

LAW AND CONTEMPORARY PROBLEMS

Volume 53

Autumn 1990

Number 4

FOREWORD

FRANCIS E. MCGOVERN*

I

INTRODUCTION

When originally conceived, this issue of *Law and Contemporary Problems*¹ was designed to collect and organize data concerning the mechanisms—typically called claims resolution facilities—developed to dispense funds to resolve mass tort litigation. It was assumed worthwhile to establish a marketplace for ideas concerning these facilities, to develop a cottage industry of expertise, and to foster experimentation with various models. The leaders of virtually all the major U.S. claims resolution facilities were invited to contribute papers. The overall goal was to provide an anecdotal compendium of information and thereby facilitate the generation of principles that might inform future designers and implementers of procedures for disbursing settlement funds.² The original conception was later broadened to include commentary by academics and practitioners from a variety of perspectives: administrative, economic, research, computerization, and psychological.

Copyright © 1990 by Law and Contemporary Problems

* Francis H. Hare Professor, University of Alabama School of Law. Also the special master who wrote the DDT allocation and distribution plan; one of three arbitrators who decided upon the implementing rules for the Manville property damage claims resolution facility; the court-appointed expert who designed the Dalkon Shield Claimants Trust claims resolution facility; an advisor to the bankruptcy court in the early stages of the implementation of the Manville Personal Injury Settlement Trust; and the court-appointed expert who drafted the UNR and Amatex claims resolution facilities in their respective bankruptcy courts.

1. This publication was preceded by a conference hosted by *Law and Contemporary Problems* and Duke University School of Law, Durham, North Carolina, April 4-6, 1989. The conference was co-sponsored by the Torts and Insurance Practice Section of the American Bar Association, the Association of Trial Lawyers of America, and the Defense Research Institute. Although not unique, this joint sponsorship suggests the level of interest in the subject matter and the balance of the program.

2. This collection of articles and comments represents part of a series of efforts by the author to foster case studies that can be used inductively to develop principles for the management of complex litigation. See, for example, Francis E. McGovern, *Toward A Functional Approach for Managing Complex Litigation*, 53 U Chi L Rev 440 (1986); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B U L Rev 659 (1989); Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, 51 L & Contemp Probs 41 (Autumn 1988).

II

THE ANALYSIS OF CLAIMS RESOLUTION FACILITIES

From a broad perspective, the analysis of claims resolution facilities seems to focus on six variables: (1) the advisability of instituting a claims resolution facility at all; (2) the value system to be incorporated in the rules that govern the claims resolution facility; (3) the relationship between design and operation functions of a facility; (4) the management structure; (5) the funding mechanism; and (6) the overall decisionmaking process.

From the beginning, one must consider the advisability of creating a claims resolution facility, particularly in light of substantial start-up costs, both in terms of administration and design. Most decisionmakers focus on the allure of disbursement mechanisms—as alternatives to the existing tort system—that reduce the high transaction costs associated with individualized treatment. They also note the ethical problems under the current system that involve potential conflicts of interest where allocation and disbursement decisions are made by parties arguably having goals contrary to their clients'. Particularly attractive to some is the creation of a Rawlsian veil that argues for *ex ante* allocation decisions, thereby undercutting complaints of distribution bias. Care should be devoted, however, not to create a vehicle that is so efficient that it will almost guarantee overuse, simply because of its existence. If the claims resolution facility becomes so routinized that undeserving claimants view it as a public good, thereby making application for funds costless to themselves while incurring costs for legitimate parties, the effect may be counterproductive. These and many other concerns should be taken into account in determining whether or not to establish a claims resolution facility. Other factors that are typically considered include the types of claims, the purposes to be served, the relative maturity of the litigation, the number of claims, the available funding, and other idiosyncracies related to the underlying litigation.

