FOURTH ANNUAL JUDICIAL SYMPOSIUM

JUSTICE IN JEOPARDY?

The Search for Due Process, Statutory Construction and Ethics in New Age Litigation

Course Materials

July 2008

All views, opinions and conclusions expressed are those of the authors and/or speakers, and do not necessarily reflect the opinion and/or policy of NFJE and its leadership.

150 North Michigan Avenue, Suite 310
Chicago, Illinois 60601

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Course Materials Table of Contents

Summary of Fact Pattern for NFJE Program:

July 2008

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Table of Contents

Summary of Fact Pattern for NFJE Program:
July 2008:

I. Synthefuel

After many years of study, trial and error, the University of California at Los Angeles (UCLA) developed a synthetic fuel, Synthefuel, which can be produced at about 75 percent of the cost of natural gas or propane. This synthetic fuel can be used in any application where natural gas or propane would have previously been used.

Synthefuel was approved for marketing in the U.S. by the Environmental Protection Agency after extensive testing in vitro and in various animal models. The testing demonstrated that, at various exposure rates 30 to 50 times the highest anticipated human exposure, tumors would develop in the brain and the liver of three of the five animal models tested.

UCLA entered into a master license with SynFuel Corporation, a national marketing and distribution company that it created, to distribute Synthefuel and other synthetic fuel alternatives which might be developed by UCLA. The distribution system consists of 35 major regional utility companies, 26 regional Synthefuel distributors (primarily located in rural communities), over 4,500 retail outlets who previously distributed propane for rural and farm use.

A. Use of an Atypical Odorant

When developing Synthefuel, researchers at UCLA recognized that there could be potential health effects associated with the use of Synthefuel. These researchers tried various odorants, including the odorants used in natural gas and propane. However, those odorants upset the chemical composition of Synthefuel, adversely affecting its use as a substitute for natural gas and propane. The odorant selected for use was, according to testing by UCLA, readily detectable by persons with average sense of smell.

B. Initial Warnings

As a result of UCLA's extensive in vitro and animal studies, including those required by EPA, recommendations were made to SynFuel Corporation that a warning be placed on any bulk-delivered Synthefuel, and that Material Safety Data Sheets (MSDS) be created that indicated a possible association between Synthefuel exposure and cancer, referring to such in vitro and animal data. MSDS were distributed when Synthefuel was first distributed, as well as when a new distributor became part of the distribution network. Further, such MSDS were periodically distributed, at least annually.

C. Profit Distribution

The profits from the sale of Synthefuel are used to help fund various charitable and university programs, including providing health services for the poor, university scholarships for minorities and disadvantaged students, and certain agricultural programs to support small farms. The profits are also used to fund additional research programs at UCLA.

D. Post Marketing Safety Concerns

Synthefuel was on the market for 4½ years when researchers at the University of Nebraska first discovered, in autopsies, traces of the components of Synthefuel in the lungs, spleen, liver, kidneys and brains of six individuals who were enrolled in an on-going health study of farmers in rural Nebraska. Prior to this time, technology had not advanced to the point where traces of such chemical components could be discovered by autopsy or otherwise. As a result of the publication of such findings, there was significant interest in evaluating whether there were any adverse health consequences of potential exposure to Synthefuel. Such interest led to various retrospective (look back) studies involving individuals potentially exposed to Synthefuel.

The retrospective studies involved persons enrolled in various university or academic hospital health studies who may have been exposed to Synthefuel, as well as individuals who responded to internet, newspaper, TV and radio broadcast for individuals to enroll in retrospective studies to evaluate potential health effects of Synthefuel. As a result, over 35 articles were published focusing on the results of such retrospective studies. The results of the studies, although inconsistent, indicate some degree of an increased relative risk for prostate cancer, bladder cancer, heart attack, stroke and dementia.

Such retrospective studies came under wide criticism from other scientists, as well as members of industry, because of the fact that they were retrospective. In other words, they looked back at exposure to Synthefuel in various contexts over the 4½ year period since it was initially marketed. The criticisms stem from the fact that retrospective studies are not as robust as prospective studies, which have a strong protocol designed to lessen the potential for confounding factors that could potentially impact the validity of the results.

Twenty-one (21) of the studies involved persons who responded to ads to participate in such studies, thereby likely skewing the results as a result of self-selection bias. Critics of the various retrospective studies argued that the only way to determine the potential of a causal relationship between Synthefuel and the various diseases would be by prospective studies with a strong written protocol requiring measured exposures and measured results, comparing those individuals exposed to a group of individuals who have never been exposed to Synthefuel but who are otherwise substantially similar on various identified metrics. Many of the individuals exposed outside of a farm environment worked in jobs where they had significant industrial exposure to various chemicals, toxic waste and airborne pollutants, all of which are potential carcinogens. In fact, many of the substances to which these individuals were exposed contain the same chemicals on their congers as are otherwise present in Synthefuel.

E. Meta-analysis of Dr. Kraft

Dr. Alexis Kraft, an epidemiologist at Harvard University, undertook a meta-analysis of the data from all of the retrospective studies. By combining the results of various small studies, she reported that the overall risk of an association between the various diseases and exposure to Synthefuel could be assessed. Dr. Kraft did make clear in her published report that further study was necessary to determine whether the associations she was reporting were causally connected to Synthefuel exposure or to something else, such as exposure to other chemicals or toxins.

Each of the disease states has a background rate within the general population. There is disagreement as to the appropriate background rate to be used for each of the diseases. Almost

all of the data generated with respect to the 35 studies came from surveys of men, and with the exception of prostate cancer, almost all of the epidemiological data is based upon a general population of both males and females. Data is not specific to populations which are comparable, for example, individuals who systematically and for prolonged periods of time have been subject to exposure to other chemicals, toxins and pollutants.

UCLA undertook its own analysis of the studies, which it contends is far more reliable because it is based on an appropriate and well recognized scientific methodology. UCLA researchers found virtually no increased relative risk, and no statistically significantly increased relative risk, for any of the diseases allegedly associated with exposure to Synthefuel.

F. The Litigation Grows Exponentially

There had been a number of lawsuits based upon the various individual small studies, less than 30 total suits pending in federal and state courts around the country prior to the publication of Dr. Kraft's article reflecting her meta-analysis. As a result of such publication, and as a result of the lay press coverage of her study, over 3,400 additional lawsuits were filed in state and federal courts within six months of publication. Unlike other "mass torts," many of the lawsuits filed in state courts remained in such venues and were not removable because plaintiffs had named as a defendant one or more of the sub-licensees of SynFuel Corporation.

Plaintiffs' lawyers throughout the nation created various consortiums in an effort to identify individuals potentially exposed to Synthefuel. A number of alternate methods were used by plaintiffs' lawyers to inform individuals of the potential litigation involving Synthefuel. Ads were run nationally on television and radio broadcasts. Internet advertising with respect to claims was also undertaken. Meetings were held at farm cooperatives, wherein plaintiffs' lawyers presented information about the alleged adverse effects of exposure to Synthefuel in farming operations.

Individuals who believed they had been exposed to Synthefuel who had also been diagnosed with prostrate cancer, bladder cancer, stroke, heart attack or dementia, signed up over the internet or over the phone. Additionally, farmers who attended these various meetings were asked to fill out data and information sheets with respect to their exposure and any possible adverse health consequences. A fairly significant number of the individuals who had been exposed or potentially exposed to Synthefuel had responded to more than one ad or internet site, providing the information requested and required by each. About 21 percent of the individuals named as plaintiffs did not know that suit had been filed on their behalf. Additionally, about 28 percent of these individuals had filled out forms which indicated they had retained a particular firm as their counsel to pursue their claims, but had in fact done so with two or more law firms.

G. Plaintiffs' Claims

The standard litany of product liability claims are asserted against various of the entities in the distribution chain, ranging from UCLA and SynFuel Corporation to the regional distributors of Synthefuel, rural co-operatives and include local retailers who fill Synthefuel tanks for use. Plaintiffs each assert claims under the Consumer Protection Act of the State of Grace, which is the state of incorporation and principal place of business of SynFuel Corporation.

Plaintiffs assert claims or prostate cancer, bladder cancer, heart attack, stroke and dementia. Certain plaintiffs maintain that they had tests which demonstrate the presence of sev-

eral of the chemical components of Synthefuel in their bodies. This group of plaintiffs have not been diagnosed with any of the diseases alleged to be associated with exposure to Synthefuel, yet maintain that they nonetheless have an existing and legally compensable personal injury.

Defendants respond by asserting that such plaintiffs have no legally cognizable claim, because they cannot establish any actual injury. Further, defendants argue that plaintiffs cannot split their personal injury causes of action.

Separate claims by individuals who have neither any diseases nor any detectable traces of any of the components of Synthefuel. These individuals assert claims for both negligent and intentional infliction of mental distress, as well as claims for medical monitoring.

H. Prior Trial Results

Prior to the action at issue, five suits were tried to conclusion. Three suits resulted in verdicts for plaintiffs. Each of those cases involved individuals with prostate cancer, and the range of verdicts was $800,000 to $1,200,000. The remaining two cases resulted in defense verdicts.

The sixth case to be tried was a consolidated action of the claims of 12 plaintiffs. The original petition in the case contains 47 plaintiffs from 14 different states. The 12 plaintiffs selected for consolidation had varying levels and types of exposure, as well as different types of claimed injuries: 4 had prostate cancer, 3 had strokes, 3 had traces of certain components in their bodies, and 2 asserted claims solely for mental distress and medical monitoring. All but 2 of the plaintiffs were residents of states other than the state of Euphoria, and although 2 plaintiffs were current residents of Euphoria, each had identifiable exposures in other states from work in the oil and gas industry.

There were originally 19 defendants, and the original petition did not state the identity of the specific defendants against whom each plaintiff was asserting claims. Rather, the allegations of the original petition simply and generally referenced the defendants' acts and omissions. However, based on the geographic location of each plaintiff and defendant, it is clear that each plaintiff could not have a claim against all defendants.

I. Pretrial Procedural Issues And Motions

Defendants filed motions to dismiss plaintiffs' petition. The motions were based on lack of personal jurisdiction, improper venue, improper joinder of plaintiffs, and improper joinder of claims. Without a detailed written opinion, the trial court denied the various motions to dismiss plaintiffs' petition.

Defendants also filed a motion to dismiss all claims under the Consumer Protection Act of Grace. Defendants argued that under the Constitution and laws of the State of Euphoria, where the case is pending, applying the law of a foreign jurisdiction (State of Grace) to plaintiffs' consumer protection claims would be a denial of due process, both as to plaintiffs and to all defendants. Defendants vigorously argued that the law of each plaintiff's state of residence (or alternatively state of actual exposure) should apply to all product liability and Consumer Protection Act claims. Plaintiffs in response argued in that it would be fair and appropriate to apply the law of the state of Grace since it was the state where Synthefuel maintains its principal place of business and that the other defendants do business directly or indirectly with Synthefuel in the state of Grace. Without explanation, the trial court denied the defendants' motion. None of the

plaintiffs reside in the State of Grace. Rather, plaintiffs reside in six different states, with each state having its own and distinct consumer protection act. Plaintiff argued that SynFuel Corporation should not be surprised that a court would apply its home state's Consumer Protection Act to claims against it.

Under the laws of the State of Grace, the profit that the defendant earned is admissible to show motive for the allegedly wrongful acts. In comparison, none of the states where plaintiffs actually reside and were allegedly exposed allow evidence of profit in determining liability for a claimed violation of the Consumer Protection Act.

Among the defendants at the time of trial were UCLA, SynFuel Corporation, American Regional Distribution Company, Inc., Mid-America Synthefuel Inc., Atlantic Fuel Marketers Corp, two farm coops, and six different local companies involved in filling propane tanks. These defendants moved for separate trials as to each plaintiff and only as to those specific defendants against whom there was a foundation for an actual claim, arguing that trying the cases together would result in a denial of due process and the denial of the right to a fair trial. The trial court orally denied such motions without explanation and proceeded to trial.

Prior to trial, the primary defendants, SynFuel Corporation and UCLA, together with the regional distribution companies, sought an interlocutory appeal. They raised the procedural issues initially raised before the trial court, including personal jurisdiction as to certain of the defendants, venue as to the claims of all plaintiffs, the improper joinder of plaintiffs, and the improper joinder of defendants. Defendants asserted due process grounds to oppose a consolidated trial of the plaintiffs' claims.

Specifically, defendants argued that there would be a denial of due process through consolidation and that the bundling of claims, especially claims as diverse as the ones involved in this case, would be highly prejudicial. Defendants pointed out that the mere fact that all plaintiffs claimed injuries and damages due to exposure to Synthefuel would result in the jury believing that there was a causal relationship, when in fact, even under plaintiffs' best evidence, there was only an increased risk. Defendants also pointed out that it would be impossible to properly instruct the jury on the various state laws underlying the theories of recovery, and that the complexity of the science and medical issues would be incomprehensible under such circumstances.

Defendants also argued that it would be far more efficient to have these various issues decided as an interlocutory matter, given the fact that the trial, which was expected to last 4½ to 5 months, would be very expensive and potential waste of precious judicial resources, if reversed on appeal. The Court of Appeals denied the application for interlocutory appeal without explanation.

J. Experts And For Summary Judgment

Defendants filed a motion to exclude the testimony of each of plaintiffs' experts and for summary judgment based upon the anticipated exclusion of such testimony. At the pretrial conference, the Court denied defendants' motions without prejudice to again considering the issues at the time of trial based upon the witnesses' actual trial testimony.

K. Petition For a Writ of Prohibition

Defendants sought review seeking an extraordinary writ in prohibition, arguing that the trial court should be prohibited from forcing defendants to trial in a case where it was to clear that there was no reliable expert testimony to support any of the claims. Defendants sought an interlocutory appeal, arguing that the trial court should be compelled to grant the relief requested. The Court of Appeals declined to take the appeal citing as its reasoning that the judgment was not final, and that all issues had not been disposed of prior to the appeal.

L. Instruction on Evidence

At the time the case was submitted to the jury, the court gave an instruction which provided as follows:

It is apparent from the evidence that certain information is relevant only to certain of the plaintiff's claims, and that information and evidence should only be considered with respect to those claims. You must decide what information is relevant to each claim, plaintiff and defendant, and the court will not try to further instruct you in that regard. You must consider, as appropriate, all of the Court's instructions in reaching your verdict.

Each of the defendants objected to the instruction, indicating that it was insufficient to advise the jury as to what information might be admissible as to certain claims or plaintiffs, and why it may be admissible as to one defendant but was not admissible as to other defendants.

M. Trial Result of 1st Consolidated Cases

The trial of the consolidated case resulted in a verdict in favor of all plaintiffs of a total of $220 million in actual damages, representing $30 million for each of the 4 plaintiffs asserting prostate cancer claims, $25 million for each of the plaintiffs asserting stroke claims, $7 million for each of the 3 plaintiffs who alleged traces of the components of Synthefuel in their body, and $2 million for each of the 2 plaintiffs claiming solely mental distress and medical monitoring. The trial was bifurcated and the case was scheduled to proceed to trial on the issue of punitive damages.

Additionally, the jury returned a verdict against all defendants under the Consumer Protection Act of he State of Grace, which allowed for trebling of the damages, without regard to (or in addition to) punitive damages. Such verdict also allowed for recovery of attorneys' fees and expenses.

N. The Issues For Consideration

1. Whether the trial court had personal jurisdiction over all of the defendants.
2. Whether the venue is proper for the claims asserted as to all defendants.
3. Whether the claims of plaintiffs were properly joined.
4. Whether the defendants were properly joined.
5. Whether the Consumer Protection Act for the State of Grace can be applied to:
    a. Product liability claims generally.
    b. To product liability claims where no injury has occurred.
    c. To claims where no plaintiff is a resident of the State of Grace.

6. Whether the requirements of the punitive damages statute of the State of Euphoria have been met, and whether punitive damages is properly submissible given EPA approval of Synthefuel and its warning language.
7. Whether a multi-plaintiff trial can raise due process concerns under a state due process clause.
8. Whether interlocutory appeals or an extraordinary writ should have been granted as to:
    a. The motions to dismiss on the basis of jurisdiction, venue, and/or joinder.
    b. The motion to dismiss plaintiffs' Consumer Protection Act claims.
    c. Whether the consolidation of plaintiffs' claims for trial would be likely to result in a denial of due process to the defendants.
    d. Whether punitive damages is submissible under *State Farm* and the state statute, given that EPA approved Synthefuel, including its initial and subsequent warning.
    e. Whether an attorney-client relationship exists between certain of the plaintiffs and the various legal counsel, and what can be done to clarify the situation to protect all involved.

Fact Scenario for NFJE Program:

July 2008

Fact Scenario for NFJE Program:
July 2008

Table of Contents

Fact Scenario for NFJE Program:
July 2008:

I. The Product Synthefuel

A. A Technological Breakthrough

After many years of study, trial and error, the University of California at Los Angeles (UCLA) developed a synthetic fuel, Synthefuel, which can be produced at about 75 percent of the cost of natural gas or propane. This synthetic fuel can be used in any application where natural gas or propane would have previously been used.

B. EPA Approval

Synthefuel was approved for marketing in the U.S. by the Environmental Protection Agency after extensive testing in vitro and in various animal models. The testing demonstrated that, at various exposure rates 30 to 50 times the highest anticipated human exposure, tumors would develop in the brain and the liver of three of the five animal models. Additionally, there was evidence of brain shrinkage in two of the animal models, as well as some evidence of a negative cardio vascular impact. However, it was never anticipated that humans would have any such significant levels of exposure in normal use.

C. Product Marketing and Distribution

UCLA entered into a master license with SynFuel Corporation, a national marketing and distribution company that it created, to distribute Synthefuel and other synthetic fuel alternatives which might be developed by UCLA. SynFuel Corporation then sub-licensed its proprietary right to Synthefuel technology to various regional utility companies and regional distribution companies that sold propane for farm and rural applications. As a result, the distribution system consists of 35 major regional utility companies, 26 regional Synthefuel distributors (primarily located in rural communities), over 4,500 retail outlets who previously distributed propane for rural and farm use, and various propane retailers who refill propane tanks used for various activities, including residential uses, such as for gas grills.

D. Use of an Atypical Odorant

When developing Synthefuel, researchers at UCLA recognized that there could be potential health effects associated with the use of Synthefuel. These researchers tried various odorants, including the odorants used in natural gas and propane. However, those odorants upset the chemical composition of Synthefuel, adversely affecting its use as a substitute for natural gas and propane. The odorant selected for use was, according to testing by UCLA, readily detectable by persons with average senses. However, one of the criticisms that would later be asserted by plaintiffs is that the odor was not sufficiently distinct from other smells so as to potentially confuse persons while exposed to Synthefuel.

E. Initial Warning Language

As a result of UCLA's extensive in vitro and animal studies, including those required by EPA, recommendations were made to SynFuel Corporation that a warning be placed on any bulk-delivered Synthefuel, and that Material Safety Data Sheets (MSDS) be created that indicated a possible association between Synthefuel exposure and cancer, referring to such in vitro and animal data. (Such recommendations were made despite the fact that scientists at UCLA did not feel that there was any actual association between the various animal tumors and other adverse effects at what would be the expected human exposure to Synthefuel). MSDS were distributed when Synthefuel was first distributed, as well as when a new distributor became part of the distribution network. Further, such MSDS were periodically distributed, at least annually, to all entities in the distribution network. SynFuel Corporation directed that such warning information be provided to all customers. The initial MSDS sheets, as well as information available generally from bulk suppliers to their customers and posted at various distribution points provided as follows:

> THE TOXIC EFFECTS IN HUMANS OF EXPOSURE TO SYNTHEFUEL IS UNKNOWN, ALTHOUGH IN VITRO (LABORATORY EXPERIMENTS ONLY) AND EXPOSURE IN ANIMAL STUDIES [INHALATION, INSERTION AND DERMAL ABSORPTION] HAS INDICATED INCREASED RISK OF VARIOUS CANCERS, AS WELL AS A DELETERIOUS EFFECT ON THE HEART, ARTERIES AND BRAIN SIZE OF VARIOUS SPECIES OF ANIMALS. IN VITRO DATA SUPPORTS THE POSSIBLE ASSOCIATION. HOWEVER, NO HUMAN DATA IS AVAILABLE. ANY POTENTIAL EXPOSURE BY BREATHING, ABSORPTION INTO THE SKIN, OR INGESTION MUST BE AVOIDED. IF YOU HAVE ANY REASON TO SUSPECT THAT YOU ARE BEING EXPOSED, THE SOURCE OF ANY EXPOSURE MUST BE IMMEDIATELY ELIMINATED.

F. Profit Distribution

The profits from the sale of Synthefuel are used to help fund various charitable and university programs, including providing health services for the poor, university scholarships for minorities and disadvantaged students, and certain agricultural programs to support small farms. The profits are also used to fund additional research programs at UCLA. In the 7 years following the introduction of Synthefuel, amounts in excess of $15 billion were donated to fund charitable programs, and an additional $2.3 billion was provided to fund various research programs, including health related research and research related to other alternative energy sources.

G. Initial Safety Concerns

Synthefuel was on the market for 4½ years when researchers at the University of Nebraska first discovered, in autopsies, traces of the components of Synthefuel in the lungs, spleen, liver, kidneys and brains of six individuals who were enrolled in an on-going health study of farmers in rural Nebraska. Prior to this time, technology had not advanced to the point where traces of such chemical components could be discovered by autopsy or otherwise. As a result of the publication of such findings, there was significant interest in evaluating whether there were any adverse health consequences of potential exposure to Synthefuel. Such interest led to various retrospective (look back) studies involving individuals potentially exposed to Synthefuel.

H. Retrospective Studies and Criticisms of Such Studies

The retrospective studies involved persons enrolled in various university or academic hospital health studies who may have been exposed to Synthefuel, as well as individuals who responded to internet, newspaper, TV and radio broadcast for individuals to enroll in retrospective studies to evaluate potential health effects of Synthefuel. As a result, over 35 articles were published focusing on the results of such retrospective studies. The results of the studies, although inconsistent, indicate some degree of an increased relative risk for prostate cancer, bladder cancer, heart attack, stroke and dementia. The ranges for the relative risk in the various studies were as follows:

Prostate Cancer	1.1 – 1.72
Bladder Cancer	.85 – 1.63
Heart Attack	1.2 – 1.4
Stroke	.6 – 1.3
Dementia	1.1 – 1.4

I. Criticisms of Retrospective Studies

Such retrospective studies came under wide criticism from other scientists, as well as members of industry, because of the fact that they were retrospective. In other words, they looked back at exposure to Synthefuel in various contexts over the 4½ year period since it was initially marketed. The criticisms stem from the fact that retrospective studies are not as robust as prospective studies, which have a strong protocol designed to lessen the potential for confounding factors that could potentially impact the validity of the results. Also, there was no valid comparator group (a group to measure the risk against), which resulted in a comparison of the exposed group to the general population.

Further, others pointed out that 21 of the studies involved persons who responded to ads to participate in such studies, thereby likely skewing the results as a result of self-selection bias. Critics of the various retrospective studies argued that the only way to determine the potential of a causal relationship between Synthefuel and the various diseases would be by prospective studies with a strong written protocol requiring measured exposures and measured results, comparing those individuals exposed to a group of individuals who have never been exposed to Synthefuel but who are otherwise substantially similar on various identified metrics, in every other respect to the Synthefuel exposed group. According to those who advocate for prospective studies, this is critical because with respect to a large number of the individuals involved in the various retrospective studies, such individuals were also exposed during farming operations to various pesticides, other chemicals, toxic substances and pollutants, in addition to any claimed exposure to Synthefuel. Additionally, many of the individuals exposed outside of a farm environment worked in jobs where they had significant industrial exposure to various chemicals, toxic waste and airborne pollutants, all of which are potential carcinogens. In fact, many of the substances to which these individuals were exposed contain the same chemicals on their congers as are otherwise present in Synthefuel.

