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Recommended Citation

Paul D. Rheingold, *Mass Torts—Maturation of Law and Practice*, 37 Pace L. Rev. 617 ()

Available at: <http://digitalcommons.pace.edu/plr/vol37/iss2/6>

MASS TORTS—MATURATION OF LAW AND PRACTICE

Paul D. Rheingold*

I. Introduction

Mass tort litigation has been with us for about fifty years. This is dating the start from the MER/29 litigation in 1964.¹ This field of law and practice has grown year after year, and it shows no sign of abating. At the same time, it can be said that this area of law and procedure has reached a mature stage; the practice is fairly standardized and earlier experiments have either become the model or have been abandoned.

The term “mass tort litigation” (MTL), as used in this article, confines itself to product liability personal injury cases involving similar injuries from exposure to the same product and resulting in multiple claimants. “Multiple” may be as small as a hundred, but may also amount to 50,000, 100,000, or more.² Thus, excluded from direct examination in this paper

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1. For a discussion of the MER/29 litigation, see Paul Rheingold, *Looking Back at the First Mass Tort Drug Case*, TRIAL MAG., Aug. 2014, at 26.

2. There is no list readily available of all mass torts, or the approximate number of claimants. One of the largest groups of mass torts is the current transvaginal mesh cases, involving well over 100,000 claimants, pending in the District Court of West Virginia. See Shezad Malik, *Vaginal Mesh Injury Lawsuit Claims Continue*, THE LEGAL EXAMINER (Feb. 8, 2017, 1:42 PM), <http://fortworth.legalexaminer.com/medical-devices-implants/vaginal-mesh-injury-lawsuit-claims-continue/>. Larger still are two product litigations that both mark the early days of mass torts and continue to this day, asbestos and tobacco. Both of these are discussed in the text below.

Other massive litigations have involved the drug Vioxx (35,000 or more plaintiffs) and Fen-Phen, the weight loss drug combination (50,000 or more). The Vioxx litigation is described in SNIGDHA PRAKASH, ALL THE JUSTICE MONEY CAN BUY: CORPORATE GREED ON TRIAL (2011); and Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, The Tort System, and the Role of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV.

are consumer economic suits, often commenced in a class action format, and toxic tort lawsuits dealing with localized pollution.

The most common product involved in mass tort litigation in recent years has been prescription drugs, followed by medical devices.³ Interestingly, however, the two largest mass torts, looking back fifty years in terms of numbers of claimants, have been asbestos⁴ and tobacco.⁵ The bulk of both of these are in the past; however, many cases remain, in part due to the latency of the disease these products cause.

There are some ways to catalog and distinguish between various mass torts, which have led to some distinctions in law and practice. One common division is between local and widespread torts. Localized torts tend to involve a catastrophic accident (plane crash) or a disaster, either man-made (BP oil spill) or natural (Hurricane Katrina). It is the widespread or national torts (a dangerous drug, for example), which have tended to drive the legal development considered in this article.

509 (2008). For a book on the Fen-Phen litigation, see ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* (2011).

For more on mass tort litigation, see RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007). JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995). Finally, for an outstanding casebook in the field, see LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (2d ed. 2008).

3. Using the establishment of multidistrict litigations, the active mass torts are divided into four categories: drugs (11), device (10), motor vehicles (2), and other products and substances (2). See PAUL RHEINGOLD, *LITIGATING MASS TORT CASES C.15.1* (AAJ Press 2006).

4. Asbestos litigation has probably involved more than one million workers. It had its origins in the 1980s, and reached such volumes that courts tried to control it through class actions, a history that is reviewed below. Asbestos litigation also led to a record number of bankruptcies, considered below. Leading books on the topic are STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* (rev. ed. 2005); and JEB BARNES, *DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM* (Georgetown Univ. Press 2011).

5. Tobacco—cigarette cases—also had their litigation start in the 1980s with class actions, which resulted in damages not awarded to individual plaintiffs. That litigation is reviewed below, as well as Florida litigation that spawned thousands of cases. Leading books on the topic are W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* (2002); and MARTHA A. DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION* (CQ Press 2001).

Another division of the cases may be made between those involving immediate injuries and those with substantial periods of time passing between exposure and disease—with so-called latent effects.⁶ The latter tend to raise statute of limitations issues and also, as discussed below, monitoring issues and identification issues (“market share”).

Mass tort litigation is as much a procedural topic as a substantive one. While there are some law issues specific to mass tort litigation, the greater area of development has been in the adaptation or invention of procedural mechanisms to the management of the cases in their organization, their development, and their disposition. The three phases just listed—organization, development, and disposition—form the three main sections of this article.

Given that this article is written by a practitioner, the analysis and writing is not of a typical academic style. An academic analysis of this field of law is also invaluable, since it examines the activities with a broader, more philosophical/jurisprudential perspective. The footnotes do contain citations to some of the many perceptive articles written by law professors. Also, the final section of this article presents a summary of how the academic world has responded to the development of the field of mass torts.

II. Organization of Mass Torts; Role of the Judiciary

In order to manage mass torts, it is a given that they must be congregated in some way.⁷ Over the course of MTL, there have been some dramatic changes in the ways in which they are organized, as is next considered.

6. An outstanding example of latent injury is the development (sometimes decades later) of mesothelioma from asbestos particle inhalation. Similarly, in the diethylstilbestrol (DES) litigation, the DES consumed by a pregnant woman caused damage to her fetus, which was manifest only when the child reached maturity. *See Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989).

7. “Congregation” is used as a general, non-legal term, in avoidance of the term “consolidation,” which has a specific meaning in the Federal Rules of Civil Procedure. *See* FED R. CIV. P. 42.

