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Administration of the 2003 Tolbert PCB
Settlement in Anniston, Alabama:
An Attempted Collaborative
and Holistic Remedy

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ESSAY

ADMINISTRATION OF THE 2003 TOLBERT PCB SETTLEMENT
IN ANNISTON, ALABAMA: AN ATTEMPTED COLLABORATIVE
AND HOLISTIC REMEDY

Edgar C. Gentle, III

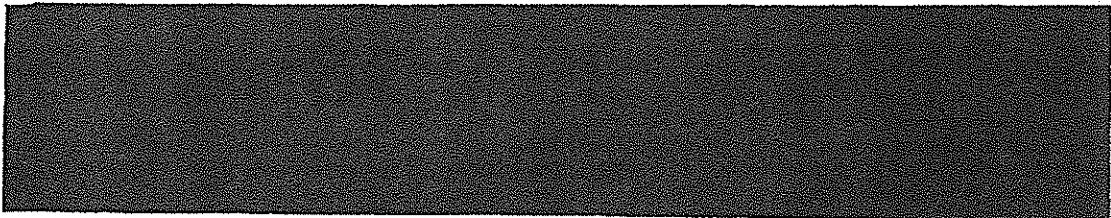
ABSTRACT

The author was the court-appointed administrator of a \$300 million dollar settlement between 18,000 claimants and Solutia, Inc., Monsanto Company, and Pharmacia Corporation (Tolbert Defendants),¹ respecting polychlorinated biphenyls (PCBs) in Anniston, Alabama. In addition to paying for claimed personal injury and property damages, the settlement paid for a medical clinic, and sponsored scientific research and community reconciliation that have begun to provide a holistic remedy. Impediments to case administration were disparate payments to claimants in other settlements, liens on 30% of claimants, and claimant poverty. A collaborative model was used to design the settlement, to help ensure fairness, and to avoid a Rube Goldberg settlement matrix. Settlement design and distribution documents are found at www.tolbertqsf.com.

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* Born February 17, 1953, in Birmingham, Alabama. B.S., 1975, Auburn University; M.S., 1977, University of Miami; B.A., 1979, M.A., 1979, Pembroke College, Oxford University; England (Rhodes Scholar); J.D., 1981, The University of Alabama School of Law. Admitted Alabama State Bar, 1981. Managing Partner of law firm, Gentle, Pickens & Turner, Birmingham, Alabama. AT&T Senior Staff Attorney at Divestiture, 1983 to 1986; Escrow Agent for MDL 926 Breast Implant Settlement, 1992 to present; Tax Counsel to Alabama Governor Siegelman, 1999 to 2000; Claims Administrator of Tolbert PCB Settlement, 2003 to present. My heartfelt thanks to the Honorable U.W. Clemon for providing me the opportunity to administer this case.

1. Of the Tolbert Defendants, Pharmacia Corporation is the successor of the Old Monsanto Corporation; with a mere name change, Solutia, Inc. was spun off by the Old Monsanto Corporation in 1997; and Monsanto Company was created in 2000.



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INTRODUCTION

In 2001, a lawsuit was brought in federal district court before the Honorable U.W. Clemon against the Tolbert Defendants with respect to PCBs manufactured over a span of forty years in Anniston, Alabama.² Instead of a class action, the case consisted of an aggregation of 18,000 individual claimants, with 78% of the claimants born before June 30, 1985, and classified as adults, and the later born 22% of the claimants classified as children. The claimants live (or previously lived) in Anniston, Alabama, near a manufacturing plant that formerly produced PCBs—now owned by Solutia, Inc. but previously owned by Pharmacia Corporation—and claim to have suffered property damages and personal injury resulting from PCB exposure.³ 90% of the claimants are African-American, and 80% earn less than 200% of the federal poverty level—the case resulted from the manufacture of PCBs in a poor, mostly black neighborhood. The case illustrates unforeseen consequences of the manufacture of useful but toxic substances, such as Agent Orange.⁴

The *Tolbert* case settled in September 2003 in tandem with the sister Alabama state court case, *Abernathy v. Monsanto Co.*⁵ Each case settled

2. *Oliver v. Monsanto Co.*, No. 2:02-CV-836-UWC (N.D. Ala. 2002); *Tolbert v. Monsanto Co.*, No. 2:01-CV-1407-UWC (N.D. Ala. 2001).

3. PCBs were used in hundreds of popular commercial applications, including electrical transformers and capacitors, hydraulic equipment, and paints, and many other industrial products. PCBs were manufactured in Anniston from 1929 until 1971. The manufacture and sale of PCBs was subsequently prohibited by the Toxic Substances Control Act of 1976, 15 U.S.C. § 2605(e) (2000), due to PCBs' resistance to environmental breakdown and potential health concerns.

