Entering the Mass Tort Arena: Critical Considerations for Plaintiff Attorneys

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The lure of multi-million dollar mass tort verdicts can be a powerful one for general personal injury or product liability practitioners. But the decision to take on complex mass tort cases may be one of the biggest decisions you can make on behalf of your firm or practice.

There are many considerations to weigh, from whether you have good cases in the first place to whether you have the means to effectively pursue them. And the stakes are high. You may reap a sizable judgment for your injured clients and considerable attorney fees for yourself and your firm, or you may find yourself mired in a long war of attrition that drains both time and money, distracting you from other relatively predictable types of cases, and failing to get your client timely compensation, if anything at all.

In deciding to expand from a “one-plaintiff, one-defendant” practice to multi-party litigation—as with any new venture—timing is critical. There are times when it is right to dive into mass torts, such as the frenetic heydays of the Fen-Phen or Vioxx litigation. There are times when it is better to remain on familiar ground; when there simply is not enough current litigation to carry your practice to new waters. The good news is that there has never been a better time to take the plunge than now. We are seeing cases with a diversity of defendants as well as several mass torts in various stages of proceedings. Some are in the active settlement phase—a perfect time to vet, develop and push your claims forward.

But when claimants present themselves, which way should you go? Depending on your firm’s position, experience and business model, some paths are far better than others. Having financed almost every major mass tort litigation in the U.S. since we formed Counsel Financial in 2001, we have considerable experience in the nuances of different types of mass torts and the types of firms that get involved. We thought it would be instructive to share some insights to guide you in deciding whether or how to handle mass tort claims that have found their way to your desk.

Law Firm Business Models

It will seem counterintuitive, but which business model you follow has less to do with your preference and everything to do with how the defendants perceive you. Do you have the financial wherewithal to carry the litigation forward? Do you have thousands of cases? Are you in a leadership position or close to attorneys and firms in leadership positions? In other words, the foundation of your relative position of power is made of two components: volume and leadership. And the defendants have to see that you have both or that you co-counsel with someone who does.

As you know, some firms operate under an “advertise and refer” model, gathering as many potential claimants as possible via nationwide advertising campaigns. They leverage both traditional media, such as television advertisements, and relatively newer Internet advertising, using search engine optimization to drive traffic to attorney websites based on keywords being searched by potential claimants. Then they refer the clients over to other firms.

Other firms take claims a few steps further, vetting the cases and working them up before sending them off to a more well-known firm that has the experience and resources to take the cases through what can be years of zero-revenue litigation.

Still other firms attempt to settle the cases themselves rather than referring them to dedicated mass tort firms—battle-tested firms that might be handling 12,000 to 15,000 or more cases.
Mass Tort Litigation is Not a Hobby

Mass tort litigation is not something you dabble in and there is no single way to approach it. For example, you may find yourself deciding to wait out defendants whose strategy might be to prolong the litigation as long as possible. Their goal is to deny plaintiff law firms and their clients any hope of expeditious resolution. Compensation for your claims may very well be out there, but “out there” could mean five to ten years or more down the road.

Knowing when to hold the cases and when to refer them requires you to consider: whether to opt-in or opt-out of consolidated actions; which defense strategy is being employed; how soon compensation will be needed; whether you have the resources to keep your cases moving for several years; and whether it would be in your and your clients’ best interests to decrease your fee for the potentially greater and quicker resolution a referral to a mass tort law firm often delivers.

So, should you opt-in or opt-out of a potential group resolution? It is important, first, to know what you’re up against. As we said, you will want to know whether defendants are actively negotiating a settlement where a reasonable payment might be available sooner rather than later. Or are they employing a “scorched-earth” strategy, in which they will fight each case to the U.S. Supreme Court if they have to? This was the position taken in cases brought against tobacco companies over smoking-related diseases. Defendants in this camp will not even consider en masse settlements, forcing plaintiff attorneys to try one case at a time. Some defendants plan on defending themselves in litigation and reserve funds for that purpose.

You might have 5,000 good cases, and you might legitimately value them in the hundreds of millions of dollars. You might even win at trial and secure a judgment. But, can you and your client wait for a possible payout months or even years from now due to post-settlement issues such as lien resolution? What kind of reserves and resources do you have? How is your client’s health? What about his or her financial situation? Think about it: if you have to try your cases one by one, and at a pace of only four or five a year, and the defendant is both determined and able to exhaust all possible appellate options, you will not get a resolution in your lifetime, let alone in that of your client.

Unless you have considerable reserves or financing, and the experience and resources, we urge smaller, general personal injury and product liability firms to stay away from defendants with the wherewithal to execute a grueling long-term litigation. That is a fight better left to dedicated and seasoned mass tort practitioners.

The decision to go it alone or join a group also comes down to this: Should you give up some of the equity you might have in your case in exchange for a quicker resolution from a more experienced mass tort firm? Understand that these “big name” firms may take anywhere from 35-50% of case value. This may be worth it, though, if you determine that a faster, more certain resolution is better than a distant, less certain payout.

Generally speaking, a personal injury attorney not accustomed to complex mass torts will find the best path for the firm and the client is to work with one of the major mass tort plaintiff law firms. The settlements they can achieve will be higher and arrive faster than when a less experienced, less fortified firm attempts to go it alone.

Liens and Post-Resolution Matters

Attorneys must be cognizant of the various liens—Medicare liens, third-party liens, governmental liens, etc.—that must be resolved prior to distributing any funds to clients. It is a complex undertaking, one that is only compounded in the case of large groups of varied cases.

