



Anticipating and Managing Multi-Plaintiff Litigation

October 25, 2023



Multi-Plaintiff, Mass Tort Litigation

- Multi-district litigation
 - Consists of many individual cases.
 - Personal injury and product liability claims often become MDLs because individual issues of causation render the cases unsuitable for a class action.
- Class action
 - One case filed by one or more class member(s) as representative(s) of the entire class.
 - The class representative(s) protect the interests of the class.



Multi-District Litigation

- Multidistrict litigation currently constitutes about a third of all pending cases in the federal system, and half of all pending civil cases.
- 22 of the 45 consolidation motions decided in 2022 were granted. This is part of a general downward trend over the past 15 years (the JPML handled fewer than half as many motions for certification of an MDL in 2022 (45) as it did 10 years earlier (94 in 2012)).
- As of August 15, 2023, 16 of the 23 consolidation motions considered this year have been granted. This is the highest rate of granted motions since 1994.
- Most MDLs involve product liability claims. The total number of pending product liability MDLs has stayed between 60 and 71 each year since 2013 (it's currently at 66 cases this year).

Bloomberg Law 2023

Litigation Statistics

Series:

Multidistrict Litigation



Class Actions

- When excluding MDL-related cases, there is an overall increasing trend for class action filings in the federal system.
- The 5,824 cases filed in 2022 represent an 89% increase from the number of cases filed in 2015.
- Medical device / pharmaceutical cases are the most common type of product liability cases filed, followed by vehicle cases.
 - As to vehicle cases, the volume may be affected by the breach of warranty actions brought under the Magnuson-Moss Warranty Act or California's Song-Beverly Warranty Consumer Act.
- Appeals from class-action, product liability actions have remained steady for the past decade, though a product liability-specific issue is not always the basis for the appeal.
- Class actions tend to resolve on average 9-months quicker than MDLs, but still often last for at least 2-3 years.

Coordination & Consolidation

Plaintiff or defense counsel must file a motion for a multi-district litigation.

- A defendant facing numerous and similar personal injury/product liability claims may want to file such a motion to minimize costs and consolidate defenses.

Similarly, if multiple class actions have been filed, counsel may need to file a motion to consolidate.

A motion to certify the class will also need to be filed by the class representative.

Selecting a Team



- Building a diverse, multi-faceted team is essential.
- A company facing a potential mass tort must carefully and quickly select counsel.
- Once selected, counsel must work with the company to put together a team of attorneys and experts to resolve the case.

