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• *Inaugural Article* • *Featured Item* •

PRELIMINARY REFLECTIONS ON ADMINISTRATION OF COMPLEX LITIGATIONS[1]

Jack B. Weinstein[*]

1 March 25, 2009, Benjamin N. Cardozo School of Law, Presentation at Seminar in Advanced Torts, Professors Anthony Sebok & Myriam Gilles, presiding. Readings assigned by me were: McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 69–85 (E.D.N.Y. 2008) (Memorandum & Order—Motion for Class Certification; Introduction only); Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 1013, 1013–25 (E.D.N.Y. 2006) (Introduction only); Guilty Plea Agreement, United States v. Eli Lilly & Co., Cr. No. 09-020 (E.D. Pa. Jan. 30, 2009), *available at* http://www.usdoj.gov/civil/ocl/cases/Cases/Eli_Lilly/index.htm; Press Release, #09-038: Justice Department, Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-Label Promotion of Zyprexa (Jan. 15, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/January/09-civ-038.html; Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 114–15 (2008) [hereinafter Weinstein, *The Role of Judges*]; Donald R. Frederico, *Consumer Class Actions: An Unauthorized Biography*, 10 CLASS ACTION LITIG. REP. 144 (2009); Jessie Kokrda Kamens, *"Unprecedented" Global Settlement Reached with Parker ITR in Marine Hose Cartel*, 10 CLASS ACTION LITIG. REP. 237 (2009); Yin Wilczek, *Cases Go Global, Class Suits Proliferate, Procedural, Jurisdictional Issues Arise*, 10 CLASS ACTION LITIG. REP. 242 (2009); *Applying "More Rigorous" Analysis, Court Certifies Class in Antitrust Litigation*, 10 CLASS ACTION LITIG. REP. 219 (2009); *Second Circuit Agrees to Hear Appeal of Class Certification in Zyprexa Litigation*, 10 CLASS ACTION LITIG. REP. 109 (2009); *Supreme Court Remands Preemption Rulings to Third Circuit Following* Wyeth v. Levine, 37 PRODUCT SAFETY & LIAB. REP. 306 (2009); Alex Berenson, *33 States to Get $62 Million in Zyprexa Case Settlement*, N.Y. TIMES, Oct. 7, 2008, at B7; JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (Pŏbwŏn Kongbosa trans., 2001) (1995) (Korean translation; for general reference, not required reading); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (for general reference, not required reading) [hereinafter Weinstein, *Compensation*].

* Senior Judge, United States District Court, Eastern District of New York.

I. INTRODUCTION—EFFICIENCIES AND FORMAL LEGAL OBJECTIVES IN DECIDING CASES INVOLVING INJURIES TO MANY PEOPLE

Having been invited to briefly summarize my view of the federal courts' appropriate role in bringing mass litigation to resolution as quickly and with as few transactional costs as possible while allowing reasonable satisfaction to the litigants and the public weal, I thought it useful to touch upon some of my relevant cases.[2]

There is a tension between the somewhat academic search for perfection in achieving due process, development of substantive rules of law, and the court's decision to meet the guideline of Rule One of the Federal Rules of Civil Procedure—that the rulings governing "procedure in all civil actions and proceedings . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"[3]—in the hurly-burly of modern legal controversies. Two examples of the discussion about this tension are Fordham Law School's symposium on Owen M. Fiss's law review article, *Against Settlement*,[4] and the paper recently presented at Cardozo Law School by Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal.*[5]

The problem of individual justice in disputes involving large masses of people is endemic in a huge heterogeneous population such as ours, where most people claiming to be injured are not in direct contact with those they believe have caused them harm.[6] Legislative, judicial, and administrative mechanisms, and the informal and formal practices of many

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2 See my comments at the Fordham Law School symposium, Jack B. Weinstein, Panel Discussion at the Fordham Law Review Symposium: Against Settlement: 25 Years Later (Apr. 3, 2009), for discussion of non-tortious political cases, such as *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See also* Jack B. Weinstein, Brown v. Board of Education *After Fifty Years*, 26 CARDOZO L. REV. 289 (2004); Weinstein, *The Role of Judges*, *supra* note 1, at 128–29 (2008) (one person, one vote litigation).

