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COMMENT: SETTLEMENT CLASS ACTIONS AND THE LIMITS OF ADJUDICATION

James A. Henderson, Jr.+

While this Symposium reflects broader concerns, all of the papers implicate, and several focus directly upon, the so-called "settlement class action." Settlement class actions share several characteristics: they are brought in the context of so-called "mass torts," are aimed at achieving judicial approval of a settlement brokered earlier between defendants and plaintiffs, and require that all plaintiffs—most especially (and often exclusively) "future plaintiffs" who have not yet manifested injury—be legally bound by the terms of settlement. Commentators respond to the settlement class action in various ways. Some approve of such settlements.¹ Some do not reject such settlements in principle but suggest reforms and improvements.² Others question such settlements on the grounds that they may not be authorized by the relevant rules of procedure,³ and still others disapprove, sometimes passionately, of the breaches of professional ethics that such settlements seem unavoidably to engender.⁴

Lest a Comment of this brevity foolishly attempt to build suspense, its conclusion may be simply stated at the outset. Settlement class actions are inherently unlawful because they clearly, and one is tempted to say unnecessarily, exceed the legitimate limits of adjudication. If this conclusion is correct, then continued or expanded reliance on such procedures will slowly but meaningfully decrease the public respect and esteem traditionally enjoyed by our courts, to the eventual detriment of us all.

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¹ Although no commentator has been willing to embrace settlement class actions without equivocation, several bave clearly implied approval in principle. See, e.g., Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 472 (1994); Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 CORNELL L. Rev. 941, 961-62 (1995).

² See, e.g., John C. Coffee, Jr., Summary, The Corruption of the Class Action: The New Technology of Collusion, 80 Cornell L. Rev. 851, 856-57 (1995) [hereinafter Coffee, Summary]; Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1049 (1995) ("I do not write to denounce all class actions that are filed and settled on the same day (so-called settlement class actions).").

See generally, Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 CORNELL L. REV. 858 (1995).

⁴ See, e.g., Koniak, supra note 2, 1126-37; Weinstein, supra note 1.

To support this conclusion, a description of adjudication as a decisionmaking process is appropriate. Since this author and others have undertaken this task at length elsewhere,⁵ the following description will be brief. Adjudication is a process of problem solving in which the interested parties present evidence of facts and arguments of law before a disinterested and impartial tribunal obligated to determine what happened and to apply relevant legal norms to the found facts in resolving the dispute between the parties. In presenting their arguments, the parties respectfully insist that, assuming favorable findings of fact, the law requires a particular result in their favor.⁶

For the law to support such arguments, the relevant rules and standards must be sufficiently specific to permit each side to rely coherently upon a chain of logic imposed by the relevant legal norms in which each constituent element may be resolved, at least tentatively, before moving to the next. When applicable standards are so vague that neither side can assert a chain of logic as a matter of right, the litigants become supplicants appealing to the tribunal's intuition, or pre-existing bias. The judge becomes manager and planner rather than law-applier and neutral arbiter. Whatever the outcome reached at trial, it will be the product not of articulatable legal norms, but rather of naked discretion.

Adjudication is not, of course, the only problem-solving process available in the legal system.⁸ Indeed, only a small minority of problems are actually resolved by resort to adjudication.⁹ A far greater number of problems are solved by the legitimate exercise of managerial discretion, as when, within limits set by law, an individual decides what to do with available leisure time, or the owner of property decides what to do with it. The process of exchanging mutually binding promises by contract is another common problem-solving tool. And legislation, too, is an alternative to adjudication.

⁵ See, e.g., Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1978); James A. Henderson, Jr., Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 COLUM. L. REV. 1531 (1973).

⁶ Karl Llewellyn spoke of the common law tradition of courts being bound to reach "one single right answer." *See* Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 24 (1960).

⁷ One important function of legal norms is to translate problems into linear chains of logic that lend themselves to argumentation in court. Before application of legal norms, problems typically present their elements in the configuration of a spider's web, in which pulling one strand causes all the rest of the strands to re-configure themselves. As each strand is pulled, in turn, the web reconfigures itself endlessly. See Fuller, supra note 5, at 395.

⁸ See id. at 393-405.

⁹ This is an accurate assertion even if one includes all claims settled prior to trial. The point here is that only a small fraction of problem-solving human decisions ever involve courts at any level.

