

A RAND NOTE

N-2805-ICJ

**Resolution of Mass Torts: Toward a Framework for
Evaluation of Aggregative Procedures**

Mark A. Peterson, Molly Selvin

1988

**Prepared for
The Institute for Civil Justice**

40 Years
1948-1988
RAND

**THE
INSTITUTE FOR
CIVIL JUSTICE**

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FOREWORD

The traditional dispute brought to the civil justice system involved either a pair of individuals or, at most, a very limited number of plaintiffs and defendants. Increasingly, however, the system is being asked to resolve disputes between large aggregations of plaintiffs and defendants. This mass litigation is, not surprisingly, placing considerable strain on a system whose formal and informal procedures and practices are based on expectations about traditional disputants that no longer necessarily hold. Some formal mechanisms, such as class actions and multidistricting, have been devised to deal with certain classes of mass litigation, but there are questions about when and how they should be applied. In the meantime, an array of informal mechanisms for aggregating civil suits have sprung up around the country, but there is little systematic knowledge about how they affect case processing efficiency or equity of outcomes.

Researchers at the Institute for Civil Justice first became interested in exploring the use and consequences of aggregative procedures for mass torts in the course of our analyses of asbestos litigation in the early 1980s. Although appellate courts around the country had rejected formal aggregation of asbestos cases, judges and litigators at the trial court level were trying a variety of informal aggregative procedures to relieve the burdens that mass litigation was placing on both the courts and the parties. At the time, the effects of these procedures on case processing time and transaction costs were uncertain; there was also concern about whether those procedures affected the equity of case outcomes.

Now, several years later and in the wake of the well-publicized Manville and A. H. Robins bankruptcy court proceedings and innovative mass settlement approaches in other personal injury disputes (e.g., DDT litigation), the legal community is actively debating the costs and benefits of aggregative procedures. To this point the debate has focused primarily on "first principles" without any real grounding in

what we may have learned so far. Because mass torts consume increasing court resources and attention, the Institute for Civil Justice has recently embarked on a program of research aimed at providing empirical input to this debate. Through intensive analysis of diverse examples of mass tort litigation, we hope to develop information on the actual outcomes of different aggregative approaches. This Note discusses the issues raised by mass tort litigation, presents the conceptual framework that will guide our work, and briefly describes the two mass tort cases that illustrate the challenges of devising procedures for resolving these disputes.

Kevin F. McCarthy

Director, Institute for Civil Justice

SUMMARY

This Note is intended to serve two purposes: first, to set forth our agenda for a program of research on mass tort litigation; and second, to present the results of our work to date. That work has centered on the development of a conceptual framework or overview of mass tort litigation and on the application of that overview to two preliminary litigation case studies. Our goal in this analysis is to explore the effects of aggregation on the characteristics, course, and outcome of mass litigation.

In recent years, we have seen an increase in mass tort litigation. Since the civil justice system is organized primarily for individual litigation, mass claims--many of them involving thousands of litigants with related but varying claims--have placed additional strain on the courts. Faced with these problems, judges and policymakers have designed innovative procedures for aggregating individual claims. Critics of this practice are concerned, however, that these new procedures may produce inequitable outcomes and may be at odds with traditional guarantees of individual access to the courts. As their uses have increased, aggregative procedures have been the focus of growing controversy, comment, and debate.

In the past, the debate about aggregative mass tort litigation has been based almost entirely on deductive arguments rather than on observations about the effect of aggregative procedures on the course and outcome of mass litigation. Rather than infer conclusions from empirical data for specific litigation, most commentators impose theories and abstract principles on individual--and varying--cases. But the diverse, complex nature of mass tort litigation makes it inappropriate for solely deductive analyses, since there is no uniform principle that covers all its labyrinthine complexities.

These general deductive inferences rest on assumptions about the facts of mass litigation and about the interests of litigants, but the facts may or may not support those deductive arguments, and litigants

might prefer aggregative to traditional legal procedures. A few empirical studies have begun to test these assumptions.

This paper joins this empirical approach by providing an introduction and agenda for an Institute for Civil Justice research program centering on case studies of mass tort litigation. The case studies will examine how the course and outcome of past mass litigation have been affected by uses of aggregative procedures. This research program will develop systematic empirical information about the consequences of adopting aggregative mass procedures and will assess both the benefits and the limitations of specific procedures. We expect that the research will produce (1) an elaborated taxonomy of procedures for aggregate handling of mass tort claims; (2) a systematic description of features that are critical to determining the course and resolution of mass tort litigation; and (3) specification of bases for evaluating the course and outcome of mass litigation. Our research is intended to collect and share information about the uses of aggregative procedures: What are their effects? What works? What does not? It should help lawyers, judges, and other policymakers choose procedures that can be effective for dealing with the particular characteristics of specific mass litigation.

PROFILE OF MASS TORT LITIGATION

Both this paper and our broader research program focus on litigation involving tort claims for bodily injury and/or death. We regard litigation as "mass" if it involves many plaintiffs suing common defendants for injuries that were allegedly caused by the same accident, product, or substance. For convenience, we refer to this as *mass tort litigation* (even though we do not examine torts that do not involve bodily injuries). We do not attempt a precise definition of *mass litigation*; it is sufficient that numerous claims are seen and treated as similar by the parties. Rather than attempt to set out and defend the importance of various issues as being necessary to define litigation as mass, the research explores the significance of those issues for litigation involving multiple claims. The mass tort litigation that we are studying stems either from catastrophic events with many traumatic

injuries (e.g., airplane crashes and hotel fires) or from broad exposure to or use of a particular substance or device. This type of mass tort litigation, sometimes referred to as *mass toxic torts*, is a relatively recent phenomenon. Moreover, litigation over most of the substances or devices initiated within the past 15 years continues.

Mass tort litigation presents unique problems for courts and litigants:

- The large number of litigants, plaintiffs as well as defendants, makes mass litigation burdensome. These large numbers significantly complicate the processing and resolution of litigation with procedures that evolved primarily for "simple" lawsuits--i.e., those involving one or two parties on each side.
- Mass tort litigation can involve enormous personal, financial, and political stakes for parties on all sides. It also imposes large burdens on the court system in terms of both public costs and concentration of cases within particular jurisdictions.
- Timing is critical for plaintiffs with significant disabilities and expenses. Yet as the number of claims increases, the need of plaintiffs for prompt compensation becomes harder to satisfy. The complex issues and larger numbers of parties can result in long delays in processing and resolving cases.
- Litigation involving toxic torts presents particular difficulties centering on issues, both technical and legal, about the causation and documentation of injuries and diseases. The frequently long latency period between exposure to a toxic substance and injury, together with the need to identify the products to which exposure occurred, further complicates these legal and technical issues.
- Finally, mass litigation presents special threats to the fairness of our justice system, raising the possibilities that outcomes will be inconsistent; that defendants faced with a great number of claims may be forced to make significant settlements even when liability is unlikely; that defendants can avoid responsibility by aggressively pursuing litigation; that compensation is not related to the seriousness of injuries; and that the burdens on defendants might not accurately reflect their relative culpability.

PROCEDURES FOR HANDLING MASS TORTS

Courts, lawyers, and litigants have developed formal and informal procedures to avoid the task of litigating hundreds or thousands of similar claims. The principal aggregative procedures that have been applied in mass tort litigation are as follows:

- **Consolidation of cases**, a procedure which is based on long-recognized judicial power to order joint trials or other proceedings for cases involving common questions of law or fact.
- **Class actions**, which are carried out under the provisions of the 1966 amendments to the Federal Rules of Civil Procedure. These amendments permit the certification of mandatory and voluntary classes in the following circumstances: (1) where separate actions would create a risk of engendering incompatible standards for the party opposing the class; (2) where the interests of the class members would be impaired if separate actions were pursued; (3) where a class is necessary to avoid piecemeal and possibly conflicting remedies; (4) and where the class action would be "superior to other available methods for the fair and efficient adjudication of the controversy."
- **Multidistrict litigation (MDL)**, which permits transfer of related cases in the federal courts to a single district court that supervises all pretrial proceedings. The MDL process has frequently been used for disasters such as airline cases and fire litigation.
- **Bankruptcy**, under Chapter 11 of the Federal Bankruptcy Code. The Manville Corporation, five other asbestos manufacturers, and A. H. Robins Co., Inc., manufacturer of the Dalkon Shield, have all resorted to bankruptcy proceedings in an effort to resolve all pending mass toxic claims. These corporations claimed that their debts exceeded their assets when the amounts of pending and future claims for injuries from asbestos or the

Dalkon Shield were reduced to present value. In addition, they argued their assets were a "limited fund" that would be exhausted before the resolution of all pending and future injury claims.

- Establishment of an **alternative dispute resolution procedure**. Some asbestos defendants and insurers set up the Asbestos Claims Facility (ACF), a voluntary claim resolution facility outside the court system, to dispose of the many claims they faced. The ACF still represents the only attempt by defendants in mass toxic tort cases to establish a specialized alternative dispute resolution mechanism.

These aggregative procedures are designed to expedite pleadings, discovery, and other formal requirements of civil procedures that become cumbersome with multiple parties. Perhaps more important, the aggregative procedures are used to structure negotiations among the parties.

THE DEBATE OVER THE USE OF AGGREGATIVE PROCEDURES

The use of mass procedures affects vital issues in the administration and realization of justice; both criticisms of mass procedures and arguments supporting their use are based on fundamental values in our system of justice. Those advocating the use of aggregative procedures in mass tort litigation contend that these procedures can prompt quicker resolution of claims than occurs with more traditional, case-by-case processing and, further, that aggregation can produce more equitable results. Critics of aggregate procedures, of course, recognize the need to resolve claims in a timely and equitable manner. However, the most widely stated criticisms of mass procedures hold that such procedures not only fail to achieve these goals but also offend other values central to our justice system. Some argue, for instance, that aggregation denies each litigant the opportunity to manage his or her claim or defense, although the extent of independent litigation differs under various aggregate procedures. Critics also contend that mass procedures are either inequitable--working against the

interests of seriously injured plaintiffs--or ineffective. Moreover, aggregate processing can sacrifice fundamental procedural rights, such as the right of each litigant to a jury trial.

The debate about aggregative procedures tends to focus on the effects of these procedures on the basic values of our justice system. In specific cases, however, litigants and lawyers seek or oppose the use of aggregative procedures because of anticipated effects on the course and outcome of litigation.

Defendants in mass tort litigation have often sought aggregation of claims because this process holds the promise of comprehensively resolving all claims, possibly capping a defendant's liability, structuring legal decisions in ways that markedly reduce overall exposure to liability, and allowing a defendant to gain temporary respite (in terms of both cost and time) when overwhelmed by litigation.

However, aggregation can also serve the interests of plaintiffs; it can expedite resolution, provide a means for collective effort, and result in a broader capitalization of costly litigation. The process of aggregation or "grouping" per se can also change the substantive law and outcome of mass tort litigation. Finally, mass processing can reduce the differences in outcomes among plaintiffs whose injuries are similar but whose claims arose in different jurisdictions.

CONCEPTUAL OVERVIEW

Our research on mass torts is aimed at understanding the impact of aggregation and of individual aggregative procedures on the characteristics, course, and outcomes of mass tort litigation. Yet the impact of these procedures is both complex and significant, primarily because of the complexity of mass tort litigation. Each instance of mass personal injury litigation involves a multitude of parties, with a maze of issues, procedures, and strategies whose outcomes have differing effects on hundreds or thousands of participants. In our efforts to sort through the maze of issues raised in each instance of litigation, we have developed a conceptual overview or framework of mass tort litigation. The overview, which is depicted in Figs. 2 and 3 in the Note, is primarily a means for organizing the following elements of mass tort litigation and exploring the relationships among them.

Characteristics

- What is the litigation about?
- Who are the participants?
- What are the objectives and strategies of the participants and what are the relationships among them?

Approach

- What is the formal organization of the litigation?
- What aggregative procedures are used?
- What are the features of those aggregative procedures?

Course of the litigation

- What procedural actions have been taken?
- How have those actions been carried out?
- What informal actions have been taken, such as negotiations and contacts among parties?

Outcomes

- Has the litigation been resolved?
- Was the resolution comprehensive--i.e., did it include all issues and all parties?
- How was compensation distributed among plaintiffs?
- What were the defendants' relative contributions?
- How satisfied are the parties with the outcome?
- How much did the litigation cost? What were the transaction costs?
- How long did the litigation take?

The overview also provides a common way of looking across various instances of mass tort litigation so that inferences can be drawn about similarities and differences in the effects of aggregative procedures.

By way of introducing the overview and demonstrating its use in this regard, our Note presents brief histories or summaries of two recent instances of mass litigation, *Jenkins v. Raymark*, a class action for 703 asbestos claims in east Texas, and the *Agent Orange* litigation. These summaries are intended to illustrate our approach in subsequent examinations of other cases--highlighting some of the issues and interactions in which we are interested. In short, we have tried to "fit" or apply our conceptual overview to these cases, to use the overview to help develop and organize inferences about mass litigation, and to make some preliminary comparisons between the two litigations.

The trial courts in both *Jenkins* and *Agent Orange* used class actions to advance--and, in the *Jenkins* case, finally resolve--the litigation. The appellate courts' support of certification and the demonstrated utility of the class actions suggest that these two cases are exceptions to the general rule that class actions are inappropriate to mass tort litigation. Indeed, problems that have led to objections to the use of class actions were not present in either case.

First, the particular issues of individual claims did not dominate common issues in either case. The class actions could resolve each case by focusing on common issues. Both the *Agent Orange* and *Jenkins* class actions were formed to deal with common issues; neither attempted comprehensive resolution of all issues.

Second, neither class action created conflicts among claimants that would have led either to inequitable treatment of plaintiffs with strong claims or to widespread opt-outs. These conflicts did not arise in *Agent Orange* because plaintiffs' claims were homogeneous--they were uniformly weak. This was not the case in *Jenkins*, where asbestos injury claims ranged from marginal cases without symptoms to death from mesothelioma. But the class action did not introduce conflicts greater than those already present in the pattern of legal representation of these claims.

Our limited review of these two cases suggests that previous objections to the use of class actions might not be appropriate where (1) conflicts about the total value of a class turn primarily on issues common to each claim; and (2) either the claims have uniformly low values or most claimants are represented by plaintiffs who have portfolios of many similar claims.

Our review of the use of class actions in these two cases has also highlighted some of the limitations of aggregation, which we will explore more fully as our research continues. For example, class certification and the manner in which the class action rules were applied clearly helped bring about a quick resolution of both the *Jenkins* and *Agent Orange* cases. Yet the opposition to the *Agent Orange* settlement voiced by class members, as well as the numerous appeals that

have been filed in that case, stands as evidence that aggregation did not ensure a satisfactory resolution of that litigation. In addition, while class certification helped promote a quick resolution of the claims grouped into the *Jenkins* class, it had little carry-over effect. As we observed in our discussion of *Jenkins* in the Note, asbestos claims filed in east Texas since certification of the *Jenkins* class are being resolved more slowly than was previously the case; at best, the rate of disposition now equals the rate of filing in that jurisdiction.

CONTINUING RESEARCH

As we noted at the outset, this paper is intended to set forth our approach for subsequent conceptual research as well as additional detailed case studies of mass tort litigation. In describing our overview and examining the *Jenkins* and *Agent Orange* class actions, we have raised a number of observations and hypotheses about mass tort litigation and the effects of aggregative procedures. As we continue with case studies of mass tort litigation, we hope to develop systematic analyses and hypotheses within the framework provided by the overview. Throughout, our research will work toward the evaluation of particular methods of aggregating mass claims to suggest how various methods of mass processing might be more systematically matched to the characteristics of particular types of litigation.

ACKNOWLEDGMENTS

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I. THE IMPACT OF MASS TORT LITIGATION

INTRODUCTION

In recent years, we have seen an increase in mass tort litigation. Since the civil justice system is organized primarily for individual litigation, mass claims--many involving thousands of litigants with related but varying claims--have placed considerable strain on the courts. Faced with these problems, judges and policymakers have designed innovative procedures for aggregating individual claims. Critics of this practice voice concern, however, that these new procedures may produce inequitable outcomes and may be at odds with traditional guarantees of individual access to the courts. As their uses have increased, aggregative procedures have been the focus of growing controversy, comment, and debate.

In the past, the debate about aggregative mass tort litigation has been based almost entirely on deductive arguments rather than on observations about the effect of aggregative procedures on the course and outcome of mass litigation. Rather than infer conclusions from empirical data for specific litigation, most commentators impose theories and abstract principles on individual--and varying--cases. But the diverse, complex nature of mass tort litigation makes it inappropriate for solely deductive analyses, since no uniform principle covers all its labyrinthine complexities.

These general deductive inferences rest on assumptions about the facts of mass litigation and about the interests of litigants, but the facts may or may not support those deductive arguments,¹ and litigants might prefer aggregative to traditional legal procedures.² A few

¹For example, arguments condemn the formation of class actions for mass tort claims because tort claims involve more individual than common issues (*Federal Rules of Civil Procedure (F.R.C.P.)*, 23b, *Notes to Advisory Committee on Rules*, West Publishing Co., St. Paul, Minn., 1988, p. 66). In at least two recent mass tort cases, however, courts have found sufficient common issues to form classes (see the discussion of asbestos and Agent Orange litigation below).

