# Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted

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Cases raising claims for personal injury, even those presenting similar claims based on the same facts, have to be run by lawyers. There is no other way to provide for fair and efficient progress of cases towards satisfactory resolutions. Providing full and fair information to the plaintiffs for whom such lawsuits were filed is important, and this essay will address how that goal may be accomplished. But the fair and efficient management of a mass tort litigation must be the primary objective of the trial judge. I explore these management themes in a comprehensive manner in *Marking the Boundaries of Managerial Judging: The*

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*9/11 Responders' Tort Litigation*, a piece I co-authored with Professors James A. Henderson, Jr. and Aaron D. Twerski.[1]

However, lawyers have their own needs and concerns that can create powerful and hard-to-check motivations. Their need to finance their cases over several years of hard-fought and expensive litigation creates substantial debts, financed at high compound interest rates.[2] Repayment of the loans tends to depend on settlements or recoveries in the lawsuits, the outcomes of which tend to be far from certain.[3] These debts create powerful motivations that potentially can interfere with the lawyer's professional obligation to serve clients' interests first and foremost.

In many cases, lawyers assemble large numbers of litigants to represent. These litigants inevitably possess claims of varying merits and varying potential recoveries. The litigants may have differing interests and expectations. For these reasons, representing a mass of litigants may interfere with a lawyer's ability to represent particular litigants. A desire for an early mass settlement may compromise the potential for maximizing individual settlements. Democratization, however desirable intrinsically, is not likely to solve these problems.

I experienced these issues in the 9/11 respiratory injury cases, more than 10,000 in number.[4] Most plaintiffs were represented by a single law firm. The claims were alleged in conclusory fashion, which made it difficult to differentiate between claims of lesser and greater merit and lesser and greater severity of injury.[5] The conclusory allegations tended to improve the status of

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1. Alvin K. Hellerstein et al., *Marking the Boundaries of Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. (forthcoming 2012).

2. Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES, Nov. 14, 2010, at A1.

3. *See id.*

4. Under the Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. §§ 40101, 44302–44306 (2006), the United States District Court for the Southern District of New York was given exclusive jurisdiction of all cases arising from, or related to, the terrorist-related aircraft crashes into the World Trade Center, Pentagon, and field in Shanksville, Pennsylvania. The first case, a wrongful death action, was randomly assigned to me. All subsequent cases were considered "related" and also assigned to me with my consent. *See* S.D.N.Y. R. DIV. OF BUS. AMONG DIST. JJ. 13.

5. Order Suggesting a Special Master for Further Proceedings at 1, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Oct. 17, 2006) (finding that master complaint fails to provide a "clear picture of the precise nature and extent of Plaintiffs' claims"); Transcript of Status Conference at 16–19, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Jan. 11, 2007) (on file with author) (dis-

weaker claims, but made it more difficult to advance the stronger claims. The allegations also posed obstacles to obtaining early, substantial settlements of the stronger claims. Indeed, a third of the claims proved not to involve any adverse effects from cleanup work at the World Trade Center,[6] and these claims remained in the litigation and participated in the mass settlement. It is impossible to know if the presence of these weaker cases affected the claims that were of stronger merit.

I considered it important, as presiding judge, to create procedures to ensure fair and even treatment among the entire span of cases. With the assistance of special masters and with the consent of counsel, I developed discovery proceedings devised to provide full information about each plaintiff in a systematic, reliable, and cost-efficient manner, so that the court and counsel could evaluate the merits and the degree of injury of each case.[7] Individual cases then were selected — several by counsel and several by the court — for more intensive discovery through traditional methods, followed by early and firm trial dates. I detailed this process in *In re World Trade Center Disaster Site Litigation*.[8]

I had not anticipated a mass settlement, but counsel agreed to one, after discovery and before trial.[9] I anticipated that individual cases would settle, and would create values that could be extended to many more cases, and perhaps all cases. The mass settlement provided an overall settlement for all plaintiffs, with different recoveries for different categories of injury.[10] The largest

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cussing "core discovery" that was intended to obtain basic information that would allow the parties to move forward).

6. Memorandum from Special Masters to Judge Alvin K. Hellerstein (Sept. 24, 2009) (on file with author); *see also In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 197 (S.D.N.Y. 2011).

7. *See* Case Management Order No. 8, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Dec. 12, 2008); Order Amending Case Management Order No. 8, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 19, 2009).

8. 598 F. Supp. 2d 498 (S.D.N.Y. 2009).

9. *See* Transcript of Status Conference at 8–13, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 12, 2010) (on file with author); Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. June 10, 2010).

