

A Consumer's Guide to Mass Tort Litigation[®]



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A Consumer's Guide to Mass Tort Litigation®

by: Mark Wolfe, Attorney at Law
mark@bfw-lawyers.com

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Important Notice to Readers: This guide is provided at no charge and without compensation. It is intended to provide potential clients and clients of Mass Tort Litigation (MTL) matters with some basic information about the MTL process. It is not intended to be an authoritative or scholastic commentary on any particular MTL case or claim. Readers are reminded that the law and legal procedures are dynamic and subject to change by legislation and/or judicial interpretation. Questions and concerns about a particular claim or case should be directed to an experienced MTL lawyer or law firm.

INTRODUCTION FROM THE AUTHOR

Our law firm first began working “hands-on” in the area of law known as “Mass Torts” several years ago. For many years up until that point, we knew about mass tort litigation and often would refer clients to lawyers and law firms more directly involved in the actual litigation of a mass tort claim. One of the biggest problems our referral clients faced as they moved into a Mass Tort type of case was that they really didn’t understand how these type cases worked and certainly did not understand how or why different lawyers kept getting involved in their case. (A course of events commonly known as “the Lawyer Shuffle.”) They also didn’t understand why their claim that occurred or originated in Alabama or Mississippi was now in some Federal Court in Oregon, or Texas or New York, etc. Finally, they were often frustrated at the amount of time it took for them to get compensated. Simply put, I don’t think most “mass tort” lawyers do a very good job of explaining how these cases work and what a client can expect as the matter progresses. As I hope you will learn from this material, these are complex cases that take a long time to process through the legal system. Now that we find ourselves more and more involved in Mass Tort cases and litigation, it is my hope that this guide will help our clients and potential clients get a better understanding of this somewhat confusing and perplexing area of the law known as Mass Tort Litigation. Thank you for allowing our law firm the opportunity to share this material and information with you and I hope you find it beneficial.

- Mark Wolfe

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I. WHAT IS MASS TORT LITIGATION

A. Overview. In a civil action for damages the victim is referred to as the Plaintiff and the party accused of causing harm is known as the Defendant. A tort is a legal term for a wrong that causes harm and allows for the victim to recover compensation from the wrongdoer via a civil lawsuit. The most common tort claim in America is a claim of negligence against a driver who causes a motor vehicle collision. A tort is a civil wrong that must be prosecuted directly by the victim. E.g., John Smith vs. ABC Corporation. A crime is a wrong against not just the victim but also against society. Because crime deterrence and prevention benefits all of us, criminal cases are prosecuted by a representative governmental body against the individual who committed the crime. E.g., The State of Alabama vs. I. Ben Stealing. In a civil action the victim has the burden of proof. This means the victim (Plaintiff) has to present sufficient evidence that: 1) the Defendant committed a civil wrong and, 2) the Plaintiff was damaged or harmed by the Defendant's wrongful conduct.

Mass Tort Litigation (MTL) cases are similar to class action lawsuits in that a large number of people may have suffered a common or similar harm from a single product, drug, environmental disaster, unfair or fraudulent business practice, etc. The victims are often spread out over a diverse geographic area but share a similar or common injury or damages. It is often the commonality or similarity of the damages that dictates whether a claim or case will be presented as a class action or as a mass tort.

In a class action, a Court determines if the potential damages for all the purported victims are so similar that only a few victims need to prosecute the litigation. These victims are known as the class representatives and they are the Plaintiffs in the class action lawsuit. Other potential claimants or victims do not necessarily have to file

their own lawsuit to benefit from the class action. In fact many times victims do not even know about the pending class action case and claim until they receive or see a Notice of Proposed Class Action Settlement. At that point most victims then have the option to elect to receive the proposed settlement benefit or they can “opt-out” of the proposed settlement and pursue their claim against the Defendant on their own. A typical class action might involve a credit card company overcharging all its customers in the same amount. For example an illegal or improper addition of a \$1.00 surcharge per billing statement disguised as an “interest adjustment charge.” In that situation, the damages would be so similar that the matter would probably be most effectively prosecuted by a class action.