²See F.E. McGovern and E.A. Lind, "The Discovery Survey," *Law and Contemporary Problems*, forthcoming, 1989, on the use of surveys and interviews in lieu of traditional discovery.

empirical studies have begun to examine these assumptions. In a series of seminal papers, Professor Francis McGovern provides comparative examination of several mass litigations in which he has worked as a special master.³

This paper joins this empirical approach. It provides an introduction and agenda for an Institute for Civil Justice research program centering on case studies of mass tort litigation. The case studies will look at how the course and outcome of past mass litigation have been affected by uses of aggregative procedures. This research program will develop systematic empirical information about the consequences of adopting aggregative mass procedures and will assess both the benefits and limitations of specific procedures. We expect that the research will produce (1) an elaborated taxonomy of procedures for aggregate handling of mass tort claims; (2) a systematic description of features that are critical to determining the course and resolution of mass tort litigation; and (3) specification of bases for evaluating the course and outcome of mass litigation. It is our hope that the research will help lawyers, judges, and other policymakers choose procedures that can be effective for dealing with the particular characteristics of specific mass litigation.

This paper is divided into three sections. The first section explores problematic characteristics of mass litigation, describes procedures used to process and resolve these disputes, and explores the dimensions of the current debate over uses of aggregate procedures.

The second section presents our conceptual framework or overview of mass tort litigation. Mass tort litigation resembles a complex labyrinth with diverse, changing features and characteristics that can determine its course and outcome. The litigation can follow a number of paths, some leading to desired ends, others straying off to an impasse. How is the participant in the mass litigation, whether judge, lawyer, or policymaker, to negotiate his way through the maze? The overview

³See F.E. McGovern, "Toward a Functional Approach for Managing Complex Litigation," *University of Chicago Law Review*, Vol. 53, 1986, pp. 440-493; and F.E. McGovern, *Resolving Mature Mass Tort Litigation*, Working Paper #78, Civil Liability Program, Yale Law School, March 1988.

provides a sort of aerial map of the labyrinth that allows us to view the intricacies of mass tort litigation in its totality. It provides a means for us to organize our observations from the various case studies. Ideally, the overview will help policymakers track the course of litigation and help them make appropriate decisions at each stage. It is a tool that can illustrate how different choices may affect the resolution of a case.

In the third section we present two case studies that illustrate how the overview in section two may further our understanding of two actual cases.

Finally, in the Conclusions, we review our observations regarding the use of one aggregate procedure.

PROFILE OF THE LITIGATION

Both this paper and our broader research program focus on litigation involving tort claims for bodily injury and/or death.⁴ We regard litigation as "mass" if it involves many plaintiffs suing common defendants for injuries that were allegedly caused by the same accident, product, or substance. For convenience, we refer to this as mass tort litigation (even though we do not examine torts that do not involve bodily injuries). We do not attempt a precise definition of "mass litigation"; it is sufficient that numerous claims are seen and treated as similar by the parties. Rather than set out and defend the importance of various issues that define litigation as mass, the research explores the significance of those issues for litigation involving multiple claims. The mass tort litigation that we are studying results either from catastrophic events with many traumatic injuries (e.g., airplane crashes or hotel fires)⁵ or from broad exposure to or use of a particular substance or device.

⁴Mass litigation involving monetary claims not arising from bodily injury presents many similar problems (See J. C. Coffee, Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action," *University of Chicago Law Review*, Vol. 54, 1987, pp. 877-937), but mass bodily injury litigation generally presents additional or more difficult problems, such as questions of medical causation, heterogeneity of claimed injuries, and statutes of limitations.

⁵Initially, this research will not examine litigation resulting

Mass tort litigation, particularly that involving toxic substances, has increased in the last decades. Figure 1 shows a time line for many types of mass tort litigation.⁶ The late 1950s saw the beginning of litigation against cigarette manufacturers by plaintiffs alleging

from airplane crashes, which is the subject of other forthcoming research by the Institute for Civil Justice. See E. King and J. P. Smith, *Computing Economic Loss in Cases of Wrongful Death*, The RAND Corporation, R-3549-ICJ, 1988; E. King and J. P. Smith, *Economic Loss and Compensation in Aviation Accidents*, The RAND Corporation, R-3551-ICJ, 1988; E. King and J. P. Smith, *Dispute Resolution Following Airplane Crashes*, The RAND Corporation, R-3585-ICJ, 1988; and J. S. Kakalik et al., *Costs and Compensation in Aviation Accidents*, The RAND Corporation, R-3421-ICJ, 1988.

⁶For example, inhalation of asbestos, a mineral fiber that was widely used as insulation, has been linked to the development of cancer and asbestosis. Diethylstilbestrol (DES), a synthetic hormone given to pregnant women during the 1950s to prevent miscarriage, has been linked to the development of reproductive cancers and other reproductive abnormalities in their daughters. Agent Orange is the name given to a dioxin-containing herbicide used as a defoliant during the Vietnam War. Plaintiffs in the Agent Orange litigation contend that their exposure to dioxin, a by-product of the herbicide's manufacture, produced a variety of injuries, including cancer and liver and neurological disorders in themselves as well as birth defects in their children. The Dalkon Shield is an intrauterine device that has been linked to the development of pelvic inflammatory disease and sterility in women who wore the device. Bendectin is the name of a drug prescribed to pregnant women for nausea. Plaintiffs in the Bendectin litigation allege that the drug produced birth defects in their children. Litigation involving DDT in northern Alabama resulted from the discharge of the pesticide (as part of waste products) by its manufacturer into a nearby stream. The Salmonella litigation resulted from the accidental contamination of milk produced by a dairy in Illinois. The Salmonella bacteria caused the deaths of 18 individuals but produced a variety of flulike symptoms in most infected people. The MGM Grand Hotel fire in Las Vegas, Nevada, in 1981 caused 88 deaths as well as traumatic injuries to many hotel guests and employees. The Dupont Plaza Hotel fire in San Juan, Puerto Rico, occurred on New Year's Eve 1986, causing 97 deaths and injuring more than 150 individuals. The Hyatt litigation resulted from the 1981 collapse of two pedestrian bridges or "skywalks" that spanned the lobby of the Kansas City, Missouri, Hyatt Regency Hotel. Over 100 people were killed, and over 230 were seriously injured. Our list in Fig. 1 is not exhaustive but does include the most notable--and largest--examples of mass toxic tort litigation within the past 30 years. Litigation involving exposure to radiation, benzene, formaldehyde, spermicidal agents, aspirin, and intrauterine devices other than the Dalkon Shield has also been initiated in recent years.

personal injuries as a result of smoking cigarettes. During the 1960s, close to a thousand individuals filed suit against manufacturers of the drug MER/29.⁷ But as Fig. 1 shows, the preponderance of major mass toxic tort litigation has been initiated within the past 15 years.

It is also noteworthy that litigation over most of the substances or devices depicted in Fig. 1 is ongoing. For some types of litigation, such as that involving asbestos or the Dalkon Shield, many individual cases have been resolved but many more continue, and new cases continue to be filed.⁸ Almost all claims about exposure to Agent Orange are involved in a single class action suit that has not yet been resolved.⁹

PROBLEMATIC NATURE OF THE LITIGATION

Mass tort litigation presents unique problems for courts and litigants alike. The large number of litigants--both plaintiffs and defendants--makes mass litigation burdensome. For example, the widespread use of asbestos fibers has already given rise to claims by at least 87,000 plaintiffs in state and federal courts throughout the country, and new claims are still being filed.¹⁰ The number of claims

⁷ MER/29 was briefly marketed during the early 1960s as an agent to lower cholesterol but was quickly withdrawn from the market. Litigation centered on evidence that the manufacturer falsified test data indicating that the drug also produced cataracts, severe forms of dermatitis, and other side effects. See P. D. Rheingold, "The MER/29 Story--An Instance of Successful Mass Disaster Litigation," *California Law Review*, Vol. 56, 1968, pp. 116-148.

⁸On asbestos, see D. R. Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts*, The RAND Corporation, R-3324-ICJ, 1985, pp. 82-85, on disposition patterns. New Dalkon Shield claims have been suspended by the A. H. Robins Company bankruptcy proceedings.

⁹See discussion of the *Agent Orange* class action below.

¹⁰The Asbestos Claims Facility (ACF) had 63,000 claims pending and had resolved 21,000 claims in June 1988. New claims are being filed at the rate of 1,300 per month; see C. Mitchell and P. Barrett, "Novel Effort to Settle Asbestos Claims Fails as Lawsuits Multiply," *Wall Street Journal*, June 7, 1988, pp. 1, 23. At the end of 1982, prior to the formation of the Asbestos Claims Facility, 3,000 claims had been fully settled by all defendants; see J. S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses*, The RAND Corporation, R-3132-ICJ, 1984. See discussion of the ACF below.

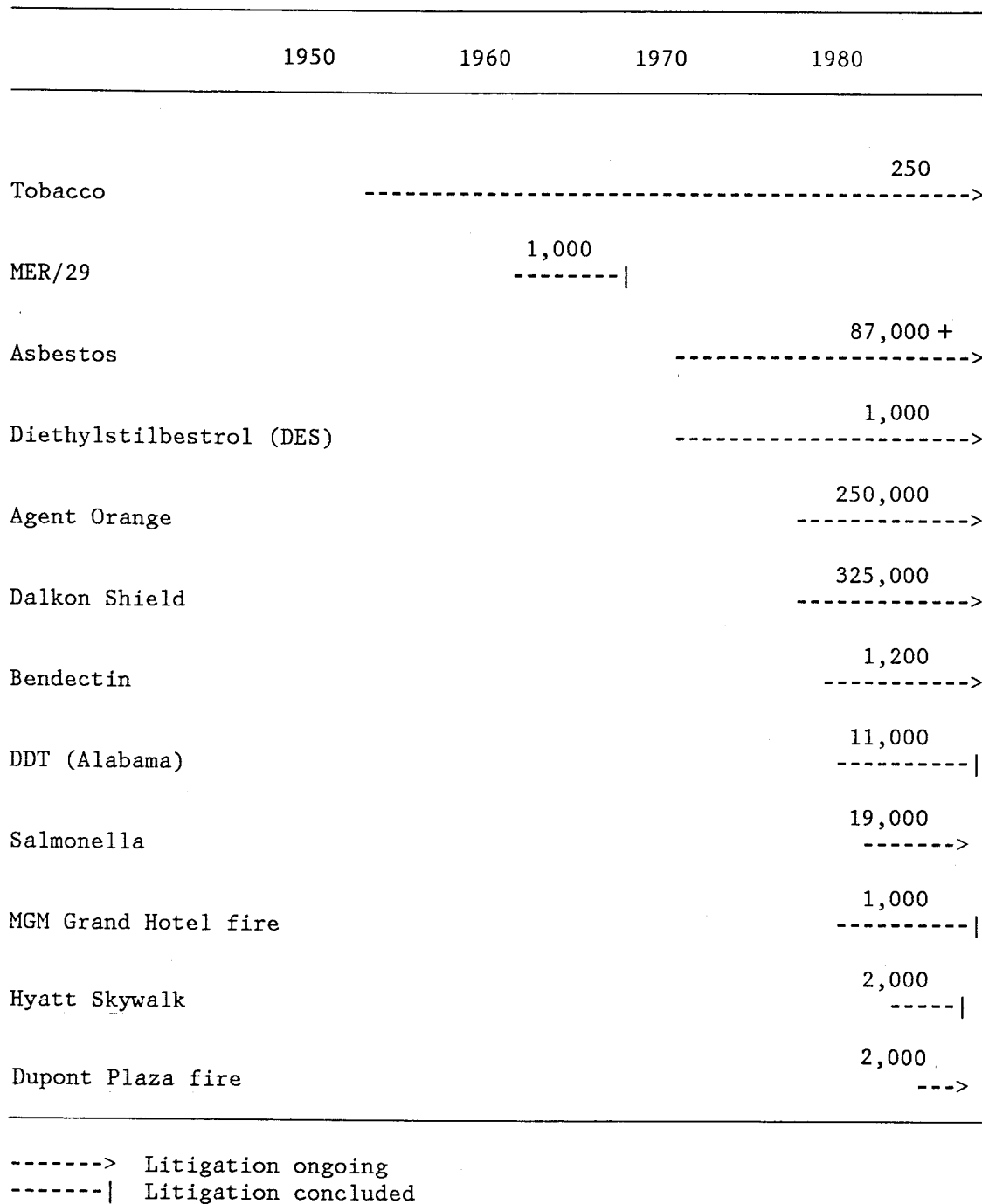


Fig. 1--Increases in the number and size of mass tort litigation

will continue to grow; estimates of the number of deaths that will occur as a result of asbestos exposure over the next 30 years range from 74,000 to 450,000.¹¹ Asbestos claims do not, however, represent the most extreme example of growth in mass tort litigation; litigation resulting from exposure to the herbicide Agent Orange involved over 250,000 claimants, and over 325,000 claims for injuries from the Dalkon Shield were made to the U.S. Bankruptcy Court (trimmed to 200,000 by the court's elimination of duplicates and claimants who failed to respond to the court's questionnaire).¹²

Litigation with so many parties simply does not fit easily within the framework of traditional legal procedures; the processes of litigation have evolved primarily to determine and evaluate issues presented by lawsuits involving one or a few plaintiffs and one or a few defendants. Pretrial processes--pleadings, discovery, and motions--give each party opportunities to identify the issues, facts, and laws involved in the dispute. Each party has a right to participate in a trial, and specific judgments are rendered for each party. Yet the participation of each party becomes increasingly inconceivable as the number of parties increases. Pleadings for 100 plaintiffs are redundant; depositions of 1,000 plaintiffs may be impossible.

Mass toxic tort litigation can also involve enormous personal, financial, and political stakes for parties on both sides. Defendants may face ruinous exposure from substantial awards in each of hundreds or thousands of claims for serious personal injuries. Some defendants also face exposure to punitive damage judgments that carry a political and social stigma, huge financial losses, and even greater risks of bankruptcy.¹³ Stakes of mass tort litigation are also great for

¹¹P. MacEvoy cited in J. S. Kakalik et al., *Costs of Asbestos Litigation*, The RAND Corporation, R-3042-ICJ, 1983, p. 9.

¹²McGovern, 1988.

¹³As the number of personal injury claims against asbestos manufacturers mounted during the early 1980s, six asbestos manufacturers, including the Manville Corporation, sought protection under Chapter 11 of the Federal Bankruptcy Act of 1979. More recently, A. H. Robins Company, Inc., manufacturer of the Dalkon Shield, filed for bankruptcy, citing the large number of pending and projected personal injury claims from wearers of the Shield. Despite the stigma and

plaintiffs with serious injuries and disabilities. Society has a stake as well in decisions regarding compensation for such injuries, including decisions about who will pay how much and to whom as well as those concerning how to change or deter future injurious behavior on the part of corporations and other institutions.

As stakes increase, litigants pursue litigation more aggressively, making use of exhaustive investigation and discovery both to obtain favorable evidence and to tax their adversaries' resources.¹⁴ In the asbestos and Dalkon Shield litigation, this aggressive discovery uncovered so-called smoking-gun evidence that manufacturers withheld or covered up information on the health dangers of these products. This aggressive litigation can be costly to litigants, and it can also mean that litigation will be decided by the parties' resources rather than by the merits of the parties' claims.¹⁵

The total amount of money involved in mass tort litigation can be staggering, even when public costs are ignored. Five years ago, about \$1 billion had been spent by all parties in compensation and litigation expenses for asbestos litigation.¹⁶ No estimates are available for expenses during the last five years or for future expenses, but the Asbestos Claims Facility has paid \$500 million in settlements,¹⁷ and at

financial costs inherent in a bankruptcy filing, protection under the federal bankruptcy rules can serve to limit, or "cap," a defendant's financial liability to mass tort plaintiffs. Nonetheless, bankruptcy or even closure of a business may be socially desirable if the business does more harm than good. Our focus here, however, is on the stakes for defendant businesses--i.e., their interests as they see them.

¹⁴Note, "Discovery Abuse Under the Federal Rules: Causes and Cures," *Yale Law Journal*, Vol. 92, 1982, pp. 352-375.

¹⁵Either plaintiffs or defendants can be disadvantaged by inadequate resources. Plaintiffs' lawyers in the *Agent Orange* litigation had continual problems financing the preparation of their case. They eventually brought in a second group of lawyers to capitalize case preparation (see P. Schuck, *Agent Orange on Trial: Mass Toxic Disaster in the Courts*, Harvard University Press, Cambridge, Massachusetts, 1986, pp. 164-259). Among other problems, A. H. Robins encountered limited human resources prior to declaring bankruptcy; experts and experienced defense lawyers were drawn thin by the nine Dalkon Shield trials in 1985 prior to Robins's bankruptcy in August. By that time, Robins faced imminent trial in many more cases.

¹⁶Kakalik, 1983, p. 38.

¹⁷Mitchell and Barrett, *Wall Street Journal*, June 7, 1988.

least \$2.5 billion more will be added under the pending reorganization plan to terminate the Manville Corporation bankruptcy proceedings. The U.S. Bankruptcy Court has determined that the A. H. Robins Company must pay \$2.47 billion to persons claiming injuries from the Dalkon Shield in addition to the \$530 million that the company spent in litigating and settling claims before declaring bankruptcy in 1985.¹⁸

Mass tort litigation also imposes an enormous burden on the court system, creating public costs that are seldom borne evenly. Mass toxic tort cases are almost always concentrated among a few jurisdictions, placing far greater burden on those courts than would be the case if the litigation had been more evenly distributed.¹⁹ Mass tort litigation is also concentrated among a small group of lawyers, sometimes taxing their abilities to advance the litigation.

Timing is critical for plaintiffs with significant disabilities and expenses. As the number of claims increases, the plaintiffs' need for prompt compensation becomes increasingly difficult to satisfy. The complex issues and the large numbers of parties can result in long delays in the processing and resolution of such cases, yet trial or settlement of each case in routine ways would be so time-consuming as to deny meaningful recovery to many plaintiffs. For example, the many asbestos claimants who are elderly or who have fatal diseases caused by asbestos exposure might die before their cases are resolved by routine methods. These claimants would be unable to obtain any personal compensation for their injuries, and in most jurisdictions their survivors would receive considerably less money.²⁰ As another example,

¹⁸"What A. H. Robins Has Wrought," *New York Times*, December 13, 1987, Sec. 3.