Additional criticisms stems from the fact that many of the 35 studies were relatively small, and reflect information that is not sufficient to be statistically significant. Such critics maintain that epidemiological findings that show an increased relative risk, without statistical

significance, could be the mere result of chance, as opposed to the result of any actual association between Synthefuel and any of the diseases described.

J. Dr. Kraft's Meta-analysis

Dr. Alexis Kraft, an epidemiologist at Harvard University, undertook a meta-analysis of the data from all of the retrospective studies. By combining the results of various small studies, she reported that the overall risk of an association between the various diseases and exposure to Synthefuel could be assessed. The meta-analysis of Dr. Kraft appeared in the New England Journal of Medicine and assessed the increased relative risk of the report of diseases as follows:

prostate cancer – 1.63

bladder cancer – 1.41

esophageal cancer – 1.08

stroke – 1.26

dementia – 1.57

Dr. Kraft did make clear in her published report that further study was necessary to determine whether the associations she was reporting were causally connected to Synthefuel exposure or to something else, such as exposure to other chemicals or toxins.

K. Revised Warning Language

After publication of many of the retrospective studies, including the meta-analysis by Dr. Kraft, the following language was added to the information contained on the MSDS and warnings accompanying Synthefuel:

> "RECENT RETROSPECTIVE STUDIES HAVE SHOWN AN INCREASED RELATIVE RISK FOR PROSTATE CANCER, BLADDER CANCER, HEART ATTACKS, STROKE AND DEMENTIA. NONE OF THE INCREASED RISK WERE FOUND TO BE STATISTICALLY SIGNIFICANT. HOWEVER, IT IS CRITICAL TO HUMAN HEALTH AND SAFETY TO AVOID EXPOSURE TO SYNTHEFUEL."

II. The Underlying Issues and Concerns

A. Epidemiology and Plaintiffs' Claims

From an epidemiological standpoint, each of the disease states has a background rate within the general population. One of the problems with the overall analysis of the relative risk for each disease state is that there is disagreement as to the appropriate background rate to be used for each of the diseases. In part, the problem stems from the fact that almost all of the data generated with respect to the 35 studies came from surveys of men, and with the exception of prostate cancer, almost all of the epidemiological data is based upon a general population of both males and females. Additionally, the data is not specific to populations which are comparable, for example, those individuals who systematically and for prolonged periods of time have been subject to exposure to other chemicals, toxins and pollutants.

Litigation concerning exposure to Synthefuel has now been ongoing for appropriately two and a half years, and thus, the total length of time that Synthefuel has now been on the market is about seven years.

B. UCLA'S Review of The Studies and The Science

UCLA undertook its own analysis of the studies, which it contends is far more reliable because it is based on an appropriate and well recognized scientific methodology. UCLA researchers found virtually no increased relative risk, and no statistically significantly increased relative risk, for any of the diseases allegedly associated with exposure to Synthefuel. UCLA's analysis included an evaluation of exposures of various sub-populations (*i.e.*, farm workers with a minimum of 5 to 10 years of exposure to various pesticides, insecticides and fungicides, as well as other potential chemical and toxic substances and pollutants).

One of the major criticisms leveled at the retrospective studies by the research team at UCLA (and others) is that the underlying studies were conduced as to populations that were not representative of the population as a whole. In other words, they were populations at major university-based medical centers, oftentimes individuals enrolled in public health programs. UCLA contends that such studies have a higher percentage of individuals who have farm and/or industrial exposures to potential carcinogens and other toxic substances. Additionally, such studies utilized individuals who responded to ads for individuals exposed to Synthefuel and are thus potentially biased. Further, Synthefuel exposure occurred primarily in populations of individuals who presumptuously are at a higher risk for most, if not all, of the diseases. The research team at UCLA maintains that comparison to the general population is a wholly inappropriate group for purposes of comparison and calculations of relative risk.

C. UCLA/NIH Prospective Study of Adverse Consequences of Use of Synthefuel

Additionally, UCLA in cooperation with and under the auspices of the National Institute of Health, proposed and undertook a prospective study which is intended to more clearly reflect, nationally and regionally, persons who have exposure to chemicals, toxic substances and pollutants as the comparator group(s) to those exposed to Synthefuel. Although there have been anecdotal reports of female exposure and diagnosis of certain of the diseases associated with such exposure, 93.8 percent of the data from the 35 studies (and therefore the meta-analysis undertaken by Dr. Kraft) involved exposures of males to Synthefuel.

III. The Development of Litigation Arising From Exposure to Synthefuel

A. The Litigation Grows Exponentially

Although there had been a number of lawsuits based upon the various individual small studies, were been less than 30 total suits pending in federal and state courts around the country prior to the publication of Dr. Kraft's article reflecting her meta-analysis. As a result of such publication, and as a result of the lay press coverage of her study, over 3,400 additional lawsuits were filed in state and federal courts within six months of publication. Unlike other "mass torts," many of the lawsuits filed in state courts remained in such venues and were not removable because plaintiffs had named as a defendant one or more of the sub-licensees of SynFuel Cor-

poration, as well as local retailers, including local farm coops, local gas suppliers and companies who fill "propane" tanks for various commercial and residential uses.

B. Plaintiffs' Lawyers Efforts to Identify Potential Plaintiffs

As is often true with potential mass tort situations, plaintiffs' lawyers throughout the nation created various consortiums in an effort to identify individuals potentially exposed to Synthefuel. A number of alternate methods were used by plaintiffs' lawyers to inform individuals of the potential litigation involving Synthefuel. Ads were run nationally on television and radio broadcasts. Internet advertising with respect to claims was also undertaken. Additionally, because of the potential of significant exposure in rural areas, meetings were held at farm cooperatives, wherein plaintiffs' lawyers presented information about the alleged adverse effects of exposure to Synthefuel in farming operations.

C. Potential Plaintiffs Respond to Information/Advertisements

As a result, a number of individuals who believed they had been exposed to Synthefuel who had also been diagnosed with prostrate cancer, bladder cancer, stroke, heart attack or dementia, signed up over the internet or over the phone. Additionally, farmers who attended these various meetings were asked to fill out data and information sheets with respect to their exposure and any possible adverse health consequences.

A fairly significant number of the individuals who had been exposed or potentially exposed to Synthefuel had responded to more than one ad or internet site, providing the information requested and required by each. Oftentimes, the information they filled out over the internet or in person at one of these meetings contained a paragraph indicating that they had selected a particular law firm or lawyer to act as their legal counsel in pursuing such claims.

As a result, about 21 percent of the individuals named as plaintiffs did not know that suit had been filed on their behalf. Additionally, about 28 percent of these individuals had filled out forms which indicated they had retained a particular firm as their counsel to pursue their claims, but had in fact done so with two or more law firms.

IV. Current Claims in The State of Euphoria

A. Plaintiffs Consumer Protection Act Claims

In their relatively uniform Petitions for Damages, the standard litany of product liability claims are asserted against various of the entities in the distribution chain, ranging from UCLA and SynFuel Corporation to the regional distributors of Synthefuel rurally, including local retailers who fill Synthefuel tanks for use in gas grills and other equipment previously operated by propane. In addition to the standard litany of product liability claims, the plaintiffs each asserted claims under the Consumer Protection Act of the State of Grace, which is the state of incorporation and principal place of business of SynFuel Corporation.

B. Plaintiffs' Claims of Injury to Their Biosystems

Many of the plaintiffs assert personal injury claims for the various diseases believed to be associated with exposure to Synthefuel. However, certain other plaintiffs maintain that they

had tests which demonstrate the presence of several of the chemical components of Synthefuel in their bodies. This group of plaintiffs have not been diagnosed with any of the diseases alleged to be associated with exposure to Synthefuel, yet maintain that they nonetheless have an existing and legally compensable personal injury. Specifically, these plaintiffs maintain that the mere presence of a component of Synthefuel in their bodies represents an insult or trespass, and that their biosystems, that is their body's chemistry and make up, has been adversely altered.

Defendants respond by asserting that such plaintiffs have no legally cognizable claim, because they cannot establish any actual injury. Further, defendants argue that plaintiffs cannot split their personal injury causes of action by asserting a "personal injury claim" now, and then if they later develop any of the diseases which other plaintiffs claim are caused by exposure to Synthefuel, assert another claim for personal injury.

C. Claims For Anxiety By Exposed But Healthy Plaintiffs

There are also separate claims by individuals who have neither any diseases nor any detectable traces of any of the components of Synthefuel. These individuals assert claims for both negligent and intentional infliction of mental distress, as well as claims for medical monitoring. Defendants maintain that the State of Euphoria has never recognized claims for mental distress or medical monitoring, and as such, fail to state a legally cognizable claim.

Those plaintiffs who originally asserted claims for injury based on traces of certain of the components found in Synthefuel have since joined in the claims for medical monitoring. Without waiving their argument that plaintiffs' claims are not legally cognizable, defendants argue that if plaintiffs are considered to be legally injured (*i.e.* by the mere presence of some components in their body), even if there are otherwise legally viable claims for medical monitoring (which the defendants deny), they cannot co-exist with an actual physical injury claim. Specifically, defendants maintain that any personal injury plaintiff would have to prove, by a preponderance of the evidence, any necessary future medical expense as part of the claim for damages. Simply put, defendants argue that if a personal injury action goes forward under such circumstances, no specific claim for medical monitoring can be asserted, or there would be a double recovery.

D. Trials and Results—Mixed Results

Prior to the action at issue, five suits were tried to conclusion. Three suits resulted in verdicts for plaintiffs. Each of those cases involved individuals with prostate cancer, and the range of verdicts was $800,000 to $1,200,000. The remaining two cases resulted in defense verdicts, including verdicts in favor of the local defendants in the distribution system.

E. First Action Consolidated For Trial

The sixth case to be tried was a consolidated action of the claims of 12 plaintiffs. The original petition in the case contains 47 plaintiffs from 14 different states. The 12 plaintiffs selected for consolidation had varying levels and types of exposure, as well as different types of claimed injuries: 4 had prostate cancer, 3 had strokes, 3 had traces of certain components in their bodies, and 2 asserted claims solely for mental distress and medical monitoring. All but 2 of the plaintiffs were residents of states other than the state of Euphoria, and although 2 plaintiffs were current residents of Euphoria, each had identifiable exposures in other states from work in the

oil and gas industry. Also, of the 9 plaintiffs involved in the consolidated action, 6 had significant family histories for prostate cancer or other types of cancer. Further, each plaintiff had significant exposure to various pesticides, insecticides, fungicides and/or industrial chemicals.

There were originally 19 defendants, and the original petition did not state the identity of the specific defendants against whom each plaintiff was asserting claims. Rather, the allegations of the original petition simply and generally referenced the defendants' acts and omissions. However, based on the geographic location of each plaintiff and defendant, it is clear that each plaintiff could not have a claim against all defendants.

V. Plaintiffs' Experts and Their Testimony

A. Dr. Chu

Dr. Chu, an epidemiologist, claimed that there was a causal connection between Synthefuel and prostate cancer, bladder cancer, heart attack, stroke and dementia. Dr. Chu purported to rely on Dr. Kraft's meta-analysis, but through his own review, revised the relative risk numbers from the studies examined in the meta-analysis. Additionally, Dr. Chu cited the pre-market animal studies to support the proposition that Synthefuel is carcinogenic in humans. Finally, Dr. Chu cited two studies where one of the components of Synthefuel, when used as a lubricant for oil drilling equipment, was found to have a relative risk of 2.1 and 2.3 respectively for increased risk of lung cancer. Dr. Chu further concluded that Synthefuel was the cause of the injuries claimed by each of the 4 plaintiffs who had prostate cancer.

In his deposition, Dr. Chu acknowledged that epidemiology does not focus on determining questions of individual causation, but rather, prospectively determining what the increased risk of exposure might be. Dr. Chu further admitted that he does not typically determine specific causation, but was asked to do so here. He further agreed that without his re-analysis, none of the Synthefuel studies, including Dr. Kraft's meta-analysis of such studies, demonstrated an increased relative risk of greater than 2.0. He also testified that the Synthefuel component that by itself showed an increase in the relative risk for lung cancer was at a strength approximately 27 times its strength as it exists as a component in Synthefuel. Additionally, the chemical component, as used for lubrication, was readily absorbed through the skin and was used in a manner where dermal absorption was common, distinct from exposure to Synthefuel. Yet, Dr. Chu maintained that the results were transferable to Synthefuel and that the differences in strength and exposure were not significant to his opinion.

B. Dr. Bright

Dr. Elizabeth Bright is a board certified oncologist who diagnosed each of the 4 plaintiffs who have prostate cancer. She stated that it was generally accepted in the medical field that Synthefuel causes prostate cancer, and that it caused each of the 4 plaintiffs' prostate cancers. Dr. Bright further stated that the 3 plaintiffs who have evidence of components of Synthefuel in their bodies have been injured as their genetic structure has been altered, and that such alteration would likely lead to cancer.

On cross-examination Dr. Bright acknowledged that she had never previously diagnosed the cause of anyone's prostate cancer, and that the issue of causation was not important to her

from the standpoint of treatment. Further, she agreed that there is no recognized or established protocol for the determination of the cause of prostate cancer. Reviewing the other known risk factors, Dr. Bright could not say which, if any, of the factors would increase or decrease any of the particular plaintiff's actual risk. From her understanding of risk factors, she was not sure how to assess their actual role in causation, except for the risks associated with Synthefuel. With respect to prostate cancer, she is aware that the majority of people with the disease have no identifiable risk factors. Further, it was her understanding that there would be a risk of 23 cases of prostate cancer in the general population per 10,000 people, and that exposure to Synthefuel would increase the risk to only 27 cases under her analysis. Thus, the majority of the general population had been exposed to Synthefuel, Dr. Bright recognized it would be impossible to identify the four persons who would not have developed prostate cancer but for their exposure to Synthefuel. She was then shown market share survey which demonstrated that approximately 62 percent of the male population in the U.S. has reported use of Synthefuel in a circumstance where exposure could occur.

C. Dr. Couch

Plaintiffs' final expert, Dr. Couch, was a clinical psychologist who examined the 3 plaintiffs who had evidence of certain components of Synthefuel in their bodies, as well as the 2 plaintiffs who made claims for mental distress and medical monitoring. She testified that, in her opinion, the stress felt by these plaintiffs was very real and diagnosable, being quite similar to post traumatic stress disorder. She then described the ways that anxiety and stress had negatively impacted their lives.

Yet, Dr. Couch acknowledged that one of the plaintiffs had told her that he had not really been concerned until he talked to his lawyer, and that only since then has he been extremely upset and had trouble sleeping. During her deposition, she also agreed that she could not determine if plaintiffs' fears were well-founded or not, although stating it would make no difference to her opinions. Specifically, although she admitted that they could each be anxious and stressed out over nothing, as she put it, it is the perception and not the reality that causes anxiety and stress.

D. Pretrial Procedural Issues and Motions

Defendants filed motions to dismiss plaintiffs' petition. The motions were based on lack of personal jurisdiction, improper venue, improper joinder of plaintiffs, and improper joinder of claims. Without a detailed written opinion, the trial court denied the various motions to dismiss plaintiffs' petition.

Defendants also filed a motion to dismiss all claims under the Consumer Protection Act of Grace. Defendants argued that under the Constitution and laws of the State of Euphoria, where the case is pending, applying the law of a foreign jurisdiction (State of Grace) to plaintiffs' consumer protection claims would be a denial of due process, both as to plaintiffs and to all defendants. Defendants vigorously argued that the law of each plaintiff's state of residence (or alternatively state of actual exposure) should apply to all product liability and Consumer Protection Act claims. Plaintiffs in response argued in that it would be fair and appropriate to apply the law of the state of Grace since it was the state where Synthefuel maintains its principal place of business and that the other defendants do business directly or indirectly with Synthefuel in

the state of Grace. Without explanation, the trial court denied the defendants' motion to apply the law of the state of residence (or exposure) of each plaintiff to their claims, including the Consumer Protection Act claims. Specifically, none of the plaintiffs reside in the State of Grace. Rather, plaintiffs reside in six different states, with each state having its own and distinct consumer protection act, including different provisions as to the burden of proof and types of evidence admissible. Plaintiffs responded that the State of Grace had the most significant contacts with respect to the acts and omissions giving rise to the Consumer Protection Act claims. Plaintiff further argued that SynFuel Corporation should not be surprised that a court would apply its home state's Consumer Protection Act to claims against it. In so arguing, plaintiffs also pointed out that each of the License Agreements entered into by SynFuel Corporation with its various distributors provides that the contract should be interpreted under the laws of the State of Grace, and that any action brought to enforce the contract or to resolve disputes arising under the contract must be brought in the State of Grace.

One of the critical evidentiary issues is that, under the laws of the State of Grace, the profit that the defendant earned is admissible to show motive for the allegedly wrongful acts. In comparison, none of the states where plaintiffs actually reside and were allegedly exposed allow evidence of profit in determining liability for a claimed violation of the Consumer Protection Act. The trial court denied the defendants' motion to dismiss the Consumer Protection Act claims without a detailed written opinion.

E. Request For Separate Trials

Among the defendants at the time of trial were UCLA, SynFuel Corporation, American Regional Distribution Company, Inc., Mid-America Synthefuel Inc., Atlantic Fuel Marketers Corp, two farm coops, and six different local companies involved in filling propane tanks. Prior to trial, these defendants moved for separate trials as to each plaintiff and only as to those specific defendants against whom there was a foundation for an actual claim, arguing that trying the cases together would result in a denial of due process and the denial of the right to a fair trial. Specifically, defendants noted the different lengths and nature of exposure to Synthefuel, different types of exposure to other chemicals, and different warning information available to plaintiffs the relevant time frame. Defendants demonstrated that certain evidence potentially admissible as to one defendant or as to one plaintiff was not admissible as to each plaintiff's claims against any given defendant. The trial court orally denied such motions without explanation and proceeded to trial.

F. Pretrial Interlocutory Appeal

Prior to trial, the primary defendants, SynFuel Corporation and UCLA, together with the regional distribution companies, sought an interlocutory appeal. They raised the procedural issues initially raised before the trial court, including personal jurisdiction as to certain of the defendants, venue as to the claims of all plaintiffs, the improper joinder of plaintiffs, and the improper joinder of defendants. Additionally, these defendants asserted due process grounds to oppose a consolidated trial of the plaintiffs' claims.

Specifically, defendants argued that there would be a denial of due process through consolidation and that the bundling of claims, especially claims as diverse as the ones involved in this case, would be highly prejudicial. Defendants pointed out that the mere fact that all

plaintiffs claimed injuries and damages due to exposure to Synthefuel would result in the jury believing that there was a causal relationship, when in fact, even under plaintiffs' best evidence, there was only an increased risk, or in other words, a mere association between exposure and the various alleged injuries. Defendants also pointed out that it would be impossible to properly instruct the jury on the various state laws underlying the theories of recovery, and that the complexity of the science and medical issues would be incomprehensible under such circumstances.

Defendants also argued that it would be far more efficient to have these various issues decided as an interlocutory matter, given the fact that the trial, which was expected to last 4½ to 5 months, would be very expensive and potential waste of precious judicial resources, if reversed on appeal. The Court of Appeals denied the application for interlocutory appeal without explanation.

VI. Defendants' Motions to Exclude The Testimony of Plaintiffs

A. Experts and For Summary Judgment

Defendants filed a motion to exclude the testimony of each of plaintiffs' experts and for summary judgment based upon the anticipated exclusion of such testimony. At the pretrial conference, the Court denied defendants' motions without prejudice to again considering the issues at the time of trial based upon the witnesses' actual trial testimony.

B. Petition For a Writ of Prohibition

Defendants sought review seeking an extraordinary writ in prohibition, arguing that the trial court should be prohibited from forcing defendants to trial in a case where it was to clear that there was no reliable expert testimony to support any of the claims. Defendants sought an interlocutory appeal, arguing that the trial court should be compelled to grant the relief requested. Further, the defendants argued that the opposition to their motions was not substantive, and for this reason alone, their motions should have been granted. The Court of Appeals declined to take the appeal citing as its reasoning that the judgment was not final, and that all issues had not been disposed of prior to the appeal.

C. Consideration of Expert Testimony at Trial

At trial, both after the conclusion of plaintiffs' evidence and the conclusion of all of the evidence, the trial court stated that it would take the objections to plaintiffs' expert testimony under advisement, but that he wanted to see what the jury decided. Later, while the jury deliberated, the trial judge questioned in several comments why the issues raised were not really about the weight to be given to the evidence, as opposed to its admissibility. Defendants responded by pointing out that, irrespective of the standard used (Daubert, Frye or some variant), the court had a gate keeping function. The Supreme Court of Euphoria recently had an opportunity to decide whether it was applying Daubert or Frye, but instead simply said that the statute dealing with expert testimony, (which was virtually identifiable to F.R.E. 702), said what it said and should be interpreted exactly as written.

D. Instruction on Evidence

At the time the case was submitted to the jury, the court gave an instruction which provided as follows:

> It is apparent from the evidence that certain information is relevant only to certain of the plaintiff's claims, and that information and evidence should only be considered with respect to those claims. You must decide what information is relevant to each claim, plaintiff and defendant, and the court will not try to further instruct you in that regard. You must consider, as appropriate, all of the Court's instructions in reaching your verdict.

Each of the defendants objected to the instruction, indicating that it was insufficient to advise the jury as to what information might be admissible as to certain claims or plaintiffs, and why it may be admissible as to one defendant but was not admissible as to other defendants.

E. Trial Result of 1st Consolidated Cases

The trial of the consolidated case resulted in a verdict in favor of all plaintiffs of a total of $220 million in actual damages, representing $30 million for each of the 4 plaintiffs asserting prostate cancer claims, $25 million for each of the 3 plaintiffs asserting stroke claims, $7 million for each of the 3 plaintiffs who alleged traces of the components of Synthefuel in their body, and $2 million for each of the 2 plaintiffs claiming solely mental distress and medical monitoring. The trial was bifurcated and the case was scheduled to proceed to trial on the issue of punitive damages.

Additionally, the jury returned a verdict under the Consumer Protection Act of he State of Grace, which allowed for trebling of the damages, without regard to (or in addition to) punitive damages. Such verdict also allowed for recovery of attorneys' fees and expenses.

F. Post-trial Consideration of Expert Testimony

After the trial, in ruling upon the post-trial motions, the trial court again denied the challenges related to the admissibility of plaintiffs' expert testimony. The trial court cited three reasons for such determination: (1) that the questions raised by the defendants as to plaintiffs' experts goes to the weight to be given to the testimony, not its admissibility; (2) that the jury answered the weight question through its verdict, that is they concluded that the testimony was reliable; and (3) even if the court had a gate keeping function, the testimony of each of the plaintiffs' experts met the criteria for admissibility because it was (a) generally accepted, and (b) reliable because it was based on substantial scientific literature, relying on the 35 retrospective studies, the meta-analysis of Dr. Kraft, and the animal data, all of which the Court determined demonstrated that exposure to Synthefuel could generally cause cancer. Finally, with regard to specific causation of the cancer of the 4 plaintiffs at issue, the Court held that Dr. Bright was qualified and believable, and as such, she must have undertaken, to her satisfaction, a differential diagnosis sufficient for the purposes of her opinions.

VII. The Issues For Consideration

1. Whether the trial court had personal jurisdiction over all of the defendants.
2. Whether the venue is proper for the claims asserted as to all defendants.

