

WHY ME? THE ROLE OF PRIVATE INDIVIDUALS IN COMPLEX CLAIMS RESOLUTION

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INTRODUCTION

Over the last two years, when reading about the Iraq war and its aftermath, I wondered: Who is Paul Bremer? Nobody elected him. Few people had heard of him before he became the Administrator of the Coalition Provisional Government of Iraq.¹ When thinking about my role in this Symposium, it

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1. President George W. Bush appointed L. Paul Bremer III as Presidential Envoy to Iraq on May 6, 2003 and in this capacity he served as the Administrator of the Coalition Provisional Authority. Prior to being in Iraq, Ambassador Bremer, a 23-year State Department employee, was Chairman and Chief Executive Officer of Marsh Crisis Consulting Company, a crisis management firm owned by the financial services firm Marsh & McLennan. From 1989 to 2000, he was Managing Director of Kissinger Associates, a strategic consulting firm headed by former Secretary of State, Henry Kissinger. *Ambassador Paul Bremer*, The Coalition Provisional Authority, at <http://www.cpa-iraq.org/bios/> (last

occurred to me that my position as a Trustee of the Dalkon Shield Claimants Trust (“DS Trust”)² was in some ways akin to that of Paul Bremer. Few people had heard of me. Nobody had elected me either. Although the DS Trust did not have as high a profile as the Iraq war and its aftermath, the person on the street may well have wondered why a relatively unknown law professor was given the job of developing standards for distributing over \$2 billion to hundreds of thousands of claimants. Similarly, although better known, Kenneth Feinberg, a private lawyer who served as a trustee of the DS Trust, more recently was appointed by the Attorney General of the United States to a high profile post to administer the September 11 Victims Compensation Fund (“VCF”) created to compensate the victims of the attacks on the World Trade Center and the Pentagon.³

This article explains why private persons, as opposed to a judge or, perhaps, another governmental official, should have the authority to exercise a high degree of discretion in developing standards for compensation and determining compensation awards for claimants. It is important to look directly at this issue because the question whether administrative trusts are an appropriate option to litigation cannot be answered without a discussion about the private persons who develop the compensation standards and administer an administrative trust, and how they should be selected.

The role of private persons in the adjudication process has been the subject of some critical academic commentary⁴ and has been critiqued implicitly in the literature casting concerns about the ADR movement.⁵ However, it is difficult to imagine in today’s litigation climate that judges would be expected to resolve the claim of each plaintiff in complex cases, particularly mass tort

visited Oct. 13, 2004).

2. Judge Robert R. Merhige appointed me to a position as a Trustee in November 1988. I was appointed Chairperson of the Trust by my co-Trustees in August 1989, and served in that capacity until the Trust completed its business and I was discharged in March 2000. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)*, 61 *FORDHAM L. REV.* 617 (1992) [hereinafter *Paradigm Lost*]; Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 *LOY.L.A. L. REV.* 79 (1997) [hereinafter *Rhetoric*].

3. Kenneth Feinberg was appointed as Special Master of the VCF on November 26, 2001. *Attorney General Ashcroft Announces the Appointment of the Special Master to Administer the September 11 Victim Compensation Fund*, United States Department of Justice, at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_26.htm (Nov. 26, 2001) [hereinafter *Appointment*]. See also Editorial, *The Victims’ New Referee*, *N.Y. TIMES*, Dec. 1, 2001, at A26 (“In a long career resolving complicated disputes, Kenneth Feinberg has never seen a case as tangled and emotionally volatile as the one he confronts now.”).

4. See, e.g., Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 *U. PA. L. REV.* 2131, 2131 (1989) (“One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts [magistrate judges and special masters], who customize procedure for particular and individual cases.”).

5. See, e.g., Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 *U. MIAMI L. REV.* 173, 185-191 (2003) (discussing shift from adjudication by judges to adjudication by agencies and ADR).

cases. Thus, the relevant concern is whether processes can be put into place to ensure that when private decision makers act, they promote and protect the various goals ordinarily served by litigation before a judge. Part I of this article provides a brief history of the “hybridization of complex claims resolution.” This discussion shows that the use of private persons to control the process of determining compensation levels is a natural outgrowth of the development of the “public law” model of litigation and the ensuing “privatization” of the dispute resolution process. What has emerged is a hybrid system in which mass claims litigation that is commenced in courts results in an administrative claims resolution facility with standards for determining compensation developed by and administered by private individuals.

The article further raises the possibility that the politicization of state and federal judiciaries creates a climate in which private decision makers are perhaps in at least no worse a position than judges to provide impartial, disinterested justice. Next, the article rejects the argument that judicial adjudication is necessarily the superior means for resolving disputes. Rather, it suggests that administrative trusts run by private persons can provide a laboratory for innovative dispute resolution processes, the evolution of the law, and, ultimately, the fair administration of justice.

Given that most trust funds that have marked the legal landscape over the last twenty years have emerged out of litigation of some kind, or the expectation of litigation,⁶ Part II of the article discusses who from the private realm should be chosen to run the administrative trust. It examines the degree of discretion that the trustees ought to enjoy, and the degree of judicial supervision that ought to be required. After making a case for the appointment of independent trustees, the article raises the repeat player problem: A relatively small group of private individuals serve as the designers or administrators of the administrative trusts that have emerged in response to complex litigation, such as in mass tort cases.

The article suggests that the arguments for using private persons as the proxy for the judicial system begin to lose force when the same private individuals are chosen, by another set of repeat players—the judges and lawyers that appear so regularly in complex litigation. The article concludes that more appropriate selection processes can help solve the issues created by the repeated use of repeat players. It borrows from the literature regarding judicial selection methods to propose innovative approaches to the selection of a broader range of private persons. The introduction of some competition in the selection of trustees should result in administrative claims resolution facilities that are an appropriate substitute for litigation. The processes such private persons develop can result in efficiency, impartiality, and appropriate levels of innovation.

6. The September 11 Victims Compensation Fund, unlike others that emerged out of litigation, was created by Congress in the expectation of litigation.

I. HOW WE GOT HERE: THE HYBRIDIZATION OF COMPLEX CLAIMS RESOLUTION

The traditional paradigm for civil dispute resolution envisions a judge who makes legal rulings, and a jury that determines the facts after a trial. Trials have been characterized as “the central institution of the law as we know it”⁷ and as “one of our great cultural achievements.”⁸ However, as Professor Gillian Hadfield has shown, the percentage of civil cases resolved by either a bench or jury trial has declined from 11.5% in 1962 to 1.8% in 2002.⁹ Not coincidentally, with increasing pace during the last several decades, civil dispute resolution has moved from the “private law” model of adjudication to the “public law” model. At the same time, private persons have become an integral part of the claims resolution process, especially in complex litigation such as mass tort litigation. These developments may be described as the “hybridization of complex claims resolution.” By hybridization, I mean that the resolution of a complex litigation requires the participation of the judiciary, government officials, the parties to the litigation, and private individuals not only during the litigation and the settlement process, but in the claims distribution process as well.

This Part discusses the evolution of these developments. First, it shows how mass tort and similar complex claims resolution became a species of “public law” litigation, and how complex claims resolution came to be characterized by the participation of not only public, but also private actors, not simply as parties and their attorneys, but also as adjuncts of the judiciary in setting standards and making awards. Next, it examines the political dynamics that undermine judicial impartiality at the state and federal levels, which leads to the claim that such private adjuncts or adjudicators may be capable of being at least as impartial as judges. This Part also suggests that the use of such persons can lead to the development of innovative approaches to dispute resolution, and help advance the evolution of law. Thus, the question is not whether private persons should play a discretionary role in resolving claims, but who those persons should be, and how they should be selected.

7. JAMES WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 108 (1999).

8. Robert P. Burns, *The Distinctiveness of Trial Narrative*, in THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS (Anthony Duff et al. eds., forthcoming Dec. 2004); see also Robert P. Burns, *A Conservative Perspective on the Future of the American Jury Trial*, 78 CHL.-KENT. L. REV. 1319, 1319 (2003) (“[T]he American jury trial, as we have developed it, is one of the greatest achievements of American public culture.”).

9. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. (forthcoming Nov. 2004). For a discussion of the possible reasons for the decline of trials, see Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Legal Studies 783 (2004).

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A. Mass Tort Litigation as Public Law Litigation

In his famous¹⁰ article, *The Role of the Judge in Public Law Litigation*,¹¹ Professor Abram Chayes examined changes in the makeup of litigation in cases such as school desegregation cases, and noted that a “new model of litigation” had emerged. Professor Chayes noted various characteristics of this new model:

1) “the party structure is sprawling and amorphous, subject to change over the course of the litigation;”

2) “the judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders - masters, experts, and oversight personnel,” and

3) the judge has “has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.”¹²

Almost twenty years later, Judge Jack B. Weinstein noted that Professor Chayes' description of modern litigation applied to private mass tort litigation as well.¹³ He explained the similarities between mass tort cases and classic public law institutional litigation. Both “implicate serious political and sociological issues.”¹⁴ Mass tort cases and public law litigation also have “strong psychological underpinnings” and both “affect larger communities than those encompassed by the litigants before the court.”¹⁵ He further explained that mass tort cases, like public law cases, raise important issues about modern society.¹⁶ He noted that there often arises in mass tort cases “a near paranoid terror of an unknown ‘them’ in the large corporation” and a sense of “extreme anxiety” like that which arises in public law cases involving government agencies.¹⁷ These characteristics in turn require courts to take a more active

10. See Richard Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647 (1988) (assessing the impact of Chayes’ article and characterizing it as the most famous of all law review articles).

11. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 59 HARV. L. REV. 1281 (1976) (describing the evolution from the “private law” model to the “public law” model).

12. *Id.* at 1282-84.

13. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U.L. REV. 469, 472, 473-74 nn.10-17 (1994) (“Mass tort cases are akin to public litigation, involving restructuring of institutions by the courts to protect constitutional rights.”). Professor David Rosenberg earlier had argued that mass tort litigation is a form of public law litigation. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

14. *Id.* at 474.

15. *Id.*

16. *Id.*

17. *Id.* at 475.

role in managing the litigation. It also requires the court and attorneys to exercise a higher degree of sensitivity so that irrational disagreements do not undermine the resolution of the litigation.¹⁸

Professor Linda Mullenix has criticized Judge Weinstein's vision of mass tort litigation as public law litigation.¹⁹ She argues that "Judge Weinstein's assertion is an analytical finesse"²⁰ because mass tort cases generally do not involve constitutional rights.²¹ Rather, she continues, mass tort litigation is essentially a collection of individual personal injury cases. Accordingly, she argues that the public law paradigm is inapplicable because "mass tort cases do not pit downtrodden, defenseless claimants against such big, impersonal governmental institutions as prisons, school systems, and mental health facilities. Further, there is no state action involved in any of these cases that would justify triggering Judge Weinstein's desired judicial activism."²²

Literally, Professor Mullenix is correct. However, the Supreme Court decided *Amchem Products, Inc. v. Windsor*²³ in 1997, in which it vacated the class action settlement of the asbestos litigation, and split 4-4 in *Dow Chemical Company v. Stephenson*,²⁴ which allowed veterans who otherwise would have been compensated by the fund created by the then defunct Agent Orange settlement facility to sue Dow Chemical for injuries allegedly caused by their exposure to Agent Orange. Both cases were decided on due process grounds. Thus, issues of constitutional law seem to loom larger than ever in the mass tort context. Moreover, the essence of Judge Weinstein's argument as to why mass tort cases should be analogized to public law litigation is that such litigation has such a huge impact on the public at large.²⁵

Unquestionably, mass tort cases have had a dramatic impact on the judicial system and society over the last two decades.²⁶ Mass tort litigation is extraordinarily expensive.²⁷ As a particular litigation becomes more protracted,

18. *Id.* at 475-76.

19. Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U.L. REV. 579, 580-81 (1994) (criticizing Judge Weinstein for treating mass tort cases as public law cases) [hereinafter *Paradigm Misplaced*]; see also Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U.L. REV. 413, 421-431 (1999) [hereinafter *Private Law Paradigm*] (critiquing theory that mass tort litigation is akin to public law litigation).

20. *Paradigm Misplaced*, *supra* note 19, at 581.

21. *Id.*

22. *Id.*

23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

24. *Dow Chemical Co. v. Stephenson*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part by an equally divided Court, vacated in part*, 539 U.S. 111 (2003).

25. Weinstein, *supra* note 13, at 474. Indeed, state claim based litigation is deserving of the time and attention of federal judges. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that state contract claim must be adjudicated by an Article III judge, not a bankruptcy judge).

26. See *Rhetoric*, *supra* note 2 (discussing evolution of mass tort litigation).

27. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN

shareholder value may be diluted and jobs may be lost.²⁸ Since the Supreme Court's decisions in *Amchem*²⁹ and *Ortiz v. Fireboard Corporation*³⁰ made it more difficult for companies seeking global peace in resolving a mass tort to use Rule 23 settlement class actions,³¹ more asbestos defendants have sought to use the bankruptcy laws to obtain such peace, and more companies involved in various mass torts may be likely to do so in the future.³² The traditional model of litigation often overly rewards some plaintiffs, but may leave others with nothing as corporate defendants' assets are depleted through the litigation process.³³

Rather than compare the harms suffered by victims of discrimination in a traditional public law case or characterize them as downtrodden as compared to victims of a defective product or drug that causes serious injury, it is more apt to compare the scope of harm in terms of the large numbers of persons affected by the same or similar conduct. Indeed, under the corporate law of most states, the boards of directors of public companies are required to maximize profits for the benefit of shareholders. Thus, they make decisions that generally do not necessarily inure to the benefit of the consumers of their products. The result can be a mass tort such as those we have seen, and will see in the case of *Vioxx*. Just as traditional public law cases are seen as a deterrent to governmental abuses, mass tort cases raise a similar need to constrain the single-minded approach to profit maximization.³⁴ In that sense, mass tort litigation unquestionably takes on the attributes of traditional public law litigation. All such litigation is complex litigation and, as such, invites nontraditional methods of resolution.³⁵

INTERIM REPORT (2002).

28. For example, asbestos litigation in the U.S. court system has cost the American economy more than 50,000 jobs and may total as much as \$275 billion. JOSEPH E. STIGLITZ ET AL., *THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS* (2002).

29. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (striking down Federal Rule of Civil Procedure 23(b)(3) asbestos class action settlement).

30. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (striking down Federal Rule of Civil Procedure 23(b)(1)(B) mandatory asbestos class action settlement).

31. *Rhetoric*, *supra* note 2; *see also* Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C.L. REV. 405 (1999) (predicting that *Amchem* and *Ortiz* decisions would, unfortunately, lead to greater use of Chapter 11 to resolve mass tort cases and arguing that class action settlements are preferable to Chapter 11).

32. *See* Rice & Davis, *supra* note 31.

33. Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 93-95 (2004) (describing increased use of bankruptcy to resolve mass tort litigation).

34. *See* Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. (forthcoming 2004) (discussing how tort bar's discovery efforts led to breakthroughs in tobacco litigation; exposing tobacco industry as "vampiric apparition").

35. *See* Edward F. Sherman, *Introduction to the Symposium: Complex Litigation: Plagued By Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 589-93 (2004) (describing evolution of complex litigation and noting problems raised by

Indeed, over the last twenty years, judges aggressively have used numerous procedural devices to steer mass tort cases to resolution without trial. Federal judges are armed with powerful aggregation tools to assist them in resolving complex cases, such as the Multidistrict Litigation statute, which allows the transfer of related cases to one district court for pretrial purposes,³⁶ and Federal Rule of Civil Procedure 23, which permits class action litigation.³⁷ In the bankruptcy context, 28 U.S.C. § 1334, which vests the federal district courts with subject matter jurisdiction over cases “related to” a bankruptcy case, may be used to support removal of state cases involving the debtor and third parties to federal court, and, ultimately, their aggregated treatment in a federal court.³⁸ In addition to these aggregation rules, courts invoke the court-made preclusion doctrine to bar relitigation of the same issues,³⁹ institute docket control mechanisms,⁴⁰ create case management consortia,⁴¹ and issue injunctions against state court litigation that raises the same claims as those in federal court.⁴² It is not a well-kept secret that judges use these tools to drive the parties to settlements.⁴³ In the aftermath of settlement, as a general matter, an administrative fund of some kind is established to pay all claimants, with the fund generally administered by a private individual rather than a judge.

Although *Amchem* makes it more difficult to resolve mass tort claims in

innovative approaches to resolution of complex litigation).

36. See 28 U.S.C. § 1407 (2003).

37. See FED. R. CIV. P. 23.

38. See 28 U.S.C. § 1334(b) (1994). Section 1334 provides for original and exclusive jurisdiction over all cases under Title 11 (the Bankruptcy Code), and further provides in relevant part: “the district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under title 11.” Section 1334 has been used in a number of mass tort cases to effect consolidation. See *In re Dow Corning Corp.*, 86 F.3d 482, 486-87 (6th Cir. 1996); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986).

39. See Georgene M. Vairo, *Reinventing Civil Procedure: Will the New Procedural Regime Help Resolve Mass Torts?*, 59 BROOK. L. REV. 1065, 1073 & n.40 (1993). For a discussion of the problems associated with the use of offensive nonmutual collateral estoppel, see *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982).

40. See Frederick C. Dunbar & Denise Neumann Martin, *Clearing Uninjured Plaintiffs from the Tort System: The Road to a Solution*, LEGAL BACKGROUNDER, July 25, 2003 (explaining how many states have instituted “inactive dockets” for “unimpaired claimants”).

41. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13 (1990) (discussing methods of payment for asbestos claims by the Center for Claims Resolution (“CCR”), a consortia for claims payment joined by numerous asbestos defendants).

42. See Georgene Vairo, *Judicial V. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1576-89 (2000) (discussing federal courts use of the All Writs Act to ensure the primacy of federal dispute resolution in mass tort cases); see also Lonny S. Hoffman, *Syngenta, Stephenson and the Federal Judicial Injunctive Power*, 37 AKRON L. REV. 605, 618 (2004) (discussing limits on federal judicial power to enjoin state court proceedings).

43. For example, the MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) makes clear that judges in complex cases ought to promote settlements. See, e.g., § 13.13 (“Specific Techniques to Promote Settlement”).

class action settlements, federal and state courts still approve such settlements.⁴⁴ Indeed, many scholars have criticized the aggressive use of judicially managed, aggregated settlements of mass torts because such resolution impairs the role of the judiciary and individual autonomy.⁴⁵ Nonetheless, it seems clear that the aggregated settlements of mass tort litigation are here to stay, one way or the other, unless tort reform succeeds in eliminating the plaintiffs' mass tort bar. Just two recent examples highlight this trend: the use of § 524(g) prepackaged plans of reorganization, that lead to the establishment of trust funds administered by private individuals to resolve asbestos liability, which have assumed paramount importance in the last few years,⁴⁶ and the establishment of the September 11 Victims Compensation Fund.⁴⁷

B. *The Hybridization of Claims Resolution*

Based on my experience as chairperson of the Dalkon Shield Trust, I have written that aggregated settlements of mass tort cases are the preferred alternative to traditional one-on-one litigation.⁴⁸ But, I have not discussed the propriety of my role or others similarly situated, such as Ken Feinberg, as Special Master of the VCF, or other trust fund administrators, as a private individual who is not a governmental official, in actually resolving claims. Although one can argue that such private persons have become governmental actors—the administrators of an ad hoc administrative agency—by the simple act of appointment, the problem remains that heretofore private individuals

44. See Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373 (1998) (discussing how state and federal courts can and are continuing to certify settlement classes). See, e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (Tjoflat, J.) (certifying single RICO class of virtually all doctors in the United States against almost all HMO's and other health insurers in the country); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004) (Posner, J.) (affirming certification of RICO class of millions, and a state law contract claim case for trial purposes after trial judges rejected class settlement as unfair; "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$ 30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative--no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied--to no litigation at all.").

45. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) [hereinafter *Managerial Judges*] (critiquing managerial judging); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-47 (1986) [hereinafter *Failing Faith*] (criticizing declining use of judicial adjudication to resolve claims).

46. Vairo, *supra* note 33, at 106-09 (describing use of Section 524(g) prepackaged bankruptcy settlements).

47. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 237 (2001); see generally Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1273-84 (2002) (discussing the establishment of the September 11th Victims Compensation Fund).

48. See *Paradigm Lost*, *supra* note 2, at 618, 654-58; Vairo, *supra* note 39, at 1093-94.

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have assumed an ad hoc judicial mantle by such appointment.

When a settlement provides a funding vehicle that essentially dictates the terms of each settlement, such that the fund administrator exercises little to no discretion on the settlement amount, perhaps the use of private individuals to serve as a trustee raises little concern, although such an individual is likely to command a higher fee for doing so than a clerk of the court, a magistrate judge, or other governmental official.⁴⁹ However, when the parties to the settlement have relied on their own private experts to develop detailed rules for paying claims, or when the settlement terms, instead, provide a high degree of discretion to the fund administrator, as the A.H. Robins Plan of Reorganization did, in connection with the DS Trust,⁵⁰ and as the Act establishing the VCF did, one might wonder why private persons ought to be charged with such a task.

Professor Peter Schuck has described this privatization of mass tort resolution:

The same elite group of plaintiffs' lawyers turns up on the management committees of one mass tort litigation after another. Much the same is true on the defendants' side. This "repeat player" phenomenon creates a high degree of informal coordination, continuity, and learning across different mass torts. It also causes litigators to devote much effort to building and maintaining their reputations and credibility. This further facilitates the lawyerization of mass tort risks.⁵¹

Thus, mass tort litigation has become a "private system" in terms of its inception, and its resolution has become increasingly private as well. Even Professor Mullenix, who criticized Judge Weinstein for applying the public law paradigm to mass tort litigation, has written that mass tort litigation has become "Private Aggregate Claims Resolution."⁵² Plaintiffs' lawyers sue in the state and federal courts in which they hope to obtain the maximum judicially enforceable remedies possible under the law from a jury. Once hundreds of suits are filed alleging harm due to a particular product, or once there is a threat that hundreds or thousands of cases will be filed, however, courts tend to routinely consolidate the cases using the federal and state analogs discussed above. Lead counsel for plaintiffs and defendants soon begin to sit down to work with the court on the "disposition" of the litigation.⁵³ This almost invariably leads to the creation of a fund administered by a private person.

