



Emerging Trends in Compensation for Widespread Losses

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Preface

In a mass consumer society where widespread losses can easily occur, the processes and procedures for providing compensation to large numbers of claimants are of considerable importance. To explore issues that affect the speed, efficiency, and fairness with which the compensation system for such losses operates in the United States, the RAND Corporation convened a conference on May 19, 2017, in Arlington, Virginia. The conference covered three topics: (1) the changing role of regulators in settlements, (2) the impact of liens on settlements, and (3) the aggregation of claims. This conference brought together stakeholders from across the legal spectrum, including judges, defense and plaintiff lawyers, representatives from the public and private sectors, and academics.

The conference had several goals:

- to facilitate communication and the exchange of information so that stakeholders can better understand how the current system is performing and the challenges it faces
- to identify the practices and strategies that can improve performance
- to identify research that would be useful to better understand the successes and shortcomings of the current system.

The conference was convened by the RAND Institute for Civil Justice (ICJ) and the RAND Center for Catastrophic Risk Management and Compensation (CCRMC) and sponsored by ICJ, CCRMC, and Tom Girardi of Girardi | Keese.

RAND Institute for Civil Justice

ICJ was founded in 1979, and it has been dedicated to making the civil justice system more efficient and more equitable by supplying government and private decisionmakers with the results of empirical analyses and analytic research.

RAND Center for Catastrophic Risk Management and Compensation

CCRMC conducts research and seeks to identify policies, strategies, and other measures that have the potential to reduce the adverse social and economic effects of natural and manmade catastrophes. CCRMC's research focuses on the following three areas:

- public-private partnerships in insurance markets for catastrophic risk
- compensation for losses following catastrophic events
- public-private coordination in disaster recovery.

Questions or comments about these conference proceedings and requests for more information about ICJ or CCRMC can be sent to ccrmc@rand.org. ICJ and CCRMC are part of

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Introduction

Events that cause widespread losses are an increasingly common feature of modern society, and these events create demand for a system that can provide just compensation to injured parties in a reasonable amount of time and with modest legal and other transaction costs. Various mechanisms have been used in the United States to resolve mass claims, including class actions under Rule 23 of the Federal Rules of Civil Procedure and multidistrict litigation (MDL) under the Multidistrict Litigation Act enacted by Congress in 1968.¹ In addition, administrative procedures that operate largely outside the courts have been used.

To better understand both emerging and ongoing issues in the resolution of mass claims through the courts, the RAND Institute for Civil Justice (ICJ) and the RAND Center for Catastrophic Risk Management and Compensation (CCRMC) convened a conference on May 19, 2017, in Arlington, Virginia (see the Appendix for the conference agenda). Based on input from informed stakeholders, RAND staff invited experts with different perspectives to participate on panels addressing the following three topics:

- the changing role of regulators in settlements
- the impact of liens on settlements
- the pros and cons of aggregating claims.

These conference proceedings summarize the key points made by both panelists and conference participants during each panel discussion.

¹ Public Law 90-926 codified at 28 U.S.C. 1407.

Panel 1. The Changing Role of Regulators in Settlements

Some observers have suggested that there has been increasingly close interplay between traditional civil litigation and regulatory enforcement actions in recent years—sometimes resulting in coordinated resolutions with arguably better outcomes for all concerned, and sometimes presenting unexpected challenges to the perhaps divergent goals of private litigants and government agencies.

The purpose of this panel was to discuss whether such a trend exists, the factors that facilitate or deter such coordination, and the potential advantages and disadvantages of close coordination between public and private legal actions.

Spectrum of Coordination Between Public and Private Litigation

Based on more than 20 years of experience, one participant observed that there are five stages on the continuum of public and private coordination in mass litigation—from separate and parallel tracks in litigation to near-complete convergence. This participant provided five examples, arranged from least to most coordination, to illustrate the point.

1. **Exxon Valdez.** The 1989 *Exxon Valdez* oil spill was an immediate and obvious mass tort situation. Everybody started simultaneously off to the races: the federal government, the state government, and private plaintiffs. It ended up being a missed opportunity for coordination. The government was able to extract substantial fines and penalties fairly early on. The private litigants ended up litigating the case through trial and then through appeal. There was no effort made to forge a total resolution of the case, and as a result, it took 20 years for the plaintiffs' class-action trial verdict to be affirmed, with greatly reduced punitive damages.
2. **Tobacco Litigation.** For the most part, public actors did not believe that it was a responsible use of public money to prosecute public claims because the tobacco defendants had a well-publicized strategy of never settling. In the case of California, the public actors turned to the private bar to litigate cases on a traditional contingent fee basis. This is an example of private funding and private prosecution of public claims—claims that belonged to the government, not to individual smokers.
3. **Deepwater Horizon.** The Deepwater Horizon spill (also known as the British Petroleum or “BP” spill) in 2010 is an example of coordination, at least at the discovery level, among the federal government prosecuting its Clean Water Act claims, the Gulf states, and private litigants with economic loss claims arising from the disaster. This level of coordination was absolutely necessary because the judge set a very aggressive timeline—there was going to be a trial on common questions within one year of the start of the MDL. Four hundred ninety-two depositions were taken in that year on multiple continents, which required the active coordination and cooperation of public and private actors. The public and private parties had the same document database, and lawyers took

turns on depositions. The cases were settled at different times within different processes, but the underlying litigation was highly coordinated.

4. **Bank of New York Mellon Foreign Exchange Transactions.** Cases were sent to the judge in the Southern District of New York as an MDL largely because, although the plaintiffs had gotten out somewhat ahead, the state attorney general had an ongoing investigation. Joint status conferences were held, and again, the parties shared discovery and took turns on depositions. Settlements were negotiated at the same time, with a lot of interaction among the participants.
5. **Volkswagen Diesel Emissions.** The Volkswagen diesel emissions case is the ultimate example of convergence of public and private litigation. There was not only discovery coordination between government agencies and private litigants, but the settlement process itself was an integrated, interrelated process. The settlement had multiple parts and aspects that were intended to operate as a single, comprehensive settlement.

Is Coordination Becoming More Common?

Participants agreed that coordination between public and private litigants is becoming more common, but that it is not new (particularly in environmental cases) and it does not happen in all cases.

