Justice for the Masses? Aggregate Litigation & Its Alternatives

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Abstract: Traditionally, disputes over injury compensation that were brought to court involved one or a few plaintiffs and defendants and were processed individually. The risk and expense of such litigation meant that most victims of legally cognizable injuries never came through the courthouse doors. The modern global economy, however, has vastly increased the potential for mass harms and losses, and modern mass media have created felicitous circumstances for mass claiming. Aggregated mass litigation blasts open the courthouse doors for individuals who might otherwise find them closed. Aggregation benefits some but disadvantages others. Class action rules attempt to mitigate these conflicts, but such procedures do not apply to aggregate non-class litigation. It is time for courts to adopt rules and practices that recognize the realities of such litigation.

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In the popular image of civil litigation, two parties face off against each other in a courtroom, a judge sits on high overseeing the process, and a jury decides who wins and who loses. Virtually nothing about this image is accurate today. Few lawyers or parties ever see the inside of a courtroom; the judge's role is to manage rather than adjudicate; and the lawyers are more likely to be arguing about schedules, procedure, and evidence than about the substantive merits of the dispute. Most of the activity takes place in the judge's and lawyers' offices – or, increasingly, by videoconference – in the parties' absence. The dispute most often ends either with a judge's decision on a legal requirement or a compromise between the parties, rather than a judge or jury decision based on the merits of the issues presented in full. And increasingly, especially in complex and high-stakes cases, rather than one party suing another, hundreds or more plaintiffs seek a remedy from multiple defendants.

The growth of what has come to be known as "mass litigation" – which encompasses both class actions and aggregate non-class litigation – began sev-

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eral decades ago in the United States. However, courts continue to struggle to contain these mass disputes within the structure of a legal system designed for the canonical battle of single plaintiff versus single defendant. Nor is this struggle limited to the United States; across the world, in jurisdictions that differ from each other in many other important ways, courts are confronting the problem of mass litigation.

Mass litigation is the child of modern capitalist economies and legal doctrines. To succeed in a global marketplace, manufacturers and service providers must sell their products to huge numbers of people or other businesses. When something goes wrong – when a product proves defective, a service is not what it was advertised to be, or a financial scheme violates legal rules – hundreds, thousands, and sometimes tens of thousands of consumers, purchasers, or investors are injured in many different parts of the world. Some harms are minor and exclusively financial; others involve personal injury or death. Once victims had no recourse against businesses responsible for their losses or injuries; depending on the time and place, they would turn to personal insurance or a social welfare scheme, or simply "lump it." In most countries today, the law holds businesses responsible for compensating losses attributable to their behavior in many – although not all – circumstances. As a result, when mass losses or injuries occur, large numbers of victims have potential lawsuits. In some areas of law, such as securities and antitrust, the harm itself is defined in terms of the market, from which mass litigation logically flows.

It is common in the United States, and increasingly common in other countries, to decry citizens' "litigiousness." Contrary to popular perception, however, the overwhelming majority of people with potential claims for compensation fail to pursue them. The best data for the United States indicate that less than 5 percent of people injured by products file suit against product manufacturers.[1] There are multiple reasons for this. Many victims blame their own carelessness – or plain bad luck – for their injuries. They may not realize that they have a claim under law. They may not know how to hire a lawyer, or they may believe they cannot afford to hire one.[2] A lawyer may tell them their claim is too expensive or too uncertain of success to be worth pursuing. As a result, until fairly recently, even when many people were injured as a result of a single event or pattern of activity, not many lawsuits ensued.

Modern mass media, now including social media, have changed these dynamics. The news of high-salience events – the announcement of a catastrophic fire, bridge failure, or airplane crash; an article in a prestigious medical journal announcing a link between a widely used pharmaceutical product and a serious disease; a whistle-blower's disclosure of financial shenanigans; or an investigative reporter's story of widespread sexual abuse – is immediately flashed around the world. Harmful behavior is labeled as such, blame is quickly apportioned (fairly or not), and the notion that those harmed could – and perhaps *should* – pursue legal claims almost immediately becomes part of conversations at macro- and micro-levels. Information about how to pursue legal redress is available at the click of a mouse.

