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Nine things you must know about mass torts

From classification and evaluation through filing – and keeping – your case in the right court

1. What is a mass tort?

“The existence of numerous parties alleging similar sorts of harm from the same dangerously defective product or negligent conduct has transformed some ordinary tort litigation into so-called mass tort litigation.” (Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort*, 28 U.C. Davis L. Rev. 917, 925 (Spring 1995).) Related claims in mass-tort litigation involve overlapping issues of fact and law. Common examples include toxic emissions, a commercial airliner crash, and industrial waste contamination. (*Robinson v. U.S.* (E.D. Cal., Nov. 20, 2001) 175 F.Supp.2d 1215.)

There are two main subclasses of mass torts that shape appropriate procedural and substantive decisions. The “single incident mass tort” occurs where multiple injuries derive from one singular, discrete incident. The “dispersed mass tort” arises where causation is more diffuse. The acquisition, nature, and severity of injuries vary both from injury to injury and between plaintiffs.

Certain types of cases dominate the mass-tort field. These include toxic torts, defective products, large accidents, and natural disasters. We are most familiar with mass torts through the heavily publicized consumer battles against pharmaceutical giants and tobacco manufacturers.

2. Evaluating the case

Mass-tort actions afford special case management to a large number of similar claims. Consolidating devices minimize duplicative proceedings and the risk of inconsistent results. Courts look to the amount of judicial and party resources that would be expended in multiple related cases. Consolidation provides

integrated treatment to streamline the adjudicative process.

Certain factual and legal predicates are more amenable to successful mass-tort litigation. These share core attributes such as common theories of liability against a common defendant, parallel causation, and similar injuries. Plaintiff volume is critical. The more claimants that attribute legitimate damages to a common tortfeasor by way of a common wrong, the better they fare.

Whether to pursue consolidation also depends on provability, applicable substantive law, the number and relationship among defendants, the experience of other courts with similar claims, whether a court-appointed expert or special master would be of assistance, and alternative means of accomplishing the purposes of aggregation.

3. Casting the net

The critical “mass” in mass torts is neither precise nor static, ranging anywhere from 100 to 10,000 linked claimants depending on the context. The first step in developing your case is to generate an extensive “inventory of cases,” or cache of individual plaintiffs. New clients are found through referrals from other attorneys or through advertising. When cases are added to your inventory through referrals, Rule 2-200 requires informed, written consent for any fee-splitting arrangement.

Advertising is also an effective method of building an inventory of cases. Television advertising can be obtained at reasonable rates by purchasing unsold advertising airtime at the last minute. Direct mail/e-mail and Internet advertising are also effective. All communications with a “former, present or prospective client” must not contain false or decep-

tive statements or omit facts necessary to make the statements considered as a whole not misleading. (Rule 1-400.) Furthermore, it is important to check the advertising rules for each state in which the advertisement is shown.

4. Screening clients

An attorney has a duty to pursue only those claims that “appear to him or her legal or just...” (Bus. & Prof. Code, §6068(c).) The Rules of Professional Conduct also forbid lawyers from accepting a case “without probable cause...” and from prosecuting any claim that is “not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of such existing law.” (Rules of Prof. Conduct, rule 3-200(A) and (B).)

There is no malpractice liability for declining a case where the action is non-meritorious. Generally, an attorney who declines representation (or withdraws from the case) due to a good-faith belief that it lacks merit is not liable for damages – even if later developments indicate that that claim did not lack merit. (*Kirsch v. Duryea* (1978) 21 Cal.3d. 303, 309 [146 Cal.Rptr. 218].) Conversely, an attorney who accepts a case and prosecutes a claim that lacks a *legal or factual foundation* risks both disciplinary action and *monetary sanctions*.

5. Defining Roles

Mass-tort actions frequently involve multiple attorneys coordinating related claims. This presents unique organizational challenges. Engage this at the outset by defining a common plan of attack and providing for an equitable division of labor. The most seasoned attorney or firm should take the reins and ensure the

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orderly execution of case responsibilities. These include discovery and “core” motions that go to common issues of liability.

