THE NATIONAL LAW JOURNAL

SEPTEMBER 20, 2010

Daily Updates at NLJ.COM

An ALM Publication

A SPECIAL REPORT

Sometimes the small fry get swept up in the net

Parties peripheral to the wrong alleged find themselves at a distinct disadvantage.

BY RUTH DOWLING AND FLORENCE CRISP

According to the Web site of the Judicial Panel on Multidistrict Litigation, one of the core purposes of the panel's centralization process is to "conserve the resources of the parties, their counsel and the judiciary." The theory is that, by consolidating numerous, geographically diverse actions into a single multidistrict litigation (MDL) action for pretrial purposes, early motion practice and discovery will be streamlined for all participants in the process, including plaintiffs, defendants and the courts.

MDLs unquestionably increase efficiency and permit resource conservation in many cases. When hundreds or even thousands of plaintiffs have causes of action against a single defendant or a small number of defendants—for example, as a result of an airplane crash or the undisclosed side effects of a particular drug—it is hard to dispute that consolidation of the pretrial proceedings benefits all of the parties.

However, the MDL process is not limited to cases in which a small number of defendants are alleged to have done a great deal of harm; it increasingly is being used to manage litigation challenging an industrywide practice involving large numbers of defendants. For example, *In re Insurance Brokerage Antitrust Litigation*, No. MDL-1663 (D.N.J.), challenges contingent commission arrangements between certain brokers and insurers. Numerous brokers and insurers were named in the first wave of suits filed in 2004, but tag-along actions continued to be filed as late as 2009, adding new defendants years after the litigation commenced.

In these industrywide cases, the MDL process can create a snowball effect, dragging companies into the case that might never have been named absent the consolidated proceeding. A plaintiff's incentive to cast a wide net for potential defendants is high because of the dollars at stake. At the same time, the transaction costs to file a tag-along case are low. As a result, companies in the industry with little or no direct involvement in the challenged practice may find themselves the unlucky members of a large defense group.

UNIQUE CHALLENGES

These "uncommon" defendants face unique strategic and practical challenges. It is exceedingly difficult for a single defendant to find an early exit from an MDL. The interests of the uncommon defendant will inevitably be overshadowed by those of co-defendants whose very way of doing business may be at stake. And while the industry giant whose conduct is at issue incurs lower litigation costs defending an MDL as opposed to dozens of disparate cases around the country, the uncommon defendant, which likely would not have been sued but for the MDL, faces increased costs borne of the much larger litigation to which it is tagged.

How then, can the uncommon defendant navigate these unfriendly waters? As a first step, can the uncommon defendant escape the MDL by opposing transfer?

Under the MDL panel's rules, tag-alongs are conditionally transferred to the MDL as soon as the clerk of the panel learns that it is a potential tag-along action. The conditional transfer can occur even before an uncommon defendant is served. It is assumed that the panel's prior opinions and orders establishing the MDL apply with equal force to the tag-alongs. The uncommon defendant is placed in the difficult spot of trying to convince the panel that its circumstances are sufficiently distinct to warrant vacating the conditional transfer order or that the original orders should be reconsidered. In the typical circumstance, when the facts alleged in the tag-along complaint are taken verbatim from complaints already consolidated in the MDL, an uncommon defendant is unlikely to convince the panel to vacate its conditional transfer order.

Having been swept into the MDL, an uncommon defendant can take steps to manage its costs and chart its own course. The uncommon defendant should consider, and periodically re-evaluate, several key issues, including whether to pursue an early exit strategy; whether to go it alone or join forces with a joint defense group encompassing all or some defendants; how to influence joint defense group decisions; and how best to manage monitoring, discovery and expert costs. The uncommon defendant is under pressure, both from MDL courts that prefer consolidated proceedings and joint defense groups, not to diverge from the larger pack of defendants. Although the uncommon defendant should take advantage of the efficiencies the joint defense group can offer, it must continually evaluate whether it is better served by forging its own path.

Successfully navigating any defendant out of an MDL in its early stages, regardless of how weak the claims against the defendant might be, is no easy task. Nevertheless,

any opportunity for an early exit should be carefully considered.

If the uncommon defendant can make a strong factual case that it should not have been named because it had little or no involvement in the challenged practice, reasonable plaintiffs' counsel may be open to dropping the claims against that defendant. After *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), plaintiffs' counsel may be more open to dropping their claims against defendants whose conduct is truly peripheral to the dispute. Of course, plaintiffs' willingness to drop a particular defendant may not come without some strings attached, and plaintiffs may require cooperation from the exiting defendant in the form of production of documents and data relevant to the industry.

