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PERSPECTIVES ON MASS TORT LITIGATION INTRODUCTION, PART II

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Mass tort litigation, the civil justice system's response to a large number of claims deriving from a product or event, is one of the most dynamic, contested, and financially significant areas of tort law. Prominent examples include asbestos litigation, pharmaceutical litigation, the BP oil spill, and the suit by September 11th first responders. Using a system originally designed for individuals to resolve the claims of groups creates many challenges on both a theoretical and practical level.

The Perspectives on Mass Tort Litigation Symposium, held at the Widener University School of Law in Harrisburg, Pennsylvania, on April 16, 2013, addressed these challenges. We assembled a nationally renowned group of legal scholars, judges, and practitioners with experience representing both plaintiffs and defendants. Topics ranged from the theories (or lack thereof) underlying mass tort litigation, emerging issues in the practice of

* Associate Professor, Widener University School of Law. I am grateful to the administration and faculty for their support of this symposium, and to Amaris Elliott-Engel, Mary Kate Kearney, Randy Lee, and Susan Raeker-Jordan for moderating the panels. I am particularly grateful to the Coalition for Litigation Justice for its sponsorship and to Mark Behrens for the crucial role he played in organizing the event. Scott Cooper also offered helpful suggestions.

As usual, the *Widener Law Journal* and Sandy Graeff did a terrific job executing the event. Finally, I thank the participants: Mike Green, Deborah Hensler, Linda Mullenix, Aaron Twerski, Thurbert Baker, John Beisner, Tobias Millrood, Victor Schwartz, Judge Eduardo Robreno, Nicholas Vari, Nancy Winkler, Mark Behrens, Scott Cooper, Todd Brown, Bruce Mattock, William Shelley, Sheila Scheuerman, and Byron Stier.

mass torts, Pennsylvania-specific civil justice issues, asbestos-related bankruptcy, and ethics in the mass tort context.

The first piece in this issue,[1] by Aaron Twerski and Lior Sapir,[2] continues a discussion from the first panel at the symposium. Twerski and Sapir are concerned about the thesis of a recent article by Michael D. Green and Joseph Sanders,[3] that courts in toxic tort cases are and should be deciding issues of admissibility of expert evidence based more on the sufficiency of the evidence than on the *Daubert* factors. Twerski and Sapir acknowledge that some courts are behaving as Green and Sanders describe.[4] The authors, however, believe that the sufficiency of the evidence approach undermines *Daubert*'s purpose of preventing questionable scientific evidence from being considered by juries.[5]

Twerski and Sapir state that the sufficiency of the evidence test used when ruling on a motion for summary judgment is the

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[1] Volume 23, Issue 1 of the *Widener Law Journal* also contained articles from the symposium: Christopher J. Robinette, *Introduction*, 23 WIDENER L.J. 47 (2013), Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander*," 23 WIDENER L.J. 59 (2013), Eduardo C. Robreno, *The Federal Asbestos Products Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013), Byron G. Stier, *The Sale and Settlement of Mass Tort Claims: Alternative Litigation Finance and a Possible Future of Mass Tort Resolution*, 23 WIDENER L.J. 193 (2013), Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229 (2013), Sheila B. Scheuerman, *Mass Tort Ethics: What Can We Learn from the Case Against Stanley Chesley?*, 23 WIDENER L.J. 243 (2013), Nicholas P. Vari & Michael J. Ross, *In a League of Its Own: Restoring Pennsylvania Products Liability Law to the Prevailing Modern "Attitude" of Tort Law*, 23 WIDENER L.J. 279 (2013), and S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013).

[2] Aaron D. Twerski & Lior Sapir, *Sufficiency of the Evidence Does Not Meet the* Daubert *Standards: A Critique of the Green-Sanders Proposal*, 23 WIDENER L.J. 641 (2014).

