A PROPOSED SETTLEMENT RULE FOR MASS TORTS

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I. INTRODUCTION

Much of the evolution in the Federal Rules of Civil Procedure has been "bottom-up" rather than "top-down" reform. The global settlement of mass tort cases, however, has reached the end of its momentum from experimentation among the district courts. The time has come for rules from a higher authority to enable litigating parties to reach a global settlement of their mass tort disputes without fear that an appellate court-rejected compromise will establish the floor for yet another round of negotiations.

The inherent tensions in our tort and civil procedure systems between individual and collective treatment and trial and settlement have been the source of a substantial amount of the current dilemma in resolving mass torts by agreement. Although the substantive law of products liability has recently drifted more toward a functional approach to liability,[1] the procedure of mass torts has become less pragmatic.[2] Appellate courts tend to consider individual and collective as well as trial and settlement concerns at the same time and in the same process with the outcome of a greater focus on individual due process issues rather than the interests of the group as a whole.[3] The suggestion here is that individual and trial issues should be disaggregated from the issues of the universe of plaintiffs and settlement by having a separate judge appointed to oversee efforts to achieve a global settlement of a mass tort. This judge would be empowered to insure that the negotiation meets all due process standards. If there were *ex ante* standards for an acceptable negotiation process, then any ensuing settlement would have a greater chance of surviving appellate review. The Advisory Committee of the Federal Rules of Civil Procedure would be an appropriate forum for establishing these standards for a settlement judge and appropriate negotiation due process.

II. INHERENT TENSIONS IN TORT LAW AND PROCEDURE

Tort law has multiple policy rationales that may conflict with each other, most notably the fairness-efficiency divide.[4] Although these two policies may

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[1] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

[2] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[3] *See* discussion *infra*.

[4] Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995) [hereinafter McGovern, *Analysis of Mass Torts*]; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 680-88 (1989) [hereinafter McGovern, *Resolving Mature*

often coincide, there are instances where goals of individual autonomy and collective utility may conflict. A vaccine to protect individuals from a potential disease can provide a concrete example. Assume that 20% of a population will contract the disease and the vaccine will eliminate 95% of that risk. Assume also that the vaccine will cause an adverse idiosyncratic reaction in 1% of the population receiving the vaccine. Finally, assume that an adequate warning about the 1% risk will deter 25% of the overall population from taking the vaccine at all. Fairness concerns would suggest that a warning should be given so that each individual can confront an unavoidable risk with "informed consent." If such a warning were given, however, this hypothetical suggests that more people would contract the disease than if the warning were not given. Utilitarian policies would suggest that no warning should be provided. There is no obvious middle ground; the policies are in conflict.

There is a similar conflict in tort trial procedure. When a trial court attempted to try a representative sample of asbestos cases and extrapolate the outcome of those trials to a larger universe of similarly situated asbestos cases in order to expedite the resolution of cases and reduce transaction costs, the Fifth Circuit Court of Appeals rejected the effort.[5] The appellate court held that due process guaranteed each individual a right to a jury trial and that right trumped a more efficient trial procedure for the entire universe of plaintiffs.[6] Arguably the same type of tension as exists in the substantive law—between "rights" and "pragmatism"—is illustrated in procedure as well.

III. INHERENT TENSIONS IN PRODUCT LIABILITY

Product liability, a subset of tort, contains multiple instances of the tension between homogenization and individualization.[7] On the one hand, there is an urge to look to the similarities among multiple claims and focus on their common elements. On the other hand, there is a powerful tendency to dwell on the unique aspects of each case. These tendencies are exacerbated by the financial interests of parties who would benefit from either a collective or individualized view of any given situation. Litigants who desire to delay a process will be able to stress each idiosyncrasy, and those who desire immediate resolution will find commonality to predominate.

The substantive law of product liability is the source of many examples of this tension. The concept of "enterprise liability" that manifested itself in "market share liability" emphasized an overview approach to causation.[8] Yet there have been virtually no cases to follow this approach except in the context of DES litigation. The concept of "defect" is another substantive law example of

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Mass Tort Litigation]; Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002) [hereinafter McGovern, *Tragedy of the Asbestos Commons*].

