

Modern Day Considerations on Managing Mass Tort Cases

S. Eric Rumanek, Marc Fishman, Carrie Hazard, Chris Liwski

Mass tort litigation is a mainstay in America, with many corporate law departments across the country managing hundreds, if not thousands, of such cases annually. These cases can involve pharmaceuticals, medical devices, children's products, and everything in between. While some believe mass tort litigation is slowing in response to increased public scrutiny and government regulations, recent surveys indicate that the mass tort landscape remains a growing area of the law that amounts to a steep risk for businesses. Additionally, media attention given to substantial jury awards in big-ticket personal injury lawsuits continues to motivate plaintiffs' lawyers to bring mass tort claims. As such, mass tort litigation is at the forefront of the minds and budgets of corporate in-house counsel.

With this increase comes a set of unique problems for corporations handling mass tort litigation. Due to technological advancements and the wide-spread use of social media, information spreads much faster and reaches far more people than ever before. As a result, plaintiffs' lawyers can readily target mass audiences, with the interest of making these tort-related cases issues of national importance. This prominence requires in-house counsel at different companies to be ready to field questions from consumers, the media, and even state and federal politicians and regulators as claims begin to generate. The litigation department must now coordinate with corporate and governmental affairs, as well as its public relations departments, to develop a strategy to not only protect the company's assets, but also the company's public image. The use of outside counsel is a crucial role in this process. Outside defense counsel can present a pathway for corporations to evaluate these claims without being overwhelmed and over-matched in the early stages of litigation. This article briefly outlines a framework for corporations to field,

manage, and ultimately defend against mass-tort litigation claims across the country, no matter the industry. Corporate in-house counsel should focus on the following high-level goals:

- 1) Establish a litigation management structure;
- 2) Develop a system to share important information across different firms assisting with the litigation;
- 3) Conduct thorough risk assessments and determine what facts will make the difference across claims;
- 4) Develop a budget in line with strategic assessments developed in determining this strategy.

By implementing these steps, in-house counsel will be better equipped to determine proper resource allocation, promoting efficient practices across all phases of the defense, and ultimately reducing risk throughout the litigation process.

I. Litigation Management Structure

As an initial matter, in-house counsel should take the time to carefully build a team of experienced and collaborative professionals to defend against the complex claims arising from these types of mass tort actions. Because these claims span different jurisdictions and are often brought by a network of plaintiff-side law firms which are known as “repeat players,” it is important to ensure the selected defense teams have the proper experience and can work together with each other throughout the litigation process. A firm which does not have expertise in the relevant subject matter area, or a set of individual firms which do not cooperate well together, will hinder a corporation’s litigation strategy. Increasingly, mass tort litigation requires cooperation amongst several different outside counsel firms which traditionally operated as competitors. In-house counsel should make abundantly clear the company’s expectation regarding cooperation

amongst firms during the process of retaining counsel to facilitate sharing and joint effort from the very start of the litigation.

This step, especially for corporations facing claims spanning across the U.S., is best accomplished by first determining who will serve as national counsel, and working with national counsel to effectively build out a strategy and larger team. National counsel's role will be aid the company in developing a consistent strategy and ensure its implementation across the other firms working to defend the claims. National counsel will work to develop and preserve factual defenses, determine which witnesses should sit for 30(b)(6) depositions, and identify the most relevant corporate records that will begin to close the universe of potentially relevant information.

In-house counsel should also work closely with national counsel to identify other law firms that can effectively defend specific claims. Once firms are identified, the management structure should delineate how specific portions of litigation will be done, e.g., arguing key motions, conducting and defending fact and expert witness depositions, and trying cases. In-house and national counsel should have a key role in building the strategy here, as the clearer the strategy, the more efficient the implementation. As the litigation develops, both in-house and national counsel should remain flexible and ready to adjust strategy as needed.

II. Use Technology to Your Advantage

The next step for in-house counsel to take in building a litigation management strategy is implementing the most efficient information storage systems and communication systems. With hundreds and thousands of claims come tens, if not hundreds, of thousands of case-specific records. With different firms storing information in different manners and communicating on different platforms, the potential for miscommunication, duplication of efforts, inconsistent work product, or data loss is high. The development of a shared site to store common information and

documents will help to maintain consistency throughout claims and promote efficient defense across jurisdictions.

In-house counsel should be involved in the development of the consistent litigation support systems, including selecting software and hardware, determining the cost parameters and design, and determining which vendors will create the systems. These systems should be user-friendly and with a consistent search function to make information-sharing feasible for firms in implementing defense theories throughout cases. Documents such as research memos on common issues of law and fact, “master” outlines to assist in fact development, and a central calendar are important to include on these systems.

III. Determine the Important Facts

Once a team has been built and an information storage system has been established and implemented, the next step in-house and national counsel should take is assessing the strength of claims as a whole and conducting a risk assessment for the corporation and national counsel to use as a reference for beginning to build a substantive defense strategy. This effort involves considering the most important corporate records and identifying the common issues of fact and law which will predominate the claims. Local counsel can provide some assistance in developing this strategy, as they will have more familiarity with specific cases and can work to determine, for example, what alternate causes may exist for the injuries alleged or how to cull non-meritorious claims in an efficient fashion.

Attention should be paid, at this point, to determine what company witnesses appear in key documents or what issues of law can be raised across claims. These points will begin to close the universe of relevant materials and help identify similar defendants. In most situations, the corporation is not the only defendant subject to these types of claims, and there may be any number

of similarly situated entities and/or individuals who have had a hand in bringing this product, or similar products, to market. These situations can bring to light the potential for agreements and “working groups” with other defense firms to reduce the time and cost of litigation.

IV. Develop a Litigation Budget

Finally, in-house counsel should work with corporate officers to determine an adequate litigation budget with the strategic considerations in mind. This budget should forecast fees and expenses which will come with defending cases, but should not be limited to accounting for these fees. The budget should determine, and strategically identify, the objectives for a coming year based on the timeline of litigation and consider the company’s national objectives in doing so. The budget should initially act as a risk-assessment tool, to give corporate leaders a clear sense of the cost of litigation, and then open a dialogue to determine how national and local counsel should alter their litigation strategy to achieve the company’s high-level objectives.

This budget should designate line-items for discrete litigation components, and work to identify areas where efficiency can be emphasized to eliminate duplication of efforts. This budget can also work to define staffing structure at each firm, whether national or in-house, to properly assess the timeline for cases. Strategic thought in crafting a budget should include consideration of the best long-term pathway for resolution. A corporation could seek to achieve global settlement of claims early in the litigation process, which may require aggressive litigation followed by coordination with plaintiff-side firms. On the other hand, a corporation may seek to test the waters through bellwether trials and determine what a case would look like tried in front of a jury in order to get a better sense of how the cases should be evaluated and valued. A litigation budget should identify strategic litigation-wide goals and begin to define “success” for the company while assessing how to best meet the company’s national objectives to the extent possible.

V. Conclusion

Mass tort litigation has the potential to swallow a company whole if not properly managed, and the reality of hundreds or thousands of claims coming in can be daunting. With a clear plan and effective implementation, though, in-house counsel can work to assess the risks, plan proactively to shape litigation, and work with regulators to ensure the company is able to weather the storm of mass tort litigation. Choosing national counsel to assist in defining and implementing this strategy is a key part of this strategy, and working with them to identify risks, offer strategic advice, and coordinate the nationwide strategy will provide the tools in-house counsel need to manage mass tort litigation effectively.