

INTRODUCTION AND HISTORY OF MASS TORTS

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From asbestos to tobacco to pharmaceutical products, mass tort litigation has become a powerful form of litigation in both state and federal courts. Mass tort litigation is a growing area of the law, which shows no signs of slowing down in the near future. Mass tort claims find their origins barely twenty-five years ago.¹ Some scholars trace true mass tort cases back even further to the late 1960's and early 1970's. In the 60's lawyers began to represent passengers in plane crashes on a structured basis. They represented a multitude of plaintiffs and victims against a myriad of defendants including manufacturers, suppliers and the airline companies themselves. These cases, referred to as "mass accident" claims, where a catastrophic event results in a number of serious and fatal injuries, are usually followed by mass litigation.² In mass accident litigation, injuries generally occur at a central location and usually manifest themselves immediately.

We also employ the term "mass torts" to refer to cases of mass exposure where claims arise from product use or exposure to toxic substances, including pharmaceutical products like Baycol and Rezulin. In some jurisdictions, mass tort claims stemming from exposure to products or toxins "account for over twenty-five percent of the entire civil caseload."³ In mass exposure cases, injuries may occur in numerous, widely dispersed locations, at different times and their full effect may be unknown for years. With the implementation of the "fast-track" system of new drugs by the FDA, pharmaceutical mass exposure cases have been prevalent in recent times. The FDA has recalled eleven drugs since 1997, the latest of which is Baycol. This figure represents only one fewer than the total number of drugs recalled in the past twenty years.⁴ Critics of the FDA and this "fast-track" program claim that they have become a rubber stamp for the pharmaceutical industry.

In the 70's, one of the more famous mass tort cases began to develop involving a chemical known as "Agent Orange." The legal world began to see suits evolving throughout the country at both the federal and state level. These claims involved an herbicide employed during the Vietnam War. The effect of Agent Orange on humans has been a hotly contested topic for the past two decades. It has now been thoroughly established that dioxin is a very potent poison and a dangerous chemical. It can cause a wide range of organ and metabolic dysfunctions. Because the majority of these claims

¹ Peggy Lane, 159 Bodies recovered in club fire, Wash. Post, May 30, 1977, at A1. (A fire in the Beverly Hills Supper Club in Southgate, KY killed 159 people and injured 100 more. The fire resulted in the first tort class action suit.)

² Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961 at 1014 (1993).

³ John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 at 1363 (1995).

⁴ Paul Durman, *Sunday Times* (London), August 12, 2001.

arose while the claimants were still enlisted in the military, plaintiffs generally ended up in the federal court system. They were subsequently transferred and consolidated into District Litigation (MDL).⁵ Baycol, like other pharmaceutical mass tort cases, now faces consolidation of lawsuits in Multi-District Litigation, located in Minneapolis, Minnesota. MDL can slow the process for plaintiffs pursuing individual claims against pharmaceutical companies like Bayer AG.

Perhaps the most notable and well-known mass tort cases involved asbestos litigation. These cases also have their genesis in the 1970's. Due to the almost endless list of asbestos-containing products and a large number of companies involved in the manufacturing and distribution of these products, asbestos personal injury litigation, unlike Agent Orange, seemed to be practically unlimited. However, where the potential for mass tort litigation existed, the causation and liability issues were pursued more on an individual basis, which was the norm at that time.

In the past, mass tort litigation was an alternative view to the traditional notions of the civil litigation system. Courts have long recognized the need for special procedures in litigation involving multiple tort claims arising from mass disaster or mass exposure cases. Mass tort cases, like that of Baycol, have now emerged to the forefront of modern civil litigation.

Due to the complexity of mass tort litigation, it is an area of the law which requires attorneys to handle several major issues simultaneously. Cases may be filed in either state or federal court with multiple named plaintiffs and defendants. Plaintiffs must also deal with defendants who may be in bankruptcy, which obviously affects their ability to collect a judgment. Plaintiff's counsel must also navigate through various state laws which may effect a variety of issues such as compensatory and punitive damages, potential statute of limitations problems, standards of liability, rights of contribution, indemnification and subrogation. Third party complaints may also arise, further complicating the process.

In Baycol, as in most pharmaceutical litigation, expert testimony is critical. The use of an expert and admissibility of testimony and evidence can develop into a fierce adversarial battle. This issue requires the judge to act as the "gatekeeper" in reviewing scientific evidence as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).⁶ Defendants have used the *Daubert* decision to deny admission of expert evidence.