The effect of PCBs on human health remains greatly debated. However, it has been established that PCBs cause chloracne to the skin, and there is also evidence that PCBs tend to cause cancer in animals and impact animal immune, reproductive, and endocrine systems. See AGENCY FOR TOXIC SUBSTANCE & DISEASE REGISTRY, U.S. DEPT. OF HEALTH & HUMAN SERVS., PUBLIC HEALTH STATEMENT: POLYCHLORINATED BIPHENYLS 5 (2000), <http://www.atsdr.cdc.gov/toxprofiles/tp17-c1-b.pdf> [hereinafter PUBLIC HEALTH STATEMENT: POLYCHLORINATED BIPHENYLS].

4. As noted by Yale Professor, Peter H. Schuck: "In the Agent Orange case, we confront an unprecedented challenge to our legal system: a future in which the law must grapple with the chemical revolution and help us live comfortably with it." PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 6 (1986).

5. No. CV-2001-832 (Ala. Cir. Ct. 2002).

for \$300 million and both were approved at a joint fairness hearing, but *Tolbert* had five times as many claimants as *Abernathy*. Both cases were aggregate non-class settlements without a preceding class action.⁶ Of the \$300 million *Tolbert* settlement, \$275 million was paid into a settlement fund, and the \$25 million balance funded a claimant medical clinic. Appointed by the court as claims administrator at Thanksgiving 2003, the author's job has been to decide with the court and counsel for the plaintiffs how the *Tolbert* settlement fund should be distributed among the claimants and to administer the medical clinic. A sister federal case provided for property remediation in the impacted area.⁷

I. THE SETTLEMENT CLIMATE OF CONTROVERSY

Of the 18,000 claimants in the *Tolbert* case, about 14,000 lived in Alabama, mostly in the Anniston area, but 4,000 lived in forty-four other states and overseas. Two hundred were in prison and one hundred were located in foreign countries. Three hundred were deceased when *Tolbert* settled.

Figure 1 summarizes the financial status of the *Tolbert* settlement as we began to decide how to divide it among the claimants in the spring of 2004.⁸ Of the \$275 million in cash, \$120 million had been paid in legal fees (40% of \$300 million pursuant to written contracts between the claimants and plaintiffs' counsel),⁹ and \$9 million was used for the advance payment program under which claimants got \$500 for providing accurate identification data. Conducting blood tests on the claimants for PCBs would cost about \$4 million,¹⁰ and this was one of the few administrative

6. Little previous scholarly attention has been given to such aggregate non-class settlements. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 1.02, 3.01, 3.15 cmt. a (Proposed Final Draft 2009).

7. *United States v. Pharmacia Corp.*, No. 02-C-749-E, 2003 WL 22319070, at *4-*8 (N.D. Ala. Aug. 4, 2003).

8. See *infra* fig. 1.

9. The size of the fee was controversial, with many claimants believing it was too large. If the case had been a class action, the fees might have been 25% to 50% less. Question: Is a large aggregate individual claimant settlement better treated as a class action when setting the level of fees? Professor Vairo asked, in connection with the Dalkon Shield settlement: "Are contingent fees ranging from twenty-four to fifty percent for settling Dalkon Shield claims appropriate if a claim is settled without the need for negotiation or formal dispute resolution" for each claim? Georgene M. Vairo, Essay, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 619-20 (1992).

10. In order to divide the personal injury monies among the claimants fairly, we had to determine their relative PCB levels. PCBs are found in the blood and the fat of humans. However, probably everybody has PCBs in their fat because PCBs are ubiquitous at this point. Two of our expert medical panelists, Dr. David Carpenter and Dr. Coreen Hamilton, advised us to conduct a PCB blood test, which would better distinguish PCB levels among claimants than a fat test, and which is about one-fourth as expensive as a fat test. PCBs come in 209 varieties, called congeners. Dr. Hamilton, a biochemist, suggested that we test for the ten PCB congeners that she indicated are the most frequently found around the plant in Anniston.

expenses the defendants did not agree to pay under the settlement. The defendants, however, did agree to pay virtually all other claimant payment administrative expenses, such as the author's administrative fees in processing and paying claims. This aspect of settlement design helped convince the claimants that we were committed to their case because we were not competing for the same pot of money.

After reserving for other administrative payments in Figure 1, there was about \$142 million to pay claims, averaging about \$7,800 per claimant. Figure 1 was mailed to the claimants to give them a realistic picture of expected payments due to high claimant expectations resulting from the *Abernathy* case, which paid its claimants five times as much. Adding to the disparity in payments among community members was the payment scale in the first PCB settlement of *Owens* in 2001¹¹ of \$20,000 per claimant.

We began blood testing the claimants in January 2004 and completed our first round of testing in June 2005. 80% of the claimants were blood tested in Anniston, with the drawing and collection of blood being organized with LabCorp, and with blood testing being done by four separate laboratories: Northeast Analytical, AXYS, EnChem (now Pace), and Maxxam. We also organized with LabCorp blood-testing sites for claimants in or near the forty-four other states where they were located. Blood testing claimants overseas proved to be impracticable. A special prisoner blood test was conducted for the approximately two hundred claimants incarcerated in Alabama, but blood testing of out-of-state prisoners also proved to be unworkable.

