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## AN ADMINISTRATIVE APPROACH TO THE RESOLUTION OF MASS TORTS?

Douglas G. Smith\*

In recent years, there have been many proposals for potential mechanisms to resolve mass tort claims.<sup>1</sup> These proposals have been advanced not only by academic commentators seeking to improve upon existing approaches, but also by courts and practitioners in attempting to resolve real world controversies. Richard Nagareda's *Mass Torts in a World of Settlement* is a valuable contribution to that debate.<sup>2</sup> *Mass Torts* not only provides an interesting overview regarding the state of modern mass tort litigation, but also an ambitious proposal for resolving such claims.

The challenges posed by mass torts in the last forty years are well known. Mass tort litigation is characterized by numerous and dispersed claims filed in multiple jurisdictions that, while they may be based on exposure to a common product or substance, often involve highly individualized factual circumstances that make them resistant to easy resolution. The pressure of mass tort litigation can be overwhelming. The sheer volume of mass tort claims can present an insurmountable burden both for litigants and the judicial system.

Such pressures lead to a break-down in the civil justice system and its ability to resolve such claims in a fair and efficient manner. Claims that go to trial may result in wildly disparate outcomes depending upon the particular jurisdiction in which they are filed and other factors. More significantly, there is extreme pressure on defendants to settle claims that cannot possibly be litigated on terms that are more favorable than are warranted by the underlying facts.

Many potential means of resolving such claims have been attempted with little success. Class action mechanisms have run into problems given the Supreme Court's twin decisions in *Amchem* and *Ortiz* limiting their application in the context of mass tort claims. Administrative and legislative remedies have not been implemented due to opposition from competing political constituencies. Finally, bankruptcy frequently has

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<sup>1</sup> See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819 (1992); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 *GEO. L.J.* 1983 (1999); Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 *TEX. L. REV.* 1695 (1998); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 *NW. U. L. REV.* 1435 (2004); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 *B.U. L. REV.* 659 (1989); Alan N. Resnick, *Bankruptcy As a Vehicle For Resolving Enterprise-Threatening Mass Tort Liability*, 148 *U. PA. L. REV.* 2045 (2000); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 *CORNELL L. REV.* 941 (1995).

<sup>2</sup> RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007).

failed to apply proper criteria to mass tort claims, resulting in the rapid depletion of funds set aside to pay future claimants.

It is in this context that Professor Nagareda offers his proposal. However, like prior proposals for the resolution of mass tort claims, Nagareda's suffers from potential flaws. Nagareda's premise is that parties have moved away from litigation and toward procedures that are more administrative in nature to resolve mass tort claims and that this move should be facilitated by putting in place a more formal structure to provide an administrative or regulatory solution. However, it is not clear that Nagareda's approach will be feasible in practice. Nor is it clear that it will provide a comprehensive solution to the problems plaguing mass tort litigation.

More fundamentally, there are particular aspects of traditional litigation-based resolution of mass tort claims that are important and should not be abandoned or de-emphasized. Much of the dysfunction with respect to mass tort claims resolution may be traced to a failure to *implement* litigation-based procedures, as opposed to being a *result* of such procedures. Accordingly, a strong case can be made that the traditional litigation-based paradigm should not be abandoned, but rather fortified.

#### I. THE CHALLENGES POSED BY MASS TORTS

As Professor Nagareda correctly observes, mass tort litigation is often "dysfunctional".<sup>3</sup> The terms used to characterize mass tort litigation vividly illustrate the intractable nature of the problem, with courts and academic commentators both concluding that the civil justice system is in a state of "crisis".<sup>4</sup> The courts are inundated with waves of claims that are often difficult to manage, much less resolve.<sup>5</sup> In the asbestos context, for example, claims have continued to increase, despite the fact that asbestos use ceased long ago: the judicial system has been overwhelmed by an "elephantine mass of asbestos cases" that "defies customary judicial administration."<sup>6</sup>

In many of these mass torts, current claimants are not, and will never be, sick.<sup>7</sup> Nonetheless, such unimpaired claimants may still receive compensation at the expense of future claimants. Resources that would otherwise be available for paying claims in the future are depleted as

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<sup>3</sup> NAGAREDA, *supra* note 2, at 20 ("When mature mass tort litigation is allowed to continue, the resolution of claims in the tort system has the potential to become dysfunctional.").

