PUBLIC AND PRIVATE LAW PERSPECTIVES: TRANSCRIPT OF PROFESSOR HOWARD ERICHSON

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PROFESSOR ERICHSON: When you hear talks about asbestos, you hear over and over again this drive toward comprehensive resolution, this desire for "global peace."[1] I like peace as much as the next guy, but in mass tort litigation, I worry that peace is overrated, or at least oversought. In part because the claims belong to the individual claimants, in part because the settlement decision belongs to the individual claimants, and in part because truly comprehensive peace in mass tort litigation is unattainable. There are simply too many moving parts in mass tort litigation.

I worry that asbestos is teaching us the wrong lesson for other mass torts. Asbestos may be the strongest case for comprehensive resolution, at least for forward-looking comprehensive resolution. On the plaintiffs' side, there are truly massive numbers and tremendously long latency periods. On the defendants' side, there are multiple defendants, serious product identification problems, and assets of the primary defendants that were woefully inadequate to meet the litigation and liability demands. With asbestos, we do have a problem of governance of the sort that Richard Nagareda has written about so beautifully,[2] and asbestos does cry out for forward-looking comprehensive solutions, maybe a legislative solution despite all the political difficulties. It is tempting, therefore, to look at asbestos litigation as a long-term failure to get comprehensive resolutions, as a miserable set of failed attempts to achieve peace, and then to think that the challenge in other mass tort litigation is to figure out how we can do better—how we can do a comprehensive resolution, how we can achieve

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1. *See* Judge Barbra Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 738, (2008); Richard Nagareda, *Public and Private Law Perspectives: Transcript of Professor Richard Nagareda*, 37 SW. U. L. REV. 677, 677 (2008).

2. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

global peace. That's what you hear lawyers on the defense side, on the plaintiff side, and on the judge side talking about all the time.

But most mass tort litigation isn't asbestos. In most mass tort litigation, a perfectly sound goal is to try to get settlements or a series of settlements that can resolve a good chunk of the claims, reasonably fairly and reasonably efficiently, leaving the remaining litigation of manageable scope. There's nothing wrong with mass tort litigation resulting in a mix of outcomes—maybe a series of aggregate settlements, individual settlements, and even trials.

Obviously, individual litigation and individual trials are not the answer to mass tort litigation. To think of the years during which the Judicial Panel on Multidistrict Litigation denied MDL transfer for federal asbestos cases[3] boggles the mind, from the perspective of 2008. In mass tort litigation, we've got to have MDL. We've got to have state-wide consolidation in any state with a critical mass of the litigation. We've got to have state-federal coordination, as Justice Helen Freedman has done so often and so well. We've got to have common-issue discovery, aggregate coordinated discovery. We've got to have a sensible approach to scheduling trials, so that we can generate information that makes settlements possible. And we've got to have the benefits of informal aggregation, by having lawyers who coordinate with each other and who represent sufficient masses of clients to invest in the litigation based on the aggregate stakes. We have to have all of this. We have to have serious aggregate handling of mass tort litigation,[4] but to say we need aggregate litigation processes is not to say that we need a single comprehensive resolution. It's not to say that we have to resolve everything in one fell swoop.

Yet over and over we see people beating themselves up trying to figure out ways to accomplish global resolutions. You can understand what drives them. For a defendant, it is the need to limit liability, constrain litigation cost, reassure the capital markets and get back to business. For the court, it is docket control, and also it is a personal, professional accomplishment for a judge to achieve a mass resolution of a mass dispute. For plaintiffs' counsel, it's the potential for enormous fees, the satisfaction of getting

3. *See In re* Asbestos and Asbestos Insulation Material Prod. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977); *In re* Asbestos Prods. Liab. Litig. (No. II), MDL 416 (J.P.M.L. March 1980) (unpublished order); *In re* Ship Asbestos Prods. Liab. Litig., MDL 676 (J.P.M.L. Feb. 4, 1986) (unpublished order); *In re* Leon Blair Asbestos Prod. Liab. Litig., MDL 702 (J.P.M.L. Feb. 6, 1987) (unpublished order). The Panel finally ordered transfer of the asbestos personal injury litigation in 1991. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

4. On techniques for handling mass tort litigation on an aggregate basis, *see generally* AM. COLL. OF TRIAL LAWYERS, MASS TORT LITIGATION MANUAL (2006); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH (2004).

compensation for your clients, and the ability to move on. You can understand what drives the desire for comprehensive resolution for all three of those sets of players.