3 FED. R. CIV. P. 1.

4 Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

5 Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal* (N.Y.U. Law & Econ. Working Papers, Paper 174, 2009), *available at* http://lsr.nellco.org/nyu/papers/174.

6 *Cf.* RONALD C. WHITE, JR., A. LINCOLN: A BIOGRAPHY 210 (2009) (noting that Abraham Lincoln had "grown up as a lawyer in a face-to-face society in which he urged his clients to settle because they had to live with one another in small communities").

non-governmental organizations, come into play in response to mass injuries.[7] Examples abound.

Post–9/11, Kenneth Feinberg was appointed by the Attorney General as special master to administer a federal government victims' compensation fund of some six billion dollars, with minimal controls. He based compensation for those killed or injured primarily on tort law. With some 3,500 claimants, Mr. Feinberg in effect acted as a chancellor, making individual decisions for each claimant.[8]

Another aspect of the 9/11 tragedy is being handled by Judge Alvin Hellerstein of the Southern District of New York. In resolving the suits of those who opted to sue for damages rather than seek compensation from the 9/11 fund, and in handling claims of those exposed during the clean-up at Ground Zero, he is using a complex statistical analysis developed by two law professors acting as special masters.[9]

In the Agent Orange case, I appointed as special master W. Bernard Richland, a former Corporation Counsel of the City of New York. He was assigned an office down the hall from mine in the courthouse. He followed flexible but generous standards in distributing Agent Orange funds.

For the current national and international mortgage meltdown, decisions on individual mortgages are required. Was the defaulter trying to keep up with payments? Did he or she have the potential to earn enough income to sustain ownership? Were there elements of fraud in inflating value of mortgages and the like? The need for sensible and fair individualized decisions in individual cases is often trumped by the need for the uniformity and somewhat arbitrary decisions required in large national disputes.

The legislature has the primary responsibility to decide how to resolve these issues. If they do not, the courts must do so to protect individuals' due process rights under our Constitution.[10]

The cases I am going to briefly discuss represent alternative judicial approaches to related issues of mass injuries. I plan to touch upon eight litigations which have been before me as a judge.

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7 *See generally* Weinstein, *Compensation*, *supra* note 1.

8 *See* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? (2005).

9 *See* Mark Hamblett, *Plan is Implemented to Resolve Complex Suits in WTC Cleanup*, N.Y. L.J., Feb. 25, 2009, at 1; *see also* Mark Hamblett, *9/11 Mediator Wraps Up Work; Only 3 Cases Left Unsettled*, N.Y. L.J., Mar. 6, 2009, at 1 (personal injury cases not settled by Mr. Feinberg).

10 *See* Weinstein, *The Role of Judges*, *supra* note 1.

First: Agent Orange[11]—A class action settlement with heavy political overtones that required a complex national distribution plan.

Second: Asbestos[12]—Involving a bankruptcy trust, trial of scores of cases, supervision of a trust and cooperation with state judges, and an economic disaster caused in large measure by court rigidity and political pusillanimity, as well as industry and medical failures.

Third: Diethylstilbestrol (DES)[13]—Individual trials, settlement of scores of individual cases and an advantageous substantive change of the common law by New York and California courts.

Fourth: Tobacco[14]—Defendants who caused premature deaths of millions of people, but largely escaped legal damages because of a failure of the class action framework caused by lack of flexibility and failure to use modern procedural and mathematical tools.

Fifth: Breast implants[15]—A legal and economic mini-disaster caused by lack of robust application of science in the courts.

Sixth: Guns[16]—A partial failure of nuisance claims, restrictive National Rifle Association–induced limits on the courts, and a stop-gap system of control by New York City's Bloomberg administration of out-of-state gun shops most responsible for illegal straw sales of handguns that found their way into New York's criminal underground.

Seventh: Zyprexa[17]—A sprawling pharmaceutical multi-district panel litigation involving settlement of tens of thousands of individual personal injury cases, administrative controls, class actions, criminal prosecution, and state and federal attorney general interventions.

Eighth: The New York Staten Island Ferry case with a maritime "no limitation of liability" decision controlling individual case disposition.[18]

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11 *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

12 *See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991).

13 *In re* DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992).

