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WINNING MASS TORT LITIGATION STRATEGIES

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INTRODUCTION

Before delving into strategies for handling mass tort litigation, it's not too simplistic to ask just what makes a tort a mass tort. While the term conjures up visions of rapacious Plaintiffs' lawyers clogging courts with thousands of claimants, overwhelming defenses by sheer volume and emptying the coffers of once viable businesses, the phenomena of mass torts is unfortunately that and much, much more. As a testament to the "mass" moniker, a simple Google search of the term "mass tort" results in about 920,000 "hits". The first of this hit parade, is the Mass Tort Information Center, a web site supported by the New Jersey State Court System.[1] This site lists the torts designated as mass torts currently pending in New Jersey. The list reads as a virtual history of the phenomena, listing products we are all familiar with: Accutane, Asbestos, Bextra/Celebrex…diet drug…lead paint…tobacco. Delving further into the website, one finds that New Jersey has enacted guidelines for the designation of litigation as a mass tort – and in so doing has provided an answer to our query by undertaking to define what exactly is meant by the term "mass tort".

New Jersey has identified six basic characteristics for determining whether a tort will be considered for designation as a mass tort. These characteristics are that the cases being brought:

- involve a large number of parties;

- involve many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;

- have a geographic dispersement of parties;

- have a high degree of commonality of injury or damages among plaintiffs;

- have value interdependence between different claims – that is, the perceived strength or weakness of the causation and liability aspects of the case(s) are often dependent on the success or failure of similar lawsuits in other jurisdictions; and,

[1] See, http://www.judiciary.state.nj.us/mass-tort/

- have a degree of remoteness between the court and actual decision makers in the litigation, that is even the simplest of decisions may be required to pass through layers of local, regional, national, general and house counsel.[2]

To simplify, mass torts involve numerous plaintiffs and defendants, bringing and defending claims based on a single event or product, which caused similar injury across a large area. These claims may rise or fall based upon their success or failure in any number of jurisdictions and the decision makers are spread far and wide. So how can you coordinate this cacophony of players, issues and courts to ensure the survival of your client?

A. Insurance Coverage

One of the first questions you must ask when you are to represent a client in what looks like a mass tort is who is funding the litigation defense and potential liability payments? This question may be answered for you if the defense has been assigned to you by an insurer. However, the very nature of mass torts brings into question not just the limits of liability for each claim, but whether and how long insurance (if it exists) will be around to cover what may be thousands of claimed losses and their expenses. As with any claim, you must assess the availability and limits of the insurance available. With many mass torts, the claims could span a number of years from the relatively recent to the distant past. The client may have changed ownership, structure, and status any number of times during the life of the claimed tort and the insurance available may equally have been placed in layers with a number of insurers during any one year or with numerous insurers over the years.

First and foremost an assessment must be made of the time parameters for the potential claims initially being brought and those that may be brought. Are the claims based on the use of a product that had or has been on the market for years (ie. asbestos, tobacco, lead paint) or is it a relatively new product or recent event (ie. diet drugs or catastrophic occurrence)? Next of course are the players – who insured the client and when. Just like your client, the original insurers may have changed ownership, structure and status over the years. How many insurers are there in a particular year or over the years? When were they on the risk and what limits of coverage are there for the claimed losses? Are there exclusions or other aspects of the policies that will impact coverage or defense costs? Where the insurance is remote and the client retains a hefty self-insured retention, what is the threshold and who are the insurers beyond that threshold? Reinsurance, excess policies, umbrella policies and tier insurers should be ascertained early and contacted as soon as practicable to ensure a continuity in coverage and compliance with the policies.

