MANAGEMENT OF MULTIPARTY TOXIC TORT
LITIGATION: CASE LAW AND TRENDS
AFFECTING CASE MANAGEMENT

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Personal injuries caused by toxic substances have generated problems of major concern to our social, political and legal systems. Reports in the news media concerning harm caused by toxic substances and expressions of public awareness of potential dangers associated with exposure to toxic substances are commonplace. Legislatures, administrative agencies and courts at both federal and state levels have begun to devote substantial energy to addressing issues raised by exposure to toxic substances. Scientific, industrial, financial and legal communities are seeking to deal with these problems from a number of different perspectives.

In many senses lawsuits brought for damages caused by toxic substances are not materially different from other types of product liability suits. Typically a business entity is sued for placing a product into the stream of commerce that creates an unacceptable risk of harm and causes injury to a person. It can be argued that any differences that exist between toxic substances cases and product liability cases are merely differences of degree, not of kind. Toxic substances cases are merely further along the same continuum as product liability cases.

For example, product liability cases have been distinguished by the mass-produced nature of products and hence the large number of persons potentially affected by those products. Toxic substances potentially

1. Defining "toxic substances" is made difficult by the variety of materials which may be harmful to the health of humans. The Virginia General Assembly provided the following description: "any substance . . . that has the capacity, through its physical, chemical, or biological properties, to pose a substantial risk of death or impairment either immediately or over time, to the normal functions of humans." VA. CODE ANN. § 32.1-239(D) (Repl. Vol. 1979).

2. The focus of this paper is on toxic substances litigation not arising under statutory compensation systems such as Black Lung, Workers' Compensation and Social Security. One of the major potential developments in this area of litigation, of course, is the passage of new legislative initiatives that could preclude the current litigation.

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expose an even greater number of persons to harm. Product liability cases often involve a lag time of several years between the act of a manufacturer in producing an allegedly defective product and injury to a consumer. A twenty-year lag time would not be unusual in toxic substances cases. Proof of a defect in a product liability case may be difficult for a plaintiff because of a defendant manufacturer's possession of essential expertise and information. Proof of a defect in a toxic substances case may be even more difficult because of a high degree of scientific uncertainty concerning the harm caused by a toxic substance.

On the other hand, it can be argued that there are fundamental differences between product liability and toxic substances cases because of (1) the number of cases, (2) the complexity of those cases and (3) the unique characteristics of how those cases occur. The quantitative differences between product liability and toxic substances cases are so great that there is a qualitative distinction. These differences can be illustrated by a host of novel legal issues that are now being considered by both federal and state courts. The exceptionally large number of plaintiffs and defendants in toxic substances cases has caused mechanical problems of case management and has involved substantial transaction costs. The application of multidistrict litigation, class actions and innovative techniques of managing discovery and trials has been hotly debated. New methods of organizing representation of clients and dealing with conflicts of interest among counsel have become commonplace.

Decision making by courts and juries has become exceptionally difficult because of the complexity and uncertainty of factual and legal issues. Collateral estoppel has been adopted in some courts with the expectation of rapid movement of cases. Judges are finding conflicts between values of fairness and utility in fashioning legal rules, and juries are being asked to resolve factual issues that are rife with scientific debate.

All of these unique characteristics seem to stem from the nature of the damage that has been or may be caused by toxic substances. There are simply no historic legal theories or particularistic evidence available to deal with some types of injuries. Courts are being asked to develop new theories of liability, to relax standards of proof, to circumvent existing bars to recovery and to allow for new indices of damages.

In the process of analyzing methods of handling these cases, the legal profession is reassessing some of the major assumptions and value choices that have been made in fashioning our legal system. Recent case law and commentary on case management illustrate this reevaluation process. The traditional view of litigation has stressed the opportunity for individualized common law treatment of two-party disputes by seeking resolution in an adversarial court trial. There has been increasing focus on a model of litigation as an opportunity to deal uniformly with the rights of potential plaintiffs to have a short queue at
the courthouse so that their disputes can be rapidly resolved by one of a variety of techniques and to deal with the rights of society as a whole to have speedy and economic judicial treatment consistent with the well-being of everyone.9

There needs to be greater attention given to the externalities and effects of this altered model of the trial process. If plaintiffs are to be tried by classes, in consolidation or by more inquisitional methods, in order to fulfill larger societal goals of efficiency and deterrence, how will the assets of traditional decision-making processes be altered? How may these procedural changes affect the fairness and ultimately the legitimacy of the legal system? What are the logical ramifications that may inevitably result from the case management mechanisms used to accommodate this new vision of litigation?

This paper is designed to suggest certain characteristics of toxic substances litigation that may be relevant in the determination of appropriate case management plans, trends that appear to be emerging in case management and case law that has affected these trends. A closer scrutiny of how toxic substances cases are changing our legal processes may assist in suggesting future actions for the bench and bar in achieving common aims and designs.

