SETTLEMENT OF MASS TORTS
IN A FEDERAL SYSTEM

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Engle v. R.J. Reynolds Tobacco Co. raises the questions of whether and how elastic mass torts can be settled in our federal system. In particular, there is a procedural and practical dilemma: state courts provide relative ease of class action certification, but without the ability to provide global peace, while federal court provides relative difficulty of class certification, but with the power to provide closure. A wide variety of options for the parties are considered in light of the Amchem and Ortiz decisions with the conclusion that the demand for finality will drive “bottom-up” reform and lead to more flexibility in resolving those types of mass torts.

Why, in Engle v. R.J. Reynolds Tobacco Co.,\(^1\) did the major tobacco companies choose to face a crippling jury verdict rather than

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1. No. 94-08273 CA-22 (Fla. Cir. Ct. Nov. 6, 2000).
settle with the plaintiffs before or during trial? Current wisdom among defendants is that they have no choice but to settle a mass aggregation of cases, like *Engle*, that creates a “bet-your-company” scenario. In fact, goes the current wisdom, the plaintiffs’ ability to put so many chips on the table without giving a defendant the opportunity to defend itself one case at a time is one of the great evils of class action litigation. Yet the defendants in *Engle* decided not to settle. Why not?

One answer is that the tobacco companies were acting quite rationally in not settling. Given the litigation environment discussed below—(1) the elasticity of the mass tort; (2) the state forum; and (3) the available procedural mechanisms—the alternatives to settlement were simply superior. The only feasible path was to litigate. A more complex answer is that they did “settle,” or at least established a procedure for potential settlement, albeit subsequent to the jury verdict. Notwithstanding the specific language of the agreements among the *Engle* parties, the net effect of their agreements regarding the appellate process could be viewed as a means for “settling” the case.

The dilemma faced by the tobacco defendants in Florida is not unique; virtually every other mass tort defendant confronts the same limited number of end games that the tobacco companies faced. Over the last twenty-five years, the mass tort pendulum has shifted from trial to settlement; will it now shift back to trial? Historically, mass tort cases have followed a fairly well defined cycle: a trial phase that sets the viability of the tort and its values; if the tort is viable, a settlement phase where the data points from trial are used to settle cases; and finally, if possible, a global settlement. The economic incentives associated with plaintiff control of the litigation and defendant search for certainty eventually led to a different model: early settlement. Plaintiffs and defendants began seeking a global resolution before there had been multiple trials. Courts now have begun to be more skeptical of these early settlements and have created barriers to early global resolution. The limited number of settlement options now available to the parties may lead many defendants, therefore, to prefer a litigated outcome.

**Engle v. R.J. Reynolds Tobacco Co.**

The amended *Engle* class action complaint, filed on May 10, 1994 in Dade County Circuit Court, 2 was brought on behalf of a nationwide class of current and former smokers and their survivors who had suffered or died from diseases caused from smoking ciga-

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rettes. After discovery, legal briefing, and an evidentiary hearing on the class certification issues, on October 31, 1994, the judge entered an order certifying a national class of "all United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes."

The defendants then filed an interlocutory appeal objecting to the class certification. On January 31, 1996, the Third District Court of Appeal of Florida affirmed the class certification but limited the class definition to all "Florida citizens and residents" and their survivors with a 1994 bar-date for current harms. The number of potential class members variously estimated by plaintiffs ranged from 40,000 to 500,000. The defendants sought review of the class certification by the Florida Supreme Court, which was denied.6

While the class certification issue was on appeal, the defendants filed a Petition for Writ of Certiorari in the Third District Court of Appeal seeking review of an order by the trial judge that had refused to stay the Engle class action because of the pendency of a tobacco class action in federal court in New Orleans. The Petition for Writ of Certiorari was denied.

On February 4, 1998, the state court entered a trial plan order and refused the defendants' request to decertify the class. The defendants sought review of both orders before the Third District Court of Appeal and their appeals were dismissed.7 The trial plan provided for phases, and Phase I began on July 6, 1998 with a trial on common issues and entitlement to punitive damages, and lasted 366 days. The trial transcript exceeds 35,000 pages and includes testimony of 84 witnesses.