¹⁹Sometimes this happens because exposure and plaintiffs are concentrated in a few jurisdictions (Hensler et al.). Concentration can also occur where plaintiffs' lawyers practice or because of the favorability of legal doctrines, such as the statute of limitations.

²⁰A claim for pain and suffering, a major component of compensation in personal injury cases, generally dies with the decedent. Punitive damages might also be unavailable in death actions. Generally, jury awards are less in death actions than in personal injury cases involving serious injuries (see M. A. Peterson, *Compensation of Injuries: Civil Jury Trials in Cook County*, The RAND Corporation, R-3011-ICJ, 1984).

delayed resolution might deny the most important remedy for women claiming infertility from use of the Dalkon Shield: the possibility of motherhood. Some of these claimants could recover the ability to conceive through reconstructive surgery or could become pregnant through *in vitro* fertilization, but these are expensive procedures that for many women could be financed only through payments for their claims.²¹ Most Dalkon Shield claimants are now in their late 30s or early 40s, however, and are nearing the end of their child-bearing years. There is also a more general potential problem: Early payments might exhaust defendants' assets, leaving nothing to compensate plaintiffs who file later or whose suits proceed more slowly. This possibility can create a "race" among plaintiffs to be among the first to resolve their claims, leading to pressures toward premature filing, insufficient preparation, and acceptance of low settlements.²²

Particular difficulties are posed by mass litigation involving toxic torts--claims of injuries arising from physiological or infectious reactions to a toxic substance. Mass toxic tort cases typically involve difficult issues about the causation and documentation of injuries and diseases, requiring that lawyers, judges, and juries deal with conflicting technical evidence. These issues must be faced both in determining if defendants caused, and are therefore responsible for, plaintiffs' injuries and in ascertaining the extent of those injuries. Litigation is further complicated if different plaintiffs claim a variety of injuries from the same substance, as is usually the case. Each injury raises somewhat different technical issues of causation and documentation.

The frequently long latency period between exposure to a toxic substance and ultimate injury further complicates technical and legal issues. Twenty or thirty years may pass between initial exposure to a substance and the manifestation of an injury. The causal link between

²¹A claimant's health insurance might pay for reconstructive surgery, but many insurance policies do not cover *in vitro* fertilization. Of course, these opportunities are denied women who have no insurance.

²²Coffee, Jr., 1987.

exposure and injury becomes more tenuous as latency increases, in part because claimants were often exposed to other toxic substances during the period of latency. Long latencies also pose difficult legal problems, such as the applicability of statutes of limitations or questions about defendants' insurance coverage.

In several types of mass toxic litigation, many plaintiffs cannot identify the products to which they were exposed either because products were mixed (e.g., Agent Orange) or because plaintiffs were exposed to generic products without knowing the name of specific suppliers (e.g., diethylstilbestrol, or DES, and asbestos). In these cases, plaintiffs may not be able to recover for their injuries even if defendants manufactured or distributed toxic substances that caused the injury. This identification problem increases with the passage of time between exposure and injury. In response to the obstacles these identification problems present to plaintiffs, courts have fashioned new rules of joint liability.²³ The identification problem does not only affect plaintiffs; the issue of relative responsibility has sometimes driven a wedge among defendants as well.

Finally, mass litigation presents special threats to the fairness of our justice system, raising the following possibilities:

- That defendants faced with a great number of claims may be forced to make significant settlements, even when liability is unlikely (such as in the *Agent Orange* example). Such "nuisance" settlements might be made for at least two reasons: first, settlement might obviate extraordinary litigation expenses; and second, given enough trials, a defendant can expect to lose, even if there is a low probability of liability in each case. These occasional verdicts might be extraordinary and could create pressure for payment in subsequent cases.²⁴
- That defendants can avoid responsibility by aggressively pursuing litigation. Costs in mass litigation are asymmetrical

²³See, for example, the California Supreme Court's decision in *Sindell v. Abbott Laboratories*, 26 Cal.3d 588 (1980). In this case, the plaintiff, a "DES daughter," could not identify the pharmaceutical company that had manufactured the generic drug her mother had taken. The court held that each defendant's responsibility for Sindell's injury was measured by its market share.

²⁴Schuck, pp. 164-259.

and are greater for plaintiffs. While a defendant can prepare a "core" or common defense, each plaintiff must separately prepare its case. A defendant's investment in litigation expenses will create far greater costs for plaintiffs.²⁵

- That outcomes will be inconsistent. With multiple trials some plaintiffs will receive nothing, while others will receive exceptionally large awards for essentially similar claims. Defendants and observers will have little guidance about future conduct because they receive inconsistent signals about the propriety of their actions.²⁶ Differing state laws (e.g., statutes of limitations, availability of punitive damages) contribute to this inconsistency.²⁷
- That compensation is not related to the seriousness of injuries; settlements and awards are determined by choice of jurisdiction, attorney skill, information available to plaintiffs, availability of evidence inculcating defendants, and emotional responses of jurors.²⁸
- That burdens on defendants are not distributed in a manner that reflects their relative culpability. Contributions are determined factors such as market share or insurance limits.²⁹

²⁵Note, "Class Certification in Mass Accident Cases Under Rule 23(b)(1)," *Harvard Law Review*, Vol. 96, 1983, pp. 1143-1161; Coffee, Jr., 1987.

²⁶*Ibid.*

²⁷J. B. Weinstein, "Preliminary Reflections on the Law's Reaction to Disasters," *Columbia Journal of Environmental Law*, Vol. 11, 1986, pp. 1-50, at pp. 16-17. See, for example, the California Supreme Court's recent decision in *Jolly v. Eli Lilly & Co.* (44 Cal.3d 1103 [1988]), in which the court held that DES claims otherwise barred by the statute of limitations cannot be revived by the court's earlier ruling in *Sindell v. Abbott Laboratories* (which greatly increased the ability of plaintiffs to win damages against the drug's manufacturers).

²⁸See, e.g., Rheingold, 1968.

²⁹See *Sindell*; McGovern, 1986, and Schuck, p. 156, on the formula Judge Weinstein recommended to defendants for funding the *Agent Orange* settlement based on a combination of product volume and dioxin content.

PROCEDURES FOR HANDLING MASS TORTS

Courts, lawyers, and litigants have been developing formal and informal procedures to circumvent the need to litigate hundreds or thousands of similar claims involving overlapping litigants. These aggregative procedures are designed to facilitate the formal requirements of civil procedure so as to expedite pleadings, discovery, and other procedures that become cumbersome with multiple parties. Perhaps more important, the aggregative procedures are used to structure negotiations among the parties.

The use of aggregative procedures for mass personal injury litigation is new to our justice system; hence courts and litigants are still struggling to determine their proper use. Our research program is intended to collect and share information about the uses of aggregative procedures--i.e., to determine their effects as well as to ascertain what works and what does not.

Table 1 lists procedures used in mass personal injury litigation resulting from the widespread use of a number of substances or from several catastrophic incidents. Most mass personal injury litigation begins with the filing of a number of individual claims. For four of the types of litigation listed, such traditional case-by-case litigation has led to the resolution of a significant number of claims; most tobacco and DES cases have been handled in this manner. Similarly, thousands of asbestos and Dalkon Shield cases were tried or settled either individually or in small ad hoc groups. As the burdens associated with individualized handling of asbestos and Dalkon Shield litigation increased, however, courts and litigants turned to formal procedures for aggregating those cases. Often more than one aggregative procedure has been used in the same litigation as courts and litigants search for effective ways to handle and resolve mass claims. In the case of asbestos, almost every aggregative procedure has been used.

Because mass personal injury litigation is a new (or at least an increasing) problem, courts and litigants have had to adapt old procedures or develop new ones. We briefly review the major procedures in the chronological order of their development.

Table 1
USE OF AGGREGATE PROCEDURES FOR SOME MASS TORTS

Method of Litigation	Subject of Litigation										
	MER/29	Tobacco	Asbestos	DES	Agent Orange	Dalkon Shield	Hyatt Skywalk	Bendectin	MGM Grand	Alabama DDT	Dupont Salmonella Plaza
Individual litigation	X	X	X	X	X	X	X	X	X		X
Consolidated actions		X	X	X		X	X	X	X	X	X
Ad hoc aggregation	X	X	X			X					
Multidistrict litigation					X	X		X	X		X
Class actions			X		X	X	X			X	X
Bankruptcy			X			X					
Private ADR			X								

Consolidation of cases is based on the long-recognized judicial power to order joint trials or other proceedings for cases involving common questions of law or fact.³⁰ Consolidation has been used in asbestos cases both for trials of multiple claims³¹ and in conjunction with plans for case management and **ad hoc** grouping of cases for negotiation.³² Attorneys have frequently negotiated and settled ad hoc groups of toxic cases--for example, all claims represented by a particular plaintiffs' lawyer. Increasingly, however, courts have developed local rules for ad hoc aggregation of asbestos cases to simplify case management and group settlement negotiations.³³ Nonetheless, even in the 1960s, consolidation was not seen as sufficiently broad or flexible to handle complex, multijurisdiction litigation.

In 1966, the **class action** provisions of the Federal Rules of Civil Procedure were substantially amended, creating four types of class actions to provide common resolution of issues for all members of the class.³⁴ Mandatory class actions can be created in three circumstances: (1) where separate actions might generate incompatible standards for the party opposing the class, a 23(b)(1)(a) class; (2) where the interests of class members would be impaired if separate actions were pursued (i.e., where early actions would exhaust defendants' funds, leaving nothing for later claimants), a 23(b)(1)(b) class; or (3) where a class is necessary to avoid piecemeal and possibly conflicting remedies, a

³⁰F.R.C.P. 42(a), based on 28 U.S.C. former Sect. 734.

³¹See M. Selvin and L. Picus, *The Debate Over Jury Performance: Observations from a Recent Asbestos Case*, The RAND Corporation, R-3479-ICJ, 1987.

³²See the discussion of the Ohio asbestos litigation plan in McGovern, 1986, pp. 440 and 478-491.

³³Hensler et al.; McGovern, 1986.

³⁴On the medieval origins and contemporary history of the class action procedure, see S. C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, Yale University Press, New Haven, Connecticut, 1987.

23(b)(2) class. Because each of these three class actions is intended either to prevent duplicative litigation or to represent preexisting groups--i.e., all students in a school system or all persons in a prison--members of mandatory classes do not have a right to pursue a separate legal action (i.e., class members cannot "opt out").³⁵ A fourth, "voluntary" class action can be formed where the class action would be "superior to other available methods for the fair and efficient adjudication of the controversy," a 23(b)(3) class.³⁶ Members of 23(b)(3) classes can "opt out" of the class to pursue separate litigation, and they must be given notice of this right.³⁷

Until recently, these class action procedures were not used in mass litigation. Attempts at forming mandatory (b)(1)(a) or (b)(1)(b) classes in mass tort litigation have been uniformly unsuccessful for completely resolving mass torts because advocates of the class have been unable to prove the need for such classes.³⁸ Mandatory classes have been used to resolve limited issues in mass torts, such as the issue of punitive damages in the *Salmonella* litigation. Attempts at forming voluntary (b)(3) classes have also met with limited success.³⁹ The comments to rule 23(b)(3) discouraged the use of voluntary class actions for mass tort litigation "because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present affecting the individuals in different ways."⁴⁰

³⁵E. F. Sherman, "Class Actions and Duplicative Litigation," *Indiana Law Review*, Vol. 62, 1987, pp. 507-559.

³⁶F.R.C.P. 23(b)(3).

³⁷F.R.C.P. 23(c)(2). See also Yeazell, pp. 238-266, on the history of the 1966 amendments.

³⁸*In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982).

³⁹Among the cases in which certification was denied: *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982); *Payton v. Abbott Labs*, 100 F.R.D. 336 (D. Mass. 1983); and *Yandle v. PPG Industries*, 65 F.R.D. 566 (E.D. Texas 1974).

⁴⁰Advisory Committee Note to 1966 Revision of Rule 23(b)(3).

Some observers now argue that the federal rules governing class actions are particularly well suited to the resolution of issues that arise in the context of mass torts.⁴¹ The rapid increase in the number of mass personal injury claims has undoubtedly contributed to an attitudinal change toward the use of class actions in mass tort litigation both among judges and among members of the broader legal community. In recent years, class actions have in fact become important in the litigation of mass toxic tort claims. For example, classes have been used for over 750 asbestos cases in eastern Texas (see discussion of the *Jenkins* case, below) as well as for DDT claims in Alabama, the *Agent Orange* litigation (see discussion below), and the resolution of fundamental issues in the *Salmonella* cases.

In 1968, two years after the federal courts amended the class action rules, Congress established the procedure for **multidistrict litigation** (MDL), a procedure whose goal was to allow more efficient and consistent handling of similar cases that had been filed in several federal court jurisdictions. MDL permits the transfer of related cases in the federal courts to a single district court that supervises all pretrial proceedings;⁴² cases are then transferred back to the original court for trial. The MDL process has been frequently used for mass disasters such as airline cases and was the vehicle for resolving the MGM Grand Hotel fire litigation. In other cases, MDL has had a limited impact. The federal Judicial Panel on Multidistrict Litigation turned down requests for use of the procedure for asbestos claims. Some common discovery was carried out under MDL in the Dalkon Shield litigation, but MDL did not lead to a common process for handling those cases. Indeed, most discovery in Dalkon Shield cases occurred in individual cases outside MDL.

⁴¹See, for example, Comment, "Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency," *Albany Law Review*, Vol. 47, 1983, pp. 1180-1229.

⁴²28 U.S.C. 1407.

While courts have become more comfortable with the use of the class action and multidistrict rules for mass litigation, some defendants have turned to other methods for the aggregation of such claims, including bankruptcy. In 1982, the Manville Corporation was one of the first to use Chapter 11 **bankruptcy proceedings** to attempt to resolve all pending mass toxic claims. Manville filed for bankruptcy claiming that its debts exceeded assets when the amount of pending claims for injuries from asbestos plus the amount of future claims (both for those with present injuries who had not yet filed and for those who will manifest injuries at a later time) were reduced to present value. Manville argued that its assets were a "limited fund" that would be exhausted before the resolution of all pending and future claims for injuries from asbestos. Since that time, five other asbestos manufacturers have sought protection of Chapter 11, and the A. H. Robins Company entered Chapter 11 in 1985 to resolve claims arising from use of the Dalkon Shield.⁴³

Finally, some asbestos defendants and insurers set up a voluntary claim resolution facility outside the court system to dispose of the many claims they faced. The Asbestos Claims Facility (ACF) still represents the only attempt by defendants in mass toxic tort cases to establish a specialized **alternative dispute resolution mechanism**,⁴⁴ but

⁴³The use of the Bankruptcy Code by a solvent company to obtain relief from present and future mass tort claims has generated considerable controversy. Some observers question whether such companies should be permitted to invoke protection of the bankruptcy laws in this manner and, if so, under what conditions. Others point to developments in the A. H. Robins bankruptcy proceedings as evidence that the bankruptcy laws do secure for victims benefits that might otherwise not be available. See Note, "The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings," *Harvard Law Review*, Vol. 96, 1983, pp. 1121-1142; M. Corrigan, "Mass Tort Issues," in G. Northstein (ed.), *Toxic Torts: Litigation of Hazardous Substance Cases*, McGraw-Hill, New York: 1984, pp. 585-617; B. Feder, "What A. H. Robins Has Wrought," *New York Times*, December 13, 1987; and J. Hanigan, "In Robins Case the Bankruptcy Laws Worked," *Los Angeles Times*, January 6, 1988, Part IV, pp. 1 and 5. See also T. Jackson, *The Logic and Limits of Bankruptcy Law*, Harvard University Press, Cambridge, Massachusetts, 1986.

⁴⁴For details of this alternative dispute resolution plan, see "Special Bulletin: Asbestos Claims Facility Releases Alternative Dispute

there has been widespread use and acceptance of various ADR procedures to settle other types of disputes.⁴⁵ Claims against those defendants who are members of the ACF are handled jointly to facilitate the resolution of asbestos claims. The ACF negotiates claims on behalf of defendant members and makes mediation facilities available if negotiations are not successful.

DEBATE OVER THE USE OF AGGREGATIVE PROCEDURES

The use of mass procedures affects vital issues in the administration and realization of justice; criticisms of such procedures as well as arguments favoring their use are based on fundamental values in our system of justice. Advocates argue that aggregative procedures are critical to the achievement of justice--that they may be the only means available within our justice system for resolving some mass tort cases. There are several examples in which courts resorted to aggregative procedures because cases were not being resolved or because the court anticipated difficulties in resolving hundreds or thousands of cases through repetitive litigation. Courts have used class actions to resolve hundreds of asbestos claims in east Texas⁴⁶ and thousands of

Resolution Plan," *Asbestos Litigation Reporter*, March 12, 1987. The ACF has been under attack from plaintiffs and from some defendant members. A class action filed in 1987 on behalf of 50,000 asbestos claimants in federal court for the Western District of Pennsylvania seeks the dissolution of the ACF, alleging restraint of trade and monopolization in violation of the Sherman Act and unfair competition and civil conspiracy under Pennsylvania state law. See "Class Action Complaint Seeks Dissolution of Asbestos Claims Facility," *Asbestos Litigation Reporter*, May 1, 1987, p. 14,775. At this writing (June 1988), seven major companies, ACF members who collectively account for 80 to 95 percent of the cash flow, have stopped or will soon stop bringing new cases into the facility. Eagle Picher Industries, the first defendant to pull out (in February 1988), has since filed suit against the facility in federal court in Cincinnati, alleging that it had settled nonmeritorious or unsubstantiated claims, failed to properly develop an ADR mechanism, and illegally restrained trade by trying to prohibit members from dropping out of the Facility. See T. Carter, "Asbestos Coalition Falling Apart," *National Law Journal*, April 25, 1988, pp. 3 and 36; and Mitchell and Barrett, *Wall Street Journal*, June 7, 1988, pp. 1 and 23.

