



10 Steps to Better Managing Mass Tort Litigation

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From the now decades old asbestos litigation to pharmaceuticals and product liability cases to the newly developing PFAS or “forever chemical” lawsuits, mass tort litigation has increasingly become the tool of choice by which plaintiffs’ lawyers attempt to extract massive sums of money from companies nationwide. Few companies will be untouched by these efforts and companies and their legal counsel can quickly become overburdened by the rising tide of mass tort litigation and the ever-increasing demands from plaintiffs’ attorneys. The following simple steps will help your company to better navigate the ever-widening and perilous waters of mass tort litigation.

1. **Retain National Coordinating Counsel;** Depending on the scope of your mass tort litigation, you may need to consider hiring a law firm to act as your national coordinating counsel. Your national coordinating counsel will work with all of the local counsel hired in the various jurisdictions where litigation is pending and will monitor the individual case work-up. Good national coordinating counsel will not only serve to supervise local counsel, but will also ensure that your company’s response to the litigation throughout the country is consistent in its approach and results.
2. **Hire Good Local Counsel;** Your local counsel will be your soldiers on the ground and in the trenches. They should be experienced and respected by the plaintiff’s counsel they are opposing and the courts in which they will appear. Depending on your strategy, your local counsel may also act as your trial team. You will need multiple trial teams and they will have to be able to handle multiple cases at the same time, should your company be forced to trial in numerous cases at the same time -- a tactic often employed by Plaintiff’s counsel to pressure your company into mass settlements.
3. **Coordinate Discovery Responses;** Depending on the scale of your litigation, you may be facing lawsuits in multiple jurisdictions throughout the country. Your company may be served with discovery from numerous plaintiff’s counsel who will likely share information obtained from the various jurisdictions. It is imperative that your various local counsel answer their discovery in a consistent manner. A good plaintiff’s attorney will used inconsistent answers filed in different jurisdictions to argue to the judge or jury that your company failed to answer discovery in a truthful manner and will seek sanctions against your company for this perceived misconduct. Your national coordinating counsel

should work closely with local counsel and review all proposed responses to pending discovery to ensure that your company is telling the same story, no matter the jurisdiction.

4. **Set Up Electronic Files;** Often called an “e-room,” these electronic files are a computer database which essentially takes the place of the hard file your local counsel would typically keep, including copies of all pleadings, discovery, correspondence, court orders and other documents critical to the case. These documents are scanned into electronic format and then uploaded and organized into various electronic folders within the database. These databases can be set up to allow secure access remotely by both company personnel and your attorneys, so that you and your company can log on and monitor the progress of any particular case. While these electronic files can be invaluable in defending mass litigation, it is imperative that both your national and local counsel have personnel in place that are adequately trained in how to set up and maintain these files, as they are only as effective as the people entering the data.
5. **Identify “Problem” Jurisdictions Early;** Plaintiffs’ attorneys filing mass tort litigation typically seek out and file their suits in jurisdictions that they deem advantageous to them. It may be that typical jurors in that jurisdiction are more blue-collar and have extremely anti-corporate views. In other jurisdictions, judges may be elected and may also exhibit certain pro-plaintiff tendencies. You should speak with both national and local counsel to quickly identify these “problem jurisdictions” and adjust your settlement or trial strategies accordingly. The night before trial starts is not a good time to find out from your counsel that your company is facing claims in a dangerous “problem” jurisdiction.
6. **Evaluate Punitive Damages Early;** In most states, punitive damages are available, in addition to compensatory damages, where the alleged conduct exhibits a “willful and wanton” or “flagrant” disregard for the rights of the injured. In most cases, plaintiff’s counsel must demonstrate to the judge that your company acted with this “flagrant disregard” before they will be allowed to seek punitive damages from the jury. Plaintiff’s counsel will attempt to do this with documents and/or testimony developed through discovery, designed to show your company acted maliciously and knowingly to injure the plaintiffs. If there are documents or witnesses which your company anticipates will support punitive damages, assume that those documents and witnesses will be fully discovered by plaintiff’s counsel. Identify these documents and witnesses early so that you can adjust your settlement or trial strategies accordingly. It may make more sense to settle cases early on, before the damaging evidence comes to light and while settlement demands are relatively low. You can be certain that once incriminating documents or witnesses are discovered by plaintiff’s counsel, those settlement demands will rise significantly.
7. **Develop Litigation Experts;** In mass tort litigation there are very often complex medical and scientific questions, which will go to the essential question of whether your company’s product actually *caused* plaintiff’s injury. Obviously, this will be a crucial issue to any jury and you should work closely with your legal counsel to identify and develop scientific and medical experts in your particular field to support your defense. Good legal counsel will be familiar with experts in your field and can train these experts to become polished and impressive witnesses on the stand. Your experts can also evaluate and point out the shortcomings of plaintiff’s experts which could lead to a legal challenge to their qualifications and ability to testify at trial. Be sure that your witnesses are available and willing to testify at numerous trials nationwide. Depending on the scope of your litigation, these experts should also be able to conduct peer-reviewed scientific studies to further support your defense. A good expert with solid scientific opinions who can effectively convey those to the jury can be the difference between winning and losing.
8. **Freeze Documents;** Most companies generate millions of e-mails and other documents on a daily basis. Once litigation is instituted against a company, that company should take affirmative steps to make sure that no documents, e-mails and other electronic documents included, are destroyed. Most plaintiffs’

lawyers will quickly seek to discover all of a company's documents which, today, would also include electronic documents. While they may not all be admissible at trial, many judges will require companies to comply with these broad requests. If your company has destroyed any documents, even if deemed irrelevant, plaintiffs' counsel will seize on this and claim that your company has destroyed documents and should be sanctioned as a result. Additional claims for spoliation of evidence could also result from such an inadvertent destruction of documents. No matter your company's document retention policy, once litigation begins, a document "freeze" should immediately be instituted to ensure nothing is lost.

9. **Develop Good Corporate Witnesses;** Once at trial, your trial team will be called upon to tell your company's story. Given current anti-corporate juror sentiments, it is imperative that you develop a witness or witnesses from within your corporation with the historical perspective and knowledge to testify in the defense of your company. Counsel should work with your corporate witnesses early and often to make sure they are well versed and confident in the strange and often difficult task of speaking to a jury. To the jury, these witnesses will be the face of your entire company, so choose carefully.
10. **Identify "Red Flag" Cases Early;** Depending on the number of cases filed against your company, there will be some cases which are more problematic for your company, depending on the alleged exposure or the extent of plaintiff's injuries. Your company should work closely with its national and local counsel to identify these "red flag" cases early. This will allow your company to maximize its resources in identifying problematic cases and working those cases up for trial. Other less problematic cases may be ripe for early settlement or dismissal, in which case, significant time, effort and resources need not be spent on these cases. This will allow your trial counsel to focus their efforts and resources on these "red flag" cases early and properly prepare them for trial. Wasting legal fees on cases with little or no exposure which will ultimately be dismissed or settled for nuisance value is a luxury that most companies can ill afford.

No company wants to find itself embroiled in costly mass tort litigation. But employing these simple steps early on and with vigor will greatly assist any company in effectively managing and resolving, via dismissal, settlement or trial, the potentially enormous risks inherent in in any mass tort litigation.