

3-1-1993

When ADR Eclipses Litigation: The Brave new World of Securities Arbitration

Norman S. Poser

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Norman S. Poser, *When ADR Eclipses Litigation: The Brave new World of Securities Arbitration*, 59 Brook. L. Rev. 1095 (1993).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss3/12>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

REINVENTING CIVIL PROCEDURE: WILL THE NEW PROCEDURAL REGIME HELP RESOLVE MASS TORTS?

*Georgene M. Vairo**

INTRODUCTION

Congress, the American Law Institute, the Federal Judicial Center, various courts and commentators have been grappling with the question of how to resolve mass tort cases fairly and efficiently.¹ At the same time, however, some commenta-

* Associate Dean and Professor of Law, Fordham University School of Law; Chairperson of the Dalkon Shield Claimants Trust. I wish to thank Andrew Gordon and Simon Roosevelt, both members of the Fordham Law School Class of 1994, for their outstanding assistance in the preparation of this Article.

¹ Various bills have been introduced in Congress to deal with the resolution of mass torts. None have been enacted, generally because of concerns about federalizing tort law. *See, e.g.*, Uniform Product Liability Act, S. 687, 103d Cong., 1st Sess. (1993); Product Liability Reform Act, S. 140, 101st Cong., 2d Sess. (1990); Product Liability Reform Act, S. 100, 99th Cong., 2d Sess. (1986); Federal Tort Claims Act, H.R. 4770, 99th Cong., 2d Sess. (1986); Government Contract Liability Act, H.R. 4765, 99th Cong., 2d Sess. (1986).

The American Law Institute ("ALI") approved the Complex Litigation Project in May 1993. The Project contains a wealth of ideas, as well as citations to the cases and literature in the area of complex litigation, which would be of particular use in mass tort cases. The Project takes a broad-based approach to expanding the role of the federal courts in aggregating similar complex cases. It also provides for transfer of cases and "reverse removal" from federal courts to state courts if the state court consents and if the states adopt appropriate legislation that would permit courts of participating states to transfer cases among themselves. *See* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 4.01 (1993).

Rather than seeking an extension of federal court jurisdiction, the Project relies on transfer from state and federal courts to a transferee court (federal or state). The transferee court would then consolidate the cases for aggregate disposition. The ALI proposal is extremely broad in that it contains no express numerical limitations on the kinds of litigations that could be subject to the proposal. The test potentially would allow transfer and consolidation of all cases arising out of the same basic transaction that is the basis of a pending federal court action.

The Proposal uses existing methods of aggregation, consolidation and class actions, rather than creating a new aggregation device. Federal "intrasystem consolidation" would be enhanced by expanding multi-district litigation ("MDL") transfers under 28 U.S.C. § 1407 through use of a Complex Litigation Panel, articulating efficiency criteria and extending authority to the transferee court over trial as

tors question whether there is a real need for the myriad and fundamental amendments to the Federal Rules of Civil Procedure ("Federal Rules"), which became effective December 1, 1993.² Indeed, we may be better off with mere "tinkering changes"³ to the Federal Rules than the fundamental changes occasioned by these recent amendments. As we found with the

well as pretrial proceedings. Federal-state "inter-system consolidation" would be accomplished by expanded removal to federal court and consolidation of actions pending in state courts meeting the same transaction test as an action pending in federal court. There also are provisions for broad supplemental jurisdiction, anti-suit injunctions, court-ordered notices of intervention and preclusion of nonparties and a federal choice-of-law standard. See AMERICAN LAW INSTITUTE, *supra*, §§ 5.01-.05.

Under the leadership of Judge William W. Schwarzer, the Federal Judicial Center has been working on proposals for resolving the asbestos litigation and other mass torts. Numerous lower courts have had to grapple with how to handle mass tort cases. See generally 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) [hereinafter Vairo, *Multi-Tort*]; see also Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617 (1992) (discussing the history and philosophy of the Dalkon Shield Claimants Trust) [hereinafter Vairo, *Dalkon Shield*]; Symposium, *Claims Resolution Facilities and the Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (1990).

² See, e.g., Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761-62 (1993); Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688 (1993).

Rule 26(a) contains perhaps the most controversial of the amendments. Indeed, in his transmittal letter of May 1, 1992, to the Honorable Robert E. Keeton, Chair of the Standing Committee of the Judicial Conference, the Hon. Sam C. Pointer, Chair of the Advisory Committee on Civil Rules, characterized the proposed rule as "controversial." Letter from the Hon. Sam C. Pointer, Chair of the Advisory Committee on Civil Rules, to the Honorable Robert E. Keeton, Chair of the Standing Committee of the Judicial Conference 1 (May 1, 1992) (on file with the author). The rule requires mandatory early, pre-discovery disclosure of information that formerly required an adversarial request. The rule has been attacked as a threat to the traditional attorney-client relationship—i.e., the adversarial system as we know it. See *id.* To the extent that the rule requires a lawyer to volunteer information damaging to her client, the proposed rule certainly appears to be an attempt to shift the mindset of lawyers. Similarly, Rule 11's amendment in 1983 was designed to encourage lawyers to think less like adversaries and more like officers of the court. See GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* § 1.01, at 1-4 (2d ed. 1992 & Supp. 1993).

³ Dissent from Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting) (joined by Stewart and Rehnquist, JJ.).

1983 amendments to Rule 11, all the new words, concepts and procedures may lead to more ancillary litigation, not less.⁴

On the other hand, as Professor Deborah Hensler notes, there is widespread agreement that the civil justice system has not worked well in resolving mass tort cases.⁵ Because I am in agreement with much of what Professor Hensler writes, rather than formally respond to her paper I will use it as a point of departure. I will argue that the 1993 amendments in themselves will not materially affect the resolution of mass torts. Rather, more thought ought to be given to the more effective use of existing procedural techniques and the development of new consolidation techniques for use in mass tort cases. Perhaps more importantly, there needs to be a fundamental change in the professional ethic that lawyers and judges bring to the resolution of mass tort cases. The classic autonomy model of the adversarial system does not seem to work well in mass tort cases. To the extent that the 1993 procedural innovations are premised on a move away from the traditional adversarial model, they may begin to provide a foundation for a shift to a new ethic and model of lawyering.⁶

After considering the debate between civil procedure reformers and preservationists, Part I of this Article demonstrates that the mass tort case presents its own problems which must be addressed, but which have not been the focus of most current civil procedure reform. Perhaps most importantly, Part I argues that the debate over the 1993 amendments is

⁴ See Georgene M. Vairo, *Where We Are and Where We Are Going*, 60 *FORDHAM L. REV.* 475, 480-81 (1991) (discussing growth of Rule 11 litigation and noting that "secondary writing about Rule 11 comprises a cottage industry"); see also Gerald Hess, *Rule 11 Practice in Federal & State Courts: An Empirical, Comparative Study*, 75 *MARQ. L. REV.* 313 (1992); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFF. L. REV.* 485, 485-86 (1988-89). Rule 11 litigation has spawned several books. See, e.g., VAIRO, *supra* note 2 (empirical studies).

⁵ Deborah Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961 (1993); see also Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling the Trial of Mass Torts*, 44 *STAN. L. REV.* 815 (1992) ("Commentators of every persuasion agree that mass torts . . . confront the justice system with serious problems for which it has yet to find solutions."); *Symposium on Problems in Disposition of Mass Related Cases and Proposals For Change*, 10 *REV. LITIG.* 209 (1991).

⁶ See *supra* note 2 (discussing how the new Rule 26(a) duty of disclosure and Rule 11, as amended in 1983, are attempts to encourage a less adversarial form of lawyering in which lawyers act more as officers of the court).

largely irrelevant in the context of mass tort cases because the amendments do not implicate the problem of access restriction to the federal courts. The 1993 amendments generally focus on the "front end" of litigation, the pretrial process, giving rise to the debate about access restriction. Part I demonstrates that mass tort cases do not present the issue of access restriction, rather, they raise the problem of how to resolve the many cases that are in federal court fairly and efficiently. Thus, Part II then considers what we should do about the mass tort case. It analyzes aspects of the debate over the propriety of managerial judging and whether special rules ought to apply in the context of mass tort cases. It also discusses why special rules are justified and, indeed, necessary in the mass tort context. Part II then offers a framework for approaching the resolution of mass tort cases, and concludes by suggesting that new modes of lawyering need to be developed to resolve mass tort cases successfully.

