A BENCH–BAR DISCUSSION

# RESOLVING MASS TORTS IN DIFFERENT FORUMS

APRIL 27–28 2023

SCHEDULE OF AGENDA

## GW LAW BENCH BAR CONFERENCE
## JAMES F. HUMPHREYS COMPLEX LITIGATION CENTER

### THURSDAY, APRIL 27, 2023

**9:00–10:15 a.m.**

### CURRENT ISSUES IN CLASS ACTION CERTIFICATION

MODERATOR: BRIAN FITZPATRICK, *Vanderbilt*

JUDGE: HON. LEE ROSENTHAL, *Southern District of Texas*

SPEAKERS: HARPER SEGUI, *Milberg Coleman Bryson Phillips Grossman*
JEAN MARTIN, *Morgan & Morgan*
HAYDEN COLEMAN, *Dechert*

A proposed class is, necessarily, large and generally contains both injured and uninjured individuals, but in some cases it cannot be ascertained who belongs in which group at the class certification stage. Assuming that the sorting can be done by the time of trial, does uncertainty at the class certification stage make the class uncertifiable? Might the answer depend on whether the class is for injunctive relief or damages?

One proposal to facilitate the use of class actions when there are both common and non-common questions is to limit the class certification to the common questions. Rule 23(c)(4). But if this is done, how will the remaining non-common questions be resolved? The Florida Supreme Court modified the usual rules on issue preclusion and held that, in subsequent non-class litigation, the findings on the common issues were issue preclusive against the defendants. Engle v. Liggett Group, 945 So. 2d 1246 (Fla. 2006). Should this procedure be made more available in the future? What are the risks and benefits of this procedure? For example, should the results of the common issues trial be immediately appealable by the losing party even if no final judgment has yet been entered?

**10:15–11:15 a.m.**

### FEE ISSUES IN CLASS ACTIONS

MODERATOR: ROGER TRANGSRUD, *George Washington University*

JUDGE: TO BE CONFIRMED

SPEAKERS: STEVEN HERMAN, *Herman Herman & Katz*
DONNA WELCH, *Kirkland & Ellis*

The perennial issue of how courts should calculate fees for class counsel will not go away, even in damages classes where there is a money judgment entered after trial or settlement. Are there cases where the amount recovered is so large that fees based on percentages alone produce recoveries for class counsel that would translate to astronomical hourly rates and/or where a change of a fraction of a percent can mean a difference of many millions of dollars? If so, what should courts do? On the other hand, does the use of a lodestar, even for cross-checking, create incentives to over-staff the case and/or spend too much time on

peripheral issues? In any event, lodestar calculations have their own indefinite aspects, such as reasonable hourly rate and multiplier, if any. Furthermore, in cases in which the class members have retained their own counsel because the amounts of recovery will be substantial (like the NFL concussion cases), does the court have the authority to reduce the agreed-upon percentage that class members have with their own counsel in light of the work done by class counsel (including for cases in which class counsel also represent a number of class members who obtain recoveries)?

**11:15–11:30 a.m.** BREAK

**11:30–12:30 p.m.** COMMON BENEFIT FEES IN MASS TORT MDL CASES

MODERATOR: ALAN MORRISON, *George Washington University*

JUDGE: HON. JOHN LUNGSTRUM, *District of Kansas*

SPEAKERS: SARAH SHOEMAKE DOLES, *Levin Papantonio*
AMY COLLINS, *Amy Collins, P.C.*

Few dispute the right (need) to compensate the leadership in MDL cases for the time and money that they spend to create benefits for all plaintiffs, through discovery, preparation of expert witnesses, responding to defense motions, and (perhaps) bellwether trials. No statute or rule permits MDL courts to require all lawyers for plaintiffs in the federal MDL to set aside a small percentage of the recovery for their clients, but it is understood that the courts have such power. Even so, how should courts determine the percentage of the holdback and whether the initial amount is subject to up-or-down revision?

