Bellwether Trials: Evolving Trends in Class Action and Complex Litigation
Strategic Use of Bellwethers by Plaintiffs and Defendants

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
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Thursday, March 25, 2010
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Bellwether Trials: What is Their Purpose? When and How Are They Conducted?

History, Mechanics, Benefits and Drawbacks of Bellwethers

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History and Background of Bellwether Trials

Literal definition of “bellwether”

- Originated from practice of tying a bell around the neck of a wether (a castrated male sheep) that would lead other sheep in the flock to follow the belled wether. The bellwether sheep would typically not go first but would follow an outlier and signal to the other sheep that they should follow.

- Judge Robert M. Parker, In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997): “the ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray.”

- Modern definition: indicator of trends (i.e., “that is a bellwether stock”)
The Rise in Bellwether Trials

Increase of bellwethers due to:

- difficulty in certifying classes for class action treatment and costs related, particularly if certification is later overturned on appeal

- rise in mass tort filings that aren’t conducive to class certification and too expensive to try individually

- desire to develop a creative procedural device that will promote global settlement of large numbers of cases (based on case values established at trial) or streamline cases for regular trials if settlement does not result
The Evolution of Bellwether Trials


- Seventh Amendment right to jury trial invalidated scheme where five court-designated categories of asbestos plaintiffs were selected to represent the damages for each category without requiring plaintiffs to prove individual causation and damages. Cimino v. Raymark Industries, Inc., et al., 151 F.3d 297 (5th Cir. 1998).

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Cases that are candidates for bellwether trials

• In general, mass tort litigation (e.g., product liability, pharmaceutical, environmental, medical device).

• Uniform injury across the litigation – if more than one injury is alleged, may need to hold test cases for each type of injury.

• Same or similar allegations of liability across the litigation.
Mechanics of Bellwether Trials

• No set rules govern bellwether trials. Courts will allow parties to be creative in designing bellwether trial provided representative cases are chosen.

• Manual on Complex Litigation:
  .... “any sample should be representative of the claims and claimants taking into account .... severity of the injuries, the circumstances of exposure to the product or accident, the mechanics of causation, the products and defendants alleged to be responsible, any affirmative defenses and the applicable state law.”
• Cataloging and evaluation of cases
  -Typically requires gathering of factual information through creation of fact sheets about each case or other routine discovery designed to highlight variables between cases.

• Status conference with court to decide which variables or key-factors dominate and are the most important in determining “representativeness.”

• Selection of cases for the bellwether pool
  -Additional fact and expert discovery through traditional means (i.e., depositions, interrogatories, etc.)
Methods of Selection of Bellwether Cases

• Selection of all bellwether cases by plaintiffs’ counsel

  - Plaintiffs will likely select only their strongest cases so “representativeness” is an issue (but a defense win would be potentially catastrophic to plaintiffs).

• Selection of an equal number of cases by each side

  - Promotes equity and fairness but does not eliminate each counsel selecting their strongest (rather than representative) cases.
• Cases nominated by each side for the court to make the selection of the best representatives from the pool.

-Court may not be in the best position to handle selection given relative lack of information about each case.

-Court may employ a “strike” procedure, similar to jury selection.

• Random selection

- Efficient, neutral but no assurance that cases selected are truly representative.
Benefits and Drawbacks of Bellwether Trials

- Benefits

- Allows parties to test various theories and defenses in trial setting: how will it play to a judge and jury?

- Allows parties to understand strengths/weaknesses of their evidence and the costs associated with the litigation (pre-trial rulings and motions in limine).

- Provides guidance on how similar cases and claims will be viewed by other juries.

- Provide a basis for settlement discussions and establish values for remaining cases.

- Bellwethers force litigants to absorb and condense huge amounts of information produced during discovery. Creates a streamlined trial package that will form the backbone of additional trials if litigation is not resolved via settlement.
**Drawbacks of Bellwether Trials**

- May seriously hinder second bite at the apple:

  - Series of bellwether trials will be tried to the same court. Rulings in first bellwether trial may result in same or similar rulings in balance of bellwether trials.

