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'Good Ol' Boys Club' In MDL; Same plaintiffs firms repeatedly lead suits.

AMANDA BRONSTAD

How many lawyers does it take to manage a mass tort action?

The question's not a joke. The high number of plaintiffs attorneys appointed to steer multidistrict litigation and the repeated use of the same firms are drawing criticism from lawyers competing for those posts and from the judiciary involved in several prominent MDL cases this year.

The tasks of heading an MDL—a civil procedure mechanism that coordinates hundreds or thousands of lawsuits against the same defendants—come with great risks because attorneys must work on contingency while representing plaintiffs in cases spread across the country. But there can be huge rewards to the attorneys' reputations and pocketbooks, given that the bulk of the legal fees go to them and settlements can be in the billions of dollars.

The number of leadership posts in an MDL range in size from a handful of firms to, as in the Vioxx personal injury cases, more than 100 spearheading the litigation. Lawyers in lead roles, which can include lead counsel or members of a plaintiffs steering committee, make key legal decisions such as pretrial motions and discovery.

Some judges appoint every attorney who serves in a leadership position. Other judges allow lead counsel to reach out informally to other firms, often creating subcommittees for particular specialties like discovery or science issues.

"The size can sort of reflect—and this is probably a bad way of putting it—whose back needs to be scratched in this litigation," said University of Georgia School of Law professor Elizabeth Burch, who published the first list of "repeat players" in MDLs as part of a 2015 law review article called "Judging Multidistrict Litigation." "It's a small group of people, most are repeat players, and so when you create committees, you create committees based on who supported you in the last MDL."

When the "usual cast of characters," as attorney Wayne Travell described it, filed applications for lead roles in the MDL against Lumber Liquidators Holdings Inc. over dangerous levels of formaldehyde in its wood flooring, he argued in court papers filed last month for the appointment of Cullin O'Brien, a solo practitioner in Fort Lauderdale, whom Travell described as a person "of color." Travell, managing partner of Leach Travell Britt in Tysons Corner, Virginia, also pushed for Carin Marcussen, a "female attorney" at Oklahoma City's Federman & Sherwood.

"The 'good ol' boy' network should not be used to exclude qualified, capable attorneys," he wrote. Travell, O'Brien and Marcussen did not respond to requests for elaboration.

That network has long existed anecdotally. But Burch's report for the first time analyzed a representative sample of 72 MDLs focused on products liability and sales practices that were pending on a particular day, May 14, 2013. Topping the list of law firms was Pensacola, Florida's Levin Papantonio Thomas Mitchell Rafferty & Proctor; Motley Rice of Mount Pleasant, South Carolina; and New York's Parker Waichman. Even though less than 41 percent of firms had lawyers appointed to more than one lead position, lawyers from those firms held 78 percent of the leadership posts, Burch found. That suggests law firms are retaining their repeat-player status by encouraging many of their lawyers to apply for lead roles in MDLs, Burch said. Her report cautioned that the presence of repeat players could lead to a dearth of diverse ideas on leadership committees and encourage collusive settlements.

Paul Geller, who lost a bid to lead the data-breach MDL against Anthem Inc. on his own, also said the repeatplayer trend has resulted in large leadership committees, often in cases that don't really need them. "These are not complex cases with millions of pages of documents," said Geller, a partner at Robbins Geller Rudman & Dowd. "You need an expert, maybe two, but you don't need the level of resources you do in something like Vioxx."

Seattle's Hagens Berman Sobol Shapiro, one of three firms appointed on Aug. 5 to lead the Lumber Liquidators MDL, argued that the "bloated leadership" proposals from competing law firms would lead to duplicative work and more attorney fees.

"In this case, I thought it was particularly important to have a small leadership team because of only one defendant, and there's really one major issue that affects all the cases," said managing partner Steve Berman.

Some judges also have pushed for smaller leadership committees, often to keep down the costs of the litigation. For example, U.S. District Judge Lucy Koh requested a committee of a "very lean structure" in the Anthem MDL.

Eric Gibbs, a partner at San Francisco's Girard Gibbs, said courts are becoming "more sensitive" to the size of committees. His firm was one of four appointed to lead the Anthem MDL. "That allows the courts to manage the cases better and ultimately allows the courts to keep attorney fees in check," he said.

But that's not the case for all judges. In litigation against General Motors Co. over ignition-switch recalls, U.S. District Judge Jesse Furman last year appointed 15 attorneys to lead the MDL.

Complex cases, such as the GM case, often need larger leadership committees, some lawyers say. "This is an extraordinary David versus Goliath dynamic," said Richard Arsenault of Neblett, Beard & Arsenault in Alexandria, Louisiana. "A lot of deference should be given to experienced plaintiffs counsel who have been in these wars and understand what kinds of teams they need to put together."

Other lawyers said repeat players are the nature of the beast. In convincing judges to give them lead roles, lawyers often advocate for colleagues who worked with them on prior cases. "You've got to have people who have experience and have done this type of litigation before," said Brian Barr, a shareholder at Levin Papantonio.

Joseph Rice, founding member of Motley Rice, who joined a leadership committee of 15 attorneys in the Deepwater Horizon oil-spill MDL, said not every firm has the financial wherewithal to lead an MDL, which could take years and cost millions of dollars. "The litigants deserve to have firms that are able to go toe to toe with firms like Kirkland & Ellis that have 1,000 lawyers and an unlimited budget," he said.

PLAINTIFFS FIRMS AT THE HELM OF MDL

The shops that frequently serve in lead roles in multidistrict litigation.

PLAINTIFFS FIRMS AT THE HELM OF MDL

LAW FIRM	# OF MDL POSITIONS*
* Numbers for some firms include all four pelvic mesh MDLs.	
Levin Papantonio Thomas Mitchell Rafferty & Proctor	22
Motley Rice	21
Parker Waichman	21
Neblett, Beard & Arsenault	20
Seeger Weiss	20
Beasley, Allen, Crow, Methvin, Portis & Miles	18
The Lanier Law Firm	18
Lieff Cabraser Heimann & Bernstein	17
Robinson Calcagnie Robinson Shapiro Davis	16

PLAINTIFFS FIRMS AT THE HELM OF MDL

LAW FIRM	# OF MDL POSITIONS*
Aylstock, Witkin, Kreis & Overholtz	15
Levin, Fishbein, Sedran & Berman	15

Source: Elizabeth Burch, professor, University of Georgia School of Law.

Contact Amanda Bronstad at abronstad@alm.com.

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