Mastering the Mass Tort Docket:
How to Bring Order to Chaos—Management Models, Special Masters and Consolidated Dockets

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“Mass” turns out to be the most apparent problem in the mass tort docket. Despite the historic predictions of the imminent demise of the multitudinous asbestos dockets, the filings continue to come in what seems like a never-ending landslide of pleadings, filings and cases. According to the Rand Corporation, back in 2002, there had already been 730,000 individuals filing asbestos cases. While there is no centralized source for tracking all national filings, all defendants are aware that cases have continued to be filed in the intervening dozen years.

The defendant who finds herself awash in those filings needs internal controls to manage the crush of pleadings, deadlines and docket obligations. Courts face the same type of logistical nightmare in trying to coordinate the needs and demands of litigants and lawyers. Starting in the late 1980s, litigants and courts have tried a variety of approaches to controlling the management of tort dockets. This paper will address both the internal controls necessary to keep track of an active asbestos docket, as well as the court system controls that have been developed to permit courts to facilitate their portion of the process.

I. Management by the Defendant

Every defendant needs a system for handling the deadline intensive litigation aspects of its asbestos docket. The management of the cases requires a balance of the administrative tasks associated with simply tracking the cases, deadlines and trials with the ultimate goal of finding a cost-effective resolution for the individual cases and the docket as a whole.

A. Step One: A Tracking System

The onslaught of case filings have to be tracked. Some defendants handle that in-house with a staff of paralegals or trained administrative staff. Some assign to outside counsel the responsibility of receiving and tracking cases. Still others employ commercial vendors such as KCIC, Navigant or Verus to monitor and track the incoming matters from filing to resolution. Regardless of the system employed, any defendant involved in mass tort litigation needs a formal tracking and calendaring system to ensure that deadlines are monitored and met. The ideal mechanism for a tracking system is one that requires single entry for data with the ability to generate reports and calendars. A secure, shared intranet for use by the client and outside counsel can provide a centralized source for case information and docket deadlines. Any unified system that decreases the possibility of inconsistent date or data entry minimizes the risk of miscommunication amongst members of the client team.

B. Step Two: An Air Traffic Controller

Every play needs a director and every mass tort docket needs someone to serve as the conduit for information. The skill set needed to organize and control a mass tort docket rivals the skill set needed to handle logistics for an army. One needs to be organized, focused and obsessive. It needs to be a lawyer because this air traffic controller must have an understanding of the legal implications of decisions made and problems that arise. My firm has Laura Rahman; DeHay has Misti Mosteller; Tucker Ellis has Karen Ross. Other firms no doubt have lawyers who play similar roles, but the uncanny focus on detail constitutes the common characteristic of the people who handle this type of coordination. Having an individual or small team with an eye
on the details and developments ensures consistent implementation of the defendant’s strategy across the venues where cases are pending and permits a close control of the staffing for depositions, hearings and trials.

C. Step Three: A Strategy Team

Mass litigation requires a strategic approach. Different defendants have different driving principles: a public company has to be sensitive to stockholders and market factors; private companies may take a longer view of litigations, but have different concerns that influence their decision making. Insurers who have inherited responsibility for litigation oversight have a still different set of concerns to balance. Some companies handle their strategic oversight entirely in-house with a dedicated team of specialty counsel who manage the cases and drive the decisions even on an individual case level. Others outsource the strategy to national counsel or utilize a blended model of both in-house and outside lawyers to develop protocols and decision parameters for the litigation. Regardless of the model used, the strategy team should also be involved with the preparation of responses to discovery served upon that defendant, insuring that a consistent set of responses is put forth across jurisdictions, as well as with any motions related to those responses. Though the information available to a defendant may change over time, resulting in revisions to discovery responses, no defendant should be in the position of having conflicting discovery responses on file in separate jurisdictions.

