The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation

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INTRODUCTION

Over the past few decades, mass torts have captured the attention of legal practitioners, judges, public policy-makers, business leaders, and civil procedure scholars. This attention is manifested in many ways. For example, massive lawsuits against manufacturers of asbestos, dietary supplements, medical devices, pharmaceutical products, and tobacco are front-page news. Law schools frequently sponsor symposia devoted to mass tort litigation. Attorneys form special committees to share information about strategies for litigating particular cases. Legal publishers offer subscriptions to newsletters devoted exclusively to particular mass torts. Law firms and professional societies offer expensive courses on litigating mass torts. Judges who preside over mass torts achieve special prominence. State and federal courts have established committees to consider the special problems that mass torts pose for the civil justice system.

Mass tort litigation has reshaped substantive and procedural doctrine over the past quarter-century. Large punitive damage awards in mass tort litigation have fueled efforts to adopt statutory caps on damages. These efforts have achieved considerable success in the state courts. Controversy over the use of scientific evidence in mass tort litigation led the United States Supreme Court to articulate new standards for assessing the admissibility of expert evidence.[1] For instance, the Court has decided two

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[1] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). For a discussion of the interplay between judicial response to scientific evidence and mass tort litigation, see Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999); *see also* MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1997); MICHAEL GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION (1996); JOSEPH SANDERS, BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION (1998); JAY

mass tort cases in its past four terms,[2] and the United States Congress has considered legislation to facilitate the administration of mass torts in virtually every one of its sessions over the past decade.[3] In 1991, the Judicial Conference asked the Civil Rules Advisory Committee to consider reforming Rule 23(b)(3) to better accommodate mass torts. When the effort to find an approach for resolving mass torts within the class action framework foundered in 1997, the Committee proposed that the Conference appoint a mass tort task force to consider alternatives. A working group on mass torts authorized by Chief Justice Rehnquist issued a report on mass tort litigation in 1999, calling for further study and consideration of policy proposals.[4] The Civil Rules Advisory Committee is continuing to deliberate on whether and how to change the Federal Rules of Civil Procedure to improve the management of mass torts.[5]

More recently, an apparent surge of mass financial injury cases (chiefly, securities and consumer cases), which share some but not all of the features of the mass personal injury and property damage suits, has further complicated the debate over mass torts, which heretofore focused on personal injury and property damage claims.[6] Controversy surrounding the litigation against tobacco and gun manufacturers and managed care organizations, which comprise a mix of private tort claims and public actions brought by state attorneys general and other government officials, has also spilled over into the mass tort domain.[7]

Mass torts attract attention from the general public because they comprise large numbers of claims, often including claims for serious injuries or fatalities, and allege that these injuries are due to the use of or exposure to high profile products manufactured by leading corporations. Perhaps most important for attracting media attention, mass torts have the

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TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES (1998); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993).

[2] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[3] *See, e.g.*, Multiparty Multiforum Jurisdiction Act of 1998, H.R. 1252, 105th Cong. (1998).

[4] ADVISORY COMMITTEE ON CIVIL RULES, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999).

[5] Lee Rosenthal, *Renewed Examination of Federal Rule of Civil Procedure 23 in 2000*, 69 U.S.L.W. 2163 (2000).

[6] *See* DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 51-62 (2000) [hereinafter HENSLER ET AL., CLASS ACTION DILEMMAS].

[7] *See* Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large-Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001) [hereinafter Hensler, *Revisiting the Monster*].

potential to yield huge jury verdicts.[8] Mass torts, however, have attracted attention from legal scholars and practitioners not just because of their scale or their stakes, but because the civil justice system seems to have performed particularly poorly in response to these claims.

Discussions of the performance of the legal system in response to mass tort litigation often center on the system's high transaction costs, including direct and indirect costs of litigation and time to resolution. Most of the available empirical information pertains to asbestos worker injury suits, and the most precise data pertain to the second decade of that litigation, which is now almost thirty years old. In a series of studies conducted by RAND, analysts found that about sixty percent of the direct costs of asbestos litigation were attributable to legal fees for plaintiff and defense counsel.[9] Asbestos cases filed in the federal courts in the 1980s took twice as long to reach disposition as other federal tort cases.[10] As the litigation progressed, new defendants were targeted, and over two-dozen companies sought the protection of bankruptcy.[11] Transaction costs of mass torts other than asbestos have not been measured systematically, but it is often asserted that they too are unusually high, compared to other tort cases.

Much of the attention civil procedure scholars have accorded mass torts has centered on the question of the appropriateness of certifying mass tort class actions.[12] During the 1990s this question became entangled with

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[8] For evidence that media reporting on civil litigation is significantly influenced by the dollars involved, see Dan Bailis & Robert MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEH. 419 (1996); Steven Garber & Anthony Bower, *An Econometric Analysis of Automotive Product Liability Verdicts*, 35 LAW & SOC'Y REV. (forthcoming 2001).

[9] JAMES KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984). In an order and memorandum on the reorganization of the Manville Trust citing the RAND estimate, Judge Jack Weinstein wrote: "Based on information now available, including overheads, insurance costs and expenditures for courts, the percentage available to plaintiffs is probably closer to 30 cents for every dollar expended." *In re* Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 749 (Bankr. S.D.N.Y. 1991).

[10] Deborah Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1976 (1992). Asbestos lawsuits filed in the federal courts were multi-districted in 1991. *Id.*

[11] *Jumbo Consolidation in Asbestos Litigation: Hearing on H.R. 1283, the Fairness in Asbestos Compensation Act Before the House Comm. on the Judiciary* (1999) (statement of William Eskridge, Jr.).

