Foreword: Causes and Limits of Pessimism

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The David Berger Program on Complex Litigation has enabled the University of Pennsylvania Law School to serve as a partner with the Advisory Committee on Civil Rules of the Judicial Conference of the United States in bringing together talented judges, scholars, and practicing lawyers to discuss the pressing procedural issues of the day. This partnership resulted in a number of meetings devoted to the state of practice under, and the possibilities for amending, Rule 23 of the Federal Rules of Civil Procedure, governing class actions. More recently, the success of the format led the leaders of the federal judiciary’s effort to reconsider the treatment of mass torts, Judges Anthony Scirica and Paul Niemeyer, to request that I organize a group to

† David Berger Professor for the Administration of Justice, University of Pennsylvania Law School.
help map the terrain for the Working Group on Mass Torts and, after the Working Group issued its report,¹ in assessing the prospects for reform surveyed there.

This Symposium on Mass Torts represents part of that effort, and I am grateful to the University of Pennsylvania Law Review for choosing it as their annual faculty symposium and to the editors for their help in making the arrangements and in shepherding the papers through the editorial process. All of those involved owe a special debt of gratitude to Ms. Rae DiBlasi, whose competent and cheerful help in this, as in so much over a Penn Law career spanning more than forty years, ensured that complicated arrangements seemed simple and allowed the participants to do their work efficiently and comfortably. A final word of gratitude is reserved for David Berger, member of the Class of 1936. Throughout an astonishing career at the bar, David has always remembered his alma mater and has always allowed the scholars his funds have supported to go where their research took them.

As the readers of the contributions to this symposium will quickly discover, not only is there no panacea for the problems created by contemporary mass tort litigation, but there is widespread pessimism among informed participants and observers about the ability of our legal system to devise adequate solutions. I believe it is worthwhile to consider briefly the sources of such pessimism, the causes of the distress that is evident in so many of the papers that follow. My hope is that this exercise may help to identify the limits of pessimism and hence to be realistic about reform.

Consideration of the characteristically masterful paper by Professor Edward Cooper, which canvasses both a bold and a modest approach to the closure of mass tort claims by litigation or settlement, should immediately remove from suspicion as the cause of pessimism the lack of imagination, ingenuity, or insight.² Rather, it appears from Professor Richard Marcus’s friendly but probing commentary that the problems of mass tort litigation are polycentric, so that pressure applied in one area causes movement elsewhere,³ and that even a mod-

³ See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 394-409 (1978) (suggesting various ways of adjudicating claims and solving problems characterized by a multiplicity of affected persons).
rest reform may yield a cure worse than the disease.⁴

The other commentary on Professor Cooper’s paper, authored by Chief Judge Edward Becker and Jerome Marcus, reminds us that expertise comes in many forms and that solutions to the problems of mass torts will require more than the best efforts of the bench.⁵ It is no criticism of a group appointed by the Chief Justice of the United States and working under the auspices of a committee of the Judicial Conference that their work has focused on legal change within the power of judges to effect. Indeed, one of the many useful products of that work has been frank recognition of the limits of judicially fashioned change and the importance, therefore, of participation, if not leadership, from the other branches of government. Professor Cooper’s paper is largely devoted, after all, to a statute.⁶ Still, it is fair comment that even the brightest group of judges and scholars of procedure may not have background in, or knowledge of, the relevant substantive law to devise the best solution for legislative adoption.⁷

Nearly fifteen years have passed since the United States Court of Appeals for the Fifth Circuit openly acknowledged that, in the absence of help from Congress, the federal judiciary would be forced to stop doing business as usual in asbestos litigation.⁸ Five years after that, the call for both a congressional solution and, in its absence, for more daring judicial efforts came from a special committee appointed by the Judicial Conference.⁹ Congress chose to devote its efforts to