A. *The Attempt at Using Class Actions*

The largest change over time in the organization of mass tort cases is the demise of the class action⁸ as a method of congregation. In the early years of handling these cases, the class action under Federal Rule of Civil Procedure (F.R.C.P.) 23(b)(3) was the obvious procedural device for the organization and control of the cases. All of the injured claimants would be placed in one class, and they would be bound by the outcome of the litigation. Thus, in the 1980s, and up until the decision in 1997 next discussed, class actions were certified in such cases as Agent Orange,⁹ Bjork-Shiley heart valves,¹⁰ and silicone breast implants.¹¹

On the other hand, some courts (even back then) found that the requirements for a class action under F.R.C.P. 23(b)(3), including commonality and superiority, were not met and hence refused to certify a class. This was often as a result of appellate decisions, overturning district court attempts to create a class, which sometimes arose of desperation to find a method of control. Examples involved tobacco,¹² blood factors (containing HIV virus),¹³ and the Hyatt Skywalk collapse.¹⁴

All hopes of using Rule 23(b)(3) to organize cases came to a sudden end in 1997, by virtue of the Supreme Court decision in the *Amchem* case,¹⁵ which effectively barred class actions in tort cases. This decision came in an asbestos case where there was a settlement class.¹⁶ Proponents of the class sought, under F.R.C.P. 23, to differentiate it from a class action, which would have been an original means of congregating the cases where the lack of commonality and other requirements most likely

8. See FED. R. CIV. P. 23.

9. *In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145 (2d Cir. 1987).

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

11. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994).

12. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

13. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

14. *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

15. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1996).

16. *Id.* at 597.

would not exist.¹⁷ Rather, they argued that there was only a settlement class where there would be less individualizing factors and less difficulty in management.¹⁸ The Supreme Court, however, barred even a settlement class because of the numerous individualizing factors among the various claimants.¹⁹

The *Amchem* decision, however, left open the possibility that a class action might be justified in the event of a “limited fund”—insufficient money to pay the anticipated damages.²⁰ The Supreme Court dealt with this issue three years later in *Ortiz*²¹ Here, again, a proposed settlement of asbestos cases involving a defendant without resources to pay full damages was presented for approval.²² The class was formulated pursuant to F.R.C.P 23(b)(1)(B).²³ The Court, however, disallowed such a class, based upon problems in defining the class and in the asserted rights of individuals to have their day in court.²⁴

In the two decades following this duo of Supreme Court decisions, few, if any, instances have arisen where a class was certified in an MTL.²⁵

B. The Turn to Multidistrict Litigation (MDL)

The congregating of mass tort cases into federal multidistrict litigation has increasingly been the major method of organizing cases. In 1968, Congress established a scheme of coordinating before one judge all of the civil cases pending in the various federal district courts where there were common questions of fact if doing so would promote efficiency and be

17. *Id.* at 601-04.

18. *Id.* at 617.

19. *See id.* at 622-28.

20. *Anchem*, 521 U.S. at 614.

21. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

22. *Id.* at 827.

23. *Id.* at 821.

24. *Id.* at 864-65.

25. *See In re Katrina Canal Breaches Litig.*, 613 F.3d 504 (5th Cir. 2010). Nor has there been any notable success in creating a national class action under state law. *See Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634 (2008), *cert. denied*, 555 U.S. 1098 (2009).

convenient for the parties.²⁶ The Judicial Panel on Multidistrict Litigation, created by this law, has the responsibility of determining if an MDL should be established and then picking the transferee court and judge to whom all cases will be assigned.²⁷

Over time, the work of the transferee judges (those to whom the Judicial Panel has sent cases) has substantially improved in efficiency, based in part on the experiences of judges who have successfully handled the assignment. This is especially true with “repeat” judges, those who have multiple mass actions assigned to them. Efficiency can be measured a number of ways, including rapidly establishing comprehensive procedures to handle large numbers of cases; moving cases through discovery quickly; and bringing the cases to a resolution.²⁸ Faults sometimes associated with the MDL system in mass tort cases, however, are delay in preparation for trial and the costs paid per case for common benefit work, both time and expenses.²⁹

C. Mass Tort Handling in The State Court Systems

At the same time that the federal legislature has been addressing the problem of many similar cases being filed in various federal district courts around the country through the use of MDL procedure, the states have similarly been adapting

26. See 28 U.S.C. § 1407 (2016). For a full discussion of how cases are selected for MDL and the work of the Judicial Panel on Multidistrict Litigation, see RHEINGOLD, *supra* note 3, at C.3.

27. RHEINGOLD, *supra* note 3, at § 3:8.

28. See DUKE L. CTR. FOR JUD. STUD., STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (EXECUTIVE SUMMARY) (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/standards-best_practices-exec_summary-final.pdf. The Center for Judicial Studies at Duke Law School has been studying MDL practices. It has issued various studies under the general rubric “MDL Standards and Best Practices.” See *id.* It has also held forums on the topics involved. Whether there is a need for development of standards for the courts handling multidistrict litigation is, however, a debatable matter.