[12] *See, e.g.*, Symposium, *Mass Tortes: Serving Just Deserts*, 80 CORNELL L. REV. 811 (1995). *But see* Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995) (noting that aggregation may take many forms and that the use of aggregative techniques predates the 1990s controversy over mass tort class actions); Charles Silver & Lynn Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) (urging lawyers to consider the implications of settlement dynamics in informally collected cases for ethical rule-making).

more general questions pertaining to Rule 23(b)(3) damage class actions.[13] Yet, mass torts arose in the U.S. in an era when courts generally declined to certify personal injury class actions,[14] suggesting that class certification is not a prerequisite for mass litigation. Scholars (and mass tort plaintiff attorneys) have argued that class certification denies mass tort claimants due process and individually crafted outcomes that otherwise would be available to them.[15] Defendants have argued that certification so increases their liability exposure as to require settlement of virtually every class action, notwithstanding differences in their legal merits. Whether such outcomes derive from certification itself, or from the features that distinguish mass litigation from other forms of civil litigation is uncertain. The high profile mass torts that arose in the 1980s—litigation over Agent Orange,[16] Bendectin,[17] Dalkon Shield,[18] and asbestos[19]—were resolved using a variety of procedural tools including multi-districting under 28 U.S.C. § 1407 ("MDL"), Rule 23(b)(3), Rule 42, the state court counterparts of all of these, bankruptcy, and informal aggregation. There has not been a systematic empirical investigation of whether the outcomes of these procedural mechanisms differ in significant ways or whether some procedures are more likely than others to yield outcomes consistent with the merits of the claims, accord more due process, or reduce transaction costs.

In previous research focusing on damage class actions, I found that mass torts, which I defined as mass personal injury and property damage suits, accounted for a relatively small percentage of class action activity in

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[13] *See* HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 9-48 (explaining the history of Rule 23(b)(3) damage class actions).

[14] *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

[15] *See, e.g.*, Susan Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995); Frederick Baron, *An Asbestos Settlement With a Hidden Agenda*, WALL ST. J., May 6, 1993, at A11.

[16] *See* PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987). The Agent Orange litigation was transferred to the Eastern District of New York by the Judicial Panel on Multi-District Litigation, where it was subsequently certified and settled under Rule 23(b)(3).

[17] *See generally* GREEN, *supra* note 1. Bendectin was transferred to the Middle District of Ohio by the Judicial Panel on Multi-District Litigation. After a failed effort to resolve the litigation as a Rule 23(b)(3) class, about 800 claims were consolidated for trial. After the jury returned a defense verdict, the mass litigation collapsed, although some individual litigation continued.

[18] *See generally* RICHARD SOBOL: BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991).

[19] *See generally* DEBORAH HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985) [hereinafter HENSLER ET AL., ASBESTOS IN THE COURTS].

the 1990s.[20] This suggested to me that concerns about class actions as the source of difficulty in resolving mass torts might be misplaced. When I interviewed mass tort practitioners for the previous study, they suggested that multi-districting was more important than class actions in determining the course and outcomes of mass torts in the federal courts. Previously, there were little published data on the uses and consequences of multi-districting in federal litigation. This article is a first attempt to fill that gap. It presents the preliminary results of an empirical investigation of patterns of multi-districting activity, focusing on mass torts.

Studying mass tort litigation first requires a definition of the term, which has no formal legal meaning. Section II presents my perspective on how mass tort litigation is distinguished from ordinary high volume civil litigation and from other large-scale litigation pursued in a collective manner. Section III describes the federal multi-districting procedure, and details how the Judicial Panel on Multi-Districting has responded to requests to consolidate mass tort and other claims from its inception in 1969 through 1999. These findings are based on a statistical analysis of the federal MDL docket.

Controversy over mass torts mounted during the 1990s. At the same time, class actions received increasing attention from policy-makers and the media. To investigate the relative importance of multi-district litigation and class certification in mass torts, my research assistants and I identified all of the mass product cases that had come before the Judicial Panel on Multi-District Litigation (JPML) in the 1990s, and conducted further research on these cases. Using a combination of on-line sources (including legal and general press descriptions), and telephone interviews with attorneys, we attempted to determine the course of these cases and their outcomes. Section IV presents the preliminary results of this on-going investigation. Section V considers the policy import of the empirical investigation.

II. THE DISTINCTIVE FEATURES OF MASS TORTS

The term "mass torts" usually denotes litigation involving a large number of tort claims arising out of the use of or exposure to a single product, or resulting from injuries due to a single catastrophic event, such as a building fire or collapse. The distinguishing feature of mass torts, however, is not their large number of underlying claims. For example, every year, hundreds of thousands of automobile accident lawsuits are filed in state courts. But no one would include "fender-bender" cases under the mass tort rubric. What distinguishes mass torts from ordinary high volume

[20] *See* HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 49-136.

civil litigation is that they are pursued in a collective fashion—that is, as groups of cases rather than individually.

Mass financial injury litigation, which some commentators now include under the rubric of mass torts, also involves collective litigation of large numbers of claims. In most instances the monetary value of each of the underlying individual claims in a mass financial injury lawsuit is so small that, as a practical matter, the claims cannot be litigated individually. For example, the alleged individual losses in many consumer lawsuits amount to just a few dollars.[21] As a result, most mass financial injury litigation in the United States is brought in the form of damage class actions, under Rule 23(b)(3) and its state law equivalents. Mass personal injury and property damage claims—those that have historically been dubbed "mass torts"—are distinguished from mass financial injury claims in that the underlying individual claims have significant damages and arguably could be litigated individually. Moreover, there is often little variation in the amount of money claimed by financial injury victims.[22] In contrast, the losses of mass personal injury victims frequently vary dramatically, from several thousands of dollars to millions. Because the individual losses underlying mass financial injury torts are usually so small, the primary rationale for bringing the claims is regulatory enforcement. Although mass product litigation may have an important deterrent effect, its primary rationale is to obtain compensation for injured parties.[23]

Mass tort litigation, as defined above, is also distinguishable from the recent lawsuits against tobacco and gun manufacturers, and managed care organizations, which I term "social policy torts."[24] The latter comprise a mix of private personal injury claims pursued collectively (that is, mass torts) and public actions brought by state attorneys general and other public officials. The public actions typically seek reimbursement of government expenditures allegedly incurred as a result of injuries due to the manufacturers' practices. Some such actions have proceeded individually, but some—such as the state attorneys general tobacco lawsuits—have been litigated in a coordinated fashion. In addition to seeking monetary compensation for individuals and public entities, the new litigation seeks changes in corporate products and practices that advocates have pursued (without much success) in state and federal legislatures. These legislative

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[21] *See* HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 401-70.