3. Whether the claims of plaintiffs were properly joined.
4. Whether the defendants were properly joined.
5. Whether the Consumer Protection Act for the State of Grace can be applied to:
    a. Product liability claims generally.
    b. To product liability claims where no injury has occurred.
    c. To claims where no plaintiff is a resident of the State of Grace.
6. Whether the requirements of the punitive damages statute of the State of Euphoria have been met, and whether punitive damages is properly submissible given EPA approval of Synthefuel and its warning language.
7. Whether a multi-plaintiff trial can raise due process concerns under a state due process clause.
8. Whether interlocutory appeals or an extraordinary writ should have been granted as to:
    a. The motions to dismiss on the basis of jurisdiction, venue, and/or joinder.
    b. The motion to dismiss plaintiffs' Consumer Protection Act claims.
    c. Whether the consolidation of plaintiffs' claims for trial would be likely to result in a denial of due process to the defendants.
    d. Whether punitive damages is submissible under *State Farm* and the state statute, given that EPA approved Synthefuel, including its initial and subsequent warning.
    e. Whether an attorney-client relationship exists between certain of the plaintiffs and the various legal counsel, and what can be done to clarify the situation to protect all involved.

Summary of Facts:

From Plaintiffs' Original Complaint and from Plaintiff Specific Discovery

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Table of Contents

Summary Of Facts:

From Plaintiffs' Original Complaint and from Plaintiff Specific Discovery

I. Plaintiffs and Their Residency

John Jenkins, Timothy Miller and Anton Michaels are citizens and residents of the state of Alabama.

Roberto Gonzales, Suzy Kraft and Habib Kazaar are citizens and residents of the state of California.

Blake Delahay, Molly Sims, Andre Vukovitch and Mike Tollivar are citizens and residents of the state of Delaware.

Walter James, Cynthia Ristano, Paul Greenburg and Carlos Rodriguez are citizens and residents of the state of Florida.

Greg Lindsay, Donald Steiner and Mack Farmer are citizens and residents of the state of Iowa.

Louis Levine, Kelly High, Mohamed Mansur and Jack Green are citizens and residents of the state of Kentucky.

Katie DuVall, John LaChien and Dwayne Allendare are citizens and residents of the state of Louisiana

Arnold Thomas, John Barber and Clayton James are citizens and residents of the state of Nebraska

Duke Tremont, Akmed Hasson and Missy Meltzer are citizens and residents of the state of Nevada

Cosimo Andari, Will Radenthal and Carlo Medina are citizens and residents of the state of Rhode Island

Henry Dickens, Stanley Levine and Mick Omar are citizens and residents of the state of Oregan

Jose Montagyna, Michelle Valentine and Benjamin Brandeis are citizens and residents of the state of New Mexico

Jim Miller and Antonia Villari are citizens and residents of the state of Euphoria.

Trent Albern, Jim O'Connor, Sally Lee, and Jonathan Michaels are citizens and residents of the state of Ohio.

II. Defendants' State of Incorporation and Location of Principal Place of Business

The University of California Los Angeles (UCLA) is organized and exists under the laws of the state of California.

Synthefuel Corporation is organized and exists under the laws of the state of Grace, with its principal place of business in the state of Grace.

Rocky Mountain Syn-Power Corporation is organized and exists under the laws of the state of Colorado, with its principal place of business in the state of Colorado and it supplies Synthefuel to its customers in Colorado, Western Kansas, the panhandle of Nebraska and southeastern Wyoming.

Southern Syn-Power Corporation is organized and exists under the laws of the state of Florida, with its principal place of business in the state of Florida and supplies Synthefuel to its commercial and retail customers in Florida, southern Alabama and southern Georgia.

Mid American Syn-Gas Corporation is organized and exists under the laws of the state of Delaware, with its principal place of business in the state of Nebraska and supplies Synthefuel to its customers in eastern Nebraska, northeastern Kansas and eastern Iowa

California Power & Gas Corporation is organized and exists under the laws of the state of California with its principal place of business in the state of California and supplies Synthefuel to its customers in Northern half of the state of California.

Ohio Synthetic Fuel Power Corporation is organized and exists under the laws of the state of Delaware with its principal place of business in the state of Ohio and supplies Synthefuel to its customers in Ohio, West Virginia, eastern Indiana and northern Kentucky.

Royal Distribution Corporation is organized and exists under the laws of the state of Delaware with its principal place of business in the state of Alabama and supplies Synthefuel to retail outlets in Alabama and Mississippi.

Tristate Distribution Corporation is organized and exists under the laws of the state of Kentucky with its principal place of business in the state of Kentucky and supplies Synthefuel to retail outlets in Kentucky, Tennessee and West Virginia.

Southwest Distribution Corporation is organized and exists under the laws of the state of New Mexico with its principal place of business in the state of New Mexico and supplies Synthefuel to retail outlets in New Mexico and Arizona.

Empire Energy Distribution Corporation is organized and exists under the laws of the state of Delaware with its principal place of business in the state of Nevada and supplies Synthefuel to retail outlets in Nevada, Utah and Idaho.

Quad-Cities Distribution Corporation is organized and exists under the laws of the state of Iowa with its principal place of business in the state of Iowa and supplies Synthefuel to retail outlets in Iowa, Illinois and Wisconsin.

Excell Gas Distribution Corporation is organized and exists under the laws of the state of Delaware with its principal place of business in the state of Grace and supplies Synthefuel to retail outlets in the state of Grace and the state of Euphoria.

Mainstreet Service Corporation is organized and exists under the laws of the state of Euphoria with its principal place of business in the state of Euphoria and is a local retail outlet in Constant, Euphoria.

Golden State L.P. Corporation is organized and exists under the laws of the state of California with its principal place of business in the state of California and is a local retail outlet in Pasadena, California.

Tucker Grill & Gas Corporation is organized and exists under the laws of the state of Rhode Island with its principal place of business in the state of Rhode Island and is a local retail outlet in West Warwick, Rhode Island.

Miami Dade, L.P. Corporation is organized and exists under the laws of the state of Florida with its principal place of business in the state of Florida and is a local retail outlet in Miami, Florida.

Bayou Fuel & Gas Corporation is organized and exists under the laws of the state of Louisiana with its principal place of business in the state of Louisiana and is a local retail outlet in Lake Charles, Louisiana.

III. Plaintiffs' Claimed Injuries

Plaintiffs, John Jenkins, Habib Kazaar, Blake Delahay, Paul Greenburg, Greg Lindsay, Mohamed Mansur, Duke Tremont, Benjamin Brandeis, and Jim O'Connor developed prostate cancer as a result of exposure to Synthefuel.

Plaintiffs Suzy Kraft, Mike Tollivar, Louis Levine, Dwayne Allendare, Will Radenthal, and Henry Dickens developed bladder cancer as a result of exposure to Synthefuel.

Plaintiffs Walter James, Mack Farmer, Arnold Thomas, Missy Meltzer, Jose Montagyna and Antonia Villari developed a dementia like syndrome as a result of exposure to Synthefuel.

Plaintiffs Timothy Miller, Roberto Gonzales, Molly Sims, Cynthia Ristano, Katie DuVall, John Barber, Carlo Medina, Michelle Valentine, Trent Albern and Jonathan Michaels suffered a stroke or strokes as a result of exposure to Synthefuel.

Plaintiffs Anton Michaels, Carlos Rodriguez, Jack Green, Cosimo Andari and Mick Omar have traces of components of Synthefuel in their bodies and have been permanently injured.

Plaintiffs Andre Vukovitch, Donald Steiner, Kelly High, John LaChien, Clayton James, Akmed Hasson, Stanley Levine, Jim Miller and Sally Lee have been exposed to Synthefuel and have been exposed to the substantially increased risk of significant physical injury and have experienced mental and emotional distress.

IV. Selected for Plaintiffs' Consolidated Trial and Exposure

A. The following plaintiffs with prostate cancer claims were selected for the consolidated trial:

(1) Habib Kazaar

(a) Exposure to Synthefuel—exposed prior to initial report from University of Nebraska, filling canisters with Synthefuel at a local retail outlet;

(b) Alternate Causation/Other Exposures—as a child and up through high school; toxic emissions from numerous factories, chemical plants and refineries located within one mile of his residence.

(2) Greg Lindsay

(a) Exposure to Synthefuel—exposed before report from University of Nebraska, but no exposure after the meta-analysis of Dr. Kramer; only exposure is the use of Synthefuel in his gas grill at home and for his home generator in the event of a power failure;

(b) Alternate Causation/Other Exposures—no identifiable exposure to any other toxic substances.

(3) Benjamin Brandeis

(a) Exposure to Synthefuel—only after issuance of second warning about the potential dangers associated with Synthefuel; only known exposure to Synthefuel was as a design engineer for a Synthefuel processing plant—5 or 6 visits of 1-2 days each;

(b) Alternate Causation/Other Exposures—worked during the summer and school breaks at the local chemical manufacturing plant where they made VX nerve gas for the U.S. Army Chemical Materials Agency.

(4) Jim O'Connor

(a) Exposure to Synthefuel—essentially from the introduction of Synthefuel up until six months after he was diagnosed with prostate cancer which was two months before filing the lawsuit, in farming operations and at local coop where he is a partner where he was often involved in "unloading" Synthefuel from tanker trucks;

(b) Alternate Causation/Other Exposures—grew up and still manages a large farming operation, also a partner in the local farm cooperative and is exposed to various chemicals, especially from certain liquid pesticides and insecticides which are processed at the cooperative prior to delivery to various customers.

B. The following plaintiffs with bladder cancer claims were selected for the consolidated trial:

(1) Suzy Kraft

(a) Exposure to Synthefuel—from time of introduction until just after second EPA warning; works as an industrial hygienist who has responsibilities for checking exposure levels at two of the three primary facilities at which Synthefuel is synthesized and manufactured, has done so since Synthefuel was first market;

(b) Alternate Causation/Other Exposure—prior to her current responsibilities, Dr. Kraft was an industrial hygienist who performed similar monitoring and safety functions for two oil and gas refineries and one chemical company in the state of Louisiana for approximately 12 years.

(2) Louis Levine

(a) Exposure to Synthefuel—a home that is operated on Synthefuel and with a gas grill also operated by Synthefuel; from eight months after the Kramer meta-analysis up until today;

(b) Alternate Causation/Other Exposure—Mr. Levine has had a large number of kidney infections, has impaired kidney function and has taken multiple antibiotics over the last 10 years and additionally has tried various herbal remedies in an effort to control bacterial and viral growths in his kidney and in addition has had a number of kidney stones.

(3) Dwayne Allendare

(a) Exposure to Synthefuel—Mr. Allendare is a pipe fitter and has been employed by Great American Pipeline, which leases a significant portion of its pipeline to Synthefuel for the distribution of Synthefuel, both nationally and regionally he has repaired various leaks, loose fittings and replaced monitoring equipment; exposure from introduction up until two months before Nebraska study published, when he retired;

(b) Alternate Causation/Other Exposure—was exposed to various chemicals and toxins in 1st Gulf war—takes male hormones for low testosterone.

C. The following plaintiffs with stroke claims were selected for the consolidated trial:

(1) Molly Sims

(a) Exposure to Synthefuel—from the time of introduction up to and through trial, her furnace, water heater and gas grill are operated with Synthefuel;

(b) Alternate Causation/Other Exposure—has taken hormone therapy products—has high blood pressure—takes high blood pressure medication and medicine for lowering cholesterol.

(2) Cynthia Ristano

(a) Exposure to Synthefuel—beginning one month after the initial report from the University of Nebraska up until her stroke; exposure occurred because she works for a regional distributor of Synthefuel and has smelled it on many occasions;

(b) Alternate Causation/Other Exposure—previously she worked for a major chemical processing plant for 10 years and was in the plant constantly.

(3) John Barber

(a) Exposure to Synthefuel—lives approximately three miles from a Synthefuel processing facility; time of exposure—since the date of introduction up until the time of trial;

(b) Alternate Causation/Other Exposure—no identifiable risk factors or exposure history.

D. The following plaintiffs with trace components of Synthefuel in their system were selected for the consolidated trial:

(1) Carlos Rodriguez

(a) Exposure to Synthefuel—from approximately three months after the initial report from the University of Nebraska up until six months after the meta-analysis by Dr. Kramer, when after attending a meeting with various plaintiffs' lawyers, he underwent screening for trace elements found in Synthefuel for presence in his body—the claimed exposure occurred because Mr. Rodriguez operates a body shop which uses Synthefuel to power various compressors and other equipment;

(b) Alternate Causation/Other Exposure: 20 years prior to beginning to use Synthefuel, he operated a body shop and has been exposed to various solvents, other chemicals and paints, which contain at least some of the same chemical constituents that are in Synthefuel.

(2) Cosimo Andari

(a) Exposure to Synthefuel— only known exposure to Synthefuel was from a leak and resulting explosion of the furnace at his office which was run on Synthefuel. He was trapped for 5½ hours in debris. The explosion occurred approximately four months after the second EPA approved warning with regard to Synthefuel;

(b) Alternate Causation/Other Exposure—no known exposure history to other toxic substances other than general environmental exposure.

(3) Mick Omar

(a) Exposure to Synthefuel—increasing exposure since the introduction of Synthefuel as Mr. Omar works as a heating and air conditioner technician. He estimates over the last seven years, approximately 55-65 percent of the furnaces used Synthefuel as the source of fuel. It is unclear how much exposure Mr. Omar had at different points in time because he cannot estimate, for example, how much he was exposed prior to the initial report from the University of Nebraska;

(b) Alternate Causation/Other Exposure—from birth until age 12, lived in a housing development that had been built on the site of reclaimed land after they closed of a chemical plant. Later, approximately 15 houses on the site were condemned and abandoned due to the failure to meet various EPA standards—At 12, after his parents both died of cancer, allegedly associated with exposure to chemical and toxins at the housing project, he moved in with his grandparents, worked on their farm and was exposed to various pesticides, insecticides and chemicals up until he finished technical school (age 19) and moved away.

E. The following plaintiffs with intentional or negligent infliction of mental distress claims were selected for the consolidated trial:

(1) Andre Vukovitch

(a) Exposure to Synthefuel—was one of the first farmers to use Synthefuel in the state of Nebraska as he previously used and converted certain farm equipment to use of natural gas—because one of his close friends was involved in the University of Nebraska study, he was well aware of the ongoing development of information with regard to the alleged risk of Synthefuel—he was exposed from the time of introduction of Synthefuel up until the present—he contends that the cost of switching back to alternative energy such as natural gas would be prohibitive and he would lose his farm if he does not continue to use Synthefuel;

(b) Alternate Causation/Other Exposure—prior exposure to insecticides, pesticides, other chemicals used in farming operations for over 45 years.

(2) Akmed Hasson

(a) Exposure to Synthefuel—is an engineer for a global engineering company, and has been a project engineer at three different facilities that are designed to store and distribute Synthefuel; exposure time—total approximately three months during the one month test operation of each of the facilities which occurred—the first two months before the University of Nebraska study—the second, one month after the meta-analysis by Dr. Kramer and the third, one week after the issuance of the revised EPA approved warning;

(b) Alternate Causation/Other Exposure—design and construction of chemical manufacturing plants where he served as Project Engineer—Superintendent and was similarly involved in the initial start up of those facilities.

V. Plaintiffs' Legal Theories and Claims

Plaintiffs assert various product liability claims, including claims for:

1. defective manufacture
2. defective product design
3. failure to warn
4. breach of warranty, express and implied
5. breach of the implied warranty for a particular purpose

Additionally, all of the plaintiffs have asserted claims under the Consumer Protection Act of the state of Grace. Plaintiffs argue that Synthefuel is organized and exist under the law of the state of Grace, it is both not unexpected and equitable to hold Synthefuel to the standards of the Consumer Protection Act of that state and to apply those standards to each of the plaintiffs' claims under the Act.

Additionally, plaintiffs contend that the distribution agreements between Synthefuel and the various regional companies and local distributors all are governed by a choice of law provision in the contract by the laws of the state of Grace. Thus again, making the application of the laws of the state of Grace fairly applicable not only to Consumer Protection Act claims but all of the claims of plaintiffs as to Synthefuel, but also as to the distributor defendants as well.

The Statutes, the Rules—Statutory Construction and Interpretation

Douglas D. McFarland

Hamline University School of Law

1536 Hewitt Ave.
St. Paul, MN 55104
(651) 523-2085
dmcfarland@hamline.edu

DOUGLAS MCFARLAND has 34 years of law teaching experience at Hamline University in St. Paul, Minnesota and Phoenix School of Law in Phoenix, Arizona. His subjects include civil procedure, evidence, federal courts, torts, and persuasion. His primary subject is civil procedure with special interest in jurisdiction. He has been voted "Professor of the Year" five times, most recently in 2007. After graduating Phi Beta Kappa from Macalester College and from New York University School of Law as a Root-Tilden Scholar, he began his career at Dorsey & Whitney in corporate law and litigation. In 1984 he took a leave to work for Chief Justice Warren E. Burger as the Tom C. Clark Judicial Fellow. In 1986 he was promoted to the head of the Chief Justice's staff.

The Statutes, the Rules—Statutory Construction and Interpretation

Table of Contents

The Statutes, the Rules—Statutory Construction and Interpretation

I. Introduction

The common law required that a case be between one plaintiff and one defendant over one form of action. Joinder of parties and joinder of claims were almost unknown. The codes introduced the possibility of joinder when a common "transaction" was involved, but many states interpreted transaction narrowly. The Federal Rules of Civil Procedure in 1938 brought a more generous attitude toward party and claim joinder. Today, a majority of states are rules states, and the code states interpret their joinder statutes more expansively.

What follows from expansive joinder is larger and more complex litigation involving multiple parties and multiple claims. Our program calls the combination of large, complex litigation with new instant communication tools new age litigation. It takes "various forms—from mass torts to consumer class actions to complex cases of every kind…Because of the size, complexity and often national scope of new age litigation, questions about ethics, due process, evidence and statutory construction take on much broader dimensions and significance."

Despite the growth in size and complexity of litigation, a case still must be constructed on a solid foundation. In fact, the larger the case, the harder and closer we should look at the foundation to be sure it will support the weight. I refer of course to the most important building block of any case, which is jurisdiction. A court cannot act with regard to the parties and case without jurisdiction. Since this seminar is about litigation in state courts, we need not examine subject matter jurisdiction. We do need to examine jurisdiction over the person. We will also look at venue, joinder of parties, and joinder of claims.

II. Jurisdiction over the Person

We are in the courts of the state of Euphoria. The case involves multiple plaintiffs and multiple defendants. The numbers in the Fact Scenario and in the Summary of Facts differ slightly. I'm going with these numbers: 45 original plaintiffs from 14 states, 19 original defendants, and 15 plaintiffs chosen for the consolidated trial. Only two plaintiffs are residents of Euphoria. The others reside across the country. Of course, we are not concerned with personal jurisdiction over the plaintiffs, since they consent to the jurisdiction of Euphoria.

The concern is personal jurisdiction over the defendants. The original 19 defendants are located in 15 states, also spread across the country. The Fact Scenario tells us "based on the geographic location of each plaintiff and defendant, it is clear that each plaintiff could not have a claim against all defendants." That is certainly clear. For example, some of the defendants are local retailers in states as far apart as California, Florida, and Rhode Island.

One defendant is incorporated in Euphoria and another regularly ships Synthefuel into Euphoria. These two defendants, or their agents, can be found within the state, so personal jurisdiction can be obtained over them by service within the state. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

The remaining defendants are located in 14 states other than Euphoria. The only way Euphoria can assert personal jurisdiction over the big players—all of whom are nonresidents— is through long-arm jurisdiction. Since jurisdiction over the person of the defendant is fundamental to the exercise of power over it by a court, we must examine this jurisdiction carefully.

We all know that long-arm jurisdiction involves two elements or steps: 1) the state long-arm statute must reach the defendant, and 2) that reach must be within the limits of due process of law:

> [B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). In other words, long-arm jurisdiction is not self-executing. Due process permits—but does not require—a state to reach out beyond its borders to serve nonresidents.

This well-known area of the law flows from the decision over 60 years ago in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) that established the "minimum contacts" test for meeting due process requirements for personal jurisdiction.

A. Long-arm Statutes

All states have enacted long-arm statutes. These statutes are basically of two types. One type is the limits-of-due-process type. Twenty of the 50 states have long-arm statutes (or court rules) that reach the limits of due process. The statute simply says state jurisdiction extends to the limits of due process. A state court need not tarry interpreting this statute; just move on to the second, due process step. The other type of long-arm statute is the enumerated acts type, which extends state jurisdiction only to nonresidents who engage in specific activities in the state. These statutes include a listing of these activities. Thirty of the 50 states have enumerated acts long-arm statutes (or court rules).

Since the action is brought in Euphoria, we are concerned with the Euphoria long-arm statute, which is an enumerated acts long-arm statute. Before proceeding to consider it; however, I insert an aside on the other type of long-arm statute.

1. Limits-of-Due-Process Long-arm Statutes

Of the 20 state long-arm statutes that extend state jurisdiction to the limit, 11 states (Arizona, Arkansas, California, Iowa, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Vermont, and Wyoming) have statutes or court rules that simply provide state jurisdiction extend to the limits of due process. *E.g.*, Wyo. Stat. Ann. §5-1-107(a) (Lexis-Nexis 2003) ("A Wyoming court may exercise jurisdiction on any basis not inconsistent with the Wyoming or United States constitution.")

The state of Grace has such a statute: "Every [defendant] that shall have the necessary minimum contacts with the state of Grace, shall be subject to the jurisdiction of the state of Grace...in every case not contrary to the provisions of the constitution or laws of the United States."

One noteworthy aspect of the Grace long-arm statute, in contrast to the Wyoming statute, is that it is tied in to the minimum contacts test of *International Shoe*. Should the Supreme Court of the United States in the future abandon minimum contacts and establish a different test, Grace would be left without an effective long-arm statute.

Nine additional states in this category (Alabama, Alaska, Illinois, Indiana, Maine, Nebraska, Oregon, South Dakota, and Tennessee) have long-arm statutes that originally were and still appear to be enumerated acts statutes, but then throw in a catchall provision extending the statute to the limits of due process. *E.g.*, 735 Ill. Comp. Stat. Ann. 5/2-209(c) (West 2003) ("A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."). That is a strange duck. The add-on provision renders the remainder of the statute superfluous.

2. Enumerated Acts Long-arm Statutes

Thirty states have enumerated acts long-arm statutes. These statutes extend state jurisdiction to only a limited, enumerated number of actions by a defendant. The Euphoria long-arm statute is typical:

> §1. Act submitting to jurisdiction—Process.
>
> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of Euphoria as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within Euphoria;
>
> (2) The commission of a tortious act within Euphoria;
>
> (3) The ownership, use, or possession of any real estate situated in the state of Euphoria;
>
> (4) Contracting to insure any person, property or risk located within Euphoria at the time of contracting;
>
> (5) The making or performance of any contract or promise substantially connected with the state of Euphoria;
>
> (6) The acquisition of ownership, possession or control of any asset or thing of value present within the state of Euphoria when ownership, possession or control was acquired;
>
> (7) The breach of any fiduciary duty within the State of Euphoria;
>
> (8) The performance of duties as a director or officer of a corporation organized under the laws of the State of Euphoria or having its principal place of business within this State;
>
> (9) The exercise of powers granted under the authority of this State as a fiduciary.
>
> (b) A court may exercise jurisdiction in any action arising within or without the State of Euphoria against any person who:
>
> (1) Is a natural person present within the State of Euphoria when served;

(2) Is a natural person domiciled or resident within the State of Euphoria when the cause of action arose, the action was commenced, or process was served;

(3) Is a corporation organized under the laws of the State or Euphoria; or

(4) Is a natural person or corporation doing business within the State of Euphoria.