One participant observed that in 2016, around 1,000 environmental and natural resources cases were resolved. Some of them were done jointly with citizens' groups and some were done jointly with the private bar. The participant noted that the model dates back to the 1980s, with Comprehensive Emergency Response Compensation Liability Act—aka Superfund—litigation, and that is where much of the current coordination between public and private litigants can be found. The participant also noted that citizen suits in the environmental arena also prompt coordination between public and private interests. This conference participant observed that the reason that coordination between public and private legal actions is common in the environmental arena is that environmental harm is almost always associated with individual harm, which brings with it individual compensation. Citing the Deepwater Horizon spill, the participant observed that it was not just losses to individuals that were being asserted, but also economic losses for states and parishes.

With up-to-the-minute news available at all times, catastrophic events are now essentially public events that develop in real time. It was observed that the 24/7 news cycle increases the pressure for a quick resolution from both public and private litigants. This requires parties (defendants in particular) to not be passive spectators or beneficiaries of litigation delay. Even if the public sector is not directly involved in a case, the public and the litigants are going to expect a reasonably quick resolution. The availability of social media and the Internet also means that people have the ability to become involved in, to interact with, and to opine upon what was traditionally litigation conducted in relative privacy.

One participant observed that courts are developing techniques that take advantage of the speed of the Internet, such as maintaining websites that are updated daily with all of a case's transcripts, orders, and schedules. The participant also noted that class members now have the

ability to reach counsel quickly and easily by email or cell phone. These developments enable people to be more than passive spectators or beneficiaries of litigation. If parties respond appropriately to public expectations—while maintaining the necessary formalities of the legal process—these large, complex, and multifaceted cases can reach adjudication or resolution in what the public considers reasonable timeframes. However, there will be little tolerance for MDL black holes or litigation that is out of step with the pace of modern life.

Factors That Prompted Coordination of Regulators and Individual Claimants in the Volkswagen Case

Although the panelists covered a wide range of recent examples of how regulators and litigants have interacted in mass litigation, the Volkswagen “Clean Diesel” emissions equipment MDL² was repeatedly discussed, in part because each of the panelists played an important role in its resolution.

From the defense perspective, the mantra from day one in the Volkswagen diesel emissions case was *global settlement*. Because there was an obvious problem and liability was not in question, the defendant wanted the problem to disappear as quickly as possible. Volkswagen is a consumer company, and continuous negative media coverage would not be good for the brand. The impact on the company’s bottom line was only going to worsen if the cases dragged out. The effect of business disruption on franchisees, customers, and employees was tremendous. In addition, the defense wanted a global settlement to avoid paying multiple times for the same loss. Because fault had been conceded, this was not a case that could be litigated. It was not a case where the company could beat the government, and then try to make a deal with the plaintiffs’ lawyers—it was a case in which a global resolution was needed as quickly as possible. The defense did *not* want this case to be like the Deepwater Horizon case, which went on for years and cost \$75 billion.

Another reason that Volkswagen wanted to simultaneously work with both the government and private parties was that it needed regulatory approval for proposed fixes to the affected vehicles. It was pointed out that it would have cost Volkswagen a fortune to buy back all the affected cars and not fix any of them. In addition, simply scrapping all the cars would not have been an environmentally friendly approach. Because regulatory approval was needed to fix the cars, the defense strategy was to deal with Environmental Protection Agency (EPA) and California Air Resources Board (CARB) issues first, then turn to consumer settlements, then to claims by the Federal Trade Commission, and finally, to resolution of criminal charges and civil penalties.

Multiple participants pointed to the importance of the judge in facilitating a global settlement. The judge was particularly successful in moving the settlement forward in this case

² For documents about the case, see U.S. District Court, Northern District of California, “In re: Volkswagen ‘Clean Diesel’ MDL,” website, undated. As of November 28, 2017: <http://www.cand.uscourts.gov/crb/vwmdl>

because he had plenary jurisdiction over everyone responsible for the various pieces of litigation and because he moved with a sense of urgency.

The defendants believed that Volkswagen was very fortunate that Judge Charles Breyer, district judge for the Northern District of California, presided over the case. One participant observed that some judges would have been more passive and allowed parties to “run wild,” but Judge Breyer saw the importance of a global resolution. The court not only issued an order appointing a plaintiffs’ steering committee, which is not an unusual step in a large-scale MDL, but the order specifically required the counsel for the United States to be active participants in every aspect of litigation. The attorneys were not just expected to show up at hearings together and share some discovery. Judge Breyer wanted the government to sit at the table and be involved in all discussions aimed at resolving some aspect of the case.

According to one participant, another approach in the Volkswagen case that may have helped induce coordination is the fact that, contrary to tendencies in these types of cases, Volkswagen “lawyered down” instead of up. A very small defense team handled the Volkswagen settlement; because the team was able to keep the issues under control and the defense side working together, the parties involved were able to arrive at a global settlement in a short amount of time. Had a large number of lawyers been involved, it is not certain that the outcome would have been the same, and the litigation certainly would not have been resolved as quickly.

One participant underscored the importance, from the plaintiffs’ perspective, of “responsible urgency.” This is something that federal judges can, and sometimes do, impress on parties, and it makes a tremendous difference in the speed and cost-effectiveness of litigation. Due to the particular circumstances of the case—environmental harm was ongoing, environmental advocates and vehicle owners were outraged, and a company was at risk—such urgency was fully appropriate. Taken together, all of the factors surrounding the case meant that it could not be litigation as usual, and the participant suggested that perhaps the new normal ought to be *no* litigation as usual. If everyone says a case is so important, then that means that, as an attorney, you should stay outside your comfort zone. This could mean, and meant in the Volkswagen case, that you work nights and weekends and internalize a sense of urgency to produce a fair outcome; to the credit of all the government lawyers and the private bar, that is what was sought in the Volkswagen case. Of course, this urgency and coordination resulted in many components of the litigation occurring simultaneously—it was not linear litigation, but a multi-ring production. In this case, it worked.

From a judicial perspective, it was apparent that there were two aspects of the problem. The first is that there were damages. There was the usual backward-looking problem of how to come up with compensation that would be satisfactory to the defendant, to the plaintiffs, and to the regulators. But there was another interesting problem: a continuing problem with respect to damages. In the Volkswagen case, there were vehicles on the road that were continuing to pollute, and that was a problem that had to be addressed. The only way to address this problem was to bring in the regulators at the outset, as Volkswagen would not want to address the

ongoing emissions problem unless it had regulatory approval. It therefore became essential that the regulators were involved. The government's integral role in the litigation had to be recognized, but the government was not going to share the costs of the plaintiffs' steering committee.

