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TRANSPARENCY AND CIVIL JUSTICE: THE INTERNAL AND EXTERNAL VALUE OF SUNLIGHT

*Kenneth Feinberg**

Thank you very much. I'm discussing today transparency in mass litigation over the next decade or so and what we can expect. First of all, what do we mean by transparency? What I think we mean or what I mean by transparency is first, external outreach providing the consumers of civil justice with more information, more sunlight, more openness. That is the external component. And the internal component: What do we do over the next decade to improve the sense of fairness, of dignity, of due process, of each litigant in the system?

Now, the first principle is to understand what I've learned over the years: transparency is not something that is looked upon with great favor in our system of justice in this country. Certainly in the criminal law it's not. I'm constantly reminded by advocates and judges and students of the criminal justice system that justice is promoted best under the radar screen, outside of the political pressures that impact the criminal justice system, the probation system, the parole system—the discretion exercised under the radar screen to promote some sense of fairness. Transparency is not a given.

In the civil justice system, very often the advocates don't want it. They don't see any great value to transparency. The deal struck in a mass litigation or a mass settlement—the less known by the litigants the better in terms of the nature of the deal and the settlement terms and conditions.

So insofar as my thesis is that there should be and will be over the next decade greater transparency, it is not without dispute as to how far you want to go with this notion of external sunshine and information dissemination and this internal idea of due process, sense of dignity, and fairness for the individual. Now, we've received some warnings about this in recent years. Justice Ginsburg in *Amchem* in

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the Supreme Court, in striking down the asbestos class settlement, pointed out that the majority's notion of notice to latent class members suffering from latent disease was insufficient—that it wouldn't really notify people of their rights and that greater steps should be taken to notify individuals whose rights are going to be impacted by a national settlement.¹

One of my sources of this concern about transparency is Justice Ginsburg in *Amchem* and her defining the issue without resolving it.² And my other source is, of course, Judge Weinstein who, over the last twenty years in mass litigation, has dealt with this internal problem of giving individual plaintiffs in mass litigation a sense of self, of dignity, of participation. It started with Judge Weinstein's Agent Orange opinion in 1984, when he decided to go around the country and hold regional hearings and invite Vietnam veterans to come into his court and vent about life's unfairness, the settlement, and Vietnam and Agent Orange exposure.³

From DES to asbestos, this notion of inviting people who want to be heard to have a hearing informally with the judge: "Judge, I don't like what's being done to me"; "Well, I'm here to listen to DES mothers, the opportunity for individual litigants to have a sense, an ideal, that someone is listening."

Now, in the judicial regimen and the administrative law regimen, there are signs that in the next decade you are going to see more of this. In the administrative law regimen, the administrative state as an alternative to litigation, the 9/11 fund is the best example. We tried to implement both external and internal transparency, and it was successful.

Externally, what we did with the 9/11 fund is, after we promulgated these regulations on how the fund would work, we made them interim regulations—temporary—and then we went out as in Agent Orange, and instead of a legal proceeding, there was an administrative, no-fault alternative to the court system where basically we visited the families who lost love ones on 9/11 and the victims who were physically injured, and asked them: What do you think of these regulations? They're only temporary. We want your input either in person, on the web, by letter. We'll take into account what you think eligibility and calculation regulations should look like and we'll give you an opportunity in town hall meetings, in local forums to be heard, and

1. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

2. *Id.*

3. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

then, after months of interim regulations, we will finalize the regulations based, in part, on your input.

Well, that was a tremendous help in convincing people around the country that the process was fair. They had a vested stake in the regulations. It was very difficult to do. Unlike litigation, it was literally months after 9/11, with families still very emotionally involved in this. And it was tough to visit local city halls; but no tougher, I suggest, than it was when Judge Weinstein in Agent Orange met in St. Louis with Vietnam veterans. And this is the external transparency in mass litigation: reaching out in advance of processing of claims in the administrative regimen to give people a stake.

Now, if you look at an administrative law textbook, this is not something that's mainstream in the twentieth century and even the twenty-first. The notion of undercutting basic principles of administrative law governing efficiency—streamlined, quick, and cost effective—and slowing down that regimen by holding hearings and outreach and giving people an opportunity to comment on the regulations is a minority view. But I suggest that in the administrative regimen, it worked with 9/11. Internally, we gave every single victim the right to be heard before calculating awards, before rendering checks, in fact, sometimes before even finding individuals eligible.

I personally conducted 1500 hearings. Did it slow down the fund? Yes. Was it costly? Yes. Was it necessary? Yes, giving every individual 9/11 family the opportunity to be heard. It was similar to Judge Weinstein inviting any DES woman who is unhappy with her circumstances to visit him.

Now, most of these hearings had nothing to do with the calculations of compensation. Few people who came to see me decided to talk about money: "Mr. Feinberg, I'm here for my hearing. I was married to my wife. She died in the World Trade Center. We were married for twenty-five years, and I want to start off this hearing by playing you a videotape of our wedding twenty-five years ago. I want you to see what those murderers did to my wife, an angel."