⁵ Multi-District Litigation (MDL) is a provision of the U.S. Code (28 U.S.C. § 1407(a)) that permits the pre-trial proceedings in different legal actions to be consolidated. The chief requirements for MDL designation are: the different actions must share one or more alleged events, circumstances or characteristics to be resolved at trial, the consolidation must promote convenience for the involved parties and witnesses and the consolidation must promote justice and efficiency by eliminating overlapping or duplicative discovery.

⁶ The Court noted that the trial judge is responsible for determining the relevance of expert testimony and the reliability of the methodology upon which the expert relies.

For an attorney unfamiliar with mass tort litigation, it can be confusing and intimidating territory. The plaintiff must constantly be on the offense, pushing discovery issues and securing trial settings. Trial settings in mass tort litigation are crucial in discovery issues and vital in initiating settlement negotiations.

Mass Torts Discovery

Discovery in mass tort litigation is often a long, uphill battle from the plaintiff's perspective. The defendant's strategy to stall and release discovery as slowly as possible has become a common theme among defense counsel. This type of behavior is often the source for motions to compel and motions for sanctions filed by plaintiffs.

With mass tort litigation, discovery may become delayed from the outset of the case based on the sheer volume of documents and materials required. This makes it even more vital that requests for discovery be served immediately. It is preferable to serve discovery with the summons and complaint in order to help ensure a timely response by your adversary. It is also worth noting that proper documentation should be kept of the defendant's failure to comply with discovery request. While it is ill advised to engage in a "battle of letters", which can amount to a complete waste of time, it is wise to have documentation, such as a letter to reconsider defendant's objections, to support a motion to compel.

Remember that defense counsel can play within the rules and force the plaintiffs to "work" to obtain discovery. Defendants can require plaintiffs to state, with reasonable accuracy, the documents that they are requesting, rather than responding to a request for "all" records. The opposite strategy is to overwhelm the plaintiff with documents by "burying them in paperwork". Courts have held that this type of response is improper where specific inquiries have been made. The rule is clear that a "responding party has the duty to specify, by category and location, the records from which answers to the interrogatories can be derived."⁷ Although this type of conduct is inappropriate, a diligent lawyer may discover valuable information that he or she would not have otherwise specifically requested. Also remember that the "uncooperative client" is not a valid excuse available to defense counsel for failure to produce.⁸

Mass tort discovery does not involve any different or special discovery. They simply require traditional, standard discovery methods applied to a large inventory of cases. The main discovery tools utilized include interrogatories, document discovery, depositions and request for admissions. The defendants will use the same discovery tools for the most part in addition to requesting disclosure of medical records and possible physical examinations. The order of discovery is determined on a case-by-case basis or by preference of the attorney. Different strategies may be employed here depending on the companies, executives, and personnel involved.

⁷ Advisory Committee's notes on amendment to FED. R. CIV. E 33 (c) (1987).

⁸ Federal Rule of Civil Procedure 26(g): The lawyer must make a "reasonable effort to assure that the client has provided all the information and documents responsive to the discovery demand."

Interrogatories

As we have seen in litigation with Bayer, as in most mass tort cases, interrogatories may evolve with the case. There may be numerous sets of interrogatories served on the defendants. Interrogatories in mass torts litigation should start out from a very broad perspective and narrow the focus as the case progresses. Remember that the principle employed here is to gain knowledge on a variety of subjects pertaining to the underlying action, so as to determine where the case may lead. Interrogatories may also be used to clear up any uncertain issues and push other information towards admissibility at trial.

One tactic to watch for from defense counsel is the “Option to Produce Business Records” answer to interrogatories. A defendant may use this answer only “where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served *..and the burden of deriving or ascertaining the answer is substantially the same*” for both parties, according to Fed. R. Civ. P 33 (c). One solution is for the defendants to provide the plaintiffs with an index of documents or provide objective coding.

Requests for Production

Requests for Production are tremendous tools in assisting the plaintiff in learning about existing documents, in order to prepare a case for trial and pursue discovery in regard to the substance and the subject matter of those documents. Plaintiff’s counsel should conduct their discovery on an extremely broad basis. This allows disclosure of documents and records including financial records, complaints received by the company or corporate defendants and records of previous problems of the same kind. Most courts have taken this “broad based” discovery approach, which promotes efficiency and judicial economy. When serving a pharmaceutical company with Requests for Production, more specific requests may include: procedures for addressing adverse effect reports, guidelines for responding to adverse effect, reports, contracts with patent holders, any advertisements, costs incurred presenting the product to the FDA, records of all proceedings before the FDA, clinical studies, patient study files, patient medical records, warnings, precautions and package inserts.