THE MORE AGGRESSIVE OPTION

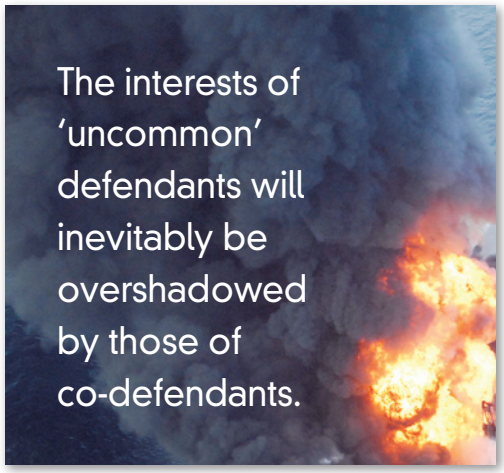
A more aggressive approach, such as a motion pursuant to Federal Rule of Civil Procedure 11, may be appropriate in some instances. Such a motion can be a powerful tool to force plaintiffs to re-evaluate whether their claims against the uncommon defendant are truly warranted. Plaintiffs' ability to control costs hinges on the defendants acting as a group, filing joint motions and consolidated sets of discovery. If the plaintiffs are required to respond to individual motions and/or discovery tailored to the particular circumstances of an uncommon defendant, their incentive to bring additional tag-along actions is reduced. In practice, the MDL process often works against the uncommon defendant's attempt to have its circumstances individually considered, with courts often insisting that defendants consolidate their motion practice.

In either case, the uncommon defendant also may want to consider whether an early nuisance-value settlement serves its interests. Settling for any amount may well be anathema to the uncommon defendant, whose conduct is, at most, only peripherally related to the challenged practice. The uncommon defendant must be prepared, however, for the prospect of defending against the claims for years.

The uncommon defendant must analyze whether its unique interests and concerns are best served by joining forces with the core defendants or going it alone.

Typically, the benefits of participating in the joint defense group are substantial. Those benefits include sharing the burden and costs of legal research and analysis, drafting of motion papers at the motion to dismiss and summary judgment stages, briefing common discovery issues and identifying and working with expert witnesses. The downside is that the core defendants—that is, those with the most at stake—are likely to exert more control over the direction of the group and may be willing to undertake projects on behalf of the group as a whole for which the uncommon defendant has no need.

Another option the uncommon defendant should consider is participating with



the larger joint defense group but also maintaining communications with other uncommon defendants. As a group, the uncommon defendants may be better equipped to assert influence over the larger defense group, to ensure that their unique interests are not compromised by decisions made by core defendants. Identifying other uncommon defendants early in the litigation and cultivating a productive relationship with their counsel may prove very useful to the uncommon defendant.

ABILITY TO RAISE ISSUES

A related issue is making sure the uncommon defendant has an adequate say in defense-group decisions. As noted above, MDL defendants frequently collaborate via joint defense groups. Furthermore, judges presiding over MDLs often encourage—or require—defense counsel to coordinate and may even appoint liaison counsel to speak on behalf of the defense group as a whole.

Typically, the defense group's representative to the plaintiffs and the court is counsel to one or more of the core defendants. Logically, this makes sense. The core defendants typically have more at stake and also devote greater resources to defending the case than the uncommon defendant. That said, the MDL process cannot function properly and fairly if the uncommon defendant is deprived of an opportunity to raise arguments unique to it.

Courts presiding over MDLs should be cognizant of this dynamic. The court may want to appoint separate liaison counsel for defendant subgroups. Within the defense group, the uncommon defendant is likely to be best served by cooperating with core defendants while simultaneously taking steps to protect its unique interests. This requires diplomacy as well as the ability to appreciate when diplomacy alone is insufficient.

Implementing effective strategies to reduce the expense of defending an MDL is critical for the uncommon defendant. Perhaps one of the most significant ways an MDL defendant can control costs is to share the burden of drafting motions and expert-witness fees with others in the defense group. The uncommon defendant should also consider whether attendance at all status conferences is worth the expense of sending an attorney. The MDL court can minimize unnecessary costs by scheduling teleconferences in lieu of in-person status conferences when appropriate.

Certain expenses, however, can neither be avoided nor shared. Primary among such expenses is the cost of responding to discovery requests. The uncommon defendant should analyze carefully how best to control such costs. This may entail individualized negotiations with plaintiffs, who generally propound the same discovery requests to all MDL defendants. Other options include using lower-cost contract document reviewers and specialized electronic review platforms.

Viewed from the perspective of the judicial system as a whole, the MDL unquestionably achieves efficiency for the courts and the core parties. For the unlucky defendant whose conduct is only peripherally related to the challenged practice at issue, however, the MDL mechanism often has the opposite effect. Managing the unique issues facing such defendants is challenging. Most important, defense counsel should understand how the uncommon defendant's interests may differ from those of the core defendant. By implementing strategies to protect those unique interests, the uncommon defendant can better navigate the sometimes troubled waters of the MDL.

Ruth Dowling is the co-chairwoman of the litigation department of Edwards Angell Palmer & Dodge and works in the Boston office. Florence Crisp is a litigation partner in the firm's office in Providence, R.I.