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Plaintiffs lawyer rips colleagues over multidistrict litigation fees, pressure tactics

ATTORNEYS & JUDGES

By Daniel Fisher | Dec 11, 2020

PHILADELPHIA (Legal Newsline) - Federal multidistrict litigation, a procedure intended to resolve mass-tort lawsuits fairly and efficiently, has mutated into an unethical moneymaking machine for lawyers that is badly in need of reform, a prominent plaintiff attorney says as he prepares to lobby for changes.

Conservatives and tort-reform groups have long criticized MDLs as a form of asymmetric warfare against defendants in which thousands or even tens of thousands of lawsuits are gathered before a single federal judge who frequently sets settlement, not trial on the merits, as the goal. But it is unusual for a plaintiff attorney to lodge such a fierce critique on the procedure that has earned his colleagues billions of dollars in fees.

That attorney is **Shanin Specter** of Kline & Specter, a Philadelphia law firm that normally would be considered every corporate defendant's worst nightmare. Specter boasts on his web page of winning more than \$200 million against Ford Motor Co. in two jury verdicts and reeling in the largest pre-trial settlement in a wrongful death case in Pennsylvania history.

Yet he is bothered by what he has observed in MDLs, including pelvic-mesh litigation that was dogged by allegations of unethical attorney practices. Specter says his firm tried 13 pelvic-mesh cases and won \$345 million in jury verdicts but he was disgusted by the tactics of lawyers who signed up far more clients than they could represent and then pressured them to accept settlement offers without providing them the information they needed to decide, including how much their individual claim would be paid.

"It's worse than malpractice; it could be a fraud on the client," he said. "The lawyer may know it is reasonably certain the client is not going to be reasonably compensated."

The dynamics of the MDL are to blame, say Specter and critics like Elizabeth Burch of the University of Georgia Law School. Congress created the MDL in 1968 as a tool for dealing with a side effect of mass production: Mass tort litigation. Plaintiff lawyers could recruit millions of clients to sue over an allegedly defective product but after the U.S. Supreme Court dramatically restricted the use of the class action to handle cases involving personal injury, the only recourse was to file individual lawsuits that swamped the system.

The solution was the MDL, in which a panel of federal judges assigns all the cases to a single judge to oversee pretrial evidence-gathering and other actions before the cases are returned to their originating

courts for trial. That was the theory, but the MDL quickly became a tool for engineering mass settlements with defendants who were only too willing to cut a deal with a small number of lawyers to end thousands of lawsuits at once.

So-called “inventory deals” involving a mixed bag of cases, from slam-dunk jury verdicts to downright fraudulent claims, became the standard procedure. Plaintiff lawyers had a huge financial incentive to run television ads to recruit the largest number of clients possible. Now, nearly every MDL ends in settlement, rather than individual trials.

Judges invented another procedure that increased the financial incentive for lawyers to recruit large numbers of clients and seize control of the executive committee in charge of the MDL: common-benefit fees, a sort-of tax the lead lawyers collect for managing pretrial activities including taking depositions and other discovery.

Plaintiffs frequently are forced to pay those fees of 5% or more on top of the 30-40% fee they negotiated with their individual lawyer. In the opioid MDL, possibly the biggest such case ever, plaintiff lawyers sought a 7% common-benefit fee that would amount to billions of dollars for the same small group of attorneys who typically dominate mass-tort MDLs.

“There’s no reason to have common-benefit fees to begin with,” said Specter. “There are lots of adequate motivations for lawyers to do common benefit work. The clients don’t have to be taxed.”

Defendants and judges bear a lot of the blame for how the MDL has developed, Specter says. While some defense attorneys and even judges have complained about plaintiff lawyers clogging the courts with flimsy lawsuits, Specter said, the bigger problem is lawyers who recruit far more clients than they can adequately represent.

“The lawyers simply cannot discover and try all those cases,” Specter said. What’s worse, “the defendant has no interest in that lawyer actually disentangling himself from all those cases.”

Defense attorneys know the lawyers on the other side of the table can’t possibly take all their cases to trial so they offer lowball settlement amounts, Specter said, leaving to the plaintiff attorneys the job of convincing their clients to accept. This has led to practices Prof. Burch has described in her book “Mass Tort Deals” as straying well across the line of the ethical rules in most states.

Some lawyers sign contracts with the companies they are suing requiring them to obtain up to 100% consent from their clients or the settlement – and their fees – will go away. Some even agree to drop representation of clients who refuse to sign, a clear conflict with their duty to represent their client’s best interests.

The pressure to cut a deal instead of preparing thousands of individual lawsuits for trial “causes the defendant to present an offer to the plaintiff lawyer that’s the lowest amount he figures his clients can accept,” Specter said. “It’s an irony that when a corporation injures one person badly, they have to pay a lot of money, but if they injure 10-20,000 they often have to pay very little, relatively speaking.”

Specter said he’s working on a letter to the rules committee considering changes to the MDL process. His recommendations include:

-Require judges to approve mass settlements, as they must with class actions. So far, judges, defense lawyers and plaintiff attorneys all seem to oppose this idea, Specter said, "a pretty good indication that it's a good idea.";

-Remand cases to their originating courts more quickly. MDL judges frequently assume their job is to hammer out a settlement of all the cases before them, regardless of how long that takes. U.S. District Judge Dan Aaron Polster announced at the beginning of the opioid MDL he wanted a settlement by the end of the year; three years later the cases are still mired in expensive pretrial maneuvering. Judges should be required to start remanding cases after a set deadline, maybe as short as a year, Specter said; and

-Reform common-benefit fees. If they can't be abolished, Specter says, they should be determined by an independent party such as a special master with no prior connection to the plaintiff lawyers leading the MDL. Under the system now, the plaintiffs' executive committee typically asks the MDL judge to approve fees at a level they decide and the judge, eager to get cases off the docket, typically approves.

Specter might be accused of talking his book, as his firm focuses on trying cases in state courts including in Philadelphia, which is notorious for delivering huge jury verdicts. He doesn't need MDLs to survive and competes against MDL lawyers for business. But his opinions are echoed by a growing number of critics who say multidistrict litigation has grown to more than half the civil caseload in federal courts and is becoming a practically lawless equivalent to the class action.

"I'm hopeful that the rules and the practices are going to change," Specter said. "The disgrace that was the mesh litigation will be eye-opening for judges and lawyers on both sides and even the plaintiffs."