



ALLOCATION METHODOLOGY

By Cathy Gianni

This article will focus on the due process aspect of allocation methodologies in mass tort class actions and multidistrict litigations. This typically involves the substantive right to allocation and procedurally how the process is structured.

Let's assume you have settled a mass tort and it is now time to allocate the settlement proceeds among the claimants. There is a variety of settlement models. For example, the settlement can involve all or almost all of the claims, e.g., Vioxx, ASR Hips or individual inventory settlements involving particular counsel or groups of counsel.

In an inventory settlement, the defendant settles based on an evaluation of each case by a law firm or group of law firms. The defendant may require that a certain percentage of the claimants accepts the allocation. The defendants negotiate a settlement grid or matrix with an agreed-upon settlement value. The values may be based on age or type of injury and may use a point or scoring system. Each point can be worth an agreed-upon value. The higher the points, the higher the allocated amount. On occasion, the defendant may negotiate a lump-sum amount, leaving the allocation process to the plaintiffs. Most settlements include a blow-out provision requiring an agreed-upon percentage of claimants to accept the settlement terms.

Whether you represent two or 2,000 plaintiffs in a class action or MDL, or you are one of two or 200 firms representing multiple claimants, allocation produces potential conflicts of interest among the competing claimants (ABA Model Rules of Professional Conduct, Rule 1.7). Counsel must obtain informed consent from

each claimant and has an affirmative duty to communicate the settlement to the claimants (ABA Model, Rules 1.0, 1.4 and 1.8(g)).

The designer of the applicable allocation model must keep in mind that pursuant to Fed. R. Civ. P. 23(e), the settlement and the resulting allocation must be fair, adequate and reasonable.

Allocation necessarily pits mass justice against individual justice. When you are formulating the model, you need to determine how many injury categories are appropriate and what types of injuries will be compensated. Common injury categories include heart attack, stroke and death. Often, deductions for comorbidities are part of the allocation methodology, such as age, body mass index and smoking.

In a pharmaceutical allocation model, there is almost always a necessity to confirm product identification and injury. Whether you design a points-based system or threshold system, care must be taken to isolate the pertinent medical records and documentation to establish proof of use/exposure and proof of injury/causation so that overall injuries can be evaluated and categorized in comparison to one another. In addition, there should be a provision and method to evaluate economic damages such as wage loss.

In instances involving dozens or hundreds of claimants, a Web-based system designed to accumulate and evaluate all of the claims is the most efficient and economical solution.

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While established injury categories are sufficient to evaluate the majority of claims, often there are a minority of claimants who have suffered extraordinary injuries with resulting damages in excess of those anticipated by the allocation model. Funds are reserved, and a separate review process is designed to evaluate and potentially compensate those claims.

Once all of the claims have been reviewed and allocated, the claimants and their attorneys are notified of the allocation. Most allocations include an appeals process. If an appeal is requested, claimants may submit supplemental documentation. Most settlements envision the right of an appellant to have a hearing either in person or telephonically.

Once the allocation is finalized, you may disclose to your clients the settlement amounts and the methods by which the amounts were calculated without identifying each claimant by name.

When envisioning how to allocate multiple claims, it may be helpful to have the court appoint an experienced Special Master to assist with the design and implementation of the process. The Special Master can assist plaintiffs' counsel with advising clients regarding the settlement process, gathering appropriate information for review, providing recommendations to the court and selecting assistants and institutions to help resolve tangential issues as well as to hear and resolve appeals.

The appointment of a Special Master is especially advantageous for both counsel and claimants by providing a forum to be heard on specific cases by an independent third party charged with applying criteria consistently to individual cases that may be highly individualized.

In conclusion, here are some practical tips for counsel to make sure the allocation process is successful:

1. Keep clients informed. Send written letters throughout the process.
2. Have counsel with the deepest understanding of individual cases prepare the grid or matrix.
3. Keep it simple and utilize a Web-based solution to streamline data collection and review.
4. Request that the court appoint a Special Master early to assist with the preparation of the allocation method and to review the extraordinary injury claims and appeals.
5. When the allocation is complete, prepare a letter to the clients describing how the allocation amount was derived and setting forth the appellate process.



***Cathy Yanni** is a JAMS neutral with a practice that includes mediation, Special Master/Discovery Referee, arbitration, and class action/MDL allocation and administration. She can be reached at cyanni@jamsadr.com.*