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SECTION REVIEW

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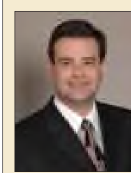
CIVIL LITIGATION

Multidistrict litigation, consolidated actions and class actions in state and federal courts in Massachusetts

BY ANTHONY V. AGUDELO



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When a tortious act, actual or perceived, is committed that adversely affects many individuals or entities, mass tort lawsuits are often filed. The term "mass tort" refers generically to tortious conduct that causes widespread harm to others. Massachusetts courts, both state and federal, are the home to a number of current mass torts actions. Multi-district litigation (MDL), consolidated actions, and class actions are the common vehicles by which such cases are often litigated. Because these mechanisms are often confused with each other, this article first provides a brief description of each, including their similarities and differences, and proceeds to discuss some of the most significant mass tort actions currently pending in Massachusetts.

MDLs, Consolidated Actions and Class Actions

When multiple separate mass tort cases are filed, courts are faced with the challenge of how best to process such suits. The Judicial Panel on Multidistrict Litigation (JPML) is a body of federal judges that was created in 1968 in large part to address such challenges. When numerous similar cases are pending in multiple federal jurisdictions, and those cases have common questions of fact, the JPML determines whether those cases should be consolidated into one action, and if so, to where those cases will be transferred. An MDL can be comprised of a number of individual lawsuits, a number of class actions, or a mix of both. Traditionally, the most common types of cases that are consolidated into MDLs are product liability, antitrust, securities, trademark and patent. When an MDL is created, the court chosen to receive the MDL conducts the pre-trial proceedings, and then remands the individual cases to the district courts where they were originally filed, although under certain conditions trials may be held in the MDL court.

In Massachusetts state court, multiple cases can be consolidated for pre-trial or trial proceedings, or both, if they involve common questions of law or fact. *See* Mass. R. Civ. P. 42. Pursuant to Standing Order 9-80, if at least one party desires that the consolidated cases be specially assigned to a particular judge, it can submit a request for special assignment to the chief justice of the Superior Court. Similar to the JPML panel, the chief justice will then determine whether the cases should be specially assigned, and if so, will also select the judge to be assigned.

With both MDLs and consolidated actions, it is standard practice for the parties to select "bellwether" cases to be the first in the group to go to trial. These cases are chosen because they are "representative," that is, they present issues central to the litigation and found in many of the pending cases. The endgame in virtually all mass tort cases is settlement, and bellwether trials are vitally important in assisting the parties to ascertain the strength of both the liability and damages portions of their cases, and thus their settlement value.

Although a class action is also a type of mass tort action, in contrast to an MDL or a consolidated action, it is a single lawsuit usually filed by one or a small group of individuals. Once a class action is formed, it typically expands to include everyone in the same class, or in other words, all who have allegedly been harmed in the same way. The class action then proceeds as a single case with a single outcome.

Assuming jurisdictional dictates are satisfied, class actions can be brought in Massachusetts state courts if they meet the requirements of Mass. R. Civ. P. 23, and can be brought in federal court in Massachusetts if they comply with Fed. R. Civ. P. 23. Both M.R.C.P. 23(a) and F.R.C.P. 23(a) require that the class be so numerous that joinder of all members is impracticable; that questions of law and fact common to the class exist; that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and that the representative parties will fairly and adequately protect the interests of the class. In addition, M.R.C.P. 23(b) requires that a class action can be maintained only if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the adjudication of the controversy. The corresponding federal rule contains the same requirements, but specifies additional requirements as well, which make the federal rule more complex and make class actions less readily available in federal court than in Massachusetts state court. Two significant differences between the rules are that the federal rule, unlike the Massachusetts rule, requires that notice be provided to potential class members and allows a class member to opt out of the class action.

In addition to M.R.C.P. 23 class actions, those class actions asserting certain consumer protection claims pursuant to M.G.L.c. 93A are also available under Massachusetts law, but are subject to different class action provisions that vary significantly from both Mass. R. Civ. P. 23 and Fed. R. Civ. P. 23. For instance, a Ch. 93A class action may be formed only where the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated, and the plaintiff adequately and fairly represents such other person. Notably, the Supreme Judicial Court has recognized that the public policy of the Commonwealth strongly favors the aggregation of consumer protection claims as class actions under Ch. 93A. *Feeney v. Dell, Inc.*, 454 Mass. 192 (2009).

