

9-1-1995

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### Recommended Citation

Christine Gail Clark, *The Sky is Falling-The ALI's Efficient Response to Courts in Crisis?*, 1995 BYU L. Rev. 997 (1995).  
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# The Sky is Falling— The ALI's Efficient Response to Courts in Crisis?

## I. INTRODUCTION

Our federal and state court systems are very busy.<sup>1</sup> Additionally, the number of cases that can be classified as "complex" is growing.<sup>2</sup> Complex cases take more judicial time to resolve than routine cases.<sup>3</sup> Many, including the Reporters of the American Law Institute's Complex Litigation Project, have looked at these numbers and speculated that changes must be made, else the court system will grind to a screeching halt.<sup>4</sup> Like Chicken Little they have started screaming "the

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1. The national average pending case load per judgeship for July 1990 through June 1991 was 422. CIVIL JUSTICE REFORM ACT ADVISORY COMM., REPORT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH 12 (1991). Despite this fairly hefty caseload, there is little indication statistically that this case load is overwhelming. The national average from filing to disposition of a federal case in statistical year 1991 was nine months. *Id.* at 14. The pending case load in Utah per judgeship is 426, *id.* at 12, with disposition taking an average of twelve months. *Id.* at 14. Despite the slightly higher than national average caseload the "existing ratio of district judges to total cases filed [in Utah] is very adequate." *Id.* at 4.

2. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY 13 (1994) ("The causes of complex litigation . . . show no sign of diminishing, and the deleterious effects of these cases are bound to be felt.") [hereinafter COMPLEX LITIGATION PROPOSAL]; *id.* at 14 (citing DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 8-11 (1987)) (stating that "mass latent injury cases have the potential for explosive growth" and that the system may well experience them as an explosion); Kyle Brackin, Comment, *Salvaging the Wreckage: Multidistrict Litigation and Aviation*, 57 J. AIR L. & COM. 655, 658-59 (1992) ("[A] tortfeasor's ability to injure has grown astronomically in terms of the number of persons affected and the degree of possible harm."). This growth will result in more large-scale, complex lawsuits.

3. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073 (3d Cir. 1980) (trial estimated to last a full year); *ILC Peripherals Leasing Corp. v. International Bus. Mach. Corp.*, 458 F. Supp. 423, 426 (N.D. Cal. 1978), *aff'd sub nom.* *Memorex Corp. v. International Bus. Mach. Corp.*, 636 F.2d 1188 (9th Cir. 1980) (trial lasted five months ending in mistrial after jury deadlocked); *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978) (trial lasted 11 months before settlement).

4. See, e.g., COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 14 (stating that absent a solution, complex litigation "will bankrupt both the state and federal court

sky is falling." But complex litigation has been around for a long time and the courts have continued to function.<sup>5</sup> Although we do not need to wait until the sky falls to make the courts more efficient, neither do we need to react hastily.

Multiparty litigation has existed since the 1100s<sup>6</sup> and has been facilitated in the United States by the Federal Rules of Civil Procedure since the 1930s.<sup>7</sup> However, complex litigation, as this litigation has come to be known, really only began to cause judicial and academic consternation and discussion in the 1950s when antitrust litigation burgeoned.<sup>8</sup> Since then, various solutions to the management problems raised by litigation in general, and by complex litigation in particular, have been explored congressionally,<sup>9</sup> judicially,<sup>10</sup> and in academia.<sup>11</sup>

systems") (quoting Judge Spencer Williams, *Mass Tort Class Actions, Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983)); Brackin, *supra* note 2, at 658 (stating that complex litigation "overwhelm[s] the capacity of the courts to handle their caseloads adequately or efficiently"); Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 541 (1989) (stating that complex litigation has caused "chaos in the judicial system"); Edward F. Sherman, *Restructuring the Trial Process in the Age of Litigation*, 63 TEX. L. REV. 721, 722 (1984) (book review) (stating that complex litigation has "taxed the resources of our judicial system to the breaking point"). But see Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 280 (1991) ("The Report's thesis—that the federal courts are in crisis—employs an incomplete calculus that overstates the costs to the system by ignoring the benefits of case adjudication.").

5. See Zechariah J. Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932) (discussing the economies of consolidating "parallel litigations [which] involve one or more common questions of law or fact, or both"); STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 38 (1987) (discussing the existence of multiparty litigation as early as 1199).

6. YEAZELL, *supra* note 5, at 38.

7. See FED. R. CIV. P. 23 (class actions); see also *id.* at 18 (joinder of claims and remedies); *id.* at 20 (joinder of parties); *id.* at 22 (interpleader); *id.* at 24 (intervention); *id.* at 42(a) (consolidation). All of these rules were adopted in 1937.

8. Linda Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 215 (1991).

9. See 28 U.S.C. § 1407 (Supp. V 1993) (governing the Judicial Panel on Multidistrict Litigation); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-05, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82 (Supp. II 1990)) (requiring courts to consider the development of special procedures to handle complex cases); see also Stephen C. Yeazell, *The Salience of Salience: A Comment on Professor Hazard's Authority in the Dock*, 69 B.U. L. REV. 481, 485 (1989) (noting that in other countries, many issues that might produce nonroutine litigation are handled through the legislative or executive process rather than the judicial process).

10. Judicially promulgated solutions include *Procedure in Antitrust and Other Protracted Cases* (otherwise known as the Prettyman Report) (adopted by the Judicial Conference of the United States on Sept. 26, 1951), reprinted in Leon R.

