

# The New Jersey Mass Tort Designation Process

## Who Decides What Kind of Cases Go Where?

by Michael Dore

In 2003, the Supreme Court announced a process pursuant to which mass tort claims filed in New Jersey state courts could be coordinated and managed in unified statewide proceedings.

Since the initiation of this process, the Court has identified and refined the rules for coordinated mass tort cases. This article will discuss the process of seeking mass tort coordination in New Jersey, and the administration of those cases. It will also examine the extent to which certain mass tort coordination procedures continue to conceal, rather than facilitate, the process of deciding whether, and where, to coordinate particular claims.

### The Mass Tort Designation Process

Prior to 2003, there had been a fair amount of controversy in New Jersey surrounding how courts should handle mass tort claims. The Supreme Court had centralized the management of numerous matters, including latex gloves, Rezulin, Propulsid, Ciba-Geigy, diet drugs, and Vioxx. While these coordination decisions were clearly rational and appropriate, there was no disclosure of the process that had been used by the Court to decide on the coordinated treatment of these matters.

In addition, in 1999 the proposal of a blue ribbon committee for the formation of a single mass tort court in Middlesex County was rejected by the Supreme Court, and academic commentators began to complain that “the secrecy of the mass tort consolidation process left the state with the appearance of an unhealthy ‘back room’ judicial process.”<sup>1</sup>

In October 2003, however, the Supreme Court formally promulgated Rule 4:38A to provide for the centralized management of mass torts in New Jersey.

This rule provides that:

The 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)).

In conjunction with this rule, mass tort guidelines were issued by the administrative director of the courts. These guidelines set forth a procedure for requesting mass tort designation, which permits the assignment judge of any vicinage or an attorney involved in a case to apply to the Supreme Court to have cases classified as a mass tort, and assigned to a designated judge for centralized management. Notice must be provided to all parties then involved in the actions, and a notice to the bar must be published in legal newspapers and on the Judiciary’s website. The Court accepts comments on and objections to the application for a defined time period.

The guidelines also identify the criteria considered with respect to the designation of mass torts. In determining whether designation as a mass tort is warranted, the Court indicated that it would consider whether the case(s) possesses the following characteristics:

- It involves large numbers of parties;
- It involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;
- There is geographical dispersement of parties;
- There is a high degree of commonality of injury or damages among plaintiffs;

- There is a value interdependence between different claims; that is, the perceived strength or weakness of the causation and liability aspects of the case(s) are often dependent upon the success or failure of similar lawsuits in other jurisdictions.

Other factors used to evaluate coordination requests include:

- There is a degree of remoteness between the court and actual decision-makers in the litigation; that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general and house counsel;
- Whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party;
- Whether centralized management is fair and convenient to the parties, witnesses and counsel;
- Whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion;
- Whether coordinated discovery would be advantageous;
- Whether the cases require specialized expertise and case processing as provided by the dedicated mass tort judge and staff;
- Whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;
- Whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and
- Whether there are related matters pending in federal court or in other state courts that require coordination with a single New Jersey judge.

Independent of these guidelines, in

July 2005 the New Jersey Judiciary published a mass tort resource book. This 25-page brochure (which was updated in 2007 and is available at the Court's mass tort information webpage at [www.judiciary.state.nj.us/mass-tort/](http://www.judiciary.state.nj.us/mass-tort/)) includes an extremely useful appendix of mass tort administrative and substantive materials. The resource book and its appendices address mass tort issues from designation through resolution. The resource book essentially explains to practitioners how mass tort coordination decisions are made, how these cases are administered, and the process the Court will use to send these cases to one of the three mass tort venues that have evolved in Atlantic, Bergen and Middlesex counties.

The resource book notes that it is "intended to provide procedural operational guidance to New Jersey judges and Judiciary staff in the management of cases within their area of responsibility." Since New Jersey counsel previously had few resources available to them to explain the intricacies of how mass tort cases are to be handled by the state courts, this book is an extremely useful tool for all New Jersey mass tort practitioners.

Interestingly, in identifying the criteria to be applied in determining whether designation as a mass tort is warranted, the resource book differs slightly from the mass tort guidance document. Both the resource book and the guidance consider whether the cases possess identified mass tort characteristics; whether centralization will delay the case or prejudice a party; the convenience of parties, witnesses and counsel; the risk of inconsistent rulings; the value of coordinated discovery; the need for specialized judicial expertise; and the efficient utilization of judicial resources.

The resource book, however, does not mention two additional criteria identified in the directive. Thus, whether

"issues of insurance, limits on assets and potential bankruptcy can be best addressed in a coordinated proceeding," and whether there are "related matters pending in federal court or in other state courts that require coordination with a single New Jersey judge," are not identified as mass tort designation criteria in the resource book. Whether the elimination of these factors from the resource book can be attributed to oversight, a change in judicial attitude toward these factors between the time the directive and the resource book were published, or other factors, is unclear.

### **Issues Raised by the Mass Tort Designation Process**

This inconsistency between the guidance and the resource book is a symptom of a larger problem. One remaining difficulty with the administration of mass torts in New Jersey is the lack of any comprehensive explanation by the Supreme Court of why a particular claim was or was not designated as a mass tort, and precisely who participated in the decision to send cases to particular mass tort venues.

