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Mediating mass torts

UNDERSTANDING THE BASICS FOR MASS-TORT MEDIATION, INCLUDING THE USE OF BANKRUPTCY COURTS

If the "Netflix" home page is any indication, mass-tort actions have gripped the American public's attention in recent years. Popular content on the streaming platform ranges from "Painkiller" – a drama series inspired by the opioid crisis and resulting mass-injury claims against Purdue Pharma – to "Scout's Honor," a docuseries that highlights the widespread sexual-abuse allegations against the Boy Scouts of America organization.

Given the nature of mass-tort disputes, which involve complex legal issues, high-stakes outcomes, and potential widespread public impact, it is unsurprising that mass-tort cases captivate the attention of legal scholars, practitioners, and the public alike. Using an experienced mediator to assist in resolving mass-tort litigation makes economic sense.

Mass torts defined

A "mass tort" is a legal action in which multiple plaintiffs file lawsuits against one or more defendants, alleging injury from similar acts of harm. The underlying events that give rise to a mass tort can vary widely, with noteworthy examples ranging from single-site catastrophic events (e.g., a toxic spill or an airplane crash), exposure to harmful substances (e.g., tobacco or asbestos), mass personal-injury cases with a common defendant (e.g., clergy abuse cases), and product-defect cases (e.g., silicone breast implants, and contaminated food cases).

Unique challenges

Mass-tort actions pose several unique challenges to legal practitioners. Such cases often include multiple cases filed in different forums, as well as a plethora of claimants, parties, insurance carriers, and attorney committees, all with varied interests. The presence of such variables adds complexity to both litigation and resolution. This article aims to highlight some of the unique considerations and minefields that one might expect to encounter on the road toward resolving a mass-tort claim.

Unique characteristics of mass-tort litigation

Deciding the "where" – Procedural issues related to forum

Mass-tort litigation often involves many cases filed in disparate forums spanning large geographic areas. The following procedural vehicles are frequently employed to coordinate such proceedings:

- *Multidistrict Litigation ("MDL"):* At the federal level, 28 USCA § 1407 permits cases filed in different district courts that share common factual or legal issues to be consolidated and transferred to a single district court for coordinated pretrial proceedings. Section 1407(a) authorizes the Judicial Panel on Multi-District Litigation ("JPML ") to approve the coordination of the cases as an MDL and to transfer the MDL to a district court or judge of its choosing.
- *Coordination proceedings:* The procedures for coordinating mass-tort cases vary from state to state. In California, Code of Civil Procedure section 404 authorizes the State's Judicial Council to grant a 'petition for coordination' where multiple civil actions in different courts share common questions of facts or law. Unlike in other consolidated proceedings, coordinated actions and MDLs are unique in that each plaintiff reserves the right to treat their case individually and determined on its own merits.
- *Consolidation:* Where multiple actions involving common questions exist within the *same* court, "consolidation" is the mechanism by which courts can join the actions for hearing or trial on any or all issues. Federal Rule of Civil Procedure 42(a) authorizes federal courts to consolidate actions involving common questions of law or fact at the federal level, while California Code of Civil Procedure section 1048(a) authorizes trial courts to consolidate multiple civil actions at the state level.
- *Joinder:* Joinder is another mechanism to manage actions with multiple claimants. While consolidation involves combining numerous lawsuits into a single proceeding, a joinder adds parties or claims to an existing action (i.e., 'party joinder' or 'claim joinder'). In California, a joinder is governed by the California Code of Civil Procedure (see sections 378 to 397.5), while in federal court, a joinder is governed by Federal Rules of Civil Procedure Rules 18, 19, and 20.
- *Staying litigation:* Mass torts rarely fit into a one-size-fits-all categorization. In practice, such litigation frequently involves cases simultaneously pending in different state and federal jurisdictions. While no clear rules exist for coordinating or combining proceedings where the underlying cases

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are pending both in state and federal courts, in such instances, it is not uncommon for courts to stay pieces of litigation in the interests of judicial economy.

Assessing the "who" – party dynamics

Given the scale of mass-tort actions and the number of claims involved, the number of parties involved in the litigation can be immense, with hundreds or even thousands of attorneys involved. As a result, both formal and informal leadership groups, committees, and coalitions exist. As such, mass-tort actions involve unique party dynamics that play an important role when considering litigation strategy and exploring potential resolution.