CHARACTERISTICS OF TOXIC SUBSTANCES CASES AFFECTING LITIGATION MANAGEMENT

The nature of toxic substances cases may give some guidance as to how they are best handled, uniformly or with some degree of discrimination and by the use of more adversarial or inquisitorial techniques. If a decision is made to seek a nontraditional solution, this analysis may make it possible to determine the trade-offs that are being made to serve the interests inherent in a more innovative approach. Although it has been suggested that toxic substances cases can be viewed monolithically, it appears that no currently utilized uniform method of litigation management has succeeded for every set of circumstances. Notwithstanding proposals for mass legislative or other solutions, case management techniques tend to be tailored to meet the demands of each toxic substances case in order to accommodate a host of complex factors that are relevant to carefully considered case management. A limited number of factors seem particularly important in determining desired mechanisms for handling these cases within the legal process: (1) plaintiffs, (2) defendants, (3) toxic substance, (4) incident, (5) environment, (6) damage, (7) location and (8) law. By focusing on these eight characteristics, it may be possible to develop an analysis that suggests a suitable case management plan.

The number and nature of the plaintiffs, the defendants, and their attorneys are critical variables to be considered in determining a case management plan. If there are few key decision-makers, it may be possible for the attorneys to agree upon a particular method of proceeding. The larger the number of individuals involved, the greater the difficulty in reaching consensus. The identity and degree of similarity in background and interests among the parties is another critical factor in the type of approach that may be possible. Unless there are significant common facts or interests shared by plaintiffs or defendants, it is more difficult to use group management techniques. In the case of defendants, it is also important to know if they are identifiable and have sufficient assets or reliable insurance coverage to satisfy potential judgments. If there are conflicts among insurance carriers or if governmental entities are involved as plaintiffs or defendants, there may be additional elements in the choice of specific techniques to use. The personalities, interests, ability and resources of the attorneys can also have an impact upon the possibilities of effective consideration. If they and their clients view the litigation as an isolated series of zero-sum distributive games, then more integrative bargains with joint gains are less likely.

The particular type of toxic substance or substances involved, the details of the incident giving rise to a contention of liability and the amount and nature of damages caused are also important. If there is only one substance that is exposed to plaintiffs on one occasion with direct, ascertainable and substantial damages, the management problems are not substantially different from other mass accident cases. If, on the other hand, there are unidentifiable or multiple substances that affect plaintiffs in a number of incidents over a long period of time with uncertain but potentially enormous results, there will be much greater difficulty. The complexity of the facts, the ability to determine causal relationships and the degree of similarity of exposure can also create rather different problems in case management. The effect of the passage of time and the effect of an interest of the parties in prospective relief can also have a critical impact upon case management decisions made by judges, attorneys and parties, particularly in the context of the acquisition of additional information concerning toxic substances.

The location of the incidents, the environment of use of the toxic substance and the applicable law are also significant variables. Exposures that occur within a single jurisdiction and environment with defined theories of liability create fewer difficulties than cases where there are jurisdictional issues, choice of law problems and no clear predominant legal issues. There also appears to be varying treatment of these cases depending upon whether they involve consumers, workers or the general public. Again the passage of time is a critical factor because of potential changes in statutory and common law that may expand or contract substantive rights.
TRENDS IN THE CASE MANAGEMENT OF TOXIC SUBSTANCES LITIGATION

By stretching the tort and litigation processes to the frontiers of their perceived limits, toxic substances litigation has fostered a number of opposing trends and developments that are affecting case management. Rather than focusing solely upon individual autonomy and individual compensation for wrongs, there has been increasing attention by commentators, judges and attorneys on the role of litigants as members of society wherein the collective utility and the deterrence effects of litigation are of paramount concern. It has been suggested that the model of a decentralized free market of common law adjudication should be transformed to a model of a centralized decision-making process dominated by rule making. The traditional view of litigation as an individualistic, rights-based adjudicatory system dedicated to the compensation of victims by free market mechanisms in an adversary setting is being challenged by a view of the legal process as a mechanism to further the collective interests of society by centralized rule making and inquisitorial fact finding to maximize utility in deterring undesired activity.

These conflicting scenarios of case management can be illustrated by focusing upon (1) procedural and (2) substantive law developments and the roles of (3) judges, (4) attorneys and (5) parties. From a procedural perspective, one currently popular theme in toxic substances litigation seems to be the lowering of transaction costs by streamlining and speeding up the legal process. Instead of concentrating upon each individual's right to a full-blown trial of unlimited duration, the filing of large numbers of toxic substances cases has led to concern about the queue of litigants waiting for an opportunity to have a day in court and about the effects of litigation upon the activities of defendants. Instead of concentrating upon each individual's rights to procedures tailored to meet their expressed needs, there has been interest in assuring that any available procedural device that may expedite the litigation and heighten the effects of litigation upon the activities of potential parties is scrutinized for potential use.