The Phase I verdict was rendered on July 7, 1999 following seven days of deliberation.8 The jury found that smoking cigarettes is the cause of various diseases and that smoking is addictive. The jury found for the plaintiff class on theories of strict liability, fraud and misrepresentation, fraud by concealment, civil conspiracy by misrepresentation, civil conspiracy by concealment, breach of implied warranty and express warranties, negligence, and intentional infliction of emotional distress. Finally, the jury found that the class potentially was entitled to punitive damages.

Following the Phase I verdict, the trial judge entered a trial plan order for Phase II. The first stage would be a trial of the claims

4. Id.
5. Id. at 42.
8. Id.
of 3 of 9 class representatives chosen by plaintiffs' counsel, followed by a trial to determine a ratio of punitive damage to compensatory damages on a classwide basis.

On August 16, 1999, the defendants filed a Motion to Enforce Mandate to Obtain Other Relief including Defendants Alternative Petition for Writ of Prohibition or Certiorari before the Third District Court of Appeal. The motion challenged the trial court's suau sponte modification of the trial plan order to include a lump sum determination of punitive damages and defendants argued that there had been a violation of the earlier appellate court mandate.

Defendants' Motion to Enforce Mandate or to Obtain Other Relief was granted, set for oral argument, and then denied by the Third District Court of Appeal on October 20, 1999. The Defendants filed a Petition for Writ of Prohibition and Mandamus or, in the alternative, Request for an Extraordinary Writ under the All Writs Power in the Florida Supreme Court, which was denied in December 1999.9

On January 31, 2000, defendants filed a Petition for a Writ of Certiorari before the United States Supreme Court seeking a review of the orders of the Third District Court of Appeal, and the Petition for a Writ of Certiorari was denied on May 22, 2000.10

The Phase II-A trial on compensatory damages for the three class representatives commenced on November 1, 1999 before the same jury that had decided Phase I, and they awarded compensatory damages totaling $12.7 million. There was some debate concerning a conflict regarding the jury's verdict on the time bar for one plaintiff, but the judge entered judgment in the plaintiff's favor.

The Phase II-B trial on punitive damages commenced before the same jury in May 2000. On July 17, 2000, after hearing 157 witnesses, the jury awarded punitive damages in favor of the Florida class and against each of the defendants.11 The jury awarded punitive damages of $73.96 billion against Philip Morris; $36.28 billion against R.J. Reynolds; $17.59 billion against Brown & Williamson; $16.25 billion against Lorillard Tobacco; and $790 million against Liggett Group. The remainder of the $144.8 billion was to be paid by the Council for Tobacco Research and the Tobacco Institute.12

**Tobacco As a Mass Tort**

Tobacco litigation is an elastic mass tort.13 The potential num-

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13. For a more extended discussion of the concept of elasticity, see Francis
ber of plaintiffs is unlimited, and the number of actual cases filed, or the propensity to sue, is a function of the anticipated outcome of those filings. As the number of successful cases that move through the litigation system increases and the cost of moving them through the system decreases, the demand of new filings increases. In contrast, an inelastic mass tort such as an aircraft crash is not affected by the speed and cost of resolution; there were a finite number of people on the airplane.

The strategy for defendants facing an elastic mass tort historically has been to raise the cost of litigation and slow the speed of case resolution. If, for some reason, settlement became necessary, every attempt could be made to keep the settlement amount private; otherwise, that settlement would become a floor for all future cases. By raising transaction costs and lowering the possibility of positive outcomes for plaintiffs as much as possible, new entrants are deterred and plaintiffs' counsel presumably would not file as many cases. Hence, defendants traditionally have opposed the aggregation of cases because it would reduce transaction costs for individual plaintiffs.

The asbestos litigation overwhelmed this defense strategy. The sheer volume of cases facing courts led judges to devise more rapid case resolution techniques culminating in consolidations, class actions, and even extrapolation. Once cases were aggregated, the incentives for plaintiffs' counsel to file new cases were greatly enhanced and the defendants faced a strategic dilemma. If they settled cases quickly, they would soon be faced with even more filings. So, defendants began to litigate rather than settle. In the asbestos cases, the litigation option was not terribly successful; but for tobacco, it has been. The tobacco companies have not settled a single individual case. Approximately forty cases have been tried, and the plaintiffs have won only six at the trial level. All plaintiff victories have been appealed; only one has been affirmed on appeal thus far. Filings of individual lawsuits against the tobacco companies have not increased dramatically over the last ten years.