It is not as if there is a lack of precedent for using private individuals to

49. Indeed, current Rule 53(a)(1)(B)(ii) exempts from the requirement of exceptional circumstances for the appointment of a master appointments that involve "essentially ministerial determinations." FED. R. CIV. P. 53 advisory committee's note of 2003.

50. *Paradigm Lost*, *supra* note 2, at 629-32.

51. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952-53 (1995).

52. *Private Law Paradigm*, *supra* note 19, at 431-47.

53. See MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 43, at §§ 10.2, 11.214, 13.13.

assist judges in resolving complex litigation. Looking at the history of complex litigation over the last decades, it is clear that we already have experienced the hybridization of complex claims resolution. The resolution of complex litigation requires the participation of the judiciary, government officials,⁵⁴ the parties to the litigation, and private individuals during the litigation, the settlement process, and in the claims distribution process. Magistrate judges frequently are given the task of managing discovery.⁵⁵ Special masters are typically appointed under Federal Rule of Civil Procedure 53,⁵⁶ and experts are appointed under Federal Rule of Evidence 706,⁵⁷ to assist the judge in various matters,⁵⁸ during all phases of litigation.⁵⁹ Given the criticisms of pushing settlement over litigation,⁶⁰ “ad hoc” procedure,⁶¹ and managerial judging,⁶² it is not surprising that the privatization of the administration of justice has been criticized as well.

There are two major arguments against these developments. First, and perhaps most importantly, there is an accountability problem. For example, referring to managerial judging and the ADR movement, Professor Resnik has argued: “Especially troubling for me is the fact that these alternatives empower decisionmakers without providing sufficient justification of why they deserve expanded authority.”⁶³ More recently, Professor Penelope Pether has written about various aspects of the “Scandal of Private Judging” in the United States courts.⁶⁴ Perhaps most importantly, the settlement of litigation may deprive the world at large of important precedent that may otherwise emerge from a fully judicial resolution of litigation.⁶⁵

These stand as a sobering and powerful critique of the thoughtless use of private actors as important players in determining the rules for the resolution of claims. Thus, it is important to look at whether allowing private persons to play such critical roles as trustees in complex litigation is appropriate. The term “trustee” will be used to describe either a private person who is appointed to administer a trust, and who is provided a high degree of discretion in

54. For example, consider the settlements obtained by the state attorneys general in the tobacco litigation, and the federal tobacco litigation brought by the United States Attorney General. The gun litigation has been characterized by some successful cases brought by cities and other governmental agencies. *See generally* Sue Reisinger, *High Noon*, at http://www.law.com/jsp/newswire_article.jsp?id=1098891006017 (Oct. 29, 2004).

55. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 43, at § 10.14.

56. *Id.* at § 11.52.

57. *Id.* at § 11.51.

58. *Id.* at §§ 11.51-11.52.

59. *Id.*

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

61. *See generally* Silberman, *supra* note 4.

62. *See Managerial Judges*, *supra* note 45.

63. *See Failing Faith*, *supra* note 45, at 544.

64. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

65. *See* Fiss, *supra* note 60.

developing compensation standards and in implementing them. Trustee will also be used to describe the various experts employed by the courts and the parties to develop the compensation standards that will be used by a trust that is administered by trustees who have relatively little discretion.

The sections below discuss a number of reasons, some practical, others subtle, that suggest that the use of trustees is necessary and appropriate. As a bonus, the use of trustees can lead to improvements in the administration of justice, if, and, as discussed in Part II, it is a big if, proper controls on the selection of such trustees are in place.

1. *The Need for Private Individuals in Complex Claims Resolution*

As discussed in the prior section, private individuals are already playing important roles assisting courts during the course of a complex litigation. Using private trustees is a necessary evolution of this development.

[T]here are things that work in practice even though they do not work in theory. One thing that works more or less in practice is the process of resolving fundamental issues of right and wrong on a day-to-day basis without a satisfactory theoretical basis for doing so. The courts perform the task, often being troubled and confused, but they get the job done somehow.⁶⁶

Professor Hazard is, of course, correct, that for the most part, on a day-to-day basis, judges do an amazing job of getting the job done. In the world of complex litigation, perhaps especially in mass tort litigation, it is difficult, if not impossible, for any one judge to get the job done. Even Judge Jack B. Weinstein, who has overseen the resolution of numerous complex and mass tort cases, has written that judges need help.⁶⁷ Magistrate judges can assist, but in complex cases, especially mass tort cases, judges have increasingly used Federal Rule of Civil Procedure 53 to appoint special masters to assist them in various ways.⁶⁸ In fact, Rule 53 was amended in 2003 in recognition of “the changing practices in using masters.”⁶⁹

Although the touchstone for appointment remains “exceptional

66. Geoffrey C. Hazard, Jr., *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 740 (1988).

67. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 143 (1995) (“it is close to impossible for one judge (particularly if he or she hopes to keep up with the rest of the caseload) personally to conduct the necessary fact-finding and negotiations, and then to develop, implement, and oversee a complicated ongoing administrative resolution of a mass tort case. Extending the reach of the court, while at the same time keeping all parties and issues concentrated in one forum, requires help.”)

68. *See, e.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, *MASS TORT LITIGATION MANUAL* 83-84 (forthcoming 2005) [hereinafter *ACTL MANUAL*]; *MANUAL FOR COMPLEX LITIGATION (FOURTH)*, *supra* note 43, at § 11.52.

69. FED. R. CIV. P. 53, advisory committee’s note of 2003.

circumstances”⁷⁰ and should be the “exception not the rule,”⁷¹ amended Rule 53(a)(1)(C) provides flexibility to courts to appoint a master to “address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.” Such a condition can easily be said to be met in most complex litigation, and the parties to such litigation generally either consent to or acquiesce in the appointment of masters for a wide variety of purposes, from discovery management to decree monitoring or settlement administration.⁷² A Federal Judicial Center report cited by the Advisory Committee noted that once a judge faces “a mass of complicated activity at the discovery or post-trial stage of a case” and believes that additional resources are necessary, a “litigation dynamic” is created that leads either to party consent or acquiescence in the appointment of a special master.

Thus, there already is a high degree of private adjudication. As Professor William Rubenstein and others have shown, we already have moved beyond the traditional models of adjudication to a “transactional model.”⁷³ Despite ethical rules designed to curb such conduct, plaintiffs lawyers themselves often will engage in group settlements and then divvy the proceeds of such settlements among their numerous clients.⁷⁴ The reality of any multidistrict litigation is party-driven negotiations aimed at achieving a judicially acceptable resolution of an otherwise intractable litigation that generally leads to the establishment of an administrative fund run by private persons.⁷⁵ On many levels, therefore, our judicial system has become a hybridization of public and private dispute resolution.⁷⁶

70. FED. R. CIV. P. 53(a)(1)(B)(i) (appointment to hold trial proceedings or to make or recommend findings of fact).

71. FED. R. CIV. P. 53, advisory committee’s note of 2003.

72. THOMAS E. WILLGING ET AL., SPECIAL MASTERS’ INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 4-5 (Federal Judicial Center 2000).

73. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001); Howard M. Erichson, *A Typology of Aggregate Settlements* (Sept. 14, 2004) (unpublished manuscript, on file with Stanford Law Review).

74. See Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395 (1998) (discussing common practice of aggregated settlements and noting ethic issues). There is an ethics issue of how an attorney can settle multiple clients’ claims, when those clients will not be treated “equally.” See MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2004) (Conflicts of Interest: Current Clients: Specific Rules); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 5-106 (1983) (Settling Similar Claims of Clients).

75. See *supra* notes 34-43 and accompanying text.

76. Catherine T. Struve, *The FDA and the Tort System: Post Marketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL’Y, L. & ETHICS (forthcoming Summer 2005).

2. *The Politicization of Claims Resolution*

a. The Politicization of Judges

It does seem anomalous to have private actors participating in the evaluation of claims. When examining whether it is desirable for private individuals to determine how much compensation a claimant may receive, it is important to go back to the reason why we otherwise would prefer judges to make such determinations. Traditionally, we are taught to believe that judges are immune from the political process, and therefore able to participate in the resolution of disputes free from partisan considerations.⁷⁷ Federal judges are thought to be even more independent. The life tenure and salary protections in Article III provide a level of independence perhaps matched only by law professors.⁷⁸ State judges are increasingly appointed, or subject merely to retention elections, or are typically granted long terms to ensure a high degree of political independence. Today, however, it is becoming increasingly clear that federal and state judiciaries are more politicized than in recent memory. Congress has taken actions directly aimed at judicial independence.⁷⁹ Increasing attention has been paid to the political battles over the appointment of federal judges.⁸⁰ Justice Stephen Breyer has questioned whether, as a matter of cognitive bias, judges can avoid making decisions that are not determined by their political perspectives.⁸¹ A desire to get reelected may at times motivate state court judges to rule in one way or the other.⁸² Moreover, in recent years,

77. Some of Judith Resnik's arguments in support of adjudication stem from this idea. See Resnik, *supra* note 9, at 199 ("Adjudication's proponents in the academy have been a part, sadly, of the story of adjudication's eclipse. First, by overstating the heroic proportions of the job of judging, they have created expectations that the job did not often met [sic].").

78. U.S. CONST., art. III, § 1.

79. With respect to the federal judiciary, the Feeney Amendment, which eliminated a statutory requirement that at least three federal judges serve on the U.S. Sentencing Commission, has been characterized by a district court as an unconstitutional violation of separation of powers. *United States v. Detwiler*, No. CR 03-372-PA (D. Or. October 5, 2004). Another district court held that the "blacklist" requirement of the Feeney Amendment, which requires that judges who grant downward departures other than when requested to do so by the prosecutor be immediately reported to the Attorney General and the Senate Judiciary Committee chills judicial independence and violates separation of power principles. *United States v. Mendoza*, 72 U.S.L.W. 1461 (C.D. Ca. 2004).

80. See, e.g., Neil A. Lewis, *Mixed Results for Bush in Battle Over Judges*, N.Y. TIMES, at A1 (Oct. 22, 2004) (discussing events such as the Bush White House's turn to the conservative Federalist Society as the source for selecting candidates for federal judicial appointment, and the Democratic Senators' response of seeking to block not only candidates with "egregious faults" because the White House was "trying to push the courts in a conservative direction" in order to achieve the "political benefit of pleasing political conservatives.").

81. *Breyer Questions His Impartiality in 2000 Election Ruling*, ASSOCIATED PRESS (Oct. 26, 2004) (stating that in his view, judges try to depend on the rule of law, but that "people are great self-kidders"), available at <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1098737118377>.