However, when you begin to consider a personal injury claim from a common product or drug, you can see how the damages among the victims may be similar but may vary greatly in duration and severity. For example if there is a significant leak of ammonia from an industrial refrigeration plant many people may have claims for chemical exposure. Some people within a close proximity to the leak may suffer severe and permanent pulmonary damage, others may suffer temporary breathing difficulties, others may only suffer some minor eye irritation, others have inflamed or irritated nasal passages and some might have several different related injuries. While all of the victims may have suffered an injury from the common event, their injuries are too diverse for a class action lawsuit. In this situation in order to receive compensation, they must all bring their individual claims or file their own lawsuit against the wrongdoer. When a large number of victims from a common wrongful event bring their lawsuits in mass, the legal jargon for such a situation is a mass tort. The Court systems across America have developed certain protocols and procedures to help with the administration and adjudication of mass tort cases.

B. What are the Benefits of Mass Tort Litigation or a Class Action Lawsuit?

The biggest benefit to victims of class action lawsuits or mass tort litigation is the savings related to litigation expenses. Most attorneys who represent victims in injury or consumer claims and cases do so on a contingency fee, meaning the attorney fee is a percentage of the monetary recovery and if there is no monetary recovery then the victim or client owes the attorney nothing for his or her time spent on the legal matter. However, litigation is an expensive undertaking and in addition to their fees most attorneys also recover any expenses they have paid for the litigation of the case. *[Note: Some States do not allow attorneys to advance litigation expenses for clients and those clients may have to pay expenses out of pocket or utilize the services of a litigation funding company.]* Litigation for victims is expensive because of the “burden of proof.” As mentioned above, the victim must prove their claim by sufficient legal evidence. In most States and Federal jurisdictions this means by a preponderance of the evidence. For example, if a large number of people have been injured by a dangerous or defective medication they must prove the medication

was dangerous or defective and that their injuries were caused by the dangerous or defective drug. This means in a lawsuit against the drug manufacturer it can assert a general denial, i.e., “our medication is not dangerous and not defective,” and it does not have to prove the medication is safe or that it is not defective. This is because the victim (the Plaintiff) carries the burden of proof and not the alleged wrongdoer (the Defendant.)

When you begin to think about having to prove something as complex as a pharmaceutical medication or a medical device is defective or dangerous, you can begin to understand how expensive such a claim can be. Almost all of these type cases require supporting testimony from highly qualified expert witnesses in order to meet the burden of proof standard. Often times numerous highly qualified experts from several different disciplines are needed to not only prove a medication or product was defective, but also to prove the victim’s injuries were caused by the defective medication or product. Unlike the victim’s attorney, these highly qualified experts can not work on a contingency fee. They must be independent, meaning they can not have an interest in the outcome of the case. Expert fees can range from a low end of \$350.00 per hour up to as high as \$2,500+ per hour. Often times they are required to work 50 - 100 hours on a case. Another often unrealized expense in complex litigation cases is basic document reproduction and management costs. In years past, and still in some cases today, hundreds of thousands of pages of documents had to be reproduced and stored. Think of the costs of reproducing or scanning 500 banker boxes of documents. Today more and more documents are produced in digital format and this helps reduce copy costs some but these reductions in copy costs are often replaced with costs related to scanning and digital archiving the documents. Hundreds of thousands of documents at ten cents a copy or at five cents per scanned document still adds up to a lot of money.

With such a large amount of expense necessary to prosecute a complex claim, you can begin to understand the economic benefit of sharing these litigation expenses among numerous victims. If you have a claim that is worth \$25,000 but it’s going to cost \$100,000 in litigation expenses to prove, you do not have an economically viable case that an attorney would prosecute. However, if there are 99 other victims harmed by the same event, medication, product, etc with a similar value claim as yours, then all of you together may have an economically viable claim that an attorney would be interested in prosecuting. If the expenses to prosecute are the same for 1 victim as they would be for 100 victims, and if all 100 claims were prosecuted successfully, each victim would only have to reimburse \$1,000 in litigation expenses. In the business world this type of benefit is known as “economies of scale.”