The same issue of elasticity was confronted in Engle. If the tobacco companies were to settle Engle, they would soon face multiple copycat suits in other states with a cumulative settlement value that would far exceed their assets. The economics of an elastic tort simply do not allow one by one settlements. It is all-or-nothing; ei-


ther try each case or enter into a global settlement. In *Engle*, given
the sums involved, the former was the only option.

**ENGLE AND FEDERALISM**

As discussed above, the original *Engle* complaint sought the cer-
tification of a class of “[a]ll United States citizens and residents, and
their survivors, who have suffered or have died from diseases and
medical conditions caused by their addiction to cigarettes that con-
tain nicotine,” and the Third District Court of Appeal of Florida
then limited the class to “Florida citizens and residents.” Settlement of *Engle* would resolve only Florida, leaving the rest of the
country fair game.

Even the viability of a state class action such as *Engle* that pur-
ports to be national in scope can be problematic notwithstanding its
legal effect as binding on everyone. On one hand, there are a num-
ber of instances involving consumer cases with damages less than
the federal jurisdictional limit that have been resolved nationally
with one or more state class actions. They have succeeded in no
small part because the economic incentive for any individual plain-
tiff to challenge them has been minimal. On the other hand, when
the damages involved are significant, most defendants have been
concerned that they can buy national peace only through a federal
class action.

Yet, if the defendants could remove *Engle* to federal court it
would be possible for them to apply the more rigorous federal rules
for the trial of class actions and probably overturn the Florida
court’s certification altogether. As discussed below, both *Amchem
Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* cast seri-
sous doubts on the certification for trial of this kind of case. The
opportunity for removal in *Engle* arose in July 2000 when the South-
eastern Iron Workers Health Care Plan filed a “motion to intervene
seeking permission to assert subrogation claims under Florida law
on behalf of itself and similarly situated funds and insurers for re-
imbursment from damages recovered by any beneficiary or insured
who is a member of the *Engle* class.” Because this motion was filed
after the punitive damages verdicts but before the entry of judg-
ment, defendants removed the action to the U.S. District Court for
the Southern District of Florida.

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App. 1995).
16. Id. at 42.
Fla. 2000).
20. Id.
While the plaintiffs' remand motion was pending and *Engle* was under federal jurisdiction, the parties in another court saw a new settlement opportunity. Lawsuits on behalf of unions, health care organizations, asbestos trusts, and smokers against the tobacco companies had been filed in the Eastern District of New York. One of those lawsuits, *In re Simon II Litigation*, was a purported national class action on behalf of eight subclasses: (1) injured smokers; (2) their estates; (3) non-injured smokers; (4) smokers with some medical expenses; (5) smokers with pending civil actions; (6) health benefit plans; (7) other non-governmental entities seeking medical reimbursement; and (8) asbestos trusts. Notwithstanding the differences in scope with *Engle*, certain parties saw *Simon II* as a vehicle for a national punitive damages class settlement that would incorporate the punitive damages aspect of *Engle*. If the tobacco defendants could be convinced to settle in a national class action all punitive damages claims, they then would have mooted *Engle*. Since *Engle* was at least temporarily in federal court, there would be no problem with federal preemption of state court action.

Some of the plaintiffs and two of the defendants seriously negotiated to reach a comprehensive settlement. The principal objections came from *Engle* plaintiffs' counsel who objected to federal preemption and the other defendants who felt that such a class settlement would not withstand appellate scrutiny and that a failed national settlement would establish a floor for various state cases. These and related concerns are discussed below in connection with *Amchem* and *Ortiz*. These settlement efforts ended when Judge Ungaro-Benages remanded the case. The next day, judgment was entered for the punitive damages.

The federalism dilemma for mass tort class actions involving individual cases with significant value can be summarized, overly simplistically, as follows: classes are relatively easy to certify in state court, but cannot be settled nationally; cases are difficult to certify in federal court, but can be settled nationally. A more complex rendition of the dilemma is that some state courts will readily certify state or national class actions and approve state or national class settlements. Defendants, however, typically cannot afford to settle a class action for only one state and are unwilling to undertake the risks associated with collateral attacks and opt-outs involved in settling a state class that is national in scope. Federal courts, on the other hand, have become reluctant to certify these types of cases for a class action trial and have recently made the certification of class action settlements significantly more rigorous and more expensive. As a result, mass tort class actions in federal court are now viewed with skepticism by many parties. If, however, it is

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possible to have a settlement class certified in federal court, the state court problems of finality can be overcome by federal jurisdiction.