I. THE REFORMER V. PRESERVATIONIST DEBATE: RELEVANT TO THE MASS TORT CASE?

Professor Jeffrey Stempel attempts to divide the world into two camps: the preservationists and the reformers.⁷ He pictures preservationists as the liberals, who argue for continued easy and open access to the federal courts and liberal, pro-plaintiff rules of discovery.⁸ And he casts the reformists as the conservatives, who seek to limit access to the federal courts and to make it easier to dispose of cases once there.⁹ Indeed, the fear of preservationists, and I am one of them especially when it comes to Rule 11,¹⁰ is that the reform movement is largely access-restricting. Much of the trend appears to favor stricter pleading standards, higher duties of investigation before filing (both to comply with Rule 11 and now to insure that one will be in a position to "do disclosure"), more restrictive discovery and the use of Magistrate Judges and alternative dispute resolution ("ADR").¹¹ Much of this drive for ostensibly

⁷ Stempel, *supra*, note 2 at 688.

⁸ *Id.* at 688-90.

⁹ *Id.*

¹⁰ See Vairo, *supra* note 4, at 484-86 (discussing "chilling effect" of Rule 11).

¹¹ See Stempel, *supra* note 2 at 669.

greater efficiency in case resolution would result in less opportunity to be heard by the "real" judge.¹²

The need for the rather drastic proposed changes to the Federal Rules¹³ may have little to do with problems inherent in the civil justice system. Rather, the need for greater efficiency is in substantial part a by-product of the Speedy Trial Act,¹⁴ our alleged "War on Drugs"¹⁵ and the failure of the Executive

¹² See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing trend towards alternative dispute resolution as minimizing role judges play in dispute).

¹³ See *Proposed Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 405-90 (1993); see also Linda Mullenix, *Civil Rule Revisions a Mixed Bag*, N.Y. L.J., Aug. 23, 1993, at S14 (discussing the proposed rule changes). The Supreme Court approved the proposed rule changes suggested by the Judicial Conference Committee on Rules of Practice and Procedure and then forwarded them to Congress pursuant to 28 U.S.C. § 2072. See Letter from Chief Justice William Rehnquist to Congress, 113 S. Ct. (Preface) 477 (1993). The House of Representatives then deleted a major provision of the proposed Rule 26(a)(1). See Ann Pelham, *House Junks Plan to Modify Discovery Rules*, RECORDER, Nov. 8, 1993, at 1, available in LEXIS, Nexis Library, RECRDR File. That provision requires litigants to share documents and witnesses with each other before pre-trial discovery. See FED. R. CIV. P. 26(a)(1) (Proposed Official Draft 1993). The Senate, however, failed to enact legislation to suspend or delete the controversial provisions. Accordingly, the entire original package became effective upon Congress' failure to act by December 1, 1993. See Rules Enabling Act, 28 U.S.C. § 2074 (1988). For a complete discussion of the Rules Enabling Act and the rulemaking process, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

¹⁴ 18 U.S.C. §§ 3152-56, 3161-74 (1992). The Speedy Trial Act requires that courts try criminal cases within seventy days of a defendant's indictment. *Id.* Thus, courts spend the majority (if not all) of their time handling criminal matters. See, e.g., Sheldon H. Elsen, *Why Business Can't Get its Day in Court*, FORTUNE, Apr. 22, 1991, at 251 ("The main reason can be traced back to a series of poorly thought through political decisions to push essentially all criminal cases ahead of essentially all civil cases. The process started with the Speedy Trial Act . . ."); Next *Federal Crime: Expired Parking Meters*, CHI. LAW., Dec. 1992, at 6 ("[G]iven the federal speedy trial act for criminal cases, the trials of civil cases have been swamped. In many federal districts, a civil case has not been tried in years.").

¹⁵ A LEXIS search produced 5470 articles containing the phrase "war on drugs," perhaps indicating how important this "war" is both to the media and to the public. Courts, however, simply cannot keep up with these resultant drug cases. See, e.g., *Is the U.S. Justice System in a State of Crisis*, N.Y. L.J., Aug. 2, 1993, at 23 ("[w]ar on drugs . . . [is] the main culprit[] for the overcrowded dockets"); Elsen, *supra* note 14, at 23 ("These courts suffer from a paralyzing overload of cases . . . the result of factors as diverse as the drug epidemic in our streets."); Irving R. Kaufman, *Reform For a System in Crisis: Alternate Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 5 (1990) ("[T]he greatest pressure on our court system . . . is the 'war on drugs'").

and Legislative branches to appoint and confirm speedily the full complement of federal judges.¹⁶

Nevertheless, there are some "civil" causes for the apparent need to bring about procedural change. During the last few decades, there has been an explosion of new statutory and common law causes of action, which has led to increased filings, especially in the area of mass torts.¹⁷ Thus, unless and until something is done to reorient our federal judicial resources toward civil cases and away from criminal ones it will appear that there is a need "to do something" about the perceived costs and delays of the federal civil justice system.¹⁸ The use of procedural reform to combat substantive problems, however, has raised a question about the motives of those seeking fundamental changes in the Federal Rules.

Indeed, it may be that the real push for drastic reform comes from the reformer/conservatives; much of the recent reform appears to be access-restricting. Perhaps those opposed to the philosophy of the 1938 Federal Rules of Civil Procedure are taking advantage of this stressful time to stand the rules on their head.¹⁹ On the other hand, I do not think that all of those participating in the reform effort have a restrictive agenda. Indeed, as Professor Richard Marcus has shown, it appears

¹⁶ See, e.g., Elsen, *supra* note 14, at 23 (discussing problem of judicial vacancies as contributing factor to courts' inability to hear civil cases); *Court Vacancies Await New President*, WASH. POST, Nov. 6, 1992, at A1; see also *Judicial Vacancies*, 128 F.R.D. 143 (1989) (discussing problem of judicial vacancies in Second Circuit).

¹⁷ See generally 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 (1983) (citing cases); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 306-16 (1991).

¹⁸ See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 854 (1984) (noting that the criticisms of the tort system are that it is "cumbersome, costly and haphazard to accomplish its . . . objectives"); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 781-82 (1985) ("The perceived inefficiencies, costs, and delays associated with mass tort litigation have provoked calls for reform . . .").

¹⁹ The adoption of the Federal Rules of Civil Procedure in 1938 marked the beginning of an "open model of adjudicatory procedure stressing simplicity, liberal pleading, broad discovery, and a preference for substance over form, with procedure's primary mission to be the just resolution of disputes." Stempel, *supra* note 2, at 714.

to be true that our profession has a tradition of trying to make the rules better and to improve practice, generally with a neutral orientation and result.²⁰ Moreover, during this period of time, standards of practice and professionalism unquestionably have fallen, contributing to the perception that our system is in real trouble.²¹ This is a problem that must be addressed.

I would argue, however, that because the mass tort is different, as Professor Hensler demonstrates,²² the debate between the preservationists and the reformists is a false dichotomy in the mass tort case. Perhaps Professor Stempel had a hard time characterizing Judge Jack Weinstein because he could not square Judge Weinstein's general "Liberal Ethos"²³ with the judge's aggressive use of consolidation techniques in mass tort cases such as *Agent Orange*, the asbestos litigation and the repetitive stress litigation,²⁴ which some think are tools for the advantaged. However, judges and others concerned with resolving mass torts cases understand that open access is not the problem. Rather, it is what we should do with the mass of cases working their way through the system that is the problem.

Professor Hensler's discussion of how mass tort cases are different explains why the open-access problem is not typically an issue in such cases. The economics of mass tort cases in-

²⁰ See generally Marcus, *supra* note 2, at 760.

²¹ See, e.g., Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 74 JUDICATURE 77 (1990) (discussing decline in professionalism over last two decades); Colin Croft, *Reconceptualizing American Legal Professionalism*, 67 N.Y.U. L. REV. 1256 (1992) (discussing negative perceptions of legal profession); Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639 (discussing lawyer competence and public perceptions of legal profession).

²² See Hensler & Peterson, *supra* note 5, at 965 (explaining that three factors distinguish the mass tort from ordinary personal injury litigation: "the large numbers of claims associated with a single litigation," "commonality of issues and actors among claims within a litigation" and "the interdependence of claim values").