[3] Michael D. Green & Joseph Sanders, *Admissibility Versus Sufficiency: Controlling the Quality of Expert Witness Testimony in the United States* (Wake Forest Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 2016468 & Univ. of Houston Law Ctr., Pub. Law and Legal Theory Research Paper Series, Paper No. 2016468), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016468.

[4] Twerski & Sapir, *supra* note 2, at 641 n.5.

[5] *Id*. at 649-50.

same test that Green and Sanders would have courts use to make a *Daubert* determination about whether evidence is admissible on the issue of causation.[6] This, they argue, puts the cart before the horse because the sufficiency issue can only be raised once there is a determination of what qualifies as "evidence."[7] As an example of the problem caused by the sufficiency of the evidence standard, Twerski and Sapir point to cases alleging the drug Parlodel, prescribed as a preventive of physiological lactation (PPL) for women who either could not or did not want to breast feed, caused seizures, strokes, and cardiovascular problems.[8] Although most courts rejected evidence that Parlodel caused the plaintiffs' injuries, several courts admitted such evidence and allowed the cases to go to trial. Given the weakness of the causation evidence[9] and the danger that other courts will find such evidence admissible in other toxic tort cases, Twerski and Sapir argue the sufficiency of the evidence approach fails to function as effectively as would a proper *Daubert* analysis.

In the second article, Michael Green and Joseph Sanders respond to Twerski and Sapir's concern.[10] Green and Sanders begin by narrowing the differences between them and Twerski and Sapir. First, they acknowledge, because of cost, the importance of screening cases at the pretrial stage.[11] Next, Green and Sanders state that the *Daubert* factors may be helpful in a limited number of cases, though very rarely in toxic tort cases.[12] Finally, Green and Sanders note Twerski and Sapir's concession regarding the descriptive nature of their claim and lack of an attempt to dispute that descriptive claim.[13] Thus, the gist of Twerski and Sapir's opposition regards the normative claim that sufficiency of the evidence is a good standard for courts to use on the admissibility of expert evidence. Specifically, Twerski and Sapir are most

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[6] *Id*. at 647-48.
[7] *Id*.
[8] *Id*. at 652-53.
[9] *Id*. at 653-54.
[10] Michael D. Green & Joseph Sanders, *In Defense of Sufficiency: A Reply to Professor Twerski and Mr. Sapir*, 23 WIDENER L.J. 663 (2014).
[11] *Id*. at 664.
[12] *Id*.
[13] *Id*. at 664-65.

concerned about the possibility of false positive determinations of admissibility.[14]

Green and Sanders argue that Twerski and Sapir's concern really relates to the standard of proof.[15] The standard in toxic tort cases is a mere preponderance of the evidence. Admissibility determinations are tied to the standard of proof.[16] Thus, the sufficiency of the evidence approach allows judges to screen from the jury any evidence that could not create a reasonable inference of causation, as judged by the preponderance of the evidence.[17] The *Daubert* factors are largely irrelevant to this inquiry and do not necessarily exclude any additional evidence. Green and Sanders conclude that what Twerski and Sapir advocate, without authority, is a higher standard of proof for toxic tort cases.

The next two articles feature opposing views on asbestos trust transparency.[18] Many of the primary historical asbestos defendants are bankrupt and established trusts in order to compensate current and future asbestos victims. In 2008, panelist William P. Shelley co-authored an article with Jacob Cohn and Joseph Arnold advocating more transparency between these trusts and the tort system.[19] In that piece, the authors argued that transparency was required to ensure that defendants in the tort system do not pay more than their share of a plaintiff's claim. Specifically, the authors asserted transparency was needed to provide information for the proper apportionment of fault, accurate apportionment of judgment reduction credits, and as a check against fraudulent claiming practices.[20] In their contribution to the symposium, the authors update their article and continue to champion transparency.[21]

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[14] *Id*.

[15] *Id*. at 666.

[16] Green & Sanders, *supra* note 10, at 668.

[17] *Id*.

[18] For more on this topic, see S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013).

[19] William P. Shelley, Jacob C. Cohn, & Joseph A. Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. OF BANKR. LAW & PRAC. 257 (April 2008).

