

Product Liability & Toxic Torts

The Use of Summary Jury Trials as a Technique for Resolving Mass Tort Claims

By Michael Dore

A summary jury trial is a procedure involving an abbreviated presentation of evidence to an advisory jury. Such proceedings have been used in a wide variety of mass tort cases and have been found to be a very effective technique for assessing individual claims in such cases — without the parties incurring the costs and expense associated with a full jury trial.

Summary jury trial procedures are intended to be flexible. The parties may jointly agree to select single issues and/or claims for the trial or may seek a far more comprehensive resolution (e.g., a summary jury trial may address a single claim for damages; all damage claims; all liability issues; causation disputes; the effect of particular exposures; etc.). Depending on the nature of the summary proceedings to be conducted, special targeted discovery steps may be implemented by the court.

The criteria for the selection of an appropriate summary jury trial plaintiff tends to be the same criteria applicable to the selection of traditional bellwether trial plaintiffs, i.e., a plaintiff or plaintiffs is selected with the understanding that the results of the jury feedback as to the claims and defenses applicable to that plaintiff or plaintiffs will be instructive to the parties in exploring and exhausting the prospects of a global resolution of all or some of the remaining claims in the case.

The jury is selected in the same manner as it would be assembled for a normal trial. Questionnaires are used to disclose the name, occupation, and marital status of the jurors and their families, as well as any knowledge of the jurors with respect to the litigation, and any attitudes or preformed opinions of the jurors regarding the parties or potential claims in the trial. Voir dire, however, is extremely limited and both sides are often provided with fewer jury challenges.

Each side is afforded a limited amount of time to describe the evidence in its favor and argue its case to the jury. Witnesses are normally not presented and only brief passages of depositions are read into evidence. For lawyer summaries of testimony or evidence, counsel are limited to representations of evidence that would be admissible at trial. In addition, counsel are only permitted to present factual representations to the jury that are supportable by reference to discovery materials, including depositions, stipulations, signed witness statements or representations of counsel that he/she spoke to the witness and that counsel is repeating what the witness stated. With respect to expert witnesses, representations with respect to their testimony are limited to information that can be verified from a written report or a deposition.

In many cases, the litigants may be required to attend the proceeding which is supervised by a judge or a magistrate. The parties' presentation during summary jury trials, however, may involve testimony and evidence that is "confidential" and may not be presented at a full trial. For that reason, the judge who will try the case usually will not preside over the summary

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jury trial, but rather, will select another judge to preside at that proceeding.

The jury may or may not be told that its decision is not binding upon the parties. Following a presentation of the jury's decision, the parties and/or their attorneys are often permitted to discuss with the jury members their impressions of the case. Following the conclusion of this process, the litigants are expected to convene to discuss settlement possibilities.

The result of the summary jury trial is nonbinding and is intended to assist the parties in a potential resolution of the outstanding claims. If an individual plaintiff's claims are not resolved through the summary jury trial and settlement, the right to a full jury trial of that claim is retained.

While the summary jury trial proceedings are moving forward, plaintiffs' action against any nonparticipating defendants are stayed and the nonparticipating parties not required or expected to participate in any summary jury trial discovery activities.

Summary jury trials have been criticized on the grounds that their results are merely advisory and do not automatically resolve disputes between the parties. In addition, it has also been noted that, since summary jury trials often come on the eve of trial, they do not shorten the discovery process or eliminate significant litigation costs.

This procedure has been extremely popular with the judiciary, however. Indeed, it has been noted by one federal judge that

over the six-year period, in which he assigned some 150 cases to summary jury trial, 70 settled after assignment but before actual summary jury trial. Of the remaining 80 cases that went to summary jury trial, only five ended up going to trial and only one resulted in a verdict different than that reached by the advisory jury. See, Michael Dore, "Law of Toxic Torts," Section 20:16 (Thompson/West 2010).

While summary jury trials have been used in cases involving a broad range of substantive issues, there has been a substantial debate as to whether or not participation in a summary jury trial can be compelled by the federal courts. Under The 1993 Amendments to Federal Rule of Civil Procedure, however, Amended Rule 16 provides that at any pretrial conference, the court may take appropriate action with respect to "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." It has been argued that, at least in the presence of a local rule authorizing such procedures, this modification of Rule 16 provides the authority for a federal trial court to compel summary jury trials.

Regardless of how the courts ultimately rule on the ability of federal judges to order such summary trial proceedings, it can be anticipated that, at a minimum, these proceedings will continue to be used on a consensual basis and will facilitate resolution of a wide variety of litigation.

A recent illustration of the use of sum-

mary jury trials in a mass tort setting can be found in the Federal Emergency Management Agency trailer formaldehyde products liability litigation which was venued in the U.S. District Court for the Eastern District of Louisiana. In that case, a procedure was set up pursuant to which the results of the summary trials were to be used to facilitate settlement but were not binding on the parties. If the parties could not resolve the disputes between them as a result of the summary trial, they were entitled to a full trial on the merits. Each party was limited to three hours for presenting its evidence, which included cross-examination. Opening and closing arguments were limited to 15 minutes for each party and did not count as part of the presentation of evidence and testimony. The summary trial evidence was to be presented to a six-person jury panel chosen from a jury *venire* of 18 persons — with the entire summary trial and deliberations process to be completed in two days or less.

Summary jury trials will certainly not be effective in the resolution of all mass tort cases. However, when the parties are in a position to understand how to differentiate the claims involved in any particular case, and when speed and confidentiality are important factors in the effort to achieve the resolution of that case, a summary jury trial is an option that should be carefully considered by all interested parties — including the courts themselves. ■