²³ Professor Marcus defines the Liberal Ethos as a concept whereby "lawsuits should be resolved in court on the merits and that courts should eschew detail." Marcus, *supra* note 2, at 761; see Linda Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 585 (1994).

²⁴ See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 476-77 (1994) (listing consolidation as one of primary means of "providing a fair and speedy compensation system that also reduces transaction costs" in the mass tort case).

tures that claimants eventually will have plenty of opportunities to assert their claims. As Professor Hensler points out, the risks for plaintiffs' attorneys and defendants are not symmetric when a mass tort presents itself.²⁵ The risks for corporate defendants are much higher, thereby providing claimants, as a group, with leverage they otherwise would not have. Thus, defendants may be more willing to settle questionable claims, which leads plaintiffs' lawyers "to dig deeper into the potential claimant pool."²⁶ Moreover, Professor Hensler is right in that the dynamics of the process are likely to drive the cases forward until the entire population has made a claim or until the defendant has exhausted its resources, and even then, the case will go on in Chapter 9 or 11.²⁷

Professor Hensler's definition of mass tort cases—numerosity, commonality and "interdependence of claim values"²⁸—works well enough, especially when we add the notion that the claimants have one certain target, the manufacturer, to go after due to developments in substantive law.²⁹ The interdependence of claim values factor is important in several respects. Certainly what goes on in the first cases will have a dramatic impact on claim values.³⁰ But so, too, will later ones. Eventually there will be a range of values established by the cases being tried, which ultimately may lead to the possibility of using consolidation techniques, such as class actions, to achieve a global settlement.³¹ The Dalkon Shield litigation provides an excellent example.

²⁵ See Hensler and Peterson, *supra* note 5, at 961.

²⁶ See Weinstein, *supra* note 24 at 537. Judge Weinstein also points out that "consolidations do tend to encourage the commencement of suits of questionable merit." *Id.* at 480.

²⁷ See *id.*; see also Weinstein & Hershenov, *supra* note 17, at 270 (stating that "defendants' liabilities exposure is also of an unprecedented magnitude that frequently threatens companies or even entire industries with bankruptcy"). See generally Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984) (discussing relationship between mass tort cases and bankruptcy).

²⁸ Hensler & Peterson, *supra* note 5, at 965.

²⁹ See *id.* Hensler notes the importance of several aspects of substantive law: the development of product liability law, market share theory, successor liability and the continuous trigger theory.

³⁰ See *id.* at 967; see also *infra* notes 32-43 and accompanying text (discussing A.H. Robins' experience with the Dalkon Shield cases).

³¹ For a further discussion of the global settlement problem, see *infra* notes 77-79 and accompanying text.

In the early cases, A.H. Robins, the manufacturer of the product, generally won,³² perhaps due to ineffective discovery by plaintiffs just feeling their way or, perhaps, to an effective document retention plan by the defendant, depending upon one's point of view.³³ Also, the defense victories might have been a product of our traditional tort system. Plaintiffs' lawyers tended to go it alone at first; perhaps it was their entrepreneurial spirit that kept them working in isolation, or a desire to keep their cases to themselves so that they could become the experts.³⁴ Whatever the motivation, traditionally there was not much information sharing in the early stages of a mass tort.³⁵

In the later Dalkon Shield cases, however, plaintiffs won and won big, in terms of both compensatory and punitive damages.³⁶ Indeed, in the *Tetuan* case,³⁷ the jury returned a verdict amounting to almost \$10 million: \$1.75 million in compensatory and \$7.5 million in punitive damages.³⁸ Seeing the handwriting on the wall, A.H. Robins filed for bankruptcy protection a few months later.³⁹ One of the ramifications of such a victory is the potential use of collateral estoppel, arguably the most important "procedural" rule in the context of mass tort cases.⁴⁰

³² See Vairo, *Dalkon Shield*, *supra* note 1, at 626.

³³ See *id.*

³⁴ Professor John C. Coffee, Jr., has written a series of articles exploring the role of plaintiffs' lawyers, primarily in securities cases. See, e.g., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Regulation*]; *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986). His observations also are applicable to plaintiffs' lawyers in mass tort litigation. See also Weinstein, *supra* note 24, at 502-03 & n.137.

³⁵ Cf. Rosenberg, *supra* note 18, at 903 (stating that "[i]nformation costs and transaction costs inhibit joint ventures among attorneys working on the same or related mass exposure claims"). But see Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 125-28, 130-31 (1968) (discussing how plaintiffs and their lawyers benefitted from pretrial consolidation and information sharing).

³⁶ See Vairo, *Dalkon Shield*, *supra* note 1, at 626.

³⁷ *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

³⁸ See *id.*

³⁹ Vairo, *Dalkon Shield*, *supra* note 1, at 626-27.

⁴⁰ Indeed, this is where Agent Orange meets the "Blue Bus." See generally Charles Nesson, *Agent Orange Meets the Blue Bus: Fact Finding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986) (discussing the difficulties plaintiffs have

This, of course, leads to the second interdependence point, a point that cannot be ignored—the “bet your company” factor.⁴¹ Depending on how these quasi-procedural issues get resolved, once we get to the *Tetuan* point,⁴² there should be enough litigation experience to establish a range of claims values, but probably not enough money to pay all the people who have been injured. For this reason, it made sense for A.H. Robins to elect the bankruptcy solution.⁴³ Moreover, even if there is enough money, there will be a cloud of uncertainty about the prospects for payment. Certainly, the point at which a company files for bankruptcy is an appropriate time for resolving the whole case. But is there a better time, an earlier time, when courts should intervene more aggressively to attempt to achieve a global resolution through the use of consolidation techniques?⁴⁴ And how should courts do so?

proving global causation issues in toxic tort cases). Once plaintiffs establish causation in a particular case, however, there is the potential for non-mutual offensive collateral estoppel. See, e.g., *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Fraley v. American Cyanamid Co.*, 570 F. Supp. 497 (D. Colo. 1983). See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). On the other hand, many commentators have discussed the unfairness that can result when offensive collateral estoppel is applied in mass tort cases. See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 304 (1957). Professor Currie discusses an example in which plaintiffs 1 through 25 lose but plaintiff 26 wins; he argues that applying non-mutual offensive collateral estoppel to benefit plaintiffs 27 through 50 would be unfair to the defendant. The *Parklane Hosiery* Court, which had endorsed the use of the doctrine, cited the Currie example as a case in which the doctrine should not be applied. *Id.* at 331 n.14.

⁴¹ See Hensler & Peterson, *supra* note 5, at 969.

⁴² See *supra* notes 36-39 and accompanying text.

⁴³ A.H. Robins filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1992), after facing an “avalanche of actions filed in various state and federal courts throughout the United States . . . seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield.” *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.), cert. denied, 479 U.S. 876 (1986). See Vairo, *Dalkon Shield*, *supra* note 1, at 626-31 (discussing bankruptcy case); see also MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, & THE DALKON SHIELD* (1985); RICHARD B. SOBOLEW, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

Indeed, the asbestos cases forced a similar result on almost half of the asbestos defendants. See Saks & Blanck, *supra* note 5, at 818 n.17.

⁴⁴ Many commentators are skeptical about the use of consolidation techniques to resolve mass torts because of a concern that aggregation deprives plaintiffs of their due process rights. See, e.g., Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1

II. WHAT TO DO ABOUT THE MASS TORT CASE

It is inaccurate to argue that the explosion in mass litigation, and the resulting problems of resolving them, are solely a product of procedure. Procedure did not create the mass tort litigation problem. In fact, I think it is fair to say that external factors, such as those pointed out by Professor Hensler—mass marketing techniques, new technology, improved epidemiology, mass media reporting,⁴⁵ the ability of plaintiffs' lawyers to advertise,⁴⁶ greater coordination among plaintiff lawyers,⁴⁷ as

(1990); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69; Transgrud, *supra* note 18. Others, however, have tried to show that even aggregated trials have the potential for achieving a level of justice that may not be possible in individual trials. See Saks & Blanck, *supra* note 5, at 815; see also *infra* notes 75-90 and accompanying text for a discussion of the phases of a mass tort case.

⁴⁵ See Galanter, *supra* note 17, at 50 (commenting on the increased coverage of the law by mass media).

⁴⁶ *Id.* at 50-51 (noting that the "collapse of restrictions on lawyer advertising . . . has accentuated the visibility of lawyers and increased dissemination of information about legal opportunities").