⁴⁵The term *alternative dispute resolution*, or ADR, is applied as a general label to any procedure designed to resolve disputes without resort to litigation.

⁴⁶See the discussion of *Jenkins* below.

injury claims from DDT exposure in Alabama.⁴⁷ Several hundred other asbestos cases were resolved by a court-designed ADR program in Ohio,⁴⁸ and thousands more were settled through the Asbestos Claims Facility's private ADR program.⁴⁹ Over one thousand claims for personal injury were settled in each of the MDL processes arising from the MGM Grand Hotel fire and the Hyatt Skywalk collapse.⁵⁰

These instances represent a central goal that aggregative procedures attempt to realize: the resolution of disputes. They also represent a second value of aggregate litigation: the timely resolution of claims. In each instance, courts or private litigants used aggregative procedures to resolve large numbers of claims more quickly than if the cases had been handled individually through traditional litigation. Although aggregative procedures might hasten the dispositions of cases taken as a whole, the procedures may slow the resolution of certain cases. The bankruptcy filings by Manville and A. H. Robins, for example, might serve to expedite compensation for the tens of thousands of persons with personal injury claims, but each filing stayed for years the processing of thousands of cases that were pending at the time of filing.

Advocates argue that mass processing produces more equitable results--that aggregate proceedings permit fair and consistent allocation both of compensation among large numbers of plaintiffs and of liability among multiple defendants. They contend that allocations can be made on rational bases, circumventing the sometimes capricious results of trials or settlements of individual cases. After the parties reached settlement in the *Jenkins* asbestos class action, for example, Judge Parker reviewed the settlement allocation⁵¹ using data about the medical condition of each plaintiff that had been collected as part of the class action.

⁴⁷On the DDT litigation, see McGovern and Lind, forthcoming, 1989.

⁴⁸The Ohio asbestos litigation plan was developed by Judge Thomas Lambros, U.S. District Court, Northern District of Ohio. See McGovern, 1986.

⁴⁹See note 44.

⁵⁰On these cases, see "Group Justice," *CPR Program Proceedings*, Center for Public Resources, New York, February 1986, pp. 67-74.

⁵¹See Sec. III.

Interests of equity are particularly critical in cases where the assets of defendants may be insufficient to compensate all plaintiffs--i.e., in "limited fund" cases. Without aggregation, defendants' resources will be exhausted before all claims are resolved, preventing recovery by subsequent claimants. Through the aggregation of all claims, the defendants' resources can be allocated proportionately among claimants. To date, no class actions have been successfully formed in mass tort cases under the 23(b)(1)(b) provisions for limited funds. However, bankruptcy proceedings such as those by Manville and A. H. Robins have been based on contentions that corporate resources were not adequate to compensate the great number of personal injury claims that had been filed or could be anticipated.

Of course, critics of aggregate procedures recognize both the need to resolve claims and the merits of timeliness and equity. The most widely stated criticisms of mass procedures argue, however, that such procedures not only fail to achieve these values but offend other values important to our justice system.⁵²

Critics emphasize the strong value placed by our system of justice on allowing each litigant to manage his own claim or defense.⁵³ Traditionally, our justice system is extraordinarily accessible. Critics contend that mass procedures can deny litigants opportunities to pursue their individual claims or defenses independently.

The extent of independent litigation differs under various aggregate procedures. For example, independent actions are not permitted under the no-opt-out provisions of Federal Rule 23(b)(1) or (b)(2) class actions, such as the mandatory class actions for punitive damages in the *Salmonella* case. Members of mandatory classes are bound by the outcome of these cases, even if they would have preferred not to be included in the class. In contrast, litigants can independently

⁵²Other, diametrically opposite criticisms hold that the use of mass procedures within the existing civil justice system do not go far enough--that mass litigation should be resolved by administrative bodies outside the justice system (interview with Kenneth Feinberg, June 1987).

⁵³Coffee, Jr., 1987.

pursue litigation by opting out of (b)(3) voluntary class actions, such as those in *Agent Orange*, the *Jenkins* asbestos litigation in east Texas, or the DDT litigation in Alabama. Some independent actions are permitted under multidistrict litigation and bankruptcy after common issues are resolved, but these two procedures differ in a critical way: While claimants can remain entirely independent of the common MDL process, those who do not file claims in bankruptcy can completely lose any right to bring a claim. The bankruptcy bar can be significant as well: Several thousand women claim that their injuries from the Dalkon Shield are barred because they did not file claims before the court's deadline in the A. H. Robins bankruptcy proceedings.⁵⁴

This preemption of control over litigation can have important symbolic and psychological effects. Tort litigation often involves strong issues of value, not simply matters of money. Plaintiffs may argue and seek from a judge or jury a statement that defendants were bad or wrong.⁵⁵ Defendants may wish to argue that they were not wrong or bad or that their errors were trivial. Past litigation shows that consideration of these value issues tends to be washed out of mass proceedings, even when the issues were central to previous individual litigation of similar claims. For example, although the plans in both the Manville and A. H. Robins bankruptcies include components for punitive damages, arguments about the companies' wrongdoing were not really an issue in either bankruptcy proceeding. Litigants may object to losing the opportunity to make these arguments in mass proceedings. Many women claiming injuries from the Dalkon Shield have strong feelings about their injuries and the claimed wrongdoing by A. H. Robins. Some have protested that the bankruptcy plan proposed for A. H. Robins does not sufficiently punish the company and its principals.⁵⁶ Similarly,

⁵⁴These women might receive some compensation through settlement of a related class action suit against Aetna, A. H. Robins's insurer. See *Glenda Breland v. Aetna*, Civ. Action No. 87-0315-R (E.D., Va.).

⁵⁵See, for example, U.S. District Judge Miles Lord's statement on February 29, 1984, reprimanding three senior Robins officials for Robins's legal tactics in the Dalkon Shield litigation, reprinted in M. Mintz, *At Any Cost*, Pantheon Books, New York, 1985, Appendix B.

⁵⁶See D. Oberdorfer and A. Cooper, "Two IUDs, Two Courtroom Tales, Robins' Fate Hangs in the Balance," *National Law Journal*, November 9, 1987, pp. 3 and 34.

many veterans and their families who felt that they were injured by Agent Orange objected to the settlement of that case because they had no opportunity to make their case against the defendants. The "fairness" hearings held by Judge Weinstein in multiple cities seemed designed to provide claimants with at least some opportunity to satisfy this need.⁵⁷

Critics also argue that mass procedures are either inequitable--working against the interests of seriously injured plaintiffs--or ineffective. They contend that aggregate handling of claims may gloss over differences among plaintiffs or among defendants. This has in fact been the principal reason for denial of class certification in multiple tort claims: that individual claims present differing issues of damages, causation, and liability.⁵⁸ Some courts and commentators have argued that because of the heterogeneity of plaintiffs' claims, mass tort classes would be either unfair or ineffective. They project that payments tend to be averaged or moderated under aggregate processing; payments to severely injured plaintiffs are reduced, and payments to slightly injured plaintiffs are increased.⁵⁹ If plaintiffs with strong claims for serious injuries remain in the class, they are likely to see their compensation diluted to increase payments to the many more numerous claimants with less serious injuries. If plaintiffs with strong claims opt out of the class, however, then the class action will not prevent duplicative litigation.⁶⁰

⁵⁷See discussion of the *Agent Orange* suit below. See also J. Resnik, "Judging Consent," *University of Chicago Law Forum*, Vol. 1987, 1987, pp. 43-102, on judicial involvement in the consent decree process.

⁵⁸Although the commentary to 23(b)(3) argues that class actions are inappropriate because of differences in issues of liability, in mass tort litigation issues of defendants' liability are often common across all claims by plaintiffs. See "Class Certification in Mass Accident Cases Under Rule 23(b)(1)," *Harvard Law Review*, Vol. 96, 1983, pp. 1143-1161.

⁵⁹Coffee, Jr., 1987.

⁶⁰*In re Agent Orange Product Liability Litigation*, 818 F.2d 145 at 166 (2nd Cir. 1987); see also discussion in Coffee, Jr., 1987.

The aggregation of claims in bankruptcy proceedings can also work against the interests of seriously injured claimants. In bankruptcy proceedings, personal injury claimants vote on approval of the bankruptcy plan as creditors. In principle, each claimant's vote on the plan should be weighted to reflect the likely value of her claim; seriously injured claimants should thus have more votes, reflecting their greater economic interest in the bankruptcy plan. If all claimants were to receive equal votes, the bankruptcy plan might be structured to the benefit of the more numerous claimants with relatively minor injuries and to the detriment of the few claimants with serious injuries. Unfortunately, however, bankruptcy courts are rarely able to estimate the value of plaintiffs' claims, and thus weighted votes can seldom be established. To be certain of those values and the proper weights, courts would have to litigate each claim--a task that the bankruptcy proceeding sought to avoid in the first place.

The data collection effort by the court in the A. H. Robins bankruptcy suggests an expedient middle ground. Because the court required each claimant to complete a questionnaire, it knew at least the type of injury claimed by each claimant. Voting weights could be made proportionate to the relative level of payments made before bankruptcy for each type of claimed injury.

Finally, some instances of mass procedures have been criticized for sacrificing fundamental procedural rights, such as the right to a jury trial.⁶¹ These denials may be particularly costly to severely injured plaintiffs who might expect large independent awards.

The debate about aggregative procedures tends to focus on the effects of these procedures on the basic values of our justice system. In specific cases, however, litigants and lawyers seek or oppose the use of aggregative procedures because of their anticipated effects on the course and outcome of litigation.

⁶¹Judge Weinstein's dismissal of "opt-outs" from the *Agent Orange* class action was challenged as a usurpation of the plaintiffs' right to a jury trial. See C. Nesson, "Agent Orange Meets the Blue Bus: Factfinding at the Frontiers of Knowledge," *Boston University Law Review*, Vol. 66, 1986, pp. 521-539.

In recent years, mass tort defendants have increasingly sought aggregative procedures for several reasons. First, some procedures can carry the promise of comprehensively resolving all claims against the defendant. The experience of the Olin Company in its litigation over DDT contamination in Alabama illustrates the importance of obtaining comprehensive resolution of litigation. In 1981, Olin settled a class action brought by Alabama residents who lived and fished near streams contaminated by the discharge of DDT from an Olin plant. Rather than resolve the claims against Olin, the settlement served as a stimulus for a larger class action brought by other Alabama residents who were not included in the first class.⁶²

The desire for comprehensive resolutions was important to both Manville and A. H. Robins, who partially justified their bankruptcy filings on their need to clarify and cap the amount of each tort liability. Both companies faced a large and apparently growing number of claims, and both claimed that the present value of the known and projected future claims might exceed the company's current assets. The bankruptcy proceeding provided an apparent means to determine and set a limit on this liability.

In fact, the two companies had different degrees of success in achieving a comprehensive resolution through bankruptcy. Robins's bankruptcy plan established a cap on its liability for Dalkon Shield injuries. Manville, however, was unable to establish a certain cap on its liability because of "plaintiff indeterminacy." This problem arises because of uncertainties about (1) who has been exposed to asbestos (or, more generally, any toxic agent); (2) whether or not asbestos (or other agent) can cause injury (general causation); (3) who has such injuries (documentation and specific causation); or (4) who will have such injuries (latency and future injuries). These uncertainties all make it difficult to determine how many persons might have injury claims and who those persons might be--that is to say, the

⁶²*Cloud v. Olin Corp.*, C.A. No. 79-PT-5128NE et al. (N.D.Ala.) and *Wilhoite v. Olin*, C.A. No. CV83-C-5021-NE (N.D.Ala.). On these two class actions, see McGovern and Lind, forthcoming, 1989.

number and identities of the plaintiffs are indeterminate.⁶³ Each of these uncertainties was significant in the Manville litigation. As a result, the bankruptcy plan did not set a firm cap on Manville's potential liability. The plan contains conditions under which additional Manville assets will be transferred to the Manville Personal Injury Trust, which is responsible for paying claims. In general, plaintiff indeterminacy makes it difficult to fashion aggregate procedures that will produce comprehensive and final resolution.

Other defendants have had varying degrees of success with the use of class actions to cap their liability. Ordinarily, class actions do not serve as vehicles for obtaining the comprehensive resolution of all claims. Mandatory class actions have usually not been found to be appropriate for mass tort litigation, and two requirements present possible impediments to achieving comprehensive resolution of all claims through voluntary class actions. First, the presiding judge is required to give notice and receive comments from class members in determining the fairness of the settlement. As the *Agent Orange* experience showed, this requirement is not necessarily a major impediment to settlement, even when plaintiffs strongly object to a settlement.⁶⁴ Second, and more important, claimants have the right to "opt out" of a voluntary class action, rejecting the settlement in order to preserve their right to pursue their claims independently. Nevertheless, when all plaintiffs accept the class settlement,⁶⁵ or where opt-out claims were barred on other grounds,⁶⁶ class actions have been used to obtain comprehensive resolution.

⁶³Schuck, pp. 184-189.

⁶⁴See discussion of *Agent Orange* below and in Resnik, 1987.

⁶⁵As happened in the Alabama DDT case, where plaintiffs who had not been a part of the class action found the settlement offer attractive enough to opt in (McGovern and Lind, forthcoming, 1989).

⁶⁶As happened in *Agent Orange*, where Judge Weinstein dismissed opt-outs as not raising claims that could get to a jury. *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985).

Similarly, multidistrict litigation (MDL) has been used to obtain comprehensive resolution, although the procedure has no formal legal provision for comprehensive resolution of claims. The MDL process applies only to those federal court cases that are specifically named, and it might therefore exclude state court cases, federal suits filed after the transfer, or those excused from the MDL process. Nevertheless, although there is no formal requirement, defendants in an MDL action might condition a settlement on the requirement that all claimants participate in such an agreement. Defendants in the MGM Grand Hotel fire MDL settlement successfully conditioned their settlement offer on such terms.⁶⁷

Although defendants are usually interested in aggregative procedures as means for comprehensive resolution, these procedures can help defendants in other ways. In several instances, defendants have used aggregative procedures to structure decisions in ways that markedly reduced their overall exposure to liability. Defendants in the *Salmonella* litigation sought formation of a class of claimants; the value of those claims fell sharply after a defense verdict in a bifurcated trial solely on the issue of punitive damages. Similarly, defendants in the Bendectin cases almost eliminated the value of those claims by first establishing an MDL process for those claims and then obtaining a defense verdict in a trifurcated trial of the general causation issue.⁶⁸

Defendants have been able to use aggregative procedures to gain respite when they were being overwhelmed by litigation. The aggregative procedure can buy some time for defendants, reducing the demands on their cash and other resources. The bankruptcy filings, of course, provide clear examples of attempts to protect a defendant's cash flow. A. H. Robins also used the bankruptcy to protect a significant drain on human resources. Before filing bankruptcy in August 1985, Robins had

⁶⁷See "Group Justice," 1986.

⁶⁸*In re Bendectin Product Liability Litigation*, 749 F.2d 300 (6th Cir. 1984).

been in trial or faced trials in many jurisdictions throughout the country. These trials or impending trials placed enormous burdens on the lawyers Robins had retained to supervise the litigation, on its expert witnesses, who were to appear in multiple trials, and on Robins personnel who were also to serve as witnesses. The pace of litigation had placed Robins under siege. The bankruptcy filing broke this siege.

Aggregative procedures can also serve the interests of plaintiffs and plaintiffs' lawyers. But the use of such procedures is often controversial, pitting some plaintiffs and plaintiffs' lawyers against others. Aggregative procedures may be promoted by plaintiffs with weak cases or speculative claims. The attempted formation of classes can introduce conflict among plaintiffs and among plaintiffs' lawyers, as happened in the Hyatt Regency litigation. Here the attempt to certify a class was opposed by plaintiffs' lawyers, who wished to maintain control over the individual claims that they represented.⁶⁹

Aggregation provides a means for collective effort among plaintiffs and for broader capitalization of the costs or risks of the litigation. The Agent Orange litigation and the Olin DDT litigation represent classic uses of class actions. In each class action, a large number of plaintiffs were able to undertake litigation that would have been far more expensive than any individual plaintiff (or plaintiffs' lawyer) could bear. Generally, however, mass procedures raise the cost to plaintiffs and their lawyers, who must pay for the work of plaintiffs' committees involved with the aggregative procedure.

Finally, aggregative procedures can change the substantive law and the outcomes of mass tort litigation. Some commentators are concerned, while others welcome the possibility, that issues of causation might be shifted in mass proceedings.⁷⁰ Particularly in toxic cases, medical causation may be generally established--epidemiological studies might show that persons exposed to a substance had an increased chance of a disease or injury--but it may be impossible to determine whose injuries

⁶⁹Coffee, Jr., 1986; and "Group Justice," pp. 70-74.

⁷⁰D. Rosenberg, "The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System," *Harvard Law Review*, Vol. 97, 1984, pp. 849-929.

were caused by the toxic substance. No plaintiff might be able to recover damages under traditional legal rules, where a plaintiff must show that it is more likely than not that her injuries were caused by the substance. If claims are aggregated for all plaintiffs who were exposed to the substance, the court or jury might award some money to reflect the increased probability of injury among those plaintiffs. Such an outcome can be criticized as inconsistent with substantive legal standards, but it might more accurately reflect the probabilistic nature of medical causation.