82. See, e.g., Richard F. Fenno, Jr., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS

state judicial elections have become “meaner,” prompting state court judicial candidates to publicize their views on disputed issues.⁸³ That mass tort litigation specifically pushes political buttons is beyond question. Specifically, breast implant litigation, Agent Orange cases, and tobacco litigation are examples of the “confluence of mass torts and contemporary political controversy.”⁸⁴ And tort reform has become a potent electoral issue. For example, President Bush has made the protection of corporations from lawsuits an important part of his political agenda during his second term.⁸⁵

These political considerations can arise in any mass tort case. The parties fight many battles between the time a case is filed, related cases are consolidated, and a settlement is achieved. Defendants are not likely to negotiate before testing motions to dismiss or for summary judgment. There is a need for judicial decision making on issues such as causation and statute of limitations, for example, to set the parameters of liability for the particular litigation. Resolution of issues such as these by the court may cabin the number of claimants, types of injuries and settlement ranges. In other words, until the mass tort litigation is “mature”,⁸⁶ the parties will be negotiating in the dark

37 (1978) (arguing that House members “try to achieve, in varying combinations, three basic personal goals: reelection, power inside Congress, and good public policy”); Richard F. Fenno, Jr., *CONGRESSMEN IN COMMITTEES* 1 (1973) (same, but adding that congressmen are also motivated by interests in setting up careers following their congressional terms and aggrandizing personal gain).

83. Emily Heller, *Judicial Races Get Meaner*, NAT’L L.J. (Oct. 25, 2004) (discussing how key interest groups have lined up against each other in 15 states involving 29 state Supreme Court judgeships), available at http://www.law.com/jsp/newswire_article.jsp?id=1098217051328; see also Julie Kay, *Christian Group’s Survey Reveals Judicial Candidates’ Opinions*, MIAMI DAILY BUS. REV. (Oct. 28, 2004) (discussing Florida State Bar Association judicial ethics committee ruling that judicial candidates may announce their views on disputed issues as long as they also stress that they will uphold the law) available at http://www.law.com/jsp/newswire_article.jsp?id=1098907051693; Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, at A1 (Oct. 24, 2004) (discussing battle over 40 supreme court seats in 20 states).

84. Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 346-49 (1996) (“The breast implant litigation provides only one example of the confluence of mass torts and contemporary political controversy. The resolution of claims by military personnel exposed to the defoliant Agent Orange remains intertwined, to this day, with the efforts of the nation as a whole to come to grips with the Vietnam War.”).

85. See, e.g., Edmund L. Andrews, *Bush Puts Social Security at Top of Economic Conference*, N.Y. TIMES, Dec. 16, 2004, at A30, col. 3 (opening his campaign for economic agenda at the “White House Conference on the Economy,” President Bush called for ending frivolous lawsuits and “restricting lawsuits brought against corporations;” noting that many panelists had long records of supporting the President’s policies). See *infra* notes (re Class Action Fairness Act).

86. The “maturity” of a mass tort has been addressed in Shiela Birnbaum, *Class Certification - The Exception, Not the Rule*, 41 N.Y.L. SCH. L. REV. 347, 348-49 (1997) (noting the problem of premature mass tort class action filings; for example, in the Felbatol litigation, a class action was filed before any individual lawsuits were); Deborah R. Hensler & Mark A. Peterson, *Reinventing Civil Litigation: Evaluating Proposals For Change: Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brooklyn L.

about appropriate levels of funding to resolve all or most claims. Judicial decisions such as these, however, expose the judiciary to the political problems discussed above.

When judges let cases get to a jury that then awards a multi-million or even billion dollar judgment, political considerations look even larger.⁸⁷ For example, in the tobacco litigation, a jury in Florida awarded a class of Florida plaintiffs more than \$100 billion.⁸⁸ The award was overturned on appeal, though the matter is still before the Florida Supreme Court.⁸⁹ In other words, it is the result of trials, not a decision on a motion for summary judgment, for example, or the settlement of cases, that is more likely to put political pressure on courts. The results of trials, though they may be warranted, result in unpredictability as well as unwanted headlines, followed by additional political pressures on the judicial systems. For example, as discussed in the next sections, developments at the federal level sparked a forum selection battle that has led to efforts in Congress and state legislatures to constrain the discretion of state court judges.

b. Differential Procedures in State and Federal Court

First, the federal judiciary, led by the United States Supreme Court, has made federal courts less attractive, generally, to plaintiffs in certain kinds of case.⁹⁰ The Court's decision in *Amchem*⁹¹ made it less likely that federal courts would certify class actions, and its decision in the 1986 Trilogy of Summary Judgment cases,⁹² together with its decision in *Daubert v. Merrell Dow Pharmaceuticals*⁹³, have made it tougher for plaintiffs to survive motions for summary judgments. Second, as discussed in the next subsection, Congress has enacted legislation and is considering other bills that allow more complex state claim-based litigation to be adjudicated in federal court.⁹⁴ The political nature of these legislative moves cannot be disputed. For example, the 2003 version of the Class Action Fairness Act, which would channel such cases to federal court,

Rev. 961, 1019-30 (1993); Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989); Vairo, *supra* note 39, at 1093-94. .

87. *See, e.g.*, *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. Dist. Ct. App. 2003) (vacating class certification in tobacco litigation in which jury awarded compensatory damages and \$145 billion in punitive damages against tobacco companies).

88. *Id.* at 469.

89. *Engle v. Liggett Group, Inc.*, 873 So. 2d 1222, 2004 Fla. LEXIS 807 (Fla. 2004). Note, however, that for the purposes of this paper, the tobacco industry refused to settle any personal injury cases, obviating the need for a settlement fund of any kind.

90. Vairo, *supra* note 42, at 1564.

91. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

92. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (clarifying standards for making summary judgment motions and for granting summary judgment).

93. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

94. *See infra* notes 96-97.

was sponsored by eighteen Republican members of the House of Representatives and only three Democrats.⁹⁵ The 2005 version of the Act, which was signed into law by the President on February 18, 2005, was co-sponsored in the House of Representatives by 60 Republicans and 13 Democrats.⁹⁶ The purpose of the Act, as Senator Specter put it, is “to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases. Regrettably, the history has been that there are some States in the United States and even some counties where there is forum shopping, which means that lawyers will look to that particular State, that particular county to get an advantage.”⁹⁷

This is nothing new, and indeed appears to be a replay of events taking place at the end of the nineteenth century. As the United States became more industrialized and business entities came to the forefront of the economy, the federal judiciary exploded to accommodate industry.⁹⁸

c. Forum Shopping and its Legislative Response is an Indicator of the Recognition of Courts’ Biases

As the stakes in complex litigation continue to rise, particularly in mass tort cases, these judicial and political developments have resulted in an unprecedented degree of forum shopping.⁹⁹ The volume of cases involving removal from state court to federal court demonstrates the truth of this assertion.¹⁰⁰ However, the removal of complex cases by defendants to federal court has undermined state autonomy and prerogatives, at least as seen through the lenses of the state judiciaries.¹⁰¹ The removal of state claim cases to federal

95. See Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003), LEXIS 2003 Bill Tracking H.R. 516.

96. See Class Action Fairness Act of 2005, S. 5 & H.R. 516, 109th Cong. (2005), LEXIS 2005 Bill Tracking H.R. 516

97. 151 Cong Rec S 999.

98. Edward A. Purcell, Jr., *Origins of a Social Litigation System*, in LITIGATION AND EQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870-1958 (1992).

99. See Vairo, *supra* note 42.

100. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (1998). A recently published study by the Federal Judicial Center shows that defense attorneys believe that in class action cases the federal forum is more beneficial to their clients’ interests and that they remove cases based on state law to the federal courts for that reason. See THOMAS E. WILLING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF ANCHEM AND ORTIZ ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION, A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS, 4-5,7-8, 18, 29-31 (Federal Judicial Center, April 2004). However, the study indicates that the rate of class certification by state and federal judges for the sample involved is virtually the same. The study also reported, however, that federal judges were more than twice as likely to deny class certification. *Id.* at 4, 8-9.

101. See Vairo, *supra* note 42.

court, where they may be dismissed by a federal judge, whereas if such cases had remained in state court the plaintiff may have reached a jury, does not seem to be within the spirit of the Erie doctrine:¹⁰² That the result reached in the federal court be the same as in the state court across the street.¹⁰³ These developments, of course, led plaintiffs' lawyers to seek haven in the state court. Some state courts, and certain counties within some states, have become magnets for plaintiffs in certain forms of litigation.¹⁰⁴

The political pressure to do something about plaintiffs' lawyers has led to efforts on the federal level to curb forum shopping. For example, the House of Representatives passed two bills in the 108th Congress to prevent plaintiffs' lawyers from controlling the forum for the resolution of disputes. The Class Action Fairness Act,¹⁰⁵ which was reintroduced and passed both houses of Congress, was signed into law by the President in February 2005. The Act allows defendants to remove most state claim based class actions from state court to federal court with only minimal diversity and relaxed jurisdictional amount requirements. The Litigation Abuse Reform Act,¹⁰⁶ which was primarily aimed at restoring Federal Rule of Civil Procedure 11 to its full, 1983-draconian version, also contains a provision that would restrict the venue for litigation, in state and federal courts, to the state in which the plaintiff is domiciled, or was injured or where the defendant is doing business.¹⁰⁷ Anti-forum shopping measures have been adopted in states that had been perceived as plaintiff-friendly and to control such state judiciaries.¹⁰⁸ The Gulf states, which had been and to some extent still are, important state court fora, have

102. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that there is no federal general common law).

103. *Hanna v. Plumer*, 380 U.S. 460 (1965).

104. See ACTL MANUAL, *supra* note 68, at page 263-65 (describing so-called "judicial hellholes" sought out by plaintiffs' lawyers with judges and juries likely to award large verdicts against corporations).

105. The Class Action Fairness Act had been the object of serious Congressional attention for the last few years. See Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003). The Senate version became the subject of compromise. See Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003) [hereinafter CAFA, S. 274]. In February 2004, S. 2062, the Class Action Fairness Act of 2004, was introduced in the Senate. See Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004). Its jurisdictional provisions are substantially similar to CAFA, S. 274. The bill appeared to have stalled. See 150 CONG. REC. S1014, S1191 (daily ed. February 11, 2004) (placing S. 2062 on the calendar), but was re-introduced early in the 109th Congress. S. 5. It passed the Senate and the House and was signed into law by the President on Feb. 18, 2005. See Class Action Fairness Act of 2005, S. 5 & H.R. 516, 109th Cong. (2005), LEXIS 2005 Bill Tracking H.R. 516

106. The Litigation Abuse Reform Act, H.R. 4571, 108th Cong. (2004) passed by the House of Representatives in September 2004 would amend Rule 11 to its earlier, more draconian form, would also apply Rule 11 in certain state cases, and prevents forum shopping. The bill was reintroduced in the House in early 2005. See H.R. 420.

107. *Id.*

108. See Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, 24 THE ADVOCATE 76 (Fall 2003) (describing 2003 amendments to the Texas procedural rules).

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witnessed legislation that requires state court judges to behave more like federal judges.¹⁰⁹

Putting aside the question whether these developments are a good thing or a bad thing, or in whose favor these developments cut, there is the reality that judges are being restricted by the political process. A combination of the forum shopping and the political pressures on courts raises the question whether courts can be as independent as we might wish them to be. Judges, particularly state court judges who do not receive the life tenure protections of Article III, may be unable or unwilling to resolve those fundamental issues of right and wrong in the traditional common law way. For example, state courts that routinely permit class certification, that in turn put settlement pressure on defendants, and in whose courts plaintiffs win large jury verdicts, know that they are inviting the types of federal legislation discussed above that would have the effect of depriving such courts of jurisdiction over such cases.