Each problem-solving process has its own source of legitimation. Adjudication rests on the availability of a viable set of legal norms on which litigants may rely in presenting arguments to an impartial tribunal bound to apply those norms in reaching a decision. The exercise of managerial discretion derives its legitimacy from the underlying grant of authority to the manager—whether, via principles of individual autonomy, to act for the manager's own benefit or, via principles of agency, for the benefit of another. Contractual obligations are binding and legitimate when predetermined norms governing consensual exchange are satisfied. Finally, legislation derives its legitimacy from a combination of electoral authorization and the satisfaction of procedural prerequisites.

Turning to adjudication, the process upon which this Symposium focuses, a review of the substantive law of torts reveals that it is structured so as to avoid, by and large, presenting courts with open-ended, unadjudicable problems. That is, tort law has traditionally avoided confronting courts head-on with the task of solving complex social problems under vague, open-ended standards calling for the exercise of managerial discretion. It can be argued that the modern trend is in the direction of discretionary problem solving. However, closer examination suggests that any such trend, if one existed earlier, has substantially reversed itself in recent years. On balance, modern tort law articulates standards for decision sufficiently specific to support meaningful participation by affected parties.

One primary means of avoiding unadjudicable problems is through reliance on so-called "no-duty" rules. No-duty rules categorically deny the right to recover based on defendants' failures to act affirmatively to advance or protect the interests of plaintiffs, thus allowing judges to act as gatekeepers in controlling the flow of litigation reaching trial.¹³ The best known and most controversial such rule removes a general duty to engage in rescue.¹⁴ But there are many

See, e.g., James A. Henderson, Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976).

¹¹ See, e.g., James A. Henderson, Jr. & Theodore Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 U.C.L.A. L. Rev. 479 (1990); James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263 (1991).

For a recent discussion of developments in products liability that support this conclusion, see James A. Henderson, Jr. et al., *Optimal Issue Separation in Products Liability*, ____ Tex. L. Rev. (forthcoming 1995).

¹³ See generally Aaron Twerski, From Risk-Utility to Consumer Expectations: Enhancing the Role of Indicial Screening in Product Liability Litigation, 11 HOFSTRA L. REV. 861 (1983).

others. Indeed, it may be said that, subject to important exceptions, actors owe no duties to act in ways that benefit others.¹⁵

Occasionally, in what has come to be known as "public law litigation," courts have made exceptions to this general rule and have required public officials to act in the public's interest. Although these cases do not, strictly speaking, involve tort law, they are public law analogs to private tort actions. Examples include judicially supervised desegregation of public schools and judicially mandated reform of state mental health facilities. Because some influential commentators have attempted to justify settlement class actions by including them within the rubric of public law litigation, closer examination of both phenomena is warranted.

Although powerful arguments can be made that public law litigation is beyond the legitimate limits of adjudication,²⁰ several factors combine to justify, at least arguably, judicial intervention in such cases.²¹ First, the interests sought to be protected involve fundamental civil rights that are seriously threatened by institutional abuses of power.²² Second, the reality is that unless a court steps in to accomplish reform, reform will not occur for a variety of political reasons.²³ Third, once the court recoguizes the rights of insular minorities in such cases—that is, once the court empowers otherwise powerless victims of institutional abuse—a court-supervised process combining public dialogue, bargaining, and compromise among interested parties largely replaces managerial governance by the court.²⁴ And finally, the judge performs to a siguificant degree as an impartial stakes-

¹⁵ Common experience suggests that most bad outcomes in life, including accidental injuries, do not, even colorably, support claims for tort recovery.

¹⁶ See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976).

See id. at 1298-1301; Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), aff'd, 522
 F.2d 717 (5th Cir. 1975); Mapp v. Board of Educ., 203 F. Supp. 843 (E.D. Tenn. 1962), modified, 319 F.2d 571 (6th Cir. 1963).

¹⁸ See Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), leading to the restructuring of state mental health facilities in Alabama. See generally Note, The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change, 84 Yale L.J. 1338 (1975).

¹⁹ See Weinstein, supra note 1, at 472; see also Marcus, supra note 3, at 882-87.

²⁰ See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 HARV. L. Rev. 1195, 1294 (1982) (arguing lack of constitutional authority); William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635 (1982).

²¹ See generally Chayes, supra note 16.

²² See, e.g., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (restructuring state mental facilities); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd in part, 503 F.2d 1320 (5th Cir.), cert. denied, 421 U.S. 948 (1974). See generally supra note 20; Linda S. Mullenix, Mass Tort as Public Law Litigation: Paradigm Misplaced, 88 Nw. L. Rev. 579, 581 n.7 and accompanying text (1994).

