2000

Aggregation and Settlement of Mass Torts

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Recommended Citation
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— BY EDWARD H. COOPER
The following essay is the pre-editing draft of the introduction to a paper delivered at a Mass Torts conference held at the University of Pennsylvania Law School in November 1999. The conference grew out of the work of the ad hoc Mass Torts Working Group that on February 15, 1999, delivered a Report to the Chief Justice of the United States and the Judicial Conference of the United States. The Working Group, chaired by Third Circuit Judge Anthony J. Scirica, '65, included members drawn from several Judicial Conference committees, including the Advisory Committee on the Federal Rules of Civil Procedure, and from the Judicial Panel on Multidistrict Litigation. The Working Group held four public meetings that in all were attended by 81 lawyers, judges, and academics. The models that are discussed in the body of the paper were prepared to stimulate discussion at these meetings and were set out in the Report appendices.

Little need be said about the models themselves. They do not purport to resolve the dilemmas sketched in the introduction. To the contrary, they are designed to underscore the insufficiency of the problems that arise from efforts to resolve substantial personal injury or extensive property damage by a substantially common course of conduct. Asbestos and silicone gel breast implants provide the most familiar models, but there have been many others and are likely to be many more.

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would be possible to pick a numerical threshold, and that may be desirable for reform legislation. The number is likely to be rather high. Two hundred fifty actions arising from common facts, or one thousand, may be handled by the collective resources of state and federal courts without significant disruption. The choice of a number, however, must be affected by something more than the impact on the judicial system. It also must take account of the impact on the tort claims. The more drastic the consequences that flow from a mass-tort characterization, the greater the care needed in framing the definition. The broad model described below would have drastic consequences indeed, affecting choice of forum, choice of law, aggregated disposition, and more. Large numbers should be required for this sort of approach. Even for aggregated settlement, many models entail similar consequences in gentler guise. Again, care is warranted.

WE ASK A GREAT DEAL OF TORT THEORY AND JUDICIAL INSTITUTIONS IN TORT LITIGATION. ONE TEST OF AGGREGATING DEVICES IS TO ASK WHETHER, IF WE HAD JUDICIAL RESOURCES FOR THE TASK, IT WOULD BE BETTER TO ENABLE EVERY PLAINTIFF WHO WISHES TO SUE ALONE TO DO SO, AND — IN THE TRADITIONAL MODEL — TO SUE AS MANY TIMES AS THERE ARE DEFENDANTS TO SUE. MANY ARGUMENTS ARE MADE IN FAVOR OF THIS RESULT. THE FORCE OF THESE ARGUMENTS IS AUGMENTED BY THE WEIGHT OF TRADITION. BRIEF REMINDERS OF THE TRADITION SUFFICE TO SET THE SCENE.

I. The Doubts

A. Individual Adjudication of Tort Claims

We ask a great deal of tort theory and judicial institutions in tort litigation. One test of aggregating devices is to ask whether, if we had judicial resources for the task, it would be better to enable every plaintiff who wishes to sue alone to do so, and — in the traditional model — to sue as many times as there are defendants to sue. Many arguments are made in favor of this result. The force of these arguments is augmented by the weight of tradition. Brief reminders of the tradition suffice to set the scene.

Traditionally, the plaintiff begins by choosing a court. The rules of subject-matter jurisdiction, coupled with the reality that most of the central defendants in mass torts are corporations, often give a choice between state and federal courts. Adept framing of the litigation can lock the case into state court. As between state courts, contemporary views of personal jurisdiction and venue often give a substantial range of choice as well. This choice can be exercised to tactical advantage by considering such matters as local aggregation practices (including settlement), jury proclivities and the degree of judicial control, choice-of-law rules, docket congestion, and attorney
QUITE A DIFFERENT CHALLENGE TO THE INDIVIDUAL REPRESENTATION MODEL ASKS WHETHER THERE IS ANY REALITY TO THE IMAGE OF INDIVIDUAL REPRESENTATION. THERE ARE, TO BE SURE, SOME ATTORNEYS AND FIRMS WHO LIMIT THEIR INVOLVEMENT IN MASS TORT LITIGATION TO REPRESENTATION OF A SMALL NUMBER OF CLIENTS, TREATING EACH CASE IN MUCH THE SAME WAY AS THE SAME NUMBER OF UNRELATED CASES WOULD BE TREATED.

convenience. Often, putting aside constraining class-action practices, the individual plaintiff chooses as well when to bring suit, whom to associate as co-plaintiffs, and whom to make defendants. Individual plaintiffs also can make choices whether to push for prompt disposition and early relief, whether to emphasize liability or damages, how to pursue discovery, and — often above all — what terms to accept in settlement.