A judge participating in the conference believed that it is the judge's role, and perhaps the litigators' to some extent, to "light a fire" under the regulators. One of the considerations for future cases is how to create a similar sense of urgency in the litigation process, ensuring that government agencies respond in a timely and expeditious way.

Advantages and Disadvantages of Coordination

It was observed that the multiple types of losses that occur in many mass events (e.g., losses to individuals, the government, and the environment) have created a new mindset—one in which defendants consider litigation holistically and try to figure out how to walk away from an event with the company intact, the individuals and public entities compensated, and the environment made whole. It was observed that such a joint resolution is an opportunity as well as a challenge, as it can help inform the way these mass cases are handled in the future.

However, from the defense perspective, the advantages of coordination between public and private actions very much depend on the situation. From the defense perspective, the central question is: "How can I make the problem go away for my client at the lowest possible cost?" In answering this question, one participant stated that at the outset of a case, one must evaluate whether the case is defensible. If it is, then it may make sense to try to keep the public and private cases as far apart as possible. If it is not, it may be best to move toward a total settlement with all parties as quickly as possible. This cost-benefit analysis must be done in the beginning.

One participant questioned why, in the Volkswagen diesel emissions case, resolution did not follow the path of similar cases, namely the 2014 General Motors (GM) ignition MDL and Deepwater Horizon, by moving sequentially and settling the private claims quickly and individually and then going to the regulators and saying that the defendant was contrite, had already solved the problem, and was requesting a credit for money spent on private claims.

Another participant countered by stating that in this case, that scenario was not viable because the regulators were needed early on. In fact, the key to the whole case was that EPA and CARB needed to approve the method for fixing the cars.

A different participant pointed out that one size does not fit all. There are cases in which one would absolutely want to stage compensation. One would want to start with a compensation fund, get compensation out early on, and, in the process, see how many claims one can take out. One would want to address urgencies that people are experiencing and inject the resources that would allow individuals and communities to recover.

In the case of Volkswagen, one participant observed that almost all class members were not only proud owners or lessees of what they believed were wonderful cars, but they also believed that they were private enforcers of environmental purity. The class in Volkswagen was

absolutely invested and concerned with the environmental remedies. They did not have the jurisdiction to enact or enforce them, but because environmental remedies were such an important concern, resolution had to be holistic in this case. But in some cases, one might want to do exactly the opposite—one might want to get early compensation out to people and then have a more controlled, staged litigation.

What Are Obstacles to Resolving Complex Cases Quickly?

Lack of Plaintiff Coordination and Cooperation

One plaintiffs' lawyer pointed out that a common obstacle to moving quickly is when plaintiffs' attorneys pursue different strategies rather than work together. This is important because success in resolving complex litigation is about the way people interrelate with each other and the extent to which cooperative, collegial relationships can be established within the adversarial system.

In the Volkswagen case, the plaintiffs' steering committee was fortunate because the judge appointed people to the committee who were not only diverse in experiences and expertise, but who had experience working in groups—which is not always the case for plaintiffs' lawyers. The plaintiffs' lawyer explained that plaintiffs' lawyers love independence and autonomy, and each one thinks that he or she knows best regarding how to litigate. But in the Volkswagen case, the plaintiffs' attorneys were able to work together, which inevitably led to a quicker resolution than would have been the case otherwise.

Part of the recipe for successful complex litigation is for the judge to make the matter a priority, investing his or her judicial resources and management skills and holding counsel accountable to the court for progress. Doing so reduces barriers among and between the people representing the parties.

One thing that assisted plaintiff collaboration in the Volkswagen case, according to this same attorney, was that the plaintiffs' attorneys knew that it was a top-priority case. They had heard about the sense of urgency from the judge, they knew there was ongoing environmental harm, they knew that they had an opportunity to work together with government prosecutors to ameliorate that harm, and they knew they had an opportunity to work with the Federal Trade Commission to compensate consumers. Everyone knew that all sides, for various reasons, wanted the case resolved quickly, and so it was taken as a mandate.

With this mindset, everyone was focused. All the little issues fell away; the petty squabbles disappeared; the natural, human tendency to want to get all the credit vanished. The panelist characterized this shared mission as a “remarkable situation” but pointed out that this was not the first time it had happened: There were earlier plaintiffs' steering committees (e.g., in the Deepwater Horizon and Vioxx cases) in which the same thing occurred—people who were not

natural colleagues or allies were given an urgent and important task and were able to rise to the occasion.

Delay on the Defense Side

One member of the audience mentioned that another obstacle to the resolution of complex cases are defense lawyers who want to keep billing and defendants who want to delay payouts. It was pointed out that situations in which liability is disputed are completely different than situations such as the Volkswagen case, in which liability already is conceded.

Lack of Coordination Between Federal and State Courts

Lack of coordination between state and federal courts is an additional obstacle to the quick resolution of cases with widespread loss. A participant observed that there is no formal statutory mechanism to enable state and federal courts to coordinate. Such coordination has been proposed in the past and was characterized by the participant as a “great idea.” Until this happens, however, it falls on state and federal judges to communicate with each other. Some states, such as California, New Jersey, and New York, do a large amount of this complex litigation work, and the more they communicate with the federal system, the more opportunities there will be to use appropriate coordination between the systems to add judicial resources to solving these problems.

To combat this weakness in the Volkswagen case, the judge invited state court judges to sit in on *Daubert* hearings regarding the admissibility of expert evidence. In these hearings, the state court judges ask their questions, even though the evidentiary standards are different, and this moves the case forward, overcoming some obstacles to settlement.

Lack of Urgency on the Part of Federal Judges

A criticism over the years is that federal MDL litigation is a black hole. In some situations, a participant noted, federal cases would just sit there, nothing would be done, and eventually, the pressure on the state courts would be so enormous that they would start to resolve these cases in an uncoordinated manner.

The answer to the problem, according to one participant, is for the federal courts to move quickly. But they can only move quickly if they have the cooperation of the litigants, and cooperation is not a given; it can be urged, but it is not necessarily achieved. The way it was achieved in the Volkswagen case was the devotion of the court to resolving the problem, and getting litigants who shared a common goal in front of the court.