10. *World Trade Ctr.*, 834 F. Supp. 2d at 188; Transcript of Status Conference at 10–17, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100 (S.D.N.Y. June 10, 2010) (on file with author). The Federal Emergency Management Authority (FEMA) provided $1 billion of insurance to New York City, to defend and insure the City against loss and expense

individual settlements were provided to plaintiffs who incurred the most severe injuries and whose injuries had the strongest causal relation to the pollutants to which all plaintiffs had been exposed.[11] Other plaintiffs had equally severe injuries, but their injuries did not have as strong a provable relation to the pollutants. (These injuries were mostly various forms of cancer.) These plaintiffs received lesser settlements.[12]

Initially, I found the settlement to be unfair: it provided too little for the plaintiffs, too much for their lawyers, and it contained procedures that lent themselves to arbitrary determinations.[13] I declined to approve the settlement, rejecting objections that I lacked authority to review settlements agreed to by counsel in individual lawsuits.[14] Ultimately, the settlement amounts were increased, the fees were lowered, and the procedures were modified. I then gave my approval.[15]

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arising from the 9/11 terrorist attacks. *See WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co.*, 549 F. Supp. 2d 555, 558 (S.D.N.Y. 2008). A captive insurance company was organized, the World Trade Center Captive Insurance Company ("WTC Captive"). *Id.* WTC Captive agreed to pay $625 million (plus contingencies) to settle the cases against the City and its contractors. *See* Transcript of Status Conference at 7, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. June 10, 2010) (on file with author). Cases against the Port Authority of New York and New Jersey and various other contractors remained unsettled.

11. *Id.* at 10–17. The approximately 5,500 plaintiffs with severe asthma, severe interstitial lung disease, and severe chronic obstructive pulmonary disease ultimately received, after the Amended Settlement was approved and implemented, more than $660 million. *See* Order Accepting Final Payment Reports Filed by Allocation Neutral at 3, *In re* World Trade Center Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. May 17, 2012).

12. Transcript of Status Conference at 10–17, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. June 10, 2010) (on file with author); memorandum from Special Masters to Judge Alvin K. Hellerstein (Sept. 24, 2009) (on file with author).

13. Transcript of Status Conference at 51–64, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010) (on file with author).

14. *Id.*

15. Order Approving Modified and Improved Agreement of Settlement, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. June 23, 2010) (on file with author); Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. June 10, 2010). To achieve the amended settlement and to gain judicial approval, the WTC Captive added $50 million to the settlement offer; plaintiffs' counsel lowered their contingent fee expectation to twenty-five percent, adding more than $50 million in value; and the City and a number of compensation and disability insurance carriers forgave liens, adding another $50 to $75 million in value. *World Trade Ctr.*, 834 F. Supp. 2d at 188.

Neither the Federal Rules of Civil Procedure nor any other rule or law specifically sets out the role of the court in a coordinated mass tort litigation.[16] And there is no authority that explicitly calls for the court to condition approval of a mass settlement on fairness hearings or on compliance with judicially crafted procedural requirements. These procedures are necessary, however, because the court is the only participant to the proceedings that is truly neutral, and only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs, give rise to invidious distinctions among plaintiffs, or unduly advantage defendants.[17]

This settlement agreement, like many others, required a high threshold of acceptances in order to be ratified — ninety-five percent of eligible plaintiffs.[18] Where a lawyer has many clients, and particularly where the clients may have differing interests and the lawyer may have his or her own strong interests in favoring settlement, the court must ensure that the clients receive fair information. I appointed a legal ethics expert to monitor these communications between the plaintiffs and their lawyers.[19] I also organized hearings at sites convenient to the plaintiffs, designed to provide full and fair information concerning the settlement.[20] I appointed special counsel to represent groups of plaintiffs who had become disaffected with their counsel and who were not responding to their counsel's communications.[21] And I appointed

16. *Compare* FED. R. CIV. P. 23(e) (requiring hearing and court approval of class action settlements), *with* FED. R. CIV. P. 41(a) (settlements and dismissals among all parties to a lawsuit, with exceptions, can be effected by stipulations of counsel; court order is not required).

17. *See World Trade Ctr.*, 834 F. Supp. 2d at 196–99.

18. Settlement Process Agreement, as Amended, *In re* World Trade Ctr. Disaster Site Litigation at 28–30, Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. June 10, 2010).

19. *World Trade Ctr.*, 834 F. Supp. 2d at 190 (stating that Professor Roy D. Simon was appointed to review communications to plaintiffs regarding amended settlement agreement); Mark Hamblett, *Hellerstein Praises 'Very Good' WTC Deal*, N.Y. L.J., June 11, 2010, at 1.

20. *World Trade Ctr.*, 834 F. Supp. 2d at 190; Order Setting Public Meetings on Settlement, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. July 19, 2010).

