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LITIGATION MANAGEMENT PROPOSALS: STORM CLOUDS FOR VOLUNTARY ADR?

*Leo Dreyer**

I. INTRODUCTION

Increasingly the courts and commentators are addressing concerns regarding the complexity of, and delays in, civil litigation. These problems are magnified by the growing demands placed upon the judicial system by the "war on drugs" and the general increase in the criminal docket.

In response to these concerns, a number of proposals have surfaced either in the form of proposals for legislation, or in the form of legislation actually introduced in Congress, which would address the handling of civil litigation. Frequently these proposals focus upon case management solutions to try to streamline the civil litigation process and otherwise make it more efficient, particularly in the handling of large and complex cases. In this general context, there are also frequently companion recommendations to introduce various forms of court-annexed alternative dispute resolution.

This Article will examine in detail some of the current reform proposals relating to case management of civil litigation and court-annexed alternative dispute resolution. These projects or proposals, discussed in more detail in ensuing sections, include the Final Report and Recommendations of the ABA Special Commission on Mass Torts,¹ the ALI Complex Litigation Project,² the Report of the Federal Courts Study Committee,³ the Multiparty, Multiforum Jurisdiction Bill of 1989,⁴ and the Civil Justice Reform Act of 1990 along with the underlying Report of the Civil Litigation Project.⁵

Although some might argue that it is counterproductive to discuss current evolving litigation management proposals before any are enacted into law, it is not any one proposal which is of primary interest. Rather, it is the contemporaneous emergence of a number of proposals which, in varying degrees, all call for forced consolidation of cases in multicase, multiforum litigation. In proposals such as the ALI proposal, consolidation cuts across traditional concerns of federalism, including consolidation of both federal and state cases in one transferee court.

The Article will examine these proposals from the standpoint of determining whether the case management and court-annexed alternative dispute resolution proposals are intended to try to increase judicial efficiency in managing litigation,

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1. See *infra* note 9.
2. See *infra* note 61.
3. See *infra* note 126.
4. See *infra* note 139.
5. See *infra* notes 145-54.

or, are indeed, intended to provide alternative methods for resolving disputes. This Article will then examine whether a more appropriate focus of the civil litigation reform movement, insofar as it concerns alternative dispute resolution, would be to create and stimulate avenues for voluntary dispute resolution, at least with respect to commercial claims, using the full array of alternative dispute resolution techniques which are presently available. In other words, regardless of which specific proposals for legislation are "on the table," should the civil litigation "reform" focus be directed toward some form of the multidoor courthouse,⁶ early neutral evaluation,⁷ or other voluntary ADR program rather than centralized, consolidated case management and mandatory court-annexed alternative dispute resolution? Should parties be forced into ADR which they do not want?

II. REPORT AND RECOMMENDATIONS OF THE ABA SPECIAL COMMISSION ON MASS TORTS

The ABA's McKay Commission made a recommendation several years ago that a Special Commission of the ABA be appointed to study the handling of mass tort litigation in federal and state courts.⁸ The ABA Special Commission on Mass Torts which was subsequently appointed developed recommendations which called for special federal legislation to create procedures for handling mass torts.⁹

6. Kessler & Finkelstein, *The Evolution of A Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988). As stated by the authors:

Professor Frank E. A. Sander of Harvard Law School first articulated the multi-door courthouse concept in April 1987 at a conference convened by Chief Justice Warren Burger to address the problems faced by judges in the administration of justice. Professor Sander envisioned the courthouse of the future as a dispute resolution center offering an array of options for the resolution of legal disputes. Litigation would be one option among many including conciliation, mediation, arbitration and ombudspeople.

Id.

7. Brazil, et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986). See also Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1.

8. Report of the ABA Action Commission to Improve the Tort Liability System (1987); McKay, *Rethinking the Tort Reform Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1230 (1987).

9. Final Report and Recommendations of the ABA Special Commission on Mass Torts (Nov. 18, 1989) [hereinafter Final Report]. An article by Michael Hoenig provides the following background: What is the "Commission on Mass Torts" and what are its major proposals? The commission consists of 12 distinguished lawyers and jurists including: two outstanding plaintiff's counsel; a general counsel for an insurance carrier; a general counsel for a pharmaceutical manufacturer; three skilled defense counsel; a law professor; a Special Master in the Agent Orange litigation; two federal judges; and one state Supreme Court Justice. Many of the commissioners have had experience with so-called "mass tort" litigation including the Copper 7 IUD, Dalkon Shield, asbestos, DES, swine flu vaccine and MGM Grand Hotel fire. Unquestionably, these legal experts are "heavyweights" in talent and

Although the Commission's recommendations have not been adopted by its ABA House of Delegates, they do serve as an outline of its road to consolidation that some would urge.

The Final Report of the ABA Special Commission develops a comprehensive program for consolidation of mass tort cases and coordinated judicial management of mass tort cases before a single transferee court. "A fundamental premise of [the Final Report] is that separate adjudication of individual tort claims arising from a single accident or use of or exposure to the same product or substance is inefficient and wasteful, seriously burdens both state and federal judicial systems, poses unacceptably high risks of inconsistent results, and contributes to public dissatisfaction with [the civil justice system]."¹⁰ In this regard, the Final Report embraces the thinking of the prior ABA Action Commission and concludes:

[T]here is a pressing need for more effective judicial management of mass tort cases. This means, at the outset, devising better strategies for consolidating the voluminous number of claims, often dispersed in state and federal courts across the nation, in a single jurisdiction and treating those claims (to the extent appropriate) as a class action. The present procedural devices in the federal system for effecting such consolidation . . . by common assent are not adequate to the task of efficient disposition of mass tort cases.¹¹

It seems clear that the Final Report of the ABA Special Commission focuses upon the case management aspects of consolidated, mass tort litigation. The approach is one of trying to foster judicial efficiency through coordinated case management.

A. Case Management Through Forced Consolidation

The principal or "centerpiece" recommendation of the Final Report of the ABA Special Commission is to establish a federal judicial panel to determine that tort actions constitute "mass tort litigation" whenever at least 250 civil tort claims

specialization with which to tackle many of the problems of true "mass" torts. Such illustrious expertise aside, the major question nevertheless is whether the proposed plan is worthy of adoption on its merits.

In August 1989, the commission issued its 76-page "Report and Recommendations" to which are added various appendices. Eleven members "joined" in the work product. One commissioner, however, Paul D. Rheingold, a noted plaintiffs' attorney with vast experience in mass litigations, "dissented" and filed a thoughtful "Separate Statement" that is contained in Appendix E. Mr. Rheingold states that the commission's solution "is both too weak for true mass torts and unnecessarily intrusive for routine mass torts."

Hoening, *The ABA Mass Tort Proposal*, N.Y.L.J. 3 (Jan. 25, 1990).

10. Final Report, *supra* note 9, at 12.

11. *Id.* at 12 (quoting Report of the Action Commission to Improve the Tort Liability System 42 (1988)).

arise from single accident or use of or exposure to the same product or substance, and each involves a claim in excess of \$50,000.¹²

In aggregating such claims, the claims may be pending in different federal district courts, in one federal district court, or in one or more state courts. If the judicial panel declares the litigation to be "mass tort litigation," under the legislation proposed by the ABA Special Commission the mass tort claims would be deemed to arise under the laws of the United States. The district courts would have original jurisdiction of all suits and any party to such an action filed in or pending before a state court could remove the action to the transferee district court which the judicial panel had designated to handle the consolidated cases.¹³

The Final Report makes 13 specific recommendations. In addition to the Recommendations discussed above, the Final Report also recommends:

4. When state law provides the rule of decision in the cases, the presiding federal court should select applicable state(s) law(s) by choice of law standards developed by the federal courts in light of reason and experience.

....

8. A court should be empowered to require the parties to engage in alternative dispute resolution procedures on any individual issue provided, however, that the right to trial by jury shall not thereby be denied or impaired[.]¹⁴

As noted above, the Final Report defines "mass tort litigation" as "situations arising from a single accident or use of or exposure to the same product or substance which involve tort claims in excess of \$50,000 for death, serious personal injury or substantial property damage asserted by at least one hundred persons."¹⁵

In addition to "single event catastrophes" such as the Kansas City, Missouri, Hyatt Regency Skywalk disaster, the Final Report focuses upon products liability litigation, including a "tort claim for death, serious personal injury or substantial property damage which arises from an allegedly defective or negligently designed product."¹⁶ The Final Report divides these "products liability cases" into two categories: (a) "toxic tort litigation" and (b) "traditional products liability litigation."¹⁷

12. *Id.* at 30-32.

13. *Id.* at iv, 49, 3d (Section 104 of the proposed federal statutes).

14. *Id.* at iv-vi.

15. *Id.* at 5-6, 2d.

16. *Id.* at 7.

17. *Id.*

The "toxic tort litigation" is described in the Final Report as follows:

Toxic tort litigation involving claims that use of or exposure to a product (including pharmaceutical drugs or medical devices) has produced an illness or condition is an increasingly common kind of product liability litigation.

....

Many of these cases press the frontiers of medical and scientific knowledge. Unlike a single mass accident, these claims arise at different times, and it is frequently impossible to identify all actual or potential plaintiffs. Unlike a traditional product liability case, it is often impossible to limit the extent of resulting injury by recalling a defective product. *Moreover, many of these cases involve injuries alleged to develop after a long latency period between use of or exposure to the product and manifestation of an illness. This circumstance often presents an exceptionally difficult cluster of "causation" issues.*

Common to these cases, or at least to all claims involving the same illness or condition, are questions of negligence, defect and "general cause," *i.e.*, the capacity of the product to "cause" the illness, condition or other injury at issue. While these cases often raise individual issues concerning the nature and circumstances of each plaintiff's illness, the cases are usually identified as "mass tort litigation" and efforts at some form of consolidated or coordinated pretrial management or adjudication are not uncommon.¹⁸

The Final Report then describes "traditional products liability litigation" as follows:

Another group of product liability cases arises when many people institute tort suits alleging that death, serious personal injury or substantial property damage was caused by the same allegedly defective or negligently designed product. Like the toxic tort cases, these claims arise at different times. Frequently, individual issues arise concerning a particular plaintiff's use of the product or the circumstances giving rise to a particular claim. Unlike the toxic tort cases, however, these cases usually involve traumatically-induced injury and therefore do not ordinarily raise difficult causation issues. Multiple claims against the manufacturer of a cigarette lighter, a motor vehicle, or a tire are examples¹⁹

18. *Id.* at 8 (emphasis added).

19. *Id.* at 8-9.

The Final Report provides the Commission's view of why the Commission feels such changes involving multicase consolidation are necessary:

A fundamental premise of our report is that separate adjudication of individual tort claims arising from a single accident or use of or exposure to the same product or substance is inefficient and wasteful, seriously burdens both state and federal judicial systems, poses unacceptably high risks of inconsistent results, and contributes to public dissatisfaction with the tort law system and the legal profession.

....

Accordingly, an important feature of our program is establishment of a federal judicial panel empowered to make an initial determination as to whether some or all individual cases should be consolidated before a single federal court for some or all purposes If consolidation before a federal court is directed, that court will have broad authority to manage the litigation and it will be empowered, but not required, to resolve all issues including liability and damages.²⁰

B. Consolidation Mechanics

The Final Report suggests that consolidation "is the single most promising way to avoid inconsistent results, attain litigation economics, and promote the just and speedy resolution of the controversy."²¹ The Final Report states that:

[N]o well-developed proposal of which we are aware suggests consolidation of anything short of the common issues of law or fact. . . . The legal system should be capable, we think, of *providing a dispositive answer to questions such as* whether an air carrier properly maintained an ill-fated aircraft, whether the fuel system of an automobile was carefully designed and constructed, whether a pharmaceutical product was adequately tested, *whether the manufacturer of a product provided adequate directions or warnings*, or whether an award of punitive damages is appropriate.²²

The Final Report does acknowledge "there will be individual questions involving each plaintiff and there may also be issues involving different groups of plaintiffs."²³ It therefore advocates "flexibility whereby the judge presiding over consolidated mass tort litigation may, as circumstances warrant, proceed to

20. *Id.* at 12-13.

21. *Id.* at 15-16.

22. *Id.* at 19-20 (emphasis added).

23. *Id.* at 20.

adjudication of all issues, some issues or no issues at all."²⁴ This "flexibility" should also be extended to determine what current claimants should be joined and whether "future claimants" should similarly be required to be joined in the consolidation proceedings.²⁵ In order to avoid the unlimited nature of such "future claimants," the Final Report explains it does "not believe a solvent defendant should be forced to litigate in the name of 'global peace' tort claims which have not and may never arise and we do not recommend mandatory 'class' treatment for the 'claim' of 'future plaintiffs.'"²⁶

The Final Report acknowledges, but is not persuaded by, the impact of the consolidation on individual, independent litigation:

While consolidation necessarily requires litigants and their attorneys to relinquish a level of control over presentation of individual cases, that cost is not appreciably different from that which occurs in a class action or proceedings consolidated under FED. R. CIV. P. 42(a) or 28 U.S.C. § 1407.²⁷

The Final Report readily acknowledges that in any tort litigation which might be subject to the consolidation provisions, "there will be individual questions involving each plaintiff and there may also be issues involving different groups of plaintiffs."²⁸ It also concedes that a "single trial of all common and individual issues arising in mass tort litigation affecting numerous plaintiffs and multiple defendants is clearly impractical."²⁹ Although the Final Report senses the difficulty consolidation poses for the fair litigation of individual claims, it concludes, nonetheless, as follows:

Accordingly we favor legislation that affords the court an opportunity to determine at an appropriate time and in the context of particular litigation whether and to what extent common or individual issues will be resolved. In making that determination, it is appropriate for the court to weigh the likelihood of settlement after some individual claims

24. *Id.* at 21.

25. *Id.* at 22. "More troublesome issues are raised by proposals to include in mass tort litigation all who have been exposed to a risk of illness or injury as a result of allegedly tortious activity but who have not yet contracted that illness or sustained that injury." *Id.*

26. *Id.* at 23-24. With respect to the initial decision to consolidate, the Final Report also states: [T]here may well be cases where consolidation of only those claims which arose before or after a specified date or which involve only particular illnesses or conditions will facilitate resolution of common questions of fact or law. The Commission's proposal calls for establishment of a judicial panel empowered to screen potentially related tort claims and decide in the first instance whether some or all of the claims should be consolidated before a federal court.

