

MSCs In California Mass Tort Litigation: A Call For Reform

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In the late-1970s and early 1980s, every Monday morning at 9:00 a.m., many of California's finest veteran trial lawyers assembled for trial call before the presiding judge of the San Francisco Superior Court. Almost invariably, both plaintiff and defense counsel asked the court, "May we first go see Judge Mayer for a settlement conference?"

For many years, my father, the Honorable Francis W. Mayer, was the judicial officer to see if you wanted the tough cases resolved without trial, particularly in the so-called mass tort actions. He was extraordinarily effective. He took the time to learn about the cases, the parties, the lawyers, the competing and sometimes difficult personalities, and the political, legal and pragmatic obstacles to a potential settlement, then rolled up his sleeves and got going. He was successful more often than not, and was never afraid to send the parties to trial immediately if settlement could not be achieved. Now, many years later, it seems as though the art and science of the even-handed court-conducted settlement conference has largely been lost, and perhaps sacrificed at times on an altar of ineffective expediency.



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Most of the California Superior Courts' local rules provide for a mandatory settlement conference ("MSC") before trial. On their face, the California Superior Courts' local rules providing for MSCs are intended to get the parties and their attorneys to focus attention on a particular matter, evaluate their case-specific positions, and make a serious effort to identify a reasonable settlement value before proceeding to trial. MSCs provide litigants with a court-sponsored mechanism for alternative dispute resolution; MSCs are either free of charge or available for a nominal fee. Parties may either request that the MSC occur, or the court, within its sound discretion, may order the parties to conduct one. Executed properly, MSCs are beneficial in that they provide litigants with an economical alternative to private mediation. The MSC was thus borne from an effort to preserve judicial resources and to promote timely lawsuit resolution.

Nonetheless, one size does not fit all. In a typical mass tort case involving dozens of defendants, the MSC can have the opposite, almost punitive effect of wasting time, energy and resources. Potential settlements in mass tort cases do not fit the usual model, not least because settlement values carry over to future cases, and individual plaintiff fact patterns vary widely. It has become abundantly clear that the time for change, and a more uniform and disciplined MSC approach, has come in the mass tort context.

Understanding the distinctive nature and factual and legal intricacies of mass tort cases, at least a few

California counties have provided for mass tort-specific MSC procedures. All California trial courts would be well-served to study the benefits and drawbacks of each county's approach, and adjust their procedures to specifically respond to the unique challenges and demands of these cases. Only then will the MSC in mass tort cases be as effective and successful as originally intended.

The Problem: In Many Counties, The MSC is Inefficient, Expensive, and Ineffective and Unfair When Applied to Mass Tort Cases

As currently implemented statewide, the typical MSC process is best suited for cases involving relatively few parties. For example, the California Rules of Court require the personal attendance at the MSC of trial counsel and party representatives with full settlement authority. But as described below, in the mass tort context, this rule has the very real effect of wasting the courts' and parties' valuable time and limited resources because not all courts devote the necessary time and effort to the process.

Most mass tort litigation involves 20 to 50 defendants per case. Unlike the "one off," or even garden variety, personal injury lawsuit, each of the companies in a mass tort case may be involved in hundreds, if not thousands, of pending cases nationwide. Moreover, for many defendants, mass tort litigation involves multiple constituencies, including relevant company business personnel, the in-house legal function, national coordinating counsel, regional or local litigation counsel, the trial attorneys, and perhaps one or more insurance carriers providing at least a defense or indemnity, for a given plaintiff's claims. Indeed, it is not uncommon to see 80-100 people attending any given mass tort MSC.

The practical problems posed by this quagmire are too great to be ignored. Because the court is not afforded the opportunity to fully understand the case, the current procedure disregards and disrespects defendants' limited resources and the "real life" implications of holding corporate representatives, attorneys and insurance carriers hostage for substantial periods of time, hoping the result will be a forced resolution. MSC attendance often takes three to four days, including travel time to and from California. Without the plaintiff personally attending, and having a mediator that does not fully understand the case, the ability to have realistic and unfiltered discussions often results in matters not resolving. Mass tort case resolution under these particular circumstances is so unlikely that the MSC, as originally contemplated by the California Legislature and the courts, may not be worth the trouble of having it at all.

