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The Common Issue In Mass Tort Consolidation

Law360, New York (September 22, 2009) -- Proposals for using procedural shortcuts to resolve so-called “common” issues in mass torts and other aggregated litigation are hardly new.

But as courts have generally tightened the requirements of the class action device in mass tort litigation, plaintiffs have placed increasing reliance on other proposals that seek to create the same hydraulic pressure for settlement as a class certification decision.

These proposals include mass joinders and consolidations, trials bifurcated between “generic” and “specific” phases, and nonmutual offensive collateral estoppel following a prior verdict for a plaintiff.

Properly understood, however, these proposals raise some of the very same problems that have led courts to tighten the requirements of the class action device in the first place in mass tort litigation.

And these proposals should fail, as a matter of basic due process and fundamental fairness, unless they permit individual issues raised in separate suits to be fully and fairly litigated.

Because the demand that each issue be litigated is unyielding, courts and advocates considering mass tort consolidation must first ascertain — at a granular level — the anatomy of an individual claim, taking into account any case-specific issues that might arise, and only then assess whether any proposal that claims to use “common” issues to resolve the litigation can truly account for all of the case-specific issues that may arise.[1]

To start with a basic principle, due process includes the right to litigate each precise issue raised in each case. As the Supreme Court has put it, “Due process requires that there be an opportunity to present every available defense.”[2]

As Lord Coke explained in the early 17th century, “every estoppel, because it concludeth a man to alleadged the truth, must be certaine to every intent, and [is] not to be taken by argument or inference.”[3]

Put another way, unless we can be sure someone has actually litigated and lost on the precise issues raised in litigation, he has a right to dispute those issues in the future.

On an individual level, this concept is uncontroversial. A storeowner who lost one suit alleging that a customer slipped on a negligently wet floor retains the right to defend another suit charging that the same floor was negligently wet on a different occasion.

Although, at some level of abstraction, both suits raise the “same” question (was the floor wet due to negligence?), a single finding that the storeowner negligently left the floor wet once does not mean that he or she has done so perpetually.

So the suits, although seemingly similar, raise different issues, and the findings of one may not generally be imported into the other.

That basic principle also applies in the context of mass tort litigation. And, as in the store example, it cannot be avoided simply by offering up supposedly common issues at a high level of generality.

Suppose thousands of plaintiffs sue the manufacturer of a product, alleging that the manufacturer failed to warn of a specific risk and that they were injured as a result.

As in the store example, the suits appear similar and raise, at some level, a seemingly common question: did the defendant fail to adequately warn of the risk?

But that question is decidedly not common. In order to succeed, each plaintiff must show that (1) the state of knowledge at the time of her injury was such that the defendant knew or should have known the product was associated with a particular risk to her, (2) based on that state of knowledge, the defendant was required to provide a certain minimum warning, (3) the defendant failed to provide the minimally acceptable warning, and (4) that the plaintiff sustained an injury because the defendant failed to provide the minimally acceptable warning.

These questions are inherently individualistic, and a finding by one jury that the defendant “failed to warn” cannot be applied to any later case.

If one jury determines that the defendant failed to warn of a specific risk that arises under certain circumstances, that finding cannot, as a matter of due process, be imported into any later suit unless the second plaintiff first shows that she used the product under the specified circumstances.

Conversely, if the jury determines that the manufacturer failed to warn because the warning it provided was improperly limited to certain uses or consumers, then the

plaintiff will lose unless she can show that the warning provided did not cover her or her use.

Whether the first trial is an individual action, a consolidated action, the first phase of a bifurcated trial or an “issues” trial in a class action, it is virtually impossible for the parties to litigate with the requisite level of specificity all of the circumstances that might arise in the future or to design a verdict form that would permit the first jury to make such a specific finding.

Instead, the first jury will invariably be asked whether the defendant “failed to warn” of a risk. And although the same jury, which knows the precise basis for its finding, can apply its finding to the circumstances of the specific plaintiff before it, it is impossible for any later jury to do so.

Nor would a finding that the defendant “failed to warn” allow a later jury to determine whether an adequate warning would have prevented a different plaintiff’s injury.