- *Plaintiff steering committees:* When a court formally coordinates a mass action via MDL or consolidation within a district, most courts will require that representatives of the plaintiffs be appointed or chosen. This group is often called the Plaintiff Steering Committee (PSC).

On the plaintiff's side, attorneys on a steering committee play more active roles in fees, whether they seek compensation based on an hourly rate, percentage of the recovery, or under a hybrid approach. As a result, the selection of steering committee members is a highly competitive process, and it is not uncommon for there to be competing applications to the court for appointment to the steering committee.

Multiple factors influence the selection of which attorneys will serve on the steering committees, including which has done the most work, has the largest number of lawsuits, and has the most experience and proven ability to finance such litigation. Similar committees also exist for defense and insurance carriers.

- *Insurance carriers:* Because liability in mass-tort litigation may touch upon multiple defendants over an extended period, arising out of numerous actions, it is not uncommon for the litigation to implicate various insurance policies and carriers. These primary and excess carriers are represented by coverage counsel, who often seek to raise unique coverage disputes and defenses. The interests of insurers and their insureds are not always identical, and at times, conflicts or disagreements may arise regarding the strategy for the management of mass-tort litigation.

Considering the "when" – sequencing and bellwether case

In light of the numerous parties and procedural issues involved in mass-tort actions, decisions in mass-tort negotiations are generally not made very quickly, and efforts at resolution can be protracted and time-intensive.

Time also plays a role in mass-tort litigation for "bellwether" cases – or representative cases selected to proceed to trial first. Bellwether cases can indicate or predict how future cases might unfold, whether by obtaining rulings or verdicts in court or by achieving settlements that can serve as a benchmark for negotiations in future litigation. The earliest-filed cases are often selected to serve as the "bellwether" cases and can thus significantly impact the resolution of subsequent cases; accordingly, plaintiffs' attorneys are wise to file their strongest cases first when initiating mass-tort litigation.

The use of bankruptcy courts as a forum to resolve mass-tort actions

In recent decades, mass-tort disputes have increasingly played out within the confines of the bankruptcy court – a role that Congress did not anticipate when it first enacted the Bankruptcy Code in 1978. Although sometimes viewed as a remedy of last resort, the bankruptcy mechanism has several features that are attractive to parties seeking to put their mass tort liability behind them, including the ability to place an automatic stay of litigation (which may result in a substantial verdict), channel multiple cases into a single forum, facilitate global resolution, and discharge liability and shield the debtor from further responsibility against prebankruptcy claims.

The use of bankruptcy to resolve mass-tort liability originated in the early 1980s with the Chapter 11 filings of several asbestos product manufacturers. Asbestos lawsuits ramped up substantially in the early 1970s. By 1982, construction material manufacturer John-Manville Corporation had been named "in approximately 12,500 [] suits brought on behalf of over 16,000 claimants" in asbestos lawsuits, while "new suits were being filed at a rate of 425 per month." (*Kane v. Johns-Manville Corp*. (2d. Cir. 1988) 843 F.2d 636, 639.)

While the Manville company was financially sound, it faced an estimated $2 billion in potential tort liability with no end in sight, considering that injuries from asbestos exposure (such as cancer) could take years or even decades to emerge. (*Ibid.*) In 1982, Manville filed for bankruptcy, not because of a "present inability to meet debts[,]" but "rather the anticipation of massive personal injury liability in the future," thus becoming the first corporation to utilize the bankruptcy court as a forum to address and resolve mass tort claims.

The Chapter 11 plan in *Manville* included several features to address the issues associated with its tort-induced bankruptcy. Most significantly, the plan provided for the formation and funding of a $2.5 billion trust to settle all current and future asbestos-related claims, along with an injunction that barred the filing of further asbestos claims against John Manville and its non-debtor insurers. Together, these measures (the trust and injunction) had the effect of "channeling" all asbestos claims to the trust's claim and settlement process, which then became the sole source of recovery for asbestos claimants.

In the decades following *Manville*'s Chapter 11 filing in 1982, more than 70 corporations have availed themselves of these procedures in the face of mass-tort liability. In recent years, however, there

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has been fierce debate regarding using the Bankruptcy Code to resolve mass-tort claims and controversy over whether this mechanism benefits the alleged victims.

The U.S. Supreme Court recently considered whether to stay a multi-billion-dollar bankruptcy settlement involving the Boy Scouts of America organization and related groups. The litigation involved a group of more than 82,000 alleged childhood sexual-abuse survivors and a bankruptcy settlement of $2.5 billion dollars. After over 100 Boy Scouts who opposed the agreements filed an appeal in February 2024, the Supreme Court briefly ordered an administrative stay of the plan, only to lift the stay days later.

