

ENHANCING SETTLEMENT THROUGH A SPECIAL MASTER

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I. Introduction

Complex civil litigation, especially that involving pharma and environmental matters, has no borders. The issues in such litigation are complex, not just in terms of the numerous parties and legal theories complained of, but also because now they often cross international borders as well. Not all pharma or environmental cases are centralized in multi-district litigation (MDL) though many are. Nor are they limited to venues specific to the site of an occurrence involving an international corporation or a local disaster. Rather courts are considering a myriad of factors including counsel location, judicial availability, and accessibility when making venue determinations. For example, the Toyota litigation regarding allegations of unintended vehicle sudden acceleration potentially could have been in any court nationwide but landed in California.¹ Vioxx litigation could have been in New York or New Jersey where the manufacturers are located but instead was heard in a federal district court in Louisiana.² DePuy hip implant litigation could have been in New Jersey but is now in MDL in a federal district court in Ohio.³

The complexity of these cases increases as time passes, while court resources dwindle with alarming frequency. In the federal courts, no provision for an extra magistrate or clerk or calendar reduction is made when a district court receives an MDL assignment. Some MDL judges are taking well over three years to consolidate and oversee discovery with no intention of remanding cases back to district courts for trial, despite a clear pronouncement in the MDL statute.⁴

No matter where, when or how the case is organized it is becoming more apparent that the court system on its own cannot accommodate the Herculean detail and daily attention such litigation mandates. Accordingly, the rules in federal courts and the courts of many states provide for the appointment of a special master to assist

as a judicial adjunct in facilitating the management, resolution and implementation of a settlement in many of these cases. Authority for appointment of a special master exists in the federal rules⁵ and in most if not all state courts through rules or statutes using one of the various titles for the role most commonly known as special master.⁶

II. Varied Assistance Offered by a Special Master

The role of special master is often misunderstood by both bench and bar. Traditionally special masters are associated as mediator, arbitrator or discovery adjuncts. However, the federal rule provides, and the federal courts have allowed and acknowledged, that the adjunct judicial role may perform many functions in assisting the court without abdicating judicial responsibility. Some of these functions include:

- Settlement Master
- Discovery Master
- Coordinating Master
- Trial Master
- Expert Advisor
- Settlement Monitor
- Class Action Master
- Claims Administrator
- Receiver

In some instances, the settlement itself may dictate the role special masters should play in the implementation of the settlement. For example, in the *In re Vioxx* MDL settlement agreement⁷ the special master is empowered to perform various functions and roles in administering the settlement of that case, such as: (1) requiring additional records or other documentation to determine claimants'

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¹ *In re: Toyota Motor Corp Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation*, U.S. Dist. Ct. (C.D. Calif.), No. 10-ml-02151

² *In re: Vioxx Products Liability Litigation*, U.S. Dist. Ct. (E.D. La.), No. 2:05-md-01657

³ *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, U.S. Dist. Ct. (N. D. Ohio), MDL No. 2197

⁴ [28 U.S.C. §1407\(a\)](#).

⁵ [Fed. R. Civ. P. 53](#)

⁶ See, e.g., [N.J. CONST. art. 11, § 4, ¶ 7](#), and N.J. R. CIV. PRAC. 4.41 (appointment requires parties' consent); and N.Y. UNIF. TRIAL CT. R. § 202.14 (Chief Administrator of courts has power of appointment). For a complete listing of state court authorities governing special masters, referees, commissioners and similar judicial adjuncts, please consult the Resource Center section of the website of the Academy of Court Appointed Masters at www.courtappointedmasters.org.

⁷ *Settlement Agreement Between Merck & Co., Inc. and The Counsel Listed on the Signature Pages Hereto, Dated As Of November 9, 2007*, found at <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>, accessed on August 16, 2011.

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eligibility or for claims valuation purposes;⁸ (2) hearing and deciding appeals by claimants concerning negative qualification determinations made by the Claims Administrator or Gate Committee;⁹ (3) hearing and deciding appeals by claimants concerning the number of points awarded by the Claims Administrator that are used to determine benefit payment levels;¹⁰ (4) reviewing and deciding on applications for extraordinary injury payments;¹¹ (4) acting as referee in disputes between Merck and the Negotiating Plaintiffs' Counsel regarding the appointment of administrative personnel under the agreement;¹² (5) sitting as binding arbitration panel to resolve issues from which the Chief Administrator has recused himself or herself;¹³ (6) promulgating and revising rules for reviewing and resolving allegations of deception, dishonesty or fraud,¹⁴ and making determinations as to whether claimants, or counsel for claimants, have used deception, dishonesty or fraud in connection with claimant's claim;¹⁵ and (7) appointing deputy special masters.¹⁶

In almost every state court there is some variety of judicial adjunct appointment. In New Jersey, the role of special master is governed by the following rules of civil procedure:

Rule 4:41-3. Powers

The order of reference may specify or limit the master's powers and may direct the master to report only upon particular issues or to do particular acts or to receive and report evidence only. Subject to such specifications and limitations, the master has and shall exercise the power to regulate all proceedings in every hearing, to pass upon the admissibility of the evidence and to do all acts necessary or proper for the efficient performance of the duties directed by the order. The master may require the production of testimonial and documentary evidence upon all matters within the scope of the reference and shall have the authority

to put witnesses under oath and call the parties to the action and examine them on oath. Unless the order of reference otherwise directs, the master shall cause the proceedings to be recorded verbatim, shall rule upon the admissibility of evidence, and shall make a record of evidence offered and excluded as provided by R. 1:7-3 for a court sitting without a jury. No objection to the admission or exclusion of evidence may be made before the court unless it was made before the master.