A related question is whether federal courts have the authority—jurisdictional and otherwise—to impose similar holdbacks on lawyers whose cases (in whole or in part) are in state court and who receive benefits from work done in the federal MDL case. If not, should they have that authority, and what limits should there be, if any? Also, increasingly there are parallel state MDL proceedings. How does that affect this question, and should state judges have comparable authority over federal court plaintiffs who benefit from state MDL proceedings?

**12:30–2:00 p.m.** LUNCH

**2:00–3:00 p.m.** JUDICIAL REVIEW OF MASS TORT SETTLEMENTS

MODERATOR: LYNN BAKER, *University of Texas*

JUDGE: HON. FREDA WOLFSON (RET.), *Lowenstein Sandler LLP*

SPEAKERS: SHEILA BIRNBAUM, *Dechert*
MICHAEL KIRKPATRICK, *Public Citizen*
AIMEE WAGSTAFF, *Wagstaff Law Firm*

Unlike a class action settlement, which, if approved, binds all class members who do not opt out, a mass tort settlement in an MDL case does not bind anyone; each client must either agree to settle their case or continue to litigate. But as a practical matter, in many mass tort cases, the claims are not viable if they must be litigated on a case-by-case basis, and lawyers will often decline to continue representing clients who do not go along with the settlement (is that tactic/threat ethical?). Do district judges have the authority to approve or disapprove such broad settlements, or are such rulings merely advisory opinions with no legal impact? If they do not have such authority, should they, and if so are the Rule 23 criteria appropriate for mass tort settlements? In addition, many lawyers settle their inventories of cases for a lump

sum, with the defendant (often by its own choice) having no say in how the money is divided. Should the formula by which lawyers decide how the money is divided be subject to court approval, even if the overall settlement is not? Finally, we will discuss a case involving a claim that in a mass settlement of Roundup cases, Bayer refused to pay the claim of a non-U.S. citizen and her lawyers abandoned her. Is this another reason why the MDL court should have review powers (the case was filed in another district)?

**3:00–3:15 p.m.** BREAK

**3:15–4:45 p.m.**

## LITIGATION FINANCE IN MASS TORTS, BANKRUPTCIES, AND CLASS ACTIONS

MODERATOR: RICHARD MARCUS, *UC Hastings*
JUDGE: KAREN CALDWELL, *Eastern District of Kentucky*
SPEAKERS: PATRICK LUFF, *Luff Law Firm*
JONATHAN MOLOT, *Burford*
JOHN BEISNER, *Skadden*
MAYA STEINITZ, *University of Iowa*
DEBORAH HENSLER, *Stanford*

There are two basic types of litigation finance in the United States. In both, money is advanced on a non-recourse basis so that the financing party is paid only if the recipient's lawsuit is successful by litigation or settlement. The first, which will not be discussed at this conference, involves small amounts, typically not more than $10,000, advanced directly to the client to pay living expenses so that they are able to hold out longer and not have to take a low-ball offer. The consumer protection issues raised by those advances are not the problems raised by commercial litigation financing that the conference will discuss.

In commercial litigation finance, by contrast, the money is advanced to pay litigation expenses (and in some cases, attorneys' fees incurred by the client). The money could be advanced to a client or to a law firm, either to finance a particular case or a pool of cases, including inventories in mass tort MDLs. The first part of this session will be focused on describing the process by which the financiers raise their capital and decide which cases to finance, in what amounts, and subject to what conditions. This part will also include a presentation on how litigation finance works outside the United States and why it developed differently there. One of the topics to be discussed in this part is how, if at all, these financial arrangements differ (and require additional regulation or disclosures) from traditional bank loans, home mortgages, retained capital, and pooling of finances among counsel, etc.