(c) Service of process upon any person who is subject to the jurisdiction of the courts of the State of Euphoria, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within the State of Euphoria. (d) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon subsection (a). (e) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Since the first step of the personal jurisdiction analysis asks whether the long-arm statute reaches the defendant, we must engage in statutory interpretation of the statute. Here we also encounter a split amongst the states.

a. Interpreting long-arm statutes to reach the limits of due process

Of the 30 states with enumerated acts long-arm statutes, 12 state courts (Colorado, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, North Dakota, South Carolina, Texas, Utah, Virginia, and Washington) take the position that the statute is intended to reach the limits of due process and therefore it does.

This position always puzzled me. How can a court look at a detailed statute that lists a specific number of acts, and conclude it really is a limits-of-due-process type statute? That seems contrary to all tenets of statutory construction. I found that the doctrine traces back to a dictum in an Illinois opinion [*Nelson v. Miller*, 143 N.E.2d 673, 679 (Ill. 1957)] that was not intended to mean the language of a statute should be cast aside, and that this misstatement took on a life of its own through easy repetition; often federal courts, with judges more familiar with the due process step of analysis, boldly asserted the state statute reached the limits of due process, and state courts later agreed. This development is traced in Douglas D. McFarland, *Dictum Run Wild: How Long-arm Statutes Extended to the Limits of Due Process*, 84 B.U.L. Rev. 491 (2004). That article also looks at the policy arguments in favor and against both types of long-arm statutes and concludes the better policy choice is an enumerated acts long-arm statute.

b. Interpreting the Euphoria enumerated acts long-arm statute

Eighteen states (Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, West Virginia, and Wisconsin) have enumerated acts long-arm statutes and their courts interpret the language of those statutes. That is what we need to do for the Euphoria statute.

First, we note that part (b) of the statute covers other traditional bases for personal jurisdiction. Second, the long-arm portion of the statute, part (a), reaches "any person." All the defendants in our case are corporations, so person will have to cover artificial persons. Third, the statute specifically states twice—in both sections 1(a) and again in (d)—the claim (statute says "cause of action") must arise from the act done within the state. In other words, a defendant who

sells widgets in Euphoria cannot be sued in Euphoria for a car accident occurring in another state. The statute requires what is known as specific jurisdiction, not general jurisdiction, over a defendant.

Now let us look at the list of nine activities enumerated in the long-arm statute that subject a nonresident to Euphoria jurisdiction. We can quickly eliminate the last seven activities as irrelevant to this case. That leaves the first two.

Have any of the nonresident defendants engaged in the "transaction of any business" in Euphoria? Certainly for the large majority of defendants the answer is no. A distributor that operates in only California, or in New Mexico and Arizona, does not transact business in the state of Euphoria if Euphoria is in the eastern part of the country; vice-versa, a distributor that operates only in Florida, or in Kentucky, Tennessee, and West Virginia, does not transact business in Euphoria if Euphoria is in the western part of the country. Perhaps the national Synthe-Fuel Corporation and the distributor that actually ships the product into Euphoria might come under this statutory clause. Jurisdiction over the corporate defendant at the head of the distribution chain, Synthefuel Corporation, may even be doubtful under this clause, as it operates through wholesalers and does not itself transact business in Euphoria.

Have any of the nonresident defendants committed a "tortious act" within Euphoria? Cases have battled over whether a defendant who produces a defective product in one state that later injures a person in another state commits a tort in the state of injury. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (tort of negligence is not committed until damages occur in consumer's state) with *Feathers v. McLucas*, 209 N.E.2d 68 (N.Y. 1965) (tort occurs where negligent act takes place). Many state long-arm statutes now specifically provide for jurisdiction over both a defendant who commits a tortious act within the state and also a defendant who commits a tortious act outside the state causing injury in the state. The Euphoria statute does not have this double provision.

This also highlights that the Euphoria statute does not cover a "tort," but instead it covers a "tortious act." That word choice by the legislature is important, as it clearly points to the negligent act, not the complete tort of negligence (with its four elements of duty, breach, cause and damages). Plaintiffs could argue that defendants' acts were not "tortious" until injury in Euphoria occurred, but that argument is tortuous. The "act" of a defendant occurred elsewhere. Outside of the local distributor in Euphoria, none of the other defendants—even those in the chain of distribution leading into Euphoria—can be said to have committed a "tortious act" within the state of Euphoria, which is what the long-arm statute requires.

The conclusion is that the Euphoria long-arm statute does not reach the majority of the defendants. It most likely reaches none. Even if a broad interpretation of the words leads to the conclusion the statute does reach one or two defendants, personal jurisdiction cannot be asserted over the other defendants, and the case must be dismissed as to them.

Some may consider this an undesirable result and think a court should find a way to interpret around the statute, perhaps by concluding the statute reaches the limits of due process. Yet the policy choice not to extend Euphoria jurisdiction over these defendants is made by the legislature. Also, many long-arm jurisdiction opinions note the need for state courts to protect state citizens. That argument points toward refusal of jurisdiction here. Only two of the original 45 plaintiffs are Euphoria citizens, and none of the 15 plaintiffs proceeding to trial are Euphoria citizens. Instead of a need to protect injured Euphoria citizens from nonresident tortfeasors,

the more relevant concern seems to be to protect Euphoria courts and taxpayers from providing a forum for an expensive litigation amongst nonresidents on both sides. Further, concluding the state enumerated acts long-arm statute extends to the limits of due process produces the undesirable result of transferring the entire jurisdiction decision from state law to federal constitutional law.

B. Minimum Contacts and Due Process

Assuming, arguendo, that the Euphoria long-arm statute reaches the defendants, we can proceed to the second step of long-arm jurisdiction analysis, the due process step. This area of the law has evolved over the more than 60 years since the decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) announced,

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

As any of you who have tried to work with this test in a fact context know, the famous minimum contacts test is hardly any test at all. It is loose and malleable. That is a good thing or a bad thing depending on your point of view. My impression from the cases is that both state and federal judges tend to think it is more bad than good, as many courts create various additional layers and glosses onto the test in an attempt to guide decisions in individual cases.

Perhaps the most important development in the test itself is the bifurcation of the original unitary test into a dual test that requires a court first to consider minimum contacts, and then to consider fair play and substantial justice separately. See *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Even with this bifurcation, the overall test is still called the minimum contacts test.

One recurring type of case in which many decisions have been made interpreting the minimum contacts test is the stream of commerce case. A manufacturer in one state places a product into the stream of commerce that carries the product through wholesalers and dealers into another state where a consumer is injured. In its essence, our Fact Scenario is a stream of commerce case so we can analyze it as one.

The last time the Supreme Court of the United States spoke to long-arm jurisdiction is now 21 years ago. That case is a stream of commerce case. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the Court splits 4-4-1 on whether merely putting a product into the stream of commerce constituted minimum contacts, although all nine Justices agree that assertion of jurisdiction in the case would violate the separate requirement of fair play and substantial justice.

The plurality opinion, by Justice Sandra Day O'Connor, concludes merely placing a product into the stream of commerce without more is insufficient to constitute minimum contacts. The defendant must also engage in "additional conduct" toward the state, such as designing the product for the state, advertising in the state, or servicing the product in the state. This view follows on *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) that mere foreseeability that a product might find its way into a state is insufficient to establish minimum contacts.

The concurring opinion, by Justice William Brennan, concludes that the stream of commerce is not random and composed of small eddies, but instead predictably flows directly into a state. Therefore, placing a product into the stream of commerce with knowledge that it will reach the forum state is sufficient to satisfy minimum contacts. This opinion also concludes; however, that assertion of jurisdiction in the individual case is not fair play and substantial justice.

The other concurring opinion, by Justice John Paul Stevens, agrees with the Brennan opinion that placing a product into the stream of commerce satisfies minimum contacts and also agrees that fair play and substantial justice is violated. The opinion amazingly asserts that minimum contacts should not even be considered in the case because fair play and substantial justice is violated.

This split leaves the lower courts in a quandary. The plurality opinion states the stream of commerce alone is insufficient to constitute minimum contacts; the two concurring opinions (totaling five of nine votes) state it is sufficient alone. As could be expected, lower federal and state courts have divided. Some follow Justice O'Connor's approach; some follow Justice Brennan's approach; some decline to make a definitive choice.

Let us consider both possibilities. If we agree with the O'Connor plurality opinion, the conclusion is clear that an assertion of jurisdiction by Euphoria over the nonresident defendants would violate due process. To establish personal jurisdiction over these defendants, they must have purposefully directed additional activities toward Euphoria, and the record shows none. If we agree with the Brennan/Stevens concurring opinions, then Euphoria will have jurisdiction at least over those defendants who participate in the stream of commerce regularly flowing into Euphoria. At the same time, Euphoria cannot exercise jurisdiction over any defendant not in the current of that stream of commerce. Since the Fact Scenario makes clear that several defendants are not part of any stream of commerce into Euphoria, the state has no jurisdiction over these defendants. The court would have to make a careful tracing, matching defendants to the stream of commerce into Euphoria.

This analysis was on the minimum contacts, or first half of the due process test. I do not proceed into the fair play and substantial justice half because we need more information to make that determination as to individual defendants. What is each defendant's knowledge of its participation in the stream of commerce flowing into Euphoria? What is each individual defendant's percentage participation? Where is each defendant located with regard to Euphoria? How many defendants are local and how many nonresident? Which defendants could reasonably expect to be haled into a Euphoria court?

The only conclusion we can make with assurance is that jurisdiction over a majority of the defendants does not pass the due process step either. These defendants must be dismissed.

Perhaps an argument can be made that all defendants are participating in a national distribution plan, so the location of each individual defendant is not important, and the locality of the acts of each individual defendant is not important. What this argument really resolves itself into is the question of whether state boundaries still matter for personal jurisdiction. Opinions differ on this question: some believe state boundaries have become irrelevant and the real consideration is fairness of the forum over the defendant; others believe that state boundaries still matter in our federal system. My own opinion is the latter. Jurisdiction is power, and that power must have a source. The source is the authority of the state. I go further to suggest that state court judges might want to draw the same conclusion. While an initial reaction might be that a

state court should maximize its jurisdictional reach and so its jurisdictional power, we want to keep in mind that reach comes at the expense of other state court systems. To the extent that a state court extends its jurisdictional power, it not only diminishes the jurisdictional power of other states but also it encourages other states to do the same. The end result will likely be more limited jurisdictional power for the state.

III. Venue

Without personal jurisdiction, the case is at an end for most defendants, but let us assume jurisdiction over all defendants exists in Euphoria. On that assumption, venue has to exist in one of the counties of the state, since venue simply distributes the jurisdictionally available business amongst the courts of the state, primarily on the basis of convenience to the parties. Since we are in the Euphoria state court system, the relevant venue statute is the Euphoria venue statute:

> §1. Except as otherwise provided in this Act, every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. If all defendants are nonresidents of the State, an action may be commenced in any county.
>
> §2. The application of the foregoing shall not be affected regardless of the number of parties in any single action.

This is a straightforward venue statute. It has only three clauses, giving three choices for venue. We can eliminate the third possibility, which applies when "all defendants are nonresidents of the State." The Summary of Defendants' State of Incorporation and Location of Principal Place of Business identifies one of the original defendants as Mainstreet Service Corporation, with both its incorporation and principal place of business in Euphoria. That single instate defendant named in the complaint eliminates the possibility that plaintiffs can lay venue in any state county of their choosing.

The second venue possibility is "in the county in which the transaction or some part thereof occurred out of which the cause of action arose." "Transaction" is of course the set of facts giving rise to the "cause of action," or more properly giving rise to the "claim." Clearly we have many transactions in this litigation because we have many separate sets of facts surrounding many different plaintiff-defendant pairings. The great majority of the transactions occurred entirely outside Euphoria. A narrow interpretation of the venue statute is that the second clause cannot apply to those transactions because it requires at least part of the transaction to take place in a Euphoria county, and we have just noted that most took place outside the state. That interpretation is reinforced by §2 of the statute, which states that the statute applies "regardless of the number of parties."

I think that is too narrow. The statute does not refer to a series of transactions, so the only reasonable interpretation for purposes of the state venue statute is that the entire litigation surrounding the safety of Synthefuel constitutes a "transaction." Transaction "is a word of flexible meaning." *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). Certainly the entire

transaction—involving 45 plaintiffs, 15 defendants, and multiple states—did not occur in one Euphoria county. Yet the statute covers "some part of" the transaction, which did occur in at least one Euphoria county.

Looking over the list of 45 original plaintiffs, we find only two residents of Euphoria. Neither of them is among the 15 plaintiffs selected for the consolidated trial, but the important time for venue purposes is the time of pleading. These two plaintiffs purchased or used Synthefuel in Euphoria. That means "the transaction or some part thereof" occurred in the county of residence of these two plaintiffs. Other counties may be possible. Defendant Excell Gas Distribution Corporation sold Synthefuel to retail outlets in Euphoria, one of which then resold to the Euphoria plaintiffs. That is also part of the overall transaction. Another possibility is that defendant Mainstreet Service Corporation sold one or both of the Euphoria plaintiffs the Synthefuel in another county in the state. On the other hand, if Mainstreet or another defendant did not sell to these two plaintiffs in Euphoria, then this venue option evaporates.

This brings us to the only other option for venue. The first clause of the Euphoria venue statute allows venue to be laid "in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county." Again the language is somewhat outdated. It refers to "him or her." That does not contemplate corporations, but we can interpret around that small problem.

Again this venue option hinges on one defendant, Mainstreet Service Corporation. It has a residence in Euphoria, so the action can be brought in the county of its residence. The statute does have a clause requiring good faith and the expectation of a judgment against a defendant whose residence is used to lay venue. Realistically this does not fit Mainstreet. A local retail outlet is not in good faith expected to satisfy a multi-million dollar judgment. This clause is intended to prevent the addition of a straw-man defendant simply to obtain venue in a favorable county. I do not see that as the case here. Mainstreet may not be expected in good faith to pay a judgment, but it does not appear to be named as a defendant in bad faith simply to shift venue from one state county to another. Indeed, by the simple expedient of not naming Mainstreet as a defendant, plaintiffs could have had the venue choice of any county in Euphoria.

In sum, and in part because venue must lie in some county in the state when we assume the state has personal jurisdiction over the defendants in the case, venue will lie under either clause of the Euphoria venue statute.

While I do not propose to go through the Grace venue statute in any detail, since it is not relevant to an action in the state of Euphoria, I will point out two things in passing. First, it would require the same sort of interpretation that we applied to the Euphoria statute because it refers to "the defendant," "the plaintiff," and "the cause of action." Certainly applying these singular terms to this plural litigation presents an interpretation challenge. Second, the Grace statute has a most interesting §3. It requires that when venue is laid by the residence of one of "several plaintiffs," that plaintiff's claim must be "a substantial part of the action." We have two Euphoria citizens out of 45 plaintiffs; that is not likely a substantial part of the action. Also, it requires that when several defendants are properly joined, plaintiff can choose to lay venue "as to any one of the defendants against whom a substantial claim exists." The problem with that is the substantial claim defendants are all nonresidents, with the possible exception of Excell Gas Distribution Corporation.

IV. Joinder of Parties and Claims

This litigation is a real conglomeration of parties, claims, and theories of recovery. It brings to mind the lament of a federal judge who wrote the court should "put an end to this Frankenstein monster posing as a class action." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C. J., dissenting).

We have 45 original plaintiffs and 19 original defendants, with 15 plaintiffs selected to proceed to a consolidated trial against more than 13 selected defendants. These plaintiffs proceeding to trial assert at least five theories of products liability: defective manufacture, defective design, failure to warn, breach of express and implied warranty, and breach of implied warranty for a particular purpose. The damages to these plaintiffs are widely varied; some have prostate cancer, some have bladder cancer, some have strokes, some have trace components in their systems, and some allege intentional or negligent infliction of mental distress. No plaintiff selected for the consolidated trial has dementia-like symptoms.

So what is the proper response of a court to joinder of parties and joinder of claims in this litigation? No problem!

The Euphoria permissive joinder rule is as follows:

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.
>
> (b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

This rule tells us several things. First, it is a rule instead of a statute. This means Euphoria is a rules state, not a code state. Second, it is identical to Fed. R. Civ. P. 20, dealing with joinder of parties. This means federal and other rules states' interpretations of joinder of parties are relevant in Euphoria. Third, it does not cover joinder of claims. Because the joinder of parties rule is identical to the federal rule, we can assume Euphoria has a joinder of claims rule identical to the federal rule: "A party asserting a claim to relief as an original claim...may join...as many claims, legal or equitable, as the party has against an opposing party." This means any and all claims a plaintiff has against a defendant may be joined in a single action.

Actually, joinder of claims is not in question in this litigation anyway. Each of the plaintiffs has only a single claim for relief, having been injured only once. So far as I can tell, each plaintiff is asserting only a single theory of recovery. Even were one plaintiff to assert more than

one theory of recovery, that plaintiff would still have only one claim. For example, a plaintiff may assert defective manufacture (strict liability), failure to warn (negligence), intentional infliction of mental distress (intentional tort), and breach of warranty (contract). That is four distinct areas of the law. How many claims does that plaintiff have? While a common misunderstanding is that each legal theory of recovery is a separate claim, the proper interpretation is that the claim is entirely fact-based. Legal theories are irrelevant to the definition of "claim." A plaintiff who has been injured only once has one claim, no matter how many legal theories are attached to it. This is the philosophy that primary author Charles E. Clark wrote into the Federal Rules of Civil Procedure; states that have adopted rules of civil procedure patterned after the federal rules necessarily have adopted that procedural philosophy. (In code states, this same philosophy of Judge Clark can be found in the definition of "cause of action.") I have written about this more than once, most recently in Douglas D. McFarland, *In Search of the Transaction Or Occurrence: Counterclaims*, 40 Creighton L. Rev. 699 (2007). The importance of defining claim broadly appears in many additional areas of civil procedure, including pleading, removal jurisdiction, federal supplemental jurisdiction, early appeal in a case involving multiple claims, and claim preclusion.

Similar understanding informs joinder of parties. We first look at the plaintiffs. Let us narrow our focus to only the 15 plaintiffs proceeding to trial (although the same analysis applies to all 45 original plaintiffs, which might be more appropriate since joinder of parties is determined at the time of pleading). Are these 15 plaintiffs properly joined despite the fact that they bring a variety of legal theories of recovery?

The rule controls the decision. The rule has two requirements for permissive joinder of plaintiffs: 1) plaintiffs must assert a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences, and 2) a "question of law or fact common to all these persons will arise in the action."

A. Do All of These Plaintiffs Assert a Right to Relief Arising out of the Same Transaction or Occurrence, or Series of Transactions or Occurrences?

I begin by pointing out that the concept of a transaction or occurrence is entirely fact based. Law does not play a part. This again goes back to the procedural philosophy of Judge Clark and the federal rules. Just as legal theories do not play any part in defining "claim," so too the fact that plaintiffs are asserting a wide variety of legal theories does not play any part in defining a "transaction or occurrence." Basically a transaction or occurrence—in the same fashion as a claim—is a set of facts that a layperson would expect to be tried together:

> These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, the subject matter of a claim, is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used.

Charles E. Clark, *Cases on Pleading and Procedure*, 658-59 (2d ed. 1940).

Because of this imprecision, some courts have felt the need to gloss the transaction or occurrence by asking whether the facts have a "logical relationship." This likely traces back to *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926), in which the Court said "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." While this

is unnecessary gloss on the rule, it may help inform our understanding in a case such as our Fact Scenario. The facts connecting all the parties in this litigation do share a logical relationship: all arise from the development, production, distribution, sale, and use of Synthefuel.

The first plaintiff is Habib Kazaar. All of the facts surrounding his alleged injury by exposure to Synthefuel form a single transaction or occurrence. Another plaintiff is Suzy Kraft. All of the facts surrounding her alleged injury by exposure to Synthefuel form another transaction or occurrence. Granted, Kazaar's transaction or occurrence is not the same as Kraft's transaction or occurrence. That is not because their types of injuries differ or their legal theories of recovery differ, but because the facts surrounding their injuries are separate.

The permissive joinder of parties rule, unlike some other joinder rules, does not require a single transaction or occurrence. It requires only a "series of transactions or occurrences." Again, looking at the facts (and not the law), can we say that the transactions or occurrences involving Kazaar and Kraft (and all the other plaintiffs) form a series of related transactions or occurrences? I think we can. All involve Synthefuel and the injuries it may have caused to all of these plaintiffs.

B. Will a Question of Law or Fact Common to All These Persons Arise in the Action?

This is recognized to be a low hurdle, and indeed it is in our Fact Scenario. Whether Synthefuel causes injury to those exposed to it appears to be one basic common question.

This litigation is more mindful of a class action than of permissive joinder of parties. Class actions require the court to decide that common questions predominate, which may be unlikely in this case. The irony is that this action perhaps could not go forward as a class action. Permissive joinder has no such requirement. It demands only one common question. This criterion is easily met.

All plaintiffs share a series of transactions or occurrences and at least one common question. The conclusion follows that all plaintiffs are properly joined permissively.

We need not continue to consider whether all defendants are properly joined permissively. The answer again is yes, no problem. The analysis is a mirror image of joinder of plaintiffs. For the same reasons, a right to relief "arising out of the...same series of transactions or occurrences" is asserted against all of them, and a question of law or fact common to all will arise.

V. Consolidation for Trial

Our Fact Scenario does not ask some questions that could be asked. Should issue preclusion be applied based on the result of earlier trials? Should this case be consolidated for trial? Would separate trials better serve the interests of justice? Separate trials are to be ordered, according to §2 of the joinder of parties rule, to "prevent a party from being...delayed or put to expense by the inclusion of a party...who asserts no claim against the party, and may order separate trials...to prevent delay or prejudice." While trying all these plaintiffs, defendants, and legal theories in a consolidated trial will produce economy, it will also result in greatly increased delay, expense, and probable prejudice to individual defendants.

I raise this only to point out that this conglomeration of parties and interests that may induce a court to order separate trials should not be taken into account in consideration of per-

missive joinder of parties. Joinder of parties is determined from the pleadings; it is not a trial concern. "The philosophy is that joinder is not properly a pleading problem, but rather is one of trial convenience, which can be judged best only at the time of trial." Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 580 (1952). That is why the authority to order separate trials to prevent prejudice is in the permissive joinder of parties rule.

Ethical Dilemmas in the New Age of Mass Tort and High Tech

Debra Lyn Bassett

University of Alabama School of Law

Box 870382
101 Paul Bryant Drive East
Tuscaloosa, Alabama 35487
(205) 348-9715
dbassett@law.ua.edu

The author of four books and more than twenty law review articles, PROFESSOR BASSETT'S scholarship addresses three primary areas—legal ethics, procedural issues in the federal courts, and the significance of place. She teaches civil procedure, federal jurisdiction, complex civil litigation, professional responsibility, and law and psychology, and is the recipient of three teaching awards. Before teaching, she clerked for the Honorable Mary M. Schroeder of the Ninth Circuit Court of Appeals, practiced law with Morrison & Foerster in San Francisco, and worked as a Senior Attorney for the California Court of Appeal. Prof. Bassett is a member of the American Law Institute and Order of the Coif.

Ethical Dilemmas in the New Age of Mass Tort and High Tech

Table of Contents

Ethical Dilemmas in the New Age of Mass Tort and High Tech

I. Introduction and Overview

The Synthefuel fact pattern provides a springboard into two interrelated ethical dilemmas: advertising/solicitation and the unintended creation of attorney-client relationships.

