

Striking Out Specious Claims in Mass Tort Global Settlements

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S. Todd Brown, *Specious Claims and Global Settlements*, 42 **U. Memphis L. Rev.** (forthcoming 2012), available at [SSRN](#).

The late Richard Nagareda once noted that global settlements in mass tort litigation present a “[Field of Dreams](#)” problem – “[if you build it, they will come](#).” In the movie, people came to the Iowa baseball field in the corn fields because it was “[money they had, but peace they lacked](#).” The opposite is true in mass tort litigation. In most cases, multinational corporations and plaintiffs’ firms with large inventories of claims typically achieve peace through a global settlement resolving all of the victims’ claims. It is money that the individual victims lack, and it is why the victims consistently come in droves, many with claims that are specious at best.

In his excellent article [Specious Claims and Global Settlements](#), [Todd Brown](#) examines three comprehensive settlements in mass tort litigation to identify the cause of the “Field of Dreams” problem. He contends at the outset that the problem is caused by more than [adverse selection](#), in which asymmetries in information allow plaintiffs with dubious claims to try to collect. (P. 20.) Instead, Brown provocatively argues that the problem arises from how the parties define what a compensable claim is in negotiating the settlement, using the settlement to “supplant[] tort law with a negotiated grid for compensation.” (P. 23.) Brown shows that the parties negotiating the settlement define grids because they only care about the size of the settlement, not the distribution of the proceeds. But by failing to establish more accurate distribution procedures, global settlements allow a thousand specious claims to bloom.

Brown carefully analyzes global settlements in asbestos, silica, and phen-fen litigation. He shows that both plaintiffs’ firms and defendants have an incentive to define the claims covered by the settlement as broadly as possible. In this way the plaintiffs’ firms collect the most claims possible to extract the largest settlement amount. Brown provides vivid examples of “claim manufacturing”—collecting inventories of clients with little regard to the accuracy of their claims. (see, e.g., pp. 11-12). The defendants go along with this strategy because, in most cases, the global settlement amount is fixed (see P. 52), and the benefits of screening individual claims do not justify the costs. In short, both parties are [rationally ignorant](#) because greater accuracy is costly and, in the case of the plaintiffs, usually leads to a lower expected recovery. (pp. 29-31).

But in defining categories of claims broadly, the settling parties invite individual victims to pass off specious claims as compensable ones. Although Brown notes the incentives for filing specious claims, he is careful not to depict the parties involved in claim manufacturing too negatively. Indeed, it is hard to imagine that intentional claim manufacturing is that widespread. Brown instead argues that the filing of specious claims arises largely from two causes. First, in most cases it is difficult to prove that an injury was specifically caused by the defendant’s conduct, which leads plaintiffs to err on the side of filing an uncertain claim. Second, Brown argues that specious claims are caused by a “compartmentalization of responsibility.” (P. 38.) Since the recruiting, diagnosing, and processing of each individual victim’s claim requires a number of professionals, doctors, and experts, each may make a contribution that is so small that none are aware that they are aiding and abetting claim

manufacturing.

The one counterexample Brown discusses is litigation involving [silica](#), a chemical that, like asbestos, can cause a number of severe diseases when inhaled. Brown notes that the litigation, which many initially had compared to asbestos litigation, collapsed after judicial intervention exposed “[numerous flaws in the litigation-screening practices](#) – largely borrowed from asbestos litigation practice – that generated the vast majority of the underlying claims.” (P. 15.) In fact, as Brown notes, this intervention led to some criminal prosecutions, although, due to the compartmentalization of responsibility, few individuals were ever sanctioned.

Brown offers four ways to limit the filing of fraudulent claims. First, he applauds courts’ recent demands for greater evidence of specific causation from individual victims. Second, to correct the problem of compartmentalization of responsibility, Brown insists on greater communication of ethical obligations to doctors and other professionals who assist with identifying claims. Third, he argues for better procedures for auditing claims; such audits should (a) be mandatory; (b) utilize sampling to reduce costs; (c) be targeted; (d) use increased sanctions; (e) defer and suspend compensation to avoid payment to specious claims; and (f) be flexible. (pp. 45-51). Finally, no doubt inspired by the judicial intervention in the silica case, he calls for increased judicial scrutiny of distribution procedures in global settlements. (pp. 51-52).

Brown’s sensitive analysis of the problem of specious claims demonstrates both his strong command of the intricacies of mass tort litigation, as well his command of the literature in a number of disciplines. One approach that Brown does not explore, but might be worth thinking about, is whether other methods may reduce the need for evidence of specific causation, which in turn would reduce the proliferation of specious claims. Since, for most mass torts, the evidence of causation is [epidemiological](#) in nature, it is difficult to translate population-based risk assessments to individual cases. But, as David Rosenberg argues in an [unpublished paper](#), that translation may not be necessary if limitations on insurance subrogation were lifted, allowing insurers to recover on behalf of the insured victims. In this way the insurers can prove their losses using population-based evidence, and the victims can recover for their claims based on their actual loss rather than prove specific causation. This is not so much a criticism but an approach inspired by Brown’s lucid treatment of the subject.

Brown is part of a group of scholars who are tackling what can be called second-generation problems in mass torts. They have focused not on the appropriateness of private, aggregate enforcement for mass torts, but on how to improve that enforcement. Their recent work has been thoughtful and exciting, and, as with Brown’s article, I have learned a great deal from their scholarship.

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