



Ethics challenges in mass-tort litigation settlements

Mass-tort litigation presents a myriad of ethical challenges and disclosure is key

BY PETE KAUFMAN

The advent of successful mass-tort litigation dates only from the last quarter of the 20th century. Perhaps the best examples of this are the asbestos and tobacco litigations, easily the two biggest mass-tort cases in the history of the U.S., or any, legal system. Both were marked by long periods of struggle for claimants. While suits involving injuries caused by exposure to asbestos were filed as early as the late 1920s, it was not until the 1980s that plaintiffs first achieved the stratospheric results for which the litigation is now famous.

The first seven-figure verdict was achieved in 1982, the same year asbestos' manufacturer Johns-Manville declared bankruptcy. By the early 1990s, more than half of the 25 largest manufacturers in the U.S. joined that company in seeking protection from the claims of tens of thousands of injured victims. (See "Asbestos Hazards Handbook - Chapter 9: The Asbestos Producers." Lhc.org.uk.)

The tobacco litigation suffered through similarly inauspicious results before the 1990s. Between 1954 and 1994, hundreds of claims were filed against cigarette manufacturers, but almost none were successful. (See Howard M. Erichson, *The End of the Defendant Advantage Wm. & Mary Envtl. L. & Pol'y Rev.*, 2001, at 126.) As one commentator observed, in an apt thumbnail of the first four decades of the litigation: "Eight hundred and thirteen claims filed against the industry, twenty-three tried in court, two (defendants) lost, both overturned on appeal. Not a penny paid in damages." (See Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice*, at 7). Then, in the late 1990s, plaintiffs' attorneys teamed with attorneys general

of at least 42 states to bring actions seeking recuperation of Medicare expenses arising from tobacco-associated illnesses, leading to settlements in the hundreds of billions of dollars.

The twin watersheds of tobacco and asbestos have, in large part, spurred the dramatic increase in mass-tort litigation; in particular, in pharmaceutical and medical-device cases. In many respects, this has been a boon to consumers, and has served as a much-needed deterrent to manufacturers. But mass-tort litigation presents myriad challenges to practitioners. One of the thorniest areas is the resolution of cases involving hundreds, or even thousands, of clients injured by a single defendant, and the scope of this problem can hardly be overstated.

Historically, far less than 1 percent of all mass-tort cases proceed to trial. Indeed, in many mass-tort litigations, no cases are tried. As a consequence, the vast majority of cases are settled by agreement of the parties. The mechanisms for resolving these cases are varied, and implicate a number of rules of ethics and conduct. Plaintiffs' counsel must be aware of their responsibilities to clients, and of the ways in which these obligations are best discharged, within the parameters of any settlement.

The ethical rules governing representation of clients, resolution of claims and conflicts of interest were drafted in the context of single-plaintiff/single-event cases. The rules impose on practitioners an obligation to understand the nature of the defendant's liability, the extent of plaintiff's damages, the value of the case for purposes of resolution, and the likely outcome in the event of trial. The rules also require counsel to communicate

settlement offers to the client, and to assist her in making an informed decision about whether and when to settle, and for how much. For example, Model Rule of Professional Conduct ("MR") 1.4 requires a lawyer to explain a matter to her client to the extent reasonably necessary to permit the client to make an informed decision. And MR 1.7 requires communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

Where an attorney represents more than one client in the same case, the potential for conflicts of interest exists. Differences in the severity of the injuries suffered by the plaintiffs, resulting in disparate values for their respective claims, can create tension when the case is settled. The attorney may seek to leverage the stronger claim to settle the weaker one, which can rebound to the detriment of the former client. Similarly, an attorney may be tempted to jettison the weaker claim in order to resolve the stronger, more lucrative one. For these reasons, and others, the rules require attorneys to make clients in multi-plaintiff cases aware of potential conflicts of interest. MR 1.7(b) provides that conflicts arising from representation of multiple clients can generally be waived, but only if the attorney reasonably believes all clients can be represented effectively.

In cases involving multiple clients, the parties can agree to an aggregate settlement; that is, a sum intended to compensate and resolve all claims. These settlements are attractive for the practical reason that they can be efficient, and for the cynical reason that, oftentimes, all parties think they are gaming the arrangement to their benefit; defendants may assume that weaker claims are diluting



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stronger claims, and plaintiffs may assume that stronger claims are adding value to weaker claims. The potential for mischief inherent in aggregate settlements provides the rationale for MR 1.8(g), which requires that, when an attorney represents more than one client, she cannot enter into an aggregate settlement without disclosing the existence and nature of all claims, as well as the participation of each client, and without first obtaining informed written consent from all clients.