⁴⁷ See Weinstein, *supra* note 24, at 480 (discussing networking of plaintiffs attorneys in breast implant litigation); Weinstein & Hershenov, *supra* note 17, at 283 ("[T]he plaintiff's mass torts bar . . . has aided aggregation by setting up steering committees and information-pooling centers."). An issue dividing the plaintiffs' bar is the extent to which it is appropriate to represent large numbers of plaintiffs, together with the issue of whether consolidation is the best means for achieving justice for injured parties. For example, in the Dalkon Shield litigation and in the breast implant litigation, there have been tensions between the group of traditional tort lawyers, who represent relatively few plaintiffs, and those who represent hundreds if not thousands of plaintiffs. Typically, the traditional tort lawyers are opposed to aggregation, while those who represent large numbers of claimants are usually more positive about the use of aggregation techniques and administrative and alternative dispute resolution schemes.

In the Dalkon Shield litigation, representation patterns were interesting. There were 44,128 Option 3 claimants (those who believed themselves to have the most serious provable claims). They are broken down as follows:

- 11,443 unrepresented claimants.
- 7101 claimants represented by a lawyer who has fewer than ten Dalkon Shield Claimants.
- 8039 claimants are represented by six lawyers. These six lawyers report from 963 to 1656 claimants each. Some of these lawyers also have agreements with other attorneys to evaluate or do most of the work on the other lawyers' clients' cases, but we cannot track those relationships.
- 13,174 claimants are represented by 43 lawyers who are handling between 100 and 1000 Option 3 claims. One of the lawyers with 161 clients has submitted materials on only 12 of his clients' claims.

Thus, almost half of the represented claimants are represented by lawyers who

well as dramatic changes in substantive law⁴⁸—are the real causes of the explosion.⁴⁹ But existing procedural rules appear to be inadequate in resolving mass tort cases.

Professor Hensler notes the critique of mass tort litigation: (1) cases take an inordinately long time to reach disposition;⁵⁰ (2) outcomes are highly variable, often seeming to have little relationship to the plaintiff's injuries or the defendant's culpability;⁵¹ and (3) transaction costs are excessive, far outstripping the amounts paid out in compensation.⁵² Thus, in mass tort cases, there exist problems that must be solved. In fact, most of the tools for dealing with mass torts are already in place or have been proposed. Better use of existing rules, serious consideration and adoption of the ALI Complex Litigation Project⁵³ and the use of dispute resolution centers have the potential to solve these problems. As Professor Hensler points out, class actions,⁵⁴ Multi-District Litigation⁵⁵ and consolidation under Rule 42⁵⁶ always have been available. Thus, the real issue is one of power and inclination to use the tools available. Should we be encouraging or constraining the judges more or less to take advantage of the rules that exist? Must everything be spelled out for them by the legislature, or by the single case/adversarial autonomous paradigm?

This is an important issue that needs to be addressed carefully in the mass tort context. Some judges have taken an active role in using consolidation techniques, but there are many who criticize aggressive case management. For example, Judge Weinstein recently has written that mass tort litigation

represent 100 to 1000 Dalkon Shield claimants. Furthermore, many of these lawyers also had clients who selected Options 1 or 2. Thus, those who had hundreds or thousands of Option 3 clients may have had hundreds more Option 1 or 2 clients. See Vairo, *Dalkon Shield*, *supra* note 1.

⁴⁸ See *supra* note 29.

⁴⁹ See Hensler & Peterson, *supra* note 5, at 962.

⁵⁰ See *id.* at 963.

⁵¹ *Id.*; see also Saks & Blanck, *supra* note 5, at 836 (discussing how aggregating claims will "refine out some of the random and systematic error (that is, irrationality and bias) of jury decisions").

⁵² *Id.*; see Rosenberg, *supra* note 18, at 852 (noting that transaction costs in mass tort cases "dwarf the compensation recovered by victims").

⁵³ See *supra* note 1 for a discussion of the ALI Complex Litigation Project.

⁵⁴ FED. R. CIV. P. 23.

⁵⁵ 28 U.S.C. § 1407 (1988).

⁵⁶ FED. R. CIV. P. 42.

ought to be considered a form of public law litigation, which justifies a strong judicial involvement.⁵⁷ I previously have written that because mass torts may have a major impact on numerous persons and on private and public institutions, mass tort litigation ought to be analogized to public law litigation.⁵⁸ This position, however, is not without its critics. In reply to Judge Weinstein's article, Professor Linda Mullenix believes there is insufficient justification for treating mass torts differently.⁵⁹ The major dispute between Judge Weinstein and Professor Mullenix is whether the mass tort case justifies a new set of ethics rules. And while she applauds Judge Weinstein for his innovations and commitment, she concludes that, with respect to the judge's role, she prefers her judges "in their robes, and on the bench."⁶⁰

Although I am indifferent to the court's garb, it is essential for judges to be activists when managing mass torts. I think we have no choice but to leave it to the judges to use the existing rules creatively once we have a mass tort case. Each mass tort case presents its own set of problems, and judges ought to be allowed to use the flexible Federal Rules to determine the best methods for handling them.⁶¹ Unfortunately, however, district court judges who use the rules innovatively in mass tort cases generally run the risk of reversal by the courts of appeals.⁶² Typically, according to the district judge, the mass

⁵⁷ Weinstein, *supra* note 24, at 539-60. He believes that judges ought to be motivated by a communitarian and communicarian ethic, *see id.* at 540-49, and that judges ought to be involved in settlement and post-settlement phases of mass tort litigation.

⁵⁸ Vairo, *Dalkon Shield*, *supra* note 1, at 621-23; *see infra* note 47.

⁵⁹ Mullenix, *supra* note 23, at 580.

⁶⁰ *Id.* at 591 (commenting on the *New Yorker* article in which Judge Weinstein discussed why he stopped wearing a robe and why he would decline to sit on the bench).

⁶¹ *See Vairo, Multi-Tort*, *supra* note 1, at 203-08 (discussing use of procedure in the context of a mass tort case and arguing for a federal common law approach because of different problems presented in different mass tort cases).

⁶² An early example of the use of the class action to manage a mass tort effectively was in the *Dalkon Shield* litigation. In *In re N. Dist. of Cal. "Dalkon Shield" Prods. Liab. Litig.*, 526 F. Supp. 887, 896 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), the district court certified a class action but the Ninth Circuit reversed. This district court's experience remains the norm. Although in some unusual cases, a court of appeals will affirm the use of a class action as a vehicle for resolving a mass tort case, *see, e.g., In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (1989).

tort case compels the use of extraordinary procedure, while, according to the courts of appeals, some principle of fairness, vaguely stated as "individual justice," is sacrificed by the use of consolidation.⁶³ But there is little explication as to how individual justice may be sacrificed, particularly when the failure to deal effectively with mass tort cases leads to bankruptcy, serious delays in payments, wide disparities in payments or inadequate payments to some victims of mass torts.

Generally, I have no dispute with Professors Owen Fiss⁶⁴ or Judith Resnik about the value and importance of the formal adjudication process. Indeed, without the effect of a court's pronouncement in the important cases of the day, our system of laws would not evolve. I therefore view with great skepticism both the need for more procedure in most cases and the wisdom of turning judges into mere dispute resolvers. Doing so demeans judges and the important role they play in the evolution of the law at both the state and federal levels.

Mass torts, however, do not present the same need for formal court pronouncements by the time a case becomes a "mega"-case. Much of the "law" of the case should already be established. For example, prior to consolidation, a trend may well have been established on liability issues such as the question of global causation. Even if it has not, an argument can be made that the use of a consolidated trial on such an issue, after an opportunity for full discovery and the vetting of quali-

(4th Cir.), *cert. denied*, 493 U.S. 959 (1989), and cases cited therein, courts of appeals have been notoriously reluctant to affirm the aggressive use of class actions or other aggregation devices as a way of resolving mass torts. Over the past two years, the Second Circuit reversed Judge Jack Weinstein twice for using innovative techniques in the asbestos litigation and in the repetitive stress cases. See *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992) (asbestos litigation).