Id. at 26 (emphasis added).

27. *Id.* at 20.

28. *Id.*

29. *Id.*

are evaluated by a jury or to employ other innovations tailored to the fair and efficient disposition of the particular case.³⁰

Thus, although the Final Report recognizes the tension consolidation creates as to the fair litigation of individual claims, its only solution to address that tension is to accord the transferee court considerable power in sorting out common and individual issues. However, even as to individual issues, there is no guarantee that the litigants will have ready access to trial by jury. The resolution of individual issues may be controlled by case management techniques of the transferee court, which may include court-annexed, mandatory forms of alternative dispute resolution. Thus, some might conclude that even as to individual issues, the "consolidation model" proposed by the Final Report contemplates centralized judicial management of the disposition of those individualized issues. Individual lawsuits would become components in a larger grid of issues and parties, to be addressed in the manner, under the schedule, and with the linkage to other issues, as determined by the transferee court. The passages quoted above suggest and imply that decisions of the transferee court regarding the handling of individual issues may be made with an eye toward settlement.

C. Choice of Law in Consolidated Actions

The Final Report recognizes the choice of law problems with multicase, multiform consolidation and notes that a "major obstacle to consolidated adjudication of common factual issues is the fact that almost all of today's mass tort cases arise under state substantive law."³¹ In order to avoid the traditional choice of law principles of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,³² and thereby apply the choice-of-law rules of the state in which the court sits, the Final Report raises as one alternative "replac[ing state tort] law with a uniform federal standard."³³

The Final Report contends that since mass tort consolidation "involves parties engaged in or conduct affecting interstate commerce, there can be little doubt that Congress would have the power to enact a uniform federal standard if it saw fit to do so."³⁴ Nevertheless, the Commission acknowledges concern "with the broader policy implications that necessarily attend a proposal to replace state tort law with a uniform federal standard, and as a consequence rejects the idea of a uniform federal standard."³⁵

30. *Id.* at 21.

31. *Id.* at 36.

32. 313 U.S. 487 (1941).

33. Final Report, *supra* note 9, at 37.

34. *Id.* at 37.

35. *Id.* at 37-38.

The proposed federal statute set forth in the Final Report regarding the ABA Special Commission's recommendations concerning choice of law provides as follows:

Choice of law. In consolidated mass tort litigation instituted, transferred, removed or maintained under this Act, the district court shall determine the source or sources of applicable substantive law. Whenever state law supplies the rule of decision, the court may make its own determination in light of reason and experience as to which State(s) rule(s) shall apply to some or all of the actions, parties or issues.³⁶

The Final Report concludes, that leaving development of the relevant considerations concerning choice of law to the judges charged with administration of the new statute on consolidation seems to be the most promising way of providing the flexibility necessary to promote the success of the consolidation regimen for the resolution of mass tort cases.³⁷ This choice of law decision of the ABA Special Commission is another indication of the significant power and authority which will be in the hands of the transferee court.

The Final Report further addresses the troublesome issue of choice of law as follows:

[W]e prefer to meet the issue head-on and propose federal choice of law legislation bottomed on Congress' authority to regulate interstate commerce. Almost by definition, mass tort litigation of the kind prompting our study involves interstate commerce both in the sense that the cases arise from activity pursued in or affecting commerce and in the perhaps separate sense that individual cases are brought in a number of different states. We have struggled to develop a bright line that separates state law selected under federal standards from federal law itself. Some commissioners are persuaded that the line can be drawn; others believe that the distinction approaches the chimerical. In any event, the Commission concludes that a narrowly circumscribed statute requiring federal courts to develop principles whereby state law—and only state law—will be selected and applied in mass tort litigation is consistent with traditional concerns of the American Bar Association and others that tort law remain a matter primarily for state courts and legislatures.³⁸

But it seems clear that even the "modified" approach adopted by the ABA Special Commission in its Final Report means that litigants who started off in state

36. *Id.* at 4d.

37. *Id.* at 43-44.

38. *Id.* at 43.

A anticipating perhaps that the law of state A would apply, may find themselves in consolidated, mass tort litigation pending in a transferee federal court, and anticipating that "the court may make its own determination . . . as to which State(s) rule(s) shall apply."³⁹ The application of choice of law rules reflects another area in which individual litigants will lose control over their individual case.

*D. The Power to Define the Scope of
Consolidated Mass Tort Cases or to
"Deconsolidate" the Litigation*

The true case management dimensions of the consolidation procedure contemplated by the Final Report are revealed in the its discussions of the powers of the transferee court to handle and manage the consolidated litigation. In this regard, the Final Report states:

The judicial panel's decision to transfer individual tort cases to a single judge will necessarily be made at relatively early stages of the litigation and without the discerning understanding of the cases which an experienced trial judge will develop as the litigation unfolds. It is accordingly necessary and appropriate that the judge presiding over mass tort cases have broad authority to shape the course of the developing litigation.⁴⁰

The Final Report concludes that in many cases it will be clear to the transferee court that consolidated resolution of common issues is the proper case management course of action.⁴¹ Presumably, in the case of a single-occurrence mass tort, litigation of common questions may be reasonably anticipated pursuant to the framework established by the Final Report. Similarly, it concludes that the common question of whether a product was "defective" or whether an adequate warning of potentially harmful effects was provided may, pursuant to a decision of the transferee court, be suitable for consolidated resolution.⁴²

In the more probable situation, however, the transferee court's decisions regarding consolidated versus individualized treatment of issues may not be so easy:

There may be other cases, however, where what seemed to be a question common to large numbers of plaintiffs turns out to be several different questions. For example, *what initially appeared to be a straightforward case involving the toxicity of a product or the adequacy*

39. *Id.* at 4d.

40. *Id.* at 59.

41. *Id.*

42. *Id.*

of a warning may become complicated as different dosage levels or different versions of the warning are identified. In such circumstances, the court must be able to redefine the scope of the litigation to provide for consolidated resolution of only certain issues or with respect to particular parties.⁴³

The significant role of the transferee court in determining how common issues and individual issues will be decided, and in effect managing and shaping the litigation, perhaps becomes even more pronounced in those mass tort consolidations in which there are a number of individualized questions:

In still other cases, it may develop that individual questions so overwhelm the common features of a case as to make consolidated resolution inappropriate. This might be the case, for example, in certain kinds of product liability litigation where the individual circumstances of each plaintiff's use are found by the court to prevent the framing of a factual question common to all or most of the cases. In yet other cases, a court may properly determine that it is premature to proceed to consolidated resolution of a common issue. For example, cases that test the frontiers of scientific and medical knowledge may need some time to mature, and in such a situation it may be preferable to defer efforts at consolidated resolution to await the results of several individual cases during which the scientific evidence may be developed and evaluated.⁴⁴

The more the Final Report begins to explore the full range of the case management powers of the transferee court, the more clearly the full measure of consolidation may be defined. As the Final Report discusses various mixtures of common issues and individual issues, it becomes abundantly clear that litigants in individual cases are sacrificing their rights to litigate in an individualized, independent manner pursuant to set rules and procedures, in deference to consolidated resolution of the claims pursuant to procedures that are left largely to the discretion of one transferee judge. Will plaintiffs who have only one day in court for one claim find this case management discretion satisfactory? Will defendants who are faced with "bet-your-company" consolidated litigation find the virtually unlimited discretion accorded a transferee judge to be a sufficient procedural protection?

In the name of case management and judicial efficiency, the Final Report clearly takes significant steps towards eliminating the individual rights of litigants to handle and process their individual claims.

43. *Id.* at 59-60 (emphasis added).

44. *Id.* at 60.

E. *Bifurcation of Issues*

While it is "the common issues that bring individual cases together as mass tort litigation, . . . [t]he Commission expects and indeed encourages courts presiding over consolidated mass tort litigation to separate some or all parties, claims or issues as the circumstances of the case may require."⁴⁵ Such "bifurcated" issues would not only include questions surrounding punitive damages (discussed previously), but could also include questions that "arise in certain kinds of toxic tort litigation" on "the issue of 'general causation.'"⁴⁶ The Final Report explains:

Because a dispute over 'general causation' can assume central importance in particular litigation, it is understandable that some suggest that the issue is properly isolated for resolution at a separate trial. In some cases, this will be appropriate and will facilitate fair and expeditious resolution of the controversy. . . . Courts are, we think, quite properly sensitive to the potential for unfairness in such circumstances, and we are accordingly content to leave to the trial judge in the context of a particular case determination of whether a separate trial of a general cause issue will promote the just resolution of the controversy.⁴⁷

Once again, the case management authority of the transferee court is highlighted by a recitation of the powers accorded the trial judge—this time in the area of bifurcation.

F. *Settlement*

The Final Report states that "[t]he opportunity to settle some or all claims is both a benefit and goal of consolidated treatment of mass tort cases."⁴⁸ Nevertheless, the Final Report concedes that where common issues central to large numbers of tort claims are at issue, unwilling parties should not be forced to deter their rights to trial in order to pursue such procedures.⁴⁹ Accordingly, the Final Report recommendations call for employment of such techniques in common issues raised in consolidated mass tort litigation only with the consent of all parties.⁵⁰

45. *Id.*

46. *Id.* at 61.

47. *Id.* at 61-62.

48. *Id.* at 68.

49. *Id.*

50. *Id.* at 61.

*G. Discussion of the Impact of Consolidated
Case Management Upon Individualized
Case Handling*

The consolidation of cases is the major feature of the Final Report. The negative implications for individual case management flowing from consolidation of pretrial proceedings, motion practice, and adjudication of "common issues of law and fact" are numerous. One of the central goals of consolidation -- the foreclosing of relitigation of the same or similar issues -- is directly contrary to individualized case handling and management, where litigation of the same or similar issues in each jurisdiction is necessary in order to obtain the most favorable pretrial and trial rulings under each jurisdiction's law and procedures.

Under the Final Report, it is possible that there could be a *single* period of discovery, with all discovery issues resolved by a single judge, and with all discovery materials shared among the various plaintiffs who are parties to the consolidated litigation. Likewise, there could be a *single* determination of common issues and perhaps little hope of successfully rearguing the issues elsewhere following the court's determination. "Common questions of law and fact" that could be resolved in one mass tort proceeding could include general causation.

Only "truly" individual issues in mass tort cases would be subject to individual determination. For example, there might exist certain kinds of products liability litigation where the individual circumstances of each plaintiff's use are found to prevent the framing of a factual question common to all or most of the cases. In such litigation, however, the consolidated trial of common issues would be completely divorced from the individual issues. Common issues would be the focus of the consolidated trial, with those issues in all likelihood resolved for future litigation as well. However, when a common issue such as general causation is tried in a consolidated vacuum, divorced from the individual issues, there is always a risk that "the trial will become a sterile, scientific inquiry divorced from the circumstances and people that give rise to the underlying tort claims."⁵¹

The answer to substantive state law questions such as the applicability of "pure" comparative fault, might be determined by the transferee court only *once*. The transferee court could select the state(s)'s law(s) that will govern resolution of claims and defenses, with the court choosing such laws in light of reason and experience. Because the Final Report does not include a specific statutory choice-of-law provision, as noted above, the transferee federal courts are encouraged to develop their own.

The Final Report illustrates the operation of the proposed choice-of-law provision with a discussion of a hypothetical, consolidated DES action.⁵² The

51. *Id.*

52. *Id.* at 38-42.

Final Report assumes that some plaintiffs could not survive a summary judgment motion based on their failure to identify the manufacturer of the product and that other plaintiffs could not survive a summary judgment motion based on the statute of limitations, depending upon which "state(s)" substantive laws are selected to govern the disposition of these issues.⁵³ The Commissioners observe that "the outcome . . . may vary solely because consolidation has occurred before a federal court pursuant to a statute designed to achieve an efficient and expeditious resolution of a multistate controversy. *Sometimes plaintiffs will benefit; on other occasions defendants will be advantaged.*"⁵⁴ As various courts work through consolidated mass tort cases, it is hard to deny that something that looks very much like federal tort law may emerge, particularly where federal judges often find themselves on the forefront of new and novel tort law theories not fully sifted by state courts. Thus, the judge before whom the litigation is consolidated may be able to pick and choose ("limited," in theory, by evolving federal choice-of-law standards) whether, for example, the design defect issue in the consolidated cases should be resolved on the basis of a generic risk-utility test or a consumer-expectations test. One can foresee a transferee judge applying California law on one issue in the case and Texas law on another.

Another recommendation in the Final Report that is of particular relevance to the question of individualized case handling is that the court before which the mass tort litigation is pending will be empowered to appoint a panel of two or more "impartial experts" where there are "issues of fact requiring resolution by expert testimony . . . involving application of scientific, technical, medical or otherwise complex principles."⁵⁵ This panel is to be advised by the court in writing of issues to be addressed by it; the panel's findings, together with concurring or dissenting findings, may be "disclosed to the trier of fact at any trial."⁵⁶ The parties are entitled to full discovery of the members of the panel. Deposition and trial testimony of individual panel members would be admissible to the extent otherwise permitted by the Federal Rules of Evidence.⁵⁷

The Panel-of-Experts procedure is calculated to increase the use of the current procedure for court-appointed independent experts on scientific and medical issues. Courts have been reluctant to take advantage of court-appointed experts, in part because of the legitimate concern that such experts' testimony would be given undue weight by the jury, since it would bear the court's imprimatur. This risk would be greatly magnified by the appointment of an expert *panel* in consolidated litigation, because the jury would be presented with a court-sanctioned "group expert opinion." The implications for individualized case management of the panel-of-expert authority in the hands of a federal transferee judge appear quite significant.

53. *Id.* at 41-42.

54. *Id.* at 42 (emphasis added).

55. *Id.* at 63-64, 69-70, 5d.