If the claims are dispersed over a long period of time you may not always have this information completely in place at the outset, the process of ascertaining the

[2] New Jersey Directives Dir. 11-03, October 27, 2003.

availability of insurance may go on for the life of the litigation. In any event, the insurers must be made part of a team effort to address and attack the claims being presented in an orderly cost effective manner. Cost effective will never be a problem with insurers – that is the adjusters job, cost containment, but there must be a coordinated effort to balance the insurance companies inclinations to pay what may be perceived as the bare minimum with the reality that a vigorous defense costs money. The insurer(s) should be included in the discussions at all levels of the litigation. A vigorous coordinated defense will best protect their interests and your clients. From the retention of experts, corporate witness development, document review and database creation, the hiring of local counsel and the usage of the best talent pool of lawyers in all jurisdictions, the insurer needs to be schooled in the cost effectiveness of a vigorous defense but kept in the loop of the decision makers.

As we all know, it is not the place of the insurer to decide strategy or tactics, but the impact of an insurers inclination toward cost containment may do just that, placing necessary defense resources out of reach. Communication with the insurer is therefore key to creating a workable environment to protect the client's interest while realizing the full benefit of available insurance coverage. The insurers must be involved and kept informed so that they understand the reasons for the decisions being made and don't just see money going out the door. Use of coverage in place agreements and agreed to parameters for cost, settlement and even attorneys fees should be negotiated early and in place before the litigation matures. Those areas that become nonnegotiable may eventually require some court intervention, so it is always advisable to have separate coverage counsel available and identified early on in the process.

When insurance is involved in any litigation there is a triangle of players on the defense - the client, the insurer and counsel. It is always better to avoid the need for the client and the insurer to settle their differences in court – the last thing mass tort litigation needs is more litigation. The only way to avoid such an outcome is by keeping the client and insurer points of this litigation defense triangle in constant discussion so to avoid one or the other feeling abused. As counsel our ethical responsibilities lie with our client, but the best interests of our client are served by avoiding infighting between those ostensibly on the same side. Constant communication, coordination and flexibility are the keys to keeping all parties working comfortably together. Luckily the technology currently available today makes such communication, coordination and flexibility easier every day. From cell phones to PDA's and video conferencing to internet web sites, it is now almost effortless to coordinate and share information between the client, counsel and the insurers.

B. Computer Tools

The most important tool at the disposal of lawyers today is the computer. It is unimaginable for some of our younger attorneys to fathom the practice of law without the entire scope and breadth of legal references at their fingertips, 24 hour e-mail access and electronic dockets. All of these tools make it possible to more easily manage the

logistical and quantitative challenge of mass tort litigation while at the same time providing an avenue for better defense strategy.

Knowledge is power. The computer systems and software available today make it possible to store, cross reference and share every important document, deposition, pleading, video, treatise, report, etc. that may be needed in your mass tort. Depending on the time frame of the claims made, some of the information may be computerized from the start. It is important to create a computer protocol early. What type of systems will work best to record the claims and provide access to all the players – client, counsel and insurers? What information needs to be gathered? How will pleadings, depositions and trial material be stored and shared for future use? How will costs be accounted and can you use electronic billing? All these questions should be addressed as quickly as possible, but, as with any software system, it is best to look for flexibility and the ability to upgrade. The last thing you need is to find yourself mired in massive litigation with a system that simply can't support the volume and doesn't integrate well with you're litigation teams' computer systems.

In those mass torts that have been with us since before the age of the personal computer, historical documents – including bygone depositions and exhibits from past trials – can be scanned in searchable format to cross reference with the evidence today. Trends and tactics can be spotted and used to bolster arguments that previously may have relied on anecdotal evidence and uncover new arguments and lines of attack unavailable due to the inability to perform such a substantial review and comparison. Your clients key documents, that may stretch back decades, can be stored in a manner that makes them accessible and searchable. The initial review and imaging of hard copy documents can be massive and may not be warranted in all situations, but the usual course of mass torts is measured in multiple years and often decades, undertaking the expense to identify, index and create a database of important documents early will pay for itself in saved legal fees for the review of the same documents over and over again.

The initial steps in creating such a database are of course to identify those documents necessary to support the litigation and any anticipated discovery. Coordinating such an endeavor through counsel should protect any resulting database as attorney work-product. Centralizing and controlling the creation, update, access and copying of documents earmarked for production from such a system gives the client and counsel control over the parameters of production of documents, consistency in response to discovery over numerous jurisdictions and a method for indexing, identifying and accessing responses made over time.

