

ICJR Research Brief

Resolving Mass Tort Litigation: What Procedures Work?

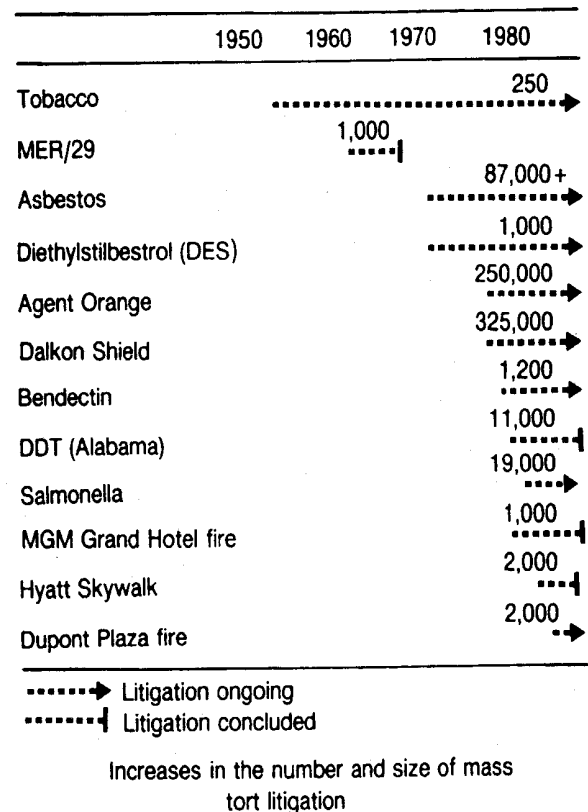
The civil justice system is designed primarily to handle the traditional tort case. Such a case typically involves a single or limited number of plaintiffs and defendants. Recently, however, a whole new type of litigation has been pushing its way onto the scene—mass tort litigation. These cases involve multiple plaintiffs and defendants. In asbestos cases, for example, manufacturers may be sued by tens of thousands of individuals, most of whom have substantially similar claims. The sheer bulk and complexity of such cases put an unprecedented strain on the courts. In fact, as the frequency of such cases rises, there are those who fear that mass tort litigation will swamp the courts entirely.

To save the courts from being overrun, judges and policymakers have designed innovative procedures for aggregating claims. By grouping together similar claims through procedures such as class actions, the courts avoid the tremendous time and expense that trying each case individually would involve. Critics of this practice protest, however, that these new procedures may produce inequitable outcomes and may be at odds with traditional guarantees of individual access to the courts. If each claim does not receive its own hearing, they ask, how can the courts ensure that each claimant receives justice?

Incidence of mass tort litigation rises dramatically

Although mass tort litigation has only recently blossomed into major controversy, its roots go back a few decades. In the late 1950s a number of individual lawsuits were brought against cigarette manufacturers by plaintiffs alleging personal

injuries as a result of smoking. During the 1960s, close to a thousand individuals filed suit against manufacturers of the drug MER/29, a cholesterol-lowering agent that was alleged to produce cataracts and dermatitis. But these cases can scarcely be considered mass torts by current standards—not when compared with something as massive and complicated as the 325,000 suits filed against the manufacturer of the Dalkon Shield since the 1970s. As the following timeline shows, the preponderance of major mass tort litigation has been initiated within the past 15 years.



Aggregative procedures relieve the courts' burden, but are they equitable?

The administrative problems mass tort litigation presents are unique. Besides threatening to take up so much time as to force other court business aside, such litigation can involve enormous personal, financial, and political stakes for parties on all sides. Furthermore, timing is frequently critical for plaintiffs with significant disabilities and expenses. Yet as the number of claims increases, plaintiffs' need for prompt compensation becomes harder to satisfy.

In response to these problems, courts, lawyers, and litigants have developed a variety of formal and informal procedures to avoid litigating hundreds or thousands of similar claims individually. The major aggregative procedures they've used include consolidation of cases, class actions, alternative dispute resolution (ADR), and multidistrict litigation (MDL permits transfer of related cases in the federal courts to a single district court that supervises all pretrial proceedings). In addition to expediting pleadings, discovery, and other procedures, aggregative procedures help structure negotiations among the parties.

Critics argue, however, that while these innovations ease the courts' administrative burden, they may compromise the courts' fairness. Mass litigation procedures raise the possibilities that outcomes will be inconsistent; that some defendants faced with a great number of claims may be forced to make significant settlements even when liability is unlikely; that some defendants can avoid responsibility by aggressively pursuing litigation; that compensation will not be related to the seriousness of injuries; and that the burdens on defendants will not reflect their relative culpability.

Which procedures ensure both efficiency and fairness?

In the past the debate about aggregative procedures has been based almost entirely on deductive arguments rather than on observations about how the use of these procedures really affects the course and outcome of mass litigation. Rather

than inferring conclusions from empirical data for specific litigation, most commentators impose theories and abstract principles upon individual—and varying—cases. But the diverse, highly complicated nature of mass tort litigation makes it resistant to solely deductive analyses, since there is no one uniform principle that covers all its labyrinthine complexities.

Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures (N-2805-ICJ), by Mark Peterson and Molly Selvin, proposes an empirical approach to determining which procedures actually work in resolving mass tort litigation. The authors present a set of common coordinates, a grid for mapping the traits and outcomes of various instances of mass tort litigation. This new grid makes it possible to compare complex cases and draw valid inferences about similarities and differences in the effects of aggregative procedures. Then the authors illustrate the utility of this framework by applying it to two recent instances of mass litigation: *Jenkins v. Raymark*, a class action for more than 700 asbestos claims in east Texas, and the *Agent Orange* litigation.

Using the comparative approach developed by Peterson and Selvin, the Institute for Civil Justice plans to conduct a series of case studies aimed at developing systematic empirical information about the uses of specific aggregative procedures—What are their effects? What works? What does not? Our research should help lawyers, judges, and other policymakers choose specific procedures that can be effective both in providing justice for the individual claimant and in preventing the courts from being buried under the mass of claims.

The research summarized in this brief was carried out within the Institute for Civil Justice of The RAND Corporation. For more information, see N-2805-ICJ, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures*, by Mark Peterson and Molly Selvin, 70 pp., \$7.50.

For copies, contact Publications Department, The RAND Corporation, 1700 Main Street, P.O. Box 2138, Santa Monica, CA 90406-2138, (213) 393-0411.