

# Top 10 Tips for Defending Mass Torts in New Jersey

by James J. Ferrelli and Alyson B. Walker

New Jersey is home to many mass torts—*asbestos*, *hormone replacement therapy (HRT)*, *NuvaRing*, *Vioxx*, *Fosamax*, *Accutane*, and *Bextra/Celebrex*—to name just a few. With plaintiffs filing numerous cases in the Garden State, it's easy to fall into the mindset that New Jersey is for plaintiffs. But don't get caught in that trap and become complacent, filing rote motions and litigating on autopilot. With the right strategy and tactics, New Jersey can be for defendants too. Here are our top 10 tips for defending mass torts in New Jersey:

**1. Stop a Mass Tort Before It Starts.** Challenge the mass tort designation pursuant to Rule 4:38A, which states “[t]he Supreme Court may designate a case or category of cases as a mass tort to receive centralized management in accordance with criteria and procedures promulgated by the Administrative Director of the Courts upon approval by the Court. Promulgation of the criteria and procedures will include posting in the Mass Tort Information Center on the Judiciary’s Internet website ([www.judiciary.state.nj.us](http://www.judiciary.state.nj.us)).”

The procedures require all interested parties to be served, as well as a notice to the bar to appear in legal newspapers and on the mass tort website.

Notwithstanding the number of mass torts designated by the New Jersey Supreme Court, mass tort designation is not automatic under our Court Rules, and the New Jersey Supreme Court has, in fact, denied requests for mass tort designation.

Upon learning of a proposed mass tort, submit comments and objections to the classification of mass tort, in the form of a brief opposing mass tort designation, and do so promptly, before a mass tort designation is issued. If supporting documentation and/or exhibits are necessary, include them as well. Obviously, these submissions should be made *before* the court rules on the mass tort designation request. This requires that you and your client be vigilant for potential mass torts looming on the horizon.

Your objection to mass tort designation should demonstrate to the court that the pertinent factors relating to mass tort designation do not weigh in favor of the designation with regard to the case or cases in question. The mass tort designation criteria are contained in Directive #7-09 (found on the New Jersey mass torts website).

Directive #7-09 lists 14 criteria to be considered in determining whether mass tort designation is warranted. These factors include considerations such as “whether the cases involve large numbers of parties;” “whether the cases involve claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;” and “whether there is a high degree of commonality of injury or damages among plaintiffs.”<sup>1</sup> Other considerations are “whether there is geographical dispersment of parties;” “whether centralized management is fair and convenient to the parties, witnesses and counsel;” “whether coordinated discovery would be advantageous;” “whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;” and “whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion.”<sup>2</sup> Further, objections and comments can be made regarding the site of the centralized management.

**2. Make Plaintiffs Prove It.** Make plaintiffs prove a *prima facie* case. In *Lore v. Lone Pine Corp.*, the court dismissed the plaintiffs' claims with prejudice for the plaintiffs' failure to comply with a case management order requiring them to demonstrate certain information with respect to claims for personal injury—"basic facts," according to the court, "to support their claims of injury and property damage."<sup>3</sup> These facts included information regarding each plaintiff's alleged exposure to toxic substances and medical and expert reports of treating physicians and other experts to support causation.<sup>4</sup> The court dismissed the plaintiffs' claims, noting that they had 16 months since they filed the lawsuit and "failed to provide anything that resembles a *prima facie* cause of action."<sup>5</sup>

*Lone Pine* orders require a plaintiff to demonstrate, by a date certain, the basic facts giving rise to the plaintiff's claim, including causation of the plaintiff's alleged injury. A *Lone Pine* order requiring expert testimony on causation could very well result in cases being dismissed for failure to present a *prima facie* case, stopping needless litigation expenses on frivolous claims. Imagine going through the cost of extensive discovery—obtaining medical records and taking depositions—only to find that the plaintiffs cannot produce an expert establishing a link between the product and the injury.

A *Lone Pine* order can be used to cut to the chase, and obtain an early determination that there is no expert testimony that supports the plaintiffs' theory of causation, and avoid the costs of extensive fact discovery. It is of particular use in cases where the defendants believe that no reputable expert in the field will offer valid expert testimony on causation.

A *Lone Pine* order is also a way to filter potential plaintiffs and save your client the time and cost of needless dis-

covery in cases in which a plaintiff may not have even been exposed to the product in question. A *Lone Pine* order may be crafted to require the plaintiff to demonstrate exposure to your client's product. Alternatively, a plaintiff may have, for example, taken a particular medication, but may not have an injury. The *Lone Pine* order allows you to see what claims and cases sink or swim before engaging in expensive, full-blown discovery practice.