14 *See, e.g.*, Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 1013 (E.D.N.Y. 2006).

15 *In re* Breast Implant Cases, 942 F. Supp. 958 (E & S.D.N.Y. 1996).

16 *See, e.g.*, City of New York v. A-1 Jewelry & Pawn, Inc., 252 F.R.D. 130 (E.D.N.Y. 2008); NAACP v. Acusport Corp., 226 F. Supp. 2d 391 (E.D.N.Y. 2002).

17 *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69 (E.D.N.Y. 2008).

18 *See* McMillan v. City of New York, 253 F.R.D. 247 (E.D.N.Y. 2008); *In re* City of New York, 475 F. Supp. 2d 235 (E.D.N.Y. 2007).

I do not plan to discuss my criminal cases where restitution in large sums to many people provides a kind of class action. Such a case was Newsday's inflation of its sales figures, which increased advertising charges by fraud.[19]

II. TEACHING

I became somewhat acquainted with precursors to mass litigations as a student in the 1940's in courses at Columbia Law School on the Development of Legal Institutions and Equity. Changing medieval institutions, politics, and sociology were reflected in the law. The developing kings' central court system was competing with many other courts dispensing justice—local lords' courts and a variety of church and other courts, particularly the chancellor's court of equity.

We knew that the "new" 1938 Federal Rules of Civil Procedure were based on the 1913 Federal Rules of Equity. The drafters of the 1938 rules, Judge Clark and others, rejected the civil procedure acts of New York and the California Field Code of the mid-nineteenth century as well as the pre-1860's theory of common law pleading based on the old writs. The class action was based, in part, on equity practice in post-medieval England.

I was teaching procedure, beginning in 1952, when Professor Kaplan at Harvard, revising the federal rules in the 1960's, considerably expanded the scope of the federal class action. The revision provided potential for utilization of class actions in mass cases.

I pretty much followed and even expanded Federal Rule 23 when I revised the New York practice, even though I did not expect the New York judges to take advantage of the new procedures (old as they really were) as much as the federal judges would. In fact, I wrote an article indicating class actions were not designed to be used in tort cases, which was cited by the revisers of the federal rules.[20] Fortunately, nobody alive but I remembers that mistake.

As a federal judge, I soon found that ancient equity concepts as well as modern class actions provided exceptionally useful tools in settling and trying complex cases involving large numbers of parties.

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19 United States v. Brennan, 526 F. Supp. 2d 378 (E.D.N.Y. 2007).

20 FED. R. CIV. P. 23 advisory committee's note on 1966 amendment (citing Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 458–59 (1960)).

III. AGENT ORANGE

The first major case I had as a federal judge involved Agent Orange and its use in the Vietnam War. I inherited it from another judge when he went to the Court of Appeals. It had been consolidated in the Eastern District by the Multi-District Litigation Panel which was at the time really just getting started.

Agent Orange was an herbicide sprayed primarily by our Air Force in Vietnam. It kept down brush and grass so that our troops would not be ambushed as they traveled on the rivers and walked through the jungles.

Agent Orange was based on off-the-shelf herbicides produced by a half dozen large corporations, each of which had its own product line. Each provided warnings and suggested masks and other protections for exposed workers. There was a strong suspicion that herbicides used in agriculture and in maintenance of roads and railroad tracks might have adverse affects on exposed humans.

The government ordered as much as it could get, relying on its War Powers to direct corporations to produce herbicides on an expedited and expanded basis. But, instead of spraying the product of each company, the government mixed all of the products together and eliminated the warnings. The herbicides came in various specifications and mixtures—Agent Orange, Agent White, Agent Blue and the like. The name applied to the color of a stripe on the drums in which it arrived in Vietnam.

Agent Orange was the most used. It was sprayed over a very substantial area, probably as large as a few of the Northeastern states. It was effective. It probably saved the lives of many of our armed forces.

Toward the end of the war, a number of former members of the armed forces who had served in Vietnam complained (as they did after the First and Second Gulf Wars) of a variety of skin, lung and other diseases that had an unknown etiology. A social worker in Chicago, observing some of these former members of the armed forces with physical and mental complaints, opined that the cause might be the Agent Orange spraying. This hypothesis was spread widely by the media. It was reinforced by experiments on mice showing that, when the herbicides were placed on their shaved skins, they developed cancerous lesions. There was also some evidence that whatever problems may have been attributable to the

herbicides might have been inherited by their offspring—that is, that these substances caused mutations to DNA and resulting defects and disabilities.

