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Mass Torts

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Mass tort is a term of art referring to civil litigation that comprises a large number of tort claims arising out of the same factual circumstances and alleging the same or similar harm to individuals, organizations, or other entities. Scholars first used the term to refer exclusively to personal injury or property damage claims resulting from a catastrophic event, such as a fire or building collapse, or arising out of use of a single product, such as a drug or medical device, or exposure to a toxic substance, such as asbestos. The term's scope has expanded, however, to include any type of mass civil litigation alleging harm to individuals or organizations, including claims of financial injury due to fraud, violations of securities laws, or claims of human rights abuse. Mass tort litigation arose in the [p. 1002 ↓] United States in the 1980s and is now a prominent feature of the U.S. civil litigation landscape. Examples of U.S. mass tort litigation include asbestos worker injury litigation, Agent Orange litigation, lawsuits arising out of the Enron bankruptcy, and litigation against Swiss banks on behalf of victims of the Holocaust. There are also examples of mass litigation in Europe and Asia.

What distinguishes mass tort litigation from ordinary high-volume civil litigation in the United States is that while ordinary cases (such as automobile accident cases) are pursued individually, mass torts are collected together and litigated en masse. Mass tort specialists typically represent hundreds or thousands of claimants in the same litigation. By means of a variety of procedural devices, most of the claims are funneled into one or a few courts, where a single judge presides over all the cases.

By aggregating cases, mass tort plaintiff attorneys are able to spread the costs of developing the factual and legal claims over a large number of clients, defendants are able to reduce their legal fees and expenses, and judges can reduce the impact of large-scale litigation on the workload of the courts. Nevertheless, aggregation also increases the scale of mass tort litigation by comparison to litigation pursued individually and increases the risk associated with adjudicating claims, thereby increasing the rate of settlement. Aggregation also precludes lawyers and judges from providing individualized justice to tort claimants and challenges due process norms.

Working based on contingency fee contracts, in a regime in which each side pays its own costs, U.S. plaintiff tort lawyers absorb all the risk of litigation. As a result, most plaintiff attorneys screen potential cases carefully to identify those that are most likely

to produce large damage awards. The economies of scale that plaintiff attorneys can secure by aggregating mass tort cases create incentives for the lawyers to file more claims than they otherwise would, and advertising, which is lawful in the United States, helps them find potential clients.

Because mass tort claims share common facts and legal issues, events that are specific to one claim within the aggregate affect many other claims as well. For example, a judicial decision to admit damaging evidence in one case affects both the potential settlement value of all the other cases that have been assigned to the judge and the potential value of cases in other jurisdictions (because it suggests that judges in those jurisdictions may also admit the evidence). The interdependency of claim values increases the risk of pursuing individual-dispositive outcomes for both sides. The risk is usually higher for defendants than for plaintiffs, however, because a single defeat for defendants will increase the value of all the other claims against them and will likely encourage more claims, but a single victory probably will not preclude further litigation against defendants, because under U.S. law, plaintiffs each have a right to their day in court.

The only way defendants can cap their exposure in mass litigation is to settle *all* the claims in what is termed a *global settlement*. Defendants' need for a comprehensive settlement tends to give plaintiff attorneys leverage in negotiating on behalf of their thousands of clients. As a result, plaintiff attorneys are often able to obtain money for clients who would be unlikely to prevail if their cases were litigated individually and to obtain more money for clients who would receive only modest compensation if their cases were litigated individually. Since plaintiff attorneys are paid on a contingency basis, their own fees increase accordingly.

Lawsuits can be aggregated in the United States by a variety of procedural devices. In the simplest mass tort—for example, a catastrophic accident in a single geographic locale—most of the cases will be filed in a single court. Commonly, such cases are assigned to a single judge for management purposes (and perhaps for trial as well). The judge typically enters a series of case management orders that directs the pretrial process. Hearings on key issues are scheduled so all attorneys may attend, and decisions in a single case are deemed to apply to other cases in the collection. Often, the judge will ask plaintiff and defense attorneys to appear and to negotiate the

settlement of all their cases or large subgroups of cases. A dozen or more cases may be consolidated for trial, in the hope that verdicts in these cases will set settlement ranges for other like cases.

In more-complicated situations, cases may be filed throughout the country. If they are filed in the federal court system, then under a federal statute that provides for multidistrict litigation (MDL), they may be collected together and transferred to a single judge for pretrial management purposes. The MDL judge will proceed in the fashion outlined above, but the judge's orders will apply to all the transferred cases. The cases must be returned for trial to the federal districts in which they were filed, but typically the MDL judge will persuade the parties to settle instead. This MDL procedure does not apply to cases filed in state courts, which cannot be collected by a federal order. However, cases distributed among courts within states may be subject to similar state MDL statutes. The MDL procedure is quite similar to the Group Litigation Order used in England to manage and resolve mass torts.

The best-known device for aggregating cases in the United States is the class action, a representative form of action under which one or a few plaintiffs can come forward on behalf of a class of similarly situated individuals or entities. Parties seeking to bring litigation in class form must satisfy a number of quite strict requirements, which the judge assesses in the court in which the class action is filed. Until quite recently, mass personal injury and property damage cases generally were denied class status, although class action certification is common in securities, antitrust, and consumer fraud cases. As mass tort litigation has become more common in the United States, allegations of injury have been followed by different plaintiffs filing multiple class actions in different federal and state courts, and those filed in federal court have been collected under the MDL procedure.

When defendants cannot achieve a global resolution of mass tort claims by other means, they may file for bankruptcy reorganization. Under U.S. bankruptcy law, defendants can channel to a trust fund subsidized by their assets all pending and future tort claims arising out of a mass injury. This step precludes future litigation and allows the defendant to resume normal business operations.

Although civil procedural rules and judicial management strategies have facilitated the rise of mass tort litigation in the United States, the factors underlying the growth of mass tort litigation are socioeconomic and cultural. To compete successfully, corporations must now market their goods and services on a national (or global) scale, meaning that a defective product or service may affect millions of consumers, many of whom will have a justiciable claim. Medical advances permit the detection of relatively small increases in risk of injury or death, which would previously have been overlooked, as a result of product use or exposure. Print and broadcast media pay particular attention to stories of corporations causing harm and quickly report any indicators of harmful products or services. The Internet provides an effective mechanism not only for lawyer advertising but also for networking among product and service users, increasing the likelihood that consumers will recognize that they may have been injured, blame the product manufacturer or service provider for the injury, and investigate avenues for filing claims. Plaintiff lawyers have become skilled at taking advantage of these socioeconomic trends to build or expand tort practices.

Increasingly, evidence of these trends is appearing in other developed economies, along with legal practices and procedures that lawyers have exploited successfully in the United States. As societies become more affluent and develop a more secular view of the world, they seem to develop a greater desire for protection against risk and an enhanced appetite for compensation for harms visited on them by others. Mass tort litigation is, in part, a response to these changing cultural norms.

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See also

- [Civil Court Procedures, Doctrinal Issues in](#)
- [Injury to Persons, Property, and Relations, Doctrinal Issues in](#)

Further Readings

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