In order to make that decision, the second jury must know the precise contents of a minimally adequate warning for someone in the plaintiff’s shoes, which a generic failure-to-warn verdict does not reveal.

Unable to answer the question properly before it, the second jury will inevitably turn to the only question it can answer: whether the defendant could have done something — anything — more to prevent the plaintiff’s injury.

The defendant could almost always have “done more” at some point, so the critical inquiry into whether the alleged warning defect caused the plaintiff’s injury becomes meaningless and the defendant is denied the right to defend on a critical causation question.

And then there is the problem of evolving knowledge. Products are constantly tested and what is “known or knowable” can change rapidly.

A jury could therefore conclude that the warnings on a particular product were adequate when adopted, but at some point became inadequate. Thus, the inquiry is not only different from plaintiff to plaintiff; it varies even for the same plaintiff over time.

But, again, a simple finding of a generic failure-to-warn verdict, or even a series of special verdicts focused on specific time periods, will not disclose the precise moment at which a warning became inadequate or what was required at any given moment.

Indeed, even the question of whether the product, in fact, has the potential to cause the alleged harm cannot be resolved on a collective basis, at least not usually.

As the Second Circuit explained in Agent Orange litigation, “[t]he relevant question ... is not whether [the product] has the capacity to cause harm, the generic causation issue, but whether it did cause harm and to whom.”[4]

The risks associated with a product can vary drastically depending on the circumstances in which it is used. Thus, a generic finding that the product can cause harm under some circumstances is not really a common question and, not a particularly useful issue to resolve.

To be sure, a finding that a product can never — under any circumstances — cause harm might end litigation if all plaintiffs are parties to the proceeding in which that finding is made.

Bifurcated trials and other such procedural shortcuts might thus appear at some level to benefit defendants and they indeed may in some cases.

But in practice, a generic trial on the issue effectively removes the plaintiffs’ burden to prove a propensity to cause harm and saddles the defendant with the burden of proving that the product could never cause any harm to anyone.

With some of the products most frequently associated with mass tort litigation (including prescription drugs and automobiles), that is a very difficult showing to make.

By their nature, such products may create some risks of harm and eliminating the specific facts of the case from the jury’s consideration can switch the burden of proof in ways that may be insurmountable at trial.

But for the same reason the defendant is unlikely to prevail in showing that its product can never cause harm, individual plaintiffs cannot take advantage of an amorphous finding that the defendant’s product has some potential to harm someone: a generic finding that the product can cause harm cannot, as a matter of due process, foreclose the defendant from challenging the plaintiff’s allegation that the product harmed her.

This is not to say that common issues never exist in mass torts or that attempts to achieve efficiencies in mass tort litigation are necessarily doomed.

But advocates and courts must take a careful and realistic look at the precise issues that will have to be litigated in each case before evaluating potential plans for coordination or consolidation, recognizing that the constitutional right to dispute every issue cannot be sacrificed on the alter of expediency.

And the subtle differences between seemingly similar claims cannot be smoothed over in order to manufacture common issues. Thus, rather than attempting to find seemingly common issues, courts would be advised to first determine the precise issues that will have to be tried in each case.

Once a court has done so, it can fully appreciate the downstream consequences of the plan before it and make a reasoned decision of whether the plan is workable, fair and a good use of judicial resources.

But without a realistic inquiry into the anatomy of an individual suit, proposals to take advantage of so-called common issues are doomed to fail.

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[1] In addition to constitutional questions, mass tort consolidation raises several prudential fairness and efficiency questions, which are both significant and difficult. See Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 285-89 (1957) (explaining unfairness of allowing aberrant verdict to decide fate of mass tort and noting that it is impossible to know after only one trial if its result was aberrant).

[2] See *Lindsey v. Normet*, 405 U.S. 56 (1972) (internal quotation marks omitted). Accord *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

[3] 2 Coke, *The First Part of the Institutes of the Laws of England; Or, A Commentary upon Littleton* ¶ 352a (16th ed. 1809).

[4] See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987).