[20] William P. Shelley, Jacob C. Cohn, & Joseph A. Arnold, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other*

Since 2008, there have been several important developments in the area. Two jurisdictions—Ohio and Oklahoma—have passed laws requiring greater transparency.[22] Congress debated a bill on transparency, the FACT Act,[23] which passed in the House of Representatives.[24] Moreover, courts are supporting discovery of trust information in tort cases, including by standing case management orders.[25] On the other hand, the authors note that three practices highlight the need for additional transparency. First, "different plaintiffs' law firms contract with each other to divide responsibility for submitting trust claims and conducting civil litigation."[26] This allows the civil litigation lawyer to assert lack of knowledge of trust claims. Second, when suppression of the existence of trust claims is exposed, lawyers for plaintiffs downplay the importance of claims by arguing that "deferred and/or unsigned claims are not evidence of exposure to the bankrupt entities' products."[27] Finally, the authors allege "plaintiffs are purposefully delaying submission of trust claims until after the conclusion of their tort claims."[28] The authors cite cases that demonstrate their points, including, most prominently, the recent *In re Garlock Sealing Technologies, LLC* case,[29] in which the court stated that plaintiffs and their lawyers withheld "evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[30]

In their response piece, panelist Bruce Mattock and co-authors Andrew Sackett and Jason Shipp focus specifically on the federal

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Changes in the Landscape Since 2008, 23 WIDENER L.J. 675, 675-78 (2014) (describing the previous article).

[21] *Id*.

[22] *Id*. at 696-701.

[23] H.R. 982, 113th Cong., § 2 (2013).

[24] Shelley, Cohn, & Arnold, *supra* note 20, at 702.

[25] *Id*. at 702-09.

[26] *Id*. at 681.

[27] *Id*. at 682.

[28] *Id*.

[29] *In re* Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

[30] Shelley, Cohn, & Arnold, *supra* note 20, at 683 (quoting *In re Garlock Sealing Techs., LLC*, 504 B.R. at 73).

and state legislation.[31] After describing the basics of asbestos trusts,[32] the authors attack the gist of the transparency argument: "Trust claims have been discoverable in many jurisdictions since at least the mid-2000s."[33] Beginning with the federal (FACT Act) proposal, the authors reject the proffered justifications for the legislation. The authors provide that standard justifications for the federal law are: (1) to protect future claimants, (2) to identify fraudulent or exaggerated claims, (3) to allow judgment defendants to obtain set-off credits, and (4) to establish the debtor company was partly or fully responsible for the plaintiff's injuries.[34] According to the authors, none of these rationales justify the FACT Act. First, future claimants are already protected by the structure of the trusts themselves; Congress required the appointment of a Future Claims Representative (FCR) to guard the rights of future claimants and there is no relevant evidence that FCRs are ineffective.[35] Second, the authors argue that evidence of fraud is restricted to a few cases; it is not widespread.[36] On the third point, the authors quote a prominent defense attorney for the point that set-off information only becomes relevant if there is a verdict;[37] the authors state that in asbestos cases, as in tort cases generally, the vast majority of claims settle.[38] Finally, on the fourth point, the authors note that the evidentiary standard for trusts is weaker than that of the tort system, and, importantly, discovery of the trusts is already available.[39] Not only would the FACT Act fail, therefore, to accomplish these objectives, it also has negative side effects. It would require trusts to engage in costly work not aimed at compensating injured victims and it would harm plaintiffs by

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[31] Bruce Mattock, Andrew Sackett, & Jason Shipp, *Clearing Up the False Premises Underlying the Push for Asbestos Bankruptcy Trust "Transparency*," 23 WIDENER L.J. 725 (2014).

[32] *Id*. at 734-46.

[33] *Id*. at 748.

[34] *Id*. at 757-67.

[35] *Id*. at 757-61.

[36] *Id*. at 761-63.

