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Making the Most of a Matrix-Driven Mass Tort Mediation Session

By Alex Polsky – February 5, 2016

Mass tort cases are designed to resolve large numbers of claims filed by individuals who have suffered similar injuries. But as often happens in life, many of us believe we are unique individuals and that our case is different, so some plaintiffs refuse an initial offer to settle. As much as 5 percent of plaintiffs in mass tort litigation refuse an offer that is part of a global settlement.

This presents a problem for both plaintiff and defense counsel. Plaintiffs may not have the desire or resources to try large numbers of opt-outs. And defense counsel want to contain risk and have financial certainty by bringing as many cases into a global settlement as possible.

The reluctance of some plaintiffs to accept an initial settlement, particularly in mass tort cases with serious injuries, is understandable. Their lives may have changed drastically since the event that harmed them. If the plaintiffs' firm has a large number of cases, the clients may not have spoken with their lawyer in person or by phone since they signed a retainer. They may have unrealistic expectations based on what they've read about the case on the Internet and may have a hard time accepting a figure that is below what they thought they would get or feel they deserve.

When these cases find their way to a settlement special master or mediator, special care is needed to handle them fairly and efficiently. It is part science and part art. First, the science.

Matrix-Based Mass Tort Settlements

Typically in a mass tort case, the defense will have agreed to an amount—say, \$1 billion—that is to be split among the plaintiffs. This includes the funds that will go to those who initially object to the global settlement. Those cases need special attention and one-on-one sessions with objecting plaintiffs and their counsel to resolve.

Often, global settlements use a matrix to gauge individual awards fairly against a global settlement figure. Matrices contain various categorizations that are then rated by a point system. It is important that the matrix be product- and litigation-specific and detailed enough to take all variances into account.

In metal-on-metal hip cases, for example, many of which are being settled now, one would rate the plaintiff's age, age when the device was implanted, age when it was explanted, complications or infections (pre- and post-explantation), and degree of recovery and quality of life, among other factors.

Then plaintiffs are rated. Those who received the device when they were younger score higher, for example, because they have a higher chance of needing a replacement device as they age. Someone of working age left unable to work would score higher than an older person in retirement.

This leads to a very narrow and specific range of damages for each plaintiff. The presiding judge in the multidistrict litigation will send plaintiffs who reject that figure to a special settlement master or mediator in an attempt to educate them and bring more plaintiffs into the settlement fold.

Working with a Settlement Master

There are several things plaintiffs' counsel can do to maximize this process. Based on that matrix, if one was used to calculate the global settlement, or a bespoke matrix if one was not, a mediator will send counsel a detailed worksheet to be completed and returned. It is important to be painfully honest and warn the mediator of any aggravating circumstances. Typically, the mediator will then have a phone conference with counsel to learn more about the individual and why he or she is reluctant to settle.

The Art of Matrix-Based Settlement

Now the art of mediating with a matrix comes in play. Few plaintiffs want to be handed a figure and effectively be told this is what you are worth. The plaintiff may not even be convinced he or she wants to settle—for any amount—and believes strongly in having a day in court.

These clients require empathy and education—in that order—from both counsel and the settlement master.

Meet with your client face-to-face, one-on-one, within several weeks of the settlement session. Preparing your client to meet with the settlement master is key. Explain who the settlement master is and what the master's role is. Inform your client that the mediator will explain the settlement offer and that the mediator will talk openly and candidly about the risks of going to trial.

The uncomfortable fact is that at this juncture, some clients will not trust their attorneys and will feel that they are being rushed into a settlement offering far less than what they expected by counsel who only want to get paid. If appropriate, tell the client that the settlement master is paid by the courts, or that costs are being shared equally between the plaintiff and defense, who both had a say in who was chosen, so they understand that the settlement master is truly unbiased. The settlement master's role is to rebuild trust in the legal process and educate the client as a completely independent third party.

In the first moments, a settlement master will explain who he or she is and what his or her role is, and perhaps even talk about things unrelated to the case, particularly if the plaintiff seems nervous or upset.

This is often the first opportunity the plaintiffs have had to tell an independent party how they believe they have been harmed. It is important to allow time for this process and to ensure that clients understand they've been heard. A skilled settlement master will let plaintiffs express their negative feelings and ask open-ended questions as to what specifically angers them. This is the vital first stage in building trust with the settlement master and the process. At that point, the settlement master has earned the right to educate the plaintiff about his or her choices.

A settlement master's role is not to "get" plaintiffs to take the settlement. Rather, it is to help them understand the risks and costs of going to trial so they can make their own informed decisions as to what is best for them.

Many plaintiffs have an unrealistic view of a jury trial, such as what evidence will be allowed. They may also not fully understand, or have fully internalized, that a large percentage of their award will go to costs and their attorney's contingent fee, no matter how clearly counsel has explained it.

The settlement master then explains the matrix and shows how the plaintiff's case has been rated among thousands or hundreds of thousands of other individuals. Allow the client to ask questions, and do not hurry the process. Patience is key.

If the plaintiff seems uneasy, the settlement master will reassure him or her that the decision is the plaintiff's and will allow the plaintiff to consult with counsel, all the while communicating that it is the plaintiff who is in control of the process.

Getting to Yes

Mass Torts Litigation Winter 2016, Vol. 14 No. 2

When the process is done correctly, a wonderful alchemy occurs. An experienced settlement master will help the plaintiff realize that, under the circumstances, the settlement offer is fair and equitable. Better still, clients begin to see that by accepting it, they have a chance to end what has likely been a very stressful chapter in their lives and finally begin the healing process.

Working with a highly experienced settlement special master is key, but equally important is the preparation plaintiffs' counsel have put in, to prepare each of their clients.

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