[5] Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990).

[6] *Id.*

[7] David Rosenberg, *The Causal Connection in Mass Exposure Cases*, 97 HARV. L. REV. 851, 910 (1984).

[8] Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

this tension. Originally there were two different definitions in § 402A of the *Restatement (Second) of Torts*—unreasonably dangerous and consumer expectations—but one type of defect.[9] Now there is one prevailing definition—risk versus utility—but three types of defect—manufacturing, design, and failure to warn.[10] Although the risk versus utility test looks to the product in question, the analysis in § 2 of the *Restatement (Third) of Torts: Products Liability* suggests that, for design and failure to warn cases at least, a product must be evaluated in the context of its overall use and overall risks. In the case of prescription drugs and medical devices, a court must focus on all classes of users and find that "reasonable health-care providers, knowing of . . . foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients."[11] Likewise for food products, the test of defectiveness looks to all reasonable consumers.[12] Rather than stressing individual factors such as whether the product danger is "open and obvious" or whether the manufacturer complied with the "state of the art," the *Restatement (Third) of Torts: Products Liability* takes a more functional, homogenized approach of whether there is a better alternative overall product that should have been produced.[13]

Likewise, substantive defenses have been greatly homogenized. Instead of misuse, alteration, assumption of risk, contributory negligence, and other individualized defenses, the trend is toward a single test referred to as "comparative negligence."[14] This defense is generally been justified as a comparison of liability, conduct, and causation among all parties in order to allocate responsibility for harm.[15] Idiosyncratic reactions to a product by a small number of users are generally ignored under the theory that a small number of injured parties do not justify individual treatment.[16]

Similar types of individual-general analyses can be seen in the area of damages. In terms of out-of-pocket expenses, most damages are individualized except when plaintiffs want to generalize to medical monitoring or enhanced risk for everyone.[17] Defendants, on the other hand, prefer generalizing pain and suffering with a capped amount[18] and plaintiffs prefer to emphasize cancer phobia or even hedonics.[19] Punitive damages present a particularly interesting

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[9] RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

[10] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[11] *Id.* § 6.

[12] *Id.* § 7.

[13] *Id.* § 2.

[14] Webb v. Navistar Int'l 1994 Transp. Corp., 692 A.2d 343 (Vt. 1997).

[15] *Id.*

[16] Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985).

[17] Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

[18] ALASKA STAT. 09.17.010 (MB 2005); O.C.G.A. 51-12-6 (2005); CAL. CIV. CODE §3333.2(b) (MB 2005).

[19] Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439 (2005); Jordyn K. McAfee, *Medical Malpractice Crisis Factional or Fictional?: An*

dilemma for the parties. If evidence of conduct warranting punitive damages includes all previous punitive damages awards, a jury might conclude that they also should find against the defendant.[20] On the other hand, jury ignorance about the amount of money previously paid to plaintiffs might lead to a larger award that does not reflect prior punishment.[21] Again, the debate over whether to take a microscopic or a telescopic vision emerges.

The same types of tension between homogenization and individualization arise in the context of procedure but with a different results. While the substantive law of product liability has become less Balkanized, concentrating increasingly on the interests of society at large, the civil procedure of mass torts has discouraged mass treatment by ensuring full due process for each plaintiff. Rule 23 is less hospitable to personal injury cases.[22] Rule 42(a) consolidations for trial are less frequent and involve smaller numbers of plaintiffs.[23] Rule 42(b) severed issue trials are now less common.[24] Multi-district litigation allows consolidation for pre-trial discovery but not for trial.[25] Offensive collateral estoppel has never progressed past theoretical applicability in mass tort cases.[26]

Evidentiary issues exhibit some of the same tensions and schizophrenia. The scope of discovery under Rule 26 varies considerably in practice. Sometimes discovery is limited to the four corners of the precise product and the precise risk that forms the basis of a lawsuit.[27] On the other occasions, the scope of discovery has been expanded to include related but similar products and risks.[28] It is not always obvious whether limiting or expanding the scope of evidence benefits plaintiffs or defendants. There has also been substantial evolution in the admissibility of evidence that occurred after the sale of a product, whether it be subsequent design changes, scientific discoveries, or other similar incidents.[29] The *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[30] hearing

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Overview of the GAO Report as Interpreted by the Proponents and Opponents of Tort Reform, 9 MICH. ST. J. MED. & LAW 161 (2005).