Aggregate procedures might reduce differences in outcomes among plaintiffs who had similar injuries, but whose claims arise in different jurisdictions. Jurisdictional differences such as comparative negligence, statutes of repose, and liability standards for product liability all might produce sharply different outcomes among plaintiffs in different jurisdictions. These differences complicate aggregate handling of mass torts and also bother some commentators who have suggested applying a uniform law (such as a federal consensus law) to such claims.⁷¹ Obviously, the imposition of such uniform, national law would change the law and outcome for at least some cases.

Although it is not clear whether courts can or should change substantive law by compensating injuries for probabilistic causation or by imposing uniform national law, it is evident that past instances of aggregative procedures have changed the outcomes of mass tort claims. The stakes of the Dalkon Shield litigation increased enormously after the bankruptcy filing by A. H. Robins; the bankruptcy court required that Robins carry out an advertising campaign to inform possible victims of their opportunity to make claims. After the campaign, the number of claims increased from under 15,000 to over 200,000.

The steps involved in aggregative procedures can also affect the value of mass tort claims. The value of all Bendectin claims fell shortly after the MDL court found no basis for liability. Similarly,

⁷¹See discussions of Judge Weinstein's views on the application of a "national consensus law" in the *Agent Orange* litigation in Schuck, pp. 128-131, and P. S. Bird, "Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse," *Yale Law Journal*, Vol. 96, 1987, pp. 1077-1098.

the value of claims for *Salmonella* in the Chicago dairy case fell after the jury awarded no punitive damages in the mandatory punitive damage class action.

II. CONCEPTUAL OVERVIEW OF MASS TORT LITIGATION

The impact of aggregative procedures is both complex and significant, primarily because of the complexity of mass tort litigation. Each instance of mass personal injury litigation involves a multitude of parties and a maze of issues, procedures, and strategies, and each can lead to outcomes that can have varying effects on hundreds or thousands of participants. This section outlines an overview of mass tort litigation which can be used to sort through the maze of issues that will be raised in each of the case studies. The overview also provides a common way of looking across various instances of mass tort litigation so that inferences can be drawn about similarities and differences in the effects of aggregative procedures.

The overview is primarily intended as a means for organizing elements of mass tort litigation by grouping those elements in the following manner (Fig. 2):

Characteristics

- What is the litigation about?
- Who are the participants?
- What are the objectives and strategies of the participants, and what are the relationships among them?

Approach

- What is the formal organization of the litigation?
- What aggregative procedures are used?
- What are the features of those aggregative procedures?

Course of the litigation

- What procedural actions have been taken?
- How have those actions been carried out?
- What informal actions have been taken, such as negotiations and contacts among parties?

Outcomes

- Has the litigation been resolved?
- Was the resolution comprehensive--i.e., did it include all issues and all parties?
- How was compensation distributed among plaintiffs?
- What were defendants' relative contributions?
- How satisfied are the parties with the outcome?
- How much did the litigation cost? What were the

transaction costs?

- How long did the litigation take?

In its most general form, as it is presented in this section, the overview attempts to provide a comprehensive list of elements that may be important in instances of mass tort litigation. Figure 3 provides a working list of those elements on which we will focus in our case studies. Some of the characteristics listed are obvious determinants of the course and outcomes of litigation, while others have been deemed important in previous discussions of mass litigation; but we expect to add items to this list as well as subtract others as we carry out the case studies.

This overview lists characteristics that are particularly critical to mass litigation -- i.e., traits that seem to have a direct effect on the course and outcomes of mass litigation or that interact with aggregative procedures to have such effects.⁷² Figure 3 lists these characteristics, grouping them as "issues," "participants," and "organization of litigation." We used these groupings to stress relationships among various characteristics rather than to draw sharp definitional lines for each group.

In addition to listing elements important to mass litigation, the overview serves as a kind of flow chart; the arrows on the overview suggest relationships among elements in mass litigation. For example, the course of litigation, subsuming both informal and formal (procedural) activities, contributes to the determination of outcomes. In turn, the activities of litigation are affected by the characteristics of that litigation, such as the nature and strength of

⁷²The overview lists characteristics that may be systematically related to the use of aggregative procedures in mass litigation. Other characteristics might be important in particular litigation but may not have such a systematic relationship. For example, the quality of defense attorneys might play a critical role in a particular case, but there may be less case-by-case variance in the organization, strategies, and experience of defense lawyers than among plaintiffs' lawyers. And differences among cases do not have as much significance for the course and outcome of litigation as do differences in plaintiffs' lawyers, who usually finance and control litigation for plaintiffs (Coffee, Jr., 1987).

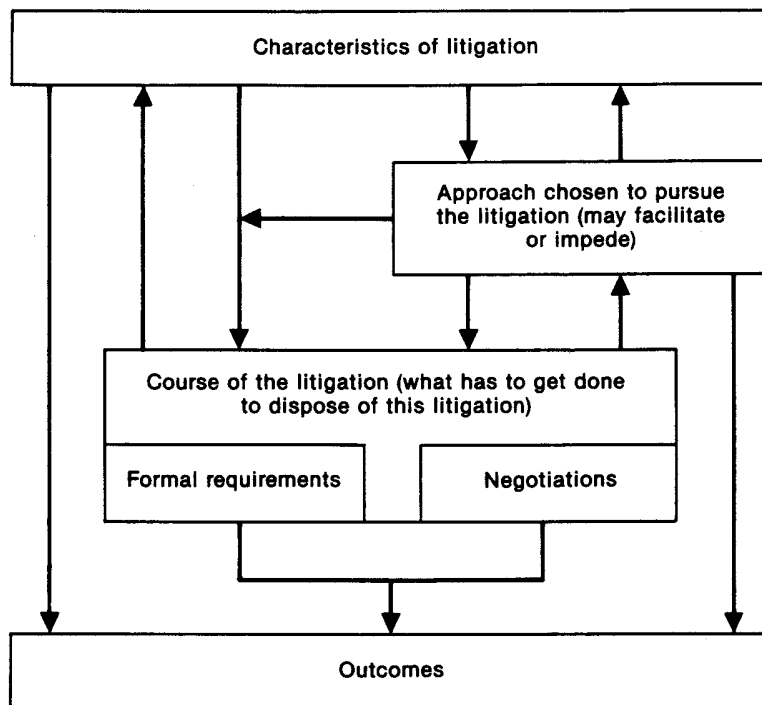


Fig. 2—General overview of mass tort litigation

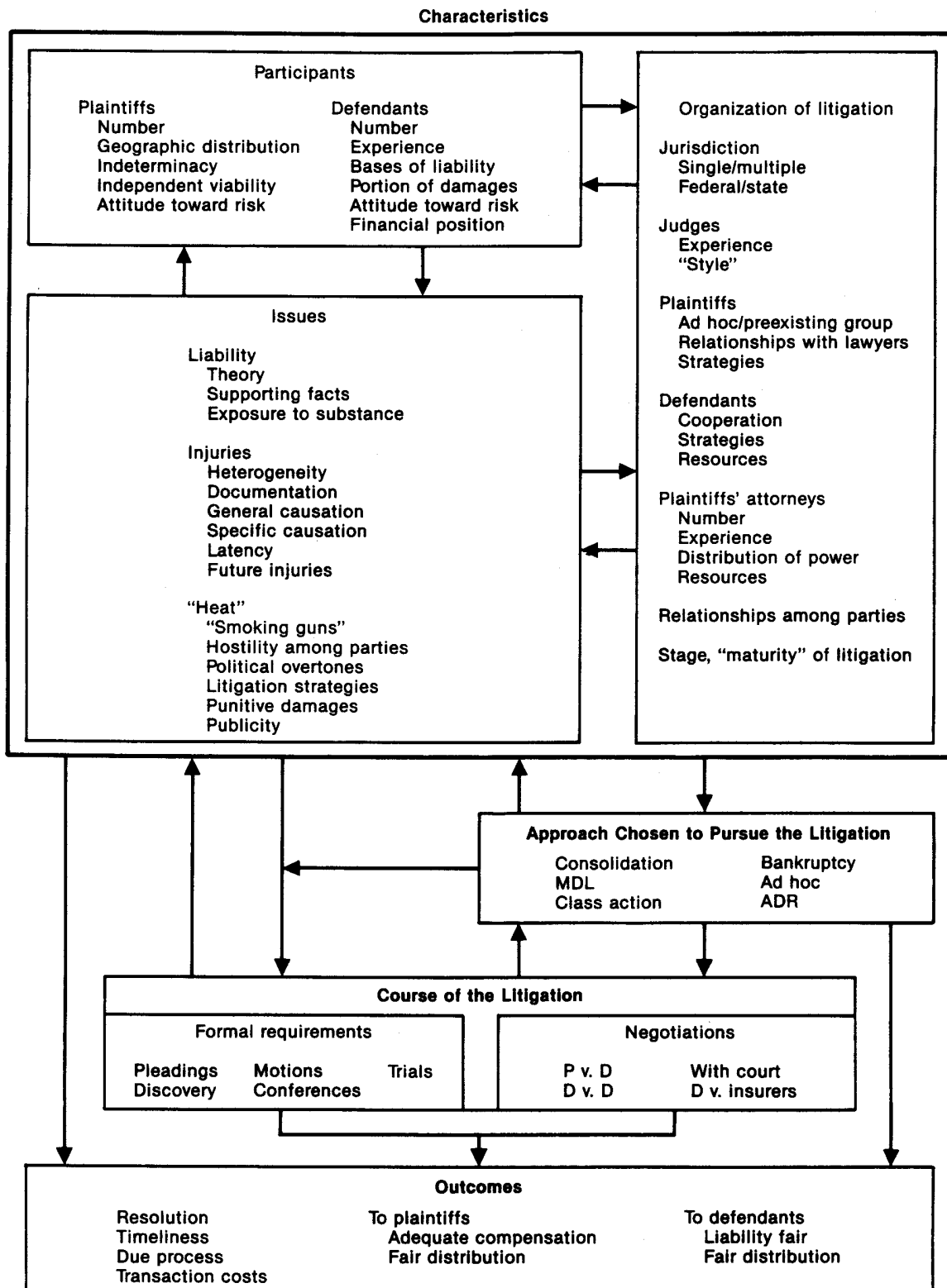


Fig. 3—Detailed overview of mass tort litigation

liability claims or the relative resources of the parties. The course of litigation is also affected by the approach toward handling the litigation--i.e., whether it is handled through traditional means or through specific types of aggregation.

While some of the relationships shown on the overview are obvious, others are more complex. For example, the choice of approach to handling mass litigation--traditional case-by-case litigation or the type of aggregative procedure, if any--is driven by characteristics of the litigation, particularly the complexity of issues and number of parties.⁷³ Decisions bearing on whether to aggregate and on the type of aggregative procedure to apply will also be affected by the progress of the litigation. Different types of aggregative procedures have been used at different stages of the same mass litigation.

Issues and participants can combine in several ways to change the nature of litigation. For example, mass toxic litigation in which there are questions about exposure to a toxic agent--or about injury causation or latency--may pose the problem of "indeterminate plaintiffs." Plaintiff indeterminacy makes it difficult to fashion aggregative procedures that will produce comprehensive and final resolution.

The characteristics of litigation will affect the impact of aggregative procedures. Differences among claims may diminish the effectiveness of aggregative procedures. Issues of liability and injuries usually vary among plaintiffs so that there is a distribution in the strength of claims. This distribution affects matters of cooperation and power among plaintiffs' attorneys as well as their likely response to aggregative procedures, as discussed in the previous section. The distribution of injuries--i.e., the relative number of plaintiffs with weak as opposed to strong claims--may markedly affect the success of aggregative procedures. Aggregative procedures can be frustrated if the strength of claims is varied and plaintiffs with strong claims choose not to cooperate in the aggregative procedure, as in the Hyatt Skywalk case.⁷⁴

⁷³McGovern, 1986.

⁷⁴*In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *rev'd*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 988 (1982).

The overview illustrates the complex relationships among the characteristics of mass litigation. Issues and litigants' characteristics not only shape but can also be affected by the organization of litigation. In Fig. 3, for example, we have described a set of issues as "heat": emotional matters that can inflame jurors, producing extreme verdicts, and that can upset litigants, making settlement difficult. Emotional issues might arise with (or even before) the filing of claims (as occurred following the 1984 Union Carbide gas leak at Bhopal, India)⁷⁵ or they may grow out of the process of litigation (as in the discovery of incriminating documents or attempts to frustrate litigation).⁷⁶ Heat might also be generated, however, by the manner in which litigation is organized or carried out. Much of the fervor among plaintiffs and plaintiffs' lawyers in the Dalkon Shield litigation grew out of an aggressive litigation strategy by the defendant that included thorough investigation and trial of claimants' sexual histories.

The general overview also identifies several other hypotheses that will be explored in our case studies. We expect to find that the approach adopted to handle mass litigation--the type of aggregative procedure--affects many of the litigation outcomes.⁷⁷ Aggregative procedures are employed to change litigation activities and are intended to change some outcomes, such as faster resolution of claims or comprehensive resolution of all claims, but the procedures may also change substantive results. For example, a given aggregative procedure might affect the comprehensiveness of resolution. Bankruptcy and class actions are both methods that might be used to resolve all claims. In

⁷⁵Emotions were raised primarily by the extraordinary extent of deaths (2,700) and injuries (10,000 to 30,000 serious injuries and up to 200,000 injuries in all), but they were also raised by the fact that injury resulted from a gas leak at an Indian subsidiary of an American business. See A. Stille, "A Sense of Dharma," *The National Law Journal*, February 29, 1988, pp. 1, 42-45.

⁷⁶See discussion of asbestos litigation below.

⁷⁷McGovern, 1986; Schuck.

contrast, MDL has no formal legal provision for comprehensive resolution of claims.

Another hypothesis of our case studies is that aggregative procedures and characteristics interact to determine the course and outcome of mass litigation; the characteristics of litigation will influence how those aggregative procedures affect the course and outcome.

A third hypothesis is that aggregative procedures can change other important characteristics of litigation -- e.g., redefining and adding issues, adding or subtracting parties, changing jurisdictions or judges, or altering the organization of litigants and their lawyers.⁷⁸

Observations and hypotheses suggested by the arrows indicate the complex relationships between aggregative procedures and characteristics that complicate our research. Since each aggregative procedure is used in distinctive litigation, we must understand the central characteristics of that litigation, how those characteristics shape the litigation in their own right, how they affect the consequences of the aggregative procedure, and how aggregative procedures in turn reshape the characteristics. The case studies must look in detail at the specific characteristics of each litigation, and comparisons across case studies must be sensitive to the specifics of each.

This section introduces the overview and suggests its comprehensive use for collecting information across many instances of mass litigation. The next sections illustrate how the overview can be used to provide a convenient, graphic means of identifying features that are particularly important in specific mass tort litigation. In discussing the *Jenkins* case, a class action for 703 asbestos claims in east Texas, and the *Agent Orange* litigation, we present brief histories or summaries reviewing elements that were critical to each. These summaries are meant to illustrate our approach in subsequent examinations of other cases--highlighting some of the issues and interactions in which we are interested. In short, we will try to "fit" or apply our conceptual overview to these cases, to use the overview to help develop and

⁷⁸McGovern, 1986; Schuck.

organize inferences about mass litigation, and to make some preliminary comparisons between the two litigations.

Our observations here represent neither in-depth research on our part nor definitive case histories of either the *Jenkins* or the *Agent Orange* litigation.⁷⁹

⁷⁹We do plan further, more complete consideration of both litigations as part of our case studies. Thorough discussions of the *Agent Orange* litigation are provided in both Schuck and Weinstein. McGovern, 1988, describes the *Jenkins v. Raymark* class action litigation. We have relied on these accounts and upon interviews with key participants in both cases.

III. PRELIMINARY CASE STUDIES

AN ASBESTOS CLASS ACTION

In October 1985, Judge Robert M. Parker of the U.S. District Court for the Eastern District of Texas certified a voluntary class to decide common issues, including the applicability of the "state-of-the-art" defense⁸⁰ as well as punitive damages for all personal injury asbestos suits then currently pending by insulators or their family members in that jurisdiction.⁸¹ This class action, *Jenkins v. Raymark*,⁸² included 703 members, all of whom were represented by lawyers from four local firms.⁸³

The class members filed their claims against 13 asbestos manufacturers, eight of whom had joined the "Wellington group" by March 1986, when trial in this case began. This group operates the Asbestos

⁸⁰Asbestos defendants in insulator cases have frequently asserted that they should not be held liable for plaintiffs' injuries because prior to the 1960s they could not have foreseen these injuries in light of the limited information available to them at the time--i.e., the "state of the art" at the time of manufacture. They argue that they should not be held responsible for knowing of the dangers of asbestos until 1964 and 1965, when widely publicized research results showed a startlingly high incidence of lung disorders among insulators. Plaintiffs counter that there was clear evidence as early as the 1930s that asbestos was harmful if the fibers were inhaled. See Selvin and Picus, pp. 7-10.

⁸¹Class members had to be residents of east Texas or have been exposed to asbestos in east Texas. Asbestos cases in east Texas have generally been filed by three groups of claimants: shipyard workers, plant workers, and insulation workers. Insulators were employed in large refineries, power plants, and other facilities putting asbestos insulation around pipes and fittings or insulating blast furnaces with asbestos cement materials.

⁸²*Wanda Jenkins et al. v. Raymark Industries, Inc., et al.*, No. M-84-193-CA.

⁸³Fifty-two individuals, all represented by lawyers from a different firm, opted out of the voluntary class. Judge Parker subsequently scheduled these cases for trial, but they settled without trial during late 1987.