As mentioned above, once the litigation is under way, the computer provides a readily available storage and retrieval tool to track the claims made, the costs of both defense and settlement/verdict and the jurisdictions that may need special attention due to same. Plaintiffs can be easily tracked for similarities in jobsites, testimony, evidence, etc. Such a system can expose fraud in the presentation of evidence, prevent duplication of claims, track similarities in expert reporting and testimony and provide a simplified method for attacking and challenging the professional witnesses current opinions with

their oldest testimony. All of this information can and should be shared with the client, the insurers, counsel and co-defendants where necessary.

This interconnectivity when used properly can lead to what may be termed the virtual law firm. The instant communication between the interested parties and decision makers – the disparate team of national, coordinating, regional, local and house counsel mentioned in the New Jersey guidelines – means that they can literally be on the same page at the same time. The various roles of such counsel will be discussed further below, but the communication and information sharing available through the full utilization of available computer systems and software destroys the boundaries of time and space between the disparate players involved in mass tort litigation and leads to a better utilization of legal resources. Not all your counsel need be expert in every aspect of the defense. You can use your best resources in each and every jurisdiction and have your legal team share results, discuss issues and strategy and prepare each other for every permutation of the litigation.

C. National Counsel v. Local Counsel

The New Jersey guidelines mentioned above list a surfeit of attorney roles that may be involved in mass torts - for just one defendant. From house counsel to local counsel and all points in between the key to successfully managing and coordinating the roles of each counsel is to define the roles each will play in the litigation early on while ensuring that as the litigation progresses these definitions will not stymie the growth and change of those roles that may be required as the litigation progresses.

Communication, coordination and flexibility have been the buzz words used throughout this paper and they are no less important in the interplay between national counsel and local counsel. Local counsel knows the courts, the law, the local experts and lawyers and the jury pool in their area – and they are often where the plaintiffs live. National counsel knows the case, the company story, the national experts and the corporate witnesses. The breakdown of roles each will play in the litigation should obviously fall to each counsel's strength – i.e. local counsel will handle medical workup and plaintiff depositions national counsel will present key experts and corporate witnesses.

A core group of trial counsel should be vetted and prepared to defend the client in every jurisdiction. This group need not be large and ideally will consist of counsel that brings not only stellar trial credentials but specific expertise in the major issues necessary to the client's defense.[3] Through the interconnectivity available by setting up well integrated computer systems and database access this core group can ensure that their knowledge is made available to all counsel. The reputation of your local counsel is central to telegraphing the way in which the client approaches the litigation. Trial

[3] Of course the areas of expertise you will be looking for depend on the nature of the litigation and the product or event at issue. By way of example, some of these areas of expertise may include medical causation, epidemiology, warnings and industrial hygiene.

counsel need be just that, prepared and ready to take the case to a jury. Whether or not cases are actually tried, a reputation for meticulous preparation and vigorous defense on every key issue creates a cache of respect and makes your client an undesirable target where there are many potential defendants. Coordinating efforts through a core team of well prepared trial counsel will go along way to preventing a mass tort form turning into a settlement clearinghouse.

Local counsel are the eyes and ears of the litigation. While systems of formal reporting should be in place (ie. monthly or quarterly and of course pre-trial reporting[4]) an open door policy of communication should be fostered between the local counsel, client and national or coordinating counsel to provide up-to-date information on trends and plaintiff activity in the various jurisdictions. It also provides a forum to ask questions, share deposition information and provide overall guidance in arcane and complicated areas of the litigation.

National or coordinating counsel keep the processes moving by controlling the litigation per the client's stated objectives. Part and parcel of this coordination is providing consistency in areas of written discovery, document production, corporate witness presentation and coordinated expert retention and preparation. Consistent production and presentation of evidence ensures that mistakes will be rare and that those that do occur can be isolated. Controlled and open access to information ensures that knowledge is diffused and shared by the litigation team, but that somebody is storing, indexing and coordinating the information for future reference and use.