The most difficult series of decisions in the development of a facility involve the selection of procedures from a menu of alternatives driven by a variety of substantive value systems. For example, it must be determined whether the facility should look more like the tort compensation system or resemble a social security approach. Typically these procedures are chosen after a review of values such as fairness and efficiency. The outcomes of these choices determine certain boundaries such as who qualifies for compensation, for what types of losses, and in what amounts. Other questions related to the selection of procedures include: Who is the appropriate decider of value: jury, judge, legislator, parties? What is an acceptable level of transaction costs, most particularly attorneys' fees? To what extent should each claim be scrutinized and individualized? What is the priority of claims? How are the behavioral needs of claimants to be accommodated?

Most analyses of procedural worth find that the driving concerns of fairness, efficiency, and other values often conflict both externally and internally. Is it fairer to resolve cases "first-come, first-serve" or on the basis

of need, particularly when determination of need may involve difficult or arbitrary decisions? Is it fairer to have a jury, judge, legislature, or parties set case values? In terms of efficiency, as a common sign notes, "Quality, time, cost—pick any two." When are the error costs associated with paying false positives sufficiently high to justify additional transaction costs? And when should values of individualization and the requirement of a cause and effect relationship—both of which inform the tort compensation system—succumb to values of the group as a whole and to the needs of claimants regardless of why or how they arose? When should the behavioral demands of litigant satisfaction associated with full-fledged "due process" be rejected in the interests of simplicity and ease of administration? In addition, when should the claims resolution facility be used as a vehicle to alter fundamental tenets of the existing compensation system? Should the facility, for example, be inquisitorial and interventionist and reach out to bring in new claimants, to assist them in marshalling their cases and to prevent others from profiting from their ills? Or should the facility remain adversarial and rely upon the claimants' responsiveness alone, without inquiry into errors or cost?

The designer of the claims resolution facility is typically not its implementer, and the goals of the designer may be inconsistent with effective or efficient implementation. One constant theme among the managers of claims resolution facilities concerns the level of predictability or flexibility in the source document. Interestingly there is no consensus among managers as to whether there should be more guidance or more flexibility. Designers may also have a similar dilemma because of new and conflicting values that may be interjected by managers. In some instances, the designers and implementers have been the same, and there have been institutionalized forms of continuing advisory roles for the designers to insure that their input is represented. It is not obvious what arrangement is superior. Yet it is clear that fundamental flaws exist in some of the claims resolution facilities that were derived from the designers' interests in reaching a settlement in the underlying case, a desire that overwhelmed the ability of the facility to survive. The tendency to ignore or defer problems to obtain an agreement among relevant parties may doom that agreement unless there is a clear appreciation of the operation and management of a claims resolution facility.

Oftentimes an ad hoc body with little or no previous experience in the mass tort arena is chosen to manage a claims resolution facility. Such bodies have been chosen because of their lack of knowledge, and arguable lack of bias, concerning the underlying case that spawned the facility. One relatively clear message provided by studying these cases is that behavioral concerns unrelated to managerial efficiency that dominate the selection of trustees or executives should be sublimated to concerns of competence and professionalism. Once selected, these ad hoc bodies have succumbed to arguable conflicts of interest in the selection of law firms, investment bankers, facility personnel, and independent contractors. Even facility organizers who would otherwise be deemed appropriate decisionmakers can become tainted

by accusations of self-interest when dealing with control over such vast sums of money. At times, the temptation to satisfy personal agenda may simply be too great.

The selection of an established institution—such as was done in the Agent Orange claims resolution plan—with long-standing controls to insure that no personal benefits are derived from facility management seems to be a superior approach. Indeed, the use of a trust format in the first instance may be unsatisfactory.

The funding mechanism itself is probably the most important and most neglected topic in this symposium. The most elegant and sophisticated design will collapse without matching funding; indeed, these claims resolution facilities arguably are maturing as compensation devices at a time when funding sources are running on empty. In the presence of a close-ended fund, an open-ended payment mechanism presents obvious dangers. This is not to say that jury trials, and their unpredictable award amounts, must be abandoned. In the UNR and Dalkon Shield claims resolution facilities, plaintiffs have access to courts, but, in the event that there are less funds than originally anticipated, jury verdicts are prorated exactly like settlements.