Because we were not able to blood test all claimants, even if they were willing to be so tested, we implemented in the summer of 2005 an option under which claimants could elect to receive \$288.50 in lieu of being blood tested, with this amount being the approximate cost of a blood test. In selecting this option, as described below, a claimant would waive a payment for the PCB blood test results, with adult claimants also waiving the right to payment for a registered nurse interview, but with children claimants not so waiving the right, due to the children's payment enhancement described below.

Settlement-fund-underwritten blood testing was completed for adults in July 2006 and for children in August 2007. Because many of the children are still under nineteen years old, with the last claimant reaching nineteen in 2021, the remaining approximately 350 untested children will still be allowed to be blood tested in the future at their own expense, as a compromise between honoring the legal rights of children as they become adults and helping the settlement fund plan its budget.

This has been the largest blood test in the history of litigation. For each claimant tested, the PCB results were determined on a parts-per-billion basis for each of the ten congeners tested, with the results for the ten congeners then being added to determine a total parts-per-billion score for each claimant. Because of anticipated lower PCB levels in children, a more sensitive test was used than for adults.

When we were engaged to administer the case, limited medical data had been collected for the claimants. Therefore, at the same time that we blood tested the claimants, they were interviewed by a registered nurse in order to obtain standardized medical data for each claimant. Alabama-tested claimants were interviewed onsite by a battery of registered nurses. Registered nurses telephoned out-of-state claimants and interviewed them on the telephone, and claimants that still had not provided the necessary registered nurse interview data were allowed to complete a yellow registered nurse interview form in lieu of an interview. The provision of registered nurses was organized with Medical Staffing Network.

The registered nurse interview form used is based upon input from the *Tolbert* medical panel on what diseases may or may not be caused by PCBs. We then developed a medical score scale of zero to one hundred with our medical panel to rank medical score results collected by the registered nurse interviews.

11. See *Owens v. Monsanto Co.*, No. CV-96-J-0440-E (N.D. Ala. 2001) (involving 1,596 claimants receiving \$20,676.69 each, or arguably much less per capita than *Abernathy* claimants re-

ceived). Ironically, the *Owens* claimants had unanimously approved their settlement but became seriously upset with the subsequent *Abernathy* settlement when it appeared that *Owens* claimants had not received the same amount per capita. Plaintiffs' counsel in the *Owens* case subsequently filed an October 25, 2003 motion to enforce the settlement agreement, based on the following Most-Favored-Nation Clause in the *Owens* April 16, 2001 settlement agreement with the defendants:

In the event Monsanto/Solutia enter into a settlement agreement after the date of this Agreement in another multi-plaintiff PCB/Amniston plant-related lawsuit that is subject to this paragraph and that results in a net present value of the per capita gross cash recovery that exceeds \$20,676.69, then Monsanto/Solutia shall make such additional payments under the terms of this paragraph as may be necessary to make the net present value of the per capita gross cash recovery in this lawsuit equal to the net present value of the per capita gross cash recovery in such other settlement.

Settlement Agreement at 15, *Owens v. Monsanto Co.*, No. CV-96-J-0440-E (N.D. Ala. 2001) (on file with author).

In a December 3, 2003 response, the defendants took issue with the suggested math in the *Owens* plaintiffs' motion, suggesting that, first, because *Tolbert* and *Abernathy* were part of a global PCB settlement, a combined \$600 million is the gross amount of the numerator involved, instead of the \$300 million in *Abernathy*, and the denominator involved 21,000 plaintiffs in *Tolbert* and *Abernathy* combined instead of the 3,500 in *Abernathy* alone. The defendants further argued for four numerator reduction adjustments: (i) \$15 million in costs paid by the defendants; (ii) \$25 million for the medical clinic; (iii) \$60 million in individual grants to some but not all plaintiffs in the *Abernathy* action through a foundation, trust or other organization; and (iv) a \$150 million property relocation/adjustment fund paid to a subset of the *Abernathy* population, reducing the numerator from \$600 million to \$350 million. Hence, under the defendants' math, the per capita amount under the global PCB settlement agreement, involving *Tolbert* and *Abernathy* plaintiffs, was \$16,667 (\$350 million/21,000), or less than the per capita payment in *Owens*.

By order dated January 8, 2004, the Honorable Inge P. Johnson, who presided over the *Owens* Case, decided that only the *Abernathy* Case should be considered for purposes of the *Owens* Most-Favored-Nation Clause computation, without its being cumulated with the *Tolbert* Case. After subtracting (i) \$150 million for a property/relocation fund; (ii) \$60 million for a foundation fund; and (iii) \$15 million for costs, Judge Johnson found a net amount for the *Abernathy* claimants of \$75 million, which, when divided by the 3,486 *Abernathy* plaintiffs, equals \$21,514.63 per capita or \$837.94 more than the *Owens* plaintiffs received, for a net due the *Owens* settlement of \$1,337,352.20.

This order was appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the federal district court by orders dated August 19, 2004; November 8, 2004; and January 5, 2006. Plaintiffs' counsel in the *Owens* Case then petitioned the United States Supreme Court for certiorari on November 2, 2007, and the petition was denied on January 7, 2008.