<sup>4</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing the "asbestos-litigation crisis").

<sup>5</sup> See NAGAREDA, *supra* note 2, at xiii ("The sheer number of claims belies any aspiration for an individualized 'day in court,' if for no other reason than the scarcity of judicial resources.").

<sup>6</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

<sup>7</sup> See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. LEGIS. 384 (1993).

present claimants with dubious claims receive immediate compensation. In the asbestos context, for example, commentators have observed that “up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though individual litigants will never become impaired.”<sup>8</sup>

Exacerbating these problems is the rampant forum-shopping that often occurs in mass tort litigation, as claims gravitate toward certain jurisdictions that plaintiffs believe are more favorable.<sup>9</sup> “[T]here has been a gross disparity in jury verdicts among states, usually with the largest verdicts coming from the same counties that allow large mass filings.”<sup>10</sup> Plaintiffs take advantage of such dynamics in order to inflate the value of claims beyond what is justified. Moreover, such dynamics lead to inequitable outcomes as the value of claims turns in large part on the jurisdiction in which they are filed, as opposed to the inherent facts and law governing each cause of action.

The consolidation of claims further exacerbates these problems, tying legitimate claims with those of dubious merit.<sup>11</sup> Settlement pressure is increased on defendants with the joining of additional claims, and that pressure applies equally to those claims that are meritorious and those that should not receive compensation.<sup>12</sup> As a result, the value of the unimpaired claims is inflated.

At the same time the number of claims expands, often the roster of potential defendants expands as well. Plaintiffs seek out as many “deep pockets” as possible in order to increase their returns. As companies are forced into bankruptcy, plaintiffs assert more tenuous claims against remaining parties who are peripheral to the litigation.<sup>13</sup> Thus, even the

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<sup>8</sup> *Amchem*, 521 U.S. at 629 (Breyer, J., concurring in part and dissenting in part).

<sup>9</sup> See, e.g., Brickman, *supra* note 1, at 1827 n.34 (“Forum shopping is widespread in asbestos litigation.”); RAND INSTITUTE, ASBESTOS LITIGATION 61 (2005) (observing that in the asbestos context “a small number of jurisdictions have accounted for the bulk of the litigation, but the areas of concentration have changed over time”).

<sup>10</sup> See, e.g., Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1747 (2002).

<sup>11</sup> See NAGAREDA, *supra* note 2, at 25 (“The willingness of some courts to consolidate large numbers of individual claimants—sometimes with widely disparate physical conditions—enhances further the settlement value of claims brought on behalf of exposed but unimpaired persons.”).

<sup>12</sup> See *id.* at 28 (“The use of aggregate settlements to resolve cases as trial dates approach comes only at the cost of doctrinal tension, for its tendency is to inflate settlement values through the inclusion of claims about which current tort law is skeptical, at best.”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521 (1994) (“Often the pressure for block settlements comes from plaintiffs’ attorneys who hope to get something for a large mass of questionable cases.”).

<sup>13</sup> See, e.g., RAND INSTITUTE, *supra* note 9, at 48 (observing that as asbestos defendants entered bankruptcy, “[p]laintiff attorneys sought out new defendants and pressed defendants whom they had heretofore treated as peripheral to the litigation for more money”).

elimination of potential defendants does not halt the expansion of the litigation.

As Professor Nagareda and other commentators have correctly observed, all of these factors combine to make the resolution of mass torts within the civil justice system particularly challenging.<sup>14</sup> The sheer magnitude of the litigation and the dynamics driving it to expand often overwhelm the judicial system. Case by case litigation is often simply not feasible, and other avenues for resolution must be found.

## II. RESOLUTION OF MASS TORTS

Many different means of resolving mass tort claims have been employed over the last several decades. From class actions, to contractual relationships, to the bankruptcy system, both parties and the judicial system have sought a mechanism to completely and finally resolve such litigation. However, in many instances, they have failed in bringing global resolution to widely dispersed mass tort claims.