Another way for judges to help speed up the process is for them to talk among themselves, reaching out to judges with experience in similar types of cases, and applying those lessons to the case at hand. In the Volkswagen case, Judge Breyer reached out to a fellow judge who had tried a similar case. The fellow judge advised Judge Breyer to set schedules and bring the lawyers in on a regular basis to report the status of the case at any given moment. Doing so is

important, claimed a participant, because judges can use a public hearing as a bully pulpit; in the Volkswagen case, the judge stated that the polluting cars were still out there, and that for a vast number of people, their car is extraordinarily important—it's their largest asset, their way to get to work, their way to drop their kids off at school, their way to live. If such points are made in a public setting, it no longer seems unreasonable for lawyers to come back in 30 days and report on what progress they have made. The participant pointed out there is a way, even though the case is enormous, to impart to the participants the sense of urgency to bring about resolution.

Of course, each case is different, but the mindset needed to resolve cases is not very different—that mindset being that every case has obstacles to its resolution. To overcome those obstacles, first they must be identified, and then a path can be found regarding how to bring about a quicker resolution than if all parties simply looked to the rules of federal civil procedure or what was learned in law school, which is to send out interrogatories and take depositions. This is what has to be done.

One judge observed that one of the lessons to take away from the Volkswagen case is that a big case does not necessarily need to take a lot of time. All the people involved in the resolution of a large case need to adopt this mindset.

Government Agencies That Do Not Speak with One Voice

Another obstacle to rapid resolution in cases with widespread losses is lack of coordination among government agencies. As one participant pointed out, it is incumbent upon the government to have a single voice in negotiations and before the judge. In addition, the government should not wait too long before getting involved. Comparing two cases, this participant opined that the government waited too long to become involved in the Deepwater Horizon case. Having learned its lesson, the government came in quite early in the Volkswagen diesel emissions case.

Lack of Transparency

When regulators and public agencies are involved in the settlement process, transparency is important. The need for transparency is somewhat unusual in the settlement process because settlements are typically achieved by give-and-take in private. But for large-scale events, it is important that the public understands the process. Ultimately, the public will see the end result and must understand the rationale for it. It was observed that whenever one is involved in large-scale litigation involving regulators, one must realize that the end result will be examined publicly.

Department of Justice Goals in Environmental Cases

From the government's perspective, the first thing to consider is whether an ongoing polluting event needs to be resolved. That primary need commands the lion's share of

government resources, deferring investigation of criminal conduct to a later point. In the Volkswagen case, polluting cars were still on the road, and the priority was to stop the damage. As a result, regulatory bodies, such as CARB and EPA, focused on setting standards to put into the consent decree.

The next step is to mitigate prior harm to the environment. In the Volkswagen case, a defendant-funded trust was set up to provide money to states to reduce nitrogen oxides. One participant considered this to be an excellent move for all parties involved because Volkswagen and the government were able to demonstrate to the U.S. public that not only did the pollution stop, but that those responsible were working to repair the damage.

Alternative Approaches

The feasibility and desirability of alternatives to the traditional approaches of resolving complex litigation was a topic of discussion during this session on the changing role of regulators in settlements.

It was observed that statutory mandates may exist to set up such early compensation funds. Under the Oil Pollution Act, British Petroleum, as the responsible party in the Deepwater Horizon litigation, was required to set up a system straight away to resolve claims as an alternative to litigation, and it did so. The litigation then addressed the remaining claims.

One participant asked whether the government should administer claims programs rather than leave the responsibility up to the litigants, who may have more personal agendas and interests. For example, in securities cases where the government has done all the work, it would be very easy for the government to administer a claims program, as it already knows the names and contact information of shareholders, the size of the individual losses, etc. Another participant responded that, even though such an approach could work in certain instances, it would not be the government that actually sets up the claims process and distributes the funds, but rather a private entity that contracts with the government. While the government will sometimes administer a claims process (either directly or through a contract), it is not something the government prefers to do, particularly for claims programs that can go on for years.

It was also asserted that government compensation programs (as opposed to those developed with the involvement of the litigants) can be affected, and often hindered, by political considerations. Thus, having the private bar to enforce, administer, and deliver compensation to the victims of wrongful conduct serves as a very important check and relieves taxpayers of financial responsibility.

Comparing the U.S. litigation system for mass events with approaches taken elsewhere is a potentially fruitful research topic. In Europe, the claim is that compensation levels are not as high as in the United States because of restrictions on private lawsuits. But transaction costs may be lower, and resolution more rapid, if the government can investigate and resolve claims more effectively than private litigants.

Panel 2. The Impact of Liens on the Settlement Process

Liens, both public and private, have been playing an increasing role in mass casualty settlements.¹ This panel addressed the impact of liens on the settlement process and what can be done to limit the extent to which liens slow or increase the transaction costs of the compensation process.

Typology of Liens

Liens against injured parties include reimbursement for Medicare and Medicaid payments, services provided by the U.S. Department of Veterans Affairs and TRICARE, payments by private health insurers, and demands from state agencies for payment of child support payments. Liens are also being considered to cover future medical care. Defendant and third-party insurers are increasingly becoming involved in resolving these liens before payments are made to injured parties.

Senior RAND researcher Eric Helland is examining the different types of liens and trends in their prevalence, as well as how liens have changed the landscape of claim resolution in mass compensation events. He is using a unique dataset that covers the resolution of a number of mass compensation events (as well as smaller events).

Helland presented preliminary data on liens in what are primarily pharmaceutical and medical device claims. Regarding the specific types of liens, Medicare and Medicaid liens are the most frequent. Helland explained that this could be due to the *fact* that Medicare and Medicaid increasingly have a well-developed process in which someone is checking to see if there is an obligation. The predominance of Medicare and Medicaid claims is also likely due to the particular set of claims in the data.

What's Happening with Liens?

Participants shared observations and anecdotes relating to the issue of liens. One participant who has worked on the defense side for many years observed that liens were not part of the conversation with pharmaceutical and medical device claims that were settled years ago—they were the plaintiffs' and plaintiffs' lawyers' problems. Then Medicare and Medicaid laws changed so that the government could come back to the defendant if the plaintiff did not settle the lien. This meant that the defendant could end up overpaying on the claim. Now, defendants will typically not make a payment to the injured party until the most important liens are resolved.

¹ *Liens*, as used in this document, refers to statutory federal and state recovery rights as well as to the legal claim of an entity (lienholder) over the property of another (claimant), whether by contract or otherwise.

Defendants did not know who to talk to in the government to get these liens resolved, so they turned to claim resolution companies.

