

# COMMENT

## AGGREGATING LITIGATION

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### I

#### INTRODUCTION

My comment on Professor Resnik's very stimulating article<sup>1</sup> will discuss the goals of aggregating litigation and the circumstances in which aggregation works best in achieving those goals. I will then discuss how this analysis relates to the aggregation of personal injury cases.

Aggregation has both substantive and procedural goals. The substantive goals are (1) to ensure civil enforcement of legal rules where the stakes of the individual beneficiaries of those rules provide inadequate incentive to bring individual lawsuits; (2) to provide compensation to the beneficiaries of legal rules where those rules have been violated and the beneficiaries have thereby suffered damage; and (3) to ensure that like cases are treated alike. The procedural goals of aggregation are (1) to conserve public and private resources by reducing the number of proceedings that hear and determine identical procedural and factual issues and (2) to preserve those resources by encouraging settlements.

### II

#### THE SUBSTANTIVE GOALS OF AGGREGATION

The aggregation of plaintiffs may ensure civil enforcement of legal rules where the individual stakes of the beneficiaries of those rules are too small to provide an incentive for the beneficiaries to bring their own actions. The paradigm of this kind of lawsuit is the shareholder derivative action brought to enforce the fiduciary obligations of officers and directors of the corporation. In companies with vast numbers of shareholders, no particular shareholder is likely to have sufficient potential benefit from enforcement of that fiduciary obligation to offset the high cost of bringing the lawsuit. There is thus a collective action problem. Whatever recovery is obtained would go to the corporation and would produce only an increase in the value of all shares, whereas the cost of bringing the suit would be borne entirely by the plaintiff. Individual shareholders thus have too little incentive to sue on their

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1. Judith Resnik, *From "Cases" to "Litigation,"* 54 L & Contemp Probs 5 (Summer 1991).

own and too much incentive to become free riders while some other shareholder bears the laboring oar of bringing the litigation.

The solution to this problem has been to allow a single shareholder to bring a lawsuit in the name of the corporation and to reward counsel for the shareholder with attorney's fees from any recovery that is made. This procedure, of course, creates a problem. Because derivative actions are driven by the quest for counsel fees, a divergence of interests results between those who control the suit (counsel for the plaintiff) and the beneficiaries of the suit (the corporate shareholders). Thus, the usefulness of derivative actions has long been controversial and has led to the imposition of various statutory and judicially created restrictions on such actions.

Applying this framework to personal injury cases, few collective action problems exist except where there are a large number of potential plaintiffs with very minor injuries. This is such an unusual circumstance, however, that it does not warrant detailed analysis.

With regard to the goal of compensation, aggregation works best where the recovery goes to a single recipient—in the case of the derivative action, the corporation—or where individual damages can be calculated easily—for example, in a securities case in which the price of a security on one date is subtracted from the price on another date and the difference is then multiplied by the number of shares held by each member of the class.

It is more difficult to justify aggregation in the name of compensation when cases involve mass torts. Each plaintiff has a distinct life expectancy, expectation of future earnings, exposure to pain, and degree of emotional suffering, among other factors. Aggregation necessarily limits the individual attributes that can effectively be taken into account, and seems justified only where the achievement of procedural goals so reduces the cost of litigation that plaintiffs are better off with their individual circumstances considered in such a limited fashion.

Aggregation does further the goal of treating like cases alike and, where a substantial number of cases involve a common factual situation, aggregation ensures consistency in result. Aggregation of tort cases emerging from, for example, a building collapse or an airplane crash thus seems desirable. Even here, however, aggregation will be beneficial only with regard to the issue of liability and only where the substantive claims of all plaintiffs are identical.

### III

#### THE PROCEDURAL GOALS OF AGGREGATION

Aggregation can reduce the costs of litigation for the parties and promote judicial economy by reducing the number of proceedings in which identical procedural and factual issues are heard and decided. Aggregation of this kind can be achieved in class actions, through multidistrict litigation procedures, or by the assignment of multiple cases to a single judge. With regard to personal injury cases, aggregation will work where the legal and factual issues are identical for all parties; thus, the procedural steps can serve all cases rather

than just one. Again, an airplane crash or a building collapse is the best example.

Aggregation will not adequately serve this procedural goal where the facts differ between individual cases. In such circumstances, it is difficult to aggregate damage issues because each plaintiff has a unique claim. Where toxic torts are concerned, moreover, exposure of the various plaintiffs may differ significantly; consequently, each plaintiff may have a different case with regard to causation. This problem is especially acute where the particular ailments alleged to have resulted from exposure to specified toxic materials are also found in persons with no known exposure to those toxic materials. In contrast, aggregation seems more appropriate where the particular ailments result only from exposure to the designated toxic material and are not found in the population generally. The Agent Orange case<sup>2</sup> falls into the first category because almost all of the ailments claimed were found in the population generally and had other known causes. Asbestos cases often fall into the latter category because asbestosis and mesothelioma result only from exposure to asbestos. Another factor compounding the difficulty of aggregating toxic tort cases is that the laws of various states concerning liability often differ.

Aggregation of cases also promotes settlement. In multidistrict litigation, aggregation allows cases to be scheduled for trial faster than if each were litigated individually. The proximity to trial is an important factor in causing settlement. Class actions raise somewhat different issues in that defendants generally resist aggregation. Once all or most of the possible plaintiffs are included in the action, however, defendants do have an incentive to settle and avoid the costs of further litigation. Moreover, once a critical amount of money has been offered in settlement, counsel for the plaintiff class may conclude that only a decreasing percentage of any further increase in recovery will be allocated to the fee award, while their own costs increase and the risk of total loss continues. At that point, counsel for the plaintiff class also has a powerful incentive to settle.

In the personal injury area, using aggregation to force settlement will greatly reduce litigation costs but will impede achieving the goals of law enforcement and compensation. In particular, aggregation may lead to recoveries far below the total damage suffered. Counsel for the plaintiff class generally will prefer a certain recovery with a large fee to the continuance of litigation in which the percentage of recovery going to fees decreases, costs increase, and the risk of loss remains. Of course, individual lawsuits in the absence of aggregation may be so costly that the net amount going to plaintiffs in individual cases would be even less than a class settlement notwithstanding the recovery of full damages.

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2. *In re Agent Orange Product Liability Litigation*, 100 FRD 718 (EDNY 1983), *aff'd*, 818 F2d 145 (2d Cir 1987).

Aggregation may also skew the distribution of recoveries among the plaintiffs. In particular, aggregation may undercompensate the strongest cases and overcompensate the weakest. The costs of determining individual damages in distributing the class fund among the plaintiffs may be high, and the award to each plaintiff will often be determined by an easily applied rule of thumb. This seems particularly likely in toxic torts cases, where a few strong claims are swamped by a large number of weak ones. In the Agent Orange case, for example, the number of class claimants was enormous, and all were allowed to share in the settlement fund without any proof of exposure to Agent Orange or evidence that their ailment was caused by Agent Orange.

#### IV

#### CONCLUSION

Aggregation of tort cases can best be justified where liability issues are severed from determination of individual damages and in cases involving common factual inquiries. Aggregation of damage issues should be restricted to those extraordinary cases in which the costs of individual litigation are so large that even the strongest plaintiffs are unlikely to net adequate recoveries.