The Supreme Court, for example, has dramatically cut back on the ability to use the class action device as a means for resolving mass tort claims. In *Amchem* and *Ortiz*, the Court noted that the inherent conflicts among present and current claimants as well as the highly individualized nature of the proof involved in mass tort claims made the class action device generally inappropriate for the resolution of such claims.<sup>15</sup> While plaintiffs have attempted creative means to get around these decisions, such as certifying mandatory punitive damages class actions, these efforts have failed.<sup>16</sup>

Likewise, attempts to negotiate private agreements with the plaintiffs' bar have failed to bring global peace. For example, Professor Nagareda discusses at length Owens Corning's National Settlement Program (NSP), which attempted to put in place contractual relationships with the major plaintiffs' firms to resolve the company's asbestos-related claims. However, as Professor Nagareda observes, the NSP largely failed because it could not constrain plaintiffs' firms that did not enter into the agreements and who asserted new claims that detracted from the global peace the agreements sought to achieve.<sup>17</sup>

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<sup>14</sup> NAGAREDA, *supra* note 2, at viii (“[T]hese characteristics—numerosity, geographic dispersion, temporal dispersion, and factual patterns—poses its own challenges for a tort system designed primarily for idiosyncratic events, one-one-one litigation, and present-day injuries.”).

<sup>15</sup> *See id.* at 72-73 (observing that, “[a]s embodied in Rule 23 of the Federal Rules of Civil Procedure in 1966, the modern class action seemed on its face a device with little applicability to mass torts”). *See also Amchem Prods.*, 521 U.S. at 626 (observing that “the interests of those within the class . . . are not aligned”); *Ortiz*, 527 U.S. at 853 (noting the “divergent interests of the presently injured and future claimants”).

<sup>16</sup> *See* NAGAREDA, *supra* note 2, at 124 (discussing the Second Circuit's reversal of Judge Weinstein's attempt to certify a punitive damages class action in the context of tobacco litigation).

<sup>17</sup> *Id.* at 143-46 (observing that the NSP was “vulnerable to new entrants among asbestos plaintiffs' law firms and to spin-offs from the signatory firms”). As Professor Nagareda

(Continued...)

Bankruptcy likewise has failed in many instances to achieve an adequate resolution of mass tort claims. The most famous example is the Johns-Manville bankruptcy, which was the first chapter 11 reorganization designed to resolve claims against a major asbestos manufacturer. As a result of the reorganization, asbestos claims were channeled to an asbestos claims resolution trust and away from the reorganized debtor. However, as Professor Nagareda observes, the Manville Trust failed to provide an adequate solution, becoming depleted as claims were asserted that were far in excess of projections: “The Manville trust proved to be a perilous institution, . . . with large numbers of claims quickly overwhelming its initial capitalization. This depletion precipitated dramatic markdowns in the payout levels originally described in the reorganization plan and repeated judicial interventions to prop up the finances of the trust.”<sup>18</sup> This outcome was largely the result of the trust’s failure to apply rigorous criteria to determine which claims should receive compensation.

Other than their decidedly mixed record of success, Professor Nagareda argues that the various mechanisms that have been attempted have one thing in common—namely, they all evidence a move toward administrative remedies for the resolution of mass tort claims.<sup>19</sup> According to Professor Nagareda, for example, the class action settlements attempted in *Amchem* and *Ortiz*, the negotiated bankruptcy plans—particularly pre-packaged bankruptcies attempted in the asbestos context, and the private agreements with major plaintiffs’ law firms, all indicate a movement toward administrative solutions where the major parties craft a consensual resolution designed to bring global peace to the litigation.