  - Evidence provided by witnesses, fact (as in corporate execs) and expert, generally has to be “gotten right” the first time out of the gate.

  - Not every plaintiff has his/her day in court.

- Selection of bellwether plaintiffs must be accepted as representative by both sides in order to avoid either party dismissing the utility of the verdict for settlement valuation.
"Tell BoPeep that our pre-conditions for coming home include the following non-negotiable demands..."
Bellwether Trials: Evolving Trends in Class Action and Complex Litigation

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Attorneys and Counselors

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The MDL Process

- Transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings."

- The Panel on Multidistrict Litigation must remand any such action to the original (transferor) district "at or before the conclusion of such pretrial proceedings."

28 U.S.C. § 1407(a)
MDL Transfer Factors

- Common fact questions must be complex, numerous, and incapable of resolution through other available procedures.
- Achieve judicial economy by avoiding duplication of discovery, inconsistent or repetitive rulings, and conserving the financial resources of the parties.
- Transfer will serve the convenience of the parties and the courts.
- A convenient transfer forum must be available.
  - Not overtaxed with other MDLs.
  - Has related actions on its docket.
  - Presence of a judge with some expertise in the issues at hand.

Trends In MDL Proceedings – Inception to 2008

- Securities (19%)
- Antitrust (16%)
- Product Liability (10%)
  - (MDL proceedings, not individual cases, which may represent 90% or more of the whole)
- Consolidation motions granted where there was/was not a case involved seeking class status: 88% v. 64%

Largest MDL Proceedings Measured By Percentage of Cases In Database

- Asbestos – 48.2%
- Silicone Breast Implants – 9.3%
- Diet Drugs – 6.9%
- Welding Fumes – 3.8%
- Vioxx – 3.4%
- Baycol – 3.0%
- Prempro – 2.7%
- Seroquel – 2.5%
- Norplant – 1.3%
- PPA – 1.1%
- Orthopedic Bone Screw – 1.0%

By Comparison…

Percentage of cases in the database making up all non-product liability MDL proceedings:

7.5%

CAFA Will Only Increase The Concentrations Of Class Actions In MDL Proceedings

- Proposed class actions much more likely to be filed in federal court.
- Nationwide classes have largely been unsuccessful in federal courts, thus encouraging multiple single-state-only classes.
- Provisions in place for removal of non-class “mass actions.”
Lex econ v. Milberg Weiss: A transferee court may not assign cases to itself for trial

- Prior to 1998, it was not uncommon for cases to remain through trial in the transferee court.
- HELD: The MDL transferee court cannot try cases not filed in its district or re-filed in its district, absent the agreement of the parties.
  - Ruling based on the plain statutory language of Section 1407(a).
  - Some commentators have viewed the decision as respecting plaintiff's choice of forum.
Rationales For Transferee Court Taking Case Through Trial Not Addressed In *Lexecon*

- Transferee court will have developed the fullest understanding of the case.
- There may remain other related cases for trial in the transferee court. Further knowledge, and even possible consolidation for trial, would add efficiencies.
- A global settlement is more likely in a forum where all or most of the pending cases are centralized and awaiting trial.
Post-Lexicon Options

- Obtain the parties' consent to try in the transferee forum.

  - May be venue issues.

- Upon remand to the transferor court, seek a venue transfer back to the transferee court pursuant to 28 U.S.C. § 1404.