Likewise, a defendant’s strategy team can also be responsible for preparing and presenting corporate representatives for deposition. Again, this approach results in a level of consistency in testimony, as well as fosters a comfort level in the relationship between the corporate witness, who more often than not is not a lawyer, and that attorney presenting the witness. The strategy team would also maintain information regarding the occasions on which the witness has testified, the subject matter involved and the plaintiff’s counsel, which may afford the opportunity to offer opposing counsel prior deposition transcripts rather than conducting another deposition. A defendant’s strategy team should be involved in any production of corporate documents to opposing counsel. A centralized repository, whether virtual or consisting of paper files, can streamline this process, and also ensure that no privileged documents are inadvertently included in a production set.

Finally, the defendant’s strategy team may handle the identification, preparation and presentation of the expert witnesses retained on behalf of that defendant. Each defendant’s unique circumstances and defenses warrant consideration of specific experts they may wish to retain to present those defenses. In the asbestos arena, these may include pathologists, industrial hygienists, mineralogists, and Navy experts, among others, each of whom will need to be educated on the details of the exposure alleged against the defendant and the defenses they wish to put forward. A defendant may opt to have the expert presented by local counsel or by a specified “handler” for that expert, but coordination of efforts is key.

No single model works for every defendant, but they all share the goal of minimizing transactional costs while providing an optimal outcome. “Optimal outcome” varies for each defendant, as well, but typically means a cost-effective resolution that minimizes or controls ultimate risk.

D. Step Four: A Resolution Plan

Someone has to be responsible for negotiations. Cost effective litigation management recognizes that there will be cases that require payment and those that do not. An experienced mass tort negotiator will have relationships with the plaintiff’s bar, an understanding of the litigation, of historic settlement values and of the defendant’s settlement philosophy, as well as the skills necessary to reach the most beneficial result for that defendant. Most defendants in asbestos litigation have a designated negotiator or set of negotiators whose assignment is to handle the intense discussions required to get the cases to conclusion. While that task typi-
cally falls to the trial lawyer in traditional litigation, mass tort requires the negotiator to have a national view of the cases and an understanding of the sometimes shifting dynamics in particular jurisdictions. Whether the negotiator is a lawyer or a trained resolution specialist, designating someone specifically for that role is crucial.

E. Step Five: A Fallback Position (i.e., The Trial Team)

When negotiations fail, you have a fall-back position. The Trial Team constitutes the bulwark against the opposing side. Depending on the litigation model employed by the particular defendant, the trial team may be the resource of first resort or the one of last resort. Some defendants rely on their local counsel in each individual case to defend the case at trial. Many rely on a cadre of specially selected trial counsel to appear as the first chair trial lawyer in cases irrespective of jurisdiction. No matter the staffing model, every defendants needs to have considered, identified and trained those lawyers whom it intends to be the last line of defense if the case cannot be dismissed or settled. With multi-million dollar jury verdicts at risk in most jurisdictions these days, competent trial counsel may be the last means of obtaining an acceptable outcome. “Acceptable outcome” does not necessarily equate with a defense verdict. Nonetheless, experience trial lawyers provide a credible response to cases in which other approaches to risk management have failed to provide an acceptable outcome.

The Trial Team needs appellate lawyers as members, too. Appellate lawyers bring a different perspective to the case strategy and provide the trial lawyers with a safety net on the procedural nuances. As the cases become increasingly more complicated from both a legal and scientific perspective, having someone with a focused eye on the potential appellate issues ensures that those issues are preserved in the event of a bad verdict, as well as providing a consistency of legal positions across cases. The asbestos cases have become increasingly more uniform across jurisdictions. Having a briefing team that can handle the motions across jurisdictions gives the defendant yet another means to implement its strategy.

II. Management by the Court

Courts have grappled with how best to manage the asbestos cases since the first few were filed in the late 1970s. Starting with negotiated case management orders for active jurisdictions system has redefined its approach to mass filings generally. Their handling of asbestos dockets specifically focuses on the control of the paper, the deadlines and the adversarial positions of the competing litigants. Not only do they have to balance the needs of the plaintiffs and the defendants, but they also have to balance the sometimes inconsistent needs of different categories of claimants and different types of defendants, often while simultaneously juggling the needs of their continuing “regular” docket of cases.

