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## COMMENTS ON OWEN M. FISS, *AGAINST SETTLEMENT* (1984)

Jack B. Weinstein\*

### INTRODUCTION

It is strange to be commenting about a debate between Professors Derek Bok (for settlement) and Owen Fiss (against settlement) twenty-five years after the event. Given the high intellect of both scholars, you can anticipate our conclusion: “Both arguments have merit.”

Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts’ automatic washer-dryers.

Since this is the two hundredth anniversary of President Abraham Lincoln’s birth, it is interesting to consider his view as a lawyer who participated in the social and legal controversies of the small cities, towns, and rural communities of mid-nineteenth-century Illinois. In his book, *A. Lincoln: A Biography*, Ronald C. White, Jr., notes that Lincoln had “grown up as a lawyer in a face-to-face society in which he urged his clients to settle because they had to live with one another in small communities.”<sup>1</sup>

Score that one in Professor Bok’s column.

Much of today’s litigation does not arise from eye-to-eye disputes, but between disconnected people and institutions. Mass cases involve harms perpetrated by powerful distant actors—“repeat players,” as some would put it—on anonymous individuals, most without the slightest clue to how the legal system can protect them. And, as Professor Adam Zimmerman of New York University Law School points out in his forthcoming article in the *Duke Law Journal*, left to their own devices under such circumstances, people’s litigation and settlement choices often tend to be irrational, that is to say, nonbeneficial, for themselves.<sup>2</sup>

Score that one in Professor Fiss’s column.

The relationships between potential plaintiffs and defendants in mass cases are often tenuous, transient, and troubled. Yet, the settlement ethic pressed by Lincoln still seems apt even in our society of faceless interactions.

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1. RONALD C. WHITE, JR., *A. LINCOLN: A BIOGRAPHY* 210 (2009).

2. See Adam S. Zimmerman, *Funding Irrationality*, 59 *DUKE L.J.* (forthcoming Mar. 2010) (manuscript on file with the Fordham Law Review).

Settlements may be even more desirable in the mass commercial age in which we now live. Unsettled disputes about harms to large numbers of people across geographic and demographic lines, caused by large entities, present risks of social breakdowns without fair, timely, and efficient resolution. Time-consuming adjudication results in excessive transaction costs and unnecessary stress on individuals, families, local and national economies, and government service networks. If we persist in trying each dispute as if it were a unique horse-and-buggy collision at a muddy intersection in nineteenth-century Cairo, Illinois, businesses may be unfairly saddled with continuing litigations while individuals claiming harm may be left almost indefinitely adrift.

Most mass tort cases must be disposed of by settlement. Trying each of them would completely overwhelm the nation's courts. For example, Zyprexa, an antipsychotic drug, was administered to hundreds of thousands of people with psychiatric illnesses, causing a large number of them to suffer serious side effects such as weight gain and diabetes. Zyprexa users have brought claims and potential suits based on the drug company's failure to warn of these dangerous side effects and on illegal sales programs for off-label usage. More than 30,000 of these cases were transferred to the U.S. District Court for the Eastern District of New York from federal district courts throughout the United States pursuant to an order of the Judicial Panel on Multidistrict Litigation.<sup>3</sup> Almost all of these individual Zyprexa claims have been settled. Similar cases have been litigated and almost all have been settled in state courts.

Had all such cases been tried, they would have overwhelmed our courts for many years. There are less than 2500 civil jury trials in the U.S. federal courts each year.<sup>4</sup> Trying tens of thousands of individual Zyprexa and other civil cases would require multiplying the number of federal and state judges.<sup>5</sup> This prospect alone casts serious doubts on Professor Fiss's aspiration of litigation-without-settlement.

Mass settlements without adjudications and contracts of adhesion requiring arbitration—as in securities, labor, franchising, and the like—do inhibit some useful development of the substantive law. There is then, as Fiss pointed out, inadequate opportunity for policy development by the courts or the legislature acting for the public as a whole.<sup>6</sup>

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3. *See In re Zyprexa Prods. Liab. Litig.*, 493 F. Supp. 2d 571 (E.D.N.Y. 2007).

4. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2008, at 137 tbl.C, 180 tbl.C-7 (2008) (noting 2175 civil trials in federal court in twelve-month period ending Sept. 30, 2008, with 267,257 federal civil lawsuits filed during that time).

5. There are an estimated 149,000 jury trials in state courts across the country per year; about thirty-one percent of those are civil trials. *See* GREGORY E. MIZE, PAULA HANNAFORD-AGER & NICOLE L. WATERS, NAT'L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 7 & tbl.3 (2007).

6. *See generally* Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996) (describing theoretical and practical aspects of Alternative Dispute Resolution).

Yet, once relatively few cases in a multiparty dispute are disposed of individually by trial or summary judgment, sensible policy governing the matter can be determined, and the vast bulk of cases can be settled on reasonable terms. Available then are consolidated discovery, value matrices, controlled attorneys' fees, cooperation between state and federal courts,<sup>7</sup> and assurance that windfalls and inexplicable denials of remedies are avoided through class or quasi-class action dispositions.

To demonstrate why one size—full litigation or full settlement—does not fit all cases, it may be useful to touch on some of the complex cases I have been involved in. My experience with them supports the view that in some cases full litigation of claims should be encouraged to avoid settlements that hide critical facts or substantive developments from the public, precluding (1) adequate compensation to those who were not aware of their rights or injuries and (2) necessary institutional and legal reform.<sup>8</sup> In other instances, reasonably prompt settlement is desirable and can be achieved without a significant number of trials or summary dispositions. In still other cases, some trials and summary judgments are useful in creating an appropriate framework for settlement of most claims.

#### I. WHEN SETTLEMENT IS NOT DESIRABLE

There are cases in which settlement is not desirable. This was apparent from my work with the NAACP Legal Defense Fund on the briefs and related negotiations among those diverse groups dedicated to eliminating racial discrimination. The two most important cases on which I worked were *Brown v. Board of Education*<sup>9</sup> and the One Person—One Vote dispute.<sup>10</sup> They required showdown litigation rather than settlement.

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7. See CODE OF CONDUCT FOR UNITED STATES JUDGES (U.S. Judicial Conference 2009). Canon 4A(4) states, "A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." *Id.* Canon 4A(4). The Commentary to Canon 4A(4) states, "This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (e.g., when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter)." *Id.* Canon 4A(4) cmt. (emphasis added). This is much too narrow a view of cooperation and mediation among state and federal judges. Such coordination in resolving disputes is desirable and common. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 237 (E.D.N.Y. 2007); *In re Zyprexa Prods. Liab. Litig.*, 239 F.R.D. 316 (E.D.N.Y. 2007) (including a "Communication to State Judges on Cooperation Between Federal and State Judges"); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.14 (2004) (including a section on "Coordination Between Courts"); MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS (1997); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1858 (1997).

8. See Elizabeth Chamblee Burch, *A New Way Forward: A Response to Judge Weinstein*, 2009 CARDOZO L. REV. DE NOVO 168; Jack B. Weinstein, *Letter to Professor Burch*, 2009 CARDOZO L. REV. DE NOVO 192; Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1.

9. 347 U.S. 483 (1954).

10. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); see also *Reynolds v. Sims*, 377 U.S. 533 (1964).

In *Brown*, settlements were not possible. The cases were litigated in several states and the District of Columbia. Settlements were proposed in some instances to provide claimed "real equality" for students at schools that would remain segregated; they were properly rejected by the plaintiffs. The cases had to be decided on the facts and the law at the trial and Supreme Court levels if we were to tear down the barriers to racial equality. A great deal of subsequent litigation was necessary since school disputes were fact specific and required a fundamental change in national educational opportunity and desegregation policies.

