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MDL Judges Are Coming Up With New Ways to Manage Thousands of Lawsuits

Judges in multidistrict litigation over Zantac and 3M's combat earplugs have used administrative dockets and registries to manage thousands of claims, while technology is being used to select cases for bellwether trials.

By Amanda Bronstad | October 11, 2021



U.S. District Judge Robin L. Rosenberg of the Southern District of Florida. (Courtesy photo)

At a hearing last month in the multidistrict litigation over Zantac, plaintiffs lawyer Mikal Watts praised the use of a registry that now has collected 140,000 claims from individuals insisting the heartburn medication caused them to get cancer.

The claims far exceed the 828 lawsuits pending over Zantac as of Sept. 15, according to statistics from the U.S. Judicial Panel on Multidistrict Litigation. But the registry is a way for U.S. District Judge Robin Rosenberg, who is overseeing the Zantac multidistrict litigation in West Palm Beach, Florida, to keep track of the claims that are out there—whether they are filed or not.

“The registry is critical to what we’re trying to do. It will be the standard in every future MDL,” Watts, of San Antonio’s Watts Guerra, told Rosenberg at the Sept. 15 hearing. “The reason is we have so much information already that allows us to start this process.”

A registry of claims is among several innovations coming from the bench and bar on how to manage growing dockets in multidistrict litigation. Many of the same ideas are now before a federal rules committee that is considering creating the first rules for multidistrict litigation. In addition to registries, some judges have shifted cases to administrative dockets and, in a nod toward technology, used Microsoft software to select bellwether cases for trial.

Rosenberg and U.S. District Judge M. Casey Rodgers, who is overseeing the multidistrict litigation over 3M’s dual-ended combat earplugs in Pensacola, Florida, are dealing with some of the largest dockets in the country. They have potentially thousands of plaintiffs, from which to select only a handful for trials that could impact the rest of the litigation.

“For the selection of bellwether trials, there hasn’t historically been a single ‘right way’ to do that,” said Lynn Baker, a professor at the University of Texas School of Law. “What this registry process is potentially attempting to do, combined with randomization, is to make that process more useful to both sides.”



U.S. District Judge M. Casey Rodgers, of the Northern District of Florida. (Courtesy photo)

‘Laboratories of Great Innovation’

Judges in multidistrict litigation are grappling with increasingly large dockets. The 3M earplug multidistrict litigation alone has nearly 260,000 claims, according to the JPML. As a result, some judges have ordered an “initial census” of the cases (<https://www.law.com/2019/10/29/some-mdl-judges-like-the-defense-bar-want-an-initial-census-of-cases/>) to help manage their dockets and, in some cases, guide them on which lawyers to appoint to leadership positions.

The push to identify the landscape of cases much earlier in the process comes amid increasing criticism of the traditional method, which involves having lawyers fill out plaintiff fact sheets for each client, often by hand and on paper. That process was cumbersome, lengthy and a “giant waste of time and money,” Watts said in an interview.

Now, judges are creating registries or administrative dockets, which can identify cases before lawyers even file them.



Mikal Watts, partner at Watts Guerra at his office in San Antonio in 2016. (Photo: Mark Sobhani Photography)

“If the statute of limitations isn’t expiring soon, the law firm might not file the cases until it has had a chance to investigate them,” Baker said. “Then, when approached by the defendant to do an inventory settlement, they will give the defendant a list of who they represent.”

The new ideas are appearing before the Advisory Committee on Civil Rules, which is weighing whether to implement the first rules for multidistrict litigation. Rosenberg, the judge in the Zantac cases, heads its multidistrict litigation subcommittee.

One of the ideas under consideration is the initial census, which has been used by both Rosenberg and Rodgers, as well as U.S. Judge William Orrick, who is overseeing the multidistrict litigation over Juul electronic cigarettes in San Francisco. At a Sept. 17 webinar hosted by the University of Berkeley School of Law’s Civil Justice Research Initiative, Advisory Committee chairman Robert Dow, a federal judge in Chicago, acknowledged those efforts. But he cautioned

that judges need to have flexibility in multidistrict litigation, which often evolves over time and can create “laboratories of great innovation.”

The advisory committee has tabled several suggestions but is considering rules in multidistrict litigation that focus on fact disclosures and initial scheduling of cases, according to an agenda book published prior to its Oct. 5 meeting.

‘Stroke of Genius’

Just how do registries and administrative dockets work? Each has its own purpose in managing a large number of cases.

“One might have a census registry for purposes of getting a better understanding of what the characteristics of the cases are,” Baker said. “You might have an administrative docket for certain cases already there as a way for them to be moved off the front burner.”

For the registry in the Zantac multidistrict litigation, Rosenberg appointed Jaime Dodge, director of the Institute of Complex Litigation and Mass Claims at Emory University School of Law, as special master to work with the lawyers on initial census forms.

Dodge, appointed in a similar role in the Juul multidistrict litigation, didn’t respond to a request for comment.

In an interview, Watts called Rosenberg’s census program a “stroke of genius.”

“You know the age of the person, you know what state they come from, you know the alleged usage facts and, therefore, in Zantac, you know who the defendants are,” he said.

And, Watts said, most defense attorneys are on board with the idea. At last month’s Zantac hearing, lawyers for Pfizer and Boehringer Ingelheim Pharmaceuticals Inc., two of the defendants in the multidistrict litigation, praised the registry.

“We think the registration information is important,” defense attorney Andy Bayman, a King & Spalding partner in Atlanta, told Rosenberg.

In the 3M cases, Rodgers set up an administrative docket to house most of the cases.

“Administrative dockets have been around for a very long time,” Baker said. “They have typically been used by courts for put cases in a ‘holding pattern.’”