29. For example, in the 2014 NuvaRing settlement, common benefit fees were assessed at 11% (meaning that the contingent fee of the individual lawyer was reduced by 11 points), and the expenses at 4.5% (meaning that the client paid 4.5% of her award to the steering committee). See RHEINGOLD, *supra* note 3, at § 7:26.50. See also Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 131 (2017).

to mass tort suits in their courts. The need generally arises when there are multi-county filings. Here, however, no uniform approach or rules have been adopted; rather, over time, many states have developed individualized procedures for congregating mass tort actions within their state.³⁰ As might be expected, some of the most advanced and comprehensive plans are in states that have seen the most MTL. New Jersey is a good example of a complex system, arising out of the presence of so many pharmaceutical manufacturers.³¹ California is another state example of a comprehensive plan, which assigns cases filed in various counties to one judge statewide.³²

Plaintiffs' lawyers have been making their choices of filing in federal versus state jurisdictions by weighing a number of factors. Some file in state court to avoid cases involved in a parallel MDL—perhaps to have more control or to save paying fees and expenses in the MDL. Defendants are, of course unhappy about being sued both in the MDL and in state court (and often it is in multiple states), especially since this may require multiple witness exposures and other disclosures, and use of different state laws regarding what must be produced.

The federal-state filings of the same mass tort have exerted pressure for coordination, if not full cooperation among the judges assigned to the litigation. Whereas, in earlier days, federal judges inherently felt that they should be in charge and expected the state court judiciary to just tag along, a more nuanced arrangement is now often achieved. The state and federal judges communicate frequently, and may enter joint orders. The aim is to have discovery done only once, no matter where it is held. On occasion, however, the state court may take the lead, having started earlier on the litigation or being independent-minded. Those seeking the goal of close coordination have been helped both by the Federal Judicial

30. State court plans are discussed comprehensively in RHEINGOLD, *supra* note 3, at C.4.

31. Information on the New Jersey system can be found at www.judiciary.state.nj.us/mass-tort/index.html.

32. Information on the California coordination statute can be found in *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014).

Center³³ and the National Center for State Courts.³⁴

D. Federal Legislation Relating to Mass Tort Organization

Two federal statutes, designed to further coordinate and federalize mass tort litigation, have been far from successful in achieving their goals. The more significant one is the Class Action Fairness Act of 2005 (CAFA).³⁵ In passing CAFA, the aim of Congress, with regard to mass tort litigation and other mass litigation, was to facilitate removal of state court actions to federal court by minimizing jurisdictional requirements.³⁶ It was reasoned, by defendants, that if all the suits were before one federal judge, they would be more under control.³⁷ CAFA legislatively created the concept of a “mass action,” defined as one in which “monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”³⁸

Once the language was added to the CAFA bill that it is the *plaintiff* who must demand a joint trial (compared to the defendant or the court), the usefulness of the law to the latter two entities was almost entirely undone. To avoid removal (assuming that is the goal of the plaintiffs), plaintiffs’ lawyers do not ask for a joint trial, even if they seek to congregate cases for discovery purposes. And even if they represent hundreds of clients, they file in batches of ninety-nine or less to avoid the 100 case rule. For the most part, with a decade of CAFA in place, few mass tort cases have been successfully removed to the federal system.³⁹

33. There is considerable information available on the issue of state mass tort cases and coordination with federal MDL litigation on the website for the United States Judicial Panel on Multidistrict Litigation, www.jpml.uscourts.gov.

34. More information about this group’s work in mass torts may be accessed at www.ncsc.org.

35. 28 U.S.C. § 1332 (2016).

36. RHEINGOLD, *supra* note 3, at § 2:3.

37. RHEINGOLD, *supra* note 3, at § 2:4.

38. § 1332(d)(11)(B)(i).

39. Leading cases disallowing removal are *Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918 (9th Cir. 2013); and *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010). But a few decisions have, on their facts, allowed removal. See *Atwell v. Boston Sci. Corp.*, 740 F.3d 1160 (8th Cir. 2013); *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012).

Another even-less-used statute relating to mass torts in the federal system is the Multiparty, Multiforum Trial Jurisdiction Act of 2002.⁴⁰ Indeed, it is all but forgotten, having been involved in virtually no litigation in the past decade.

E. Other, Minor Methods of Congregation

A number of other means have been assayed in order to manage mass torts, but none have shown any recent promise. Therefore, they are reviewed very briefly here.

Two methods involve a combination of substantive law and procedure. First, there is the “market share” concept: that a group of defendants who produce the same product can be sued collectively, each made to pay for a proportion of damages which bears some relation to the share of the market the particular defendant had.⁴¹ To the extent the market share concept has found acceptance at all, it is in the very limited situation where the product is fungible and, due to the passage of time (for a latent injury), the particular maker can no longer be identified.⁴² No recent mass tort has been managed under this doctrine.

A second potential method is the use of the “medical monitoring” theory: that a fund can be created for a group of persons exposed to some toxic substance to pay costs of monitoring their health to see if a latent disease associated with exposure can develop.⁴³ This method has not been well accepted by the courts, and even at its best, could not round up cases of persons already injured.⁴⁴

More standard procedural methods of congregating cases—consolidation of cases within one court pursuant to F.R.C.P. 42,⁴⁵ or joinder of cases pursuant to F.R.C.P. 20⁴⁶—have not provided means of organizing national litigation.⁴⁷

40. 28 U.S.C. § 1369(a) (2016).

41. RHEINGOLD, *supra* note 3, at § 6:21.

42. *Id.*

43. *Id.* at § 2:29.

44. *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013).