The purpose of these sections is not to suggest that individual judges are biased per se, but rather that there are structural influences that put political pressures on state and federal judges that may shape the way judges are likely to behave, and that the parties to litigation respond to their perceptions to best achieve the aspirations of their clients. To the extent that judicial independence may be compromised in important ways, arguments against using private decision makers lose some force. Depending on how they are appointed and the level of official supervision, private trustees are a further step away from the political process, arguably “less subject to capture”,¹¹⁰ so to speak, if proper controls are put into place. Because, as explained in Part II, judges should be involved in the selection and supervision of trustees, it can be argued that using trustees serves no purpose in terms of eliminating some of the political and structural biases discussed in this section. Part II, however, will offer suggestions for the selection of trustees that is likely to enhance the independence of trustees.

In other words, the reality of the legal landscape today suggests that plaintiffs’ lawyers and defense lawyers will jockey for position by trying to control the forum in which the mass claims litigation takes place. Until Congress enacts legislation which eliminates state courts as a viable forum, mass claims will be filed in state and federal court. In terms of negotiation on favorable terms, under this scenario, there will be a stalemate that leads to a global settlement, which in turn creates the need for an administrative trust.

109. *Id.*

110. Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1797-98 (2002) (critiquing theory of agency capture pursuant to which a single interest group will capture the regulatory process and successfully impose its views on the captured agency).

3. *Non-Judicial Adjudication Can Promote Fairness*

Commentators have developed an important critique of nonjudicial claims resolution. As Owen Fiss,¹¹¹ Judith Resnik,¹¹² and others have argued, the development of the law can be undermined by nonjudicial adjudication, the bureaucratization of the judiciary,¹¹³ and managerial judging. One can add to this list the type of hybrid claims resolution that this article has described. However, for several reasons, the promise of judicial adjudication is oversat in the typical case that results in the creation of a claims resolution facility. Indeed, in hybrid complex litigation claims resolution, the law can evolve in important ways, and the goal of achieving justice in terms of fairness and efficiency can be accommodated.¹¹⁴ Beyond a utilitarian argument that even if some individual claims are not as “fairly” resolved as they would have in a judicial context, mass claims administration is preferable because the judicial system would crash if all claims had to be adjudicated individually, the fears underlying the Fiss/Resnik argument are less forceful today than in the past.

First, as Professor Resnik and others have recently lamented, adjudication and the development of the law have atrophied under the minimalist approach of the Rehnquist Court.¹¹⁵ For example, Professor Resnik has written that the relatively obscure opinions, *Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, Inc.*¹¹⁶ and *Great-West Life & Annuity Insurance Co. v.*

111. See Fiss, *supra* note 60, at 1083-85 (“Given the underlying purpose of settlement—to avoid trial—the so-called “findings” and “conclusions” are necessarily the products of a bargain between the parties rather than of a trial and an independent judicial judgment. . . . Even assuming that the consent is freely given and authoritative, the bargain is at best contractual and does not contain the kind of enforcement commitment already embodied in a decree that is the product of a trial and the judgment of a court.”).

112. See *Managerial Judges*, *supra* note 45, at 423-27 (“Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power.”).

113. See Resnik, *supra* note 5, at 181 (noting that Article III judges worked with Congress to create a workforce of over 4000 non-Article III auxiliary judges such as magistrate and bankruptcy judges, administrative law judges, and hearing officers) (citing, Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442 (1983)).

114. See Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 *J. LEGAL EDUC.* 7, 26-29 (2004) (discussing possibilities for creative and innovative problem solving in ADR context); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167 (1985) (arguing that the application of federal common law in mass tort cases leads to fairness and efficiency); cf. Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, (Sept. 27, 2004) (demonstrating impact of private party participation in rule making process) (unpublished manuscript, on file with Stanford Law Review).

115. See Resnik, *supra* note 5, at 175 n.12. See also John Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court Trail of Error in Russel, Mertens, and Great-West*, 103 *COLUM. L. REV.* 1317 (2003); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 *SUP. CT. REV.* 343.

116. 527 U.S. 308 (1999).

Knudson,¹¹⁷ “must be understood as working in tandem with the majority's restrictions on the power of Congress to develop new federal rights.”¹¹⁸ She explains how the holdings in these cases teach federal judges to provide remedies only with express congressional permission, and, then to grant such remedies narrowly. She further shows how the Rehnquist Court has attempted to convince Congress not to grant such permission in the first place.¹¹⁹

Thus, Resnik is most concerned about the decline of adjudication in federal question cases involving constitutional and federal statutory rights. In such cases, the plaintiffs typically seek resolution of broad questions of law that need to be enunciated. Injunctive and declaratory relief are the primary types of remedies sought in such cases. In contrast, in the cases that typically result in a claims resolution facility, the plaintiffs seek money damages, and their claims tend to be based on state law. Additionally, the key issue once a claims resolution is created is the determination of the plaintiff's eligibility for relief in terms of product identification or causation, issues that have no impact beyond the individual plaintiff.

Second, the adjudication function of the courts is compromised when courts of appeals fail to publish their opinions and refuse to allow them to be cited as precedent. Some federal courts of appeals thus mete out essentially private justice when they refuse to allow all their decisions to be used as precedent.¹²⁰ By refusing to publish opinions, such courts are acting in essence as private dispute resolvers because these opinions do not purport to make law except as applied to the case before it.

Third, as Professor Russell B. Korobkin argues, the law has an important role to play in ADR and other private settlements. He observes that it is incorrect to view the choice between an adjudicated outcome of a dispute and settlement simply as one that invokes the rule of law, on the one hand, and private contract law, on the other. Rather, the law significantly effects nonadjudicated settlements in two ways. The first is rather obvious: a litigant with a strong case as a matter of law can demand more than one with a weaker case. Known substantive legal entitlements affect bargaining power. Second, the legal rules governing the adjudication process and settlement conduct also influence private dispute resolution. For example, the law of bargaining behavior limits misrepresentation and coercion in nonjudicial fora, and adjudication rules, such as fee shifting statutes, offer of settlement rules, evidentiary restrictions concerning settlement negotiations, and judicial review of some types of settlement agreements all affect disputants' bargaining power outside the courthouse.¹²¹

117. 534 U.S. 204 (2002).

118. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *IND. L. REV.* 223, 224 (2003).

119. *Id.*

120. See Pether, *supra* note 64.

121. Russell B. Korobkin, *The Role of Law in Settlement* (Sept. 2004) (unpublished)

While Professor Korobkin's thesis does not purport to apply to trust resolution processes, it clearly can and does. Private persons designing systems for compensating claimants out of administrative trust funds similarly act with the same background of substantive and procedural rules. Depending on their grant of powers, they may have greater flexibility in carrying out their duties. Nonetheless, they will be constrained by existing law. Accordingly, while the parties are bargaining over the contours of a settlement in mass tort litigation, they will be constrained by existing legal principles, and the settlement they reach necessarily will reflect aspects of this law, such as historical settlement amounts and criteria for proving causation, that often becomes part of the settlement plan or reorganization.

Once a settlement results in the establishment of a trust, the private adjudicators running the trust generally will have to develop standards for making awards, and then will have to determine how to make compensation awards to each claimant. At that point, precisely because they may be technically unconstrained in a binding sense by existing law, independent trustees can try to develop the "best law" to apply.¹²² Therefore, the use of private trustees may facilitate discussions about the proper evolution of the law. For example, the VCF provided the opportunity to rethink the collateral source rule and whether to compensate survivors of domestic partners, to name only a few issues.¹²³

The Fiss/Resnick position places a very high degree of emphasis on the importance of getting things right, a laudable goal. However, another important value in the law is finality, especially in circumstances where there is no clear answer to a legal question and where reasonable differences are leading to escalating conflict among parties, and political discord, as is often the case in mass tort litigation.

Additionally, because some of the questions being decided in these mass tort cases are unsettled issues, with unique factual patterns and issues, then

manuscript, on file with Stanford Law Review).

122. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 270, 294-95, 325-27 (1966)(emphasizing in choice of law analysis application of the better rule of law; arguing that courts necessarily weighed substantive content in their role as creators of the common law); see also Stanley E. Cox, *Applying the Best Law*, 52 ARK. L. REV. 9, 18 (1999) ("Justice was best neutrally achieved by applying the best rule possible to the case. Application of such a rule would further the parties' expectations that courts would deal with them justly."). See generally Vairo, *supra* note 112.

123. See Stephan Landsman, *A Chance to be Heard: Thoughts About Schedules, Caps, and Collateral Source Deduction in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393 (2003) (discussing collateral sources rules considered by Special Master Kenneth Feinberg); see also Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 449 (2003) (discussing need to provide rules to cover particular circumstances of each victim, including domestic partners); David Hechler, *Intensive Care*, NAT'L L.J. (July 1, 2004), available at http://www.law.com/jsp/newswire_article.jsp?id=1088439689003.

perhaps it is best that they are not decided in ways that are making broad reaching precedent: Hard cases make for bad law. In this respect, there is a major difference between mass claims resolution and traditional public law litigation. The type of relief typically sought in traditional public law litigation is injunctive relief. The key issue generally in such cases is whether undisputed governmental conduct gives rise to a constitutional or federal statutory claim. Such cases generally can be decided on summary judgment. In such cases, legal precedent is determinative. One legal ruling may determine the relief for numerous parties. The Fiss/Resnik critique of the use of settlement and private adjudication is appropriate in such cases because precedent matters.

In mass claims litigation, in contrast, the plaintiff generally seeks monetary relief and the key issues in the case tend to be factual. For example, in the breast implant litigation, the key issue is whether exposure to silicon causes autoimmune disease. In the Dalkon Shield litigation, the key issue is whether the Dalkon Shield, as opposed to some alternative cause, was responsible for the claimants' injuries. Even if there are several key legal issues, individual determinations will need to be made to determine an appropriate remedy for each victim. Moreover, the factual issues are generally complex and require for their resolution expertise in extralegal matters. In such cases, precedent is of less value and the need for innovation and expertise greater. The balance here is similar to that discussed in the legal commentary about the virtue of standards that call for an ex post adjudication by a judge, as opposed to rules that can be determined before adjudication.¹²⁴

To reach a final resolution of a complex, mass tort litigation in the right way—with appropriate rules—the process developed and implemented by trustees must be perceived as legitimate. As discussed in the next part, legitimacy can be enhanced by proper selection procedures for trustees.

II. WHO SHOULD BE APPOINTED?

The discussion in Part I establishes that, like it or not, mass tort and similar complex claims resolution is characterized by the participation of public and private actors, not simply as parties and their attorneys, but also as adjuncts of the judiciary in setting standards and making awards. It also suggests that such private adjuncts or trustees may be capable of being at least as impartial as judges; and that such persons may be able to advance the evolution of law because they are not technically constrained by binding legal precedent, and enhance the finality principle.

124. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *OR. L. REV.* 23 (2000).

Thus, the question is not whether private persons should play a discretionary role in resolving claims, but who those persons should be, and how should they be selected. The reality is that mass tort litigation, or the prospects of it, are likely to lead to the establishment of a claims resolution facility that will be run by private persons rather than judicial officers.¹²⁵ Once the mass tort ball gets rolling, the trial judges will encourage the parties to negotiate. A negotiated settlement that accounts for an established number of claimants, the range of possible injuries, and a fund sufficient to compensate the claimants for those injuries, requires trustees who can develop standards and determine the compensation for each of the claimants. The ability of the claims resolution facility to function optimally and legitimately depends on who the trustees are.