What one now often sees in large pharmaceutical or medical device litigation is a negotiation with Medicare or Medicaid to address all the claims together, not the liens for each claimant individually. An agreement is reached on the percentage of the settlement that will be paid to resolve the liens, but there is little information on how this percentage varies across different mass cases.

From the plaintiffs' perspective, liens can reduce and delay payments to injured parties. Another potential concern for plaintiffs regards how much of the lien to pay. A key issue is whether the plaintiff is required to pay an entire lien when a case is settled for less than the total loss to avoid litigation costs and delay.

A plaintiffs' lawyer recounted his experience of dealing with liens in the Reno Air Races disaster. In that matter, there were potential liens from Canada, from companies that provide health care providers to military dependents (TRICARE), and from Medicare. The potential liens were both statutory and contractual. The lawyer handling this matter asked hospitals to not file with Medicare for reimbursement. In this lawyer's experience, Medicare's policies are inflexible and inconsistent, and communication is difficult, which can slow and defeat compensation. It is a much better strategy, therefore, to deal directly with the hospital or provider. It is difficult, however, to avoid Medicare altogether, and this participant described a situation that can create an impasse: One insurer did not want to provide compensation to a crash victim, who had completed treatment before becoming Medicare eligible, until the crash victim's potential liens were resolved. The insurer wanted a letter from Medicare stating that Medicare would not come back to the defendant later. But Medicare could not write such a letter because the claimant was not yet a Medicare enrollee.

One lien-savvy participant posited that there will be more and more attempts by Medicare to articulate how it can assert rights to reimbursement for future medical costs.

One participant observed that Medicaid increasingly has the same status as Medicare regarding liens. Medicaid liens are complicated by the fact that, since it is a means-tested program, a claimant can go on and off the program over time.

Yet another wrinkle is that as the number of parties asserting liens grows, there will be less and less incentive for the injured party and the plaintiffs' attorney to file a claim. The result could be fewer settlements, which would not be in the interest of either the injured party or the lienholder. Another participant who works in the field agreed with this assessment, stating he has actually turned down cases because the potential liens are simply too large. This resulted in the claims remaining uncompensated.

Barriers to Speeding Up the Lien Resolution Process

One plaintiffs' attorney observed that in an environment of limited settlement funds, one may need to aggressively fight to show that some portion of a claimed medical cost is unrelated to the injury. This is very individualized and expensive. It was observed that, to this day, Medicare identifies all costs on a plaintiff's record during a particular time period. Lawyers should not assume that all these costs are related to the injury. Also, Medicare does not have to pay attention to the fact that settlements are discounted, although Medicare will consider attorneys' fees a cost of procurement.

Set-asides for future medical costs create another thorny issue. Medicare will not pay future medical costs for people who have already been compensated for such costs. The challenge in tort cases is that, unlike workers' compensation, settlements are not typically parsed out into categories like pain and suffering, past medical treatments, or future medical treatments. It presents a real challenge to determine which part of a settlement is for future medical costs.

This future-cost-of-care matter, according to a participant, is one that Medicare has not quite figured out. It seems that it wants to set up a type of deductible that plaintiffs would pay before Medicare will make payments. In fact, Medicare had issued an advance notice of rulemaking on how to address future medical costs. Medicare then asked for public comment on how it should calculate what needed to be set aside. The response was so full of anger that Medicare pulled the rule. As of now, if the plaintiff can produce a letter from a treating physician stating that there will be no future medical costs, then Medicare will not pursue future medical costs. But Medicare is picking up the issue again, developing guidance on how providers should enter information on future medical costs into a recipient's Medicare file, and it has started putting out bids for contractors to do liability set asides. This will be an issue moving forward.

One participant foresaw problems with future medical costs on the private side. For example, could a private health care insurer file a lien for future costs on the policy?

Another problem regarding lien resolution is that a plaintiffs' lawyer who is not individually minimizing lien responsibility is potentially breaching his or her fiduciary duty to the claimant. Based on *Burrow v Arce*² in Texas, a plaintiffs' lawyer risks forfeiture of fee by not advocating for the individual interests of a particular plaintiff unless engaged in an aggregate settlement.

The complexity of lien law and practices also makes it difficult to resolve liens rapidly. Some states have developed a made-whole doctrine, which says that no subrogation interest attaches until the plaintiff has been made whole. This can be a way to avoid some liens, but means that state-specific strategies may be appropriate to address certain private liens. New York and New Jersey have anti-subrogation rules which can prevent some liens. This can be helpful in one-off cases, but in mass litigation that involves many states, it may still make sense to pay a lien that may not be enforceable in some states.

² *Burrow v Arce*, 997 S.W.2d 229 (Tex. 1999).

Differences in how lienholders treat attorneys' fees and lien obligations when settlements are less than some measure of the total damages ("discounted settlements") also generate complexity in the lien resolution process. One participant observed that Medicare will reduce a lien by taking into consideration attorneys' fees, which can mean a reduction in the requested lien payment by 33 to 40 percent. In contrast, some private lien holders—such as self-funded Employee Retirement Income Security Act of 1974 (ERISA) union health plans—are supposed to be paid before the injured party and reimbursed 100 percent.

Bogus lienholders are another problem. In some cases, there are fraudulent lien claimants. In other cases, several recovery contractors are independently pursuing recovery for the same lienholder on a contingency basis.

One participant observed that, from a policy perspective, nobody has addressed the point that until 1980, tort recoveries were not subject to Medicare reimbursement claims.³ In this participant's view, it is wrong for the government to essentially shake down claimants for a piece of their tort recovery, especially when there is a discounted settlement to begin with. When Congress rewrote the Medicare Secondary Payer statute in 2003, it could have specified that all Medicare costs related to the injury be paid out of a settlement, but it did not. The statute says that the reimbursement extends only to the extent that it is demonstrated that the primary plan has the responsibility to make payment. Yet Medicare seems to ignore that and instead demands payment regardless of the limits of the defendant's liability (e.g., when the defendant is only 45 percent liable).

Another participant agreed, stating that there is a seemingly intractable policy at Medicare that does not pay attention to the reality of discounted settlements. There are multiple problems in that arena, and while it is sometimes viewed as a plaintiff's problem, it is a problem for society as a whole, especially as it relates to the efficiency of the compensation process and the desire not to burden a claimant who can least afford it.

Strategies for Speeding Up the Lien Resolution Process

One strategy discussed is to rely on lien resolution companies to work out settlement terms with the government. Drawing on data from past lien settlements, these companies could develop guidelines for the percentage of the overall settlement that should go to different lienholders. Plaintiffs and defendants would agree to pay that percentage without needing to spend time reviewing individual claim files.