While plausible, these fears were never substantiated by any serious scientific studies. In fact, the necessary studies have still not been conducted. Correlations between diseases and possible exposure were largely due to statistical artifacts. For example, a rather large study, conducted in the Atlanta area, of children with a variety of defects and diseases at birth—cleft palate, etc.—fell on both sides of the statistical average. Some children with one parent who had been exposed to Agent Orange had fewer medical problems than the non-sprayed parent; others had more. Moreover, our blue-sea sailors near Vietnam suffered about the same ratio of diseases as those who were in the jungles. It was very hard to know exactly who was subject to spraying directly, or indirectly through contact with the ground, where the herbicides decayed at a slow rate.

A large number of suits were brought all over the country against the manufacturers and the United States. They included a national class action.

Although the underlying scientific theory was shaky, it soon became clear to me that there had been some negligence on behalf of the manufacturers. Some of them had produced particularly dirty herbicides with a great deal of dioxin. Dioxin is the poison that allegedly causes adverse effects in human beings.

I appointed a committee of plaintiffs' attorneys. A magistrate judge controlled discovery. Three "settlement masters" were critical. (I had used the settlement master device in settling an earlier class action for discrimination in a New York City middle school.) One of the settling masters had contacts with Democrat legislators (Ken Feinberg, who has assisted in the resolution of subsequent cases of mine). One had contacts with Congressional Republicans. One had contacts with the White House.

By 1970, spraying of these substances had been stopped. There was, however, a continuing national and international discussion about whether the use of herbicide had been a war crime.

A class action was obviously the way to handle the matter in view of the many thousands of claimants. It was clear that the dispute should be settled without a trial. Litigation would have gone on forever and probably would have been inconclusive.

So the settlement masters I had appointed began settlement discussions. Under my direction, they resolved the case. The settlement let the United States out because of its War Powers defense. The six manufacturers would be responsible for a total of 180 million dollars in payments. I allocated the percentage each manufacturer was to pay.

With the high rates of interest at the time, ultimately the settlement provided about 1/3 of a billion dollars—the highest settlement ever at that time. Ken Feinberg and I worked out the terms of distribution.

The manufacturers were delighted to get off the hook to the degree they had. Their stock rose on announcement of the settlement, and the government walked away.

Ultimately, there was a political accommodation. The legislature provided for veterans' disability pensions, though there were no statistical correlations between certain diseases and possible exposure. Causation was simply assumed. Billions of dollars have been paid on this theory through the VA, though nobody has done the necessary studies to show statistical or acceptable correlations or an epidemiological basis for causation assumptions. It is difficult to know who was exposed and for how long. As time went on, the various diseases became endemic to the aging veterans rather than related by any causal connectors to the original exposure. There are many other carcinogens in Vietnam and elsewhere to which veterans may have been exposed.

The system that we worked out—and that was approved by the Court of Appeals for the Second Circuit—first, provided for an insurance policy for anybody who could show a minimum possible connection to exposure. There was a whole series of diseases that were compensated according to matrices based upon age, time since exposure, nature of disability and the like. Second, a sum approaching 100 million dollars was used to set up social work agencies and to subvent their work in each of the 50 states and Guam. These agencies helped veterans—and their families—who exhibited post-traumatic syndromes and who were often abusive of themselves and their families.

The money ran out after about ten years. Anybody who became diseased or needed the social work agencies in the interim was covered. Provided was ten-year coverage by a modest insurance policy for anybody who became ill, and assistance from social agencies available throughout the country.

The herbicides were also considered responsible for health impacts on non-Americans. A few years ago, people from Vietnam started a new case on the ground of a violation of international law by poisoning people and the land. I wrote a comprehensive opinion, which was affirmed, dismissing these suits based on international law and other reasons.

There were then brought a number of suits—called the *Stephenson* litigation—by veterans who had become ill many years after all of the settlement assets had been exhausted.[21] They claimed that they had not been properly represented in the original class action so that they were now entitled to bring suit against the manufacturers, their injuries having just been discovered.