PROCEDURES AND STRATEGIES FOR RESOLUTION

Personal injury torts have historically been resolved one by one. The notes of the Advisory Committee on the Federal Rules of Civil Procedure to Rule 23 comment:

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. 22

The pressure of one mass tort after another and of the asbestos litigation in particular led trial courts to certify mass tort class actions, only to have their opinions rejected by courts of appeals. Finally, there were several breakthroughs in Dalkon Shield, DDT, asbestos, and others. The U.S. Supreme Court changed direction in Amchem and Ortiz.

What did Amchem and Ortiz do?

Amchem and Ortiz have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive, and, in certain circumstances, improbable. These opinions have also prompted substantial introspection at a more conceptual level regarding fundamental questions of fairness and efficiency in the tort compensation system. One of the most interesting discussions generated by Amchem and Ortiz has involved the strategic reactions of judges and lawyers to the role of class action settlements in personal injury mass torts. These discussions involve the initial distinction between certification for trial and certification for settlement.

At the doctrinal level, Amchem and Ortiz addressed a number of issues raised under Rule 23 of the Federal Rules of Civil Procedure and avoided constitutional and statutory issues presented by the parties. In Amchem, the Court stressed that the “dominant concern” is “whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.” 23

This concern manifested itself in both the Rule 23(b)(3) predominance requirement and the Rule 23(a)(4) adequacy of representation

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standard. The Court rejected the argument that asbestos exposure, compensation, and settlement fairness were sufficient to establish "class cohesion" to satisfy the predominance requirement. The Court also rejected the argument that the same counsel and class representatives could adequately represent plaintiffs with current injuries and plaintiffs with future injuries as well as plaintiffs suffering different harms. In particular, the Court noted that similarly situated plaintiffs might be affected differently with regard to inflation, loss of consortium, exposure-only damages, access to the litigation system through opting-out, and caps on damages.

The Court did not require a settlement class to be certified as a trial class but did impose heightened scrutiny "to protect absentees by blocking unwarranted or overbroad class definitions." Justiciable case or controversy, standing, amount in controversy, notice, and Rules Enabling Act issues were reserved. The Court did, however, express skepticism that "legions so unselﬁsh and amorphous" could pass muster as a class once these issues were confronted.

Like Amchem, the Ortiz opinion did not address the justiciability of the case, the Rules Enabling Act, the Seventh Amendment, due process of notice, or in personam jurisdiction. In this context, the court found the settlement lacking in its proof of a limited fund, in its disparate treatment of class and non-class members, and in its Rule 23(a) prerequisites. In particular, the opinion noted that "Fibreboard was allowed to retain virtually its entire net worth" but left open whether this alone would be fatal or could be mitigated by the savings in transaction costs created by a settlement. Seemingly more important to the Court was the issue of arms-length bargaining over the limit and insuﬃciency of the fund in light of the incentives of class counsel and the Rule 23(a) standards for adequacy.

24. Id. at 622-25.
25. Id. at 625-26.
26. Id. at 626-27.
27. Id. at 620.
28. Id. at 613 n.15.
29. Id.
30. Id.
31. Id. at 628.
32. Id. at 613.
33. Id. at 628.
35. Id. at 845-46.
36. Id.
37. Id. at 846.
38. Id. at 846.
39. Id. at 854.
40. Id. at 848, 858-59.
41. Id. at 859.
of representation."  These points also underscored the Amchem prerequisites related to commonality and typicality, and the insufficiency of a common interest in receiving compensation to overcome these inherent factual differences. Fundamentally, the opinion noted that "the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b)."  Like Amchem, Ortiz did not foreclose the possibility of a class action settlement, but the opinion narrowed the size of the window of opportunity to do so.

