

SYMPOSIUM

PERSPECTIVES ON MASS TORT LITIGATION

INTRODUCTION

Christopher J. Robinette*

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 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 practitioners Victor Schwartz and Mark Behrens, chronicles one of the most significant mass

* 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.

torts, asbestos litigation, after the bankruptcies of the historical asbestos defendants.² In tracing the post-bankruptcies history, Schwartz and Behrens note the accuracy of a remark by former asbestos plaintiffs' lawyer Richard "Dickie" Scruggs, who commented that asbestos litigation has become an "endless search for a solvent bystander."³ Schwartz and Behrens assert that liability in asbestos cases should only be imposed under general principles of tort law: breach of duty, product defect, causation in fact, proximate causation, and damages.⁴ Even before the bankruptcies, Schwartz and Behrens state that plaintiffs' lawyers attempted to extend liability in asbestos cases to remote defendants under market share liability,⁵ enterprise liability,⁶ and alternative liability.⁷ Each of these theories, a departure from established tort principles based on very specific fact patterns, was widely rejected as inapplicable to the facts of asbestos litigation.⁸

Since the bankruptcies of virtually all primary historical defendants, according to Schwartz and Behrens, asbestos plaintiffs' lawyers have tried several novel theories. One such theory is the "any exposure" theory of causation. Plaintiffs' experts who espouse this theory often opine that any occupational or product-related exposure to asbestos is a substantial contributing factor to the plaintiff's harm. For years, many courts rejected this theory,⁹ applying the now familiar "frequency, regularity, and proximity" test developed by the Fourth Circuit Court of Appeals in *Lohrmann*

¹ Issue Number 3 of the *Journal* will also include articles from the symposium.

² Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander"*, 23 WIDENER L.J. 59 (2013).

³ *Id.* (citing Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 MEALEY'S ASBESTOS BANKR. REP. 5 (Feb. 2002)).

⁴ *Id.* at 62.

⁵ *Id.* at 63-66. Market share liability originated in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

⁶ *Id.* at 66-68. Enterprise liability originated in *Hall ex rel. Hall v. E.I. du Pont de Nemours & Co.*, 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

⁷ *Id.* at 68-69. Alternative liability originated in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

⁸ Schwartz & Behrens, *supra* note 2, at 63-69.

⁹ *Id.* at 73-74.

*v. Pittsburgh Corning Corp.*¹⁰ More recently, courts are rejecting the "any exposure" theory of causation by applying a more rigorous analysis of the concept of dose and its role in substantial factor causation in asbestos cases.¹¹ Another theory advanced by plaintiffs involves "take home" exposure cases against premises owners. In these cases, owners of premises where there was asbestos are sued for failing to warn the spouses and family members of workers about the risks of exposure to asbestos carried home by workers on their person and clothes.¹² Most courts have rejected such claims, but the authority is split.¹³ Jurisdictions in which the duty analysis focuses on the relationship between the parties and less on foreseeability hold there is no duty to warn.¹⁴ In jurisdictions where foreseeability is the sole or primary factor in the duty analysis, the issue becomes the time period in which the exposure occurred.¹⁵ Courts typically find no liability for exposures occurring before the first study presented in October 1964 and published in 1965, or at least after 1972, showing an association between asbestos disease and fibers brought home from the workplace.¹⁶ A third theory being advanced is that manufacturers owe a duty to warn about asbestos-containing replacement parts or external thermal insulation manufactured by another party and affixed to the defendant's product post-sale.¹⁷ Almost every court ruling on this theory has rejected it.¹⁸ Schwartz and Behrens conclude: "Problems arise . . . where [generally accepted principles of tort law] are ignored, normal rules of duty are not applied, or proof of causation is minimized."¹⁹

The symposium's Distinguished Address was delivered by the Honorable Eduardo C. Robreno, United States District Judge from the Eastern District of Pennsylvania. Since October 2008, Judge

¹⁰ Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

¹¹ Schwartz & Behrens, *supra* note 2, at 73-74.

¹² *Id.* at 79-80.

¹³ *Id.* at 80-81.

¹⁴ *Id.* at 80.

¹⁵ *Id.* at 83.

¹⁶ *Id.* at 83-84.

¹⁷ Schwartz & Behrens, *supra* note 2, at 88.