[22] Some securities class actions include individual claims that are worth large sums of money. But securities cases are typically prosecuted within the class action framework, perhaps in part because the key liability doctrines refer to collective harms, such as "fraud on the market."

[23] *See* HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 49-136.

[24] *See* Hensler, *Revisiting the Monster*, *supra* note 7.

goals distinguish the new social policy torts from mass personal injury and property damage litigation and mass financial injury torts.

What motivates parties and their attorneys to treat personal injury and property damage claims collectively? Historically, what stimulated collective treatment may simply have been the concentration of like claims in a single place. A building fire[25] or structural collapse[26] in which many individuals suffered the same or similar injuries was likely to result in coordinated efforts to assign liability and assess damages by parties, attorneys, and courts located where the accident took place.[27] Toxic spills[28] and other environmental pollution[29] also gave rise to large numbers of claims concentrated in particular geographical areas. Asbestos litigation is an example of a mass tort involving a widely dispersed product that was initially similarly geographically concentrated, as many claims arose from workplace exposure in shipyards and petrochemical factories situated in a small number of coastal areas.[30]

But geographic concentration is not the sole, or the most significant factor predisposing collective treatment of mass injury and property damage claims. Perhaps as a result of their initial experiences dealing with geographically concentrated claims, plaintiffs attorneys learned that it was financially attractive to litigate large numbers of like claims against one or a few defendants collectively, at more or less the same time, rather than individually. Such a coordinated approach allows attorneys to spread the costs of developing the factual and legal claims over a large number of clients, each of whom an attorney has agreed to represent under a standard contingency fee agreement. This is not only cost effective but strategically advantageous: Litigating on behalf of hundreds, thousands, or tens of thousands of similarly situated clients gives plaintiff attorneys more leverage in negotiating settlements than they might have negotiating the resolution of each claim individually. As a result, individuals whose injuries are relatively modest may be able to secure greater compensation

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[25] Examples of mass litigation arising as a result of building fires include the Beverly Hills Supper Club fire, and hotel fires at the MGM Grand and Du Pont Plaza. *See* Hensler & Peterson, *supra* note 14, at 970-77.

[26] An example is the Hyatt Skywalk collapse. *Id.* at 972-74.

[27] In its famous Advisory Note to Rule 23(b)(3) adjuring judges *not* to certify class actions for mass personal injury litigation, the Civil Rules Advisory Committee clearly had such catastrophic events in mind.

[28] *E.g.*, DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIMES (1997); *see also* HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 319-38 (tracing the toxic tort litigation against Louisiana manufacturing company Harcros Chemicals).

[29] *See, e.g.*, Francis McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61 (1990).

[30] *See* HENSLER ET AL., ASBESTOS IN THE COURTS, *supra* note 19, at 15.

(and, as a result, pay higher fees to the attorneys) although individuals whose injuries are more serious may find that the value of their claims is diluted.[31] The large pools of potential claimants associated with mass product litigation, combined with social dynamics that tend to increase the rate of claiming above that normally observed in tort litigation,[32] create a supply of clients that facilitates such large-scale collective litigation strategies. Today, whenever information emerges about the possibility of a link between disease and use of a mass marketed product or mass exposure to a chemical substance, mass tort plaintiff attorneys understand there is a potential for large-scale collective litigation. They advertise widely for clients, and sign individual representation agreements with hundreds or thousands of those who come forward.

Defendants, too, have incentives to treat mass tort litigation collectively rather than individually. When the size and value of claims threaten the financial viability of a corporation, it is essential to develop a comprehensive strategy for resolution. Adopting standardized pretrial practices for defending the large volume of claims may reduce transaction costs. Settling large numbers of cases at a time, according to pre-determined formulae, may help in managing cash flow. But the only way that defendants can cap their exposure in mass tort litigation is to settle *all* of the claims against them in a collective fashion. Such collective resolutions have come to be known as "global settlements." Negotiating a global settlement, even if the price of such a settlement is high, may enable the firm to reassure shareholders that it can weather the litigation storm.[33] Occasionally, a defendant may seek class certification in order to facilitate a global settlement. Concentration of claims in the plaintiffs' bar reduces defendants' transaction costs to pursue such strategies. When mass tort claims are brought against two or more defendants, the defendants may respond by coordinating their strategies, further concentrating the litigation and promoting collective resolution.[34]

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[31] Silver & Baker, *supra* note 12, discuss the financial incentives for plaintiff attorneys to collect claims and prosecute them *en masse*.

[32] *See* Hensler & Peterson, *supra* note 14, at 1019-26; Deborah Hensler, *A Glass Half-Full, A Glass Half-Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Francis McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995).

[33] Silver & Baker, *supra* note 12.

[34] If litigation is prolonged, such coordination among defendants may be difficult to sustain. As individual corporations exhaust their insurance coverage, they may be unwilling or unable to comply with previously negotiated agreements on how to allocate damages among defendants. Bankruptcies and other key litigation events may also significantly affect the litigation posture of individual defendants making previously negotiated agreements untenable.