TOLBERT, ET AL. V. MONSANTO CO., ET AL.
AMOUNT AVAILABLE TO PAY CLAIMS
AT DECEMBER 31, 2003

Settlement Amount
\$ 300,000,000

Tolbert Qualified
 Settlement Fund
\$ 275,000,000

Medical Clinic: \$ 25,000,000 In Ten
 Yearly Installments of \$2.5m plus
 \$500,000 from Pfizer plus \$2.0
 million from Pfizer plus \$100,000
 from Science Study license of PCB
 Blood Test Data, for total of
\$27,600,000

Beginning Balance	<u>\$275,000,000</u>
Plaintiffs' Attorney Payments	-\$120,000,000
Advance Payments (Adults)	- \$7,000,000*
Advance Payments (Children)	- \$2,000,000*
PCB Blood Test Budget	- \$3,985,000*
2003 Estimated Income Tax Payment	- <u>\$150,000</u>
2003 Income	÷ <u>\$668,161</u>
Amount Available to Pay Claims	<u>\$142,533,161</u> *
Average Amount Available Per Claimant Following Advance Payment (18,447 claimants*)	<u>\$ 7,726.63*</u>

*Numbers are Estimates

Figure 1: Summary of financial status of *Tolbert* settlement as of
 December 31, 2003

A fourth PCB case, *Clopton v. Monsanto Co.*, was filed for 5,000 to 7,000 PCB claimants in the same federal court in 2003.¹² In *Clopton*, the court denied requested class certification because "questions of law or fact common to class members" did not "predominate over any questions affecting only individual members."¹³ Hence, a global PCB class action settlement may not have been available in *Tolbert* and *Abernathy*, absent agreement. These four "bites at the PCB apple" illustrate the potentially unfair results of the piecemeal settling of toxic tort cases. The four cases included 28,000 to 30,000 individuals, and considering that Anniston's population in the year 2000 was 21,000, and Calhoun County, Alabama, where Anniston is situated, had a population of 113,000 in the year 2006, the impact of the PCB litigation on this Alabama community has been pervasive.

In retrospect, the fairest solution for the Anniston PCB contamination problem may have been a one-time global class action settlement. However, the class action solution to mass tort settlements has come increasingly under fire, and the court's decision not to class the *Clopton* case casts doubt on the availability of this solution.¹⁴

Other attempted or suggested solutions to curb huge discrepancies in awards among similarly situated mass tort plaintiffs include a comprehensive national medical disability system, or national legislation, such as that passed to compensate 9/11 victims and nuclear reactor victims for personal injury.¹⁵ Even with such global solutions, the debate on a fair compensation rate continues.¹⁶

An example of the resulting climate of controversy experienced in the Anniston community over these multiple and disparate PCB settlements is

12. *Clopton v. Monsanto Co.*, No. CV-03-UWC-3369-S (N.D. Ala. 2003).

13. FED. R. CIV. P. 23(b)(3).

14. See Kenneth R. Feinberg, *Reporting from the Front Line—One Mediator's Experience with Mass Torts*, 31 LOY. L.A. L. REV. 359, 361 (1998) (championing the Rule 23 solution to mass tort settlements); *In re Joint E. & S. Dist. Asbestos Litig.*, 120 B.R. 648, 656 (E.D.N.Y. 1990) (Johns-Manville Asbestos Trust implementing this remedy); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 839 (E.D.N.Y. 1984) (Agent Orange settlement implementing this remedy). Compare, however, more recent cases strictly applying Rule 23 to reject class action settlements. See *Archem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-29 (1997); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740-52 (5th Cir. 1996); *In re Rhone-Paulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1304 (7th Cir. 1995).

Arguably, in reviewing the Asbestos proposed settlement of the *Tolbert* case, Judge Clemon's hands were tied because of the accepted rule that a court must approve or disapprove a settlement as a whole and cannot materially change it by, for example, putting all the *Abernathy* and *Tolbert* money in one bucket and dividing it ratably among all the claimants from both the cases. See *Bowling v. Pfizer, Inc.* 145 F.R.D. 141, 150-51 (S.D. Ohio 1992). See generally *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984); *Cox v. Shell Oil Co.*, No. 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995).

15. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 155-59 (1995). See also SCHUCK, *supra* note 4. See generally 42 U.S.C. § 2210 (2006); Kenneth R. Feinberg, Lecture, 56 ALA. L. REV. 543 (2004) [hereinafter Feinberg Lecture].

