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Resolution of a mass tort action often involves a mysterious and *sui generis* process in which the efforts of the parties switch, either imperceptibly or seemingly instantaneously, from grinding litigation to the prospect of resolution. The Manual for Complex Litigation, Fourth Edition (hereinafter "MCL") is a treasure trove of information, insights, and explanation of this complex topic (pun intended).

Evaluating the strengths and weaknesses of cases in a mass tort ultimately occurs in connection with the litigation of an "actual case in controversy," and this leads directly to the use by MDL judges of the bellwether process.

Mass torts can only be resolved if they are effectively aggregated. If the litigation is spread out through hundreds of courts hosting thousands of cases, there can be no effective aggregation. How that can be accomplished is both complex and beyond the scope of this article.[1] For our purposes we will assume the litigation has been effectively aggregated by the JPML[2] before one MDL judge as we focus on resolution. However, the reader should recognize that in instances in which mass tort suits are located in multiple active state and federal jurisdictions, the resolution process is exponentially more complicated.

The MCL recognizes the difficulty of resolution:

> Some cases involve important questions of law or public policy that are best resolved by public, official adjudication. Other times, however, resistance to settlement arises from unreasonable or unrealistic attributes of parties and counsel, in which case the Judge can help them reexamine their premises and assess their cases realistically.[3]

Only those who have stood before the power and majesty of a puissant federal judge intent on helping them "reexamine their premises and assess their cases realistically" know just how intimidating that moment can be. More often, the role of the MDL court in facilitating settlement is dictated by the personal predilections of the trial judge.[4] The purpose of litigation is the peaceful resolution of conflict through simulated combat between adversaries who are represented by champions known as lawyers. As the referee, umpire, and judge of the contest, the court has a heightened duty to appear impartial. Actively involving itself in settlement can easily be seen by the combatants as creating at least the appearance of partiality toward one side or the other.

Instinctively, most trial judges know that trials, or even trial dates, settle cases. In the context of mass torts, that necessarily involves bellwethers. Once the court picks one or more plaintiffs to be bellwethers, it will issue rulings that may apply not just to this case but to all cases, or they might be specific to this case

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[1] For detailed analysis on aggregation best practices, see *e.g.*, Robert Adams, et al., *Bellwether Trials*, 89 UMKC L. REV. 937 (2021).

[2] The Judicial Panel on Multidistrict Litigation (JPML) is codified under 28 U.S.C. §1407.

[3] MANUAL FOR COMPLEX LITIGATION (FOURTH) §13.11 (hereinafter "MCL 4th").

[4] See MCL 4th §13 for a detailed description of the various tools available to the trial court to promote settlement.

alone. The theory is that if the court tries one or more of these bellwether cases, the court will become acclimated to the issues involved in these cases and the parties will discover the weaknesses and the strengths of their cases. After all the discovery is complete, the case will proceed to trial.

Bellwether trials have been around as long as MDLs. In the usual MDL, there will be a handful of bellwethers selected. In some instances, the courts put up a slate of a hundred or more. In these instances, the court is merely trying to grind the parties into the ground. In other cases, the court will pick four or five, tell the parties to prepare the first two, then hold a trial. That trial is a real trial, one in which the legal dispute of that plaintiff is going to be resolved. However, the rulings emanating from that trial, such as *Daubert* or other pre-trial rulings, might apply to everyone. In *Vioxx*,[5] the court tried eight separate bellwether trials. Plaintiffs won some, Defendant won some, and down the road they would go. In *Avandia*,[6] the MDL Court did not even hold a bellwether trial.