Fundamental Issues Raised by Amchem and Ortiz

The Amchem and Ortiz opinions raise some of the more fundamental issues implicated by torts in general and mass torts in particular. At the same time, the opinions unite ideological positions in a counterintuitive manner. Arguably, the opinions reflect efficiency, pragmatism, and instrumentalism pitted against corrective justice, principle, and deontological approaches. On the one side, there are the merit-based arguments that assert the perfect is the enemy of the good and focus on the propriety of rough justice. These arguments reinforce the policy-based goals of compensation in our tort system. On the other side, there are the process arguments that uphold the sanctity of certain principles that are inviolate. This position reinforces a view of tort law based upon individualized justice.

Disaggregating these positions reveals rather unusual coalitions of rationales. The instrumentalist position contains both pro-plaintiff and pro-defendant justifications. The plaintiffs would benefit in the aggregate because of the present value of monies paid and the defendants would benefit because they would receive global peace. The arguments based upon principle are equally disparate. There are both individual autonomy and equality concerns favoring defendants coupled with concerns that the institution of the courts should be the vehicle for social reform.

This variety of rationales presents exquisite ironies. The individual fairness position produces actual outcomes in Ortiz, for example, that conflict with some of the aspirational outcomes being sought. The default agreement creates: (1) less aggregate dollars for the plaintiffs; (2) greater attorney fees for the plaintiffs' counsel; (3) more conflict of interest in counsel's representation of clients; (4) more disparate treatment of plaintiffs; (5) less compensation for future plaintiffs; and (6) less compensation for more seriously harmed...

42. Id. at 852.
43. Id. at 856-59.
44. Id. at 863-64.
plaintiffs. Thus, the desire to protect the rights of plaintiffs resulted in a disadvantage to those same plaintiffs.

The argument for a principled status quo of first-come-first-served in the litigation process unless altered by the legislature has its own irony. The legislature is being told that it is the only institution available to fix the “problem,” when the “problem” was created in the courts. There has been no legislation addressing mass torts; there are, however, substantive and procedural decisions by courts that have altered the legal landscape to make it conducive for mass torts.

The pro-defendant pragmatists present their own irony. They are advocating a legal procedure that will have the effect of imposing substantial costs on defendants. In Ortiz, for example, the insurance carrier demanded a Rule 23(b)(1)(B) settlement, thereby enabling it to spend more than $2 billion to terminate an insurance policy that cost less than $10,000. Adding insult to injury, it was plaintiffs’ counsel who insisted in the negotiations that the back-up plan be included.45

Another ironic position is that of the pro-plaintiff pragmatists. In Ortiz, this is in part the product of the practical effects of the plurality opinion. The winners are: the company and its shareholders; the insurance carriers; the plaintiff’s counsel; and the current and near future plaintiffs, particularly those less seriously involved. The losers are the future plaintiffs in general and the more seriously injured in particular.

One of the more interesting residual questions lingering after Amchem and Ortiz is whether the U.S. Supreme Court will allow any bulk discount settlement of mass torts at all. The reality in the litigation trenches is that plaintiffs’ counsel accept a discount on case values in order to receive larger aggregate sums of money more quickly. Defendants are willing to spend huge sums of money if: (1) they receive a discount for paying that money sooner than the litigation system usually requires; and (2) they can receive global peace. The economic principles in this sense are simple—the more you buy at the same time, the less you pay per item. Can this type of transaction—formal or informal—ever withstand arguments based solely upon fairness principles? Will the Court recognize the time value of money created by a lengthy judicial process?

Another related but unanswered question is whether the idea of individualized justice is so important to our social fabric that it must be maintained even though it has become largely fictional. As with other fictions in our legal system, its presence may have independent value. Likewise, there is the unanswered question of whether the tort system would ever countenance the contracting away of per-

45. Id. at 825.
sonal rights. Just as tort law frowns upon general waivers of access to the judicial system when there is physical harm, there may be a parallel limitation to even partial de facto waivers in mass tort settlements. The current debate over the interpretation of Rule 23 is arguably a surrogate for a conversation on these and other more fundamental issues.

Reviewing the Strategic Alternatives

Given the depths of the uncertainties plumbed by Amchem and Ortiz, some of the most interesting questions for the current mass tort environment involve how the parties will cope in their efforts to find strategies for settlement. Are there alternatives, either long term or short term, available to defendants like the tobacco companies? What room do defendants have for maneuvering in an Engle-type situation? A brief review of the strategic landscape suggests that there were few options given the available time frame for resolving Engle.

