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State actions may drive Toyota MDL

A federal judge orders attorneys to keep tabs on state litigation.

Amanda Bronstad

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Merck & Co. Inc. was doing well in federal litigation over its painkiller Vioxx a few years ago, obtaining multiple jury verdicts in its favor. The biggest loss? A \$250 million award in state court in Texas.

That verdict was later overturned on appeal, but plaintiff's lawyer believe the state court onslaught helped persuade Merck to settle the litigation for \$4.85 billion. State court cases continue to play a significant role in mass torts, including the federal multidistrict litigation against Toyota Motor Corp. That's why the judge assigned to five lawyers the role of liaison counsel to a raft of state court cases, many of which are being coordinated for pretrial proceedings.

"The interplay between state and federal is very important, and the activity in the state court will help foster resolution. It certainly did in Vioxx," said Dawn Barrios, a partner at New Orleans-based Barrios, Kingsdorf & Casteix who has been state court liaison for plaintiffs' steering committees in at least four MDLs, including the Vioxx litigation. Barrios is one of three plaintiffs' liaison counsel in the Toyota MDL.

Their role is to periodically inform U.S. District Judge James Selna, who is overseeing the federal MDL, of the state cases pending against Toyota and, if possible, to coordinate discovery and depositions with attorneys in those cases.

"It's going to be a panoply of different types of claims we'll want to get a handle on and make sure we have an understanding as to what is occurring in those cases," said Gretchen Nelson, a partner in the Los Angeles office of New York's Kreindler & Kreindler and a plaintiffs' attorney assigned as liaison counsel.

Nelson and the other liaison counsel have been monitoring efforts to coordinate more than 50 lawsuits into single proceedings in state courts in California, Texas and New York. A judge in Los Angeles recently granted a request to coordinate at least 21 cases in California state court, while in Texas a petition has been filed to coordinate 15 cases. In New York, Toyota's lawyer has filed a petition to coordinate 16 lawsuits.

Not all plaintiffs' lawyers with state court cases want to be part of the coordinated proceedings. Some argue that their cases aren't related to the claims of sudden unintended acceleration at the root of the federal MDL, while others maintain that coordination would stall their efforts to go to trial.

REACHING OUT TO THE STATES

The federal MDL comprises more than 200 lawsuits against Toyota. Most were brought on behalf of consumers seeking economic losses from the diminished value of their vehicles; others involve injuries and deaths allegedly caused when a Toyota accelerated out of control.

Barrios said she was drafting a letter to Toyota's lawyers requesting a database of cases filed nationwide in state courts. She estimated that about 100 cases are pending in multiple states against Toyota and expected that as many as 100 would follow in Texas and California alone. "My opinion is that most of the cases have not been filed," she said.

The trend in federal MDLs has been to monitor related state court cases, said Barrios. Federal judges in MDLs have gone as far as to sit in on state court proceedings, she said.

During a recent hearing in the federal MDL, Selna emphasized that monitoring the state court cases was vital. "I think it's important for the federal MDL judge to reach out to these judges," he said.

Most of the lawyers involved in the state court actions are not part of the federal MDL. But they raise similar arguments for



Wigington Rumley Dunn's Jeff Wigington



Kreindler & Kreindler's
Gretchen Nelson



John Gomez of The
Gomez Law Firm

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coordinating the discovery phase of their cases into a single proceeding.

"Many of the discovery issues will be the same, and that will necessitate communication and coordination," said Jeffrey Wigington, name partner at Corpus Christi, Texas-based Wigington Rumley Dunn, one of the attorneys who moved to coordinate the state cases in Texas.

Lawyers who support coordination argued that a single proceeding in state court would avoid duplicative discovery and conflicting opinions down the road. The lawyers also have requested that discovery be stayed in all the state cases until the coordination issue is resolved.

In California, a consortium of plaintiffs' attorneys led by Mark Robinson, senior partner at Newport Beach, Calif.-based Robinson, Calcagnie & Robinson, petitioned the Judicial Council of California to coordinate the cases. Robinson is co-liaison counsel on the personal injury and wrongful death plaintiffs' steering committee in the federal MDL.

During a May 25 hearing in Los Angeles, Toyota's lawyer, Lisa Gilford, a partner in the Los Angeles office of Atlanta's Alston & Bird, told Los Angeles County, Calif., Superior Court Judge Carl West that she wants the cases coordinated in Orange County, Calif., Superior Court, which sits in Santa Ana. That's where the federal MDL is located.

The judge ordered that the cases be coordinated but declined to pick a location, referring that issue to California Chief Justice Ronald George.