This debate between individualization and more general social interests is not unique to these cases. There is a rich literature concerning procedural due process that analyzes the abstract concerns raised by this trend in toxic substances litigation. Indeed, the breadth of views


concerning procedural due process suggests that there may well be sufficient room, at least in the short run, for substantial variation and experimentation in the types of procedures available in toxic substances litigation. If, however, there appear in the long run to be major problems in achieving procedural fairness because of discrepancies in the use of varying procedural devices, there may be a significant shift toward more uniform treatment.

Although there is a large amount of empirical work available to suggest the effects of different procedures upon the substantive outcome of litigation, most of this work has been done by behavioral scientists rather than lawyers. In the asbestos litigation, for example, several courts have consolidated a number of plaintiffs for a bifurcated trial on liability with seriatim trials on damages to the same jury. Social science research predicts that this procedural device would assist the plaintiffs in proving that asbestos is defective and that it caused their harm. On the other hand, there will be a tendency for jurors to average out damage awards so that there probably would be an overall lower verdict in the event that liability is found. In actual practice it is arguable that these predictions are borne out. If courts go one step further and certify class actions, there is a wide variety of predictions from social science research concerning possible effects. Thus the use of novel procedures does seem to have a substantive effect upon the outcome of litigation and it can be anticipated that increasing attention will be given to the outcome-determinative effects of the use of these different case management techniques.

Similar trends toward less individualization have been well documented in the substantive law of product liability. As the theory of liability has become based more upon instrumentalist principles of societal well-being and away from individualized rights-based concerns and fault-oriented determinations of punishment, there has also been a tendency to emphasize the merits of expedited group litigation. The same logic used to support the theory of strict liability in tort, for ex-


ample, can be construed to support a statutory national compensation system run through administrative mechanisms. Major theoretical effort, however, has been expended by commentators from a variety of perspectives to establish a rationale of the role of the tort law as a compensation system and to preclude the logical necessity of statutory compensation. Recent legislative initiatives on national product liability law and specific compensation proposals attest the vitality of this debate. Whether case management devices designed to expedite lawsuit disposition and reduce transaction costs are sufficient to diffuse a more generalized approach remains to be seen.

The model of the judge as a strict constructionist umpire presiding over private disputes has recently received competition from a view of judges as activist managers concerned with the public effects of litigation. The advent of lawsuits seeking prospective relief for the public at large has led some commentators to suggest that this new model of public law litigation is firmly entrenched in our legal system. There are suggestions that toxic substances litigation should be viewed more in this light than as individual disputes to be resolved seriatim. Judges are being asked to "legislate" mass solutions to mass exposure cases by using procedural and substantive devices to manage the litigation with maximum effect on all the potential plaintiffs and all the potential defendants. Under this scenario there would be increasing use of more inquisitorial techniques such as mediators or experts devoted to capitalizing upon scientific expertise and sophisticated decision making.

At the same time, there have been major expressions of concern that the changing role of judges from umpires to managers has created due process flaws that may undermine the legitimacy of our litigation system. The current state of case management is somewhere between these two extremes, with most judges borrowing from the activist tradition to accomplish what they conceive to be the demands of due process. The major unanswered question is whether judges can be comfortable in this intermediate role or whether there will be a polarization of approaches by individual judges creating rather substantial differences in judicial behavior. Experiences with developments along this continuum

12. The dichotomy of strict constructionist and activist or interpretivist and noninterpretivist is certainly not unique to toxic substances litigation. Indeed, much can be learned about the foundations of the current debate concerning the role of judges in toxic substances litigation by consulting the debate among law professors at a higher level of abstraction. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. Rev. 1 (1974) (representing the pole of interpretivism); Brest, The Misconceived Quest for Original Understanding, 60 B.U.L. Rev. 204 (1980) (representing noninterpretivism); Elly, Democracy and Distrust (1985) (illustrating attempts at middle ground).
in other contexts suggests that we will not have a single consistent approach in the near future.

There has also been a trend among both plaintiff and defense attorneys toward a more centralized and organized effort in litigation. In many instances the era of single attorneys working in isolation in a free competitive market has given way to court supervised counsel organizations of lead, liaison, and committees of counsel or to groups of counsel seeking to pool their efforts. Plaintiffs' attorneys, for example, have been particularly effective in developing voluntary groups as an alternative to court mandated hierarchies and fees. Indeed, there has been an effort by many plaintiffs' attorneys to avoid multidistrict litigation and class actions so that they can preserve the sanctity of each attorney's case without sacrificing the benefits of pooled information. The large transaction costs necessitated by this arrangement of counsel, however, have led to pressure for courts to oversee fees and contingency contracts.

Defense attorneys have been subject to similar trends. In-house counsel are increasingly resorting to the use of regional counsel and to national management of what is perceived as a more efficient and economical approach to national litigation. Retained counsel have been meeting to share information and trial techniques. It is no longer uncommon for specialized trial counsel to be brought into a major metropolitan area to try a lawsuit that would formerly have been tried by local counsel. There are many instances, however, where attempts to coordinate discovery and trial practice have failed miserably when there have been disagreements rising out of differing trial strategies, litigation goals and settlement interests. Just as in the case of bargaining between plaintiffs and defendants, there can only be joint gains if the game is integrative and the parties negotiate accordingly.

