

TRIAL

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**Confidentiality
concerns** 20

**Post-settlement
tax issues** 32

**Perfect visual
presentations** 44

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After the settlement

Tying up loose ends

It's not over until . . .

The ink may have dried on the settlement agreement, but the plaintiff lawyer must labor on. It takes direction, planning, and resourcefulness—as these attorneys report—to get the fat lady to sing her final aria and bring down the curtain on the case.

The waiting is the hardest part

DOUG SHEFF

It took the better part of a year to properly investigate our case, collecting thousands of pages of research, medical records, and witness statements. Finally, we filed it (involving a woman who had suffered a severe brain injury) against a large multinational corporation.

Discovery was hard fought and extensive. Trial was looming. The parties decided to mediate the case, and after endless discussion, we settled. My work was finally over—or was it?

The first obstacle to our closing the deal involved how the settlement would be paid. We considered a lump-sum settlement, a structured settlement, and a combination of the two, and we retained experts to evaluate various proposals and an economist to check calculations. In the end, the woman's family agreed to have part of the proceeds paid up front (for legal fees, expenses, and loss-of-consortium claims) and the balance invested in a combination of structured settlement payments and annuities.

The more difficult question was who would manage the money. The brain-injured woman's husband had been appointed as temporary guardian at the outset of the case. He was elderly, however, and other family members ques-

tioned his ability to continue in this capacity. After days of argument and discussion, the husband was reappointed as guardian; however, a trust was also established. More days of debate ensued when the family could not agree on a trustee. Finally, an independent trustee was selected.

Once this had all been arranged, the entire settlement had to be approved by the court because the proceeds were subject to a seven-figure workers' compensation lien. In Massachusetts, the law once allowed the court to intervene and reduce a lien when a reduction would promote justice. But the law changed, and now lien holders have to be dealt with independently.

This particular lien required a separate mediation process, which was difficult to resolve. Having argued so passionately that the merits of our case were strong against the defendant, we were forced to argue just the opposite—the only leverage to convince the lien holder to compromise was the likelihood of defeat.

We argued that my clients would not sign the petition without a significant reduction of the lien and that it was a tough case that could be lost at trial. We got the lien reduced significantly, but there were also several smaller liens that had to be negotiated. It took weeks to resolve them and report the case ready for final approval. We secured a court date, received approval, and waited for the check from the in-

insurance company.

After clearing so many hurdles, the finish line was in sight, and we expected the check forthwith. But then I was told that the insurer wrote checks only on the twentieth of the month; we had made our request on the third.

Agitated already by the lengthy process, my clients counted down the days. No check had arrived by the end of the month. The clients were outraged and directed their anger at my office. At one point, they even alleged that we had received the money but were not

representative to the mediation. With all the parties in one room, explore a variety of options, calculate present values, and select the appropriate one. This not only speeds up the settlement process, but it also shows the other side that you are serious about resolving the case. (Ask whether the defendant intends to bring a structure company to the discussions, because the answer may help you to evaluate just how serious the defendant is about settlement.)

■ Start client control early in the case. Inform clients that concluding a settle-

ment may take nearly as long as the litigation itself. Some delays can be expected in the post-settlement phase of any mass tort case, but in one recent case, an unforeseeable event made the road to "case closed" particularly arduous.

After four-and-a-half years of litigation, five days of mediation, and the involvement of three federal judges, more than 3,000 cases were finally ready to be resolved. Between August 2005 and the end of that year, plaintiff counsel had to contact each of the plaintiffs regarding the potential settlement. As luck would have it, Hurricane Katrina struck the last week of August, leaving 1,836 people dead, another 705 people missing, and hundreds of thousands of people evacuated and displaced from their homes.

Plaintiff counsel in mass torts often face the difficulty of finding clients who have relocated without providing new contact information, particularly when the litigation goes on for years. Hurricane Katrina greatly exacerbated this problem.

Hundreds of our clients—and even some of our attorneys—were affected by Katrina. The defense and the court understood that concessions had to be made, and time limits were extended. We all shared the aim of getting the plaintiffs their settlement money, particularly during a time of such need.

When a settlement involves thousands of claimants, at least a few unusual hurdles are bound to arise. But this case included some downright bizarre twists, including clients refusing to take the money—and not because they preferred to continue pursuing litigation. Some even signed the release paperwork but would not accept the check.

Most of these clients finally accepted after numerous phone calls, but a few did prefer to dismiss the case without payment even after fully understanding the meaning of a dismissal without prejudice.

One elderly woman insisted that her cat should receive the settlement funds.

Try to settle liens before the case is concluded. You lose a lot of leverage once it's over and you can no longer argue that refusing to reduce a lien might force a difficult case to trial.

willing to part with it.

Defense counsel offered no assistance. I was forced to file a motion with the court seeking enforcement of the settlement agreement and interest on the settlement amount. Shortly after that, the check finally appeared. It was deposited, cleared, and distributed a long three months after the settlement date.

Lessons learned

The conclusion of a large case these days can sometimes become nearly as complex as the underlying matter. The following techniques can help attorneys avoid problems:

■ Try to settle liens before the case is over by using a sliding scale. Offer some hypothetical scenarios to the lien holder and see if you can work out a compromise in advance. You lose a lot of leverage once the case is over and you can no longer argue that refusing to reduce a lien might force a difficult case to trial.

■ Select potential trustees before mediation and allow your client to meet them, discuss concerns with them, and find the right "fit" early in the process.

■ Bring a structure company repre-

ment can be a lengthy process involving a great deal of planning.

■ Include deadlines with an interest clause in your release. This provides some certainty as to a payment date and penalties for ignoring it.

Large settlements have become a complex ordeal, and appropriate planning is required. Follow these simple suggestions to reduce the time between when the case is settled and when your client receives his or her just compensation. ■

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In the eye of a settlement storm

KAREN BARTH MENZIES

In today's mass tort world, lawyers responsible for finalizing global or aggregate settlements will often be acting for hundreds, even thousands, of claimants and their family members. The sheer sizes of these groups raise logistical hurdles that challenge the efficiency of the process.