Specifically in the area of expert retention, the coordinating counsel should – with other similarly situated defendants and the help of local counsel – identify, educate and maintain contact with a ready pool of experts that can provide reliable testimony in every jurisdiction. Obviously, efforts should be made to recruit experts in the required fields that are leaders in their respective fields. However, local or regional professionals can foster a certain community bond with juries and squelch the "hired gun" argument that may be used by plaintiffs' lawyers to color a jury's perception of your experts. As with any witness, preparation should begin early and the pitfalls of being overly technical addressed. Experts who are unfamiliar with the vagaries of trial testimony present a special challenge. The vetting of experts therefore depends not only on their knowledge and opinions that support your client's legal defenses, but intangible factors regarding their presentation. The coordinated communication efforts discussed above again help to keep in contact with, and provide timely information to your experts so that consistent appropriate opinions can be presented in every jurisdiction.

D. Legislative Efforts

[4] The types and scope of reporting should be coordinated where possible between insurers, client and counsel so as not to provide a burden on local counsel. Obviously information is necessary for the decision makers to make decisions, but if the reporting requirements are redundant and/or overly burdensome they'll be no time left to prepare for trial.

At every government level, legislation can help shape and control your ability to manage and potentially put an end to your mass tort (if you only succeed in taking the "mass" out of the equation, you've come a very long way). Nobody is suggesting that the courthouse doors be locked and closed or that those truly injured by another's negligence go without just compensation. But the unvarnished truth of most mass torts is that with those who may have legitimate claims that deserve a full and fair hearing come the many who've signed on at the behest of screeners, unscrupulous lawyers, union organizers and ever present advertisement. In a society and governmental system that runs on the free flow of ideas, the right to petition the government to redress grievances must be pursued as an integral part of your defense plan.

While the recent Federal legislative efforts regarding asbestos litigation garnered great attention, and though this latest attempt to reign in the grand daddy of mass torts has stalled for now, the real success on the legislative front in asbestos and other mass torts has been on a state level. From enacting caps on non-economic damages to establishing protocols for meeting threshold medical criteria, legislative efforts in many jurisdictions have lessened the volume and impact of mass torts by injecting much needed mechanisms for courts to perform a culling of non-meritorious from meritorious claims, thus removing the easy money incentive for some plaintiffs' lawyers to treat mass torts as a settlement clearing house.

Efforts to influence legislative prerogatives regarding mass tort litigation should always center on fairness to all parties. The surprise endorsement of the asbestos legislation by Richard "Dickey" Scruggs, a longtime plaintiffs' asbestos lawyer[5] was explained in a piece in the Washington Post, where Mr. Scruggs notes, "I'm worried that men and women who have legitimate claims are running out of options…" [6] In a New York Times piece on February 9, 2006, Mr. Scruggs is quoted as supporting the bill because, "This bill stops companies from going bankrupt and prevents trial lawyers from going after these companies and bringing them down…"[7] Clearly, Mr. Scruggs has become convinced that the unprecedented number of bankruptcies directly brought about by asbestos litigation has resulted in a situation where many of his clients have no opportunity for compensation. An in depth analysis of the causes for asbestos related bankruptcies is beyond the scope of this article, however, anecdotal evidence from the current silica experience[8] indicates that many asbestos claims may have been manufactured through an economic model of litigation – round up as many claimants as possible, get a quick B-read from willing medical practitioners and your in the money. The sheer volume eventually destroyed the front line asbestos companies leaving us with

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[5] See, www.asbestossolution.org

[6] Washington Post, February 8, 2006, "Asbestos Settlement Advances"

[7] New York Times, February 9, 2006, "Large and Small Businesses Part Ways on Asbestos Bill"

[8] Judge Jack's opinion in the Federal Silica MDL 1553 has resulted in Congressional hearings into the conduct of specific plaintiff's firms and medical practitioners. (See, *Morning Edition, House Takes up Silica Fraud Claims*, (National Public Radio broadcast, March 8, 2006) (full transcript and sound recording at http://www.npr.org/templates/story/story.php?storyId=5251005). It has also resulted in many asbestos bankruptcy trusts and asbestos defendants taking a harder line on radiographic diagnosis of asbestosis and other diseases. (See, Fred Krutz and Jennifer Devery, *Commentary, In the Wake of Silica MDL 1553* Mealy's Litigation Reporter: Silica, Vol 4, #5, January 2006, at 3, n 21.)