As mass torts became a more significant feature on the civil litigation landscape, courts struggled to manage them efficiently. Over time, judges, like plaintiff attorneys and defendants, learned that standardization of pretrial procedures—for example, by adopting standing discovery orders—reduced transaction costs, and that collecting claims promoted settlement. In recent years, state and federal judges have also begun to coordinate their management of mass torts, extending standardized procedures across jurisdictions and setting schedules in one jurisdiction so as to facilitate settlement in another.[35] But reducing the average litigation costs per claim made filing large numbers of claims more attractive to plaintiff attorneys. Additionally, facilitating collective resolution of claims arguably increased the risk to defendants of rejecting settlement offers, driving up the value of mass claims and increasing the incentive to file them. When aggregation did not lead to global settlements that extinguished all litigation, it may have contributed to expanding some mass torts beyond what might otherwise have been their scope.[36] By signaling that courts were prepared to facilitate aggregation and global settlement, judges' practices may also have contributed generally to the growth of mass litigation by increasing its attractiveness to plaintiff attorneys.[37]

The common factual and legal underpinnings of mass tort claims and their concentration in the hands of a small number of parties, lawyers, and judges produce another litigation feature that distinguishes mass torts from other high volume claims: a high degree of interdependency of claim values. Because the cases arise out of the same facts and frequently rely on the same scientific evidence and the same expert witnesses, a judge's decision to admit damaging evidence in one case affects *both* the potential

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[35] *See* Francis McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851 (1997).

[36] Agent Orange litigation provides example of aggregate resolution that extinguished future litigation. After the parties agreed to a class action settlement under Rule 23(b)(3), Judge Jack Weinstein dismissed the claims of those who opted out of the class, on the grounds that the evidence they submitted could not sustain a finding of a causal link between Agent Orange exposure and their alleged injuries. Class members who had not opted out could obtain compensation only under the administrative scheme that was established by the settlement. *See* SCHUCK, *supra* note 16. When, some time later, a Vietnam veteran came forward arguing that he was not aware of the class action and therefore should be permitted to sue for compensation due to Agent Orange exposure, his claim was dismissed. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993). Asbestos litigation provides a contrasting example. Although some asbestos claims have been resolved by class settlements and mass trials and virtually all cases are settled in groups, there has been no global settlement. Over time, the scope of asbestos litigation has expanded dramatically to include new defendants in new industries. *See generally* DEBORAH HENSLER ET AL., ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE (2001).

[37] Mass tort litigation may also have significantly shifted the role of the judge from neutral umpire to inquisitor. *See* Erichson, *supra* note 1.

settlement value of all of the cases in that jurisdiction (which may well all be assigned to the same judge), and the potential value of cases in other jurisdictions, by suggesting that the same evidence may be admitted there. Plaintiffs' access to jury trials and the availability of punitive damages are key factors in estimating the stakes of mass tort litigation. A multi-million dollar verdict in one jurisdiction increases the settlement value of all claims in all jurisdictions, by suggesting that other juries in that *and* other jurisdictions may make similar awards.[38] The inter-dependency of claim values increases the risk of pursuing individual dispositive outcomes, which, in turn, increases the attractiveness of collective resolution to plaintiff attorneys and defendants.

III. MULTI-DISTRICT LITIGATION IN THE FEDERAL COURTS

The most obvious way in which a court can facilitate collective litigation is by certifying a class action under Federal Rule of Civil Procedure 23(b)(3) or its state counterpart. Resolving a (b)(3) class action by trial or settlement binds all members of the class present and absent who have not exercised their right to opt out and proceed individually. The potential to resolve large numbers of like claims in a single action suggests that the class action might be an attractive mechanism for resolving mass tort claims. Perhaps, as a result, the term "class action" is sometimes treated as if it were synonymous with "mass tort." But the 1966 Civil Rules Advisory Committee, which was responsible for devising the current structure of the federal class action rule, thought that a representative action would ill fit a mass of personal injury claims. Even when those claims arose out of the same incident, the Committee reasoned, the differences among them (*e.g.*, with regard to injury severity) were likely to outweigh what they had in common, making it difficult for one or a few individuals to faithfully represent the interests of the many.[39]

By the 1980s, some judges had come to view the class action as a mechanism for aggregating large numbers of previously filed individual

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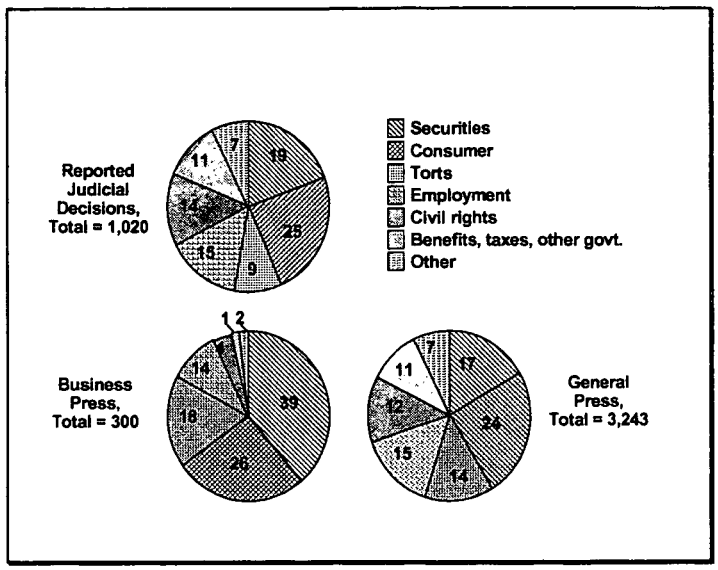
[38] For a discussion of multiple punitive damages in mass torts, see Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415 (1994). *See also* Hensler & Peterson, *supra* note 14, at 1040-42; Arvin Maskin, *Litigating Claims for Punitive Damages: The View from the Front Line*, 31 LOY. L.A. L. REV. 489 (1998).