In the One Person-One Vote cases, litigation was also essential. New York's "rotten boroughs," which provided disproportionate representation for rural communities, could not be tolerated. I wrote for the brief for Nassau County in a case that was argued in the Supreme Court.<sup>11</sup> I participated not only in the New York litigation,<sup>12</sup> but also in the related political efforts to redraw lines for legislative districts. Those of us working on the problem traveled throughout the state, meeting with unions and other groups and trying to get fair apportionment through the legislature—without success. Why would a farmer in northern New York give up his extra voting power to help a Nassau County suburban homeowner who is struggling to pay her taxes? A fair settlement was not possible. The issue had to be litigated. Change had to be based not only on political campaigning and legislative advocacy, but also on fact-finding litigation and Supreme Court decisions.

Litigations involving desegregation and voting power still remain incomplete. We have not fully met equal opportunity and democratic requirements. Yet, we are further along because of decisions to litigate rather than to settle in these fields.

## II. WHEN SETTLEMENT IS ESSENTIAL

There are cases in which timely and efficient settlement is essential. The Agent Orange dispute is one such example.<sup>13</sup> *In re Agent Orange* involved a serious national issue presented by sick Vietnam veterans who were being ignored by their government. Litigation would likely have resulted in the rejection of veterans' claims based on the lack of scientific support as well as the manufacturers' government contractor and war powers defense.<sup>14</sup>

Nevertheless, it was apparent that there had been some negligence in the production of Agent Orange and other herbicides that were designed to be widely sprayed to protect our ground troops in Vietnam from enemies hiding in the jungle. Excessive amounts of dioxin, a carcinogen, had been

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11. See *WMCA*, 377 U.S. at 634; see also *Reynolds*, 377 U.S. at 533.

12. *WMCA*, 377 U.S. 633.

13. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

14. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (recognizing government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 15–17, 24–27, 85–87 (E.D.N.Y. 2005) (applying *Boyle v. United Technologies Corp.* to dismiss claims of Vietnamese nationals and listing similar cases).

negligently incorporated in the herbicides supplied to the government. An appropriate resolution could only be achieved through settlement, with the considerable efforts of the parties and Kenneth R. Feinberg, one of the court-appointed special settlement masters in the case.

Settlement gave those who might have been exposed a ten-year insurance policy against diseases that might arguably have been caused by Agent Orange. It set up a national chain of social work agencies in all fifty states to serve individuals claiming exposure and their families.<sup>15</sup> This disposition muted some of the veterans' political distress while they organized for further assistance from Congress. Ultimately, the federal government provided relief through a program administered by the U.S. Veterans Administration. Such a legislative response is rare. In cases of mass harm where no timely and appropriate remedy is otherwise available, the courts are obligated to act, using all available tools, including settlement.

### III. WHEN SETTLEMENT IS DESIRABLE FOLLOWING SOME INDIVIDUAL ADJUDICATION

Most cases are probably best administered with some trials and summary judgments used to create a rational framework for global settlement. An example of this is the some seventy asbestos cases that I tried.<sup>16</sup> They arose from warship construction in the Brooklyn Navy Yard during World War II. The verdicts in those fully litigated jury cases furnished an estimate of values necessary to craft the settlements of many thousands of cases. A number of trials were required, but settlement of the majority of cases was desirable to timely alleviate the hardships of the many seriously affected victims and their families.

The asbestos cases as a whole on a national basis were mishandled, in part because of the failure of the Supreme Court and our intermediate federal appellate courts to recognize the potential utility of a national class action or series of class actions. Instead, the courts focused on cases in which the attorneys for the plaintiffs overreached and acted unethically. Rather than considering corrective action to prevent overreaching by the plaintiffs' bar, the courts used these cases as a basis for almost destroying the class action as a vehicle for resolving serious asbestos matters on a basis reasonable to both industry and injured. Meanwhile, Congress did nothing to avoid what proved to be a financial and litigation disaster.