Probably the most interesting trends associated with the management of toxic substances litigation are occurring at the level of the parties themselves. It is clear that some defendants are eager to see more standardization and uniformity in trial processes to assist them in resolving all litigation and in predicting outcomes so that they can price products and act accordingly. At the least, there has been an effort by some defendants to attempt to coordinate their activities with other defendants so that they can present a consistent front to plaintiffs and have an orderly allocation of responsibility among defendants or their insurers. On the other hand, some defendants have had major success in isolating individual cases for trial without consolidating them in classes for national disposition. It can be anticipated that there will be continued resistance by defendants to class action treatment except in the punitive damages area or when the class action device is the only mechanism for laying substantial litigation to rest. The logic of some defense desires for uniformity and for contribution from other defendants, including the federal government, however,
potentially suggests a national legislative compensation system, at least for exposure to certain substances. The most nebulous but potentially the most powerful interests are those of the plaintiffs themselves. Just as public law litigation seems to have been generated from overall societal developments in structure and values, current interest in collectivizing toxic substances litigation can be seen as originating from those same sets of values. Indeed, the reactions of some jurors in "sending a message" by making substantial awards in individual cases reflect this tendency. There is little doubt that toxic substances cases are creating major concern in the populace as a whole, but there has been little general expression of interest in changing case management techniques except from voluntary groups of plaintiffs in specialized areas. If, however, there is a prevalent perception that current models of legal decision-making are unsuccessful in handling toxic substances litigation, then we can anticipate a radical shift in focus from private, individualistic rights-based emphasis to a more public view of society's rights as a whole.

CASE LAW AFFECTING CASE MANAGEMENT OF TOXIC SUBSTANCES LITIGATION

There are large numbers of trial and appellate decisions that have both a direct and an indirect impact upon the management of toxic substances litigation. These cases relate both to procedural and substantive aspects of the judicial process and affect the desires of judges, attorneys and parties to select case management techniques. The following analysis suggests some of the major developments in trial organization, procedural devices and substantive law at the high level of generality inherent in an overview. In treating the effects of case law upon trends of individual or group treatment of cases, for example, there are varying degrees of grouping from national to state to local levels and the case law considered may have only a tendency toward allowing grouping of litigation within geographical or jurisdictional limits.

Pretrial and Trial Organization Procedures

The most sweeping device for grouping litigation in one setting is the class action under Rule 23 of the Federal Rules of Civil Procedure. It

18. While the Advisory Committee to the Federal Rules of Civil Procedure stated that mass accident cases were not amenable to class action treatment, see C. WIGGINS & A. MILLER, FEDERAL PRACTICE & PROCEDURE Civil Section 1783, there have been a number of recent opinions concerning the application of Rule 23 to product liability cases. In the DES litigations four attempts have been made to certify a class: McElhaney v. Eli Lilly & Co., 93 F.R.D. 875 (D.S.D. 1982) (statewide); Ryan v. Eli Lilly & Co., 84 F.R.D. 230
(D.S.C. 1979) (statewide); Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) (statewide); and Mink v. University of Chicago, 27 Feb. R. Sev. 2d 739 (N.D. Ill. 1979) (participants in drug experiment). Only in Payton did the court decide to utilize class treatment and only after carefully limiting the class to those individuals who were bound solely by Massachusetts law and certification was restricted to specific issues which applied to the entire class. In the other cases, the trial judges stressed the lack of typicality in the claims of DES victims and the manner in which the drug was administered and the absence of common issues which were predominant throughout the proposed class.