Finally, there is major concern over who decides these various issues related to the design, implementation, and operation of claims resolution facilities. We have instances where too much power in the hands of the court or the parties can lead to severe dissatisfaction. In part this is because the provider of funds—typically the defendant—cares about the amount but not how the funds are dispersed, thereby eliminating one side of the adversarial equation. This can lead to a potential conflict between the court and certain beneficiaries, particularly when the court views itself as the protector of unrepresented interests. A more satisfactory approach appears to be the use of a court-appointed, true representative of those interests, so that the court can maintain its more neutral role.

Another potentially corrupting influence for decisionmakers is the size of the affected funds. The claims resolution facilities discussed in this symposium involve more than \$7 billion. A court may not, for example, be the best institution to select among potential managers, some of whom view their roles as satisfying their employer more than the fund's beneficiaries. At the same time, courts may have agendas of their own that are not shared by claimants, who are more often than not excluded from the decisionmaking process. Thus, accountability remains an essential ingredient to any successful claims resolution facility.

III

THE PAPERS IN THIS SYMPOSIUM

The papers in this symposium begin with the base case scenario presented by Scott Baldwin of Marshall, Texas,³ who explains anecdotally how mass tort

3. Scott Baldwin, *Comment*, 53 L & Contemp Probs 9 (Autumn 1990).

cases have traditionally been settled in the absence of claims resolution facilities: the parties' attorneys determine a lump sum amount to resolve all cases and then plaintiffs' counsel, using a variety of techniques, allocates the monies among the various plaintiffs. From Scott Baldwin's perspective, because this manner of settlement requires cooperation among the parties' counsel and the court, the keys to such a settlement are the personalities of those involved—parties, counsel, and judges—and their ability to work together in harmony.

Outside the settlement facility context, some plaintiffs' counsel arrive at a total settlement figure by evaluating each case individually and reaching an additive value. Others set a flat value for a limited number of categories of plaintiffs, place their clients into the categories, and multiply to determine a total settlement amount. Still others decide what total amount of money they can obtain for all of their cases and, once the total is determined, allocate the money among their clients. Defense counsel typically do not second-guess any of these allocation processes, and the courts intervene only when the parties are minors or incompetents. In effect, therefore, both counsel act as the claims resolution facility by reaching a settlement amount and allocating and distributing it to the plaintiffs. This cooperative effort is an extremely efficient process, if it works.

Where there are large number of parties, however, the personalities of counsel can become overwhelmed by diversity and complexity. Transaction costs skyrocket; inefficiencies in redundancy, communication, and opportunity costs can be severe. The next contributor to the symposium, Larry Fitzpatrick of the Asbestos Claims Facility and the Center for Claims Resolution,⁴ discusses the mechanisms available to defendants for surmounting these obstacles in the context of asbestos litigation. He discusses increasing the number and lowering the value of case dispositions, reducing defense costs, developing alternative settlement procedures, and producing superior trial outcomes.

Marianna Smith of the Manville Personal Injury Settlement Trust,⁵ next discusses the claims resolution facility established for one defendant whose assets were exceeded by claims—the Johns-Manville Corporation.

Traditional mass tort settlements, such as the Asbestos Claims Facility, the Center for Claims Resolution, and the Manville Personal Injury Settlement Trust, represent approaches designed to make the tort compensation system more efficient while retaining the fundamental characteristics of tort processes. Dean Robert McKay⁶ discusses the Manville Property Damage Claims Resolution Facility, which is at the other end of the compensation system spectrum. There, because of an allocation of the bulk of the available

4. Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 L & Contemp Probs 13 (Autumn 1990).

5. Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 L & Contemp Probs 27 (Autumn 1990).