In contrast, two-party ADR proceedings can take a half-day or more. The effort requires judges or mediators to develop an intimate knowledge of the parties, issues, and strengths and weaknesses of each side's position. It can require the neutral to spend significant amounts of time with each party to help evaluate those strengths and weaknesses. Realistically, the chances of settling plaintiffs' claims against 20 to 50 defendants within a one- or two-day period are virtually nonexistent. Ultimately, dozens of parties' representatives, attorneys and insurance carriers spend significant hours at an MSC, only to have a few moments in front of the presiding official to discuss their position, thus wasting resources of all involved

Troubleshooting: California's Failures and Successes at the Mass Tort MSC

Two recent examples illustrate how the MSC program can go awry when procedures are not specially adapted to mass tort cases:

For many years, the Los Angeles Superior Court has been home to litigation involving the claims of hundreds of current and former employees of a major aerospace defense contractor which elected to

close its long-time plant in favor of a new manufacturing facility elsewhere in the county. Plaintiffs and their prominent attorneys sued the company and virtually every one of its chemical product suppliers over decades, alleging personal injuries — from the most modest claims to every form of cancer and systemic disease — from exposure to a purported occupational “chemical soup.”

Over the years, the court endeavored to compel global settlements by forcing consolidated trials of large groups of dissimilar plaintiffs, improperly imposing collateral estoppel on causation and conduct defenses, and having plaintiff jury verdicts rubber-stamped in unpublished and cursory appellate opinions. Most defendants eventually capitulated, paying massive amounts of money untethered to the merits of individual plaintiff claims rather than subject themselves to continued trials environment. Nonetheless, a handful of stalwart companies stayed the course and refused to surrender. Finally, the cases were ordered to MSC before the court’s reputedly finest settlement judge.

The resulting half-day proceeding would have been laughable if not so disturbing. Plaintiff counsel would not even provide a demand to any company, and the settlement judge’s reported response was to tell the defense (perhaps tongue in cheek) that “there is no justice in Los Angeles County,” and that millions upon millions should be offered, just to make the cases go away. Thankfully, those overtures were rebuffed by most, and, in a true irony, defendants eventually obtained summary judgments from a new trial judge in all remaining cases.

Though efforts were made to develop an effective MSC procedure for mass tort cases, Los Angeles judges did not adopt a consistent approach. Some required personal appearance, others allowed for virtual attendance by Skype, and still others permitted telephonic participation. Presently, MSCs in Los Angeles are only conducted by joint request of the parties, or are randomly ordered in cases with “too many defendants” when it is clear there remain certain parties who should not waste time preparing for trial. At the very least, the decision to minimize the use of the process recognizes the precious time and resources wasted by unsuccessful MSC procedures.

In the San Francisco asbestos litigation, MSCs are held every Tuesday and Thursday in cases filed by individual plaintiff firms, regardless of whether the cases are ripe for resolution discussions, or ready for trial. The MSCs are no longer conducted before judges, but typically before a panel of two attorneys purportedly experienced in the area of law involved, or by a commissioner or settlement manager employed by the court. Generally, litigants in San Francisco are ordered to attend the MSC (or several sessions of one) near the time of an often-illusory trial date, as a last ditch effort to resolve the matter or to narrow down the number of remaining defendants.

Naturally, ignoring the status of a case's readiness simply ensures the MSC’s failure. In one recent case, over 70 lawyers, insurance adjusters, and party representatives were forced to spend several days traveling to and from various states throughout the country to attend an MSC lasting one day. Several hours passed before any specific party was approached to discuss its position. None of the 48 companies in attendance had settled by the end of the MSC. Requiring each party’s representatives and attorneys to engage in such a pointless exercise can only be construed as a heavy-handed attempt to cudgel a settlement, or as punishment for failing to offer more money, regardless of the merits of the case against the defendant. These are the antithesis of the MSC's original purpose of promoting effectiveness, fairness and efficiency.