The second part will focus on potential issues for the opposing parties and the court arising from litigation financing. Do courts have authority to require disclosures of the existence of litigation finance of any and all kinds, and if so what do they have the authority to require be disclosed—the existence, the amount, and/or the terms? Is disclosure sought to avoid conflicts by the judge, and if so, why are judges investing in litigation finance companies? If that is not the purpose, what is? Are there problems with some arrangements such that the real party in interest is not before the court? Do defendants have any legitimate interest in learning about any aspect of litigation finance, comparable to the right to discover the extent of an opposing party's liability insurance? To the extent any of this authority is lacking, should the Rules Committee create that authority, and what should it be? Are there special problems in financing class actions and the need for full disclosure to the court and class members?

**4:45–5:45 p.m.** RECEPTION

## FRIDAY, APRIL 28, 2023

**9:00–10:30 a.m.**

### BANKRUPTCY ISSUES IN MASS TORTS CLAIMS

MODERATOR: LINDSEY SIMON, *University of Georgia*
JUDGE: TO BE CONFIRMED
SPEAKERS: ANNE ANDREWS, *Andrews & Thornton*
DAVID FREDERICK, *Kellogg Hansen*
NAN EITEL, *Executive Office for U.S. Trustees*
GREGORY GORDON, *Jones Day*

This session will have two parts. One part will focus on how the resolution of tort claims in bankruptcy proceeds, both for a one-off case (where the claim might be litigated) and then how mass tort claims are likely to be handled in typical corporate reorganization (Chapter 11) proceedings. Issues to be discussed include filing claims, the role of the committees and the U.S. Trustee, and if a plan of reorganization is proposed (as it usually is) the process by which the plan is approved, including voting by class. The basic point to be conveyed is that the process is completely different from resolving claims in an MDL or a class action, and counsel must understand how it works.

The other part will discuss three major issues that are being litigated in this area, all of which are tactical reactions to ever-increasing mass tort claims. One is the authority of the bankruptcy court to issue a release to third parties who are not in bankruptcy, but who make a financial contribution to the plan that enables creditors generally to receive more money in the proceeding. If it is legal, what are the conditions on which the release can be issued? The second is the power of the court to issue a stay of litigation, not only against the bankrupt party, but also against others, such as the parent corporation, when claims may or may not be made against both the bankrupt and the other party. Third is the legality of the Texas two-step, a tactic by which a parent corporation spins off a subsidiary with the principal tort liability, with or without a funding source for tort victims, so that only the subsidiary is subject to the bankruptcy court's supervision. While the Third Circuit rejected that effort, the company does not appear to have abandoned it. There are differences among the three situations, but they have one common element: the third party has some close relation to the bankrupt party. This part of the session will focus less on the legal arguments under the Bankruptcy Code and more on why the particular moves were made (that is, what tactical advantages motivated the filing party) in lieu of the more traditional options for resolving mass torts, and on the other side who was objecting and why.

**10:30–10:45 a.m.** BREAK

**10:45–11:45 a.m.**

### MASS ARBITRATIONS

MODERATOR: ROGER TRANGSRUD, *George Washington University*
SPEAKERS: SHIRISH GUPTA, *JAMS*
WARREN POSTMAN, *Keller Postman*
JOE SELLERS, *Cohen Milstein*
ROBERT J. HERRINGTON, *Greenberg Traurig, LLP*

For years, employers and sellers of all kinds of goods and services have included provisions in their contracts requiring that all disputes go to arbitration and forbidding collective arbitration. Despite objections from consumers and others, the Supreme Court has, with very few exceptions, rejected all efforts to avoid arbitration and at the same time has rejected almost all efforts to have class actions for claims subject to arbitration, whether in court or via arbitration. Now the shoe is on the other foot, as employees and consumers who are subject

to arbitration have sought arbitration en masse, and businesses are trying to stop the process. This panel will explore why at least these plaintiffs are heading to arbitration: is it numbers, or costs being imposed on employers, or attorney's fees, or something else? To the surprise of no one, defendants are fighting back, and this panel will also explore what defendants are arguing to avoid mass arbitrations with respect to disputes under existing contracts and how they might shape their contracts to avoid mass arbitrations in the future (including particularly the propriety and legality of mandatory cost-sharing provisions).

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