

Q&A: Mayer Brown partners discuss mass environmental tort practice

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Representing clients in mass environmental tort cases requires thoughtful action on multiple topics. Emergency response, public relations, insurance, litigation strategy and expert issues are just some of the areas where early and strategic thought may change the trajectory of a case over months, even years.

Global law firm Mayer Brown has issued a navigational guide, "Responding to a Mass Environmental Tort Litigation, a How-To," to assist attorneys handling these types of cases. Thomson Reuters recently sat down with Mayer Brown partners Mark Ter Molen, Sarah Reynolds and Miriam Nemetz to discuss writing the guide and their deep experience in this topic.

The questions and answers have been edited for clarity and brevity.

Thomson Reuters: What made now the right time to prepare a guide for responding to environmental mass torts?

Mayer Brown: We realized that we have a great deal of experience handling these kinds of cases and thought this guide would be a helpful means of highlighting our knowledge and capabilities. Through that experience, we've identified places where advanced planning can reduce risk and liability and we thought our clients could benefit from those insights.

TR: Please share some of your notable experiences in this field.

MB: We have been involved in several high-profile cases in this area. We represent Veolia Environment in the ongoing state and federal court litigation over lead contamination of the city of Flint's drinking water and associated injury claims.

We currently represent CSX in litigation stemming from the 2013 derailment of a Conrail train and the associated release of vinyl chloride from a breached tanker car. Approximately 45 lawsuits were brought by over 2,000 individuals alleging personal injuries and property damage. We defeated a motion for class certification in a New Jersey federal court case and successfully fended off the plaintiffs' request for an interlocutory appeal to the 3rd Circuit, while obtaining summary judgment for thousands of individual cases pending in federal and state court.

The firm successfully defended Nicor, the major natural gas supplier to the northern half of Illinois, in numerous putative class cases and over 1,200 consolidated individual cases in Illinois state court alleging personal injuries and property damage

from exposure to elemental mercury in certain residential and business gas-delivery equipment. We also represented the company in parallel investigations and litigation brought by the Illinois Environmental Protection Agency and the Illinois attorney general's office and additional investigations initiated by the U.S. EPA. We resolved both litigation tracks on favorable terms.

Mayer Brown represented Pactiv Corp., whose predecessor owned a wood treatment facility in southern Alabama, against more than 8,400 neighboring residents who alleged exposure to air emissions containing dioxins and other chemicals. We ultimately settled all claims against Pactiv on extremely favorable terms.

Finally, we obtained a favorable outcome for Cargill in a Nebraska groundwater contamination matter. A deep-pocket plaintiffs' firm brought Erin Brockovich to Grand Island, Nebraska, to recruit more than 250 plaintiffs for lawsuits alleging personal injury, wrongful death and property damage associated with alleged exposure to groundwater contaminated by chlorinated solvents.

We obtained summary judgment after our investigation revealed the prior facility owner engaged in dumping on the premises that was the likely source of the contamination. The cases were settled on very favorable terms prior to an appellate decision.

Additionally, the site had been identified for Superfund listing and we used the court findings to successfully negotiate with the EPA. We also retained experts to develop comments on a public health assessment prepared for the site by the U.S. Agency for Toxic Substances and Disease Registry.

TR: What can corporate counsel learn from your book? Who else might benefit from reading it?

MB: Corporate counsel will appreciate the complexity of this kind of litigation, the number of significant and varied decisions that need to be made at an early stage, and the pressure that these kinds of cases can exert on a company, in terms of overall monetary exposure, but also in terms of reputational impact and the resources and time required to respond.

Our guide provides insights on advanced planning that can help reduce exposure if an incident occurs, and spots issues at every stage of the response and litigation-aftermath that might be overlooked in the heat of an emergency.



TR: You have a section on dealing with insurance carriers. What's important to know about this area?

MB: The obvious issue is notice, notice and more notice. Secondary issues tend to be negotiating with primary and excess carriers with respect to coverage and, of course, potential settlement opportunities.

These kinds of cases tend to generate very large initial demands which in turn tend to trigger multiple policies. Sometimes that complexity can lead to complicated settlement negotiations.

TR: In your experience, what are the common mistakes clients and corporate counsel make when facing this type of incident?

MB: We see several flavors of mistakes. One common area is the early PR statement disclaiming or unduly minimizing responsibility for the underlying incident. These kinds of early misstatements then come back to be problematic for the litigation.

Another issue is document collection and retention. These cases often involve older — and in some cases formerly owned — facilities and it is important to work hard early on to identify and collect all relevant documents.

A third area is pinching pennies early in the case in a manner that inhibits the full defense of the case later. A good example of this issue is retaining key experts early on to make sure that you are fully educated on the important technical matters — that knowledge can help guide legal strategy.

TR: The guide addresses both class-action and mass-action suits. What are some of the pros and cons of these proceedings?

MB: From the defense standpoint, class actions are usually difficult to certify if plaintiffs are pursuing personal injury claims. That said, if a defendant is interested in settling the case early, the class action vehicle may prove useful.

Mass action suits, where large numbers of individual plaintiffs pursue similar claims as part of the same lawsuit, present logistical and cost challenges for purposes of discovery. For purposes of trial, mass action claims are commonly resolved using a “bellwether” approach, essentially exemplar trials of representative plaintiffs.

TR: If you were in the role of plaintiffs’ attorney, what would you take away from this guide?

MB: These large claims are complicated and tend to be expensive and lengthy battles for both sides. The more prepared a defendant is, the more formidable an opponent they are.

TR: How has mass tort practice changed over the last few years? What trends are emerging in this practice?

MB: Courts are less and less likely to certify classes involving personal injury claims. Certification of particular “issue classes” is however proceeding in some circuits. Also, recovery for damages like “environmental stigma” is becoming more of an uphill battle in this era of overall rising property values.

TR: What have been the most legally notable settlements of the past few years?

MB: Of course, the BP gulf settlements, which aggregating penalties, fines, and compensatory payments exceeds \$60 billion.

In February, 3M paid \$850 million to settle claims brought by the Minnesota attorney general over groundwater contaminated with perfluorinated compounds at one Minnesota location.

Other settlements include the more than \$200 million settlement by NCR Corp. to clean up sediment contaminated by polychlorinated biphenyls at Fox River Superfund site in Green Bay, Wisconsin.

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ABOUT THE EXPERTS



Mark Ter Molen (L) is the co-chair of **Mayer Brown's** Environmental Litigation group. He is based in the firm's Chicago office. **Sarah Reynolds** (C) is a partner in Mayer Brown's Chicago and Palo Alto offices. She is a foundational member of Mayer Brown's full-service, multidisciplinary Environmental Tort practice. **Miriam Nemetz** (R) is a member of the Supreme Court & Appellate practice in Mayer Brown's Washington DC office.

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