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Pharmaceutical and Medical Device MDLs And Mass Torts: Avenues to Settlement



By CATHY YANNI

With the current state of class action law and the difficulties associated with class certification, more and more pharmaceutical and medical device mass tort cases are being combined into multidistrict litigations (MDLs). This allows for the efficient processing of cases that could involve hundreds or thousands of plaintiffs in dozens of federal courts which all share common issues. At the end of 2012, there were 291 centralized MDL dockets, and 25 percent of those are product liability cases, the largest percentage attributed to any one case type. (See http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2012.pdf.) Due to their nationwide reach and volume of plaintiffs, the overwhelming majority of pharmaceutical and medical device mass torts are centralized in MDLs.

The U.S. Judicial Panel on Multidistrict Litigation was created in 1968 and is composed of seven judges appointed by the Chief Justice of the U.S. Supreme Court. The panel decides whether similar cases in multiple federal district courts should be centralized in a single MDL docket and which court should oversee the MDL. About one-third of all cases in Federal Court are in the MDL system and 27 percent of active federal judges have an MDL assignment. The MDL panel conducts hearings to determine whether cases should receive MDL status, and then assigns them to a judge. The

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panel adheres to a tight briefing schedule, which is completed within 30 days of the filing of a motion to centralize and meets every two months to hear arguments on MDL status and assignment. It hears arguments on 15 to 20 cases at each session, and each counsel has two to five minutes to argue to the panel. The panel recommends that parties arguing for the same result designate one spokesperson, but still anywhere from two to eight lawyers typically argue. After the arguments are heard, the panel issues an order about two weeks afterwards with MDL status and assignment.

At some point in nearly every pharmaceutical and medical device product liability MDL, a settlement program is established. In fact, it is estimated that 95 percent of all MDLs settle and there are many paths to settlement. More often than not, a settlement program commences with mediation and progresses through settlement and allocation.

Some federal judges employ the Bellwether approach. Bellwether trials are procedures that are intended to take a random sample of cases from a mass tort and try it with a jury, and in theory, the results can be extrapolated to the remainder of the cases. For example, many judges will allow the plaintiffs to select five cases and the defendants to select five cases to try in a Bellwether trial. The notion is that the jury verdicts will enlighten counsel as to the potential range of values of the individual cases in the MDL. State court coordinated proceedings also sometimes employ the Bellwether method. What also often has happened in practice is that the cases selected are extremes for one side, therefore not being a true representation of the typical cases involved in the mass tort.

Federal judges often appoint one or more mediators or special masters to assist with settlement in pharmaceutical and medical device product liability MDLs. Some judges take a very active role in resolving their assigned MDL matters and often hold mediations at the courthouse. On the plaintiff side, members of the plaintiff steering committee, along with individual claimant counsel, work together to resolve their claims. Defendants often assemble a national settlement team whose sole job it is to resolve the litigation. The lead settlement counsel focuses on settling the case, and should be someone who is a respected trial attorney and has the ability to work effectively with plaintiffs' counsel, knowledge of the mediation process, and negotiating ability and perseverance. Mediators appointed to MDLs

develop a deep understanding of the issues and thus gain valuable insight into the settlement values for the individual claims. Settlement counsel will work together with trial counsel and in-house counsel to learn the case and strategize for settlement, then together with the judge and mediator, negotiate with plaintiffs with purpose and authority to resolve specific cases and/or inventories.

In state courts, parties in complex pharmaceutical mass tort litigation will often seek assignment of one or more pending actions to a single court. They will petition a specific judicial council in that court for coordination of cases involving common questions of law and fact. Many state codes and laws provide for such coordination, which ultimately can help to streamline mediation and settlement strategies across all of the similar cases once they are aligned. In some cases the coordinated proceedings are also related to a federal MDL. Counsel, federal and state court judges, special masters and mediators in mass tort MDLs often coordinate their settlement strategies with the state coordinated proceedings, providing consistency across settlements.

Models of the Settlement Process

Over the years, several models for settling pharmaceutical and medical device MDLs have developed.

