

## **Managing Data in Mass Tort:**

### **A Case Study**

Kimberly Buffington<sup>1</sup>

Elizabeth Hanke<sup>2</sup>

Kami E. Quinn<sup>3</sup>

Stephanie L. Sciallo<sup>4</sup>

Andrea Tecce<sup>5</sup>

In any mass tort scenario, the descriptor “mass” can apply to many aspects of the problem, including the mass of data accumulated about the cases themselves. In today’s world, lawyers spend considerable time addressing how to manage and organize data in a cost effective manner for the purposes of discovery *within* litigation. What is sometimes overlooked is how thoughtful organization and maintenance of data *about* litigation can provide a defendant with advantages in its defense, save money, and streamline insurance recovery efforts.

Below, we lay out a scenario in which a mass tort defendant finds itself with more than enough information to address all of its needs -- but because it failed to plan for information management at the outset – no cost-effective way of meaningfully accessing the information. As you will see, due to the creeping scope of the tort problem, changes in circumstances, inherited data or simply a failure to understand the benefits of well-kept data about litigation, it is all too easy for a mass-tort defendant to find itself in a data morass.

### **The Scenario**

Breaking Bad pharmaceutical company (“BreakBad”) acquires the assets of an entity called Heisenberg, Inc., in part to gain access to the breakthrough depression treatment developed and initially marketed by Heisenberg, True Blue Crystal (“Blue”). As part of the Blue acquisition, BreakBad also receives a database of sales information related to Blue that is workable, but on a fairly old system that is no longer being supported by the software company.

Blue became a best seller for BreakBad, particularly when BreakBad obtained approval to and began marketing Blue as a treatment for stress-related conditions in addition to depression. Blue accounts for billions in annual sales for BreakBad.

---

<sup>1</sup> Kimberly Buffington is a Partner at Pillsbury Winthrop Shaw Pittman LLP, focusing on consumer class action defense and related insurance coverage issues.

<sup>2</sup> Elizabeth Hanke is Vice President at KCIC LLC, a Washington DC litigation consulting firm.

<sup>3</sup> Kami Quinn is a partner at Gilbert LLP in Washington, DC focusing her work on insurance recovery.

<sup>4</sup> Stephanie Sciallo is Associate General Counsel at MSA The Safety Company in Pittsburgh, PA.

<sup>5</sup> Andrea Tecce is Managing Director at Navigant Consulting in Washington, DC.

After Blue had been on the market for nearly 10 years (“Year 1”), BreakBad began to receive an occasional complaint that Blue was responsible for strokes, heart attacks or less severe heart conditions in certain of BreakBad’s customers. At the outset, BreakBad received only 5 to 10 complaints per year and was able to settle the claims for less than \$250,000 apiece, even for the most severe claims.

BreakBad has submitted these claims to its primary insurer, ProtectYourINC, Inc. (“Protect”). Protect has paid defense counsel directly to defend these claims, directed the defense and settled the claims. In Year 5, the number of claims and jurisdictions in which they have been filed have increased to such an extent that the insurer hires national coordinating counsel, Saul Goodman from Billing, Billing & More, LLP (“Billings”).

Because Protect has paid these claims and handled the defense, BreakBad has not needed to devote significant resources to overseeing the litigation. They have relied on Jesse, an experienced paralegal who had been with BreakBad for many years, to administer and oversee the claims under the supervision of BreakBad’s Associate General Counsel in charge of Litigation, Skyler, and the General Counsel, Mr. White. For the most part, the legal department relies on reports from Protect and Billings to monitor the litigation, and focuses its attention primarily on the remaining limits of BreakBad’s insurance.

Over time, BreakBad’s claims continue to increase in both quantity and amounts paid to settle. By Year 10, although it has since reformulated Blue, BreakBad has settled over 200 claims and more than 500 additional claims have been filed against it. BreakBad has just suffered its first significant plaintiff’s verdict.

Although Protect paid the \$5,000,000 judgment, Mr. White has become concerned. He believes that Blue has always been a good product and that Protect may not be doing enough to protect BreakBad’s reputation. He worries that the publicity from this verdict may draw even more claims against BreakBad. Finally, he is somewhat concerned that if this problem is not contained, BreakBad may ultimately run out of insurance. Thus, Walter calls a meeting of his in-house legal team.

## **The Data**

In a scenario like the above, a defendant without a thoughtful plan is likely to have accumulated data about the Blue cases in a number of places. For example, the in-house legal department likely keeps some information about the claims, often in an Excel file, but sometimes in a Microsoft Word document. Depending on Jesse’s technological sophistication, this chart is more or less likely to be organized in a way that makes it easy to sort and filter. It’s likely that the chart does not contain all of the information related to every claim, either because of human error, or because there were claims that were resolved before Jesse was hired or understood that the number of Blue claims would warrant a chart, or because it was not apparent at the time that the data would be relevant.

In house counsel may also keep a file of “settlement reports” or other summary documents setting out the amount and basis of settlement for each claim. But again, over the ten or more years in which the problem has grown, it is likely that personnel changed as did the

company's understanding of the problem. It is likely that those files are, at best, searchable .pdfs, and they may or may not all be housed in a single location (physical or electronic). Some sales information that has been used for the defense of the claims resides in the Heisenberg database, and indeed the legal department believes this information could give them a good sense of the potential for future claims, but the database is now so archaic as to be essentially unusable – except to print screen shots of individual sales contracts.

