



Brian Kabateck
KABATECK BROWN KELNER LLP



Lina Melidonian
KABATECK BROWN KELNER LLP



Porter Ranch litigation: Lessons learned

TEN LESSONS LEARNED FROM REPRESENTING CLIENTS IN MASS TORTS AND OTHER MASS ACTIONS

October 23, 2016, marked the one-year anniversary of the public discovery of the Aliso Canyon Gas Leak in Porter Ranch. Several groups of well-organized lawyers almost immediately began representing the homeowner victims of this disaster. Many have substantial experience in mass actions but like every case, Porter Ranch has its own twists and turns, and like every case, the lawyers learn more about representing a large group of plaintiffs at once. Many of these lawyers are leaders in our legal community and have rolled up their sleeves once

again to help. This article outlines some lessons learned from this avoidable disaster as well as some learned from working on many other mass tort/mass action cases.

1. Client management when “living in a nightmare”

The Porter Ranch cases differ from various other coordinated mass actions because the clients are presently “living in a nightmare.” Lawyers and law firms must have a staff that is well prepared to deal with an onslaught of questions,

comments and a variety of issues. In Porter Ranch the need is and will be compared to other mass actions where the injury occurred in the past. Unlike other cases, the clients are living in a nightmare and have live issues.

In a personal-injury case, for example, the accident or incident has already occurred and the people are learning to cope with a “new normal.” In these cases, the issues are live and ongoing. The Porter Ranch residents were living outside of their homes for a period of time

See Kabateck & Melidonian, Next Page

and did not know when they were going to return home. Clients who are presently living this nightmare will want to call and demand service on a regular basis, and you need to have well-equipped team members who are responsive. Often, clients prefer to talk directly to a lawyer and not a clerk, paralegal or assistant. They also are going to require you to help them with related problems to their property. Regular and consistent client communication in the form of e-mail updates and newsletters help because it does tend to alleviate concerns and avoid an onslaught of calls regarding the status of each client's case.

Lawyers must learn to be fluid in dealing with clients and active in dealing with their problems. It must be clearly articulated that sometimes there really is nothing you can do for their specific issues at the present because the cases have to be thoroughly litigated.

2. Properly assessing damages

It is key to get educated fast; to learn about the global and specific damages at issue. Proper management of clients' expectations regarding the damages of their case (their property value, the nuisance, emotional distress) is critical. It is the lawyer's job to have the clients understand and recognize that the determination of damages is an ongoing process.

Make the clients an active part of the process. For example, suggest they keep a diary of what happens to them on a daily basis, but also suggest it be written for their lawyer so it's protected. Explain to your clients what damages are immediately compensable, what damages are going to require trials and litigation, and what damages may not be recoverable.

3. Independent evaluation

Be very careful when you hear that lawyers are starting to closely investigate a potential mass action. Don't get too excited and think you will be left out. Just because some lawyers are looking at a potential mass action does not mean it is viable. Even if there are lawyers that you like and/or respect who have generated an interest in a particular case, do

your own investigation. All lawyers who have been involved in mass actions at one time or another have made some mistakes about the viability of a particular case. Investigate the project and go your own way and do what makes sense for your own practice. Conversely, keep your ear to the ground and listen for when a new claim or action might be viable and investigate early.

4. Cooperation is key

Once you decide to get involved in a case, get along with others. Following your independent investigation and evaluation, when you do get involved in a case you believe is viable, it's best to work with the leadership structure and to participate in the process. In the Porter Ranch cases we have been extraordinarily fortunate to have Paul Kiesel as the primary liaison counsel and a group of esteemed lawyers including Frank Pitre, Jake Courtney and Brian Panish who are working on the case on a day-to-day basis. The work gets divided up and is led by committees. Organization is key. The biggest mistake an attorney can make is to decide to go their own way when the leadership structure forms. Of course there may be cases and circumstances where it is important to have independence, but typically in consolidated mass actions it would be a huge mistake. The lawyers who are not participatory in the organization and leadership are ultimately doing a disservice to their clients.

5. Money matters

An attorney must make sure that they have the financial ability to work on these types of cases, or work with other lawyers who do, because even if you are cooperating with the leadership structure you are nevertheless going to find yourself spending significant amounts of money. The Porter Ranch cases are indisputably expensive because of the various ongoing expert costs. It is rare to have a mass action where the amount of money spent to develop liability, general causation and damages does not approach — and often exceeds — \$1 million in costs and expenses. Indeed, these costs are shared by all cases pending in the

coordination. In addition, you are going to need money to fund the operation of your internal organization while the case is ongoing.

