



INTRODUCTION TO THE MDL SETTLEMENT PROCESS

By Catherine A. Yann, Esq.

This four-part series will present a discussion on settling multidistrict litigations (“MDLs”). I will begin with Introduction to the MDL Settlement Process, followed by Best Practices for Settling, Ethical Obligations of Counsel and Allocation Methodology.

The Judicial Panel on Multidistrict Litigation

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. The MDL process was established to avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve resources of the parties, counsel and the judiciary. 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 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, although 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.

Bellwether Trials

MDL cases reflect a cross section of litigation, including antitrust, employment, intellectual property, securities and product liability cases. Most MDLs settle, and there is a variety of settlement models. In a bellwether trial system, generally the judge will request that the plaintiffs and defendants each select several representative cases for trial. Cases are fully prepared and tried to a jury. These cases are typically representative of issues of liability and damages that will be common to all cases. It is assumed that the verdicts will be instructive on the value of the cases within the MDL and will provide the parties with enough information to determine whether groups of cases should be settled. The drawback to this system is that the parties need to complete discovery, which can be extraordinarily expensive, and the verdicts may not be instructive.

Examples of cases that used bellwether trials are fenphen, Yaz and Yasmin and currently the transvaginal mesh MDLs.

Matrix or Grid Settlements

In some cases, there is a settlement protocol established. Cases are negotiated individually with a grid or range for valuing cases. In order to evaluate cases, plaintiffs are required to prepare a plaintiff fact sheet. This is generally a document agreed upon by the parties that seeks to collect a description of the claim, including proof of use, injury and diagnosis. Additionally, in pharmaceutical cases, plaintiffs are required to produce pharmacy records and/or receipts; hospital-

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ization records, including admission notes, discharge summary, diagnostic tests and itemized medical bills; and proof of wage loss.

The matrix or grid process takes into consideration variables such as age, date of injury, type of injury, complications, comorbidities, etc., and establishes fixed settlement values for claims that fall within each tranche. Occasionally, a “calculator” is established, allowing attorneys to input data for injured parties to automatically compute the allocation amount. We’ll explore allocation methodology in depth later. The original grid matrix used in settling asbestos cases was started 30 years ago, and since then, grids have been used to settle cases such as Vioxx and Zyprexa. In Vioxx, an innovation to the system was putting a calculator online so that lawyers and claimants could see the proposed values of their cases. Since then, the use of online applications in MDL settlements has increased.

Often, special masters and mediators are appointed by the court to monitor and adjudicate discovery issues and facilitate settlement on an ongoing basis. For example, special masters are often utilized to hear appeals in situations where plaintiffs dispute the assigned settlement value of the case. Sometimes the parties agree on a panel of mediators to implement the settlement. MDL judges can also appoint a magistrate judge to oversee the settlement.

Some examples of ways judges have used special masters and mediators in the settlement process include the following: In *Baycol*, the judge appointed 10 mediators to resolve hundreds of claims; In *Gadolinium*, the judge and a single mediator mediated approximately one thousand cases; In *Zyprexa*, the court appointed four special masters and a discovery special master as part of the settlement resolution. In the *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation* settlement agreement, the court appointed three special masters, a claims administrator and settlement oversight committee to oversee the distribution of the settlement funds.

In the next segment, I will discuss best practices for a successful MDL settlement process. ■

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