[39] This reasoning struck a chord with mass tort practitioners who had entered into individual representation agreements with all of their clients. When, in the 1990s, mass tort litigation attracted the attention of class action lawyers who had honed their representative litigation skills in securities and other financial injury litigation, a battle between individual mass tort practitioners and class action practitioners began which continues to this day. For discussions of the special problems of mass tort class actions, see, e.g., Koniak, *supra* note 15; Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. Rev. 296 (1996).

claims and resolving them, en masse, by trial or settlement.[40] A desire to facilitate class treatment of mass torts spurred the most recent significant effort to reform Rule 23, an effort that occupied the Civil Rules Advisory Committee through much of the 1990s.[41] Notwithstanding these signs of cracks in judicial opposition to class treatment of mass torts, through the 1990s mass personal injury and property damage suits accounted for less than one-fifth of class action activity in the United States. (See Figure 1)

Figure 1
Most Class Action Suits Are Not Mass Torts



For parties, judges, and attorneys seeking to collect cases *without* adopting a formally representative model, multi-districting (MDL) under 28 U.S.C. § 1407 appears to offer an attractive alternative. Under 28 U.S.C. § 1407 parties may request that the judiciary collect lawsuits arising out of the same or similar circumstances that have been filed in different federal district courts and transfer them to a single court and judge, for purposes of pretrial preparation. The JPML, appointed by the Chief Justice, has the power to grant MDL status and selects the judge to whom the cases will be transferred.[42] The explicit purpose of the multi-districting

[40] On the contrast between *representative* and *aggregative* forms of collective litigation and the blurring of the distinction over time, see HENSLER ET AL., CLASS ACTION DILEMMAS, *supra* note 6, at 68-119.

[41] *See id.* at 11-37 (discussing the history of efforts to reform Rule 23).

[42] The Panel may consider granting MDL status *sua sponte*, but usually acts in response to party requests.

procedure is to permit more efficient pre-trial development. Rather than multiple judges devising (perhaps competing) schedules for case development, resolving discovery disputes, and deciding other pre-trial motions, a single judge presides over the pre-trial progress of the litigation. To help organize the litigation, the judge typically appoints lead counsel or a plaintiff steering committee; if there are multiple defendants, the judge may also order them to coordinate their activities to the extent that is feasible and appropriate given their posture in the litigation. Taken together, all of these organizational activities ought to have the effect of reducing both private and public costs of pretrial litigation.[43]

Under the statute, if the cases are not resolved during their pendency in the transferee court, they must be sent back to the court in which they were originally filed for trial.[44] But collecting and transferring like claims to a single judge often encourages settlement of these claims, which may be the real goal of the parties requesting multi-districting.[45] Transferring all pending federal claims to a single judge may also provide an occasion for that judge to certify a class action, encompassing not only the transferred claims, but those filed in state courts (which otherwise would not come under the federal court's jurisdiction),[46] and those of absent parties as well.

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[43] Based on surveys with attorneys, Olson found significant cost savings associated with multi-districting. Susan Olson, *Federal Multidistrict Litigation: Its Impact on Litigants*, 13 JUST. SYS. J. 341 (1988). But research on cost savings associated with the introduction of alternative dispute resolution procedures in the courts suggests that relying on attorneys' subjective judgments of litigant costs may lead to erroneous conclusions. *See* JAMES KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996).

[44] On occasion, MDL judges have tried cases. GREEN, *supra* note 1. And some have argued that trials might be permitted under section 1407. *See* Blake Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV 711 (1991). In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), the Court resolved this alleged ambiguity by holding that transferee judges must return unresolved cases to their original courts for disposition. A bill amending § 1407 to permit transferee judges to try MDL claims was passed by the House of Representatives in December 2000. Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001).

[45] That MDL is understood by practitioners to serve a settlement function is illustrated by the appointment of "settlement judges" as MDL transferee judges in a number of mass torts.

[46] For discussion of a proposal to amend § 1407 to include mass torts filed in state courts, see William W Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529 (1995); *see also* Sandra Mazer Moss, *Response to* Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute, 73 TEX. L. REV. 1573 (1995); Sam C. Pointer, *Reflections by a Federal Judge: A Comment on* Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute, 73 TEX. L. REV. 1569 (1995); Paul D. Rheingold, *Comments on* Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute, 73 TEX. L. REV. 1581 (1995).

Lawyers, parties, and judges may all cooperate to facilitate such global resolutions.[47]

From its inception in 1968 through 1999, the JPML decided approximately 1,300 motions for transfer.[48] Table 1 shows the distribution of these motions by case type. About twenty percent of the motions related to securities cases and about fifteen percent to antitrust litigation. "Mass torts," which I use to refer to both mass product defect cases and suits arising out of catastrophic events, accounted for eleven percent of motions. Another eleven percent related to litigation arising from air disasters. Generally in the U.S., wrongful death cases arising out of air crashes are litigated by a highly specialized bar that overlaps only somewhat with the mass tort bar.

[47] Additional strategies for collecting cases and disposing of them collectively include consolidation for trial under Federal Rule of Civil Procedure 42(a) and its state counterparts, bankruptcy, and informal aggregation. PAUL RHEINGOLD, MASS TORT LITIGATION §§ 5:2-11 (1996).

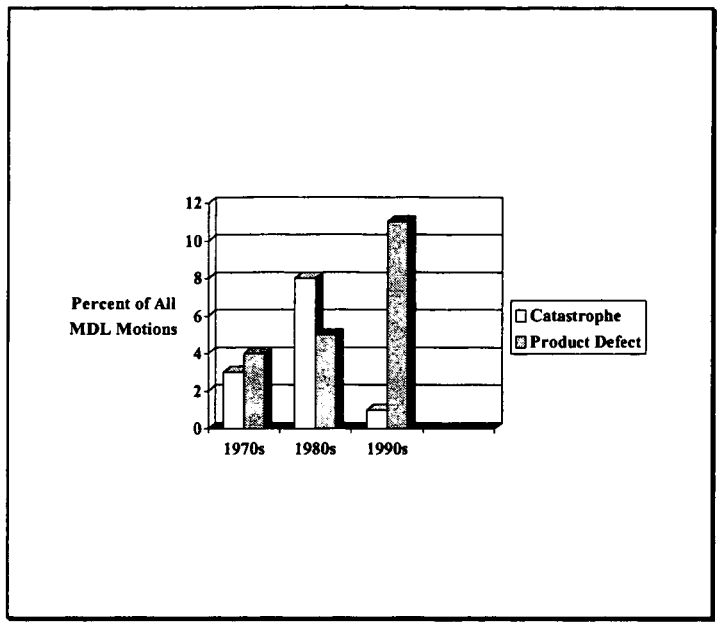
[48] Another 159 motions were withdrawn or the JPML declined to decide them because they had become moot. Note that each motion represents multiple lawsuits (since the prerequisite for collection and transfer of cases is the pendency of multiple cases). Some of the 1300 motions decided related to the same underlying litigation. For example, motions to transfer asbestos worker injury suits were twice denied by the Panel before it granted MDL status to federal asbestos personal injury lawsuits in 1991. MDL docket data were provided by the Clerk of the Panel. I am responsible for the tabulations and statistics presented here.