A. *The Degree of Discretion*

Integrally related to the question of who the trustee should be is the question of how much discretion the trustee should have. A high degree of discretion, together with a measure of independence, enables trustees to make the necessary decisions to promote the goals of an administrative trust. If the goal of an administrative trust is to provide justice that comes as close as possible to the judicial ideal, trustees ought to have as a high degree of discretion as judges would have. However, the more discretion a trustee has, the more important the identity of the trustee.

If the private individual charged with running a trust is exercising an essentially ministerial function, rather than a high degree of discretion, the objections to the use of a private person, and the identity of such person, become less controversial. For example, while scholars have discussed the role of special masters in the discovery and settlement phase of the Agent Orange litigation,¹²⁶ there is no commentary on the facility itself because there was nothing controversial about how it was administered.¹²⁷ There was a mandate with a formula as to how to distribute the proceeds of the Agent Orange settlement that was quite specific and provided no meaningful discretion.¹²⁸ However, because the administrators of the Agent Orange facility had so little discretion to individualize the awards, the settlement scheme was subject to

125. See, e.g., Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003) (discussing appointment of Special Master Kenneth Feinberg).

126. See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 344-46, 362.

127. *Id.*; Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 987 (1995) (describing how many claims facilities are based on an administrative model). All administrative agencies perform some discretionary functions. The question is one of degree.

128. *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1257-58 (E.D.N.Y. 1988).

criticism precisely because the “overall award bore no discernible relationship to the injury claims of the victim class.”¹²⁹

In contrast, the DS Trust trustees,¹³⁰ and the Special Master of the VCF,¹³¹ were provided a high degree of discretion in developing standards and determining how much claimants ought to be paid. Although broad parameters were set, numerous decisions had to be made, and awards were individualized to the highest degree possible. Certainly, the DS Trust and the VCF failed to provide the same degree of individualized justice that a jury trial would have provided. Moreover, as in the case of Mr. Bremer’s administration of Iraq,¹³² decisions the DS Trustees, and that Ken Feinberg made as Special Master of the VCF, were lambasted by some commentators and those who might be affected by these decisions.¹³³ However, the DS Trust and the VCF generally have been described as a success in terms of fairly and efficiently compensating victims.¹³⁴ In the case of the DS Trust, previous articles have shown how fairness and efficiency were served impartially. Fairness, in the sense of equality of treatment of each claimant was a major goal of the DS Trust. The DS Trust claims resolution process ensured that equally situated claimants would receive identical compensation.¹³⁵ Efficiency was served by ensuring

129. Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 149-50 (2003).

130. *Paradigm Lost*, *supra* note 2.

131. See George L. Priest, *The Problematic Structure of the September 11 Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 527 (2003) (noting that although the fund has generated “remarkable” controversy, the “general consensus [is] that . . . Special Master Kenneth Feinberg, has executed his duties, as much as he possibly can, with good judgment, commitment, and dedication to the victims whom the Fund aspires to compensate.”); *Rhetoric*, *supra* note 2, at 141-45 (noting positive reactions to Dalkon Shield Claimants Trust).

132. See generally Michael G. Gordon, *Debate Lingered on the Decision to Dissolve the Iraqi Military*, N.Y. TIMES, Oct. 21, 2004, at A1 (discussing Bremer’s decision to disband Iraqi military immediately upon the “catastrophic success” of the shock and awe campaign, which overruled U.S. military generals’ plan to use Iraqi soldiers to help rebuild Iraq).

133. See, e.g., *Paradigm Lost*, *supra* note 2, at 651–54, 656-58 (“Commonly discussed general complaints include a lack of willingness to compromise, a failure to reveal information concerning the trust’s evaluation of claims, an insensitivity to the behavioral needs of claimants, and an overemphasis on administrative convenience.”). See also Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1998).

134. See Priest, *supra* note 129.

135. See *Rhetoric*, *supra* note 2. For further discussion of the meaning of equality see William B. Rubenstein, *The Concept Of Equality In Civil Procedure*, 23 CARDOZO L. REV. 1865, 1893-96 (2002) (“Outcome equality is important because it is evidence of a consistent, and hence legitimate, dispute resolution system. Equality is desired not to guard against caste-like practices, but rather to assist in the project of achieving acceptable adjudicative outcomes.”).

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that administrative costs be held as low as possible.¹³⁶ The DS Trustees assiduously sought to avoid the appearance of bias, and indeed were criticized for refusing to be more amenable to the suggestions of the parties while developing its policies and procedures.¹³⁷

The DS Trust and VCF experiences support the argument that endowing trustees with a high degree of discretion is critical to the administrative trust's success. At the same time, endowing trustees with a high degree of discretion ups the ante in terms of who such trustees should be, and the terms of the settlement should provide with respect to the degree of discretion.

Professor Francis McGovern has noted that the design of claims resolution facilities entails a search for legitimacy.¹³⁸ Generally, judicial approval provides the desired legitimacy. However, when the design of the facility and the implementation of the design are performed by different persons, as when the court approves the design but the design provides those implementing the plan with a high degree of discretion, the beneficiaries of the claims resolution facility "are put in the position of judging the design of a proposed facility before they know the actual application of that design to their individual claims."¹³⁹ Professor McGovern suggests a number of ways around this problem.

Essentially, one model is to endow the trustees with a high degree of discretion. Another model is use experts during the negotiation process, to design the facility and to develop the rules that the trustees will implement. Although the rules so developed are subject to judicial approval in either a class action or bankruptcy context, rules developed by experts are more problematic than those developed by trustees with a high degree of discretion because the suggestions of such experts'are likely to be subject to the needs of the particular clients they represent.

Accordingly, it is important to return here to a definition. Earlier in the paper, I define trustee broadly to include trustees of the type described in this subsection. The definition, however, also encompasses any private individual who is involved in setting the rules for an administrative trust, including the experts for the parties. As a practical matter, such experts are at least as important as the trustees who administer a trust with a high degree of discretion because they are the rule makers. The problems discussed below, in terms of the repeat player problem and how to control it, require certain adjustments. Any settlement plan that dictates the rules of settlement, without providing for a high degree of trustee discretion, should be subject to a heightened level of scrutiny at the approval stage. The proponents at that stage act on behalf of

136. *Id.*

137. *Id.*

138. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, XX Stanford L.J. nnn, (at page 18) (2005).

139. *Id.*

their clients. Parties ought to be able to control who their experts will be during the course of settlement negotiations. However, to ensure that the potential of the hybrid system of mass claims resolution can be realized, the trustees who develop the essential rules for determining compensation ought to be controlled by proper selection procedures, discussed below.

B. *The Repeat Player Issue*

Judge Weinstein has lamented that there is a relatively small pool of persons who are equipped to take on the responsibility of serving as a proxy for a judge.¹⁴⁰ Similarly, a study prepared for the Judicial Conference in connection with proposed amendments to Rule 53, governing the appointment of special masters, noted the difficulty in locating unbiased candidates who had the expertise that would be required for the role of special master.¹⁴¹ It is questionable whether there is in actuality such a small pool. Nonetheless, the reality is that a small number of persons are appointed repeatedly to positions as special masters and fund administrators even though, for example, it would seem that the prior and current provisions of Rule 53 would require a more thorough examination of criteria for appointment.¹⁴² Moreover, parties generally have little to say about who should be appointed, and ultimately, the decision comes down to the judge's decision to pick a particular special master.¹⁴³

In her article on the "ad hoc" administration of justice, Professor Linda Silberman wrote of the "good news/bad news" arising out of the use of private persons in the administration of justice:

As a matter of principle, the lack of formal procedures for selection of a special master is troubling. . . . The modern-day special masters, however, have more often than not been either prominent experienced practitioners with particular pre-trial expertise and the ability to make nearly full-time commitments, or prestigious academics with impeccable credentials and time flexibility. (A quick survey of the special masters in the cases noted here suggests that there is also a highly regarded crew of academic "proceduralists" who have contributed not only to the processing of the individual case, but also to conceptual thinking about pre-trial management and innovative practices for complex litigation.) Notwithstanding the high level of energy and competence of these individuals, they are selected from a narrow circle and have no institutional imprimatur to function as decision makers. . . . However, the special master system continues to be a peculiar hybrid; for even where parties are willing to pay for a special master, they return (at taxpayer expense, of course) to the judge to seek review of the master's rulings. To the extent

140. WEINSTEIN, *supra* note 67, at 109-10 (noting that the cadre of special masters is too limited, which can lead to conflicts of interest because the same lawyers are involved in each case; suggesting code of ethics to deal with repeat player issue).

141. WILLGING ET AL., *supra* note 72.

142. *See generally* MOORE'S FEDERAL PRACTICE Ch. 53 (3d ed. 2004).

143. WILLGING ET AL., *supra* note 72.

that no review is requested or when review becomes *pro forma*, adjudication of some important issues has then been inappropriately abdicated to the special master, and there is always the danger that the judge does not engage in the intellectual process of decision making once a special master has made her report.¹⁴⁴

This is a powerful critique of the hybridization of justice. The existence of repeat players in the trust fund game raises a host of questions.¹⁴⁵

Courts recognize the problem. For example, the district court judge overseeing five asbestos company bankruptcies that had been assigned to him for coordinated case management was disqualified by the Third Circuit because of the appearance of impropriety created by his reliance in those asbestos-related bankruptcies on advisors who represented future claimants in another asbestos-related bankruptcy.¹⁴⁶ Indeed, the Third Circuit noted the “hybrid status” of the district court’s private advisors, who included lawyers and a law professor who have been involved in numerous mass tort cases.¹⁴⁷

The American College of Trial Lawyers in its Mass Tort Litigation Manual, referring to the Third Circuit case, expressed its concerns about special masters with close ties to the court or the parties, stressing the need “to balance the desire to obtain experienced masters with the need to assure that any individuals selected by the court are not perceived as having interests as a result of work performed for any party in the litigation.”¹⁴⁸

The arguments raised above for using trustees with a high degree of discretion begins to lose force when the same private individuals are chosen again and again. This problem, in turn, is exacerbated by another set of repeat players—the judges and lawyers who regularly appear in mass claims litigation.¹⁴⁹ The impartiality of the repeat players can be questioned by those

144. Silberman, *supra* note 4, at 2154.

145. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1365 (1995); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513 (1994) (modeling litigation as a prisoner’s dilemma, noting the possible divergence of interest between lawyer and client when the lawyer is playing a repeat game while the client is a one-shot player).

146. *In re Kensington Int’l, Ltd.*, 368 F.3d 289 (3d Cir. 2004).

147. *Id.* at 307 n.17.

148. ACTL MANUAL, *supra* note 68, at 83-84.

149. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952-53 (1995) (“The same elite group of plaintiffs’ lawyers turns up on the management committees of one mass tort litigation after another. Much the same is true on the defendants’ side. This “repeat player” phenomenon creates a high degree of informal coordination, continuity, and learning across different mass torts. It also causes litigators to devote much effort to building and maintaining their reputations and credibility.”). See also *In re Kensington Int’l, Ltd.*, 368 F.3d 289 (3d Cir. 2004) (disqualifying the district court judge overseeing five asbestos company bankruptcies that had been assigned to him for coordinated case management because of the appearance of

who perceive that their decision making is clouded by a fear of alienating the repeat players who chose them. This raises the question whether such actors can remain truly independent and exercise their discretion appropriately. A perception that repeat players are making decisions to please the judges and lawyers in an effort to gain more business undermines the legitimacy of the administrative trust itself, and is, therefore, problematic for the administration of justice.