A. Federal Court MDL

In the early 1990s, the federal court system adopted the multi-district litigation docket as a means of managing its asbestos case load. The docket was designed to manage multiple matters “involving one or more common questions of fact [that] are pending in different districts. 28 U.S.C. §1407 (2008). The Judicial Panel on Multidistrict Litigation transfers cases from disparate jurisdictions to a single district for consolidated handling.

In 1991, the asbestos personal injury cases filed in—or removed to—federal court were transferred to the United States District Court for the Eastern District of Pennsylvania under the MDL 875. The intent was for the MDL court to coordinate discovery through the summary judgment stage, then send the case(s) back
to the court of origin for trial if summary judgment was not granted or the cases were not otherwise resolved. While the MDL 875 still exists, its case load has declined significantly as Judge Robreno, the current MDL judge, has focused his attention on resolving the backlog of cases that had been transferred to MDL 875 but never left. Significant effort has gone into reducing the number of cases held in suspending animation in the MDL. The number of cases transferred to MDL 875 from August 1, 2006 to May 31, 2014 was 186,591. The number of cases terminated during that same period was 183,759, leaving a total of 2,832 pending, according to the most recent report. See, https://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.report.may2014.pdf. Those remanded cases have either been resolved or, in rare cases, tried in the court of origin.

B. State Court Master Docket

State courts were early adopters of the mass tort management systems. New York City has arguably the most comprehensive management system in the country. Instituted in 1996, the New York City Asbestos Litigation system (“NYCAL”) comprises a comprehensive set up for a case management and litigation handling. The system provides for a Master Asbestos Judge (currently the Honorable Judge Sherry Klein Heitler), an Asbestos Special Master, (currently Shelley Rossoff Olsen), a specified defense counsel liaison committee, a plaintiffs’ liaison committee and an asbestos specific case management order. See the website at http://www.nycal.net/

Texas was an early entrant into a comprehensive asbestos management system, entering a series of county specific Standing Orders (early versions of a docket specific case management order) starting in the late 1980s. That process evolved into a consolidated state level MDL for asbestos and a separate MDL for silica in September 2003, under Texas Rule of Administration 13. The Texas asbestos MDL court oversees the pretrial phase of the cases, hearing motions, arbitrating discovery disputes and ensuring that any trial set case has been fully prepared prior to its return to the court of original jurisdiction, including the completion of the pretrial conference and resolution of motions in limine. The Texas Silica MDL fulfills a similar mission, but with a smaller universe of cases on file. Both have been effective at standardizing and streamlining the litigation which they oversee.

Many jurisdictions have variations of the NYCAL and Texas MDL models applicable to state level litigation. Los Angeles has a centralized asbestos docket, primarily focused on the scheduling and handling of trial set cases. Northern California has an equally mature but separate system that coordinates the conduct of asbestos litigation for San Francisco and the Bay Area. As in the NYCAL system, the Northern California system includes a designated set of defense and plaintiff counsel with responsibility for coordinating discovery, compiling medical records and retaining joint defense experts for specific cases. Rhode Island has Judge ___ as its designated asbestos judge with responsibility for coordinating all the state's asbestos litigation, including both pretrial and trial. “The Philadelphia Complex Litigation Center was the first courthouse in the United States designed exclusively for complex, multi-filed Mass Tort cases when it opened in 1992.” www.courts.phila.gov/common-pleas/trial/civil/clc.asp. The Philadelphia process has evolved over time and underwent significant revisions in 2012. [For a detailed discussion of the changes in the Philadelphia Mass Tort Procedure, see www.dechert.com/files/Publication/C3103_New_Order_Revises_Mass_Tort.pdf.

