



Mass torts: Solving the derivative-claimant dilemma in personal-injury litigation

By taking their lead from the *Vioxx* cases, attorneys can cut through the paperwork that slows down the system when there are claimants in wrongful death or survival actions



Danishwar

By Maryam Danishwar

Mass-tort litigation is a multifaceted and challenging practice area. It typically involves numerous legal claims arising from a common event or source. Most commonly, when we think of mass

torts, we think of products liability in pharmaceuticals or consumer products. What separates mass-tort cases from ordinary high-volume litigation is that they are pursued in a collective manner; that is, as groups of cases rather than independently. Such litigation often involves several defendants and multiple state and federal courts located around the country. Examples of cases in this practice area include mass tort litigation dealing with tobacco, breast implants, asbestos, lead paint, and the drug *Vioxx*. Large antitrust claims, and large-scale, “man-made” disasters, such as chemical-plant explosions and airplane crashes, and even natural disasters also fall within this area.

The 1980s witnessed the rise of mass personal-injury litigation. High volumes of claims were filed against many corporations for damages due to injuries or diseases attributed to pharmaceutical products, medical devices, catastrophic events or toxic substances. Since then, mass-tort personal-injury litigation has become common.

While mass-tort litigation has become a widely-utilized procedure that helps ensure a uniform and cost-effective means to justice, there are still many problems that need to be resolved in order to make the process more efficient.

The furtherance of mass-tort personal-injury cases is particularly burdened with complications when derivative claimants are involved. Whether the action is initiated as a wrongful-death claim or pursued as a survival action and regardless of whether the case is in a Multidistrict Litigation (MDL) or state-coordinated proceeding, the procedure becomes far more daunting when estate representatives are concerned.

This situation proves problematic because, in a majority of cases involving derivative claimants, there are no estate administrations that provide a designated or court-appointed qualified personal representative or administrator of the estate. As such, there is no party vested with the authority to legally act on behalf of the estate of the deceased injured party in furtherance of the claim. This hinders the litigation in two major ways. First, it leaves the derivative claimant unable to obtain evidentiary materials to prove the case. Second, it leaves the derivative claimant unable to legally sign and bind the estate to a settlement or other similar negotiations. These limitations have a serious detrimental effect on the litigation as a whole in that they slow down the process of the litigation and the possible resolution of the cases. Claimants pursuing a case in their individual capacity in the same litigation in turn are also faced with this delay

See Danishwar, Next Page

because this type of litigation tends to normally move forward in bulk.

These problems can be remedied through efficient pretrial case management and orders. Whether it is in the MDL or in state-coordinated proceedings, presiding judges are vested with the authority to take actions that will expedite the case and to keep costs reasonable. Effective pretrial orders or case-management orders can implement an efficient procedure for qualifying a derivative claimant as a personal representative of the estate of the decedent for the purposes of the litigation to avoid the problems mentioned above.

Protecting the patient's privacy rights, yet hurting the derivative claimant

In a mass-tort personal injury suit, as in any other personal-injury suit, damages are substantiated in large part through medical records. However, obtaining medical records for a deceased claimant has become a major road block for derivative claimants when the deceased passes away without an estate set up. This is because while most other privacy interests die with a person, the legislature decided to keep the confidential and privileged nature of medical records unscathed.

While the HIPAA Privacy Rule recognizes that a deceased claimant's protected health information may be pertinent to a family member and provides ways for a surviving family member to obtain the protected health information of a deceased relative, the methods are burdensome and time consuming. In the case of a derivative claimant, a physician practice may disclose the decedent's records *only* to the individual's "personal representative," as defined in HIPAA. A "personal representative" is "an executor, administrator, or other person [who] has authority to act on behalf of a deceased individual or of the individual's estate." (45 CFR 164.502(g)(4).) As a result, determining appropriate release of a decedent's medical records can be complex for health-care providers. Therefore, before a health-care facility can disclose a decedent's records, the provider must obtain

proof of such appointment or face the consequences of violating a patient's privacy rights.

