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Mass Tort Claim Processing Facilities: Keys to Success

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MASS TORT CLAIM PROCESSING FACILITIES: KEYS TO SUCCESS

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In recent years mass tort claim processing facilities have become important vehicles for resolving individual mass tort claims and distributing settlement funds. In the asbestos arena, courts have established post-bankruptcy settlement trusts for defendants such as Amatex, 48-Insulations, Johns-Manville, UNR, National Gypsum, Eagle-Picher Industries, Celotex, Paycor, and others. In addition, courts have created class-action settlement facilities for products such as DDT, Albuterol, Breast Implants, Agent Orange, and Polybutylene Pipes. Having operated for almost a decade, some of these facilities are now at a point where we can evaluate the practices which make them successful in processing and resolving mass tort claims.

The purpose of this essay is to outline the characteristics of successful facilities, and to describe the reasons behind their success. This will be accomplished by first defining what the measures of success should be for mass tort claim processing facilities, and then determining the actions which have furthered those goals.

I. MEASURING SUCCESS

A facility's success is first measured in terms of how well it conforms to and furthers the goals or principles outlined in its charter. For example, a reorganization plan explains the goals of a mass tort trust created subsequent to a bankruptcy proceeding, and the settlement document explains the goals of claim processing facilities resulting from class-action settlements. Although not always explicitly stated, the three most common goals are: (1) fairness of the settlement offers, (2) equality of treatment of all beneficiaries, and (3) dispositions favoring settlement or litigation.

The second measure of a facility's success is the efficiency of its operation. Efficiency is normally achieved through low transaction

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or operating costs of the facility—it should cost the facility relatively little to dispose of an individual claim.

The final measure of success is whether the facility engenders confidence among the individual beneficiaries and counsel. As we will see, these goals are dependent upon each other for the overall success of the organization.

II. FAIRNESS OF SETTLEMENTS

The fairness of settlement offers depends on their historical consistency within the tort system. In other words, facility offers must reflect how much claimants received in the tort system prior to the establishment of the claims processing facility. If, as a result of bankruptcy or limited funding, the amounts offered could not equal those historically paid in the tort system, the facility should at least use the claim characteristics which determined the value in the tort system.

Undertaking an analysis of closed cases and prior settlements accomplishes this goal. The analysis focuses on identifying correlations of case value, and quantifying the relationship between these factors and case value. For example, in the Dalkon Shield case the analysis indicated that the primary factor impacting historical case value was the quality and quantity of documentary evidence supporting the use of a Dalkon Shield.[1] The second most important factor was the nature of the injury alleged by the claimant.[2] For instance, confirmed claims of infertility received substantially more than claims for simple pelvic infections. Within a given injury category, the analysis identified the importance of factors such as the age of the plaintiff, the severity of the injury as measured by days of hospitalization, invasiveness of treatment or permanence of injury, and the economic losses of the claimant.[3]

Once these factors are identified, straightforward mathematical or statistical methods can yield quantification of the importance of the factors in determining historical claim value. For example, con-

1. *See* Francis E. McGovern, *Issues in Civil Procedure: Advancing the Dialogue a Symposium: Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 681 (1989).

2. *See id.*

3. *See* Special Note to Women Who Used the Dalkon Shield: How Your Dalkon Shield Claims Will Be Treated, 5, *In re* A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Special Note to Women].

firmed claims of injury X may have settled for an average of between $10,000 and $20,000. Within group X, the claims of plaintiffs receiving treatment Y were settled for between $12,000 and $15,000. Within the Y treatment group, claims of plaintiffs experiencing any economic loss were settled for an amount between $14,000 and $15,000. Such analyses can, and in fact almost always do, lead to clear quantitative patterns. The factors which create these patterns will differ among torts and may be subtle and difficult to identify in some instances, however, such an analysis is critical to insuring the fairness of settlement offers.

Some facilities have involved plaintiff's counsel in the process to verify the accuracy of these analyses. For example, the Dalkon Shield Trust ("Trust") asked twenty plaintiffs' attorneys to evaluate hypothetical cases and opine as to the settlement value of these cases prior to the bankruptcy proceeding. The Trust compared the counsels' judgments with the results of its historical analysis. Where there were differences between counsel values and Trust expectations, the Trust reanalyzed historical settlements. The input of the claimants' counsel provided insight into the methods used by counsel in evaluating claims, and served as a valuable method for improving the precision of the analysis. Not only did this exercise improve the Trust's understanding of historical precedent, it provided an opportunity to develop a level of confidence in the claim evaluation process.

Finally, the methods used to evaluate and make settlement offers on future claims must reflect an understanding of historical settlement patterns. This may be accomplished through the use of explicit evaluation rules, computer programs, or evaluation matrices. By generating settlement offers which meet both claimant and counsel criteria of fairness, this approach provides an empirically supportable foundation for defending claim valuations in subsequent negotiation, arbitration, or litigation.