16. See Feinberg Lecture, *supra* note 15, at 548-49.

found in a *Forbes* article where *Tolbert* claimant Rose Munford laments, "I'd like for someone to explain to me how this makes sense."¹⁷

To help explain to our claimants why plaintiffs' counsel settled *Tolbert* for much less per claimant than *Abernathy*, Bob Roden, the *Tolbert* plaintiffs' liaison counsel appointed by Judge Clemon, sent the claimants the letter in Figure 2.¹⁸ As the Roden letter relates, the *Tolbert* case was a relatively young one at the time of settlement, having been filed only a couple of years before it settled.¹⁹ By contrast, *Abernathy* had been litigated for seven to eight years, and many of the *Abernathy* claimants already had favorable jury verdicts.²⁰ In addition, one of the defendants in the *Tolbert* case, Solutia, had threatened bankruptcy.²¹ In settlement discussions, the defendants argued that if the *Tolbert* claimants' lawyers did not accept the \$300 million offer, the claimants may receive nothing, with Solutia threatening to go into Chapter 11 bankruptcy, and staying the case, perhaps indefinitely.²² If this had happened, the *Tolbert* claimants would have had to file bankruptcy claims and might never have been paid anything. Indeed, after the *Tolbert* case settled, Solutia filed a petition in bankruptcy in December 2003 as a Chapter 11 debtor.²³

II. CLAIMANT PAYMENT PROGRAM DESIGN BY COLLABORATION

Because of the financial and social challenges in our case, and to be as fair to the claimants as possible, we designed our settlement with a maximum amount of claimant input, including large town meetings where we answered every question raised, convening a claimants advisory committee, mailing the claimants a questionnaire on claimant payment program design based upon the town meetings and input from the claimants advisory committee, drafting a resulting payment matrix and mailing it to the claimants for further input, and having three days of fairness hearings at which the claimants could be heard on design of the payment program.

Wearing the "creative problem solver" hat of a claims administrator described by Kenneth Feinberg,²⁴ we tried to sell the settlement to the community and crafted its payment design through attempted consensus. The fairness hearing may have served as an imperfect surrogate for the traditional aggregate non-class settlement ethical rule that claimants must approve the settlement before plaintiffs' counsel may do so, which did not

17. Suszn Kitchens, *Money Grab*, *FORBES*, Nov. 15, 2004, at 162, 168.

18. Letter from Robert B. Roden, *Tolbert* Plaintiff's Liaison Counsel, to *Tolbert* Claimants (March 18, 2004). The letter is reprinted *infra* figure 2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Feinberg, *supra* note 14, at 361.

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March 18, 2004

Dear Claimant:

Many of you have questioned the decision to settle the Tolbert/Oliver case for 300 million dollars, when the Abernathy claimants were receiving the same amount. Many factors played into this including:

- 1) The fact that the Abernathy plaintiffs had been in litigation for seven to eight years.
- 2) That actual verdicts were being handed down in the Abernathy case (a jury had actually been impaneled for 18 months).
- 3) Abernathy had twice been argued before the Alabama Supreme Court.
- 4) On average the Abernathy plaintiffs lived closer to the Solutia/Monsanto facility.

The attorneys for the Tolbert plaintiffs argued long and hard that all these factors should be given less weight and that Tolbert plaintiffs should receive more.

In the end the attorneys for Tolbert were advised that 300 million was all there was for them, and further that if it were not accepted Solutia was prepared to file for bankruptcy within a few days. This raised the real possibility that the plaintiffs could get little or nothing.

The attorneys for the plaintiffs researched the bankruptcy issue and hired outside counsel specializing in bankruptcy. In the end, it was their conclusion that the plaintiffs were at risk of receiving nothing if Solutia did bankrupt. As you all know, Solutia did subsequently file for bankruptcy. We should all be thankful that the case had already settled and the settlement will not be affected by this unfortunate event.

The attorneys in the Tolbert matter worked very long and hard for the plaintiffs and used their best judgment in the end. We all appreciate the tragedies you people have suffered and we all continue to be with you. Thank you for allowing us to represent you in this matter. We look forward to seeing you all at the next community meeting.

Very truly yours,

Robert B. Roden

Robert B. Roden

Figure 2: Plaintiffs' counsel letter to *Tolbert* claimants

happen here.²⁵ Following the fairness hearing, we made our final recommendations to the court on payment program design, which were approved in June 2004. Claimant personal injury payments began immediately, with the first batch of checks going out two days later on June 16, 2004, and with the oldest claimants being paid first. We are unaware of any other mass tort payment program so designed through attempted claimant consensus. This method carried out Judge Jack B. Weinstein's advice in mass tort settlements to let the claimants tell their stories in distribution plan design so that they will believe that the resulting plan is more just, and to allow the neutral special master to experience the necessary empathy element of fair decision making.²⁶ At bottom, though, this settlement plan, like many others, was arguably ad hoc private tort reform without legislative safeguards.²⁷

Defining fairness, much as Mr. Feinberg does, as consistency,²⁸ the settlement payment matrix had no subjective factors. Applying our democracy theme, the claimants' answers to the questionnaire and the fairness hearing were the major factors in plan design.

The first design step was to split the settlement fund between personal injury and property damage. The vast majority of claimants agreed that personal injury was more important. We therefore came up with a simple proposal that personal injury would count twice as much as property damage, so that, with 18,500 claimants and 3,000 parcels, a 93/7 split was computed.