The American Law Institute's Complex Litigation Project proposal (the "Proposal") is the latest in a long line of proposed solutions. This Comment will first look at the Proposal and its underlying theme of efficiency, and then examine the relationship between efficiency and justice. This Comment discusses the basic consolidation criteria of the Proposal as they are applied to the difficulties caused by complex litigation in its pretrial, trial, and remedial stages. The author concludes that the Proposal inadequately treats these different types of complexities, and that its failure to do so has the potential of creating more complexity. Lastly, a consolidation mechanism that takes into account pretrial, trial, and remedial complexity as well as multiparty, multiforum complexity will be proposed.

## II. THE PROPOSAL AND EFFICIENCY

While judicial, congressional, and academic solutions address the problems of managing complex litigation generally, the Proposal is concerned with complex litigation in its multiparty, multiforum form<sup>12</sup> and focuses on consolidating litigation that involves "one or more common questions of fact" in a federal or state forum.<sup>13</sup> To facilitate these goals, the

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Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 62-84 (1953); *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (1970); MANUAL FOR COMPLEX LITIGATION, THIRD (1995) [hereinafter MCL 3D].

11. See, e.g., Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989) (concluding that courts need to use existing mechanisms to aggressively package like cases); Hondorf, *supra* note 4; Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907 (1980) (suggesting discovery rules especially tailored for the needs of complex cases); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63 (1988) (discussing the problems with nonmutual collateral estoppel and advocating class actions as a better vehicle for resolving duplicative litigation); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986) (suggesting an approach for creating federal subject matter jurisdiction for multiparty, multiforum litigation); Barry R. Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 CONN. B.J. 77 (1994) (proposing rules which balance the need for judicial economy and the need for impartiality and protection of due process rights in managing complex cases); Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985) (discussing current joinder techniques and the overall desirability of joinder in mass tort cases).

12. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7.

13. See *id.* § 3.01 (federal intrasystem consolidation); § 4.01 (state court

Proposal seeks to repeal and enact various federal transfer statutes<sup>14</sup> as well as to create a Uniform Complex Litigation Act and an Interstate Complex Litigation Compact.<sup>15</sup>

The underlying premise of the Project is that efficiency is the greatest good.<sup>16</sup> The Proposal argues that the repetitive litigation that is the hallmark of mass tort and contract litigation "unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system."<sup>17</sup> The Proposal seeks to solve these problems of repetitive litigation by consolidating cases involving "one or more common questions of fact"<sup>18</sup> in a state or federal court. The rationale is that resolution of multiparty, multiforum litigation by one or a few courts is more efficient than allowing those cases to be resolved separately.

The Project defends its emphasis on efficiency by stating that a more efficient system can be more fair.<sup>19</sup> The Proposal argues that multiparty, multiforum cases that are not consolidated are not justly resolved since like parties are treated dissimilarly.<sup>20</sup> It further argues that failure to consolidate "has contributed to differences in appellate decisions that permit similarly injured plaintiffs to recover enormous awards in some jurisdictions, modest awards in others, and no awards in still others."<sup>21</sup> However, justifying the sweeping changes suggested by the Proposal on the grounds that greater efficiency will lead to greater justice contradicts many of the basic policy decisions inherent in the American justice system.

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consolidation); § 5.01 (federal-state intersystem consolidation).

14. *Id.* app. a at 437-53.

15. *Id.* app. b at 455-546.

16. *See id.* at 7-20 (discussing problems caused by inefficiency).

17. *Id.* at 7.

18. *Id.* § 3.01(a)(1).

19. *See id.* at 19-20.

20. *Id.* at 7 ("Repeated relitigation of the common issues in a complex case . . . results in disparate treatment for persons harmed by essentially identical or similar conduct.").

21. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 15 n.8 (citing DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 48-49 (1985)).

First, efficiency is not the model on which our government is based. We have two separate systems of government at the state and federal levels. The Project's characterization of dissimilar awards as unjust fails to take into account the justice produced by our diverse system of state and federal laws. Our fragmented system inevitably produces disparate results for similar parties,<sup>22</sup> yet the system also checks the exercise of governmental power and thereby protects individual rights.<sup>23</sup> Different results for like parties may thus be a cost of the greater protection provided by our federalist system. In any event, the greater efficiency achieved by the Project cannot be so easily justified by a short-sighted view of justice that fails to consider the justice produced by our system of dual government. We have accepted the inefficiency of dual state and federal systems of government in the hope that this inefficiency will lead to greater justice.

Second, efficiency is not the primary goal of the federal government. The federal government is divided into judicial, legislative, and executive branches. These three branches were not made coequals for greater efficiency. Three branches of government were created to ensure to the people their rights—to ensure a just government.<sup>24</sup>

Third, even within one branch of government, our objective is not efficiency. The hallmark of our justice system is the jury trial.<sup>25</sup> Jury trials are not efficient. They are longer<sup>26</sup> and

22. See Brunet, *supra* note 4, at 287 ("[I]f victims of defective products reside in different states, consistent results are not necessarily desirable."); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 134-35 (advocating methods that allow for different results in some mass torts because of different domiciles of victims).

23. See THE FEDERALIST NO. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) ("[T]he constitutionally mandated balance of power between the states and the Federal Government [is] . . . a balance designed to protect our fundamental liberties.").

24. THE FEDERALIST NO. 48 (James Madison).

25. See U.S. CONST. amends. VI, VII; THE FEDERALIST NO. 83, at 464 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The friends and adversaries of the plan of the convention . . . concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

26. See Craig M. Bradley, *Reforming the Criminal Trial*, 68 IND. L.J. 659

more expensive<sup>27</sup> than bench trials. But we as a society have decided that jury trials lead to a more just result and are willing to pay for this inefficiency.

The overriding goal of our government is justice, not efficiency. This is not to say that efficiency is undesirable. It is only to emphasize that efficiency must sometimes be sacrificed to the greater goal of justice. Only when we have satisfied ourselves that justice will be done should efficiency become a consideration.