Fortunately, the unique problems presented by MSCs in mass tort cases are not lost on all California counties. Indeed, Alameda County explicitly acknowledges that mass tort MSCs require special attention, judicial sophistication and real finesse in order to obtain legitimate resolutions.

The Alameda County Court has formulated an effective approach akin to private mediation. At the court's direction, MSCs are not conducted until there are a limited number of parties remaining in the case. This alone compels plaintiffs and their attorneys to resolve earlier and more reasonably with tangential players. Frequently, the MSC is held as the case approaches trial, and further MSC sessions are scheduled after the trial judge issues a decision on the parties' motions in limine and Evidence Code sec. 402 foundational hearings. If a case does not resolve before trial commences, further MSCs are conducted with the remaining defendants until all settlement efforts are exhausted. By conducting the MSC with limited defendants left in the case, the settlement judge can become more intimately familiar with the issues presented by plaintiff's theories against each, and the responses and defenses to those theories. Accordingly, all parties are fully equipped with the knowledge and evidence required to accurately evaluate the likelihood of success at trial, and thus are more likely to settle if the MSC occurs after evidentiary rulings are issued or as trial progresses.

Importantly, at least for initial MSCs, the Alameda Court only requires attorneys — not parties, other corporate representatives or insurance carriers — to attend unless there is a particularly strong reason to compel the presence of others. Consistent with the original purpose of the MSC, the court respectfully moves with alacrity, with the evident goal of saving time, money and resources without use of coercive tactics and, most importantly, without sacrificing effective dispute resolution. One attorney has been quoted as saying this court “works magic, even in the most difficult cases.”

The Solution: Effective Mass Tort MSCs

While the MSC can be effective in mass tort litigation if executed properly, it rarely is. The success of the program requires the time, attention and special consideration by judges and parties alike in light of the unique circumstances presented by mass tort cases.

The ideal MSC would be conducted by a strong, experienced, informed and respected settlement judge who can fairly evaluate the facts of the case and all parties' positions. Parties should be encouraged, not forced, to engage in settlement negotiations. Like mediation, the MSC is effective only if the adversaries are interested in resolution. Unless parties express a willingness to participate earlier, an effective MSC is unlikely to take place, if at all, until the case is largely ready for trial. Thus, the MSC should be held at or just before the time of a real trial date when there remain fewer defendants, unless there is consensus among the parties otherwise. Fewer parties in attendance at the MSC fosters the settlement judge's ability to fully engage each of the parties concerning their theories, defenses, evidence and vulnerabilities. Additionally, the actual trial judges should decide evidentiary motions and communicate those rulings to the MSC judge to keep the settlement lines of communication open, even after the commencement of trial.

Moreover, with respect to party representative attendance, personal appearances should not be required as a matter of course, but should only be compelled under special circumstances. When the court deems those special circumstances call for personal attendance, both the plaintiff and defendant representatives should be required to participate. Since the personal attendance requirement was originally promulgated as a prescription that parties take the MSC process seriously, there is really no need for such a requirement today. It is simply unworkable generally in mass tort cases. Companies and their counsel and insurance carriers take effective dispute resolution seriously, understand the financial consequences and risks of trial, and are virtually always willing to entertain reasonable settlement negotiations so long as the case is ripe for such discussions. With the current state of technology, a representative can be virtually "in the room" through the use of videoconferencing systems such as

Skype, without spending multiple days and thousands of dollars traveling to California.

The time for MSC reform is now. By taking these steps, the courts themselves have the opportunity to conserve limited judicial resources and lighten the load on their dockets by doing their part to maximize the likelihood of ADR success through a robust and meaningful MSC program that is tailored for the unique characteristics of mass tort cases.

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