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PERSPECTIVE

The hidden costs of mass tort cases can sink your firm

By Brian S. Kabateck and Drew Ferrandini

At first glance, it may seem like participating in an established, coordinated proceeding for a defective drug or device is a sound financial decision for a plaintiff's firm. After all, in most mass tort cases there has already been a recall and lawyers think that it's only a matter of time before the parties hammer out issues of liability and damages, coming to a reasonable settlement program. Moreover, for the majority of attorneys involved there is virtually no motion work and normal litigation costs such as depositions or expert fees are nonexistent.

But the true cost of participation goes well-beyond client retention and many attorneys are simply unaware of the hidden taxes of mass actions. From an increasingly high cost to simply legitimately retain a case to very large common benefit assessments that require firms to reduce their fee percentage, to lengthy drawn-out settlements programs that a require firms incur carrying costs for months after the case has settled, the risks are myriad and drastically cut into a firms' bottom-line.

It is important to understand the general structure of multidistrict litigation (MDL) and how they are formed. For a MDL to be created, a group of lawsuits must involve questions of common fact. The Judicial Panel on Multidistrict Litigation, consisting of seven appellate and district court judges all from different circuits, then decides by majority vote whether to create an MDL and where to send it.

Then the appointed court creates a plaintiffs' steering committee (PSC) as one of its initial matters for the newly formed MDL. The PSC's purpose is to represent the common interests of all plaintiffs. There are many benefits to the PSC. Typically, these are larger plaintiff firms that have the resources to take on the well-funded defense firms on the other side. They also help facilitate much needed coordination and serve as a liaison to the number of smaller firms in the litigation. But, all of this comes at a price.

Having your case pending in a MDL means having to pay hefty fees. The transferee court typically collects a "tax" or assessment generally between four to 8 percent of each gross recovery from all parties that have cases in the MDL or that rely on MDL work product. That assessment is used to compensate those who perform "common benefit work," and usually is deducted from the attorneys' fee portion of individual recoveries. In larger MDLs, the common benefit fund could total tens of millions of dollars.

This can be challenging on a number of levels. For example, if the common benefit assessment requires all attorneys to pay 5 percent of the attorney fees, the immediate problem is that the clients' retainer agreements will already have a set contingency fee. So if clients have already agreed to pay their attorneys 30 percent of the award, they certainly will not be happy to be informed that they need to now pay an additional 5 percent to compensate attorneys they did not retain and have likely never met.

Therefore, the only recourse firms have to avoid simply breaking their contract with clients is to reduce their own fees by the percentage that the court has approved for the common benefit. This means that same firm will now only receive 25 percent instead of 30 percent in attorney fees. While this may seem like a nominal difference, mass actions are always a numbers game. A 5 percent reduction in fees is not much for an individual case, but across a large inventory it can be a substantial loss.

Along with reductions in attorney fees, firms in mass action cases have to deal with relinquishing the control they would normally have over their cases. Even after a settlement is reached, it can be months (sometimes years) until the money is actually paid. Often these settlement agreements will require that certain thresholds be met before cases are funded. This is simply because if a defendant is going to settle the cases they want to make sure the vast majority of plaintiffs are enrolling in the settlement program. Otherwise, a defendant will be forced to keep incurring the litigation costs that the settlement agreement was intended to resolve. The enrollment threshold for these settlements can be as high as 95 percent.

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Therefore, even if your firm is exceptionally efficient and manages to get informed consent and executed releases from all of your clients within weeks of the settlement program being announced, you will still have to wait for hundreds firms all over the country to do the same. This prolonged process is not only frustrating to attorneys and clients, but expensive as well.

Long-term management of clients' cases and expectations are another hidden cost in the mass torts world. As the PSC will take the lead in the litigation, often times there is not much individual clients need to do beyond perhaps some initial discovery. After that, a firm will need to invest substantial resources in keeping these clients up-to-date with the litigation, as it may be years before there is substantial development. This could mean a full time paralegal devoted to the task or investment in case management software that allows firms to easily generate mass mailing and emails. If a firm fails to do this, the clients will either become frustrated, constantly calling your firm asking for the status of their case, or they will simply disappear. Then when it's time for you to get them to sign a settlement agreement you will need to spend resources just to locate the client.

The carrying cost of getting involved in these cases should not be underestimated, as another hidden cost is simply the time firm expends litigating these cases. In some circumstances, large pharmaceutical litigation can last for over five years. During this time, firms are only expending money — and not taking any in. Attorneys' time has value. Time that could be used focus to on litigating cases with quicker resolution is instead mired in murky MDLs. Then firms are stuck with massive inventories and cash flow problems — which is to say nothing about the issues that are created by California Code of Civil Procedure Section 583.310 that states: "An action shall be brought to trial within five years after the action is commenced against the defendant."

When viewed globally and when considering the expert costs and resources involved in prosecuting sophisticated drug and device products liability cases, many plaintiffs' attorneys do conclude that participating in an MDL makes sense. But, it is certainty not with risks and hidden costs. A plaintiff's attorney must consider these issues carefully before investing in mass action — beware little expenses.

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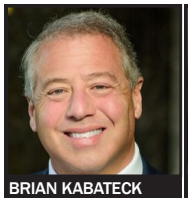
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