How you decide to distribute the costs is up to you but should ideally bear some relation to the amount of work you contribute and your contemplated recovery from the strength or number of your respective claimants. The cost of legal services in Multidistrict Litigation and Judicial Council Coordination Proceedings may be apportioned among all parties who benefit from the services. Pre-trial orders will determine the types of expenses that can be recovered, the procedure for record keeping and submission, and the methods of collection and payment. (See *In re Vioxx Prods. Liab. Litig.* (E.D La. April 8, 2005) MDL No. 1657, (Pretrial Order 6), <http://vioxx.laed.uscourts.gov/Orders/vioxxpto6withA.pdf>; *In re Vioxx Prods. Liab. Litig.* (E.D La. Aug. 4, 2005) MDL No. 1657, (Pretrial Order 19), <http://vioxx.laed.uscourts.gov/Orders/vioxxpto19.pdf>.)

6. Filing your case in Federal Court – Consolidation under section 1407

Pursuant to 28 U.S.C. §1407, the Judicial Panel on Multidistrict Litigation has the power to transfer civil actions pending in more than one district to any other district for pretrial purposes. The threshold set of criteria for these motions is threefold. “Common questions of fact must be complex, numerous, and incapable of resolution through other available procedures such as informal coordination.” (Manual for Complex Litigation (Fourth Ed.) at 366.) Prudential and procedural factors under 1407 must balance in favor of transfer. Lastly, an available forum must be convenient for the parties and witnesses. This motion may be accomplished both sua sponte and on party motion. MDL transfer presents the opportunity to negotiate a global settlement.

The transferor court should not automatically postpone rulings on pending motions. Matters such as motions to dismiss or to remand, which raise issues unique to individual cases, may be appropriate for resolution before a decision by

the Judicial Panel. (Manual for Complex Litigation (Fourth) §20.1.)

The Multidistrict Litigation Panel (“MDL Panel”) “may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims...” deemed inappropriate for transfer. (28 U.S.C. § 1407(a).) The Judicial Panel employs a balancing test to select the transferee court. The factors considered include: (i) the district where the largest number of cases are pending; (ii) where discovery has occurred; (iii) where cases have progressed the furthest; (iv) the site of the occurrence of common facts; (v) where the costs and inconvenience will be minimized; and (vi) the experience, skill, and caseloads of available judges. (Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 210, 214-215 (1977).)

A transfer under §1407 becomes effective when the order granting the transfer is filed in the office of the clerk of the transferee court. At that point, the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction. (*In re Plumbing Fixture Cases* (J.P.M.L. 1973) 298 F. Supp. 484, 496.)

As long as counsel is in good standing with the Bar of any federal district, no pro hac vice application is required to practice before any transferee district and counsel is not required to engage local counsel. (Georgene Vairo, Moore’s Federal Practice – Civil § 112.03 (Third Ed. 2007).)

Orders of a transferor court remain in effect unless the transferee judge vacates or modifies them. (*In re Master Key Antitrust Litig.* (J.P.M.L. 1971) 320 F. Supp. 1404, 1407.) The Judicial Panel has no authority to direct the transferee judge in supervising multidistrict proceedings once transferred. (28 U.S.C. §1407(b).) While the transferee judge’s jurisdiction extends only to pretrial proceedings, the judge has authority to grant terminating motions. (*In re Donald J. Trump Casino Sec. Litig. - Taj Mahal* (3rd Cir. 1993) 7 F. 3d 357, 367-368.)

Choice-of-law issues can arise where rulings turn on questions of substantive law. In diversity cases, the law of the transferor district follows the case to the

transferee district. (*Van Dusen v. Barrack* (1964) 376 U.S. 612, 639 [845 S.Ct. 805].) The judge has discretion in federal question cases. (*In re Korean Air Lines Disaster* (D.C. Cir. 1987) 829 F. 2d 1171, 1175.)

7. Remand of the action

Section 1407(a) directs the MDL Panel alone to remand the action when pretrial proceedings conclude, unless previously terminated. (*In re Roberts* (3rd Cir. 1999) 178 F. 3d 181, 184.) The transferor judge does not have the power to affect transferee rulings, since doing so would eviscerate the function of consolidation. (Georgene Vairo, Moore’s Federal Practice – Civil § 112.06 (Third Ed. 2007); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).)