In these situations, the potentially large number of people with viable legal claims for even modest amounts of money quickly attracts lawyers. Historically, this occurred more often in the United States, where lawyers' ability to charge contingent fees (fees contingent on the client receiving an award in the case, usually in the form of a percentage of that award) makes legal representation feasible for people at all income levels, than in other countries, where contingent fees are prohibited. The situa-

tion outside the United States is changing, however, as some countries have eliminated or diminished barriers against contingent fees and lawyers in other countries have found other means of obtaining speculative financing.

Over the past several decades, plaintiff lawyers have developed sophisticated strategies for coordinating representation of plaintiffs in mass litigation. By sharing information and costs among law firms and spreading their own financial risk across large portfolios of lawsuits, U.S. plaintiff law firms have been able to substantially level the playing field between plaintiffs and well-heeled corporate defendants. Today, lawyers are sharing these strategies worldwide.[3] This is reflected by parallel litigation in multiple jurisdictions over personal injury claims associated with everything from pharmaceutical products and medical devices such as Vioxx and hip implants to financial injury claims following on the Lehman Brothers bankruptcy and the collapse of Bernard Madoff's Ponzi scheme.

For legal and logistical reasons, when mass litigation erupts, lawyers tend to file claims in a relatively small number of courts. Without much warning, a local court with a dozen or so judges may find itself inundated with hundreds or even thousands of similar claims. As a practical matter, the court has three options for dealing with this mass of claims: treat each claim individually in the ordinary fashion; collect the claims and deal with them as a group; or – if the law permits – allow one or a few claimants to represent all of those with similar claims in a single lawsuit such as a class action. Often the key consideration for judges and lawmakers who adopt special rules for mass litigation is procedural efficiency: that is, which approach will resolve claims the quickest and at the least expense for parties and for the taxpayers who subsidize the court system. Yet the courts' decisions about how to treat mass claims concern far more than expenses – they have profound implications for procedural fairness and distributive justice.

The history of asbestos worker injury litigation in the United States vividly demonstrates the complicated consequences of procedural choice in mass litigation. Exposure to asbestos causes a variety of diseases, including mesothelioma (a deadly cancer) and asbestosis (a moderate to severe respiratory impairment).[4] Yet while some of the health risks of asbestos have been known since the late nineteenth century, it was not until the early 1970s that plaintiff attorneys managed to convince a court that sufferers of asbestos-related diseases could be compensated under product liability law. By that time, tens of thousands of workers had been exposed to asbestos, most of them in a handful of regions where on-the-job exposure was especially prevalent. When a legal avenue for obtaining compensation for medical costs and work loss opened up, workers turned to the lawyers in these regions. Fearful of the risk that pursuing novel litigation against major corporations entailed – and perhaps mindful of the experience of other plaintiff attorneys who had tried unsuccessfully to win personal injury lawsuits against tobacco manufacturers – few law firms were willing to take on these cases. Those who did filed cases in a handful of federal and state courts.[5]

At first, these courts treated asbestos lawsuits conventionally, one case at a time. Although the lawsuits raised novel doctrinal issues and required complicated scientific evidence to support the workers' claims, it was not obvious that they would pose special burdens on judges and other court personnel and, in any event, most courts had no procedures in place for handling civil lawsuits any differently. But treating these cases individually was not

without consequences; the sheer proliferation of cases meant long delays to disposition. Large corporations with substantial legal resources could profitably wait out plaintiff attorneys, and protracted litigation also benefited defense counsel, who billed by the hour. The reverse was true for plaintiff attorneys who self-financed the litigation, looking to benefit when cases were settled and they could take their share of plaintiffs' compensation. As litigation lingered on court dockets, some plaintiffs died while others' diseases intensified.