45. FED. R. CIV. P. 42.

46. FED. R. CIV. P. 20.

47. RHEINGOLD, *supra* note 3, at C.5.

F. Financing of MTL

The financial management of MTL has also evolved dramatically over the years. In effect, it is now well recognized that the plaintiffs' lawyers who are managing the litigation (generally a steering committee appointed by the court) "front" the costs of the litigation. This is done by a combination of, first, capital contributions to a common fund, to pay for such costs as document acquisition and analysis, hiring experts, and depositions of defendants' employees. And there are further large outlays that fall into the category of "retained" expenses, where a firm pays its own expenses in doing common work. In a way, this is no different from an individual firm with a single case carrying the costs of the litigation, pending the outcome. The law firms paying the expenses do so, of course, with the intention of being reimbursed at the end of the litigation.⁴⁸

Similarly, the plaintiffs' counsel managing the litigation provide their time, as they would in any contingent fee case, without hourly payment from the clients. Here, the expectation, based upon good outcomes in prior MTLs, is that they will be reimbursed at the end of the litigation, often at high hourly rates if the litigation is very successful.⁴⁹

The ultimate source of reimbursement, for time and expenses, recently has come almost exclusively from the settlement funds paid to the claimants (whether it is a lump sum to be spread, or a per-case payment under some sort of plan).⁵⁰ The method of a settling defendant contributing separately to a fund to pay these management costs is seldom followed recently. In advance of the resolution of the litigation, the MDL court will generally set percentages that will be withheld from each settlement to pay for the expenses and the time.⁵¹ Most recently, the expense portion has been charged to the client, and the time portion deducted from the individual

48. See *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417 (2d Cir. 2013); *In re NuvaRing Prod. Liab. Litig.*, No. 4:08 MDL 1964 RWS, 2014 WL 7271959 (E.D. Mo. Dec. 18, 2014); see also RHEINGOLD, *supra* note 3, at § 7:26.50.

49. See *infra* note 52.

50. RHEINGOLD, *supra* note 3, at C.7.

51. *Id.*

lawyer's fee.⁵²

III. Development of Mass Tort Cases Toward Trial

Once a mass of product cases have been congregated (most likely when an MDL as has been discussed), the next step is to prepare the cases. This is conducted as one would prepare for trial, but it is done in the shadow of experience that most mass torts cases, as with all litigation, are eventually disposed of by settlement.

Certain orders and procedures have developed and have now become routine at the start of a new congregation of cases. These include confidentiality and protective orders; the way in which motions will be handled, both on all-case issues and individual cases; and a determination whether or not there can be simplified service of complaints, or the filing of a master complaint, with individual plaintiffs filing a short-form complaint.⁵³

Over time, the preparation of the cases for trial has moved into a common pattern. As to disclosure from the plaintiffs, on each case the defendant first will seek extensive written responses in a specially negotiated document often known as a Plaintiff's Fact Statement.⁵⁴ Also with this would go production of documents the plaintiff has in hand, and authorizations for medical records, tax records and other documents.⁵⁵

52. See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

53. The Federal Judicial Center has put great effort over the years into providing advice for judges to whom mass tort actions (and other complex actions) are assigned. See, e.g., FED. JUD. CTR, MANUAL FOR COMPLEX LITIG., FOURTH (2004), http://www.fjc.gov/public/home.nsf/autoframe?openagent&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/524. For more information on its activities, one may access its website, www.fjc.gov. Some states have similar printed advice and website sources.

54. RHEINGOLD, *supra* note 3, at § 8:9.

55. *Id.* at § 8:10. Recently, the fact statement demanded from each plaintiff is now balanced by a similar demand from the defendant, often known as a Defendant's Fact Statement, which seeks information in its possession about the plaintiff's specific case. In drug litigation, an example would be contacts the defendant had with the prescriber of the medicine for

As far as disclosure from the defendant, the plaintiffs' discovery team will, today, automatically seek the defendant's business records. These days, these records are almost entirely in electronic form, and issues inevitably arise about how they will be searched and produced. The ESI (electronically stored information) fights are not particular to mass torts, but almost inevitably arise and are more massive.

In mass tort work, millions of documents are routinely provided by the defendant to the plaintiffs' group, which must then find a platform on which to house them, and a method to search them. The long running task of the group is, first, to select the documents to be used in depositions, and then to boil them further to a list of "hot documents" for trial.

From documentary discovery (and limited use of interrogatories), modern MDL plaintiff discovery from defendant moves to depositions. Dozens, if not hundreds, of depositions are taken these days of the defendant's present and former employees, often followed by non-party depositions, such as of physicians who did research.

At the same time that the massive groundwork discovery outlined above is going on, supervising judges and the parties realize that some movement of cases to trial must be commenced. The choice is to try all cases on specific issues, or try some representative cases on all issues. In the latter approach, which is almost universally used today in MTL, bellwether cases are prepared fully for trial. That process, which straddles both preparation and trial/resolution issues, is discussed in the next section.

IV. Resolution: Trials and Settlements; Bankruptcy

The most significant topic to be covered in this study of the maturation of mass tort litigation is how such litigation is resolved. The many ways in which this may occur—trial, settlement, summary judgment, discontinuance, even bankruptcy—are all considered here, but as the litigation has matured, it has become ever more a game of settlement.

the plaintiff.

A. Ways in Which Mass Tort Cases Are Tried

When MTL was developing in the 1980s and 1990s, two distinct methods were devised by the courts for trial of the cases. The first was issue or phased trials: issues in the litigation would be identified and one issue would be selected for trial first; the outcome would bind all cases. Then, if no settlement arose, the next issue would be tried. This process involved bifurcation of issues. Examples of this method include the Costano tobacco cancer cases,⁵⁶ the Beverly Hills fire case,⁵⁷ and the Watson oil refinery explosion case.⁵⁸ It should be noticed that most of the cases that experimented with phased trials were within the territory of the Fifth Circuit.

In recent years, this method—trial of one issue in all cases—has fallen into disuse. Perhaps part of the reason was the question of what issue would be tried first. Some judges evidently felt that the most contentious issue should be tried first. If the plaintiff lost, that would end the litigation, and if the plaintiff won, that might lend itself to settlement. However, these procedures went against the grain of naturally trying cases together on liability, causation, and damages. Further, it was hard to find issues common to all cases to such a degree that one jury verdict could bind all claimants.