Rules can be adopted to make the state and federal court systems more efficient without sacrificing justice. The Proposal notes that the goal of the Federal Rules of Civil Procedure is the "just, speedy, and inexpensive determination of every action."<sup>28</sup> It goes on to say that "[u]nfortunately, complex litigation can yield determinations that are slow, enormously expensive, and potentially unjust."<sup>29</sup> These difficulties are apparently adequate justification for the Project's almost exclusive focus on the inefficiencies of complex litigation. The Proposal pays scant attention to how those inefficiencies may be necessary in reaching a just result. Additionally, as discussed in the remainder of this paper, the Proposal pays little attention to the potentially greater inefficiencies created by its recommendations.

### III. CONSOLIDATION AND POSTAGGREGATE COMPLEXITY

Jay Tidmarsh discusses four procedural features that are commonly thought to be indicators of complex litigation.<sup>30</sup>

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(1993) (discussing the inefficiencies of time caused by jury trials); Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 17-18 (1990) (discussing the length of jury trials and the inability of juries to deal effectively with the increasing length and complexity of cases).

27. See Brodin, *supra* note 26, at 17; Daniel B. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus*, 51 WASH. & LEE L. REV. 669, 671 n.15 (1994) ("We need plea bargaining because providing jury trials for all defendants who wish to contest their guilt is too expensive."). Disturbingly, the expense of a jury trial was used to justify excluding such a right from the Fugitive Slave Act of 1850, 9 Stat. 462. Senator Mason argued that the right to a jury trial would cause delay and expense and make it nearly impossible for slave owners to recover their property. See CONG. GLOBE, 31st Cong., 1st Sess. app. 1584 (1850).

28. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 16 (citing FED. R. CIV. P. 1).

29. *Id.*

30. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992).

These features are "intractable pretrial proceedings; difficulties of proof and comprehension at trial; complications in the implementation or administration of a remedy; or the number of parties."<sup>31</sup> The Project focuses on complexity caused by multiparty, multiforum litigation but fails to adequately account for the other three types of complexity, thereby creating further problems. This section discusses each of the four types of complexity, including how the Proposal affects those types of complexity and suggesting possible solutions to the problems created by each type of complexity.

#### A. Complexity Caused by the Number of Parties

The Proposal ignores many types of complexity<sup>32</sup> and focuses on the complexity cause by multiparty, multiforum litigation. The Proposal uses the phrase "complex litigation" to "refer[] exclusively to multiparty, multiforum litigation [which] is characterized by related claims dispersed in several forums and often involving events that occurred over long periods of time."<sup>33</sup> Despite its focus on multiparty, multiforum complexity, the Proposal does not effectively resolve the problems caused by this type of complexity.

Complex cases caused by multiparty, multiforum litigation "share two defining characteristics: they all involve the potential for relitigation of identical or nearly identical issues, and consequently, they involve the enormous expenditure of resources."<sup>34</sup> Examples of litigation satisfying these two criteria can be found in the asbestos litigation,<sup>35</sup> agent orange litigation,<sup>36</sup> silicone implant cases,<sup>37</sup> and cases arising from

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31. *Id.* at 1701.

32. The Proposal dismisses other types of complexity by stating that these types of complexities have been or are being dealt with by other groups. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 3-4. The Proposal's explanation for ignoring other kinds of complexities is disingenuous since others have also suggested solutions to multiparty, multiforum litigation and this fact has not stopped the ALI from going forward with the Project. *See, e.g.,* Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 991-93 (1994).

33. COMPLEX LITIGATION PROPOSAL, *supra*, note 2, at 7.

34. *Id.*

35. "[A]n estimated twenty-seven million people . . . were exposed to significant concentrations of asbestos dust." David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1693 (1986) (book review). "The estimated legal bill for all facets of the asbestos litigation easily exceeds a billion dollars." *Id.* at 1694.

36. Chief Judge Weinstein and Judge Pratt certified a class of approximately 2.4 million members in the agent orange litigation. COMPLEX LITIGATION PROPOSAL,



any airplane accident.<sup>38</sup> These examples all involve multiple plaintiffs seeking recovery for very similar injuries from relatively few tortfeasors. The defendants are repeatedly asked to disclose the same information. Courts are repeatedly asked to decide the same questions of culpability. This repetition is time consuming and expensive.<sup>39</sup> Thus, though the questions of law and fact may be simple, the large number of people involved have caused cases of this type to be deemed "complex litigation."

The Proposal purports to resolve the problems caused by multiparty, multiforum litigation. However, the Project's solution may well create more problems than it resolves. Section 3.01 of the Proposal provides the consolidation criterion. Cases that can potentially be consolidated are those that "involve one or more common questions of fact."<sup>40</sup> This definition is overly broad, as is easily demonstrated. For example, one author has questioned whether, under the definition given by the Proposal, a "medical malpractice case [could] be complex if it arose from the use of a surgical procedure identical to the surgical procedure involved in unrelated actions against other physicians[.]"<sup>41</sup> The commentary to the Proposal rejects such an outcome by stating that "[t]he second element of the standard, requiring a finding that transfer will serve the just, efficient, and fair resolution of the actions, ensures that there will be substantial factual overlap . . . ."<sup>42</sup> However, consolidation of cases questioning the efficacy of the surgical procedure would satisfy the second element of the standard. Consolidation would be efficient; the question of the efficacy of the procedure would be resolved in one consolidated action and would thus not be subject to relitigation. Additionally, consolidation would be

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*supra* note 2, at 11. This class settled for \$180 million in 1984. *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1252 (E.D.N.Y. 1988).

37. As of September 1993, there were between 10,000 and 12,000 breast implant claims pending in United States courts. 19 THE GRAY SHEET (FDC Reports, Inc.), Sept. 13, 1993, at 1. Awards in early cases ranged from \$1.5 million to \$25 million (\$20 million in punitive damages). Susan A. Casey, *Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine*, 19 WM. MITCHELL L. REV. 931, 932 n.4 (1993).

