UMKC Law Review

Volume 89
Number 4 *Multidistrict Litigation: Judicial and Practitioner Perspectives*

Article 15

June 2021

Bellwether Trials

Eldon E. Fallon
Eastern District of Louisiana

BELLWETHER TRIALS

Judge Eldon E. Fallon*

I. INTRODUCTION

The MDL process embodied in 28 U.S.C §1407 is emerging as a significant legal vehicle for dealing with complex litigation involving numerous cases. This process was originally intended to establish a centralized forum, selected by the MDL Panel, where related cases would be consolidated so that coordinated pretrial discovery could proceed in an efficient and effective manner. The centralized forum or "transferee court," as it is known, was to be a sort of waystation at which the preliminary aspects of the litigation could be more or less completed before individual cases would be sent back for trial by the transferor court, the court(s) where the cases were originally filed. In practice, however, the transferee court has done more than function as the discovery crucible. Statistically, only about two percent of MDLs are remanded back to the transferor court for resolution.[1] Most MDLs are resolved in the transferee court. One method used by transferee judges to accelerate a global resolution of an MDL is the "bellwether" or "representative trial."

II. DEVELOPMENT OF BELLWETHER CONCEPT

Initially, courts attempted to use the results of a bellwether trial to bind the parties in the similar consolidated cases. This attempted early use of bellwether trials was essentially an endeavor to adopt the method used in adjudicating a class action, but an MDL is not a class action. True, like a class action, an MDL is a consolidation of common or similar cases, but, unlike a class action, the commonality aspect of the cases in an MDL lacks the necessary predominance requirement of Federal Rule 23(b). That is to say, while there is some commonality of facts, this commonality aspect does not predominate over or exceed the individual aspect of each of the cases. In an MDL, each case remains distinct and separate from the others, and appellate courts have generally held that a decision on the merits in one does not bind other coordinated cases. Consolidation of individual cases in a transferee court by the MDL Panel pursuant to §1407 does not merge the suits into a single cause, change the rights of the parties, or make those who are parties in one suit parties in another.[2] Thus, while consolidation improves the efficiency of the pre-trial process, courts still face the possibility of trying hundreds or thousands of similar cases. It is in this setting that bellwether trials have developed and proved useful.

Although bellwether trials are not binding on other related cases, they are, of course, binding on the parties in the specific case that is tried and can also still be beneficial to the MDL process. However, the primary purpose of conducting bellwether trials is not to resolve the thousands of related cases pending in an MDL

---

* United States District Judge for the Eastern District of Louisiana.

[1] *See Statistical Analysis of Multidistrict Litigation*, JPML, http://www.jpml.uscourts.gov/statistics-info (last accessed Jan. 7, 2020).

[2] 28 U.S.C. § 1407 (2020).

by one representative proceeding, but instead to provide meaningful information, experience, and data to allow the parties to make an intelligent and informed decision as to the future course of the litigation. The type of information and data spawned by the bellwether process includes such things as informing the parties as to the economic costs of a trial, the effective use of jury questionnaires in selecting a jury, the time it takes for a trial, the performance of the witnesses during a trial, the appropriate exhibits for a trial and the most effective method of using and displaying them, the testing of various theories of liability or defenses in a trial setting, and, finally, the result or verdict rendered by the jury. This information and data can play an important role in informing the parties as to whether the litigation can be completely resolved either by a global settlement or some other global dispute resolution process. Even if a global resolution is not immediately available, the bellwether process makes future trials more efficient and less expensive. The bellwether process allows the parties to compile what is known as a "trial package," which usually includes video depositions, pleadings, expert reports, a copy of the jury questionnaire used in the bellwether trial, copies of the significant exhibits, *in limine* rulings in the bellwether trial, jury charges, and other material that can be of assistance in future trials in similar cases.

Moreover, even where a successful global resolution is achieved, whether it be a settlement or an alternate dispute process, the resolution most often consists of an "opt in" requirement and generally not all of the cases choose to do so. For those cases that do not opt into the final resolution, the parties (in those cases) have access to the trial package, which can be used in the trial of those later cases. This is another benefit resulting from the bellwether process.

III. SELECTING CASES FOR BELLWETHER TRIALS

With this in mind, it is timely to discuss the method for selecting the bellwether cases. After the initial determination to utilize the bellwether process, the transferee court and lead counsel for the parties should focus on the mechanics of the trial selection process. Ideally, the trial selection process should accurately reflect the individual categories of cases that comprise the MDL so the resolution of the bellwether cases can illustrate the potential for success or failure of a particular category of cases, give the measure of damages, and illuminate the costs of a trial as well as the forensic and practical challenges of presenting certain types of cases to a jury. Any trial selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact.

