

# Consolidation, a complex litigation solution to litigation costs

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## What exactly is “Complex Litigation”?

Complex cases are those ripe for consolidation and adjudication before one trier of law or fact. This process is generally favored by courts across California, so long as consolidation does not despair any parties due process rights, and not being used for an improper purpose.



## What does the California Supreme Court have to Say about Consolidation?

Cal Rules of Court 3.400: A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants; to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.



## Is it Complex?

In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

1. Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
2. Management of a large number of witnesses or a substantial amount of documentary evidence;
3. Management of a large number of separately represented parties;
4. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
5. Substantial postjudgment judicial supervision.



## How does complex litigation apply to adjudication of Workers Compensation Cases?

8 CCR § 10396 provides for Consolidation of two or more related cases, involving either the same injured employee or multiple injured employees, and rests in the sound discretion of the Workers' Compensation Appeals Board.



## The WCAB considers factors including:

- Whether there are common issues of fact or law;
- The complexity of the issues involved;
- The potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved;
- The avoidance of duplicate or inconsistent orders;
- The efficient utilization of judicial resources.



## Additional WCAB Authority

Cal Lab Code § 4615 provides an automatic stay on lien collections from any criminally indicted [charged] provider of services under Cal Lab Code § 4600 or § 4621.

Cal Lab Code § 139.21 provides that upon suspension of a provider, any liens not dismissed shall be consolidated and adjudicated in a special lien proceeding [conducted by the Special Adjudication Unit], and provides the Administrative Director shall set up a special lien proceedings process.

Note: While there is no statutory authority for special lien tribunals of unindicted/suspended service providers, the Administrative Director, by way of the WCAB, has started consolidating cases suspected of insurance fraud under the Special Adjudication Unit- see SAU Calendar for indicted/suspended providers, and separate calendar for “other consolidations”



## What does the Department of Insurance have to say about Complex Litigation in Workers Compensation Cases?

The WCIRB provides for a single claim reporting where several injuries/claims are the result of a catastrophe

Appendix 1, Paragraph 4, of the March 2021 WCIRB Reporting Handbook (attached) provides that a Catastrophe is:

“Any single accident resulting in a compensable injury to two or more persons. Accident includes incidents where multiple claims have been consolidated for hearing by the Workers Compensation Appeals Board.” (emphasis added)

Also, see Cherokee International v WCIRB (1993), attached.



## There are multiple strategic benefits from a consolidation:

### Cost Mitigation:

- Streamlining discovery
- Fewer attorneys
- Cost spreading across multiple cases
- One trial across multiple cases on the common issues of fact or law (for example: one trial on several 132(a) allegations or affirmative defense universal to all cases)
- Clarity and more certainty to outcomes in all cases- better case control
- Doctrine of Res Judicata



To the point: One trial in 40 cases costs substantially less and provides more predictability than 40 trials in 40 cases, and in front of 40 different judges.



## Strategic benefits, Cont....

### Special Lien Tribunal [Suspected Insurance Fraud across several Cases]:

- Nullification of litigation costs leverage by bad faith service providers
- Appointment of Workers Compensation Judge specially appointed to report any workers compensation fraud to the Department of Insurance
- Stay of proceedings on all matters consolidated
- Consistency of discovery efforts across a vast number of cases involving bad faith services

Instead of negotiating a bad faith invoice based on litigation costs, defend against all invoices for significantly less and deter future bad faith services.



## Strategic Benefits, Cont....

### Premium Impacts to Employers:

- Reduction in claims reported when there is a wave of litigated claims from a single “accident”- less experience modifier impact
- Cost mitigation in defending waive of 132(a) or S&W allegations
- More control over exposure and outcomes when consolidated on good facts or law
- More predictability, and better control over trial judge (one challenge applies to trial on all cases)



## There are several hazards to a non-strategic consolidation:

- Bad facts or law equates to a bad outcome across all cases from a single decision
- Will the expansion of complex litigation in workers compensation give rise to “class action” AA’s who solicit claims when there is a plant or office closure?
- When consolidation will result in change of venue from the “home turf” of multiple AA’s, costs arising out of removal petitions may be incurred
- The consolidated issues / cases will only move as quickly as the slowest AA, potentially extending time these claims are open. You may have to choose between savings of costs and duration of claim adjudication (you may not be able to have both)
- Consolidations involving multiple carriers poses a risk of subordination, where the carrier with the most claims may have more control over the case trajectory than other carriers



## EXAMPLE

1. There are over 1,000 cases involving one service provider that has engaged in suspicious activity. The service provider engages in a practice of utilizing litigation costs in each case to leverage settlements above the initial invoices amount, They will not comply with normal discovery efforts to verify the services were rendered or even requested.

### Issues:

- Adjudication across multiple district offices has resulted in inconsistent outcomes in trying these cases.
- The amounts in controversy, individually, do not justify the costs to litigate; however, in aggregate the amounts in controversy are in excess of several hundreds of thousand dollars.
- The trial judge, largely due to the amount in controversy, is not enthusiastic about trying the issue.
- The service provider will not negotiate to even the original invoiced amount, and insists on trying the issue unless multiples over the original invoiced amount s paid by way of settlement.