8. Filing Your Case in State Court – Coordination under Code of Civil Procedure section 404-404.8

Pursuant to Code of Civil Procedure sections 404-404.8, the Judicial Council has the power to coordinate civil actions pending in different courts to any other state court for pretrial purposes. Coordinated cases must involve common questions of fact or law and the transfer must be deemed “complex” under the standards set by the Judicial Council. (Code Civ. Proc., § 404-404.8. See also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter 2008) ¶12:371.)

A complex case is one that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case; keep costs reasonable; and promote effective decision making by the court, the parties and counsel.” (Weil & Brown, *supra*, ¶12:47.1.)

Either all of the plaintiffs or all of the defendants in the action may submit a petition directly to the Chair of the Judicial Council. If all parties on one side of the lawsuit do not agree, a party must first file a motion with the presiding trial court judge. (Levit & Yakutis,

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Coordination of Civil Actions 11 (Judicial Council of California, 2nd ed. 2000) (1976); Cal. Rule of Court, rule 1520(b).) On petition, the Judicial Council or presiding judge may assign a coordination motion judge to determine whether the actions are complex and should be coordinated. (Code Civ. Proc., § 404.) Notwithstanding successful challenges, the transferee judge may stay the action pending this determination. The judge must also set a hearing on the petition within 30 days after being appointed. (Cal. Rules of Court, rules 3.516, 3.527(a), 1514.)

The judge will coordinate if doing so will “promote the ends of justice,” balancing the familiar factors of commonality, convenience, efficiency, resources, consistency, and likelihood of extrajudicial settlement. (Code Civ. Proc., § 404.1; see *McGhan Med. Corp. v. Sup. Ct.* (1992) 11 Cal.App.4th 804, 811 [14 Cal.Rptr.2d 264].) The chair of the Judicial Council then assigns a coordination trial judge to decide where the proceedings will take place. The coordination trial judge has broad powers to remand, sever, transfer, add cases, or terminate. (Cal. Rules of Court, rule 3.542-3.545.)

The transferee judge or Chief of the Judicial Council in MDL and JCCP will often appoint lead counsel and/or a steering committee of counsel to coordinate the various litigation tasks. Depending on the circumstances of the case, the court or the steering committee will appoint other committees to delegate

the workload. Where there are both state and federal cases pending, a State Liaison Committee is often appointed.

A court may consolidate related claims for one or several portions of a bifurcated or multifurcated trial. A court may also order unitary treatment from pretrial through the conclusion of the matter, known as “single-phase” adjudication. Courts alternatively consolidate cases only for pretrial issues where individual characteristics predominate, making joint trial impractical. The crucial element is that common issues that are critical to determinations of liability would make litigation more fair and efficient through aggregation.

9. Keeping your case in state court

A case filed in state court is subject to removal to federal court if federal subject-matter jurisdiction exists. This can be avoided by pleading only state-law causes of action and joining in-state defendants to defeat diversity. Thus, consider asserting your claim against all potential defendants in the stream of commerce in a products case. Under the modern doctrine of strict products liability and the Restatement (Second), anyone who is “engaged in the business of selling products for use or consumption” is subject to liability. (*Restatement (Second) of Torts*, § 402A (1965), comment f, at 350. 1 *Amer. Law Prod. Liab.* 3d §§ 5.4, at 13, 5.5, at 15, 5.6, at 16-17 (1987); *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d. 256, 262 [37 Cal.Rptr. 896].)

For example, in a product-defect action against an out-of-state manufacturer, you might consider joining an in-state distributor or retailer. Those in the stream of commerce are subject to liability and their inclusion maximizes your ability to confine prosecution of the underlying claims to state court. Supposing one of their distributors is located or does business in your state of filing, their local presence can defeat removal for the remaining defendants. (*Bernstine v. Merck & Co., Inc.* (E.D. Cal. 2007); 2007 WL 1217589, *1; *Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 347 [5 Cal.Rptr. 863]; *Bowles v. Zimmerman Manufacturing Co.* (7th Cir. 1960) 277 F. 2d 868, 875.) Ensure that a reasonable relationship exists between that party and the harm alleged in order to avoid a defense of fraudulent joinder.

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