Professor Nagareda goes further than merely characterizing the recent attempts to resolve mass tort claims as administrative in nature, however. He advocates facilitating the administrative resolution of mass tort claims by “overriding [the] contingency-fee contracts for the representation of claimants already in the tort system.”<sup>20</sup> According to

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observes, it was difficult for such arrangements to lead to global peace given that “the signatory law firms within the asbestos bar cast their agreements with Owens Corning simply in terms of promises to advise any future clients to seek compensation under the terms of the Owens Corning administrative process rather than through tort litigation.” *Id.* at 110-11. Moreover, he further opines that such arrangements raise potential ethical issues: “It remains at least an open question whether the agreements at the heart of the NSP truly stand outside the ethical stricture against restriction of future law practice.” *Id.* at 111.

<sup>18</sup> *Id.* at 75; *see also id.* at 225 (“Misallocation through fund depletion plagued the Manville bankruptcy trust virtually from its inception, with present claimants quickly consuming the resources of the trust.”).

<sup>19</sup> *Id.* at viii (“Simply put, the evolving response of the legal system to mass torts has been to shift from tort to administration.”); *see also id.* at 269 (“Litigation brought by private lawyers on behalf of private claimants has come to operate, in practice, in the manner of public administration.”).

<sup>20</sup> *Id.* at 222. *See also id.* at 250 (“[T]he leveraging proposal turns on the overriding of fee agreements reached by contract between plaintiffs’ lawyers and their clients.”).

Nagareda, “much of the difficulty in mass tort litigation today stems from a lack of alignment between the incentives of plaintiffs’ lawyers engaged in comprehensive peace negotiations and the interests of those whose rights they stand to affect.”<sup>21</sup>

In particular, Nagareda finds problematic the fact that plaintiffs’ counsel may receive large amounts of compensation with little associated risk even where a comprehensive settlement results in future claimants receiving small amounts of compensation because the funds available to compensate them have been exhausted.<sup>22</sup> His proposed solution is to withhold part of the contingency fee received by plaintiffs’ counsel for present claimants, hold that amount in escrow, and make it contingent upon the successful compensation of future claimants.<sup>23</sup> This, he believes, would give plaintiffs’ counsel an incentive to safeguard the interests of the future claimants since part of their compensation would be tied to the proper compensation of future claims.

### III. AN ADMINISTRATIVE ALTERNATIVE?

Professor Nagareda’s two fundamental premises are subject to question. *First*, it is not clear that the resolution of mass tort claims has gone as far in the administrative direction as Professor Nagareda contends. Rather, litigation still plays a central roll in the resolution of mass tort claims—particularly in the early stages of such disputes, where litigation can prove dispositive and preclude maturation of a mass tort completely. *Second*, it is not clear that administrative resolution of mass tort claims should be facilitated. The rigid application of evidential and legal principles using the tools available in litigation has proven fruitful in paring down mass tort claims and discerning which claims should receive compensation. This valuable aspect of the litigation-based approach should not be abandoned. Indeed, it is often the *absence* of such litigation-based approaches that leads to the “dysfunction” observed in much of the mass tort litigation.

#### A. *The Role of Litigation In Mass Tort Resolution*

With respect to Professor Nagareda’s first proposition, there are many ways in which litigation still plays an essential role in the resolution of mass tort claims. In many instances, litigation has completely precluded certain mass tort claims, thereby effecting a global resolution. Thus, Professor Nagareda’s contention that “[w]ith rare exception, the resolution of a plaintiff’s tort claim will come by way of a settlement, not trial”<sup>24</sup> is subject to question.

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<sup>21</sup> *Id.* at 53.

<sup>22</sup> *See id.* (noting “the prospect of inequitable treatment for future claimants relative to those in the present day who are otherwise similarly situated”).

<sup>23</sup> *See id.* at 237-38.

<sup>24</sup> *Id.* at ix.

In the *Meridia* pharmaceutical litigation, for example, defendants successfully brought motions for summary judgment that essentially terminated the litigation.<sup>25</sup> The *Meridia* litigation involved claims brought by patients who had taken an anti-obesity medication they claimed had caused high blood pressure and a variety of adverse cardiovascular events.<sup>26</sup> The Judicial Panel on Multidistrict Litigation consolidated the litigation before the U.S. District Court for the Northern District of Ohio. After significant discovery and briefing on a consolidated basis, the court granted summary judgment as to all claims, finding that the drug's labeling adequately warned of potential increases in blood pressure and associated consequences.<sup>27</sup> The court's ruling effectively ended the litigation on a nationwide basis, thereby achieving a global resolution.

