

Stock, Screen, Steer, Substitute To Win Bellwether Trials

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Upon creation of multidistrict litigation involving a drug or medical device, companies may contemplate the dreaded “S-word” — “settlement.” While an early settlement program can sometimes serve as in-house counsel’s best option in an MDL, if the company can brace itself for the filing of thousands of lawsuits and years of invasive and intensive discovery, four other “S-words” might lead to a series of bellwether trial outcomes that protect the product’s legacy and save the company millions.

Those “S-words” are the strategic steps every company should take in advance of bellwether trials: Stock, Screen, Steer and Substitute.

Stock — Collect Information to Vet Every Plaintiff’s Case

First, stock up on all of the information in-house and outside counsel will need to understand the details of each plaintiff’s case. At the very first MDL status conference, plaintiffs’ lead counsel will likely allege a need for sweeping company discovery, including years’ worth of hard copy documents, electronically stored information and email, and dozens of company depositions.

Meet counsel’s demands with your own. The best time to ask for a lengthy and comprehensive Plaintiff Fact Sheet (PFS) is when the plaintiffs’ own extensive discovery requests are at the forefront of the MDL judge’s mind.

At a minimum, make sure that the PFS requires production of all medical records each plaintiff and his or her counsel possess, as well as complete medical authorizations, rather than seeking just a medical authorization alone to collect medical records. It is important to ensure that plaintiffs’ counsel did not receive records that, for whatever reason, were not provided to defendants when their counsel independently requested them.

The court’s order requiring the PFS should also include a penalty (ideally dismissal) for plaintiffs who fail to timely and fully comply with its disclosure requirements. The PFS should also explicitly incorporate a duty to supplement consistent with Federal Rule of Civil Procedure 26(e).

The ultimate goal is to ensure that, as a baseline, the defendant knows everything important about the



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plaintiff that his or her counsel knows. When a smaller subset of cases has been targeted for potential bellwether trial selection, defense counsel should dig even more deeply into those plaintiffs' backgrounds. Public record and social media searches often unearth weaknesses unknown even to plaintiffs' own counsel.

Screen — Use the Bellwether Process to Justify Dismissal of Meritless Cases

Second, screen meritless cases from the MDL's inventory so they are not selected for bellwether trial. The court will want to try representative cases that test plaintiffs' theories of defect and provide insight into the merits of the MDL's broader inventory.

Before bellwethers are selected, ask the court to take steps to ensure that all cases available for potential selection have threshold levels of merit. Where plaintiffs' counsel allege that the product causes a common injury, defense counsel should ask the court to require all plaintiffs to present objective evidence that the plaintiffs actually suffered that injury.

Perhaps the product's alleged risks only materialize in the presence of another factor, such as a certain patient characteristic or use of another medication or product. In those instances, defense counsel should ask the court to require plaintiffs to present evidence supporting the presence of that additional factor.

Requiring evidence necessary for a claim to have merit helps ensure that the time and resources expended in the bellwether process are not wasted on cases that do not meet the requirements of Federal Rule of Civil Procedure 11. Such screening mechanisms can result in the dismissal of hundreds of cases, so plaintiffs' counsel may resist them.

However, if the threshold evidence is truly necessary for a case to have merit, readily available and relatively easy to produce, that resistance will likely have no reasonable basis.

Steer — Propose a Bellwether Plan That Allows Control Over Case Selection

Third, in proposing a bellwether plan, ensure that the parties maintain some control over which cases are selected and tried, rather than leaving the selection completely random. Alternatively, if the court prefers random selection, consider the use of strikes after the random set of cases is identified, which will help eliminate outliers that are unrepresentative.

The bellwether selection process should allow each side to prepare short submissions with the facts of the bellwether cases and to explain to the court how the picks are or are not representative of the MDL. Harness data to explain to the court the makeup of the MDL based on products, injury categories or patient demographics.

Include a Lexecon waiver provision in the bellwether plan that requires a plaintiff to try his or her case in the MDL court rather than their home jurisdiction, particularly if the MDL court's jury pool will generally be more favorable than the alternatives.

Substitute — Replace Plaintiff's Purported Cause of Injury With Your Own

During the initial years of the MDL, plaintiffs will present their common theories for why and how an MDL product causes injury, sometimes based on a lone journal article or questionable science. Once the

bellwether trials begin, the defense will finally have its chance to substitute competing reasons for injuries in specific plaintiffs.

At trial, simply pointing out the failings with the plaintiff's theories may not be enough. Even though it is not the defense's burden to prove that an alternative cause led to the plaintiff's injury, defense counsel should set out to do just that.

Finding alternative causation means digging into a plaintiff's medical history and pursuing every plausible alternative cause with a team that includes clients' in-house experts and retained experts. Clients' knowledge of the clinical data surrounding the product at issue is invaluable.

Understanding the nuances of the products and the major related literature is a significant factor. This knowledge can help defense counsel find weaknesses in the plaintiffs' experts' opinions and identify alternative causes.

No company chooses to be dragged into a mass tort. However, utilizing these strategic steps from the date the MDL is created will provide opportunities for small successes throughout the life of the MDL — and potentially major success when the first bellwether trial begins.

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