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NOTES FOR A DISCUSSION OF MASS TORT CASES AND CLASS ACTIONS*

Hon. Jack B. Weinstein[†]

Mass tort cases—such as those resulting from asbestos, agent orange, breast implants, the dalkon shield, the polybutane pipe, and heart valves, to name just a few—raise some tough questions for our society and the legal profession.

The overarching issue is: how can we best protect and compensate people exposed to toxic substances and dangerous products—particularly those with latent, after-discovered dangers—at a reasonable cost, without unnecessarily destroying industries and unduly deterring development of new products?

PROTECTIVE APPROACHES

People turn to our state common law of torts, to the courts, and to federal and state class actions for protection and compensation, because legislatures and administrative agencies have generally failed to comprehensively and reliably address the problems.

New Zealand's approach—government guarantees for medical treatment and lost income to those injured—has no chance of adoption in the United States. Nevertheless, some of our safety nets, such as social security disability, workers compensation, and limited public medical insurance, help ameliorate harm and justify some limits on tort compensation, such as deductions from damage awards for collateral benefits.

Protection by governmental agencies, through an administrative system of prior product approval and administrative penalties for lack of compliance, has some merit. Various feder-

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al agencies already have considerable protective responsibility and power to impose penalties. They include the Securities and Exchange Commission, the Food and Drug Administration, the National Institute of Occupational Health and Safety, the National Highway Traffic Safety Administration and the Consumer Product Safety Commission.

We lack, however, comprehensive and reliable guarantees against bureaucratic failures and inadequate legislative appropriations which will support timely and comprehensive studies of causality, as well as risks and benefits.

Evasion of regulations for profit and by reason of negligence on the part of producers are a continuing concern. Additionally, the public fears that behind-the-scenes political or private influence will weaken effective regulatory control. However, administrative protections can be combined with private recovery to reduce transactional costs.

The alternative generally embraced in the United States is a tort system that deters misconduct through compensation after injury. Objections to this system, such as excessive caution in product development, a lottery-like over-and-under compensation for some of those injured, and greed-driven fee excesses of some lawyers, have some basis in fact but are more often than not exaggerated.

On balance, mass tort class actions, when tightly supervised by independent judges, and run by skilled and pragmatic lawyers, accomplish much more good than harm to society, and benefit those who have been injured. Even American industry benefits, because our products are probably somewhat safer and more acceptable to consumers as a result of the threat of tort litigation.

The pragmatic American way is to rely upon a combination of theories and agencies, with modifications to balance the needs of litigants, commerce, the courts, and our federal political system. Within this eclectic system a multitude of narrower questions remain. I will touch briefly on ten.

1. Preemption

How much shall we leave to state and how much to federal substantive law? In *Medtronic, Inc. v. Lohr*,¹ a case involving an allegedly defective pacemaker lead, the Supreme Court sensibly held that as long as the relevant federal administrative agency (in this instance the Food and Drug Administration) has not provided for preliminary protection by requiring adequate testing of the product, and unless Congress specifically requires otherwise, traditional state tort law, supported by state and federal class actions, remains the appropriate means of protecting the public.

2. Science

A continuing problem is how to engage the scientific community in relevant judicial proceedings. We must increase the likelihood that court decisions on liability are based on the appropriate science-based considerations of risk and causation. The recent *Daubert*² decision by the Supreme Court, reminding us that judges are gatekeepers protecting litigation against science-charlatans, has strengthened courts' hands. Judge Pointer's use of a panel of distinguished neutral scientists under Rule 706 of the Federal Rules of Evidence in the breast implant cases will give the courts a better grasp of the complex medical causation issues in those cases. A more important issue is how we can obtain more help from responsible scientists.

Unresolved problems include: how to pay a Rule 706 expert's fees (in the breast implant cases, there is a grant of \$400,000 from the courts' Administrative Office); how such experts can be prepared for depositions (by definition they are naive about the legal system and have no sponsoring counsel); and how their reports can be used at trial in a way that does not unduly burden them with repeated court appearances, while still protecting the due process of the litigants. Should the jury even be told that they are court appointed?³

¹ 116 S. Ct. 2240 (1996).

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

³ *See, e.g.*, 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVI-

3. Settlements: Future Claimants

Shall those who will not discover their injuries until the future be bound by a settlement? Can we avoid the serious ethical conflicts that arise in attempting to represent thousands of current clients while simultaneously providing for the claims of future unknown claimants? How can we guarantee that enough money will be available in the future to pay appropriate claims? Can alternative dispute resolution techniques be utilized in order to cut litigation and fund distribution costs?