There are three separate but equally important sequential steps that will streamline any trial selection process and allow that process to achieve its full potential, regardless of the type of MDL. The first step requires the transferee judge to catalogue the entire universe of cases that comprise the MDL and divide the cases into several distinct, easily ascertainable categories. The easiest way to carry out this step is to instruct the parties to use fact sheets in place of interrogatories and construct the fact sheets so that this type of information is readily available. In MDLs, the use of interrogatories as a discovery device is problematic. They generate a plethora of motions, which can derail an MDL at the beginning or slow

its progress down to glacial speed so that it becomes a proverbial "black hole". Fact sheets allow the parties to acquire some basic information so they can proceed expeditiously with depositions and documentary requests. In practice, the fact sheets are prepared by the parties by agreement. If the parties cannot reach an agreement on the structure and content of the fact sheets, the transferee court can prepare them. If the fact sheets are answered electronically, they can be searched for pertinent information so each case can be placed in the appropriate category.

The second step requires the attorneys for the parties and the transferee court to select a manageable number of cases that reflect the various categories and contain cases that are both amenable to trial by the transferee court and close to being trial-ready. This becomes the discovery pool from which the bellwether cases are selected. The number of cases that make up the discoverable pool bears some relationship to the number of bellwether trials anticipated. For example, assuming the goal is to try five or six bellwether trials, a workable discovery pool would be about thirty cases. Ten can be selected by the plaintiffs, ten by defendant, and ten by the transferee court. The court can either select specific cases or randomly pick them. If fact sheets are completed electronically, there are computer programs that will allow the court to randomly pick the ten cases reflecting the census of the litigation.

The third step requires the attorneys and the transferee court, after case specific discovery nears completion, to select the cases for the bellwether trials. There is no one prescribed way for selecting bellwether cases. The trial selection process is limited only by the ingenuity of each transferee court and the attorneys for the parties. Each transferee court that utilizes the bellwether process must consider all the unique factual and legal aspects specific to the MDL in question, and then fashion an appropriate, customized trial selection formula. One method empowers the court to do so either by picking specific cases or by random selection. Another method is for the attorneys to do it, with each side picking a fixed number of cases, as well as vetoing one case selected by the opposing side. A third way involves both the attorneys and the court picking the bellwether cases; each side has a certain number of picks and the court makes its picks by random selection.

IV. TRIAL LOGISTICS

Once the cases are selected for bellwether trials, the focus shifts to the logistics of the trials. An initial decision needs to be made about the length of time to set aside for each bellwether trial. Experience indicates that time limits should be favorably considered. Otherwise, the trials become interminable and less focused. This can be done in several ways. One way is for the court to meet with counsel, discuss the number of witnesses to be called, and allot a certain number of hours to each side. Another way is for the court to assign a number of days to each side. In any event, it should be possible to conduct a bellwether trial in two to three weeks. To accomplish this objective, however, it is necessary that the trial be devoted to the testimony of the witnesses and not be consumed by argument of counsel over objections regarding the admissibility of exhibits. This can be

avoided by the court making rulings–on the record–as to the admissibility of the exhibits in advance of trial after affording opposing counsel the opportunity to object. This does not eliminate the need for counsel to introduce the exhibit at trial, but it avoids the need for opposing counsel to object since her objection has already been made and put on the record. It is also helpful for the court to conduct pretrial meetings each day of trial to discuss the impending testimony and any anticipated issues that may occur. The court can give counsel its anticipated ruling if necessary, so that the trial can proceed more efficiently.

Another effective method for making the bellwether trial proceed more efficiently is the use of jury questionnaires. This can considerably shorten the time to select and seat the jury. Generally, the parties can meet, confer, and produce an agreed-upon questionnaire, which the court can alter if necessary. If counsel cannot agree, then each side can present their proposed questionnaire and the court can fashion the appropriate one to use. The most effective method of utilizing the questionnaire is to invite the prospective jurors to court about one or two weeks before the trial and fill in the questionnaire. This ensures that their answers are their own and not the answers of friends or family. The questionnaires can then be sent to the attorneys for review and a date set with the court two days hence for cause challenges which, of course, are put on the record. The use of jury questionnaires generally allows the jury to be selected in several hours so that the trial can commence more quickly.