Another important reason for Requests for Production is to limit the defendant’s evidence at trial. If the defense fails to produce a document that would be required in a response to Requests for Production, they may be barred from introducing that document at trial. When receiving documents produced by a defendant in mass tort litigation, each item should be numbered so that they can be identified.

Electronic Data and Digital Discovery

Today, computers are a must for both large and small corporations. Computers are used to store large amounts of data as well as an efficient way to communicate. For the most part, corporations do a less than adequate job of preserving information and data

related to litigation. For most companies the lack luster maintenance of records is an innocent act as opposed to an intentional wrong. However, because the majority of relevant information in pharmaceutical litigation is stored electronically, the services of a skilled computer professional may be required. Requests for discovery include disclosure of electronically stored data, the most prevalent being e-mail. This data may not have ever been transformed into a hard copy and even though “deleted” may still be retrievable.⁹ This “digital data”, electronically stored information, is discoverable, if relevant.¹⁰ Plaintiffs should be entitled to discover any material related to the record holder’s computer hardware, programming techniques associated with relevant data, structure of the stored data and the operation of the data processing system.¹¹

“Given the work that computers can do today, it is probable that the parties to mass litigation will index and store documents so that they can be readily searched and retrieved. At a minimum one would want to be able to search by the names in the document (sender, recipient, name in the text), date, subject and the document’s assigned number, tying into use later at trial.”¹² In Baycol litigation, all documents were produced on CD’s along with a database of Adverse Events.

Requests for Admissions

Requests for Admissions are not considered a significant piece of the discovery puzzle. Requests for Admissions may address issues such as the statement of fact; opinions of fact, the application of law to fact; and the genuineness of a document described and of which a copy is served or otherwise “furnished or made available” for inspection and copying.¹³ It is unlikely that this discovery tool will lead to any new evidence or relevant documents. The main purpose of Requests for Admissions should serve to clear up and minor details or tie up loose ends.

⁹ Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000); Linnen v. A.H. Robins Co., Inc., 10 Mass L. Rptr. 189, 1999 WL 462015 (Mass Super. Ct. 1999). Motions for discovery of electronic data may also seek injunctive relief for non-destruction of electronic files, see Illinois Tool Works, Inc. v. Metro Mark Products, Ltd., 43 F. Supp. 2d 951 (N.D. ILL. 1999), and a duty to preserve may arise without any such order, Baliotis v. McNeil, 870 F. Supp. 1285 (M.D. Pa. 1994).

¹⁰ Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94-Civ. 2120 (S.D.N.Y. 1995), 1995 WL 649934; Seattle Audubon Soc. v. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994).

¹¹ Manual for Complex Litigation § 2.715, at 120 (5th ed.)

¹² Thomas E. Willging, “Beyond Maturity: Mass Tort Case Management in The Manual for Complex Litigation,” 147 U.Pa.L.Rev. 2225 (2000)

¹³ FED. R. CIV. P. 36 (a)

Privilege Log

Another valuable tool available to plaintiff's counsel is a privilege log. A privilege log lists the pertinent documents that the defendant does not produce for a legally valid reason, such as attorney-client privilege, work-product, etc. The log must describe the "nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."¹⁴

Depositions

Depositions are one of the most critical and effective means of gathering information in the discovery process. In mass tort litigation, there are usually numerous depositions taken both by the plaintiff and the defendant. It may be necessary to depose employees of the defendant, former employees, physicians and other experts who have knowledge regarding the cause of action. On occasion, it will be necessary to obtain a court order to depose certain parties such as a government witness, i.e. – a scientist or employee of the FDA. One of the most important depositions available to plaintiffs are 30(b)(6) depositions. Prior to filing for a 30(b)(6) deposition, all of the names, positions and other relevant information should be gathered of persons working in the defendant's IS (information services) department. A 30 (b)(6) deposition should be taken of the person or persons most knowledgeable about the defendant's computer system. These employees usually fall under one of four categories: the records manager, the MIS manager, the director of safety surveillance systems, and the director of sales force automation.

