MASS TORTS

HAVING ECONOMIES OF SCALE WORK IN YOUR FAVOR

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THE MAJORITY OF HOMEOWNER PROPERTY DAMAGE CLAIMS IN THE UNITED STATES INVOLVE DAMAGES THAT RANGE FROM THREE TO SEVEN THOUSAND DOLLARS PER CLAIM.[1] ALTHOUGH THE INSURANCE INDUSTRY PAYS BILLIONS OF DOLLARS A YEAR AS A RESULT OF THESE CLAIMS, MANY ARE NOT INVESTIGATED OR PURSUED FOR SUBROGATION.

Whether these claims involve smoke damage caused by a catastrophic fire or water damage from a defective plumbing product, many are not pursued for subrogation because investigative and litigation costs alone would exceed the overall size of the claim. Consequently, insurers are often forced to forego subrogation on individual claims based solely upon the economies of scale. This unfortunate reality forecloses the prospect of subrogation on a large majority of otherwise recoverable claims.

Although small claims may not justify the expenditure of resources for the pursuit of subrogation, they can under certain circumstances be aggregated and collectively pursued through a mass tort action. By aggregating small, related claims and pursuing a mass tort, viable small claims can be pursued in an efficient and cost-effective manner and can result in seven to eight figure recoveries.

This article is intended to provide an overview of how mass torts can provide a vehicle for subrogation recoveries by aggregating claims and flipping the economies of scale in your favor. The article will also highlight some of the critical issues that must be addressed to effectively develop and pursue a mass tort.

What is a mass tort?

Mass torts arise out of a "civil wrong that injures many people"[2] and are initiated by numerous parties alleging similar injuries that have been caused by the same defective product or negligent act. Historically, the civil wrongs which lead to mass torts have come in two forms: 1) a single event that causes multiple injuries, known as a "single incident mass tort;" and 2) multiple injurious events that arise out of the manufacture and sale of one defective product, known as a "dispersed mass tort."

Single incident mass torts often arise out of cases involving toxic emissions, industrial waste contamination and mass disasters. As illustrated by the foregoing examples, a single incident mass tort involves one event that causes varying degrees of harm to numerous individuals or entities. Historic examples of single incident mass torts are catastrophic fires and flooding events that cause widespread destruction of property. Dispersed mass torts, on the other hand, do not involve a single catastrophic event. Instead, they arise out of multiple harm-causing events that can be traced back to one isolated cause – generally a defective product. Classic examples of dispersed mass torts involving property damages are defective washing machine hoses and asbestos removal claims.

Whether damages arise out of a single catastrophic event or a recurring defective product, the most important aspect of any mass tort is the aggregation, or bundling, of claims.

Aggregating claims

The first step towards the development of a mass tort initiative is to identify common claims against common defendants. If the facts of each individual claim lack commonality, a mass tort cannot be pursued.

In the context of a single incident mass tort, commonality in terms of responsible parties and the harm-causing event is fairly straightforward, as the harm-causing event and potential defendants should be common to all prospective plaintiffs. For example, in cases involving a catastrophic fire, the harm-causing event, i.e., the fire, and parties responsible for causing the event, will almost always be common to all injured parties. Therefore, the primary task in developing a single incident mass tort will be to identify all injured parties and work towards the development of a joint prosecution agreement, which addresses issues such as: cost sharing, expert sharing and uniform theories of liability. The goal of the joint prosecution agreement is to ensure commonality among the plaintiffs so that a mass tort can be pursued in an efficient, cost-effective manner.

As it relates to dispersed mass torts arising out of defective products, identifying common claims against common defendants is a much more dubious task for subrogating insurers, because each individual loss occurs at a different time, in a different location, and is often handled by a different adjuster. Consequently, an insurer could conceivably pay hundreds of related losses in any given calendar year without recognizing commonality among the losses.

Notwithstanding this inherent impediment, many insurers in recent years have taken proactive steps to identify and track loss trends. Although the approaches to trending may vary from insurer to insurer, the overall effect of trending has: 1) enabled many insurers to identify recurring losses caused by the same product defect; and 2) facilitated the development of uniform systems geared towards the prosecution of mass torts. For example, many insurers have implemented programs that enable their field representatives to, not only identify losses caused by a common product defect, but to also collect and preserve essential evidence from the loss site for future use in a mass tort.

Through trending and the implementation of systems designed to track related losses and foster the preservation of evidence, insurers are in an ideal position to aggregate recurring claims that are caused by the same common defect. In other words, insurers are often in a position to be on the front lines of a dispersed mass tort initiative.

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MASS TORT ACTIONS CAN SERVE AS AN EFFICIENT FORUM FOR THE RESOLUTION OF NUMEROUS CLAIMS THAT SHARE COMMON ISSUES OF LAW AND FACT.

Jurisdiction and Joinder of Claims

In single event mass tort actions, jurisdictional concerns involving the joinder of claims is generally not a concern, because the injured parties and their claims are geographically confined to the area where the single event occurred. Therefore, most plaintiffs in a single event mass tort can simply join a consolidated mass action filed in the jurisdiction where the single event occurred. Jurisdiction will generally be conferred by virtue of the traditional rules of *lex loci delicti*, the place of the wrong.