Moreover, in some respects, repeat player trustees become quasi-governmental players, although generally better compensated than their judicial counterparts are. Additionally, as Professor Silberman has suggested, they are, essentially unaccountable on a general political level.¹⁵⁰

There is no question that many of the repeat players who have played prominent roles in mass tort litigation have a special expertise. And, certainly, there is a virtue to the predictability of repeat players. Moreover, repeat players attract their fair share of criticism. For example, to name two of the most prominent, Professor Francis McGovern¹⁵¹ has been attacked, for example, in the *Wall Street Journal*¹⁵² and Ken Feinberg has been criticized as well¹⁵³ for

impropriety created by his reliance in those asbestos-related bankruptcies on advisors who represented future claimants in another asbestos-related bankruptcy).

150. Silberman, *supra* note 4, at 2154 (“However, the special master system continues to be a peculiar hybrid; for even where parties are willing to pay for a special master, they return (at taxpayer expense, of course) to the judge to seek review of the master’s rulings. To the extent that no review is requested or when review becomes *pro forma*, adjudication of some important issues has then been inappropriately abdicated to the special master, and there is always the danger that the judge does not engage in the intellectual process of decision making once a special master has made her report.”); *cf.* *Cheney v. United States Dist. Court*, 124 S. Ct. 2576 (2004) (involving question whether non-governmental employees were *de facto* members of governmental committee established by the President).

151. *Judge Levin Follows Suggestions For Baltimore Trial*, 6-16 Mealey’s Litig. Rep.: Asbestos 9 (1991) (discussing Special Master Francis McGovern’s suggestions for trial, and appointment of co-lead counsel Ron Motley and Peter Angelos and their involvement in other asbestos cases; also noting that the Special Master would determine the punitive damages multiplier). One of the most prominent of these mass tort masters, Professor Francis McGovern, has written widely about his experiences. *See, e.g., The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61 (1990); *Resolving Mature Mass Tort Litigation*, 69 B.U.L. REV. 659 (1989); *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

152. *See, e.g., St. Francis of Asbestos*, WALL ST. J., June 15, 2004, at A14; *see also Baltimore Defendants Concerned Over Consolidation*, 5-7 Mealey’s Litig. Rep.: Asbestos 2 (1990) (“In his April 24 order, Judge Levin appointed Francis E. McGovern special master for the proceedings. . . . Defense sources indicated a displeasure over the appointment of a special master for such duties. . . . ‘One wonders why you need a special master to organize a trial,’ said a defense source. ‘I thought Judge Levin was supposed to be the ‘Asbestos Guru.’””). Professor McGovern was appointed over the objection of some parties. *See Baltimore Judge Refuses to Recuse Himself*, 5-9 Mealey’s Litig. Rep.: Asbestos 2 (1990) (“The defendants had moved in opposition to the appointment of Francis McGovern as special master. Judge Levin denied the motion to withdraw McGovern from the position and denied defendants’ motion to ask McGovern to recuse himself. . . . ‘I feel very strongly that this is an unfair procedure,’ said a defense source who believed that negotiations in the city’s alternative dispute resolution (ADR) plan may have been irreparably damaged. ‘When all

their regular appearances in mass tort cases and for the decisions they have made. Accordingly, the critique may well be an appearance problem more than a problem of actual conflict of interest.¹⁵⁴ Nonetheless, the problem needs to be addressed because repeat players can be perceived as being accountable to the parties or court that are responsible for their appointment, rather than to the claimants.

C. Solving the Repeat Player Problem

It will not be easy to solve the repeat player problem. The system is lucrative,¹⁵⁵ and appears to be entrenched. This section explores two ways in which the repeat player problem can be ameliorated. One involves a selection process that expands the number of qualified potential trustees. Another involves clarification of the duty of the trustees and the question of accountability.

1. Selection of Trustees

Currently, as suggested above, the process for selecting trustees appears to be largely court and attorney-driven. This process has led to the selection of competent and innovative trustees notwithstanding the problems outlined above. Even if the repeat player problem is one of appearances, it is important that the selection system be improved. First, improving the selection process, even if it results in repeat players' selection, is also likely to ensure that new players will be brought into the administrative trust system.

Second, the introduction of new players is likely to enhance innovative approaches to dispute resolution. Mass claims litigations are not fungible. Processes that may work well in one context, may not work in another. The circumstances of a particular mass tort changes as well. For example, the

the pressure is on one side, it doesn't give the plaintiffs any incentive to negotiate in good faith.").

153. *Motley Tells Feinberg To 'Remember The Alamo'*, 5-23 Mealey's Litig. Rep.: Asbestos 3 (1991) (reporting on plaintiff attorney Ron Motley's response to Settlement Master Kenneth Feinberg's quote in a Dec. 13 New York Times article with a "four-page history lesson on the Alamo." Feinberg reportedly had said that the In Re: Eagle Picher settlement talks and controversy surrounding them represented "the plaintiff's lawyer's Alamo." Motley responded: "Contrary to what you may believe, the defenders of the Alamo ultimately triumphed because their just cause was vindicated. . . . Their courage and determination is an inspiration." Motley also referred to "superior forces" in "Judge Weinstein's Court" that "would deny victims liberties and rights guaranteed to them by the Constitution and the rule of law.").

154. *In re Kensington Int'l, Ltd.*, 368 F.3d 289, 307 (3d Cir. 2004).

155. Although Ken Feinberg served as Special Master of the VCF pro bono, trustees typically are paid high hourly rates while serving the parties as experts when they design compensation systems in the context of the negotiation of a the standards for an administrative trust, or annual salaries and meeting fees that are far higher than those received by court officials while serving as the trustee of the trust itself.

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asbestos litigation today is far different than it was ten or so years ago. Numerous traditional asbestos defendants have invoked the protection of Chapter 11, leading plaintiffs' attorneys to file claims against whole new industries. The mix of claims filed over the last several years also has changed. Relatively fewer claims for mesothelioma and other serious injuries are being filed, and more claims by claimants who have been exposed to asbestos but who may not have manifested serious injury are being filed. Non-repeat players may bring new ideas to the solution of the problems presented by these developments.

The idea here is similar to the idea that corporate governance can be improved by the introduction of more independent directors, as opposed to insiders. Although there is a need to study whether introducing a more outside directors actually improves the actual performance of a corporation,¹⁵⁶ intuition suggests that the selection of a more diverse group of trustees may enhance decision-making.

a. Panel of Trustees

Many trust instruments provide for a panel of trustees rather than one trustee. Of course, there are exceptions, the VCF being one, and the Dow Corning Breast Implant Settlement Fund being another. The two aspirations outlined above for improving the selection process are likely to be realized if the administrative trust provides for more than one trustee. If the selection process results in the selection of a repeat players, the confidence of the lawyers who in the past have been more directly responsible for the appointment of the repeat players will have some confidence that the trustees will act in a predictable manner. But, the goals of innovation and legitimacy will be served as well if the selection process, as it should, results in the selection of a non-repeat player, as well. Accordingly, settlement agreements should provide for a panel of trustees charged with developing an appropriate compensation system, rather than one trustee.

I argued above that trustees should have the same degree of discretion as judges. It follows that a group of trustees will make better decisions than one trustee. Diversity among judicial decisionmakers facilitates the exchange of diverse ideas that lead to improved decision-making.¹⁵⁷ Additionally, an

156. See Laura Linn, *The Effectiveness Of Outside Directors As A Corporate Governance Mechanism: Theories And Evidence*, 90 NW. U. L. REV. 898, 96162; 966 (1996); Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 IOWA J. CORP. L. 231 (2002).

157. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 176-77 (1921) (referring to the process of judicial decision-making, Justice Cardozo observed: "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (recognizing that constructive decision-making is often best achieved "by allowing judges of differing perspectives and philosophies to communicate with, listen to,

empirical case can be made that judicial decision-making is enhanced when individuals with diverse views participate in the decision-making process.¹⁵⁸

b. Criteria

Several approaches to adopting new selection systems for trustees can be considered. One basic approach would be to require persons interested in the position as trustee to apply for the position. Courts could develop a list of exacting minimum criteria that judges and/or the parties ought to consider when determining who should be charged with developing rules and distributing the fund to claimants. The criteria should include typical personal characteristics, such as gender and race; and merit-based factors, such as educational background, including whether the candidate has advanced degrees in a relevant area; professional experience, bar association work, or academic writing in areas relevant to the duties of a trustee, such as claims resolution experience, economic theory, finances; identification of leadership positions in bar associations or other organizations; pro bono experience, and managerial experience.

Disclosure ought to be made of any comparable or relevant prior experience. Any candidate who is a repeat player ought to be required to list not only relevant experiences, but also to identify specific innovative policies and procedures developed in each of the cases, and why they were adopted. Similarly, in order to ensure that trustees will act independently in the best interests of the claimants as opposed to a desire to be reappointed, they ought to be required to list examples of situations in which they took divergent positions from their peer groups in matters unrelated to their representation of a client. The list ought to be made public and disseminated so that interested prospective trustees can present their credentials to the court and the parties for review.

c. Selection Criteria

The next part of the process under this approach would be to provide some objective criteria for the selection process by the court or by the parties, with the selection approved by the court. For example, there could be a repeat player score. A high number of prior appearances of a particular repeat player could be offset by the selection of a non-repeat player. Additionally, a repeat player could be scored in terms of claims resolution rates. If their proposals as party

and ultimately influence one another”).

158. See generally Cass R. Sunstein et al., *Ideological Voting On Federal Courts Of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 308 (2004) (“We also find evidence within the federal judiciary of “group polarization,” by which like-minded people move toward a more extreme position in the same direction as their predeliberation views. If all-Republican panels are overwhelmingly likely to strike down campaign finance regulation, and if all-Democratic panels are overwhelmingly likely to uphold affirmative action programs, group polarization is likely to be a reason. Finally, we offer indirect evidence of a “whistleblower effect”: A single judge of another party, while likely to be affected by the fact that he is isolated, might also influence other judges on the panel, at least where the panel would otherwise fail to follow existing law.”).

experts or their tenure as a trustee resulted in high resolution rates, corrected for degree of difficulty, they would receive a high score. There also could be an innovation score. A repeat player with a high score in terms of appearances, but whose application presented indicia of innovation would be preferred to one who did not seem to be innovative. A non-repeat player who evidenced practical and innovative ideas would receive a high score. Innovative ideas that should be evaluated highly would be ones that combine the highest degree of individuality in claims resolution at a reasonable administrative cost. Higher levels of claimant participation in the process enhance the legitimacy of the process.¹⁵⁹

Additionally, since trustees are proctors for judges, it may be appropriate to borrow from some of the recent literature on the selection of Supreme Court justices and other judges.¹⁶⁰ The selectors should consider how the criteria outlined above demonstrate that those applying are, and therefore are likely to serve as, productive, innovative, and collegial trustees, whose varied experiences will lead to a “balance of eccentricities” as Justice Cardozo once said, that would lead to more respected standards.¹⁶¹ One virtue of appointing a repeat player is that there will be no need to reinvent the wheel. However, changed circumstances may require a better wheel. The addition of new players will facilitate a productive dialogue about how to deal with the new challenges presented in any mass claims situation. In other words, the selectors should consider a balanced set of trustees in terms of their actual experience to achieve the aspirations discussed above.