III. EQUALITY OF TREATMENT

Equality of treatment among claimants is the cornerstone of success in any mass tort facility. It can significantly impact the achievement of other goals, such as efficiency of operations, fairness of settlement offers, and trust of the beneficiaries. The actions which lead to equality of treatment in mass torts settlements are contrary to the methods employed in normal tort settlement. The adversarial relationships in the tort system position each side to obtain the most favorable outcome in a single case. In fact, equality of settlements is

more a measure of a defendant's failure than anyone's success in the tort system. The defendant seeks to settle an individual case for less than the last settlement of a comparable matter. A successful defendant considers this accomplishment a trophy representing the skill and wile of the negotiator. The normal settlement process in the tort system is based on disparate rather than equal treatment.

The hallmark of equitable treatment in mass tort facilities is the standardization of all aspects of the claim process. Standard formalized methods exist that apply to all claimants and govern the following: filing of claims; order in which a facility evaluates claims; factors used in claim review and evaluation; methods used to determine the value of the settlement offer; releases required of the claimants; timing of payments to the claimants; methods for negotiating, mediating, arbitrating, or litigating claims where the claimant rejects the offers; and administrative procedures used internally by the facility to process claims.

It is not enough to merely institute a policy which treats all claims equally. It is necessary to define in writing, in as much detail as time and money permits, the specific methods used in all aspects of claim processing. Facilities have successfully used flow charts, manuals, rules, and computer programs to formalize such procedures.

One facility, taking great pride in the procedures it used to handle and evaluate claims, decided to test the equality of treatment to verify its stellar performance. Although the facility had no written rules for analyzing and valuing claims, it was confident that the training and supervision that the claim evaluators received insured consistent evaluations. The test involved giving each evaluator the same group of twenty-five claim filings. After the claims evaluators completed their evaluations, the facility aggregated the results and compared the values placed on each claim by the evaluators. Of the twenty-five claims, none were consistently evaluated as having the same value. In fact, those claims that were *most consistently* valued differed by twenty-five percent from one reviewer to another. Clearly, equitable treatment cannot be claimed if the same claimant could receive a settlement offer twenty-five percent higher or lower depending upon the person reviewing the claim.

Operational procedures should be adopted to guarantee that a claim receives the same settlement offer regardless of when the claim is filed, who reviews it, or when it is reviewed. The way to achieve this goal is by standardizing and formalizing all claim procedures—from claim filing through final payment. Standardization must begin

at the policy level. Those who develop standard procedures must consider the following factors: what constitutes a valid cause of action; what constitutes adequate evidence of the use or exposure to the product and the injury; what determines claim value and what is the relative importance of these factors; and what will be done with non-domestic claims.

A mass tort trust or claims processing facility that provides fair and equitable settlement offers is at greatest risk when claimants reject the offers. How should claimants be treated when offers are judged to be unfair or inadequate? If, at this point, the facility enters into negotiations with claimant or claimant's counsel, how can the facility handle the negotiations so that the results are consistent with past and future settlements? If two claimants are exactly identical in all substantive aspects of evidence and damage, should one claimant receive more merely because their expectations are greater?

Facilities have handled the negotiation problem successfully in two different ways. The first strategy is to enter into negotiation and re-valuation of a claim *only* if the claimant submits new information to the facility. For example, if the claimant presents medical records which were unavailable at the time of the original evaluation, the facility will reevaluate the claim based on this new information. This approach deals with the negotiation problem by effectively eliminating conventional negotiation. Although this approach solves the problem, it creates problems when claimant's counsel expects a conventional offer-demand exchange. In these cases the facility must devote considerable effort to educating counsel about the reasons for and soundness of the approach.

The second strategy involves entering into discussions with the claimant or the claimant's counsel on factors which should have been considered in the valuation of the claim. If, as a result of these negotiations, a facility determines that a piece of evidence or information should be relevant to the value of the claim, the claim value is altered and the ongoing rules and procedures used in evaluating all future claims reflect the principles underlying this alteration. This approach insures that offers to subsequent claimants are equal to the settlement offer of the individual claimant under negotiation. However, the facility must also be sensitive to the possibility that settlement offers will slowly increase over time, and it must guard against that tendency.

IV. CONFIDENCE AMONG CONSTITUENTS

Not only is it necessary that a facility provide fair settlements and equitable treatment, but the constituents whom the facility serves must also believe that the settlements are fair and equitable. The only way constituents will accept settlement offers without negotiation is if they believe the settlements are fair and equitable. In this way, the speed of claim processing will increase and the cost required to dispose of claims will decrease. Experience indicates that constituents base this confidence on three factors: (1) strict adherence to stated policies; (2) frequent and open communication with claimants and counsel; and (3) user friendliness. If the facility does not strictly adhere to its stated policies and does not provide fair and equitable settlement offers, no matter how much the facility tries to foster confidence among its claimant population, such an attempt will never be successful.