Unlike single event mass torts, dispersed mass torts involve claims that are not confined to one geographic area. Aptly named, a dispersed mass tort is comprised of claims that are dispersed all over the country. Although it would appear to be a daunting task to identify a forum for joinder of these claims, most states, especially those modeled after the Federal Rules of Civil Procedure, contain provisions that permit joinder of dispersed claims, so long as certain criteria is established. For example, a single plaintiff may join "as many claims as it has against any opposing party." Fed. R. Civ. P. 18. Consequently, a subrogated insurer with hundreds of related product defect claims against common defendants can join these claims in one action instead of litigating them piecemeal. At the same time, Fed. R. Civ. P. 20(a) permits "all persons to join in one action if they assert any right to relief… arising out of the same transaction, occurrence, or series." Under the circumstances, if jurisdiction can be established between one plaintiff and one defendant, most states will permit the joinder of related claims by other plaintiffs, so long as the joined claims arise out of the same transaction or occurrence and generally involve the same liability evidence.

Benefits of Mass Torts

The old adage that there is strength in numbers holds true. Mass actions permit plaintiffs to pool resources, defray costs and put forward a uniform front to recover on cases that, individually, would not be worth the cost of pursuing. Moreover, the aggregation of damages in a mass tort action increases the stakes for all parties, which can serve as catalyst that will often promote settlement discussions. Aside from these obvious benefits, mass tort actions can serve as an efficient forum for the resolution of numerous claims that share common issues of law and fact.

Litigating hundreds, if not thousands, of related claims in a piecemeal manner is neither an efficient nor cost-effective means of dispute resolution. Individualized litigation would result in an unnecessary duplication of written discovery, depositions and trials involving the same issues. Mass tort cases, however, are usually coordinated before the same judge so as to maximize judicial economy and to facilitate an orderly, cost-effective exchange of discovery and dispute resolution.

As it relates to discovery, courts have developed a number of creative schemes intended to minimize the cost, delay and burden of discovery. For example, some courts have implemented "phased" or "sequenced" discovery models. Under the phased or sequenced discovery model, initial discovery is limited to issues and information that may facilitate settlement negotiations or provide a foundation for dispositive motions. Other creative discovery methods can include: *sequencing by parties* whereby one party or claim proceeds first and blazes the trail of discovery for other claimants; *conference depositions* wherein multiple witnesses are deposed as a group on a particular subject area; and orders which permit the use of depositions from prior cases regardless of the jurisdiction.

In addition to implementing novel discovery methods, courts presiding over mass torts have also developed unique and creative approaches to trials to facilitate an efficient and expeditious resolution of mass tort cases. Examples of the various trial approaches include: 1) a series of *consolidated group trials* on all issues each with groups of common plaintiffs against common defendants; 2) *bifurcated or trifurcated trials* whereby all parties litigate common issues in one trial, leaving individualized issues to be resolved in smaller trials; 3) *reverse bifurcation* whereby damages are litigated first so that the defendants' overall exposure is established; or 4) *bellwether trials*[3] involving a representative sample of claims wherein all issues are litigated to establish a baseline for the resolution of remaining claims.[4]

UNLIKE SINGLE EVENT MASS TORTS, DISPERSED MASS TORTS INVOLVE CLAIMS THAT ARE NOT CONFINED TO ONE GEOGRAPHIC AREA.

Although the nature of a mass tort action will often dictate a court's approach to discovery and trial, the use of bellwether litigations, coupled with the doctrine of collateral estoppel, can prove to be an extremely efficient and cost-effective means to litigate a mass tort.[5] Under the *bellwether trial* practice, certain individual cases within the mass tort proceeding are selected to proceed through litigation in advance of all other cases. The results of the *bellwether* cases are then used to assist the parties in evaluating the remaining cases. If a *bellwether* case results in a final judgment on the merits, the remaining litigants can rely upon the doctrine of collateral estoppel[6] to preclude the re-litigation of common liability issues.[7] The utilization of bellwether cases and collateral estoppel can be effective and is often favored by courts because it "relieves parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication."

As discussed at the outset of this article, insurers often forego the pursuit of subrogation on small claims based solely upon the economies of scale. The decision not to pursue these claims, however, can be a missed opportunity as they represent a large, often untapped source of subrogation revenue. By being proactive in identifying and aggregating common claims caused by a single event or product defect, insurers can take advantage of the efficiencies of mass tort litigation and realize substantial recoveries.

1 *Insurance Information Institute*, Homeowners Insurance –Expenditures for Homeowners and Renters Insurance (2010).

2 *Robinson v. U.S.*, 175 F.Supp.2d 1215, 2118 (E.D. Cal. 2001) *quoting* Black's Law Dictionary 1497 (7th ed. 1999)

3 "The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar. References to bellwether trials have long been included in the *Manual for Complex Litigation*." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir.. 1997)

4 *The Manual for Complex Litigation, Fourth Edition.*

5 *In re Mentor Corp. Obtape Transobturator Sling Products Liability*, 2010 WL 797273 (M.D.Ga. 2010).

6 The doctrine of collateral estoppel, also known as issue preclusion, is "based on the notion that it is not fair to permit a party to re-litigate an issue which has previously been decided against him in a proceeding in which he had an opportunity to fully litigate the point."*Gilberg v. Barbieri*, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808 (1981).

7 For collateral estoppel to be applied apply: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Schreiber v. Philips Display Components Co.* 580 F.3d 355, HN 9 (6th Cir. 2009)

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