²⁸ See Fletcher, supra note 20, at 693; see also Chayes, supra note 16, at 1313-16.

²⁴ Chayes, supra note 16, at 1312.

holder with little or nothing to gain personally by favoring solutions that are inconsistent with widely shared legal norms.²⁵

It will be observed that until the problems addressed in public law litigation reach the proportions of large-scale institutional pathology, courts properly deny relief to individual plaintiffs. Thus, a prisoner complaining of unappetizing food in a prison's dining facility, or a student complaining of the level of education at a public school, will almost certainly be denied relief as a matter of law. Taken individually, such claims would ask courts to review extrajudicial policy decisions against standards too vague to support meaningful adjudication. It is only when the problems aggregate institutionally—"clump up to critical mass," if you will—that a court will seriously consider intervening on behalf of the victims of an alleged abuse of institutional power. Until extrajudicial processes of decisionmaking prove to be woefully inadequate, resulting in wide scale abuse, courts properly defer to such extrajudicial processes.

Turning now to consider the relevance of the foregoing synopses to the legitimacy of settlement class actions, one may begin with the observation by Professor John Siliciano and others that the underlying tort claims in such class actions are typically well within the traditional boundaries of adjudication and thus could, if courts were so inclined, be litigated either individually or collectively as could any other claim to recover in tort.²⁶ While insightful, this observation tells only part of the story. As Professor Siliciano correctly observes, the alleged "crisis" that purports to justify extraordinary procedural innovations in mass tort involves not the nature of the underlying claims, but their nnmber.²⁷ He begins to answer the question, "Does size matter?" by identifying four contentions advanced to justify an affirmative response:

First, it is argued, the congestion resulting from mass tort claims causes *intolerable delays* in the determination both of these cases and caseloads in general. Second, resolution of such cases involves *unacceptably high transaction costs*, with claimants often recovering only thirty to forty cents per dollar of the total amount expended in litigation. Third, mass tort cases, if handled by the tort system, can easily result in the *bankruptcy of defendants*. Finally, and in part because of such bankruptcies, late-arriving claimants face the prospect

²⁵ Judges do presumably gain professionally, over time, by reaching what are generally perceived as fair and sensible decisions that are consistent with pre-existing legal norms. See generally Richard Posner, Economic Analysis of Law 534-37 (4th ed. 1992).

²⁶ See John Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. Rev. 990, 991-95 (1995); see also Mullenix, supra note 22, at 581.

²⁷ See Siliciano, supra note 26, at 995.

of inadequate damage awards because compensation funds are exhausted. 28

Professor Siliciano then proceeds to argue that each of these contentions is, taken alone or in combination, inadequate to justify a conclusion that crisis has descended upon the tort system.²⁹ Indeed, he argues persuasively that these aspects of the tort system "are not pathologies, they are instead the inevitable by-products" of the system as it is designed to function.³⁰ On the face of things, he is clearly correct. In tort settings other than mass tort, courts have correctly refused to be concerned with the four peripheral considerations he identifies.³¹ These considerations involve problems that are clearly beyond the traditional limits of adjudication.³² Just as in the case of public litigation, at least until such problems "clump up to critical mass," courts can and should defer to extra-judicial processes of decisionmaking to address, and possibly alleviate, problems of delay, transaction costs, and the financial impact of tort judgments on defendants.³³

But what of the argument that, in the mass tort context, these problems have, indeed, clumped up? What of Professor Schuck's apparently valid observation that legislatures can not be expected to act affirmatively to address, let alone to "solve," these aggregations of difficulties? Does not the court face extrajudicial political impasse? Is not the situation in the mass tort context sufficiently analogous to that confronting courts in the context of public law adjudication to justify a departure from tradition as radical as the settlement class action, by which persons not yet injured are bound to agreements of which they could not possibly have known and in which, therefore, they could not possibly have participated? The professor school of the professor of th

²⁸ Id. at 998.

²⁹ Id. at 998-1006.

³⁰ Id. at 1008.

One context in which the defendant's wealth has traditionally been deemed relevant is that involving the controversial subject of punitive damages. It has been argued forcefully that for courts to consider defendants' wealth in this context is to depart from the rule of law. See Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415 (1989). The other context in which defendant's financial ability to pay and plaintiff's financial need to be paid have been made relevant is private nuisance. This has also proven to be controversial. See generally Henderson et al., supra note 14, at 502-05.