The problem, of course, is that for the claimants themselves, the comprehensive resolution may or may not be a good thing. Richard Nagareda is right that there is a peace premium—that negotiating a settlement that gives the defendant peace is a value-generating enterprise. That's going to be good for many of the claimants, but not necessarily for all of them. And this is the key: it's up to *them*. The claims belong to the claimants. The decision whether to release a claim in settlement belongs to each claimant. Unless there is a certified class action—in other words, unless a judge has decided that there is sufficient identity of interest so that the claimants may be bound to a settlement by class counsel and class representatives—the claims still belong to the individual claimants, and the decision whether to settle belongs to those individual claimants.

So with all respect to Professor Nagareda, "coercion" *is* a bad word when it means taking the settlement decision away from the person who owns the claim.[5] When plaintiffs' counsel on steering committees or in other leadership positions purport to negotiate settlements on behalf of the entire universe of claims including plaintiffs they don't represent, and when they seek fees from the settlement on behalf of the entire universe, it's a power grab in which counsel are trying to treat something as a class action even though no class has been certified and even though they know that no class could be certified.

In this power grab, the lead plaintiffs' lawyers are abetted by district judges who bring parties to the table, push the idea of comprehensive resolution, and offer their approval of the settlement. If it's not a class action, why is anybody asking for the judge's approval? In some ways it's not unlike the earlier era of class actions, in which judges were actively involved and lawyers were negotiating class action settlements. But one difference is in those class actions, the district judges faced review from skeptical appellate courts—think of *Castano*,[6] *Cimino*,[7] *Amchem*[8] and *Ortiz*[9]—whereas with non-class mass settlements, there is less opportunity for review.

5. *See* Nagareda, *supra* note 1, at 661 ("When we hear the word 'peace'—when we hear the word 'settlement' in the mass tort area—we should hear the word 'coercion.' But the important point is that 'coercion' is not a bad word.").

6. Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

7. Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998).

8. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

9. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

When I think of the problems with recent big mass tort settlements, I see a series of over-reactions. I think particularly of the arc from asbestos to Fen-Phen to Vioxx. The early asbestos litigation involved horrendous inefficiencies and delays. With costs mounting and liabilities mounting, naturally the parties tried to move to a comprehensive resolution. But they overreacted and tried to do settlement class actions that were comprehensive and that would include future claims. The Supreme Court squelched that effort in *Amchem* and *Ortiz*, saying that there were conflicts of interest and inadequate representation.

Fast-forward two years to the Fen-Phen settlement class action, in which Wyeth and the lead plaintiffs' lawyers attempted to negotiate a comprehensive resolution of that diet drug litigation. In order to deal with the *Amchem* problems, they made it much easier for claimants to enter the system and much easier for claimants to exit the system, by including a series of intermediate and back-end opt-out opportunities in the class settlement. At the time, it seemed like a brilliant solution to the *Amchem* problem, a way to achieve global resolution while providing some of the "structural assurance" of fairness the Supreme Court demanded.[10] In hindsight, we know what happened to Wyeth. The number of claims vastly exceeded expectations, partly because of fraudulent claims, and the number of opt-outs was also greater than expected. Wyeth ended up not getting the peace that it thought it had bargained for.

Now fast-forward to last November and the Vioxx master settlement agreement. Merck was looking to do a comprehensive resolution. Plaintiffs' lawyers were on board for that, and they knew they couldn't do a class action given the constraints of *Amchem*, so they negotiated a non-class mass aggregate settlement. But in an effort to make it comprehensive and to avoid the problems that plagued the fen-phen settlement, they instituted not only a series of gates to avoid fraudulent claims, but also ethically problematic provisions about lawyers having to recommend the settlement to 100 percent of their clients and purporting to require lawyers to withdraw from representing clients who declined the settlement.

For what? These over-reactions in attempts to settle all occurred in the search for the Holy Grail of comprehensive resolution—something that we still haven't obtained in asbestos, and something that I suggest need not be the goal in most mass torts.

Justice Freedman raised as a source of concern that the injustice we see in mass tort litigation is exactly the same sort of injustice we see in ordinary

10. *Amchem*, 521 U.S. at 627.

tort litigation.[11] I would like to give that a somewhat more idealistic spin: the problem of mass litigation is that it holds out the possibility of *greater* justice than we are likely to achieve in individual litigation. Some of the greatest injustices in individual litigation are where you have an actual breach of duty that causes harm, but a plaintiff cannot bring the claim, either because the claim is not economically viable or because the lawyer can't litigate on an even field with the defendant. And the other injustice we see in individual litigation is vastly different results for similarly situated claimants. Mass litigation, whether through adjudications or private settlements, holds out the promise of more consistent and fair allocation. The hope in mass litigation is that we can do things better than in individual litigation, and one of the tragedies of asbestos is the promise that was never realized.

11. *See* Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 517 (2008); Helen Freedman, Judicial and Practical Perspectives: Transcript of Helen Freedman 34 (Jan 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).