Eventually, judges began to question the wisdom of individual treatment. Drafting separate orders for almost identical individual lawsuits did not seem to make much sense, so judges invented the notion of a "master case," the decisions in which would apply to all asbestos cases in their courtrooms. Holding separate conferences to set schedules for proceedings in hundreds of cases filed around the same time by the same law firm against the same defendants seemed like a waste of time, so the judges called the lawyers and scheduled all their cases for the year. Once that idea had taken hold, it seemed logical to hold mass settlement conferences with those lawyers. These conferences somewhat ameliorated the uneven playing field between plaintiffs and defendants, allowing plaintiff attorneys to offer defendants the bargaining chip of a single mass settlement, which could put a substantial dent in defendants' liability exposure.

Not all cases were susceptible to settlement, however. Judges needed to try some cases in order to test plaintiff attorney's legal theories and produce evidence of causation and liability. Product liability trials are more time-consuming than trials of ordinary personal injury lawsuits. Few if any courts had a sufficient number of judges to rapidly try the scores of asbestos lawsuits that were deemed "trial-ready"; some courts calculated the likely waiting time to trial for asbestos lawsuits in years, not days or months. Some judges attempted to remedy congestion on the trial calendar by grouping cases for trial, asking a single jury to hear and deliver verdicts for several cases at a time. In one famous instance, a state judge in Baltimore instructed a six-person jury to hear and decide some eight hundred asbestos lawsuits in a single trial. In another, a federal judge in East Texas applied a sophisticated statistical sampling technique to select cases representing different factual circumstances, with the goal of applying the jury's average verdict for each case type to *all* such cases on his trial calendar.[6] On their face, these innovations posed significant due process issues. The difficulty of constructing an efficient and fair trial procedure for masses of cases led judges and lawyers to rely increasingly on aggregate settlements.

As time passed, plaintiff attorneys and defendants negotiated standing agreements to settle asbestos lawsuits. The few plaintiff law firms that had been willing to invest in the litigation early on by now had thousands of asbestos-worker clients. Defendants whose products had an attenuated relationship to workers' asbestos-related diseases paid small amounts to extinguish claims that had a small chance of success; more culpable defendants paid larger amounts. Claims in different disease categories were valued according to the severity of plaintiffs' injuries. To help defendants manage their cash flow (and plaintiff attorneys manage their tax burdens), these agreements called for defendants to settle a fixed number of claims annually.

Although usually described as efficiency moves necessitated by the large numbers of lawsuits, group settlement conferences, group trials, and wholesale settlement contracts reflected a radical re-conceptualization of asbestos litigation that would come

to apply to all mass litigation. Mass litigation was increasingly viewed *as a mass itself*, an aggregate liability (to defendants) or asset (to plaintiff attorneys) capable of evaluation and disposition at the macro-level. Trial court judges who designed management strategies for resolving cases in the aggregate could substantially reduce their caseload and win acclaim within the judiciary. Defendants who developed strategies for resolving the claims against them in the aggregate could reduce their litigation cost-to-compensation ratios to a more acceptable level and reap benefits in the capital markets. Plaintiff law firms that accumulated large inventories of cases and resolved them in aggregate settlements or in accordance with standing agreements could bank on a business model that would support their firms for many years.

The calculus for individual plaintiffs and for society was more complicated. For many injured asbestos workers, aggregate procedures offered the only avenue into the legal system, and – given the minimalist U.S. safety net – the only path to compensation for medical costs and work loss. Among the plaintiffs who gained access to the courts were asbestos-exposed workers who were not currently impaired but were at risk of suffering impairment in the future. Under the conventional "one case at a time" procedural model, these plaintiffs would have been unlikely to find representation and, because of time limits on litigation, they ran a risk of not being able to pursue a claim if and when they developed more serious injuries. Other workers had moderate-to-severe injuries and some had terminal illnesses. Because product liability litigation is expensive, many of these workers also would have been unlikely to obtain legal representation if plaintiff attorneys had to litigate their cases individually.