The resulting \$11 million property damage fund was distributed to the claimants in proportion to the tax appraised value of their property in the affected area because we did not have the resources to test the property for PCBs and PCB levels varied greatly due to flooding over the years, contamination of the soil by neighboring foundries, and relocation of fill dirt. Similar property payment programs have been used in other toxic tort settlements.²⁹

The property damages program was the easy part of the payment matrix, with the difficulty coming with personal injury, as subjective factors

25. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438 (2006). But see PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. b (Proposed Final Draft 2009) (suggesting the aggregate settlement rule should be relaxed for large-scale settlements, such as *Tolbert*). See also Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12, for a discussion of the recent aggregate non-class \$4.85 billion global Vioxx settlement, where the participant plaintiffs' counsel were required to settle for all of the plaintiffs with no opt-outs, much as in *Tolbert*, with the amount due each plaintiff to be determined later, much as in *Tolbert*.

26. WEINSTEIN, *supra* note 15, at 8, 10, 13, 56-59, 161.

27. See JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 6 (1996), [http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/\\$file/Tidmarsh.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/$file/Tidmarsh.pdf).

28. Feinberg Lecture, *supra* note 15, at 553.

29. September 2004 Settlement Approval Order in *Samples v. Conagra* and *Williams v. Conagra*, in the State Circuit Court of Pensacola, Florida.

are almost impossible to eliminate. In designing the personal injury program, we first had to divide the corpus between the 78% who were adults and the 22% who were children represented by a guardian *ad litem*. Because the children could not be paid until age nineteen, and the last child would not reach that age until 2021, the money would be held for them for a longer time. In the meantime, the adults wanted to be paid immediately, with their friends and relatives in the *Abernathy* case already having been paid in the spring of 2004. An initial proposal to divide the money based upon the number of claimants in the two categories was abandoned because detectible PCBs from the blood test were found three times more frequently in adults than children and adult PCB levels averaged eight times as high as for children. After considerable thought and claimant input, the court decided to pay adults and children at the same rate for PCB levels, with \$8 million therefore being available for children and \$123 million being available for adults, with some enhancements for children as described below. Children payments bear an interest component.

Directly linking PCBs with personal injury was very difficult, with the defendants conceding only that they cause chloracne.³⁰ Therefore, we focused on three objective, relatively easily proven criteria for personal injury: the claimant's score on the PCB blood test, the claimant's score of zero to one hundred based upon a registered nurse health interview designed with input from our medical panel, and the number of years the claimant lived in the impacted area. Because this is a PCB case, after hearing all the claimants and reviewing the questionnaire results, the court decided to give PCB levels the greatest weight, with the three factors being scored 70/15/15. However, adults scored zero on the registered nurse interview if they did not have detectible PCBs because such a claimant would not be able to show linkage between PCBs and disease had his case gone to trial.

82% of the claimants answering the questionnaire thought they should be paid for living in the impacted area even if they scored negative on the PCB blood test and were not sick, apparently because this factor attempts to measure the time of exposure that a claimant experienced over time in

30. As pointed out by Professor Schuck:

In the toxic tort dispute, the nature of the injury is very different and the processes of establishing, defining, and measuring that injury are far more complex. A chemical agent . . . is suspected of having harmed one or more individuals. Often the pathways of causation are difficult to detect, the time periods extend over decades, and the effects are not readily isolated or scientifically understood.

SCHUCK, *supra* note 4, at 8-9. Other judges have struggled with the traditional tort requirement for provable personal injury in order to justify a mass tort recovery. For example, the Supreme Court rejected recovery for emotional distress in connection with asbestos inhalation in *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432-37 (1997). *Cf. Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041-42 (D.C. Cir. 1981); *Uniroyal, Inc. v. The Home Ins. Co.*, 707 F. Supp. 1368, 1394 (E.D.N.Y. 1988).

living near the plant. The court agreed, thereby assuring that almost all the claimants received a payment, however small. This helped make peace among the claimant population, with communicatarian or feminist justice for the group as a whole taking precedence over individual justice for the claimants most contaminated with PCBs, much as happened in designing the Dalkon Shield and Agent Orange settlements.³¹

Because the personal injury fund was split between children and adults based on their PCB levels, the children stood to receive very little money unless their payments were enhanced. The court decided to award children without detectible PCBs 50% of their registered nurse interview score, even though a similar adult would receive zero, and the child with a PCB contaminated mother 100% of the nurse score, under the theory that the children may have been contaminated with PCBs in the placenta, but with PCBs now being diluted and non-detectible. In addition, children only had to live in the impacted area five years instead of the ten years required of adults to receive a payment because of the more acute impact that PCBs are thought by some experts to have on children than adults.³² Due to the tremendous pressure to pay *Tolbert* claimants, as the sister *Abernathy* case had already been paid, and due to our claimants' great poverty, we could not wait until all of the claimants were blood tested and all of the payments were computed to pay them.³³ Instead, we began to pay the claimants right after the payment program was approved in June 2004 based upon an estimate, with a 20% reserve.³⁴ This was followed by a second dividend in the summer of 2005, and a final dividend in December 2005, when almost all of the claimants had been scored for personal injury. The average adult personal injury payment was \$9,100, including the \$500 advance payment, with the average child claimant receiving \$2,000.

31. See SCHUCK, *supra* note 4, at 12, 295-96; WEINSTEIN, *supra* note 15, at 170; Vairo, *supra* note 9, at 619, 621-23.