38. "Airlines pay from \$3,500 to \$17,000 per victim in legal fees." Brackin, *supra* note 2, at 656 n.4.

39. See *supra* notes 3, 33-37 and accompanying text.

40. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01(a)(1).

41. Tidmarsh, *supra* note 30, at 1713.

42. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 43.

deemed just and fair since patients subjected to the same surgical procedure would receive the same treatment by the judicial system. Although it is unlikely that cases involving the same surgical technique would be consolidated, the Proposal definitionally would allow such an outcome.

The Project implicitly acknowledges the overbreadth of its definition by giving the transferee court power to separate consolidated cases into smaller groups involving common questions.<sup>43</sup> For example, in asbestos litigation a transferee court could separate into different groups and send to different courts cases involving lung cancer, mesothelioma, asbestosis, and pleural claims.<sup>44</sup>

Not only does the overbreadth which necessitates bifurcation create inefficiency, the bifurcation process itself creates inefficiency. Bifurcation is expensive and time consuming.<sup>45</sup> Additional inefficiency is created if the transferee court transfers all of the bifurcated cases back to itself for the determination of an issue such as damages. The necessity for bifurcation could be eliminated if the Complex Litigation Panel<sup>46</sup> (the "Panel"), instead of consolidating all asbestos cases and transferring them all to one judge, sent all asbestosis claims to one judge and all mesothelioma cases to another judge from the outset. Time savings would be greater even if all the cases were subsequently transferred to one judge for the resolution of damages claims.

Section 3.01 is an attempt to resolve the problem of multiparty, multiforum litigation by consolidating cases involving "one or more common questions of fact."<sup>47</sup> As has been shown, this standard is overly broad and can potentially cause even greater inefficiency than the unconsolidated resolution of cases.<sup>48</sup> A better solution might be to allow consolidation only if

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43. *Id.* § 3.06.

44. See Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 569 (1991) (discussing the trial approach of Judge Parker in the *Cimino v. Raymark Indus., Inc.* litigation, No. B-86-0456-CA (E.D. Tex. Nov. 12, 1990)).

45. See MCL 3D, *supra* note 10, § 21.632 (noting the possibility of "increased cost . . . and inconvenience" with bifurcation); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2388 (1971) (describing risks and benefits of bifurcation).

46. The Complex Litigation Panel is comprised of federal judges who decide whether to consolidate multiparty, multiforum cases and where to transfer those cases. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.02.

47. *Id.* § 3.01(a)(1).

48. Tidmarsh, *supra* note 30, at 1714 ("The huge cases created by assembling

the common questions of fact arise from the conduct of one or more common parties. Additionally, greater efficiency can be attained within the proposed system if the Complex Litigation Panel consolidates groups of like cases rather than sending all cases to a transferee court from which groups of like cases are separated and transferred.

### B. Complexity in Pretrial Proceedings

Complexity in pretrial proceedings is a result of lengthy and/or voluminous discovery.<sup>49</sup> Difficult legal or factual issues are not enough to make a case complex at the pretrial stage. Lawyers are trained to resolve difficult legal or factual issues. However, "voluminous" or "protracted" discovery . . . precludes the lawyers from performing their adversarial task—the crafting of persuasive and comprehensive arguments."<sup>50</sup>

Case management is crucial to resolving pretrial complexity. As observed by James Withrow and Richard Larm:

[T]he crux of truly fair and efficient management of large cases is still "iron-hearted" control by the judge. . . . [L]arge antitrust litigations would be better controlled and certainly more fairly adjudicated if it were frankly recognized that pretrial, and not trial, is where the merits of such cases are revealed. Trial, if it occurs at all, is but the final denouement of pretrial adjudication, save in the case where pretrial responsibilities have been neglected by the presiding judge.<sup>51</sup>

Failure to manage pretrial discovery in large cases leads to chaotic and expensive discovery and to complexity during the trial. "One of the primary objectives in managing complex cases is the development of procedures to clarify and narrow the issues in dispute."<sup>52</sup>

Section 3.01 of the Proposal which articulates the factors to be taken into account prior to consolidation does not list pretri-

all the parties in one forum . . . might generate the pretrial, trial, and remedial difficulties often associated with multiparty suits.").

49. DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 1223 (6th ed. 1989) ("Complex cases can be identified by the fact that they involve large stakes, broad-ranging discovery, and sometimes multiple parties.").

50. Tidmarsh, *supra* note 30, at 1703.

51. James R. Withrow & Richard P. Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 5 (1976).

52. Andrew J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 493, 503 (1988).

al complexity as a factor. Consideration of pretrial complexity may be implicitly found in the requirement that "transfer and consolidation . . . promote the just, efficient, and fair conduct of the actions."<sup>53</sup> However, consideration of pretrial complexity should be an articulated factor of consideration for a number of reasons. First, the mass consolidation of multiparty, multiforum cases has the potential to create pretrial complexity that would not have been present in individually pursued cases. Pretrial complexity can lead to sloppy formulation of the issues. Sloppy issue-formulation may in turn lead to sloppy trial presentation<sup>54</sup> and a potentially unjust resolution. Second, pretrial complexity may lead to a prolonged period of discovery, thereby unduly postponing recovery. And, as the Proposal points out, "someone who is not wealthy and [is] seriously injured may find that justice delayed is, indeed, justice denied."<sup>55</sup> Third, mass consolidation may lead to unexpected conflicts of interest, depriving parties of counsel they would otherwise have been able to rely on.<sup>56</sup> Finally, pretrial complexity and confusion of the issues intensified by consolidation may deter settlement. "The process of reaching a settlement requires each side to evaluate the risks and opportunities inherent in continuing the litigation and balance them against the gains and costs of settling at a particular price."<sup>57</sup> If the parties are unable to evaluate these risks accurately, the chances of settlement are harmed. Settlement, particularly of a complex case, is far more efficient than taking a case to trial.