It takes a special judge to have the skill and the daring to effect resolution without even trying one case. Some judges believe a bellwether trial will serve only to cement the parties' positions. For example, if the plaintiffs win, plaintiff lawyers may have unreasonable expectations that they can win every similar case, and if they win a lot of money, they may believe every similar case is lucrative. If the defendant wins, the defendant's lawyers typically know not to read too much into it, but their client may not know any better, and the Board of Directors of that company might say, "See, I told you we could win this thing." This reinforcement of positions during bellwether trials can be very unsettling to the resolution process. Nonetheless, thoroughly preparing for trial is important because at some point the defendant will realize they may soon be facing remand.[7]

Separate and apart from inserting herself directly into the settlement process, and in addition to setting trial dates, the trial judge has at her disposal several options to encourage settlement. Chief among these are: the threat of remand of some or all of the cases;[8] the appointment of a Special Master to

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[5] *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La.).

[6] *In re* Avandia Mktg. Sales Practices & Prods. Liab. Litig., No. 07-MD-1871 (E.D. Pa.).

[7] *See* 28 U.S.C. §1407(a). Defendants often have unlimited legal resources. They can hire a thousand-lawyer firm. I was in a case where my opponent had a thousand lawyers in its firm. I had four in my firm. When it got down to crunch time, that firm hired another firm, which had another 700 lawyers. What they don't have is the ability to fill multiple trial teams simultaneously across the United States, including experts who can be *Daubert*-tested and testify. Long ago I was Lead Counsel in a class action in Louisiana in the breast implant litigation. (*See* Spitzfaden v. Dow Corning Corp., 619 So. 2d 795 (La. Ct. App.), writs denied, 624 So. 2d 1236, 1237 (La. 1993)). Dow Corning, which was our primary defendant, went bankrupt two weeks before trial, but it was not insolvent. Later, after all the dust settled, I was having dinner with opposing counsel and I asked what happened. And he replied: "I had 13 trials scheduled in the next four weeks all over the United States and I only had two trial teams and three sets of experts." The prospect of sending the cases back is very daunting to the defendant, and it should be to the plaintiff lawyers too. However, they generally are not known for having a lot of self-introspection, and they definitely don't want to admit that they will be in a sling too, if 500 of their cases get sent back all over the United States.

[8] 28 U.S.C. §1407 (a); *see also*, U.S. *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 36–37 (D.D.C. 2007). (Only the Judicial Panel on Multidistrict Litigation may remand

supervise the settlement process;[9] encouraging the parties to use a private mediator; and the threat of issuing a *Lone Pine* Order.[10] Of the three, threat of remand weighs most heavily on the defendant, while the prospect of a *Lone Pine* Order looms large over the plaintiffs.

Often, MDL remand orders are accompanied by a dreaded *Lone Pine* Order.[11] This is a common law doctrine that arises from an obscure trial decision, which in one form or another has gained traction with most trial judges charged with managing large numbers of aggregated cases. It stands for the proposition that every plaintiff in the litigation must, at some point, be prepared to demonstrate both general and specific causation, in addition to proving his exposure to the suspected agent, as well as the extent of his injuries. Failure to adequately comply with the Order can be, and often is, cause for dismissal of the suit. It sounds simple enough, but in the context of litigation involving a staggering number of cases, it presents obstacles of scale, time, and expense.

First, there are usually only a limited number of experts qualified to issue *Daubert* proof evidence of general causation (Can it cause this harm?), and deep into the litigation they often reach the breaking point. Next, while there may be an adequate number of experts who, in reliance on the General Causation opinions of others, are competent to issue a Specific Causation opinion that the drug or chemical in question did in fact cause this harm to this plaintiff, there remains the logistical nightmare of having hundreds or thousands of plaintiffs examined and opinions collected in a timely manner. Lastly, obtaining those written opinions can be a very expensive proposition. The specter of dismissal of individual cases hangs over the plaintiff bar like a cold, dark fog.