56. *Id.*

57. *Id.*

In addition to the foregoing, it is possible that the proposed statute contained in the Final Report of the ABA Special Commission may actually provide an incentive to increased and expanded litigation. The orientation of the Final Report is toward the filing of lawsuits, and not toward "mass tort" cases in which plaintiffs have had some success.⁵⁸

As suggested above, there are also legitimate concerns regarding the orientation of the Final Report toward settlement objectives. The Final Report may envision a practical scenario in which several cases would be tried to establish settlement "parameters," and subsequently the federal judge in charge of the consolidated cases would try to point the subsequent parties toward settlements based on those parameters. Clearly, any such orientation, expressed or implied, could be contrary to the general litigation interests of those interested in individual case management.

In conclusion, proposals such as the Final Report of the ABA Special Commission may, as a practical matter, place too much "case management" authority in the hands of one transferee judge. The transferee judge will be able to "select" law and handle cases in a quasi-legislative manner. The judge will presumably be able to select law which he deems to be most applicable and desirable in each circumstance. In addition, the judge will have tremendous powers to streamline discovery and otherwise control the litigation. The judge can (i) appoint panels of experts, (ii) determine which issues will be tried as common issues, (iii) establish mandatory ADR procedures for individual issues, and (iv) otherwise structure the handling of the litigation to facilitate disposition. Such case management power in the hands of one transferee judge could adversely impact the overall fairness accorded individual litigants. As more case management authority is committed to the discretion and judgment of one transferee judge, the less any one litigant can rely upon fixed rules and procedures and the due process which such rules and procedures confirm and provide.

H. *Mandatory ADR on Individual Issues*

As indicated by the foregoing, the Final Report of the ABA Commission on Mass Torts contemplates significant consolidated power in the hands of the transferee judge. In this regard, the Final Report clearly contemplates use of that transferee, consolidated power to force mandatory, court-annexed ADR procedures upon the parties to resolve at least individual issues. Specifically, the Final Report provides as follows regarding ADR:

58. Unlike the Report and Recommendations of the ABA Commission, the actual federal legislation proposed in the Final Report does not contain any specific definition of mass torts. This area of uncertainty may be a concern.

Recommendation 9.

(a). A court should be empowered to require parties to consolidated mass tort litigation to engage in alternative dispute resolution procedures on any individual issue providing, however, that the right to trial by jury shall not thereby be denied or impaired.

(b). With the consent of all parties, the court may employ alternative dispute resolution procedures on common issues raised in the litigation.

Commission Commentary:

These recommendations reflect our conclusion that a court presiding over consolidated mass tort litigation should have broad discretionary authority to provide for the efficient and fair conduct of the litigation.

....

Provided that the right to trial by jury is not thereby impaired, Recommendation 9 contemplates legislation to empower the court to require exhaustion of litigation alternatives before a case proceeds to trial solely on an *individual* issues.⁵⁹

In addition to the recommendation, the Final Report also contains a proposed federal statute which includes a provision for alternative dispute resolution:

Section 109. Alternative Dispute Resolution.

(a). In any action maintained under this subchapter where there has been a determination by the court to retain any action for adjudication of some or all issues, the court may, upon a finding that the just, speedy and inexpensive disposition of the action will thereby be advanced, require some or all of the parties to engage in alternative dispute resolution procedures on any individual issues remaining for resolution including, without limitation, mediation, third-party evaluation, non-binding arbitration, non-binding summary jury trial or mini-trial. Nothing in this section shall be construed to impair a party's right to trial by jury in the event that alternative dispute resolution procedures directed by the Court do not result in settlement.

59. Final Report, *supra* note 9, at 70 (emphasis in original).

(b). With the consent of all parties, the court may permit some or all parties to engage in alternative dispute resolution procedures on common issues.⁶⁰

The recommendations contained in the Final Report concerning alternative dispute resolution must be read in the context of the overall recommendations concerning consolidation of multicase, multiform litigation. If cases are consolidated pursuant to legislation enacted as a result of the recommendations contained in the Final Report of the ABA Special Commission, the transferee judge will be in a position to impose alternative dispute resolution on the parties, at least as to "individual issues" and their cases. Voluntary ADR procedures *may* be applied to common issues. As will be recalled, the court will determine the nature and identity of common and individual issues.

The recommendations of the Final Report regarding ADR clearly contemplate that a court would be empowered to require parties to consolidated mass tort litigation to engage in alternative dispute resolution procedures on individual issues. Thus, not only would parties lose an element of individual control of their litigation, but the forced imposition of alternative dispute resolution methods may place the parties one or more steps even farther removed from a jury trial on the individual claims in their individual case. As thus contemplated, the alternative dispute resolution referenced in the Final Report of the ABA Special Commission may be thought to be more of a system of case management than a system of voluntary, alternative methods for resolving disputes. The clear thrust of the various proposals is a preference toward consolidated, judicially-oriented case management over the individual rights of litigants to handle their litigation and to pursue alternative methods of voluntary dispute resolution, when and *if* they so desire.

III. THE AMERICAN LAW INSTITUTE COMPLEX LITIGATION PROJECT

The American Law Institute is in the process of drafting a series of proposed federal statutes that, if enacted, would permit and facilitate the consolidation of "related litigation" in a method similar to that proposed by the ABA Commission on Mass Torts. Although work has been underway on the Complex Litigation Project for some time, final documents may not be approved by the ALI until as late as 1992. The subgroup of the ALI that is charged with developing these draft statutes is the "Complex Litigation Project." As of April 6, 1990, the Complex Litigation Project has produced Tentative Draft No. 2 of (1) a Revised Statute for Federal Intrasystem Consolidation, and (2) a Federal-State Intersystem Consolida-

60. *Id.* at 5d-6d.

tion Statute for Federal-State Intersystem Consolidation.⁶¹ Each statute is accompanied by supporting and explanatory commentary. The statutes contained in the Complex Litigation Draft provide a jurisdictional and procedural framework for the consolidation of certain classes of tort cases and other claims (referred to by the Reporters as "multi-party, multi-forum litigation"). Additional materials were issued by the Complex Litigation Project to address the questions of consolidation in state courts and choice of law on September 19, 1990.⁶²

The Complex Litigation Project addresses consolidation and case management of multicase and multiforum complex litigation. Although the Complex Litigation Project does not specifically address ADR, as does the Final Report of the ABA Special Commission, mandatory ADR is merely one step removed from the case consolidation and transferee court case management contemplated by the ALI Complex Litigation Project.

The following sections briefly discuss the ALI's two draft statutes as set forth in the ALI Complex Litigation Project Tentative Draft No. 2 of April 6, 1990.

A. *Revised Complex Litigation Statute for Federal Intrasystem Consolidation*

The ALI proposal provides that 28 U.S.C. Section 1407 (concerning multi-district litigation) is to be repealed and the following types of provisions are to be substituted. A Complex Litigation Panel of nine federal circuit and district judges is to be established and given responsibility for deciding "whether and where separate actions shall be transferred and consolidated" under the proposed statute.⁶³

The Complex Litigation Panel is empowered to transfer "civil actions pending in more than one district [that] involve one or more common questions of fact or law . . . to any district for consolidated pretrial proceedings or trial, or both."⁶⁴ These transfers shall be made upon determination that the transfer and consolidation in the designated transferee court "will promote the fair, just, and efficient conduct of the actions."⁶⁵ The Complex Litigation Panel is directed to consider the following factors in deciding whether to order transfer and consolidation: (1) the extent to which transfer and consolidation will reduce duplicative litigation, the

61. The American Law Institute, Complex Litigation Project, Tentative Draft No. 2, April 6, 1990 [hereinafter Complex Litigation Draft]. For those who may be interested, the ALI offices may be contacted via the Executive Office, The American Law Institute, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104. Arthur R. Miller, Harvard University Law School, is the ALI Reporter for the Complex Litigation Project; Mary Kay Kane, University of California, Hastings College of Law, is the Associate ALI Reporter.

62. The American Law Institute, Complex Litigation Project, Reporter's Preliminary Draft No. 3, September 19, 1990 (Chapter 4, Consolidation in State Courts; Chapter 6, Choice of Law) [hereinafter Preliminary Draft No. 3].

63. Complex Litigation Draft, *supra* note 61, at 1.

64. *Id.* at 2.

65. *Id.*

relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary; and (2) whether transfer and consolidation can be accomplished in a way that is fair and does not result in undue inconvenience to the parties and witnesses.⁶⁶ "In special circumstances, one or more common issues, rather than entire cases, may be transferred and consolidated." In addition, more than one district court may be designated as a transferee court.⁶⁷

The Complex Litigation Panel is required to designate individual judges to conduct the consolidated proceedings.⁶⁸ Because the Complex Litigation Draft contemplates that a judge or judges may be designated and assigned temporarily for service in the transferee district, the judges clearly do not need to be from the district where the proceedings are consolidated.⁶⁹

Proceedings for the transfer of actions under the ALI's proposed statute may be initiated by the Complex Litigation Panel on its own motion, on the suggestion of the court before which any such action is pending, or on the motion of a party in any such action filed with the Complex Litigation Panel.⁷⁰ The Complex Litigation Panel must give notice to all parties in all actions for which transfer is being considered, specifying the time and place of the hearing to determine whether transfer and consolidation shall be ordered.⁷¹ Any party to an action pending in any district that would be affected by the proceedings may furnish material information to the Complex Litigation Panel hearing concerning the hardship or inconvenience of consolidation.⁷² Parties are permitted "to show cause" why a particular action or claim should be excluded from transfer even if the Complex Litigation Panel determines that the group of related actions should be transferred.⁷³

Although orders granting a motion to transfer and consolidate shall include a statement of the reasons for the decision, such orders cannot be appealed or reviewed except by extraordinary writ pursuant to 28 U.S.C. section 1651.⁷⁴ The proposal provides, "there shall be no review by appeal or otherwise of an order of the Panel denying a motion to transfer for consolidated proceedings."⁷⁵

The ALI's proposed statute contemplates that the transferee court has full power to "organize and manage the consolidated proceeding."⁷⁶ The transferee court may, for example, organize the parties into groups with like interests, separate issues into those common questions that should be treated on a

66. *Id.* at 3.

67. *Id.*

68. *Id.* at 7.

69. *Id.*

70. *Id.* at 7-8.

71. *Id.* at 8.

72. *Id.* at 8-10.

73. *Id.* at 8-9.

74. *Id.* at 11-12.

75. *Id.* at 12.

76. *Id.* at 13.

consolidated basis, identify individual issues that do not require common treatment, certify classes encompassing the litigation as a whole or particular issues, and stay discovery and trial preparation on issues not consolidated until the close of the consolidated proceeding.⁷⁷ The court may also sever issues or claims and transfer such issues or claims for separate or consolidated treatment in one or more "retransferee districts."⁷⁸

In consolidated actions, the transferee court shall determine "the source or sources of the applicable substantive law."⁷⁹ Whenever state law supplies the rule of decision, the transferee court shall "make its own determination as to which state's rule(s) of decision shall apply to some or all of the actions, parties, or issues."⁸⁰

Of potential relevance to possible imposition of mandatory ADR by the transferee court, the ALI's proposed statute provides:

- (d) As soon as practicable after transfer and consolidation have been effected, the transferee court shall prepare a preliminary plan and order for the management and disposition of the litigation, specifying whether the transferee court will determine the entire

77. *Id.*

78. *Id.* at 14-15.

79. *Id.* at 17.

80. *Id.* Preliminary Draft No. 3, supra note 62, sets forth the following choice of law provisions for state created actions:

§ 6.01. Mass Torts

(a) In actions consolidated under § 3.01, the transferee court shall determine the law governing the rights, liabilities, and defenses of the parties with respect to an issue in tort by considering the factors listed in subsection (b) with the objective of applying a single state's law to all the claims being asserted against each defendant.

(b) The factors to be considered in determining the law under subsection (a) are:

- (1) the place of injury;
- (2) the place where the conduct causing the injury occurred;
- (3) the principal place of business of the defendants; and
- (4) the domicile of the plaintiffs.

(c) If, in evaluating the factors listed in subsection (b), the court finds that the place of injury and the place where the conduct causing the injury occurred are in the same state, that state's laws should control. If those factors are not in the same state, but the plaintiffs are domiciled in the same state as the state where a defendant has its principal place of business or the plaintiffs are domiciled in the same state as the place of injury, then that state's law should control. In all other cases, the state where the conduct causing the injury occurred should provide the governing law.

(d) In applying the rules in subsection (c), the transferee court shall assess whether the results obtained will be fair and will allow for the consolidated treatment of the claims before it. In appropriate cases, the court may determine that the actions should be divided into subgroups of claims or parties so as to allow more than one state's law to be applied. The court also may determine that only some of the claims involving some of the parties should be governed by the law chosen upon the application of the rules in subsection (c), and that other claims or parties should be remanded to the transferor courts for individual treatment there. If so, the court may exercise its authority under § 3.06(c) to sever, retransfer, or remand issues or claims for treatment consistent with its determination.

action or only specified issues and providing for the disposition of issues that it will not determine.⁸¹

The transferee court's decision to retransfer claims or issues may be reviewed only by the Complex Litigation Panel.⁸² This review is discretionary; any party to a retransfer decision may petition the Complex Litigation Panel for its review.⁸³

The proposed ALI statute contemplates that 28 U.S.C. section 1292 is to be amended to add a provision permitting immediate appellate review of a liability determination by a transferee court as to "all the claims and parties."⁸⁴ Review of that determination may be sought as a final judgment under 28 U.S.C. section 1291 within thirty (30) days of the trial court's order. If a liability determination has been made as to *less* than all the claims or parties, the transferee court may certify that determination for interlocutory appellate review "if it concludes that there is no just reason for delay."⁸⁵ All appeals of consolidated actions (except those consolidated for pretrial purposes only) shall be heard in the court of appeals of the circuit in which the transferee court, as designated by the Complex Litigation Panel, is located.⁸⁶

The transferee court is given personal jurisdiction in consolidated actions over any party "to the full extent of the power conferable on a federal court under the United States Constitution."⁸⁷

Trial and hearing subpoenas may be served at any place within the jurisdiction of the United States, "or anywhere outside the United States if not otherwise prohibited by law."⁸⁸

B. Complex Litigation Statute for Federal-State Intersystem Consolidation⁸⁹

The preceding discussion of the Federal Intrasystem Consolidation involves only the federal courts. However, the ALI Complex Litigation Project maintains that the problems posed by multiparty, multiforum litigation cannot adequately be addressed without also considering whether related cases that are filed in both federal and state courts also should be subject to some consolidation mechanism. For the ALI, the answer is yes.