Even where litigation does not completely resolve mass tort claims, it may play an important role in significantly narrowing the litigation so that it becomes manageable. In the *PPA* litigation, for example, initial *Daubert* rulings played a significant role in determining which claims should receive compensation.<sup>28</sup> After discovery and hearings regarding the scientific evidence of causation, the district court presiding over the MDL proceedings issued a ruling that granted in part defendants' *Daubert* motion. The court excluded evidence regarding a causative link between phenylpropanolamine and hemorrhagic or ischemic stroke where plaintiffs had not taken the medication within seventy-two hours of their stroke and further excluded expert evidence regarding any causal link between PPA and all other alleged injuries such as seizures, cardiac injuries, and psychoses.<sup>29</sup> Not only did the district court's ruling have a significant effect on the federal litigation because it was often outcome-determinative with respect to subsequent motions for summary judgment,

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<sup>25</sup> See *Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006).

<sup>26</sup> *Id.* at 863-64.

<sup>27</sup> See *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791 (N.D. Ohio 2004).

<sup>28</sup> See generally Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 *DRAKE L. REV.* 621 (2006). As the trial judge presiding over the PPA litigation later wrote:

The *In re PPA* court's decision to take an aggressive role in determining the admissibility of scientific evidence had the important practical result of setting clear parameters for motions for summary judgment. Where the plaintiffs' experts' testimony is ruled inadmissible, the plaintiffs' cases are usually subject to dismissal. Once the *Daubert* issues were decided, the court could rule on motions for summary judgment. Such motions are a major vehicle for reducing meritless claims in a large litigation.

The approach employed in *In re PPA* has become accepted as a model case management technique for incorporating the trends toward global resolution of scientific issues while respecting the limitations placed on the transferee judge by the *Lexecon* decision.

*Id.* at 638.

<sup>29</sup> See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 289 F. Supp. 2d 1230 (W.D. Wash. 2003).

but it also influenced state court litigation given that the federal court had invited state court judges presiding over similar litigation to attend the *Daubert* hearings.<sup>30</sup>

While Professor Nagareda views *Daubert* as primarily providing a “time-out” in litigation “[w]here the analytical gap between available information and any conclusion about general causation is simply ‘too great,’”<sup>31</sup> in many instances it is dispositive and completely bars the maturation of mass tort claims because the scientific evidence affirmatively *disproves* such claims. Even where such a decisive result is not obtained, litigation can effectively shape the outcome of mass tort claims, as in the *PPA* litigation. Accordingly, such threshold rulings that apply to all or some categories of claims can have a dramatic effect in resolving mass tort claims.

Likewise, litigation has played a significant role within certain mass tort bankruptcy proceedings. In the A.H. Robins bankruptcy proceedings, for example, claimants seeking damages for injuries sustained as a result of using the Dalkon Shield intrauterine contraceptive device were permitted to litigate their claims, but not at the expense of those claimants who did not wish to do so.<sup>32</sup> In order to evaluate asserted claims, the court required “information of the claimant’s use of the Dalkon Shield, the type of injury alleged and the names of physicians or clinics visited by the claimant.”<sup>33</sup> The court then established a trust facility to pay claims that met pre-established criteria. Application of rigorous criteria resulted in preservation of limited funds available to pay claimants.<sup>34</sup> Of the over 350,000 claims filed, only about 6,600 claimants initially elected arbitration or trial.<sup>35</sup> By 1997 virtually all of the claims had been resolved for far less than the \$2.4 billion fund (as augmented by accumulated interest from investments) approved by the court to cover all tort claims through the post-confirmation trust.<sup>36</sup> In comparison with the Manville Trust, the Dalkon Shield Trust, during the first four years of its operation, processed five times as many claims, paid

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<sup>30</sup> Rothstein, *supra* note 28, at 632-34.