Other files and information related to the claims probably reside with the various defense counsel hired by the insurers, all of whom likely maintain it in different systems of varying quality. National coordinating counsel may keep duplicates of some, but not all, of the information maintained by the various local counsel and may also have created his own Microsoft Word or Excel chart to track claims and/or claimants. It likely contains much of the same information as Jesse's chart, but is organized differently and contains some additional information, and does not capture some information that Jesse does maintain. Some, but not all, of the information in coordinating counsel's chart is likely privileged.

In addition to the claims information, there is also insurance-related information, including correspondence from insurers, records of insurer payments, and the policies themselves. This information is likely kept with other correspondence or on its own, and may overlap in some part with the claims information. In addition, although Protect is paying for the defense of claims, some counsel may provide BreakBad with copies of invoices for legal fees or expenses, others may not. All of these are likely to be in different formats. Each firm may have its own matter, task and activity code system and may or may not uniformly tie their bills to a particular claimant. Protect may have additional information relating to fees and expenses in its offices.

## **The Problem**

It quickly becomes apparent that even getting a complete picture of the most basic data about the claims would be an expensive endeavor in this scenario. Moreover, with this many potential sources of information, conflicts and errors are inevitable. Even if all of the information were gathered from all of the sources that maintained some or all of it, there is no clear or easy way to sort, quantify or analyze the information.

As BreakBad's journey through the mass tort landscape continues, it is likely to have increasing need for data that it can manipulate, analyze and sort successfully and at low cost. First, Mr. White, Jesse and Skyler will need to address the basic questions the legal team is likely to hear from management, such as:

- How much have we spent per year? Overall?
- What is the ratio of defense to indemnity?
- What are the trends in our expenses?
- What can we expect in the future?
- How much insurance do we have left?

Without complete, accurate and manipulable data, even these most basic questions are tricky to address. But the data stakes rise when, for example, BreakBad's primary carrier exhausts and it turns to its excess carrier to pay. Even the most cooperative excess carrier will require information sufficient to show that the primary coverage is exhausted. Beginning the process of assembling and analyzing the claims data only when the excess carrier has asked for it all but guarantees that the transition from primary to excess coverage will not be seamless, and that BreakBad will be funding the defense and settlement of claims for some period.

If the excess carrier(s) are less cooperative and BreakBad finds itself in litigation with its insurers, another layer of data needs comes into play. Now BreakBad will need to comply with discovery requests related to this claims information (including separating the privileged materials from the non-privileged materials). If it seeks a buy-out settlement with an excess carrier, it will need to demonstrate its expected future claims experience – a task that is unreliable at best and impossible at worst -- without reliable historical data.

Finally, if BreakBad finds itself in the position of controlling the defense of its claims, accessible and reliable information can allow its defense team to work together more seamlessly, share information and be more efficient. It also allows in-house counsel an ability to manage and predict its expenses more successfully.

### **The Solution**

The scenarios we discuss above are only a few of the myriad of ways that good data management in a mass tort scenario can be critical to minimizing the financial impact on a defendant. Good data allows for a more effective, better-managed defense, reduced burden on in-house personnel, streamlined insurance claim and less expensive (and likely more successful) insurance coverage litigation, if necessary. The key to reaping these benefits is planning.

In the first instance, a defendant (or its counsel) that is facing a mass-tort, or potential mass-tort situation ought to brainstorm at the outset (1) who will likely need information about the claims, (2) what information will they need, (3) where will that information come from and (4) for what purposes will it be used? For example, potential users of basic claimant demographic data and claims characteristics include: in-house counsel, local counsel, national coordinating counsel, coverage counsel, and insurers. The data is most likely to be generated by local counsel. It may be necessary to produce the data during discovery. At some point, experts may also be asked to rely on the data. It will be used for a variety of purposes including managing the defense, budgeting for future defense costs, making insurance claims, monitoring trends, etc.

Once the company and its counsel has considered these questions, there are many potential effective systems, but there are a few basic rules for any circumstance:

- (1) To avoid duplicate efforts, expense and conflicting data, information should be entered/gathered once, rather than multiple times.
- (2) Multiple access points for the same data allows all stakeholders to coordinate their efforts.

- (3) Data should be kept as granular as possible, i.e., “first name” and “last name” rather than “name”.
- (4) Create universal numbering convention so that data kept in separate places can be put back together; establish case or claim level ID and claimant level ID numbers if appropriate. Include claimant specific defense tracking in this number system.
- (5) Data should be sortable, summarizable and manipulable. Keep the numbers in a number field and the text in a text field – never mix data types in the same column or field.
- (6) Do not neglect defense billing data. Establish protocol for tracking claim specific and general time with meaningful matter names. Export defense counsel time entries from their individual systems in addition to the hard copy invoices so that any billing guideline disputes can be addressed down the road.
- (7) The best data management systems will provide an immediate link or reference to the source for all of the data it captures.
- (8) Create written guidelines for data conventions, i.e., “BreakBad will default to 1/1/YEAR when only a year is listed for any date field.”
- (9) Build in back-ups and redundancies. The best database in the world is useless if it becomes corrupted or disappears.
- (10) Consider the appropriate level of security for the data involved.
- (11) Be mindful of commentary in data management systems that could negatively impact defense or coverage strategies in subsequent litigation.

Walter, Jesse and Skyler will likely have to undertake an expensive project gathering their data and creating a system that works. Some useful information may have been lost permanently. With some planning and knowledge, other defendants can avoid that fate.