Table 1
Number and Percentage of Motions by Case Type, 1968-1999

Case Type	1968-69	1970s	1980s	1990s	TOTAL
Air Crash	6	56	52	36	146
	(20%)	(15%)	(13%)	(8%)	(11%)
Catastrophe	1	12	30	5	48
	(3%)	(3%)	(8%)	(1%)	(4%)
Products	0	16	20	54	90
	(0%)	(4%)	(5%)	(11%)	(7%)
Antitrust	17	82	35	61	195
	(57%)	(22%)	(9%)	(13%)	(15%)
Contract	2	17	20	46	68
	(7%)	(4%)	(5%)	(10%)	(5%)
Employment	0	17	11	18	46
	(0%)	(4%)	(3%)	(4%)	(4%)
Intellectual	2	42	50	24	123
Property	(7%)	(11%)	(13%)	(6%)	(10%)
Securities	1	79	75	105	261
	(3%)	(21%)	(19%)	(22%)	(21%)
Miscellaneous	1	60	99	132	292
	(3%)	(16%)	(25%)	(28%)	(23%)
TOTAL	**30**	**379**	**389**	**473**	**1271**

The number of motions considered by the JPML rose significantly over time, from a total of 379 in the 1970s to a total of 473 in the 1990s, an increase of approximately twenty-five percent. The number of motions in mass product defect cases increased more dramatically. The total number of mass product motions considered by the panel in the 1990s was one-and one half times the number considered in the previous two decades combined. In contrast, the number of motions associated with catastrophic accidents fell in the 1990s to less than one-fifth the 1980s level and less than half the level in the 1970s. (See Figure 2) As a result of the growth of MDL motions in mass product defect cases, by the 1990s, mass torts accounted for twelve percent of the MDL docket.

Figure 2
The Percent of MDL Motions Associated with Mass Product Defect Cases Increased Over Time



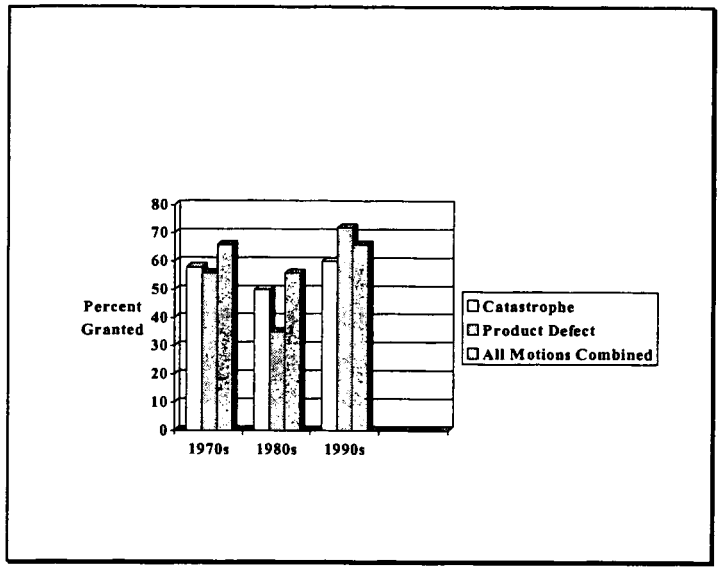
Although the total number of motions heard by the JPML increased over time, the proportion of total motions granted held relatively steady, at about two-thirds overall. Over the roughly three decades of its existence, the panel granted motions associated with air crash, anti-trust, and securities litigation 75-95 percent of the time, and it granted motions in catastrophic accident cases 50-60 percent of the time. But the proportion of motions granted in mass product defect cases varied dramatically (even after taking into account the small numbers of pertinent motions). As illustrated in Table 2, during the 1990s, the panel granted almost three-quarters of the motions for transfer in mass product defect cases that came before it, although in the previous decade it has only granted about one-third of these motions.

Table 2
Number and Percentage of Motions Granted by Case Type, 1968-1999

Case Type	1968-69	1970s	1980s	1990s	TOTAL
Air Crash	5	50	42	30	127
	(83%)	(89%)	(81%)	(83%)	(87%)
Catastrophe	1	7	15	3	26
	(100%)	(58%)	(50%)	(60%)	(54%)
Products	0	9	7	39	55
	(0%)	(56%)	(35%)	(72%)	(61%)
Antitrust	16	68	26	46	156
	(94%)	(83%)	(74%)	(75%)	(80%)
Contract	2	3	5	14	24
	(100%)	(18%)	(25%)	(30%)	(35%)
Employment	0	9	3	11	23
	(0%)	(53%)	(27%)	(61%)	(50%)
Intellectual Property	0	22	28	13	63
	(0%)	(52%)	(56%)	(6%)	(51%)
Securities	1	65	63	80	209
	(100%)	(82%)	(84%)	(76%)	(80%)
Miscellaneous	1	17	29	77	124
	(100%)	(28%)	(29%)	(58%)	(42%)
ALL CASES	**26**	**251**	**218**	**313**	**808**
	(87%)	**(66%)**	**(56%)**	**(66%)**	**(64%)**

In sum, during the 1990s, mass product cases accounted for a higher percentage of all multi-districted cases than in the past, although securities and antitrust cases continued to dominate the multi-districted caseload. In the 1990s, mass product and catastrophic accident cases together accounted for twelve percent of all motions granted by the panel. (See Figure 3)

Figure 3
The Percent of Mass Product Defect Motions Granted Increased Over Time



IV. COMPARING THE ROLES OF MDL AND CLASS ACTIONS IN MASS TORTS

The MDL docket includes a notation indicating whether one or more actions included in the motion alleges class status. Whether a class was ever *certified* in the litigation is not indicated, nor does the docket indicate motions for class certification that may have been made subsequent to the JPML's decision. But the class action notation provides a rough sense of the intersection between class action and MDL activity. Since the panel's inception, about thirty-five percent of all the motions decided included cases with class status claims; in mass product defect cases, the fraction with class claims was somewhat higher, at forty-one percent. But whereas the fraction with class allegations in the total population of motions decided did not vary much over time, in mass product cases it rose from about ten percent in the 1970s to fifty percent in the 1980s, and fifty-four percent in the 1990s. (See Table 3.) It seems likely that the 1970s' figure reflected the understanding—in accord with the Advisory Committee's Note—that personal injury cases would not ordinarily be granted class status. The higher levels of class activity in the succeeding decades illustrate the erosion of that understanding.