Assuming that the facility is adhering to formalized policies, it is important that the claimant population understand both the policies and the procedures used by the facility. An effective constituent communication program fosters this understanding. In the case of the Dalkon Shield Trust,[4] the program involved periodic newsletters to claimants, newsletters to attorneys, as well as individualized letters to claimants reporting on the status of operations.[5] In the case of the MDL 926 (Breast Implant) Claims Office,[6] the communication program included widely disseminated question and answer booklets, individualized letters to claimants, and telephone and computer bulletin boards.[7] In the case of the UNR Asbestos Trust,[8] claimants and counsel communicated through regional face-to-face meetings and frequent letters. Regardless of the medium used, communication with constituents must be frequent, open, and honest.

The final step in the confidence building process is to design a facility that is user friendly. User friendliness may be defined as the employment of procedures making the burden of filing a claim easier.

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4. *See In re* A.H. Robins Co., Inc. "Dalkon Shield" IUD Prods. Liab. Litig., 406 F. Supp. 540 (J.P.M.L. 1975).

5. *See* Special Note to Women, *supra* note 3, at 1-8.

6. *See In re* Silicone Gel Breast Implants Prod. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

7. *See* Mitchell A. Lowenthall & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 577 n.293 (1996).

8. *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

For example, many facilities have specialists that staff telephone banks and whose sole purpose is to answer questions quickly from claimants and counsel. Some facilities have designed claim filing procedures to minimize the time and effort required to register a claim. In the asbestos arena, some trusts have offered claimants the option of using the information previously filed with other defendants in lieu of filing new forms and medical records with the facility. In each instance the simplified procedures make the individual claimants feel that the facility is supportive of and interested in them.

V. PROMOTE SETTLEMENT OVER LITIGATION

Virtually all facilities are designed to promote settlement over litigation. Although many facility administrators might argue that there is little they can do to control the rate of litigation, they can do a great deal, at least indirectly, to control litigation rates. If the principles of fairness of settlement offers, equality of treatment, and confidence are present, the probability of litigation is low. If claimants and counsel know that the offer presented is consistent with historical precedent, consistent with offers made to claimants with similar facts and evidence, and believe that the facility is operating in the best interests of all claimants, settlement offers will be accepted and litigation will be avoided. When any one of these elements is missing, settlement offers have been rejected in higher numbers and litigation rates have skyrocketed.

Although not directly within the control of a claim processing facility, structural provisions exist that can be included in reorganization plans and settlement agreements provisions, thereby improving the likelihood that claimants will prefer settlement over litigation. These provisions include the following: court orders channeling all claims to the claims facility; alternative dispute resolution mechanisms which the claimant must utilize prior to filings for litigation; and disincentives to litigate, such as award caps, elimination of punitive damages, court certification prior to entering a complaint in the tort system, and staggered payments of litigation awards.

VI. EFFICIENT OPERATIONS

Efficient operations are normally defined as the cost of the facility allocated over the number of claims disposed. For example, a facility which annually requires $1 million to operate and disposes of 10,000 claims per year has a per claim cost of $100. A facility spending $10 million per year to dispose of 100,000 claims would also have

a per claim cost of $100. Experience indicates that the per claim processing costs of mass tort claim facilities can vary from $25 per claim to over $3000 per claim.

In general, the cost of processing claims is dependent upon two factors: the number of times a claim must be reviewed by a skilled professional, and the amount of interaction or negotiation required to dispose of a claim.

Where claim filing procedures are complex, or filing instructions are significantly detailed as to cause confusion, the facility commonly requests that the claimant provide additional information after the initial evaluation of the claim but before a settlement value can be determined. In these situations, the facility is forced to review the claim more than once. In fact, the claim must be reviewed each time the claimant provides new or additional information. In some instances this can mean three or four complete reviews before an offer is possible. In facilities where re-evaluations are prevalent, operating costs tend to be high. Costs may be cut by opening communication about trust procedures and applying standardized methods for claim filing.

Where the facility must negotiate the claims or devote significant time to discussing settlement offers for individual claimants, the costs can be extraordinary. Since the primary cost of a mass tort facility is salary expenses, the more time required per claim by professional evaluators or reviewers, the greater the overall cost of disposing of a claim. The most successful method of improving efficiency and reducing costs associated with negotiation is to establish a system that provides fair and equitable settlements—one that claimants accept without question.

The degree of difference between an efficient facility and an inefficient one is surprising. With efficient asbestos claims facilities practicing the principles described above, the professional time required to process a claim is about twenty to forty minutes. In facilities lacking the trust of the claimants or the consistency and fairness of offers, the professional time required to dispose of a claim is measured in hours rather than minutes.

VII. SUMMARY

For the past ten years, mass tort claims have been resolved through bankruptcy and class-action proceedings. In virtually all instances, claim processing facilities have implemented the concepts reflected in the reorganization plans and settlement agreements.

These facilities have succeeded or failed based on their ability to realize five basic principles: fair settlement; equal treatment; avoidance of litigation; confidence among constituents; and efficiency of operation.

When these principles are missing, the facilities fail to meet their planned goals. Such failures undermine current legal approaches to mass tort resolution and leave the tort system without alternatives to the slow and inefficient administration of justice.