When selecting the dates for the bellwether trials, it is helpful to select the dates for all of the designated trials with perhaps a month or three weeks between cases so that the parties can prepare for the next trial. It is also helpful for the court to inform counsel, at the outset, that if one of the trials settles, the next one must move into the settled case's slot. This insures a more efficient process.

V. STREAMING TESTIMONY

One practice gaining favor in bellwether trials in MDLs is the streaming of testimony. This is particularly useful in product liability cases, especially prescription drug cases. In those cases, the plaintiffs must prove what the defendant manufacturer knew or should have known at various periods during the development of the drug. They generally attempt to do this by taking the depositions of the defendant employees. It is not unusual for these depositions to be taken early in the discovery process when the plaintiffs have several potential theories of recovery that they are seeking to prove. The depositions, which are usually conducted by video, cover the entire litany of theories and generally consume the full time limit of seven hours.

When one of the cases in the MDL comes up for a bellwether trial several years later, many of the theories covered in the deposition are no longer viable or do not form the main theory of liability in the particular case. Usually, the trial is in a different state than the residence or location of the defendant employee who was deposed long ago, so the witness cannot be subpoenaed and will not voluntarily come to court to testify. The deposition can, of course, be used, but it will take seven hours to present to the jury and contains a lot of information that

may not be relevant or useful in the present theory of liability. In such an instance, the plaintiff attorney generally attempts to excerpt the testimony she feels is germane. This attempt is usually met with an objection based on Rule 106 of the Federal Rules of Evidence, arguing that additional testimony is necessary to put the testimony in proper perspective.[3] This usually increases the length of the testimony and dilutes its focus.

To give each side a fair opportunity to present their case as they see fit, a transferee court may elect to stream the witness's testimony. Under 28 USC §1407(b), the transferee court in an MDL has the same power as any district court in any district in the country. As an example, acting under 28 USC §1407(b), the transferee judge in a recent Xarelto case issued a subpoena to a witness in Philadelphia directing the witness to appear at the federal court in Philadelphia, and his testimony was streamed to the trial which took place in Jackson, Mississippi.[4] The testimony took two hours and was focused on the significant theories and defenses.

VI. CONCLUSION

The injection of jury trials into the MDL process through the use of bellwether trials can greatly assist in the resolution of disputes. At a minimum, the bellwether process provides counsel the opportunity to develop their cases and gain practical litigation experience. This can lead to the development of trial packages, which can be used by contract or retained counsel in the event that a global resolution cannot be reached, and a particular case needs to be tried. But the objective results obtained in the bellwether trials often precipitate settlement negotiations, and also ensure that all of the parties to such negotiations are grounded by real-world evaluations of the litigation by multiple juries. Indeed, these experiences, coupled with the alternative of dispersed litigation in courts across the country, supply a strong impetus for global resolution.

Despite the benefits of bellwether trials in the MDL process, there are some potential disadvantages associated with the practice. Bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. This is to be expected to a degree, as coordinating counsel often pull out all the stops for bellwether trials given the raised stakes. For example, in bellwether trials, it is not unusual for both sides to utilize teams of lawyers and jury selecting consultants, shadow juries, and mock juries. Live testimony is usually streamed from the courtroom into separate "war rooms" in the courthouse, as well as to remote locations around the country so that attorneys can follow along and, in some instances, draft various motions in real time. All of these bells and whistles add up; indeed, holding multiple trials on this stage can quickly swell the cost of multidistrict litigation. Furthermore, because bellwether trials are typically held in the transferee court's judicial district, the informational output is generally limited to the local jury pool. And in a country as diverse as ours, local communities are

[3] FED. R. EVID. 106.

[4] The author has personal knowledge of this subpoena as a judge involved in the case.

bound to exhibit divergent tendencies and beliefs. Of course, to the extent that this reality raises concerns, the transferee judge can travel to different locations to hold bellwether trials before different jury pools. This was done in the Vioxx and Xarelto MDLs when the transferee court, located in New Orleans, tried some cases in Texas and Mississippi to give the attorneys experience with different jury pools.[5] But, even recognizing these disadvantages, the use of bellwether trials proves a balanced and effective tool in resolving complex multidistrict litigation.

[5] Nicholas Malfitano, *Xarelto Litigation Resolved with $775M Global Settlement; Louisiana Federal Court, Philadelphia's CLC Handled Most Cases*, PENN. RECORD (Mar. 26, 2016), https://pennrecord.com/stories/512325249-xarelto-litigation-resolved-with-775m-global-settlement-louisiana-federal-court-philadelphia-s-clc-handled-most-cases.