better angels.

And Judge Real, who understands this too, has simply synthesized the due process requirements of class action procedure in a short series of abbreviated commandments: ensure that absent class members are properly represented, notified, and accorded due process; prevent collusion between class counsel and the defendant during the settlement process; evaluate the preclusive effects of the proposed settlement; record objections on the record; and assess the fairness and reasonableness of the settlement to all class members,

making findings as to the value of each individual plaintiff. Thus, the *Amchem* decision didn't say to lawyers: "You can never have a mass tort class action or settlement." Rather, the *Amchem* decision said: "Do a better settlement."

Thus, these practitioners and judges are the masters of the possible, in otherwise often impossibly difficult cases in difficult times. Sol Schreiber and his colleagues—endorsed by the Ninth Circuit—have used class action procedure not only to aggregate human rights claims but also as the scaffolding for calculating group damages using statistical extrapolation. Sol Schreiber is no dummy. He knows perfectly well that this methodology was imperfect and vaguely bizarre in its attempt to resolve *en masse* something as peculiarly individual as human torture claims. Hence these lawyers, special masters, and judges repeatedly—and sometimes almost poignantly—admit that their solutions are imperfect. But, in the imperfect world of mass tort litigation, they challenge the naysayers and dissenters to come up with something better.

Fifth, the practitioners recognize the efficacy and attendant difficulties of bankruptcy as an alternative means to resolve mass tort claims. Bankruptcy is becoming a hallmark—or way-station—for third-generation mass tort litigation. Barbara Houser's paper thoughtfully lays out the major legal issues in the judicial system's attempts to craft bankruptcy laws around mass tort litigation. In so doing, she incidentally makes another point all these writers realize: that mass torts present a new litigation phenomenon that does not fit tidily within existing rules and statutes. Thus, mass tort litigation has been an evolutionary process of applying old rules to new cases. And the recent Congressional report and proposals for reforming federal bankruptcy law contain provisions for mass tort claims that are intended to address some of these problems.

Sixth, the alternative dispute resolution practitioners—Professor Menkel-Meadow and Kenneth Feinberg—support and endorse various alternative dispute resolution (ADR) techniques, especially voluntary mediation, for resolving mass torts. Again, recognizing the imperfections in these techniques, its practitioners nonetheless suggest that these methods have great appeal by bringing parties together to craft joint solutions to these massive litigations. The ADR advocates seem especially attuned to the individualism at stake in mass torts; but, rather than repudiating group solutions, these advocates teach us that a middle ground can satisfy the need for both individual and collective justice. The ADR advocates help us see that

humanity need not be sacrificed on the altar of group efficiency, but that group justice can serve both needs.

Seventh, a common thread through all these Essays, exemplified by Paul Rheingold's contribution, is the practitioners' keen sensitivity to the ethical dilemmas inherent in resolving mass tort litigation. Over many years of experience, they have seen it all. In the most egregious instances, the public has seen it all too. As Arvin Maskin points out, for example, punitive damages are on the rise and play an increasingly important role in mass tort litigation. These lawyers know and understand very well the perils and pitfalls of representing groups of claimants and of attempting to structure aggregate lawsuits or craft class settlements, illustrated by B. Thomas Florence's description of mass tort claim processing facilities. These lawyers know about sham and "no value" settlements. They know all about conflicts of interest; adequate and inadequate representation; improper solicitation of clients; collusion; fraud; impermissible restraints on future practice; and excessive and improper legal fees. Yet, in spite of it all, these practitioners understand that good counsel do not do this. And, in this regard, the role of the dissident, as Robert Gerard and Scott Johnson persuasively discuss, has constructively served to keep everyone honest.

Finally, these practitioners have contributed something very useful to our appreciation of the current state of mass tort litigation, apart from their practical wisdom. By their example, these quiet practitioners helpfully instruct us to turn down the rhetoric. In the last quarter century, the evolving field of mass tort litigation has brought out the worst and the best in the profession. It is certainly no surprise that such high stakes litigation has elicited some of the least professional behavior, from colleagues at the bench, the bar, and in academia. Bad lawyering has fueled exaggerated charges and personal attacks, further fanned by posturing, self-righteous advocates wrapping themselves in the flag. Mass tort litigation has become a bad caricature—a horrible parody—of everything wrong with the judicial system.

In contrast, these practitioners tell us to turn down the volume and look to the problems at hand. They tell us to work steadily, in good faith and as good lawyers, to find the best possible solution. They tell us it can be done.