⁶³ This was the precise debate in the Repetitive Stress Litigation. Judge Weinstein argued that the need for consolidation of over 40 repetitive stress cases in the Eastern District of New York was compelled by the existence of a mass tort. See *In Re: Repetitive Stress Injury Cases*, 142 F.R.D. 584 (E.D.N.Y. 1992), *vacated*, 11 F.3d 368 (2d Cir. 1993). The Second Circuit criticized Judge Weinstein for "substitut[ing] a discussion of so-called mass torts for precise findings as to what are the 'common question[s] of law or fact' justifying consolidation" pursuant to Federal Rules of Civil Procedure 42(a). *Id.* at 373. It also cautioned that aggregation techniques must not be used when to do so would "trump our dedication to individual justice." *Id.*

⁶⁴ See generally Fiss, *supra* note 12; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 432 (1982) (discussing need to preserve formal adjudication).

fied experts, could result in greater accuracy and, therefore, more fairness.⁶⁵ Moreover, a range of claims values may have been established through the settlement of cases and through jury verdicts. Once a case or series of cases becomes a mass tort case,⁶⁶ dispute resolution should be about ensuring open access to compensation, and about achieving fairness. If there is no recovery for some, there can be no justice.

But there are three critical problems faced by the courts, lawyers and claimants in helping a better process for administering mass tort cases to evolve: (1) methods for determining when we have a mass tort case; (2) methods for encouraging lawyers to use consolidation techniques for the good of all claimants; and (3) developing a new paradigm for lawyering.

A. *When Do We Have a Mass Tort Case And What Steps Must We Take?*

When I used the term "administering mass tort cases," I did so advisedly, as I do not wish to begin by alienating those who are against managerial judging.⁶⁷ As discussed above, once we have a defined mass tort, the Fiss/Resnik "law finding" function already will have been served.⁶⁸ There will have been much publicity in the media about the litigation problems of the company, with widespread coverage of the path-breaking cases. Once the litigation reaches this point, there is arguably less need for formal adjudication, and more of a need for "managerial judging" because there will be hundreds or thousands of cases already in the pipeline, and many more on the way.⁶⁹

The only real risk with managerial judging at this stage, therefore, is that some claimants may not recover as much once a case becomes a mass tort as they would have otherwise. But where is it written that one claimant is entitled to more

⁶⁵ See generally Saks & Blanck, *supra* note 5.

⁶⁶ Of course, determining when a case is a mass tort is a problem. See *infra* notes 75-77 and accompanying text.

⁶⁷ See *supra* note 64.

⁶⁸ See Fiss, *supra* note 12, at 1084 (discussing the importance of the judge's obligations to conduct an inquiry into both the law and the facts of a case); Resnik, *supra* note 64, at 431 (same).

⁶⁹ See Weinstein, *supra* note 24, at 479 (discussing speedy and efficient consolidation action in the breast implant litigation, *In re Silicone Gel Breast Implant Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992)).

than another? What due process rights does a first-in-line claimant have? Does that claimant have the right to get more when it means some injured people will get less or even nothing? I think not. Once this point is reached, the courts must use all the procedures available to resolve the disputes before them. But one of the biggest issues is determining whether the litigation problem is so massive that courts should turn from individual adjudication towards global solutions. Arguably the breast implant cases were consolidated too soon.⁷⁰ It might have been preferable to wait for more settlement experience and for more cases to go to judgment until after plaintiffs' lawyers were sure they had uncovered all the important evidence. Alternatively, courts could certify a settlement class action, with representative claims pulled out for trial (after expert identification) to develop claim valuation. Indeed, traditional concerns of the civil justice system have focused on the adjudicatory function served by courts,⁷¹ individual control of claims by plaintiffs⁷² and, specifically in the mass tort context, the establishment of a range of claim values for facilitating later case resolution.⁷³

Courts traditionally have performed two related functions in the usual course of case resolution, which appear to be lost through early consolidation of claims. One is the court's role in the development of substantive law through the resolution of novel issues. It may be argued that the early consolidation of cases will rob the courts of the ability to perform this function. However, mass tort cases do not make good grist for this mill. Instead, they most often present difficult individual causation issues as applied to basic tort law principles. Little substantive legal progress results from the resolution of these issues. In any event, to the extent that resolution of global causation issues achieves this development of substantive law function, it can be met equally well by consolidated trial(s) of the same

⁷⁰ But see Weinstein, *supra* note 24, at 480.

⁷¹ See, e.g., Fiss, *supra* note 12, at 1085 ("[The judiciary's] job is not . . . simply to secure the peace, but to explicate and give force to the values codified in authoritative texts . . . : to interpret these values and to bring reality into accord with them.").

⁷² See Epstein, *supra* note 44, at 5-8, 53-60 (discussing fairness and due process problems created by consolidation).

⁷³ Hensler & Peterson, *supra* note 5, at 967.

issue(s). The other function concerns developing judicial precedent with respect to claim values, both generally and for potential litigants pursuing similar claims. As to potential future claimants pursuing the same or related claims in the mass tort context, a paradigmatic claim value should serve equally well given the likely substantial similarity of the claims.

Turning to the remaining traditional concern, while a great deal of emphasis has traditionally been placed upon individuals' ability to control their own claims, the different nature of mass tort cases suggests that individual resolution need not assume the same importance once the mass tort has been identified. The benefits to be gained by consolidation may outweigh individual need or desire to control one's own claim when plaintiffs' time and expense may be significantly reduced through consolidation. More importantly, and as discussed below,⁷⁴ especially once global liability is established, whether individual control of claims should take precedence over controlled distribution by an independent dispute resolution facility should seriously be questioned.

Indeed, when the fastest plaintiffs with the most eager lawyers are first to the courthouse, available defendant resources may be overly depleted by large punitive awards. As a result, later and perhaps more deserving plaintiffs are denied compensatory recovery. The greater the size of the potential claimant pool, the more likely is this possibility. The overall objective should be the satisfaction of the largest number of claimants to the greatest extent possible given the available asset pool. This objective is subverted when initial claimants deplete the pool excessively. Although it may be argued that large awards including punitive damages are important to deter future defendant(s) misbehavior, in mass tort cases the number of claimants is generally so large that the necessary pool of assets adequately serves this purpose. If sufficient assets exist to compensate all plaintiffs properly, *pro rata* distribution of a consolidated punitive damage award may still be appropriate. In short, there is no good reason to favor individual control of settlement of claims over consolidation when doing so may negatively impact the greater good of maximum compensatory recovery for all.

⁷⁴ See *infra* notes 84-90 and accompanying text.

Thus, the most important objective in the resolution of mass tort cases should be reaching global peace. As used here, global peace includes: satisfactory resolution of plaintiffs' claims; equitable distribution of available compensatory assets; safeguarding the financial viability of defendant(s) when practical and possible; and the general and specific deterrence of defendant(s). The most effective way to achieve these goals is by consolidation at an appropriate time.⁷⁵ Outlined below is a three- phase process for (1) identifying the existence of a mass tort case, (2) consolidating existing cases and gathering of others, and trial of consolidated issues, and (3) resolution and distribution of fair compensation.

It appears that mass torts go through three phases. Phase 1 is the "Private" phase, when plaintiffs begin to file cases alleging injury from a particular product. This is the Private phase because there has been little or no media exposure creating a stampede of cases.⁷⁶ Rather, plaintiffs' lawyers have worked with clients to develop product-defect arguments. During this phase, plaintiffs may win some cases but, generally, defendants are at an advantage, usually because of questions involving whether a product is defective or global causation problems. Thus, they can either settle cheap or win defense verdicts.⁷⁷ At this time, arguably it would be premature to use consolidation techniques, both because it is preferable to have verdict and settlement benchmarks for setting claims values, and because of our tradition of individual justice, despite the risk that plaintiffs' discovery in this early stage will be incomplete.

Phase 2 is the "Consolidation" phase. Whether media exposure or lawyer advertising or a serious defect leads to a steady

⁷⁵ "Consolidation" is used here in its generic sense—a sort of hybrid between class certification under Federal Rule of Civil Procedure 23 (or under proposed Rule 23), and consolidation under Rule 42.

⁷⁶ Given the rapid advancement of modern communication, it is now possible to identify and predict potential cases when the first reports of injury from a particular product are reported in medical journals and in other news media. Indeed, recognition of an emerging mass tort case could begin even before the first suit has been filed. As a practical matter, however, only lawyers have been able or in position to benefit from identification at this stage. With the very first round of complaint filings, however, the judiciary should be alert to the need for future consolidation.