<sup>31</sup> NAGAREDA, *supra* note 2, at 40. *See also id.* at 42 (“The *Daubert* Court rightly identifies a pressing need within the civil justice system for some way to regulate the transition from immature to mature litigation—to call time-out in mass tort litigation so that superior information might emerge.”).

<sup>32</sup> *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 *FORDHAM L. REV.* 617, 637-51 (1992).

<sup>33</sup> *In re A.H. Robins Co.*, 862 F.2d 1092, 1095-96 & n.4 (4<sup>th</sup> Cir. 1988).

<sup>34</sup> *See* WEINSTEIN, *supra* note 1, at 280-81 n.88 (“The Dalkon Shield Claimants Trust has been, on the whole, a success.”); Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 *LOY. L.A. L. REV.* 79, 153 (1997) (the Dalkon Shield Trust’s approach to resolving claims “worked well”).

<sup>35</sup> Vairo, *supra* note 34, at 145.

<sup>36</sup> *Id.* at 126-27.

the full face amount of its settlement offers, and incurred one-tenth the administrative cost per claim.<sup>37</sup>

Likewise, litigation played a prominent role in the Dow Corning reorganization. In those bankruptcy proceedings, debtor Dow Corning objected to breast implant claims on the ground that there was no reliable scientific evidence or expert testimony, under the standards set forth in *Daubert*, to support a finding that silicone gel breast implants caused disease.<sup>38</sup> Dow Corning asked the bankruptcy court to (1) determine whether the claimants' scientific evidence was admissible under *Daubert* and (2) grant its motion for summary judgment and disallow thousands of pending disease claims for lack of sufficient admissible evidence of causation. The court agreed that it could adjudicate such threshold issues in order to assess the validity of the claims.<sup>39</sup> Estimation of those claims that were not disallowed would proceed following adjudication of the debtor's liability.<sup>40</sup> While the Dow Corning's summary judgment motion on threshold issues of disease causation was pending, the parties negotiated a consensual plan of reorganization. That plan set out criteria for allowable disease claims, provided for efficient and fair compensation mechanisms for those who opted to settle, and further provided that unsettled claims would be subjected to a controlled litigation process that would provide the opportunity for resolution of the same threshold, scientific issues.<sup>41</sup>

Finally, litigation-type procedures have played a significant role in recent asbestos bankruptcies. While Professor Nagareda focuses on the pre-packaged asbestos bankruptcies,<sup>42</sup> many of the recent asbestos bankruptcies have been heavily contested. In the Babcock & Wilcox bankruptcy, for example, the district court partially withdrew the reference from the bankruptcy court to resolve threshold issues relating to the company's liability concerning various categories of claims.<sup>43</sup> The court then set a bar date and crafted a special proof of claim form to be used in setting out the factual basis for the claims.

The court contemplated that it would hear "motions for summary judgment on threshold liability issues," such as "the appropriate standard of liability, the availability of punitive damages, the validity of claims by unimpaired individuals, the validity of claims based on unreliable scientific evidence of disease and/or causation, the appropriate statute of limitations, and the applicability of the sophisticated purchaser and

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<sup>37</sup> Vairo, *supra* note 32, at 655-56.

<sup>38</sup> See *In re Dow Corning Corp.*, 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997); *In re Dow Corning Corp.*, 215 B.R. 346, 348 (Bankr. E.D. Mich. 1997).

<sup>39</sup> *Dow Corning*, 215 B.R. at 352.

<sup>40</sup> See *Dow Corning*, 211 B.R. at 555.

<sup>41</sup> See *In re Dow Corning Corp.*, 244 B.R. 718 (Bankr. E.D. Mich. 1999).

<sup>42</sup> See, e.g., NAGAREDA, *supra* note 2, at xviii, 98, 167-74.

<sup>43</sup> See *In re The Babcock & Wilcox Co.*, No. 00-0558, 2000 WL 422372 (E.D. La. Apr. 17, 2000).

government contractor defense.”<sup>44</sup> Ultimately, as in *Dow Corning*, the parties reached a negotiated plan of reorganization against the backdrop of these proposed claims handling procedures.