In addition to the economies of scale benefit for expenses, class action participants and mass tort litigants also often receive a benefit related to the cost of attorney fees. In almost all class action matters and most mass tort litigation, attorney fees

are subject to review by the Court and often set by the Court. In almost all of these situations the end contingency fee allowed by the Court is less than the initial fee agreement signed by the client. Also, even absent a reduction by the Court, the attorney will often adjust the contingency fee downward to reflect his or her “economies of scale” in representing a large number of victims. For example in the recent BP Oil Spill class action settlement, our firm was able to charge most of our business clients a contingency fee significantly below the Court authorized amount of 25% because we were handling such a large volume of business revenue loss claims.

II. HOW DOES MASS TORT LITIGATION WORK?

A. Overview. Mass tort litigation is extremely complex from a logistics and procedural perspective. To fully understand and appreciate the process you have to know some basic information about civil lawsuits and jurisdiction. Jurisdiction is simply the Court system where a lawsuit can be filed and tried by judge or jury. In civil actions, the two basic jurisdictions are State courts and Federal courts. Some types of claims or cases must be brought in State court and other claims or cases must be brought in Federal court. Sometimes a claim can be brought in either State court or Federal court. Various State and Federal laws prescribe and dictate jurisdiction issues. These Courts, both State and Federal, are often referred to as “trial courts” because that is where the actual trial will occur and the judge in that Court presides over the trial to make sure all rules of procedure and all evidentiary rules are applied fairly to the parties. Within each State certain additional jurisdiction requirements may prescribe a sub-jurisdictional area where a claim or case must be filed and tried. For example, in Alabama and Mississippi the State court system is divided into Circuits. These are prescribed geographical areas within the State where certain claims must be brought to trial. Most of the time State court Circuits (sometimes called Districts) follow county or parish borders. The Thirteenth Judicial Circuit of Alabama is prescribed by the Mobile County boundary and is cited as The Circuit Court of Mobile County, Alabama. A simple example for Alabama Circuit Court jurisdiction is the legal requirement that a civil claim arising from a car crash must be brought in the Circuit where the collision occurred or the Circuit where the Defendant resides. For a simple car crash case those are the only options, and if the crash occurred in Mobile County and the at-fault driver lived in Mobile County then the law requires that a civil lawsuit to recover damages must be brought in The Circuit Court of Mobile County, Alabama. Federal Courts are also divided into Circuits with some Circuits encompassing several States. Alabama is in the 11th Circuit along with Georgia and Florida. Mississippi is in the 5th Circuit which also includes Louisiana and Texas. Within each Federal Circuit there are prescribed Districts. In each of these Districts are the trial courts for Federal causes of action that may have occurred within the District. Often the Federal Districts are further broken down into regional Districts. For example if you believe your employer has discriminated

against you because of your age, a protection afforded against by Federal law, and you work in Mobile County, Alabama then your age discrimination lawsuit would be brought in the United States Federal Court Southern District of Alabama. Even within some of these Federal regional Districts are further sub-regional Courts. Besides jurisdictional issues, sometimes civil lawsuits also encompass issues as to what laws will apply to a claim or case. This is often referenced as a “choice of law” situation and can get quite complex. For example, you live in Mobile, Alabama and are in a car crash in New Orleans, Louisiana. The at-fault driver lives in Texas but was driving a company vehicle for work and his employer is located in Arkansas. This situation presents several jurisdictional options as to where you can file the lawsuit and just as importantly what laws will apply to the claims made in the lawsuit. In this example it would be possible to file the lawsuit in the appropriate Circuit Court of Arkansas (where the Defendant company is headquartered) and have the Arkansas Court apply Louisiana law to the facts and damages claimed. However, if the lawsuit was filed in Arkansas then the Court will apply Arkansas procedural laws to the case as it progresses through the litigation process. If there are subrogation issues, then Alabama law on that point may apply. Laws vary from State to State regarding procedures and admissible evidence. Federal procedural laws and evidentiary laws can also be different than those of the States where the Federal court is located.

In the car crash example set forth above, you can see there are a number of things to be considered before simply filing a lawsuit. The most important question for the attorney is: “What jurisdiction will give my client the best chance for success?”