⁷⁷ See *supra* note 47 (discussing Dalkon Shield experience).

increase in filings or an explosion of cases, the courts should now be aware of the need for an efficient means to resolve such cases. At this point and the tricky part is determining just when courts ought to be open to more aggressive use of class actions and consolidation to resolve outstanding global issues, to determine the scope of harm in terms of the number of persons who may claim injury and the amount of money that will be needed to adequately compensate the injured and, thus, make possible a global settlement.

All consolidated claims should be broken down on the basis of similar injury types. If there has been insufficient time prior to consolidation to establish a range of claims values, a representative claim or group of claims can be chosen for trials. Necessary considerations in determining the representative claims should, generally speaking, be the same as those identified in Federal Rule of Civil Procedure 23: commonality, typicality and representativeness (of injury as well as proof). Each of the representative claims is then brought to trial. In this way, the waiting process for the establishment of a range of claim values is replaced by a group of adjudicated paradigmatic claims. Representative compensatory award having been rendered, there will be a basis for the awards for all other claims in the same group. A claims resolution facility will use the representative awards as the point of departure in Phase 3 when offering awards to other claimants of the group depending upon injury severity and the proof presented. This approach could be more efficient than awaiting the complete establishment of a range of claim values in individual cases or settlement; by specifically categorizing extant claims rather than relying on a random group of earlier litigated claims that may be less representative of a particular group, or insufficiently broad to cover the range of injury types, a more accurate assessment of claim values is possible. The logical choice to coordinate the early consolidation scheme is the Judicial Panel on Multidistrict Litigation ("MDL Panel"), at least until the more expansive ALI Complex Litigation Project proposals are adopted.⁷⁸

⁷⁸ 28 U.S.C. § 1407 (1988). Subsection (c) specifically provides the Judicial Panel on Multidistrict Litigation ("JPML") with authority to initiate consolidation. For a discussion of the ALI Complex Litigation Project, see *supra* note 1.

When it appears more likely than not that a mass tort case is emerging, the MDL panel should order transfer of pending federal cases to an appropriate district court. Subsequent cases would be consolidated with the initial cases. Once existing claims have been transferred, a special master should be appointed to assist in determining further potential claims before a class is certified or categorization of claims takes place. This process should include the usual forms of notice in newspapers, on radio and, perhaps, television. Additionally, an information center or "hotline" should be established to answer initial queries. Means must also be devised to encourage prompt responses from potential claimants. The additional expenditure of judicial resources is justifiable only if judicial and litigant resources are saved by expedient consolidation. There also should be attempts to coordinate with the state judiciaries as Judge Weinstein did with other asbestos litigation, and as Judge Sam Pointer is doing in the Breast Implant litigation.

The district court should then assemble an expert group to evaluate the nature of the claims asserted. This "expert group" should likely comprise persons with social scientific, medical and legal expertise. It is important that the expert team be balanced so that there will be a proponent for a spectrum of ideas and approaches. During the settlement process, the various classes, the defendants and other interested parties will make projections based on the data generated by neutral experts. The claims resolution facility should use experts with various viewpoints. In the Dalkon Shield settlement, for example, one of our key experts, who prepared our compensation scheme, had served as the expert for the claimants' committee.⁷⁹ By hiring him we hoped to insure the soundness and credibility of our payment scheme. We also hired a lawyer from one of the leading plaintiff's firms, which had settled all its Dalkon Shield cases before the Chapter 11 case, to work with that expert.⁸⁰ In addition, there is a need for arms-length cooperation between the Trustees and plaintiffs' lawyers as the

⁷⁹ The Trustees chose Dr. Timothy Wyant, a bio-statistician from the Claimants Committee expert team.

⁸⁰ The attorney was Martha K. Wivell from the firm of Robins, Kaplan, Miller & Ciresi.

claims resolution facility is being formally implemented.⁸¹

In Phase 2, through the class action device, numerous parties and claimants can be bound, thereby achieving global peace or nearly global peace. The device can be used to find the claimants, to estimate future claimants by providing a notice campaign, to obtain a settlement that provides enough money to compensate the victims of a defective product and to create a claims resolution facility to provide various options for payments.⁸² The global settlement can provide for the establishment of a compensation facility with different payment options depending on the type of injury, proof problems, etc. It can provide rules for how the claims will be resolved, which claims will be resolved first and for the appointment of independent directors or Trustees to oversee the operation of the facility. The trick, of course, is encouraging parties in a mass tort litigation to agree on a solution. Incentives, such as timing of payment and waiver of certain defenses, must be developed to encourage claimants not to opt out.

The Dalkon Shield Plan⁸³ was adopted because of one basic element—the idea of full compensation to all creditors. Two other elements flowed from the element of full compensation: (1) channelling all Dalkon Shield claims to one compensation fund to achieve “Global Peace;” and (2) a Trust to be run by independent Trustees appointed by the court. It was possible to work out a plan in the Dalkon Shield case because of the

⁸¹ In the case of the Dalkon Shield Claimants Trust, the Trustees met with plaintiffs' counsel twice during the formative stages, but did not solicit their advice on a regular basis. The Trustees did, however, seek their input where we felt they could help. For example, we used an “attorney valuation project” to help us determine—or “reality check”—the claim valuation system our experts developed. We asked thirty plaintiffs' attorneys who had numerous claimants or who were experienced Dalkon Shield litigators to review twenty or so redacted claims files. We asked them to value the claims as if they had a limited fund of a certain amount to distribute, and as if they had unlimited funds.

Notwithstanding these contacts, the Trustees were criticized for not cooperating sufficiently with plaintiffs' lawyers. It remained the Trustees' view that in order to remain independent and, thus, to discharge their fiduciary duty to all claimants appropriately, it was important to control the degree of communication. This led to understandable resentments. See Vairo, *Dalkon Shield*, *supra* note 1, at 651-54 & 656-58.

⁸² See Weinstein & Hershenov, *supra* note 17, at 287-90 (discussing use of class action device).

⁸³ For a complete description of the Dalkon Shield model, from which these suggestions are drawn, see Vairo, *Dalkon Shield*, *supra* note 1.

bankruptcy filing. Although we have seen the beginnings of a similar settlement in the breast implant litigation, much needs to be done to get all parties fully aboard on the important details.⁸⁴

Phase 3 is the "Claims Resolution" phase. Whether in the context of a negotiated or adjudicated class action settlement, reorganization plan or other device, the final task will be to establish a dispute resolution center to resolve fairly and efficiently the individual claims asserted. The structure and organization of the Dalkon Shield Claimants Trust ("DSCT") can be used as the model for a claims resolution facility.⁸⁵ From this point the process should proceed as it continues to at DSCT.⁸⁶ Offers will be made on the basis of claim form evaluation. In light of the high degree of loss of individual control, particular efforts should be made to ensure the highest degree of personal attention practically possible. ADR and arbitration options should, of course, also be preserved.⁸⁷

One of the main advantages of this approach is that potential claimants may be able to pursue their claims from start to finish without the assistance of counsel. Of course, some claimants will choose to retain counsel regardless, and many may want the advice of counsel at some point during the process.⁸⁸ For those who wish counsel for advice or to have counsel appointed for them, a pool of pre-screened attorneys should be created specifically for this purpose. Lawyers or firms that wish to enter the pool must first ensure that they will comply

⁸⁴ See Sandra G. Boodman, *\$4.75 Billion Proposed for Breast-Implant Cases*, WASH. POST, Sept. 21, 1993, at Z7; Dick Lehr, *\$4.7b Accord Eyed on Breast Implants*, BOSTON GLOBE, Sept. 10, 1993, at 1; *Breast Implant Victims May Get \$4.7 Billion*, CHI. TRIB., Sept. 10, 1993, at 3; *Proposed Settlement on Breast Implants*, N.Y. TIMES, Sept. 10, 1993, at 1.

⁸⁵ See generally Vairo, *Dalkon Shield*, *supra* note 1.

⁸⁶ See *id.* at 641-45.

⁸⁷ See *id.* at 645-47.