To my amazement, the Court of Appeals for the Second Circuit reversed and reinstated the cases. The judges apparently failed to recognize that these plaintiffs had received the benefits of a ten-year policy of insurance and the free ticket that I mentioned. The Court of Appeals took the position that the plaintiffs had received nothing and therefore had not been properly represented. The Supreme Court split 4 to 4, in effect affirming.

The case came back to me, whereupon I dismissed it again on the ground that the manufacturers had the benefit of the government contractor defense which was equivalent to that of the government's.[22] They were acting under compulsion as agents of the government. That dismissal was affirmed. (The same defense would have applied to the original Agent Orange case, but the defendants were willing to settle because the strength of this defense was not clear at that time.)

That pretty much terminated Agent Orange as a litigation matter.

The Agent Orange controversy did establish that class actions were useful in very complex cases that often involve political as well as economic and scientific issues. When settled, they provide a method of sound utilization of available funds, with minimal transaction costs, to assist persons who believe they were, or are, injured; they permit defendants to limit their exposure and get on with their productive work without huge continuing litigations hanging over their heads. Equitable theory underpins the cases.

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21 Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).

22 *In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404 (E.D.N.Y. 2004).

Stephenson helped cripple class actions. It meant that a defendant could not be sure that it was buying full peace.[23]

IV. ASBESTOS

I became involved with asbestos because a number of cases were assigned to me as an Eastern District Judge arising from Navy Yard exposure to asbestos. While young men of 17 and 18 were awaiting entry into the armed forces in World War II, they worked on the battle ships and aircraft carriers at the Brooklyn Navy Yard, sometimes knee deep in asbestos.

The government knew that these young people were being endangered. It furnished masks to the painters who had refused to paint the hulls with poisonous paints until they were provided with protection. The doctors in charge knew that asbestos being breathed in by these workers in the hulls of these new ships would create serious future health problems. They had seen some of them in the Manville and other factories. And there were ancient stories of workers in asbestos who suffered lung problems.

I tried about 70 of those cases in two large groups. They resulted in large but defensible verdicts that furnished data for settlement of tens of thousands of asbestos cases that followed.

One puzzling aspect of the case, for me, was that the largest manufacturer, Manville, was in bankruptcy. I asked why none of the bankruptcy funds were available to pay the Manville share of the judgments in the cases I tried. I soon discovered that most of the assets of Manville (including insurance) which were in a Manville trust in the Southern District bankruptcy court, were being used by a group of plaintiffs' lawyers to pay a relatively small number of their clients and their huge fees.

I issued an immediate stay to prevent any further distribution of those funds, and "suggested" that I be assigned to handle the asbestos cases in the Eastern as well as the Southern District so that I could supervise the bankruptcy trust. I then restructured that trust and provided for payments on a scheduled basis. So much of the trust funds had already been dissipated that it could pay only about five

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23 PRINCIPLES OF AGGREGATE LITIG. § 2.07 reporters' notes cmt. d (Proposed Final Draft 2009).

cents on the dollar. Recently that was increased to ten cents on the dollar. But there were very substantial payments, particularly for those who had the most dreaded disease, mesothelioma.

I also cooperated closely with state judges, even holding sessions on motions where I shared the bench with a state judge. A few of these cases were tried on an individual basis, but they were largely settled.

An attempt was made to settle them on a national basis with large class actions. This approach was stillborn when the Third and Fifth Circuits dismissed the cases on the ground that class actions could not be utilized since each individual plaintiff had his own individual claim with individual diseases, reliances, causation, and medical background.[24] The settlements should have been rejected, but on ethical rather than substantive grounds. They involved plaintiffs' attorneys who had overreached and failed to represent properly the entire class rather than their own clients.

The categorical dismissals on theoretical grounds were wrong. Strong courts could well have taken charge of those cases so that fees and representation would be adequate and outcomes would be fair and reasonable.

The savings to many industries would have been enormous. The many bankruptcies that resulted partly through excessive fees and litigation costs were due, in my opinion, to misconceptions of the appellate courts and the Supreme Court about the way class actions should be administered.