In considering consolidation, the Complex Litigation Panel should evaluate the extent to which pretrial complexities can be resolved.<sup>58</sup> For example, different methods of alternative dispute resolution might be used to resolve little-disputed fac-

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53. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01(a)(2).

54. See Tidmarsh, *supra* note 30, at 1703.

55. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 16.

56. See MCL 3D, *supra* note 10, § 20.23 (advising the initial investigation of any possible conflicts of interests caused by consolidation).

57. WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 193 (1982).

58. See, e.g. WAYNE D. BRAZIL ET AL., *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* (1983); *PRACTISING LAW INSTITUTE, THE COORDINATION AND MANAGEMENT OF MAJOR LITIGATION* (1982); *TORT & INSURANCE PRACTICE SECTION, AMERICAN BAR ASSOCIATION, MANAGING COMPLEX LITIGATION* (1991); MCL 3D, *supra* note 10, *Recommendations on Major Issues Affecting Complex Litigation* (1981); *CIVIL JUSTICE REFORM ACT ADVISORY COMM.*, *supra* note 1; SCHWARZER, *supra* note 57; Dennis A. Kendig, *Procedures for Management of Non-Routine Cases*, 3 HOFSTRA L. REV. 701 (1975).

tual questions, eliminating the need for voluminous document production on those points. Additionally, a special master or magistrate judge could be appointed to coordinate and facilitate pretrial discovery and issue formulation.<sup>59</sup>

The extent to which pretrial complexities can be resolved may depend in large part on the ability or inclination of the transferee court to be actively involved in pretrial management. Thus, once the decision to consolidate has been made, the Panel should take into account the managerial style of the transferee judge when assigning the case.<sup>60</sup> The Panel should also consider whether the assignee court has promulgated a Civil Justice Expense and Delay Reduction Plan as required by the Civil Justice Reform Act of 1990<sup>61</sup> and what the Plan provides for in terms of case management.<sup>62</sup> Finally, the Panel should consider the extent to which the court has opted out of the new discovery rules adopted by the Judicial Conference in December 1993.<sup>63</sup> Courts that have a functioning Civil Justice Reform Act Plan and that have adopted the new discovery rules are more likely to have the tools necessary to facilitate efficient discovery and pretrial planning in a consolidated case.

### C. Complexity During Trial

Complexity during the trial can be a product of "large amounts of evidence in a constrained, pressure-filled situation,"<sup>64</sup> or the inability of a decision maker to make a rational

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59. See BRAZIL ET AL., *supra* note 58. "A special master is a private attorney, a law professor, or a retired judge who is appointed, with or without the consent of the parties, to assist the judge in performing some of his or her functions." *Id.* at 1 n.2; see also FED. R. CIV. P. 53 (authorization for appointment of special masters); 28 U.S.C. §§ 631-36 (1988) (statutory authorization of magistrates); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 380 (1979) (stating that the Federal Magistrate Act "provides the federal trial courts with a long-range, standby resource which can supplement the judges in efficient and expeditious disposition of the business of the courts").

60. Mullenix, *supra* note 44, at 486 ("Judge [Robert M.] Parker [of *Cimino v. Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex. Nov. 12, 1990)] assumed the role of a highly activist, managerial judge, whereas Judge [James McGirr] Kelly [writing in *In re Asbestos School Litig.*, 768 F. Supp. 146 (E.D. Pa. 1991)] assumed a reactive, non-interventionist posture." Note that Judge Parker's case came to trial much sooner than Judge Kelly's case. Mullenix, *supra*, note 44, at 486.).

61. §§ 101-05, 104 Stat. 5089.

62. See, e.g., CIVIL JUSTICE REFORM ACT ADVISORY COMM., *supra* note 1, at 58-70.

63. See Robert Pass, *Big Changes in the Federal Rules*, 20 LITIG., Summer 1994, at 10-11.

64. Tidmarsh, *supra* note 30, at 1704.

decision based on the evidence presented. The first aspect of trial complexity may create or contribute to the second aspect of trial complexity. Once again, the Proposal fails to discuss the problem of trial complexity. Presumably, the requirement that consolidation "promote the just, efficient, and fair conduct of the actions" allows consideration of trial complexity prior to consolidation. However, as in the case of pretrial complexity, failure to specifically take trial complexity into account prior to consolidation may create more inefficiency than it resolves.

Trial complexity, due to the volume of evidence, can be resolved in many of the same ways that pretrial complexity is resolved.<sup>65</sup> For example, special masters may be used in the pretrial stages to resolve evidentiary disputes,<sup>66</sup> thus facilitating the admission of evidence. Trial bifurcation can reduce the volume of evidence to be managed in each trial. Computer programs can be enlisted to organize and present evidence.

The greatest hazard posed by the presentation of voluminous amounts of evidence is that it contributes to fact finder dysfunction.<sup>67</sup> Many solutions have been proposed to the problem of decision makers' incomprehension, and in particular jury incomprehension. Better management and presentation of evidence, as mentioned above, may ease the situation. Judicial interrogation of witnesses may help both jury and judicial comprehension of issues by removing the gloss added by counsel. "[A] number of [other] procedures for improving jury comprehension in complex multiparty civil litigation [can be used], such as bifurcated trials, preliminary and interim jury instructions, interim summations, juror note-taking and questions, detailed jury instructions, and special verdicts."<sup>68</sup>

More radical solutions to the problem of jury comprehension include trying complex cases before special "blue ribbon" juries composed of experts in the subject matter of the dis-

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65. See *supra* notes 56-57 and accompanying text.