[20] Arhart v. Micro Surtch Mfg. Co., Div. of Honeywell, Inc., 798 F.2d 291 (8th Cir. 1986); Mason v. Texaco, Inc., 741 F. Supp. 1472 (1990).

[21] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994).

[22] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); In Re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (1995).

[23] FED. R. CIV. P. 42(a).

[24] *Id.* at 42(b).

[25] 28 U.S.C.S. §1407 (2005); *see* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

[26] Izhak Englard, *The System Builders: A Critical Appraisal of Modern Tort Theory*, 9 J. LEGAL STUD. 27 (1980).

[27] Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465 (1993).

[28] FED. R. CIV. P. 26(b) (2005).

[29] JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 195-199 (5th ed. 2004); James A. Henderson, Jr., *Symposium: The Passage of Time: The Implications for Product Liability: Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765 (1983).

[30] 509 U.S. 579 (1993).

also illustrates the tension between general and specific. Defendants tend to prefer epidemiological evidence for drug and medical device cases, and plaintiffs tend to rely more on clinical evidence. Defendants usually use *Daubert* as a prelude to Rule 56 motions for summary judgment whereas plaintiffs view *Daubert* as more of a Rule 105(a) evidentiary hearing to resolve whether a given expert should be allowed to testify. Protective orders offer yet another illustration of the tension between the general and the specific.[31] Should the evidence of a settlement with one plaintiff be available to all other similarly situated plaintiffs?

Legislative efforts in the mass tort arena also raise the tension between broader and narrower visions of liability and damages. The 9/11 statute mandated intense individual review for the calculation of damages.[32] The Bankruptcy Code, on the other hand, allows a court to estimate all damages, present and future, in personal injury asbestos cases with one single hearing.[33] The proposed asbestos statute is a defined benefit plan limited to plaintiffs who meet certain criteria.[34]

As an analysis of these disparate areas of product liability illustrate, there is little uniformity at the conceptual level in resolving tensions between collective, homogenized, general perspectives and individual, specific, and narrow perspectives. It should come as no surprise, therefore, that appellate courts have taken a more conservative, traditional approach in their view of a global settlement of a mass tort.

IV. APPELLATE REVIEW OF GLOBAL MASS TORT SETTLEMENTS

The U.S. Supreme Court has addressed two proposed global mass tort settlements and found them both wanting. In *Amchem Products Inc. v. Windsor*[35] the court focused on the elements of Rule 23 regarding typicality, commonality, adequacy of representation, predominance, superiority, and notice.[36] It took a narrow view of those elements in personal injury cases and established a precedent that will make it difficult to use the class action device for global settlements of mass torts.[37] An attempt was made in the fen-phen litigation to use Rule 23(b)(3) as interpreted by the Supreme Court for a global settlement.[38] This effort, however, has not been followed. The *Amchem* requirements led the negotiators to provide in a sequence of potential opt-outs for claimants back into

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[31] Baker v. Liggett Group, Inc., 132 F.R.D. 123 (1990).

[32] September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 237 (codified at 49 U.S.C § 40101 (Supp. I 2001)); Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457 (2003).

[33] *See* 11 U.S.C.S. § 502(c) (2005); *see also id.* § 524(g).

[34] Fairness in Asbestos Injury Resolution Act, S. 852, 109th Cong. (2005).

[35] 521 U.S. 591 (1997).

[36] *Id.*

[37] *Id.*

[38] *In re* Diet Drugs, 369 F.3d 293, 298-99 (2004).

the tort system that increased the costs of the settlement to prohibitive levels.[39] A fear that even so generous a settlement would result in appellate reversal also led counsel to preempt any appeals by settling with all objectors.[40]

Arguably, however, the impetus for the Supreme Court's reversal of *Amchem* lay in its distrust of the settlement negotiations themselves.

> Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. . . . The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.[41]

Notwithstanding the court's concerns about notice, justiciability, and future claims, at a minimum there seems to be a need for a "structured assurance" of negotiation fairness among all interests as a prerequisite for any global settlement that could meet Supreme Court scrutiny.

Likewise in *Ortiz v. Fibreboard Corp.*[42] the Supreme Court relied on a strict interpretation of Rule 23(b)(1)(B) to overturn a global settlement, yet the gravamen of the opinion seems to be a distrust of the negotiation process that created the settlement. Following *Amchem*, the Court considered the Rule 23(a) prerequisites, notice, justiciability, and classification of claimants.[43] It also focused on the amount of money in the settlement from the insurance carriers and Fibreboard.[44] The Court expressed concerns about the rights of unrepresented claimants during the negotiations.

> Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. . . . The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of the distributions to those within it. On each, this certification for settlement fell short.[45]

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[39] *Id.*
[40] *Id.*
[41] *Amchem*, 521 U.S. at 625-26.
[42] 527 U.S. 815 (1999).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 854.

The Court went on to discuss *Amchem*'s call for "structural assurance of fair and adequate representation for the diverse groups and individuals affected."[46]

Two recent opinions by the Third Circuit Court of Appeals in rejecting prepackaged bankruptcies echo the same fundamental concerns that appellate courts have regarding global settlements unless they feel confident that the negotiations involved sufficient regard to all affected interests. The Third Circuit in *In re Combustion Engineering* was particularly concerned about "the prime bankruptcy policy of equality of distribution among creditors."[47] It challenged the fairness of treatment among present and future claimants, malignant and nonmalignant claimants, pre-petition and post-petition claimants, pre- and post 1959 claimants, and pre-petition claimants who had settled their claims but with a "stub" payment due after the effective date of the plan of reorganization.

> Had the future and other non-participating asbestos claimants been adequately represented throughout the reorganization process, including the CE Settlement Trust negotiations, then perhaps the corresponding stub claims would demonstrate the "indicia of support by affected creditors" . . . . But they were not. Instead . . . a disfavored group of asbestos claimants, including the future claimants and the [malignant] . . . claimants, were not involved in the first phase of this integrated settlement. The result was a Plan ratified by a majority of the "stub votes" cast by the very claimants who obtained preferential treatment from the debtor.[48]

Again, an appellate court seemed to focus on the fairness of the negotiation process.

In re Congoleum Corp.[49] provides another illustration of the skepticism of appellate courts to global settlements unless there are assurances that all interests affected are adequately represented in negotiations.

> Pre-packaged plans offer a means of expediting the bankruptcy process by doing most of the work in advance of filing. That efficiency, however, must not be obtained at the price of diminishing the integrity of the process . . . [I]n class actions, particularly settlement-only suits, the district court has a duty "to protect the members of the class . . . from lawyers for the class who may in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that class.[50]

All four of these opinions can be analyzed as having at least two common threads: (1) a concern for the appearance of negotiations where all interests are adequately represented, and (2) a lack of concern or understanding of the merits of the settlement agreements themselves. This focus on assurance that the

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[46] *Id*, at 856 (quoting *Amchem*, 521 U.S. at 627).
[47] 391 F.3d 190, 240 (3d Cir. 2004).
[48] *Id.* at 245.
[49] 426 F.3d 675 (2005).
[50] *Id.* at 688.

negotiation process was acceptable leads to the conclusion that future global settlements, if they are to be viable, must have such "structured assurance."