The selection process could also borrow from the jury selection process. Once a series of prospective trustees apply, their applications would be screened for obvious bias. Once the panel of prospective trustees is finalized, the court clerk could randomly pick a group from the panel for a public voir dire by the supervising judge and the attorneys for the parties. Claimants and the defendants should be given notice of the proceeding, and be given the opportunity to question the prospective trustees as well. Prospective trustees could be challenged for cause, and the parties could be provided a certain number of peremptory challenges.

While somewhat fanciful, such an approach has the virtue of controlling

159. Lawrence B. Solum, *Procedural Justice*, 78 U.S.C. L. REV. 181, 275-77 (2004).

160. *See, e.g.*, Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 Cal. L. Rev. 299 (2004) (proposing that a tournament of court of appeals judges should govern the selection of Supreme Court Justices based on objective considerations of judicial merit such as the quantity and quality, based on relative citation rates, of their judicial opinions); James J. Brudney, *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. U.L. REV. (forthcoming Spring 2005), (proposing consideration of additional criteria such as collegiality and career diversity).

161. *See* Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921) (“The eccentricities of judges balance one another [and] out of the attrition of divers minds is beaten something which has a consistency and average value greater than its component elements.”)

the repeat player problem. But its very randomness may result in relatively less well qualified trustees. There are several variations of the jury selection approach that could ameliorate this problem. For example, the parties could make their preferred selections from the panel, with the court making the final selection, after balancing the factors described above and making written findings.

Another possibility is the establishment of a National Panel of Trustees, with the trustees selected in any case by lottery—like the way judges are selected for cases in the federal courts. The randomness of such an approach would solve the repeat player problem. However, the Panel will likely be quite large, given the number of law professors, lawyers, and economists who likely would seek to be on such a Panel. Because of the lack of control the parties and the courts would have in the selection process, it is hard to imagine that this proposal would generate much enthusiasm.

2. Accountability

No matter who is chosen, trustees must be accountable to the particular claimant group they were appointed to serve. For example, the duty of the trustees of the DS Trust expressly ran to the claimants themselves. Every decision the trustees made had to pass the test of whether the decision was in the best interests of the claimant group as a whole.¹⁶² This approach led to major criticisms in the early years of operation by specific plaintiffs' lawyers who were concerned about how our decisions would affect their particular clients. Additionally, by trying to stay independent, the trustees were criticized for being too insular.¹⁶³ However, by focusing on the needs of the claimants as a whole, rather than any specific criticism, the trustees were able to make the decisions they thought would best achieve the goals of paying as much as possible to each claimant consistent with their levels of proof and the limited fund we had to distribute at the lowest possible administrative cost.

There are two mechanisms for ensuring that the trustees remain faithful to their duty. First, there needs to be an appropriate level of judicial supervision. If the repeat player problem is solved by a selection system such as those considered above, the appearance of bias raised in the asbestos case discussed above disappears. The mass claims administration system will be perceived as less closed which enhances public confidence in the systems developed. The DS trustees were supervised by Judge Robert M. Merhige. Although the court had the authority to supervise major matters, such as the approval of contracts,¹⁶⁴ the trustees had the flexibility to make appropriate policy. The

162. *Paradigm Lost*, *supra* note 2, at 637-38 (discussing DS Trust's first operating principle: "treat all claimants fairly and equally, always focusing on the best interests of claimants collectively instead of on the interests of a particular claimant or group of claimants").

163. *Id.* at 656-58.

164. *See In re A.H. Robins Co.*, 880 F.2d 769, 771-76 (4th Cir. 1989) (affirming the

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level of supervision enabled the DS Trust to thoroughly explore alternatives and to implement them independently of the parties and the court in the best interests of the claimants.

Second, and, most importantly in the experience of the DS trustees, in terms of accountability, the DS Trust trustees had to answer to the claimants. Their fiduciary duty ran to the claimants, and the Trustees had the exclusive authority to make policy for the trust. The normative position here is that non-repeat players may meet certain desiderata of impartiality better than repeat players. Part of this is because they are not beholden to the corporate parties or plaintiffs' lawyers, who have committed mass torts or represented victims of them, and thus may have a stake in using these repeat players in future private or hybrid adjudications.

However, being a repeat player can, in some circumstances, enhance one's sense of responsibility. This is because there is a kind of implicit sanction involved in the prospect of not being hired again. What guard is there to ensure that non-repeat players act responsibly and impartially, rather than on whim? If the DS Trust had designed a bad system, vast numbers of claimants could have voted with their feet by rejecting their offers and heading for trial. The trustees knew that they needed to design a system that would appeal to claimants, or the Trust would not be able to succeed in its goal of paying the Dalkon Shield claimants fairly or efficiently. If the trustees failed, they could be removed, as three trustees were.¹⁶⁵

Whether a repeat player or not, accountability to the claimants, with the court in position to supervise major expenditures, is likely to result in optimal policies and procedures that will benefit the claimants rather than the parties and the courts.

D. The Dalkon Shield Claimants Trust: Paradigm Lost Revisited-A Story

Years ago, a lawyer from the law firm representing the claimants committee in the A.H. Robins Chapter 11 case called me. The purpose of the call was to interview me for a position as a trustee of the Other Claimants Trust established as part of the A.H. Robins Plan of Reorganization. I had an academic interest in the A.H. Robins Chapter 11 case, having written an article about choice of law in mass tort cases.¹⁶⁶ I told the caller that I had no experience in claims resolution or administration. He told me that that was not a problem because we would be empowered to hire experts who would help us figure out what to do.

Some months later, the court appointed me to the position. Shortly

district court's broad power to supervise the Trustees in matters such as appointment and fees of professionals, but noting that the district court did not have the power to interfere with the "day to day" operations of the DS Trust).

^{165.} *Id.*

^{166.} See Vairo, *supra* note 114.

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thereafter, after a motion to remove the trustees of the DS Trust resulted in the removal of three of the five original trustees, the court appointed me to serve as a Trustee of the DS Trust.¹⁶⁷ Along with our executive director, my co-trustees, most of whom had never served in a similar capacity,¹⁶⁸ and I decided whom to hire as our experts, and I served with our experts in determining how we would implement the Plan of Reorganization and its Claims Resolution Facility.¹⁶⁹

The DS Trust developed some very novel approaches. We used an expert who had never been involved in a mass tort before.¹⁷⁰ We did not use a matrix, as the asbestos trusts do, but rather a “highly structured, rules-based decision making system.”¹⁷¹ We adopted a no-negotiation policy.¹⁷² We created an ADR vehicle that provided claimants who wanted to reject their administratively generated offer with the opportunity to obtain a higher award from a neutral third party.¹⁷³

These policies, while they proved successful in terms of providing fair compensation as well as a high degree of individualized claims resolution,¹⁷⁴ led me to predict early on that our innovative approaches would lead to the DS Trust establishing a “paradigm lost.” I speculated that: “Those who historically have had much to gain in mass tort cases—namely, lawyers and other professionals—would lose much of their power if the Dalkon Shield Claimants Trust succeeds in its goal of distributing the settlement fund as fairly and efficiently as possible.”¹⁷⁵

Most of the DS trustees and its administrator have not become repeat players.¹⁷⁶ To my knowledge, nobody questioned our impartiality.¹⁷⁷ But, there

167. *Paradigm Lost*, *supra* note 2, at 634-36 & n.71.

168. *Id.* at 632-33. Ken Feinberg served during the first few years of the DS Trust’s existence.

169. *Id.*

170. *Id.* at 634 (referring to Professor Charles Goetz of the University of Virginia).

171. *Id.* at 641.

172. *Id.* at 641-42 (describing our best and final offer/no negotiation policy).

173. *Id.* at 646; *see also Rhetoric*, *supra* note 2, at 146-47.

174. *Rhetoric*, *supra* note 2, at 153-56.

175. *Paradigm Lost*, *supra* note 2, at 660 (discussing initial resistance to DS Trust policies).

176. Of course, Ken Feinberg had and continues to serve as an expert or Trustee in numerous mass torts. I have served as an expert in the Breast Implant litigation, *see In re Dow Corning Corp.*, 287 B.R. 396, 412 (E.D. Mi. 2002), testifying at the Confirmation Hearing based on my experience in the A.H. Robins case. I have not sought, or declined any appointments as a special master or other position similar to my position with the DS Trust. Although I have had the opportunity to participate in the mass tort world, I can hardly be characterized as a repeat player in the way that my colleague Ken Feinberg is, or Francis McGovern, and others are.

177. I did not apply for my position but can speculate that my appointment came as a result of knowing persons involved in the case, including the judge. Some commentators have written that the DS Trustees, and me in particular, were somehow beholden to the district court. *See* RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 339 (1991). Such criticism is irritating and inaccurate.

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was a lack of a comfort level with the DS Trust on the part of plaintiffs' lawyers particularly, because we were an unknown quantity for the most part, and we operated independent of their suggestions as we developed our policies.

Reflecting on my own experience, I certainly was not a repeat player when I was appointed. However, the credentials I brought to bear may be the sort that would put me in a position to pass the screening aspect of the selection process I outline above. Nonetheless, I doubt that I would have been appointed had I not been professionally acquainted with the court and one of the individual trustees. The point of telling this story is to suggest that the mass tort claims industry does not appear to value innovation as much as it values predictability. Thus, I am not sanguine that the selection process will be changed to include significant numbers of new players. The quality and legitimacy of dispute resolution by private persons may suffer as a result.

CONCLUSION

The question of privatization of governmental functions is a charged and complicated one. Reflecting on my experience, however, and returning to the question I have posed here—whether private persons ought to serve as adjudicators, and who should they be—I believe I do have part of an answer: Maybe it does not matter whether the person on the street has heard of the person appointed. Maybe it is a good idea that the person selected has a low profile. The absence of a lightning rod history perhaps suggests a degree of impartiality. What matters is accountability. It may sound naïve, but as long as a trustee acts in the best interests of the claimants, and is ultimately accountable to them, as opposed to the parties responsible for their selection, the goals of fair and efficient compensation in mass tort litigation can be met. There are two checks on such trustees—the supervising court as well as the claimants they serve. If they fail to discharge their duties, the court may remove them, or the claimants will invoke litigation rather than take advantage of the administrative process.

To ensure the highest degree of impartiality and flexibility, a group of independent trustees should be created by and charged with broad powers by a plan of reorganization or a settlement. Of course, though, that raises the stakes in terms of who ought to be appointed. The tendency to appoint repeat players is understandable because huge amounts of money are at stake. In my view, however, by blending experience with fresh perspectives, the principle of and appearance of impartiality is served. The pool of possible private dispute adjudicators may well be larger than thought if one looks beyond the ranks of those who have held positions in the past and the people they simply know and trust. Surely, for example, there are other procedure scholars who may be pleased to receive a call.