Claims Facility (ACF), which represents member defendants as a single unit in settlement negotiations and at trial. Before the ACF's organization, each defendant had prepared for trial independently and had negotiated separately with plaintiffs.

Judge Parker certified a 23(b)(3) class action⁸⁴ in the *Jenkins* case as a means to resolve quickly and efficiently a number of questions about liability and defenses for all pending insulator cases, including the "state-of-the-art" defense, product identification, product defectiveness, gross negligence, and punitive damages.⁸⁵ The defendants objected to class certification and brought an interlocutory appeal to Judge Parker's certification decision. The Fifth Circuit, in upholding Judge Parker's ruling, held that the formation of a voluntary class in this instance for the limited purpose of deciding common issues was an appropriate use of Federal Rule 23.⁸⁶ In upholding Judge Parker's use of his discretion to certify the class, the court of appeals first outlined the burdens of asbestos litigation and then reiterated its earlier call for "new approaches" for handling this litigation [citing *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981)]. The court of appeals concluded that "Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of time over, the litigation of the state-of-the-art issues."⁸⁷

Several weeks after the appellate court opinion, Judge Parker began a class action trial to decide these liability and defense issues for all cases in the *Jenkins* class. This trial was also to decide all remaining issues for the 10 class representatives, i.e., injuries and damages. The court planned a series of subsequent "minitrials" to resolve remaining issues among small groups of unnamed class plaintiffs.

⁸⁴F.R.C.P. 23(b)(3).

⁸⁵See Selvin and Picus, and Hensler et al., pp. 105-106, on previous innovative attempts by Judge Parker and his colleagues in east Texas to dispose of that court's large asbestos caseload.

⁸⁶*Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

⁸⁷782 F.2d 468, 473 (5th Cir. 1986).

In addition to initiating the class action trial, Judge Parker mandated the collection of extensive information about each of the claimants. In response to defendants' challenge that the 10 class representatives were not typical of the entire class, the court appointed Professor Francis McGovern as a special master to gather information about all members of the class.⁸⁸ Both plaintiffs' and defendants' lawyers were required to complete a questionnaire dealing with medical evidence, employment history, and product exposure for each plaintiff.⁸⁹ Their answers provided a detailed description of the class and identified areas of agreement and disagreement for each claim. The special master developed and presented to the jury a report detailing information about class members.⁹⁰

Judge Parker actively participated in settlement negotiations that began before the trial and continued after trial had commenced.⁹¹ The judge insisted that negotiations proceed in groups; he permitted one plaintiffs' lawyer to settle with all defendants at once or one defendant to settle with all plaintiffs at once. He did not, however, allow piecemeal settlements, i.e., one plaintiff with some defendants.⁹² Five weeks after trial of the common issues began before a jury--in April 1986--the claims of all class members were settled for a total of \$137 million.⁹³

⁸⁸Professor McGovern has been a prolific innovator in the development of aggregative procedures in mass tort litigation.

⁸⁹One of the present authors worked for the court on this data collection and analysis.

⁹⁰See McGovern, 1988, pp. 14-19 and 21-22.

⁹¹Settlement discussions are described in *In re Raymark Industries, Inc.*, 831 F.2d 550 (5th Cir. 1987).

⁹²Judge Parker could impose these conditions because the Federal Rules of Civil Procedure require that settlements of class actions be approved by the district court [F.R.C.P. 23(c)]. See Resnik, 1987.

⁹³Approximately 600 of the 703 claimants settled after two weeks of trial; another 103 claimants settled after another three weeks of trial. The trial was not completed and the jury did not deliberate.

Under the federal rules, class actions cannot be dismissed or settled without the court's approval. Judge Parker used his power to approve settlements to establish procedures that would expedite other asbestos litigation pending in east Texas. The judge indicated that he would approve a settlement in this case only if the lawyers for both sides established an alternative dispute resolution (ADR) procedure for all asbestos cases filed after the *Jenkins* class was certified (such cases then numbered approximately 900).⁹⁴ Both sides agreed. The ADR mechanism itself is a three-stage process involving negotiation, arbitration, and finally minitrials for cases that could not settle. Key to this ADR procedure was the plaintiffs' agreement to waive punitive claims in exchange for a waiver by the defendants of the state-of-the-art defense. This procedure has been operating in east Texas for more than two years and has led to the resolution of approximately 600 cases.⁹⁵

We have applied our conceptual overview (Figs. 2 and 3) to highlight key characteristics and relationships in the *Jenkins* case (Fig. 4). The aggregative approach chosen by the court as well as its application significantly affected the course and outcomes of the litigation, but the effects of that class action approach hinged on particular characteristics of asbestos litigation in east Texas.

The *Jenkins* procedure--the formal requirements of Federal Rule 23 as well as the manner in which Judge Parker structured and supervised negotiations--had a significant effect on the course of litigation. First, Judge Parker ordered a common trial of the liability and defense issues for the entire class, thereby expediting the resolution of issues that would likely have arisen in each individual claim. This common trial not only offered significant cost savings but also greatly increased the stakes of the trial, particularly for the defendants. A

⁹⁴Insulator as well as noninsulator cases are included in this ADR procedure, although the vast majority are insulator claims.

⁹⁵Telephone interviews with Judge Parker, June 8, 1987, and June 8, 1988. On the history of asbestos litigation in eastern Texas, see McGovern, 1988, pp. 4-8.

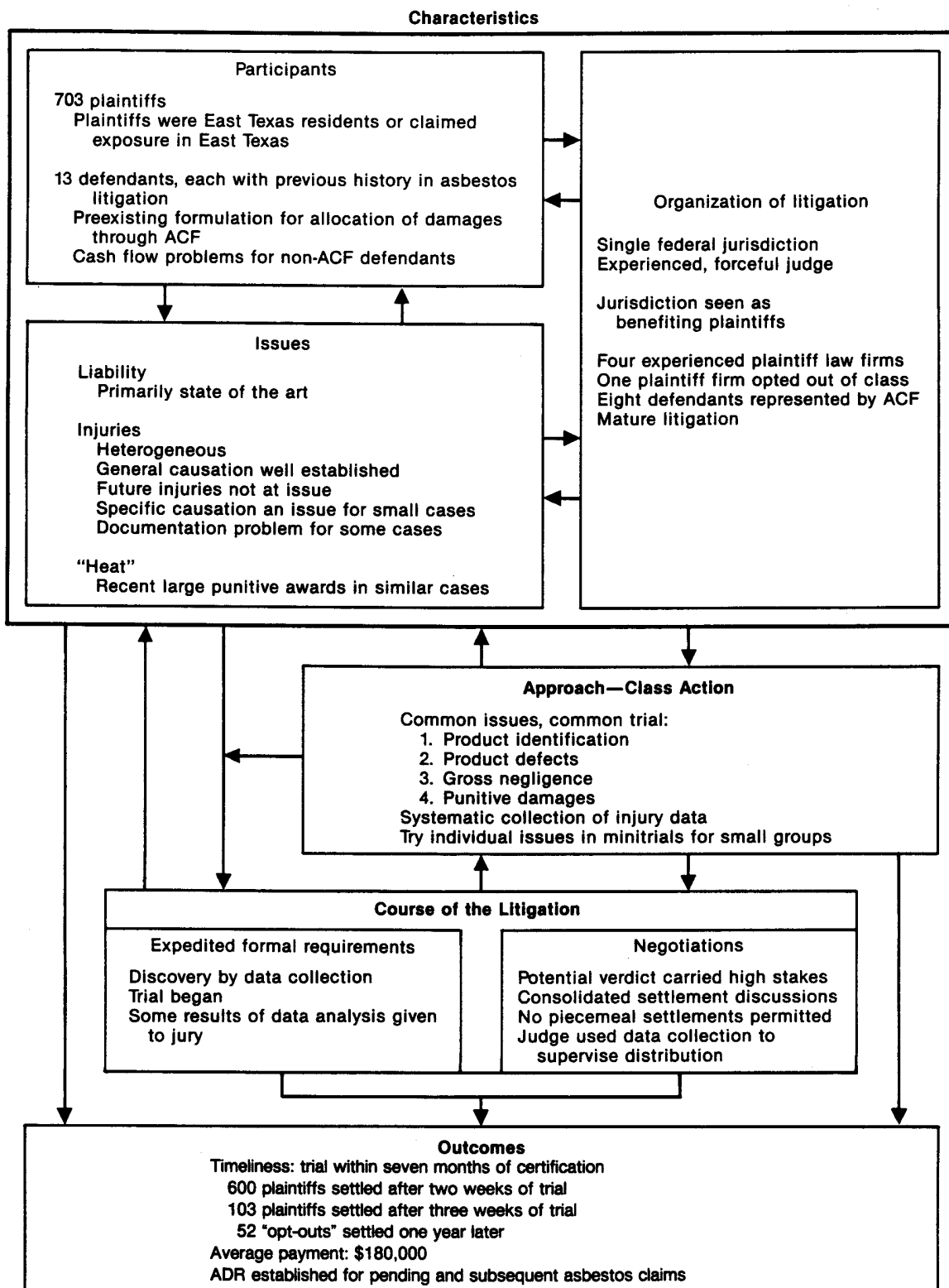


Fig. 4—An overview of *Jenkins v. Raymark*

class action verdict presented defendants with the possibility of losing what they regarded as a key defense--state of the art--while becoming liable for punitive damages to 703 individual plaintiffs.⁹⁶

Judge Parker's organization of the class trial in this way--had it gone to a verdict--promoted acceptance of a settlement value for the entire class. Had he first resolved defenses and liability for punitive damages in the class trial, Judge Parker would have eliminated most of the uncertainty about the total value of claims in the class; the value of each claim would still have rested on the strength of documentation and on the specific causation of injuries, but it is unlikely that these issues would have had a significant effect on the total value of all claims in the class. The strength of injury claims undoubtedly varied among the 703 cases; strengths in some cases offset weaknesses in others. With the common trial issues resolved, however, the parties would have been able to reach an aggregate value with relative ease.⁹⁷

Second, data collection carried out by the special master provided a surrogate for individual discovery in each of the 703 claims. Special Master McGovern presented summaries of this information to the jury. Judge Parker reported that he and the parties used these data while negotiating settlement of the class action.⁹⁸ Again, the data collection saved the significant costs of individual discovery for each claim.

Information derived from this data collection clearly differed from that which would have been obtained during ordinary discovery; the single questionnaire that was used for each claim could not pursue unusual issues that were especially critical to a particular case, and

⁹⁶One plaintiffs' lawyer familiar with asbestos litigation in east Texas believes that for this reason use of the class action (or other aggregative procedure) in a jurisdiction such as eastern Texas, where the mass personal injury litigation has generally proved favorable to plaintiffs, is unfair to defendants.

⁹⁷Any "grouping" procedure serves this function by encouraging parties to agree on an aggregate value even though they may still disagree as to the value of individual claims.

⁹⁸Telephone interview with Judge Parker, June 8, 1987.

it could not elicit nuances. The absence of such information would have hampered the preparation and trial of these cases had they been tried individually. Given the fact that the court adopted aggregative procedures, however, the data collected in *Jenkins* proved more useful than that generated through ordinary discovery; no one could have meaningfully analyzed the overwhelming information that would have been generated by depositions and interrogations for 703 claims. The data collection form focused on key issues, providing common summary information for all claimants; in this way, it facilitated comparison across class members and identified areas of disagreement between plaintiffs and defendants.

Third, certification of the class consolidated settlement negotiations among four plaintiffs' lawyers (representing all 703 claims) and among six defendants or defendant groups (five separate defendants and the ACF representing eight defendants). Other aspects of the *Jenkins* procedures undoubtedly contributed to the negotiation of an aggregate settlement. Savings of discovery and trial costs, for example, may have allowed each side to be more flexible on what it offered or demanded than if the cases had been tried individually.⁹⁹ The data collection provided parties with information needed to place a total value on all claims. Finally, the high stakes and risks from the common trial of liability and punitive damage issues created strong incentives to compromise.

Fourth, the data collection placed Judge Parker in an unusually strong position to manage and evaluate the distribution of the settlement among plaintiffs. Once the lump-sum settlement was reached, Judge Parker divided that total among the plaintiffs' lawyer groups on the basis of questionnaire data about plaintiffs represented by that lawyer. He then ordered each group of lawyers to present him with a plan for the distribution of that group's share of the settlement award among the individual plaintiffs that they represented. Before approving the distribution of funds, Judge Parker reviewed each group's distribution plan by comparing the information gathered from selected plaintiffs with their proposed share of the settlement sum.¹⁰⁰

⁹⁹McGovern, 1986.

¹⁰⁰Resnik, 1987, raises questions regarding the judicial role in approving settlements.

The aggregative procedures in *Jenkins* clearly changed some outcomes. It created an ongoing ADR process. The class action rapidly increased the pace of litigation. Basic discovery for all cases was completed in one month through the use of computerized data collection.¹⁰¹ Within seven months of certification of the class, the class action disposed of almost all insulator claims pending at the time of certification. This contrasts sharply with the pace of litigation before certification of the class; some claims within the class had been pending for up to seven years.¹⁰²

The aggregative procedures in *Jenkins* may have changed other outcomes of asbestos litigation in east Texas. The settlement involved significant payments, averaging \$180,000 per class member. One of the plaintiffs' lawyers in *Jenkins* stated that settlement values for the *Jenkins* claims were approximately 20 percent higher than those paid for comparable asbestos injury claims in eastern Texas settled before or since this case. Judge Parker contends that *Jenkins*' case values are comparable to those for cases that predated *Jenkins* but higher than for claims settled since. He attributes the current lower value to recent filings by plaintiffs who claim less severe injuries or, in some cases, can only prove exposure. He also believes that these lower settlement values also represent recognition on the part of plaintiffs' lawyers of the increasing cash flow problems of several major defendants.¹⁰³

¹⁰¹ One of the authors designed and oversaw this data collection.

¹⁰² However, Judge Parker has of late been dissatisfied with the pace at which cases have been moving through the ADR procedure. The pace of ADR dispositions--approximately 50 cases per month during the spring of 1988--is falling behind that of new filings, which have averaged between 50 and 80 cases per month during the same period. Judge Parker expressed his dissatisfaction in a recent meeting with lawyers for all sides, and in response, the parties are preparing modifications to the ADR procedure to present to the judge. If there is not sufficient progress in the disposition of cases through ADR within the next few months, Judge Parker said he may, as a "last resort," certify a new asbestos class action in east Texas. The judge has also removed a group of 38 cases, represented by a single plaintiffs' attorney, from the ADR procedure because he determined that both sides were not participating "in good faith" in the arbitration phase of the procedure. These cases will instead be scheduled for trial before another judge. (Telephone interview with Judge Parker, June 8, 1988.)

¹⁰³ The *Jenkins* claimants received far less than the average of

Both the decision to certify a class and the application of the class action rules in *Jenkins* depended on the characteristics of asbestos litigation in east Texas. The same procedures might not have succeeded in disposing of so many claims in litigation with substantially different characteristics. The value of the *Jenkins* claims turned on matters addressed in the class action trial--the applicability of defenses (primarily state of the art) and the availability of punitive damages--as well as on individual factors involving documentation and specific causation of injuries. As with asbestos litigation in general, there were no issues of general causation for injuries claimed by members of the *Jenkins* class; ample evidence showed that asbestos causes asbestosis, lung cancer, and mesothelioma.

The timing of this litigation was important within the framework of other asbestos litigation both in east Texas and nationally. The class was certified at a "mature" stage in the development of asbestos litigation; dozens of trials across the country had tested causation and liability claims and had established relative dollar values for the range of asbestos-related injuries. Parties had an informed basis for evaluating the data collected and organized by the special master. Data collection such as that used in *Jenkins* might have been less effective if the parties had not had the considerable experience of prior litigation. In addition, several of the major defendants, represented by the ACF, had previously negotiated a formula among themselves by which to allocate damages in such cases, thereby eliminating protracted intra-defendant disagreements. Furthermore, the recent history of asbestos litigation in east Texas put pressure on defendants to settle the *Jenkins* class. In the *Newman* trial of 1984, defendants had lost

\$400,000 for each of 30 plaintiffs resulting from a settlement following a consolidated asbestos trial the previous year in Judge Parker's court, *Newman et al. v. Johns-Manville Sales Corporation et al.* (Civ. No. M-79-124-CA). The *Newman* settlement occurred after the jury had awarded \$3.9 million in compensatory damages and \$4 million in punitive damages to plaintiffs in four of the 30 consolidated cases. On the *Newman* trial, see Selvin and Picus.

badly on both the state-of-the-art defense and punitive damages, the focus of the class action trial.¹⁰⁴ The risk of losing these issues for 703 claims was extraordinary.¹⁰⁵

Our review of the *Jenkins* class action also highlights the manner in which aggregative procedures can alter the characteristics of the litigation, supporting one of the hypotheses discussed above. The aggregative procedures used in *Jenkins* increased burdens on the financial resources of defendants. The common trial increased defendants' risks; the expedited proceedings greatly accelerated the timing of payments by defendants and their insurance companies. One defendant claimed that these pressures threatened its solvency. During the course of the *Jenkins* trial, officers of Raymark Industries, Inc., told their board of directors that the litigation "threatened the precipitous and unanticipated exhaustion of available insurance."¹⁰⁶ Raymark informed plaintiffs' lawyers and the court that it would file for bankruptcy if the plaintiffs did not accept its offer.¹⁰⁷

Moreover, as we have noted, the aggregative procedures in *Jenkins* changed the organization and course of other asbestos claims pending at the time of the class action settlement as well as those filed since. In imposing an ADR procedure for other pending asbestos claims, Judge Parker effectively added all those plaintiffs as parties to the *Jenkins* litigation.