But providing access to all these plaintiffs had costs as well as benefits. In mass settlement negotiations, plaintiff lawyers might discount the value of more seriously injured plaintiffs' claims in order to encourage defendants to settle lesser-value claims. Weaker claims clogged the courts and ultimately contributed to decisions by scores of asbestos defendants to file for bankruptcy. In some instances, the perceived availability of "easy money" led to fraudulent claims. Providing access to court to all those with legitimate claims – including many who would not have had access if courts insisted on individual litigation – arguably drew appropriate attention to the harm associated with defendants' behavior, contributing to socially valuable deterrence from repeating the same actions in the future. However, incentivizing questionable or fraudulent claims raised the specter of "overdeterrence" and undermined the legitimacy of the courts' role in compensating mass harms.

From a procedural perspective, aggregation offered plaintiffs virtually no opportunity for individualized hearings of their claims, except for the few plaintiffs whose cases went to trial. Although on the surface this may seem to have been a loss for plaintiffs in mass litigation, their experience in this regard was not much different from that of plaintiffs in ordinary litigation, who also have few opportunities to make their voices heard in the courtroom.[7]

By the mid-1980s, judges and lawyers were applying the aggregation template to scores of mass litigations. U.S. federal law provides a procedural tool for aggregating cases: the *multi-district litigation* (MDL) procedure, of which judges and lawyers made full use for claims arising out of the use of heart valves, stents, and pacemakers; intrauterine devices and other contraceptives; diet drugs; silicone gel breast implants; and exposure to Agent Orange, DDT, and radiation. Once it became clear that there

was a potential for mass claims, few judges were prepared to deal with these lawsuits conventionally, one case at a time.[8] Their first move was to appoint a small committee of plaintiff lawyers – usually those that had taken on the largest number of clients with the relevant claims – to lead the litigation. Securing these appointments increased these firms' power (and fees) and helped construct the mass tort plaintiff bar. Although it does not provide for mass trials, the MDL statute created a framework for mass settlement. Once defendants were persuaded that plaintiff attorneys had enough viable claims to pose significant legal, financial, and public relations problems, they often proved willing to agree to settlement of all the claims that had been filed regarding a specific product.

As the number and size of mass litigations mounted in the 1990s, a new realization set in. By aggregating claims and processing them efficiently, courts were incentivizing plaintiff lawyers' firms to expand their efforts to identify potential mass litigations. And by agreeing to mass settlements, defendants incentivized plaintiff firms to represent increasing numbers of claims in a single litigation, including not only meritorious smaller-value claims that would have been too expensive to prosecute individually, but also claims that might well have failed if subjected to individual investigation and hearing. Over time, judges and defendants began to adjust their strategies to narrow access for mass claimants. Judges became more wary of promoting settlement before they had decided key legal or factual issues. Defendants insisted on trying bellwether cases in order to test their strength – and their appeal to juries – before agreeing to settle, and only agreed to aggregate settlements that excluded weaker claims that plaintiff attorneys were unlikely to pursue individually. In some instances, alternative dispute resolution procedures such as mediation and arbitration were used to assess the value of individual claims, offering an opportunity for an individualized hearing. Mass litigation continued, albeit in a more circumspect fashion.[9]

Though claims are aggregated, mass litigation is still an agglomeration of individual claims, each represented by an individual lawyer who has agreed to represent his or her client for an individual fee.[10] To finalize an aggregate settlement, therefore, each of the individual claimants must agree to its terms. Often defendants will require that most plaintiffs accept an aggregate settlement as a condition of the defendants' agreement to settle. For example, the defendants in the litigation concerning recovery worker toxicity exposure at Ground Zero following the September 11 terrorist attacks required that 95 percent of the approximately ten thousand individual plaintiffs accept the proposed aggregate settlement.[11] Even when a settlement occurs in part because of judicial pressure, there is no formal hearing on the terms of the settlement and the judge does not have specific authority to approve it; nor is the judge specifically authorized to regulate the plaintiff attorneys' fees. Fairness is considered a matter for discussion between plaintiffs and their lawyers outside of court. How often such discussions occur when a single firm represents tens of thousands of claimants in a single litigation is a matter for conjecture.