¹⁸ *Id.* at 88-90.

¹⁹ *Id.* at 94.

Robreno has presided over the Federal Asbestos Multidistrict Litigation (MDL-875).²⁰ Around the time Judge Robreno was appointed as presiding judge, 51,818 cases were pending in MDL-875. Over the 5 years that Judge Robreno has presided, over 180,000 cases involving an excess of 10 million claims have been processed by the court. As of October 1, 2013, the number of cases has been reduced to less than 3,000.²¹ Judge Robreno has announced that MDL-875 is in its final phase and will likely be concluded in the near future. In this article, Judge Robreno explains how he was able to achieve such successful results.

Judge Robreno's article begins with a history of asbestos litigation.²² He then explains not only the operating principles behind his success, but the steps he took to achieve it.²³ Other efforts at efficiently managing mass tort litigation, such as the class action, focused on aggregating claims. By contrast, Judge Robreno focused on disaggregating claims. He refers to the idea as "one plaintiff-one claim,"²⁴ and the "purpose was to separate the cases so each claim against each defendant could stand on its own merit."²⁵ Judge Robreno then focused substantial resources on the litigation.²⁶ Judge Robreno's article is a "how to" for any judge facing similar challenges and should be given careful consideration under analogous circumstances.

Judge Robreno describes the payoff as "lessons learned and unlearned."²⁷ Judge Robreno cautions that something comparable to the scope and complexity of asbestos is unlikely to come again in the context of mass tort litigation. However, he proposes a "new paradigm" for the handling of other mass tort cases which may arise in the future. First, "unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases

²⁰ Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or Paradigm?*, 23 WIDENER L.J. 97 (2013).

²¹ *Id.* at 185.

²² *Id.* at 101-17.

²³ *Id.* at 126-80.

²⁴ *Id.* at 126.

²⁵ *Id.* at 127.

²⁶ Robreno, *supra* note 20, at 127.

²⁷ *Id.* at 186.

will clog the process."²⁸ Additionally, he emphasizes "one plaintiff-one claim" as "the consolidation or aggregation of large numbers of cases distorts the litigation and the settlement process."²⁹ He further provides that MDL courts should address the pretrial issues and promptly remand to transferor courts; moreover, the court must provide timely legal guidance by promptly ruling and issuing opinions on matters before the court.³⁰ To do this well, there must be sufficient judicial and administrative resources.³¹ Finally, judges must make it clear that there is no agenda to "clean house" by dismissing cases or to coerce defendants into settlements.³² When defendants see a decline in the number of cases they must defend, due to an early assessment of the merits of each claim, and plaintiffs see more meritorious claims move to the head of the line, as relatively unmeritorious cases are dismissed, both sides will support the court's program.³³

In his piece, Byron Stier argues that litigation financing may provide substantial benefits as an alternative method to resolve mass tort disputes.³⁴ Stier begins with a brief history of the two primary methods of resolving mass tort personal injury cases: the class action and the non-class mass settlement. Both are problematic. Class actions, in which a court certifies a group of claimants can be represented as if they were a single claimant, were popular in the 1980s and into the 1990s.³⁵ Courts, however, began to question whether individual issues predominated in a case, meaning a class could not be certified under Federal Rule of Civil Procedure 23.³⁶ In 1997, the Supreme Court of the United States struck a blow to the use of class actions by rejecting the use of class certification for asbestos in *Amchem Products, Inc. v.*

²⁸ *Id.*

²⁹ *Id.* at 187.

³⁰ *Id.* at 187-88.

³¹ *Id.* at 187.

³² Robreno, *supra* note 20, at 188-89.

³³ *Id.* at 188-89.

³⁴ 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).

³⁵ *Id.* at 196.

³⁶ *Id.* at 198.

Windsor.³⁷ The Court's ruling made it clear that the use of class actions to resolve mass tort personal injury cases would be severely limited.