## Strategic Goals:



- Compel discovery across all cases
- Present all discovery enforcement motions to a single judge
- Mitigate trial costs and discovery costs, eliminating the litigation cost leverage as a factor
- Provide global picture of suspicious conduct, across all cases, to a single trier of fact
- Prevent collection proceedings outside of consolidation
- If successful, on the merits, prevent future litigation of the same dispute
- If appropriate, obtain remedies inclusive of sanctions and restitution for payments made due to concealment and fraud (easier enforcement)
- Res Judicata- findings apply to all past, present, and future cases involving same facts and disputes. Peace from future litigation.



## Hazards to Consider:

- Significant front end adjudication on service provider's resistance to consolidation
- Significant delay in the resolution of individual disputes.
- Running of compounding interest, resulting in increased exposure if service provider prevails.
- Complicated discovery, involving vast amounts of data, potentially necessitating 3<sup>rd</sup> party discovery management vendor and expert fees to authenticate evidence
- Complex trial, and near certainty of appeal
- Complex internal review and resource allocation in gathering cases subject to consolidation, and in responding to service providers discovery requests.



## Hazards to Consider (cont)

Amount in controversy: \$100,000 in present disputed recovery amounts

Potential remedies: \$725,000 in restitution and permanent stay of future bad faith conduct

Projected litigation and discovery Costs: \$80,000

High probability of success or favorable settlement



## **EXAMPLE**

2. There was a plant closure due to COVID-19. Every employee was laid off. Upon reopening very few of the laid off employees have accepted re-employment having moved on to another employer and the work force is 85% new hires. After 3 months of reopening, the plant has been ordered to close again due to the emergence of a new COVID-19 variant. All current employees have been laid off again. The employer receives 40 claims, all alleging cumulative trauma injuries to psyche and various orthopedic injuries. All claims filed were filed by new hires. All claims are denied.



## Issues:

- Large volume of potentially non-compensable claims may result in large premium increases for the employer.
- Unpredictability in case outcomes, due to claims spread across multiple district offices and judges, results in variable litigation strategies premised on the assigned judges.
- Unpredictability in case outcomes and adjudication costs provides settlement leverage to AA and the injured worker
- Claims spread across multiple attorneys and claims professionals may result in less efficient administration, reporting, claim review, and adjudication



## Strategic Goals:

- Minimize impact of non-compensable claims on employers experience modifier
- Predictability of outcomes on post term defense and 6 month preclusion on psyche claims
- Reduce non-allocated costs by having a single trial on all common issues (post term defense and 6 month preclusion on psyche claims)
- Prevent “piecemeal” settlement of provider liens across all cases, reducing overall costs and exposure
- Consolidated cases reside with fewer handling attorneys providing consistency in communications and litigation strategy- efficiency



## Hazards to Consider:

- A loss in one case on affirmative defense will result in a loss on all, surrendering leverage to settle cases.
- If cases involve multiple district offices and AA's, the AA's losing "home field advantage" will likely resist consolidation increasing front end costs adjudicating appropriateness of consolidation
- Consolidation may extend the time between claim reporting and file closure
- If the consolidation involves a bright AA, and the case goes poorly for employer, this may encourage that AA to start seeking out large volume class action type cases to consolidate (future industry impacts).



## Non-strategic Consolidation Examples:

Taking any example provided above, and replacing it with a defective defense, or bad set of facts and law, will compound losses and surrender settlement leverage.



## How can you identify if a consolidation is strategically appropriate?

- Are you considering resolving a dispute because of the costs to litigate?
- Does the actual dispute involve the injured worker, or a provider?
- Was there a large plant closure or single incident resulting in multiple claims?
- Do you have a universal dispute across multiple cases, common affirmative defense?
- Generally, if the dispute has been raised or caused by the same party in several claims, the same is true across all claims.
- Is the costs savings high enough to justify a longer timeframe for claim closure?
- Will the opponent agree to consolidation?
- What WCAB will preside over the consolidation?



## Always consider



1. What strategic goal will the consolidation help you achieve;
2. What are the possible hazards of a consolidation;
3. The probability of both success and hazards;
4. Whether the cost benefit analysis is favorable.



## Wrapping it Up



- There are many prospective benefits when a consolidation is pursued on a favorable group of cases.
- There are significant hazards to a consolidation on bad facts or law.
- Consolidation is discretionary, and large consolidations are reviewed by Associate/regional Chief Judges.
- Consolidation should never be pursued for an improper purpose (not just to delay a bad set of cases and exhaust the finances of the opposition), reputational harm and the potential for financial penalties for abuse of process are present and should be expected.
- Any consolidation needs to be for a strategic purpose, there needs to be a targeted benefit that the consolidation is likely to provide, and that benefit must outweigh any foreseeable hazards.



Strategic Consolidations are very unique to themselves. Please contact me anytime to discuss your prospective consolidation.

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