

Practical Considerations for the Non-Mass Tort Attorney

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Introduction

This article will provide a brief overview of key practical considerations to consider when a client is retained because of a claim subject to a MDL. This article will point out some fundamental distinctions between traditional PI cases and a mass tort case.

Client Communication

Initial client communication is essential when retaining a new client with a mass tort case. There are significant differences between mass tort cases and other legal cases that a client may have been exposed to in the past. Educating a new client and managing client expectations from the beginning will pay dividends later.

First, it is important to educate new clients on the MDL process. It is common for complex MDL cases to last five or more years from intake to resolution. This is much longer than most legal cases that a new client may have been exposed to in the past.

Second, because cases can span years, keeping clients informed of the progress in the case is important. Regular update letters or emails, updating the client on their specific case as well as general litigation updates, establish a clear channel of communication and prevent problems later in the cases.

Finally, it is likely that a client will move or change phone numbers during the pendency of the case. Often, there are short deadlines and you must be able to communicate quickly and efficiently with clients. If there has been a history of efficient communication over the course of the representation, you will be confident that you have correct contact information when you need critical information from your client.

At some point during the case, many clients will apply for or ask about a lawsuit loan. Most lending companies do not lend on mass tort cases due to their belief that the cases are too risky or too speculative. Client education is critical. Mass tort cases often last for years, so the amount ultimately due on a small loan taken out at the beginning of a case can triple or even quadruple when the case concludes. It is important to advise the client of this to avoid problems at settlement.

Venue and Filing Lawsuits

Most MDL's are not in Ohio. Recently, Ohio District Courts have received two major MDL's. DePuy ASR MDL 2197 was consolidated in the Northern District of Ohio in front of Judge Katz in 2010. The C8 Litigation, MDL 2433, was consolidated in the Southern District of Ohio front of Judge Sargus in 2013. However, it is far more common

for a litigation to be consolidated in an out-of-state District Court. New clients must understand that their case will not be filed in Ohio.

Inevitably, when a client finds out that their case will be filed in a different state, one of the next questions is “will I have to go to Court there?” Generally, and almost certainly, the answer is no (except, possibly, for bellwether trials, discussed in the next paragraph). Even in the unlikely event the client is required to appear for a deposition, the client will be deposed where the client resides. The MDL is created for pretrial proceedings only. In the rare event that cases do not reach resolution in the MDL, they can theoretically be remanded to the Plaintiff’s home district for trial.

Another common question is “when will my case go to Court?” Nearly all MDL cases are resolved without a trial. In a litigation with 10,000 Plaintiffs, only a handful, if any at all, will ever see trial. These trials in an MDL are known as bellwether trials since they are designed to give guidance to the parties for settlement negotiations. Traditionally, Plaintiffs’ leadership counsel selects a handful of cases and the Defendants select the same number of cases. From that pool, the Court will select the cases to be prepared for trial.

Discovery

Discovery is also handled differently in most mass tort cases. Plaintiffs do not complete traditional interrogatories or respond to traditional document requests. Instead, Plaintiffs each complete a Plaintiff Fact Sheet or “PFS” which contains streamlined written questions and general requests for documents. A PFS does not look like traditional discovery. Instead, they look more like worksheets and often contain charts, check boxes, and simple yes or no answers. Failure to complete a PFS in compliance with Court deadlines established by Pretrial Orders can mean dismissal of the case.

There are likely to be dozens of depositions in any given MDL. The majority of these are expert depositions, company employee depositions, or 30(b)(6) persons most knowledgeable depositions. Individual Plaintiffs will only be noticed for a deposition in a bellwether or accelerated trial process.

Settlement

MDL cases reach resolution very differently than other PI cases. Recently, the trend has been to settle entire litigations in bulk and use a third party settlement administrator such as Garretson, BrownGreer, or Providio to evaluate claims and administer settlements.

These settlement programs raise many ethical considerations, most of which are beyond the scope of this article. Settlements vary wildly. Some, such as DePuy ASR, have a base amount from which the settlement value can go up or down based on the strengths and weaknesses of each case. In NuvaRing, each signature injury was assigned a value. In the recent Actos settlement, there were no values given. Counsel could calculate the number of points a claimant may receive but could not determine even an approximate value.

No matter what method is used in a bulk settlement the most important ethical consideration is informed consent, required by Model Rule 1.8 and the Ohio Rules of Professional Conduct. Each client must consent in writing to the settlement and be provided full disclosure of the terms, process, and general circumstances surrounding the settlement. Each client must be in a position to make an informed decision to either participate or walk-away from a settlement.

Conclusion

These are just a few of the unique issues to consider when retaining a new client whose claim may belong in an MDL. All are important considerations for any firm with a mass tort case.