⁸⁸ In the Dalkon Shield case, over 70% of the claimants were unrepresented. Vairo, *Dalkon Shield*, *supra* note 1, at 618. Interestingly, unrepresented claimants electing Option 3 netted more than represented claimants. *Id.* at 655 n.136. Although there are some questions about the need for and role of lawyers in the dispute resolution phase of a mass tort, see *infra* note 100, Professors Bundy and Elhauge have argued that lawyers' advice to clients improves the adversary system. See Stephen McG. Bundy & Ebner Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and its Regulation*, 79 CAL. L. REV. 313 (1991).

with certain guidelines—specifically, that some particular experience qualifies them as appropriate advocates and advisors for mass tort claimants.⁸⁹ More importantly, controls should be placed on the fee arrangements in order to prevent current abuses by some lawyers.⁹⁰

B. *Need for New Paradigm*

Perhaps before we can hope for effective use of class actions and global solutions to mass tort cases, we will have to accomplish even more radical goals than those articulated in the 1993 amendments to the Federal Rules. We need new models of lawyering, arguably an important philosophical underpinning of the new disclosure rule.⁹¹ This will allow a shift from an emphasis on individuals, which arguably leads to much of the waste in mass tort cases, to an emphasis on the claimants as a group. Indeed, mass tort cases present an opportunity to question the distinction between public and private law as well as the claimant's role in this kind of dispute.⁹²

Mass tort disasters typically involve the general public. Accordingly, we ought not continue to view private mass tort litigation as merely settling a private dispute.⁹³ The courts,

⁸⁹ Such experience might include, for example, prior product liability, toxic or other mass tort, or perhaps medical malpractice representation.

⁹⁰ See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29, 74 (1989); Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41, 49 (1991).

⁹¹ See *supra* notes 7 & 13.

⁹² Much has been written on the problems associated with the distinction between public and private law. See Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 864-68; Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984). See *supra* notes 59-60 and accompanying text for Judge Weinstein's and Professor Linda Mullenix's views on this subject.

⁹³ See Vairo, *Dalkon Shield*, *supra* note 1, at 621-23; Weinstein, *supra* note 24, at 478-88 (noting that mass torts are akin to public litigation); see also Bender, *supra* note 92, at 868 (tortfeasors "imposing risks on the public . . . and . . . coping with the harms resulting from those risks are public questions of the highest order"); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 666-67 (1985) (stating that tort law is "often public in its spirit and

the lawyers, the tortfeasor and injured plaintiffs should begin to view themselves in terms of the community.⁹⁴ A focus on protecting the whole class of injured plaintiffs will, of course, create tensions because our traditional model views the lawyer's duty as maximizing the recovery of his or her particular client.⁹⁵ But we must confront these tensions. As we move in the direction of group resolution, there is the obvious problem of conflicts between the themes of group participation and individual autonomy. The current rules of legal ethics or of lawyer-client interaction do not fit the problem of mass tort litigation;⁹⁶ what lawyers do in mass tort cases ends up impacting *groups* of people, whether the lawyer purports to act for an individual client or a group of clients. Moreover, the success of lawyers in mass tort cases may depend on the degree to which they empower clients outside as well as inside the courts.

But a problem in mass tort cases, as in much public law litigation, is that the group of injured clients is not monolithic. Proper representation of plaintiffs in mass tort cases will require "radical alterations in our usual methods of protecting individual autonomy in the lawyer-client relationship."⁹⁷ The problem is determining how to weigh the values of individual autonomy against group connection—the well-being of the group.⁹⁸ Professor Ellman has argued in the context of public law litigation that

effect"); Rosenberg, *supra* note 18, at 901 ("a claims's deterrence value is . . . a 'public good'").

⁹⁴ See Weinstein, *supra* note 24, at 477 ("[P]articipants must be aware of the needs of the entire community."); cf. Bender, *supra* note 92 at 866; Rosenberg, *supra* note 18, at 907-08. But see Mullenix, *supra* note 23.

⁹⁵ See Rosenberg, *supra* note 18, at 907 ("[P]ublic law litigation thus seeks to achieve the benefits of deterrence by sacrificing some of the benefits of individualized treatment of claims").

⁹⁶ See generally Weinstein, *supra* note 24.

⁹⁷ Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

⁹⁸ "If lawyer-client relations can be shaped that provide effective representation of client groups and also secure real protection for the autonomy of those group's members, these relationships are to be welcomed precisely because they do respect both sets of values." Ellman, *supra* note 97, at 1108. "If we have good reason to acknowledge the value of both autonomy and connections in our moral lives, however, then it makes sense to question a calculus which operates to privilege one set of claims so sharply over the other" *Id.* at 1109.

[P]eople's involvement in groups can both protect and express their autonomy; (Query—does this work only in voluntary groups; can it work where we have 'fortuitous groups', i.e., by virtue of common injuries or lawyers?) and at the same time, groups that respect their members' autonomy may draw strength from that very feature of their make-up. In the many cases where considerations of autonomy and community coincide, only a method of representation that honors both will succeed.⁹⁹

His principle applies equally well in mass tort litigation.

Indeed, applying these principles in mass tort cases to a class action model, consent from the class representatives must be obtained, and because of different levels of injury and proof, subclasses would be needed. Lawyers must be sensitive to the values at stake when counseling clients about the best model of representation.¹⁰⁰ But once consent to proceed as a class action is obtained, the lawyer acquires some degree of freedom from the wishes of individual clients. The lawyer owes her most fundamental duty to the class itself, not individuals within the class.¹⁰¹ Of course, the lawyer is not totally free to do whatever he or she thinks is appropriate without regard for the clients' wishes. Moreover, there will still be the problem that some class members will opt out of a Rule 23(b)(3) class at their lawyers' recommendation. Thus, unless the class lawyer ensures a certain security that the needs of individuals largely will be satisfied, there will be little prospect of a viable Rule 23(b)(3) damage class.

To date, it has been difficult to obtain certification of damages class actions except in all but the most unusual cases.¹⁰²

⁹⁹ *Id.* at 1109.

¹⁰⁰ See *id.* at 1122 ("Group representation cannot protect individual autonomy in the same ways, or perhaps to the same extent, as individual representation does [H]owever, group representation is by no means always opposed to individual autonomy; instead, group representation is essential to protect those aspects of autonomy that people express through their membership in groups—as well as those values beyond autonomy's purview that republicans, feminists and others suggest collective engagement may serve.").

¹⁰¹ FED. R. CIV. P. 23(e). Disagreements can be resolved without the consent of all affected in the class structure. Judges can perform a very careful analysis of the fairness of the settlement model and the claims resolution proposed to insure that the amount needed to compensate the claimants is sufficient and that a framework has been laid to guarantee fairness of treatment in the claims resolution facility. There is a growing body of experts with experience in setting up facilities that can be consulted by the court in this regard.

¹⁰² See *supra* note 62 discussing court of appeals reversals of district court class

Perhaps this is where the proposed amendments to Rule 23 will help, as they break down the formal distinctions among the types of class actions in order to give the courts more flexibility in obtaining global mass tort settlements.¹⁰³ The simple fact is that in mass tort cases, at some point the needs of the group of injured persons will require group representation. The autonomy model works in the early stage of a mass tort, as the "law giving" function and the "claim value" functions are being served. For there to be true justice, however, it will be difficult for victims to protect themselves against the corporate defendants except through group involvement. In the Dalkon Shield litigation, for example, it took a notice campaign to reveal the hundreds of thousands of potential claimants to put the defendant on notice of the true value of its wrongdoing. That mass of claimants, as a group, generates the leverage. Indeed, in the Dalkon Shield litigation, that leverage resulted in a fund of almost two and one-half billion dollars, which was deemed acceptable to claimants and their lawyers.

The problem, however, is identifying methods of lawyering that will allow attorneys to honor both autonomy and connection¹⁰⁴—the "client-centered" model, as Professor Ellman would call it—for mass tort representation. There are a number of ways to balance autonomy and connection. There could be a steering committee of lawyers, each responsible for a subclass, perhaps one of which consists of those who want to opt out. These subclasses ought to be determined by the court after expert analysis of the claims base identifies different types of injuries and proof problems. In addition, techniques such as focus groups or claimant meetings could be used to identify claimant wishes.¹⁰⁵ In developing a decisionmaking model for determining what the claims resolution process should look like, there will be inevitable tensions. Should a democracy model be used, or should the lawyers act as mediators of the conflicting wishes after engaging in a process of discussion, reflection and information gathering from the claimants?

action certifications.

¹⁰³ See FED. R. CIV. P. 23 (effective Dec. 1, 1993).

¹⁰⁴ See Ellman, *supra* note 97 at 1127.

¹⁰⁵ See Weinstein, *supra* note 24, at 542-50 (discussing communication in the mass tort case; advocating using federal courthouse as central meeting site).

