PUBLIC AND PRIVATE LAW PERSPECTIVES: TRANSCRIPT OF PROFESSOR RICHARD NAGAREDA

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PROFESSOR NAGAREDA: It's a real pleasure to share the podium with so many other people whose writings have contributed so much to my learning about mass torts. And thank you, especially, to the students at Southwestern and the whole law school administration for putting together this event. We're talking here about what I would describe as a kind of awkward intersection of "public" and "private" in the law of mass torts. Whenever we use the terms "public" and "private" in scholarly discourse, there's a certain amorphousness to the categories. But what I hope to demonstrate is that, by thinking about mass torts in these terms with a bit more specificity, we can sketch out the landscape and direction for the law in the twenty-first century. So, let me start with a couple of observations that I think should be broadly shared.

The first observation is that the endgame of mass torts is some manner of settlement that is broadly encompassing, if not necessarily a truly global or all-encompassing settlement. The basic structure of the settlement is also relatively familiar. The notion is to shift claims out of the conventional tort system into some sort of privatized and largely administrative compensation grid.

The second observation that I also think is widely shared—and we've been reminded of this by Judge Rothstein's remarks[1]—is that a great deal of the debate today, certainly in the asbestos area and I think in mass torts more generally, is a debate about how to legitimize the peace arrangement. How do we legitimize the settlement, in short? What is it exactly that gives the settlement arrangement the authority to replace the preexisting rights of

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1. *See* Judge Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733 (2008).

claimants in tort with some new set of rights set forth in some manner of settlement arrangement?

Based on the asbestos litigation and, indeed, a number of other mass torts, we can start to sketch out a menu of arrangements for the making of peace, if you will. And if we lay out the arrangements from left to right in our minds, the menu highlights the notions of "private" and "public" in this area.[2] So, on the left side, we have "private" arrangements grounded in notions of contract as the basis for the binding effect of the settlement. And, here, I mean "contract" understood in much the same way as the common law of contracts—that is, actual, individual, affirmative, autonomous consent. And, indeed, settlement agreements in individual lawsuits, even outside of the mass tort context, are literally contracts in the ordinary common-law sense.

On the opposite side—on the right side, if one were to visualize the menu spatially—we have overtly "public" arrangements, which consist literally of public law or legislation. Here, the source of authority is consensual in nature, but the consent is more ephemeral—much different than in the private law of contracts. We're not talking about actual individualized consent. We're talking about consent, if at all, that flows from some underlying delegation of authority to Congress. The important point is this: it turns out, for reasons that we've already hit upon today, that we don't see the pristine worlds of contract and legislation very often in the mass tort area and, certainly, no longer in asbestos. Individual settlements don't buy much in the way of peace; and Congress steps in only exceedingly rarely to displace litigation with some sort of compensation scheme. The 9/11 Fund is the exception in this regard.[3] The result is that the contested terrain is the terrain in the middle. And the terrain is contested precisely because it involves a curious and not well-theorized mixture of private contractual notions and public legislative ones.

So what does all of this tell us about where things stand and what does this tell us about the future direction of the law of mass torts and asbestos specifically? Three things, I think.

First, we have three nominally different bodies of law governing these middle arrangements: the law of legal ethics directly speaking to what we call aggregate settlements; the law of civil procedure concerning class

2. The notion of a menu or continuum of peacemaking arrangements that range from notions of private contract to ideals of public legislation is more extensively developed in Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008).

3. On the workings of the 9/11 Fund, see generally KENNETH R. FEINBERG, WHAT IS LIFE WORTH? (2005).

actions and class settlements; and bankruptcy law, literally the Bankruptcy Code, dealing with peacemaking through bankruptcy. I would suggest, however, that we ought to understand these various bodies of law, at least insofar as they apply in the mass tort context, as being much more contiguous and much more overlapping in nature. All of them, at their core, are struggling with how to legitimize an exercise of coercive power.

