

CORPORATE COUNSEL

From the Experts: A Lasting Peace in Mass Torts

Achieving finality with mass tort settlements

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Mass tort claims can present a tremendous financial and legal burden on a company. In-house counsel recommending settlement of a mass tort to company management, often at significant cost, must be confident that the settlement will buy a lasting and comprehensive peace. There are several key negotiating points that can help in-house counsel achieve such finality.

Incentivize Plaintiffs to Participate

In all mass tort settlements, the parties are keenly interested in the settlement amount, but other settlement terms often are crucial to an individual plaintiff's decision to participate. These include how an aggregate settlement amount will be allocated among the settling plaintiffs; how quickly payments will begin and will be completed; and whether and to what extent individual plaintiffs can challenge what they perceive as erroneous payment determinations after they sign a release. Because these terms do not directly affect the defendants' and participating insurers' bottom lines, they should be designed to attract as many plaintiffs into the settlement as possible, thereby providing the most "bang for the settlement buck."

Strong v. weak claims

Mass tort litigation often includes a blend of plaintiffs with stronger and weaker claims. Although the promise of a large payment should provide incentive for plaintiffs with strong claims to settle, finality requires settling the other cases, too. In such instances, a tiered approach to adjusting settlement claims and allocating payments can encourage participation across the settlement population.



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For example, a settlement of diverse cases can include fixed, expedited payments to plaintiffs with weaker claims. Although such plaintiffs will not receive significant payments relative to others, the promise of a quick payment and closure may be sufficient to convince them to join the settlement. More serious claims likely will require more time and effort to ensure a fair allocation among plaintiffs.

For these claims, a point system differentiating recoveries by type and severity of injury, relative proof of causation, and other factors may be appropriate. In addition to creating incentives for differently situated plaintiffs to settle, payment and administrative tiers reduce costs and accelerate certain payments, thereby making the settlement more attractive to more plaintiffs without increasing its overall cost.

A mass tort settlement also should provide for an "up-front" payment to all settling plaintiffs to incentivize participation. Because it is often impossible to know in advance into which payment tier a particular plaintiff will fall, this initial payment should be equal to the lowest possible recovery

under the settlement, to avoid the possibility of overpayment.

A fair allocation

Establishing a fair and transparent allocation process promotes participation in the settlement and, thus, finality. Because plaintiffs counsel may be conflicted with respect to allocation among their differently situated clients, it is often necessary to engage an independent third party to perform the allocation. Doing so will assure all litigants that the process will be administered fairly. This can be costly, of course, and the parties should agree in advance how and when administrative costs will be paid.

Thresholds and incentives

Settlement can be conditioned upon satisfaction of a participation threshold. In other words, defendants can offer to settle all pending cases, but require that a specified percentage of eligible plaintiffs accept the offer in order for the settlement to become final.

Although any participation threshold protects defendants, multiple thresholds targeting different groups of plaintiffs can produce even greater finality. By using multiple thresholds, defendants and participating insurers can retain greater control over the mix of plaintiffs that must elect to settle before the deal is finalized.

It also is possible to increase the aggregate settlement amount if plaintiff participation exceeds a baseline threshold. This offers plaintiffs and their counsel incentive to

exceed the minimum participation threshold necessary for the settlement to take effect.

Specialized claims

Just as payment tiers and participation thresholds promote finality, so does dedicating a portion of the settlement amount for particular groups of plaintiffs. Such groups may include plaintiffs who underwent an invasive surgery or who are disabled as a result of their injuries. By earmarking portions of the settlement amount for such groups, high-risk claims are more likely to settle.

Alleged future injuries

Achieving finality requires a release of each settling plaintiff's past, present, and future claims against the defendants, including claims based upon injuries discovered after the settlement. Such broad releases are commonplace and typically enforceable, although relevant state law must be evaluated to ensure finality. Defendants should be attuned to the risk that a plaintiff will challenge the enforceability of his or her release. The settlement paperwork can be tailored to mitigate this risk.

Funding the purchase of an insurance product to pay settling plaintiffs if they develop specified injuries in the future is another way to encourage participation and minimize future claims. For example, if a plaintiff population fears developing cancer in the future, part of the settlement amount can be used to purchase an insurance policy that will pay settling plaintiffs should they develop a future cancer.

Protect Against Third-Party Claims Nonsettling defendants

Most states' laws encourage settlements by barring nonsettling codefendants' contribution claims against the settling defendants, but further protection can and should be obtained in the settlement agreement. To protect against potential indemnity claims by nonsettling defendants, the settlement agreement may require plaintiffs to reduce any future judgments to the extent of the judgment debtor's indemnification claims against the settling defendants. The settlement agreement also can require the plaintiffs to obtain as a condition of any future settlements a release

of codefendants' indemnification claims against the settling defendants.

Third-party payors

Plaintiffs' claims against the settling defendants may be subject to liens and reimbursement claims held by providers of workers' compensation benefits, disability payments, Medicare and Medicaid, etc. If these claims are not satisfied or compromised, the third-party payors may pursue the settling defendants for reimbursement. The settlement agreement should require plaintiffs to prove that these liens and reimbursement claims have been or will be resolved before payments are made, and to defend and indemnify the settling defendants against any such third-party payor claims.

Discourage future claims by new plaintiffs

One risk of settlement is encouraging new plaintiffs to file suit. Ironclad protection against future claims is possible only in limited circumstances, such as through a bankruptcy proceeding or certification of a limited fund settlement class. Beyond these unique situations, there are several ways to discourage future claims.

Lone Pine orders

Entry of an order setting minimum pleading and evidentiary requirements for future claims, to be met at an early stage of future litigation, may discourage the filing of nonmeritorious "me too" claims after a settlement. Commonly called a "Lone Pine" order after the New Jersey superior court decision that first employed this case management tool, such an order is most effective where future suits are likely to be consolidated before one court, such as multidistrict litigation.

Future contingent payments

The most likely source of post-settlement lawsuits may be the same plaintiffs counsel who brought the initial suits and negotiated the settlement. But ethical rules in many jurisdictions prohibit limitations on plaintiffs counsel's pursuit of future claims as a condition of settlement.

Making a portion of the payment to current settling plaintiffs contingent on the number of future suits filed against the settling defendants may mitigate the risk of future cases. Should that number exceed certain thresholds, the contingent payments would be reduced to reflect fairly the settling defendants' increased exposure. Conversely, if the number of new claims falls below agreed thresholds, the contingent payments would increase in recognition of the greater finality obtained by the settling defendants.

Mark Collins and Ryan Smethurst, partners in the Insurance Disputes group at McDermott Will & Emery, served as negotiators and principal drafters of the recent World Trade Center litigation settlement agreement, which resolved 10,116 personal injury suits brought by individuals who participated in the rescue, recovery, and debris removal work on and after 9/11.