Mr. Scrugg's lament. Mr. Scruggs is now looking for fairness. However, in that same New York Times article, the representatives of smaller businesses noted that legislative efforts in jurisdictions such as Texas and Mississippi with regard to tort reform had cut into the number of asbestos claims being filed against them and that what they would be asked to pay on a yearly basis under the Federal asbestos legislation was far more than their yearly profits.[9]

Mr. Scruggs epiphany is the ultimate paradox in that many of the claimants that received compensation from companies now defunct, were likely unimpaired and therefore, under a more realistic system, would never have been compensated. While there has been no undertaking to ascertain the exact impact of any such claims on asbestos bankruptcies specifically and the litigation generally, a lesson has been learned and when plaintiffs' counsel attempted to apply their asbestos model to silica litigation, they ran not only into Judge Jack, but a concerted effort in a number of jurisdictions to avoid the pitfalls of the asbestos model. To date, Texas, Florida, Georgia, and Ohio have passed legislation providing protocols and threshold triggers for bringing silica related cases.[10] This legislation basically sets out medical criteria and fact investigation requirements for bringing silica related claims, providing the court with an early mechanism for disposing of non-meritorious claims. These criteria don't lock the courthouse doors, they simply seek to ensure that only those that are actually injured are handled through the civil trial system.

Legislative efforts are time consuming and expensive. They require a dedicated effort to reach out to the relevant lawmakers in each jurisdiction as well as the pubic at large through a specific program of public relations. These efforts may best be handled through trade and business groups (such as industry groups and the Chamber of Commerce). But your client should not overlook the value of hiring a public relations firm to structure, coordinate and present the narrative that will be used to achieve your legislative goals, whether they be limiting the number of plaintiffs (along the lines of the silica example) or killing the litigation altogether (the best example being the NRA and gun manufacturers efforts). While it is not always cost effective to have local counsel directly involved in these efforts,[11] they will provide a steady stream of news regarding setbacks and victories that can be used to highlight and juxtapose the differing civil trial systems and what works and doesn't work to promote fairness in every jurisdiction.

While many companies would like to avoid the spotlight which litigation shines on them and their industry, plaintiffs will use the media to paint the corporation and the industry as the bad actor that in its callous quest for profits injured their clients. Rather than waiting to respond to such scurrilous accusations, companies should go on the offensive early. Using the wealth of information you will have collected from your client

[9] Id.
[10] For a more thorough analysis of the likely impact of this legislation, see, Jeffery J. Hines and Michael A. Pichini, *Silica Tort Reform – A National Overview*, Harris Martins's Silica Columns, September 2005, p. 2.
[11] Of course, this comes with the caveat that if local counsel is politically involved in the jurisdiction at issue, they may be your first best source for access to the decision makers that can achieve your legislative goals.

and the resources available through myriad public and private sector institutions[12] the narrative can be presented with hard evidence rather than through anecdotal press releases which may appear overly self-serving.

E. Joint Defense Groups

In most mass tort situations your client is not alone.[13] There may be any number of similarly situated defendants - specifically in the case of a mass tort based on a product - who either produced the product at issue, installed the product, or made equipment to use with or protect against the dangers of the product. In these situations, many different agreements and groups can be formed between the defendants to lessen the time and cost impact of the litigation.

As a general principal, medical issues can be an area where all defendants can agree – the plaintiff is either injured or he is not - and joint medical defense agreements and funds are common. Of course as the medical issues get more complex the differences in the defendants relative relationship to the cause of the injury become a greater issue and defendants may be forced to part ways.[14]

General investigation of numerous cases with regard to document retrieval and background checks are also areas where all defendants can pool their resources to achieve the desired collection and indexing of information.