1. Modification of Amchem and Ortiz by Rule Changes

There will be efforts to strengthen the possibilities for class action settlement by modifying Rule 23. There will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny. These modifications may include enhanced review of proposed settlements by endorsing discovery of the settlement merits, settlement negotiation, and any ex ante or ex post incidental agreements. Other possible factors for inclusion in Rule 23(e) include: the maturity of the tort; the extent of participation in settlement negotiations by non-class counsel; the cost and probable outcome of trial on the merits; the total potential resources available for trials or settlement; litigation market values; opt-out rights; reasonableness of attorneys' fees and the division thereof; claims processing procedures; previously rejected settlements; fairness of settlement terms; and, the presence of third party evaluation of settlement.

2. Restriction of Class Actions by Rule Changes

There are proposals by the Advisory Committee on Rules to allow federal preemption of state class actions when: (1) a class action is not certified by a federal court; (2) a class action settlement is not approved by a federal court; and (3) while a federal court is considering class action certification. The net effect of these changes would be to impose Amchem and Ortiz on the states, thereby restricting their use.

3. Education of the Supreme Court

Most observers of the appellate court review of mass tort noted
a rather prolonged education process of mass torts and of due process. Probably the best examples are the asbestos litigation in the Fifth Circuit and the Judicial Panel on Multi-District Litigation (J.P.M.L.). Time and time again, the Fifth Circuit rebuffed efforts to resolve cases more expeditiously until the court finally relented in *In re Raymark Industries, Inc.* and the cases involved settled. The J.P.M.L. finally transferred the federal asbestos docket to Philadelphia on the eighth try. Perhaps this educational process of the marketplace of litigation will generate some alternative Supreme Court thinking. If litigants continue to have economic incentives to seek appellate review because the current system creates substantial inefficiencies, there may be some modification of *Amchem* and *Ortiz*.

4. Adaptation to Amchem and Ortiz

In some mass torts the parties will attempt to negotiate a settlement that will satisfy the dictates of *Amchem* and *Ortiz*. The most notable current examples of this strategy are in the Prudential and the fen-phen litigation, with the Holocaust litigation not far behind.

*In re The Prudential Insurance Company of America Sales Practices Litigation* approved Rule 23(b)(3) settlement class on behalf of over 8,000,000 life insurance policy holders alleging a variety of deceptive sales practices. Although this was not a personal injury case, this opinion is important, in general, for allowing the settlement, and, in particular, for focusing on the value of an open-ended settlement amount.

*In re: Diet Drugs Products Liability Litigation* differs from *Amchem* and *Ortiz* in the following respects: (1) no inventory settlements; (2) no future unfiled cases; (3) no latency; (4) subclasses; (5) four opt-outs; (6) medical monitoring; (7) inflation, consortium, and other damages; and (8) some serious injuries excluded altogether. On a negative note, there have been no trials to set case values and there was no third party or judicial mediator. On the positive similarity front there is: (1) accelerated payment option; (2) comeback for more serious diseases; (3) lengthy negotiations; (4) numerosity; (5) tolled statute of limitations; and (6) sophisticated claims process-

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47. 831 F.2d 550 (5th Cir. 1987).


49. 148 F.3d 283 (3d Cir. 1998).

ing. Negative similarities include: (1) medical criteria more restrictive than common law; (2) medical criteria excluding certain diseases; (3) no method for modifying medical criteria; (4) filing of complaint and settlement virtually simultaneously; (5) limitation on rights with later opt-outs; and (6) more individual plaintiff variations. The most critical aspect of the fen-phen settlement was the succession of opt-out rights granted to class members as they obtained additional information concerning their medical condition.

5. Creation of an Alternative Class Action Settlement Model

The most recent effort to use the class action device to settle a mass tort has occurred in the Sulzer hip replacement litigation. In re Inter-Op Hip Prosthesis Products Liability Litigation involves a Rule 23(b)(3) settlement that provides all the assets of the defendant for class members for a period of six years, thereby reducing financial incentives to opt out. The intent is to take advantage of the arguments that favor an opt-out class while benefiting from the reality of a mandatory class.