California law also provides the beneficiary or personal representative of a deceased claimant with the full right of access to the decedent's medical records under the same requirements that would apply to requests from the patient themselves. However, derivative claimants who do not have court appointed authority have a difficult time obtaining evidentiary materials necessary in order to substantiate their claims. (Health & Saf. Code, §123105(e).)

As discussed above, in the majority of the cases involving deceased injured parties there are no probate proceedings that appoint any individual as a legally-recognized representative. Most often this is because the decedent did not leave behind tangible assets that required an estate, or because the assets left behind were of nominal value not requiring an estate administration for transfer purposes. Setting up an estate is time consuming, confusing, and very expensive on the back end for statutory fees. In addition to the statutory fees, there are costs for appraisal fees, publication costs and miscellaneous fees charged by the county. A typical estate might incur anywhere between \$1,000 to \$3,000 in court costs and other required fees. The cost itself becomes a deterring factor for many claimants who are seeking to obtain records to determine the merits of the case itself. It becomes a costly risk to set up an estate to obtain evidence that might not result in a qualifying claim. While fronting this cost for a client may not be a substantial problem in individual cases, it becomes a substantial one in mass tort litigation which may involve hundreds of similar cases requiring the same procedure *and* the same fees.

This complication has the effect of not only slowing down the litigation process but oftentimes can stop the progress altogether. The case is left in limbo because an attorney cannot in good faith dismiss the claim or further the progress of the claim for lack of evidence.

Authority to compromise a claim too costly

Settling mass tort cases is especially tricky when estate representatives are involved. Resolving claims by these plaintiffs requires additional consideration to guarantee that the settlement is valid and binding. State laws govern who may bring forth and compromise wrongful death claims or pursue and compromise survival actions on behalf of a decedent's estate. Only an administrator or an executor of the estate ("personal representative") has such authority. Therefore, verifying that presumed representatives settling such claims are rightfully authorized to do so is vital to long-term settlement enforceability. As such, defendants nowadays are extremely cautious of taking measures to ensure that everyone attempting to release death related claims in a mass tort settlement actually has authority to do so. In the majority of such cases, defendants require that plaintiff provide legal proof of his or her authority to bind an estate to a settlement. Again, this becomes an issue in cases where no estate is set up and a personal representative of the estate is not appointed.

While setting up an estate seems like a practical solution in this instance, the costs associated with the process still cannot be justified, especially when the award might be less than or comparable to the fees incurred for setting up the estate.

The solution to both these complications lies in the pretrial phases of litigation in the coordinated or consolidated proceedings. Both in the Multidistrict Litigations and in state court coordinated proceedings courts are vested with broad powers to exercise wide ranging supervision, management, and control of all aspects of mass-tort litigations.

Given this authority, presiding judges can work with the attorneys in leadership roles to implement procedure to provide a speedy and more efficient framework for tackling these issues.

A change is in "order"

The Judicial Panel on Multidistrict Litigation, a group of seven district and

See Danishwar, Next Page

federal circuit judges, may transfer factually associated cases filed in different federal districts to a single judge for coordinated or consolidated pretrial litigation. (28 U.S.C. § 1407.) In order to obtain MDL designation, the panel requires that the different actions must share one or more alleged events, circumstances or characteristics to be resolved at trial, the consolidation must promote convenience for the involved parties and witnesses and the consolidation must promote justice and efficiency by eliminating overlapping or duplicative discovery. While in theory, a case returns to the transferor judge for trial after pretrial proceedings are concluded in the MDL, the vast majority of cases are resolved in the transferee court.

Once an MDL is designated and a presiding judge is assigned, the transferee judge has considerable discretion over the administration of the litigation. (28 U.S.C. § 1407(a).) The Federal Rules of Civil Procedure, predominantly Rules 16, 26, 37, 42, and 83, contain several provisions which grant supplemental authority to a court's inherent power to manage litigation.

More specifically, Rule 16(c)(12) expressly addresses complex litigations, giving power to the judge to assume "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Furthermore, Rule 16(c)(9) provides that the court may take any actions in the pretrial proceedings relating to settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.

