

## **Mass Tort: Endgame**

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This presentation and paper will be prepared for the Pound Symposium on Class Actions, Mass Torts and MDLs: The Next 50 Years at Lewis & Clark Law School. I welcome comments, suggestions, and critique.

The paper presents three ways that mass tort cases settle: (i) the pick off, (ii) the funnel, and (iii) the balloon. It uses examples from historical settlements to present the likely outcome of each of these approaches; considers their costs and benefits for the various stakeholders: defendants, plaintiffs and the court system; and evaluates the litigation risk each present.

### (i) The Pick Off

In this type of settlement, defendants settle high value, high risk cases individually or by purchasing the inventory of lawyers with successful claims. Examples to be discussed include a GM Ignition Switch inventory settlement and late stage asbestos settlements. This form of resolution is not global. The litigation may continue at a low level for many years, but the risk exposure remains relatively stable and tolerable for the defendant. However, this strategy often involves taking some cases to trial, which may increase litigation risk if the defendant errs in its determination of value.

### (ii) The Funnel

The funnel involves the creation of alternative dispute resolution systems, such as claims administration facilities, into which claims are funneled. These serve to winnow down payable claims and test the merits of each claim before payout. Procedurally they may be class actions or aggregations, and they may follow a history of litigation between the parties or be reached early in the life of the litigation. Examples to be discussed include Vioxx and the NFL concussion litigation. A condition of this form of settlement is that the claims are a closed or known universe. This form of resolution also results in continuing litigation, albeit in a different forum. The privacy of the forum means it is easier for companies to minimize the appearance of risk. Although the results of such settlements are not available to the public, there has been evidence that many plaintiffs do not receive compensation resulting in court fights over the conduct of the claims administrators. Because courts have

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generally backed the administrators, there is little risk to the defendant entailed in this follow on litigation.

### (iii) The Balloon

This form of settlement involves class actions with uncapped funds. A claims administration facility is usually used to process the claims. It has been used in elastic mass torts where the full universe of claims is unknown, largely because the Supreme Court's decision in *Amchem v. Windsor* seemed to warrant uncapped funds in mass torts involving future claimants. Because the tort is elastic, the creation of the facility tends to encourage additional claims, overwhelming the defendant and resulting in a much higher payout than initially anticipated (thus the term "balloon"). Examples to be discussed include the Deepwater Horizon litigation and the litigation against Wyeth involving the diet drug Phenylenethanamine. The litigation exposure with these types of settlements is that while they initially appear to be beneficial, the original estimated value is only a fraction of the ultimate payout. In terms of litigation risk, these are the highest risk settlements although they appear to offer the best path towards global peace when first announced.