Additionally concerns were expressed as to how to define the class membership and how to manage such actions. See generally Comment, Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation, 14 U.S.F.L. Rev. 463 (1980); Note, Payton v. Abbott Laboratories: an Analysis of the Massachusetts DES Class Action Suit, 6 AM. J.L. & Med. 243 (1980). The Ninth Circuit Court of Appeals reversed the certification of a statewide class of Dalkon Shield users because of a lack of typicality in the events surrounding the individual injuries. In re No. Dist. of Cal., Dalkon Shield IUD Product Liability Litigation, 693 F.2d 847, 854-55 (9th Cir. 1982). In environmental pollution suits use of class actions has met with some obstacles. Some courts have taken to class certification no single person could afford to bear the litigation expenses and the remedy sought would benefit all class members. See also Adler, The Viability of Class Actions in Environmental Litigation, 2 Ecology L.Q. 533 (1974). The United States Supreme Court hindered the development of environmental class actions when it ruled that in diversity suits the individual claims could not be aggregated to satisfy the jurisdictional amount. See Mattis & Mitchell, The Trouble With Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions, 53 N.D.L. Rev. 137 (1974). To manage the claims arising out of the Kegone pollution of the James River, a trial judge endeavored to establish subclasses of the various types of injured parties. Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) (this effort was subsequently abandoned). Two courts have attempted to deal with the problem of assessing punitive damages in situations where numerous people are injured in a single accident or by a mass produced product by use of a class action. In re Federal Skywalk Cases, 53 F.R.D. 415 (W.D. Mo.), vacated 800 F.2d 1175 (8th Cir. 1988) (mandatory class membership was impermissible under Anti-Injunction Statute as to parties who had filed their suits in state courts; later efforts to secure a voluntary participation in a class proved fruitless); In re No. Dist. of Cal., Dalkon Shield IUD Product Liability Litigation, 693 F.2d 847 (9th Cir. 1982) (vacating the trial court's certification of a nationwide class to determine the question of punitive damages). Because of the problems encountered in federal courts, there has been increased interest in the possibility of pursuing class actions in state courts. See generally Alpert, The Uniform Class Actions Act: Some Promise and Some Problems, 16 Harv. J. on LEGIS. 583 (1979); Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Harv. L. Rev. 718 (1979). Of interest are the following articles: Almond, Settling Rule 23 Class Actions at the Pre-Certification Stage: Is Notice Good Enough?, 26 Emerg. L. Rev. 303 (1978); Berger, Litigation of a Class Action, 18 Forum 335 (1983); Bernstein, Judicial Economy and Class Actions, 7 J. LEGAL STUD. 349 (1978); Denbeaux, Restitution and Mass Actions: A Solution to the Problems of Class Actions, 10 SETON HALL L. REV. 273 (1979); Garth, Conflict and Dissent in Class Actions: A Suggested Perspective, 77 NW. U. L. REV. 492 (1982); Kennedy, Class Actions: The Right to Opt Out, 25 A. L. REV. 3 (1983); Miller, Of Frankenstein's Monster and Unwitting Knights: Myth, Reality, and the Class Action Problem, 92 Harv. L. Rev. 664 (1979); Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982); Rivkin & Silverberg, To Certify or Not to Certify: The Use of the Class Action Device in Mass Tort Litigation, 33 FEDERAL INS. COINS. Q. 105 (1983); Verner, Numerosity and Federal Rule 23(a): Is There Too Many?” 1982 U. MICH. L. REV. 312 (1982); Yeager, Group Action and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866 (1977); Case Comment, Class Actions: Certification and Notice Requirements, 65 GEOR. L.J. 1009 (1980); Comment, Mass Accident Class Actions, 60 CALIF. L. REV. 1618 (1972); Comment, Products Liability Class Suits for Injunctive Relief Under Federal Rule 23, 47 FORDHAM L. REV. 49 (1978); Comment, Restrictions on Communication by Class Action Parties and Attorneys, 1980 U. CHI. L. REV. 360; Note, Class Actions Versus the Anti-Injunction Act in re Federal Skywalk Cases, 31 U. KAN. L. REV. 467 (1983); Note, Class Action in a Products Liability Context: The Predominance Requirement and Cause-in-Fact, 7 Hofstra L. REV. 859 (1979); Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv. L. Rev. 1143 (1983); Note, Conflicts in Class Actions and Protection of Absent Class Members, 91 Yale L.J. 590 (1982); Note, Developments in Class Actions, 91 Harv. L. Rev. 630 (1978); Note, Developments in the Law-Class Actions, 89 Harv. L. Rev. 1318 (1976); Note, Due Process and the Punitive Class: The Importance
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may be possible to bring all potential plaintiffs in a toxic substances case into one court for a single trial, at least on some of the issues generated by the litigation, thereby redefining the traditionally considered unit of litigation rather dramatically. The use of this method of case management has the potential for enormous savings in transaction costs. In practice, this potential has not been realized. There has been substantial resistance to the use of the class action device in personal injury litigation because of arguably unique factual and legal characteristics of each case. Although there has been some success in economic loss claims, a perceived lack of typical cases and of predominant issues coupled with resistance from both plaintiff and defense bars have inhibited its use. Even if a court desires to create a class for limited issues or isolate certain subclasses, there can be problems with interlocutory appeals, opt-outs and notice. Recent efforts to create a federal class action when there is a limited fund for compensatory or punitive damages and the use of state class actions seem to have more potential for success.

Multidistrict litigation has found significantly more favor by courts and attorneys in toxic substances litigation.10 If the pretrial discovery in individual cases has not matured prior to application before the Judicial Panel on Multidistrict Litigation and if there are no major problems with tag-along cases, multidistrict litigation treatment can be highly successful. Some attorneys, however, have reacted negatively