While most surviving victims approved of the Boy Scout's bankruptcy plan, non-debtor protections are non-consensual, meaning that claimants who disagree with the deal cannot "opt-out" and pursue claims against the nonbankrupt entities in court. Attorneys opposing the plan claim that this limits the monetary relief available to claimants by shielding non-debtor third parties from liability, even though many have their own insurance policies.

The U.S. Supreme Court is currently reviewing the legality of such non-consensual third-party releases in the bankruptcy settlement involving Purdue Pharma, the maker of the opioid painkiller OxyContin. In that litigation, thousands of lawsuits asserted that Purdue's aggressive marketing of OxyContin contributed to the nation's opioid crisis and widespread addiction and overdose deaths. As part of the settlement, members of the Sackler family, which owns Purdue Pharma, seek to contribute six billion dollars to the litigation trust in exchange for releasing claims related to the opioid crisis, even though they are not a party to the bankruptcy proceedings.

On August 10, 2023, the Supreme Court agreed to hear the appeal of the bankruptcy and, in granting certiorari, asked the parties to brief and argue "[w]hether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by non-debtors against non-debtor third parties, without the claimants' consent." The Supreme Court heard oral arguments in the Purdue Pharma case in December 2023 and is expected to issue a ruling around June 2024. The Supreme Court's decisions in *Harrington v. Purdue Pharma* will have significant implications for using the bankruptcy mechanism to settle and resolve mass tort claims. (Editor's note: The Supreme Court filed its opinion in *Harrington v. Purdue Pharma* on June 27, 2024, and held that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants.)

Thorough preparation to make the most of the mediation process

Mass-tort actions involve significant preparation for the parties and their chosen mediator(s). As an initial matter, the parties must consider various factors when selecting an appropriate mediator. Parties should prioritize engaging a mediator with extensive experience handling mass-tort cases and a deep understanding of the procedural, legal, and factual complexities involved. While subject-matter expertise is not always essential, some mediators may offer particular skills or experience in complex bankruptcy and insurance-related disputes.

Another issue for parties to consider when preparing for mediation is the best method for valuing the claims asserted. Practically speaking, it is often difficult to evaluate each claim with the level of granularity that one typically sees in an individual negotiation.

Although it is possible to negotiate each claim separately, doing so is time- and resource-intensive and is not always practicable given the scale of the negotiations. As a result, parties often compile spreadsheets identifying key factual and legal points that allow for easy analysis of the various claims and provide a framework for negotiations.

There is no one-size-fits-all rule for what specific information practitioners should consider; however, any decision must balance the equity of a thorough evaluation with the practicality of a global negotiation. One consideration in compiling such a matrix is how it will relate to a subsequent allocation process. At the allocation stage, determinations are made about apportioning the settlement funds amongst the individual claimants. The allocation procedure need not necessarily be tied to the claim valuation used for the negotiations. However, as the effort required to assemble this information can be substantial, gathering such information at the negotiation stage may have significant cost and time savings for counsel.

Where insurance carriers are involved, parties may benefit from issuing a policy-limits demand to the carrier before engaging in settlement negotiations. This demand can be helpful if the insurance provider and the insured entity have divergent interests, such as having different views on the settlement price.

Parties may also encounter numerous post-settlement issues when seeking to effectuate a potential resolution agreement. For example, suppose a settlement is reached as part of a Chapter 11 bankruptcy proceeding. In that case, the bankruptcy plan will be subject to confirmation by the bankruptcy judge, who will ultimately determine whether the proposed settlement is fair to the debtor's estate and its creditors. In this analysis, "the court does not have to be convinced that the settlement is the best possible compromise. Instead, the court must conclude that the settlement is within the reasonable range of litigation possibilities. (*In re Penn Cent. Transp. Co.* (3d Cir. 1979) 596 F.2d 1102, 1114.) The debtors bear the burden of persuading the bankruptcy court that the proposed

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settlement falls within the reasonable range of litigation possibilities. As such, litigants must be mindful of the need for their mutually agreed-upon settlement to pass the bankruptcy court's muster.

Closing thoughts

Given the unique features of mass-tort litigation, mediating such cases involves substantial preparation by the parties and the mediator(s). If the news is any indicator, mass torts will play an important role in civil litigation and public discourse for many years.

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