In the Suffolk County Developmentally Disabled case, fact-finding litigation followed by a settlement decree served to reduce dreadful conditions for young people in a state facility and gave parents and

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15. Jack B. Weinstein, *Preface* to THE LEGACY OF VIETNAM VETERANS AND THEIR FAMILIES: SURVIVORS OF WAR: CATALYSTS FOR CHANGE xi-xii (Dennis K. Rhoades et al. eds., 1995) (discussing Agent Orange Class Assistance Program (AOCAP)) [hereinafter LEGACY]; *id.* app. H, at 493-96 (listing AOCAP-sponsored social services by state).

16. *See, e.g., In re Joint E. and S. Dists. Asbestos Litig.*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996).

community organizers time and support for political advocacy.<sup>17</sup> The result was the transformation of a huge Bedlam-type institution into modern cottage family-style living accommodations that replaced inhumanity with dignity and respect for the children and the adults they grew to be.

In the diethylstilbestrol (DES) cases, mothers who had taken the drug diethylstilbestrol gave birth to daughters whose reproductive organs were seriously injured. A relatively small number of the cases were tried, setting matrix patterns for subsequent settlement.<sup>18</sup> The most important constructive action coming out of the DES litigation was taken by the state appellate courts in New York and California. They modified tort law so that where the parties could not tell whose product had been used, the recovery would be based on the percentage of each DES manufacturer's production during the year when the mother took the drug. A single trial established year-by-year production ratios.

The Breast Implant litigation suggests why prompt individual trials and other dispositions on the merits are sometimes essential to safeguard against claims that are without merit. *Daubert*-based<sup>19</sup> decisions in the Eastern and Southern Districts of New York and in the District of Oregon cut off plaintiffs' expansive claims that lacked scientific merit.<sup>20</sup> A more robust national trial approach might have avoided unnecessary bankruptcies faced by defendant companies.

Each of these, and many other, litigations provides insights that support or diminish the arguments by Bok or Fiss. Each litigation has individual characteristics of fact, law, and psychological dynamics. And each has to be handled in a way that is sensitive to an enormous diversity of political, economic, and other pressures and considerations.

#### IV. CASES OUTSIDE THE TRIPARTITE STRUCTURE

The cigarette<sup>21</sup> and gun<sup>22</sup> cases that have been before me do not fit the suggested tripartite structure of (1) settlement not possible; (2) settlement critical; and (3) settlement desirable based on a rational framework set by some litigation. These cases were significantly complicated by a political

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17. See *Soc'y for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879 (E.D.N.Y. 1990) (approving settlement); see also *Soc'y for Good Will to Retarded Children v. Cuomo*, No. 78-1847, slip op. at 1 (E.D.N.Y. June 10, 1993) (order closing case on finding that parties fully complied with terms of settlement).

18. *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992).

19. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

20. See, e.g., *In re Breast Implant Cases*, 942 F. Supp. 958, 961 (E. & S.D.N.Y. 1996) (finding scientific evidence inadequate to prove breast implants caused systemic, not just localized, injuries); see also *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402, 1453 (D. Or. 1996) (finding scientific evidence of alleged systemic harm from breast implants "speculative" and inadmissible under *Daubert*). The remedies in these litigations were limited to a small number of plaintiffs alleging localized, rather than systemic, injuries.

21. See, e.g., *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *rev'd sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

22. See, e.g., *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296 (E.D.N.Y. 2007).

barrier: powerful industry and interest groups hampered legislative, court, and administrative solutions that could have been effective in limiting widespread harm.

In the cigarette cases, defendants skillfully avoided any assumption of responsibility for fraudulent advertising that caused the early deaths of millions of smokers.<sup>23</sup> Trials were rare for a number of reasons. Except for a few cases, such as the Florida class actions, there was a failure to come to grips with massive legal responsibility for massive harm. There is now a prevailing judicial view on these matters that is much more conservative than it was in the 1950s and 1960s.

