THE MASS-TORT MACHINE:

How law firms profit by suing businesses over questionable science

CENTER FOR TRUTH IN SCIENCE

SUMMARY

INTRODUCTION

A mass tort is a type of civil action consisting of numerous individual plaintiffs alleging injury from a defective and dangerous product or a specific incident.[1] Mass tort cases are often made against varying medical devices, prescription and over-the-counter pharmaceuticals, and household products. Mass torts commonly fall into one of the following categories: agricultural torts, defective medical device torts, defective product torts, disaster torts, pharmaceutical torts, and toxic (dangerous or lethal chemicals) torts.[2] Recent cases have involved Roundup weed killer, talcum-based baby powder, and the blood thinners Pradaxa and Xarelto.

Mass tort cases—like class action suits—involve a large number of plaintiffs alleging similar injury from a single product or incident. However, unlike class action suits, each mass tort case is filed individually because of the severity and types of damages the plaintiffs are each alleging can be quite different.[3] If the cases are settled, each mass tort plaintiff will receive a different amount based on their alleged injuries—unlike class actions, in which all plaintiffs of a single case receive awards equally. Typically, mass tort plaintiffs allege that they have suffered a serious injury that has resulted in thousands of dollars in medical bills, lost wages, and physical and emotional suffering.[4]

Courts have increasingly utilized mass processing methods—including mass torts, class action suits, and multidistrict litigation—to increase efficiency with the legal process, ensure consistent rulings between a large number of related individual complaints, reduce backlogs, and reduce court costs.[5]

THE BEGINNINGS OF A MASS TORT CASE

"Many mass torts require nothing more than a large number of plaintiffs with similar claims against a corporate defendant in an effort to force the company to make an economic decision: Pay an incalculable amount of money to fight these lawsuits for decades, risking the company's reputation and value, or reach a settlement—most of which will go to the attorneys—to put the issue behind them."

Mass tort cases usually begin with a trigger, including a large-scale disaster, a potentially defective product, or the alleged contamination of drinking water. Triggers may also be unfavorable federal or state regulatory actions, like mandatory recalls or warning labels; critical research findings or articles from scientific literature, like those from the World Health Organization and other worldwide scientific organizations; a voluntary recall by a company; widespread, negative media reports; or an unexpected verdict in a big case. All of these incidences can be triggers that start the beginnings of, or add momentum to, a mass tort filing.

Litigation relative to the tobacco and cigarette manufacturing industry is perhaps the most readily available example of where a mass tort, supported by valid scientific evidence, served its function of compensation awarded to injured parties for legitimate damages.

It was not until the 1930s that the medical establishment began expressing concern about the health effects of smoking, even though smoking, as a practice, had been around for hundreds of years. By the 1930s, cigarettes had earned the nickname "coffin nails," and "smoker's cough" was a recognized condition. Large-scale epidemiologic studies conducted by Ernst Wynder and others in the 1940s and 1950s linked cigarette smoking, emphysema, and lung cancer.[6] Nevertheless, tobacco companies continued campaigning to reassure the public about the utility and safety of their products.

Lucky Strike, the most popular brand of cigarette in the U.S. during the 1930s and 1940s, advertised that "toasted" cigarettes were less harmful to one's throat and reduced coughing; another marketing campaign targeted women, suggesting that smoking "Luckies" was associated with noticeable weight loss. The R.J. Reynolds Company published ads claiming, "More Doctors Smoke Camels Than Any Other cigarette." Philip Morris hired physicians for sizable amounts of money to publicly support the tobacco industry and validate the claims of cigarette manufacturers.[7]

By 1964, the Advisory Committee to the U.S. Surgeon General concluded that cigarette smoking was a cause of lung and laryngeal cancer based on roughly 7,000 studies into the negative health consequences of smoking.[8] Massive tort litigation (more than 800 lawsuits filed between 1950 and 1994) led to the "Tobacco Master Settlement Agreement," which was entered into in November 1998, originally between the four largest United States tobacco companies (Philip Morris Inc., R.J. Reynolds, Brown & Williamson, and Lorillard) and the attorneys general of 46 states.[9]

The states settled their lawsuits against these corporations for their estimated smoking-related healthcare costs. These companies agreed to refrain from certain marketing practices and to make annual payments to the states (a minimum of $206 billion over the next 25 years) to compensate for ongoing medical costs associated with caring for persons having smoking-related diseases.[10]

While the "Big Tobacco" lawsuit resulted in a positive outcome for the plaintiffs and their attorneys, it fueled the creation of today's mass tort industry. Many mass torts require nothing more than a large number of plaintiffs with similar claims against a corporate defendant in an effort to force the company to make an economic decision: Pay an incalculable amount of money to fight these lawsuits for decades, risking the company's reputation and value, or reach a settlement—most of which will go to the attorneys—to put the issue behind them.