Another approach can be seen in the GM ignition switch case. To speed payments and resolve litigation, the defendant agreed to pay the liens, and lien resolution firms gave the defendant an estimate of lien amounts without opening individual claim files. Taking liens off the table is a way to speed up negotiations between plaintiffs and defendants. The ability of

³ 42 C.F.R. Sec. 411.50(a).

resolution companies to negotiate liens down by a significant amount increases the attractiveness of this approach to defendants.

Private lien resolution programs for private lienholders, such as private health insurers, are a growing phenomenon. Based on past experience, a negotiator-participant could say that liens take about 8 percent of settlements on average. This provides the basis for a negotiator to invite a private lienholder to a lien resolution process if it agrees that liens cannot take more than 15 percent of a claimant's settlement. With this limit, plaintiffs may be willing to participate, and the settlement process can move forward more quickly.

From the perspective of the lien resolution specialist, lienholders need to realize that the only way for there to be a global settlement is for the lienholder to seek reimbursement for the bare minimum of care needed for the type of injury alleged. From there, there could be a safety valve that would allow the lienholder to appeal the lien amount in particular cases.

One participant characterized the strategy used to resolve liens in the Reno Air Races disaster cases. Two columns were developed for the settlement proposal—one for the amount of money the plaintiff would receive up front, and the second for the amount that was projected for liens. The defendants began by paying column one and held back column two. If plaintiffs' lawyers did not want to work with a claim resolution company, they needed to work with the lawyers for the lienholders to resolve the lien. Once the liens were resolved, any amount remaining in column two was paid to the injured party. This method allows money to go out to injured parties quickly. In the end, defendants get the lien releases they are interested in and the litigation is done.

Regarding the risks plaintiffs' lawyers face with global lien settlements, plaintiffs' lawyers need to explain to their clients that it would be too expensive and take too long to resolve cases on an individualized basis. Plaintiffs' attorneys should do what they can to ensure that the plaintiff understands in advance how the amount taken out of the settlement for liens will be determined.

Need for Legislative Intervention

Several participants felt that this was an area ripe for legislation. The current system, they claimed, is not working very well. It is time-consuming, erratic, and the issues are typically negotiated anew for each mass event.

Another participant observed that Medicare is making rules for set asides for future medical costs in a vacuum and there is a need for legislative guidance. The Medicare set asides for future costs could be a nightmare if not dealt with properly.

Need for Additional Data

All participants thought that the initial lien data presented by the researchers was interesting and useful and agreed that there is a great need for more data and analysis. More information is needed on the amounts that liens have been discounted and on lien payments as a percentage of

the settlement. Additional analysis on the factors driving the variation in discount rates across different types of mass events is warranted.

There is some preliminary evidence that smaller lienholders, such as state agencies seeking to collect child support payments, increasingly want to be involved in the process. This could complicate the settlement process. More analysis is needed to determine if there are, in fact, more liens from smaller lienholders.

There was also interest in analysis to better understand the extent to which fraudulent liens were being asserted.

Panel 3. The Aggregation of Claims—Pros and Cons

In a mass consumer society where losses to large numbers of people can easily occur, a system is needed that can resolve claims with reasonable speed and efficiency. No litigation issue is currently more important in this regard than how and whether claims can be aggregated.

This panel discussed what judges and litigants are doing to address situations that involve large numbers of claims, what issues arise, and what information is needed to better understand how current approaches are working and can be improved upon.

The Problem

As one participant put it, federal rules and other procedures were originally tailored to a civil litigation paradigm of one plaintiff, one defendant, and two lawyers. However, the paradigm is changing, and it has become increasingly common to see litigation with large numbers of claimants and considerable numbers of attorneys on both sides.

There are undoubtedly a number of factors that are driving this change. Advertising to recruit large numbers of claimants is one potential factor, and the high cost of discovery is another. One participant noted that although discovery is a wonderful tool, it can be so expensive that one lawyer cannot afford it. For example, plaintiffs' lawyers had to front \$42 million in the Vioxx litigation to try the first cases. Plaintiffs' attorneys thus have incentives to group together, resulting in more claim aggregation.

It was observed that there are basically three options for handling mass claims:

1. Claims can be processed individually by courts.
2. Claims can be aggregated in courts.
3. Claims can be processed outside the courts via some type of administrative scheme.

Processing claims individually is rarely practical in large-scale events. Aggregation is the approach of choice for cases that are filed through the court, while administrative processing is the primary choice for out-of-court facilities.

The two primary aggregation mechanisms in U.S. federal court are class actions (Rule 23) and MDLs (28 U.S.C. 1407). The Supreme Court, through *Amchem*¹ and *Ortiz*,² has been critical of class actions in the personal injury setting. Its concern surrounds the individual nature of the losses, and the extent to which those losses were caused by the drug or the event. Regardless, however, there remains a need for a vehicle to find a way to resolve mass disaster cases.

¹ *Amchem Products, Inc. v Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 1997 U.S. 4032.

² *Ortiz v Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

According to one participant, court statistics show that approximately 50 percent of the current pending federal caseload is made up of federal MDLs (currently about 130,000 claims are in MDLs), and just 20 MDLs account for about 120,000 claims. Nearly all of these “mega-MDLs” are pharmaceutical or medical device cases.

It was observed that a growing number of countries have adopted formal court procedures for aggregating mass claims. At least three dozen countries have adopted procedures that the U.S. legal community would recognize as a type of class action (a representative action brought on behalf of a large group of people). Some countries, in addition to or instead of a class action, have processes for aggregating mass claims that are quite similar to our MDL process.

There have been criticisms that the number of lawyers and judges involved in MDLs is small, and this “repeat player effect” has resulted in outcomes that are in the interest of lawyers and judges but not the injured parties. Many academics criticize judges for using too many “innovative” procedures that, the academics claim, judges make up as they go along.

However, according to one participant, much of what judges are doing is in the manual for complex litigation and clearly within judges’ authority under Rule 16 of the Federal Rules of Civil Procedure. One participant warned that the legal community should be wary of pursuing reform legislation on MDLs when it is unclear what the problems are that need to be solved or whether there is any problem requiring reform.