Without the class action vehicle, a defendant was required to obtain a settlement agreement and waiver from each individual plaintiff to resolve mass tort personal injury cases.³⁸ One way to manage the large number of claimants is to create a fund, allow claimants to recover from the fund, and claimants must sign a waiver in return for compensation. To improve the efficiency of such a process, defense lawyers sought to strike package deals with certain plaintiffs' counsel, settling many claims at once.³⁹ The most noted use of this procedure occurred in the \$4.85 billion Merck Vioxx settlement in 2007.⁴⁰ The settlement, however, was not binding on anyone unless a high percentage of plaintiffs agreed to it. Moreover, plaintiffs' counsel agreed to recommend settlement to all of their clients and withdraw from representing any client who refused to participate.⁴¹ Stier, citing the scholarship of Howard Erichson and Ben Zipursky,⁴² notes the ethical problems involved in compromising independent judgment on a client's behalf and impeding the client's right to settle his or her case. Moreover, Stier argues that, even without the particular provisions in the Vioxx settlement, mass settlements are subject to concerns about conflicts of interest and inadequate representation.⁴³

A promising alternative, Stier continues, is to allow the sale of mass tort claims. Such a sale would have significant benefits in mass tort cases. Injured plaintiffs would receive needed compensation more swiftly.⁴⁴ Because of market incentives, the amount claimants receive might be bolstered as well. In addition, the presence of financiers would, Stier argues, improve the problem of adequate representation that affects mass action

³⁷ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

³⁸ Stier, *supra* note 34, at 203.

³⁹ *Id.*

⁴⁰ *Id.* at 204.

⁴¹ *Id.* at 206.

⁴² Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011).

⁴³ Stier, *supra* note 34, at 207-11.

⁴⁴ *Id.* at 214-15.

settlements currently. By purchasing claims from a lot of claimants and consolidating them, the concern of representing multiple claimants by one lawyer is eliminated.⁴⁵ Stier acknowledges there are potential problems that must be overcome;⁴⁶ ultimately, he concludes the approach is a step forward for mass tort litigation.⁴⁷

Like Stier, the Honorable Thurbert Baker discusses litigation financing. Unlike Stier, Baker focuses on concerns about the practice.⁴⁸ Baker notes that concerns about litigation financing come from multiple stakeholders. Business interests are afraid that outside financing will "reduce the opportunity for fair and efficient settlements of disputes."⁴⁹ Plaintiffs' attorneys are worried about the practice's effect on the attorney-client privilege and critical case decisions, such as whether and when to settle.⁵⁰ Consumer groups are concerned that the practice preys on the vulnerable.⁵¹ Indeed, Baker provides several examples of consumers borrowing money from lenders and paying exorbitant amounts of interest. In some cases, consumers owe more than the amount of their recovery.⁵²

Baker argues the risks are more serious in the context of mass tort litigation because litigation financing exacerbates the existing problem of plaintiffs not having a sufficient role in the case and already recovering miniscule amounts even in successful litigation.⁵³

A major issue is whether litigation financing companies are subject to consumer protection laws. Financiers argue such laws are not applicable to them because their service is "non-recourse," meaning the plaintiff does not pay unless her legal claim is successful.⁵⁴ Baker, as the former Attorney General of Georgia, is

⁴⁵ *Id.* at 222-23.

⁴⁶ *Id.* at 217-22, 224-27.

⁴⁷ *Id.* at 227-28.

⁴⁸ Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229 (2013).

⁴⁹ *Id.* at 231.

⁵⁰ *Id.*

⁵¹ *Id.* at 231-33.

⁵² *Id.* at 237-38.

⁵³ *Id.* at 239-40.

⁵⁴ Baker, *supra* note 48, at 233-34.

concerned about this loophole. He concludes: "To the extent state legislatures wish to permit lawsuit lending, lenders should—at the very least—be subject to state usury, truth-in-lending, and other consumer protection laws."⁵⁵

Sheila Scheuerman examines ethics in the mass tort context, drawing lessons from the recent disbarment of famed mass tort lawyer Stanley Chesley.⁵⁶ Scheuerman begins by briefly reviewing Chesley's career, including his early successes and his participation in almost every major type of mass tort.⁵⁷ She carefully chronicles the fen-phen (diet drug) case that cost Chesley his law license.⁵⁸ Chesley was one of four lawyers representing a group of plaintiffs in a case that started as a class action, but was settled instead as a non-class mass action. The case was settled for \$200,450,000 and distribution of the sum was left to the plaintiffs' lawyers.⁵⁹ No notice of the settlement was provided to the individual clients or the class members. Instead, staff members for the law firm of Chesley's co-counsel called the individual clients to obtain their consent for specific amounts of money that were smaller than the amounts provided on an itemized schedule to the defendant.⁶⁰ Each client accepted the settlement. The lawyers' contingent fee contracts entitled them to approximately a third of the settlement. Instead, they took over half of it, convincing the judge to award an attorneys' fee of forty-nine percent and creating a *cy pres* trust for a portion of the money.⁶¹