¹⁰⁴See note above.

¹⁰⁵McGovern, 1988, pp. 21-22.

¹⁰⁶Minutes of the March 18, 1986, meeting of the board of directors of Raymark Industries, Inc., as quoted in *In re Raymark Industries, Inc.*, 831 F.2d 550 (5th Cir. 1987).

¹⁰⁷At least one plaintiff's lawyer believed the sincerity of Raymark's contingent plan for bankruptcy. Raymark's offer and threat precipitated settlement by most defendants on March 19, 1987 [*In re Raymark Industries, Inc.*, 831 F.2d 550 (5th Cir. 1987)].

THE AGENT ORANGE CLASS ACTION

Like *Jenkins*, the *Agent Orange* litigation also involved a substantial settlement of a voluntary class action. But the issues and characteristics of the two cases were strikingly dissimilar, and the course and outcome of the two class actions stand in stark contrast.

As the Second Circuit Court of Appeals noted, *Agent Orange* was "by any measure ... extraordinary ... litigation"¹⁰⁸ that tapped the frustrations and anger felt by many Vietnam veterans. The litigation was part of a broad set of continuing actions and organizations that have attempted to address Vietnam veterans' problems and grievances.¹⁰⁹ This larger setting colored the way in which the parties, lawyers, and courts dealt with the litigation.¹¹⁰

The litigation itself presented exceptional problems. Liability was virtually nonexistent; neither the trial courts nor the appellate courts felt that there was credible scientific evidence supporting the contention that Agent Orange caused any of the wide range of injuries claimed by plaintiffs.¹¹¹ Judge Jack Weinstein, who worked out the settlement, viewed the plaintiffs' case on causation, in the words of the Second Circuit, "as so weak as to be virtually baseless."¹¹² Plaintiffs' weak claims were further undercut by defenses that

¹⁰⁸*In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2nd Cir. 1987).

¹⁰⁹Many of those grievances have been directed at the Veterans Administration. On litigation involving the Veterans Administration and Vietnam veterans, see M. Coyle, "The Veterans Administration Under Fire," *National Law Journal*, June 15, 1987, pp. 1, 18-20.

¹¹⁰In our brief review of the *Agent Orange* case, we have relied heavily on Schuck's account of the litigation, supplemented by interviews with several major participants.

¹¹¹The complaints from class members included more than 10,000 cancers (with a wide variety of locations and types), 67,000 families having one or more children with birth defects, and 40,000 wives who had experienced miscarriages or stillbirths. See Schuck, p. 206.

¹¹²*In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2nd Cir. 1987). Judge Weinstein expressed his skepticism regarding causation soon after having been assigned this case. Schuck, p. 113.

apparently protected both private defendants (the government contract defense)¹¹³ and the United States government (the *Feres* doctrine and the "discretionary function" exception to the federal government's waiver of immunity).¹¹⁴

The litigation was massive and an organizational nightmare. There were 250,000 claimants in the *Agent Orange* class¹¹⁵ residing in nearly every state as well as in Australia and New Zealand. The large number

¹¹³The government contract defense applies to manufacturers of products "when the product was defectively designed by the government and manufactured under contract with the government pursuant to that design" [*In re Agent Orange Product Liability Litigation*, 597 F.Supp 740, 843 (E.D.N.Y. 1984); Note, "Liability of a Manufacturer for Products Defectively Designed by the Government," *Boston College Law Review*, Vol. 23, 1982, pp. 1025-1086.] The district court concluded that the defendants were entitled to judgment if the defendant proves (1) that the government established the specifications for "Agent Orange"; (2) that the "Agent Orange" manufactured by the defendant met government specifications in all material aspects; and (3) that the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange" [*In re Agent Orange Product Liability Litigation*, 506 F.Supp 762-796 (E.D.N.Y. 1982)]. The court determined that defendants had established the first two elements of the defense and granted summary judgment in the defendants' favor on those material propositions. The Second Circuit concluded that the government contract defense was an impossible hurdle to plaintiffs' class action claims [*In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 173-174 (2nd Cir. 1987)]. In fact, the district court dismissed the opt-out claims in part because of their inability to overcome this defense [*In re Agent Orange Product Liability Litigation*, 611 F.Supp 1223 (E.D.N.Y. 1985)], and the Second Circuit agreed [*In re Agent Orange Product Liability Litigation*, 818 F.2d 187 (2nd Cir. 1987)].

¹¹⁴The *Feres* doctrine prohibits liability on the part of the United States for injuries to servicemen arising "out of or...in the course of activity incident to service" [*Feres v. United States*, 340 U.S. 135, 146 (1950), quoted in *In re Agent Orange Product Liability Litigation*, 818 F.2d 194 (2nd Cir. 1987)]. In 28 U.S.C. Sect. 2680(a), a "discretionary function" exception is created to the government's waiver of sovereign immunity through the Federal Tort Claims Act [*Hogan v. Dow Chemical*, 818 F.2d 210 (2nd Cir. 1987)].

¹¹⁵Approximately 300 plaintiffs opted out of this class to pursue their claims individually. See "Procedural History of the Agent Orange Product Liability Litigation," *Brooklyn Law Review*, Vol. 52, 1986, pp. 335-340, and Schuck, p. 126, on Judge Weinstein's definition of the class, and pp. 226-244 on the disposition of these opt-out claims.

of plaintiffs' lawyers--over 1,000--were poorly organized and contentious.¹¹⁶ Plaintiffs' lawyers had repeated difficulties in funding the litigation.¹¹⁷ Because of their financial and organizational problems and the inherent weakness in their claims, plaintiffs' lawyers were substantially unable to develop evidence about causal relationships between Agent Orange and plaintiffs' injuries.¹¹⁸

The first claim alleging personal injuries resulting from the use of Agent Orange was filed in 1978. By 1979, plaintiffs and defendants had jointly petitioned the Judicial Panel on Multidistrict Litigation of the U.S. Courts for consolidation and class certification.¹¹⁹ The parties agreed to remove all litigation to federal court, and all cases were consolidated under MDL in the Eastern District of New York. In late 1980, Judge Pratt indicated that the court would certify a class; but the class was not formally certified until October 1983, shortly after Judge Jack Weinstein took over the case.¹²⁰ Weinstein certified a voluntary class to decide common issues of liability and causation as well as a mandatory class to decide the plaintiffs' punitive damage claims.

Shortly after certifying the class, Judge Weinstein set a trial date of May 7, 1984, seven months later. On the eve of trial, lawyers for the defendant manufacturers and the class agreed to settle for a sum of \$180 million plus interest, although defendants continued to deny liability. The circuit court characterized the settlement as "essentially the payment of nuisance value" despite its "extraordinary" size.¹²¹ Both the trial court¹²² and the appellate court¹²³ regarded

¹¹⁶Schuck, pp. 123-124.

¹¹⁷Schuck, pp. 120-121.

¹¹⁸Schuck, pp. 10-11, 18-19, 85-86, 103-105, 161-162, and 261-262.

¹¹⁹The case was transferred when the first judge to which it was assigned, Judge George Pratt, was elevated to the circuit court.

¹²⁰818 F.2d 145 at 151 (2nd Cir. 1987).

¹²¹Ibid.

¹²²*In re Agent Orange Product Liability Litigation*, 597 F.Supp .740 (E.D.N.Y. 1984). See Schuck, pp. 113, 181-182.

¹²³See, e.g., *In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2nd Cir. 1987).

plaintiffs' claims as being virtually without merit. If defendants had not settled, however, they would have faced enormous legal fees and expenses to continue. They also faced a potential exposure of billions of dollars of damages. The weakness of plaintiffs' legal positions offered a very slim chance that the plaintiffs would win; but defendants could not be certain of victory, particularly because plaintiffs' claims had such enormous emotional appeal.

No plan for the allocation and distribution of these funds was included as part of the settlement, but a plan subsequently drafted limited compensation (a maximum of \$12,500 per claimant) to claimants who suffered total disability and to the families of exposed veterans who had died (approximately 10,000 claimants, or 4 percent of the class).¹²⁴ Judge Weinstein subsequently granted the defendants' motion to dismiss the claims of the opt-out plaintiffs, concluding as a matter of law that no jury could find liability.¹²⁵ This decision ended the case at the trial court.

Because of the intense interest in the litigation among class members, Judge Weinstein held "fairness" hearings on the settlement in five cities during August 1984. Rule 23(e) of the Federal Rules, as interpreted by case law and by the *Manual for Complex Litigation*, requires that notice of a proposed settlement be given to class members and sometimes mandates that hearings be held.¹²⁶ But Judge Weinstein's hearings were unusual both for the number of individuals who testified and for the depth of emotion they expressed. Hundreds of veterans, widows, and other interested parties testified, and more than a thousand class members communicated their opinions to the court in testimony or in writing.¹²⁷ The great majority of witnesses denounced the settlement, and nearly everyone who spoke, including those who supported

¹²⁴Kenneth Feinberg, one of the judge's special settlement masters, took the lead in drafting this plan. See Schuck, pp. 206-223.

¹²⁵Schuck, pp. 226-244.

¹²⁶See *Manual for Complex Litigation* (2nd ed.), Clark Boardman Company, New York, 1986, sec. 30.44.

¹²⁷597 F. Supp. 740 at 764.

the settlement, agreed that the fund was inadequate.¹²⁸ Many who testified believed that Agent Orange had caused their injuries and were disappointed that the settlement had eliminated their opportunity to have the causation issue decided by a jury. Noting the widespread plaintiff dissatisfaction, Judge Weinstein subsequently approved the settlement as the most favorable outcome that plaintiffs could expect given the weakness of their claims.¹²⁹

Nearly every decision in this litigation was appealed. In April of 1987, the Second Circuit Court of Appeals issued nine separate opinions affirming the district court's actions.¹³⁰ Further appeals to the U.S. Supreme Court are likely. Ten years after the first Agent Orange claims were filed, no funds have been distributed.

As with the *Jenkins* case, our brief review of the *Agent Orange* litigation identifies some of the relationships, characteristics, and hypotheses from our conceptual overview that we believe are important to understanding the effect of aggregation (Fig. 5). Again, our overview helps show how the aggregative approach that was adopted and the manner in which it was applied strongly influenced both the course and the eventual outcome of *Agent Orange*.

Aggregation, the judge's style, and the way in which the legal issues were structured all influenced the course of litigation. Judge Weinstein scheduled trial to begin just seven months after certifying the class. He restructured the case to focus on medical causation issues. Judge Pratt, to whom these cases were first assigned, had viewed the defendants' government contract defense claims as more important than the plaintiffs' causation arguments, because that defense might dispose of the entire litigation without involving the court in the complex and arcane arguments of medical causation. By shifting the initial focus of the case to medical causation, Judge Weinstein made

¹²⁸See Schuck, pp. 173-178, on these hearings. Judge Weinstein summarizes the main objections to the settlement at 597 F. Supp. 740, 765-775.

¹²⁹597 F. Supp. 740 at 857.

¹³⁰*In re Agent Orange Product Liability Litigation*, 818 F.2d 145 et seq. (2nd Cir. 1987).

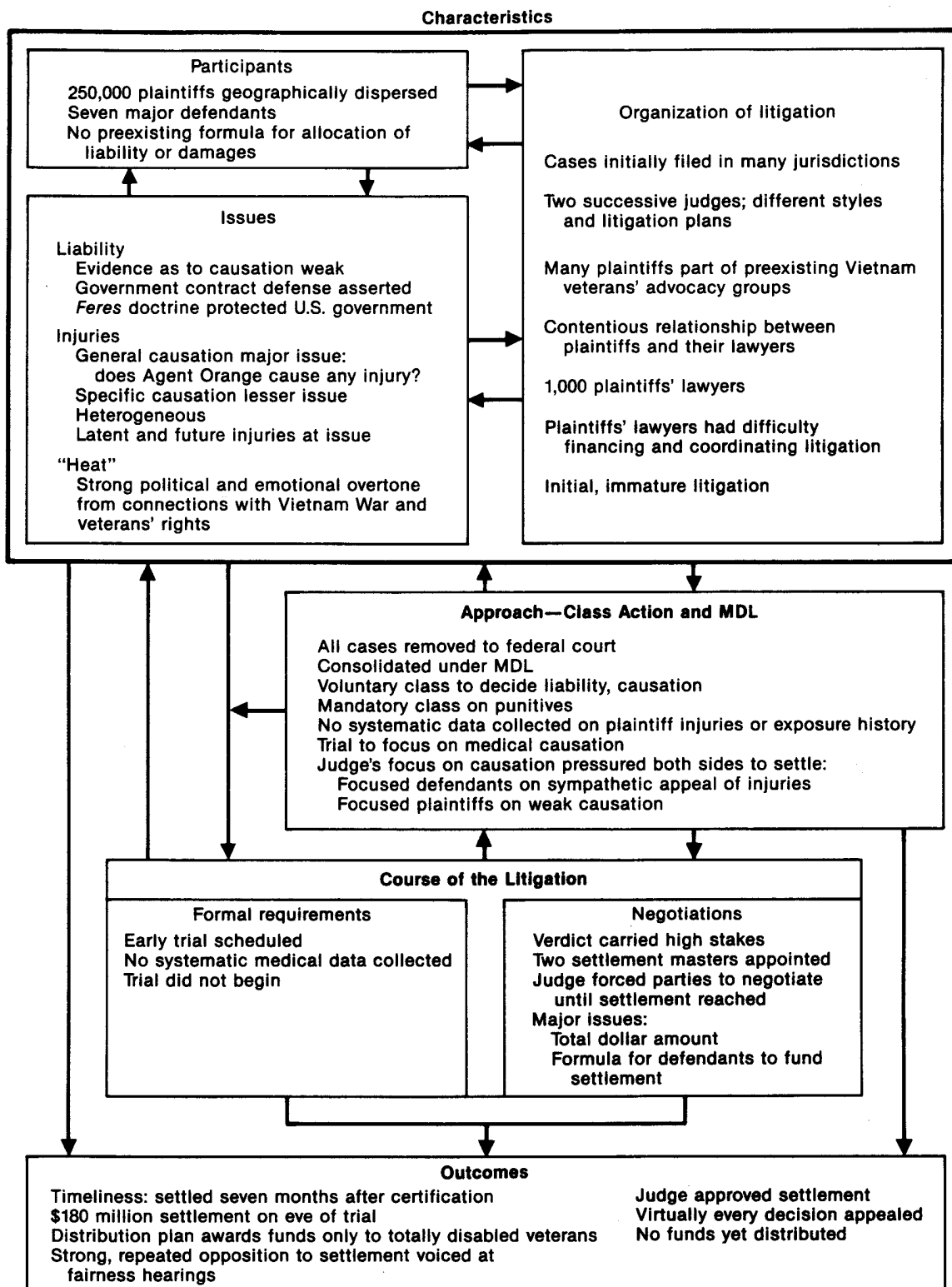


Fig. 5—An overview of Agent Orange litigation

both sides more amenable to settlement. The shift forced defendants to consider plaintiffs' injury claims and the potential appeal of many of those claims. The change heightened defendants' uncertainty regarding the outcome of a jury decision; jurors might be compelled by the plaintiffs' misfortune and find causation despite the inherent weakness of plaintiffs' causation arguments. On the other hand, the court's actions forced plaintiffs' lawyers to undertake, within a tight schedule, the enormous task of preparing medical causation as the first issue. The new emphasis also forced plaintiffs' lawyers to recognize difficulties with their arguments and evidence on medical causation. The judge was able to take advantage of that uncertainty, along with his power to award attorneys' fees in the case,¹³¹ to actively push for settlement.

The approach to aggregation clearly affected outcomes. The oldest Agent Orange claims had been pending for four years when Judge Weinstein took over the litigation in the fall of 1983. The case seemed unamenable to settlement before Judge Weinstein certified the class. His application of the class action rules facilitated settlement within months. It is less clear, however, how aggregation affected the size of the settlement. Most likely, if the case had not settled but had gone to trial, plaintiffs would have gotten nothing. The class action certainly will affect distribution among plaintiffs; it provided for a distribution plan that could not have existed without aggregation.

The overview also shows that, as in *Jenkins*, the characteristics of the *Agent Orange* litigation interacted with the particular aggregation method in determining the course and outcome. Most clearly, Judge Weinstein changed the issues on which the litigation focused from government defense to medical causation, thereby increasing each side's

¹³¹Some have argued that the judge's power to award fees in a class action raises the potential for conflict of interest between lawyers and their clients in mass tort class actions. See, for example, G. Miller, "Some Agency Problems in Settlement," *Journal of Legal Studies*, Vol. 16, 1987, pp. 189-215, and Coffee, Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action," Working Paper #22, The Center for Law and Economic Studies, Columbia University School of Law, September 1986.

perception of its risk at trial. The judge's actions also changed the organization of litigation among plaintiffs' lawyers. In emphasizing medical causation, he weakened the power of the plaintiffs' lawyer, who had been unsuccessful in developing evidence as to causation. The judge's rulings on fees also affected power among plaintiffs' lawyers.

By comparing the *Jenkins* and *Agent Orange* litigation, we can begin to add to our understanding about the dynamics of mass tort litigation and the effects of class actions for such cases. To establish liability, as in all toxic cases, plaintiffs had to prove a general causal link between the toxic agent--dioxin in *Agent Orange* and asbestos in *Jenkins*--and the types of injuries claimed by plaintiffs.