Table 3
Percent of MDL Motions with Class Allegations

Case Type	1968-69	1970s	1980s	1990s	ALL YEARS
Air Crash	0	2	4	0	2
Catastrophe	3	3	8	1	4
Products	0	13	50	54	46
Antitrust	53	62	37	62	57
Contract	100	6	5	13	15
Employment	0	82	55	67	70
Intellectual Property	0	2	16	4	8
Securities	100	66	53	61	60
Miscellaneous	100	13	23	39	28
ALL CASES	**43**	**35**	**27**	**42**	**35**

The aggregate statistics presented above leave many questions regarding the courses and outcomes of the cases that came before the JPML unanswered: What other procedures were used in the litigation to collect cases? Which procedures provided the basis for final resolution of the cases? Were the cases ultimately settled or decided, and who got what

from whom? What happened to the (few) cases that were denied MDL status? Did patterns of procedure or outcomes vary according to type of litigation—e.g. catastrophic event versus product defect, pharmaceutical product versus chemical or other? Is there any evidence that the growth or scope of mass tort litigation depends on the use of a *particular* procedure for collecting cases, such as the class action?

To answer these questions, we reviewed judicial decisions and specialized and general media reports on the catastrophic event and mass product defect litigations that came before the JPML from 1990-1999. We also contacted attorneys who played key roles in some cases to supplement the information that we found on-line. The litigation that we investigated included lawsuits arising out of exposure to asbestos, use of L-tryptophan (a diet supplement), cardiac pacemakers, blood products, silicone gel breast implants, and polybutylene plumbing. To date, we have been able to characterize the nature of the claims for 54 of the 59 mass product defect and catastrophic accident motions that JPML considered in the 1990s.

The first thing we discovered as a result of our research is that about one-third of all the MDL motions arising in product defect cases in the 1990s do not, in fact, satisfy my definition of a mass tort: the claims did not allege either personal injury or property damage as a result of the product defect. Rather, these cases sought compensation for financial losses that consumers allegedly suffered when a defect was identified and widely publicized, thereby arguably diminishing the resale value of that product. (These cases are sometimes known as "diminished value" lawsuits.) These financial injury cases typically arise as class actions, without prior individual litigation, for two reasons: First, because the individual claims are not valuable enough to enable a plaintiff to secure individual representation; second, because most plaintiffs are unaware of the alleged loss until the litigation is filed, and the claims of the plaintiffs are relatively homogenous (thus making them particularly suitable for representative litigation). Among all motions for multi-districting associated with product defects, motions in these financial injury cases had the highest likelihood of being granted. (See Table 4.)[49]

[49] We do not know whether any of the litigation classified by the JPML docket clerk as product defect cases before 1990 involved financial injuries only. For this reason we have chosen not to adjust the figures in the previous tables to reflect this new data; to do so, would make it impossible to compare 1990s patterns to those of earlier decades. Assuming at the extreme that none of those earlier cases involved solely allegations of financial injury, then about 30 percent of the growth in mass product defect cases that we observed in the MDL docket data (see Table 1) would be explained by the addition of this new category of cases.

Table 4
Distribution of MDL Product Defect and Catastrophic Event Motions, 1990-1999

Case Type (Product Defect Allegation)	Number	Percent of Total	Number Granted	Percent Granted
Catastrophic Event	5	9	4	80
Personal Injury	28	52	21	75
Property Damage	5	9	4	80
Financial Injury	16	30	14	88
TOTAL	**54**	**100**	**43**	**80**

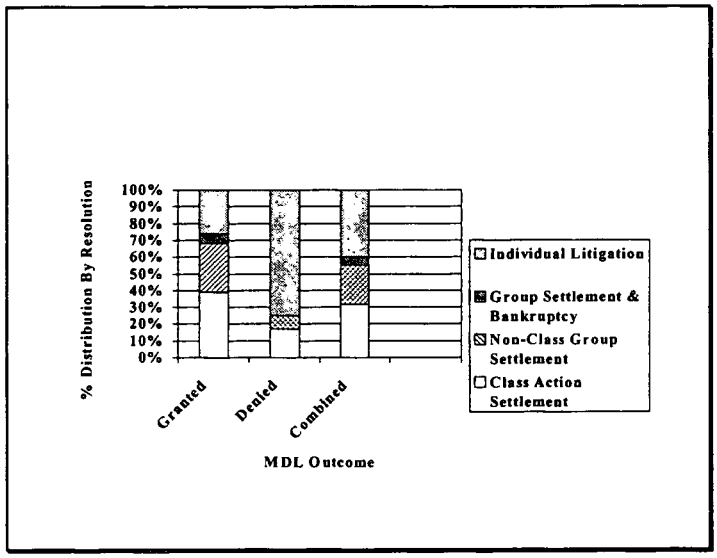
The mass product defect and catastrophic accident cases that came before the JPML in the 1990s were resolved in a variety of ways. Table 5 shows the distribution of the forty-three cases for which we have completed our investigation of the mode of resolution. Sixty percent of these cases were settled collectively; among those collective resolutions about half were group settlements outside the class action framework (two of these included resolutions in bankruptcy) and about half were class action settlements. Some of these class action settlements took place in state courts, either during the pendency of the federal MDL proceedings or after cases were remanded or when the panel denied an MDL motion. In some instances, state court judges granted class certification when the MDL judge had denied it. (See Table 5.)

