

Complex litigation

Looking at the legal, costly challenges of multidistrict cases

BY SHANNON CLINTON | CONTRIBUTOR

Involving thousands of lawsuits, 11 deaths and a historic oil spill in the Gulf of Mexico, the Deepwater Horizon rig explosion has focused precedent-setting attention on the complexity and breadth of multidistrict litigation.

When there are numerous, similar lawsuits filed against a company, like those related to the BP oil spill that cross multiple districts and states, they're typically consolidated into multidistrict litigation or an MDL case.

These complex civil actions are then heard in federal district courts by a single judge to make the process more efficient for both defendant and potentially hundreds of plaintiffs.

Maibeth Porter, a shareholder with Maynard Cooper & Gale, said an MDL case ensures a court's ruling is uniform from the start. It allows non-case specific discovery like depositions or general expert opinions, which can apply to all involved cases.

For a business named in these cases, Porter said defense witnesses are prepped as quickly as possible, "So if they're deposed early on, they're ready."

While there have been no recent changes in the laws applying to this litigation, she warned business owners that rules enacted around 2001 allow discovery of electronically stored information to include metadata and e-mails.

The legal expense related to these cases can be considerable.

But Porter said businesses that are self-insured or have liability insurance can defray the legal expenses and minimize exposure.

Rusty Johnson, assistant professor at Samford University Cumberland School of Law, said these cases typically arise with product liability.

There have been six or seven MDL proceedings in Alabama's Northern District, which includes Birmingham.

When combining cases into MDL, Johnson said knowing what criteria judges will use can also be helpful.

A standing panel of federal judges, the U.S. Judicial Panel on Multidistrict Litigation or MDL panel, weigh statutory factors to determine if there's a common issue of fact among the cases, such as whether it's conveniently located for witnesses to appear and other pretrial considerations.

Sharon Stuart, a partner with Christian and Small LLP, who has represented defendants in MDL cases, said a defendant pharmaceutical company may welcome becoming part of an

MDL. It gives the company a more focused way to manage an otherwise unwieldy discovery process.

Early in these cases, attorneys must read and digest significant amounts of data to effectively present information at trial. Because of their complexity, they often rely on expert assistance.

"With any case the lawyer really has to up front proactively learn the case, learn the products, learn about the alleged injuries, the alleged causation ... then really learn the science," she said.

According to Matt Minner, a partner with Hare Wynn Newell & Newton, without MDL, the top officers and other key personnel for a manufacturer defending itself against a thousand individual cases could be compelled to testify potentially hundreds of times. In an MDL, they'd only be deposed once.

Minner, who has worked on BP oil spill litigation and cases involving Merck's prescription drug Vioxx, said the oil spill litigation will be tried similarly to MDL cases against drug and medical device manufacturers.

The early ruling, which is critical to the case, will determine what evidence will be allowed.

According to Stuart, there are typically three

outcomes in MDL: To be disposed of on motions with a summary judgment, a "bellweather" trial conducted on one or more pending cases for each side to determine how they would fare in court, or more commonly, a settlement.

Minner said a bellweather trial can provide guidance to potentially thousands of other cases and it's not a mock trial - the results are binding. One Arkansas trial, in which he participated, led to a \$48 million verdict against the defendant pharmaceutical company.

Porter added local counsel also can be helpful to national counsel by anticipating how a judge will rule in certain circumstances based on past experience.

Ernest Cory, a founding partner with Cory Watson Crowder DeGaris PC and lead counsel in several MDL cases including the prescription drug Chantix case in Alabama's Northern District, said initiating multidistrict litigation is only the beginning.

After potentially hundreds to thousands of cases are combined into MDL, individual plaintiffs continue to work with their attorneys nationwide, making communication crucial, Cory said

'THE BOTTOM LINE is this is a very technical, very highly organized litigation.'

Ernest Cory
Founding partner
Cory Watson Crowder DeGaris

SEE LITIGATION, PAGE 15



Hare Wynn's Attorney Matt Minner, right, and Zondra Bess, the firm's litigation support specialist in IT, discuss a case.

LITIGATION: Some MDL cases have involved 100 million documents

FROM PAGE 9

While updating his own clients in the case, he's also updating many other attorneys by letter, e-mail and phone.

Systems that manage documents are also key as multiple motions and filings, and other legal documents, amassed over potentially years of litigation can also create millions of pages of paperwork.

In the past, Cory said, hard copies had to be stored in a single location. In a 1990s silicone breast implant case in Birmingham federal court, he recalled renting a 10,000 square-foot office just to house documents.

Today's computerized databases, metatags and search codes significantly simplify the process.

"It's not uncommon to have 100 million documents to go through and analyze," he said. But today's systems can code documents for relevance to the case and other criteria for easier and faster retrieval.

Cory said some judges have even created websites for MDL cases they oversee to help circulate case updates.

"The bottom line is this is a very technical, very highly organized litigation," he said.

Porter added most businesses are not blindsided by this type proceeding because it's preceded by numerous lawsuits filed in federal court based upon a common fact pattern.

"Most businesses in this situation began preparing," she said. "The danger is not preparing a defense as quickly as possible."

Shannon Clinton is a freelance writer. To reach her, contact athibodeaux@bizjournals.com.

BIRMINGHAM
BUSINESS JOURNAL