MDLs, consolidated actions and class actions all proceed in the pretrial phase as single matters. But with MDLs and consolidated actions, each individual claim is culled out for trial. Because each claim will have its own trial, unless there is another resolution of the individual claims or the group of cases as a whole, the individual claims can have very different outcomes. In contrast, in a class action matter, there is only one outcome, and if the class is successful, then all members will share in the settlement or verdict. Mass torts that result in personal injuries or death are more likely to be merged into an MDL or a consolidated action, rather than a class action, because the damages elements can, and usually do, vary greatly from one plaintiff to the next, and thus the class action model may not be as well-suited as the MDL or consolidated action models.

The Benefits of Aggregation

In general, the aggregation of cases into an MDL, consolidated action or class action yields numerous advantages over having many cases brought by similarly-situated plaintiffs: they promote efficiency by saving significant time and financial resources; they reduce the opportunity for inconsistent rulings and they permit a single court to make important pre-trial decisions. Indeed, many, if not a majority, of defendants prefer such aggregation because of these same benefits. Moreover, corporate defendants can dramatically decrease the number of depositions they must give, and greatly reduce the chance of witnesses giving inconsistent or contradictory testimony. Plaintiffs also reap the benefits of allowing their counsel to work together for the common benefit of all plaintiffs and to pool their financial resources. Where a single plaintiff may not be able to successfully pursue a claim against a large corporation, which intends to vigorously defend itself, when many plaintiffs band together, the challenge is much less daunting.

Current Mass Tort Litigation in Massachusetts

One of the largest mass tort litigations in Massachusetts involved the diet drugs fenfluramine and phentermine, commonly known as Fen-Phen. These drugs caused severe cardiopulmonary problems and were recalled by the United States Food and Drug Administration (FDA) in 1997. Fen-Phen cases were consolidated in a federal MDL in Pennsylvania, and 200,000 cases settled globally in 1999 for approximately $4 billion dollars. Massachusetts was the first state in which a Fen-Phen wrongful death case was brought, and also had a consolidated docket of thousands of Fen-Phen cases filed in state court. Since then, mass tort filings have continued to grow in the commonwealth.

Currently, there are 13 MDLs pending in federal court in Massachusetts. These actions include claims of product liability, antitrust violations, breach of contracts, improper sales practices by pharmaceutical companies, patent infringement, improper debt collections, and improper mortgage modifications. The two MDLs with the largest number of consolidated claims are *In Re: Fresenius GranuFlo/NaturaLyte Dialysate* (currently approximately 1,500 claims) and *In Re: New England Compounding Pharmacy, Inc.* (more than 300 claims). Both are product liability actions arising out of mass torts that caused many deaths and serious personal injuries across the country. In addition, they both involve products that were recalled in 2012.

The *Fresenius* cases involve products used in the dialysis process that were designed, manufactured and distributed by Waltham-based Fresenius, which owns a significant number of dialysis clinics nationwide and is a major seller/supplier of dialysis products throughout the country. In addition to the more than 1,500 claims against Fresenius that comprise the MDL assigned to the U.S. District Court for the District of Massachusetts, there are nearly 3,000 similar claims pending against Fresenius in Massachusetts state court. These claims have been consolidated in Middlesex Superior Court and are presided over by Judge Maynard Kirpalani, *In re: Consolidated Fresenius Cases*, Middlesex Superior Court, CV2013-03400, and the first bellwether trial has been scheduled for October 2015.

The *NECC* matter involves fungus-tainted steroid medications prepared by Framingham-based NECC that were recalled, and has led to investigations by the Federal Bureau of Investigation, the FDA, the Center for Disease Control and Prevention, the Massachusetts Department of Public Health and the Massachusetts Board of Registration in Pharmacy, among others. At the end of last year, a settlement was announced in which owners and insurers of NECC had agreed to pay approximately $100 million to victims of the tainted products. Because the settlement figure is grossly inadequate to compensate all of the victims for their losses, the claimants have brought claims against other entities that may bear some legal responsibility, and the claims are still proceeding against these other defendants.