In Texas, several plaintiffs' attorneys and Dallas-based Hartline, Dacus, Barger, Dreyer & Kern, which represents Toyota in the state cases, filed a joint motion on May 11 with the state's Judicial Panel on Multidistrict Litigation to coordinate at least 15 lawsuits pending in 14 counties.

The panel has five members, including chairman David Peebles, presiding judge of the Texas 4th Administrative Judicial Region in San Antonio. The panel has coordinated other cases, including the Vioxx litigation and cases against Ford Motor Co. and Bridgestone Corp.'s Firestone Tire Co. over defective tires.

Toyota's lawyer in the state court cases in New York is Steven R. Kramer, a partner in the White Plains, N.Y., office of Pittsburgh's Eckert Seamans Cherin & Mellott. He moved before the state's Litigation Coordinating Panel to combine 16 cases from five counties, all but four of them personal injury suits.

AVOIDING 'RED TAPE'

Not every lawyer in state court wants his case coordinated into a single proceeding. Some, particularly those pursuing personal injury cases, argue that combining discovery would put the brakes on their own progress toward trial. "We get to trial pretty fast in San Diego," said John Gomez of The Gomez Law Firm in that city. "And we'd like to get our case to trial quickly without all the red tape caused by huge numbers of lawyers."

Gomez represents the relatives of California Highway Patrol Officer Mark Saylor, killed along with his wife, his daughter and his brother-in-law when his Lexus crashed after suddenly accelerating to 120 miles per hour. The Aug. 28 crash prompted the first wave of Toyota's recalls, which now number more than 8 million vehicles worldwide.

Other lawyers argue that their cases should be separate because they don't involve the same facts. On May 25, E. Todd Tracy of The Tracy Firm in Dallas and Melissa R. Smith, a partner at Gillam & Smith in Marshall, Texas, filed an objection to the coordination proceedings in Texas. Both are handling wrongful death cases involving accidents that occurred last year. They argued that their cases involve different years, makes and models with various defects, from floor mats to accelerator pedals to the electronic throttle control system. They noted that not all the plaintiffs' attorneys in Texas are using the same experts.

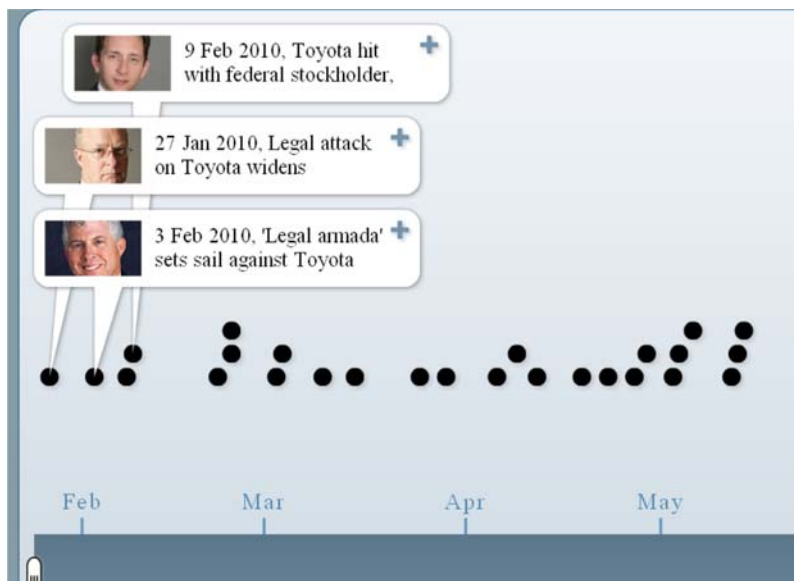
Neal J. Roher of the Law Offices of Neal J. Roher in Garden City, N.Y., who is co-counsel in a personal injury case filed two years ago in New York against Toyota, said the products liability cases should be separate from other claims. "Some of these other complaints are not even for personal injuries," he said. "They're for monetary damages and diminution of value of the automobile and violations of economic statutes in New York," he said.

Plaintiffs' attorney, particularly those who represent local automobile dealerships that were sued because they sold the allegedly defective vehicles, said that their cases don't even belong in a proceeding that deals with sudden unintended acceleration.

"The reason that we indicated that we were likely to object was because we don't see this as an unintended-acceleration case. It's an airbag case," said Robert Biechlin Jr., a partner at Thornton Biechlin Segrato Reynolds & Guerra who represents a San Antonio car dealership. His plaintiff claims that the air bag failed to deploy when he rear-ended a car. "All of a sudden, it took on new life with the unintended-acceleration issues."

Contact Amanda Bronstad at abronstad@alm.com. Bronstad owns a Toyota subject to recall but is not a party to the litigation.

SUING TOYOTA: A TIMELINE OF LITIGATION AGAINST TOYOTA MOTOR CORP.



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