The records manager would be responsible for record keeping prior to litigation. The Records Manager is essential in order to comprehend this procedure. Another area covered by the records manager would be document preservation procedures when the company is on notice of pending litigation. The MIS Manager is crucial in records retention for electronic information, as is the case in Baycol litigation. These records may include: E-mail, backup tapes and spreadsheets.

The deposition should also include questions regarding the hardware and software used by the defendant, how their computer system is structured, how data is stored, questions regarding backup systems and rotation schedule, security information (i.e. – password protection), whether data compression is used, and all steps that the defendant took in response to your notice letter. These type questions will generally attract strong resistance from the defense; however, if the proper answers are given they could provide a clear guide as to what questions to ask in subsequent discovery. From time to time a defendant may seek a protective order to prohibit the plaintiff from taking a deposition. A party seeking prohibition of the deposition "has a heavy burden of demonstrating the good cause for such an order."¹⁵ "A strong showing of good cause and extraordinary

¹⁴ FED. R. CIV. P. 26 (b) (5)

¹⁵ *Medlin v. Andrew*, 113 F.R.D. 650, 653 (M.D.N.C. 1987)

circumstances” must be made to avoid a deposition altogether.¹⁶ Case law suggests that these type orders should only be granted in extreme circumstances.

Protective Orders

The recent trend by defendants has shown an increase in filing protective order stipulations prior to disclosure of certain records. Protective orders have especially become common in mass tort litigation. These orders only serve to emphasize already important principle of disclosure between adversaries. A request for a protective order to limit or preclude discovery should be grounded on facts. The facts must set out with specificity by someone with knowledge of the harm that disclosure would do to the person requesting the order. The confidential nature of the information being sought and the harm its disclosure would bring must be shown. This is often times a defensive tactic for delaying or withholding pertinent documents.

Preservation Orders

In Baycol litigation, as well as other mass tort litigation, a preservation order may be filed with the court. Preservation orders are routinely entered in complex cases.¹⁷ A preservation order addressing specific issues of the lawsuit can help to secure an efficient and complete discovery process. If the plaintiff has concerns that relevant information may be destroyed due to inadvertence or in the ordinary course of business by the defendant, a preservation order is appropriate. The *Manual for Complex Litigation* recognizes that such an order is proper in a lawsuit of this nature and that entry of the order should be done very early in the litigation: “Before the commencement of discovery – and perhaps before the initial conference – the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, and records that may be relevant to the litigation.”¹⁸ Even after securing a court order regarding preservation of evidence by the defendants, some defendants may not comply. This should lead to motions for sanctions filed by the plaintiff.

If a document is lost or destroyed, however inadvertently, there may be no way for the Court or Plaintiff to determine whether the document ever existed, and more importantly, what information was contained therein. It is imperative that parameters be set which preserve all materials and documents, electronic and otherwise, which may have relevance and be discoverable. This should leave no doubt that an order to preserve electronic data and information is necessary to ensure that documents and information properly discoverable are available for production.

¹⁶ *Motsinger v. Flynt*, 119 F.R.D. 373, 378

¹⁷ *HJB, Inc. v. Am. Home Prods. Corp.*, Nos. 93 C 6728, 93 C 6789, 93 C 6790, 93 C 6773, 1994 WL 31005 (N.D. Ill. Feb. 1, 1994)

¹⁸ *Manual for Complex Litigation* § 21.442 (3rd ed. 1995)

Settlement

Generally, mass tort cases have a higher rate of settlement than do most individual tort cases.¹⁹ Often defendants find it safer to settle rather than “role the dice” in front of a jury of their peers. Aggregating cases may increase the plaintiff’s opportunity for a large group settlement.

Trial settings drive settlements; this is true for both mass tort and individual tort cases. For this very reason, judges may pressure the parties to complete **discovery in a timely fashion** knowing settlement is always a possibility. Mass tort cases have settled on the day of or day before trial, i.e. – Agent Orange.

Another type of settlement often discussed in mass tort circles are “global settlements”. Global settlements occur where all claims are resolved in one fell swoop. This type of settlement can be beneficial to the plaintiff, the defendant and the court system in general. The plaintiff has the opportunity to be compensated in a reasonably efficient time without further expense and the defendant is able to resolve all claims against them as well as have a clear picture of their future financial position. This type of settlement also clears room on the court docket and promotes judicial economy. These types of settlements usually occur with weaker cases where the plaintiff’s position is not as strong as desired.

¹⁹ *Manual for Complex Litigation* (3rd ed.)