6. Co-option of the Opposition

In the bone screw and the silicone breast implant litigation, there were three successful class action settlements that arguably would not meet Anchem or Ortiz muster. The strategy on the part of the settlement proponents was to co-opt the opposition, thereby eliminating any appeal. This preemption of opposition was accomplished either by including objecting counsel into the class settlement or by convincing potential objectors that the merits of the settlement deserved their support. It appears that a similar strategy was followed in the fen-phen cases as well.

7. Invention of Surrogates to Class Action Settlements

In lieu of a class action settlement, a defendant might decide to create a class action surrogate. The defendant could, for example, make a unilateral and irrevocable settlement offer to all plaintiffs hoping that the number of acceptances would be sufficiently high to reduce the scope of the mass tort to a manageable size. The net effect could be similar to the outcome in a multiple opt-out class like fen-phen. Some aspects of the settlement strategy in Hyatt Sky-
Another surrogate could be to negotiate long term settlements with individual plaintiffs' counsel by resolving current claims and by establishing a settlement formula for that attorney's future cases. This would be analogous to the Prudential settlement.

A third surrogate could be to negotiate a settlement trust fund created by all defendants for all plaintiffs to resolve all cases. The trust fund could be voluntary or mandated by legislation as discussed below.

8. Legislation

Statutory changes could take various forms: (1) federalizing class actions; (2) enhancing settlement classes; (3) creating a new form of bankruptcy; (4) eliminating all or part of a tort; (5) streamlining or otherwise altering civil procedure; (6) establishing an alternative compensation system; or (7) establishing hybrid options to tort.

Legislation could effectively eliminate any future Engle by federalizing state class action rules, or, at the opposite end of the spectrum, by expanding the concept of a settlement class to allow global resolution of mass torts. Much thought also has been given to creating a new type of bankruptcy that also would allow a global solution without forcing a defendant to endure the entire bankruptcy process.

Much political capital has been spent on attempts to reduce the impact of tort law and to limit the effects of procedures for resolving tort cases. These efforts have included product liability reform, asbestos reform, tobacco reform, and others.

Another legislative model contemplates a completely different alternative to the tort system and resembles the black lung childhood vaccine or workers' compensation systems. Such a compensation scheme could be implemented through party or federal funding and administrative claims processing.

A hybrid approach would involve a voluntary alternative to tort law similar to the claims resolution facilities created to administer settlements. In re: A.H. Robins Co., for example, involved a series of options for claimants—a single quick pay, a streamlined benefit schedule, tailored ADR, and litigation—to receive benefits from a fixed fund determined by a court's estimate of total liability. The
United Nations Compensation Commission has a similar approach, only with open-ended, rather than capped, liability.\textsuperscript{61}

Similarly, the Air Transportation Safety and System Stabilization Act has a “September 11th Victim Compensation Fund of 2001” that caps airline liability for some claims at the value of their insurance and provides for an alternative claims process to be administered by a special master.\textsuperscript{62}

9. **Litigation**

Using either an aggregation or a divide-and-conquer strategy, a defendant may seek to litigate its way out of a mass tort. Aggregation without a class action provides the opportunity for a global resolution of pending cases in a given jurisdiction or J.P.M.L., and, perhaps, of specific issues that may limit the litigation. A single issue trial on causation, for example, has been attempted, as well as Daubert motions and Rule 706 experts.

The strategy historically favored by the automobile manufacturers and, most recently, in the repetitive stress cases contemplates coping with a mass tort by forcing plaintiffs to develop and proceed to trial case by case. The theory is to avoid the spillover effect among plaintiffs and plaintiffs’ counsel and to create disincentives to filtering cases because of increased transaction costs.

10. **Bankruptcy**

Johns-Manville, A.H. Robins, Dow Corning, and, most recently, at least eight asbestos manufacturers have been exploring bankruptcy as an alternative to a class action settlements. If there is no possibility of a class action settlement to bring finality to their litigation, these defendants have to change the legal landscape by pursuing bankruptcy. Within bankruptcy there have been three strategies: (1) turn over the keys to the company in return for control and equity considerations; (2) attempt to re-write history by showing that liability does not exceed assets; and (3) piggy-backing on another bankruptcy by using “related to” jurisdiction. In its most simple form, the settlement strategy would contemplate a pre-packaged bankruptcy plan. The litigation strategy typically involves challenges to the plaintiffs’ medical evidence on exposure and disease by Daubert and Rule 706 experts and revision of legal standards of exposure and corruption. The “related to” strategy has been successfully implemented by Aetna in the A.H. Robins bankruptcy and the shareholders in the Dow Corning bankruptcy.