Examples of Different Aggregation Approaches

Class Action: National Football League Concussion Litigation

The National Football League (NFL) wanted global peace, and lawyers were able to use Rule 23. The 3rd Circuit affirmed the settlement, and the Supreme Court denied cert. Among the keys to the success of this approach in the NFL case were the development of a proxy for chronic traumatic encephalopathy (so that this plaintiff subgroup could be distinguished from other plaintiff subgroups) and removing the cap on the award amount so that there was no conflict between the plaintiff subgroups. Provisions put in place to prevent any significant issues with regard to fraudulent claims were also important. Playing devil’s advocate, one participant noted that the NFL model would not work in all settings—there is continued hostility from the federal bench to treating personal injury cases on an aggregate basis.

Quasi-Class Action: Zyprexa

Zyprexa did not go through Rule 23, but the judge in that case provided supervision regarding legal fees and the distribution of awards to injured parties. The judge called it a quasi-class action. In the view of one plaintiffs’ attorney, judicial oversight of the award distribution was appropriate because it is not good practice to give law firms a pot of money to distribute

among their clients as they see fit. This view, however, was disputed by other conference attendees.

Quasi-Class Action: Vioxx

Similarly, in the Vioxx litigation, the judge reviewed the plaintiff lawyers' fees referring to the case as a quasi-class action. This case featured a compensation grid, which allowed lawyers to quickly figure out how much each type of claimant should receive, based on a number of points.

Comparing the Zyprexa and Vioxx litigations, one participant noted that the first settlement in Zyprexa generated approximately 20,000 new cases. The same did not occur in the Vioxx litigation; according to this participant, this was the result of rulings and orders by the judge toward the end of that litigation as well as the defense's use of *Lone Pine* (which requires plaintiffs to substantiate the elements of their claims).³

Inventory Settlement: Paxil Birth Defects Litigation

The Paxil birth defect litigation did not use an MDL, class action, or quasi-class action; rather, it used an inventory approach. The defense's strategy was to start by trying some cases. The defense tried a case picked by the plaintiffs, and it received a favorable damage award at trial—only \$2.5 million, which was less than the plaintiff's medical expenses. From a defense perspective, this approach was successful because these cases had many issues with causation. Plaintiffs often did not have medical or pharmacy records showing that they had taken Paxil or that they took the drug during the first trimester of pregnancy, when Paxil-related injuries occur. The defense therefore moved for a *Lone Pine* order, which required plaintiffs to prove either by way of medical record, pharmacy record, or affidavit from their health care provider that Paxil was taken during the first trimester. That allowed the defense to window out many claims. This is an alternative approach to the quasi-class action model: When one gets beyond signature injuries, there are many problems with aggregation.

The judge moved the settlement process forward by scheduling trials, which meant that the defense was not allowed to delay. In the end, the defense gave each plaintiff's firm a pot of money, and let them divide it up.

Techniques Used by Judges in MDLs

Judges can use a variety of techniques when hearing MDL cases. They can, for example, use new technology to conduct depositions where all lawyers participate online and the judge can rule immediately.

³ *Lore v Lone Pine Corp.*, No. L-33606-85 at 1-2 (N.J. Super. Ct. Nov. 18, 1986).

Another technique that judges can implement is the use of fact sheets instead of interrogatories. At least one participant stated that interrogatories are poor vehicles for MDLs. Based on the fact sheets, judges can create classes of claims and then select bellwether cases for trial (some are picked by the plaintiffs, some are picked by the defendants, and some are picked at random).

Some judges believe in holding meetings with all the lawyers— both for transparency and to get the lawyers to develop working relationships. This can be facilitated with an initial meeting with leaders from each side.

One judge attending the conference said he uses the federal rules as a jumping-off point. He believes that perhaps new rules need to be crafted given the paradigm shift not just in MDLs, but in civil litigation in general.

Potential Advantages of MDLs or Class Actions

One of the greatest potential advantages of MDLs is efficiency in the discovery process. An additional advantage is uniformity in discovery and the handling of cases. It should be recognized, however, that MDLs do not always result in payments. Many cases are vigorously defended and result in no payment or very limited payments to a limited set of people.

A potential advantage of class actions is something approaching global peace. One participant pointed out that complete global peace is difficult to obtain because even if there are participation thresholds that must be met before a settlement can become effective, there are always a number of cases that stick around and continue to be litigated.

Finally, another potential advantage of MDLs or class actions is that cases in which individual losses are not large enough to warrant individual litigation can be addressed.

Potential Drawbacks of MDLs or Class Actions

One participant noted that in the old days, the MDL process was a black hole—someone filed a case in state court, the case was transferred to federal court, and then transferred to an MDL judge. The plaintiff and the plaintiff's lawyer did not know what was going on. Today, in contrast, there is typically a website for each MDL with exhibits, pleadings, transcripts of meetings with the judge and lawyers, etc. However, it remains the case with MDLs that there is often little transparency regarding the amounts received by individual claimants. It is possible that the actual settlement terms for some MDLs will become public and disgrace the entire system. One participant expressed disdain for inventory settlements, arguing that payment should depend on the claimant's need, not the lawyer's ability. A good lawyer will get a higher inventory settlement than a bad lawyer, which, in this participant's view, is not fair to the claimant.

There is much more transparency regarding settlement terms in class actions. But the problems with class actions are that (1) they are frowned upon by courts for personal injury

cases, and (2) global peace can be very expensive from a defense perspective. From a defense perspective, global peace is not always the desired outcome—it can be enormously expensive. Sometimes, the defense just wants to settle the cases that are present. For example, the defense would not want to provide compensation to everyone who took Vioxx, only those who filed claims.

One participant observed that for both class actions and MDLs, there remains the possibility that an individual claimant may be better served by individual litigation. For example, pain and suffering claims in California disappear when the claimant dies. It matters, therefore, which cases go first as the bellwether cases in aggregate litigation.

Another potential drawback to MDLs is fraud. In many cases, advertisements tell consumers to call a number if they used the product in question and have some vaguely defined symptoms. The phone is often answered by a claims generator, who takes the information and sells it to a lawyer, who then files the claim. The result can be claims for injuries that are not caused by the product in question. In Vioxx, for example, about one-third of the claimants could not produce medical records that they had taken Vioxx. For many products, there are no signature symptoms, but symptoms (e.g., heart attack, stroke) that are not necessarily particular to the product. The allegation in these cases may be that the product heightened the risk. Part of the problem, according to one participant, is that many claims come from lawyers who do nothing but advertise for cases, and a substantial number of the claims turn out to be without merit.