66. See *BRAZIL ET AL.*, *supra* note 58, at 12.

67. See Brunet, *supra* note 4, at 278-79; Tidmarsh, *supra* note 30, at 1766.

68. Mullenix, *supra* note 44, at 566; see also Committee on Fed. Courts of the N.Y. State Bar Ass'n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549 (1988) (focusing on the relationship between judge and jury while analyzing various techniques which may be employed to aid the jury in fulfilling its role); Elizabeth A. Faulkner, Note, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 ARIZ. ST. L.J. 297, 325 (1989) ("The special verdict allows the trial judge to control the jury, simplify jury instructions, and place the jury findings on the record for appellate review, thus reducing unnecessary trials.").

pute,<sup>69</sup> or eliminating the jury altogether and appointing judges expert in the area to hear the cases.<sup>70</sup> The constitutionality of eliminating a jury trial altogether in complex cases has been questioned.<sup>71</sup> However, Justice Marshall in *Peters v. Kiff*<sup>72</sup> acknowledged a due process right to a competent tribunal, stating,

The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. . . . Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law.<sup>73</sup>

The Third Circuit has found that when the complexity of the evidence prevents a jury from coming to a rational verdict there is no right to a jury trial.<sup>74</sup> However, the Ninth Circuit has rejected such a notion stating that the Seventh Amendment does not contain an exception for complex cases.<sup>75</sup> The Supreme Court has not specifically addressed the issue, and until it does the remaining circuits are sitting on the fence.<sup>76</sup>

69. See William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981).

70. Paul Lansing & Nina Miley, *The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective*, 14 LOY. L.A. INT'L & COMP. L.J. 121, 135-37 (1991) (discussing a Pennsylvania proposal to create a commercial court to try certain disputes without a jury before a specially trained business law judge).

71. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571 (1983); Lansing & Miley, *supra* note 70; Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981).

72. 407 U.S. 493 (1972).

73. *Id.* at 501.

74. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084-86 (3d Cir. 1980).

75. *In re United States Fin. Secs. Litig.*, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (The district court refused jury demands on the ground that the case was too complex. The Ninth Circuit reversed on the ground that there is no complexity element to the Seventh Amendment.).

76. See *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir. 1985) ("We need take no position here [as to the theory] that trial by jury violates due process of law if the suit 'is too complex for a jury to understand and decide rationally.'"); *Phillips v. Kaplus*, 764 F.2d 807, 814 (11th Cir. 1985) ("While at least one circuit has suggested that mere complexity of facts alone can provide the basis for . . . the denial of a jury trial, we have not done so, and we do not do so here" (cita-

The Panel should consider whether consolidation will exacerbate the problems caused by trial complexity. Prior to transfer of a consolidated action, the Panel should consider whether the transferee court allows the creation of special juries or the elimination of a jury altogether. However, the Panel should also consider that the elimination of a jury trial due to complexity, artificially created by the consolidation of numerous cases, raises even greater questions of constitutionality than the elimination of a jury trial in inherently complex cases. Additionally, transfer to a court that will remove a complex case from the jury, when the case was originally filed in a court which will not allow the elimination of a jury trial due to complexity, undermines party expectations. This problem is also likely to undermine party satisfaction with the resolution of the case. Party dissatisfaction similarly may arise from the fourth and final type of complexity, complexity in the implementation of the remedy.

#### *D. Complexity in the Remedy*

Remedial complexity is caused by the creation and attempted implementation of administratively unmanageable remedies.<sup>77</sup> A result of remedial complexity is the inability of the parties "to implement the declared remedy."<sup>78</sup> "[T]he remedial phase in complex cases often lasts far longer, and is far more costly in terms of judicial and attorney resources, than the high-profile pre-remedial phase."<sup>79</sup> Since victory without a workable remedy is hollow,<sup>80</sup> any proposed solution to the problem of complex litigation that does not discuss remedial complexity is illusory. The Proposal notes that there are "cer-

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tions omitted).).

77. Tidmarsh, *supra* note 30, at 1709. Remedial complexity generally manifests itself in two forms: the complexity caused by the "inordinate expense in obtaining and managing the information needed to choose a proper remedy, or the necessity of solomonic, creative, and somewhat unprincipled solutions to intractable remedial questions," and the complexity of administering the remedy once it is fashioned. *Id.*

78. *Id.* at 1773.

79. *Id.* at 1709; see also Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 338 n.7 (1986) (stating that in a complex case, "any judgment or settlement reached, even one for money damages, is likely to be difficult to implement").

80. Tidmarsh, *supra* note 30, at 1774 ("If the rational application of fact to law dictates in theory a result impossible to accomplish in practice, the legal declaration is a nullity.").



tain 'complex' forms of relief"<sup>81</sup> but does not go beyond this rather terse statement to propose solutions to the problem of remedial complexity. Neither does the Project acknowledge that by consolidating multiparty, multiforum cases the Proposal itself may be creating cases the resolution of which will require "certain 'complex' forms of relief."

Remedial complexity can result in failure to implement the declared remedy when one or more of the following problems is present: first, if there are too many parties to the remedy resulting in administrative chaos (administrative remedial complexity); second, if there are not enough parties to the remedy, resulting in a party vital to the implementation of the remedy being outside the court's control (absentee remedial complexity); or third, if implementation of the remedy is so expensive that the parties, though they may be willing, are unable to implement the solution (implementation remedial complexity).