Fundamentally, the two class actions differed because general causation had been well demonstrated for asbestos injuries but had not been shown for the wide variety of injuries allegedly caused by Agent Orange.¹³² Establishing specific causation for each plaintiff was important for

¹³²Schuck summarizes medical evidence on the relationship between Agent Orange and medical conditions claimed by plaintiffs. Animal studies present considerably stronger evidence as to general causation than does available human epidemiological evidence (see Schuck, pp. 18-20 and 22). Researchers have found that dioxin concentrations much lower than those found in Agent Orange, when supplied on a daily basis, produced cancer in more than half the rats exposed as well as rapid signs of acute toxicity and early death in rats and mice. Researchers also found that lower concentrations of dioxin produced the same effects but simply took longer to do so. A 1966 study, focusing specifically on the safety of the Agent Orange herbicide formulations, found that these formulations caused many birth defects in mice and rats whose mothers had been exposed to relatively high levels of dioxin. But neither the conceptual nor the epidemiological evidence showed a conclusive link between dioxin exposure and development of medical problems in humans. Epidemiological evidence with regard to the dangers of dioxin to humans is complicated for several reasons. First, the toxicity of Agent Orange depends in part on the concentration of dioxin in the herbicide. That concentration varied from manufacturer to manufacturer. Second, the dioxin exposure that individuals sustained in Vietnam varied among those who loaded or sprayed the herbicide or were simply in areas that had been sprayed; for individuals in the latter group, exposure varied with the length of time that they remained in areas that had been sprayed. Furthermore, it was impossible to know how much of the herbicide had reached the ground in specific locations where it could be ingested or inhaled or the levels to which specific individuals had been exposed. Third, with the exception of chloracne, an unusual skin disorder, all the injuries that plaintiffs contended were caused by their exposure to Agent Orange can be caused by other agents as well. Partly because of these difficulties, the plaintiffs had no experimental or statistical

some claims in the asbestos case--that it was more likely than not that lung cancer or breathing difficulties for particular plaintiffs were caused by asbestos. But plaintiffs in *Agent Orange* never reached the issue of specific causation because they had not established a general causal relationship between Agent Orange and the injuries they claimed. Indeed, in its decision on *Agent Orange*, the Second Circuit asserted that general and specific causation were not different issues,¹³³ perhaps because of the confusing strategy of plaintiffs' lawyers for establishing general causation. Plaintiffs' lawyers had initially planned to identify patterns of exposure, symptomatology, etiology, and legal responsibility through computer analysis of the case histories and medical records of individual class members and their families. This effort barely got under way in part because of inadequate funding and dissension among the plaintiffs' attorneys.¹³⁴

Despite the great differences in the strength of substantive issues in the two class actions, both resulted in large settlements, in part because of the presence in each case of a set of factors that added "heat" to the litigation--inflammatory emotional or political issues. *Jenkins* and *Agent Orange* both show that factors of heat can have pervasive effects on mass tort litigation, influencing its organization and the approach to aggregation while increasing the value of claims.

In the asbestos cases, heat was generated primarily by depositions and by the discovery of documents that allegedly demonstrated early knowledge among some asbestos executives of the dangers of asbestos exposure and their suppression of that information.¹³⁵ Plaintiffs had

evidence proving that dioxin caused cancer, birth defects, and other diseases in the population of soldiers exposed to Agent Orange. The only available evidence regarding causation consisted of scattered information as to disease incidence following occupational accidents involving dioxin; the observations of veterans and veterans' counselors as to the association of their injuries, the congenital problems of their children, and the premature death of comrades with their Vietnam exposure to Agent Orange (Schuck, pp. 23-24, 41-42, and 47-48); and an Air Force study of all those involved in the herbicide spraying program. On this evidence, see Nesson, pp. 536, 538.

¹³³*In re Agent Orange Product Liability Litigation*, 818 F.2d 145 at 164-165 (2nd Cir. 1987).

¹³⁴Schuck, pp. 52-53, 88-89, 103-105, 161-162.

¹³⁵See P. Brodeur, *Outrageous Misconduct, The Asbestos Industry on Trial*, Pantheon, New York, 1985.

succeeded repeatedly in using these documents to win punitive damages and probably to increase compensatory awards. Heat generated through the introduction of these documents was important to the outcome of previous asbestos litigation in east Texas. Jurors in the 1984 *Newman* case, for instance, stated in a postdeliberation interview that they had examined and had been influenced by the documents in returning the large compensatory and punitive verdicts in that case.¹³⁶

The heat of asbestos cases may have facilitated settlement in *Jenkins*. The class action jury was to decide the issue of liability for punitive damages as well as the applicability of the state-of-the-art defense. Defendants had to have been concerned that presentation of evidence relevant to punitive damages could once again turn a jury against them on the state-of-the-art issue. Furthermore, this heat may also have helped forge the parties' agreement to an ADR procedure for all other pending claims by insulators. By agreeing to give up their primary general defense, the state of the art, in exchange for the plaintiffs' agreement to drop punitive claims, the defendants effectively removed heat from the pending asbestos cases.

Heat dominated the *Agent Orange* litigation as well. That heat was generated not by the litigation itself but by the strong political overtones of the litigation, the shadow of the Vietnam war, and the active, sometimes passionate participation of organized veterans. The emotional and political overtones affected the organization of the case. Concerns about veterans' rights and problems motivated the participation of some plaintiffs' lawyers. Some of the tension among plaintiffs' lawyers arose out of conflicts between lawyers who viewed Agent Orange as a cause and those who looked upon the litigation more as a matter of business.¹³⁷ In his legal opinions as well as in other public statements about the case, Judge Weinstein displayed considerable sympathy toward afflicted veterans and their families.¹³⁸

¹³⁶See Selvin and Picus, pp. 33-35.

¹³⁷Schuck, pp. 37-48, 255-257.

¹³⁸*In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 at 857-858 (F.D.N.Y. 1984), where Judge Weinstein summarizes the difficulties of many veterans and asserts that the U.S. government has a moral obligation to address those difficulties. See also Schuck, pp. 155, 174-178.

Factors of heat affected the outcome of the *Agent Orange* litigation. Given the apparent weakness of the plaintiffs' cases, the value of Agent Orange cases might have derived solely from this heat; defendants could not ignore the possibility that plaintiffs might get large verdicts from juries because of the political overtones and strong emotional aspects of plaintiffs' claims.

III. CONCLUSIONS

We have intended this Note to serve two purposes: to review the growing phenomenon of mass tort litigation and to set forth our agenda for research on the use of aggregative procedures to process and resolve this litigation. As part of the first objective, we have explored some of the problematic characteristics of mass litigation, described procedures used to process and resolve these disputes, and identified some of the apparent benefits and problems associated with aggregation generally as well as with the use of particular aggregative procedures. The major objective of this Note, however, has been to introduce our methodology and agenda for subsequent research on the use of aggregation in mass tort litigation. Our work to date has centered on the development and refinement of a conceptual overview to organize and analyze both the dynamics of mass tort litigation and the impact of aggregative procedures on the resolution and outcome of that litigation. In the preceding pages, we described this overview and applied it, in brief fashion, to two instances of mass litigation, an asbestos class action in east Texas and the *Agent Orange* class action. As we noted above, our review of these two class actions and our discussion of the overview's application to them were meant to illustrate our approach in subsequent case histories rather than to serve as in-depth research or definitive case histories.

In this section we will take a final look at these two class actions to summarize our observations with regard to the advantages as well as limitations associated with the use of this procedure in mass tort litigation. Finally, we will briefly outline our future research plans.

THE IMPACT OF CLASS CERTIFICATION IN MASS PERSONAL INJURY LITIGATION

Despite traditional legal skepticism about use of class actions for mass torts, antipathy toward such use by the Second Circuit,¹³⁹ and the Fifth Circuit's repeated rejection of other means to aggregate similar cases,¹⁴⁰ the trial courts in both *Jenkins* and *Agent Orange* used class actions to advance--and, in the *Jenkins* case, finally resolve--the litigation. The appellate courts' support of certification and the demonstrated utility of the class actions suggest that these two cases are exceptions to the general rule that class actions are inappropriate for mass tort litigation. Indeed, problems that have led to objections to the use of class actions were not present in either case.

First, the particular issues of individual claims did not dominate common issues in either case. The class actions could resolve each case by focusing on common issues. Both the *Agent Orange* and the *Jenkins* class actions were formed to deal with common issues; neither attempted comprehensive resolution of all issues. The *Agent Orange* voluntary class dealt with general causation and affirmative defenses, while the mandatory class dealt with punitive damages.¹⁴¹ The *Jenkins* class dealt with state of the art, product identification, and punitive damages. In principle, both class actions would have had to have been succeeded by case-by-case litigation of individual issues--primarily documentation of individual injuries, specific causation, and calculation of damages.¹⁴² In both cases, however, the common issues that were subjects of the

¹³⁹In reviewing *Agent Orange*, the Second Circuit Court stated, "The present litigation justifies prevalent skepticism over the usefulness of class actions in so-called mass tort cases and, in particular, claims for injuries resulting from toxic exposure" [*In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 164 (2nd Cir. 1987)]. It further stated, "Were this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been in error" [*In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 166 (2nd Cir. 1987)].

¹⁴⁰See Hensler et al. for a discussion of previous attempts by Judge Parker to aggregate asbestos cases.

¹⁴¹*In re Agent Orange Product Liability Litigation*, 100 F.R.D. 724 (E.D.N.Y. 1983).

¹⁴²Judge Parker had developed a plan for trying individual issues in a series of minitrials for collections of claims.

class actions were effectively dispositive of the entire litigation. In *Agent Orange*, the class issues were so weak for plaintiffs that the case had only nuisance value. If the case had not been settled plaintiffs would almost certainly have lost, perhaps without ever reaching trial. All the other issues in *Agent Orange* made little difference, because the common issues rendered such low value apart from what else happened with other issues.¹⁴³

In the *Jenkins* case, the common class action issues were the major source of uncertainty; general causation for the types of injuries claimed in *Jenkins* was clear, and the total value of individual damages could be estimated with reasonable precision on the basis of information collected by the Special Master. Once the common issues of state of the art, exposure,¹⁴⁴ and punitive damages were resolved, the total value of the claims was fairly easy to determine.

Full trial of all issues in these cases would have involved substantial consideration of injuries and other individual issues. The real conflicts about the value of each case, however, turned primarily on issues that were common to every claim in the class action.

Second, neither class action created conflicts among claimants that would have led either to inequitable treatment of plaintiffs with strong claims or to widespread opt-outs. These conflicts did not arise in *Agent Orange* because plaintiffs' claims were homogeneous--they were uniformly weak. This was not the case in *Jenkins*, where asbestos injury

¹⁴³ Assume that plaintiffs had a one-in-fifty chance of winning both general causation and the defenses (a probability of .02, which seems greater than either the district court's or the circuit court's estimates of plaintiffs' chances). If plaintiffs could only establish that damages had a total value of \$500 million, the expected value of all claims would be \$10 million--the chances of winning liability (.02) times \$500 million in damages. If, on the other hand, plaintiffs were successful and established the total value of damages at \$5 billion, then the expected value of all claims would be \$100 million (.02 x \$5 billion). Certainly \$100 million is a lot more money than \$10 million, but this difference is small in comparison with the wide range in the total value of damages between \$50 million and \$5 billion.

¹⁴⁴ While matters of plaintiffs' exposure to asbestos seem to be particular to each plaintiff, those issues were common in east Texas, where almost all members of the *Jenkins* class were exposed as insulators working in refineries or petrochemical plants.

claims ranged considerably from marginal cases without symptoms to death from mesothelioma. But the class action did not introduce additional conflicts greater than those already present from the pattern of representation of these claims. Four plaintiffs' law firms represented all claimants; each firm had a considerable number of claims. Lawyers tended to settle asbestos claims in groups so that there was already the possibility that claims were "leveled," i.e., the strongest claims received less than might have been the case had they been litigated separately.¹⁴⁵ One might object to the leveling of claims that can result from aggregation, but this was caused by patterns of representation, not because of the class action. In fact, the data collected as part of the *Jenkins* class action helped address the potential problems of inequitable distribution of settlements. Judge Parker drew on these data to distribute the settlement among the plaintiffs' lawyers and to monitor distribution by each lawyer.

To summarize, the present limited reviews suggest that previous objections to the use of class actions might not be appropriate where (1) conflicts about the total value of a class turn primarily on issues common to each claim; and (2) either the claims have uniformly low values or most claimants are represented by plaintiffs' lawyers who have portfolios of many similar claims. Like the two cases reviewed here, the *Olin* DDT class action in Alabama litigation also fits this exception: Common issues of general causation drove the total value of all claims, and because of the weakness of general causation, the value of each claim was uniformly low.¹⁴⁶ Presumably, we will refine and perhaps add to these exceptions as our research explores case studies of mass tort litigation.

The maturity of litigation, the stage at which aggregation occurred, was important to and different in the two class actions. The *Jenkins* class action went smoothly in part because asbestos litigation was mature; the court and lawyers had considerable experience trying and settling asbestos cases. In general, the timing of aggregation within

¹⁴⁵See Hensler et al. on asbestos settlements.

¹⁴⁶See McGovern and Lind, forthcoming, 1989.

the overall history of that type of litigation seems critical; aggregation may promote a quicker and more satisfactory resolution in cases filed after a history of similar litigation.

Early, unsuccessful attempts were made to aggregate asbestos cases through MDL and class actions. Had those attempts been successful, the value of asbestos claims might have been substantially less, and the history of asbestos litigation might have been quite different. First attempts at aggregation were made in the 1970s, when defendants were more successful with the state-of-the-art defense than they have been recently, and before the discovery of documents and depositions that have been used to obtain substantial punitive damages.

The value of Agent Orange cases might also have changed if aggregation had occurred later in the history of that litigation, after the trials of some claims. Those trials would have tested the strength of plaintiffs' causation arguments. The value of those claims might have been completely eliminated if plaintiffs had been repeatedly unsuccessful. Alternatively, the value might have increased considerably if plaintiffs had been successful in some early trials.

As in *Agent Orange*, Bendectin claims were subject to aggregate procedures before that litigation was mature. For a time the value of the MDL Bendectin claims was eliminated after the jury found no causation in the bifurcated trial of general causation. Recently, juries have decided Bendectin claims that were not a part of the MDL. While defendants have won most trials, substantial plaintiffs' verdicts in several have given some value to these claims, increasing the likelihood of further claims and trials. If Bendectin cases had been aggregated after rather than before these trials, the aggregative procedure might have comprehensively disposed of all claims.

While these examples suggest that the value of plaintiffs' claims increases as litigation matures, time is not really so partisan. Within any litigation, the value of claims rises and falls with critical events such as the development of new evidence or theories, notable defense verdicts or large plaintiffs' verdicts, changes in legal doctrines, and the occurrence of events not directly related to the litigation. For example, some have speculated that the AIDS epidemic has generated a

return to more conservative sexual attitudes and practices. Such attitudes might have helped A. H. Robins Company in its largely unsuccessful effort to persuade juries that the sexual practices of Dalkon Shield plaintiffs--not their use of the Shield--were responsible for the development of pelvic inflammatory disease (PID).

Our review of the use of class actions in these two cases has also highlighted some of the limitations of aggregation. For example, class certification and the manner in which the class action rules were applied clearly helped prompt a quick resolution of both the *Jenkins* and *Agent Orange* cases. Yet the strength of the opposition to the *Agent Orange* settlement voiced at the fairness hearings, as well as the numerous appeals filed in that case, serves as evidence that aggregation did not ensure a satisfactory resolution of that litigation. We expect to explore more fully the important relationship between aggregation and litigant satisfaction as our research progresses. In addition, while class certification helped promote a quick resolution of the claims grouped into the *Jenkins* class, it had little carryover effect. As we noted in our discussion of *Jenkins* above, asbestos claims filed in east Texas since certification of the *Jenkins* class are being resolved much more slowly than was previously the case; at best, the rate of disposition now equals the rate of filing in that jurisdiction. The rate of disposition may have slowed in part because of what Judge Parker perceives as a lack of commitment to the ADR program by some lawyers. *Jenkins'* success in resolving so many claims may have increased the rate of filing of new claims in east Texas.¹⁴⁷ We also expect to address some of these secondary effects of aggregative procedures in subsequent work.

¹⁴⁷Telephone interview with Judge Parker, June 8, 1988. The fact that the resolution of one set of claims may encourage filing of additional, similar claims is not necessarily a negative attribute of aggregation. Settlements or verdicts which plaintiffs regard as swift and fair do and should serve to encourage others with similar claims to seek redress. We are speaking here about limitations on the ability of aggregative procedures to comprehensively resolve claims--i.e., to finally resolve all similar claims or all those similar claims in a particular jurisdiction.

CONTINUING RESEARCH

As we noted at the outset, this paper is intended to set forth our approach for subsequent detailed case studies and conceptual research on mass tort litigation. In describing our overview and examining the *Jenkins* and *Agent Orange* class actions, we have raised a number of observations and hypotheses about mass tort litigation and the effects of aggregative procedures. As we continue with case studies of mass tort litigation, we hope to develop systematic analyses and hypotheses within the framework provided by the overview. We expect that the work will lead to many discrete hypotheses about the effects of, or interactions among, one or several factors described in the overview.

While our analytic approach does not promise an immediate, global analysis of mass tort litigation, we feel that the approach is demanded by the complexity of this subject and that it holds the greatest promise for eventual success. Mass litigation is far too complex to support strong deductive inferences that have general application. Our examinations of class actions within this paper suggest the limitations to previous analyses that attempt to apply to all class actions for mass torts--those general analyses do not seem to fit the cases described in this paper.

While our current work is descriptive and inductive, we expect to move to broader inferences and deductive analyses. As our research continues, we will have opportunities to validate our inferences with subsequent case studies. Throughout, our research will work toward the evaluation of particular methods of aggregating mass claims to suggest how various methods of mass processing might be more systematically matched to the characteristics of particular types of litigation.

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