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⁶ See Cooper, supra note 2, at 1953-57.
⁷ Participants in this Symposium had the benefit of a long and thoughtful paper by Professor David Rosenberg, who could not attend but who offered a very different approach. See David Rosenberg, Mass Production Goods, Torts and Justice (unpublished manuscript, copy on file with the University of Pennsylvania Law Review). Other substantive solutions are sketched in these pages by Professor Hazard and by Professor Mullenix. See Geoffrey C. Hazard, Jr., The Futures Problem, 148 U. Pa. L. Rev. 1901, 1915-18 (2000); Linda S. Mullenix, Back to the Futures: Privatizing Future Claims Resolution, 148 U. Pa. L. Rev. 1919, 1928-30 (2000).
⁸ “If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant’s attorney to the extent enjoyed by the profession in the past.” Jenkins v. Raymark, 782 F.2d 468, 473 (5th Cir. 1986).
⁹ See REPORT ON MASS TORT LITIGATION, supra note 1, app. C at 24 (noting that the Ad Hoc Committee called for legislative authorization for class action trials to override the limitations of Rule 23); Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 27-35, 36-39 (Mar. 14, 1991) (on file with the University of Pennsylvania Law Review) (recommending consideration of a national legislative solution and urging the Advisory Committee on Civil Rules to end its informal moratorium on revisions to Rule 23).
seemingly more tractable and in any event politically profitable areas of litigation. The judiciary did entertain daring solutions in asbestos litigation, but they foundered on limits found in existing law, interpreted in the shadow of the Constitution. And the Chief Justice laments.

Perhaps we should conclude from this history that what Professor Richard Marcus calls "benign neglect" is not only (in light of the alternatives) the best strategy but also the only feasible course. Perhaps, that is, our pessimism should reflect not only the difficulty of moving Congress to action, but, as Professor Geoffrey Hazard's bleak analysis of the so-called "futures problem" suggests, the barriers that the Supreme Court's recent class action decisions have erected and those that even Congress would confront in trying to resolve the futures problem. Yet, before descending to those depths of despair, one should consider the more optimistic view of class actions taken by Judge Diane Wood and also by Professor Linda Mullenix, as well as the more optimistic views of specialists in bankruptcy, Professor Alan Resnick, and Professor Elizabeth Gibson (whose commentary seems to chart a course between Resnick and Hazard).

Professor Resnick's and Professor Gibson's contributions may also suggest a strategy of incremental legislative change that, when coupled with a similar strategy of judicially fashioned reforms, might yield some relief, if not a global solution. In any event, they have deepened my doubts about the wisdom and propriety of using Rule 23(b)(1)(B) certification instead of bankruptcy to achieve "global peace" and strengthened my belief that if Congress were to amend the bankruptcy laws as suggested, the shadow of constitutional doubt that

\[\text{\footnotesize \begin{align*}
11\text{ See Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999).} \\
12\text{ See Ortiz, 119 S. Ct. at 2324 ("But the 'elephantine mass of asbestos cases,' ... cries out for a legislative solution.") (Rehnquist, C.J., concurring).} \\
13\text{ Marcus, supra note 4, at 2009.} \\
14\text{ See Hazard, supra note 7.} \\
15\text{ See supra note 11 and accompanying text.} \\
17\text{ See Mullenix, supra note 7, at 2020-22.} \\
18\text{ See Alan N. Resnick, Bankruptcy As a Vehicle for Resolving Enterprise-Threatening, 148 U. PA. L. REV. 2045, 2049 (2000).} \\
\end{align*}\]
darkens Professor Hazard's paper would dissolve in the bright light of a democratic response to urgent practical problems.\(^{20}\)

Even a strategy of incremental judicial reform faces serious practical, political, and legal roadblocks. Professor Francis McGovern describes examples of cooperation in mass tort litigation within the federal judiciary and between the federal and state judiciaries, and he sketches a model of enhanced cooperation.\(^{21}\) Chief Justice Norman Veasey's commentary gives some hope of an invigorated state judicial response and participation,\(^{22}\) but the problems of funding and coordination are surely daunting. Part of McGovern's plan calls for elaboration of the relevant sections of the *Manual for Complex Litigation*.\(^{23}\) Yet, Thomas Willging's interesting paper exposes the pitfalls of prescription in that influential but not authoritative publication.\(^{24}\)