V. THE MERITS OF GLOBAL MASS TORT SETTLEMENTS

Notwithstanding the skepticism inherent in these appellate opinions, the global settlement of a mass tort may be arguably worthwhile. One of the most thoughtful defenses of settlement was written by Professor Stephen Bundy.[51] He noted that both law and procedure favor compromise of claims. Procedural innovations in the Federal Rules of Civil Procedure including pre-trial conferences, judicial management, hiring of ancillaries, and requirements for alternative dispute resolution are all examples. The Civil Justice Reform Act of 1990 explicitly encouraged the settlement option to litigation and fostered empirical analysis to improve our use of ADR techniques.[52]

Professor Bundy examined various rationales behind a policy of favoring settlement including "pathological adversariness"[53] that may reflect

> a destructive bias against settlement. One version of the account rejects the presumption of party competence. From this perspective, settlement is preferred to continued litigation because it better serves the parties' interests, and decisions not to settle are accordingly characterized as unwise, inefficient, or even self-destructive. A second version of the critique rejects the premise that party competition serves the public interest, favoring settlement because it may produce a more just outcome among the parties, or improve the overall health of the civil justice system. From this public interest perspective, party decisions not settle are seen as selfish, harmful, or perhaps even morally wrong."[54]

Professor Bundy rejects these arguments to justify judicial promotion of settlement but does find another rationale for support: assisting to overcome the "barriers to negotiation."[55] "Often the parties and the public interest will be better served by continued litigation. In a significant number of federal cases, however, the increased costs and risks of bargaining may be preventing settlements that have more private and public value than continued litigation."[56]

In the context of mass torts, the barriers to successful negotiation are extensive. The discussion below suggests a methodology for overcoming some of those barriers, but the question remains: Are private and public values promoted by settlement? The appellate opinions focus on the downside of negotiated resolutions, but there is an upside as well.

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[51] Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992).
[52] *Id.* at 4.
[53] *Id.* at 5.
[54] *Id.*
[55] ROBERT H. MNOOKIN ET AL., BARRIERS TO CONFLICT RESOLUTION (1995).
[56] Bundy, *supra* note 51, at 78.

The following formula reflects the relative costs and benefits to plaintiffs, defendants, and society of the litigation and administrative settlement alternatives for resolving a mass tort:

$$Cd = n(TCd + BCp)$$
$$NBCp = BCp - TCp$$

where, n = number of plaintiffs
TCd = defendant's transaction cost per claim
TCp = plaintiff's transaction cost per claim
BCp = value of plaintiff's claim per claim
NBCp = net value received by plaintiff
Cd = defendant's total cost or societal cost
Present value discount rate = inflation rate

Assume a mass tort of 20,000 plaintiffs at a value of $100,000 each. The total value of the mass tort is $2,000,000,000. Assume that a trial of each case would result in a verdict of $100,000 with transaction costs of $40,000 to the plaintiff and $60,000 to the defendant. The cost to the defendant would be $160,000 per case for a total cost of $3,200,000,000. The net benefit to each plaintiff would be $60,000 or a total benefit of $1,200,000,000. Under the litigation regime the cost to the defendant would then be $3,200,000,000 and the benefit to the plaintiffs would be $1,300,000,000. The costs and benefits to society would presumably be higher: the use of the public justice system and the vindication of public rights.

Under a settlement with an administrative claims regulation facility, assume that each plaintiff would receive $60,000 at a transaction cost of $5,000 for each claim or a total of $1,300,000,000. A defendant could settle anywhere between $1.3 billion and $3.2 billion and the defendants, the plaintiffs, and society would have a superior result.

Unfortunately, the realities of any global mass tort negotiation are far more complex, but the fundamental point remains: the transaction costs of litigation dwarf any suspected differences in the valuation of the claims. Even though more than ninety-five percent of the cases will settle, the transaction costs will not diminish significantly. The passage of time in the resolution of cases cuts both ways for both defendants and plaintiffs, the time value of money may equate inflation. For insurance companies, however, their policies are in nominal dollars, so the passage of time reduces their ultimate cost. Opportunity costs and marginal valuation probably affect plaintiffs more than defendants unless the shadow effect of the mass tort on the capital markets adversely impacts the defendant.

The actual global negotiation process usually reflects the defendant's argument that a large settlement should be at "wholesale" values, not "retail" values; there should be a bulk settlement discount. The issues in the negotiation then become both the amount and the velocity of the payments. In a mature mass tort, where there are sufficient data points to establish the criteria and values of legitimate claims and the amount for each category of claim can readily be

established. Courts and negotiators have done this repeatedly in bankruptcy cases.