Of course, one can try more than one plaintiff's case at once, but one cannot feasibly try 100 or 1000 plaintiffs' cases at once. Thus, the almost universal method that is used today is to try one case at a time. However, it is not practical to prepare all cases for trial at once and then select one at a time for trial. Specific case preparation entails depositions of the plaintiff, of a spouse, of treating doctors, of prescribing or inserting doctors in the case of drugs and device; then retaining and deposing case-specific experts (on specific causation compared to general causation); and then *Daubert* motions as to generic experts; and then summary judgment motions.⁵⁹

56. *Costano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd* 84 F.3d 734 (5th Cir. 1996).

57. *In re Beverly Hills Fire Litig.*, 695 F.2d 207 (6th Cir. 1982).

58. *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), *reh'g denied* 53 F.3d 663 (5th Cir. 1994).

59. RHEINGOLD, *supra* note 3, at C.8.

Instead, the practice has evolved of selecting a few cases to advance through full preparation. These cases are most commonly referred to as bellwether cases.⁶⁰ A small number of cases are selected and advanced, while the large majority do not move forward on discovery beyond the type of initial disclosures mentioned previously. The aim and hope is that, after one or several trials, enough experience develops as to liability, causation, and damages, such as to guide the parties to an overall settlement.⁶¹

How to select the bellwether cases is also a practical area that has undergone some development over the years. One of the earliest and simplest methods of selection of the bellwether cases was to let each side pick an equal number and then to narrow the list down through defaults, strikes, or judge selection. However, this has tended to produce cases that are at the extremes: the plaintiff picks a case with great sympathy, while the defendant picks one with many defenses. The result may be the trial of a case which is of no guidance to the merits or value of the mass of cases. To help pick a case where the outcome of the trial will be meaningful, more recently a few judges have developed methods to pick *typical* cases, rather than the extremes. This requires the judge to become familiar with the “nitty gritty” of the litigation (which some just don’t do) and the court to select a case that is down the middle. A third method sometimes used is for the court to pick cases at random, which may only slightly move the cases toward the average case.

In extended litigation, the bellwether cases are often selected in waves. A second, third, and even further round of cases are moved along through the preparation phases, perhaps a few months apart. This has become a judicial method of keeping pressure on both sides of the litigation, as it increases expense and time to manage waves of cases. The *Vioxx* litigation, one of the most massive of mass torts, is an example of the multiple wave process; since the cases were going to trial (and both sides were winning individual cases), the federal and state court judges kept up the pressure by

60. *Id.* at § 10:45.

61. See Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); RHEINGOLD, *supra* note 3, at § 10:45.

ordering continuing waves of new bellwethers.⁶²

In roughly half of MTLs, one or more trials occur before a settlement of a global nature is arrived at. The results of the trials have a direct impact on the amount of settlement, to be sure. The *Vioxx* litigation is, again, a good example of how multiple trials can work to produce an overall settlement.⁶³ Initially, Merck, the defendant, chose not to settle; instead, the defendant put money into fighting these heart attack cases by litigating each as they came to trial.⁶⁴ This occurred both in the MDL or in various state courts, New Jersey being the primary one.⁶⁵ In all, before an across-the-board settlement was worked out, some sixteen cases were tried.⁶⁶ The defendant won about eleven of these cases, and there were some reversals on appeal.⁶⁷ With this unusually rich “data base,” a settlement plan was arrived at, which provided about \$4.85 billion to dispose of some 35,000 cases.⁶⁸

Since the judge supervising the MDL has a wealth of knowledge about the litigation, it would be logical for that judge to try the first cases. And while this sometimes happens, the matter has become the subject of dispute. The statute creating MDLs states that a case not disposed of while in the MDL “shall” be remanded.⁶⁹ In interpreting this law in 1998, the Supreme Court held that the transferee court may not try a case sent to it, unless with the consent of the parties.⁷⁰ That was also with the exception where the transferee court has valid jurisdiction over a particular case because it was filed originally in that court.⁷¹ Another method enabling the transferee judge to try a case, even if it was not filed in its district originally, is to do an inter-circuit transfer pursuant to

62. See *supra* note 2 and accompanying text; see also RHEINGOLD, *supra* note 18, at § 9:39.50.

63. *Id.*

64. *Id.*

65. *Id.*

66. See *supra* note 2 and accompanying text.

67. *Id.*

68. *Id.*

69. See *id.*

70. *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 38 (1998).

71. *Id.*

statute.⁷² Thus, in a recent transvaginal mesh case, the MDL judge in West Virginia transferred a group of cases to Florida, and went there to try them.⁷³

B. Settlement of Mass Torts

As noted, group settlement of a mass tort litigation may arise before the first trial, as the bellwether cases are moving along, or after a few trial outings. In any instance, what is discussed here is the type of settlement plan that is worked out.

There is tremendous pressure on all participants in MDL to settle the litigation. The judge wants the settlement not only to end the work, but also because the disposition of a mass tort is an achievement among the court's peers. The defendant usually desires this, so long as a global resolution is involved; that is, the litigation and its costs and time-consuming nature can be put behind it. And the lead lawyers for the plaintiffs, as well as the individual lawyers, want it, too, in consideration of both time and money expenditures.