Industry needs to buy peace from long, drawn-out, debilitating legal conflicts. An early and sound settlement of a class action is often the best way to protect everyone.

*Rhone-Poulenc*⁴ constituted, in the opinion of many, a somewhat cruel and unnecessary inhibition imposed by one appellate court upon an attempt to settle the almost intractable HIV hemophiliac tragedy. Despite the *Rhone-Poulenc* decision, the matter is settled anyway, all over the world.⁵

The Ninth Circuit, in *Valentino v. Carter-Wallace Inc.*,⁶ has cast doubt on *Rhone-Poulenc*, stating "the law of this circuit . . . has not looked favorably upon granting extraordinary relief to vacate a class certification."⁷ It pointed to current proposals to amend Rule 23 of the Federal Rules of Civil Procedure in order to encourage settlements to support its reluctance "to close the door" on product liability class actions.⁸

Yet proposals by the Civil Rules Committee to amend Rule 23 to permit settlement class actions under strict court control have only modest merit. The only proposal of substance—to permit interlocutory appeals—can only slow up and complicate

DENCE ¶ 706[03] (J. McLaughlin ed., 1996).

⁴ *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995).

⁵ See, e.g., Anthony De Palma, *Canadian Study Says Tainted Blood Victims Deserve Payment*, N.Y. TIMES, Nov. 27, 1997, at A15; *455 Hemophiliacs Settle AIDS Suit*, L.A. TIMES, Mar. 21, 1996, at 4.

⁶ 97 F.3d 1227 (9th Cir. 1996).

⁷ *Id.* at 1232.

⁸ *Id.* at 1233.

expeditious and fair settlements. The intermediate appellate courts are not generally helpful in micromanaging these complex cases.

Present Rule 23 can do the job. The means are already there: subclassing and court appointment of independent counsel to represent future claimants and other unrepresented subclasses; close control by the judge assigned to the case coupled with the power to require modification of settlement details; and strict monitoring of fees and lawyers' relations with huge numbers of clients.⁹

The problems posed by settlements of massive class actions were partially addressed by the Supreme Court in *Amchem Products*,¹⁰ an asbestos case. Justice Ginsburg, writing for the majority, advocated a rather strict adherence to the terms of Rule 23, while allowing consideration of a settlement in deciding on certification. More reflective of the equitable and pragmatic spirit of Rule 23 was Justice Breyer's minority opinion, allowing the trial judge to give more weight to a settlement in determining whether common issues predominate. This more closely corresponds with the notion that Rule 23 was intended to be flexible, a tool for lawyers and judges to resolve complex, mass litigation problems in a fair, efficient, and expeditious manner. The full meaning of *Amchem* will need to be spelled out over the years in many complex litigations, but it has, temporarily at least, put a damper on settlement class actions.

I have little doubt that a global settlement or series of class action settlements, providing for matrix payments on the current *Manville* plan,¹¹ but at nearly full value, is desirable. The problem is primarily the conflicts of interest that exist for plaintiffs' attorneys. The ethicists who see no evil at all in some of these sweetheart deals have a higher tolerance than I.

⁹ See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1996).

¹⁰ *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

¹¹ See, e.g., *In re Joint Eastern and Southern Dist. Asbestos Litig. (Johns-Manville Corp.)*, 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992).

Ethics cannot be abandoned in the chase for big bucks. In mass torts we are just beginning to come to grips with this dilemma.¹²

4. Integration of Criminal, Administrative, and Civil Litigations

One issue that is just beginning to gain attention is the integration of restitution orders in criminal cases and recoveries in parallel civil cases. Congress and the courts are now stressing restitution to victims as an additional remedy to be imposed on the criminally guilty.

For example, in a recent massive fraud, fleecing hundreds of poor Chinese immigrants, the defendant was prosecuted criminally in *United States v. Hollman Cheung*,¹³ while simultaneously, some 100 of the victims were joined as plaintiffs in a civil suit.¹⁴ One judge was assigned to both the civil and criminal case. In negotiations conducted with assistance from the magistrate judge, and with public fairness hearings by the court, an integrated settlement of the civil case and criminal case developed. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the sentencing judge did not participate in any criminal plea agreement negotiations.¹⁵

The private plaintiffs' attorneys fees were approved by the court in *Cheung*. The defendant was left destitute but with a reduced prison term. He cooperated with the FBI, the United States Attorney, and the lawyer representing him in both the civil and criminal case to locate *all* the victims.¹⁶ The public hearing at which the victims expressed their hurt was revealing. As in the case of litigations like asbestos, agent orange or DES, seeing the suffering victims first hand made it clear that they should not go remediless under our legal system.