6. Be prepared for the long haul

Mass actions never settle quickly, for a number of reasons, not the least of which is because the defendant wants to know what the entire universe of cases will be before they get serious about settling. This oftentimes means that an attorney has to wait out for the entire case to get past the statute of limitations to give defendant the peace of mind that nobody else can file a lawsuit. You must be in it for the long haul if you embark on mass actions.

7. Early retention of experts

Find the right experts and retain them early. Oftentimes the issues become so narrow and focused that there are only a handful of top experts in the United States who would be willing to participate and either act as a consultant or testifying expert. Timing is important; lock-up the good experts early and retain them. Work with your co-counsel and other plaintiff lawyers to find the right experts. This must be done before the defense has an opportunity to lock them up and preclude you. In the Porter Ranch cases, some of the experts who were already retained by the Plaintiffs' Steering Committee were poached by defendants. Being diligent and the first to retain the best experts paid off for the plaintiffs.

8. Act intelligently and ethically in client development

It is typical to have advertising agencies — for both traditional and online media — soliciting attorneys' business to procure new clients. Do not get involved in doing anything that is remotely unethical and be aware of the ethics rules concerning solicitation. Defendants in these cases will investigate the case-generation process. The old adage, "If you can't win on the law, win on the facts; if you can't win on the facts, win on the law; if you can't win on either go after the lawyers," certainly applies.

See Kabateck & Melidonian, Next Page

Further, there are a number of “business organizations” that are willing to loan attorneys money for mass-tort litigation costs. Sometimes it’s non-recourse (meaning you don’t have to pay it back if you lose) which can be incredibly expensive with up to 25 percent interest annually, compounded daily.

Porter Ranch is unique in the sense that it is geographically focused so the case-acquisition costs are not extraordinary because the location of potential clients is well known. However, in some mass actions, the clients are not geographically based. If you are going to invest money in case acquisitions, track how much it is costing to get a lead and a retainer. Make intelligent decisions accordingly. Avoid a “back of the envelope” analysis, thinking that each case is going to be worth a certain amount of money so you can invest a certain amount of money. Instead, focus on what makes the best sense for you financially. Never put all of your eggs in one basket.

There are concerns that some boutique firms involved in the Porter Ranch litigation may have huge amounts of money, including funds from high-interest loans, invested in this project. The litigation will undoubtedly be successful, but it is going to take a long time and these lawyers may be putting a tremendous amount of equity at risk.

9. Decide early on who you want to be

Once the litigation gets started, do you want to be a “player” or do you want

to let others do the work and sit back and recognize that you will have to pay some kind of common benefit assessment to let them do the work – which is fine under the right circumstances? If you do not have a lot of cases or you do not have the time, you may want to be a sideline participant. But, if you do decide to retain and represent a lot of clients, be ready for the operation. Clients deserve excellent representation. There are times where partnering up with other law firms because they are better equipped to handle the cases makes the most sense and there is no shame in it.

10. Trust Kenny Rogers’ advice:

“You gotta know when to hold ‘em, know when to fold ‘em, know when to walk away, know when to run.”

A successful and just result for the Porter Ranch residents is where this litigation is going. However, if one really wants to talk about lessons learned in mass-tort actions, whether they are pharmaceutical, construction, medical devices or environmental actions like Porter Ranch, heed these words carefully. Not all cases are perfect, and not all cases are created equally. There may be a time where you are investing good money after bad and it is time to get out. Or, it could be that the litigation is too much for you and somebody is better equipped to take on the daily management of your clients and their cases. Or, it could be that your firm is best equipped to represent the plaintiffs and you may need to ask other firms to give you their cases.

Unfortunately, some lawyers hold on for too long to cases that are “circling the drain.” In this grand scheme of the mass action arena, you need to control your clients’ expectations and, frankly, your own. Running a law firm and handling cases is a blend of passion, ethical obligations and being a good business person. Make the right decisions as the case matures.

Summary

These ten points are our observations from more than 15 years of working on large-scale mass actions. We have made great friends and colleagues from the dedicated lawyers who spend their professional careers helping large numbers of Californians and other Americans turn and fight corporate abuse and misuse of the public’s trust. If you are new to mass actions, you will soon have your own “lessons learned” to share with other plaintiffs’ attorneys.

Brian S. Kabateck is a consumer rights attorney and founder of Kabateck Brown Kellner LLP. He represents plaintiffs in personal injury, mass torts litigation, class actions, insurance bad faith, insurance litigation and commercial contingency litigation.

Lina Melidonian is a senior associate at Kabateck Brown Kellner LLP who manages the complex mass torts department at the firm.

