Mass Torts Made Perfectly Convivial

Monday February 13, 2012

Last week we attended a Mass Torts Forum/Roundtable for Judges and Lawyers in Philadelphia. It was run by Mass Torts Made Perfect (MTMP), an organization created by plaintiff lawyers. We spotted only five defense lawyers at the Forum, surrounded by many, many plaintiff lawyers. And it was perfectly delightful. The plaintiff lawyers were invariably civil and gracious. The folks at MTMP want to host more events where both plaintiff and defense lawyers get together. If the events are all like this one, there is a reason to be optimistic. The goal makes sense, because judges are insistent that plaintiff and defense lawyers work as many things out as possible. It's easier to do that if the adversaries actually know and trust each other.

And make no mistake about it: judges do want the opposing lawyers to clear away as many squabbles as possible. The Forum was built around an impressive collection of judges: Garrett Brown, recently retired Chief Judge from the District of New Jersey (he presided over the Fosamax Femur MDL), Donovan Frank, D. Minnesota (Guidant MDL), David Herndon, Chief Judge, S.D. Illinois (Yaz MDL), Daniel Stack, Special Master in the Yaz MDL), and Sandra Moss, Court of Common Pleas in Philadelphia (as she said, every mass tort from A-Y, and probably soon Z). It was what we in the business call a hot panel. All the judges were thoughtful and engaging. Here are some of the more interesting points that were ventilated during the Forum:

- Addressing case management issues early is in everybody's interest. Coordination, including between federal and state courts, can aid efficiency and reduce costs. It can also make it harder for parties to play jurisdictions against each other. An MDL can be a "life-changing" experience for a court. It starts to feel like a huge construction project, where landmarks along the way signal progress. Judges also look for "economies of scale."

- Discovery issues "do not improve with time."

- Electronically stored information has prompted a wholesale change in the legal culture. There is so much more discovery, and it is so much more complex and expensive to produce. That, in itself, can constitute settlement leverage. The judges are aware of the various model orders, as well as the Sedona principles in this area. But one size does not fit all. Proportionality issues in this area are important and vexing. They are also not always susceptible to stipulation between the parties. Judges know that, as much as

they want the parties to agree, in certain areas the judge is simply going to have to make a hard decision.

- Allocation of costs is another issue that remains contentious, but sometimes the most lively disputes are not between plaintiff and defense lawyers, but between various strata of plaintiff lawyers.

- Some judges advocate a staged or tiered approach to discovery. That approach might end up being more efficient and less expensive. Then again, it might not.

- Globalization is affecting litigation, just as it is affecting every other aspect of our lives. It can get complicated when a corporate-defendant is headquartered abroad, and it has documents in another country subject to very different laws. Some think that if a company is selling products in the United States, it must be subject to U.S. laws. Others acknowledge that it's not as simple as that, and the niceties of foreign law might actually need to be respected.

- Judges are all over the map on how to select bellwether trials. There is still some support for letting each side pick their favorite cases, but it is possible that the best cases are not representative enough to mark out settlement values. Plus, plaintiffs can subvert the system by dismissing the defense picks at the last minute. Judges don't like that. And here's a piece of good news: most judges think it makes no sense to create a bellwether trial with multiple plaintiffs.

- Most judges are not a fan of imposing hard and fast time limits on the lawyers, but in rare instances they can make sense.

- Jury questionnaires can save time, but they can also miss nuances. It struck us how different the jury selection process is in federal versus Philly courts. In the former, typically the judge does all the questioning, and in the latter the judge is not even present.

- It usually takes something significant – at minimum, a trial date – that inspires the parties to get serious about settlement. This will doubtless not arrive as a surprise, but judges really, really like settlements. Some judges are especially eager to take part in settlement discussions, and others refer settlement issues out to other judges or mediators.

- *Daubert* is a powerful tool, but some judges feel over-*Daubert*ized. The chief complaint involved *Daubert* motions that attack conclusions rather than methods, or that really go after the weight or credibility of the scientific evidence. One judge agreed to be a

gatekeeper, but not “an armed guard.” Most judges are not eager to conduct a full-blown *Daubert* hearing with testimonial evidence and all the bells and whistles. A post-deposition affidavit submitted by an expert will be viewed by judges with a certain amount of skepticism.

Not all the good lines came from the judges. One plaintiff lawyer, upon learning he was seated on a panel next to one of the lawyers who had done the early briefing in the *Daubert* case, said he felt like he was meeting the person who first weaponized a killer virus. Everybody in the ballroom laughed, which must be some sort of good sign.