Contributing to the legal failures were the greed of some plaintiffs' attorneys, the failure of the medical profession to warn, the failure of Congress to pass legislation that might have cabined the problem, and the failure of industry to take steps in the 1950's and later when much disease could have been avoided. The failures of the health protective agencies of state and federal government were inexcusable, as they have been in other areas.

V. DES

Diethylstilbestrol, DES, was my next encounter with mass cases. This drug was given to women during pregnancy

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24 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

to reduce some of their physical discomfort. There had been inadequate testing. DES daughters suffered cervical cancers and other injury to their reproductive organs. The children became aware of the problem in their teenage years and some time later when they found they could not have children.

Nobody knew quite whom to sue since, long after the event, the mothers did not know whose drug they had taken. There were a dozen or so producers. In only a few instances could we trace the prescription to a particular producer; in most cases this was not possible.

New York and California state courts remarkably, and pragmatically, solved the problem. They ruled that a recovery could be had against all of the manufacturers based upon their individual share of sales for any particular year, correlated with the year when the mother was pregnant.[25]

I tried a few of these cases, with verdicts setting some kind of value guidelines. I then received most of the rest of the cases as "related." These cases were settled over the last twenty years or so as women became cognizant of their problems. The defendants paid on a rolling basis that did not place too heavy an annual burden on their insurers and their cash flow.

That litigation is now practically at an end. I closed all my cases recently. Any new cases will be handled by another judge.

During the course of the litigation I met with a number of the women and their tales were tragic. During the Agent Orange case, I had similar contact with veterans who thought they were injured by Agent Orange. I held hearings all over the country and visited some of the social work agencies we set up, and participated in national meetings that developed new techniques for handling veterans' family problems.

The DES cases did demonstrate that by pragmatic modification of substantive law and reasonable interpretation of procedural law, and with reasonable defendants and a plaintiff attorneys bar, the cases in a mass tort could be settled on a reasonable basis without a class action.

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25 Sindell v. Abbott Labs., 26 Cal. 3d 588 (1980); Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487 (1989).

VI. CIGARETTES

Next were the tobacco cases. There I was completely stymied.

The tobacco companies were responsible for the premature deaths of millions of Americans because of their advertising and pushing of cigarettes, and because the medical and political establishments did not do their job in reducing cigarette smoking. This medical disaster could not have been avoided completely, but it could have been substantially reduced. Fortunately, lung cancers have begun to decline because of the high cost of cigarettes due to taxes, the social pressure against cigarette smoking, and the rules in places of employment, restaurants and the like forbidding smoking.

I have laid out in the materials assigned as readings for the seminar, some of the cases in which I jousted with the Court of Appeals for the Second Circuit and was repeatedly unseated.

One series of cases, not included in the materials, provided for a national class action based on punitive damage recovery.[26] The punitive damages would have been distributed among all users. This plan would have avoided the problem of a series of punitive damages in individual cases where individual plaintiffs could obtain, in addition to their actual damages, punitive damages. Individual plaintiffs' punitive damages to a few people did not seem reasonable to me since the massive tort affected millions of people. But the Court of Appeals reversed.[27]

A separate national class action for those who claimed personal injuries was certified by me. Certification was reversed by the Court of Appeals, on the ground that each individual presented different causation and damage problems that had to be handled on an individual basis.

My theory was that when you have such large numbers, you can, through surveys and statistical projections, determine, with sufficient accuracy for these purposes, what the total damages were and then distribute them on a fair basis. This approach would have at least caused the defendants to pay their fair share of the huge damages fraudulently caused by the producers. It would compensate the injured to some reasonable and rational degree.

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26 *In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002).

27 *In re* Simon II Litig., 407 F.3d 125 (2d Cir. 2005).

When that series of personal injury and punitive damage classes failed, there was another class action I certified. It was based upon the theory that the so-called "light" cigarettes had been overpriced. They had been sold as relatively safe compared to regular cigarettes. They were not safer. Economists and epidemiologists provided, in my opinion, a sufficient basis for projecting the overpricing which ran into the billions. Distribution would be predicated on the percentage of cigarette packs a person had bought during the years for which damages were to be awarded, based upon simple affidavits.

