



## BEST PRACTICES FOR SETTLING MDLS

By Cathy Gianni

In recent years, studies have shown an increase in product liability lawsuits, and given the widespread sales of the products, many of these cases are being consolidated into multi-district litigations (MDLs). Many state courts, such as California's, have coordinated proceedings and have similar coordinated settlement models, and there is increased cooperation between federal MDLs and similar state-court-coordinated cases. The most successful MDLs for both plaintiffs and defendants occur when the parties and the court consider a settlement process from the inception of the MDL and when the federal and state court proceedings are coordinated into an overall settlement process.

For the purposes of this discussion, we will assume that an MDL has been created and assigned to a federal judge. We will also assume that there are state-court-coordinated proceedings assigned to a single complex litigation judge.

The federal district court judge should have a process in mind to settle the litigation. Recently, there has been a movement to coordinate the MDL cases with the similar state court cases. This requires cooperation between the MDL judges and state court judges. Some MDL judges appoint a Special Master to oversee the settlement process, or at times a Magistrate Judge is used to assist in settlement. On occasion, the Special Master for Settlement appoints deputy Special Masters or federal mediators to assist with the resolution of the cases. In the best-case scenario, both federal and state courts will utilize the same Special Master, which allows them to understand the complexity of the litigation, the incentives of the parties and the path toward global resolution.

The Special Master assigned to the litigation develops a deep understanding of the issues and knowledge of settlement values for the individual claims. Some judges take a very active role in resolving their assigned MDL matters, holding mediations at the courthouse with the assistance of the mediator. There are many paths to coordinating mediation. The Special Master can work with individual firms to settle cases individually or in a pool, and he or she can also work with the plaintiffs' steering committee (PSC) to resolve cases on a global basis.

From the inception of the litigation, both plaintiffs' counsel and defense counsel should approach the litigation with a settlement strategy. In every MDL and coordinated state litigation, there is a PSC. There should be designated members of the PSC who will serve as the plaintiffs' negotiating committee. Typically, these individuals have vast MDL experience and maintain ongoing relationships with plaintiffs' counsel, defense counsel and, more importantly, state and federal Judges.

A key part of settlement strategy for the defense is to create a national settlement team whose sole job it is to resolve the litigation. The settlement team needs a lead counsel whose only focus is settling the case. He or she should be a respected trial attorney with knowledge of the mediation process, have the ability to work effectively with plaintiffs' counsel and possess great perseverance. Settlement counsel will work together with both trial and in-house counsel to learn the case and strategize for settlement. With an overall settlement strategy in place, discovery (often the most expensive aspect of litigation) can focus on key issues.

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Ideally, the PSC and defense counsel will cooperate to develop a plaintiff fact sheet (PFS) to collect pertinent information with respect to exposure, use and potential damages. In some cases, the court will streamline the discovery process to promote settlement.

Once the parties are satisfied there is sufficient information to evaluate the individual cases, a formal settlement program can be established. There are various approaches to resolution based on the size, complexity and potential value of the litigation. Global settlement is often utilized in situations where the injuries are quantifiable and manageable through a claims process overseen by the court and the Special Master. In situations where the injuries are broader, cases are often settled on an inventory basis firm by firm. In certain situations, outlier cases having extreme damages may be settled individually. Often such cases are settled in a plaintiff's home jurisdiction with plaintiff's counsel, national defense settlement counsel and a mediator or Special Master in attendance.

In conclusion, there is no cookie-cutter solution. Each MDL has a distinct character. Despite the complexities, the best practice is to have a coordinated settlement strategy at the outset between the federal and state court judges, Special Master, PSC and national defense counsel. ■

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