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. Why have we in the law bothered thinking for so long about how to legitimize these sorts of settlement arrangements? I submit that the driving intuition is that they have a considerable potential, especially in asbestos, but in other areas as well, to be value-generating transactions for both sides of the litigation as well as for society as a whole. That is why it is worth the legal system's time, and our time, to sort out these arrangements. Value-generation—the capacity of these deals to create wealth that would not otherwise exist—is directly related to the peace that the deal actually delivers and, hence, to the coercive power that it exercises.

Second, developments in one part of the middle terrain have ripple effects to other parts. This is an especially important observation, I think, when we're speaking here today more than a decade after the Supreme Court's 1997 decision in *Amchem Products v. Windsor*.[4] *Amchem* remains controversial in the law of class actions. The important point is that making class settlements nearly impossible to do in the mass tort area—as *Amchem* effectively does—will not choke off the desire for peace and closure. Rather, what is does is to push those efforts into the proximate portions of the menu on both the left and the right.

So, the major development in asbestos litigation in the post-*Amchem* period is the movement to the right—from class settlements to prepackaged reorganizations under § 524(g) of the Bankruptcy Code.[5] The movement in the other direction is apparent in the Vioxx litigation, where we see the use of contracts between Merck and the major plaintiffs' law firms in that area of litigation. All of this is an unstable equilibrium, in my view. And it's unstable for the following reason: because the law effectively is saying to people something that should sound rather odd when you put it all together. It says: "Look, these are big business deals. These are multi-billion dollar transactions. And we'll give you two basic options: you can put the company into bankruptcy, and you might have to develop a somewhat more

4. 521 U.S. 591 (1997).

5. 11 U.S.C. § 524(g) (2000).

friendly relationship with Joe Rice in order to do it. And what you get there is an Article I judge. Or your other option is that you can explore the boundaries of legal ethics by using contracts along the lines of the Vioxx example. But the one thing you cannot do—the one thing that is basically off the table post-*Amchem*—is actually to present the deal as an Article III case in the aggregate before an Article III judge positioned to apply a relatively well-elaborated body of procedural law governing class actions. You can't do that." I think that's unstable ultimately, in the long run.

Third and finally, much of the debate here over how to legitimize the coercive force of the deal is, I think, a debate ultimately about due process. What do we really want to insist upon before we are prepared to say to people—as we must in any sort of settlement arrangement—"You can no longer sue. You get the privatized compensation grid." Here's a forward-looking thought on that. The hard job for mass tort law today is to rethink the process due in a manner that is much less closely tied up with conventional notions of lawyer-client relationships and all of the individual autonomy that's associated with them. Our job consists of translating—adapting to the mass torts context—a rather different set of due process notions: ideas drawn a bit more from the public side of the menu. Legislation is legitimized not through individual consent in the sense of the common law of contracts and not in the sense of legal ethics. It's legitimized, if at all, through a much larger set of ongoing arrangements that basically tie the interest of the people who are exercising governing power roughly and imperfectly to the interests of those over whom they are asserting a power to govern.

So what does that mean? I think it helps us to pinpoint that one major problem with peacemaking efforts in mass tort litigation is precisely their one-shot nature—the notion that the peace arrangement is going to be an ongoing one, especially when you're talking about latent disease claims, but that the deal is largely a one-shot arrangement for the people who are exercising governing power, which is to say the lawyers involved. One possible approach here, to which I have alluded in my book,[6] is to use mechanisms like the fee calculation to *extend* the relationship between future claimants and the lawyers who purport to bargain on their behalf. And the reason for this stems from an underlying description of what is really going on when we engage in attempts at comprehensive settlement or at least broadly encompassing settlements. What is going on is that counsel on the plaintiffs' side are engaged in a particular kind of leveraging. They are leveraging their representation of existing claims into the assertion of a

6. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT ch. 11 (2007).

power to bargain on behalf of claimants whom they expect to emerge over time—persons who are not their clients and who may never become their clients in the ordinary lawyer-client sense. The leveraging here goes beyond the lines of strict, lawyer-client relationships; and the sooner we get away from thinking about these arrangements in those terms, the sooner we can start grappling with the underlying leveraging that permeates these arrangements for settlements and that possesses both the potential for gain and the potential for abuse.