Generally speaking, there are two types of resolutions[12] that come in various guises: Global Resolutions and Inventory Resolutions. Now, what is a Global Resolution? It might be disguised as a class action resolution of this case. It might be disguised as a mandatory resolution of this case under certain Federal Rules. It might be disguised as an individualized voluntary resolution of the case. All global resolutions have two things in common. First, there is only one pot of money, and second, there is only one set of criteria that applies to every client involved. Does that mean that if, for example, there are one hundred people and the pot is worth one hundred dollars, every person receives one dollar? No, everyone gets separate allocations. However, there is only one set of qualifying criteria, usually set by the defendant, which leads to specified amounts for certain

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a case or cases transferred for coordinated pretrial proceeding; a district court sitting as transferee court lacks that power).

[9] MCL 4th, §13.13.

[10] *See* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: From Fact Sheets to Lone Pine Orders* (July 23, 2019) YALE L. J. FORUM (Forthcoming), https://ssrn.com/abstract=3425289.

[11] Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); *see* Burch, *supra* note 10, at 1-15.

[12] For a rather negative view of MDL product liability settlements, see Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531 (2017).

circumstances or injuries. So, whether you're a solo practitioner with two cases or you're a litigation powerhouse with a thousand cases, your identically situated clients are going to be paid an identical amount of money if they accept the deal.

A class action resolution using a global resolution amends that process by providing that class members will be bound unless they affirmatively opt out. In almost every case, except very limited pot cases that are subject to certain bankruptcy rules, everyone gets a chance to accept or reject the opportunity to participate in the settlement. In other limited circumstances, the clients must accept the settlement "blind," that is, without knowing the ultimate value of their settlement.[13] More often, however, the client will know at least his gross settlement amount prior to accepting or rejecting the settlement.

In an inventory settlement, there are many, many pots. Indeed, there is one for each law firm. The defendant will come to your law firm to offer you a certain amount of money for that many cases. Then it will go to another law firm and offer it a different amount of money for the same number of cases. Thereafter, it may offer a third firm yet another amount of money for a different number of cases. Further, the criteria by which the plaintiff can allocate the money often changes from settlement to settlement. Historically, all of the resolutions were global, because all mass torts were generally driven by class actions to begin with, and that was the easiest way to get as many people signed up as possible. The reluctance of the federal courts to certify class actions in mass tort litigation has reduced the use of class actions for purposes of case aggregation and, thus, for resolution.

Now virtually all of the national settlements are inventory settlements negotiated firm by firm. MDLs are led by teams of lawyers selected by the presiding court and formed into a Plaintiffs' Steering Committee, usually led by one or more Lead Counsel. Do the clients of the PSC attorneys get more than those of a solo practitioner? Yes, because they have proven that they pose a greater threat to the defendant. They know the science, they know the case, they are willing to go to court, they are funded and capable, and their clients will benefit accordingly. While this may seem unfair, ideally the leaders of these various ways of joining cases have worked hard and in the best interests of everyone.

One of the most compelling reasons that inventory settlements have gained traction is the thought by defendants that their extrajudicial nature makes them more effective, less complicated and less costly than global resolutions. With rare exceptions, they avoid costly and time-consuming court approval which itself is rife with potential for objections and appeals.[14] Further, the defendants have shown a willingness to pay a premium to the clients of those firms that pose an actual litigation threat. This strategy, however, does not extend to those firms not actually engaged in the litigation and most definitely does not apply to firms which have simply collected cases through advertising with no intent whatsoever of ever actually trying one.

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[13] This most often happens in global class action settlements such as that contained in the NFL concussion litigation. *See In re* National Football League Players' Concussion Injury Litig. No. 2:12-md-02323 (E.D. Pa.).

[14] *See* Mueller, *supra* note 12, at 556-61.

It is fair to say that mass tort litigation usually gets contentious. The fate of hundreds or thousands of clients and the corresponding exposure to the defendant of millions (if not billions) of dollars of liability tends to attract a certain type of lawyer. They are referred to as trial counsel, and only the most articulate, most daring attorneys apply. Driven by a compelling need to compete, they tend to take matters to the extreme. This attribute, while laudable, may lead trial counsel to become bitter toward each other and myopic about their clients' exposure during litigation. While there may be some grudging admiration for an opponent, there is precious little social interaction between opposing trial counsel. This, in turn, has led to the advent of settlement counsel. These attorneys tend to be more socially adept, less engaged in the emotional aspects of the fray, and more willing to entertain the notion of an extra-judicial resolution of the dispute. While some trial counsel eschew their use, the more recent trend is for each side to use settlement counsel while the battle rages on in Court.