The most common type of settlement in recent years has involved some sort of schedule by which all claimants will be paid. Sometimes a grid is agreed to between counsel, which creates various categories into which an individual may fall. The grids typically employ the severity of the injury, the age of the claimant and other factors.⁷⁴ Another common method is a point system, where the claimant may obtain or lose points, depending on factors felt to be significant to determining damages. Some common factors are age, length of hospitalization, and type of outcome. Under these plans, points may be deducted, often due to the existence of perceived risk factors, such as smoking or obesity.⁷⁵

72. See 28 U.S.C. §§ 292, 294 (2016). Some courts have experimented with procedures to accelerate trials by trying two or more cases at once, either with one jury, or a jury per plaintiff. See RHEINGOLD, *supra* note 3, at § 10.49.

73. See *In re Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, Nos. MDL 2326, 2:13-CV-8669, 2015 WL 1395576, at *1 (S.D. W.Va. Mar. 25, 2015).

74. The plan is described in RHEINGOLD, *supra* note 3, Stryker Hip Replacements, at § 9:39.85.

75. The plan is described in RHEINGOLD, *supra* note 3, NuvaRing

Since the plaintiff must opt into the plan (unlike a class action where one would have to opt out), defendants offering such plans have, over recent years, utilized steps to try to get as close to 100% of potential claimants as possible into the plan.⁷⁶ The most common step is to set a very high amount of participation, which, if not met, will allow the defendant to withdraw the plan (called a “walk-away” right on the part of the defendant); a typical quota is 95%.⁷⁷ However, in recent experience, no defendant has “walked away,” even if, perhaps, the total number did not reach that, and to the author’s knowledge no offer of settlement by a defendant has failed on this basis.

An added step to achieve near-total participation in a global settlement plan has been recent attempts by a defendant to coerce each involved law firm to put all of its cases in the settlement plan. This practice has come to be known as an “all or nothing” requirement. Ethical issues have been raised about such a requirement, since individual clients might have differing goals and demands, some doing better in the proposed plan, some perhaps doing better if they continued to litigate.⁷⁸

Although plans with an “all or nothing” requirement have survived attack, ethical issues still remain to be resolved. One of the arguments defendants use in supporting such requirements are that a plaintiff’s firm will otherwise cherry pick its best cases and hold them out and put the weaker cases, which may form a large majority of the firm’s inventory, into the plan.

Even short of an all or nothing demand, there is a lot of client coerciveness in seeking a high level of participation by clients. Plaintiffs’ counsel tend to insinuate to clients that it is for the common good that all participate. In this they may be backed up by support from the court, the plaintiffs’ leadership committee who worked out the plan (and will be rewarded for that), or a report by an “ethicist” that the plan is not unethical. Further coercion may arise from practices that the court adopts (supported by the defendant and plaintiff leaders) that place

Settlement, at § 7:26.50.

76. *See id.* at §§ 9:39.80, 9:39.85.

77. *See id.*

78. *See* discussion in RHEINGOLD, *supra* note 3, at § 14:13.50.

great burdens on any plaintiff who fails to opt in and instead wants to proceed to trial.

The role of the court in supervising and approving a mass tort settlement has changed over time, too. In earlier settlements, the judge played a prominent role in approving a settlement, perhaps as a hangover from class action litigation where the judge was required to approve a settlement.⁷⁹ What is becoming more common these days is a private settlement between the parties. The judge is kept informed, and may well have pressured the parties to compromise, but the court's role in the end is limited to commending the plaintiffs to enter into the settlement.⁸⁰ One motive that may be in the mind of plaintiff leaders when they opt for a private settlement is that they are removing the judge from a potential role of supervising the attorneys' fees of the plaintiffs (and perhaps putting a cap on them).⁸¹ These so-called "private settlements" are subject to criticism because some degree of judicial supervision may be needed, and legal issues arise among counsel that need resolution.

Before the topic of changes in settlement practices can be finished, several variations need to be examined.

Where implants are involved, such as hip replacements, a two-tier practice has been developed for making payments for the injuries caused by the devices. This is because of peculiarity of these devices, where there is often a basic injury common to all cases, usually the revision of the defective device

79. Examples where courts have regulated fee contracts of individual plaintiffs' lawyers, with the suggestion that an MDL settlement is like a "quasi-class" situation, include *Zyprexa*, RHEINGOLD, *supra* note 3, at § 7:47. Other judges have apparently believed that they do not have the power to reduce fees, or have decided not to take such steps. See Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 *FORDHAM L. REV.* 319 (2011); Charles Silver & Geoffery P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *VAND. L. REV.* 107 (2010).

80. RHEINGOLD, *supra* note 3, at § 9:69. Since there are always going to be issues raised as to the claims, and some concept of due process survives even in private settlements, the settlement agreement may involve the use of special masters, who will hear and decide disputes. While these masters are sometimes retired judges, they are not subject to further review, as would occur in the court system.

81. See RHEINGOLD, *supra* note 3, at § 9:69.

(removal of the bad device and replacement), and then some additional complaints that may occur thereafter; these are rare but serious events such as an infection, a heart attack, or the need for a re-revision.⁸²

In recent years, defendants have, on occasion, used an approach to settlement other than across the boards nationally. Instead, they engage in what has become known as “inventory” settlements, approaching each firm representing plaintiffs to work out a settlement of all of its cases. Sometimes this is done under conditions of confidentiality so that one firm does not learn what another is doing. In that way, firms with less bargaining power or inside knowledge (such as is gained by having led the discovery on behalf of plaintiffs in an MDL) may not obtain as large an amount for their clients as others do. In other instances, the defendant has not imposed any confidentiality duties; the plaintiffs are free to exchange information as to values. This openness facilitates settlement, of course.⁸³ This type of so-called transparency has been lauded,⁸⁴ but in reality, there is usually no full availability of settlement values. Leaders in the litigation do not readily share what their clients are being paid, or they may exaggerate what they are getting (sometimes to try to get referrals).⁸⁵

The inventory settlement may have its appeal to both

82. This was done, for example, in the ASR hip cases discussed in RHEINGOLD, *supra* note 3, at § 9:39.80. Every claimant who has had a revision received a base payment. *Id.* However, there could be reductions for the presence of various factors, such as very short use, very long use, age, or weight. *Id.* Then there may have been adverse consequences of the revision that add damages, sometimes called enhanced or extraordinary injuries. *Id.* Examples include the need for re-revision, or an infection, or dislocation, or even a death. Here, additional set sums are paid pursuant to the plan.