**3. Science Matters.** Typically, the science is critically important in mass tort cases. Line up experts and understand the science early on, and use it from the outset to develop and hone your case strategy. From depositions to possible motion practice, the science of a case can and usually will have a tremendous impact. But if you do not get up to speed early on the applicable science in your case, you may be missing tactical opportunities for the defense of the case. On a more practical level, it may be extremely time-consuming to find the appropriate expert for your cases, or there may be few top-flight experts in the field. These factors also weigh in favor of starting on expert witness issues at an early juncture.

Similarly, finding out what information and/or records your experts need is important—and in the case of obtaining pathology can be problematic—so it is a best practice to get a jumpstart on the science and expert witness issues early on in the case in order to give your client the best opportunity to obtain all pertinent materials for its experts (which may or may not be available as more time passes).

**4. Think Outside New Jersey.** Think ahead on a potential *forum non conveniens* motion. If the defendant has a persuasive argument that it lacks a connection to New Jersey, and the plaintiff is from out of state, move early to limit the scope of discovery regarding *forum non conveniens* with expedited

deadlines. This allows you to explore and develop the necessary facts for a successful *forum non conveniens* motion, without having completed full discovery (which could arguably make your *forum non conveniens* motion moot).<sup>6</sup> Plus, the closer to trial you get, the less inclined a judge may be to grant your motion, and you may have issues regarding another available forum.

*Forum non conveniens* motions have been granted in New Jersey mass torts. In 2007, for example, the New Jersey Superior Court, Appellate Division affirmed the *forum non conveniens* dismissal of 98 plaintiffs from the United Kingdom in the *In re Vioxx Litigation*.<sup>7</sup> Ultimately, the Appellate Division found that the public interest factors were decisive in dismissing the plaintiffs' claims. The court questioned why a New Jersey jury should decide a case in which U.K. law and regulations would be applied, at least in part. Additionally, the court found that New Jersey's interest in having the litigation decided in the state was "lessened by the residence of the plaintiffs abroad and their ingestion, in the U.K., of a prescription drug subject to foreign regulation."<sup>8</sup> The court also considered the strong interest of the U.K. in the determination of the litigation, as well as the "administrative difficulties which follow from having litigation pile up in congested centers" as factors in support of affirming the *forum non conveniens* dismissal.<sup>9</sup>

The New Jersey Supreme Court denied certification of the Appellate Division's decision.<sup>10</sup>

**5. Candor and Collegiality Count.** Candor with the court is of the utmost importance, as is collegiality with opposing counsel and your co-counsel. While this is true just about everywhere (at least regarding candor), this principle is particularly magnified in a New Jersey mass tort, in which the coordinating judge will be omnipresent at the (typically) monthly case management

conferences, telephone conference calls, hearings, and trials.

In a typical mass tort, the court gets to know counsel quite well. Being anything other than completely forthcoming with the court will not only damage your personal reputation, but also likely undermine the effectiveness of your arguments to the court and the court's perception of your client.

Further, judges in New Jersey generally expect collegiality among counsel, perhaps moreso than in other jurisdictions; lapses in collegiality could likewise undermine your credibility with the court. As the face of your client to the court, it goes without saying that your credibility is a critical element of your effectiveness as an advocate for your client.

**6. Pick Your Battles Wisely.** This is the corollary to No. 5, above. Make informed judgments on what are really important issues. As noted above, the coordinating judge will be omnipresent. Decisions to quibble over minutia that are subject to amicable resolution will not impress the judge. Go with your gut: Is it a major and important issue to your case? If so, see No. 7, below. If not, see if you can resolve it amicably among counsel, consistent with your client's interests. Just remember that the reputation you create may be with you for a long time, and it may ultimately be impossible to repair the damage to your reputation resulting from the decision to fight over an issue of negligible importance.

One area in which this rule has frequent application is with respect to document discovery. The scope of discovery in New Jersey is generally interpreted broadly by trial judges, and the mass tort arena is no different from other state courts. If you're going to draw a line in the sand on document production or other discovery, be prepared to demonstrate to the court good reasons for setting the boundaries of your docu-

ment production or discovery as you propose. If you fail to do so, you run the risk of violating No. 5, above.

**7. Preserve, Preserve, Preserve.** If you believe you have valid arguments, don't stop filing motions just because the trial court continues to deny them. Preserve issues for appeal, and when the opportunity arises, bring the appeal. Timidity has no place in advocacy, particularly in New Jersey mass tort litigation, notwithstanding that a single case typically involves a host of significant issues, and you may well not prevail on all issues. New Jersey appellate courts have recently issued a number of decisions that are notable for defendants.