II. The Efforts of the Synthefuel Plaintiffs' Lawyers to Identify Potential Plaintiffs Implicate Potential Ethical Concerns in the Areas of Advertising and Solicitation

A. Advertising

The fact pattern states that the plaintiffs' lawyers used television, radio, and Internet advertisements to inform individuals about the potential Synthefuel litigation.

1) Lawyer advertising has long been protected, so long as the advertisements are not false, deceptive, or misleading. (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).)
2) The ethical rules authorize lawyer advertising "through written, recorded or electronic communication, including public media." (Model Rule of Prof'l Conduct 7.2; *see* Vt. Ethics Op. 97-5 (general advertising rules apply to websites).)
3) Lawyer advertising on the Internet implicates additional concerns.
    a) Marketing rules for lawyers vary from state to state, yet the Internet reaches across state borders, making it impossible to control the audience.
    b) *See* Tex. Disciplinary Rules of Prof'l Conduct Part VII (Internet advertising is subject to filing and pre-approval requirements).

B. Solicitation

The fact pattern also states that the plaintiffs' lawyers presented information about the adverse effects of Synthefuel exposure at meetings held at farm cooperatives. These farm cooperative meetings, although described as "informative," raise the danger of in-person solicitation. (*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).)

In traditional single party litigation, the client typically selects an attorney—whether from word-of-mouth, the Yellow Pages, or a lawyer referral service—and that client approaches and retains the lawyer directly. In contrast, in the mass tort/class action context, often the situation is reversed and it is the attorney who is seeking the clients, which raises the potential for solicitation issues.

Generally, Model Rule 7.3 guides the prohibition against attorney solicitation.

> A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a

lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

Model Rule of Prof'l Conduct 7.3(a).

Note that Rule 7.3 of the Model Rules of Professional Conduct equates Internet chatrooms with in-person solicitation. (Model Rule of Prof'l Conduct 7.3 (including "real-time electronic contact" in its prohibition); see Ill. State Bar Ass'n Op. No. 96-10 ("[I]f a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3."); Mich. Prof'l Jud. Ethics Op. RI-276 ("A lawyer may not solicit legal business during an interactive electronic communication unless ethics rules governing in-person solicitation are followed."); Utah State Bar, Ethics Adv. Op. No. 97-10 ("Attorneys' participation in 'chat groups' is considered to be an 'in person communication' and subject to the restrictions of Rule 7.3(a).")))

Although "ambulance chasers" are the stereotypical target of the prohibitions against solicitation, the danger of stumbling into solicitation casts a broader net.

III. The Responses to the Synthefuel Advertisements and Meetings Create the Potential for the Unintended Formation of Attorney-Client Relationships

A. Overlapping Responses

The Synthefuel fact pattern states that a number of individuals responded to more than one advertisement or Internet site. The overlapping responses create dangers of misunderstandings—misunderstandings both by the lawyers and by the individuals who responded.

With respect to potential lawyer misunderstandings, when individuals submitted data about their exposure to Synthefuel, lawyers may have interpreted those submissions as consent to representation.

Similarly, the overlapping responses create a danger of misunderstandings by the individuals who responded to the advertisements and meetings. Individuals may have assumed that their responses automatically created an attorney-client relationship.

B. Attorney-Client Relationship: A Top 10 Ethical Trap

A recent ABA Journal article listed "Stumbling into a lawyer-client relationship" as #1 in the "Top 10 Ethics Traps" for lawyers (Stephanie Francis Ward, *Top 10 Ethics Traps*, A.B.A. J. (Nov. 2007).)

Neither the ethical rules nor the case law requires specific formalities for the initiation of an attorney-client relationship.

1. Model Rules of Professional Conduct

The Model Rules of Professional Conduct do not define the formation of an attorney-client relationship. The most analogous provision is Rule 1.18, which addresses the duties to prospective clients. (*See* ABA Model Rule of Prof'l Conduct 1.18 ("(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a pro-

spective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.").)

2. *The Restatement (Third) of the Law Governing Lawyers*

The *Restatement (Third) of the Law Governing Lawyers* provides that an attorney-client relationship is formed when,

> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers §14 (2000).

3. Case Law

An attorney-client relationship may be deemed to exist absent a written agreement, an engagement letter, or a fee arrangement. (See, *e.g.*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) ("A professional relationship is not dependent upon the payment of fees nor...upon the execution of a formal contract.").)

In evaluating circumstances in which it is disputed whether an attorney-client relationship was created, courts typically have looked to whether the putative client reasonably believed that counsel was his attorney. (*See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) ("reasonable expectations" determine whether attorney-client relationship exists); *see also* Law. Manual on Prof'l Conduct (ABA/BNA) 31:103 (1989) (existence of attorney-client relationship looks to whether client subjectively believed that the relationship existed).) Accordingly, attorney inattention or carelessness can lead to unintended consequences.

The same attendant duties of loyalty and confidentiality that adhere in traditional attorney-client relationships also accompany the creation of an inadvertent attorney-client relationship.

C. The Internet

The Internet reaches a broad population and is a cost-effective marketing tool. However, the Internet further complicates the potential for ethical issues, including an expansion of the potential opportunities for creating unintended attorney-client relationships. Specifically, the proliferation of websites and e-mail tend to encourage both unsolicited e-mail (by individuals) and the giving of legal advice (by attorneys), which can lead to the unintended creation of attorney-client relationships. (*See* Phila. Bar Ass'n Prof'l Guid. Comm. Ethics Op. 98-6 (1998) ("[I]n the course of an interaction with any person on the Internet an attorney/client relationship may begin…").)

1. Submission of Legal Questions

On some Internet websites, lawyers invite the submission of legal questions to which they will respond for a fee. (*See, e.g.*, http://www.aragdirect.com/AskAnAttorney (providing "one-time attorney access" for $39.95.) Other Internet websites, operated by non-lawyers, invite the submission of legal questions and invite lawyers to respond to those questions. (*See, e.g.*, http://www.lawguru.com.) Still other websites may post articles of general legal interest, with or without an option to "click here" to contact a lawyer. (*See, e.g.*, http://www.thehugheslawfirm.net.)

2. E-mail

E-mail raises similar related concerns. Law firm websites typically include the e-mail addresses of the firm's attorneys. (*See, e.g.*, http://www.hhlaw.com/professionals.) Accordingly, it has become easy for anyone to make direct e-mail contact with a practicing attorney with a plea for help, a formal request for advice, or an informal "question."

3. Blogs and Chatrooms

Blogs and chatrooms continue the same theme. (*See, e.g.*, http://www.scfamilylaw.com (blog); http://law.justanswer.com (chatroom).) These venues can seem deceptively casual and informal, but their informal nature will not preclude a layperson from relying on a lawyer's advice provided in that context.

Disclaimers can be an effective means of preventing a layperson from developing a "reasonable belief" that an attorney-client relationship was created.

IV. Conclusion

In sum, the Internet complicates the potential for ethical issues, including an expansion of the potential opportunities both for solicitation and for the unintended creation of attorney-client relationships.

Plaintiffs' Perspective on Ethical issues in New Age Litigation

Edward D. Robertson, Jr.

Bartimus, Frickleton, Robertson & Gorny, P.C.

715 Swifts Highway
Jefferson City, Missouri 65109
(573) 659-4454
chiprob@earthlink.net

EDWARD D. ROBERTSON, JR., "Chip" to everyone but the Social Security Administration, is a former member of the Missouri Supreme Court, having served on that Court from 1985 until 1998, and as Chief Justice of Missouri from 1991 to 1993. A graduate of Westminster College (1974), Mr. Robertson matriculated at the Perkins School of Theology at Southern Methodist University, before entering the University of Missouri-Kansas City School of Law, from which he graduated in 1977 with distinction and as an editor of the Law Review. He received an LL.M. from the University of Virginia School of Law in 1990. Mr. Robertson has been an assistant attorney general of Missouri, the Deputy Attorney General of Missouri, the chief of staff to Missouri Governor John Ashcroft, and in private practice now for over a decade since leaving the Supreme Court. Mr. Robertson, a partner in Bartimus, Frickleton, Robertson & Gorny, P.C., manages the law firm's class action and complex litigation practice as well as the firm's appellate work.

Plaintiffs' Perspective on Ethical issues in New Age Litigation

Table of Contents

Plaintiffs' Perspective on Ethical issues in New Age Litigation

I. The Ethical Issues

A. "Ethics"

"Ethics" means the rules of professional conduct that inform the actions of lawyers, judges and those involved in the legal system. It does not mean the broader notions of ethics in the sense of moral philosophy or theology.

B. Client Solicitation

1. Rules of Prof. Conduct Rule 4-7.2

(a) Subject to the requirements of Rule 4-7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter…

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:

(1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;

(2) a lawyer may pay the reasonable cost of advertising, written communication, or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17…

2. Rules of Prof. Conduct Rule 4-7.3

(a) In-person solicitation. A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative.

(b) Written Solicitation. A lawyer may initiate written solicitations to an existing or former client, lawyer, friend, or relative without complying with the requirements of this Rule 4-7.3(b). Written solicitations to others are subject to the following requirements:

(1) any written solicitation by mail shall be plainly marked "ADVERTISEMENT" on the face of the envelope and all written solicitations shall be plainly marked "ADVERTISEMENT" at the top of the first page in type at least as large as the largest written type used in the written solicitation;

C. Formation of the Attorney Client Relationship

The attorney-client relationship arises when "a person manifest to a lawyer the person's intent that the lawyer provide legal services for the person…and the lawyer manifests to the person consent to do so or the lawyer fails to manifest lack of consent to do so and the lawyer." *Restatement (Third) The Law Governing Lawyers*, §14.

D. Client Communication

1. Rules of Prof. Conduct Rule 4-1.4

(a) A lawyer shall:

(1) keep the client reasonably informed about the status of the matter;
(2) promptly comply with reasonable requests for information; and
(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. Rules of Prof. Conduct Rule 4-1.2

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation,…and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

E. Aggregate Settlements—Client/Client Conflicts

1. Rules of Prof. Conduct Rule 4-1.8

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients,…unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims…involved and of the participation of each person in the settlement.

F. The Duty of Candor to the Court

1. Rules of Prof. Conduct Rule 4-3.3

a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in Rule 4-3.3(a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

II. The Ethical Model Continuum

A. The Core Model: Direct One-to-One Relationship Driven

The ethical rules governing attorney conduct assume the existence of a one-to-one relationship between the attorney and the client. This model assumes a common interest between the lawyer and the client with direct and as frequent as necessary communication. This model is the foundation for the development of the ethical rules.

This model works well in the vast majority of the cases. These cases seldom make the headlines because they are the judicial system achieving justice in a quiet, efficient way.

Though the rule assumes individualized (tailor-made) justice, there are still disparities in the results even under this system.

A teen-aged couple is killed in a railroad crossing accident. Both families hire the same attorney to represent them in a wrongful death action against the railroad. The cases are severed for trial. The attorney, with full consent, decides to try the passenger's case first to establish liability without concern for comparative fault issues. The trial results in a four million dollar verdict for the plaintiff. The driver's case is tried second and results in a $20 million verdict with 40 percent fault to the driver.

B. The Movement Toward Collective Justice: The Class Action Model (1963)

The class action, though it involves large numbers of claimants, still drives from fictions created along the lines of the core model.

The attorney's representation is loosely premised upon the theory of unity of interests among the class members. The class representatives become the symbolic one-to-one clients who speak for and who are virtually identical to every other class member in all significant aspects. Rule 23 requires commonality, typicality and predominance to create this perception.

The number of lawyers is limited so that communication issues are generally manageable with the class representatives.

"Aggregate" settlements are subject to close court supervision that permits a discount of full value by a likelihood of success factor and the time-value of money, thus rationalizing the settlements on an economic basis.

The core model provided "cover" but commentators criticize the divorce of the class members' economic interests from those of the lawyer presuming in many incidents that lawyer greed drives the settlements and the courts are in cahoots with those who can clear a court's docket and free its time for other cases.

The reality is that class action rules reject application of ethical rules to serve both efficiency and economies of scale.

C. Mass Torts

A "mass tort" for our purposes involves personal injury suffered by droves of claimants ostensibly caused by a single or closely related products handled by one or multiple defendants.

Courts have been reluctant to apply class action rules because of commonality, typicality or predominance issues. Exceptions to this general rule are sometimes made for settlement classes, but those are problematic following *Amchem Products v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Like class actions, however, mass torts involve representation of thousands of claimants by a small number of attorneys.

1. The Economics

Individual cases are expensive to prosecute and high-risk propositions. Mass tort cases are likewise expensive and resolution can take a decade. These cases usually involve unusually complex technological, scientific and policy issues, extensive discovery, expert witnesses, and unusual questions of causation. An expenditure of millions, sometimes, tens of millions of dollars is not unusual—all without any assurance of a return on that investment. Spreading the risk across a large group of clients provides important benefits beyond client-specific cost and risk reduction. Client accumulation:

1) Creates opportunities to build economic incentives in defendants to settle the cases;
2) Creates economic certainty for defendants;
3) Encourages courts to consolidate cases for pre-trial matters (if not more);
4) Makes economic recovery available to the less-injured.

2. The Ethical Concerns

1) Methods used to accumulate clients;
2) Client communication/control issues;
3) Discounting the value of the most serious cases and inflating the value of the least serious cases to achieve settlement;
4) Defendant's chest pounding concerning its intentions and liability.

III. Mass Torts' Place in the System

1) The Goals of the Tort System: "The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims." *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex.2003)
2) Understanding the Incentives: Because of the sheer numbers of persons involved, mass torts necessarily place a tremendous burden on the judiciary. Successful resolution of these kinds of cases requires judges who are conversant with the incentives and who are prepared to exploit those incentives to reach a just solution.
3) Application of the Rules of Professional Ethics: Beginning with the asbestos litigation, several scholars have questioned whether mass torts lead to violations of professional ethical norms and/or whether mass torts warrant amendments to those. *See, e.g.*, Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl L. & Pol. Rev. 243 (2001)(jeremiad suggesting that ethical violations by plaintiffs' attorneys are rampant in most mass tort cases); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 N.W.L.R. 469 (1994)(suggesting that core principles of ethics do not serve efficiently in a world of mass torts); Charles Silver and Lynn Baker, *Mass Settlements and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997)(suggesting that a change in the aggregate settlement rule is appropriate in mass torts); and Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. Tex. L. Rev. 149 (1999)(suggesting as the title intimates).

IV. Client Accumulation

A. Client Solicitation

The rules against client solicitation "seek to preserve the professional ideal of the attorney-client relationship and are "based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." Comment, *A Critical Analysis*249 of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958).

B. Advertising

The First Amendment protects appropriate attorney advertising as commercial speech, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Even advertisements that are merely "potentially" misleading may be regulated only insofar as the regulation is no more broad than "reasonably necessary to prevent deception." *In re R.M.J.*, 455 U.S. 191 (1982). Advertisements targeted at a particular group are also protected. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)(Dalkon Shield ad containing drawing of intrauterine device permitted with appropriate disclosures).

C. Direct Solicitation of Clients

"To solicit means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing while 'advertising' is the calling

of information to the attention of the public, by whatever means." *Koffler v. Joint Bar Ass'n*., 51 N.Y.2d 140 (1980).

1) *Personal Solicitation*: The constitution does not prohibit discipline of a lawyer who "solicits a client in person, for pecuniary gain, under circumstances likely to pose…a significant potential for harm of the prospective client." *Ohralik v. Ohio State Bar Ass'n*., 436 U.S. 447 (1978).
2) *Mail Solicitation*: A letter presents no risk of harm to a potential client comparable to that a personal solicitation presents. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988)
3) *Solicitation by Third Parties*: Provided an organization has no financial interest in the attorney-client relationship, the constitution protects the right of an organization to provide information to its members that allows them to assert/protect legal rights. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

V. Aggregate Settlements

Aggregate settlements implicate client autonomy, the attorneys' duty to communicate with a client,

A. The American Law Institute Position

The ALI Reporters propose to bypass the aggregate settlement rule by creating two exceptions. The *first exception* applies when the total value of the aggregated claims is more than five million dollars and the total number of claimants is 40 or more. In these cases, the proposal allows individual claimants, after consultation with counsel, *to agree in advance to be bound to a proposed settlement when 75 percent of the claimants approve the settlement* or, "if the settlement significantly distinguishes among different categories of claimants, a separate 75 [percent] vote of each category of claimants" approves the settlement. Limited judicial review is available, but only if the challenge is brought within 90 days, and even then, the *settlement will be unenforceable only if the challenger's waiver was not adequately informed* or the 75 percent approval is not obtained or 40 person/five million dollar criterion are not met. The *second exception* applies when advance client waivers have not been obtained. Here the lawyer may seek approval for the fairness and adequacy of an aggregate settlement, but the proposal provides no guidelines for determining under what circumstances courts should agree to do so.

The reporters give two separate reasons for relaxing the aggregate settlement rule. First, they argue that the rule impedes multi-party settlement and is unnecessary to protect clients, given the 75 percent approval requirement. Second, they argue that waivers of important rights are routinely granted, and there is no reason not to honor such waivers to enable group decision-making.

B. The Dissenting View

The ALI Draft Proposal is seriously defective, however, in the reporters' efforts to allow plaintiffs' attorneys to bypass the aggregate settlement rule, primarily by having clients execute advance waivers of their right to its protections. The reporters

have neither offered evidence that the rule significantly impedes the settlement of mass lawsuits nor drafted provisions that provide sufficient alternative protection against inadequate and unfair settlements. Although purporting to honor client preferences and autonomy, the reporters ignore the danger that *overreaching attorneys will shape client preferences at a time when the clients have insufficient information to assess whether advance waivers are really necessary to obtain the benefits of collective litigation.* The current law of lawyering recognizes that *clients are often vulnerable* and thus provides numerous safeguards for clients beyond those generally provided by other law. One of those *safeguards is the current aggregate settlement rule*. The burden is on the reporters to justify significant changes to that rule, and they have failed to meet that burden.

Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?,* 57 DePaul L. Rev. 395, 422 – 23 (Winter 2008).

VI. The Elephant in the Room

1) The first elephant: Attacks on mass tort practice and the ethical issues raised center on arguments that plaintiffs' counsel have become separated from their clients – that the mass tort lawyer's goal is to maximize fees at the expense of real recovery for the client.
2) The second elephant: The economic reality is that full recovery for every claimant is unlikely in a mass tort setting because a) the threat of bankruptcy; b) difficulties in proving liability/causation; c) economic pressures on both parties create a "no one can afford to lose" scenario that results in a settlement that creates certainty for a defendant and a recovery for claimants across the range of provable claims.
3) The third elephant: Judges have the ability to manipulate cases, evidence, trial schedules, etc. to place the parties in a position that makes settlement the only rational option.

VII. The Proposals for "Correction"

A. Government Programs

Mass tort reform proposals all begin with asbestos as a justification. The reformers propose a government program to provide a solution similar to workers' compensation statutes.

The proposed Fairness in Asbestos Injury Resolution ("FAIR") Act, S. 852, would have taken asbestos cases out of the judicial system and moved them into a Department of Labor-administered $140-billion trust fund, paid for with assessments on businesses and insurance companies. The legislation proposed a cap on attorneys' fees at five percent of recovery instead of the typical 40 percent. The bill proposed imposing medical criteria.

B. Judge Weinstein

Mass consolidations aggressively managed by seasoned judges who understand the incentives for each side. Such management by the judiciary can reduce ethical dilemmas through judicial oversight/intervention.

VIII. The Marketplace Solution to Mass Torts

1) Accumulation of Clients—assists in determining the universe of claimants for purposes of the defendant determining its exposure.
2) Clients in mass torts are told at the outset that the likelihood of full recovery is remote due to the possibility of bankruptcy or of a settlement that will necessarily compromise value for reduced risk.
3) Defendants begin by asserting that the claims are without merit and that they will fight every case, no matter what their real view of the merits is or what they know the evidence will reveal in the end.
4) Cases consolidated in defendant's home state court or in MDL in federal court.
5) The sides invest substantial sums in creating incentives in the opposing side (by media, expert identification, interest groups, accumulation of cases, etc).
6) Early trials take place, providing assessments of the evidence, setting ranges of ver dicts, and providing glimpse of possibility of broad liability in the defendant.
7) At some point, these factors combine to create environment in which global settlement can be reached based on the economic assessments of the parties and actual trial experiences.
8) The process permits the marketplace of a particular case to create a matrix for recoveries for individual claimants.
9) In effect, the "market" operates to create a set of rules similar to workers' compensation statutes to provide compensation within a fixed asset allocation without the need of either the permanence or inflexibility provided government control (beyond that provided by the judiciary in its oversight role). As with workers' compensation, individually tailored justice suffers somewhat; severe injury is sometimes undercompensated while slight injury is overcompensated in an attempt to provide claimants recovery without the necessity of "proving" liability or the requirement of defeating defendant's defenses.

IX. Vioxx: The Market at Work

Choice of Law Considerations and Perspectives on Interlocutory Appeal

Mary Kay Kane

UC Hastings College of the Law

200 McAllister Street
San Francisco, CA 94102
(415) 565-4777
Kanem@uchastings.edu

MARY KAY KANE is the John F. Digardi Distinguished Professor of Law and Chancellor and Dean Emeritus at UC Hastings College of the Law. She is a graduate of the University of Michigan, having earned both her B.A. and J.D. degrees from that institution. Prof. Kane has written several articles and books in her major field of federal civil procedure and complex litigation, including being the principal author responsible for 13 volumes of the co-authored multivolume treatise *Federal Practice and Procedure*. She also served as the Co-Reporter for the American Law Institute's Project, *Complex Litigation: Statutory Recommendations and Analysis*, and as the Reporter for the Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990. Prof. Kane currently is an Adviser to the American Law Institute's Project, *Principles of the Law of Aggregate Litigation*.

Choice of Law Considerations and Perspectives on Interlocutory Appeal

Table of Contents

Choice of Law Considerations and Perspectives on Interlocutory Appeal

I. Introduction

My objective today is to discuss the special considerations that may be appropriate in making choice-of-law decisions and determinations whether to accept interlocutory appeals of various rulings in what the program has termed "New Age Litigation." And I will attempt to illustrate my general comments on these topics by using the relevant facts in the hypothetical *Euphoria* litigation involving Synthefuel. But before getting into the details of my assignment, I think it might be helpful if I shared with you why I think that these two issues—choice of law and interlocutory appeals—deserve special treatment in this type of litigation and why your role as appellate judges gives you a particularly excellent vantage point and opportunity to address some of the important issues that arise in these types of cases.

First, I will cover some definitions. As the program appropriately notes "New Age Litigation" takes various forms and poses a wide range of issues. For my purposes, however, the type of litigation that I am most interested in derives from the two American Law Institute projects with which I have been associated and in which the two matters that are the basis of my talk became important focuses in developing proposals for the better handling of these cases. So let me briefly describe the two projects and why choice-of-law and interlocutory appeals issues were deemed necessary components in achieving improvements to the handling of these cases by the judicial system.

II. The ALI's "New Age" Litigation

The first project on which I was engaged was as the Co-Reporter, with Arthur R. Miller, for the American Law Institute's *Complex Litigation: Statutory Recommendations and Analysis* (1994). That project was a five-year study, culminating in final approval by the Institute in 1994. (Since that was some 14 years ago, that alone should indicate to you that although the problems of this type of litigation have increased, particularly with the introduction of scientific evidence and the treatment of expert testimony, "New Age Litigation" has some long legs.) In any event, as defined for purposes of the ALI project, complex litigation embraced multiparty, multiforum litigation characterized by related claims dispersed in several forums and often involving events occurring over long periods of time. The objective was to develop new procedures to allow the consolidation of the units of a complex dispute that frequently were dispersed in multiple, overlapping lawsuits, and to design procedural mechanisms that would facilitate the handling of these cases, once consolidated, on a fair, efficient, and economical basis. Because we were charged with developing a solution to handle a nationwide problem that was evidenced in state and federal courts, it was understood that any potential solution would need to be statutory in nature.