In California, by definition, a "complex case" is an action that requires *exceptional judicial management* to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel. (Cal. Rules of Court, rule 3.400(a).) According to the California Rules of Court, Standard 3.10, "a complex litigation should be assigned to one judge for *all purposes*" in order to further the aforementioned goals. (Emphasis added)

Coordination brings to one court two or more "civil actions sharing a common question of fact or law [that] are pending in different courts." (Cal Code Civ. Proc., § 404.)

The standards of complex cases notwithstanding, even in an individual action where related actions exist, the California Rule of Court prescribes that "if all the related cases have been filed in one Superior Court, the court, on notice to all parties, may order that the cases, *including probate* and family law cases, be related and may assign them to a single judge or department. (Cal Rules of Court, rule 3.300 (h) (emphasis added).)

As such, both federal and state court mass-tort judges are given the power to exercise jurisdiction over all aspects of a litigation including probate issues.

In planning and implementing case management, the court must act to promote fairness, efficiency, and an opportunity to be heard while bringing about a just resolution as speedily, inexpensively, and fairly as possible. Judges are obligated to modify case management procedures to the needs of the particular litigation and to the resources available from judicial system as well as the parties. Judicial time is in short supply and must be utilized effectively. Limited time and a high volume case load may force some judges to believe that they should not dedicate time to civil case management. However, investing time in the beginning stages of the litigation can – and usually does – lead to an earlier resolution, with shorter trials, less motion practice, and, ultimately can save judicial time and relieve some burden from the already congested dockets.

It should be the goal of the presiding judge of a personal injury mass tort litigation to implement procedures to solve the derivative claimant dilemma during the pretrial phase of the litigation. This can be done in a Case Management Order or a Pretrial Order.

Currently, in the majority of the mass tort proceedings both defendants and plaintiffs work together to compromise on issues regarding case management, such as discovery, service of process, filing of additional complaints, protective

orders, trial scheduling management and so forth. Master complaints and short-form complaints are adopted to provide a uniform method for future filings. Discovery is most often conducted via uniform court-approved fact sheets for both the plaintiffs and defendants. Uniform procedures are implemented in obtaining and submitting evidence (which normally works well for claimants filing in their own individual capacity). But somehow, a uniform procedure for solving the derivative claimant dilemma is not often a part of this elaborate process. This needs to change. If such a procedure was sought during the critical pretrial stages of the litigation, the resolution of such cases would be possible in a more efficient and less time-consuming manner.

However, it is not wholly the role or responsibility of the presiding judge to implement such procedures. The lead attorneys in these proceedings also have an obligation to expedite this procedure.

In all mass tort proceedings, both sides have a group of attorneys who serve as a lead counsel and/or liaison counsel. Almost all mass-tort litigation also has a steering committee that helps in the decision making and case management of the litigation. Each role has various responsibilities that are agreed to and approved by the court. The attorneys acting in the capacity of one of these leadership roles should seek to implement a solution to the derivative claimant dilemma in the early stages of the litigation.

The proposal of resolving these issues is not alien to the mass-tort world. There is precedent in previous litigations that has already paved the road. Specifically, the Honorable Victoria G. Chaney has set a precedent for this process in California in the *Viox* cases (JCCP 4247). The facts in those cases were similar to the cases discussed herein; that is, derivative claimants were unable to obtain medical records for settlement qualification purposes and were unable to bind the estates because of a lack of sufficient estate proceedings. As a result, Judge Chaney agreed to sign Letters of Special Administration giving

See *Danishwar*, Next Page

an heir the ability to perform both tasks where needed.

To take advantage of this simplified process, a derivative claimant was simply required to submit a Petition for Assignment of Special Administrator in which he/she stated that the purpose of the petition was solely to request that the Court designate the derivative claimant the Special Administrator with the limited authority to proceed with the wrongful death claim as it related to the settlement. Although petitioners were required to post a bond per the California Probate Code section 8440, the Court set that amount at \$25 to ensure that the bond would not become a hindrance to the process. As a result, California derivative claimants were given the authority to execute the settlement agreement and bind the estate to the settlement. However, this procedure was put into place long after a global settlement had been reached rather than at the outset of the litigation. As such, the resolution of the cases involving deceased claimants took far longer than necessary. A majority of the derivative claimants were only able to *begin* obtaining medical records at this juncture of the proceedings whereas individual claimants were already on the path of signing onto the global settlement and receiving their allocation notifications.