Thus, while the Court may have responded well in 2003 to the criticism of its private and unstructured identification and designation of mass torts, it may not have done as well as other judicial coordinating bodies (such as the Judicial Panel on Multidistrict Litigation) in providing an open disclosure of the application of its mass tort designation criteria to particular factual situations. Clearly, Supreme Court opinions explaining why claims with respect to products or drugs such as lead paint or Accutane were designated as mass torts, while claims with respect to vinyl chloride or Embrel were not, would be extremely helpful to practitioners in this area.

Moreover, Rule 4:38a clearly provides that the Supreme Court is the entity that controls the mass tort designation

process. Proceedings under that process, however, raise questions regarding whether, and, if so how, each of the justices of that Court actually participates in this process. Indeed, upon submission of a mass tort designation request to the Administrative Office of the Courts pursuant to the mass tort guidance, the decision-making process may be something of a judicial black box.

Unlike most submissions to the Supreme Court, only one copy of the mass tort designation request, or any response to that request, must be filed, which could lead counsel to question whether all of the justices of the Court are, in fact, reviewing that single submission. Similarly, no oral argument of such a mass tort coordination request is permitted, thereby eliminating a procedure that could disclose who was involved in the decision-making process and what issues they considered crucial to their mass tort designation decisions.

Also unclear is the role of the other judicial participants in the decision-making process. Whether the mass tort designation and case assignment decisions of the Supreme Court involve input from the administrative director of the courts, county assignment judges, the judges before whom particular potential mass tort cases are pending, or the three designated mass tort judges themselves, is simply unknown. It is known that there is no formal participation by these parties in the decision-making process, and that there is no explicit procedure for obtaining the input of these interested parties.<sup>2</sup>

The opacity regarding the issue of who participates in the mass tort coordination decision-making process is also present with respect to the question of how mass tort coordination decisions are reached. The guidance and the resource book provide a full exposition of the factors to be considered. Without argument of particular mass tort coordination requests, or written decisions by

the Court regarding the basis for its coordination decisions, however, the application of these factors to particular factual situations will remain unclear to all participants in the mass tort designation process.

This uncertainty is particularly pronounced with respect to a recent phenomenon that has developed in the mass tort coordination process. This phenomenon is the practice of designating a collection of cases for centralized management, but specifically announcing that this is not a mass tort coordination.<sup>3</sup> Thus, since 2009, the Supreme Court has assigned a number of purported mass tort matters to the Atlantic County (pelvic mesh; Reglan; Stryker implant) and Bergen County (DePuy ASR hip implant; Pompton Lakes; Prudential; Zelnorm) mass tort vicinages for centralized management, but with the specific announcement that they were *not* designated as mass torts.

While the Court was quite clear that these matters were not designated as mass torts, it was not at all clear about precisely what this meant. Thus, for example, under the Supreme Court's designation process it is clear that special masters may not be designated in mass tort cases without the approval of the Supreme Court. Whether the same is true of these centrally managed but 'undesignated' mass torts is less than certain.

### Conclusion

Since 2003, the Supreme Court and the Administrative Office of the Courts have made tremendous progress in creating, disclosing and implementing the state's system for the centralized judicial management of mass tort cases. The refusal of the Court to permit oral argument of mass tort designation requests, and its failure to publish comprehensive decisions explaining its mass tort coordination decisions, however, has left all parties involved in the administration

of mass tort cases uninformed about why particular cases are designated for mass tort treatment and why those cases are sent to particular venues. ☹

### Endnotes

1. See Michael Dore, Reforming the New Jersey Supreme Court's Procedures for Consolidating Mass Tort Litigation: A Proposal for Disclosing the Rules of the Game, 55 *Rutgers L. Rev.* 591, 610 (2003).
2. For publically disclosed instances where that input has been obtained, see, e.g., Judge Carol Higbee's suggestion that cases involving the generic version of Accutane be designated as part of New Jersey's Accutane Mass Tort Litigation, [www.judiciary.state.nj.us/notices/2011/n110328c.pdf](http://www.judiciary.state.nj.us/notices/2011/n110328c.pdf), and the November 2009 request of Passaic County Superior Court Judge Donald Volkert Jr. that all of the state's Yasmin, Yaz and Ocella lawsuits be designated for centralized mass tort management.
3. See, e.g., the "pelvic mesh" litigation, [www.judiciary.state.nj.us/notices/2010/n101012b.pdf](http://www.judiciary.state.nj.us/notices/2010/n101012b.pdf), ("...the Supreme Court,...has determined to assign all pending and future pelvic mesh state court litigation...to Atlantic County...for centralized management without mass tort designation;" the Prudential litigation [www.judiciary.state.nj.us/notices/2010/n100217b.pdf](http://www.judiciary.state.nj.us/notices/2010/n100217b.pdf), ("all New Jersey state court actions currently pending in Essex County seeking damages or other relief against the Prudential Life Insurance Company of America and others involving alleged commercial bribery and other torts, *though not designated as a mass tort, shall be assigned for centralized case management purposes* to Superior Court, Law Division, Bergen County..."); and the Stryker implant litigation, [www.judiciary.state.nj.us/notices/2009/n090417a.pdf](http://www.judiciary.state.nj.us/notices/2009/n090417a.pdf), ("the Supreme

Court, after considering the application and the comments received, has determined to assign all pending and future litigation involving Stryker Trident hip implants to Atlantic County...*for centralized management purposes but not to designate it as a mass tort.*"(emphasis in original).

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