For example, consider the top 20 selling prescription drugs in 2010, including familiar names like Lipitor, Nexium, Plavix, Seroquel, Crestor, Cymbalta, and many others.[11] A quick internet search finds that nearly all of these drugs have resulted in settlements, lawsuits, or both.

Mass tort lawyers typically operate under a contingency fee payment arrangement, which pushes plaintiff attorneys to file a plethora of cases, drive up settlements, and avoid costly trials to increase profits. A study of civil lawsuits found that most "plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken [the] offer."[12]

COSTLY OUTCOMES BASED ON QUESTIONABLE SCIENCE

Legal actions based on sound and settled scientific evidence, like those on tobacco and asbestos, can demonstrate the dangers of exposure to these substances and contribute to healthier and safer environments for all Americans. In these cases, mass torts help offset the asymmetry between the resources of a large corporation and the individuals that have been harmed by their products.

Unfortunately, many more mass torts are based less on settled science than economic coercion. The scientific community and the integrity of scientific research seem to hold no weight to the outcomes of mass tort cases. Consider the following recent examples.

Roundup

When the International Agency for Research on Cancer (IARC) released a report declaring glyphosate (the active ingredient in the weed killer RoundUp, and now a component in many other similar products in its generic form) to be "possibly carcinogenic," a plethora of mass tort cases were filed that resulted in billions of dollars in punitive damages being extracted from Monsanto and other glyphosate manufacturing organizations.[13] Other accredited agencies concerned with public health, such as the Environmental Protection Agency (EPA) and the European Food Safety Authority, found no convincing evidence of glyphosate's carcinogenicity.[14-15] The scientific fraud did not end there: "Thanks largely to the investigative work of David Zaruk on Science 2.0, The Times reports that Christopher Portier, a key IARC advisor who lobbied to have glyphosate listed as a carcinogen [and helped author the IARC's report], accepted $160,000 from trial lawyers representing cancer patients who stood to profit handsomely by suing glyphosate manufacturers. Mr. Portier's failure to disclose such an obvious conflict of interest has exploded into a textbook case of scientific fraud."[16] A federal judge overseeing the Roundup multi-district litigation case described the science linking glyphosate to non-Hodgkin's lymphoma as "shaky" and "pretty sparse."[17]

Despite this corruption and less-than-sound science, Bayer, which inherited thousands of mass torts when it acquired Monsanto in 2018, is set to pay $10 billion—among the largest settlements in U.S. civil litigation history.[18] The settlement covers an estimated 95,000 cases.[19]

Talcum powder

Thousands of women have filed talcum powder lawsuits alleging that Johnson & Johnson's talcum-based baby powder caused ovarian cancer.[20] Nearly 40 years of government and non-government research has found no conclusive link between the mineral talc and cancer, yet plaintiffs have issued thousands of lawsuits against Johnson & Johnson. The Food and Drug Administration (FDA), after extensive review, has insufficient scientific evidence linking talc to cancer, and in 2014 rejected a request to mandate "that products containing talc warn that frequent application can cause women to develop ovarian cancer." The National Cancer Institute, a sub-group of the U.S. Department of Health and Human Services, issued a similar statement and arguing that evidence does not point to a link.[21] The American Cancer Society (ACS) outlines risk for ovarian cancer increasing with age, family history, and pregnancy history. It has stated that studies linking talc and ovarian cancer are "potentially biased."[22]

To date, Johnson & Johnson has settled for hundreds of millions of dollars. Most recently, the company agreed to pay $100 million to settle more than 1,000 lawsuits.[23]

Pradaxa

In December 2011, the FDA announced that it would investigate reports that the blood thinner Pradaxa caused "serious bleeding events in patients" but cautioned that its experts "continued to believe that Pradaxa provides an important health benefit when used as directed."[24] Following nearly a year of evaluation, the FDA concluded that it has "not changed its recommendations regarding Pradaxa."[25] In May 2014, the FDA completed a new study of more than 134,000 patients and found Pradaxa "to have a favorable health benefit" and "made no changes to the current label or recommendations for use."