Thus, even where there has been a negotiated resolution, litigation and litigation-type procedures have played a prominent role in defining the scope of liability and determining which claims should be paid. Arguably, it is the *failure* to apply such principles that has led to “dysfunction” such as that seen with the Manville Trust. Had the trust employed rigorous litigation-defined criteria for paying claims from the outset, arguably its assets would not have been depleted through payment of dubious claims. Litigation therefore plays an important role, and *should play* an important role in defining mass tort liability.

### B. *The Barriers To An Administrative Solution*

At the same time that litigation retains an important role in the resolution of mass tort claims, there are significant barriers that exist to utilizing administrative remedies. Indeed, Professor Nagareda acknowledges many of these potential pitfalls to an administrative resolution of mass tort claims.

*First*, there are significant conflicts within the plaintiffs’ bar that may preclude using administrative solutions to resolve mass tort claims. In the asbestos litigation, for example, there are plaintiffs’ counsel who specialize in representing clients who suffer predominantly from malignant disease and those who specialize in representing claimants with various non-malignant conditions.<sup>45</sup> Malignant claimants have more serious conditions, but are fewer in number. Their interests clash with those of nonmalignant claimants who represent the bulk of the asserted claims and therefore can exercise significant leverage against defendants, but whose claims are demonstrably less serious. Because there is diversity in the types of claims different firms handle, the interests of firms may differ dramatically. Thus, a firm that handles predominantly unimpaired claims may balk at settlement terms that disfavor such claims in order to preserve resources for future claimants with more serious injuries. In contrast, a firm that handles predominantly malignant claims will have the opposite incentives. Accordingly, it may be difficult to reach any agreement among the plaintiffs’ bar, and certain elements may vigorously oppose an administrative solution of the type that Professor Nagareda proposes.

*Second*, because there may not be uniformity among plaintiffs’ counsel with respect to the types of claims they represent, there is a significant opportunity and incentive for cheating. In the asbestos litigation, for example, medical screeners have “depart[ed] from accepted

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<sup>44</sup> *Id.* at \*4-\*5.

<sup>45</sup> McGovern, *supra* note 10, at 1748-49 (“Because the plaintiffs’ bar is not uniform in its representation of clients with the same asbestos diseases, there has been increasing disagreement as to the appropriateness of the allocation of the limited resources in bankruptcies and their resulting trusts.”).

medical standards by diagnosing asbestos-related ‘injuries’ that fail to meet minimum diagnostic criteria set by the American Thoracic Society of the American Medical Association.”<sup>46</sup> As a result, huge numbers of unimpaired claims have been generated by mass screening programs.<sup>47</sup> Even though the filing of such claims may hurt all plaintiffs’ firms under Professor Nagareda’s proposal because their compensation is tied to the successful compensation of future claims, the cheaters will benefit by receiving immediate compensation for dubious claims and that benefit may outweigh any harm that occurs as a result of the escrow arrangement.

*Third*, while Professor Nagareda assumes that claims will decrease at some future point in time, experience suggests otherwise. In the asbestos litigation, there have been dramatic increases in claims that are at odds with underlying disease trends, which should be decreasing.<sup>48</sup> “[C]aseloads have burgeoned—not because of an increase in the numbers of the seriously ill—but rather because of the enormous incentives for plaintiffs to enter the lottery and the far more enormous incentives for plaintiffs’ lawyers to obtain ever increasing numbers of claimants.”<sup>49</sup> The increase in claims is comprised in large part of claims asserted by individuals with no functional impairment.<sup>50</sup> In particular, Nagareda’s assumption that the period during which plaintiff counsel fees are placed in escrow “need not be especially long” and, in particular, “not as long as the latency periods for the kinds of diseases implicated by mass torts”<sup>51</sup> may render his proposal less effective. Moreover, if the incentive is not large enough, it may not override the natural incentive that counsel with large inventories of current claims have to ensure the maximum compensation for their clients.

*Fourth*, Professor Nagareda’s proposal calls for significant interference in private contracting and individual claimants’ ability to make decisions regarding their own claims. Indeed, he acknowledges

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<sup>46</sup> See NAGAREDA, *supra* note 2, at 148-49; Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM J. TRIAL ADVOC. 247, 252-54 (2000).