81. Complex Litigation Draft, *supra* note 61, at 19.

82. *Id.* at 19-20.

83. *Id.*

84. *Id.* at 21-22.

85. *Id.*

86. *Id.* at 23.

87. *Id.* at 24.

88. *Id.* at 25.

89. The proposed federal-state intersystem consolidation statute assumes that the statute for federal intrasystem consolidation has been enacted and "builds upon [it]."

To fill this perceived consolidation need, the ALI proposes its Intersystem Consolidation which supports consolidation through expanded removal as well as through mandatory or coerced consolidation.

The ALI's proposed federal-state consolidation statute provides that:

[T]he Complex Litigation Panel may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts, if the removed actions arise from the same transaction, occurrence, or series of transactions or occurrences as an action already filed in the federal court, and share a common question of law or fact with that action.⁹⁰

Removal may be initiated upon either the request of any party to one of the state actions or by the certification of any state judge presiding over one or more of the actions. The Panel is directed to consider whether removal and consolidation is warranted and to ensure that removal would not "unduly disrupt or impinge upon state court proceedings or impose an undue burden on federal courts," in addition to considering the other "consolidation factors" enumerated in the Federal Intrasystem Consolidation Statute.⁹¹ If the Complex Litigation Panel determines to remove a given class of cases, any case where all parties and the presiding state judge object to its removal may be remanded.⁹²

A transferee district court shall have subject matter jurisdiction over any claim that (1) arises from the same transaction [or is removed pursuant to the above provision] as a claim that has been transferred to it pursuant to Section 3.01 of the Intrasystem Consolidation Statute or (2) involves indemnification arising from the same transaction, occurrence or series of related transactions or occurrences as a claim that has been

90. Complex Litigation Draft, *supra* note 61, at 33. The Complex Litigation Project's draft of this statute appeared most recently in The American Law Institute, Complex Litigation Project, Preliminary Draft No. 2, September 13, 1989 [hereinafter Preliminary Draft No. 2]; The American Law Institute, Complex Litigation Project, Council Draft No. 2, November 14, 1989 [hereinafter Council Draft No. 2].

91. Complex Litigation Draft, *supra* note 61, at 33.

92. *Id.* at 33-34. Preliminary Draft No. 2 included a proposal that district courts have original jurisdiction of civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences, if (1) "the matter in controversy exceeds the sum or value of \$25,000 for each of any 25 actual or prospective plaintiffs" and if at least one of the actions may be filed or has been filed in a court of a state other than that of any other action, or (2) the matter in controversy exceeds the sum of \$5,000 for any five actual or prospective plaintiffs and all the defendants *cannot* be joined in the courts of any one state or in the courts of a state in which a substantial part of the acts or omissions giving rise to the action occurred or a substantial part of the actions or omissions giving rise to the action occurred in two or more states. Such an action may be brought only if a party is a citizen of a state and any actual or prospective adverse party is a citizen of another state or of a foreign state. Preliminary Draft No. 2, *supra* note 90. This proposal was apparently rejected by the Project Advisory Committee.

transferred to it pursuant to Section 3.01 [of the proposed Intrasystem Consolidation Statute].⁹³

This jurisdiction exists without regard to whether the ancillary or pendent claim involves the addition of a party who is not a party to the jurisdictionally sufficient claims to which it is joined. The court's exercise of this jurisdiction is discretionary.

Personal jurisdiction may be asserted over any party to a consolidated action by the district court to which an action is transferred for consolidated treatment (after removal) "to the full extent of the power conferrable on a federal court under the United States Constitution."⁹⁴

In actions removed under this Section, the ALI's proposed new 28 U.S.C. section 2120 would provide that "[t]he federal court shall determine the source or sources of applicable substantive law" and "the court may make its own determination as to which State's rule(s) of decision shall apply to some or all of the actions, parties, or issues."⁹⁵

Various time limits are established for the filing of removal petitions in multiparty, multiforum cases. No time limit is imposed when removal is initiated by certification of a state trial judge.⁹⁶

The transferee court may enjoin related proceedings pending in any state or United States court whenever "it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just and efficient resolution of the actions."⁹⁷ This grant of authority is discretionary. The transferee court should consider in determining whether to enjoin pending related litigation (1) how far the actions to be enjoined have progressed, (2) the degree to which the actions pending in the other courts share common questions with and are duplicative of the consolidated actions, (3) the extent to which the actions to be enjoined involve issues or claims of federal law, and (4) whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding.⁹⁸

Under the ALI proposal, the transferee court has the power to require non parties to intervene in the consolidated litigation or "be bound by the determinations made [therein] to the same extent as a party to that action" if (1) the claim or claims of the nonparties involve one or more questions of law or fact in common with the consolidated actions "and arise out of the same transaction, occurrence, or series of transactions or occurrences;" (2) intervention will advance the efficient, consistent, and final resolution of asserted and unasserted claims; and (3) intervention will not impose upon either the non-parties or existing parties

93. Complex Litigation Draft, *supra* note 61, at 76.

94. *Id.* at 138-39.

95. *Id.* at 139.

96. *Id.* at 62.

97. *Id.* at 83-86, 143-45.

98. *Id.* at 83-86.

undue prejudice, burden, or inconvenience.⁹⁹ The transferee court's decision to require compulsory intervention "will not be subject to immediate review, unless it otherwise qualifies for review under one of the interlocutory appeal statutes."¹⁰⁰ The transferee court is required to provide the nonparties that it desires to intervene with "clear and timely notice" of the proposed required intervention and the fact that the nonparties will be bound by and precluded from relitigating matters adjudicated in the action pending before the transferee court. Upon receipt of this notice, any interested party or nonparty may file with the transferee court a statement of reasons why intervention should not be ordered.¹⁰¹

C. Practical Considerations Regarding The ALI Complex Litigation Project

The ALI Complex Litigation Project represents another proposal for a statutory scheme to consolidate "related litigation" which parallels the case management proposal of the ABA Commission on Mass Torts and H.R. 3406, the Amended Multiparty, Multiforum Jurisdiction Act of 1989.¹⁰²

The bulk of the 152-page ALI Tentative Draft No. 2 on the proposed Federal-State Intersystem Consolidation Statute is devoted to a detailed defense of the proposed statute on constitutional and public policy grounds. This may be due to the fact that the statute itself, in conjunction with the Federal Intrasystem Consolidation Statute, provides the Complex Litigation Panel and the court to which the consolidated litigation is transferred with a series of powerful procedural tools calculated to serve the ultimate case management goals of the Complex Litigation Project, namely, the fair and efficient resolution of entire controversies

99. *Id.* at 145.

100. *Id.* at 98.

101. *Id.* at 146. Preliminary Draft No. 2 also provided that where actions are being consolidated from both state and federal courts, the Complex Litigation Panel could designate a *state* transferee court. The state judge would become "federalized" and have the same powers and responsibilities of a federal transferee court. In addition to the consolidation and transfer factors to be considered when a federal court is the transferee court, when a state court is the proposed transferee court the Complex Litigation Panel is directed to consider (1) the number of individual cases that were pending in state courts relative to the number of actions pending in federal courts, (2) the number of states in which the state and federal cases are located, (3) whether the law of a particular state is likely to govern the litigation, and (4) any other factor indicating that a particular state or federal interest should be accommodated in determining whether or not to transfer the consolidated cases to a state court. Appeals from the state transferee court would be to the federal appeals court for the circuit in which the transferee state court sits. The Complex Litigation Panel would be expanded to include nine state court judges designated by the Chief Justice of the United States. The Complex Litigation Panel would be divided into two divisions. The first division, comprised of federal judges, is to handle the transfer and consolidation decisions regarding cases filed in the federal courts only; the second panel, comprised of both federal and state court judges, is to handle removal, transfer, and consolidation decisions involving cases from both the federal and state court systems. Preliminary Draft No. 2, *supra* note 90.

102. H.R. 3406, as currently drafted, is limited to personal injury (or property damage) arising out of a single occurrence-accident.

and the avoidance of redundant and duplicative litigation.¹⁰³ These procedural tools include expansion of current federal multidistrict litigation consolidation to include coordinated or consolidated trials as well as consolidated pretrial proceedings, removal jurisdiction over state court actions involving common questions of law or fact and arising out of the same transaction, occurrence or series of related transactions or occurrences, power to enjoin parallel litigation, and the power to compel the joinder of nonparties.

The ALI's proposed Federal Intrasystem Consolidation Statute, as its title implies, is applicable only to cases filed in the federal courts that "involve one or more common questions of fact or law."¹⁰⁴ One principle departure of the proposed Federal Intrasystem Consolidation Statute from 28 U.S.C. section 1407 is that the transferee court may conduct consolidated *trials* as well as pretrial proceedings. The transferee court has full power to organize and manage the consolidated proceeding. This power includes "the separation of issues into common questions that require treatment on a consolidated basis and individual questions that do not."¹⁰⁵ The Reporters note, however, that in severing issues "the court must ensure that severing issues does not impinge on the parties' jury trial rights."¹⁰⁶ Liability and damages issues, for example, are thought to be sufficiently "distinct and independent" so as to satisfy the limitation of the Seventh Amendment.¹⁰⁷ The severed issues may be tried before the consolidation court, or the court may retransfer the severed issues to another court (for example, where the case originated).

The transferee court is also empowered to "determine the source or sources of the . . . substantive law" applicable to consolidated cases. In a diversity case, the transferee court "may make its own determination as to which State's rule(s) of decision shall apply to some or all of the actions, parties, or issues."¹⁰⁸

As the draft Federal Intrasystem Consolidation Statute stands, it would apply to many types of litigation in federal courts, including products liability cases. The only "numerosity" requirement is that there be civil actions pending in "more than one [federal] district"; the only "relatedness" requirement is that "one or more" actions "involve one or more common questions of law or fact."¹⁰⁹ As with the ABA Final Report, the consolidation for *trial* on "common" issues is also a centerpiece of the Complex Litigation Project. Common issues would be tried in the abstract, divorced from the individual issues of any case or claimant. As

103. Complex Litigation Draft, *supra* note 61, at 2-3, 34-37.

104. *Id.* at 2-3.

105. *Id.* at 13.

106. *Id.* at 14.

107. *Id.*

108. *Id.* at 17.

109. *Id.* at 2-3.

is the case with the ABA proposal, this is an unfavorable posture for the independent, individualized handling and trial of cases.¹¹⁰

Moreover, as noted above, the Federal Intrasystem Consolidation Statute authorizes the transferee judge to select the state law that will govern liability (and other) determinations without reference to state choice-of-law principles. As with the ABA proposal, this provision creates the very real possibility that the substantive law for a particular case could be selected by a judge from the law of a jurisdiction lacking even minimum contacts with the parties or claims. New or novel theories of liability and recovery might also be imposed, if embraced by the transferee judge.

The statute and its comments contemplate a coordinated period of discovery, with the transferee judge managing the cases in an active, quasi-legislative manner. Discovery *against* the defendants may be expected to be expedited and controlled under the polestar of efficient judicial management. Conversely, defendants' discovery, much of which could be limited to "individual" issues, may well prove to be truncated and closely monitored, or deferred until the "common" liability issues have been resolved. In any case, the control over discovery represents significant case management opportunity for the transferee judge.

The case management aspects of the draft statute for Federal Intrasystem Consolidation are reinforced and magnified by the draft statute for Federal-State Intersystem Consolidation.¹¹¹ As noted above, much of the Reporters' commentary is devoted to a detailed discussion of the constitutional underpinnings of the expanded notions of federal jurisdiction. This jurisdiction can be invoked where "one or more civil actions" are filed in state court sharing common questions of law or fact and arising from the same transaction or occurrence (or series of transactions or occurrences) with "an action already filed in the federal court."¹¹² The ALI Reporters note that the transaction standard delimits groups of cases that have a sufficient relationship so that centralizing control over them should foster

110. As in the Final Report, *supra* note 9, the Complex Litigation Panel's decision to consolidate cases is discretionary. The Complex Litigation Panel's exercise of discretion is to be informed by a number of factors, including whether consolidation can be accomplished in a way that is fair to the parties. Thus, individual litigants could try to argue that their cases are uniquely unsuited for consolidation because the individual issues predominate over the common questions. A similar argument has been made in the context of class certification in the asbestos cases, *see* Yandle v. PPG Industries, Inc., 65 F.R.D. 566 (E.D. Tex. 1974), and the DES cases, *see* McElhaney v. Eli Lilly & Co., 93 F.R.D. 875 (D.S.D. 1982), with mixed results.

111. The ALI Reporters have withdrawn their proposed grant of original federal question subject matter jurisdiction over multiparty, multiforum cases. The ALI Reporters note that their initial approach "appears [to be] a more efficient means of achieving [consolidation]." Complex Litigation Draft, *supra* note 61, at 37. Their more cautious choice of removal jurisdiction, however, will "allow the [Complex Litigation Panel] to gain experience regarding how consolidated cases best can be handled and what cases should be suitable for such treatment, and should allow for closer scrutiny, as well as the development of uniform standards for identifying what cases should be treated in this fashion." *Id.* at 37-38. "[W]ith more experience," the ALI Reporters suggest, "[i]t may be that . . . original jurisdiction also should be conferred on the federal courts." *Id.* at 38.