Scheuerman notes the explanation for such conduct could be as basic as greed, but she also draws three lessons applicable to all mass tort lawyers from Chesley's disbarment. First, client identification is crucial.⁶² Client rules are different in the class action and non-class mass action contexts. In the latter, the attorney has an attorney-client relationship with each individual

⁵⁵ *Id.* at 241.

⁵⁶ Sheila B. Scheuerman, *Mass Tort Ethics: What Can We Learn From the Case Against Stanley Chesley?*, 23 WIDENER L.J. 243 (2013).

⁵⁷ *Id.* at 245-57.

⁵⁸ *Id.* at 249-57.

⁵⁹ *Id.* at 250-51.

⁶⁰ *Id.* at 252-53.

⁶¹ *Id.* at 253-55.

⁶² Scheuerman, *supra* note 56, at 258.

plaintiff. Second, and relatedly, do not confuse a class action for a non-class mass action.⁶³ Chesley attempted to justify taking a higher percentage of the settlement and the use of a *cy pres* trust based on rules applying to class actions. At the time of settlement, however, the case was no longer a class action and general rules applicable to individual clients applied. Third, a lawyer is responsible for the ethical lapses of co-counsel.⁶⁴ Chesley argued he should not be responsible for such ethical lapses, but the rules on fee-splitting and aggregate settlements are clear. In a fee-splitting context, counsel can either divide fees in proportion to the work performed or assume joint responsibility.⁶⁵ By choosing joint responsibility, he was responsible for the ethical lapses of his co-counsels; one of which was not keeping the clients informed of fee-sharing and obtaining consent,⁶⁶ and one was not obtaining consent from each client for the aggregate settlement.⁶⁷ At a minimum, the latter requires each client to be informed of: (1) the total amount of the aggregate settlement; (2) the amount the individual client is receiving; (3) the amount of attorneys' fees and costs; and (4) how these sums are calculated.⁶⁸ Scheuerman concludes by suggesting the lump sum payment may have created the problem and recommends further consideration of such payments.⁶⁹

Of all general tort law applicable to mass torts, products liability is the most significant. In their piece, Nicholas Vari and Michael Ross lament the current state of products liability law in Pennsylvania and urge the Supreme Court of Pennsylvania to adopt the Restatement (Third) of Torts: Products Liability in an upcoming case raising that issue.⁷⁰ Vari and Ross argue that the

⁶³ *Id.* at 262-73.

⁶⁴ *Id.* at 273-76.

⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(1) (2013).

⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(2).

⁶⁷ MODEL RULES OF PROF'L CONDUCT R. 1.8(g).

⁶⁸ Scheuerman, *supra* note 56, at 275-76.

⁶⁹ *Id.* at 276-78.

⁷⁰ Nicholas P. Vari & Michael J. Ross, *In a League of Its Own: Restoring Pennsylvania Product Liability Law to the Prevailing Modern "Attitude" of Tort Law*, 23 WIDENER L.J. 279 (2013). The case is *Tincher v. Omega Flex, Inc.*, 64 A.3d 626 (Pa. 2013) (order granting allocator). The appeal is currently pending at No. 17-MAP-2013.

biggest problem with Pennsylvania's products liability jurisprudence is the decision to preclude a jury determination on whether a product was "unreasonably dangerous."⁷¹ Pennsylvania adopted the Restatement (Second) of Torts § 402A⁷² and its standard of "a defective condition unreasonably dangerous to the user or consumer." In 1975, however, the Supreme Court of Pennsylvania held that because considerations of "reasonableness" have no place in a jury's strict liability analysis, the issue of "unreasonably dangerous" was one of law.⁷³ Moreover, keeping all issues of reasonableness from juries, Pennsylvania has never decided whether to use a "consumer expectations" test a "risk-utility" test, or some combination thereof.⁷⁴

