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COLUMN

Navigating settlement allocations in mass tort

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How are settlement funds fairly and efficiently distributed in a mass tort claim where many individuals have filed civil personal injury lawsuits against a common defendant, when the drug, product, event or actor has caused various differing injuries to all the individuals involved?

Allocation methodologies are common where counsel for the parties have agreed to a lump sum, or "global" settlement—whether it is a single pot of money to resolve all claims across multiple counsel, or a pot of money to settle the claims of all clients for a single attorney. Although it is outside the scope of this article, much has been written about the ethics rules a lawyer must navigate during the joint representation of multiple clients in a mass action, particularly as it relates to settlement. Consultation with an ethics expert should be considered by counsel before wading into this arena to ensure that their engagement agreements, communications, negotiations, and other processes comply with their professional responsibilities.

WHO DOES THE ALLOCATION AND WHAT DOES IT LOOK LIKE?

Neither the Multidistrict Litigation Act (28 U.S.C § 1407) nor the Bankruptcy Code (11 U.S.C § 101 et seq.) set forth a specific framework for the distribution of settlement funds in mass tort cases in multidistrict litigation (MDL) or bankruptcy. Typically, an experienced retired judge or experienced attorney acts as a neutral to determine how the settlement "pot" should be divided. The neutral is usually court-appointed in MDL and JCCP proceedings and may be referred to as the Court Appointed Neutral or Special Master.

Your ideal allocation neutral will have been selected by counsel and appointed by courts to allocate settlements in a wide variety of torts, in order to work with counsel to brainstorm and implement the process best suited to the case at hand. An allocation protocol for a product or pharma case will likely look different than an allocation model in the areas of sexual abuse or fertility scandals, but best practices for one type of case may translate to a useful approach in another allocation protocol.

At the heart of any allocation process lies the model used to determine how settlement funds are distributed among claimants with different injuries. Regardless of the specific model employed, certain elements remain consistent: apportioning settlement amounts based on objective criteria and consistently applied standards.

These models may include predefined settlement values for specific claim categories or rely solely on categorized criteria without predetermined values. The design of the allocation matrix is informed by various factors, including the nature of allegations, scientific evidence, evolving knowledge, and legal developments throughout the settlement process.

An allocation protocol will typically include consideration of the following:

1. Documentation Requirements: What must be provided? What may be provided? Will the Allocation be solely "on the paper" or will interviews be conducted? Categories of documents required or permitted may include plaintiff fact



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sheets, attorney summaries, plaintiff statements, medical records, employment/education or other relevant records, and expert reports as agreed by counsel.

2. Interviews: The number of plaintiffs and timeline for completion of the allocation process may inform the inclusion of a provision for plaintiff interviews. If allowed, consideration should be given as to whether it is permitted or required, as well as considerations as to time, place, and manner.

3. Appeal Rights: Will plaintiffs have the right to appeal or seek reconsideration of the decision on their settlement amount based on changed circumstances or new evidence?

Once the allocation determinations, or "awards," have been finalized by the neutral, the logistics of getting the money to the plaintiffs falls to the settlement administrator, who will typically have been appointed separately by the court, along with a trustee to handle costs and administrative issues and ensure the settlement monies have been safeguarded and handled appropriately until distribution

of the settlement proceeds. The trustee and/or settlement administrator is often proposed by plaintiffs' leadership in the MDL. There are various companies and firms that use attorneys, analysts, and technology to further assist the plaintiffs' steering committees, the court-appointed neutral or the special master in administering and processing the large number of claims seeking settlement proceeds.

CONCLUSION

Navigating settlement allocations in mass torts requires a thoughtful well-crafted allocation model to achieve fairness, efficiency, and transparency. An experienced Allocation neutral can help counsel meet their goal of ensuring the settlement proceeds are distributed equitably and expeditiously to the plaintiffs affected by mass torts.

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