Lead plaintiffs counsel Bryan Aylstock, a partner at Aylstock, Witkin, Kreis & Overholtz in Pensacola said the administrative docket is designed to give lawyers time to get military records for their clients, who are U.S. service members alleging the earplugs caused hearing problems.

A few months ago, Rodgers began ordering the transfer of thousands of cases from the administrative docket to the active docket, where plaintiffs can choose whether to pursue or dismiss their lawsuit.

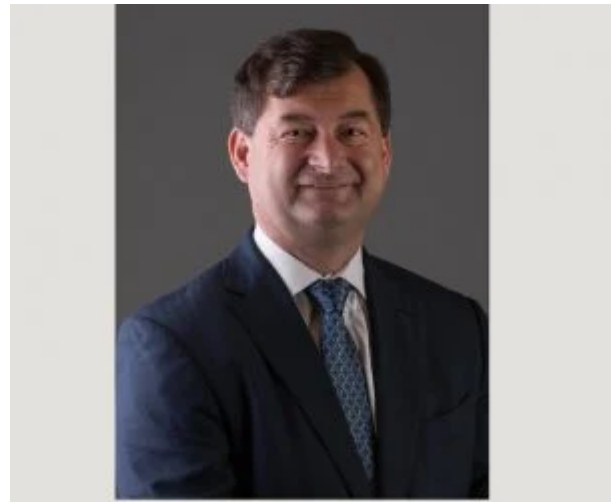
“The admin docket was never intended to exist in perpetuity,” Rodgers said at an Aug. 20 hearing, according to the transcript. “It may take as much as a year. I’m hoping not, but it could take as much as a year for all of these cases to get transitioned.”

Not everyone is on board with this strategy. Lawyers for Civil Justice, which initially supported the idea of an initial census, criticized what it called the increased use of “shadow dockets” in multidistrict litigation in a Sept. 29 letter to the advisory committee.

“Unfortunately for both claimants and defendants, the key concept of early disclosure of evidence showing exposure and injury was de-emphasized or even forgotten as the number of unfiled claims took flight,” the letter says.

Alex Dahl, general counsel of Lawyers for Civil Justice, said many of the census forms still have incomplete information, for instance. Allowing those unfiled claims, he said, is what drives multidistrict litigation to reach dockets of more than 100,000.

“So, in our view, what is needed isn’t a new system, but rather rules that work for these cases. Rules that are transparent, uniform, that are known to the lawyers and the parties even before the case starts. Rules you can read in a book just like other rules,” Dahl said. “‘Shadow dockets,’ or these administrative dockets, are taking things in the opposite direction.”



Bryan Aylstock of Aylstock, Witkin, Kreis & Overholtz (Courtesy photo)

New Age of Selecting Bellwether Trials?

The registries and administrative dockets have helped judges get to the next step in multidistrict litigation: Selecting cases for trials that represent the myriad claims in the entire docket. Some have turned to technology to narrow down their selections.

Watts said he got an idea from his rival on the defense side, Kirkland & Ellis partner Patrick Haney in Washington D.C., when the two lawyers had to select a trial in the Minnesota state court litigation involving Syngenta’s genetically modified corn.

Haney pitched the idea of using the randomizer function on Microsoft’s Excel program.

“And as he took me through it,” Watts said, “it made all the sense in the world.”

The Microsoft function uses an algorithm to randomly select a subset of data. From that much smaller and manageable group, lawyers on both sides, and sometimes the judge, choose which cases they wanted for trials.

That's a big jump from traditional plaintiff fact sheets, which lawyers in multidistrict litigation have used for several years in the bellwether selection process. They were often hand written, Watts said, and lawyers had to manually enter information about cases into a computer database—a process that could take months.

"We would take the plaintiff fact sheets, we would burn up a bunch of copy costs to print it 50,000 times, burn up 50,000 envelopes and stamps and send them to the client with 50,000 return receipt envelopes," he said. "Microsoft randomizer can do that in 5 seconds."

Haney did not respond to a request for comment, and a firm spokeswoman said Kirkland & Ellis declined to comment for this article.

But Baker said the bellwether selection process isn't just about trials.

"That information is going to be useful not just for the selection of bellwether cases but also for settlement negotiations down the road," she said.

In the 3M earplug multidistrict litigation, Rodgers provided a six-page "initial census" questionnaire that included the locations of the plaintiff's duty stations, whether the plaintiff used the earplugs at issue, and the plaintiff's specific physical injuries alleged. Plaintiffs also had to provide documentation, such as proof of military service, disability benefits and hearing tests. Then, according to a pretrial order last year, Rodgers used the completed census forms to analyze the characteristics of each claim to identify the most common plaintiff: A U.S. Army member between 30 and 49 years old who has a combination of ringing of the ears and hearing loss.

Rodgers has been working with claims administrator BrownGreer PLC to randomly select 1% of the cases as a sample from which to choose bellwether trials.

Since 2014, BrownGreer has been offering a database program called "MDL Centrality" to lawyers and judges, said Roma Petkauskas, a partner at BrownGreer.

"MDL Centrality is a custom built platform for mass tort lawyers," she said. "The system allows an easy and efficient exchange of documents and information like the plaintiff fact sheets and profile forms."

Aylstock said that defendants and plaintiffs each got to randomly select which cases from the final bellwether pool that they wanted for trial, as did the judge.

The first trial began on April 30 and ended in a \$7.1 million verdict for three plaintiffs. Three more trials have taken place, with awards of \$1.7 million and \$8.2 million, and one defense verdict.

Rodgers has scheduled 12 more trials in the next eight months.

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