B. In the Beginning. Now that we’ve gone through jurisdiction and choice of law issues, I think you can begin to see the procedural and legal complexities related to a Mass Tort situation. Injuries and damages to the victims occur across multiple jurisdictional boundaries. Claims or cases can be brought and filed in a multitude of State or Federal jurisdictions. Generally, what will happen in a Mass Tort situation is that initial or early lawsuits will be filed in bulk by attorneys or law firms in a multitude of State and Federal jurisdictions. For example, if our law firm represents 25 clients from the South Alabama area with the same mass tort claim, we may choose to file all 25 cases in our local Federal court or local State court as long as jurisdiction is proper. Meanwhile in California, a law firm in Los Angeles may file 50 of the same mass tort cases in their local State court while another law firm in San Francisco may file 30 of the same mass tort cases in the Federal District Court in that region. Since in a Mass Tort case, it’s the same Defendant or Defendants getting sued all over the country in many jurisdictions, they will quickly make an effort to stay some of the proceedings and then their attorneys will try to consolidate all of the cases within one or two jurisdictions. These initial proceedings are complex and often require multiple hearings in multiple jurisdictions. In the above example, we would like for our clients’ cases to proceed in the jurisdiction where it was filed with our firm prosecuting the claims. While

this is generally our preference, the more probable likelihood is our clients' cases will be consolidated and moved to another jurisdiction. At this stage in the Mass Tort process, law firms and attorneys representing the victims are often building coalitions to help try and secure a jurisdiction and venue they feel is best for their combined clients and where the lawyers can maintain control over the litigation process and potential outcome. All of this legal maneuvering takes time and it can often last well over a year. Often times during this process many claims and cases are stayed, meaning no substantive work is being done directly with the clients. During this time lawyers are very busy briefing legal issues such as jurisdiction prerequisites and choice of law applications as well as attending hearings on these matters. These hearings may occur in several different jurisdictions and often include subsequent hearings.

At some point the State and Federal Courts where a mass tort case is pending come together and make a determination as to where all the cases will be consolidated and what lawyers and law firms will be responsible for the various aspects of the case. This is called the MDL jurisdiction which stands for Multi-District Litigation. Sometimes State courts refer to it as MCL jurisdiction, Multi-Circuit Litigation. Usually cases are consolidated into a Federal or State MDL, but not always. Depending on the facts and circumstances of a case, or a small group of cases, they can be excluded from MDL participation. Once an MDL jurisdiction has been selected, the Judge of that jurisdiction who will be overseeing all of the now reassigned cases will select and appoint a few of the Plaintiffs attorneys to the Steering Committee for the case. Those lawyers will make decisions on what other lawyers and law firms will be on any sub-committees and who will be handling what work assignments and responsibilities for the prosecution of all of the cases assigned to that MDL jurisdiction.

C. The Lawyer Shuffle. It is usually after these MDL hearings and steering committee appointments and assignments that clients experience what I call the "lawyer shuffle." This is not necessarily a bad thing for clients nor does it add anything to their legal fees. It's just that most of the time clients do not understand why it is happening and lawyers never seem to take time to explain it to the clients. Typically, clients get a letter from their lawyer that says, "by the way attorney John Smith from ABC Law Firm has now been associated to help with your case. Please cooperate fully with his office. This association will not increase your attorney fees in anyway. I will no longer be your attorney on this matter." Sometimes this happens several times during the course of a mass tort claim and can often leave clients with no idea who "their" attorney is and no idea what is happening on their case. First, as a consumer you have to understand how lawyer to lawyer referrals work, and how work assignments for lawyers on mass tort cases are handled. If a lawyer signs up a potential mass tort case and does some "screening" work on that file, he or she can then send it to another lawyer for further work via the "association" provision in the fee agreement. That lawyer may then do some work on the file and agree to

pay the referral lawyer a percentage of the ultimate fee generated. At some point that lawyer may refer the case to another lawyer with a similar agreement. None of this increases the fee to the client and this process is often considered a good thing for legal service consumers because it allows lawyers to refer certain types of claims or cases to a more experienced attorney for the client's case. In the context of mass tort cases, once a MDL jurisdiction is selected then consolidation occurs and work assignments and responsibilities are assigned by the Court appointed steering committee for that particular mass tort. If a lawyer representing a group of mass tort clients in the MDL jurisdiction is not "working" on the file then he or she will often refer his or her block of clients to one of the other law firms that is actually working on the case. Again, more lawyer shuffle for the clients! As stated above this is not necessarily a bad thing for clients but it can be frustrating if they do not understand how and why this happens.