Rule 4:41-5. Report

(A) Contents and Filing. The master shall prepare a report upon the matters submitted including any findings of fact and conclusions of law required by the order. The master shall file the report with the court within 10 days after the conclusion of the hearings, unless the court extends the time within such 10-day period by order reciting the unusual circumstances requiring such extension. The court shall forthwith notify all parties by mail of the filing of the report. Unless otherwise ordered, the master shall file the original transcript of the proceedings and the original exhibits with the deputy clerk of the Superior Court in the county where the case is to be tried, who shall, if the reference was made in an action pending in the Superior Court, transmit them to the Clerk of the Superior Court 3 years after the filing of the complaint, unless the court otherwise directs.

(B) In Non-jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless contrary to the weight of the evidence. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties and may move the court for action upon the report and the objections thereto. The court, after hearing on the motion, may adopt the report, modify or reject it in whole or in part, receive further evidence, or recommit it with

⁸ Id., Art. 1, § 1.4.1

⁹ Id., Art. 2, §§ 2.6.2, 2.6.3

¹⁰ Id., Art. 3, § 3.2.4

¹¹ Id., Art. 4, § 4.2.4

¹² Id., Art. 6, §§ 6.1.3 – 6.1.5

¹³ Id., Art. 8, § 8.1.3

¹⁴ Id., Art. 10, § 10.1.3

¹⁵ Id., Art. 10, § 10.4.2

¹⁶ Id., Art. 17, § 17.1.17

instructions. A party failing to object in the trial court to the master's findings shall be precluded from raising objections to the findings on appeal.

(C) In Jury Actions. In an action to be tried by a jury the findings of the master upon the issues submitted are admissible as evidence of the matters found, and may together with the evidence taken before the master be read to the jury, subject to the ruling of the court upon objections to the report or the evidence.

(D) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report may thereafter be considered.

III. Special Master as an Aid to Settlement

After the settlement of the claim in chief is resolved, other important issues such as counsel fees and costs can delay finalization of the case. Often the court may choose to utilize the services of a special master to resolve these issues informally among counsel.

In the Guidant MDL litigation in Minnesota,¹⁷ there was a significant rift with the plaintiffs' counsel regarding the fee due the PSC (Plaintiffs' Steering Committee). Special Master Pat Juneau, a veteran of Louisiana practice, attempted to mediate a solution. This was not a typical role for a master but it was necessary to conclude the matter. While the ultimate decision was made by the court after oral argument, the parties were comfortable and confident enough to seek assistance from the special master.

Many times the role of the master is misunderstood, especially by the uninitiated, and is equated to the role of additional court clerk. It was of no assistance when none other than Chief Justice John Roberts, during oral argument in the case of *South Carolina v. North Carolina*,¹⁸ uttered the now famous quote that he regarded the special master appointed in that case as "more akin to a law clerk than a district judge" and that the Supreme Court doesn't "defer to an aide that we have assigned to help us gather things here."¹⁹

The Chief Justice later tried to retreat somewhat from that comment in part of the concurring and dissenting opinion he authored in that case (joined by Justices Ginsburg, Sotomayor and Thomas) regarding exceptions to the report of the special master:

...[the Supreme Court] is not well-suited to take on the role of a trial judge. [citation omitted] We have attempted to address that reality by relying on the services of able special masters, who have become vitally important in allowing us to manage our original docket. But the responsibility for the exercise of this court's original jurisdiction remains ours alone under the Constitution.²⁰

So experience with the Special Master to the initiated can prove to be beneficial to all.

IV. Considerations When Appointing a Special Master

The first issue the parties and court should weigh is: Does this case merit the assistance of a special master?

If the conclusion on that issue is "yes", then proceed to the second question: Will these parties be able to fund a special master's role in this case?

If funding is deemed adequate, proceed to question three: What are the needs of this case so that the role of the special master is clearly defined?

Other considerations include:

- The need for someone with knowledge of specialized technology, judicial experience, or particular academic credentials;
- Whether disqualifiers are necessary such as prior employment or stock ownership;
- When the special master must be available, the anticipated duration of the commitment, and the candidate's willingness to make that commitment.

V. Effective Use of a Special Master in Mass Torts

If the special master is viewed from the beginning of the case as an experienced judicial adjunct to assist the court and parties with molding the process effectively, efficiently and economically, then the possibility of a positive outcome is increased dramatically. However,

¹⁷ *In re: Guidant Corp Implantable Defibrillators Products Liability Litigation*, U.S. Dist. Ct. (D. Minn.) MDL No. 05-1708

¹⁸ 558 U.S. ___, 130 S.Ct. 854 (2010)

¹⁹ See Tony Mauro, "Was Chief Justice's Comment on Special Masters Too Harsh?", *The National Law Journal*, September 18, 2009, available at <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202435570716>, accessed on August 2, 2011.