A similar procedure involving Special Letters of Administration is a possible solution for other mass-tort proceedings to help alleviate the issue at hand, but at a far earlier stage. Special Letters of Administration are sought in either testate or intestate estates when there is not a qualified executor or general administrator, as the case may be. Pursuant to California Probate Code section 8540(a), the court may appoint a special administrator to exercise any powers that may be appropriate under the circumstances for the preservation of the estate if the circumstances of the estate require the immediate appointment of a personal representative. The appointment may be for a specified term, to perform particular acts, or on any other terms specified in the court order. (Cal. Prob. Code, § 8540(b).)

In a state-court coordinated proceeding, the parties should, at the outset of the

litigation, present to the Court a proposed case management order or a proposed pretrial order to implement a similar procedure in which a template petition or form is adopted in order for derivative claimants to be vested with the requisite authority to obtain medical records and bind the estate to a settlement.

In California, another option in resolving this issue is to propose in a case management order or a pretrial order that the Judicial Council forms DE-111 (Petition for Probate), DE-140 (Order for Probate) and DE-150 (Letters) be submitted simultaneously or within the same time frame as the plaintiff facts sheets so as to assist with the medical records retention issue early on. The forms are simply a more detailed version of the petition that was adopted in the Vioxx JCCP, yet allow for a far more simplified process than estate administration.

A comparable process can be adopted in MDLs as well, depending on probate rules of the state where the MDL is designated. In fact, this exact issue was also a focus in the Vioxx multidistrict litigation situated in New Orleans, Louisiana, *In Re: Vioxx Products Liability Litigation*, MDL No. 1657, United States District Court, Eastern District of Louisiana. On September 29, 2008, Honorable Eldon E. Fallon approved Pretrial 35A (Production of Records in the Vioxx Resolution Program Pursuant to CAP 2008-1, "Required Representative Capacity Documentation: Vioxx User Claimant") to specifically address the issue of derivative claimants' inability to obtain medical records and their inability to bind the estate to the settlement.

Citing the Court's express authority to direct and control the coordinated discovery in the litigation pursuant to 28 U.S.C. § 1407, Federal Rules of Civil Procedure 16, and Federal Rules of Civil Procedure 26(b), Judge Fallon adopted the CAP 2008-1 procedure, "to allow claims submitted to the Vioxx Resolution Program on behalf of Deceased Claimants to move forward in the settlement process without delay." (*In Re: Vioxx Products Liability Litigation*, MDL No. 1657, PTO 35A.) The process allowed a claimant or their attorney to complete a

Form V2031 providing information on a surviving spouse or the designated representative of a deceased claimant. The surviving spouse or designated representative named in the Form V2031 was vested with the authority to sign a release or medical authorization forms, allowing the claim to proceed and be evaluated in the claims process.

Problem solved

Despite the tremendous progress and development of mass-tort personal injury litigation, the obstacles faced by derivative claimants remain unresolved. When there are no estate administrations which provide a designated or court-appointed, qualified personal representative or administrator of the estate, the litigation is effected in two significant ways. First, a derivative claimant is unable to obtain evidentiary materials to prove the case. Second, a derivative claimant is left unable to legally sign and bind the estate to a settlement or other similar negotiations. These issues have a harmful effect on the litigation as a whole in that they slow down the process of the litigation and the possible resolution of the cases.

The solution to the derivative claimant dilemma is to tackle the issue at the early stages of litigation with pretrial orders or case management orders that provide a procedure to designate the derivative claimant as an authorized representative of the estate. The Court's express authority in mass tort procedures allows for this process, regardless of whether the litigation is situated in a state court proceeding or MDL. *Vioxx* has already provided a precedent for this process in both state and federal court. Future mass tort proceedings should implement a similar course of action but at the outset of the litigation rather than at the settlement stage. In this way, a derivative claimant can obtain a resolution of the case in an efficient and timely fashion.

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