Table 5
Predominant Mode of Resolution for MDL Motions Granted and Denied, 1990-1999

Predominant Mode of Resolution	Motion Granted	Motion Denied	TOTAL
Group Settlement, Outside of Class Actions	9 (29%)	1 (8%)	10 (23%)
Group Settlement and Bankruptcy	2 (6%)	0 (0%)	2 (5%)
Class Action Settlement	12 (39%)	2 (17%)	14 (32%)
Individual Litigation	8 (26%)	9 (75%)	17 (40%)
TOTAL	**31**	**12**	**43**

When the JPML granted a multi-districting motion, a case was much more likely to reach a collective resolution than when the motion was denied. Among the cases where an MDL motion was granted, about thirty-five percent were resolved by group settlement outside a class action framework (including two that involved resolution in bankruptcy) and thirty-nine percent were settled as class actions. When motions were denied, we usually did not find evidence of collective resolutions. Figure 4 presents these findings graphically.

Figure 4
Type of Resolution for Mass Torts In Which MDL Motions Were Granted and Denied, And For Both Categories Combined



When cases were not settled collectively, it is often difficult to determine their outcomes. What we have found to date in such instances is a mix of victories for defendants on summary judgment or at trial, and individual settlements.[50] Taken together the data suggest that when collection resolution fails, mass litigation ceases, although some individual lawsuits may linger on.

[50] In at least one of the cases we investigated, the MDL judge himself dismissed the case on summary judgment.

In Section II, I argued that mass financial injury litigation is distinctive from the litigation that arises out of catastrophic accidents and mass personal injury and property damage litigation arising out of alleged property defects. Our discovery that some of the cases we had assumed were personal injury and property damage torts were actually financial torts allowed us to examine whether these two categories of litigation tend to be resolved differently. Although there are too few cases to reach strong conclusions, the available data suggest that class action certification and settlement is crucial to mass financial injury litigation, whereas in mass personal injury and property damage litigation mass settlements can take place either within or outside of the class action framework. (Indeed, in this dataset group settlement outside the class action framework is somewhat more likely in the latter cases.) (See Table 6.)

Table 6

Predominant Mode of Resolution for MDL Motions Granted and Denied in Personal Injury or Property Damage, and Financial Injury Cases, 1990-1999

Form of Resolution	**Personal Injury / Property Damage Cases**			**Financial Injury Cases**		
	Action on Motion			Action on Motion		
	Grant	Deny	Total	Grant	Deny	Total
Non-Class Group Settlement	9 (45%)	1 (12%)	10 (36%)	2 (18%)	0 (0%)	2 (13%)
Class Action Settlement	7 (35%)	1 (12%)	8 (28%)	5 (45%)	1 (25%)	6 (40%)
Individual Resolution	4 (20%)	6 (75%)	10 (36%)	4 (36%)	3 (75%)	7 (47%)
TOTAL	**20**	**8**	**28**	**11**	**4**	**15**

To further investigate whether mass litigation depends for its success on class action certification, I calculated the percentage of collective (rather than individual) resolution under three scenarios: class action certification regardless of MDL status, granting of MDL status when class action certification is either not sought or sought but not obtained, and denial of MDL status when class action certification is not sought or sought but not obtained. Because my data are limited to those cases in which MDL status is sought, I cannot determine the success of collective litigation when parties neither seek an MDL motion nor obtain class certification. Table 7 shows these calculations for all cases together and for catastrophic accident, personal injury and property damage cases, and financial injury cases separately. For the cases shown in Table 7, class certification ensured collective resolution. This is somewhat misleading, however, because in all of these cases certification was granted *after* the class counsel and defendants had reached settlement – in other words, these were settlement class actions. In catastrophic accidents and mass personal injury and property damage cases arising out of alleged product defects, the parties had a high likelihood of success in reaching collective resolution, even when class certification was not obtained, if MDL status was granted. For financial injury cases, MDL status alone was less likely to lead to collective resolution. Collective resolutions were rarely obtained when parties did not obtain class certification *or* MDL status. Moreover our investigations indicate that where collective resolution attempts failed, mass litigation collapsed.

Table 7

Proportion of Collective Resolution Under Three Different Procedural Scenarios, for Mass Personal Injury or Property Damage, and Financial Injury Cases in which MDL Motions were Filed, 1990-1999

Procedural Scenario	**Personal Injury / Property Damage Cases**	**Financial Injury Cases**	**ALL CASES**
	Percentage Resolved Collectively		
Class Certification Granted	100	100	100
No Class Certification, MDL Status Granted	69	33	58
No Class Certification, No MDL Status	14	0	10

CONCLUSION: POLICY IMPLICATIONS

Procedural scholars, jurists, and other public policy-makers interested in mass tort litigation have focused their attention on class actions. Class certification has been cited as a significant cause of the growth of mass personal injury and property damage litigation and class resolution has been criticized as the most significant barrier to providing tort plaintiffs with individually crafted outcomes and individualized due process. The scholarly and public policy critiques of mass tort class actions ignore the availability and use of other collective mechanisms for resolving mass tort litigation. Our examination of aggregate data on the activities of the JPML from 1968-1999 and our investigation of the procedural history and outcomes of cases in which motions were submitted to the panel in the 1990s demonstrate the importance of federal multi-districting in mass personal injury and property damage litigation. Multi-districting played an important role in facilitating the growth of mass tort litigation during the era when class action certification was widely regarded as inappropriate for catastrophic accident and other personal injury and property damage claims. Moreover, it has continued to serve as a vehicle for collective resolution after that understanding eroded. In the wake of the U.S. Supreme Court's decisions in *Amchem* and *Ortiz,* we should expect parties to turn back to multi-districting and other non-class mechanisms for collective resolution, rather than to abandon mass tort litigation altogether.