Another area of wide agreement will be in the united front the defense group presents to the court in the initial stages of the litigation. It is at this time that the defendants, working together, can achieve through judicial fiat what might take years on the legislative front – a case management order that sets forth certain initial disclosure requirements for both the plaintiffs and defendants that can be used to help the court cull the non-meritorious claims from the system. Of course, plaintiffs counsel will fight hard to include a massive dump of information from the defendants regarding issues irrelevant to the specific facts of those first cases presented. It is in this situation where the plaintiffs having brought numerous defendants into the matter may backfire. It is patently unfair for each and every defendant to be asked to provide every scrap of information they have prior to the plaintiff making a prima facia showing that the defendant should even be involved in a specific case. The CMO should be structured in

[12] While the information you will need depends on the issues underlying your tort, generally court documents (the language in the complaints and the sheer volume being filed against your client) should be juxtaposed with relevant government statistics and industry studies regarding the claimed injuries. By way of example, state workers' compensation statistics for the type of injuries claimed; government regulations regarding the reporting of the specific diseases or injuries at issue; Center for Disease Control statistics; Morbidity studies, etc. can be used to challenge the merit of the claims being brought. Where there has been full compliance with government regulations, the current regulatory scheme should be used to your client's advantage.

[13] Of course, in mass torts based on pharmaceutical products the exact opposite may be true, it may be your client alone that is the target due to the sale of one patent protected product.

[14] By way of example, in asbestos litigation there is an ongoing debate as to whether certain types of asbestos can cause specific asbestos related diseases. Some defendants find themselves supporting this defense while others must attack it because of the specific asbestos fibers used in their products.

such a way as to require the plaintiff to do some actual work prior to simply clogging the court with 100's of cases and causing the court to throw up their arms and give them anything they want to make it go away. The court's should realize by now that this doesn't work but simply invites more and more litigants to their jurisdiction. No judge wants to spend the rest of her career trying the same case over and over again. A solid CMO gives the court a mechanism to control and narrow the litigation from its inception. When the venue is known for handling actual cases that have met certain specific criteria and actually making the parties litigate in a fair and upfront manner, the jurisdiction will become unpleasant to the plaintiffs and the number of frivolous lawsuits should decline.

On the issues where defendants may part ways there are still opportunities where other shared questions may lend themselves to groupings of company defendants within specific and/or across all jurisdictions who can reach out to each other and share specific experts who support issues specifically related to their industry.[15]

Joint defense agreements should always be reduced to writing and protect the independence and confidentiality of its participants. At some point during trial preparation even the most cohesive defense group will give way to the concerns of each individual defendant. The united front is feasible for only so long, then, as it must be, each defendant must preserve and pursue the best possible course for its own interests. The better drafted joint defense agreements contemplate the independence and self-interest of the participants and provide contingencies for this eventual and inevitable parting of ways. That said, what to do with the renegade defendant who may join in the agreements while cutting deals with plaintiffs' counsel to the detriment of the remaining defendants.[16] Such duplicitous dealing within the defense group cannot be tolerated and must be dealt with swiftly and consistently. If such breach of confidence is in abrogation of signed defense agreements, available remedies should be pursued as outlined under the agreement. Alternatively, a rogue player should be ostracized and absolutely no information should be shared with that defendant. They should be barred from any cost saving groupings and cut from any defense committees or meetings. They should not be invited to join on any joint pleadings or consulted about defense strategy (as such discussions may make their way back to the plaintiff). Where the court has set up defense liaison counsel their participation as such should be challenged and vigorously opposed.

[15] Using asbestos again as an example, gasket defendants oftentimes use the same industrial hygiene and medical experts to support their low dose and encapsulated fiber defenses. These experts would not be helpful to say a contractor whose liability rests on the use of pipe covering.