In California, the requirements of MR 1.8(g) should be read in the context of Rule 3-310 of the State Rules of Professional Conduct which requires that the disclosure to clients must include the relevant circumstances, and actual and reasonably foreseeable consequences, of any decision or waiver they are asked to make. The rule prohibits an attorney from undertaking the representation of any client if there is a potential conflict of interest, unless the client gives informed, written consent. In multi-plaintiff cases, in order for the attorney to continue with the representation of all parties, there must be unanimous consent on the part of each client. And before the attorney can agree to an aggregate settlement, she must consult with each client, identify all settling clients, and disclose the amount each client is receiving. The rules governing consultation do not require an in-person meeting; the required information can be provided by any reasonable means.

For the attorney handling single-event cases, discharging these ethical obligations is a relatively straightforward matter. Ensuring ethical compliance when handling litigations involving many plaintiffs, represented by the same firm, is more complicated. The difficulty is due largely to the mechanics of mass-tort litigation. These cases nearly always involve a single defendant, or a small group of defendants, and thousands, or even tens of thousands of plaintiffs. The plaintiffs are represented by hundreds of attorneys, or more. Mass-tort cases are typically consolidated before one federal court (as in a

multidistrict litigation) or before a single-state court (as in a Judicial Council Coordinated Procedure “JCCP”, in California). To be sure, these cases have some features of a single-event case. Discovery and development of the general liability case proceed much as they would in a case involving a single plaintiff. In efficiently run coordinated actions, this work will be done by a group of plaintiff’s attorneys, under the direction of a court-appointed Plaintiff’s Steering (or Executive) Committee. As in any litigation, the ultimate goal is either resolution or trial.

There are a number of benefits of mass, or aggregate, settlements, most of which are similar to the benefits of mass-tort litigation. Demonstrating liability in mass-tort cases that involve defective drugs or medical devices can be exceedingly difficult. Few firms possess the resources necessary to pursue mass litigation against the manufacturers of these products. Consolidated mass actions ensure the participation of sophisticated, well-financed attorneys. Cooperation among all plaintiffs’ counsel usually works to decrease the costs of litigation for individual plaintiffs, often quite significantly. Collaboration nearly always improves attorney work product, which adds value to most cases and increases settlement leverage. But the task of resolving individual claims falls to the attorney representing the plaintiff. It is that attorney’s responsibility to ensure that her clients’ rights are protected, and that their claims are resolved fairly, and in a manner consistent with all ethics rules.

Mass-tort settlements cannot be handled like class-action settlements, in which one lump sum is divided among all class members, in accordance with one consistently applied methodology, which requires court approval. This approach works in class actions because Rule 23 imposes requirements of commonality and typicality on all claims. Compliance with Rule 23, and a grant of class certification, ensures (as much as possible) that the damages suffered by all claimants (the members of the class) are similar, if not

identical. The class representative can prosecute the claim on behalf of all class members because her damages are assumed to be more or less equivalent to those suffered by each class member. Conflicts of interest are avoided because class counsel is pursuing a damages’ model applicable to all claimants, and there is no incentive, or reason, to privilege one claim over another. Moreover, judicial oversight is provided, indeed required, via mandated fairness hearing and approval of attorney’s fees. Finally, nearly all class settlements have a release valve built in, with the opportunity to opt out of any proposed resolution.

Mass-tort cases, however, cannot be treated, or resolved, like class cases. The most notable authority for this prohibition is *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591. *Amchem*, an asbestos case, essentially stands for the proposition that, in mass actions where there are disparities between plaintiffs (in exposure to the injury-producing product, in laws of the states in which they were exposed and injured, and in the types and severity of injuries actually suffered), the requirements of commonality of issues of fact and law are not met. Because these disparities nearly always exist in mass-tort cases, class-type settlements of these cases are almost always impossible. This means, essentially, that for the purposes of resolution, mass-tort cases must be treated individually, and in accordance with all applicable ethical rules.