³² The sorts of solutions identified in the next footnote clearly present the "spider's web-like" problems described in *supra* note 7.

Delay might be alleviated by building more courts and appointing more judges. But see Siliciano, supra note 26, at 1000. Transaction costs might be reduced by limiting pretrial discovery and otherwise streamlining civil procedures. Impact on defendants might be reduced by amending bankruptcy and insolvency laws.

³⁴ See Schuck, supra note 1, at 972-73.

³⁵ Admittedly, even traditional class actions, to some extent, involve problems of notice and participation. It would be naive to insist on individualized treatment for every

That the public law adjudication analogy does not justify settlement class actions is clear upon review of the elements that arguably justify public law ventures by courts into theoretically unadjudicable territory. First, how serious are the social problems presented by mass tort? Professor Siliciano makes a strong case that their seriousness is exaggerated in the rhetoric of "crisis." But even assuming that a crisis exists, does the rest of the public law litigation scenario play out in the mass tort setting? Upon reflection, it most certainly does not. Rather than empowering the otherwise powerless—for example, helpless inmates in a brutally savage mental institution—settlement class actions arguably empower the powerful-corporate tort defendants and plaintiffs' class counsel.36 Rather than leading to an ongoing, arms length dialogue and compromise, the empowerment in the context of settlement class actions takes the form of judicial approval of a "done deal," in which the major parties in interest—"future plaintiffs"—have no real voice.³⁷ And the standards that courts apply in approving such settlements are so vague and open-ended as to be meaningless.38

Moreover, rather than the court playing the role of impartial stakes-holder, in the settlement class action context judges are directly and personally benefitted by their approvals of the "done deals" between defendants and plaintiffs' counsel. Indeed, one suspects that a major (albeit tacit) reason why some courts have approved settlements the fairness of which, on their face, appear dubious is the liberating effects of docket-clearing. And finally, one should consider what might be described as the "morality play" aspects of both public law litigation and settlement class actions. In connection with the former, the ongoing public dialogue and compromise following judicial empowerment of the otherwise powerless arguably serves to educate the public to the relevant issues. Quite the opposite is true with settlement class actions. Basic issues like general causation go unresolved, save for the defendants' settlement agreement. And even that agree-

claimant in every tort case. See generally Glen O. Robinson & Kenneth S. Abraham, Collective Justice in Tort Law, 78 VA. L. Rev. 1481 (1992). But this writer is persuaded by Professor Koniak's characterization of these future plaintiffs as "unknowing," Koniak, supra note 2 at 51-53, and thus uniquely under-represented in the context of settlement class actions. But see Marcus, supra note 3, at 888-95.

³⁶ See Mullenix, supra note 22, at 581 ("[M]ass tort cases do not pit downtrodden, defenseless claimants against such big, impersonal governmental institutions as prisons, school systems, and mental health facilities."); Siliciano, supra note 26, at 1009.

³⁷ See supra note 36.

³⁸ It is difficult to imagine a more open-ended standard than "fairness to all concerned." See generally Koniak, supra note 2, at 1120-26.

³⁹ If one truth emerges from all the debate and discussion of mass tort class actions it is that judges dread the prospect of spending the remainders of their careers trying, seriatim, factual variations on the same mass tort fact pattern. See generally John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. (forthcoming 1995).

ment is purged of moral content. Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.⁴⁰

Based on the foregoing comparisons and contrasts it hardly follows, from the shaky premise that public law litigation falls within the legitimate limits of adjudication, that the same thing may be said of settlement class actions. In the latter context, the court delegates power to the powerful, who cannot be expected necessarily to act in the best interests of faceless future plaintiffs. The standard by which the court judges the fairness of the settlement is so vague as to be nonexistent. The court has a direct and personal benefit to be gained by approving the settlement, and the entire arrangement more than subtly hints of judicially-sanctioned blackmail.

Might, as Professor Coffee suggests, reform of the ground rules rescue the settlement class action from enough of these difficulties to justify this "solution" to the "crisis" of mass tort? This writer instinctively doubts that it could. Settlement class actions are attractive to judges, defendants, and plaintiffs' counsel because they serve the interests of all three constituencies. One may fairly suspect that these interests may be served only if the interests of future plaintiffs are devalued. This is not to say that parties to these settlements necessarily act in bad faith. Indeed, this writer has conversed directly with many of the major players and assumes they are genuinely sincere. They are, however, only human, and thus quite capable of deceiving even themselves.