TORTS

WATCHING THE GROWING MULTI-PLAINTIFF CHALLENGE

In the product liability arena, a growing number of multi-plaintiff trials are finding their way into consolidated litigation, including multidistrict litigation (MDL). Many see this bundling of plaintiffs as confusing to juries. But a number of courts are open to the strategy—and that is creating challenges for defendants.

Consolidated litigation is used when there are numerous plaintiffs in related lawsuits, often in MDL. A small subset of representative plaintiffs is selected for bellwether trials, where each plaintiff's claims are heard separately. These trials provide test cases that can inform the litigation of the rest of the plaintiffs' cases. Thus, if there were 1,000 plaintiffs with similar claims, five might be picked as being representative of the entire group and heard separately in a series of bellwether trials.

But some plaintiffs are looking for a different approach. "Rather than adjudicate these cases one at a time, some plaintiffs are trying to lump cases together in one bellwether trial, with one jury hearing those multiple cases at the same time," says Andrew Kaplan, a partner at Crowell & Moring and vice-chair of the firm's Mass Tort, Product, and Consumer Litigation Group. The rationale for such a move is that hearing cases individually when there are a large number of plaintiffs is too inefficient.

From the plaintiffs' perspective, the potential for high awards offers another incentive. In a high-profile, multi-plaintiff trial in 2018, for example, a jury in Circuit Court of the City of St. Louis delivered a $4.69 billion verdict against Johnson & Johnson over the company's talc-containing products.

TOO MUCH FOR JURIES?

For defendants, the multi-plaintiff approach creates significant challenges. Often, product liability lawsuits involve fairly complex information and arguments. "Even when you're talking about the same product and the same type of alleged injury, there are real differences in each case that need to be analyzed by the jury," says Kaplan. For juries hearing a number of cases at once, it can be difficult to keep the separate cases and facts straight, or to clearly understand the nuanced differences across claims.

Perhaps worse, says Kaplan, "that approach is prejudicial to the defendant. If you have one plaintiff saying this product caused injury to me, a jury can judge that based on the facts of that case. If there are six people who are claiming similar things, it suggests that there is no issue about causation—that the injury actually happened. Juries think, Why else would there be so many people in this trial?"

That perception issue also comes into play when plaintiffs rely on experts to build their case. "The problem becomes especially acute in a situation where the science is dubious. When you have a dozen or more plaintiffs in the courtroom, the sheer number of plaintiffs improperly bolsters the science that lays at the foundation of the claims," says Kaplan.

Experience supports the idea that the multi-plaintiff approach affects juries' perceptions. For example, juries often return nearly uniform verdicts for all cases in a multi-plaintiff trial, even though the facts and claims differ among plaintiffs. In addition, it seems that the same sort of evidence can lead to different outcomes as the number of plaintiffs in a trial grows. Kaplan points to a series of related trials involving DePuy, a hip implant manufacturer, over the past few years. "The first bellwether trial was a single-plaintiff case in the Northern District of Texas, which ended with a verdict for the defense," he says. "The next trial, with five plaintiffs, resulted in a $550 million plaintiff verdict. The following six-plaintiff trial ended with a $1 billion plaintiff verdict. And most recently, another six-plaintiff trial produced a $247 million plaintiff verdict. That suggests that juries have a hard

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time making an independent, fair evaluation if there are multiple plaintiffs."

With such amounts at stake, plaintiffs have increasingly pursued the multi-plaintiff approach, especially in the medical device and pharmaceutical fields. "They recognize the pressure that's asserted on companies when they bring claims of hundreds or thousands of people at a time," says Kaplan. Often, the plaintiffs' bar uses aggressive tactics in setting up this litigation. "They will typically advertise widely, often spending millions of dollars to recruit a large number of plaintiffs," he says. "Increasing the number of plaintiffs creates the illusion that there is a real issue, even if most of those lawsuits are driven by someone seeing an advertisement on TV. And that high volume of plaintiffs then lets them argue that they need a consolidated multi-plaintiff trial to handle it efficiently."

This "build it and they will come" approach to inflating the number of plaintiffs often casts too wide a net, Kaplan continues. "It creates a consolidated litigation where there is a low bar to entry," he says. "If you are just signing up names and telling people that they will collect money at the end if there is a settlement, you're naturally going to get a lot of weaker claims thrown into the mix. Plaintiffs' attorneys will often start by bringing their stronger cases and then quickly add an inventory of people who really have nothing in the way of a claim."

THE COURTS' VIEW

The willingness to hear consolidated multi-plaintiff trials varies across courts, but over the past two years, the strategy has been endorsed by two federal appeals courts. In February 2018, the Fourth Circuit confirmed the use of consolidated multi-plaintiff trials in *Campbell v. Boston Scientific*, and more recently, says Kaplan, "the Fifth Circuit has not prohibited the DePuy hip implant bellwether multi-plaintiff trials."

Kaplan says that the push for consolidated multi-plaintiff trials—and the associated advertising that invariably follows—can be expected to continue. "For the plaintiffs, there's really little to lose in trying this strategy," he says. "We will probably see more of a push for this in places where courts and jury pools tend to favor plaintiffs, such as St. Louis and certain jurisdictions in West Virginia, Illinois, Florida, and elsewhere. And if we see more courts allowing it, then plaintiffs will be encouraged to use this strategy even more."

That is by no means a given, however. Kaplan notes the potential for judicial backlash against the use of multi-plaintiff trials, and there have been indications that some judges see problems with the practice. In a 2016 surgical-mesh case, Judge Clay Land, chief judge of the U.S. District Court for the Middle District of Georgia, noted that plaintiffs' attorneys had quickly expanded the plaintiff pool from 22 to 850 with "tag-along" plaintiffs who had frivolous claims, and took them to task for doing so. "He threatened the plaintiffs' lawyers with sanctions if they brought more cases like that," says Kaplan. "He also took exception to the whole consolidation process over that very issue—and he urged other judges to watch for these tactics in other consolidated trials." It remains to be seen if other courts will follow that lead.

A WARNING ON FAILURE TO WARN

Today, companies are seeing an uptick in "failure to warn" cases, in which plaintiffs claim that they were harmed by a product because of a lack of warning about potential injury.

One reason for the increase, says Crowell & Moring's Andrew Kaplan: "Failure to warn claims are easier to prove than actual product defect claims, so we're seeing more of these cases filed and progressing to trial."

Plaintiffs may also be leveraging changes in jury attitudes, according to research with jury surveys and mock juries—and experience in actual trials, says Kaplan: "Jurors now appear to be more accepting of arguments that put the burden on the company to provide warnings on their products." Younger jurors, in particular, are willing to see that as a company's responsibility and to judge a company's actions based not just on the actual warning and harm, but on the company's broader values, as well. "It's sort of a moral barometer question for them. So you'll see plaintiffs' attorneys asking juries questions like, 'Is this company good? Wouldn't a good company want to warn its customers about these things?'" he says.

In addition, jurors who have become accustomed to internet searches and online shopping are more inclined to expect access to a wealth of information about virtually anything—including products. "Many jurors now see a lack of warning as a company withholding information and taking away their freedom to make their own choice about using a product," says Kaplan.

With these changing juror perspectives, he says, "results in actual cases are showing that failure to warn claims are more successful than other defective product claims. And when the plaintiffs' bar sees a model that works, they are going to flock to that." Litigators need to be aware of these shifting jury attitudes and tailor their approaches accordingly.