D. What's Next? Usually at this point the attorneys for the victims have come together and determined what they consider to be the best cases related to a particular mass tort claim. Those few cases are then given an expedited push into the litigation process. These cases are commonly called the "bell weather" cases and they are used by both sides to determine how successful, or unsuccessful, the other victims might be if their cases were to proceed to trial. During this time if the victim's claim or case is not one of the expedited "bell weather" cases, there is not much substantive interaction with the attorney. Usually during this time the Defendant(s) will want all of the victims to answer some basic written questions, called Interrogatories, about their claim and damages and produce applicable medical records and documents. Your lawyer and his or her staff will help with this process. If all goes well with the bell weather cases, which usually go to trial over about a two year period, the Defendant will enter into meaningful settlement negotiations for the resolution of all the remaining claims. Most of the time there will be set pay-outs for certain damage factors and at that point damage assessment criteria will be established. Sometimes the damage assessment criteria are very narrow and some victims may find themselves without any significant compensation. Again, it all comes back to what can be proven legally under the law.

E. How Long Will This Take? As you can see from the process described above, Mass Tort cases take a long time to work through the legal system. Three to five years is the usual length of time; however, if legal causation requirements can not be met, mass tort claims may be dismissed by the Court early on in the litigation process.

III.. HOW TO SELECT A MASS TORT LITIGATION LAWYER

Because of the prevalence of lawyer to lawyer referrals and the payment of referral fees to referring lawyers (See Section II C above), there is no shortage of lawyers aggressively advertising for Mass Tort cases on TV, the Internet and/or in print. It's

almost impossible to watch 30 minutes of TV without seeing a commercial that says, “Have you taken XYZ medicine? You may have a claim for money damages! Don’t delay, call today!” The problem is the fine print and “disclaimers” on these TV ads are too small to read. If you could actually read these disclaimers, you would see that most of the lawyers or law firms advertising for a mass tort claim are not going to be the lawyers law firms responsible for handling or prosecuting your mass tort claim or case. Simply put, they are just the first step in the lawyer shuffle. You can try to avoid this first step in the lawyer shuffle by asking if the law firm that is advertising for the mass tort case is going to be the law firm that will be actually handling the litigation of the claim or case. Again, even if a law firm starts out as the litigating law firm, because of MDL jurisdiction consolidations, that lawyer or law firm may have to refer your case to another law firm somewhere into the litigation process. However, if the lawyer or intake person for the firm tells you otherwise, then you may want to contact another lawyer. Remember, while many of these lawyers or law groups advertising for mass tort cases simply push the cases off to other attorneys, there are some law firms who advertise for mass tort cases and actually litigate mass tort cases as well. If you know an attorney in your area or have used an attorney in the past for a legal matter, you may want to contact that attorney for further guidance. Even if that attorney can not give you meaningful guidance, he or she may know another attorney in your community who can help you with your selection process.

IV. BOTELER, FINLEY & WOLFE

Our firm has been helping injury victims and their families recover the compensation they are owed for over 25 years. While we are relatively new to the area of Mass Tort Litigation we have already been directly involved in two of the largest mass tort/class action cases pending in the United States. We have been aggressive litigators for many years, but just as importantly we provide better client service than most other law firms. We are a small firm with a very experienced and competent support staff. We limit our involvement in mass tort cases to a few select type cases. But even if it is not a case we are involved in, we can help locate and place you with one of the lead law firms for any particular mass tort claim or case. We can help you reduce the lawyer shuffle, and if we refer you to an attorney or law firm, we will make sure you are provided regular updates about your claim or case. We are here to help. Please feel free to contact us.

This guide was prepared by Mark Wolfe, Attorney at Law of Boteler, Finley & Wolfe for the purpose of providing general information to the public. It is provided to interested people or parties at no charge and it should not be considered as legal advice for any specific or particular injury claim. If you have any specific questions or comments about an injury claim, you can e-mail the author at mark@bfiw-lawyers.com. No representation is made that the quality of legal services to be performed are greater than the legal services provided by the other lawyers.

