



For Immediate Release

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Monograph Proposes Innovative Reforms for Mass Tort “MDL” Process

With large payouts and relatively low hurdles to cross, mass torts have become a favorite of plaintiffs’ attorneys who seek to find their “biggest bang” for their contingent fee gamble. Mass torts promote the falsehood that “more is better.” The more cases an attorney files, the more likely he is certain of a large payday and the more he is certain of a prominent role as the litigation moves forward. In a MONOGRAPH released today by the Washington Legal Foundation (www.wlf.org), two leading mass tort litigators present a compelling proposal for the reformation of mass tort adjudication.

Litigate the Torts, Not the Mass: A Modest Proposal for Reforming How Mass Torts are Adjudicated was authored for WLF *pro bono* by **John H. Beisner** and **Jessica D. Miller**. They are partners in the Class Action, Mass Tort and Aggregated Litigation practice group at O’Melveny & Myers LLP, Washington, DC.

The MONOGRAPH features a foreword by Vanderbilt School of Law Professor **Richard A. Nagareda**, who also serves as the Director the Cecil D. Branstetter Litigation & Dispute Resolution Program.

This publication tackles the problematic issues associated with the manner in which mass torts are litigated in our current judicial system. Because of the sheer number of filings associated with a mass tort, the root problem is a court system that tries to find the quickest means, a short cut, to a judgment or settlement. Our court system’s attempt to deal with the mass tort issue has failed to find an approach that adequately balances the need for fairness toward the defendant and the need for a streamlined and uniformed approach. Ultimately at stake is fairness for all; an equitable system must be able to deliver timely justice for those deserving.

The MONOGRAPH proposes four comprehensive, yet basic, procedural reforms that will improve the multidistrict litigation (“MDL”) process for litigating and resolving the mass tort dilemma:

- Expand the diversity jurisdiction of federal courts;
- Adoption of standardized winnowing procedures;
- Eliminate class action tolling of limitation periods; and
- Revise ethical rules to account.

Standing in the path of efficient mass tort resolution is the duplicitous nature in which plaintiffs’ attorneys file their cases. What results is a jurisdictional battle which may find a patchwork of similar cases filed in federal and multiple state courts. The results are predictable; inconsistent pre-trial rulings, duplicative discovery, and undue burden on the defendant. The authors propose **altering the diversity rule** by shifting it from complete diversity to a minimal diversity standard (the minimum amount in controversy remains the same). This is a possible solution because the U.S. Constitution grants Congress authority to alter the jurisdiction of the federal courts. This would simultaneously cease the plaintiff-attorney practice of attaching plaintiffs to cases to solely destroy diversity jurisdiction and ease the ability for related claims to be brought under the dominion of an MDL.

A key tenet of the MONOGRAPH: The earlier the merits of a plaintiff’s case can be discovered, the quicker justice can then be handed down. The authors contend that **winnowing tools** must be implemented **“to shake the junk cases from the mass tort tree.”** Proposed tools include the expanded use of the fact sheet; early granting of medical and employment records; preliminary plaintiff interviews; affidavit submission by independent physicians (*Lone Pine* order); fee shifting for frivolous claims; and random selection of bellwether cases.

To additionally ease the burden on our system, **mass torts should not be allowed to live in perpetuity**. The authors call for “limitless tolling” practices to be halted by expediting briefings and rulings on personal-injury class actions in mass tort proceedings and for the broad acceptance that *American Pipe* tolling should not apply to mass tort cases. The authors contend that limitations periods should not be tolled for pending class actions brought on behalf of mass tort personal injury classes.

The authors round off their proposal with an analysis of a settlement process that often fails to bring finality for the defendant; the authors hypothesize that **a settlement should “actually resolve the litigation”** and empty the court system of related claims. The process of a settlement in a mass tort poses its own ethical challenges if a strict rendering of the ABA Model Rules of Professional Conduct are to be followed. **Current ethical rules are framed by the “one lawyer, one client” model** and must be altered to account for the realities of a modern mass tort settlement.

Copies of this educational WLF MONOGRAPH can be obtained by contacting the Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302. Questions regarding the Monograph or WLF’s publications can be directed to Legal Studies Division Chief Counsel Glenn Lammi.

Washington Legal Foundation is a national, non-profit public interest law and policy center. By utilizing a unique approach to forwarding its mission – publishing timely legal studies, engaging in innovative litigation, and communicating directly to the public – WLF has become the nation’s most effective advocate of freedom and free enterprise. This Monograph is one of seven free-standing formats in which WLF’s Legal Studies Division produces legal policy papers and promotes free enterprise legal thought.