The lack of formal judicial regulation of aggregated mass litigation may surprise readers familiar with the third procedural option for resolving mass litigation, a class action in which one or a few plaintiffs represent a large number of other similarly situated people. U.S. courts have long provided a representative litigation procedure for situations where a court ruling on the legality of a policy or practice will inevitably affect an entire group of people (such

as taxpayers, African-American schoolchildren, or older employees) or where it is more efficient to decide some or all aspects of similar individual claims in a single proceeding. Litigation can only proceed in class action form with the approval of a judge, who is required to "certify" that the case meets the conditions set forth in the rule. Today, at least two dozen other jurisdictions in North and South America, Europe, the Middle East, and Asia have adopted class action procedures for similar purposes.

The rules for class action proceedings, as well as the extensive legal requirements for class certification, are intended to protect the interests of individuals who are not present in the courtroom and whose claim outcomes are determined collectively rather than individually. The judge must approve the class representatives, as well as the lawyer(s) who will represent the class. If a class is claiming monetary compensation, class members must receive an adequate notification of the proceeding and the terms of any proposed settlement (including proposed attorney fees) and must have an opportunity to "opt out" so that they can pursue individual litigation. The judge must approve a proposed settlement for "fairness, reasonableness, and adequacy," after a public hearing at which any class member can speak in opposition to the settlement's terms. Although in most instances few class members appear at such hearings, some judges have scheduled multiple sessions in large spaces, including auditoriums and sports arenas, and encouraged class members to come forward to share their opinions.[12]

If class members prevail (by settlement or trial), the judge decides how much they must pay their counsel. Some judges model lawyers' fee awards on the prevailing one-third contingency fee in ordinary tort litigation; however, when settlement amounts are huge, most judges award fees that constitute a much smaller percentage of the total paid by defendants.[13] As a result, total class counsel fees may be substantially less than the total earned by plaintiff attorneys representing clients in aggregate litigation. Mindful of this discrepancy, a few judges who have presided over aggregate mass litigation have limited plaintiff attorneys' fees either by persuasion or fiat, asserting the litigation is a "quasi-class action" subject to judicial regulation.[14] Plaintiff attorneys (and some academics) have contested judges' authority to set attorney fees in non-class aggregate litigation but, to date, few challenges have reached appellate courts.

Although the current U.S. Supreme Court has steadily restricted class action suits,[15] U.S. courts have historically viewed the procedure as appropriate for securities, anti-trust, and consumer protection litigation, as well as suits for injunctive relief, such as employment discrimination claims. Deciding such suits on a class-wide basis (and in some instances determining monetary remedies by formula) obviously increases efficiency. Requiring judges to regulate class litigation was intended to ensure that these efficiency gains did not come at the cost of denying procedural rights to class members.

In contrast, on the grounds that the many individual differences among tort claimants and their potential conflicts of interest require individual consideration, U.S. courts have generally refused to certify mass tort litigation for class treatment. (Interestingly, outside the United States, some jurisdictions have adopted class actions specifically *for* mass tort claims.) The judicial authors of the leading decisions on class certification of mass torts have seemed to assume that the alternative to representative litigation is individualized litigation, affording

plaintiffs the full panoply of due process protections and putting plaintiffs firmly in control of the process – notwithstanding the extensive evidence that this is rarely true.

Like aggregate procedures, representative class actions create winners and losers. Deputizing a single lawyer to represent large numbers of claimants (many of whose claims are worth such small amounts that they are not worth pursuing individually) with the promise that the lawyer will receive a large share of any aggregate award or settlement incentivizes lawyers to look for opportunities to bring such cases to trial. If the claims are meritorious, the consequence is socially beneficial: defendants are deterred from future wrongdoing by the aggregate monetary sanction, and individual class members receive recompense (small though it may be) for their losses. As class action filings mounted in the 1990s, however, defendants began to push back against class certification, arguing that a large majority of class actions were *non*-meritorious. Both because of the direct expense of contesting class actions and because of the potential for media coverage to tarnish their products' reputation, corporations claim that they are "blackmailed" into settling damage class actions as soon as they are filed.