Another significant Massachusetts mass tort litigation involves Transvaginal Mesh (TVM), a synthetic mesh product that is used to surgically treat conditions caused by the weakening of a woman's pelvic muscles. Plaintiffs in these actions allege that these mesh products have caused them to suffer from a wide array of vaginal, bowel and bladder problems. TVM cases, like the Fresenius cases, have both an MDL and a state court consolidated docket. Although the TVM MDL is not pending in Massachusetts, there are two consolidated ➤16

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HEALTH LAW

The Affordable Care Act's impact on prevention

Examining access to affordable preventive health services

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One promising aspect of the Patient Protection and Affordable Care Act[1] (ACA) is the opportunity for increased access to preventive health services. Since 2010, most health plans have been required to cover a range of services, such as annual wellness visits and cancer screenings, without cost-sharing by plan members. For consumers, particularly those with limited incomes, this mandate reduces financial obstacles to better health. Unfortunately, implementation by health plans has been uneven, leaving members with uncovered charges. More oversight and broader consumer engagement is needed for the preventive services mandate to have its intended broad effect.

Background

Even with health insurance, many consumers face unaffordable health care costs. From $25 copays for physician visits to 20 percent coinsurance for medical procedures, having health insurance does not insulate people from medical bills. As a result, many low-income consumers have avoided necessary care. Ideally, ready access to preventive services leads to better health and reduced medical costs over time.

Through the ACA, Congress sought to eliminate the financial disincentives to obtaining preventive health care. The ACA mandates that group health plans and health insurance issuers cover a range of preventive health services without cost-sharing. This mandate applies to the majority of health plans, including employer-sponsored plans, student health insurance, and private non-group insurance.[2] Most privately insured residents of Massachusetts have health plans subject to the preventive services mandate. The preventive services mandate represents one of the major benefits available to Massachusetts residents under federal reform.[3]

Neither the text of the ACA nor the law's implementing regulations specifies the preventive services that health plans must cover without cost-sharing. Instead, the law and regulations refer to guidelines and recommendations issued by the Centers for Disease Control and Prevention, the Health Resources Services Administration and the United States Preventive Services Task Force. By incorporating these guidelines and recommendations, the ACA allows for flexibility in determining services subject to the mandate over time. This flexibility will be important as new standards and technologies develop in preventive medicine.

For adults, preventive services that must be covered without cost-sharing include screening for colorectal, breast and cervical cancers, blood tests for cholesterol and sexually transmitted infections, and counseling for certain conditions.[4] Preventive services that must be provided for children at no cost include regular immunizations, certain blood tests, and vision and hearing exams.[5] Additional services that must be covered for women include an annual physical, the full range of FDA-approved contraceptive methods, and lactation equipment and supplies.[6]

Implementation

Consistent with the law, implementation of the preventive services mandate began shortly after the ACA's passage, with plan years beginning on or after Sept. 23, 2010.[7] The mandate relating to coverage of preventive services for women was delayed until Aug. 1, 2012.[8]

Despite the relatively swift implementation of the mandate, putting the preventive services benefit fully into effect has been fraught with difficulty. This is due in part to the lack of specificity in the statute and regulations. Health care providers and health plans communicate through a complex system of medical billing codes. The recommendations issued by the Preventive Services Task Force and other responsible agencies list services generally, without diagnosis or procedure codes. This disconnect between the recommendations and the way that services are identified and authorized by health plans has led to differential treatment of consumers depending on the plan.

Further, the mandate allows for the use of "reasonable medical management" by health plans. This means that health plans may determine coverage limitations and cost-saving techniques where the guidelines do not specify the frequency, method, or setting for a service. This medical management "loophole" has also resulted in wide variation among health plans.

The ACA's promise of cost-free contraception demonstrates the inconsistent application of the preventive services benefit. Upon the benefit's initial implementation, many health plans offered only *oral* contraceptives at no cost, while imposing cost-sharing for other methods. Further, many plans covered only generic contraceptives at no cost. Due to this confusion, the Employee Benefits Security Administration (EBSA) issued guidance in February 2013.[9] EBSA clarified that a health plan must cover the *full range* of FDA-approved contraceptive methods. EBSA further clarified that health plans may limit cost-free coverage to generic alternatives but *only if* medically appropriate for the patient.