Notwithstanding these findings from an independent agency, Pradaxa lawsuits continued to be filed. Eventually, Boehringer Ingelheim, the company that owns Pradaxa, settled for $650 million, resolving thousands of federal multidistrict litigation (MDL) and state cases in 2014.[26-27]

Xarelto

Like Pradaxa, the anticoagulant Xarelto was deemed "a safe and effective treatment for patients" by the FDA for its recommended use after multiple studies.[28] Over 30,000 lawsuits were filed against Bayer Healthcare and Janssen Pharmaceuticals. The two companies decided to settle for $775 million because it "allows the companies to avoid the distraction and significant cost of continued litigation" despite the fact that Bayer and Janssen had previously won six cases that went to trial.[29]

SCIENCE VS. SETTLE

"The mass tort machine drives up numbers as trial dates are set and settlements—whether rumors or real—are made."

In the mass tort cases described above, the overwhelming scientific evidence demonstrated the safety of the product—yet defendants still decided to settle. Why? The decision to settle comes down to risk management and economics. Mass tort lawyers know that if they can find enough plaintiffs, they can win their argument without ever seeing the inside of a courtroom—and it all starts with advertising.

Aggressive and often misleading advertising aimed at soliciting allegedly injured clients for mass torts has become a big business. People are bombarded with advertisements seeking clients for a mass tort case, most frequently for an allegedly defective product, drug, or chemical compound. The pitch is often a simple variation of: Have you ever used product X? Do you have cancer? You may be entitled to significant compensation. Call this number today!

Mass tort firms commonly solicit potentially injured clients through various means, including television, radio, print, and social media advertisements following a triggering event. According to the U.S. Chamber Institute for Legal Reform, plaintiffs' lawyers, companies that specialize in advertising and gathering leads, and third parties that finance mass tort litigation spend around $1 billion on television advertising each year to find plaintiffs who have allegedly suffered injuries.[30] In 2014, it was estimated that there were approximately 67,000 personal injury or mass tort TV spot broadcasts every year.[31]

Fueling this billion-dollar industry are companies called "lead generators."[32] These companies generate the pipeline connecting claimants to lawyers by directing injured plaintiffs to call a toll-free number or submit information online so someone can follow up with them.[33] Lead generation campaigns can cost $100,000 per week over several months for larger torts—often costing a total of $1.25 million or more.[34] Smaller campaigns can cost law firms around $25,000 for a two-week period.[35] Due to the high settlement amounts mass torts can generate, plaintiff lawyers often pay lead generators between $500 and $10,000 per lead.[36]

Another method by which mass tort lawyers discover new litigations is via the Mass Torts Made Perfect (MTMP) conference in Las Vegas.[37] The twice-a-year-conference discusses and promotes current and future mass tort cases. According to MTMP's website, more than 500 law firms and 1,400 participants attend the event every spring and fall to share ideas and resources.[38] The program's main portion is the litigation track, covering individual mass tort projects, such as hernia mesh, military earplugs, PFAS, talcum powder, Zantac, and more.[39] Attendees also have an opportunity to network with marketing companies that specialize in mass marketing to help identify and solicit potential plaintiffs.

Aggressive advertisements generate thousands of claims, leading to high settlement amounts

LITIGATION	COST	ADS
Roundup	$103 million	450,000
Talcum powder	$63 million	175,000
Pradaxa	$94 million	289,000
Xarelto	$122 million	375,000

Source: April 2020 report from the Institute for Legal Reform

In the four previous cases mentioned, aggressive advertisements that generated thousands of claims were driving factors in the high settlement amounts—not damaging science. According to an April 2020 report by the Institute for Legal Reform, $103 million was spent on 450,000 ads related to Roundup litigation, $63 million was spent on 175,000

ads for talcum powder litigation, $94 million was spent on 289,000 ads for Pradaxa litigation, and $122 million was spent on 375,000 ads for Xarelto litigation.[40]

The report found that prospective jurors reported that Roundup ads were aired so frequently that they were "bordering on harassment."[41] An explosion of ads referencing a $2 billion verdict to a California couple continued to feature the $2 billion amount even after it was cut to $86 million.[42] Advertising spiked following rumors of a high-value settlement, as well.[43] In the case of talcum powder, "advertising has fluctuated like a volatile stock, rising to publicize massive awards, and falling with dismissals, defense verdicts, invalidation of awards, and other rulings favorable to defendants."[44] Advertising campaigns critical of Pradaxa solicited 4,000 initial claims and caused a settlement of $650 million before a single trial.[45] News of the settlement triggered more ads and created a second wave of litigation.[46]

The objective of all this advertising spending was to solicit clients to sign onto the respective litigation. The mass-tort machine drives up numbers as trial dates are set and settlements—whether rumors or real—are made. According to an owner of a lead generator firm, "What [plaintiff lawyers] hope for is that the Monsanto's of the world come in and say, here's $10 billion, spread it how you like."[47]

THE MASS TORT MARKETING MACHINE

"A defendant faced with hundreds, perhaps thousands of legal suits—every one of which would have to be brought before a judge, potentially in different districts, to either accept or dismiss—will incur crippling, asymmetric legal expenses."

