Help Wanted: Creativity In Defense Of Mass Tort Litigation

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The recent verdict against Merck made us cringe. By all accounts, the defense was difficult for the average juror and some characterized the defense lawyers as not terribly effective communicators. Sad, but not surprising. It is rare that people use the phrase "defense lawyer" in the same sentence as "creativity" without the word "lack" also appearing. Creativity may be the most important tool for managing massive litigation. Why?

Think of the changes at Merck. A year ago it was more or less an ordinary corporation. Today it is the alleged villain in hundreds or thousands of deaths and heart attacks, and it lost its first "mass tort" trial.

Merck is not alone. Change comes fast in mass litigation. In too many jurisdictions, plaintiff's lawyers are free to name dozens of defendants, and then add or drop defendants at the last minute as it suits their objectives. Facts change due to national discovery sharing. Or, facts may change as a result of inadequately trained lawyers taking incomplete or improperly focused depositions. Meanwhile, the relevant science and law continue to evolve.

Central to the creative process is the ability to see change on the horizon, and make use of it. New information and ideas now emerge and circulate faster than ever. The power of the Internet for collaborative and virtually instantaneous information sharing is one important change. Another is the almost global ability of professionals to communicate through English and numbers-driven spreadsheets. And, entrepreneurial, talented plaintiff's lawyers use their extensive financial resources to develop creative new theories.

Merck notwithstanding, there are some examples of change and creativity in discovery and trial on the defense side that are noteworthy.

Prepare for and Try Underlying Cases in New Ways

Mass tort defendants should stop settling or trying underlying cases based on strategies developed years ago. With recent verdicts reaching new highs against what used to be considered "peripheral" defendants, manufacturers need to focus on today's litigation environment, and think creatively and case-specifically for trial preparation and trial itself.

Examples? Lawyers taking and defending depositions must be adequately trained and prepared on product-specific as well as general issues. Entities intent on short-term savings have for years allowed untrained lawyers to "cover" depositions. Manufacturers cannot afford to continue this outmoded strategy in the current environment where plaintiff's lawyers are seeking new defendants and trying cases against unprepared entities. Even the world's best trial lawyers cannot win a case when the relevant facts were missed because of inadequate questioning at deposition. So, figure out the facts you need, invest the resources to train the lawyers on how to get the facts, and then send them out to depositions.

Concerned about cost of trial? Stop thinking about litigation as a series of cases and start thinking of it on a macro level as a broad business problem. In that context (which is, after all, the context for making a decision about whether to try a case or not), the cost of any trial pales in comparison to the size of the problem and the amount that will be spent to solve it. Perspective counts.

For trial itself, try new tactics. One possibility is to take more control of the facts by engaging lay witnesses to testify about real world working conditions in "exposure" cases. For example, in asbestos litigation, plaintiffs try to support claims against myriad companies by swearing that their job entailed "working with" a variety of products they claim were present at a job site. To expose

exaggerations or inaccuracies regarding the responsibilities of tradesmen and/or unions, our firm and others have successfully developed and retained lay witnesses who are familiar with different trade responsibilities. For example, you may have a case where plaintiff testified in his deposition that he was an electrician but that he repaired pumps as part of his job. A trade witness can explain to the jury that in that particular locale, an electrician would be violating strictly enforced union job guidelines if he opened up the inside of a pump to repair it, and for this reason it would never have happened.

Challenging plaintiffs' work histories with a memory expert is another possibility. "Memory experts" have been used in criminal cases for years, and now these experts are starting to appear in civil cases to explain the unreliability of a plaintiff's memory. For example, plaintiffs and "co-workers" in some mass tort cases frequently testify about the products they claim to have used 25 or more years ago. When they start rattling off long lists of names of products they supposedly used long ago, there are valid reasons to suspect errors, coaching and worse. A memory expert can help the jury see why the claimed memories are not reliable without requiring the defense to argue that the sympathetic, ill plaintiff is lying, something juries are loathe to believe.

Another possibility? Hire an expert who traditionally has worked for plaintiffs. When product liability litigation goes on for years, expert witnesses explicitly or implicitly create a record about what was scientifically known or suspected at a given point in time. Thus, an expert who may have testified for years for plaintiffs against "old" defendants may have created a record and in fact believe that "new" defendants being sued today had no reason in the past to fear defects in their products. Your best witness may be an expert the plaintiffs' firm has hired and relied on for years.

Defendants also should not be afraid to create new experts. Look beyond traditional areas of expertise to well-respected members of industry, academics or experts with non-traditional backgrounds. The Internet provides virtually limitless access to find un-tapped academics and scholars who may be independently researching or studying areas that you could make relevant.

Finally, take a new look at your trial themes, and maybe even bring in a new lawyer to do it. Too often defendants blindly follow the past, and reflexively seek to avoid discovery/investigation of the corporate history because they fear the past. You need to know the past. If the history is problematic, then know it and set a proper long-term strategy. But, at least for many "new" defendants in "exposure" cases, there is a strong possibility that the history will show a company with a good story to tell about why it did what it did.

Depending on the nature of the "mass tort," the facts and history and other relevant factors, an early resolution program designed to minimize negative publicity and avoid big verdicts might be appropriate while at the same time being prepared to try a case if necessary. An "all or nothing" approach will not work given the complex considerations involved in mass tort litigation.

Conclusion

Creative thinking is not the strong point for most lawyers. As the world moves faster and in more directions, success requires lawyers to place far more emphasis on using change and creativity as key tools for managing mass tort litigation.

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