With the Court having established that 70% of personal injury payments would be based upon PCB levels, we faced a dilemma with 300 deceased claimants who had not been blood tested for PCBs. Discussion with the claimants advisory committee revealed that families of these claimants would be satisfied if they received about \$4,000, with the family understanding that a blood test was impossible. Noting that, based upon the average date of death of a deceased claimant, the claimant was likely to have had PCBs, the court decided to pay the families of deceased claimants based upon the registered nurse interview score and the years of living in the area of concern, as if they had a positive PCB score, with the resulting payment averaging \$5,500. Under this approach, the families were satisfied.

32. PUBLIC HEALTH STATEMENT: POLYCHLORINATED BIPHENYLS, *supra* note 3, at 6.

33. Historically, trustees and special masters administering mass torts risk termination if they do not move with alacrity. This happened to three of the five trustees in the Dalkon Shield settlement. See *In re A.H. Robins Co.*, 880 F.2d 779, 788 (4th Cir. 1989); Vairo, *supra* note 9 at 632-33.

34. Judge Weinstein recommends internal administrative appeals to the special master in designing mass tort settlements. See WEINSTEIN, *supra* note 15, at 143-48.

III. FIELDING APPEALS, TAMING THE SEA OF LIENS, AND SIMPLIFYING TAXES

As a condition to fairness, the payment program allowed dissatisfied claimants to appeal the computation of their personal injury or property payments.³⁵ Indeed, Professor Feinberg created an appeals process in administering the 9/11 claimant payment statute even though it is not provided for.³⁶ A retired circuit judge was appointed as the appeals special master. Of the 18,000 property damage and personal injury claims paid to date, 970, or 5%, were appealed. Although this rate is five times that experienced in MDL 926, the breast implant settlement, all but a handful of claimants seem satisfied with the *Tolbert* appeals process and none are pending.³⁷

Unlike the 9/11 settlement where liens were self-reported by the claimant or the MDL 926 settlement where a small number of liens were filed with the claims office,³⁸ in the *Tolbert* case, 30% of the claimants had liens or potential liens against their claims due to prior bankruptcies; child support judgments; civil judgments; restitution; and medical liens of the Veterans Administration, Social Security, Medicare or Medicaid. For example, there were \$5 million of child support judgments against the claimants alone.

For each category of lien, we tailored a lien resolution process that facilitated a potentially reasonable settlement with the lienholder but reserved the claimant's right to contest the lien. For example, the 20% of claimants with Medicare liens could pay Medicare 10% of their personal injury payment or contest the lien, and claimants with bankruptcy liens could split their personal injury payment with the bankruptcy estate under a sliding scale determined by how long ago the claimant filed for bankruptcy. For restitution and child support liens, the claimant could either agree to the lien or participate in an interpleader action to contest it.

To clarify the income tax consequences of each payment received by a claimant, the payments were divided into personal injury, which is not taxable,³⁹ and property, which potentially is.⁴⁰ The checks were different colors, and each check came with an explanatory sheet on the tax conse-

35. Feinberg Lecture, *supra* note 15, at 547.

36. *Id.* at 547. As escrow agent for MDL 926, I paid all the personal injury claims—perhaps 5% involved lienholders.

37. E-mail from MDL 926 Claims Administrator, to Edward C. Gentle, III (July 22, 2009, 14:39:45 CST) (on file with author).

38. As this was not a class action, the eighty-eight claimants providing special services to plaintiffs' counsel in developing the *Tolbert* case could not be paid as lead plaintiffs. Nevertheless, the majority of claimants agreed in their questionnaires that these claimants should be paid for developing the case, with the average claimant receiving \$13,000.

39. 26 U.S.C. § 104(a)(2) (2000).

40. 26 U.S.C. § 61(a) (2000).

quences of the payments. Unlike the *Abernathy* case, where the claimants received a combined personal injury and property payment, the number of Internal Revenue Service inquiries of our claimants has been small and they appear to have been resolved.⁴¹

IV. CRAFTING A HOLISTIC REMEDY TO CURE THE LONG-TERM HEALTH DILEMMA AND BEGIN TO RECONCILE THE COMMUNITY

Concerned about the unknown long-term health effects of PCBs, we asked the claimants in our questionnaire if some of the personal injury money should be held in reserve for claimants that get sicker later. 95% of the claimants rejected this proposal, bearing out Mr. Feinberg's prediction that, when presented the opportunity to accept money now, claimants do so, because they are future-risk averse.⁴² Fortunately, the parties and the court already included a long-term care provision in the *Tolbert* settlement: the \$25 million earmarked for a medical clinic.