[16] There is anecdotal evidence from various mass torts that certain defendants appear to have been co-opted by plaintiffs to: thwart removal to federal court by consistently refusing to consent to removal; naming expert witnesses at the behest of plaintiffs' counsel which experts are then used to attack other defendants; providing information on defense strategy in return for early and/or reduced settlements, etc.

F. Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation's website has a link for "pending MDL's",[17] and while all the cases handled under the MDL heading cannot be considered mass torts, an MDL designation should always be considered as an option for a mass tort. However, seeking and MDL designation should be considered carefully as there are both pros and cons involved with proceeding in this manner.

The Judicial Panel on Multidistrict Litigation was created in 1968 by an Act of Congress.[18] The purpose of multidistrict litigation is to centralize civil actions pending in different federal districts to prevent duplicative discovery and inconsistent pretrial rulings while conserving the participants resources – including judicial resources.[19] For trial the cases are remanded to the original district. [20]

This consolidation process can prove very favorable for holding down litigation costs. As opposed to having a number of local counsel, the MDL may be handled by a litigation team closest to the district where the cases have been consolidated. The centralization of numerous cases for discovery can reduce redundant responses and result in a large number of cases being prepared for trial at one time. Rulings that narrow the scope of the trial and evidence presented will also be handled on a large scale. Furthermore, consolidating cases for discovery may have the salutary effect of providing information that can be analyzed and used to assess the claims being made for similarities and potential fraud – as was the case in the recent Silica MDL.

However, the very nature of having discovery and pretrial issues resolved at one time for a very large number of cases may equally prove unfavorable to your client. Sweeping discovery rulings by the court may require the production of large amounts of information – information that may cover long periods of time and include documents or other items that would normally not have been produced if the cases were not consolidated but had proceeded on a case by case basis. Such a great pool of information may provide a ready reference of information for plaintiffs to use against your client in perpetuity. Even with a confidentiality agreement in place, once a document has been produced there is no controlling its dissemination and use as a reference for future discovery requests.

G. Corporate Witnesses

This topic is reserved for the end of this paper because, when preparing for the defense of mass tort litigation that could conceivably go on for decades it is an understatement to say that the corporate witness deposition will be important. The plaintiffs undoubtedly will ask for a corporate representatives deposition, so the time to

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[17] See, http://www.jpml.uscourts.gov/
[18] 28 U.S.C §1407 et seq.
[19] In re Ford Motor Co. Crown Victoria Police Interceptor Products Liability Litigation, Jud.Pan.Mult.Lit.2002, 229 F.Supp.2d 1377
[20] 28 U.S.C. §1407 et seq.

start preparing is not when the notice is received, but when the first 100 complaints come delivered to the door. From the start, procedures should be in place to identify, cultivate and present a corporate witness that can not only testify to the facts that clear you client of any wrongdoing, but that can present these facts in a way that a jury can accept, understand and believe. In certain jurisdictions your corporate witness may be videotaped in discovery. This means that even a stellar performance on the facts may be undercut by a witness who simply does not appear well on video.

House counsel and National or Coordinating counsel should identify the departments within the client's company where the witnesses most likely work. Those who remain with the company need to be given the leeway to participate in the litigation while those who have left the company either through retirement or otherwise need to be found and contacted. Former employees can provide a wealth of personal knowledge in those instances were the tort is based on a bygone event and it is important that it is explained to these individuals early on the role they may be asked play in the litigation – whether as direct witnesses or used as a reference to prepare other current employees. Many times former employees or employees who have been involved with a specific litigation and have learned the nuances of testifying and the issues involved can be retained as consultants by the client after their retirement.

Key documents will play an important role in preparing your corporate witnesses for testimony. In many cases the witnesses may have authored or participated in the creation of the documents. Where the documents are from the past, the witness may always testify to having reviewed and become otherwise acquainted with the document(s). Once identified, these documents will become the basis of testimony and the key to providing a consistent work up of future witnesses. Documents that may be considered "bad" need to be confronted head on, with standard answers explaining the timing and situations surrounding their creation.

