MASS TORTS THROUGH THE DECADES

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With mass torts as with many things in life, the aphorism – the more things change, the more they remain the same – rings true.

Legal practitioners still grapple with the issue of causation and how to achieve collective redress, key issues in one of the seminal mass tort litigations involving Agent Orange, the herbicide formulation developed and used by the U.S. military during the Vietnam War.

We continue to look for the next asbestos – PFAS (per/polyfluoroalkyl substances) and the herbicide, Roundup, are among the recent candidates – yet asbestos litigation continues apace with the emergence of cosmetic talc litigation; and we might wonder if ultra-processed foods will become an analog to the tobacco litigations.

Given the hurdles in prosecuting traditional toxic tort and product liability theories for a class, there has been a trend toward seeking class action relief based on consumer protection theories (which compares to an earlier trend of class actions seeking "medical monitoring" on a class-wide basis without needing to prove injury).

AGENT ORANGE RETROSPECTIVE

One of the first chapters in the mass torts story is the Agent Orange litigation. The cases were presided over by late federal district judge Jack Weinstein, who is commonly referred to as the Father of Mass Torts for his innovations in handling such matters, including his use of special masters and creative settlement and claim administration processes.

As some basic background, lawsuits against the chemical companies that produced the herbicide for the U.S. government under contracts governed by the Defense Production Act were first commenced in the late 1970s, with some 600 cases later being consolidated in a federal multi-district litigation. These cases alleged a variety of diseases arising out of purported exposure to Agent Orange and, more particularly, trace amounts of dioxin formed during the production of the formulation's 2,4,5-T component (measurable in an average concentration of less than 2 parts per million). The matter was ultimately certified as a class action encompassing veterans from the U.S., Australia and New Zealand, along with their spouses, children and parents. On the eve of trial in May 1984, the case settled with seven defendants agreeing to pay $180 million into a settlement fund to be established and administered by the court.

Issues over the application of class action principles and standards for causal proof in the mass torts context – which Judge Weinstein tried to solve in the Agent Orange litigation – have persisted across the succeeding decades of mass tort practice.

MASS TORT CLASS ACTIONS

As individual issues (exposure, medical history) typically predominate over

common issues in the mass tort context, proceeding by class action is uncommon. Agent Orange was an exception; Judge Weinstein is said to have structured a class action to engineer a settlement.

But a problem that emerged with respect to treatment of the Agent Orange claims on a class basis was how a mass tort settlement could be applied to future claims, affording settling defendants a complete resolution. The Agent Orange settlement fund was designed to last for 10 years; however, beginning in 1998, new lawsuits were filed by veterans claiming their diseases were not discovered until after the settlement fund was exhausted, and they were therefore not bound by the class settlement. Judge Weinstein dismissed the newly filed cases as barred by the 1984 class settlement, but the Second Circuit concluded that such future claimants could not be bound to a class settlement without violating their due process rights.

The resolution of future claims has significantly impeded class treatment of mass torts, resulting in delays and inefficiencies. A proposed class settlement of Roundup claims in Missouri State Court tackles the future claims issue by providing for its compensation program to last for 21 years, though the Federal judge presiding over the Roundup MDL questions whether it could legally bind people who may develop cancer in the future.

MASS TORT CAUSATION AND EXPOSURE

Causation and exposure remain battleground issues for mass toxic torts. To support approval of the Agent Orange class settlement, the courts acknowledged the weakness of the evidence supporting a causal link between Agent Orange and the myriad diseases claimed by the veterans. Judge Weinstein later observed that "in the 1970s, 1980s and 1990s, the courts concluded that none of the available evidence would support a finding to a more-probable-than-not standard of causality between exposure to Agent Orange and disease." As for Agent Orange exposure, although there is historical data on the timing and parameters of spray missions and troop locations, the National Academy of Medicine describes it as an "intractable" scientific issue.

The tug-of-war over causation and exposure has continued in the mass torts arena. Pulling in one direction, scientific evidence is now generally more accessible and available to plaintiffs. Researchers' ability to gather and analyze data for epidemiological studies is always improving, aided by advancements in AI, and scientific literature continues to proliferate. Regarding exposure, methods to detect substances in the environment and the human body have become increasingly sensitive, along with methods to model exposure pathways. In addition, we have seen the hazard classifications issued by the International Agency for Cancer Research (IARC) become more impactful over the years, perhaps most prominently with its 2015 assessment of glyphosate as probably carcinogenic, playing a key role in the Roundup litigation. (Regarding IARC, we might flag its 2025 monograph upgrading its classification for automotive gasoline to "carcinogenic to humans" as a potential source of new litigation.)

Pulling in the other direction, first, with the expanse of scientific literature, provenance and quality have become significant concerns. Indeed, issues have arisen on both the plaintiff and defense sides. While a scientific journal recently retracted a glyphosate paper based on questions of "authorial independence," in other instances, papers authored by plaintiff experts have been subject to efforts to quash as nothing more than made-for-litigation science. Amendments to Federal Rule 702, effective in 2023, were intended to reinvigorate the federal courts' gatekeeping role on expert scientific evidence in response to growing criticism that courts were inadequately fulfilling that role, including deferring consideration of expert evidence to the jury as a matter of its strength or weight. The 2023 amendments clarified that a court must review expert testimony as a preliminary question, finding whether its admissibility is established by a preponderance of the evidence and the expert's "opinion reflects a reliable application of the principles and methods to the facts of the case."

ALTERNATIVE MASS TORT THEORIES

Given the causation battleground and lack of class-wide relief in a traditional toxic tort context, it is not surprising that claimants have sought out other theories on which to base recovery. Around the 1990s, claims for class-wide medical monitoring, which would not require a fulsome showing of causation and provided recovery for "no-injury" plaintiffs, became a trend, but those cases had mixed results.

The current trend to avoid the elements of a traditional toxic tort case and invoke class-wide relief has been to attack a product's alleged toxic hazards under various consumer protection statutes and causes of action, asserting that the consumer was misled because some undisclosed, potentially hazardous substance is in the product.

For instance, as a corollary to the Roundup cancer cases, consumer class actions were brought alleging that the purported presence of glyphosate in breakfast cereal (used on wheat crops), was misleading insofar as the product was advertised as "natural."

PFAS have been a broader target in this regard. PFAS are referred to as "forever chemicals" because they do not break down in the environment or the body due to an exceptionally strong carbon-fluorine bond, and they have been linked to cancer, liver damage and weakened immunity, among other things. The substances are found in numerous consumer products (nonstick pans, stain-resistant carpets, grease-resistant paper used in food packaging, cosmetics, etc.), leading to consumer lawsuits based on the nondisclosure or misdescription of the presence of PFAS in the product and their attendant risks. For example, suits have been filed against cosmetics manufacturers on the theory that the presence of PFAS in their products contradicts their representation of the product as providing "sustainable beauty."

WHAT'S NEXT?

Predicting the next mass tort, we might follow the growing focus on ultra-processed foods (UPFs) as foretelling a litigation trend. One of the early UPF cases analogized the food companies to the tobacco industry for concealing health risks while using "addiction science techniques and predatory marketing campaigns." The case was dismissed, though, with the court relying on the traditional exposure and causation standards, observing that the plaintiff failed to "allege how often he consumed Defendants' products, in what amounts, or when" and "[e]ven putting aside the reality that [his] diseases have a multitude of causes, there are simply not enough facts to suggest that Defendants' products caused Plaintiff's harm."

For the mass torts process, it seems the primary issues and our tool kits will largely resemble earlier versions.

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