[37] Mattock, Sackett, & Shipp, *supra* note 31, at 764-65.

[38] *Id*. at 751-53.

[39] *Id*. at 765-67.

making their personal information available to people who have no need for it.[40]

The state legislation is explicitly premised on relieving current tort defendants of potential liability.[41] The authors describe the state legislation as allowing defendants to force plaintiffs to file claims with certain potentially relevant trusts or file a response seeking a determination by the court that the claims need not be filed.[42] This advantages defendants in two ways. First, it forces plaintiffs to create evidence helping defendants demonstrate other potential sources of exposure.[43] Second, it allows defendants to delay the proceedings.[44] The authors argue that transparency is not the goal; the legislation is another variety of tort reform.

In the final piece,[45] Scott Cooper and Lara Antonuk analogize tort reform favoring injurers to "The Royal Nonesuch," a scam presented as a play in *The Adventures of Huckleberry Finn*.[46] Two characters identifying themselves as "the duke" and "the dauphin" take revenge on a town in Arkansas for the poor reception of their version of one of Shakespeare's plays by putting on "The Royal Nonesuch."[47] In front of a full house, the dauphin appeared on stage in nothing but body paint and his "performance" lasted but a few minutes. Unwilling to admit they had been tricked, the audience told their friends and neighbors the play was great. The second night, the rest of the town saw the "play."[48] On the third night, the townspeople were going to take their revenge with rotten cabbages and eggs, but the duke and dauphin skipped town with the money they "earned" from the townspeople.[49] Cooper and Antonuk argue that those advocating tort reform have put on "The Royal Nonesuch" for the people of Pennsylvania.

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[40] *Id*. at 753-56.
[41] *Id*. at 770.
[42] *Id.* at 769.
[43] Mattock, Sackett, & Shipp, *supra* note 31, at 770.
[44] *Id*. at 771.
[45] Scott B. Cooper & Lara Antonuk, *The Royal Nonesuch: How Tort Reformers Are Pulling One Over on Pennsylvania*, 23 WIDENER L.J. 773 (2014).
[46] MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).
[47] *Id*. at 201-02.
[48] *Id*. at 203.
[49] *Id*.

Cooper and Antonuk cite three examples of tort reform hurting or potentially hurting Pennsylvanians: (1) reform of joint and several liability; (2) potential venue reform; and (3) potential caps on damages. First, in 2011, Pennsylvania altered the common law rule of joint and several liability, by which an injured plaintiff could be made whole by any defendant legally causing the injuries. In its place, Pennsylvania adopted, with limited exceptions, several liability, by which each defendant is solely responsible for the amount of liability assigned to it by a jury and a plaintiff accepts any shortfall due to a defendant's inability to pay. Cooper and Antonuk argue there are many cases in which this reform would work an injustice.[50] Moreover, despite promises, no insurance company has reduced premiums and no employer has hired an employee or added any jobs because of the reform.[51] Second, proposed venue reform, according to Cooper and Antonuk, is outside the powers of the General Assembly, not necessary, and would lead to logistical problems and harm to injured victims.[52] Third, caps are grossly unfair to injured victims, particularly children, those who do not work outside the home, and the elderly.[53] Moreover, caps are inconsistent with section 21 of article III of the Pennsylvania Constitution.[54] What Pennsylvania needs instead of these three reforms is "pro-victim legislation;" among other proposals, the authors champion reforms to allow hedonic damages, allow claims for loss of filial consortium, move to pure comparative negligence, and raise the mandatory liability limits for motor vehicle insurance coverage.[55] The authors conclude by urging Pennsylvanians not to be taken advantage of any further.

We hope these articles are not just intellectually engaging, but will guide lawyers, judges, and legislators addressing the future of mass torts.

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[50] Cooper & Antonuk, *supra* note 45, at 781-83.
[51] *Id*. at 780-81.
[52] *Id*. at 795-99.
[53] *Id*. at 799.
[54] *Id*. at 800.
[55] *Id*. at 803-05.