Even if there is consensus on claim values, defendants typically argue for a bulk discount based upon the more rapid velocity of settlement payments. Although there appears to be some skepticism in appellate opinions about any discount on trial values in a global settlement, courts have generally accepted discounts in individual settlements based upon litigation risk, individual differences in the marginal value of money, and disparate opportunity costs. There should be, therefore, a similar recognition of the importance of those variables in group settlements. The appellate skepticism seems to lie with the predictability of values and agency failure in the negotiations.

The valuation issue should not be an outcome determinative factor.[57] Once there have been sufficient data points regarding criteria and value, the marketplace of litigation generally adopts standardized approaches to settlement. The number of actual trials in any given mass tort has historically been miniscule before settlements take over, sometimes in groups and sometimes individually. The unfamiliarity of appellate courts with the normal processes of resolving personal injury cases may explain the aversion most lawyers have to the risks of appellate review. It is not uncommon for dissident lawyers to be compensated for their willingness to drop their objections. Another explanation may be found in the tensions inherent in product liability cases described above. It is possible to categorize judges into "rights" and "pragmatic" groups that may explain their approach to mass tort settlements.[58]

There are at least eight different approaches defendants are currently using to settle mass tort cases that can be defined by cases exemplifying their use: Baycol,[59] Baycol lite,[60] Bendectin,[61] silicone gel breast implants,[62] fen-phen,[63] asbestos bankruptcy,[64] and 9/11.[65] These strategies, with one exception, are all based upon the assumption that a mass tort typically has the following characteristics: a small number of serious cases; a large number of non-meritorious cases that may have value in the tort system because of their sheer numbers unless there can be a filtering process to eliminate them altogether; and a medium number of marginal cases. The Baycol strategy is designed to identify the meritorious cases, settle them, and force all remaining cases to trial.[66] Baycol

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[57] McGovern, *Analysis of Mass Torts*, *supra* note 4; McGovern, *Resolving Mature Mass Tort Litigation*, *supra* note 4; McGovern, *Tragedy of the Asbestos Commons*, *supra* note 4.

[58] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997).

[59] *In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001).

[60] *In re* Baycol Prods. Litig., 218 F.R.D. 197 (D. Minn. 2003).

[61] *In re* Bendectin Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *rev'd*, 749 F.2d 200 (6th Cir. 1984).

[62] *In re* Silicone Gel Breast Implants Prod. Liab. Litig. 887 F. Supp. 1455 (N.D. Ala. 1995).

[63] *In re* Diet Drugs, 369 F.3d 293 (2004).

[64] *In re* Johns-Manville Corp., Nos. 82-B-11656 and 82-B-11676 (Bankr. E.D.N.Y. Aug. 30, 2002).

[65] September 11th Victim Compensation Fund of 2001, 28 C.F.R. 104.1-.71 (2004).

[66] *In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001).

lite involves slightly less rigorous line drawing between the meritorious and marginal cases, allowing for relatively low value settlements of some of the marginal cases.[67] Bendectin is the exception to the other strategies by assuming that there are no meritorious cases and forcing them all to trial without any settlement option.[68] Silicone gel breast implant involved settling the high-end cases for commensurate values, settling the low-end cases for amounts close to nuisance values, and trying the marginal cases.[69] The fen-phen and asbestos bankruptcy strategies contemplate the settlement of all cases with bankruptcy payments at less than full value.[70] The 9/11 approach is designed to circumvent the tort system by creating an altogether different alternative.[71]

Given the anticipated cost of the fen-phen settlement, the negative externalities of bankruptcy, and the unique circumstances of the 9/11 statute, the only currently viable strategies available to defendants in mass torts involve a combination of trials and partial settlements. There is no procedure for a realistic global settlement, even when the parameters of the mass tort are universally recognized and accepted. There are, however, combinations of partial settlements—individual, unilateral offers by a defendant to all willing plaintiffs, settlement by categories of plaintiffs with defined characteristics, settlement of subgroups or entire inventories of plaintiffs' lawyers, settlements when cases are set for trial, and ad hoc or opportunistic settlements.