<sup>47</sup> Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 564 (1992) (a “probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs lawyers who engage in aggressive claim-solicitation campaigns”).

<sup>48</sup> See RAND INSTITUTE, *supra* note 9, at xx (concluding that “the unanticipated increases in claims filings in recent years are more likely to be a result of changes in claiming behavior than differences between projected and actual rates of asbestos-related illness”); Brickman, *supra* note 1, at 1834 (“companies that have had involvement with asbestos-containing products have seen the number of claims made each year escalate far beyond what one might . . . expect based upon medical and scientific data”).

<sup>49</sup> Brickman, *supra* note 1, at 1834.

<sup>50</sup> See RAND INSTITUTE, *supra* note 9, at xxv (“The fraction of claims that asserted nonmalignant conditions grew through the late 1980s and early 1990s, rising to more than 90 percent of annual claims in the late 1990s and early 2000s.”).

<sup>51</sup> NAGAREDA, *supra* note 2, at 238.

that his proposal requires “cast[ing] aside notions of conventional lawyer-client relationships.”<sup>52</sup> “[T]he proposal forces plaintiffs’ lawyers who represent claimants to consider the interests of future claimants as if they too were their clients.”<sup>53</sup> Accordingly, the proposal runs into ethical restrictions regarding the duty of loyalty owed to one’s clients and to zealously advocate on their behalf. The proposal would inherently divide the loyalties of plaintiffs’ counsel in a manner that is at odds with our current notions of appropriate representation. As Professor Nagareda concedes: “The leveraging proposal acts upon contingency fees to protect future claimants from both present clients and their lawyers, acting together, not to protect client from lawyer. The additional layer of contingency in the leveraging proposal effectively brings into existence a relationship between the lawyer and future claimants that neither the lawyer nor her present client is likely to desire.”<sup>54</sup>

At the outset, there are significant legal hurdles to such a proposal. It is unclear that federal rulemaking or even legislation could trump state-law ethical obligations imposed upon attorneys with respect to their clients. Moreover, as Professor Nagareda acknowledges, “[t]he replacement of rights to sue in tort with a new set of rights to compensation under an agency rule would call for careful constitutional analysis.”<sup>55</sup> But even if such changes could be made through federal action, it is questionable whether such changes are warranted. As Professor Nagareda concedes, there must be a “compelling justification” for overriding the “commitment to individual autonomy,” which is “a central feature of the present, litigation-based view of mass torts.”<sup>56</sup> It is not clear that Professor Nagareda’s proposal will have sufficient benefits to warrant such drastic action.

#### IV. CONCLUSION

Professor Nagareda’s latest work represents a valuable contribution to the debate over the proper resolution of mass tort claims. While his proposals for reform may be subject to constructive criticisms and may ultimately prove unworkable or ineffective, Professor Nagareda’s attempt to craft an administrative remedy for mass tort claims provides valuable insight into the nature of mass tort claims and the reasons that they have proven so difficult to resolve through traditional means.

While in some respects, mass tort litigation has seemed to resolve itself or at least its magnitude has seemed to lessen in recent years, it remains a significant problem that will have to be addressed by the civil justice system for the foreseeable future. Given our complex and technologically-advanced society, new products and substances are

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<sup>52</sup> *Id.* at 244.

<sup>53</sup> *Id.* at 246.

<sup>54</sup> *Id.* at 252.

<sup>55</sup> *Id.* at 265.

<sup>56</sup> *Id.* at 233.

constantly introduced that may have unrecognized effects on human health and safety. Accordingly, debate regarding the proper mechanisms for resolution of such claims is likely to continue.

The costs placed on the civil justice system and society in general by mass tort litigation are in many instances seemingly unnecessary and unwarranted. Moreover, the often inequitable outcomes are undesirable, and indeed intolerable, to the extent that one of the goals of our justice system is the accurate and efficient adjudication of claims brought by private litigants. While this article has suggested that many of the tools for rationalizing mass tort claim resolution already exist in the traditional litigation system, debate over the proper approach to claims resolution is likely to continue.