19. In enacting 28 U.S.C. Section 1407, Congress authorized the mandatory consolidation of similar actions filed in different federal district courts for pretrial handling. Three examples of the use of this mechanism are In re Agent Orange Product Liability Litigation, 762 F. Supp. 762 (E.D.N.Y. 1980) (ongoing litigation in which the transferee judge is determining those issues which are general to all suits, such as the applicability of the “government contractors” defense); In re Swine Flu Immunization Products Liability Litigation, 464 F. Supp. 949 (J.P.M.L. 1979) (the product of nationwide discovery simplified the trial of suits on remand, see Petty v. United States, 679 F.2d 719 (8th Cir. 1982)); and In re A.H. Robins Co., Inc., “Dalkon Shield” IUD Products Liability Litigation, 462 F. Supp. 540 (J.P.M.L. 1979). A group of toxic shock syndrome suits were not consolidated because the discovery process was well advanced in most cases, with two cases ready for trial. In re Rely Tampon Products Liability Litigation, 533 F. Supp. 1346 (J.P.M.L. 1982). A major issue in multidistrict litigation transfers has been the power of the transferee judge. See In re Upjohn Co. Antibiotic “Cleocin” Products Liability Litigation, 694 F.2d 114 (6th Cir. 1981) (transferee judge could vacate protective orders previously issued by the transferor courts); Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575 (1977). Since only a very small percentage of actions are remanded to the transferor courts, id., at 583, the transferee judge becomes the key decisionmaker despite the fact that the parties had made an initial choice of forum. Involved problems in choice of law determinations can arise since the substantive law of the transferor forum must be applied. See In re Air Crash Disaster at Washington, D.C. on January 13, 1982, 559 F. Supp. 333 (D.D.C. 1983) (variations as to issues and as to jurisdictions in which suits originally filed); Reese, The Law Governing Airplane Accidents, 39 WASH. & LEE L. REV. 1303 (1982). For additional views on multidistrict litigation see Booker, The Multidistrict Panel: The Most Decisive Stage, 25 ABA ANNUAL lw. 1243 (1979); Herndon & Higginbotham, Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. Section 1407, 31 BAYLOR L. REV. 33 (1979); Peters, The Trial Lawyer’s Guide to Multidistrict Litigation, 17 TRIAL 76 (Nov. 1981); Note, Air Crash Litigation and 28 U.S.C. Section 1407: Experience Suggests a Solution, 1981 U. ILL. L. REV. 927.
to MDL because of the loss of individual control over litigation and court mandated assessments for expenses and attorney's fees. There has also been objection because of the tendency of transferee courts to resolve the litigation before it is sent back to the transferor courts for trial. As a result, filing cases in state court has been used to avoid multidistrict litigation.

There has been an increasing use of Rule 42 to consolidate cases for pretrial or trial or conversely to sever limited issues for trial. As suggested above, there may be substantial effects upon the outcome of litigation created by using these techniques. The number of and relationship of issues to be tried at the same time, the order of presentation, the use of one or more juries and the selection of counsel are all potentially outcome-determinative.

Another popular method of case management is the use of "creative scheduling," test cases and collateral estoppel to encourage the rapid

20. Rule 42(a) authorizes the consolidation of distinct actions for either pretrial and discovery, see Neubauer v. Owens Corning Fiberglass Corp., 686 F. 2d 570 (7th Cir. 1982); In re Three Mile Island Litigation, 95 F.R.D. 164 (M.D. Pa. 1982); In re Federal Skywalk Cases, 53 F.R.D. 415, 419 (W.D. Mo. 1963) (consolidating federal and state suits), or for trial of one or more issues. See In re Federal Skywalk Cases, 98 F.R.D. 479 (W.D. Mo. 1982) (means of dealing with punitive damages claims); Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (8th Cir. 1969) (Alareen). Consolidation has been employed in situations where some claimants have not wanted to participate in class actions. See In re Agent Orange Products Liability Litigation, 506 F. Supp. 762, 785 (E.D.N.Y. 1980). Rule 42(a) requires that the actions be pending and that there are common questions of fact and/or law. Consolidation has been criticized because it can result in a situation where the jury treats all plaintiffs alike despite differences in their conduct, injuries, and damages. See Oman v. Johns-Manville Corp., 482 F. Supp. 1060 (E.D. Va. 1980), vacated in part White v. Johns-Manville Corp., 662 F.2d 234 and aff'd in part White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981). Generally, lead counsel is appointed by the court to administer the consolidated proceedings and the court possesses the authority to compromise such counsel from a common fund contributed to by the other attorneys. See In re Swine Flu Immunization Products Liability Litigation, 89 F.R.D. 695 (D.D.C. 1981). See also McCoid, A Single Package for Multiparty Disputes, 28 Stan. L. Rev. 707 (1976); Sherr & Eft, Consolidated Pretrial Procedures in Environmental Litigation, 8 Nat. Resources Law. 631 (1976).

movement of lawsuits through the legal system. Although there is little doubt that setting a case for trial will go a long way toward achieving settlement, substantial unfairness can result in the overt application of trial dates for this purpose. Test cases in the personal injury area have generally been found to be of limited value as management tools per se. Certainly the more information the parties have concerning the probable value of cases and the chances of success, the more likely it is that there can be a settlement. But test cases are not binding and a lack of consistency in verdicts can generate rather than retard litigation. Collateral estoppel, when used carefully, also has great potential. Care should be given, however, to possible unfairness

created by offensive collateral estoppel especially when there is no requirement of mutuality or there is inconsistency in trial verdicts.