VI. THE NEED FOR STRUCTURED ASSURANCES

The key to appellate approval of global settlements seems to be in the area of faithful representation by counsel of all interests affected by a compromise. If appellate courts demand "fair and adequate representation for the diverse groups and individuals affected"[72] as a prerequisite to the approval of a global mass tort settlement, then it should be possible to define those requirements *ex ante*. Because the appellate analyses typically avoid, misinterpret, or misunderstand the merits of a complicated personal injury settlement, the process by which the settlement is reached becomes paramount. If courts are to concentrate on process, the appearance of propriety becomes critical.

Unfortunately, there will always be parties who will complain that they were disadvantaged in the negotiations, even if their objections are actually based upon the merits of the outcome and not on the negotiations themselves. These parties can take advantage of an appellate court's inability to distinguish between the appearance of unfairness in the bargaining procedures and actual unfairness. It becomes necessary, therefore, to define both (1) the elements of "fair and

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[67] *In re* Baycol Prods. Litig., 218 F.R.D. 197 (D. Minn. 2003).

[68] *In re* Bendectin Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *rev'd*, 749 F.2d 200 (6th Cir. 1984).

[69] *In re* Silicone Gel Breast Implants Prod. Liab. Litig. 887 F. Supp. 1455 (N.D. Ala. 1995).

[70] *In re* Diet Drugs, 369 F.3d 293 (2004).

[71] *In re* Johns-Manville Corp., Nos. 82-B-11656 and 82-B-11676 (Bankr. E.D.N.Y. Aug. 30, 2002).

[72] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

adequate representation for the diverse groups and individuals represented,"[73] and (2) the "assured structure" so that those elements can be achieved.

A. The Necessary Assurances

Fortunately there has been significant recent commentary concerning the elements of a fair negotiation process. Professor Eric Green has written about six aspects of the complex disputes he has mediated: (1) all information available to all parties; (2) participation by all parties; (3) the opportunity for informed choice; (4) lawyers focused on negotiation rather than trial; (5) access to technical expertise; and (6) availability of principals.[74]

Professor Richard Reuben has stressed factors that are essential to achieve legitimacy in court-related negotiations: (1) neutral forum; (2) impartiality of mediator; (3) right to counsel; (4) right to present evidence; (5) ability to exit; and (6) attention to procedural protections, power imbalances, and confidentiality.[75]

By far the most rigorous attention to failures in the process of negotiating the resolution of a legal dispute occurs in the writings of Professor Judith Resnik. Her recent article, "Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract"[76] treats settlements of litigation that invoke the power of the public system of justice and that deserve to have sufficient due process safeguards to compensate for bargaining inequalities and other potential weaknesses of the unsupervised settlement process.[77] Her prediction is that the future hallmark cases of civil procedure will be "about the jurisdiction of courts to settle cases, the scope of the issues settled, the power to bargain, the obligations of judges to oversee bargaining, and the enforceability of contracts to divest courts of jurisdiction. In short . . . a new plot line—of contract[ing procedure]."[78]

Professor Resnik catalogues a long list of issues and rights that are implicated by "contracting procedure" that should incorporate due process concerns.

> Further, in an effort to avoid post-settlement conflicts, one could impose on judges an obligation to review draft contracts to check for vague terms and unclear provisions so as to learn about whether a true "meeting of the minds" has taken place or whether 'mutual mistakes' animate an agreement.

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[73] *Id.*

[74] Eric D. Green, *Mediating the Impossible High Stakes, Complex "Bet the Business Case"*, 86 B.U. L. Rev. (forthcoming 2006).

[75] Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577 (1997); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000).

[76] Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

[77] *Id.*

[78] *Id.* at 626.