For example, in a case arising out of the Vioxx litigation, the Appellate Division threw out a multi-million dollar punitive damages award in *McDarby v. Merck & Co., Inc.*, on the grounds that a punitive damages claim against a pharmaceutical company was not permitted under the Product Liability Act (PLA).<sup>11</sup> The *McDarby* court also held that the PLA subsumed the plaintiffs' Consumer Fraud Act claims, which resulted in the striking of awards of attorneys' fees and costs of some \$1.7 million and \$2.4 million, respectively, in favor of the plaintiffs in that case.<sup>12</sup>

The legal principles established in *McDarby* were significant for mass tort defendants, notwithstanding that the Appellate Division rejected the defendants' argument in *McDarby* that the plaintiffs' product liability claims under the PLA were preempted by the federal Food, Drug and Cosmetic Act.<sup>13</sup> As in *McDarby*, an appeal may establish positive precedential opinions to be applied in future cases, even where you do not prevail on all issues in the appeal.<sup>14</sup>

**8. Think Globally.** Internally, prepare your office for the number of cases that will be filed, and start your organization early. Although the first few cases may come in slowly, they will multiply quickly. Being prepared ahead of time

will ensure that you are on top of everything. Consider hiring a vendor for records collection and/or medical records analysis and summaries to reduce the client's records-related costs. Other issues to consider include staffing and coordination of case work and case management.

Externally, *participate* in case management conferences—don't just *attend* them. Volunteer to take on a task, and think about the long-term impacts of any decisions made at these conferences.

What may work in one case—or even several cases—could become a nightmare when dealing with mass torts. Think through the best ways to streamline discovery procedures, create master pleadings and/or discovery forms, and establish reasonable timelines. Set responsibilities for both sides, and make sure they are clear and practical. When in a discovery dispute over these responsibilities, try to work with opposing counsel to resolve them before going to the judge (see No. 10, below); similarly, think about whether the issue is important enough to raise with the court (see Nos. 6 and 7, above).

**9. Act Locally: Retain and Use Local Counsel.** At a minimum, you'll need someone to sponsor your *pro hac vice* admissions if you are not licensed in the Garden State.<sup>15</sup> But more importantly, local counsel will know how the court operates, from the New Jersey rules to any traditional issues, practices, and judicial preferences. Also, effective use of local counsel will enable your client to minimize excessive travel costs and expenses for proceedings occurring in New Jersey, some of which can be handled by local counsel as a cost and time saving measure.

**10. Play Nice.** You'll be spending a lot of time with co-counsel and opposing counsel, as well as the coordinating judge. How you handle hotly debated topics, such as production of documents

and issues of privilege, can impact the future course of litigation. Dealing above-board, being respectful, and extending professional courtesies can make for a collegial relationship with opposing counsel that can continue through the mass tort litigation. From your client's standpoint, this will decrease the cost of litigation by eliminating and avoiding unnecessary disputes and/or motion practice.

This is not to suggest that you should ever stop advocating for your client's interests; rather, agree to disagree *respectfully*. The litigation will move more smoothly and more professionally, which will likely lead to cost savings and optimal results for your client.

## Conclusion

Hopefully, these 10 tips will make the task of defending a New Jersey mass tort action less daunting, and less costly for your clients. With diligent and prudent lawyering, and a focus on collegiality and candor, defense counsel can advance client interests more effectively and cost efficiently, and increase the likelihood of a favorable outcome. ☺

## Endnotes

1. Directive #7-09, Procedure for Requesting Designation of a Case as a Mass Tort for Centralized Management, available at [www.judiciary.state.nj.us/directive/2009/dir\\_7\\_09.pdf](http://www.judiciary.state.nj.us/directive/2009/dir_7_09.pdf).
2. *Id.*
3. *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. L. Div. Nov. 18, 1986) at \*\*3-4.
4. *Id.* at \*3.
5. *Id.* at \*7.
6. See, e.g., *Kurzke v. Nissan Motor Corp.*, 164 N.J. 159, 168 (2000) (generally, *forum non conveniens* should be made after moving party has made good faith effort to obtain discovery and can provide the court with a factual record demonstrating that the plaintiff's chosen forum is unreasonable).
7. See *In re Vioxx Litig.*, 395 N.J. Super. 358 (App. Div. 2007).
8. *Id.* at 378.
9. *Id.*
10. 193 N.J. 221 (2007).
11. 401 N.J. Super. 10, 94-95, 949 A.2d 223 (App. Div. 2008), *appeal dismissed*, 200 N.J. 282, 980 A.2d 487 (2009).
12. *Id.* at 95, 949 A.2d 223.
13. *Id.* at 54-56, 60-61, 949 A.2d 223.
14. See also, e.g., *Kendall v. Hoffman-La Roche, Inc., et al.*, No. A-2633-08T3, 2010 N.J. Super. Unpub. LEXIS 1904, \*\*88-94 (Aug. 5, 2010), *cert. granted*, 205 N.J. 99 (Feb. 3, 2011) (reversing \$10.5 million plaintiff's verdict in Accutane trial and ordering new trial on grounds that defendant's numerical proofs should have been admitted at trial, which denied the defendant a level playing field).
15. For information on appearances *pro hac vice*, see Rule 1:21-2.

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