The massive investment in advertising leads to large numbers of allegedly injured prospects, and plaintiffs' attorneys have little incentive to thoroughly vet the claims generated by lead generators early on in the process.[48] Legal ads direct potentially injured parties to call into hotlines that collect and filter their information. Only a fraction of the callers may have the criteria necessary to file suit, given their particular set of circumstances, medical records, and other factors. Of these, perhaps only a small fraction may have a legitimate tort case. However, most tort cases never make it to trial, and even if they did, it is likely that they would not hold up in multidistrict proceedings.[49] Mass tort firms often file them for the express purpose of adding to the pile. A defendant faced with hundreds, perhaps thousands of legal suits—every one of which would have to be brought before a judge, potentially in different districts, to either accept or dismiss—will incur crippling, asymmetric legal expenses. The defendant must respond to many cases, whereas the plaintiffs' attorneys need only respond to a select few before lumping them all together. This practice—often referred to as browbeating of the defendant—is one additional tactic used by mass tort law firms to induce defendants to settle.

For example, plaintiffs alleged the prescription painkiller Vioxx caused heart attacks and strokes. Merck corporation, the defendant, won most but not all of the jury trials, prompting parties to negotiate a global resolution of the personal injury claims.[50] The settlement required claimants to satisfy three basic requirements: (1) they had a heart attack, ischemic stroke, or cardiac death; (2) they used a minimum amount of Vioxx; and (3) they took the drug within a proximate time of the heart attack, stroke, or cardiac death.[51] Nearly a third of the time, heart attack claimants were unable to satisfy the requirements, and roughly 30 percent of stroke claimants failed to provide proper documentation of the requirements.[52] In the end, a total of 15,287 plaintiffs "could not demonstrate the basic facts necessary to recover: that they had an injury; that they took at least 30 Vioxx pills; and/or that they took the drug within close proximity to the date of injury."[53]

So prevalent has this abuse become that certain MDL judges are overwhelmed by huge numbers of suspicious cases. Consequently, they are engaging in questionable legal practices in an effort simply to move settlements forward. One MDL judge stated, "the court does not intend to engage in the process of sorting through thousands of individual claims...to determine which claims have or have not been

properly presented." Nevertheless, he did recognize that plaintiffs' counsel was "expand[ing] the number of plaintiffs beyond those with viable causes of action…distort[ing] the true scope of…litigation."[54]

Some MDL judges attempt to manage cases properly; that is to say, their effort is to obtain justice rather than just settlement. Judge Clay Land, presiding over an MDL proceeding involving allegedly defective surgical-mesh devices, found a great number of meritless claims, many of which were barred by the statute of limitations or lacked evidence of specific causation. Judge Land put plaintiffs' counsel on notice that they would be subject to sanctions in future orders granting summary judgment in recognizably illegitimate cases. "[MDL] judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly," Judge Land declared.[55]

In a similar mass tort involving silica, Judge Janis Graham Jack dismissed all but one of more than 10,000 claims as fraudulently prepared. Judge Jack wrote that the "'epidemic' of some 10,000 cases of silicosis 'is largely the result of misdiagnosis'" and that "the failure of the challenged doctors to observe the same standards for a 'legal diagnosis' as they do for a 'medical diagnosis' renders their diagnoses . . . inadmissible[.]" Judge Jack wrote that "the diagnoses were… manufactured for money," and "in [the] hopes of extracting mass nuisance-value settlements because [defendants] are financially incapable of examining the merits of each individual claim in the usual manner."[56]

MASS TORT ADVERTISING RECKLESS ENDANGERMENT

Mass tort advertisements are often misleading and dangerous to consumers. They frequently use federal agency logos, phrases like "medical" or "health alert," and various warnings that the product causes heart attacks, stroke, birth defects, or death.[57] All of this happens with little to no oversight. Consequently, misleading mass tort advertisements can have very real, very harmful impacts on the individuals they target. Recent events have demonstrated a certain recklessness, perhaps even negligence, in the workings of mass tort advertising machines trying to generate clientele. A 2016 publication of the Heart Rhythm Society reported 31 cases of individuals who had stopped taking rivaroxaban, the blood-thinner commonly known as Xarelto, pursuant to viewing negative rivaroxaban legal advertising.[58] Seventy-four point nineteen percent of these patients experienced a stroke or a transient ischemic neurologic event, two patients had persistent residual paralysis. Another patient, a 45-year-old man receiving rivaroxaban for the treatment of deep vein thrombosis, stopped the drug and died of a subsequent pulmonary embolism. Another female patient, receiving rivaroxaban for stroke prevention, stopped the drug and died of a massive stroke.