Available data contradict these claims; only a small percentage of claims that seek class status are certified, although those cases are almost always settled. Most cases filed in the form of class actions are either dismissed, disposed of by summary judgment in favor of the defendant, or dropped; in some cases, the defendants settle with an individual plaintiff.[16] However, the perception that plaintiff law firms abuse class actions has gained widespread traction and arguably contributed to recent U.S. Supreme Court decisions making class certification more difficult in a wide variety of circumstances in which it was once deemed appropriate.

Three decades of mass litigation in aggregate and class form have brought home to corporate America the power that collective legal action confers on individuals and smaller businesses that do not have the wherewithal to litigate individually and cannot find legal representation on contingency. Just as "divide and conquer" can be an effective strategy in political conflicts, it is also effective in preventing access to courts to victims of mass financial harm. Today, employment, consumer, and other such contracts routinely include arbitration clauses waiving parties' rights to pursue legal claims in court; instead, they are directed to private arbitration tribunals. A key provision of these clauses is a prohibition on any kind of collective arbitration proceeding. The U.S. Supreme Court has upheld these prohibitions.

Nonetheless, plaintiff attorneys continue to litigate mass tort claims, which are difficult for corporations to constrain by contract in aggregate form. And, notwithstanding the general disfavor shown toward class certification for mass torts, judges continue to certify class actions in some instances. (For example, in August 2013 a class of former football players who are suing the NFL in federal court for concussion-related injuries announced they had reached a settlement with the NFL; in January 2014, the judge overseeing the case refused to approve the settlement but implied that she would be willing to certify a class for settlement purposes if the terms were more generous.[17])

It is tempting to assess mass litigation procedures against the benchmark of individualized due process. Judged this way, aggregate litigation fails: it provides neither individualized process nor individualized outcomes to plaintiffs or defendants. But insisting on individual dispute

processing almost guarantees that injury victims will be denied justice: no court has the resources to manage a flood of claims individually in a timely enough fashion to serve plaintiffs' needs. In complex cases, individual litigation is too expensive for ordinary plaintiffs to pay for on an hourly basis and too expensive and risky to attract lawyers working on contingency. Aggregate litigation therefore opens the courthouse doors to mass claimants who would otherwise find them closed.

Because aggregate litigation relies almost exclusively on settlement – turning to adjudication only in rare and possibly aberrant cases – the soundness of plaintiffs' claims is not fully legally tested. As a result, it is difficult to determine whether the net effect of the litigation is overdeterrence (as defendants claim), underdeterrence, or optimal deterrence. Nor is it possible to assess whether the litigation delivers on tort law's promise of corrective justice.

Aggregate litigation empowers mass tort plaintiff lawyers and defendants; it does so, however, by treating the plaintiffs themselves more as objects than as subjects. Because there have been few surveys of mass plaintiffs, we know virtually nothing about how they assess their experiences or outcomes, although grumbling on websites devoted to specific mass litigations suggest they are often unhappy and distrustful of their own lawyers, the defendants, and the courts.

If judges were willing to abandon the fiction that aggregate litigation is no different from individual litigation, courts could, as a few judges have demonstrated, incorporate protection for individualized rights into aggregate litigation procedures. When appointing attorneys to lead the litigation, they could consider how well the candidate law firms have communicated the progress of the litigation to their clients in the past. They could encourage, if not require, the establishment of websites and Facebook pages giving up-to-date information about the litigation and its prospects. The judiciary, through rule reform, could seek specific authority to review and approve settlements and attorney fees in mass litigations that look for all the world like class actions. Neither individual parties nor society as a whole can afford to litigate claims arising out of mass harms individually, and the benefits of resolving such claims collectively are too great for defendants to insist on *never* doing so. By confronting the realities of mass litigation and thinking creatively about how to balance efficiency and fairness in aggregate litigation, the judiciary can help maintain the relevance and legitimacy of courts in the twenty-first century.

ENDNOTES

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