112. *Id.* at 33.

their efficient and economical adjudication. This low "numerosity requirement," if two cases can be called such, would be met in numerous circumstances. Moreover, the low threshold number and the absence of any limitation to mass tort cases could make the proposed ALI statute, if adopted, a much greater expansion of federal court jurisdiction than the ABA Mass Torts proposal.¹¹³

More importantly, the Complex Litigation Panel would have the authority to remove *all* "transactionally related" cases filed in state courts on the motion of any party or upon the state judge's certification to *one* such case.¹¹⁴ This grant of authority goes beyond the removal provision of the ABA Mass Tort Proposal, which permits removal of a given case (and transfer to the consolidated proceedings) on the motion of a party to that case. The ALI Reporters describe the combined effect of the removal and consolidation features as follows:

In most cases, removal and consolidation of transactionally related claims sharing common questions of law or fact will promote judicial efficiency because the litigants will need to prepare for one trial, conduct discovery only once, and will be able to share discovery expenses. Consolidation also may benefit the participants by reducing the risk of multiple and overlapping punitive damage awards, the rigors of the "divide and conquer" strategy of many institutional defendants, and the possibility of inconsistent results.¹¹⁵

Two additional features of the Federal-State Intersystem Consolidation Statute should be discussed further. The first is the express grant of authority to the transferee court to "enjoin related proceedings, or portions thereof, pending in any State or United States court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just and efficient resolution of the actions before it."¹¹⁶ This authority does not exist in the current draft of the ABA proposal. The ALI Reporters note that the consolidation court "cannot depend entirely on the fortuity of all parties being willing to join in the [consolidated] action" in order to achieve the "efficiency and fairness" of the Complex Litigation Project.¹¹⁷ Thus, the ALI perceives that it is necessary to provide for situations in which

113. As presented at the August 1989 ABA Annual Meeting, the ABA proposal's consolidation feature would be triggered by "at least 100 civil tort actions arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property . . ." Final Report, *supra* note 9, at 2d.

114. Complex Litigation Project, *supra* note 61, at 61-62. The ALI's proposed statute "authorizes removal to be initiated upon the request of any party to a state action, or upon certification by a state court judge before whom one of the actions is pending." *Id.* at 57.

115. *Id.* at 35.

116. *Id.* at 83.

117. *Id.* at 84.

parties refuse to cooperate and the result is duplicative litigation that interferes with the transferee courts' ability to manage the consolidated litigation.¹¹⁸

The second feature worthy of further note is the transferee court's authority to compel intervention by nonparties in the consolidated action. Again, this goes beyond the ABA proposal which merely provides that a person who is "aware of" a consolidated proceeding, and could have participated as a party in the proceeding (but did not), may not "claim or derive any evidentiary or other benefit of a judgment entered against a defendant . . . in the consolidated adjudication."¹¹⁹ The ALI's proposed Federal Intrasystem Consolidation Statute permits the transferee court, again *on its own initiative* (or by motion of a party), to notify nonparties with claims that involve one or more common questions of law or fact with the consolidated action, that they must intervene in the consolidated action or be "bound by the determinations made [therein] to the same extent as a party to that action."¹²⁰ This procedure is "limited to being used with reference to existing claims and thus does not provide a mechanism for addressing the problems of duplication or inconsistency that may occur when claims mature later that involve adjudication of some of the same facts."¹²¹

The ALI Reporters conclude that this provision is necessary "because under the present issue preclusion rules people allegedly injured . . . [in a complex dispute] have an incentive to wait on the sidelines while litigation is pursued by similarly situated plaintiffs."¹²² The ALI Reporters note, however:

Absolute finality is not possible, of course. Intervention and preclusion . . . necessarily are limited. This device cannot achieve the consolidation of claims of nonparties who are unknown to the court or of claims that have not yet arisen. In these situations there is no way that meaningful notice and opportunity to be heard can be provided under this scheme.¹²³

Thus, the proposed ALI statute at least requires that all nonparties receive "clear and timely notice" of the pending consolidated action before such non-parties will be bound absent their intervention.

The combination of removal, antisuit injunctions, and compulsory intervention, the latter two of which may be initiated by the Complex Litigation Panel or

118. As first proposed, the action to be enjoined need *not* have "substantially impair[ed] or interfer[ed] with the consolidated actions." Preliminary Draft No. 2, *supra* note 90, at 102. The additional requirement was added to underscore the exceptional circumstances necessary for such an injunction to issue. The ALI Reporters suggest that "it would be very rare for a case to be enjoined . . . that did not involve at least one of the parties litigating in the transferee court." Complex Litigation Draft, *supra* note 61, at 85.

119. Final Report, *supra* note 9, at 7d.

120. Complex Litigation Draft, *supra* note 61, at 97.

121. *Id.* at 99.

122. *Id.*

123. *Id.* at 101.

the transferee court on its own motion, may vest the transferee courts under the Complex Litigation Project proposal with even more authority than transferee courts would have under the ABA Mass Torts proposal. Moreover, as noted above, the absence of a numerical threshold for the grant of federal question or removal jurisdiction, and the lack of limitation to tort cases, represents a broad expansion of federal court jurisdiction beyond the mass tort contemplation of the ABA proposal. The confluence of these powers in a transferee court may result in heightened resistance to this proposal by all litigants, plaintiffs or defendants, who still want individualized control of their litigation.

The ALI proposal clearly places significant power in the hands of the transferee federal judge to control, organize, and manage the consolidated litigation all the way through trial. The transferee court enjoys express authority to force nonparties into the consolidated action through a variety of procedural means, or suffer the result of being bound by its ultimate outcome.

The Complex Litigation Project's proposals do not include some of the other features of the ABA Mass Torts proposal. For example, the ALI Project has not yet addressed issues such as compulsory settlement negotiations or participation in alternative dispute resolution procedures. Similarly, the Complex Litigation Project has yet to create anything analogous to the ABA's proposed "panel of experts" procedure. The work of the Complex Litigation Project, however, is ongoing.

D. *The Impact of the Complex Litigation Project on ADR*

The central feature of the Complex Litigation Project is consolidation of common issues in related cases. Consolidation of cases for the purposes of discovery, pretrial motions, and adjudication of "common issues of law and fact," will remove these cases from individualized case management and preparation. This core feature is shared with the ABA Mass Torts Proposal. The ALI proposal goes beyond the ABA Mass Torts proposal, however, both in its contemplated expansion of federal court jurisdiction and in its grant of authority to the transferee court to manage the consolidated litigation.

Although the ALI Complex Litigation Project does not specifically address mandatory, court-annexed ADR, there can be little doubt that mandatory ADR would fall within the extensive powers which are contemplated for the transferee court over the consolidated litigation.

In discussing the case management authority of the transferee court, the ALI Reporters note as follows:

In order to allow for the most efficient handling of complex multi-party actions, the transferee court must be given maximum flexibility to design and structure the litigation in light of the particular issues and parties involved. This section recognizes that it sets out various options that may be used by the transferee court to accomplish the fair, just, and economical resolution of the actions.

....

As provided in this section, the only constraint on the transferee court's discretion in structuring the litigation is that the approach taken should foster the just, efficient, and fair resolution of the actions.

....

The timing for resolving retransferred or remanded issues or claims also is within the transferee court's discretion. The purpose of this section is to provide maximum flexibility to the transferee judge to manage the litigation in a way that will be most efficient and fair.¹²⁴

Given the express provisions of the ALI's proposed statutes on consolidation, and given the intent expressed in the ALI Reporter's comments to the proposed statutes, there can be little doubt that one of the primary goals behind the proposed statute is to concentrate case management authority in the hands of the transferee federal judge. Given this concentration of power there is no reason to expect that the transferee judge would not have case management authority extending to the imposition of mandatory alternative dispute resolution procedures. Thus, although the Complex Litigation Proposal does not contain ADR provisions or requirements, it seems clear that the transferee judge will have sufficient case management authority to undertake mandatory ADR proceedings. For example, is there any reason to believe that a transferee judge could not order court-annexed arbitration, court-annexed mediation, summary jury trials, or submissions to a "panel of neutrals" selected and appointed by the court?

Under the consolidation contemplated by the ALI's proposed statutes, alternative dispute resolution would not be a voluntary procedure entered into freely by the parties to try and resolve disputes. Rather, it is quite likely that alternative dispute resolution under the ALI consolidation model will be a hybrid form of mandatory case management procedure. It is reasonable to anticipate that the consolidation statutes contemplated by the ALI will increase the use of and recourse to mandatory alternative dispute resolution, and will, simultaneously, decrease the use of availability and recourse to voluntary ADR worked out and agreed to by the parties. In this context, if the transferee courts do engage in mandatory ADR, it may be preferable to refer to such procedures as transferee court case management procedures, and not to label them as alternative dispute resolution methods. In the hands of a transferee judge in consolidated litigation, the mandatory ADR procedures will acquire attributes of pretrial case management proceedings, and will look less and less like traditional methods of voluntary alternative dispute resolution.

Because the Complex Litigation Project is perhaps, at present, the most comprehensive treatment of a proposed statute for multicase, multiforum

124. *Id.* at 14-15.

consolidation, it deserves detailed examination. The implications of the Complex Litigation Project for alternative dispute resolution should also be discussed. Even though the ALI's proposed statutes do not reference ADR, the impact of the ALI proposal on ADR should be evaluated because the ALI "consolidation model" may become *the* federal law relating to multicase, multiform consolidation. In that event, the case management authority of the transferee court under the ALI's proposed statutes will be important and relevant to a consideration of ADR in the environment of multicase complex litigation. As noted above, the "weather forecast" for the future of voluntary ADR under the consolidation litigation model is "stormy" at best. While there is considerable movement in the bar and the legal profession to try to incorporate voluntary dispute resolution methods in business relationships, contracts, and in actual disputes, the ALI consolidation model focuses upon dispute resolution as a mandatory case management device. Although much of the dialogue on alternative dispute resolution focuses upon "voluntary cooperation," the ALI consolidation model suggests that the focus on ADR will be on "mandatory participation," "judicial efficiency," "centralized management," and procedurally "coerced" settlements. Is this the "weather forecast" we are looking for?

IV. FEDERAL COURTS STUDY COMMITTEE

In November 1988, the 100th Congress created within the Judicial Conference of the United States a fifteen-member Federal Courts Study Committee. They directed the Committee, by April 2, 1990, to make a complete study of the courts of the United States and of several states and transmit a report on such a study to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute.¹²⁵

The statute specifically directs the Federal Courts Study Committee to analyze alternative dispute resolution, and the types of disputes currently embraced by federal jurisdiction. In December 1988, Chief Justice William H. Rehnquist appointed the Federal Courts Study Committee members who were, in the words of the statute, representative of the various interests, needs, and concerns which may be affected by the jurisdiction of the federal courts.

Thus, as with other projects and proposals, the Federal Courts Study Committee was to look at subjects such as consolidation of complex litigation and alternative dispute resolution. Consolidated case management and mandatory alternative dispute resolution were thus once again considered under the umbrella of judicial efficiency.

On April 2, 1990, the Federal Courts Study Committee (the "Committee") published its report containing recommendations concerning the structure and

125. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

operation of the federal courts.¹²⁶ Certain of these recommendations address issues of potential concern to litigants in multicase civil litigation. These issues include diversity jurisdiction, adjudication of complex litigation, and alternative dispute resolution.

A. *Diversity Jurisdiction*

The basic recommendation of the Committee as to diversity jurisdiction is as follows:

Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation interpleader, and suits involving aliens. At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction.

....

As currently codified in 28 U.S.C. § 1332, diversity jurisdiction essentially authorizes federal courts to decide cases that do not involve federal law if those cases are between citizens of different states or between United States citizens and aliens, and the amount in controversy is over \$50,000. Federal jurisdiction is not exclusive in such cases, and federal courts apply state law.¹²⁷

The Committee's reasons for seeking the virtual elimination of diversity jurisdiction are as follows:

We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on federal judicial resources. On the other hand, no other step will do anywhere near as much to reduce federal caseload pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts.¹²⁸

126. Report of the Federal Courts Study Committee (April 2, 1990) [hereinafter *Federal Courts Report*].

127. *Id.* at 38-39.

128. *Id.* at 39.

B. *Complex Litigation*

The recommendations regarding diversity jurisdiction must be considered, however, in the context of the Committee's complex litigation recommendations. The Committee broadly endorses some type of legislation to authorize the federal courts to adjudicate multistate, multiforum "complex litigation."¹²⁹ The Committee recognizes that current law permits consolidation of such cases in federal court for pretrial purposes only. Although the Committee does not address a number of difficult subsidiary issues, the Committee nevertheless concludes that something must be done to economize the handling of such litigation. The Committee makes no recommendation that federal substantive law standards be enacted to accompany the suggested procedural reforms.

The primary Committee recommendation on complex litigation, along with explanatory Committee comment provides as follows:

a. Complex litigation

Complex, multi-party disputes often give rise to litigation in both state and federal courts. The committee supports a statutory amendment, and proposes two steps the courts should take, to facilitate the processing of complex litigation in federal court.

(1) Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation.

The past few decades have witnessed a considerable increase in complex litigation in which litigants press related claims concurrently in several federal and state courts. Airplane crash and product liability cases are two examples. There is partial federal court authority to deal with such cases, but it does not go far enough. For cases already in federal court, 28 U.S.C. Section 1407(a) permits consolidated proceedings in cases involving common questions of fact—but only for pretrial proceedings. As a practical matter, to be sure, cases often settle, or liability questions are tried together by consent. Many parties to these national cases, however, cannot have their state law claims tried in federal court because they are citizens of the same state as one of their adversaries and thus do not meet the long-standing requirement of complete diversity among parties.

129. *Id.* at 44.

We believe, though, that the federal trial forum should be available to ensure the economy of one court's resolving disputes involving multiple parties from many states. Thus we recommend that Congress broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings and adopt a new jurisdiction based on minimal, rather than complete, diversity so that parties to a multi-state, multi-party state law litigation can be included even if they are citizens of the same state. This jurisdiction would permit more efficient handling of cases that are already partly before the federal courts, thus minimizing any workload increase. (And any increase would be more than offset if Congress eliminates most current diversity jurisdiction.)

We do not take up numerous difficult subsidiary issues in complex litigation, such as choice of law, statutes of limitations, single-event or related-matter jurisdiction, removal of possible revision of joinder and class action rules, and remand for trial on damages. The American Law Institute and the American Bar Association Commission on Mass Torts have conducted major studies of these questions, and the House of Representatives is considering legislation to create a special federal jurisdiction for mass disasters.¹³⁰

As can be seen from the foregoing, the Committee contemplates and recommends federal legislation to enhance the ability of the federal courts to consolidate in the name of judicial efficiency and economy. However, unlike the Complex Litigation Project and the ABA Special Commission on Mass Torts, the Committee does not even attempt to address a number of very basic and troublesome issues such as choice of law. Once again, the overriding polestar appears to be case management.