Apart from the effect of these many and elusive choices on outcome, we celebrate the "process values" that go with individual control. The sense of participation and control are believed to affect the level of satisfaction or dissatisfaction with litigation, and the acceptability of the process. We tend to focus on plaintiffs in praising these values, perhaps in part because we — some of us, at any rate — do not care as much about the process-value experience of corporate defendants, and perhaps in part because we believe that defendants who face many adversaries can achieve a substantial measure of participation and control in aggregated litigation in ways that individual plaintiffs do not.

Frank discussion of the charms of individual litigation adds values that represent escape from the cold rationality of legal rules. As to most issues in mass torts, the burden of persuasion is stated as a preponderance of the evidence. The preponderance of the evidence, however, is an extraordinarily fluid concept that is shaped by many subtle factors. The context of specific parties and injuries may have a powerful impact on the willingness of either judge or jury to accept a given level of uncertainty. This flexible response to fact uncertainty joins with equally flexible response to legal uncertainty. Fault, contributory fault, causation, as well as the fancier frills that may decorate tort theory, all bend to individual factors. Such adaptability seems to some to speak ill of the institutions that administer our law, but to many it represents a triumph of justice over law.

This summary recital of the advantages of individual litigation would read to many observers as a recital of disadvantages. To take one narrow illustration, defendants bewail the opportunities plaintiffs often enjoy to select a court, just as plaintiffs decry the occasional opportunities that
 defendants seize to defeat a plaintiff's initial choice. When dealing with individualized events that involve no more than a few people, nonetheless, these protests have not led to any general change or prospect of change.

Dissatisfaction with individual adversary litigation of tort claims takes on a new tone when addressed to mass torts. With essentially unique events, we have few ways to measure the correctness of the judgment. It is relatively easy to take it on faith that most judgments are correct. When addressed to mass torts, however, also raise substantive questions about the theories themselves.

One of the institutional doubts peculiar to mass torts is the frequently expressed fear that "premature" aggregation will create a mass tort where more sober procedures would show there is none. One version of this fear is that a few plaintiff victories in unusually sympathetic cases brought in particularly favorable forums will stampede many claimants into premature filings, intimidate courts into aggregation, and force capitulation. A more sensible process of repeated trials of typical cases might reveal that there is no mass of victims.

Mass torts do not seem to have much effect on the substantive doubts about the tort theories that define liability-creating conduct. Negligence, product-liability, environment contamination, and like theories are challenged and defended on essentially the same grounds. New point is given, however, to the rules that focus on victims. The point often is made in addressing the "predominance" requirement for certifying a class under Civil Rule 23(b)(3). Questions of causation, plaintiff fault, and damages are treated as unique to each plaintiff, and in predominant over common issues of the defendant's responsibility. But we are driven to ask whether these distinctions really should be made, at least when common injuries are inflicted on thousands, tens of thousands, or even greater numbers of victims. Why, for example, should the "make whole" view of tort law award more money to the victim who had enjoyed the fortune of making more money, and thus has suffered the misfortune of losing a greater stream of future income? How can we possibly presume to distinguish the value of the anguish, pain, suffering, and like intangible injuries of victims who have suffered the same physical impairment? Why should we care that, statistically, smokers are more likely to be injured by asbestos exposure than nonsmokers: if we cannot trace the causal connection with respect to a particular plaintiff, why take account of the statistical probability — unless it is to support a contribution claim on an aggregated basis by asbestos defendants against tobacco manufacturers?

As measured by these traditional notions, it is indeed "weird" that a settlement of blood-solids litigation should award $100,000 to each victim without accounting for any of these distinctions; a less tradition-bound view might see the result as profoundly wise.

Substantive doubts about tort doctrine bear on aggregation in another way. Different state-law systems threaten to destroy the commonality that supports aggregation, whether by class action or other device. If we become impatient with these obstacles, it is easier to subordinate state-law differences to achieve the advantages of aggregation.

B. Aggregation

Aggregation has many advantages. It offers promise of "a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'" At least after "maturity" has been achieved, there is a single determination for all parties. The single determination avoids the inconsistencies that arise from separate adjudications, achieving the uniformity — like treatment of like claims — that eludes us, at times as to liability and inevitably as to remedies, when we cling to individual litigation. A once-for-all-who-remain adjudication can command litigating resources and judicial attention in a way that may enhance the prospect of fair disposition. Even if the result is no more fair — if, indeed, even uniformity generates as much unfairness as fairness — it may reduce drastically the costs that attend individual litigation.

The costs of aggregation vary with the form. Voluntary small-scale consolidation by permissive joinder or similar devices presents few problems. Aggregation by inventory was noted earlier. Aggregation by consolidation of actual cases actually filed may seem the next more coercive step. The effect of consolidation, however, is little different from class certification if any substantial number of actions is involved.