6. Robert B. McKay, *Asbestos Property Damage Settlement in a Bankruptcy Setting*, 53 L & Contemp Probs 37 (Autumn 1990).

funds to the personal injury trust, and a resultant shortfall in available cash, the right to a jury trial was eliminated and a strict allocation formula was devised by three arbitrators working under the auspices of the bankruptcy court. The formula involved a no-fault, no-product-identification reimbursement of specified expenses made by eligible plaintiffs on a predetermined priority basis. In effect, the facility contemplated a totally new type of compensation scheme based upon notions of fairness and reality generally divorced from tort law.

The Agent Orange Veteran Payment Program was modelled loosely after a social security type of system. As explained by Harvey Berman of the Aetna Life and Casualty Corporation,⁷ the administrator of the program, there was an underlying assumption in the case that there was no tort liability for the plaintiffs and thus that the court, itself, could design a system that it felt was fair. The resulting program pays veterans based upon total disability or death, and offers a broad-ranging social services foundation.

My article on the DDT settlement fund,⁸ which was designed as a hybrid with monies distributed under a system that attempted to mimic the tort system in outcome but eliminate its attendant transaction costs, recounts how the Agent Orange approach of unrestricted judicial design was rejected in favor of a more traditional approach.

Kenneth Feinberg, one of the trustees of the Dalkon Shield Claimants Trust,⁹ next outlines the most complicated of the claims resolution facility models. Under the trust's approach, the claimants were given a series of payment options: flat amount, schedule of benefits, alternative dispute resolution, or traditional litigation. The claimants themselves then decided which model best satisfied their unique desires.

In a comparative article, Mark Peterson of the Institute for Civil Justice at the RAND Corporation¹⁰ collected relevant data from each of the claims resolution facilities and compared them along a compensation system axis. He considers how the structure and operation of each facility related to its relative success.

The last several authors in the symposium comment from various perspectives on the development, implementation, and operation of claims resolution facilities. Glen Robinson and Ken Abraham¹¹ propose the aggregative valuation of mass tort claims. Ian Ayres¹² evaluates the economic

7. Harvey P. Berman, *The Agent Orange Veteran Payment Program*, 53 L & Contemp Probs 49 (Autumn 1990).

8. Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 L & Contemp Probs 61 (Autumn 1990).

9. Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 L & Contemp Probs 79 (Autumn 1990).

10. Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 L & Contemp Probs 113 (Autumn 1990).

11. Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 L & Contemp Probs 137 (Autumn 1990).

12. Ian Ayres, *Optimal Pooling in Claims Resolution Facilities*, 53 L & Contemp Probs 159 (Autumn 1990).

incentives of resolving mass tort claims. Deborah Hensler¹³ assesses the current claims resolution facilities and outlines what we need to learn to improve them. Tom Florence and Judith Gurney¹⁴ discuss the computerization of claims resolution facilities. Finally, Tom Tyler¹⁵ offers a psychological perspective on the settlement on mass tort claims.

IV

CONCLUSION

Three recent developments illustrate some of the pitfalls associated with the design and implementation of claims resolution facilities. On May 16, 1991, Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York concluded that the Manville Personal Injury Settlement Trust should be reconstituted because the trust lacked sufficient funds to pay its claimants.¹⁶ He certified a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure and approved a new series of provisions for the operation of the trust, including a payment order based on severity of disease rather than on order of filing and an annual pro rata distribution of funds. Judge Weinstein also approved an elimination of all incentives for jury trial and a reduction in attorneys' fees. The commonly discussed seeds of the trust's destruction included unlimited access to trial, pressure for settlement, design by only a portion of the beneficiaries, lack of flexibility in implementation, and inexperienced management.