Additionally, Pennsylvania is one of a very small number of jurisdictions holding a defendant strictly liable for failure to warn of dangers unknown at the time of the product's sale.⁷⁵ Vari and Ross note these decisions are outliers in products liability jurisprudence and move Pennsylvania in the direction of making manufacturers into insurers of their products. The Restatement (Third) of Torts: Products Liability was completed in 1998 and has the benefit of decades of products liability wisdom that developed after the Restatement (Second) § 402A was drafted. Vari and Ross argue that Pennsylvania can achieve the "modern" attitude it trumpeted in 1966 by adopting the Restatement (Third) in *Tincher v. Omega Flex, Inc.*⁷⁶

The final piece in this issue is Todd Brown's article on the role of bankruptcy trusts in asbestos litigation.⁷⁷ Brown begins by quoting a remark by Francis McGovern that asbestos litigation is subject to the "tragedy of the commons," the idea that goods held

⁷¹ *Id.* at 281-82.

⁷² *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).

⁷³ *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), *abrogated by Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012).

⁷⁴ Vari & Ross, *supra* note 70, at 282-83.

⁷⁵ *Id.* at 283 (citing *Carreter v. Colson Equip. Co.*, 499 A.2d 326, 331 (Pa. 1985)).

⁷⁶ *Id.* at 295-97.

⁷⁷ S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013).

in common are overconsumed and underprotected.⁷⁸ Asbestos plaintiffs were "overgrazing" the assets of asbestos defendants, to the detriment of the value of the assets. As a result, many of the defendants declared bankruptcy. Many of those bankrupt defendants established trusts in order to compensate current and future asbestos victims.⁷⁹ The trusts, however, have suffered from the commons problem as well. Plaintiffs' lawyers, understandably, are doing all they can to recover for their current clients, but, in so doing, they are arguably overgrazing the trusts and solvent defendants.⁸⁰ If one is concerned about the big picture of asbestos compensation, including future claimants, the commons is a significant problem.

The commons problem in asbestos litigation is exacerbated by linkages. Brown explains that two types of linkages affect asbestos litigation: exposure and compensation.⁸¹ "Exposure linkages shift liability where plaintiffs were exposed to bankrupt and solvent defendants' products, but only exposures to solvent defendant's products are considered in determining causation and allocation of liability."⁸² In litigation, plaintiffs have incentives to focus on exposure to the products of solvent defendants and downplay exposure to bankrupt defendants' products. "Compensation linkages arise where joint liability rules transfer the unpaid liability shares of bankrupt defendants to one or more solvent co-defendants."⁸³ Thus, as more asbestos defendants become bankrupt, remaining defendants come under increasing pressure as plaintiffs focus on exposure to their products and they have to pay the shares of liability for bankrupt defendants.

It is from this perspective that Brown discusses the issue of transparency in bankruptcy trusts. To file for compensation from one of the trusts, claimants must fill out a form making a case for compensation, including information on exposure and damages. Unlike in most cases, however, basic information about trust

⁷⁸ *Id.* at 300 (citing Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1722 (2002)).

⁷⁹ *Id.* at 301-02.

⁸⁰ *Id.* at 302.

⁸¹ *Id.* at 307-12.

⁸² *Id.* at 308.

⁸³ Brown, *supra* note 77, at 311.

claims in asbestos cases is not publicly disclosed.⁸⁴ Information provided to trusts to obtain compensation is obviously relevant in an asbestos case brought by the same claimant against a different defendant, and courts have held this information is discoverable.⁸⁵ Notwithstanding discoverability, defendants often contend they do not receive these materials in the discovery process, and some plaintiffs' lawyers acknowledge that they time trust submissions to avoid discovery.⁸⁶ To resolve this problem, legislation has been introduced on a federal and state level (and passed in Ohio and Oklahoma)⁸⁷ that imposes various disclosure obligations on the trusts and tort claimants. Brown defends such legislation as a way to reduce double-claiming, ease the pressure created by the linkages, and maintain the viability of compensation for future claimants.⁸⁸

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

⁸⁴ *Id.* at 314-15.

⁸⁵ *Id.* at 325-26.

⁸⁶ *Id.* at 328.

⁸⁷ *Id.* at 331-45.

⁸⁸ *Id.* at 348-59, 361-73.