A major settlement with the state attorneys general has required cigarette manufacturers to pay the states a large sum over many years—to be financed primarily by profits from future smokers. Whether the recovery is being properly spent by the states or whether the legal fees were grossly overblown is a matter beyond this discussion. Class actions combined with more individual trials would have been useful in providing both compensation and deterrence.

Social disapproval of smokers, excluding smoking in restaurants and work places, medical pressure to reduce lung cancer, laws, and taxes are proving more reliable means to reduce cigarette use than the work of courts or lawyers. Recent legislation allowing the federal government to regulate tobacco products, including the amount of addictive nicotine in a cigarette and how cigarettes may be packaged and marketed, may provide effective pressures to stop the pushing of cigarettes by manufacturers—change that litigation has been unable to achieve.

The handgun cases involved sales to straw buyers in states with poor control of retail sales of guns. The guns leaked into New York through a criminal pipeline, causing serious harm to our cities.<sup>24</sup>

Trials were frustrated by the inadequacies of the substantive law of nuisance and the National Rifle Association's efforts to block litigation. About two dozen cases were settled in my court. Consent decrees were obtained against the most dangerous out-of-state sporting goods stores, which were responsible for a disproportionate number of illegal guns in New York.

These cases demonstrate the failure of local, state, and federal lawmakers to protect the public from a plain and far-reaching problem in urban areas. The resulting harm, as I see it, results not only in the deaths and catastrophic injuries of people who are shot in our cities, but also in the destruction of the young people who face devastating minimum sentences of incarceration for possessing guns to which they should never have had

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23. See, e.g., *Schwab*, 449 F. Supp. 2d 992; see also Amanda Bronstad, *The Bloom Is off the Rose for Tobacco Claims*, NAT'L L.J., Sept. 21, 2009, at 10.

24. See, e.g., *A-1 Jewelry & Pawn*, 247 F.R.D. 296; *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005), *rev'd*, 524 F.3d 384 (2d Cir. 2008).



access. No political, legislative, or judicial solution to prevent this carnage has materialized.

In view of the blockage of the political route, some gun litigation prior to settlement has proven useful and necessary. Adequate discovery and preparation for trial has facilitated the dissemination of important information to the public. Some of the illegal gun transport routes from southern states to New York City have been cut off through consent decrees.

#### CONCLUSION

Properly conducted and supervised, mass litigations can often best compensate large numbers of those injured, reduce transaction costs, avoid bankruptcies, and provide desirable deterrence of dangerous activities. Because of the failure to utilize class and other mass actions properly, the cost to society has often been greater, and the benefits far less, than what should have been the case. The problem is in part attributable to failures of industry, the medical and legal professions, and others charged with protecting the public.

I would have preferred that the legislative, executive, and judicial branches acted more effectively to control aspects of such large litigations as Asbestos, One Person-One Vote, Cigarettes, and Zyprexa. Better protective work by administrative agencies would have helped in the Asbestos, DES, Guns, and Zyprexa litigations, and particularly in avoiding the many injuries caused by cigarettes and handguns. Given the political failure to provide adequate protection, the courts have a failsafe, default obligation to provide constitutionally required protection of the public through deterrence against dangerous conduct and reasonable compensation to harmed individuals.<sup>25</sup>

In light of the pragmatic bent of our lawyers, judges, legislators, and jurors, both Bok and Fiss partly seem right, even if at times unnecessarily dogmatic in their opposing views. Exercise of sound judgment by administrative agencies, lawyers, corporations, and individual litigants in the criminal and civil justice systems is required to find the right mix of settlements and trials in the many distinctive disputes that our contemporary complex society produces.<sup>26</sup>

As we have seen in criminal sentencing, rigid and excessive reliance on ideology can lead to massive injustices. The same thing may be said of civil disputes.

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25. See John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541–43 (2005); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1 (2008).

26. See sources cited *supra* note 8.