For the *In re: Baycol Products Liability Litigation*, a Minnesota MDL involving a prescription drug commonly prescribed to aid in lowering cholesterol, Judge Michael J. Davis created a settlement program overseen by a special master. The special master, along with the judge, appointed 10 mediators to resolve cases from jurisdictions across the United States. By design, the mediations took place in the cities where the plaintiffs were located. In addition, Judge Davis also reached out to state court judges who were handling individual cases filed in state court outside of the MDL to create a national settlement program.

The *In re: Zyprexa Products Liability Litigation*, a New York MDL involving an antipsychotic prescription drug and more than 10,000 claimants, settled for a nearly \$1.4 billion. Judge Jack Weinstein appointed four special masters to design and implement a claims administration process. Claimants were required to provide proof of injury and proof of use to the claims administrator for review, evaluation, and allocation by the special masters, who evaluated each claim and provided an award. Claimants could appeal the initial award and also claim for extraordinary injuries. The special masters handled the appeals process.

Judge Dan Polster took a hands-on approach to resolving more than 600 cases in *In Re: Gadolinium Contrast Dyes Product Liability Litigation* an Ohio MDL involving an MRI contrast agent. Judge Polster appointed a special master in the role of mediator while maintaining his involvement in the resolution of cases. Mediations were conducted singularly and in groups both before Judge Polster and across the country in cities where plaintiffs resided. There were state cases related to the same tort, and many of those state coordinated proceedings were aligned with the same special master. The special master was appointed in both the federal MDL by the federal judge and the California coordinated proceeding by the California Complex Litigation Judge.

For *In Re: Vioxx Marketing Sales Practices and Products Liability Litigation*, Judge Eldon E. Fallon, in the

Eastern District of Louisiana, ordered Bellwether trials. The plaintiffs and defendants picked representative cases that were tried and based on those results, the litigation moved towards settlement. Judge Fallon actively participates and encourages settlements. Some MDLs lend themselves to mathematical models for resolution and allocation. The *In Re: Vioxx* MDL used a points-based allocation system to consider such variables as age, injury, comorbidities. These points were then added up to produce a numerical value that corresponded to an allocation value. A "Vioxx calculator" was available online for claimants and counsel to use in determining their allocation. Judge Fallon appointed a Special Master who in turn appointed two other Special Masters to resolve post allocation appeals issues

State courts also employ similar methods to resolve consolidated pharmaceutical and medical device product liability cases, whether or not they are correlated MDLs. Most recently, Judge Brian Maritnotti appointed four mediators for *In Re: Stryker Rejuvenated Hip Stem and ABGII Modular Hip* after defense and plaintiff counsel jointly agreed to a panel.

HOW TO PREPARE FOR A SUCCESSFUL MDL SETTLEMENT PROCESS

1. From the inception of the litigation, both plaintiff counsel and defense should approach the litigation with a settlement strategy.
2. Lead plaintiff counsel, who will be part of the plaintiff steering committee (PSC), should include members who have strong negotiating skills.
3. The PSC should be critical as to the strengths and weaknesses of its members.
4. Defense counsel should analyze its client's strengths and weaknesses and assemble a national settlement team. In the best case scenario these assignments should be in place even before an MDL assignment is made.
5. A timeline for submission of plaintiffs' fact sheets, applicable medical records, and damages should be amassed and values assigned to individual cases.
6. Involve the MDL judge from the inception in a settlement program.
7. Encourage the judge to reach out to state judges to analyze the number of state court judges handling similar cases and if possible align settlement strategies with them.
8. Seek the assistance of a mediator and have both the federal and state court judges appoint the mediator as a special master so the mediator or mediators can have a global view of the mediation.

Conclusion

In recent years studies show an increase in pharmaceutical and medical device product liability lawsuits, and given the widespread sales of the products, many of these cases are being consolidated into MDLs. Many state courts such as California have coordinated proceedings and have similar coordinated settlement models and there is increased cooperation between federal MDLs and similar state court coordinated cases. The most successful MDLs for both plaintiffs and defendants occur when the parties and the court consider a settlement process from the inception of the MDL, and when the federal and state court proceedings are coordinated.