C. Megacase Judicial Management

Many proponents of consolidation of complex litigation cite to multicase, megalitigation such as the asbestos litigation as support for case management and judicial intervention. However, the consolidation proposals of the ALI, ABA, and Federal Courts Study Committee would extend to hundreds, if not thousands, of "small" multicase litigations. The problems with the 20,000-case litigation, such as that involving asbestos, suggest special consideration for a very small number of instances of high-volume litigation.

The Committee seems to clearly recognize the distinction between general complex litigation and the megacase. In this regard, the Committee recommends:

- (3) For the small number of instances in which extraordinarily high numbers of injuries may have been caused by a

130. *Id.* at 44-45.

single product or event, the courts should explore, and the Federal Judicial Center should analyze and disseminate information about, tailored procedures to avoid undue re-litigation of pertinent issues and otherwise facilitate prompt, economical and just disposition of claims. Congress should be alert to the need for statutory change to facilitate resolution of such mega-cases.

Some products or events—asbestos injuries, for example—give rise to thousands of claims that swamp several federal districts and state courts with the task of relitigating similar issues and resolving individual issues. Courts have determined that alternative procedures to reduce relitigation are essential for some of these cases. They have managed asbestos caseloads through mass trials or certification of all pending cases in the district as a class action. Heavy judicial involvement in the Agent Orange litigation led to a class-wide settlement. Congress designed an administrative process for black lung victims to cope with similar problems. But some alternatives have created their own problems. For example, the black lung scheme led to heavy judicial burdens. And the Asbestos Claims Facility and the Center for Claims Resolution (established by prospective defendants and their insurers, after negotiations with plaintiffs' lawyers) have not enjoyed great success.

Thus, the Committee does not recommend such alternatives for situations that do not present the great problems of the megacases. And the pertinent characteristics of megacases are likely to differ enough to make any generic approach unsuccessful. Rather, courts facing an outburst of such litigation should consider alternatives to traditional methods (claims-processing mechanisms, for example) once traditional litigation has established liability. If they have the authority, they could require or provide the option of simplified administrative processing with surer, though possibly lesser, compensation.

The Federal Judicial Center should collect and analyze data on the new methods and, as it thinks best, disseminate information to judges before whom such litigation is pending. Studies of such alternatives might suggest wider applications for them, and at some point, Congress may wish to facilitate the resolution of megacases by altering the substantive terms for relief or establishing alternative remedy schemes. Such legislation might aid not only the federal courts but also state systems, which sometimes carry the lion's share of mega-case burdens.¹³¹

131. *Id.* at 46.

D. ADR Under the Report of the
Federal Courts Study Committee

For the past decade and more, federal and state courts have adopted and adapted alternative ADR techniques to standard procedures for handling civil litigation.¹³² The objectives of these techniques have been to "reduce cost, delay, and antagonism, and at the same time to preserve the time of judges for the disputes that most need their attention".¹³³ Examples include:

- * "court-annexed arbitration," which usually requires a non-binding hearing and award some months after filing and before the parties may proceed to trial (if they do not accept the award or settle);
- * the less formal "early neutral evaluation" procedure, in which an experienced attorney meets with the parties and counsel fairly soon after filing to discuss issues in a case and possible claim values;
- * intensified trial-level settlement mediation by a magistrate or judge (perhaps other than the one who would try the case), or mediation at the trial or appellate level by professionals on the court's staff;
- * optional "fast track" proceedings that provide for limited discovery and early trial;
- * special masters for discovery and other matters in complex cases; and
- * summary jury and bench trials, to provide the parties a non-binding estimate of the case as a means of facilitating settlement.¹³⁴

The methods referenced above and covered in the report of the Federal Courts Study Committee are those that federal courts might either require, or make available to litigants, during the pretrial stages of civil litigation or on appeal before full briefing and argument. The methods discussed do not include arbitration, conciliation, mediation, and negotiation, and other procedures if they operate outside the judicial system.

132. A 1983 amendment to Federal Rule of Civil Procedure 16 specifically authorized judges and litigants, at the pretrial conference, to "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16. In 1988, the legislation that created this committee authorized the continuation of mandatory court-annexed arbitration programs that had begun in ten judicial districts between 1977 and 1986. It also authorized consensual programs in ten additional districts and imposed detailed requirements for reports by the Administrative Office of the United States Courts and the Federal Judicial Center on the operation of these programs.

133. Federal Courts Report, *supra* note 126, at 82.

134. *Id.*

The Committee has made several recommendations regarding the use of ADR in federal courts. The first recommendation provides as follows:

1. Congress should broaden statutory authorization for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives.

More specifically, Congress, subject to any sunset provisions it believes desirable, should:

- * eliminate any doubt that all federal courts may adopt local rules establishing dispute resolution mechanisms that complement or supplement traditional civil pretrial, trial, and appellate procedures. The enabling legislation should require participation by the local bar, dispute resolution professionals, and the public in the drafting of these local rules;
- * permit (but not require) district courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and court-annexed arbitration, with limitations on types of cases subject to mandatory reference, and authorization for motions to exempt cases from an otherwise mandatory procedure; and
- * forbid the creation of financial incentives in mandatory initial ADR proceedings (except as a sanction for misconduct), but permit experimental use of cost and fee incentives for parties who reject arbitration hearing awards and fail later to improve on them, or who reject and fail to improve on formal post-award settlement offers.¹³⁵

Although the Committee notes a number of concerns regarding court-annexed ADR,¹³⁶ it does not address possible concerns about the use of mandatory, court-annexed ADR in the context of consolidated, judicially-managed complex litigation.

The second ADR recommendation of the Committee provides as follows:

2. Congress should authorize and provide funds for sustained experimentation with alternative and supplementary techniques, subject to the guidelines recommended below and any other limitations Congress may deem advisable.

135. *Id.* at 83-84.

136. *Id.* at 84.

Like much else in the law, alternative devices are at the same time established and evolving. Rigorous empirical analysis might reveal these techniques' unanticipated consequences or their failure to provide the benefits promised by their promoters. Accordingly, Congress should authorize and fund sustained research on the ADR techniques adopted as a result of the recommended legislation—as well as in areas other than ADR where controlled experimentation may be valuable. The authorization should extend to controlled experimentation—research that subjects one group to the rule or procedure under analysis and subjects a similar group to the existing system. Such research, if kept in place long enough to produce sufficient data for meaningful comparative analysis, is the most powerful social science research technique available, and published reports on such experiments are essential to advancing our knowledge about the results that alternative procedures may provide.¹³⁷

The Committee's third ADR recommendation is that the "Judicial Conference should establish a committee to provide advice and guidance to courts about alternative dispute resolution."¹³⁸ Perhaps such a committee would look at the impact of mandatory ADR and consolidated complex litigation on the rights of the individual litigants.

V. MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 1989 (H.R. 3406)

On Wednesday, October 4, 1989, the Honorable Robert W. Kastenmeier introduced in the House of Representatives the "Kastenmeier Bill," officially entitled the "H.R. 3406, the Multiparty, Multiforum Jurisdiction Act of 1989." The Kastenmeier Bill was introduced to create a new federal court subject matter jurisdiction which would be specially tailored to meet the problems created by certain single-occurrence mass tort litigation.¹³⁹ On February 28, 1990, the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Committee voted to report to the full Committee H.R. 3406.

Representative Kastenmeier offered an amendment in the nature of a substitute which made several changes in the Multiparty, Multiforum Jurisdiction Act of 1989. Specifically, the amendments limited the Bill to actions arising from a single accident. Accident is, in turn, defined as a sudden accident, or natural event culminating in an accident, that results in death or injury incurred at a

137. *Id.* at 85-86.

138. *Id.* at 86. As noted by the Committee, a Judicial Conference Committee, "operating under the auspices of the Federal Judicial Center, can provide advice to federal courts on alternative and supplementary civil litigation procedures, guidelines for the operation of such techniques, and help in avoiding failed approaches." *Id.*

139. 131 CONG. REC. E3275 (daily ed. October 4, 1989) (The Bill did not pass in the 101st Congress, but may be reintroduced in 1991 in the 102d Congress).

discrete location by at least 25 natural persons. Thus, the Kastenmeier Bill does not extend to the mass tort or products liability litigation which is covered by the ABA Mass Tort Proposal, the Complex Litigation Project, and the report of the Federal Courts Study Committee.

H.R. 3406 would thus establish a mechanism for channeling all actions arising from accidents into a single federal court for adjudication according to a single body of state law.

To establish this consolidation mechanism, the Bill would (1) give the federal courts original jurisdiction over actions arising from such disasters, (2) provide for consolidation in one federal court of all federal court actions arising from any such disaster, (3) allow defendants to remove any action from state court to federal court that could have been brought in federal court in the first instance under the bill, and (4) direct the federal district judge who gets the case to choose the state law to be applied to all actions arising from the disaster, based on a laundry list of considerations.¹⁴⁰

Section 2 of the Bill would enact a new Section 1367 of Title 28 giving the federal district courts sitting in diversity original jurisdiction to hear single accident cases of any civil action involving minimal diversity between adverse parties.¹⁴¹

By requiring only "minimal diversity," H.R. 3406 would make it significantly easier for a party to invoke federal court jurisdiction. "Minimal diversity" normally means that there need be only one plaintiff and one defendant in a case who are citizens of different states. Under the Bill, there apparently need be *no* diversity between *any* plaintiff and *any* defendant—only "minimal diversity" between "adverse parties."

Section 4 of the Bill would amend Section 1407 of Title 28 (governing multidistrict litigation) to allow a district court that gets multiple actions arising from a large-scale disaster under H.R. 3406 to consolidate the actions for trial and for the determination of liability and punitive damages.¹⁴² The district court to which the actions are transferred also may determine damages or remand the actions to the courts in which they were brought for separate damages determinations.

Under existing law, transfer in multidistrict litigation is authorized only for purposes of coordinating or consolidating pretrial proceedings. The actions are then remanded to the districts in which they were brought for trials on liability and damages.

Section 5 of the Bill would amend Section 1441 of Title 28 (governing removal) to permit a defendant to remove any action from state court to federal court that could have been brought in federal court in the first instance under the Bill.

140. *Id.*

141. H.R. 3406, 101st Cong., 2d Sess. § 2 (1989).

142. *Id.* § 4.

Section 6 would add a new Section 1658 to Title 28 directing a federal district court, in an action brought under new Section 1367, to determine what state's law should be applied to the action, based on a comprehensive "interest analysis" taking into account 11 specified factors. The court's choice of law determination would govern all other actions arising from the disaster, and all elements of each action, unless federal law applies or the court specifically provides that some other state's law shall apply. The bill "creates no Federal substantive law."

Existing law provides that in any diversity case, the laws of the state in which the case was brought provide the rules of decision. When a federal court must make a choice of law decision, it applies the choice of law rule of the state in which the court sits.¹⁴³

H.R. 3406 would free the district judge of the obligation to follow the forum state's—or any state's—choice of law rules. In so doing, it would undermine the ability of the states to develop and apply their own law to disputes between private persons in multiparty torts cases.¹⁴⁴

Presumably the transferee court under H.R. 3406 would have authority to order the parties to participate in mandatory ADR procedures. However, as with the ALI Complex Litigation Statutes, this matter is not specifically addressed.

VI. THE CIVIL LITIGATION PROJECT AND THE CIVIL JUSTICE REFORM ACT OF 1990

To consider the perceived high litigation costs and delay that burden litigants in the civil litigation system, Senator Joseph Biden, Chairman of the Senate Judiciary Committee, suggested in August 1988 a working conference of participants in the civil litigation system. The Brookings Institution and the Foundation for Change, working with the Rand Institute for Civil Justice, brought together a task force of 36 members to address the issues. The report of the task force, *Justice For All*,¹⁴⁵ set forth a number of recommendations for change to the civil system. Subsequently, legislation has been introduced in Congress to address these issues.

A. *The Civil Litigation Project*

The recommendations in *Justice for All* contain a number of suggestions for case management and judicial coordination, including recommendations on ADR. However, unlike the mandatory, court-annexed ADR process contemplated by other proposals such as the ABA Mass Tort Proposal, the report provides impetus for more voluntary procedures.

143. See 28 U.S.C. § 1652 (1948).

144. Cf. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939).

145. Report, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989) [hereinafter *Justice for All*].

The ADR recommendations for the Civil Litigation Project as set forth in *Justice for All*, provide as follows:

Procedural Recommendation 7: Provide in each district court's plan for neutral evaluation procedures and mandatory scheduling or case management conferences at the outset of all but the simplest of cases.

[COMMENT:]

Much unnecessary cost and delay can be avoided at the outset of many cases through sensible case management evaluation and scheduling techniques. We have two specific recommendations in this area to offer.

Neutral Evaluation and Alternative Dispute Resolution. First, we suggest that each district court's plan require parties at the outset of all but the simplest and most routine cases to attend a conference with a neutral court representative to assess the suitability and desirability of alternative dispute resolution (ADR) procedures. This would expand the procedures now being used in the Northern District of California, where volunteer attorneys meet with parties at an early stage to shape the issues and the discovery process.

Interest in a variety of ADR techniques has accelerated in recent years and covers a wide range of procedural devices: arbitration, mediation, and nonbinding summary trials in which the attorneys present brief summaries of their cases to juries without live testimony. Although much research remains to be done about the effectiveness of these techniques and about the circumstances to which specific ADR procedures best apply, there is some anecdotal evidence that ADR can help resolve disputes more quickly and at less cost than traditional litigation. Accordingly, we believe that the cost savings from early neutral evaluation outweigh any small additional costs of the procedure at the "front end" of litigations.