About the author: Mark C. Wolfe

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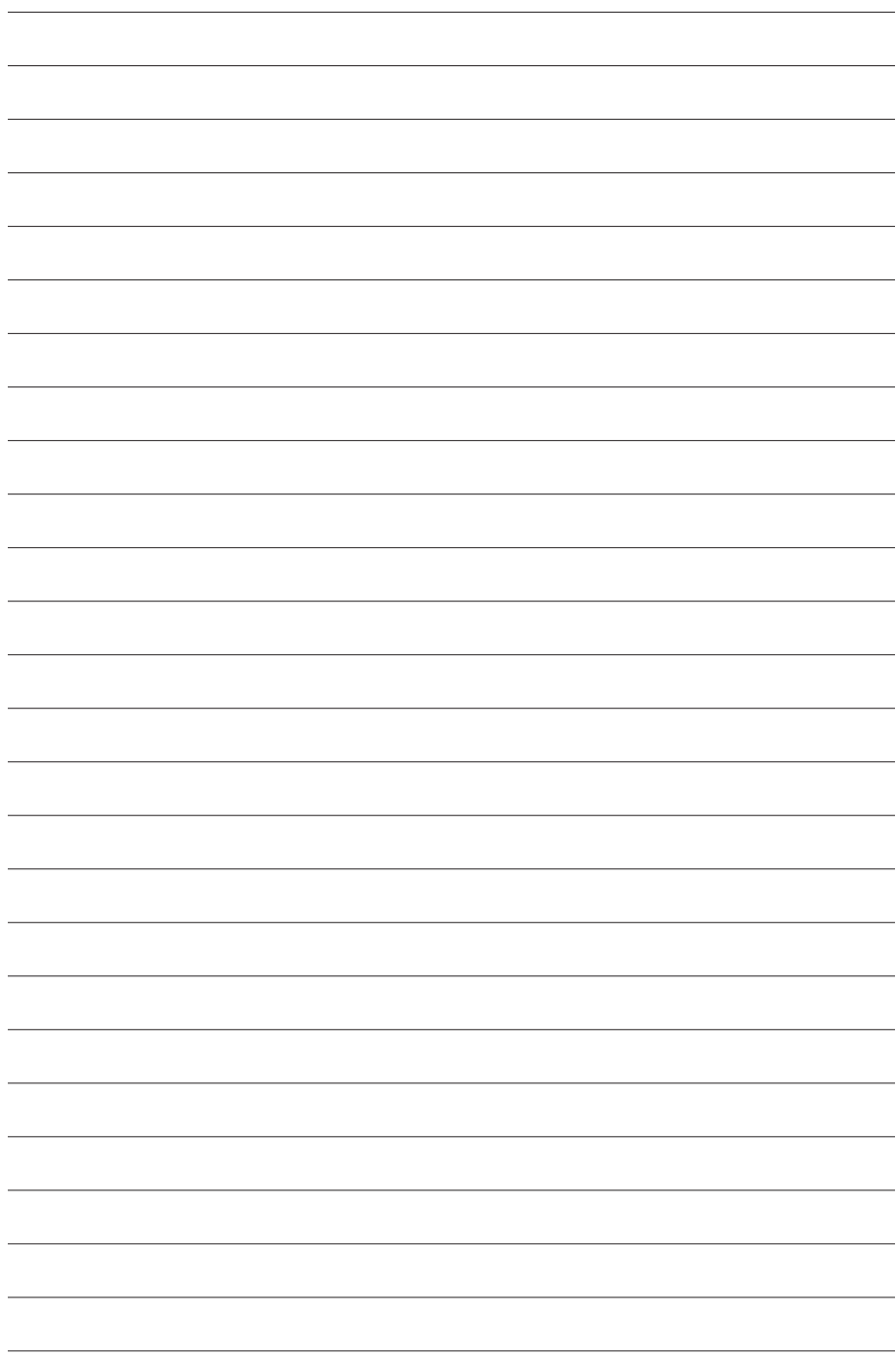
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