²⁰ 558 U.S. ___, at ___, 130 S.Ct. at 869 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

if the role of the special master is misunderstood either by the judge or the lawyers, then the special master's participation most likely will be frustrating and difficult for all.

A. The Trial Judge

Most trial judges would love the luxury of an extra pair of hands to assist in the many facets of a complex mass tort case that, because of calendar control, budget, or the nature of the mass tort beast itself, leaves the judge with multiple difficulties. The special master can supplement but not supplant the judge's role. Good special masters, and especially retired trial judges, know this going into an assignment. Sometimes trial judges do not. The special master is not there to do the judge's job or act as another law clerk. Nor is the special master to be considered an assistant to the magistrate as the tough decisions get kicked down the hallway. Rather, there should be an understanding between the judge and the special master at the beginning of the relationship, even separate and apart from the specifics of the appointment order.

Questions to answer include: Does the judge want to know everything that happens in the case, day by day, week by week? Does he or she want phone calls, e-mails or formal reports? Does the judge want a team effort with the magistrate and liaison counsel or a strict pyramid delegation of responsibilities with no interaction until trial?

The judge's number one goal is to resolve the dispute. The judge must become the maestro, look at the case before him or her and do four things right away: (1) Establish communication protocols; (2) Bring order from chaos; (3) Figure out what will be done with respect to resolution and alternative dispute resolution methods; and (4) Establish a plan of enforcement. If the judge skips one of these steps, there will be problems. If the judge is not proactive in a mass tort case, there is a risk of losing the court's hold on the case.

A critical point in mass tort cases, particularly class actions, is the Daubert²¹, Frye²², or Kemp²³ hearing on the admissibility of evidence from an expert. It is absolutely essential and paramount in everyone's mind at the beginning of the case. Generally the defense is going to push for a hearing early to establish which expert evidence comes in and how the case will be defined.

The plaintiffs are going to have the natural tendency to say more discovery is needed so they can develop their case. It is complex and the judge orchestrates the correct time balance.

Most successful trial judges in mass tort cases know they have to be more aggressive in case management or the beast will swallow the ringleader. Many judges think, "Well, I have done these X number of cases so why do I need a special master in this case?" I invite such judges to speak with the MDL judges and state judges that have worked with special masters. I am sure that, with rare exception, each would praise the invaluable roles the special masters played in their cases to achieve total resolution. Those who try to do it on their own without assistance can achieve closure eventually, but at what price? A delay of two to three years until that one judge had time to oversee all the discoveries, hold all the hearings, calendar all conferences, hold their own settlement conferences, and see that the settlement is implemented over several years?

Many other judges get it right the first time and welcome the assistance of a special master to be the glue that holds all the pieces together. They are clear with the special master about the scope and extent of assistance desired and expectations regarding communication. They make apparent the goals they expect the special master to achieve so the calendar is administered effectively and efficiently. Moreover, the costs of litigation are diminished because, through the creation of counsel committees, costs often plummet. For example, weigh the costs of monthly billing for motions on every issue versus committee consent on issues with a special master's oversight.

B. The Trial Lawyers

Experienced mass tort trial lawyers recognize the value of having a special master. Many will initiate discussion of retaining a special master early on in the case.

Problems arise when inexperienced attorneys misperceive the role of the special master. Such attorneys are inexperienced in mass torts, pharma or environmental litigation or a combination of these. If the attorneys are inexperienced in complex litigation the labor of the special master can be one of extreme challenge instead of creativity. The special master will spend time putting fires out and not advancing on the time

²¹ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

²² *Frye v. United States*, 293 F. 1013 (D.C. 1923).

²³ *Kemp ex rel. Wright v. State*, 174 N.J. 412, 809 A.2d 77 (2002).

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table the judge wants. When every recommendation, every path of settlement, and every attempt at non-traditional litigation is opposed and appealed to the trial judge then the counsel using such tactics make difficult litigation almost impossible to resolve.

Experienced attorneys meet frequently with the special master and contribute to the positive advancement of the case. They cooperate in having committees and liaison counsel so that, while they may not agree on liability and damages, they will agree on a positive process to get the case moving forward on a track to resolution.

VI. Conclusion

Thirty plus years of experience with special masters in the federal courts and an increasing number of state courts have led to far greater acceptance of the use of

special masters to assist in the resolution of complex civil litigation, especially in the area of mass torts. Whether your court has a provision by court rule, statute or court policy, the advent of the special master is here and should be used to the utmost in the resolution of mass tort cases.

Creativity involving the role of the special master is limited only by the imaginations of the parties and the court. The experience many special masters have in managing complex litigation often exceeds that of the others involved in these cases. The special master should be viewed by MDL litigants and counsel as a positive resource available to all who are willing to work toward a common goal of resolving complex litigation as efficiently as possible. 