At some point the defendant offers your firm a certain sum of money in return for its clients' releases. The defendant generally does not want to become involved in the allocation process. Usually, who receives money and how much are of little concern, but it does want some safeguards to ensure it receives the relief it seeks.

Most often a defendant will request a participation percentage – perhaps 95% of your clients to accept their offers: sometimes by number, sometimes by value (i.e., either clients receiving 95% of the allocated value or 95% of all of the clients must provide releases of their claim.) Making the decision of allocation involves a series of interlocking algorithms using columns of data culled from spreadsheets to assign points. Visualize this as a checkerboard with A and B coordinates arranged in numerous rows and columns, resulting in multiple squares. Each row and each column represent a constellation of compensation factors such as: age of onset, amount of exposure, latency, injuries, and other significant items, all of which are allocated points. The more points a client is allocated, the more valuable his or her case.

Every single client will be assigned to a grid coordinate, and a given client can only have one. This is called the allocation process, and each one of these squares has a value. The final step involves tallying all the points and dividing it into the money, thus creating a per-point value. Clients should be offered their per-point value multiplied by the number of points that they were allocated.

However, mistakes happen. Clients are not always timely or forthcoming with case updates; information gets overlooked, forgotten, or misunderstood. Yet continuously accepting changes leads to a slippery slope. The most prudent course of action is to withhold a percentage of funds from the pot and save it for appeals.

Unique and extraordinary circumstances are bound to occur, which do not tend to fit neatly within a square on the allocation grid. For this reason, it is wise to set aside another percentage of the pot for an extraordinary injury fund (EIF). If the Appeals Fund or EIF have leftover cash after the process, that money is returned to the original pot.

There are ethical rules about how to conduct a settlement of that sort, particularly about giving to your client's full disclosure of pertinent settlement

facts. A keen eye for detail is key. Each client must be advised of the best recommendation and whether they should accept it. Further, the participation percentage must remain at the forefront of these recommendations. If it is not met, Defendants may retract the offer (although if the numbers are very close, the lucky plaintiffs' team may receive a wink and be allowed to proceed). If an offer is retracted, the per-case average will surely plummet – that is, if Defendants can be persuaded to return to the negotiating table.

The next stage involves addressing liens. A lien is an inchoate right which exists without a writing in favor of one against another for services that have been rendered. Liens must be paid in priority to anything else, and they act as a claim against the individual's recovery. There are two types of liens. Mandatory liens, such as Medicare and Medicaid, require the client, through counsel, to affirmatively reach out and make sure they are settled. There are other liens which ordinarily only must be addressed if the company with the lien has put the client (or counsel) on notice.

It may seem counterintuitive that a health insurance subscriber who successfully sues a drug manufacturer has to give some of her settlement money to her insurance carrier, since she likely bought insurance to cover an event like the hospitalization that resulted from her taking the drug. Yet most of those insurance companies, either by contract or law, have a right to be paid back some or all of what they are owed.[15] A scrupulous defendant will take care to ensure all liens are satisfied, lest a disgruntled lienholder turn its sights on them instead.

At long last, the defendant releases the settlement funds and the curtain falls once the clients receive their distributions. Only those who are comfortable in a highly chaotic environment will be successful in the MDL arena. The enormous stakes, the abrupt changes of fortune, and the unpredictable unfolding of events require a nimble mind, a still heart, critical thinking skills, and the courage to act upon one's convictions. Should this describe you, then welcome!

[15] *See* Erik V. Larson & Diana L. Panian, *Successfully Discharging Medical Liens on Personal Injury Cases*, 32 CUMB. L. REV. 349 (2002).