The use of third parties—magistrates, special masters, experts and expert panels—has also found some success.23 If a large number of cases can be handled together, the parties may be interested in going to the legal marketplace and “hiring” individuals to develop case management plans, to reduce the number of issues in dispute or to resolve contested issues. When there is a high level of scientific uncertainty, the court itself may seek assistance. The addition of third parties is also not without problems; a third party may create an unnecessary layer of decision making that consumes litigation time and cost with repeated de novo review of decisions. There is also the possibility that an expert hired by the court might become a jury of one subverting an otherwise adversarial system into an inquisitorial one.

Finally there is a host of alternative dispute resolution techniques that are finding increasing acceptance: arbitration, mini-trials, mediation, claims handling facilities and more.24 Some courts have had success in referring cases to an alternative dispute resolution mechanism prior to trial by jury. Again, however, there is the potential for the creation of an additional layer of decision making that can ultimately be counterproductive or that can radically alter perceived notions of “justice.”

In addition to these major case management devices, judges have been increasingly resorting to greater control over traditional discovery and trial processes. Some judges have not been hesitant to use time and quantity limitations and discovery and to require the parties to exhaust informal discovery mechanisms before resorting to formal ones. More importantly, some judges have developed discovery management plans that restrict the parties to certain issues or sources of information. The Federal Rules of Civil Procedure provide sufficient sanctions for discovery abuse to give judges enormous impact on the


24. See, generally, Green, Growth of the Mini-Trial, 9 Litigation 12 (Fall 1982); Olson, An Alternative for Large Case Dispute Resolution, 6 Litigation 22 (Winter 1980).
pretrial process. Some courts have also become increasingly involved in settlement negotiations, overseeing and "urging" settlement. In the trial itself, it is not unusual for the judge to limit voir dire, arguments and the presentation of evidence. There are also judges that require the attorneys to comply with techniques of enhancing jury comprehension requiring intermediate summaries, explanations of evidence to be presented and exhibit notebooks.

Other Procedural Case Law

Trial and appellate decisions on procedural issues have some impact upon the case management of toxic substances litigation. Most of the cases focus upon an immediate dispute to be resolved—such as whether or not a protective order should be upheld—rather than the ramifications of the decision upon the type of case management that may be encouraged or deterred. Other decisions—on Rule 16 of the Federal Rules of Civil Procedure, for example—directly relate to the case management process.

Some of the most important case law affecting management and the strategy of management relates to the financial and other incentives for either a speedy and economical resolution of disputes or a more deliberate decision-making process. The existence of prejudgment interest or the creation of a medical fund prior to trial may tend to encourage defendants to seek a rapid termination of litigation. The availability of innovative structured settlements, most favored nation settlements, insurance fund settlements and mandatory offers of settlement may, at least arguably, also act to speed up the litigation process if handled properly. If not, they may slow down the ultimate resolution of a case by creating additional complications. Plaintiffs typically are eager to expedite litigation, but there has been some suggestion that the setting of attorneys' fees by courts using the lodestar method may create some disincentives to the resolution of litigation until an appropriate number of attorney hours are expended.

25. For an example, see In re Upjohn Co. Antibiotic "Cleocin" Products Liability Litigation, 664 F.2d 114 (6th Cir. 1981).


If attorneys desire to have toxic substances cases treated in groups, there are many trial and appellate decisions on ancillary issues that may assist or inhibit their desires. The availability of forum shopping, diversity, federal question and long-arm jurisdiction, private attorney general clauses and fees, favorable conflict of laws and borrowing statute decisions and amenable local rules are among the procedural devices that can aid a plaintiff in centralizing litigation. The use of voluntary counsel groups, lead, liaison or committee counsel organizations and liberal admission to practice before local courts can also assist. Correspondingly on the defense side, judicial acceptance of lead, liaison and committee counsel of defendants and the ability of counsel with special expertise developed during a case to stay in the litigation even if a client has settled or the attorney changes firms can facilitate defense consolidation. The ability to use national depositions, video depositions and discovery from other cases can also encourage parties to make a group effort.

On the other hand, there are many procedural decisions on these and other issues that may deter collective treatment of toxic substances litigation: third-party practice, contribution and indemnity


31. Problems arise in securing diversity jurisdiction and in seeking removal of actions initially filed in state court.


34. See note 18, supra.


38. See Rheingold, Development of Litigation Groups, 6 AM. J. TRIAL ADVOC. 1 (1982).

procedures,\textsuperscript{40} conflict of interest rules\textsuperscript{41} and restrictive local rules. As was considered above, the setting of attorneys' fees by courts may encourage plaintiffs to seek more individual treatment of cases and fees.

If a party desires to isolate the litigation rather than developing it with other cases, there are also many procedural decisions that have an impact. Protective orders, settlement secrecy, noncompete agreements by attorneys and other similar devices that limit access to information and expertise in other cases may or may not be available.\textsuperscript{42} In situations where it appears that a case has been isolated, there is still the possibility that a court may require that discovery, experts and even work product from settled parties be made available in continuing litigation.\textsuperscript{43} The existence of case law of this nature could effectively restrict the quarantining of a specific lawsuit.