### 1. *Administrative remedial complexity*

Remedial complexity that is a result of administrative difficulties caused by the presence of too many parties has been resolved in a number of ways. Courts have created claims-resolution facilities in a number of mass tort situations.<sup>82</sup> The court, in *In re Joint Eastern & Southern Districts Asbestos Litigation*, created the Manville Personal Injury Settlement Trust.<sup>83</sup> In the Agent Orange litigation, the court established guidelines that claimants had to meet in order to claim compensation from the court established fund.<sup>84</sup> These claims resolution facilities reduce administrative complexity by creating a central facility to which claimants present their claims, establishing uniform standards for claim relief, and subjecting the remedial process to judicial review. A less elaborate approach to resolving administrative remedial complexity would be to

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81. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 3.

82. Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (1990) (describing operation of claim-resolution facilities in asbestos, Agent Orange, Dalkon Shield, and Triana cases).

83. See 129 B.R. 710, 751-56, 838-46 (E. & S.D.N.Y. 1991).

84. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1263-66 (E.D.N.Y. 1988); *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982), *cert. denied*, 467 U.S. 1247 (1984); see generally, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1516-36 (1976) (discussing calculation and distribution of damages in class actions).

appoint masters, magistrates, and implementation committees to create remedial plans and give recommendations.<sup>85</sup>

## 2. *Absentee remedial complexity*

The Project recognizes the problems that arise when parties necessary to a solution are not present before the court. Section 5.05 of the Proposal provides for forced intervention by, or the preclusion of, claims by nonparties that have claims involving "one or more questions of fact in common with the actions pending before the . . . court."<sup>86</sup> Section 5.05 resolves one prong of the "not enough people" problem—it binds all similarly situated plaintiffs by the court's decision. However, it does not necessarily allow the court to join defendants necessary to the implementation of the remedy.

Additionally, this expanded notion of issue and claim preclusion seems manifestly unfair. Mandatory intervention forces individuals to abdicate their own choice of forum and to participate in litigation that involves so many parties and so much procedure that the psychological and actual value of having one's case heard "may be lost or trivialized."<sup>87</sup> Mandatory intervention results in a loss of dignity for the party.<sup>88</sup> A "Rand

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85. See, e.g., *Bradley v. Milliken*, 620 F.2d 1143, 1156-58 (6th Cir.) (requiring experts who are employed to assist the court in creating a remedial plan to prepare written reports to be placed in the record), *cert. denied*, 449 U.S. 870 (1980); *Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. 1972) (adopting special master's recommendations for changes in prison routine); *Mullenix*, *supra* note 44, at 545-50, 558-64 (describing use of a court-appointed expert in a group trial to determine damages in an asbestos class).

86. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.05(a)(1).

87. Brunet, *supra* note 4, at 297. The Proposal mentions that repetitive litigation may undermine the legitimacy of the courts, COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7, but fails to recognize that an important part of fairness is the ability to be heard. Consolidation that devalues a party's ability to be heard may encounter constitutional problems, for, as the Court in *Grannis v. Ordean* stated, "The fundamental requisite of due process of law is the opportunity to be heard." 234 U.S. 385, 394 (1914). See also Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 65. Additionally, "aggregation may dim our capacity to see injustice." *Id.* An example of this principle in action is the Agent Orange class consolidation. The concern in creating a class 2.4 million persons strong appears to be less with addressing the injustices suffered by the victims than with just getting the cases out of the courts. See also Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69 (stating that individuals examining the aggregation of mass torts have given "[i]nsufficient attention . . . [to] the fairness of such proceedings to individual plaintiffs").

88. Brunet, *supra* note 4, at 297; see also Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 44 (stating that involuntary

Institute study comparing client perceptions of litigation, arbitration, and settlement conferences concluded that dignity was evaluated as especially important to perceived fairness and litigant satisfaction. Indeed, litigants rated dignity the highest procedural concern of those values essential to a fair adjudicatory procedure.<sup>89</sup> The Reporters indicate that one of the concerns behind the Project is that "[r]epeated relitigation . . . contributes to the negative image many people have of the legal system."<sup>90</sup> It seems likely that the mandatory intervention suggested by the Proposal that results in the undignified treatment of litigants will contribute even more than repeated relitigation to the "negative image many people have of the legal system." After all, there is less cause for concern if the legal system is slow and repetitive but nevertheless functions properly than if the legal system fails to fulfill its role.

### 3. *Implementational remedial complexity*

The Project does not address remedial complexity caused when a defendant fails to implement the remedy because of his or her financial inability to pay the damage award. However, solutions to this type of remedial complexity can be developed by considering the problems raised by asbestos, "[t]he giant of complex litigation."<sup>91</sup> It takes little imagination to conclude that the repeated award of punitive damages helped drive asbestos manufacturer Johns-Manville into bankruptcy.<sup>92</sup> Persons claiming asbestos caused illnesses after the Johns-Manville bankruptcy have been treated differently than claimants who participated in the bankruptcy proceedings.<sup>93</sup> Simply stated, the repeated award of punitive damages contributed to

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participation in complex litigation brings with it questions about "kidnapped" participants).

89. Brunet, *supra* note 4, at 284 (footnotes omitted) (citing E. ALLEN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES* 62-63 (1989)).

90. *COMPLEX LITIGATION PROPOSAL*, *supra* note 2, at 7.

91. *Id.* at 10.

92. *See In re Johns-Manville Corp.*, 31 B.R. 965 (S.D.N.Y. 1982); *see also* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121, 1122 (1983) ("Manville and UNR Industries are the first such apparently healthy corporations to file chapter eleven petitions in the face of massive tort claims.").

93. *See COMPLEX LITIGATION PROPOSAL*, *supra* note 2, at 12 (discussing whether a bankruptcy court "can achieve equity between early- and late-filing claimants").

the bankruptcy of Johns-Manville, which led to the inequitable treatment of postbankruptcy claimants.