¹² WEINSTEIN, *supra* note 9, at 79-83.

¹³ 952 F. Supp. 148 (E.D.N.Y. 1997).

¹⁴ Lang Fang Chau v. Hollman Cheung, 952 F. Supp. 148 (E.D.N.Y. 1997).

¹⁵ See FED. R. CRIM. P. 11(e)(1)(c) ("The court shall not participate in any such discussions" of possible plea agreements).

¹⁶ *Cheung*, 952 F. Supp. at 149; see also *United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996); *United States v. Malpeso*, 943 F. Supp. 254 (E.D.N.Y. 1996); 18 U.S.C. §§ 3663, 3664 (1994).

Cooperation in parallel criminal and civil cases—based partly on the French system—can be broadened. For example, if the SEC is going to fine a potential civil defendant, can that procedure be integrated with a class action to compensate the victims so we can avoid the present two-tiered expensive prosecutions (i.e., one administrative and one as a private class action using information revealed in the SEC prosecution)? Similarly, where the government fines a defendant, as it did recently in the antitrust criminal case settled against Archer Daniels Midland Co. for \$100,000,000,¹⁷ an additional settled amount might compensate victims with a cause of action to stave off more civil litigation.¹⁸ Power to fine for the violation of regulations governing the manufacture and sale of automobiles, drugs, toys and other consumer goods could provide room for integrating some private and public litigations. The government itself is often partly at fault and should contribute to the settlement in cases such as agent orange.¹⁹

One of the benefits of our combined state and federal regulatory-private tort systems is that they ask how we can better compensate and protect without wrecking our current commercial and legal institutions. The practical and practicable, rather than the ideological, rule the day in class actions.

Observing from the neutral position of a judge, given the huge complex problems to be solved, on balance, our legal system does a fairly credible job in protecting the public and defendants. We ought not to remove that protection or unduly hobble the legal system by inhibiting civil suits unless we are willing to pay the costs of greater administrative controls. We do not know quite where the developing law of restitution or administrative control will go. We do know that in our complex legal-political system, pragmatic, better ways will be devised to meet the problem of mass tort actions.

¹⁷ Kurt Eichenwald, *Archer Daniels Agrees to Big Fine for Price Fixing*, N.Y. TIMES, Oct. 15, 1996, at A6.

¹⁸ *Settlement in Archer Daniels Case Approved*, N.Y. TIMES, Apr. 12, 1997, at A1.

¹⁹ See, e.g., David White, *Compensation Bill Doubled*, FINANCIAL TIMES, Oct. 4, 1997, at 2 (Spanish government fined to compensate victims of cooking oil poisoning); NATIONAL VETERANS LEGAL SERVICES PROGRAM, THE VETERANS SELF-HELP GUIDE ON AGENT ORANGE (1995) (government programs supplementing programs resulting from private litigation against manufacturers).

5. Alternate Dispute Resolution

Much can be done outside of court by voluntary cooperation. For example, an American Arbitration Association Committee under Kenneth Feinberg's chairmanship, has developed guidelines for use of alternative dispute settlement techniques from pre- to post-judgment in mass torts to avoid and reduce the costs of litigation.²⁰

6. Integration of Federal and State Court Systems

How can we better integrate our state and federal court systems? There is now some vying for control with a race to one courthouse or another for perceived advantages in class and other actions. In *Matsushita Electric Industrial Co. v. Epstein*,²¹ a state court settlement of a class action released all claims, federal and state, throughout the nation. The Supreme Court approved on full faith and credit grounds.

The American Law Institute has suggested a joint federal-state procedure patterned on the federal multidistrict panel technique of concentrating federal cases before one judge for pretrial control.²² The conflict of laws problems are acute, but resolvable.

A good deal of cooperation among judges through telephones and joint meetings is already developing.²³ Recently, for example, four judges sat on the same bench—one state judge charged with coordination of all New York breast implant cases, two federal trial judges from the Eastern and Southern Districts of New York charged with all such cases in their districts, and an Eastern District magistrate judge to hear prospective scientific evidence and decide which experts could testify and how the issues were to be tried.²⁴

²⁰ See AMERICAN ARBITRATION ASSOCIATION, RECOMMENDATIONS OF TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION AND MASS TORTS (1997).

