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5 Ways To Contain The Chaos Of Mass Torts And MDLs

By **Sindhu Sundar**

Law360, New York (June 20, 2014, 9:04 PM ET) -- The first steps an attorney takes when faced with the prospect of multidistrict litigation can mean the difference between settling for an outsize sum and defeating suits on their merits before they accumulate, attorneys say.

Acting swiftly to gather company documents about the accused product, preparing witnesses and calculating the right time to seek consolidation are a few crucial steps to tackling some of the unique challenges of mass tort suits sprawling across the country.

“You need to be setting your anchors and determining strategy as early as you can, because everything you do should be influenced by your endgame,” said Christin Garcia, a Faegre Baker Daniels partner. “You need to understand what documents there are, what they say, who are the key people involved and what they know.”

Here are ways how to manage multidistrict litigation and mass tort cases:

Synch-Up Your State Proceedings

The viral nature of mass tort cases means that federal MDLs often take place simultaneously with consolidated state court proceedings. Defense attorneys seeking to avoid conflicting obligations imposed by state courts or duplicative discovery disputes on the same issue should take the initiative to ask state judges to follow certain pretrial findings of federal court judges and to keep state courts apprised of federal MDL developments, attorneys say.

"You want to make sure that different courts know when the same issues are arising," said Anand Agneshwar, the co-chair of Arnold & Porter LLP's product liability group. “MDL works best when it serves as kind of steering wheel for the big ship."

Defense attorneys can also reach across the aisle to the plaintiffs bar to streamline the course of the proceedings by negotiating uniform fact sheets and other details in the MDL as well as agreeing to rely on that as the forum to resolve some of the major questions, he said.

"The goal of an MDL is to have one forum that can have some authority for a nationwide litigation and lead it in a certain way," Agneshwar said. "But in order for it to be effective, there needs to be a buy-in from all parties."

Look Before You Leap

The very existence of increasing mass tort cases doesn't automatically suggest an MDL would be the right course of action, nor is it wise to pull the trigger on consolidation during the early stages of a liability crisis.

An MDL offers the benefits of streamlined discovery proceedings, but it can also attract consumers' attention and may drive them to pile on cases that may not otherwise have been filed individually, attorneys say.

Keeping cases separate may also work to the defense bar's advantage, as it forces plaintiffs to devote more resources to each case taking place across several jurisdictions in the country. However, at some point as the cases pile on, it might be prudent to move swiftly on consolidation, and defense attorneys say they must rely on their judgment and expertise to determine when the right time is. Ideally attorneys would want to align cases when they are roughly at the same stage of discovery.

“That’s where the lawyer has to draw on his or her experience, because there's not going to be a magic number of cases or easily defined tipping point," Blackwell Burke PA partner Peter Goss said. "Your clients will also have to evaluate the cost-benefit of continuing to fight on separate fronts versus consolidation.”

Choose Bellwethers Carefully

Although the defense bar picks cases for bellwether trials, defense attorneys sometimes have little control over whether they make the cut because different MDL judges have different practices in how such cases are selected, attorneys say.

The purpose of such a trial is to help the defense gauge its odds of success in the overall litigation, but the defense should watch for outsize verdicts that can throw off that calculation, attorneys say.

In the Actos bellwether trial that concluded earlier this year, Takeda Pharmaceutical Co. was hit with the whopping $6 billion punitive damages verdict that, because of its size, doesn't necessarily reflect the drugmakers' prospects in other litigation over the drug, attorneys said.

"It means that that result is not helpful for determining a benchmark for settlement," Goss said. "Usually you want to get a fair representation of other cases that have been filed so that the case being tried will represent the value of a certain number of cases. Where the result is such an outlier, it makes it really difficult to use that outcome for any constructive settlement discussions."

In such cases, the defendant should push to try more suits, he said.

Beware of Foreign Discovery

Japan-based Takeda and Germany-based drugmaker Boehringer Ingelheim International GmbH are both intimately familiar with the travails of failing to meet discovery obligations, particularly those that involve foreign employees.

Takeda **argued in vain** to Louisiana federal Judge Rebecca Doherty that not all its employees in Japan understood the implications of a litigation hold it had imposed in 2002 that related to Actos. BI **came**

under fire for failing to implement a companywide litigation hold to preserve critical documents and communications by June 2012, when it knew a wave of product liability lawsuits over its blood thinner Pradaxa was inevitable.

Some of these discovery problems underscore a lack of appreciation among clients in foreign locations about the rigorous discovery process in U.S. product liability litigation, attorneys say. Boehringer last month agreed to pay roughly $650 million to settle claims in multidistrict litigation over Pradaxa.

"The discovery dispute became a very significant lever for plaintiffs for obtaining the settlement," Goss said. "A product liability litigator in the U.S. has to help a client based overseas, whether in Germany or Japan or India or England, to communicate the nature of litigation in the U.S. and the expectation that the they would have to provide a lot of documents in U.S. litigation that they would not have to in their home countries."

Look for Info in Unlikely Places

Some mass tort litigation — think asbestos — involves products manufactured decades ago. The challenge posed by those cases is to find information about the accused product to see if it indeed contained the substance alleged to have caused occupational harm, for instance.

This can be especially tricky if it was a company's predecessor that made the product and no longer exists. But hope isn't lost, because some of those defunct companies donate their documents to some seemingly unlikely places.

"One of the first things you want to do is to try to track down any documents the company has — and some have whole collections in libraries," said Joseph Hovermill ofMiles & Stockbridge PC.

If you can determine that the accused product didn’t contain asbestos after all, then you embark on an aggressive defense and come up with informal strategy to try to get cases dismissed.

If you do find that the product contained asbestos but was relatively obscure, you would take a softer strategy that relies on a theory that few employees could have come into contact with such a rare product, he said.

Hovermill says the firm sometimes even resorts to the online marketplace eBay to look for old company brochures, where collectors of American industrial history may be hawking their wares.

"You’d be surprised at what you can buy on eBay," he said.

--Additional reporting by Lance Duroni. Editing by Jeremy Barker and Emily Kokoll.