The Court of Appeals rejected that proposal for an overpricing class action. It found that the form of distribution such as we had used in Agent Orange was not permissible. It was a "fluid recovery" that had to be authorized by statute. It ruled that each individual plaintiff had to prove why he began to smoke and what the damages were in his own case.

That series of pricing class action opinions is touched on in the assigned readings. In effect, the manufacturers have gotten off practically scot free with brilliant lawyering. The courts, including some of the best judges on the intermediate appellate and Supreme Court, have been strongly influenced by what is our traditional assumption: that each individual plaintiff is entitled to control his own case and that each defendant is entitled to defend against individual plaintiffs. That rationale had more force in the era of the horse and buggy. It is not convincing today, where decisions affecting the lives of millions or billions of people are made by faceless corporations and others in this and other countries. An individual one-to-one responsibility is impossible to ascertain and compensate for. Alternative processes for multi-party litigation have been proven to work, achieving fair and just outcomes consistent with our legal framework.

VII. BREAST IMPLANTS

The breast implant litigation was largely based on a litigation fraud. There were some simple failures of the implants due to leakage and related problems. Claims—supported by medical charlatans—that enormous damages to women's systems resulted could not be supported. A judge from the Southern District and I held *Daubert* hearings. We quickly discovered that large damages, based on most diseases claimed, were unwarranted. As in the case of the Oregon

district court, we announced a strict limitation on damages. The cases then quickly settled for small amounts.

Unfortunately, the MDL litigation got out of hand. Scientific proof was not controlled. Huge unwarranted recoveries with resulting bankruptcies prevailed. Judicial control should have prevented this fiasco.

VIII. HAND GUNS

The next group of cases that I dealt with involved hand guns. First was a series of individual litigations brought by the NAACP based on a theory of public nuisance against manufacturers and retailers who had allowed their guns to be sold in a way that funneled them into a criminal underground stream flowing into New York City. There they increased killings and made life more miserable for people, particularly in predominantly poor and minority communities.

I tried the NAACP case, but for technical reasons it could not go forward. I did approve a suit by the City on the nuisance theory.

Congress intervened to make it almost impossible to obtain the necessary information from the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives. This agency had a good deal of the information necessary to establish the responsibility of gun companies and the retailers. The NRA has an enormous influence in the legislative area.

The City of New York under Mayor Bloomberg then brought a series of individual actions against about two dozen retailers in the South who were responsible for the straw sales that facilitated the flow of a substantial number of illegal guns into New York. Those cases have now been settled or have resulted in default judgments. Injunctive relief provides for the City to pay for a special master who will supervise merchandising in these stores. It provides for fines and other controls. That litigation is believed to have resulted in less of a stream of these illegal guns into the City, and it may have caused a decrease in murders.

The jurisdictional basis for our handling the cases and the in personam long-arm jurisdiction over the out-of-state gun dealers provides an interesting story based on old equity cases.

The realities of protective litigation and the effect of politics are reflected in the obstacles faced by those pursuing legal means of curtailing illegal gun sales and markets.

Individual actions to meet a mass problem are of limited efficacy where legislative and administrative powers are being utilized to protect an industry.

IX. ZYPREXA

The next series of cases involve the drug Zyprexa. The drug was originally designed to treat some mental problems such as schizophrenia. It has proved fairly effective in many serious cases. Sales are in the billions each year despite a good deal of controversy about side effects.

I have merely touched on relevant materials in the readings. The most interesting aspect of the Zyprexa litigation, I believe, is the way it sprawls into so many different phases. There is, first, the administrative control area where the Food and Drug Administration is supposed to insure that testing is accurate and that consumers are protected by labeling and other warnings. The FDA has not measured up to its responsibilities in this country for a variety of legislative and administrative reasons. It is not, I believe, as protective as the analogous Japanese or European Union administrative agencies.

Alleged fraudulent failure to warn of side effects, particularly weight gain and diabetes, resulted in a series of personal injury litigations. They were sent to me by the Multi-District Litigation Panel.

Some thirty thousand of those individual personal injury cases have been settled. In settling them it was necessary to set up matrices; provide plaintiff attorneys committees; limit fees; supervise national discovery and provide for depositories available to state and federal litigants; deal with a particularly onerous problem, that of liens by insurance companies, and by the federal government, and by state governments for their Medicaid expenditures; and provide for alleged excess expenditures by BlueCross BlueShield and various third party payors. There are also criminal proceedings rising from the advertisement of off-label drugs. A complex interaction among institutions for controlling drugs and their costs through government agencies and non-governmental agencies all come into play in these related Zyprexa litigations.