Unfortunately, true individual resolution of every case in a practitioner’s “inventory” of cases in a mass-tort litigation is often impractical, if not impossible. Defendants will rarely, if ever, propose or negotiate settlement amounts for each case. Rather, a defendant will propose an aggregate settlement of all of the attorney’s cases. This permits the defendant to apply its own internal settlement calculus to cases, and permits it to report (in ways that are self-serving and, oftentimes, deliberately misleading) the lowest possible average, and maximum, settlement amounts for cases in a litigation. In



particular, pharmaceutical defendants are quite fond of setting out a handful of parameters for “compensability” of cases in a litigation, and then offering attorneys, or firms, an aggregate settlement, which plaintiffs’ counsel must then allocate to individual claimants.

Mass-tort litigations usually are resolved one of two ways: global, or matrix, settlements; or inventory settlements. In a global settlement, the defendant, with or without the agreement of plaintiffs’ counsel, proposes a settlement to cover all extant claims. The proposal will ordinarily identify an amount of money the defendant has dedicated to settle all claims, together with a methodology, or matrix, which sets out criteria according to which all claims will be paid. In a global settlement, plaintiffs’ counsel applies the matrix to her clients’ claims, determines how much each would receive under the settlement proposal, and makes a recommendation to each client about whether to accept or reject the offer. In an inventory settlement, the defendant negotiates a settlement of all cases handled by a single firm, or group of firms. As in a matrix settlement, the defendant will usually seek to negotiate one sum to resolve all cases, rather than individually negotiating all claims. In an inventory settlement, plaintiffs’ counsel should evaluate each claim individually to determine a minimum settlement amount to recommend to each client. After all clients have consented to a minimum amount for which each will agree to settle, counsel can add the values of all claims together to reach a minimum aggregate settlement amount. If plaintiffs’ counsel is successful in negotiating a settlement greater than the aggregate total, each client should receive a pro rata percentage of this “excess” amount. As discussed below, the mechanics of this approach should be

disclosed to all clients in advance of any settlement negotiations.

The key to ethical compliance in mass-tort settlements, however they are handled, is disclosure. While there is disagreement with respect to the amount that is required, the author proposes that candid and open communication with clients is always the best approach. In order to comply with the requirements of MR 1.8, this disclosure should start when the attorney-client relationship is initiated. Practitioners should provide mass-tort clients with all information about how their case will be handled and, when appropriate, how it will be resolved. At a minimum, disclosure related to settlement should be provided when resolution is imminent. Counsel should provide as much information as possible about the circumstances, terms and process of any proposed settlement. The goal should be to enable all clients to make informed decisions about whether to accept or reject the settlement amount. Where counsel is proposing an allocation of funds, she must explain the mechanism or methodology used to determine the individual distributions. Counsel must also make clear in the disclosure that, at time of distribution, clients have waived any potential conflict regarding joint representation.

An adequate settlement disclosure communication should contain a comprehensive update on the litigation, including the procedural status, and any upcoming mediation or trial dates. While it is probably not necessary to include a blow-by-blow description of the negotiations, practitioners should provide some discussion of the settlement talks. With respect to settlement criteria and values, clients should understand that all cases are different, because of reasons related to liability, causation, and

damages. It is critically important for practitioners to disclose the criteria used to determine settlement amounts, for example: the nature and extent of the injury; the existence of co-morbid conditions; the age of the plaintiff; or the existence of an economic loss, like a loss of earnings. Any evaluation must be done according to objective, consistent criteria, verifiable from medical records and other documents. Counsel must always bear in mind that she cannot favor one client over another.

Finally, practitioners should also identify and explain the applicable ethical rules. Communications regarding the way mass-tort cases are handled and resolved should not elide ethical obligations; rather, all potential conflicts of interest should be disclosed and described. And the client must be told that she has the right to accept or reject any settlement proposal, as well as the right to advice from independent counsel in making her decision.

The mass-tort plaintiff’s bar has the ability to perform an enormously important service for the American public, by holding manufacturers accountable for their errors. But it must resist the recent drift, evident in some drug litigations, to a practice which privileges massive and seemingly deliberately obtuse settlements, and which treats claimants as commodities, and not as clients.



Kaufman

Pete Kaufman is an attorney at Panish, Shea & Boyle in Los Angeles specializing in drug and device litigation. He is a graduate of the University of Wisconsin-Madison and the University of Florida, Levin College of Law.