> Additional inquiry could be required that judges ensure that settling parties were knowledgeable about the risks and advantages of continuing to litigate when they agreed instead to settle claims. Yet another option would be to rely on the judge to be a source of information about the quality of a proposed agreement . . . [and to] sit as a kind of "fiduciary" for the absentees.[79]

Additional issues to be addressed involve which judge should have this role, what the role of the judge should be, and how the judge should behave. Other concerns involve "the authority to bind, the terms of the agreement, and the roles of lawyers and judges . . . [and] substantive provisions of settlements . . . [and] doctrines of unconscionability and public policy limitations."[80] Further issues involve "third party access to information," "confidential settlement agreements," and "better information than in bargaining in other settings."[81]

Professor Resnik would insure that greater attention is given by courts to situations where there is unequal bargaining power, contracting out of rights, and dissent. There should be a hearing with "judicial scrutiny for fundamental fairness"[82] before a settlement is sanctioned, if a deal falls apart, or if a judge must enforce an agreement.[83]

B. The Necessary Structure

The structure necessary to meet appellate scrutiny would need to recognize the realities in mass torts of both the tension between the rights of the individual and the rights of the group and the potential for due process failure by separating the trial and settlement functions of the judiciary. The necessary structure would need to recognize that the role of the court, the parties, the information, the issues, the procedure, and the outcome of a global mass tort settlement are fundamentally different from a single mass tort trial.[84] In a trial the judge is an umpire; in settlement the judge facilitates. In a trial the parties are only those in the case to be tried; in a settlement, all the potential parties need to have a seat at the table.

The most critical difference between trial and settlement in mass torts involves the information needed at trial as opposed to the information needed for a global settlement. An individual trial contemplates a *Daubert* hearing on the witnesses specific to the case at hand, general and specific liability, general and specific causation, individual damages, and the defendants in that case. A global settlement needs information on all experts who might testify, general liability and causation, and a host of group characteristics involving total number and

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[79] *Id.* at 639.
[80] *Id.* at 648-49.
[81] *Id.* at 652.
[82] Resnik, *supra* note 76, at 661.
[83] *Id.*
[84] Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

location of plaintiffs, the overall criteria for liability and causation, all trial and settlement results, the identity of all defendants, and, if applicable, their insurance and other assets. The information that forms the basis of a global settlement is simply different from the information necessary at trial.

The issues that need to be resolved in a global settlement also do not coincide with the issues in a single trial. There are four essential issues in any mass tort global settlement: the total cost, the criteria for payment, the level of payment for various categories of claims, and the administration of the settlement. All four of these variables are usually negotiated at the same time to ensure that they create a consistent outcome. If the criteria that are used to identify viable claims are too loose, there will be unexpectedly large pressures on the total amount of available funding; likewise with the level of payment. An administration that is either too lax or too strict can also create unanticipated adverse pressures on the total settlement amount.

A global settlement strategy has a typical development that is distinct from a trial strategy. The parties identify the variables that are critical to the viability and valuation of claims and make assumptions about variables that are uncertain or unknown. They also take into account all of the essential decision-makers who may be affected by a global resolution and gauge their potential reactions to any proposed settlement. Once these critical variables and actors are taken into account, the negotiators engage in a form of reverse engineering by attempting to devise an outcome that can accommodate the four essential issues in the context of a given mass tort. There may be short term or long term solutions and there may be the necessity of multiple attempts at reaching a solution before an endgame can be attained.

As has been considered above, the procedures and outcomes are not identical for trial and global settlement. Yet the mechanism for achieving an appropriate bifurcation of functions is readily attainable. If a mass tort is given multi-district treatment, it would be possible to assign two judges—one for pretrial and discrete trials and another to oversee the settlement process. By splitting the roles of the judges, it is possible to concentrate on the strengths of individualized trials and the strengths of group settlement rather than merging the two in a commingled process that dilutes each of those strengths.

VII. CONCLUSION

Product liability substantive law in general and mass tort litigation specifically have internal tensions between individual and collective goods. At the same time, appellate judges have disagreed about the role of "rights" and "pragmatism" in global mass tort settlements, generally emphasizing individual rights over the interests of the group. The suggestion here is to solve both of these areas of conflict by bifurcating the trial and settlement roles of the judiciary. Different judges would be responsible for individual trials and global settlements. In addition, the judge responsible for overseeing the negotiations toward a global settlement would have the benefit *ex ante* of a set of rules promulgated by the federal judiciary that would mandate standards of due process in the negotiation that would meet appellate muster.