The human cost of misleading legal advertising

After seeing advertising related to potential dangers of the blood-thinner Xarelto, 31 individuals stopped taking the medication. Here's what happened:

Experienced a stroke or a transient ischemic neurologic event

Experienced persistent residual paralysis

Died of a subsequent pulmonary embolism

Died of a massive stroke

Source: 2016 publication of Hearth Rhythm Society

Further research has found many unfavorable implications concerning public health. Research has found "mounting evidence that misleading information and exaggerated claims made in lawsuit ads prevent people from seeking treatment or lead them to stop taking a prescribed medication without consulting a doctor."[59] The FDA reports that healthcare professionals filed 61 reports, as of December 2016, of patients stopping their blood thinner medications after viewing a lawsuit advertisement critical of the product.[60] According to the FDA, this resulted in six deaths and other patients most commonly suffering from strokes.[61] Mental health patients are at risk as well. Psychiatrists have reported that some patients stopped taking their medications after viewing a lawsuit ad, with some even attempting suicide.[62]

JURISDICTIONAL GAMESMANSHIP

Due to the asymmetric nature of mass tort cases, the complicated science and medical terminology and devices, and the diversity of the claimant injuries, mass tort cases can be ripe for abuse. Research suggests that the strategy plaintiffs' lawyers use pushes defendants to settle even when the science and evidence is on their side.[63-64]

Cases with diverse plaintiffs and injuries are designed to proceed as MDL in the federal system. Still, plaintiff lawyers have found ways to group diverse plaintiffs together from multiple states and avoid federal MDL proceedings—a sort of jurisdictional gamesmanship often called "litigation tourism." The purpose of MDLs is to bring all cases before a single judge in one court, reducing the overall strain on the legal process and making the proceedings more efficient and consistent. This process can work well, but plaintiffs' attorneys have an incentive to keep proceedings more confusing and less efficient in order to force businesses and defendants to settle, especially when the science or evidence is not entirely on their side.

To proceed in state courts, plaintiff attorneys and lead generators begin by finding one plaintiff from a state with a plaintiff-friendly state court.[65] They file a lawsuit in their favored state court with a plaintiff from that state along with plaintiffs from dozens of other states and one plaintiff from the same state as the defendant.[66] This strategy allows plaintiff attorneys to argue that there is no federal diversity jurisdiction, meaning a federal court has no jurisdiction and the suit should remain in the state court.[67] As an example, Missouri Appeals Court Judge Kurt S. Odenwald "observed that out-of-state plaintiffs flock to St. Louis City court becauses the 'jury pool [is] much more friendly, and they see that the requirements for expert-witness testimony in Missouri is less than [that required by other jurisdictions under] Daubert."[68]

While 40 states utilize the multi-factor Daubert standard for the admissibility of expert testimony in mass tort cases, ten states—including California, Florida, Illinois, New Jersey, New York, Pennsylvania, Washington, Nevada, North Dakota, and Virginia—continue to use a more liberal standard allowing more questionable scientific evidence into consideration.[69] The effect of this is that plaintiff attorneys can shop around to their list of favorable state courts forcing defendants into costly litigation in courts less favorable to them, which increases the pressure on defendants to settle. As long as they keep their torts to fewer than 100 people, plaintiff attorneys can avoid pertinent federal laws, making it "extremely difficult for defendants to remove the cases to federal court."[70]

CONCLUSION

Mass torts, which are intended to help balance the asymmetry of resources between corporations and individuals and deliver justice to legitimately injured individuals, have instead become a playground for lawyers, investors, and advertising companies to extort billions of dollars from businesses based on ambiguous, distorted or faulty scientific claims. The asymmetric nature of mass tort cases, the complicated science, medical terminology and devices, and the diversity of the claimant injuries creates an incentive for law firms to use fear-based tactics that require companies to make costly "science versus settle" decisions. In other words, companies whose products have been deemed safe by independent regulatory agencies often still settle with allegedly injured claimants because it is less costly than litigation. The real losers are the millions of American consumers who are forced to pay higher prices for products and the businesses who must decide based upon the risks of frivolous litigation, not science, whether to invest in new technologies, therapies, and other life-saving products.

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