Opt-in class aggregation offers an alternative that has found little support.
The possible advantages are not
inconsiderable. An opt-out class imposes a
burden on the unwilling; the burden
includes responsibility to read, understand
in a sophisticated way, and respond to
the opportunity to request exclusion. The level
of informed consent represented by a
failure to opt out is likely to be as high in
body-injury mass torts as anywhere, but
still leaves much to be desired. But "high"
may not always be high enough. A
claimant who has an attorney may not be
given sound advice about the opt-out
decision, and many
claimants —
particularly those who have only "future"
claims — may not have attorneys at all. An
opt-in class, on the other hand, involves
only those whose consent is as real as the
consent that personal injury victims give to
much of anything in the course of litigating
their claims. The class can be certified on
terms that avoid many of the problems of
an opt-out class, including specification of
a choice of law, methods for compensating
both class counsel and counsel for those
who opt in, methods for resolving
individual issues, and so on. An opt-in
settlement class might have particularly
attractive advantages. The class would in
effect involve an offer to settle extended to
all victims after notification by
representatives whose negotiation is likely
to be respected. The central objection to
this procedure seems to be that it would not
work. Too few claimants would choose
to opt into a litigation class, and too few
would choose to accept the offer of
settlement by intervening. The pragmatic
view is that a settlement offer would be
viewed as a new floor, assuredly available
to anyone who fails to opt in but
supporting more favorable terms for most.
Even a litigation class would have the same
effect — no one would opt in, expecting
that any class victory would establish a
similar floor for later settlements.

Broader and more coercive forms of
aggregation entrench the disadvantages that
must be set against the potential
advantages. Most apparent are the loss of
individual control and the risk that the
efficiently achieved and uniform result will
be wrong. Defendants frequently complain
that there is no chance of winning on the
merits — even a defendant willing to risk
the full damages liability that would follow
a fair adjudication of liability settles for fear
that the sheer mass of self-identified
victims will overwhelm reason and force a
finding of liability. The rewards of
successful broad aggregation, moreover,
courage a race to aggregate first, or at
least to bring the first aggregated action
to judgment.

Class-action aggregation emphasizes the
problem of conflicting interests among
plaintiffs. The problem exists in any
aggregation, but is highlighted by Rule 23
requirements. A searching inquiry into
potential conflicts could easily lead to so
many subclasses as to defeat any hope of
global settlement or a single trial. Conflicts
will exist based on differences in extent
and character of injuries, optimal choice of
law, comparative responsibility, causation,
and other easily identifiable positions.

Individual victims, given free choice, likely
would differ as well with respect to more
effusive choices of litigation tactics, most
particularly including settlement. Workable
control over a thoroughly consolidated
proceeding is likely to be achieved only by
resolutely ignoring many of these conflicts.
This result can be achieved by pretending
that the conflicts do not exist, by asserting
the advantages of efficiency and discounting
the importance of the conflicts, or by
forthrightly concluding that many
distinctions drawn by traditional tort rules
for individualized litigation do not justify
recognition of an "interest" that defeats
aggregation. With a choice-of-law question,
for example, it can be asserted that all
relevant laws are essentially the same; that
the differences are too trivial to upset
efficient disposition; or that the differences
do not justly warrant different treatment —
that like treatment should be accorded
victims from all states.

A very special problem of conflicting
interests arises from the desire to defer
aggregation to the point at which a mass
tort has matured through the pretrial, trial,
and settlement of an informative number of
individual actions. The lawyers best
equipped to manage the later aggregated
litigation are those who brought the
dispute to maturity. They are the ones we
want. But the anticipation of aggregation
may make it difficult to handle the
individual actions without regard to, and
distortion by, the future proceedings. The
steps taken to settle individual-client
asbestos claims in preparation for
settlement of a broad class claim provide a
familiar example.

Repeated aggregation of different mass
torts creates risks of a different sort.
Depending in part on the means of
aggregation, mass torts may come to be
dominated by a small number of
specialized and well-financed lawyers,
litigating before a small number of
specialized judges. The results may be
similar to the problem of "regulatory
capture." All participants know what to
expect, and they expect to repeat the
strategies that have brought resolution in
the past. Tactics may be shaped by the
expectation that all players will meet again in
future and different mass tort actions.

Settlements in particular may reflect
received traditions and the expectation of
future negotiations.

Effective aggregation, finally, presents
severe challenges to received notions of
federalism. The challenges are illustrated
by the features of the proposed "broad
aggregation" model. Most courts are
excluded from the action. Choice-of-law
traditions are ignored. Common appeal
control is asserted even when the
aggregation court invokes the assistance of
other courts. These challenges will seem
dawning to some, but trivial to others.

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