

Multiple fronts

How to prepare for and handle multi-jurisdictional litigation **Interviewed by Adam Burroughs**

In multi-jurisdictional litigation, a client faces multiple lawsuits in more than one jurisdiction, asserting substantially similar claims arising from a common alleged event, transaction or practice.

"You have litigation going on in several jurisdictions raising the same set of issues, which can lead to duplication of expenses and the risk of inconsistent verdicts; defendants must manage that risk," says Fredrick S. Levin, a member at Dykema Gossett PLLC.

Smart Business spoke with Levin about strategies one can employ to manage multi-jurisdictional litigation.

Why does multi-jurisdictional litigation need to be handled differently from routine litigation?

Multi-jurisdictional litigation needs to be treated specially because of the greater potential exposure. Take, for instance, a dispute over a small fee. Using a traditional cost-benefit analysis, it may seem to make sense to let your internal claims department handle it, or to employ the firm regularly retained for routine, lower-dollar cases.

However, 'routine' treatment may not be best. For a single, routine case, it may not make sense to spend the money to bring a motion to dismiss or take significant discovery. It may be less expensive to have a short trial. But, if the case goes to trial and the result is an adverse judgment, that judgment might be used against you in similar cases being heard across the country. The issues decided adversely could provide the seeds for a class action on a state or nationwide basis. If a claim challenges an allegedly common practice or has been or may be raised in more than one jurisdiction, there are a number of techniques for managing multi-jurisdictional litigation.

How can defense counsel work effectively across jurisdictions?

When facing multi-jurisdictional litigation, it is essential to create a defense that is consistently applied across jurisdictions. There should be a common approach to marshaling the facts, documents and other evidence, analyzing the legal theories and determining the most appropriate defense, and assuring that the strategy can be successfully applied across jurisdictions.

For efficiency and consistency, there is great value in appointing a lead firm to implement the overall strategy. In selecting a lead firm, look not only for substantive expertise but also experience managing multi-jurisdictional



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litigation, including experience managing other lawyers and law firms nationwide.

Lead counsel may also need to hire local counsel. Select local counsel based on:

- Experience participating in coordinated, nationwide efforts;
- Knowledge of the judge and local custom and procedures; and
- A working relationship with opposing counsel, if possible.

What are some strategies for defending against multi-jurisdictional litigation?

The key to an effective defense is an early and thorough diagnosis of the problem. Is there potential merit to your adversary's claim? Are the facts or practices easily explained and defended? If not, what is the best means for resolving the claims efficiently? Is the problem multiplicity of suits such that the cost of litigation poses a greater threat than the claims? Does such multiplicity impede a global settlement? What is the best forum for litigating, trying or resolving the claims? Is there an opportunity to consolidate all suits in one forum? The answers to these questions will drive the strategy for extricating your business from the problem.

For example, if your adversary's claims are legally deficient, a motion to dismiss may be appropriate. Lead counsel will want to examine the law and a host of other factors for each

of the pending cases and then push forward in the jurisdiction where you are most likely to prevail. The victory in that jurisdiction can then be presented in other jurisdictions.

If the problem is multiplicity of suits, various techniques can be used to obtain some or all of the advantages of single proceeding. For example, if several cases are pending in the federal court system, you can apply to the Judicial Panel on Multidistrict Litigation for an order consolidating the cases into a single court for pre-trial purposes. Some states have similar procedures for consolidating into one court multiple cases pending in different counties within a single state. In some rare situations, if the paramount objective is eliminating multiplicity of suits or achieving a global settlement, you may consider consenting to class action treatment, which, if allowed, will resolve in one proceeding all — or nearly all — similar cases.

Even without formal consolidation:

■ The involved courts can enter orders: (a) setting similar schedules for conducting discovery and motion practice; (b) requiring the use of a centralized document 'library,' so that evidence need not be produced more than once; (c) allowing depositions taken in one proceeding to be used in others, so you and your colleagues do not have to be deposed more than once; (d) imposing uniform written discovery forms; and/or (e) limiting the scope of discovery. Courts may also appoint a common 'Special Master' to hear and resolve discovery disputes so that the same rules apply across the board. Usually, such coordination will require motions to the involved courts. However, it may be possible to obtain agreement from opposing counsel; although litigation is adversarial, it need not be nonsensical.

■ In a multi-jurisdictional case, there will often be others in the same line of business who are being challenged for the same or a similar practice. Your lead firm can coordinate with its counterparts using a defense steering group.

■ Your lead firm can host a secure, password protected 'extranet' to facilitate communication among you, your lead firm and your local counsel. The extranet site can be used to host pleadings, depositions and discovery materials.

■ Your lead firm can (and should) help you to manage the selection of expert witnesses. To reduce expenses, these experts can be made available across jurisdictions. <<

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