EBSA has issued extensive guidance on many aspects of the preventive services benefit. This guidance has offered greater clarity to health plan members seeking preventive health services. Nonetheless, health plans may still determine coverage limitations where federal law does not specify the frequency or method of treatment. Thus, with respect to cancer prevention, patients face confusion about coverage for colorectal, breast and cervical cancer screenings. For example, health plans differ as to whether future colorectal cancer screening must be cost-share free for a patient that had polyps removed during a prior colonoscopy. Also unresolved is the question of whether more frequent screenings due to higher risk of cancer (such as indicated by colon polyps) must be covered without cost-sharing.[10]

Impact on Prevention

The interim final rule, released in July 2010, underscores three main factors that contribute to underutilization of preventive health services and the need for federal action: (1) health insurers have no financial incentive to cover preventive services as the cost-saving benefits are long-term and lost entirely when members switch health plans; (2) individuals do not see an immediate benefit from preventive services and thus do not obtain them; and (3) the benefits of preventive care are most evident population-wide, requiring centralized action to provide incentives on a broad scale. The ACA seeks to provide a clear incentive to health plan members to obtain preventive care. However, the inconsistent implementation of the mandate has eroded this consumer incentive.

Further federal guidance and enhanced consumer engagement are needed for the preventive services mandate to have its intended broad effect. To increase utilization of preventive health care, thereby improving population health and reducing long-term health system costs, health plans and insurers must implement the mandate more consistently. Federal guidance since 2010 has not led to uniform implementation across health plans. This lack of uniformity has undermined consumer confidence in the ACA's preventive services benefit, likely hindering the intended impact of this important provision. And yet, consumers can assert their own rights in enforcing the preventive services mandate. When faced with unanticipated costs for preventive ➤18

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state court actions pending in Middlesex County, one against defendant Boston Scientific (headquarters in Natick, Mass.) and the other against defendant Covidien (U.S. headquarters in Mansfield, Mass.). Both defendants are makers of allegedly defective mesh products. Judge Diane Kottmyer presides over the Boston Scientific cases, and she has scheduled the first bellwether trial for July 2014.

Asbestos Cases

Other mass tort cases brought in Massachusetts proceed as individual cases. The most noteworthy of these cases, because of their volume, longevity and number of different parties involved, are those wherein plaintiffs allege wrongful death or personal injury claims arising out of exposure to asbestos. Nearly all such cases brought in Massachusetts are filed in state court, although some cases are removed to and proceed in federal court. Thousands of asbestos cases have been filed in Massachusetts spanning more than three decades. These cases have a Superior Court justice and a special master specially assigned to them, have their own docket and electronic filing system, and have their own governing pre-trial orders. Although the vast majority of these cases are dismissed voluntarily or settled, four have gone to verdict since the turn of the century, and the verdicts have all been in favor of the defendants.

Beyond the court system, plaintiffs who claim asbestos-related illnesses also have access to compensation from many bankruptcy trusts formed by companies that manufactured and supplied asbestos-containing products. Those companies went bankrupt defending and paying asbestos claims, and the trusts have a current total of more than $18 billion in available assets, with up to another $12 billion pending. Despite the fact that most of the actually culpable companies are now immune from suit as a result of their bankruptcy, the availability of large trust funds, and the string of defendants' verdicts, plaintiffs continue to file asbestos claims in Massachusetts at a high rate. Indeed, approximately 400 cases are currently pending in Massachusetts courts, and new cases are continually being filed.

What's Next?

The availability of MDLs, consolidated actions, and class actions to efficiently and effectively process huge numbers of claims by victims of mass torts is of great import, especially now when judicial resources are so scarce, the economy is still climbing out of recession, and litigation costs are ever-increasing. There is a wide spectrum of aggregated cases currently pending in Massachusetts, in both state and federal courts, and attorneys who practice in the field of mass torts do not anticipate any slowing down in the filing of such actions. The bulk of the pending cases involve Massachusetts-based companies, so many eyes are on the outcomes of these significant matters. ■