- Ask transferee judge to seek inter- or intra-circuit assignment pursuant to 28 U.S.C. § 292 or 294.
Post-Lexicon Options

- Transferee court still may address other substantive, potentially dispositive matters.
  - Dismissal with prejudice.
  - Summary judgment.
  - Class certification.
Attempts To Address The Mass Tort Problem Through The Class Action: Amchem & Cimino


- *Cimino v. Raymark Indus., Inc.*, 151 F. 3d 297 (5th Cir. 1998) – Rejecting “bellwether-like” asbestos class trial plan
  - 3,031 consolidated actions per Rule 42(a). Rule 23(b)(3) certification.
  - Three-phase trial plan:
    - I:  Try individual claims and defectiveness issue
    - II:  Determine class-wide exposure
    - III:  160 sample cases to be extrapolated to the class
The Bellwether Trial In Today’s Environment

- Force the parties to develop the case, developing/testing the evidence and bringing claims to maturity.
- Give the parties and the court a sense of the merits, costs, and length of a trial.
- Use as a rough pricing mechanism.
The Rough Paradigm For The Bellwether Trial

- Plaintiffs must be “representative.”
- Select cases randomly or limit cases to where the parties can agree to “typicality.”
- There must a sufficient number of representative verdicts to assess the nature and strength of the claims and their values.
- Possibly only try certain issues (e.g., negligence, breach of duty, conspiracy, etc.)

Issues Relevant To The Predominance Inquiry

- The “common” issue of negligence, defectiveness, or breach of duty

- Threshold issues:
  - Will a single jurisdiction’s law control?
  - Product identification
  - Manifested versus unmanifested defects
  - Differing models – product variation
  - Variable contracts, disclosure, or other written/oral material
  - Negotiated transactions?
Single issue trials may be the last thing a defendant would ever advocate or agree to.

- Breach of duty without causation or injury.
- Potential variations in duty or conduct over time.
- Conspiracy without causation or injury.
- General v. specific causation.
- Intertwined affirmative defenses.
Issues Relevant To The Predominance Inquiry

- Injury and causation
  - Exposure and dose
  - Reliance and materiality
  - Pricing variations over geographic or product markets
  - Individual medical histories and alternate causation
  - Learned or other intermediaries

- Affirmative defenses

- Issues of individual knowledge
Bellwethers A Poor Fit With Class Certification

- One plaintiff may not (and probably will not) identify all the potentially relevant individual issues.
  - Could the parties ever agree on who is “typical”? 
  - Could the parties ever agree on what size/nature of a sample is “representative”? 

- Full merits discovery (with the attendant expense).

- How/why would you try a “negative value” claim?

- After multiple trials, what then is the rationale for going back to certify a class?

- In immature tort would not become mature through this process

- Single issue trials may be the last thing a defendant would ever advocate or agree to.
Existing Procedural Protections Preferable To Resort To The Bellwether Trial

- CAFA: Restrictions on the spurious class action
- *Twombly* and *Iqbal* – Specific pleadings required
- *Falcon* and *Castano* – Rigorous analysis required
- *Hydrogen Peroxide* – Aggressive inquiry into the merits, and into the nature/credibility of witness testimony
- Rule 23(f) – Interlocutory appeal of class decisions
Vioxx – Consider The Bellwether If A Class Is Not Possible

- There will be occasions when individual trials are not a viable strategy for either plaintiff or defendant.

- Over 100 million prescriptions – 20,000 claims.

- Bellwether trials facilitated global non-class settlement
  - $4.85 billion fund, overseen by a federal judge and special masters.
  - Coordination between federal and state court judges.
  - Claimants given choice to enroll in the settlement.
  - Escape clause for Merck if enrollment fell below 85% of pending claims.
  - Lawyers wishing to participate had to submit enrollment forms for 100% of Vioxx clients.
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Strafford Webinar
Thursday, March 25, 2010

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In re: Genetically Modified Rice Litigation

A bellwether trial in action.

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In re: Genetically Modified Rice Litigation

• Background:
  – LL601 and LL604 rice.
  – Genetically modified.
  – Field tested in various locations throughout the country and Puerto Rico.

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- Cheniere foundation seed grown there too.
- LLRice 604.