The second development involves the Dalkon Shield claims resolution facility. A recent *Wall Street Journal* article on the facility was entitled "Large Morass; Dalkon Shield Trust, Hailed as Innovative, Stirs a Lot of Discord; IUD Claimants Call It Hostile to Challenges, Secretive in Making Its Decisions; No Easy Cure for Mass Torts."¹⁷ This title reflects the sentiments of at least some of the participants in the claims resolution process and suggests a high level of dissatisfaction over claims processing. Commonly discussed general complaints include a lack of willingness to compromise, a failure to reveal information concerning the trust's evaluation of claims, an insensitivity to the behavioral needs of claimants, and an overemphasis on administrative convenience.

The third development is more general. The pervasive sense of dissatisfaction with the existing procedures for handling mass torts has led to an approach suggesting that the claims resolution facility model has a life of its own as an end rather than as a means.¹⁸

13. Deborah R. Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 53 L & Contemp Probs 175 (Autumn 1990).

14. B. Thomas Florence & Judith Gurney, *The Computerization of Mass Tort Settlement Facilities*, 53 L & Contemp Probs 189 (Autumn 1990).

15. Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 L & Contemp Probs 199 (Autumn 1990).

16. *In re Johns Manville Corp.*, slip op 90-3873 (ED NY May 16, 1991).

17. *Wall Street J* 1 (June 3, 1991).

18. *In re Johns Manville Corp.*, slip op 90-3973 at 61-63.

Originally the claims resolution facility was merely a disbursement mechanism totally dependent upon the tort system. Then it became a hybrid, a method of engrafting more efficient, albeit less individualized, administrative procedures onto the litigation process. Now there is evidence that for some it has evolved into a substitute for the tort system, a vehicle to promote new values in place of the values fostered by substantive tort law.

A number of commentators have indicated distaste for the transaction costs, particularly plaintiff attorneys' fees, associated with tort cases; for the drain of repeated asbestos cases on the courts; for the necessity of individualized treatment of similarly situated plaintiffs; and for the disbursement of compensation based upon the idiosyncracies of jury verdicts and tort law rather than on the basis of need.¹⁹ An appropriately designed claims resolution facility, such as was developed in Agent Orange, can, and at least arguably should, rectify these perceived problems. There has been a suggestion in at least one mass tort case,²⁰ however, that a court has sought out a case to use as a vehicle for reform, appointed counsel to achieve a particular settlement, engaged in *ex parte* discussions to ensure that settlement, and generally assumed the role of an advocate attempting to legislate a particular claims resolution facility as an alternative to the existing tort system.²¹

Unfortunately the temperature of the debate raised by these three recent developments has been sufficiently high that productive discourse has been noticeably lacking. There has been a need for an academic view of claims resolution facilities that have evolved from the exigencies of legal practice.

The purpose of this symposium is to provide a factual basis for common understanding of claims resolution facilities and to raise the initial issues that must be considered to develop a successful facility. The purpose of this symposium is not to resolve these issues but to elevate the level of discourse so that all participants—courts, plaintiffs, defendants, and others—can seek superior solutions to their common problems. It is quite tempting for judges and lawyers to assume that they have the expertise to design and implement a claims resolution facility. The recent developments in Manville, Dalkon Shield, and Eagle-Picher illustrate the difficulty of the task and the need for a more sophisticated and interdisciplinary analysis.

Both academic and personal appreciation is due to Theresa Glover and the student editors of *Law and Contemporary Problems* for making this issue possible. The non-traditional subject matter and approach of the issue required abundant diligence, care, and creativity.

19. See generally David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind L.J. 561 (1987); *Trends in Asbestos Litigation* (Federal Judicial Ctr, 1987); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga L Rev 429 (1986); *Asbestos in the Courts: The Challenge of Mass Toxic Torts* (RAND, Inst Civil Justice, 1985).

20. *White v Eagle-Picher Industries*, CV-90-4253 (E & SD NY December 11, 1990).

21. See Petition for Writ of Mandamus and Prohibition, *In re Patton*, CV-90-3974 (2d Cir, filed December 17, 1990), voluntarily dismissed, March 7, 1991.