21. Order to Appoint Special Counsel, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. Nov. 24, 2010) (on file with author) (appointing Michael Hoenig of Herzfeld & Rubin, P.C.).

special counsel for a group of plaintiffs whose interests could not be represented by regular counsel.[22]

It is important to provide full and fair information at all stages of a mass tort litigation, in a systematic and regular manner, to the plaintiffs who are the real parties in interest.[23] Clients must be able to instruct their lawyers, and must have full and relevant information concerning the progress of their cases and the strategic choices that their lawyers make. Judges have to open their proceedings and devise procedures to assure prompt and adequate information to the litigants, as well as to the lawyers. Where necessary, ethics counsel and special counsel should be appointed to ensure that full and fair information is given to plaintiffs, and that plaintiffs receive conflict-free evaluations and advice about how best to proceed. In a mass tort litigation, where a lawyer represents hundreds or even thousands or clients, the task of providing such advice, in the best interests of each client, is daunting. How to ensure conflict-free representation, without intruding unduly on the lawyer-client relationship, is a difficult, but necessary, judicial task.

In the end, of the approximately 10,000 plaintiffs who sued New York City and its contractors for alleged respiratory injuries and cancers resulting from their search, rescue, and debris removal effort at the World Trade Center and in Fresh Kills, Staten Island, over ninety-nine percent settled. Fewer than eighty-five opted to continue their cases. At this writing, only one opt-out case remains, after further dismissals and settlements. Additional settlements with the Port Authority of New York and New Jersey and other contractors were consummated.[24] A total of approximately $710 million, cash, has been paid by the WTC Captive on behalf of the City and its contractors, and by other defen-

22. Order Appointing Counsel, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 7, 2011) (appointing Noah Kushlefsky of Kreindler & Kreindler LLP).

23. *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 495–502 (1994).

24. *See* Order Accepting Final Payment Reports Filed by Allocation Neutral, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. May 17, 2012).

dants.[25] This huge, historic, and emotionally searing litigation has all but ended.[26]

The very high rate of approval follows, I believe, unusual and specially devised procedures to disseminate information to, and to ensure maximum involvement of, the parties themselves. The following is a list of some methods that I employed in the 9/11 litigation to ensure a full and fair spread of information and the availability of conflict-free advice and evaluation:[27]

1. Frequent conferences were held, with notices and agendas published on the court's website.[28] The conferences were held on the record in large and open courtrooms, with the public invited. I took pains to ensure that all points were explained so that all those attending were able to understand. Anyone in attendance could ask questions or suggest items for discussion.

2. Summaries and case management orders were also published on the court's website promptly after each conference. Each conference was intended to order events and progress to the next scheduled meeting, and no meeting is adjourned without setting a following meeting.

3. The press was encouraged to attend and report on the conferences and on every aspect of the litigation. If the press reported problems related to it by the parties — often involving issues with their lawyers — I brought up those problems for discussion at the next conference. Documents and exhibits submitted to the court, or prepared by the court, were promptly posted on the court website, where they were available to the press.

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25. An additional $27,550,754.22 was paid as premiums for the Cancer Insurance Policies, distributed to the settling plaintiffs.

26. Additionally, another $80 million may be paid: $55 million in bonus payments provided by the settlement agreement, and $25 million over five years in contingent payments. *See In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 198–99 (S.D.N.Y. 2011) (requiring $55 million in bonus payments to be paid because percentages of approval exceeded ninety-five percent). (A decision regarding contingent payments, conditioned on litigation activity less than the agreed threshold after the effective date of the settlement, is pending.) Approximately 2,000 cases in nearby buildings remain in litigation.

27. *Accord* Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 463 n.48 (2012).

28. *See September 11th Litigation Cases*, U.S. DIST. CT. S.D.N.Y., http://www.nysd.uscourts.gov/sept11 (last visited June 28, 2012). I enlarged on practices recommended by Federal Rule of Civil Procedure 16 and the Manual for Complex Litigation.

4. Motions on the important issues were heard in open court. The lawyers were encouraged, with the court's assistance, to express arguments and issues in language that lay people could understand and appreciate.

But in the end, the problems posed by mass tort litigation are not solved by these efforts towards democratization. They depend on proper judicial involvement in all stages of these cases, to ensure fairness and efficiency in the mass of cases and with regard to each particular case. The requirement of Rule 16 of the Federal Rules of Civil Procedure — that the judge actively manage all phases of a case to expedite dispositions, discourage waste, facilitate settlements, and promote the quality of justice,[29] is particularly necessary in mass tort litigation.

29. FED. R. CIV. P. 16(a).