83. This was done, for example, in the Yaz birth control drug litigation. *See in re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 6302287, at *1 (S.D. Ill. Dec. 16, 2011); RHEINGOLD, *supra* note 3, at § 9:41.50.

84. JOSEPH W. DOHERTY ET AL., CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM (2012). See Chapter 5, which discusses the settlement in the *Baycol* litigation.

85. A third path, one which only occasionally eventuates, is that a defendant selectively settles some cases and goes to trial on others (obviously trying to pick ones it may win on compared to ones it might lose on). This behavior is only a one-way station since eventually some plan must be worked out.

plaintiffs and the defendant, but it has its faults. First, there is no judicial supervision with its potential protection of the rights of claimants. Second, there are certain ethics pitfalls involved: the temptation is to take a lump sum for the whole inventory and then the plaintiffs' firm spreads it among its clients, which is improper.⁸⁶

Additionally, as a condition for settling all of its current inventory, the mass tort law firm may be requested not to take on representation of new clients involving the same product, which raises further ethics issues.⁸⁷

C. Summary Judgment; Dismissal

An MDL can, of course, come to an end other than by settlement. The transferee court can grant a motion for summary judgment dismissing many or all of the cases in the MDL; such a motion can be granted, in some circumstances, where all expert testimony offered by the plaintiffs has been struck, as a result of a prior *Daubert* motion.⁸⁸ It can also arise by virtue of a motion based on a legal defense, such as pre-emption.

Up until about five years ago, the granting of a motion that was dispositive of all or most of the cases pending in an MDL was a rarity. However, there recently has been an increased use of summary judgment grants in MDL cases, ending the MDL without payment to the plaintiffs. Recent instances of

86. There is a great amount of academic literature on aggregate settlements. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Sybil L. Dunlop & Steven D. Maloney, *Justice is Hard, Let's Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN'S L. REV. 521 (2009) (involving the interpretation of Model Rule 1.8(g) of the Model Rules of Professional Conduct). See also AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010); Rara Kang, *Working With The Model Rules: Navigating Ethical Dilemmas in Aggregate Settlements of Non-Class Action Mass Toxic Tort Suits*, 27 GEO. J. LEGAL ETHICS 585 (2014).

87. See Ronnie Gomez, *Ethics Rules in Practice: An Analysis of Model Rule 5.6(b) and Its Impact on Finality in Mass Tort Settlements*, 32 REV. LITIG. 467 (2013).

88. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); see also *in re Norplant Contraceptive Prods. Liab. Litig.*, 955 F. Supp. 700 (E.D. Tex. 1997), *aff'd*, 165 F.3d 374 (5th Cir. 1999) (where a grant of summary judgment as to all cases ended the litigation).

summary judgment granted on the basis of the failure to have expert evidence, most usually on the causation issues in the mass of cases, are *In re: Mirena IUD Products Liability Litigation*⁸⁹ and *In re: Zoloft (Sertraline hydrochloride) Products Liability Litigation*.⁹⁰ Recent instances of summary judgment being granted on the basis of preemption defenses are *In Re: Incretin-Based Therapies Products Liability Litigation*⁹¹ and *In Re: Fosamax (Alendronate Sodium) Products Liability Litigation*.⁹²

D. Arbitration and Mediation

A method to settle mass tort cases of occasional use is to set up a mediation center, or expert, who hears large numbers of cases over time. The concept is that the mediator, through this experience, will have learned values that cases are worth (and the defendant is willing to pay). In most instances, individual cases settled during this mediation process. This is, however, a slow and expensive way to settle a mass of cases. The chief value of the mediation process, here, has been that once some values are set—what plaintiffs will take and what defendants will pay—a comprehensive settlement plan may be developed, as described above.⁹³

Mediation has also been used recently as a means of

89. *In Re: Mirena IUD Prods. Liab. Litig.*, 202 F. Supp. 3d 304 (S.D.N.Y. 2016). The court first struck the testimony of all of plaintiffs' experts that sought to relate the embedment of this intrauterine device to defects in design, and then granted summary judgment. *Id.* at 328. The decision is on appeal.

90. *In re Zoloft (Sertraline hydrochloride) Prods. Liab. Litig.*, 176 F. Supp. 3d 483 (E.D. Pa. 2016). Summary judgment was awarded to the defendant in almost all cases pending in the MDL in 2016 based on a failure of expert evidence to prove that the drug, when taken by pregnant women, causes birth defects. *Id.* at 500-01. The decision is on appeal.

91. *In Re: Incretin-Based Therapies Prods. Liab. Litig.*, 142 F. Supp. 3d 1108 (S.D. Cali. 2015). The decision is on appeal.

92. *In Re: Fosamax (Alendronate Sodium): Prods. Liab. Litig.*, No. 08-08 (JAP) (LHG), 2014 WL 1266994 (D.N.J. Mar. 26, 2014). On appeal to the Third Circuit, the Court reversed the dismissal and held that whether there was preemption or not was a fact issue for the jury. *See In Re: Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, No. 14-1900 et al., 2017 WL 1075047, at *24 (3d Cir. Mar. 22, 2017).