There has been substantial discussion of changes in the Federal Rules of Civil Procedure to accommodate a court in defining management approaches to groups of litigation.\textsuperscript{44} Depending upon the desires of a judge, these revisions in the rules can go a long way toward facilitating a more generalized approach to the development of similar types of litigation. With a few major exceptions, however, there is still enormous discretion allocated to each judge concerning preferred methods of proceeding.

Substantive Law

The substantive law issues that may affect the decision-making process in selecting a case management plan run the gamut of product liability law. The same issue decided in one fashion may encourage group processes whereas another result could mandate individual treatment. Generally, the expansion of federal jurisdiction tends to promote more collective handling of toxic substances litigation. If the control-


ling law is federal by virtue of federal common law, 45 bankruptcy, 46 federal question, 47 or federal preemption, 48 there is an increasing chance of more centralized management. Either because of the unavailability of federal jurisdiction, such as military exclusions, 49 or foreign accidents, 50 or strategy desires to avoid federal jurisdiction, 51 such as lack of trial by jury or nature of juries, there would be a tendency toward less consolidated treatment.


47. See note 32, supra.


State substantive law, which is usually the controlling law, may also encourage or inhibit methods of case management in toxic substances litigation to greater or lesser degrees.52 Enterprise liability, market share liability, concert of action, alternative liability,53 workers' compensation,54 and common defenses such as the government contractor's defense55 are all possible issues that can assist the parties to merge cases. On the other hand, the availability of punitive damages,56 economic loss57 or fear of cancer damages58 with differing standards, highly individualized defenses such as comparative negligence59 or assumption of risk,60 and exceptions to workers' compensation coverage61 may preclude the most general management approaches. The


bulk of the state substantive law issues, however, can be viewed in both directions, depending upon how they are decided. Causation, contribution and indemnity, insurance coverage, statutes of limitation, statutes of repose, evidentiary issues and damage questions can cut both ways. By looking at individual decisions in each jurisdiction, it may be possible to determine the extent to which a desired management plan is feasible.

CONCLUSION

Problems associated with case management in multiparty toxic substances cases raise virtually all of the fundamental issues embodied in our tort system. We have an opportunity to identify and reevaluate


63. See references cited in note 40, supra.


68. See Friends for All Children, Inc. v. Lockheed Aircraft Corp., 663 F. Supp. 552 (D.D.C. 1983) (part of settlement is distributed to plaintiffs with balance placed in a trust fund since the severity of any single victim's injuries will not be known until some time in the future).
with great care and deliberation the basic issues, values, assumptions, trends and logical implications inherent in our legal system. On the other hand, there is a great temptation to seek a quick, definitive and final solution to these problems that will lay to rest some of the enormous amount of uncertainty created by toxic substances litigation. Although it is alluring to err on the side of predictability and seek a certain resolution, previous experience with masses of litigation that threatened to inundate the tort system suggests otherwise. The assets of our federal system in encouraging a wide variety of approaches to the solution of common problems should be given ample opportunity to flourish. Experimenting with a broad range of the case management plans, rather than reaching an immediate decision that would bind all decision-makers, seems preferable at this time. By resorting to the marketplace of ideas rather than a small number of policy makers, it may be possible to seek a middle ground between the traditional view of litigation in its common law form and the more uniform treatment as illustrated by legislation. If, after giving the legal marketplace an opportunity to operate, we are unable to satisfy the basic value choices that we have made, then resort to other decision-making processes may be necessary.
APPENDIX A

LAW REVIEW ARTICLES RELATING TO THE MANAGEMENT OF SELECTED TOXIC SUBSTANCES LITIGATION

Agent Orange


Comment, Agent Orange as a Problem of Law and Policy. 77 NW. U.L. REV. 34 (1982).


Asbestos


Smith & Birck, Sailing the Uncharted Seas of Asbestos Litigation Under the Longshoreman’s and Harbor Workers’ Compensation Act. 22 Wm. & MARY L. REV. 177 (1980).


Comment, An Examination of Recurring Issues in Asbestos Litigation. 46 ALB. L. REV. 1307 (1982).

Dalkon Shield


DES


Campion, DES and Litigation: The First Ten Years. 2 REV. OF LITIGATION 171 (1982).


Sheridan, Sindell and Its Sequelae—or—From a Defendant’s Perspective, How to Manage Multiple-Party Litigation Under Nontraditional Theories of Litigation. 17 FORUM 1116 (1982).

Comment, Bearing the Burden of DES Exposure. 60 OR. L. REV. 309 (1981).


Immunization

Rheingold & Shoemaker, The Swine Flu Litigation. 8 LITIGATION 28 (Fall, 1981).

Silicosis

Bingham, Silicosis Products Liability. 5 J. PROD. LIAB. 89 (1982).

Toxic Shock