MEDIATING AND ARBITRATING COLLECTIVE SETTLEMENTS IN THE UNITED STATES

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INTRODUCTION

The United States now has more than seventy years' experience with the resolution of complex mass disputes as a consequence of the introduction of the class action rule in 1938 and the multidistrict litigation statute in the 1970s. Over the span of several decades, the nature of mass disputes has been transformed and the modalities for resolution of these complex cases have expanded greatly. Thus, the American legal system has evolved from the traditional litigation paradigm into more fluid forms of non-litigated aggregate settlements. Most notably, various procedural approaches have become infused with alternative dispute resolution techniques. The landscape of mass dispute resolution now embraces a hybrid array of procedural settings permeated with ADR actors and practices. The following describes this ADR landscape, evaluates the efficacy of various ADR procedures, and assays normative considerations in resolving these mass disputes.

(1) MDL CONSOLIDATION WITH MEDIATED CLASS ACTION SETTLEMENTS. A prevalent model that emerged at the end of the twentieth century involves the transfer and consolidation all pending cases spread across multiple federal courts, arising out of an injury or harm, to one judicial district for pre-trial proceedings. This transfer-and-consolidation procedure is accomplished pursuant to the United States multidistrict litigation statute, 28 U.S.C. § 1407. The MDL procedure enables the aggregation of large numbers of claims, creation of litigation committees, and judicial management of pre-trial proceedings – most notably discovery. The MDL statute prohibits trial of the litigation in the MDL district, but instead mandates that cases be remanded to their originating courts after the conclusion of pretrial proceedings.

In practice, few cases aggregated under MDL auspices are ever remanded for trial. Instead, most MDL proceedings result in mass settlements before trial. At the end of the twentieth century, a high percentage of MDL settlements were consummated as class settlements, subject to Federal Rule 23 class certification requirements and Federal Rule 23(e) fairness requirements.

The MDL paradigm is now the dominant procedural modality for resolving mass disputes in the United States. Nowadays, the Judicial Panel on Multidistrict Litigation moves fairly quickly to create an MDL forum (and appoint and MDL judge) for virtually every emerging mass dispute. The Federal Judicial Center has studied and documented the exponential increase in MDL proceedings in the past decade.

With the ascendency of the MDL model, MDL managerial judges now routinely use court-appointed mediators to assist parties in brokering MDL class action settlements. In the past, actors involved in MDL proceedings privately negotiated the terms of any class settlement. Now, mediators have become a routine part of MDL class settlements. The judge may select the mediator or parties may agree on a mediator of their choice.

Mediators become immersed in the factual claims, defenses, damages, and administration of mass disputes, assist in risk assessment, and help parties craft mutually acceptable settlement terms. In addition to assisting in the negotiation of substantive terms, mediators also assist in crafting the procedural structure of class settlements. Because class settlements must be judicially approved pursuant to Rule 23(e), mediators supply affidavits attesting to the fairness, adequacy, and reasonableness of settlements submitted for judicial approval. The testimony of mediators involved in MDL class settlements, then, is used to bolster support for class settlement approval.

Mediators are viewed as admirable complements to the MDL class settlement process. To the extent that they facilitate the parties in assessing risks, narrowing issues, fine-tuning settlement terms, and assuring substantive and procedural fairness, mediators play an increasingly important role in class settlements. Mediators assist the court by inserting a neutral arbiter into the settlement process, unaffected by adversarial bias or financial incentive. Mediators assist the court by providing impartial assessment of settlement proceedings and terms at the back end of a negotiated agreement. On the other hand, repeat mediators may be affected by a kind of agency capture, seeking to appease settling parties (or the presiding judge) in order to secure future employment. In addition, at least one court has indicated that a mediator's affidavit in support of the propriety of a class settlement should not be accorded automatic deference, or proof of the fairness of a settlement. In other words, courts have suggested that mediators ought not to be deployed as window-dressing to enhance the likelihood of judicial approval of an otherwise dubious settlement.

(2) MDL CONSOLIDATION WITH MEDIATED NON-CLASS SETTLEMENTS. This second model for aggregate dispute resolution deviates from the traditional MDL model in that disputing parties resolve mass claims, but through a *non-class settlement*. That is, the disputing parties whose claims are aggregated in MDL proceedings broker a settlement, agree to resolve all outstanding claims, but further agree not to do so as a Rule 23 class action or subject to Rule requirements. Similar to the traditional MDL class settlement modality, actors involved in non-class settlements frequently employ mediators to assist in crafting such non-class settlements.

While proponents to the non-class aggregate settlement champion this model as a significant liberation from the constraints of Rule 23 class settlements, the non-class settlement model has generated a fair amount of critical commentary precisely for this reason. The use of mediators in the context of non-class settlements implicates the same benefits that adhere in the class settlement context. However, the lack of transparency in non-class settlements clouds the ability of non-parties to assess the role or efficacy of mediators involved in the settlement process.

(3) CLASSWIDE ARBITRATION. It also is possible to settle mass disputes through the alternative dispute mechanism of classwide arbitration, which is a relatively recent phenomenon in the United States. In a series of cases, American courts enforced arbitration clauses with class arbitration provisions or clauses that were silent concerning that possibility. In reaction, businesses and potential corporate defendants carefully crafted class action waiver provisions. California then enacted a statute essentially limiting or prohibiting such class action waivers, endorsed by judicial decision. The U.S. Supreme Court eventually addressed this problem, upholding the right (and validity) of contacting parties to include such waivers, and repudiating the concept of classwide arbitration.

Nonetheless, parties may agree to classwide arbitration. Classwide arbitration may be conducted under the auspices of the American Arbitration Association and other national arbitration entities. The AAA has promulgated a series of rules governing classwide arbitration that mimic in most respects the class certification process mandated by Rule 23. If a classwide arbitration is approved, then an arbitrator selected by the parties will arbitrate a classwide decision and award.

To date, the AAA has arbitrated several hundred classwide arbitrations. To the extent that parties consent, classwide arbitration offers the benefits of traditional arbitration: that is, inexpensive and expeditious resolution of claims. However, classwide arbitration entails the same disadvantages of arbitration proceedings, only on a grander scale, complicated by a lack of transparency in the proceedings and results. Also, one might question the expertise of arbitrators (as opposed to judges), to determine complicated and unfamiliar questions such as the suitability of an action for class certification and classwide resolution.

(4) FUND APPROACHES. A fourth modality that has emerged on the American legal landscape in the twenty-first century is the fund approach to resolving mass claims. The two most prominent funds since 2001 have been the World Trade Center Fund that Congress created in the aftermath of the WTC events, and the Gulf Coast Claims Facility created in the aftermath of the BP Deepwater Horizon explosion and oil spill in the Gulf of Mexico. In the intervening years, numerous smaller funds have been created to provide remediation to victims of school shootings and other disasters. These funds embody an alternative means to resolve mass claims apart from the tradition tort litigation system, and are suffused with alternative dispute resolution actors and techniques.

There is now a substantial literature on various funds created and implemented in the past fifteen years. Advocates praise fund approaches as an alternative to the tort litigation system, for providing fair compensation in expeditious fashion to injured parties who might have weak claims or other impediments to speedy recovery. On the other hand, critics raise challenges to the creation, implementation, and administration of funds that function apart from constraints of the adjudicative system.