

## Plan Implemented to Resolve Complex Suits in World Trade Center Cleanup

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More than seven years after the Sept. 11 terror attacks, plaintiffs lawyers and New York City are now following a road map a federal judge hopes will result in settlements next year in the complicated process of determining liability for respiratory damage allegedly suffered by thousands of workers who participated in the cleanup of the World Trade Center site.

A total of 225 of the most severe cases have been selected by two special masters appointed by Southern District of New York Judge Alvin Hellerstein in the litigation brought by more than 9,000 plaintiffs.

Of that group of 225, six cases will soon be selected for what are formally scheduled to be trials but are really a path toward settlement. Two of those sample cases will be selected by New York City, its contractors and other defendants; two more will be selected by attorneys for those who claim injury from the cleanup of toxic materials; and another two will be selected by the judge himself.

Those six cases will then steam forward with full discovery according Hellerstein. By September, they will have been joined in stages by another 24 cases, setting a total of 30 cases on track for the argument of motions beginning in January 2010 and trial readiness by May 2010.

Paul Napoli of Worby, Groner Edelman & Napoli Bern, plaintiffs' liaison counsel, and James Tyrrell of Patton Boggs, who represents the city, will begin selecting sample cases the first week of April.

"I think things are going according to plan," Napoli said in an interview Tuesday. "We will know a lot more as we start to get into discovery."

"It's too early to tell how its going to work out," Tyrrell said. "The special masters met their deadline with a lot of hard work and selected their cases. We are now studying the cases that they have selected from this first tranche and we will be ready."

Hellerstein has run into one hurdle after another while trying to make progress toward resolving litigation that may be unique in its complexity.

He settled on his final plan for the cases in late 2008, memorializing the procedure in an opinion issued Feb. 19, 2009, explaining his methodology for a case management order that he said was "forged with the experience of earlier failures and frustrations" but also with the cooperation of counsel for both sides and the special masters: Professors James A. Henderson of Cornell Law School and Aaron Twerski of Brooklyn Law School.

To break logjams over discovery, disputes over insurance and other problems, the judge decided to focus first on the most severely injured workers to produce a sample of trial-ready cases that will set the parameters for settlement.

The plan had to take into account a series of complexities that start with the fact that some plaintiffs, including police officers and firefighters, were involved in search-and-rescue missions immediately after the twin towers fell, while others were laborers for contractors involved in the more extended period of cleanup and shipment of debris to the reopened Fresh Kills Landfill on Staten Island for identification of remains and sorting for evidence in the attacks. More problems were posed by the fact that some contractors only worked at parts of the 16-acre site while others traveled all over it, some employees were given masks and others were

not, different parts of the site contained different toxic materials and some employees smoked or had pre-existing conditions.

A difficult challenge was also posed by the fact that, all told, the plaintiffs are claiming that exposure to toxic materials in the air and at the site led them to contract some 387 different diseases, ranging from lethal to mildly irritating.

A further complication was that the disaster site was overseen by a host of city, state and federal agencies, with no clear lines of authority to separate them. The more than 80 defendants led by the city and its contractors claim immunity under various state and federal statutes and doctrines shielding actors from liability when acting in times of emergency. Those immunity arguments will be a major part of the motion practice early next year.

Moreover, there has been an extended discovery fight over the insurance of the private contractors, the city's \$75 million in coverage and \$1 billion provided by the Federal Emergency Management Agency for a captive insurance fund.

Napoli contends that the \$1 billion was allocated to compensate victims, but Tyrrell takes the opposite view: that it was never intended to be a "pool of money" to be disbursed. Instead, he said, it was intended to cover the city's insurance needs as it defends itself against liability for the alleged injuries to workers.

#### COMPLICATED DISCOVERY

With so many overlapping and intertwined issues, the toughest job in moving the litigation forward has been discovery, particularly with regard to alleged injuries and medical records. Henderson and Twerski, the special masters, worked with the lawyers to build a structure for a database that requires each plaintiff to give specific answers to some 360 questions, including questions on their injuries, treatments, the hours and places they worked at the site, the warnings they were given and the safety precautions that were taken.

The plan divides the 9,090 cases into five groups, running from the first wave of cases filed to the last. The first four groups will contain 2,000 cases each. The fifth group will contain the remainder and any after-filed cases.

The special masters and counsel for both sides prepared severity charts that grade a person's condition on a scale from zero to four. They also selected six major disease categories in which to group the illnesses.

The plan kicked off on Jan. 1 and within 40 days, plaintiffs in the first group of 2,000, Group A, completed a subset of the data fields that detailed their disease rankings, duration of exposure at Ground Zero and pre-existing disorders.

Ten days later, the special masters selected from this group the 200 cases ranked most severe, 25 additional cases for diseases that are not necessarily included in the severity chart, and an additional 400 cases at random.

The database for the 200 most severe cases and the 25 additional cases will be completed by April 1. Within five days, both sides and the judge will select the first six sample cases.

Completion of the database for the 400 cases chosen at random is due in late May, after which each party will choose two more cases and the judge picks another two. Those 400 cases will proceed along on discovery only, with no schedule set for motion or trials.

#### TESTING STRENGTH OF CLAIMS

Judge Hellerstein explained his logic for the plan in his opinion, saying first that "full discovery on all issues will assure the integrity of each side's disclosures in the database and a thorough testing of all claims and defenses. A basis for settlement, or valuation by trial, should prompt resolution of all such severe cases."

Second, he said that filling the database on all remaining cases, "first by sample and then in full, enables values to be negotiated for all cases."

Finally, the judge said the combination of the questions used to populate the database together with "traditional broad discovery in selected cases will allow the parties vigorously to test their opponents' claim, assuring the integrity and reliability of the parties' disclosures and establishing a procedure that can promote broad resolutions of cases in a fair, efficient and just manner."

Hellerstein explained his approach during a panel discussion at the New York State Bar Association on Jan. 29.

He said the sample of the 30 most severe cases was designed to be big enough so that "values would be created" on claims.

"It allows the parties to get a good sense of the strengths and weaknesses of all the cases," he said.

Hellerstein also is presiding over wrongful death cases filed against the airlines and other defendants in connection with the attacks. Ninety-three of those 95 cases have settled, and fellow Bar Association panelist Kenneth Feinberg, who headed the federal 9/11 Victims Compensation Fund, said he expected the same thing to happen with the respiratory cases. The remaining wrongful death cases, he said, "will never ever go to trial," and the physical injury cases arising out of the aftermath of the attacks "will never go to trial. Eventually, they will settle."