To make economical use of this grant, two incumbent Anniston clinics are used, one for adults and one for children, instead of building one from scratch. 4,000 adults and 1,000 children claimants make use of the clinic, which provides approximately 2,000 pharmaceutical prescriptions per month and primary medical and dental care.⁴³ In order to take full advantage of third party payments available from private insurance and government, and to maximize the value of clinic resources, a "retail model" is used with a third party administrator for medical care and a pharmacy benefit manager for the twenty pharmacies in the area that provide prescriptions. Prescription co-pays and annual medical and prescription benefit caps further conserve resources. We project that the clinic endowment will last about fifteen years, thanks to these frugal measures. Although the clinic project was unpopular with the claimants at first because they wanted all of their cash up front, it is now perceived as providing a dynamic remedy compared to the *Abernathy* and *Owens* cases.⁴⁴

A clinic long-term planner, whose salary is paid by plaintiffs' counsel and the author, organizes scientific research and obtains clinic grants. Because of the regrettable history of scientific research in Tuskegee, Alabama, and the mistrust associated with PCB contamination, implementing scientific research has been difficult. In order to facilitate community trust, a research committee, comprised of claimants and other residents,

41. See *Abernathy v. Monsanto Co.*, No. CV-2001-832 (Ala. Cir. Ct. 2002).

42. Feinberg, *supra* note 14, at 368-69.

43. Quarterly Clinic Meeting Minutes (Fed. 18, 2009) (on file with author).

44. 95.3% of the 2,408 claimants responding to our March 2004 settlement design survey wanted to receive all their money now. Summary of Survey Results on Website (Apr. 21, 2004).

has created a code of conduct requiring potential researchers to disclose the methodology, goals, and uses of the scientific research.

Although members of other large mass tort settlements have grown to believe they are a community,⁴⁵ PCB contamination impacted a specific geographical community from the start. PCBs have resulted not only in property damage and personal injury, but have exacerbated division between races, economic classes, and communities in the area. Through additional funding obtained by the long-term planner from the Andrus Family Fund in New York, a reconciliation program was designed to nurture societal forgiveness, recovery, and growth. Focusing on children, who may be best able to forgive, the project enhances children's access to social, developmental, and educational resources for personal achievement. Hopefully, this reconciliation process will allow claimants to "let go" of their victim identity, and allow the community to recover and prosper.

Although settlement administration arguably loses its inherent judicial nature when venturing into community rebuilding, it is submitted that a community remedy is needed for a geographically discrete toxic tort.⁴⁶

V. SOLVING THE COMMUNICATIONS, OVERHEAD, AND SURPLUS PROBLEMS

Personal contact with claimants and ongoing communication—through meetings, a telephone bank, periodic update letters, and hearings—are key components in designing and administering a mass tort settlement.⁴⁷ As a result of the controversy concerning the *Tolbert* settlement and the poverty of the claimants, we received 200,000 claimant phone calls, about twelve per claimant. By contrast, in the MDL 926 breast implant case, we received 50,000 calls from 260,000 claimants, or one call per five claimants. In the Agent Orange case, over 500,000 calls were received⁴⁸ from 2.4 million Vietnam veterans and their families.⁴⁹ We also received about 200 letters from the claimants per week for the first two years, answering every one with a personal response as suggested by Judge Weinstein.⁵⁰ We made hundreds of emergency advance payments to adult claimants, met with claimant groups numerous times, and tried our best to explain this settlement to the claimants fully and to address all of their needs to the fullest extent possible.

45. See WEINSTEIN, *supra* note 15, at 46-52 (discussing the community aspect that revolves around mass tort litigation); Vairo, *supra* note 9, at 623 (same).

46. Judge Weinstein agrees that in the mass tort context, communication relief—advancing the entire impacted community—is a necessary component. WEINSTEIN, *supra* note 15, at 46-52.

47. See Vairo, *supra* note 9, at 640-41. See also WEINSTEIN, *supra* note 15, at 12, 54-60.

48. See WEINSTEIN, *supra* note 15, at 12.

49. See SCHUCK, *supra* note 4, at 4.

50. See WEINSTEIN, *supra* note 15, at 54-55.

This collaborative, intensive-contact approach in claimant design and payment, and the average low amount per check of \$2,100, put a strain on administrative expenses. Based upon our administrative experience in other settlements, we suggested a 5%-of-claims paid cap, and the defendants agreed. To carry out this plan, we had to write off 23% of our time, or \$2 million. The resulting overhead per claim of \$400 equals that experienced over a decade earlier in Dalkon Shield.⁵¹

Since the claimants were paid based on an estimate, using a statistical sample and requiring a reserve, there remains a \$2.7 million surplus, or 1.8% of the \$151 million originally available to pay claims. Due to claimant liens and the extremely small size of the resulting checks, we estimated that the overhead costs for issuing this surplus to the claimants would be 10%. As a result, the claimants advisory committee and the court agreed to use the surplus to endow the medical clinic further. Many claimants, however, remain dissatisfied with this result.

CONCLUSION

We attempted to design a collaborative settlement that is both forward-looking and holistic. The major factor in claimant payment design was claimant input. Instead of merely paying the claimants a check for claimed damages, the court implemented an EPA-supervised environmental clean-up, a medical clinic, and a reconciliation program to begin to heal the underlying scars from PCBs, discrimination, and poverty. Scientific research may help answer the rhetorical question of what PCBs do to human health.

It is the author's hope that the long-term legacy of this settlement will be an Anniston community that not only has begun to cure itself but is organized and united in facing what the future may bring.

51. See Vairo, *supra* note 9, at 654.