Once the ground work is done, the testimony should be presented and preserved to be referenced over the life of the litigation as the first best evidence on the subjects covered. During the initial depositions, key documents should be identified and authenticated were appropriate and the testimony and key documents should be used to educate the next generation of witnesses, thus ensuring there will always be consistency and continuity of the client's message. Future witnesses should be identified and cultivated early so as to ensure there will always be a knowledgeable and well prepared group of corporate witnesses available.

Summary

A mass tort presents the ultimate legal challenge for any business entity. The potentially devastating impact presented by such litigation should be met head on with a vigorous defense of each an every legal issue and a coordinated plan of attack for each topic presented in this paper. Early coordinated action can make the difference between a company's slow and agonizing loss of economic viability or sustainable financial capacity.

Jeff Hines joined the firm as a partner in 2003. Mr. Hines is licensed in Maryland, the District of Columbia and Virginia, and has represented clients in trials and appeals in all three jurisdictions. His areas of practice include professional malpractice, toxic tort and environmental, pharmaceutical, products liability, and commercial, securities and employee litigation. Mr. Hines is listed in Best Lawyers in America under legal malpractice law, in Super Lawyers under products liability and in The Best of the U.S.

Professional Malpractice Litigation. Mr. Hines defends attorneys, health care providers, realtors, clergy, social workers and other professionals in malpractice claims brought in Maryland, Virginia and the District of Columbia. In 2008, Mr. Hines successfully tried a will construction case in the Circuit Court for Montgomery County, Maryland. In 2005, Mr. Hines convinced a federal judge in the United States District Court for the Eastern District of Virginia to apply Virginia law regarding the non-assignability of legal malpractice claims substantially reducing an insurance company's claims against its panel counsel. In 2004, Mr. Hines obtained a defense verdict in Maryland for an accountant who allegedly provided improper tax advice. In December 2003, Mr. Hines successfully tried a wrongful adoption matter involving allegations of child trafficking and brain damage in the Circuit Court for Montgomery County, Maryland. Mr. Hines was able to strike plaintiff's expert neuropsychologist for basing his opinion on unreliable data. At his prior firm, Mr. Hines obtained a defense verdict after a three week jury trial in a sexual abuse case brought against a psychologist in the Circuit Court for Fairfax County, Virginia. In addition, Mr. Hines obtained a defense verdict in a multi-million dollar case against an attorney brought in the Superior Court of the District of Columbia. Mr. Hines has also defended attorneys and health care providers in matters before disciplinary boards.

Pharmaceutical and Products Liability Litigation. Mr. Hines represents Astra Zeneca in the Seroquel and Pain Pump litigations. Mr. Hines has represented Pfizer, Inc. in the Neurontin, Celebrex and Mirapex litigations. Mr. Hines was part of the national team representing Wyeth in Fen-Phen litigation. At his prior firm, Mr. Hines handled a variety of product liability claims involving products ranging from contact lenses to light industrial lifts. Mr. Hines also was Scottsdale Insurance Company's national coverage counsel for claims arising out of the national firearms product liability litigation.

Toxic Tort and Environmental Litigation. Mr. Hines is a member of the GDLD team coordinating a major sand supplier's national defense of silicosis claims. Mr. Hines oversees expert development, conducts training seminars for defense counsel, coordinates discovery, oversees settlement negotiations, and participates on trial teams.

Commercial, Securities and Employee Litigation. Mr. Hines is currently defending broker-dealers in cases filed with the FINRA. Mr. Hines prepares responses to the FINRA's Enforcement Department and defends broker-dealers and registered representatives in Rule 8210 examinations and in customer initiated arbitrations. In December 2004, after a three day arbitration, Mr. Hines obtained a defense verdict on behalf of a broker-dealer and registered representative, including an expungement directive. Mr. Hines also represents a major credit company and has defended them in multiple suits filed in the United States District Court for the Eastern District of Virginia (Richmond division). For over ten years, Mr. Hines was national counsel for Parents Without Partners, Inc., the largest single parent organization in the world whose members at one time exceeded 250,000. Mr. Hines also represents corporations regarding compliance with ethical obligations.

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