One might argue that it would be impossible or undesirable to develop the model of lawyering sketched here. But we ought to recognize that under existing rules and practice,¹⁰⁶ mass tort cases already present difficult ethical issues. For example, the way in which some lawyers obtain and represent clients presents issues of (im)proper representation. Indeed in Dalkon Shield, nine lawyers or law firms represent over 10,000 "Option 3" claimants.¹⁰⁷ How can a lawyer or firm properly serve hundreds, let alone thousands, of clients?¹⁰⁸ Simply put, when there is multiple representation, there are issues of loyalty.¹⁰⁹

Perhaps the class action model provides a vehicle for the courts to monitor the settlement of claims, thereby insuring adequate representation.¹¹⁰ Typically, the federal class action

¹⁰⁶ See generally Mullenix, *supra* note 23.

¹⁰⁷ 25,000 Option 3 claimants are represented by lawyers handling more than ten Dalkon Shield claims. Over 11,000 Option 3 claimants are not represented by counsel. The Plan contemplates that Option 3 be elected by those claimants with the most serious Dalkon Shield injuries. There are numerous issues that such representation raises. For example, when counseling client A, is an attorney's judgment clouded by his or her fee expectations in other cases? Is the usual advice given in a product liability case appropriate in an essentially administrative system for resolving claims?

¹⁰⁸ Articles about the Dalkon Shield case indicate that some lawyers are representing thousands of Dalkon Shield claimants. See, e.g., Paul Blustein, *How Two Young Lawyers Got Rich by Settling IUD Liability Claims*, WALL ST. J., Feb. 24, 1982, at 1 (reporting on two plaintiffs' attorneys representing over 900 claimants); Malcolm Gladwell, *Latest Fight in a Long Case: Attorney Fees; Victims' Lawyers Getting Too Much, Critics Contend*, WASH. POST, Jan. 22, 1989, at H1 (attorney representing 1000 Dalkon Shield claimants and still searching for more); *Women Reject Settlement Offers From Stingy Dalkon Shield Trust*, ATLANTA J. & CONST., Nov. 14, 1991, at D4 (attorney representing 1000 clients). With lawyers representing such large numbers of claimants, obvious questions arise—notably, whether these lawyers even have the time for individual communication or consultation with their clients. See Jack B. Weinstein, *A View From the Judiciary*, 13 CARDOZO L. REV. 1957, 1963 (1992); Weinstein & Hershenov, *supra* note 17, at 325.

¹⁰⁹ For example, when there is a fixed compensation pool, do attorneys have any duty to those who are unrepresented? Do they have any duty to their other clients? How far should attorneys go in "cooperating" with the Trust? How can attorneys who represent numerous claimants fairly advise clients who have obtained the first offers when the attorneys may owe a considerable amount to lenders who have carried them while waiting for settlements to be administered? See, e.g., Gladwell, *supra* note 108, at H1. A plaintiff's lawyer with a multitude of clients dismissed criticisms of his high contingent fees by stating he had his own financial concerns to worry about. In representing his Dalkon Shield claimants, the lawyer became \$1 million in debt and paid \$100,000 a year in interest.

¹¹⁰ Most claims are settled on this basis, on the forms submitted and on medi-

rule and similar state provisions protect the interests of class members when hundreds or thousands of persons have similar claims.¹¹¹ The need for judicial supervision is demonstrated by the Dalkon Shield claims resolution process, in which many lawyers have hundreds, and even thousands, of clients. Like many large class actions, the Dalkon Shield claims process features large contingency fees for lawyers and a limited compensation fund for clients.¹¹²

cal records, rather than by negotiation or formal dispute resolution. The contingent fee arrangement is supposed to shift risks from the client to the attorney—the high risk of litigating justifies a high fee. Commentators have criticized the use of high contingent fee arrangements in claims resolution, as opposed to litigation, contexts because the high risk does not exist. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1837 (1992); Brickman, *supra* note 90, at 74; Coffee, *Regulation*, *supra* note 34, at 889-94. Charging high contingent fees but not assuming any risk is arguably unethical. See Brickman, *supra*, at 1837 (calling it "illegal and unethical" as well as "grossly exorbitant" to collect contingent fees under such circumstances); Brickman, *supra* note 90, at 53 (charging 33 to 40% contingency fee is violative of "the fiduciary obligation to deal fairly with the client" when risk of nonrecovery is low).

In the case of a properly screened Dalkon Shield claim, risk of nonrecovery is minimal. Lawyers know exactly how much they can expect from any single Option 1 or Option 2 claim simply by checking the Trust's damage schedules. Although it is possible to recover from \$125 to over \$1,000,000 in Option 3, the medical evidence, and not the skill of the lawyer in "presenting" a claim, is determinative. Arguably, the lawyer's skill and "risk" factors are relevant only if the claimant rejects the Option 3 offer and elects trial or arbitration. One commentator, in describing the asbestos claim resolution process, noted that it is "unfathomable . . . why lawyers continue to be paid on a contingency basis since the processing of asbestos claims has become relatively simple." Lu, *supra* note 90, at 49. Although the medical issues are not always simple, the claims resolution process in the Dalkon Shield Litigation is very straightforward.

¹¹¹ The Federal Rules provide for adequate representation of class members to protect the due process interests of the class and of the adversary. See FED. R. CIV. P. 23.

¹¹² See, e.g., Brickman, *supra* note 90, at 65 ("[c]ontingent fee retainer agreements require . . . unparalleled judicial supervision"); Weinstein & Hershenov, *supra* note 17, at 289 ("[W]ith a limited compensation fund, court control over fees . . . is desirable."). Courts, however, have been reluctant to assume this function. See, e.g., Brickman, *supra* note 110, at 1838 n.72 (there is a "virtual complete failure of the courts to exercise superintendence"); Coffee, *Regulation*, *supra* note 34, at 897 ("[T]he general attitude of courts . . . has been one of benign neglect.").

As noted above, the courts generally do not become involved in overseeing attorneys' fees. The only exception is the class action, where, in fact, judges do act as guardians of the class members' interests with respect to attorneys fees. See Lu, *supra* note 90, at 61; Weinstein & Hershenov, *supra* note 17, at 326. In class actions, due process demands that judges protect the interests of absent class

Moreover, the ethical issues are not confined to lawyers' behavior.¹¹³ In a settlement providing for an alternative dispute resolution scheme and traditional litigation, how can Trustees, who are charged to act as fiduciaries, do so knowing that at least some subset of claimants will become adversaries? The fact that these several issues already exist suggests the need to consider developing a new professional ethic for mass tort cases.

CONCLUSION

I have previously written that a claims resolution facility that ensures a fair and efficient distribution of an adequate compensation fund justifies a departure from the traditional autonomy model because it ensures equality of treatment for all injured parties, as opposed to potential windfalls for some claimants, and no recovery or inadequate recoveries for others.¹¹⁴ It appears that the DSCT is achieving success when measured against this test.¹¹⁵

The success of the DSCT has serious implications for resolving claims of women and other traditionally less powerful persons, or for any victims of a mass tort. The problem is how to develop a plan that results in the distribution of the most money to the victims in such a way that the victims feel that justice has been served. This may require a drastic change in the professional ethic of the participants in the tort system.

members. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Because of the inherent difficulties a lawyer has in assisting hundreds of clients with their claims, such clients are in a position similar to class members, particularly through the claims resolution process. Accordingly, the due process rationale for requiring court supervision may well apply to the Dalkon Shield claimants. As discussed earlier, many claimants are represented by lawyers with thousands of clients, making individual contact extremely difficult. Further, requiring a claimant to pay a large contingency fee to a lawyer who has provided little assistance with her claim undermines her satisfaction with the settlement offer.

¹¹³ Indeed, the Trust's policies are designed to achieve a resolution of all claims in the shortest possible period of time. If more claimants were to elect trial and arbitration, rather than to settle at Option 3, the Trust would be in business for a far longer time. Thus, the Trust's policies, which provide incentives to settle rather than to litigate, should cause the Trust to go out of business sooner rather than later.

¹¹⁴ See generally *Vairo, Dalkon Shield*, *supra* note 1.

¹¹⁵ See generally *Weinstein*, *supra* note 24.

Without such a change, the resolution of mass tort cases may well remain intractable. Effective use of existing and proposed consolidation techniques depends on the evolution of our individual-centered adversarial system to a group-centered model of advocacy.