While the ALI *Complex Litigation* project's attempt to develop a means to allow consolidation across jurisdictional lines certainly is not one of the issues facing state appellate judges today, the second part of our study, dealing with what special procedures need to be provided in order to allow the fair adjudication of these consolidated cases is directly relevant to the chal-

lenges that state courts currently face, as exemplified in the hypothetical Synthefuel facts that are presented. Further, I must note that one of the reasons I am very pleased to be able to share with you some observations this afternoon is because you actually have the ability to make change and create the jurisprudence that will respond to the issues posed by these mass consolidations. I say that noting that our statutory proposals were published in 1994 and, as is evident by the fact that we are here today, they obviously were not enacted or even seriously considered in Congress. However, since choice-of-law rules are judge-made law--and state law as well--and similarly since the scope of appellate interlocutory appeals is a matter peculiarly within your control, the state appellate judiciary is in an ideal position to address these challenges without needing to wait for legislative intervention. Thus, I hope that some of the insights we garnered in producing the *Complex Litigation* project may interest and entice you into addressing both of these areas.

The second ALI project on which I have had the privilege to participate is the *Principles of the Law of Aggregate Litigation* (Tentative Draft No. 1, April 7, 2008). That project is ongoing, and is led by an excellent team of reporters, one of whom, Bob Klonoff, you will be hearing from later this afternoon. I serve as one of the Advisers to the project. The *Aggregate Litigation* project takes as a starting point that massive aggregate litigation presents significant management problems and costs, and poses serious risks of under-representation. Thus, it needs procedures designed with these distinctive features in mind. The project then seeks to identify good procedural principles for handling aggregate lawsuits and, in this way, to help judges before whom these lawsuits are pending.

What is notable about both of these ALI projects, at least for this part of the program, is that they each recognize that the existing procedural rules for handling the kind of mass actions that are the currency of today's society do not adequately address the special needs presented and, in particular, that there may be a need for specialized choice-of-law treatment for these cases, as well as additional opportunities for interlocutory appeals. So let me turn briefly to explain why those conclusions pertain and the types of procedural solutions that these two projects put forth.

III. Choice-of-Law Considerations

A. The Need for Special Rules

The need to provide special rules to govern choice-of-law determinations in consolidated cases embracing hundreds or thousands of plaintiffs, multiple defendants, and conduct and injuries across multiple states is exemplified by the Synthefuel problem. The *Synthefuel* litigation is lodged in the state courts of Euphoria, yet plaintiffs are residents of six different states. Defendants, which include the original manufacturer and the developer of the product—UCLA and SynFuel Corporation—the regional distributors, and the local retailers in the chain of distribution also are located in several states. Plaintiffs are asserting multiple claims:

1) Personal injury, disease claims allegedly resulting from exposure to the product;
2) Trespass claims for some plaintiffs who show the presence of a component of Synthefuel in their bodies, although they are not yet diagnosed as having any disease;

3) Claims for negligent and intentional infliction of mental distress, as well as medical monitoring claims for some plaintiffs who have been exposed to the product, but who have not yet suffered any diseases or identified any detectable traces of Synthefuel in their bodies; and

4) A Consumer Protection Act claim under the law of the State of Grace, which is the home state of SynFuel Corporation.

Recognizing the geographic distribution of parties and events, the first question that must be answered is what law or laws should govern the determination of these claims. The answer to that question ultimately may influence, if not determine, whether these cases or some portion of them can remain consolidated for purposes of a trial. The trial court cannot simply apply forum law by default or it will risk violating the due process rights of some of the plaintiffs and defendants who otherwise may have had no contact with the forum. The Supreme Court emphasized this point in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985). And ever since that time, it has been clear that in order to determine the propriety of a multistate class certification, the trial court must make a choice-of-law determination at the outset of the case. The same principle obviously applies in mass consolidations, such as the *Synthefuel* litigation.

But here is where a problem emerges because in this type of litigation an important goal is to achieve judicial efficiency by allowing the coordinated processing of these cases in one court and that goal may be undercut if the choice-of-law rules suggest that many state laws are applicable so that to keep these cases together will result in an unmanageable mess. At the same time, the law or laws chosen must be fair to all the interests involved. For example, in the *Synthefuel* litigation, the plaintiffs urge that the Consumer Protection Law of the State of Grace should apply to all claims (and thereby authorize double damages) because that is defendant Synfuel Corporation's state of incorporation and principal place of business. Without addressing whether that might be the appropriate choice for claims between Euphoria plaintiffs and defendant Synefuel, the litigation also involves claims by plaintiffs who are not from either the state of Euphoria or the state of Grace against defendants who are not from either state. Thus, the simple application of the law of the State of Grace double-damages provision could result in a denial of due process to those other defendants because, if plaintiffs prevail, their damages would be doubled even though neither they nor the defendants had any connection with the state of Grace and their own states of residence do not authorize any such penalty. Conversely, with reference to the claims for mental distress and medical monitoring on behalf of plaintiffs who have neither any diseases nor any detectable traces of the product, to simply apply the forum state's law, which does not recognize such claims, to all the claims—even those of plaintiffs who have no contact with the state of Euphoria—may unfairly deprive those nonstate plaintiffs of relief that might be available in their home states. Thus, a more careful and nuanced evaluation of the appropriate governing law to select for those claims is necessary.

The constraint imposed by differing substantive laws on the ability to consolidate claims for adjudication is recognized in the ALI's *Aggregate Litigation* project. That project sets forth the principle that courts should encourage the aggregate adjudication of common legal or factual issues across multiple claims, but it recognizes that the content of substantive law should influence the decision whether to afford aggregate treatment because procedural rules should not be used to alter the content of substantive rights. (See *Aggregate Litigation §2.02, comment e.*) Thus, although that project does not deal with choice-of-law rules per se, its principles underscore that

determining what substantive law can apply and whether it can apply to all or many of the claims between the parties may be at the core of deciding whether aggregate treatment is permissible.

While state choice-of-law rules vary, the important thing to note for my purposes is that whatever choice-of-law approach is utilized in the forum state, it was necessarily developed in the context of two-party litigation and may not be suitable in this new type of proceeding in the sense that it would not readily recognize the varying interests that are involved. For example, if the traditional *First Restatement of Conflicts of Laws* (1935) approach is used, the law of the place of injury would apply to the personal-injury claims and that would necessitate reference to, in our hypothetical, six different state laws. The *First Restatement* never contemplated the kind of litigation we have here and thus never suggested whether or how that conclusion might be modified under these circumstances. If, as is more common today, the state of Euphoria utilizes the *Second Restatement of Conflicts of Laws* (1969) as its conflicts principles, it, too, will find no guidance on this kind of case. However, the rules to be applied will be much more complicated on each of these four claims. For example, with regard to the personal-injury claims, the *Second Restatement §146* provides that the state where the injury occurred will control the determination as to the rights and liabilities of the parties, "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will applied." And the determination of whether such a state does exist under §6 requires the analysis of seven factors designed to identify things such as the relevant state policies, the underlying policies in the particular field of law, the justified expectations of the parties, and "the needs of the interstate and international systems," to name a few. Further, as indicated in the original quote of §146, this type of analysis must be done on an issue-by-issue basis.

In two-party litigation this inquiry into the factual elements surrounding each claim and the weighing of the relevant state policies and interests is, if not easy, at least manageable, allowing the development of more precise judge-made choice-of-law rules that can be applied in future cases. However, those rules may not be appropriate in the context of these consolidated cases because they may ignore the interests of many of the parties. So the problem is how to do an appropriate analysis of what states may have the most significant relationship with the various claims and parties that are before the court.

B. What Types of Rules Should Apply

It is against this backdrop that it becomes clear that there is a definite need to develop some specialized choice-of-law rules to be applied in this type of litigation. And it is for that reason that the ALI's *Complex Litigation* project took up that challenge. In deciding that special choice-of-law rules may be appropriate, it is important to recognize that the adoption of special rules for complex, consolidated actions will not per se violate the due process rights of any of the parties, even though the application of those rules may mean that a particular state's law will be applied to a claim that, if it had been litigated individually, would have been decided under a different state's law. This is because there is no constitutional right to the application of a particular law to the facts of a case. See *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981). Due process is implicated only in ensuring that whatever choice-of-law standard is applied, it does not result in the application of the law of a state with which the parties have no contacts. See *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985).

Because the approach of the *Complex Litigation* project was to develop a model statute, we developed precise rules for different types of claims. But what is most important to recognize for purposes of today's discussion is that the choice-of-law standards that were developed in the project were premised on three things, two of which are relevant to state courts developing law on this subject. First, the governing-law decision should be decided by considering separately the different claims being brought against each defendant, rather than by attempting to identify at the outset a single law to be applied to the entire litigation and, further, the court should be given authority to divide the claims into issues when appropriate to recognize varying policies that may inform the development of the law on particular issues. Second, it would be highly desirable if a single state's law could be applied to a particular issue that is common to all the claims and parties involved in the litigation so as to maximize the efficient handling of the litigation and encourage consistent results. The approach also recognizes; however, that in some circumstances it may not be possible or desirable to have a single state's law control and that that conclusion may indicate that consolidation would be unworkable or that it should be limited to certain claims or issues.

As an example of how those underlying policies influence the kind of rule that might apply, attached in an Appendix to this paper is the proposed rule that we included to deal with mass torts, such as the kind of case presented in the *Synthefuel* litigation (*§6.01*). I include that section not to suggest that it necessarily is what any particular state court would need to apply, but to indicate the kinds of considerations that might appropriately be taken into account when determining the law to govern liability questions in consolidated mass-tort litigation. I also note that we recognized a need to provide separate choice-of-law rules to govern issues such as the statute of limitations, damages, and the availability of punitive damages (*§§6.04-6.06*). The critical elements that the mass-tort rule sets forth are:

1) The objective of applying a single state's law to similar tort claims against a particular defendant;
2) The authority of the court to divide the action into subgroups of claims, issues, or parties to foster consolidated treatment;
3) The need to examine the law of the states of the place of injury, the place where the challenged conduct occurred, and plaintiffs' and defendants' residences to determine which states have policies that would be furthered by the application of their laws; and
4) Precise rules as to how to select between state laws when more than one state has such an interest in having its policies furthered.

It is these kinds of concerns that should shape the choice-of-law decision in the *Synthefuel* litigation and other "New Age" litigation and it is these kinds of concerns that need the attention of the state appellate courts in order to develop a body of doctrine as to how these cases can or should be appropriately handled.

IV. Interlocutory Appeals in Mass Consolidated Litigation

The second issue on which I have been asked to opine is whether or when it would be appropriate to allow interlocutory appeals in the kind of consolidated litigation represented by the *Synthefuel* example. The need for making available interlocutory appeals for some of the

rulings in mass consolidations was recognized in both ALI projects. Why? There are several reasons.

First, given the scope of the litigation and the enormous costs associated with it (in terms of both time and money), an erroneous ruling on several of the procedural matters concerning how to structure or try the cases will result in an enormous waste of trial time and party resources if the ruling is reversed. While in ordinary litigation denying an interlocutory appeal also may result in a wasted trial, the order of magnitude of the stakes in these cases justifies earlier intervention by the appellate courts in some instances. Second, because this "New Age" litigation raises new challenges and issues, it requires the development of judicial approaches and procedural law to govern its processing and that is best achieved by allowing appellate court review to develop those standards. Thus, earlier intervention offers the potential for the necessary legal framework to develop and to set appropriate boundaries on when and how these cases are to be tried. The key is in determining what issues are sufficiently unique or determinative to merit this intervention. That, of course, is exactly what state appellate courts have the capacity to do utilizing existing state interlocutory appeal mechanisms, such as extraordinary writs or special interlocutory appeals statutes.

To explore some possible considerations, let me tell you about the types of rulings in each of the ALI projects that were identified as potentially meriting such early review and why that was so. Then I will turn to the *Synthefuel* problem and talk about how the rulings there might be viewed for purposes of deciding whether to grant review.

A. Interlocutory Appeals in the ALI Projects

The *Complex Litigation* project identified three areas in which it was determined that interlocutory review was particularly appropriate. These included: review of the trial court's decision as to whether and what issues would be accorded common treatment (*§3.07(b), comment c.*); review of the trial court's decision regarding the governing law or laws to be applied (*§6.07(b)*); and review of the liability determination if it was separately adjudicated on a common basis, before individual damage trials went forward (*§3.07(c), comment d*). In each of these instances immediate appeals were not as of right, but were subject to the discretion of the appellate court and, sometimes, also required the concurrence of the trial court. Thus, under these proposals, for appeals of the decision regarding what issues could be tried on a common basis, the reviewing court was given complete discretion to decide whether to take the appeal, but when determining to take an appeal from the liability determination, the appellate court was to evaluate whether taking the appeal "is likely (i) to avoid harm to the party seeking review and (ii) to promote the efficient and economical resolution of the litigation." In contrast, appeals of the governing law determination required the trial court to certify that the issue was ripe for review and that an immediate appeal from the order "may advance materially the ultimate termination of the litigation."

The distinctions between these criteria I must leave to you to consider at another time. What is most important for purposes of today's program is that each of these areas was identified as needing some special treatment in order to encourage earlier appellate scrutiny than ordinarily would occur. Thus, the potential for early review of the trial court's decision regarding issues deserving common treatment reflected concerns that the potential impact of an erroneous decision on that issue would be to force the parties to incur what might be prohibitive litigation costs, the subordination of their individual claims or defenses, and undue delay, all of

which might ultimately affect the outcome of the litigation. Similar concerns that an erroneous choice-of-law decision in complex litigation would result in enormous waste and delay in ultimately resolving the controversy drove the decision to authorize discretionary appeals there. And, finally, it was determined that providing for one review of the common liability decision avoided the possibility of multiple appeals of the same matter following the various damage judgments that ultimately might be entered.

The *Aggregate Litigation* project also recognizes three areas where it deemed interlocutory review to be particularly important. First, it provides that one of the underlying principles that should guide a court's determination of whether aggregate treatment of a common issue should be given should be consideration whether the resolution of the common issue would be subject to appellate review (*§2.02(a)(3), comment i*). Second, it suggests that the court's authority to authorize an "issue class action," that is the aggregate treatment of only some of the issues in the litigation, should be conditioned on authorizing an aggregate interlocutory appeal of any determination of the common issue on the merits (*§2.09(a)(3), comment b*). And third, in a separate chapter dealing with aggregate settlements, it suggests the need to allow appellate review of orders rejecting proposed class settlements when parties from both sides of the case join in the appeal and the trial court's rejection is not conditional (*§3.12*). While the rationale for the first two opportunities for discretionary review is similar to the one that I just described for the *Complex Litigation* project, the opportunity for interlocutory review for rejected settlements was premised on the recognition that if that rejection is not justified, "the court and parties will have wasted valuable time litigating a case that could have been settled on terms acceptable to both sides."

It is these same kinds of considerations—ones that reflect an understanding that the special nature of mass consolidated cases requires some unique or specialized trial-court rulings—that suggest the appropriateness of state appellate courts today exercising their existing interlocutory appeals authority in appropriate circumstances to review some of the key trial-court rulings in these cases. Not only may immediate review avoid the potential for enormous cost and burdens on the parties and the trial-court system, but also it will allow the development of the law surrounding how and whether these cases should be allowed to go forward on an aggregated basis.

B. Interlocutory Review in the *Synthefuel* Litigation

Having discussed some of the areas and concerns that suggest the need for a receptive attitude toward interlocutory review, let me complete my presentation by briefly examining the four rulings in the *Synthefuel* litigation on which the defendants unsuccessfully sought interlocutory review.

The first ruling was the court's denial of a motion to dismiss based on lack of jurisdiction and venue and improper joinder of claims and parties. The jurisdiction and venue objections involve no peculiar issues related to the fact that these are consolidated actions and thus do not present any particular reason why they should be treated differently than they would be in two-party litigation. Thus, if the state appellate system does not allow interlocutory appeals of such motions ordinarily, there is nothing to suggest those rules should be altered for the *Synthefuel* litigation. As presented, the same conclusion would seem to apply to the denial of the motion to dismiss based on improper joinder. But, here, it may be that a more nuanced view might be helpful. At this preliminary stage in the action, appellate review appears premature. This is still early

in the litigation and efficiencies may be gained by keeping the claims together at this stage. The trial court has not yet resolved how these claims will be tried. If; however, such a motion comes at a stage closer to trial when the court is ruling as to what claims may be tried jointly and subject to common proof, review might be useful because the harm flowing from an erroneous decision at that later stage could be great.

The second ruling was the denial of a motion to dismiss the Grace Consumer Protection Act claims on the grounds that the application of the law of Grace to all the claims violates due process. This choice-of-law decision is a clear legal issue that could benefit from interlocutory review. This also is true of all of the choice-of-law determinations made by the *Euphoria* trial court. This is particularly the case if you accept my earlier suggestion that it is important in these consolidated actions to develop and apply choice-of-law standards that are designed to balance the desire for judicial efficiency and economy and the rights of the litigants to avoid unfair surprise. Thus, early appellate scrutiny here provides the opportunity to develop the appropriate standards for these cases, as well as to supervise the trial courts that are operating in "uncharted waters."

The third ruling was the denial of a motion for bifurcated trials. To the extent that defendants' arguments for immediate appellate review rest on the potential unfairness of having the jury be presented with evidence that might be admissible for one plaintiff or defendant, but not as to others, this does not seem to be different from similar arguments that might be made in litigation involving fewer parties and on which the appellate courts generally may not want to intrude. To the extent that the type of trial-court order that is implicated involves a broader range of issues and, given the number of parties involved, the potential for increased prejudice, it may be appropriate for earlier appellate intervention. The key is that the appellate court in making the determination whether to allow the appeal should balance the competing interests and whether a ruling might help resolve not only this litigation, but also set useful precedent for future consolidated cases.

The fourth, and final, ruling was the motion to exclude expert testimony and for summary judgment. Again, this area is one that depends heavily on the facts. The need to continue to develop the legal standards for the admission of expert, scientific testimony remains strong, suggesting that appellate review might be useful. On the other hand, the same kind of issues arise in two-party litigation and the only distinctive feature in the *Synthefuel* litigation is the fact that, if the trial court was in error, there will be enormous savings in trial time and litigant cost, given the size of the litigation, if it can be disposed of on summary judgment rather than at trial. But that same argument can be made about any pretrial motion that could dispose of these consolidated cases before trial, so that alone should not be the determinative factor. In other words, to my mind this is a close case. In the hypothetical, however, the parties sought a writ of prohibition as the means of bringing this matter to the appellate court and, given the extraordinary nature of that form of appellate relief, it may be understandable as to why it is denied. For me, the question is whether the state appellate court ought to consider such a ruling under other, less extraordinary, routes, if their state statutes provide them a range of discretion in such matters.

So, as even this brief analysis reveals, while some of the pretrial decisions can readily be identified as either needing or not needing early review, many are more difficult to categorize and require a more careful evaluation of the facts and circumstances leading to the ruling. But the key in all instances is the desirability of recognizing that in this type of litigation there may be special needs that should be examined when determining whether interlocutory review is appropriate.

Appendix

ALI Complex Litigation: Statutory Recommendations and Analysis (1994)

§6.01. Mass Torts

(a) Except as provided in §6.04 through §6.06, in actions consolidated under §3.01 or removed under §5.01 in which the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a tort claim by applying the criteria set forth in subsections (c)-(e) with the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant.

(b) If the court determines that the application of a single state's law to all elements of the claims pending against a defendant would be inappropriate, it may divide the actions into subgroups of claims, issues, or parties to foster consolidated treatment under §3.01, and allow more than one state's law to be applied. The court also may determine that only certain claims or issues involving one or more of the parties should be governed by the law chosen by the application of the rules in subsections (d)-(e), and that other claims or parties should be remanded to the transferor courts for individual treatment under the laws normally applicable in those courts. In either instance, the court may exercise its authority under §3.06(c) to sever, transfer, or remand issues or claims for treatment consistent with its determination.

(c) In determining the governing law under subsection (a), the court shall consider the following factors for purposes of identifying each state having a policy that would be furthered by the application of its laws:

(1) the place or places of injury;

(2) the place or places of the conduct causing the injury;

(3) the primary places of business or habitual residences of the plaintiffs and defendants.

(d) If, in analyzing the factors set forth in subsection (c), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its law, the court shall choose the applicable law from among the laws of the interested states under the following rules:

(1) If the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs.

(2) If subsection (d)(1) does not apply, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and a defendant has its primary place of business or habitually resides in that state, that state's law governs the claims with respect to that defendant. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(3) If neither subsection (d)(1) nor (d)(2) applies, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(4) In all other cases, the law of the state where the conduct causing the injury occurred governs. When conduct occurred in more than one state, the court shall choose the law of the conduct state that has the most significant relationship to the occurrence.

(e) To avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of other factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (c), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (d).

Appellate Perspectives on Pretrial Motions:

In Limine, Daubert, *and Summary Judgment*

Bernard Taylor, Sr.

Akila McConnell

Alston & Bird LLP

1201 W. Peachtree St.
Atlanta, GA 30309
(404) 881-7000
bernard.taylor@alston.com

BERNARD TAYLOR SR. is the chair of Alston & Bird LLP's Products Liability Group. He concentrates his practice on complex disputes including commercial litigation, products liability and toxic torts lawsuits.

AKILA MCCONNELL is an associate in Alston & Bird LLP's Environmental and Land Use Group. Her practice is focused on complex environmental and toxic tort litigation.

Appellate Perspectives on Pretrial Motions:
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Table of Contents

Appellate Perspectives on Pretrial Motions:
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The American judicial system is founded upon the principle of fairness and equitable justice. Indeed, "Equal Justice Under Law" is etched on the façade of the building that houses the ultimate judiciary body in this country, the Supreme Court of the United States. Yet, some trial courts, dubbed "judicial hellholes" by defense attorneys and "magic jurisdictions" by plaintiffs' attorneys, fail to abide by this principle and instead "systematically apply laws and court procedures in an inequitable manner." Am. Tort Reform Ass'n, Judicial Hellholes 2007, iii (2007), http://www.atra.org/reports/hellholes/report.pdf; *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17-3 Mealey's Litig. Rep. Asbestos, Mar. 1, 2002 at 1, 6 ("magic jurisdictions" are those "areas where what happens in court is irrelevant because the jury will return a verdict in the favor of the plaintiff").

In limine, *Daubert*, and summary judgment motions are intended to eliminate biases and insufficient evidence so that a jury may view a case from a fair and balanced perspective to provide equal justice for all parties. Trial judges in inequitable jurisdictions pave the way for frivolous litigation by refusing to dismiss claims founded on junk science or prejudicial evidence, and plaintiffs' attorneys flock to these jurisdictions to file complex litigation.

A textbook example of a judicial hellhole/magic jurisdiction is the *Propulsid* litigation that involved a trial court that permitted bad science, biased information and insinuations, and unsupported evidence to reach the jury. As a result, after four weeks of trial, the jury spent less than two hours deliberating before awarding ten million dollars to each of ten plaintiffs, without regard to the individual facts of each plaintiff's claim.[1] *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 35 (Miss. 2004); Victor E. Schwartz, Leah Lorber, & Rochelle M. Tedesco, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts From Becoming Judicial Hellholes*, 27 Am. J. Trial Advoc. 215, 219 (2003-2004). The overwhelming majority of the jury's award was for pain and suffering; for example, one plaintiff had incurred only $535 in actual medical expenses compared with the ten million dollar award she received from the jury. *Id*. at 220. On appeal, the Mississippi Supreme Court took bold strides to eliminate this judicial hellhole by reversing the judgments of the trial court and remanding the case for a new trial. *Janssen*, 878 So. 2d at 63.