Electronic filing systems have been instituted by most jurisdictions, but not all. See, https://iapps.courts.state.ny.us/webcivil/FCASMain These electronic systems are increasingly common across the country for all civil litigation, not just for those cases related to a mass tort docket. The benefits of an electronic system in the mass tort arena are many, including streamlining service of process on all counsel of record and allowing more ready access to the court’s file for counsel who may or may not have a physical presence in the specific jurisdiction.
C. Don't Forget the Bankruptcy Court

An unfortunate reality of mass tort litigation is that a number of defendants have been forced into bankruptcy as a result of the claims against them. The bankruptcy courts have established procedures for handling these cases, as have the trusts that are often the end result of the defendant's bankruptcy. A defendant may also be able to utilize the information submitted by an individual claimant to a trust as part of their defense to a claim, either to establish alternative exposure or possibly to refute specifics of the allegations against that defendant. The scope of bankruptcy court handling of claims and claimants is beyond the scope of this paper. However, a paper worth reading on the topic is the following: Scarcella, Kelso and Cagnoli, Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind the New Recruitment Of Lung Cancer Cases, 13 MEALEY’S Asbestos Bankruptcy Report, November 2013.

D. Best Practices for Interacting With the Courts

1. Read the rules.
2. Follow the procedures.
3. Show up on time.
4. Respect the time and decisions of court special masters and case managers

Although this may be a mass tort docket, the same level of respect owing to any court is due. The judge and/or special master may be appointed specifically for this mass docket, or may be a “regular” judge with this additional assignment, but they still have the power to make or break a defendant's case, and those decisions can have lasting repercussions across a nationwide mass tort docket. There is no need for a defendant to start out with a strike against its case. Special masters and case managers on both the federal and state level have the opportunity to learn a significant amount of information regarding the defendant and the claims against it. Take the time to educate the court and case managers on your defense through appropriate motions. The court will also have the chance to develop a relationship with your counsel, as it likely the same lawyers will appear before it repeatedly on both sides of the bar. Be mindful of this when pushing forward with the tough motions, and also when asking for relief against opposing counsel. Mass tort dockets often operate under their own set of unwritten rules in addition to any existing written orders or procedures. The rule of poultry equivalence (“what's good for the goose is good for the gander”) just may be applied to your request, meaning anything you ask the court to require from opposing counsel will also be required of you.

III. Conclusion

As with any lawsuit, handling a mass tort docket requires preparation, but the preparations done in this instance are on a much broader scale than when a single issue is being litigated a single time. Actions taken by a defendant in one case will almost certainly carry over to future cases, likely in a multitude of jurisdictions. A thoughtful coordination of efforts is critical to a defendant's success in navigating both the litigation as a whole and the individual court systems. Successful management of cases includes implementing a system, either an internal team or an external vendor, to track the cases themselves from service through resolution. It is also helpful for a defendant to have a designated air traffic controller to manage the litigation in a broader sense, to keep the system organized and prevent catastrophe. Coordination of a national strategy for the cases requires a strategy team to address discovery, document productions, corporate witnesses and expert witnesses and to create the protocol for each defendant's chosen method of addressing the litigation.

When reasoning with opposing counsel and attempts to convince them to simply dismiss their claims against a defendant fail, the next things a defendant has to consider are a resolution plan and possibly trial.
Whether the cases are negotiated on a national scale – by national counsel, the defendant itself or an outside resolution specialist – or by local counsel, those settlements set precedents as well. A defendant should also consider the message they are sending by the value they assign to any claim. Finally, a defendant must have a trial plan. The trial team may be a specialist who parachutes into jurisdictions just before trial or may be involved long before then, or could also be the local counsel who has prepared the case and is intimately familiar with the details of that particular claim and the jurisdiction at hand. Either way, a defendant's trial team may be the last resort for obtaining an acceptable outcome in the case.

Finally, along with the systems and controls established by the defendant, many courts around the country on both the state and federal level have also created their own methods of managing a mass tort docket, sometimes through special courts set up specifically for those cases, having a specific judge and case manager to address the claims on that docket. These courts often have their own special rules and practices that must be adhered to, along with those applicable in that jurisdiction generally, so developing expertise and a relationship with that court is key for any defendant.