Federalism and Mass Tort Litigation

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Date : April 22, 2014

J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, **J. Tort Law** (forthcoming 2014).

Fair and global resolutions to mass tort claims are not easy to achieve. Aggregation of claims, either through a formal class action or perhaps through multi-district litigation ("MDL") consolidation, has been a key feature of mass tort litigation for several decades. In an MDL, related cases filed in federal court may be consolidated before a single judge for coordinated pre-trial proceedings, including settlement. The benefits and limitations of aggregation generally, and the MDL device itself, have been the subject of numerous academic papers. American federalism places a stumbling block in the way of complete aggregation – the presence of related but non-removable claims pending in state court, which cannot be part of that consolidated federal action.

While many scholars have viewed non-removable claims as a limitation on the success of aggregation, surprisingly few have tackled the issue head on. Maria Glover provides a thoughtful and thorough investigation of this problem in *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*. Unlike scholars who have come before her, Glover does not dismiss the issue as an annoying yet intractable problem, although she does not purport to "solve" it. Rather, her article is a fresh and inventive take on this problem, in which she suggests that the presence of non-removable state actions might actually be *beneficial* to the resolution of mass tort claims.

Champions of aggregation have promoted complete consolidation of related claims on the theory that a global peace is difficult to achieve when defendants face the uncertainties of resolving parallel claims, and that the global settlements that parties reach in such cases lack in fairness and legitimacy because they do not account for the voices and needs of all possible claimants. Glover argues that these parallel claims need not necessarily block global settlements nor detract from their legitimacy. Instead, "the non-removable state cases, used as test cases, would provide information about what actually happens when these cases are litigated in front of the relevant state judge and tried (where applicable) before a jury pooled from the relevant geographic area." In other words, non-removable state actions provide important data, not just about circumstances and values of individual claims under the relevant state substantive law, but about how such claims interact with the nuances of local practice and procedure.

Because federalism is one of the major stumbling blocks to complete and seamless aggregation (both in terms of jurisdiction over claims and in terms of a unified answer to choice-of-law problems), scholars have assumed that federalism must be part of the solution, either by adjusting federalism theory to accommodate greater consolidation, or by using current federalism theory to justify current allocations of jurisdiction. Glover's main insight respects "happenstantial federalism," the idea that "federalism may foster conditions that would aid in mass litigation governance, but those conditions do not stem from the typically cited purposes or values underlying federalism itself." That is, the jurisdictional facts that render such claims non-removable are immaterial to their value as information for a global settlement. The values of federalism should not lead judges or scholars to accord either greater or lesser weight and legitimacy to these decisions. It is the mere *fact* of federalism and not the *reason* of federalism that has assigned such claims to a place outside of an aggregation. The outcomes of these

cases, both in terms of substantive legal rulings and in terms of award values, can provide valuable information for the settlement grids that are frequently used in global settlements of mass tort cases.

At one level, the idea of happenstantial federalism is rather benign and obvious: of course it is the case that our federal structure creates circumstances and consequences that are unrelated to the core values of federalism. But Glover is suggesting something deeper than that. Her insight is that once these particular benefits of federalism are recognized as being "happenstantial," we are no longer tied to the values of federalism in defining and justifying these benefits. For a scholar such as Robert Post, the pendency of non-removable state court claims was part of a larger system of "jurisdictional redundancy," a powerful concept, but one that relied heavily on federalism values for its overall force and cohesiveness. For Glover, however, the benefits of non-removable state claims are purely instrumental. Thus, their *use* can be purely instrumental, rather than shoehorning those benefits into a framework of federalism values—values that, frankly, are of little relevance to the utility of state court cases as additional data points in a global settlement grid. Unmoored from the restraints of justification within the theoretical framework of federalism, Glover is free to suggest that state court resolution of cases can enhance the legitimacy of global federal settlements simply because of the *data* that the state court cases produce.

The main barrier to optimal instrumental use of such data is that the state court cases that produce results – whether in the form of judicial disposition on the merits, trial verdicts, or settlements – are not chosen according to any statistical sampling method. They are, by their very nature, "happenstantial." Glover notes this limitation and suggests further inquiries and studies into how such random data might be harnessed in a statistically rigorous fashion. Students of law and economics would do well to take up this invitation; together with Glover's theoretical work, it could provide a powerful advancement in how lawyers, judges, and academics view and structure complex litigation that cannot be consolidated into a single forum.

Cite as: Robin J. Effron, *Federalism and Mass Tort Litigation*, JOTWELL (April 22, 2014) (reviewing J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, **J. Tort Law** (forthcoming 2014)), https://courtslaw.jotwell.com/federalism-and-mass-tort-litigation/.