Nevertheless, because the evidence of ADR is far from definitive and because the optimal choice of specific ADR techniques varies from case to case, it would be a mistake to freeze into the procedural rules one or more particular techniques. Thus districts should experiment with ADR procedures through the neutral evaluation mechanism. In effect, we suggest that the district plans formalize the "multidoor courthouse" concept that has been implemented in certain federal districts and state courts. Congress should make funds available to districts to experiment with different ADR mechanisms, with a body designated to administer the funding program. As part of its ongoing

assessment, the Federal Judicial Center should, in consultation with the districts, evaluate the results of these experiments and, where appropriate, suggest their regular use among all districts.¹⁴⁶

The Civil Litigation Project clearly envisions active judicial case management to help streamline the civil litigation process in federal courts. However, the task force behind the Civil Litigation Project has concluded that judicial case management, or managerial judging,¹⁴⁷ can be pursued without sacrificing due process protections accorded the litigants.¹⁴⁸ Nonetheless, in this context, it is reasonable to foresee federal judges acting pursuant to any legislation enacted as a result of the Civil Litigation Project, becoming much more aggressive in managing mandatory alternative dispute resolution as an overall case management tool.

B. Civil Justice Reform Act of 1990

On January 25, 1990, Representatives Brooks, Kastenmeier, Fish, and Moorhead introduced the Civil Justice Reform Act of 1990 in the House of Representatives, and the Bill was referred to the Committee on the Judiciary.¹⁴⁹ A companion bill was introduced in the Senate under the sponsorship of Senator Joseph Biden, the initial coordinator for the Civil Litigation Project.¹⁵⁰

The Civil Justice Reform Act, as introduced in the House of Representatives, contains thirty-five proposed findings of Congress which focus upon civil litigation delay, expense, and judicial management.¹⁵¹ The Act also provides for differentiated case management of the type recommended in the report of the Civil Litigation Project.¹⁵²

The proposed legislation would require that each United States District Court develop a civil justice expense and delay reduction plan in accordance with the provisions outlined in the proposed legislation. The plans would apply to all civil proceedings. Each United States District Court would be directed to develop its plan with a view toward facilitating deliberate adjudication on the merits in appropriate cases, streamlining discovery, improving judicial case management, and generally renewing the court's commitment to the just, speedy and inexpensive resolution of civil disputes. The proposed legislation specifies certain

146. *Id.* at 23-24.

147. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

148. Justice for All, *supra* note 145, at 24-25.

149. Civil Justice Reform Act of 1990, H.R. 3898, 101st Cong., 2d Sess. (1990) [hereinafter House Reform Act].

150. Civil Justice Reform Act of 1990, S. 2027, 101st Cong., 2d Sess. (1990).

151. House Reform Act, *supra* note 149, at 2-4 (Section 2 of the Act).

152. *Id.* at 5-9.

requirements which shall be included in each civil justice expense and delay reduction plan.¹⁵³

As to requirements for alternative dispute resolution, the Civil Justice Reform Act of 1990 will require the civil justice delay plans of the district courts to include:

(11) An early neutral evaluation program, to which certain categories of cases identified in each plan will be assigned and through which the parties and their counsel present the legal and factual bases of their case to a neutral court representative at a non-binding conference that takes place at the earliest possible stage in the litigation.¹⁵⁴

The Act, by its own terms, focuses upon the need for judicial case management. The early neutral evaluation conference, which may be mandatory in certain cases, appears to be designed to provide parties with information on ADR alternatives. If the parties do not voluntarily agree on an ADR procedure which disposes of the litigation, it is not clear the extent to which the Civil Justice Reform Act of 1990, with its emphasis on judicial case management, would foster mandatory ADR as a part of the pretrial proceedings of the court.

VII. CASE MANAGEMENT VERSUS VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION

The preceding discussion concerning proposals to overhaul the civil justice system, with a particular emphasis on mass torts or complex litigation, discloses a common theme of case consolidation and management. In order to try to improve the efficiency of the administrative aspects of handling the litigation, the various proposals focus upon consolidation of cases before a single judge, typically a federal judge, and provide for extensive case management authority. However, as judges are given an ever wider range of powers, the individual rights of individual litigants are increasingly subsumed in the desire to make courts efficient. In addition, toward the same objective of consolidation and efficient case management, concepts of voluntary alternative dispute resolution are transformed into court-annexed procedures that can be applied in a mandatory manner by a transferee judge in a consolidated case.

This Article suggests that the emphasis on consolidation and case management is misplaced. Additionally, as the focus of consolidation and case management brings alternative dispute resolution into the process, the focus on mandatory alternative dispute resolution techniques, such as court-annexed arbitration, is similarly misplaced. These techniques are being considered as tools of the courts to manage cases and perhaps to force settlements. The adjudicatory nature of mandatory alternative dispute resolution as contemplated by these plans

153. *Id.* at 5.

154. *Id.* at 7-8.

and proposals accentuates the already inappropriate emphasis upon forced consolidation and multicase management.

From the standpoint of alternative dispute resolution it is urged that the appropriate emphasis should be upon voluntary dispute resolution and upon the dissemination of knowledge and information concerning the alternative dispute resolution options which may be available. As a substitute for the mandatory procedures denominated as alternative dispute resolution procedures in the consolidation and case management proposals, concepts analogous to the multi-door courthouse and early neutral evaluation should be employed early on in the dispute resolution process to focus the parties' attention on voluntary dispute resolution.

One need only examine the recent litigation involving summary jury trials to begin to appreciate the impact and difference between court-annexed "alternative dispute resolution" procedures which are mandatorily imposed upon litigants, and voluntary alternative dispute resolution techniques which are utilized by agreement of the parties to seek a common ground of settlement and dispute resolution.

A. *Voluntary Versus Mandatory ADR: The Summary Jury Trial Example*

The summary jury trial was originated in 1980 by Judge Thomas Lambros of the United States District Court for the Northern District of Ohio.¹⁵⁵ The summary jury trial seeks to (i) provide an inexpensive but accurate forecast of trial outcomes and (ii) refine the settlement analysis or calculus of the parties.¹⁵⁶

A summary jury trial is analogous to a minitrial, except a jury hears the case and a judge actually presides at the "trial." Generally, a summary jury trial is ordered by a judge and conducted by either the judge or a magistrate. Some judges, however, employ the procedure only if both parties agree, and there have even been cases in which the attorneys themselves have requested a summary jury trial. Although the formats vary, the summary jury trials generally are one-day proceedings using a six-person jury. The jurors issue their nonbinding verdict after hearing the presentations of opposing lawyers, but without the benefit of witnesses' testimony.

A summary jury typically consists of six citizens chosen from the normal jury pool, with opposing counsel permitted two preemptory challenges each. Jury instructions are delivered by the judge, but are limited to the central issues. Some judges inform the juries that their verdict is merely advisory, while others do not.

Counsel are given from one to three hours to present their case through a combination of opening and closing arguments, plus a summary of the evidence. In other words, the attorneys may have latitude to mingle argument and representations of fact. The lawyers also are free to read briefly from depositions

155. See Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 43 (1980).

156. See *Associated Pa. Contractors v. Jannetta*, 738 F. Supp. 891 (M.D. Pa. 1990); Maatman, *The Future of Summary Jury Trials in Federal Courts*, 21 J. MARSHALL L. REV. 455 (1988).

and other documents. However, generally speaking, only evidence that would be admissible at trial is permitted. Representations of fact must be based on information obtained during discovery or by a professional representation that counsel has spoken with the witness and is repeating that which the witness stated. Counsel may present exhibits to the jurors. Objections by counsel are not encouraged in the summary jury trial process, although conduct which is "out of bounds" may be subject to objections and rulings by the court.

To summarize, a typical summary jury trial procedure might include the following steps: (1) Judge addresses the jury; (2) Plaintiff's presentation; (3) Defendant's presentation; (4) Plaintiff's rebuttal; (5) Judge's instructions to jury on the law; (6) Jury deliberation; and (7) Results (Some courts may require unanimity on the question of liability; others do not).

Some courts which have used the summary jury trial procedure have allowed the parties leeway to provide notebooks for the jury with key documents and deposition summaries selected by the parties. The parties may utilize more than one lawyer or "presenter" to present a summary jury trial. The summary jury trial may or may not actually utilize live witnesses.

Some maintain that summary jury trials have become an increasingly popular tool for alternative dispute resolution among the federal judiciary, particularly for hard-to-settle cases that would monopolize a courtroom for weeks or months at a time if they went to trial.¹⁵⁷

In those cases in which a summary jury trial has failed to bring about a settlement, the advisory verdict generally has proven to be an accurate forecast of the subsequent jury verdict delivered following a full-scale trial. Judges and lawyers familiar with the procedure credit its success in promoting settlements to a variety of factors. These factors include: (1) The jury's advisory opinion enables attorneys for both sides to get a better handle on how a full-fledged jury would evaluate their case after sitting through an actual trial; (2) The clients get a sense of the strength of the opposition's case because they are required to attend the trial; and (3) The summary jury trial provides an emotional outlet for clients—and their lawyers—by giving them an opportunity to have, in effect, their "day in court."

If the six-person jury is unable to reach a unanimous verdict, each juror is encouraged to render an individual verdict. A split verdict has occurred in about ten percent of the summary jury trials. From the judge's point of view, when a jury renders a split verdict it may be even more conducive to a settlement because both sides can see the risk of going to trial.¹⁵⁸

Rule 16(c) of the Federal Rules of Civil Procedure provides, in part, that at pretrial conference "the participants . . . may consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute." This rule was

157. See generally Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).

158. See Ranii, *New Spurs to Settlement: Summary Jury Trials Gain Favor*, NAT'L L. J., June 10, 1985, at 1; Maatman, *supra* note 156, at 463.

thought to provide the authority and framework for the use of summary jury trials in federal court. In 1984, the Federal Judicial Conference of the United States endorsed the use of the summary jury trial as an effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases.¹⁵⁹

The authority of the federal courts to order the use of summary jury trials, even over the objection of a party, had not been seriously questioned until *Strandell v. Jackson County*.¹⁶⁰ The Seventh Circuit held in *Strandell* that the Federal Rules of Civil Procedure do not provide the authority for federal courts to order a litigant into a summary jury trial over that litigant's objection. The court concluded that "while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."¹⁶¹ The Seventh Circuit further concluded that the pretrial conference was intended, under the rule, to be informational and factual, and was not intended to be coercive. The court further noted that a mandatory summary jury trial could affect the balancing between two core concepts under the rules: disclosure in the pretrial discovery process and the protection of attorney work product.¹⁶²

According to the Seventh Circuit in *Strandell*, convenience, docket-clearing expedience, and the regulation of procedure should not force a party to sacrifice its substantive rights. Absent a reworking of the Federal rules, mandatory summary jury trials are not authorized.¹⁶³

As a threshold matter, some courts and commentators wonder whether the federal courts have the statutory authority to empanel citizens selected from the district court's master wheel to sit for purposes of an "advisory" and clearly "non-binding" summary jury trial.¹⁶⁴ Thus, even if the parties ask for or consent to a summary jury trial, there is a legitimate question of authority of the federal courts to proceed with a consensual summary jury trial. At least one court has squarely held that such authority simply does not exist.¹⁶⁵

In *McKay v. Ashland Oil, Inc.*,¹⁶⁶ the court "respectfully disagreed" with the Seventh Circuit decision in *Strandell*. In so doing, the *McKay* court held that a local court rule allowing a judge to order parties to participate in non-binding summary jury trials may be a valid exercise of the power of federal district courts.

The *McKay* case involved claims of wrongful discharge of the plaintiffs by defendant Ashland Oil Corporation. The court characterized the case as complex

159. See Maatman, *supra* note 156, at 457.

160. 838 F.2d 884 (7th Cir. 1987).

161. *Id.* at 887.

162. *Id.* at 888.

163. *Id.* at 887.

164. See Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990); Maatman, *supra* note 156, at 477; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 53 U. CHI. L. REV. 366, 386-387 (1986).

165. Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990).

166. 120 F.R.D. 43 (E.D. Ky. 1988); see also *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (the court may order parties to participate in a summary jury trial).

because of the plaintiffs' claims that various business transactions by defendant included illegal bribing of foreign officials, and that plaintiffs' discharge was due to their unwillingness to cooperate in these schemes.¹⁶⁷ The case was set for a six-week trial. To facilitate settlement, and over the plaintiffs' objection, the court ordered a five-day summary jury trial under its Local Rule 23. The plaintiffs moved for reconsideration of this order based upon the *Strandell* decision. The district court held on reconsideration that a mandatory summary jury trial is "a valid pretrial settlement procedure."¹⁶⁸

The local rule at issue in *McKay* provided that "A judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution."¹⁶⁹ The court concluded that Rule 23 authorized a mandatory summary jury trial.

The *McKay* court observed that each federal district court is authorized by Rule 83 of the Federal Rules of Civil Procedure to adopt rules governing its practice, so long as they are consistent with the federal rules.¹⁷⁰ Local Rule 23 was deemed valid under Rule 83, since far greater intrusions into the autonomy of trial lawyers and parties have been upheld under that rule.¹⁷¹ For example, *Rhea v. Massey-Ferguson, Inc.*¹⁷² upheld Local Rule 32 of the Eastern District of Michigan, which authorizes judges to refer certain cases to mandatory mediation and imposes costs if a party does not better the evaluation of the mediators by ten percent at trial. Many other cases, the *McKay* court notes, have upheld referral to nonbinding arbitration, and a summary jury trial is essentially nonbinding arbitration with an advisory jury instead of arbitrators. The *McKay* local rule also met the U.S. Supreme Court's test for local rules under *Colgrove v. Battin*,¹⁷³ in that it is not determinative of the outcome of litigation.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. The Federal Rules of Civil Procedure provides:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

172. 767 F.2d 266 (6th Cir. 1985).

173. 413 U.S. 149 (1973).

If a court does order a summary jury trial, can the press attend? No, said the trial court in *Cincinnati Gas & Electric Co. v. General Electric Co.*¹⁷⁴ However, a group of newspapers argued on appeal to the Sixth Circuit on April 8, 1988, that (i) the summary jury trial transcript should be opened, (ii) that the summary jury should be released from a gag order, and (iii) that a restriction upon the access of the press to court controlled proceedings (as distinguished from settlement conferences or private ADR, such as arbitration) is unconstitutional.