93. Mediation was the beginning point for settlement of the Stryker hip implant litigation. *See RHEINGOLD, supra* note 3, at § 9.39:85.

disposing of individual, hard-to-settle cases. Sometimes, the judge who is supervising the overall litigation will lend a hand doing this at the tail end of the litigation.⁹⁴

E. Bankruptcy

A substantial method of resolving claims, in terms of volume of cases disposed of, is via bankruptcy. If the defendant has chosen to go into bankruptcy, usually Chapter 11,⁹⁵ the mass tort claims against it are carried into the bankruptcy as claims, under well worked out but complex procedures.⁹⁶ This resolution method was extremely popular in the asbestos litigation, where over 100 companies have gone through bankruptcies.⁹⁷ This has led to the creation of trusts to pay claims.⁹⁸ This was also true in the ephedra litigation, where many small companies were defendants.⁹⁹

But often the defendant is too big to go into bankruptcy, and in any case the parties may prefer that the company stay in business and continue to make money to pay settlements, or to sell itself as a going entity.

V. How the Academic World Has Viewed and Shaped the Development of Mass Tort Litigation

While the practitioners and judges have moved along with handling the exigencies of often thousands of persons suing over the same matter, they have been studied by law professors and other academics. This is not to suggest that there is a total divide, however. Suggestions and criticisms by academics have had their impact upon the litigation, primarily upon the

94. Binding arbitration has rarely, if ever, been used to dispose of large numbers of cases in a mass tort. In class actions, class-wide arbitration has been severely limited by virtue of a line of Supreme Court decisions. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

95. 11 U.S.C. § 101(4)(a) (2016).

96. RHEINGOLD, *supra* note 3, at § 12:2.

97. *Id.* at § 12:46.

98. See Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163 (2006).

99. Note, for example, the Metabolife Chapter 11 bankruptcy proceedings and the Muscletech proceedings. See RHEINGOLD, *supra* note 3, at § 12:53.

judiciary, which in turn may view the mass of litigation before it through some sort of jurisprudential lens.

Some law professors have tended to see mass torts as an aspect of “public law,” in contrast to individual law suits, which might be labeled “private law.”¹⁰⁰ It is the mass of cases that transfers the MTL into the public arena. As a consequence, the law profession, the judiciary, and the general public have concerns for what is best for the public interest.¹⁰¹

But even then, there is no clear consensus on what is in the public interest. Especially in the early days of mass tort litigation, writers expressed concern for the rights of individual litigants, which they feared were being submerged by collective or aggregated forces.¹⁰² Their ideal was claimant autonomy. Then came a strain of reasoning that the litigation was so overwhelming, that in fact a collective or comprehensive solution was needed for the public good. “Rough justice” might be tolerated if an efficient system of doling out compensation fairly might be affected. While the pendulum, in practice, has swung decidedly in favor of the aggregative approach, tension and concern does remain between these two poles. Further, as the mass litigations get worked out today, both concerns for the rights of individual claimants, and the need for efficiency and expense reduction, coexist.

A specific aspect of the academic debate has centered on the assurance of fairness in a settlement by assigning an important role to the judge supervising mass tort. Since this was “public law,” it follows that a judge will not only control

100. See *supra* notes 77-78 and accompanying text.

101. For an excellent, up-to-date analysis of the issues raised in this section, see Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015). Her article is nominally a review of a biography of Judge Jack Weinstein by Jeffrey B. Morris. See JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* (2011).

102. See David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A ‘Public Law’ Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). Judge Jack Weinstein, a frequent commentator on the mass tort system, also discussed these issues. See WEINSTEIN, *supra* note 2. The American Law Institute has made several attempts at trying to frame recommendations of good law in this area, the main one being AM. L. INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994), which had little impact.

the litigation, but also approve any settlement. Although mass torts have moved away from class actions, where judges are obligated to approve settlements, the professors analogize any settlement for a large group as demanding judicial review.¹⁰³ As noted in an earlier section, however, there has been a rise of private, unsupervised settlements.

Another mass tort topic that led to considerable academic examination and writing has been ethical issues raised about how clients are kept informed about the litigation, how their consent is obtained to settlements or other major steps in the lawsuits, and whether plaintiffs' lawyers are representing their clients' interests, or their own.¹⁰⁴ That is also a topic discussed in the practice section above. In many recent torts, it is quite apparent that the lawyers are primarily looking out for themselves, and that they employ rationalizations that they are fighting for their clients in working out a multi-billion-dollar settlement (with large fees).

VI. Conclusions

This overview of fifty years of development in the field of mass torts indicates ever more sophisticated methods of handling large number of similar cases efficiently. This does not mean, however, that the cases are being moved along swiftly. The mere massiveness of the litigation tends to slow resolution down. Further, framed by the academic debate over the need to preserve individual autonomy, there can be little claim that individual case justice is being meted out. Clients lack a voice and true empowerment in the workup and settlement of the cases. Not only does the system take over, which might be regarded as a collective necessity, but as shown above, the attorneys take over, too, for their own financial recovery and power.

"Rough justice" is the name sometimes given to the end

103. Linda Mullenix refers to these settlements as raising "troubling questions about fairness, adequate representation, and the merger of legislative, administrative, and judicial functions." Mullenix, *supra* note 77, at 611.

104. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010).

results of mass tort litigation, in the past and today as well. It may be that there is an ideal balance between efficiency and autonomy that is yet to be struck. However, for now, the dynamic forces reviewed in this paper continue to make mass tort litigation function, although at a price, at least in the jurisprudential sense.