²¹ 116 S. Ct. 873 (1996).

²² See THE AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

²³ See, for example, the private meetings of the Mass Tort Litigation Committee of state and federal judges with off-the-record discussions on case coordination, particularly in the asbestos, breast implant, and new arrivals on the mass tort scene. Reports and letters in private file of author.

²⁴ See *In re Breast Implant Cases*, 942 F. Supp. 958, 959-60 (E.D.N.Y. &

We have not fully appreciated the possibility of removal from state to federal courts and consolidation by multidistricting provided by the supplemental jurisdiction of the recently amended section 1367 of Title 28 of the United State Code. The power to grant stays to avoid court conflicts and to protect jurisdiction needs further exploration.²⁵

7. Modern Technology

We have not fully adopted modern technology such as video cassettes, satellite beamed conferences, online information, CD-ROM and computers to avoid the duplication of effort and to keep attorneys and their clients in touch with each other and the courts. Some of the traditional advantages of close one-on-one client-attorney-court relationships can be preserved while large numbers of litigants are protected at one time.

8. Partial Compensation as Needed

We have not explored fully the possibility of compensating people who need immediate medical help while waiting for science to provide a fuller analysis of risks and dangers. For example, the *Pfizer* heart valve settlement provided for payment of costs, surgery and compensation as needed.²⁵

In the New York breast implant cases we are trying damages separately from local injuries caused by defective breast implants, while putting off the more dubious systematic injury matters until the Rule 706 panel reports are issued.²⁷

S.D.N.Y. 1996).

²⁵ See Anti-Injunction Act, 28 U.S.C. § 2283 (1994) (stay of state court proceedings); cf. *In re Eastern and Southern Dist. Asbestos Litig.* (*In re Eagle-Pitcher*), 134 F.R.D. 32, 36-37 (E.D.N.Y. & S.D.N.Y. 1990); *In re Joint Eastern and Southern Dist. Asbestos Litig.* (*In re Johns-Manville Corp.*), 120 B.R. 648, 654-59 (E.D.N.Y. & S.D.N.Y. 1990); see also *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1245, 1431 (2d Cir. 1993) ("A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.' ") (citation omitted).

²⁶ Milt Freudenheim, *Settlement Approved on Pfizer Heart Valves*, N.Y. TIMES, Aug. 20, 1992, at 4.

²⁷ *In re Breast Implant Cases*, 942 F. Supp. 958 (E.D.N.Y. & S.D.N.Y. 1996); cf. *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, cert. granted, 117 S. Ct.

9. Early Consideration of Merits

The scope of authority possessed by courts to consider the merits of the case and the needs of the parties early on in deciding how far class actions and other mass litigations will be permitted to go is just beginning to develop. Supreme Court dictum in *Eisen v. Carlisle & Jacquelin*²⁸ has unnecessarily limited court discretion to consider the merits in deciding on class certification. Evaluation of the merits controls our tactics at every phase of a litigation. Tying the courts' hands by preventing early protection of the parties and the public is not appropriate in mass tort class actions. Moreover, it is inappropriate to limit the courts' power to suggest modifications of settlements after fairness hearings in order to fine tune a settlement to better protect potential claimants and the public.²⁹

10. Integration of Bankruptcies and Other Litigations

How bankruptcy can be avoided while utilizing some of its procedural and other protections needs further thought. Treating the same problems in many uncoordinated bankruptcy courts with ongoing litigations in other courts is unduly wasteful of resources. Why, for example, should we have so many separate asbestos-related bankruptcy funds being separately administered by separate trusts with so many overlapping claimants?

CONCLUSION

Our dynamic, free society constantly presents new challenges. While the problems are immense, so too are our resources in skilled lawyers, sensible laypersons, dedicated judg-

379 (1996) (emotional distress actionable under Federal Employers' Liability Act where employee was exposed to asbestos but had not yet shown symptoms and cost of medical monitoring recoverable). The New York breast implant cases were being settled after a trial of eleven claims based on local injuries alone. N.Y.L.J., Nov. 28, 1997, at 1.

²⁸ 417 U.S. 156 (1974).

²⁹ Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing With Class Action Settlements*, 163 F.R.D. 369 (1995).

es and new technology. Using present institutions and procedures, we *can* provide reasonable protections against mass disasters while providing acceptable compensation at reasonable costs when people are injured. Our system works relatively well. Nevertheless, we can do better.