The United States Court of Appeals for the Sixth Circuit upheld the district court's closure order in *Cincinnati Gas & Electric Co. v. General Electric Co.*¹⁷⁵ The *Cincinnati Gas* case involved a suit brought in federal district court by the owners of a failed nuclear power project. Litigation was initiated against General Electric alleging that General Electric concealed flaws in the nuclear reactor system it sold to the owners of the project. Plaintiffs claimed \$360,000,000 in damages as a result of the defective reactor system. The particular nuclear power project at issue involved considerable public interest because of alleged cost overruns and charges of corruption as well as the controversy surrounding the general nuclear power issue. The power plant was eventually abandoned as the site of an electric generating facility. Once the litigation was underway, the district court judge entered a closure order to prevent the public and press from attending a summary jury trial in the case. The judge ordered that a transcript be made of the summary jury trial to preserve the substance of the proceeding in case his decision regarding the closure order was overturned on appeal.¹⁷⁶

In upholding the closure order, the Sixth Circuit first concluded that historically there has been no recognized right of access to summary jury trial in part because this mechanism has been in existence only since 1980. In this regard the Sixth Circuit stated:

At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference. It is important to note that the summary jury trial does not present any matter for adjudication by the court. Thus, we find appellant's argument to be unpersuasive and therefore hold that the "tradition of accessibility" element has not been met.¹⁷⁷

The Sixth Circuit also determined that public access did not play any significant positive role in the functioning of the summary jury trial. Indeed, the court concluded, that public access would actually be detrimental to the process

174. 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (1988), *cert. denied sub nom.*, *Cincinnati Post v. General Electric Co.*, 489 U.S. 1033 (1989).

175. 854 F.2d 900 (6th Cir. 1988), *cert. denied sub nom.*, *Cincinnati Post v. General Electric Co.*, 489 U.S. 1033 (1989). *See also* Note, *The Public's Need to Know vs. Effective Settlement Techniques: The First Amendment Confronts the Summary Jury Trial*, 1990 J. DISP. RESOL. 149.

176. 117 F.R.D. at 600.

177. 854 F.2d at 904.

if one of the parties has concerns about confidentiality, and would thus diminish the effectiveness of the summary jury trial as a settlement device.¹⁷⁸

The argument of the newspapers opposing the closure order has been summarized as follows:

The four Ohio newspapers that intervened to contest the closure order argued that a summary jury trial bears too much resemblance to a trial to be considered simply another settlement technique. For example, a judge paid from tax dollars presides over the proceeding, and a jury of citizens listens to the case and renders a verdict. In addition, the proceeding serves as a forum for discussion of legal issues and, in this case, matters of paramount public concern. The newspapers contrasted the summary jury trial with a typical settlement conference to show that the proceeding has more in common with the regular trial. They also noted that the proceeding occurred after the final pretrial conference with the judge. For these reasons, they argued, a summary jury trial is essentially a trial procedure, and such procedures have historically been open to the press and public.¹⁷⁹

Summary jury trials clearly represent but one ADR option. The foregoing illustrates, however, that even in two-party litigation there may be a number of questions and objectives regarding a mandatory summary jury trial procedure. In consolidated mass tort cases, the parties approaching a summary jury trial will need to address a full range of issues and concerns, including public and media access to the summary jury trials.

B. *Summary Jury Trials in Consolidated, Complex Litigation*

Given the ongoing debate concerning mandatory summary jury trials versus voluntary summary jury trials; concerning the ability of the courts to use jurors for summary jury trials; concerning public access to summary jury trials; what will be the extent of this debate in the context of consolidated complex litigation? For purposes of discussion, let us assume consolidation under the ALI's proposed multicase, multiforum consolidation statute. Let us assume that 200 products liability cases from federal and state courts are consolidated in one transferee court.

Pursuant to the ALI's proposed statute, the transferee court will try to identify individual and common issues. As to the individual issues, the transferee court may order mandatory forms of alternative dispute resolution. In this regard, it would be entirely within the authority of the transferee court to determine, and

178. *Id.*

179. Comment, *Cincinnati Gas & Electric Co. v. General Electric Co.: Extinguishing the Light on Summary Jury Trials*, 49 OHIO ST. L. J. 1453, 1464 (1989).

order, that the parties would be required to participate in a mandatory summary jury trial on individual issues, before proceeding to trial in the case. From the defense standpoint, the defendant manufacturer could be faced with 200 summary jury trials on individual issues in the products liability claims. From an individual plaintiff's standpoint, plaintiff would be forced into a summary jury trial which might represent yet another hurdle or obstacle in plaintiff's path to the jury. In addition, both the plaintiff and the defendant would, of necessity, undergo these mandatory summary jury trials of individual issues in a context segregated from the larger case involving the overarching common issues.

If one considers the possibility of consolidating 200 products liability cases in a federal district court before Judge Thomas Lambros, then mandatory summary jury trials would seem to be a very realistic possibility. The point is, however, that any transferee judge would be in a position under the ALI proposal, or similar proposals, to enforce mandatory summary jury trials. There seems to be little discussion in any of the proposals as to whether this is a direction in which the legal community wants to be heading.

Consider, for example, the other potential problems if a transferee judge under one of the consolidation proposals discussed above, orders a summary jury trial on the issue of causation, and allows the press to attend. Do litigants want a federal judge to have this kind of power over mandatory ADR procedures? Does the judicial system want this much concentrated power to force mandatory ADR upon the parties?

C. Voluntary ADR: The Early Neutral Evaluation Example

Arbitration and mediation are ADR procedures which have been in existence for some time and are utilized fairly extensively. However, parties and counsel have also begun to devise hybrid dispute resolution procedures tailored to fit the specific matter in controversy. These hybrid procedures tend to borrow aspects of one or more of the established alternatives and modify or combine them to satisfy the needs of the participants in a particular case.

Experience suggests that the analysis of a legal dispute may properly include a review of available dispute resolution processes as well as the possibility of devising a hybrid process more likely to succeed under the facts and circumstances of the particular case. Many of the hybrid procedures encourage communication by and among the participants not only as to the procedures to be utilized but also the result sought to be obtained. However, alternative procedures, in and of themselves, will not always provide more efficient and effective means of dispute resolution. In some cases, the alternatives will simply not be appropriate.

Early neutral evaluation is a newly established procedure which provides for a confidential evaluation session conducted by a neutral appointed by the court or by some other mechanism. At the session, the parties briefly state their claims and positions and with the help of the neutral attempt to reduce the scope of the dispute by identifying areas of agreement and putting aside nonmaterial claims while settlement possibilities are explored. Plans for sharing information may be

discussed. The evaluation is intended to help the parties view their cases more objectively at an early enough stage in the process to make a difference. With early evaluation, the neutral may be able to suggest specific ADR procedures to resolve the identified issues still "on the table."

Parties can create opportunities for such assessment on their own initiative. The services of a third party to serve as a neutral can be obtained if the parties so desire. Basically, any time the parties are interested in expediting the dispute resolution process, they should be able to do so. Even if all of the issues in a case are not amenable to resolution outside the litigation process, it may be possible to use one or more of these alternatives to narrow the controversy, leaving fewer questions to litigate. Counsel and clients benefit from remaining alert to such possibilities.

Some courts have taken the initiative to develop procedures for early neutral evaluation. The United States District Court for the Northern District of California developed and initiated an early neutral evaluation program in 1985. The results of that narrowly-defined program encouraged the court to expand the early neutral evaluation program.¹⁸⁰ The central feature of the early neutral evaluation procedure in the Northern District of California is a confidential two-hour case evaluation conference hosted by a neutral who is an experienced practitioner appointed by the court under its inherent power to appoint special masters. The court generally requires that the parties themselves, accompanied by counsel, attend the early neutral evaluation session.¹⁸¹

The early neutral evaluation program in the Northern District of California has had four major components. First, each party makes a 15- to 30-minute presentation of its position in the litigation. Second, the neutral works with counsel to try to reduce the scope of the dispute by identifying areas of agreement and urging the lawyers to put tenuous theories on the "back burner" until settlement possibilities are thoroughly explored. Third, the neutral evaluator candidly assesses the strengths and weaknesses of the arguments, assesses the evidence and offers a valuation of the case, for example, by estimating the likelihood of liability and the dollar range of damages. Fourth, the neutral helps the litigants devise a plan for sharing information and/or conducting discovery that will prepare the case for serious settlement negotiations as soon as possible.¹⁸²

After hearing the parties' positions and making his or her assessment, the neutral evaluator may consider and discuss the possibility of early settlement procedures. If the parties are agreeable, the neutral may caucus privately with one side at a time to encourage candor and to determine whether the parties' privately-articulated positions are close enough to make settlement a viable option.

180. RECKHAM, EARLY NEUTRAL EVALUATION: AN EXPERIMENT TO EXPEDITE DISPUTE RESOLUTION, IN *ADR AND THE COURTS—A MANUAL FOR JUDGES AND LAWYERS: INNOVATIVE STRATEGIES FOR CASE MANAGEMENT, EARLY SETTLEMENT AND DISPUTE RESOLUTION* 165 (1987).

181. *Id.* at 167.

182. *Id.* at 168.

An important feature of this and other early neutral evaluation programs is that the evaluation and planning conference takes place early in the litigation.¹⁸³ In some instances, the neutral evaluation session may be held even before the first judicially-hosted status conference on the theory that using the judge's time at the conference can be more productive if the parties have already met in the context of a neutral evaluation conference.

Although the foregoing discussion represents one court's approach to early neutral evaluation, it should be kept in mind that early neutral evaluation procedures can provide a forum, at least in commercial litigation, for discussing a lawsuit or a dispute, and can provide a vehicle for determining whether alternative dispute resolution procedures might be of assistance.

General guidelines to a neutral in any early neutral evaluation program, perhaps of the type contemplated in the Civil Justice Reform Act of 1990, might include the following:

* Make opening statement:

Describe purpose and procedure;
Set appropriate tone: informal, analytical, helpful.

* Have plaintiff (through counsel) present its side of the case, pointing where feasible to specific documents, witnesses, or other evidence that support important factual contentions.

(During this phase, the neutral keeps his or her questions to a minimum and does not permit others to interrupt with questions or to cross-examine.)

* Have defendant(s) present its (their) side(s) of the case.

* Invite responsive presentations and observations by counsel and parties.

* Ask questions of counsel and parties to clarify and probe.

* Identify common ground, laying foundation for stipulations.

* Identify key places where parties disagree.

* Privately prepare case evaluation:

Likelihood of liability, noting central reasons; Likely range of damages, noting major elements and calculations.

183. *Id.* at 168-69.

- * Ask if parties and counsel want to explore settlement possibilities. If so, consider private caucusing.
- * If no interest in exploring settlement, or if parties try but fail to reach agreement, *evaluator discloses his or her written evaluation and explains the reasoning behind it.*
- * If appropriate, and if consistent with the mandate from the court, discuss the key discovery and/or motions that will equip the parties to value the case, negotiate toward settlement, and efficiently prepare for trial.
- * If appropriate, discuss follow-up: e.g., dates for key discovery or informal exchanges of information (including copies to evaluator), responses to offers, a second evaluation session.

The foregoing discussion of the operation of an early neutral evaluation program may be contrasted with the mandatory imposition of specific ADR techniques such as a court-mandated summary jury trial. Are the individual interests of the litigants being served by voluntary, exploratory programs such as early neutral evaluation or some prototype of the multidoor courthouse?

VIII. CONCLUSION: EMPHASIZING THE VOLUNTARY ASPECTS OF ADR

The Final Report and Recommendations of the ABA Special Commission on Mass Torts, the Complex Litigation Project, the Federal Courts Study Committee, the Multicase, Multiforum Jurisdiction Act of 1989, the Civil Litigation Project, and the Civil Justice Reform Act of 1990 all focus, in varying degrees and with varying approaches, upon the question of case management in multicase, multiforum litigation. A central feature of the more aggressive proposals, such as the Complex Litigation Project, is multicase, multiforum consolidation into one transferee court which will preside over consolidated litigation, through discovery, and if it so determines, through trial.

The consolidation "packages" offer opportunities for managerial judging and case management, all to the possible detriment of the individualized handling of litigation by the individual parties to a lawsuit. The consolidation "packages" also, however, will provide an impact on alternative dispute resolution as it may be used in federal courts. While some of the proposals such as the Final Report and Recommendations of the ABA Special Commission on Mass Torts specifically address alternative dispute resolution, other proposals such as the Complex Litigation Project are silent as to specifics on alternative dispute resolution. However, in all of the proposals cited above, it is contemplated that the federal courts in general, or the transferee courts in the case of consolidated actions in particular, will exercise increasing authority over the case management aspects of

litigation. This presumptively will include authority to identify, and require participation in, various forms of court-annexed mandatory alternative dispute resolution.

In such situations, however, alternative dispute resolution may be viewed more in the context of a case management technique, or a pretrial litigation management technique, rather than one of the traditional forms of voluntary alternative dispute resolution.

If we recognize and acknowledge values of individualized case preparation and case handling, and if we recognize and acknowledge values relating to the voluntary aspects of alternative dispute resolution, perhaps there should be more dialogue and examination concerning the consolidation proposals' use of mandatory, court-annexed alternative dispute resolution procedures.

It cannot be said that voluntary participation in alternative dispute resolution is in any way an antithesis to efficient case handling and management. Thus, for example, we see that the Civil Justice Reform Act of 1990 proposes an early neutral evaluation program through which the parties and their counsel will present the legal and factual bases of their case to a neutral court representative at a nonbinding conference, at the earliest possible stage in the litigation. As suggested by the Report of the Civil Litigation Project, *Justice for All*, the purpose of the early neutral evaluation session will be to point litigants toward voluntary methods of alternative dispute resolution. Although voluntary ADR may not be workable or even desirable for personal injury cases, voluntary ADR and early neutral evaluation may be welcome in commercial litigation.

Early neutral evaluation is consistent with the general concepts of the multidoor courthouse in which the courthouse of the future serves as a dispute resolution center offering an array of options for the resolution of legal disputes.

Should the dialogue on the various case management proposals include more discussion of procedures to expose counsel and their clients to voluntary ADR options? The preliminary evidence suggests that the answer may be yes. Litigants, and particularly litigants in personal injury cases, should not be forced into consolidated litigation or managed, mandatory ADR.