Apart from practical and prudential limits to what discretionary judicial action can accomplish in this area, formal lawmaking by the judiciary quickly confronts either the limitations in the Rules Enabling Act\(^{25}\) or the need for statutory amendments. When the Supreme Court has acknowledged what everyone knew—that the 1966 amendments to Rule 23 had important substantive consequences\(^{26}\)—it becomes very difficult to make further amendments that implicate the availability of the class device without the active involvement of Congress.\(^{27}\) In the present climate, it is also very difficult to see how to en-

\(^{20}\) See Stephen B. Burbank, *The Class Action in American Securities Regulation*, 113 ZEITSCHRIFT FÜR ZIVILPROZEB INT'L (forthcoming 2000) ("[I]t may be that the people's elected representatives can wage peace more broadly and more effectively than can self-appointed representatives.").


\(^{23}\) See McGovern, supra note 21, at 1895.


\(^{26}\) "[T]his Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants." Mistretta v. United States, 488 U.S. 361, 392 (1989) (footnote omitted).

gage Congress without sacrificing the value of political neutrality to which judges and their helpers in the rulemaking process aspire.\textsuperscript{28} It may be concerns of this sort that have led to the Chief Justice’s apparent “benign neglect” in response to the Working Group on Mass Torts’ recommendations for further action, which contemplate formal cooperation between the judicial and legislative branches.\textsuperscript{29}

A more likely explanation of what I take to be the Chief Justice’s pessimism has to do with other potential costs of judicial involvement in the highly charged political environment of mass torts litigation. Professor Judith Resnik advises us, as they say, to “follow the money.”\textsuperscript{30} She evidently believes that the judiciary could, if it were so inclined, rein in the practicing bar, and she sees in that prospect opportunities for progress in addition to the resolution of mass torts litigation.\textsuperscript{31} Her paper is rich in insight and extremely useful in focusing attention on incentives. However, I share the skepticism of Judge Patrick Higginbotham as to whether the benefits of the process she would impose are worth the costs,\textsuperscript{32} and of Professor Nancy Moore as to whether the legal system as a whole would be well served by the judicial role in monitoring attorney-client relationships that Resnik’s prescriptions would require.\textsuperscript{33} More fundamentally, I share the view of A.A.S. Zuckerman that any attempt to reduce the expense of litigation can be defeated by the entrepreneurial ingenuity of the bar until such time as reformers directly alter the mechanisms by which the bar is compensated.\textsuperscript{34} In this country, of course, that would require legislation.\textsuperscript{35}


\textsuperscript{29} See REPORT ON MASS TORT LITIGATION, supra note 1, at 67-70.


\textsuperscript{31} See id. at Section V.D.


\textsuperscript{34} See A.A.S. Zuckerman, Lord Woolf’s Access to Justice: Plus Ça Change . . . ., 59 MOD. L. REV. 773, 795-96 (1996) (“There is no alternative to a direct attack on the economic incentives to complicate and protract the litigation process.”).

"Following the money" in mass tort reform focuses attention on the corrosive effect that money plays not just in legislative halls but in the halls of justice where judges are elected. It is no wonder that the Chief Justice recoils from cooperative lawmaking.\(^{36}\) Yet, considering how unlikely is effective reform from Congress and how limited are the reforms that can come from the judiciary, federal or state—considering, moreover, that continued neglect may not be benign—we may need to redefine the reform landscape. Overruling Buckley v. Valeo's invalidation of campaign expenditure limitations\(^ {37}\) could serve as an immense boon to legal reform, permitting both legislators and elected judges to put principle before principal and enabling the cooperation between Congress and an independent judiciary that the fear of guilt by association now retards. Pessimism is a luxury we cannot afford.

\(^{36}\) Cf. Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. CAL. L. REV. 315, 316 (1999) ("The message that courts are engaged in partisan politics denies the possibility of the rule of law."); id. at 339 ("Some politicians and interest groups believe or pretend that the similarities between judges and legislators run far deeper [than the fact that both make law], and that the processes of government affecting judges should reflect that view of reality.").