"Mr. Feinberg, I lost my son—he was twenty-four years old—at the Pentagon, and I want to start off this hearing by playing you a video of his Bar Mitzvah when he was thirteen. What an angel he was. There's his uncle. That was his aunt. She died a few years ago."

Transparency—giving people in this case due process, a stake in the proceeding—I think was extremely valuable. And on the legal side, the notion of transparency in the twenty-first century is going to take on new meaning, both external and internal.

External: This notion that it is satisfactory in mass litigation to simply announce a settlement and publish it in the newspaper, those days are ending. Reasonable notice in the twenty-first century should mean something different. Judge Weinstein or some of our other panelists mentioned the use of the Internet. Take a look at the Virgin Atlantic/British Airways private antitrust settlement announced about a month ago and examine the notice program. Publication in the newspaper? Sure; but e-mail, website, blogs as additional ways to notify millions of people. The technology in the twenty-first century of what constitutes transparency and the correct external notice constitute a whole new matter.

I'm learning this. Do you know there's a 1-800 facility now, a technological facility, where you can have a 1-800 call and on that call have thousands of people, not ten or twenty. In 1984 Judge Weinstein traveled around the country to hold five or six regional Agent Orange hearings. Today, you can visually invite people to city halls around the country and the host is in the Eastern District or the Southern District or the Chief Judge here in Chicago.

So, one very practical transparent issue in the twenty-first century is going to be technological ways to give people more of a stake in terms of outreach by letting them know, educating them not only about a settlement but about the conduct of the litigation. Are we only talking about class actions? No. We're talking about aggregative settlements. Read Sam Issacharoff's "Law of Aggregate Litigation," published by the American Law Institute this year, a very valuable monograph, discussing how we need to deal with transparency in mass litigation not only with Rule 23 but with aggregative claims, MDL, local consolidations.⁴

Read Judge Weinstein's *Zyprexa* opinion last year.⁵ He's coined a new phrase: a "quasi class," mainly the principles governing due process and notice in Rule 23 may be, and should be, transferrable to any aggregative claim, even if it's not a Rule 23 class, dealing with notification of claimants, legal fees, opt-out rights or rights not to participate in an aggregative settlement; a very valuable opinion discussing how in the twenty-first century some of the principles governing notice in Rule 23 ought to also be deemed important in a non-23 aggregative situation. He was focusing on the *Zyprexa* case involving the settlement of 7000 MDL non-class claims.

4. SAN ISSACHAROFF, *LAW OF AGGREGATE LITIGATION*, (American Law Institute 2008).

5. *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007).

Most lawyers aren't looking for transparency, in my view, at least the way I see it day-to-day. Most lawyers prefer remaining under the radar screen. First of all, we don't want anybody mucking up the deal; if too many people opt out, people will come into the fairness hearing and object. Too much sunshine gives you sunburn. It's a dangerous thing.

The defendant does not want transparency. The defendant wants ninety-nine percent of everybody to participate, but, again, we're counting on the plaintiff lawyer to make sure everybody is on board.

Now, of course, once there's a settlement, once the deal is done, everybody wants transparency. We want as many people to come into the deal as possible. It impacts not only the fee issue, but it also impacts the due process review of the deal. So we want as many in, and the defendant wants the releases.

So, once the deal is struck, everything changes in terms of transparency—in terms of outreach, notification, transparency. In the context of negotiating the deal, let's put a lid on how much information is disseminated. That's the way it works.

Now, there are always problems with transparency, with outreach, with sunshine, with dissemination of knowledge. In 9/11 and in Agent Orange, Dalkon Shield, and in other mass litigation, too much transparency runs up against legitimate concerns of confidentiality. A balance must be struck.

In the 9/11 fund hearings, I can't recall how many times a family member would come to me and say: "Mr. Feinberg, you're going to give me four million dollars tax-free. If the public knows that, my kid will be kidnapped. I won't be able to send my child to school. You can't disclose that Mrs. Jones in Morristown, New Jersey got four million dollars. Please."

It happens everyday in the courtroom and in the administrative regimen—you must balance confidentiality with the public's right to know.

We did it in 9/11. We announced ranges so that the *New York Times* couldn't figure out who received what: "Last week ten people received a total of twelve million," and we fudged it all up so that there's some information available, total amount spent of the taxpayers' money, but not so much transparency and sunshine so that the *New York Times* can knock on the lady's door and print an article the next day.

The same problem with the confidentiality of these settlements in court. "Judge, we want it confidential; we need the settlement

sealed.” Well, you know, Alan Morrison and some others may say: Wait a minute, the public’s right to know must be considered.

On the other hand, query, can you even get the deal done if the public has a right to know? Or does that cloud the opportunity to even get the deal done, if I know it’s going to be in the newspapers the next day?

So again, we must consider how you balance and calibrate transparency in the twenty-first century: There’s an ideal about transparency, but when you try and work out over a seminar or over a conference like this what the ramifications are, and the limits on transparency, that’s a challenge.

So, there’s some food for thought within my twenty minutes.