A class action I certified based much on the *Schwab* theory that I used in the "light cigarette" cases and that was reversed by the Court of Appeals calls for payments to a class

of third party payors—union funds, insurers and the like—for overpayments that they made for the drug they claim was excessively priced. As you see from the materials, I believe that there is a basis for finding liability predicated on excessive pricing. It is a theory that is thin in light of the patent monopoly of drug manufacturers and their ability to fix prices to maximize profits. Yet, there appears to me to be enough merit to warrant presenting the issue to a jury.

The class action of Zyprexa third party payors has been certified for appeal to the Court of Appeals. In light of an intervening Supreme Court case reducing the burden on the plaintiff to show that the individual person harmed was himself misled, there may be a basis for an expansion of the use of class actions in pharmaceutical cases that has been rejected until now in the Second Circuit.

Many pharmaceutical cases have been predicated on individual settlements, which was the case for Zyprexa and some of the other drugs that are touched on in portions of the Zyprexa opinion, as indicated in its table of contents. I think a properly interpreted class action would be better than individual actions. But, litigators and field research are needed to suggest which way is better, in what respect, and under what circumstances.

X. MARITIME

Maritime law as well as bankruptcy law provides procedures for handling some mass cases. By limiting liability in the first phase of a maritime case to the value of the ship, the defendant's damages can be controlled.

In the case of the New York Staten Island ferryboat crash of 2003, a judge of our court ruled that there was no limitation of liability. After this key ruling on behalf of all plaintiffs, they only had to prove individual damages of injured or killed passengers. Based upon the limited burden on plaintiff's attorneys, I severely limited their fees, as I had done in the Agent Orange, asbestos, and Zyprexa cases. My fee limitation decision was appealed, but the appeal was recently withdrawn.

XI. FEES

The issue of control of attorneys' fees by the court came up repeatedly in these litigations. Plaintiffs' counsel and some academics have criticized control by the courts of legal fees in aggregate non-class actions. For example, Professors Charles Silver and Geoffrey P. Miller, in analyzing the concept of a quasi-class action, have suggested—with considerable merit to their contentions—that courts are not effectively or justifiably controlling fees in multi-district litigations.[28] Conceding that it might be best if the courts did not control fees in these cases, the questions remain: (1) should legal fees be controlled in a mass case? And (2) how, and by whom?

The average claimant-client in these mass cases has never been in contact with a lawyer and has almost no power to negotiate a fee. He or she signs a retainer agreement providing for a scale of fees that was generally designed for individual litigation. It does not account for the huge savings in transactional costs in effectively administered litigations with centralized discovery, development of expert evidence, and the like. Some of these benefits of transactional efficiencies belong to the clients. If no one else ensures appropriate sharing through fees reflecting this fact of mass litigation, the courts—as fiduciaries for those claiming injuries—must step in.

XII. CONCLUSION

Federal Rule 23 class actions have been reduced in their impact in tort and securities cases. Higher pleading requirements are somewhat discouraging. There is a general hostility, I believe, particularly at the appellate level, to class actions and other devices for efficient administration of mass litigation. An ALI study may be useful in inducing a fresh look at relevant procedures, but the tide has turned against class actions.

State class actions still are possible. Congress has intervened—primarily to protect defendants—through the Class Action Fairness Act of 2005[29] to permit removal, and

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28 Silver & Miller, *supra* note 5, at 46–47.

29 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

therefore to prevent the plaintiffs from flocking to those states which have judges or law amenable to class actions.

A good deal of the work should fall on the shoulders of administrative agencies, which can ensure protection of consumers and securities investors and the like to prevent tortious conduct. The criminal law also has its place.

Traditional individual court actions on a consolidated basis have their utility in protecting and compensating the public, especially given that administrative protections and controls have been so unreliable.

In the end, I must reluctantly conclude that the law—and certainly I—have failed to rise sufficiently to meet the challenges of modern litigation. We have not served the people as well as we should have.