Another potential drawback noted is that these types of cases tend to have high transaction costs; this raises the question of whether it would be better to have some kind of administrative system for pharmaceutical and medical device cases. One participant argued that such a system could be funded up front as part of the price of the product (for products whose labels were approved by the government). However, another participant cautioned that the Food and Drug Administration (FDA) can say that a medical device is cleared for sale even though it has not gone through a full approval process with human trials. There is an incredibly minimal regulatory process in this arena; consequently, there is an ongoing need for the tort system.

Need for More Data and Analysis on Aggregation Approaches

No one knows how many class action lawsuits are certified annually in the United States, nor does anyone know how many “putative” class actions are filed. Multiple participants indicated that policymakers and the legal community need to know how many are filed, what types of cases they are, and how they are resolved (e.g., how many are resolved without payment). Additionally, policymakers and the legal community need to know how many claimants actually come forward to collect their awards.

Little empirical information is available about how MDLs work—specifically, in terms of settlements and legal fees. One participant argued that better information is needed on how many MDLs result in no or very limited payments. More information is also needed regarding the

types of cases that are being consolidated and how that has changed over time. Participants also called for more information on how many MDLs result in inventory settlements versus grid-type settlements. There is also a need for data on the percentage of fraudulent claims before legislation moves forward related to such fraudulent claims.

More information is also needed on the size of transaction costs. In the view of one participant, a fairly small percentage of overall resources spent in the claim resolution process goes to injured parties. The defense side is spending billions, the plaintiffs' attorneys get 30 to 40 percent of the settlement, and now there are third-party funders wanting a return on their up-front investments.

Further work is also warranted on alternative systems around the world for processing mass claims—specifically, on the New Zealand system. American scholarship has not looked at New Zealand's system for decades, and doing so would be a worthwhile endeavor, as New Zealand has a type of administrative system with regard to product liability. Before modifying MDL or class action procedures, it would be useful to know if there is something better out there to replace them.

Another piece of data that could be useful is to look at the variables that go into variations in settlement amounts—e.g., the location, the lawyer, and whether the case is trial ready, to name a few.

Finally, one participant indicated that it would be useful to collect information on how many recalls happen with medical devices rubberstamped by FDA compared to Class 3 devices that go through clinical trials. It would be useful to compare data on how many claims are filed and the amount paid per claim in cases for which there have been clinical trials to those for which there have not been clinical trials.

Conclusion

As we are reminded with ever-increasing regularity, widespread losses due to events have become a mainstay of American society. With this in mind, RAND convened this conference to address the changing role of regulators in settlements, the impact of liens on settlements, and the pros and cons of claim aggregation.

These conference proceedings make it clear that there is a need for additional data and research in these three key areas. RAND is looking to conduct future research in these areas so that the system for resolving claims related to widespread losses can be better understood and improved.

Appendix. Conference Agenda



**RAND Center for Catastrophic Risk Management and Compensation
and RAND Institute for Civil Justice
Present**

Emerging Trends in Compensation for Widespread Losses

Ritz-Carlton, Pentagon City

May 19, 2017

Agenda

- 9:30 a.m. Registration and Networking**
- 10:00 a.m. Introduction and Welcoming Remarks**
Lloyd Dixon, Director, RAND Center for Catastrophic Risk Management and Compensation
- 10:15 a.m. Framing the Discussion: Emergent Issues Affecting the Compensation System**
Kenneth Feinberg, Advisory Board Chair, RAND Center for Catastrophic Risk Management and Compensation; Trustee, RAND; Attorney, The Law Offices of Kenneth R. Feinberg, PC
- 10:30 a.m. Panel: The Changing Role of Regulators in Settlements**
- *Moderator: Nicholas Pace, Social Scientist, RAND Corporation*
 - The Honorable Charles R. Breyer, Senior Judge, United States District Court for the Northern District of California
 - Elizabeth J. Cabraser, Partner, Lief Cabraser Heimann & Bernstein
 - John Cruden, Former Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
 - Robert J. Giuffra Jr., Partner, Sullivan & Cromwell LLP
 - Mark McNabb, President & CEO of Electrify America LLC
- 12:00 p.m. Lunch and Networking**
- 12:45 p.m. Presentation and Discussion: The Impact of Liens on Settlements**
- *Moderator: Paul Heaton, Adjunct Economist, RAND Corporation; Senior Fellow and Academic Director, Quattrone Center, University of Pennsylvania Law School*
 - *Presenter: Eric Helland, Senior Economist, RAND Corporation; William F. Podlich Professor of Economics, Claremont McKenna College*
 - Sheila L. Birnbaum, Partner, Quinn Emanuel Urquhart & Sullivan, LLP
 - Matthew Garretson, Founding Partner & CEO, Garretson Resolution Group
 - Michael Slack, Founding/Managing Partner, Slack & Davis

- 2:15 p.m. **Panel: The Aggregation of Claims: Pros and Cons**
- *Moderator: Kenneth Feinberg*
 - Andy Bayman, Partner and Chair of Life Sciences Practice, King & Spalding LLP
 - John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP
 - The Honorable Eldon E. Fallon, Judge, United States District Court for the Eastern District of Louisiana
 - Deborah Hensler, Judge John W. Ford Professor of Dispute Resolution; Associate Dean, Graduate Studies; Co-Director of Law and Policy Lab, Stanford Law School
 - Christopher Seeger, Founding Partner, Seeger Weiss LLP
- 3:45 p.m. **Closing Remarks**
James Anderson, Director, RAND Institute for Civil Justice
- 4:00 p.m. **Adjourn**

In a consumer society where widespread losses can easily occur, the processes and procedures for providing compensation to large numbers of claimants are very important. To explore issues that affect the speed, efficiency, and fairness with which the compensation system for such losses operates in the United States, the RAND Institute for Civil Justice and the RAND Center for Catastrophic Risk Management and Compensation convened a conference on May 19, 2017, in Arlington, Virginia. These conference proceedings explore stakeholder opinions on the changing roles of regulators, the impact of liens, and claim aggregation. Participants discussed how previous cases—particularly the Volkswagen diesel emissions case—provided examples of how regulators and claimants could cooperate to create satisfactory outcomes for both defendants and plaintiffs. They also explored the role of liens in the settlement process and how different aggregation processes (class action, multidistrict litigation, and inventory settlement) affect compensation. Multiple participants argued that collecting more data on the liens and aggregation processes, as well as exploring how other countries approach claim aggregation, would help the legal community better handle compensation issues.



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