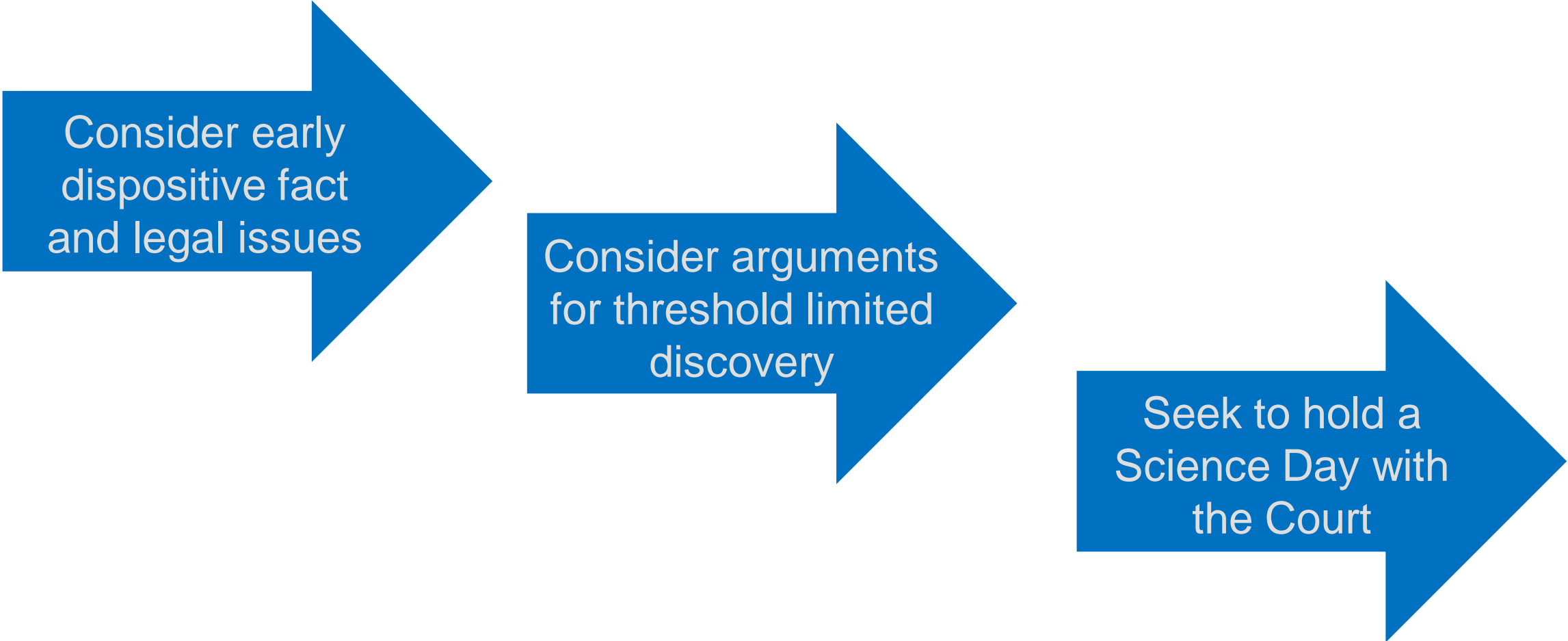
Playing Nicely With Others

Mass tort litigation involves multiple players that counsel and the Client will need to work with for the life of the litigation, including:

- The firms representing the plaintiff(s)
- Other potential defendants and their attorneys
- The court(s) and court personnel
- Third parties that might have relevant discovery.

Developing collegial working relationships with these other players will reduce the cost and headache involved in litigating mass torts.

Narrowing the Issues and Setting the Narrative



Consider early
dispositive fact
and legal issues

Consider arguments
for threshold limited
discovery

Seek to hold a
Science Day with
the Court

Remember to balance litigation objectives with business needs.