Even in the vast majority of trial courts where judges provide equitable rulings, new age litigation confuses the legal and procedural requirements for *in limine*, *Daubert*, and summary judgment motions by adding immature science and technology to undeveloped law and large numbers of dissimilar plaintiffs and defendants.[2] Appellate courts are, thus, challenged to curtail trial courts that fail to act as appropriate guardians of justice, while developing novel law on burgeoning products and sciences that can be used in diverse cases. This article argues that an appellate court must: 1) be vigilant to reverse judgments in which prejudice and bias have swayed the jury; 2) gather knowledge and accept creative solutions to eliminate junk science; and 3) promote the use of case management orders, such as Lone Pine orders,[3] to weed out unsupported claims early in the litigation.

I. Motions *In Limine*: Preventing Prejudice

A. Overview of *in Limine* Rulings

A motion *in limine* requests, prior to trial, that the trial court enjoin an opponent from using or mentioning potentially prejudicial evidence at trial.[4] An *in limine* ruling can "shield the jury from unfairly prejudicial or irrelevant evidence," thus "foster[ing] efficiency for the court and for counsel by preventing needless argument at trial." *Ebenhoech v. Koppers Indus., Inc.*, 239 F. Supp. 2d 455, 461 (D.N.J. 2002).

Because the Federal Rules of Evidence favor the admission of all relevant evidence, a federal court may consider "preliminary questions" of the admissibility of evidence. Fed. R. Evid. 104(a), 402. Thus, though not explicitly authorized by the Federal Rules of Evidence, it has become practice in the federal courts to make pre-trial *in limine* rulings pursuant to the trial court's inherent authority to manage trial. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). Similarly, state courts have permitted the granting of a preliminary motion to secure the exclusion or inclusion of anticipated prejudicial matter as within the sound discretion of the trial court. *See* Jeffrey F. Ghent, *Modern Status of Rules as to Use of Motion In limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, 63 A.L.R. 3d 311 (1975) (providing list of states that have authorized the use of motions *in limine*).

However, a motion *in limine* should be granted only if the evidence sought to be excluded is "clearly inadmissible for any purpose;" otherwise, the evidentiary ruling should be deferred until trial so the questions of relevancy and potential prejudice may be resolved in the proper context. *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); see also *Forsyth County v. Martin*, 610 S.E.2d 512, 518 (Ga. 2005) (the grant of a motion *in limine* excluding evidence must be "exercised with great care" because, to be granted, there must be "no circumstance under which the evidence under scrutiny is likely to be admissible at trial); *Tatum v. Barrentine*, 797 So. 2d 223, 228 (Miss. 2001) (a motion *in limine* should be granted only when (1) the evidence in question will be admissible at trial and (2) the mere offer, reference, or statements made during trial concerning the evidence will tend to prejudice the jury). Further, because *in limine* rulings are speculative and made without the benefit of the context of the trial, such rulings are not binding on the trial court. *Ohler v. United States*, 529 U.S. 753 (2000).

Prior to 2000, federal courts took different approaches as to whether a losing party to an *in limine* decision must renew an objection or offer of proof when the evidence is offered at trial in order to preserve a claim of error on appeal. See *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) (requiring renewal at the time evidence is to be offered at trial); *Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) (not requiring renewal if it was ruled on definitively by the trial court judge). In 2000, the Federal Rules of Evidence were amended to read that if the court makes a "definitive ruling" admitting or excluding evidence, a party need not renew its objection to preserve the claim of error for appeal. Fed. R. Evid. 103(a); *see also* Fed. R. Evid. 103(a), Advisory Committee Note (placing the "obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.")

State courts have also taken different approaches to the preserving objections to *in limine* rulings. Some have found that a losing party must renew the objection at the time the evidence would be offered at trial to preserve the claim of error for appeal. See *Gee v. Treece*, 851 N.E.2d 605 (Ill. App. Ct. 2006); *Day Adver. Inc. v. Devries & Assocs., P.C.*, 217 S.W.3d 362 (Mo. Ct.

App. 2007); *Evans v. Family Inns of Am., Inc*., 540 S.E.2d 46 (N.C. Ct. App. 2000). Other courts do not require the renewal of the objection if the trial judge ruled definitively on the motion *in limine*. See *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn. Ct. App. 2000); *Sims v. Collins*, 762 So. 2d 785 (Miss. Ct. App. 2000).

Because the trial court is in the "best position" to determine the prejudicial effects of testimony and evidence, an appellate court will not reverse a trial court's *in limine* ruling absent an abuse of discretion. *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505 (Ala. 2000).

B. Appellate Resolution of the Worst-Case Scenario

The *Propulsid* litigation was brought against Janssen Pharmaceutica, Inc., by 155 plaintiffs in Jefferson County, Mississippi alleging cardiac injuries caused by Propulsid, a medication prescribed for gastroesophageal reflux disease. Propulsid first became widely available in 1993. After discovering certain cardiac adverse reactions associated with the medication, Janssen Pharmaceutica limited the distribution of Propulsid in 2000, and litigation was filed shortly thereafter. The Mississippi trial court joined all plaintiffs but bifurcated the compensatory and punitive damages portions of these cases.[5] *Janssen Pharmaceutica*, 878 So. 2d at 36-45.

Plaintiffs based their negligent misrepresentation claim on the Food & Drug Administration's objections to four Janssen promotional materials, upon which objection; Janssen modified or withdrew those promotional materials. The trial court granted Janssen's motion for directed verdict on the misrepresentation claim due to the plaintiffs' failure to offer any proof of reliance. However, the trial court permitted the admission of these documents, and denied a motion that would have precluded plaintiffs from referring to those marketing materials, though they were relevant only to the dismissed claim. *Id*. at 61.

Throughout closing arguments, though the only issue before the jury was inadequacy of warnings, plaintiffs' counsel argued that Janssen's promotional campaign was "false and misleading" and Janssen was "lying and cheating" to the FDA. In closing argument, plaintiffs' counsel stressed the defendants' "guilt" and that the jury should "send a message" to Janssen by basing the amount of damages solely on the finances of the defendants. For example, plaintiffs' counsel discussed a passage from the Bible about Jesus throwing out the moneychangers whose greed defiled the temple. Counsel remarked, if today Jesus,

> [W]alked up to that temple, you know what would be at the top of that temple? It would be Jannsen and Johnson & Johnson at the top of that temple when He walked in…They are still in there…They are in the temple, and they are asking you to let them keep it.

Schwartz, *supra*, at 226-27.

The Mississippi Supreme Court in its review of the *Propulsid* litigation questioned the relevancy of the promotional documents since the plaintiffs failed to prove that the prescribing physicians relied on any alleged misrepresentations. Further, the court condemned the statements made by plaintiffs' counsel and found that the prejudicial and inflammatory argument alone merited reversal of the verdict. The court explained:

> Essentially, Plaintiffs' counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to

> inflame and prejudice the jury. In awarding each Plaintiff $10 million across the board, the jury responded to this inflammatory and improper argument.

Janssen, 878 So. 2d at 62. Evidence of purported corporate wrongdoing or irrelevant injuries do not establish compensatory damages, and should not be used to inflate pain and suffering damages. See *Smith v. Wyeth-Ayerst Labs. Co.*, 278 F. Supp. 2d 684 (W.D.N.C. 2003) (granting a motion *in limine* to bar evidence of adverse reactions from fen-phen that plaintiff did not suffer).

Following the lead of the Mississippi Supreme Court, the remainder of this paper focuses on suggestions to appellate judges to ensure that evidence presented to the jury is relevant to proof of the claim and not prejudicial.

II. *Daubert*: Eliminating Junk Science

A. Overview of *Daubert*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court confirmed the important role of trial courts as gatekeepers to prevent "junk science" from entering the courtroom.[6] The trial judge's role as gatekeeper is critical because "[i]n the mind of the typical lay juror, a scientific witness has a special aura of credibility." Schwartz, *supra*, at 220 (quoting Edward J. Imwinkelried, *Evidence Law and Tactics for the Proponents of Scientific Evidence, in Scientific and Expert Evidence* 33, 37 (Edward J. Imwinkelried ed., 2d ed. 1981)). As recognized by the Supreme Court, "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. The Federal Judicial Center in its 1999 Report to the Mass Torts Working Group, commissioned by Chief Justice William Rehnquist, reported that, "Unanticipated biochemical interactions may provide regular grist for the mass torts mill. Yet, whether a specific product has caused-or is even capable of causing-injuries to its users represents a difficult question for scientists as well as generalist judges and juries to answer." Thomas B. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 338 (1999). Thus, particularly in complex cases and new age litigation, jurors are more likely to rely on the testimony of expert witnesses rather than utilizing their own scientific experience and background. Schwartz, *supra*, at 221.

In *Daubert*, the Court concluded that Federal Rule of Evidence 702 superseded the 70-year old *Frye* general acceptability test, under which scientific testimony was deemed admissible only if the underlying scientific technique was "sufficiently established to have gained general acceptance" in the relevant scientific community. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Daubert* Court rejected this test, and instead found scientific testimony admissible if the testimony "assist[ed] the trier of fact" and the trial judge determined that the testimony and evidence was "good science" based on the scientific method, and relevant and reliable. *Daubert*, 509 U.S. at 593. The effect and purpose of *Daubert* was to take "the decision-making process out of the hands of the scientific community, and [to] place[] it in the hands of the trial judge." Thomas L. Cooper, *Expert Witness Testimony---*Frye *Revealed---The Impact of* Trach-Fellin II, 75 Pa. B.A. Q. 10, 11 (2004). In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court extended the *Daubert* rule to all expert witnesses, both scientific and non-scientific, who rely on skill or experience to formulate opinions.[7]

To assess whether scientific evidence is reliable, the *Daubert* Court listed four non-exclusive factors that the trial court should consider:

1) Whether the theory or technique at issue is susceptible to testing and has been subjected to such testing;
2) Whether the theory or technique has been subjected to peer review and publication;
3) Whether there is a known or potential rate of error associated with the theory or technology; and
4) Whether the theory has been generally accepted in the scientific community.

In *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), the Court affirmed that a judge may reject an expert's rationale, even where the methods and principles which formed the expert's opinion are recognized as valid. The amendments to the Federal Rules of Evidence in 2000 reflect *Daubert* and its progeny, and expert testimony is admissible if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

Daubert rulings are particularly important in toxic tort litigation, because to recover, a plaintiff must demonstrate both that the product causes injuries in the general population (general causation), and also that the product caused the injury to that particular plaintiff (specific causation). *McClain v. Metabolife Int'l., Inc.*, 401 F.3d 1233, 1237-1241 (11th Cir. 2005); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1106 (8th Cir. 1996); *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042 (D.N.J. 1992). Thus, epidemiologists, pharmacologists, and toxicologists are sought to testify on the potential of injury to the general population, while specialist physicians like cardiologists and internists are sought to testify on specific causation.

B. Appellate Resolution of the Worst-Case Scenario

In the *Propulsid* litigation, the plaintiffs introduced cardiology and pharmacology experts who testified that in "relatively rare" cases, Propulsid may produce heart-related side effects, "as disclosed in Propulsid's labeling." *Janssen*, 878 So. 2d at 59. The cardiology and pharmacology experts did not examine the plaintiffs in the trial group, and did not provide opinions on specific causation. Plaintiffs introduced two local family physicians, an internist, and a psychologist as the specific causation experts. None of the physicians had specialized in pharmacology or epidemiology, or published studies about Propulsid or similar drugs. *Id*. The testimony given by these so-called experts amounted to rhetoric; one expert explained, for example, that someone who takes Propulsid is "like a wounded gazelle" that is "likely going to be eaten for dinner" by a lion. Schwartz, *supra*, at 222.

The Supreme Court of Mississippi responded by finding that not only did plaintiffs' expert testimony fail to address and account for preexisting conditions and alternative causes, the defense experts uniformly testified that plaintiffs' heart-related symptoms were typical of their preexisting conditions. The court found substantial basis to believe that the jury awarded damages "based entirely on passion and prejudice," and found that this issue alone merited a new trial. *Janssen*, 878 So. 2d at 61.

In addition to courts like the Supreme Court of Mississippi rejecting expert testimony based on anecdotal data, in the aftermath of *Daubert*, courts have rejected expert testimony based on unrelated scientific research. *Joiner*, 522 U.S. at 136 (holding that an epidemiological study showing PCBs injected into infant mice caused a different type of cancer than that suffered by the plaintiff did not meet *Daubert* scrutiny). Other courts have held that, for an expert opinion on causation to be relevant, the expert must base his testimony on epidemiological studies that demonstrate the product in question at least doubles the risk of the disease from which the plaintiff suffers. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DePaul L. Rev. 335, 349 (1999-2000).

An unexpected consequence of *Daubert* is the growing body of litigation-generated science—scientific research generated for and funded by plaintiffs' law firms to provide scientific literature for new product litigation, in order to meet the *Daubert* threshold. William L. Anderson, Bary M. Parsons, Drummond Rennie, *Daubert's Backwash: Litigation-Generated Science*, 34 U. Mich. J.L. Reform 619 (2000-2001). While litigation-generated science may not inherently be bad science, it avoids the scrutiny and objectivity of peer-reviewed scientific research. Anderson, *supra*, at 621. For this reason, Judge Kosinski in the *Daubert II* case asserted:

> That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science…For one thing, experts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration.

Daubert v. Merrell Dow Pharms., Inc. (Daubert II), 43 F.3d 1311, 1317 (9th Cir. 1995).

On the other hand, some analysts have argued that the problems of bias, relevancy, and reliability are not unique to litigation-generated science, but rather common to all science used in a litigation setting. These analysts argue that cross-examination is the best tool to deconstruct litigation-generated science and claim that few peer review processes are as "stringent or as probing" as cross-examination in an adversarial setting. Leslie I. Boden and David Ozonoff, *Litigation-Generated Science: Why Should We Care?*, at http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2199311.

As a practical matter, most courts have rejected litigation-generated science because the methodology was not "generally accepted, the tests were biased by the litigation link, and the tests were either not published or the publication occurred without disclosure of the litigation connection." Anderson, *supra*, at 663. For example, in the underlying *Daubert* case, the plaintiffs' epidemiological experts did not themselves conduct studies on the effects of the medication Bendection, but rather "reanalyzed" studies published by other scientists, none of whom reported a statistical connection between Bendectin and birth defects. *Daubert II*), 43 F.3d at 1311. On remand from the Supreme Court, the *Daubert II* Court noted that such reanalysis was not published and thus was not subject to "the usual rigors of peer review" that may have "brought to light the more glaring arithmetical errors" in plaintiffs' experts' testimony. *Id*. at 1318 n.7; see also *Valentine v. Pioneer Chlor Alkali Co.*, 921 F. Supp. 666 (D. Nev. 1996) (excluding expert testimony where the expert conducted an epidemiological study on only seven individuals and all of the exposed participants were current plaintiffs or were previously involved in the litigation). Similarly, in *Ruffin v. Shaw Industries, Inc.*, 149 F.3d 294, 298-99 (4th Cir. 1998), the court of

appeals excluded expert testimony on the toxic effects of carpet samples because the EPA, an independent laboratory, and two carpet manufacturers were unable to replicate the expert's findings.

C. Innovative Solutions

1. Court-Appointed Experts

In order to resolve these problems associated with expert testimony, trial courts have utilized a number of innovative solutions. Federal Rule of Evidence 706 allows trial courts to appoint experts to address issues of scientific uncertainty, or to appoint a technical advisor to assist the judge in understanding complex technical information. Courts rarely enlist court-appointed expert assistance in order to preserve the adversarial process, and will only appoint experts in "exceptional cases in which the ordinary adversary process does not suffice."[8] *In re Joint E. and S. Dists. Asbestos Litig.*, 830 F. Supp. 686, 693 (E.D.N.Y. 1993). However, courts have found that court-appointed experts may be critical in "complex mass tort problems" because,

> [T]he epidemiological and other scientific questions are complex and riven with uncertainties and interdependent variables; the number of persons affected runs into the hundreds of thousands; the courts cannot proceed toward a just and equitable result without some reasonably firm data projecting the numbers and volume of claims at issue; and all parties have strong and conflicting interests in the character of that data.

Id.

For example, in the breast implant multi-district litigation, Judge Pointer of the District Court for the Northern District of Alabama appointed a national panel of neutral experts to provide evidence relating to the reliability of evidence linking systemic diseases with silicone gel breast implants. After more than two years of study and a cost to the parties of $800,000, the four panel members reported no sufficient scientific basis to link implants to connective tissue or immune system diseases. Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 Va. L. Rev. 801, 802 (2000).

In contrast, rather than relying on Federal Rule of Evidence 706, Judge Robert Jones of the District Court for Oregon used his inherent authority to appoint four technical advisors to furnish him with reports on the reliability and admissibility of complex scientific evidence. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996). Counsel was permitted to cross-examine these technical advisors. *Id*. Based in part on these experts' reports, Judge Jones excluded plaintiffs' proferred expert testimony in a *Daubert* hearing. *Id*. at 1414.

Another approach has been developed by the American Medical Association and Tennessee Bar Association, under which a Tennessee judge needing technical assistance in a case involving medical evidence may consult a Tennessee physician's panel to recommend three highly qualified experts from a neighboring state. Jenny B. Davis, *Junk Science RX*, 93-DEC ABA J. 13 (2007); see also *Judge Thomas Leads Effort on Streamlining Malpractice Cases*, Oct. 26, 2005, http://www.chattanoogan.com/articles/article_74807.asp. The judge, with the consent of the attorneys, will select one of the three recommended physicians as an independent expert. The expert will then review the opinions of any medical experts retained by the litigants

and issue an assessment of their reliability pursuant to *Daubert* factors. *See also* Cecil B. Wilson, Report of the Board of Trustees on Pilot Program on Independent Experts and Testimony in Civil Cases, (Oct. 6, 2006), http://www.ama-assn.org/ama1/pub/upload/mm/475/bot3i06.doc. This approach is unique in that it utilizes the expertise of the physicians to identify who should be considered an expert. *See also* David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 Alb. L.J. Sci & Tech. 517, 531 (2002-2003) (proposing that lawmakers and scientists provide a minimum standard for what constitutes an expert in all major scientific fields).

A Federal Judicial Center Study examined cases in which judges had appointed experts found that judges who appointed experts considered the experts to be helpful. Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* 4-5 (1993). However, the study also found that "judges and juries alike tend to decide cases consistent with the advice and testimony of court-appointed experts." *Id*. For example, Judge Carl Rubin appointed a standing panel of experts to review asbestos cases and give an opinion as to the presence or absence of asbestos-related diseases. In 13 of the 16 cases in which the expert testified, the jury agreed with the expert. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991). The study reviewing this case found the conclusion to be "inescapable: A Court's expert will be a persuasive witness and will have a significant effect upon a jury." *Id*. at 41.

The persuasiveness of a court-appointed expert witness on the jury may be tempered by restrictions on the experts' role or the use of cross-examination. For example, an individual appointed by the federal district court under its inherent authority to appoint technical advisors is not required to furnish an expert report or subject to cross-examination because the advisor is not called as an expert witness pursuant to Fed. R. Evid. 706. *Ass'n of Mexican-American Educators v. State of California*, 231 F.3d 572 (9th Cir. 2000). On the other hand, in the multidistrict asbestos litigation described *supra*, the expert panel appointed to determine the likely volume and value of future asbestos claims did not act as "mere" technical advisors but rather a panel who presented testimonial, documentary and other evidence in the trial. *In re Joint Eastern and Southern Districts Asbestos Litigation*, 830 F. Supp. at 694. Thus, the court ordered the panel to issue a report, present the report at a hearing and be subject to cross-examination on such report, and the parties would also be able to present their own testimony and exhibits relating to this report. *Id.*

State courts have less frequently appointed independent experts in mass tort litigation. However, in 2005, in a class action involving individuals harmed by a tank car fire, the Louisiana Court of Appeals found it appropriate for the district court, under its inherent authority to manage cases, to appoint an expert to recommend methodologies for grouping similar claims and make recommendations to the district court for the conduct and management of future trials. The court of appeals held that such recommendations would be subject to cross-examination. *Adams v. CSX Railroads*, 904 So. 2d 13 (La. App. 4 Cir. 2005).

2. Educating the Judiciary on Scientific Principles

Shortly after the Supreme Court's *Daubert* decision, United States Ninth Circuit Court of Appeals Judge Jack Weinstein expressed a concern felt by many judges: "Many federal judges believe *Daubert* made their lives more difficult. They are going to have to give a more rea-

soned statement about why they are letting in evidence…After all, we're not scientists. We're in strange territory and we want to do the best we can." Chief Justice Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 Berkeley Tech. L. J. 671, 715 (2007) (quoting Rorie Sherman, *Judges Learning Daubert: "Junk Science" Rule Used Broadly*, Nat'l L.J., Oct. 4, 1993, at 28). Similarly, Justice Joseph Walsh of the Delaware Supreme Court has identified two barriers to a consistent framework for testing the admissibility of scientific evidence: 1) judges' initial lack of scientific education and training may permit junk science to enter the courtroom and 2) the subjective nature of the gatekeeper role. *Id*. at 715. These two factors have provided the "legal community with little ability to predict, and appellate judges with little control over [] the admission of novel scientific evidence in a particular case." *Id*. at 716-17.

To respond to these concerns, the Federal Judicial Center sponsors programs focused on science and the law and also published a Reference Manual on Scientific Evidence to assist federal judges in "managing expert evidence, primarily in cases involving issues of science or technology." *Id*. at 723 (quoting Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 1 (1994)). In addition, a non-profit agency known as ASTAR is working with the judiciary to recruit, train, evaluate, and certify state and federal court judges who specialize in cases involving complex science and technology.[9] ASTAR finds and trains "resource judges" who receive 120 hours of education on bioscience, biotechnology, biomedicine, and bioforensics. These resource judges are then selected to handle cases involving science and technology.

In sum, while *Daubert* poses formidable challenges for both trial and appellate courts, courts can combat these challenges by stringently applying the *Daubert* factors, relying upon neutral experts where necessary, and educating themselves about underlying scientific principles.

III. Summary Judgments: Rejecting the Frivolous

A. Overview of Summary Judgment

It has been suggested that the source of mass torts problems lies in the volume of litigation caused by mass production and marketing. "As efficiency in production and manufacturing has increased, we have found that design errors are multiplied by factors measured in the millions. An ill conceived pill or a negligently designed fastener, costing but a few cents each, can place a large corporation at risk." Paul V. Niemeyer, *Remarks to the Institute for Law and Economic Policy*, 39 Ariz. L. Rev. 719, 719 (1997). At the same time, the rates of filing claims in mass tort claims is high, perhaps flowing from notice campaigns required by aggregate treatment in class actions, or from attorneys' advertisements in mass media. Willging, *Mass Torts*, *supra*, at 346.

Others have identified a Catch-22 in mass torts: "The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger the mass tort filings become." Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822. Thus, commentators have found that the push toward efficiency has encouraged the filing of baseless claims; lawsuits are being filed by people who are "*not sick*, using those who suffer from serious disease to inflate the value of those claims." Victor E. Schwartz and 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, 250 (2000-2001).