Do you resolve the liens yourself or work with an outside resolution company that specializes in this process? Cost is one issue to consider. Resolution companies charge per case. If you go that route, you will want to know your state ethics rules as to whether you can charge that amount back to your client. While a law firm can have a paralegal assist, it starts to become impossible when the job involves numerous multiple liens and large groups of
cases. It is best to work with qualified third-party providers that know how to address liens en masse. Not only are they more efficient, but these experienced lien-resolution professionals will secure a better value resolution of the lien.

That raises another advantage to working with an experienced mass tort litigation firm. You benefit from other, proven resources they access continually, such as advertising, call centers, vetting and lien resolution services that have the specific expertise, processes and staff in place that enhance what the mass tort firm brings to the table.

In most cases, it benefits you and your client to negotiate the best deal you can with the law firm that represents the highest number of claimants and has a leadership position in the litigation.

Latency Issues That Impact Case Values

Thorny issues have arisen with mass torts involving such devices as hip implants and transvaginal mesh (TVM), where the claimant may not be able to afford the revision surgery they sorely need. If they settle, they are doing so at a time when their case has less value in the eyes of the defense since they have not undergone the revision surgery.

The question arises: Do you hold back and have these clients undertake revision surgery? This raises additional questions. If your claimant cannot afford the procedure, should the client turn to a company that advances the funds for the surgery, but demands a large return on the investment? Although the settlement value has increased significantly.

In these cases, the attorney must be careful to understand the terms offered by the company advancing the funds and how much increased case value that brings. Also be very careful to suggest your client see her treating physician for an opinion on the medical necessities of the procedure.

Also, if you know your client cannot afford the surgery, prior to settlement, consider negotiating a reserve with the defendants whereby they agree that if your claimant has the surgery in a reasonable time frame after settlement, such as within twelve months, then the settlement amount will increase by a certain percentage.

Ethical Risks of Group Settlements

Obtaining a multi-million dollar settlement designed to resolve all of your claims at once certainly has its upsides. For the defendants, they can call a halt to years of expense, distraction of resources, and uncertainty. Plaintiffs should be able to receive some compensation for their injuries. For plaintiff firms, they can benefit from considerable attorneys’ fees and avoid years of litigation. Over-burdened courts are spared depletion of their precious resources. But the risks to the plaintiff law firm are far from over when a settlement is paid. Plaintiff attorneys inherit the prickly responsibility for the fair and ethical allocation of the funds among their claimants—some of whom will receive more than others. Answering the question—“Who gets what?”—is rife with pitfalls for the plaintiff attorney.

Firms should strongly consider enlisting the assistance of a third-party administrator or special master appointed by the court. They should understand their ethical obligations and know the multiple values of different types and severities of claims, such as when a claimant does not have revision surgery, or has one revision surgery, or has multiple procedures.

Stop and give some thought to the process and resources required to resolve 5,000 cases comprising a dozen categories. You have ethical obligations to each claimant and addressing the myriad liens involved. You risk not getting it right. Working with a reputable lien-resolution firm that can manage the volume and variety of claims in your portfolio significantly mitigates your risk.
For ethical guidance, you should consult your own state ethics rules on the subject, but many are in sync with the ABA rules. Here is the ABA Standing Committee on Ethics and Professional Responsibility’s summary of ABA Op. 06-438 (Feb. 10, 2006):

“In seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement or aggregated agreement of their claims as required under Model Rule 1.8(g), a lawyer must advise each client of the total amount or result of the settlement or agreement, the amount and nature of every client’s participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.”

The risk of running afoul of such rules can be considerable, and it becomes greater the more categories of claims you have in your group. You do not want to be one of the firms that learn this the hard way. An attorney in Indiana diligently shared his allocation formula with his clients, but earned a public reprimand for not telling them the total amount of the settlement. A court in Texas allowed plaintiffs to sue their attorney for forfeiture of attorney fees—even without proving damages—because the attorney entered into an aggregate settlement without their approval. In 2011, a group of mass tort lawyers and the judge were disbarred—and two attorneys even went to jail—because they not only failed to tell the plaintiffs the total amount of the settlement but a court found they took too much of the settlement for themselves.

We heartily endorse ABA guidance that you should at least disclose the following facts to make sure your clients are providing a valid and informed consent to a settlement:

• The total amount of the aggregate settlement or the result of the aggregated agreement.

• The existence and nature of all of claims, defenses, or pleas involved in the settlement or aggregated agreement.

• The details of every other client’s participation in the settlement or agreement.

• The total fees and costs to be paid to the lawyer if they are to be paid from the proceeds of the settlement or by an opposing party.

• The method by which costs are to be apportioned.

Conclusion

We strongly advise personal injury and product liability firms to carefully weigh the risks and rewards of pursuing mass tort litigation. In most cases, working with dedicated mass tort law firms and related service providers will deliver greater compensation sooner, and with considerably less risk to your practice.

About the Author

Joseph C. Kasouf, J.D., M.S., General Counsel, Counsel Financial has more than 24 years of experience in corporate legal, litigation, budget, financial and business leadership. Most recently, he was Chief Counsel, Associate Vice President, Associate General Counsel at a Fortune 100, multi-line, international insurance and financial services corporation. He has also served as an Adjunct Professor at Syracuse University and at Franklin University. Mr. Kasouf is a graduate of Syracuse University where he earned a Bachelor of Arts Degree in Speech Communication (cum laude), a Master of Science in Speech Communication, and a Juris Doctor.