Record Development – Fact and Expert Discovery

Build record early

Identify consulting experts to ensure the appropriate record is produced

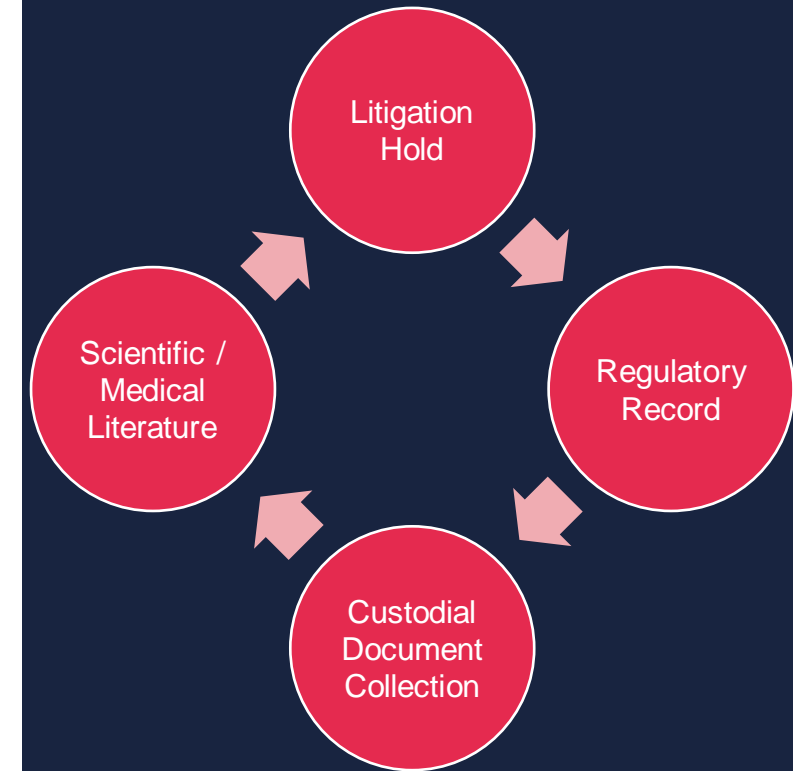
Working with company witnesses

- Understanding regulatory record
- ESI protocol / Protective Order

Preparing expert disclosures

Building a Record

- ❑ Scope a tailored, but sufficiently broad litigation hold and add relevant custodians.
- ❑ Identify a document collection and managed review vendor.
- ❑ Collect and review the regulatory record.
- ❑ Interview key custodians and collect documents.
 - Email
 - Shared drives
 - Databases
 - Cloud accounts
 - Company issued devices
- ❑ Identify and review published literature relevant to causation issues.



Working with Experts to Build the Record

1

Identify consulting experts at the outset of the litigation.

2

Use their assistance with identifying scientific and medical literature relevant to causation issues.

3

If the consulting expert will be used as a testifying expert; assess discoverability of documents provided/reviewed.

4

For consulting experts, provide key documents relevant to their area of expertise.

Working with Company Witnesses

- Form and maintain a relationship of trust and collaboration.
- Provide table setting of the litigation.
- Keep disruption of their day-to-day to a minimum.
 - Understand company's organization structure
 - Identify relevant team members
 - Prepare witness interview outlines that address fact development and custodial collection questions
- Set deposition expectations.

Understanding the Regulatory History

- Identify team(s) with responsibility for communicating with regulators.
- Identify and understand regulations and SOPs governing communications with regulators and reporting obligations.
- Collect and index regulatory file(s).
- Review regulatory file(s) and prepare issue memos.

Protecting Your Client's Confidential Information



Have conversations early about Client considers confidential information and how that aligns with legal precedent.



Prepare a tailored ESI Protocol and Protective Order.



Educate document review and briefing teams on categories of confidential information.



Prepare arguments for motions to seal early and set expectations wit Client on the likelihood of success.



Remember the Client has strategic partners and ensure everyone is on the same page.

Preparing Expert Reports

- Research discoverability of drafts and communications with consulting and testifying experts in all applicable jurisdictions.
- Ensure drafts and communications are protected from disclosure under applicable laws.
- Refrain from creating multiple draft reports.
- Set calls to discuss drafts rather than exchange via email.

Dispositive Motion Practice

***Daubert / Saigon*
Briefing**

**Summary
Judgment**

Trial

- There are various methods for selecting bellwether trials.
- Ensure the preservation of key legal issues for appeal following trial.
- Consider the impact of the trial on the Client and its employees.



Litigation Exit Opportunities



Always consider the end game when litigating a multi-plaintiff mass tort.

- What does finality look like in a mass tort context?
- When should you consider potential settlement?
- Should you use a MDL / Class Action Settlement Master?
- Can litigation victories be leveraged into potential settlement?

Litigation Exit Opportunities: Ways to Make it Go Away Without Settlement

- Leverage dispositive rulings on legal issues to discourage further lawsuits.
- Pursue costs, including expert fees.
- Consider whether sanctions are appropriate.
 - *Guzman et al. v. Walmart Inc.*, 1:22-cv-03465 (S.D.N.Y.):

In *Guzman*, the judge ordered a plaintiff attorney that frequently files consumer fraud class actions to produce a spreadsheet identifying every case his firm has filed since 2020 using a similar theory of the case and ordered the attorney to show cause as to why he should not have to pay for the Walmart defendants' attorney fees.

“Plaintiff's counsel is imposing plenty of costs, and someone has to pay them. Plaintiff's counsel has taken everyone on a ride, and plaintiff's counsel must show who should pay for the ticket.”

- Think resolution from the outset of the litigation and strategize accordingly.