11. Reduction of Assets

Some defendants have despaired of finding any acceptable mechanism for achieving global peace and are simply removing equity from the defendant, liquidating insurance assets, and running up the white flag for the residue. This has variously been accomplished by stock buy-backs, increased dividends, exchanging debt for equity, securitizing debt, and transfer of assets.

"SETTLEMENT" of ENGLE

The Engle trial court entered judgment in the amount of $144.8 billion in a 68-page opinion issued the day after the case was remanded to state court. As a result, the defendants faced an appeal bond of 115% of the judgment—approximately $167 billion. The bond amount arguably exceeded the valuation of all the defendants by far more than $80 billion.

Anticipating precisely this scenario, the tobacco defendants had prompted Florida legislation limiting appeal bonds to $100 million. The legislation was enacted into law before the entry of judgment but during the trial of the case. Some media pundits suggested that the legislation was favored by the Florida legislature in order to protect the defendants from filing for bankruptcy and thereby jeopardizing the more than $13 billion over 25 years the tobacco companies owe Florida in accordance with the $246 billion national tobacco settlement reached in 1998.

After the entry of judgment, the defendants posted $403 million in bonds to preempt a court order to collect the entire judgment. Three of the defendants, Philip Morris, Lorillard, and Liggett, reached an agreement with the plaintiffs to increase the bonds to $2 billion and to set aside $709,763,077 of that amount to settle the issues of the applicability of the exceptions language, the duration of the stay, and the constitutionality of the new bond statute. In return for that payment, plaintiffs agreed not to increase the settling defendants' bonds, even if the statute is held to be unconstitutional. In addition, the plaintiffs will not challenge dividend payments while the case is under appeal.

The settlement, then, was over the issues related to the statute: for example was it unconstitutional because it was written specifically for the tobacco industry, because it was passed during the trial, or for some other reason? Since the settled issues were unique to the Florida situation, there was less of a problem with elasticity. At the same time, the appellate court now knew that there would be

63. FLA. STAT. ANN. ch. 768.733(2) (2000).
64. Mary Ellen Klas & S.V. Date, State Law Designed to Protect Settlement; $13 Billion for Florida Could Still Dwindle But Not During Appeals, PALM BEACH POST, July 15, 2000, at 9A.
over $700 million for the benefit of the class if the case is overturned on appeal. If a court is focusing on the outcome money to Florida smokers or potential reversal by the U.S. Supreme Court, the "settlement" may be attractive notwithstanding the explicit language in the agreement that there was no settlement.

CONCLUSION

The settlement of elastic mass torts is problematic in our federal system. Not only is there the difficulty inherent in elasticity—the undefined nature and number of plaintiffs—but also there are the procedural barriers related to the relative ease of certification in state courts with no ability to obtain global closure, and the difficulty of certification in federal court that could provide the level of closure sought by parties. Defendants do not feel comfortable settling piecemeal because each settlement that leaves open the opportunity for new plaintiffs to file suit simply establishes a floor for the next settlement. Defendants demand global peace and are willing to pay a premium for that peace. Outside of bankruptcy or litigation victory, the finality defendants seek is either difficult to obtain or quite costly.

There are, however, quite inventive middle paths with less finality and less cost that are offering new opportunities for a healthy resolution of mass tort litigation. If recent history is a guide, future strategies will be "bottom-up,"—created by lawyers and judges facing the reality of overburdened courts and unrequited plaintiffs. For them, the perfect is the enemy of the good; they are seeking pragmatic solutions to immediate problems. For the United States Supreme Court, however, the perspective is somewhat different and longer term. There will be a point, however, when the pressure for a more acceptable outcome will become too great. The legislature, the courts, and the juries will then be forced to reach a more balanced solution, neither perfectly principled nor overly pragmatic. Rigid interpretation of Amchem and Ortiz will give way to a more flexible approach to dispute resolution. The model of claims resolution facilities that represent a hybrid of tort and administrative approaches have worked too well to be ignored. The need for a procedural vehicle to provide embattled defendants an opportunity to flourish outside of bankruptcy will keep the pressure on the legal system for another generation of approaches.