Punitive damage reform has been much discussed.<sup>94</sup> However, disregarding the need or even the desirability of punitive damages reform, the Proposal's consolidation mechanism could be used to resolve more efficiently the problems caused by the repeated award of punitive damages, thus decreasing remedial complexity caused by inability to pay. The Panel could, instead of consolidating all asbestos claims, only consolidate the question of punitive damages. The transferee court would determine the total punitive damage award. This award would be used to establish a punitive damage award fund. Asbestos claimants who were awarded punitive damages in separate unconsolidated trials could then apply to the fund for a portion of the previously determined punitive damage award. This solution has the advantages of giving qualified claimants a piece of the punitive damage pie and preventing the repeated punishment of a defendant for the same egregious behavior. As shown below, the consolidation of common questions of punitive damages promotes the Project's goal of efficiency. In short, consolidation of punitive damage claims alleviates the problem of remedial complexity, because it reduces the likelihood that the court will impose damages that are beyond the defendant's ability to pay, and it puts the onus of collecting the punitive damages award on the individual plaintiffs rather than requiring the defendant to contact a multitude of plaintiffs.

The Proposal inadequately addresses the problem of remedial complexity. Prior to consolidation the Panel should consider whether consolidation will create remedial complexity due to the sheer number of parties involved. Additionally, the Panel should consider whether the mandatory intervention provision of section 5.05 will create more problems in terms of litigant dissatisfaction than it resolves in terms of remedial complexity

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94. See, e.g., Jimmie O. Clements, Jr., *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24 ST. MARY'S L.J. 197 (1992); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992); Jonathan Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753 (1993); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473 (1993).

caused by the absence of necessary parties. Finally, the Panel should consider whether remedial complexity, caused by inability to pay damage awards, can be resolved by consolidating only the question of damages.

#### IV. CONCLUSION: ANOTHER PROPOSAL

Section 3.01 of the Proposal provides the standard for consolidation of multiparty, multiforum cases. This section provides:

- (a) Actions commenced in two or more United States District Courts may be transferred and consolidated if:
  - (1) they involve one or more common questions of fact, and
  - (2) transfer and consolidation will promote the just, efficient, and fair conduct of the actions.
- (b) Factors to be considered in deciding whether the standard set forth in subsection (a) is met include
  - (1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and
  - (2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses.<sup>95</sup>

As discussed above, these criteria inadequately address the problems of pretrial, trial, remedial, and multiparty complexity. Because of these inadequacies, it is likely that consolidation under these criteria would lead to greater inefficiencies than would have existed had there been no consolidation. A standard for consolidation that better addresses the problems of complex litigation as a whole is presented below.

- (a) Actions commenced in two or more United States District Courts may be transferred and consolidated if:
  - (1) they involve one or more common questions of fact arising from the conduct of one or more common parties, and
  - (2) transfer and consolidation will promote the just, efficient, and fair conduct of the actions.

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95. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01.

(b) Factors to be considered in deciding whether consolidation under the standard set forth in subsection (a) is met include

- (1) the extent to which transfer and consolidation will increase administrative difficulties of the pretrial, trial, and remedial phases of the litigation, thus making a just resolution of the consolidated case less likely, and
- (2) whether transfer and consolidation can be accomplished in a way that upholds the dignity of the parties and does not result in undue inconvenience to them and the witnesses; and
- (3) whether transfer and consolidation will increase the likelihood that resolution of the case will result in a effective remedy.

The requirement in (a)(1) that the common question of fact arise from the conduct of one or more common parties prevents the prospect of the consolidation of cases of victims of the same surgical technique practiced by different doctors.<sup>96</sup> The requirement in (a)(1) also prevents tortfeasors from being grouped together, and thereby prejudiced by another tortfeasor's actions, merely for creating the same product regardless of collaboration.<sup>97</sup>

Subsection (b)(1) makes it clear that pretrial, trial, and remedial administrative difficulties caused by consolidation should be considered prior to consolidation. If consolidation would lead to administrative difficulties that would jeopardize the just resolution of the case, then regardless of the inefficiency, consolidation is not justified. Subsection (b)(2) takes into account a party's reaction to consolidation. The preservation of a party's dignity is important in ensuring that litigants feel the legal system has served them well.<sup>98</sup> The addition of (b)(3) is necessary to recognize that consolidation that results in a remedy that can not be implemented is of little value.<sup>99</sup> Remedy implementation should be considered prior to consolidation.

The primary goal in resolving any case is a just result, not simply an efficient result. A case should be resolved efficiently and justly if possible, but the main purpose of our justice sys-

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96. See *supra* notes 40-41 and accompanying text.

97. Tortfeasors who may be found liable under theories of market share liability (e.g., asbestos manufacturers) would still be lumped together since the tortfeasors are common defendants to each case using the market share theory of recovery.

98. See *supra* notes 86-88 and accompanying text.

99. See *supra* note 78 and accompanying text.

tem should be the administration of justice. The ALI proposes the consolidation of cases involving "one or more common questions of fact." Consolidation under the criteria suggested by the Proposal could lead to a just and efficient result. However, because the Project fails to consider any aspects of complex litigation other than multiparty, multiforum litigation, it is likely that consolidation will actually lead to greater inefficiencies and greater injustice in many cases. Thus, problems of pretrial, trial, and remedial complexity need to be considered as well as problems raised by multiparty, multiforum cases. Additionally, greater consideration needs to be paid to party concerns prior to consolidation. Although our courts are busy, it is premature to say the sky is falling. It is even more premature to assume that we would prefer an efficient result to a just result in the event that the sky did fall. As James Madison stated in *Federalist No. 51*, "[j]ustice is the end of government."<sup>100</sup> We cannot deviate from that end.

*Christine Gail Clark*

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100. THE FEDERALIST NO. 51, at 322 (James Madison) (Isaac Kramnick ed., 1987).