Summary judgment has been described by Federal District Court Judge Bernice Donald as a "superb" tool for reducing the judicial backlog resulting from this increased litigation. Bernice B. Donald, *The Summary Judgment Process: When the Solution Becomes Part of the Problem*, 194 F.R.D. 262 (2000).

At one time, summary judgment was disfavored, employed with great restraint, and perceived as a form of pretrial dismissal. Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987). In the mid-1980s, the Supreme Court of the United States revised its jurisprudence on summary judgment and found it to be an "integral" part of the Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); Fed. R. Civ. P. 56. Most relevant to mass tort and new age litigation, in *Celotex Corp.*, an asbestos products liability suit, the Supreme Court held that if the nonmovant fails to establish an element "essential to that party's case," the moving party is entitled to judgment as a matter of law. The Court explained, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp.*, 477 U.S. at 322-24.

B. Resolution of the Worst-Case Scenario

Mass screenings of potential claimants has become a common method to find future plaintiffs. Plaintiffs' lawyers travel with questionable experts in "examobiles" to union halls and low-income neighborhoods to gather plaintiffs, often including those who have been unharmed by the product. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 628 (S.D. Tex. 2005) ("[I]n the business of mass screenings, a diagnosis, whether accurate or not, is money in the bank. This was quite literally true with the [ ] firm, who only paid [the screeners] when the firm received a positive diagnosis and a client willing to sign-up to be a plaintiff."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

Even more concerning, in Texas, one grand jury investigated allegations that a law firm prepared clients for depositions through the use of a memo containing detailed lists of asbestos-containing products, with descriptions of packaging, and health symptoms that could enhance legal damages. The memo stated, "It is important to maintain...that you NEVER saw any labels on asbestos products that said WARNING or DANGER...Do NOT say that you saw one brand more than another, or that one brand was more commonly used than another." Schwartz, *Letter*, *supra*, at 251.

In response to the concerns on mass screening, Senior District Judge Charles R. Weiner, who oversaw the federal asbestos docket in Pennsylvania, dismissed all non-malignant asbestos claims that were identified through mass screenings, allowing them to be reinstated only with "some evidence of asbestos exposure and evidence of an asbestos-related disease." *In re: Asbestos Prods. Liab. Litig. (No. VI),* No. MDL 875, 2002 WL 32151574, at *1-*2 (E.D. Pa. Jan. 16, 2002) ("Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future.")

In an effort to address the unique causation problems associated with mass tort litigation, "Lone Pine" case management orders have grown increasingly common since their origins twenty years ago in *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super.

Ct. Law Div. Nov. 18, 1986). In *Lore*, defendant Lone Pine Corporation operated a landfill to which the remaining defendants allegedly sent hazardous substances. *Id*. at *1. Exercising its broad discretion to manage pre-trial discovery, the trial court entered a case management order requiring plaintiffs to provide "sufficient information to establish the existence of a *prima facie* case," including a report from a treating physician supporting "each individual plaintiff's claim of injury and causation" and a real estate appraisal supporting "each individual plaintiff's claim of diminution of property value." *Id*. at *1-*2. The court found that the plaintiffs should be "put to the test of proving their cause of action," and that failure to comply with the court's order, along with the associated expenses for defendants and the court, compelled dismissal of plaintiffs' claims. *Id*. at *4.

Since *Lore*, similar orders have been frequently used in mass tort cases to assist the court and parties in determining which plaintiffs can state *prima facie* claims for personal injury and/or property damage caused by defendants' alleged acts or omissions. Courts now widely recognize the usefulness of *Lone Pine* case management orders. In *Bell v. ExxonMobil Corp.*, No. 01-04-00171-CV, 2005 Tex. App. LEXIS 1680 (Tex. App. Mar. 3, 2005), for example, the court required each plaintiff alleging personal injury from a chemical explosion at defendant's plant to submit expert affidavits describing the "manner and duration of the [chemical] exposure" and opining that "to a reasonable medical probability, the injury [was] sustained because of that exposure." *Id*. at *3. The court also required expert affidavits "detailing the location of the property damage…, the amount of economic injury, and the causative link between the chemical exposure and the damage." *Id*. at *3-*4; see also *Claar v. Burlington N. R.R. Corp.*, 29 F.3d 499, 500 (9th Cir. 1994) (case management order "required plaintiffs to submit affidavits describing their exposure to the chemicals they claim harmed them, and affidavits from physicians listing each plaintiff's specific injuries, the particular chemical(s) that in the physician's opinion caused each injury, and the scientific basis for the physician's conclusions."); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, 2005 WL 991249 (S.D.N.Y. Apr. 27, 2005)(granting defendants' motion for a *Lone Pine* order); Case Management Order No. 3, *Rineheart v. Ciba-Geigy Corp., et al.*, No. 96-517 (M.D. La. July 6, 2000)(same); *In re Asbestos Prods. Liab. Litig. (No.* VI), No. MDL 875, 2007 WL 2372400 (E.D. Pa. May 31, 2007) (ordering *prima facie* evidence to be provided by plaintiffs).

Effective use of the *Lone Pine* order promotes early dismissal of frivolous claims by defendants. In *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000), the United States Fifth Circuit Court of Appeals confirmed the propriety of using *Lone Pine* orders in federal "mass tort" cases to ensure *prima facie* validity of plaintiffs' claims. In *Acuna*, more than 1600 plaintiffs alleged a range of personal injuries resulting from the mining and processing activities of multiple defendants. *Id*. at 337-38. The federal district court issued pre-discovery *Lone Pine* orders requiring each plaintiff to submit an expert affidavit specifying the injuries suffered by each plaintiff, the substances causing each injury, the facility at which exposures occurred, the dates and circumstances of exposure, and the scientific basis for the expert's opinion. *Id*. at 338.

On appeal, the United States Fifth Circuit Court of Appeals affirmed dismissal of plaintiffs' claims for failure to comply with the district court's case management orders. *Id*. at 341. The court endorsed the use of *Lone Pine* orders to facilitate resolution of mass tort claims, noting that "[n]either the defendants nor the court was on notice from plaintiffs' pleading as to how many instances of which diseases were being claimed as injuries or which facilities were alleged to have caused those injuries." *Id*. at 340. The court noted that the *Lone Pine*

orders "essentially required that information which plaintiffs should have had before filing their claims…" *Id*.

Thus, to get to the heart of the matter in mass tort litigation, *Lone Pine* and other case management orders may be an effective tool to allow the court and defendants to discover unsupported claims. At that point, summary judgment should be granted against such plaintiffs to reduce the judicial burden of frivolous claims.

Endnotes

[1] On post-trial motion for remitter, the trial court reduced the total amount of damages to $48 million. *Janssen*, 878 So. 2d at 36.

[2] New age litigation is a "creature of technology, size, and law. It takes various forms---from mass torts to consumer class actions to complex cases of every kind." NFJE Fourth Annual Judicial Symposium Program.

[3] *Lone Pine* orders are defined and described, infra, Section III.

[4] In the mass tort context, motions in limine are usually filed to exclude expert testimony that does not meet *Daubert* requirements, as discussed in Section II, *infra*.

[5] The joinder of the 155 plaintiffs and the use of the plaintiff-selected ten-person trial group was reversed by the Mississippi Supreme Court. The court explained, relying on its decision in parallel *Propulsid* litigation, that the trial court improperly joined the suits because the actions did not arise from the same transaction or occurrence because each plaintiff's claim arose from individual facts and circumstances. See *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004). In *Armond*, the Mississippi Supreme Court found that because "scientific, legal, and factual issues related to 'immature torts' are novel and unsettled, mass joinder is inappropriate and 'until enough trials have occurred so that the contours of various types of claims within the...litigation are known, courts should proceed with extreme caution in consolidating claims." *Id*. at 1099 (quoting *In re Bristol-Meyers Squibb Co*., 975 S.W.2d 601, 603 (Tex. 1998)).

[6] Junk science has been described as a "hodgepodge of biased data, spurious inference, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill. It is a catalog of every conceivable kind of error: Data dredging, wishful thinking, truculent dogmatism, and now and again, outright fraud." Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 3 (1991).

[7] Most state legislatures have adopted a counterpart to Rule 702, which codifies the *Daubert* principles. However, some state courts continue to apply the *Frye* general acceptability test or apply *Daubert* in limited circumstances. *Flanagan v. State*, 625 So. 2d 827, 829 (Fla. 1993); *Turner v. State*, 746 So. 2d 355 (Ala. 1998). As *Daubert* is the predominant rule in the country, this article only addresses *Daubert*-related factors.

[8] The American Academy for the Advancement of Science and the Private Adjudication Center at Duke Law School assist in identifying neutral candidates to be appointed as experts by judges.

[9] ASTAR is a consortium of the Supreme Court of Ohio, the Court of Appeals of Maryland, the Supreme Court of Illinois, and the Supreme Court of Washington. Thirty-nine jurisdictions are ASTAR members and there are currently about 50 ASTAR resource judges in the country. See Website of the ASTAR Resource Judge Program, http://einshac.org/ (last visited May 30, 2008).

Due Process Considerations—Constitutional Perspectives:

Procedural and Substantive Due Process and Evidentiary Issues in Complex Multiparty Litigation

Robert H. Klonoff

Lewis & Clark Law School

10015 S.W. Terwilliger Boulevard
Portland, Oregon 97219
(503) 768-6600
klonoff@lclark.edu

ROBERT H. KLONOFF is currently Dean and Professor of Law at Lewis and Clark Law School in Portland, Oregon. His areas of expertise include class action litigation, civil procedure, and appellate litigation. Dean Klonoff clerked for the Honorable John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit, served as an Assistant United States Attorney in Washington, D.C., and as an Assistant to the Solicitor General of the United States. After his government service, he was a visiting professor at the University of San Diego Law School. He later served for many years as a partner at the international law firm of Jones Day. While at Jones Day, Dean Klonoff was an Adjunct Professor of Law at Georgetown University Law Center. In 2003 he was selected as the Douglas Stripp/Missouri Endowed Professor of Law at the University of Missouri-Kansas City School of Law. He has written numerous articles on class actions and has lectured throughout the United States and in several foreign countries on class actions and appellate litigation.

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION

Chapter 3: Aggregate Settlements

Draft

(as of 5/11/08)

This Discussion Draft was approved by the Council of the American Law Institute and will be presented to the full body of the American Law Institute on May 19, 2008.

TABLE OF CONTENTS

CHAPTER 3. AGGREGATE SETTLEMENTS

Chapter 3

AGGREGATE SETTLEMENTS

TOPIC 1

PRINCIPLES COMMON TO CLASS AND NON-CLASS AGGREGATE SETTLEMENTS

§ 3.01 General Settlement Principles

(a) Claimants and respondents may settle aggregate proceedings on terms that may not be available as remedies in contested lawsuits, provided that any such settlement affords equitable treatment among claimants and serves the internal objects of aggregate proceedings, as set forth in § 1.04.

(b) Questions relating to the fairness of aggregate settlements and the adequacy of representation afforded to claimants should presumptively be raised and resolved by the time the particular settlement is reached (and, when relevant, at the time the settlement is reviewed by a court with jurisdiction over the matter).

(c) Post-judgment challenges to aggregate settlements are disfavored unless no proper procedure for contemporaneous challenge was available and, accordingly, should be limited as set forth in this Chapter.

TOPIC 2

CLASS SETTLEMENTS

§ 3.02 Court Approval of a Class-Action Settlement

(a) A certified class action may be settled, compromised, or dismissed only after appropriate notice to the class and approval by the court.

(b) Before a class action is certified, a settlement or voluntary dismissal on behalf of only the named class representatives may be consummated only if it is approved by the court. When a proposed settlement or dismissal does not involve any payment or other special consideration, a court should presume the propriety of the decision not to prosecute the claim and should rarely withhold approval or require notice to the class.

§ 3.03 Hearing and Review Procedure for Class Settlements

In reviewing a proposed class-action settlement, the court must engage in a two-step process:

(a) Before issuing notice, the court must conduct a preliminary review of the proposed settlement to determine whether any defects in the proposed notice or other formal or substantive irregularities exist that warrant withholding notice. The preliminary review is not, however, a

substitute for a thorough and careful review of the settlement at the time of the actual fairness hearing pursuant to Subsection (b).

(b) After notice and an opportunity for objections (and, when appropriate, opt-outs), the court must conduct a full review of the settlement, including an in-court hearing, with an opportunity for the parties and objectors to offer evidence and present arguments. Whether the court approves or disapproves the settlement, it must make written findings and conclusions in support of its decision.

§ 3.04 Notice of Class Settlement

(a) The purpose of a notice of a proposed class settlement is to set forth the major contours of the proposal and to inform class members of their right to attend the fairness hearing and to lodge written objections by a prescribed date should they so desire.

(b) At the preliminary review stage, the court should determine the appropriate form and content of the notice. In fashioning notice of a class settlement, the court should consider the cost of notice and the likely recovery involved under the proposed settlement to ascertain whether individual notice is required, or whether some other form of notice would suffice. Individual notice should be presumptively viewed by a court as less important when the claims are likely too small to be pursued individually in the absence of a class action.

(c) The notice of a class settlement, when required, should be written in plain language and should contain, at a minimum, a definition of the class, the specific material terms and conditions of the settlement (including the precise relief to be given to class members), the proposed fees sought by class counsel, how the class member can obtain additional information about the case, and whether opt-out rights are provided. The notice should also provide details about the fairness hearing and the submission of objections.

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in written findings and conclusions, whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in Subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in Subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties modify the agreement in a manner specified by the court. This Subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, prior to or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised but the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

§ 3.06 Approval of a Settlement Class

(a) In any case in which the parties simultaneously seek certification and approval of the settlement, the case need not satisfy all of the requirements for certification of a class for purposes of litigation, but instead

need satisfy only the requirements of Subsections (b) and (c) of this Section.

(b) Subject to Subsection (c) of this Section, a court may approve a settlement class if it finds that the settlement satisfies the criteria of § 3.05, and it further finds that (1) significant common issues exist, (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues.

(c) In addition to satisfying the requirements of Subsection (b) of this Section, in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in § 2.04.

(d) If a proposed settlement class does not go forward, no statements, representations, or arguments made by the proponents of the settlement in the settlement context may be used against the proponent making the statement in any contested class-certification procedure, or in any other context.

§ 3.07 Cy Pres Settlements

A court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case. The court

should apply the following criteria in determining whether a cy pres award is appropriate:

(a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should presumptively be distributed directly to individual class members.

(b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable.

(c) If individual distributions are deemed not viable based upon the criteria set forth in Subsections (a) and (b), the settlement may utilize a cy pres approach if the parties can identify a recipient involving the same subject matter as the lawsuit that reasonably approximates the interests being pursued by the class.

§ 3.08 Objections and Attorneys' Fees For and Against Objectors

(a) A court that rejects a proposed settlement in its entirety may order the appointment of new lead counsel and a new class representative. The court may also award attorneys' fees out of a common fund for efforts

made by attorneys on behalf of objecting class members in materially improving the settlement for the class or any subclass, with such fees to be linked to the magnitude of the improvement to the class members' recovery.

(b) If objectors demonstrate that a settlement should be rejected in its entirety, and if a classwide judgment or settlement is later obtained in a new or reconfigured case involving the same basic allegations of wrongdoing, the objectors to the first settlement should be permitted to recover reasonable fees if they can demonstrate that their efforts in challenging the prior settlement were instrumental in laying a basis for the ensuing benefit enjoyed by the class.

(c) If objectors succeed in their challenges to the settlement and can show that the positions of the plaintiffs and defendants misrepresent the benefits of the proposed settlement and that the positions were not reasonably advanced for the purpose of maintaining a valid settlement, the court should consider imposing sanctions against class counsel, counsel for the defendant, or the parties under applicable law.

(d) If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

§ 3.09 Court-Designated Guardians Ad Litem, Special Masters, Experts, and Other Adjuncts

(a) In addition to considering the views of objectors, the court may designate one or more monitors whose function is to help ensure that any class settlement is fair and reasonable as negotiated and as implemented. Such monitors may include:

(1) a guardian ad litem, whose function is to protect the class or a segment of the class by scrutinizing the conduct of class counsel and defense counsel in the overall settlement process; or

(2) a neutral or special master, whose function is to serve as a neutral advisor to the court regarding the fairness of settlement and the adequacy of representation of subdivisions of the class.

(b) The court may appoint its own expert to analyze technical or scientific aspects of a proposed settlement.

(c) The court may solicit the views of appropriate federal or state officials with respect to the fairness of the proposed settlement.

§ 3.10 Settlement of Future Claims

(a) "Future claims" are those claims of class members that might be brought against the respondent, depending on potential future events that are contingent at the time of the class settlement.

(b) A class settlement may not resolve future claims unless the court determines that class members with potential future claims are represented in a manner that avoids structural conflicts of interest within the meaning of § 2.08(a)(3).

(c) When the parties simultaneously seek class certification and approval of a class settlement that would resolve future claims, structural conflicts of interest under Subsection (b) may be avoided insofar as the class settlement:

(1) does not make tradeoffs with respect to class members with future claims vis-à-vis other class members; or

(2) provides additional structural assurances of protection for class members with future claims, such as deferred opt-out rights or delayed determination of the fee award for class counsel pending experience with the operation of the settlement as to future claims.

§ 3.11 Second Opt-Out

In any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement. If the court refuses to grant a second opt-out right, it must make a written finding that specific reasons exist for its refusal.

§ 3.12 Appellate Review of Orders Rejecting a Proposed Class Settlement

(a) A court of appeals may, in its discretion, grant an appeal from an order finally and definitively rejecting a proposed class-action settlement, provided that the appeal is filed within 10 days after entry of the order. An appeal does not stay proceedings in the trial court unless the trial court or the court of appeals so orders. This Section applies only to appeals in which both the class and the defendants join, and it does not apply when the district court's rejection of a settlement is conditional or when further proceedings relating to the proposed settlement are contemplated.

(b) In an appeal under Subsection (a), the appellate court may appoint counsel, including but not limited to counsel for objectors, to represent the trial court's position that the settlement is not fair and reasonable.

(c) The decision of the trial court rejecting a settlement is reviewed for abuse of discretion.

§ 3.13 Attorneys' Fees

(a) Attorneys' fees in class-action settlements should be based on both the direct value of the settlement to the class and the value of cy pres awards satisfying the criteria of § 3.07.

(b) Subject to Subsection (c), a percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the

percentage being based on both the monetary and the nonmonetary value of the settlement. The court may consider using the "lodestar" approach as a cross-check, particularly when the value of the settlement is uncertain.

(c) Other than its use as a cross-check, or its use in cases seeking solely injunctive or declaratory relief, the lodestar method should be limited to:

(1) situations in which fees will be awarded under a fee-shifting statute that requires the lodestar method, or

(2) cases in which the court makes a specific finding that the percentage method would be unfair based on the specific facts of the case.

(d) Courts should consider defining the expected fee recovery as a percentage set early in the litigation rather than after the fact. When courts do so, they may, where appropriate, adjust the fees in exceptional cases where settlement is reached very early in the litigation or the level of recovery is extraordinary.

§ 3.14 Post-Judgment Challenges to Settlement

(a) The normal vehicle for challenging a settlement is a direct appeal from the order or judgment approving the settlement. Apart from appeal, a judgment embodying a class-action settlement may not be challenged, except:

(1) before the court in which the settlement occurred on grounds generally applicable under the governing rules of civil procedure for obtaining relief from judgment; or

(2) before the same or a different court on the ground that the settlement court lacked personal or subject-matter jurisdiction, failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice as required by applicable law.

(b) In restricting collateral challenges to a class settlement, this Section leaves unchanged existing law governing class members' right to pursue claims of malpractice or breach of fiduciary duty against class counsel.

TOPIC 3

NON-CLASS AGGREGATE SETTLEMENTS

§ 3.15 Need for Special Treatment of Non-Class Aggregate Settlements

Significant differences between class and non-class cases require that these two types of cases be treated differently for purposes of settlement.

§ 3.16 Definition of a Non-Class Aggregate Settlement

(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

(b) The resolution of claims in a non-class aggregate settlement is interdependent if:

(1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants; or

(2) the value of each claim is not based solely on individual case-by-case facts and negotiations.

(c) In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants.

§ 3.17 Circumstances Required for Aggregate Settlements to Be Binding

(a) A lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent, in writing. Informed consent requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants. Further, informed consent requires that the total financial interest of claimants' counsel be disclosed to each claimant.

(b) In lieu of the requirements set forth in Subsection (a), an individual claimant may agree in advance to be bound in a proposed settlement by the collective decisionmaking of a substantial majority of the claimants represented by one lawyer or group of lawyers who are covered by the proposed settlement (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial majority vote of each category of claimants represented by one lawyer or group of lawyers in the matter), whether proceedings have been commenced or not. Such decisionmaking authority must be vested solely in the collective claimants and may not be delegated to a lawyer or any one person otherwise acting in a representative capacity on behalf of claimants. The applicable legislative or rule-making body shall determine precisely what percentage constitutes a "substantial majority" of claimants.

(c) In exercising the collective decisionmaking option specified in Subsection (b), each claimant may consent, in a writing signed by each claimant, to such collective decisionmaking either as part of the lawyer's or group of lawyers' retainer agreement or at any other point during the course of the litigation. In either situation, the writing must confirm the terms and conditions of the lawyer's retention, and the agreement must be signed by each claimant after the lawyer has communicated detailed information and explanation about the material risks of, and reasonably available alternatives to, the proposed course of conduct.

(d) A waiver under Subsections (b) and (c) is valid only in cases involving a substantial amount in controversy and a large number of claimants, as determined by the applicable legislative or rule-making body.

§ 3.18 Limited Judicial Review for Non-Class Aggregate Settlements

(a) Any claimant who receives notice of the consummation of a settlement entered in to pursuant to § 3.17 in which he or she did not personally agree to be bound is entitled, within the time period set by the legislature or rule-making body, to challenge the settlement on the ground that the settlement did not comply with § 3.17. Such a challenge may be brought in the court in which the case is or was pending or, if no case is or was pending, in any court of competent jurisdiction.

(b) The right to challenge the settlement under Subsection (a) is nonwaivable.

(c) A lawyer for a claimant who negotiates a settlement that a court later determines to be unenforceable under Subsection (a) may be required to pay the reasonable attorneys' fees and costs incurred by the challenging claimant.

§ 3.19 Alternative Mechanism of Petitioning the Court if an Aggregate Settlement Is Not Feasible

(a) When the requirements of § 3.17 cannot be completely met, a claimant's counsel who receives an offer for a lump-sum settlement of interdependent claims may seek approval for the enforcement of such a settlement before a court of competent jurisdiction in the state where the original attorney-client agreement was formed. Such judicial approval shall extend only to the claims that are presented to the court for a review of fairness. The lawyers and the claimants whom the lawyers represent bear the burden of establishing that despite substantial good faith efforts, and through no fault of their own, the lawyers and claimants could not satisfy all of the requirements of § 3.17 and that judicial intervention is therefore necessary and appropriate.

(b) Prior to invoking Subsection (a) of this Section, claimants' counsel must use all reasonable efforts to notify all affected claimants and provide such claimants an opportunity to participate in the judicial proceedings.

(c) The court's limited equitable discretion under this Section may be exercised only in the following exceptional circumstances:

(1) Individual claimants who are needed to sign or approve a waiver under § 3.17 cannot be located after reasonable efforts, and there is agreement on the terms of the settlement by close to a substantial majority of claimants, with the determination of what constitutes "close to a substantial majority" to be set by the applicable legislature or rule-making body; or

(2) Despite the parties' good faith effort to comply with the numerosity or amount-in-controversy requirement established by rule or legislation, the settlement fails to comply with either or both of those requirements but otherwise comports with the purposes of § 3.17.