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• Timeline
  – January 2006: Riceland Food becomes aware of GM rice in its inventory.
  – Aug. 18, 2006: Riceland announces rice samples from 5 rice growing states – Arkansas, Louisiana, Mississippi, Missouri and Texas – were positive for LLRice 601.
In re: Genetically Modified Rice Litigation

• August 20, 2006 – Japan bans imports of U.S. long grain rice.

• August 23, 2006 – Europe announces cessation of long grain rice imports until rice is tested and certified to be GM-free.

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• August 28, 2006 – First lawsuits filed.

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• November 30, 2006 – Hearing before Judicial Panel on Multidistrict Litigation.

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• December 19, 2006 – JPML orders consolidation before Judge Perry in Eastern District of Missouri.
In re: Genetically Modified Rice Litigation

- January 8, 2007 – Judge Perry issues first Order.
- April 18, 2007 – First Case Management Order.
- May 17, 2007 – Master Consolidated Class Action Complaint.
- July 6, 2007 – Merits discovery commences.
• How will bellwether trials be conducted?
• CMO 11 answered that question.
“An essential disagreement between Lead Plaintiffs’ Counsel and Lead Defendants’ Counsel relates to the selection of bellwether trial cases. The parties agree that the court should conduct separate bellwether trials for sample plaintiffs from each of the five states involved here, but they disagree on how to select those plaintiffs and cases. Plaintiffs have proposed that the individual claims of the plaintiffs who were named plaintiffs to the master class action complaint should form the pool for the bellwether cases. Defendants object that they should be able to select some cases, and propose that both parties make selections from cases in which *Lexecon* waivers are filed. I will borrow from each party’s suggestion, but adopt neither in its entirety.” CMO 11.
In re: Genetically Modified Rice Litigation

- CMO 11
- “Even without Lexecon waivers there is a pool of plaintiffs whose cases could be tried in this district.”
  - 7 cases filed in EDMO originally.
  - 6 of those cases encompass 10 Missouri farmers.
  - The 7th case has 257 plaintiffs (50 from Arkansas, the rest from Missouri).
  - Master Class Action Complaint had 21 plaintiffs – 5 from Arkansas, 4 from Louisiana, 4 from Mississippi, 4 from Texas.

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• CMO 11
  – Set procedure for selection of 50 cases to be in the “Initial Trial Pool.”
  – “. . . with the idea that we should expect to conduct bellwether trials of 10 plaintiffs’ claims.”
  – “I urge the parties to select cases that will be representative, so that we may obtain maximum benefit from the bellwether concept.”
In re: Genetically Modified Rice Litigation

- Plaintiffs can pick plaintiffs named in Master Complaint or others.
- Full discovery on 50 cases.

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In re: Genetically Modified Rice Litigation

• Selection Process for Initial Trial Pool & Bellwethers.
  – From the plaintiffs’ claims available for trial (originally filed in EDMO, named in Master Complaint, *Lexecon* waivers filed by December 1) each side selects 5 plaintiffs from each state for inclusion in the Initial Trial Pool.
  – Selections made simultaneously via e-mail at 4:00 p.m. Central on December 16, 2008.
  – From the Initial Trial Pool, 10 bellwethers (2 from each state) are selected.
  – If no agreement, each side picks one plaintiff from each state for a total of 10 parties by July 20, 2009.
In re: Genetically Modified Rice Litigation

• Trial Schedule.
  – November 2, 2009 – Missouri.
  – January 11, 2010 – Arkansas & Mississippi.
  – April 19, 2010 – Riviana (Non-Producer).
  – June 21, 2010 – Louisiana & Texas.
In re: Genetically Modified Rice Litigation

• Pre-Trial
  – Motions to Dismiss.
  – Motions for Partial Summary Judgment.
  – Motions in Limine.
  – Witness and Exhibit Lists.
  – Deposition Testimony Cites.
  – Jury Interrogatories.
  – Verdict Forms.

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Questions?

“\textit{You seem to know something about law. I like that in an attorney.}”

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