

Miami Federal Court Becomes Hotbed for MDL Cases

By Celia Ampel

Many Florida attorneys are poised to make national news in 2016 as they toil away at significant multidistrict litigation, from a case involving the largest auto recall in history to about \$1 billion in overdraft fee claims against Wells Fargo.

The Southern District of Florida will kick off the year with five multidistrict litigation, or MDL, cases, according to the U.S. Judicial Panel on Multidistrict Litigation.

And at least one more might pop up as Colson Hicks Eidson lawyers ask the JPML to choose a South Florida judge to hear breach-of-contract and racketeering cases against the fantasy sports websites FanDuel and DraftKings.

The JPML consolidates federal cases filed across the country to be heard in one district to streamline discovery and pretrial rulings. Cases that survive the pretrial MDL process are then remanded to their original districts.

South Florida lawyers and judges are being chosen more often to handle MDLs as the legal community's reputation improves, said Miami attorney Scott Wagner, who has worked on about a dozen of the consolidated cases.

Plus, the district's caseload has shifted, the Bilzin Sumberg partner said.

"There's been a downturn in the amount of criminal cases here in the Southern District of Florida in the last 10, 15 years," he said. "The courts have more time to deal with large, complicated MDLs."

One such MDL is the Takata air bag litigation, in which Wagner represents Honda defendants accused of colluding with air bag manufacturer Takata Corp. to hide an alleged defect in the air bags.

Three of the four lead plaintiffs' firms in that case are in South Florida: Podhurst Orseck in Miami, Colson Hicks in Coral Gables and Boies, Schiller & Flexner, whose Miami office is involved along with New York and New Hampshire attorneys.

The case includes personal injury claims filed by 28 people allegedly injured by the defective air bags and economic loss claims from more than 100 drivers whose cars were recalled.



The size of the case and the number of defendants make it stand out among other MDLs, said chair lead counsel for the plaintiffs, Peter Prieto of Podhurst Orseck.

"You have close to a dozen defendants, which is kind of unique in an MDL," he said.

"You have so many cars involved, which at this point are 19 million U.S. cars. The other uniqueness is you have both economic loss and personal injury claims. It's usually one or the other."

The plaintiffs' attorneys are hoping for trial on the economic loss claims sometime in 2017. The coming year will be spent on discovery, including foreign discovery involving Japanese and German defendants.

"There will be millions of pages of documents to review, and it's unclear right now how many depositions will be taken," Prieto said. "It's safe to say there will be a lot of depositions taken by both sides."

If discovery is substantially completed within the year, the attorneys will also work on motions for class certification, he said. The personal injury claimants do not have to be certified as a class, and therefore their claims will likely go to trial before the economic loss claims.

Wagner declined to comment on the Takata case.

The Takata case is still in the early stages, unlike another Southern District of Florida MDL that has been chugging along since 2009.

Plaintiffs in that case claim their banks re-ordered debit card and other charges to collect extra overdraft fees. Many defendants have already settled, including Bank of America, J.P. Morgan Chase and U.S. Bank.

But one of the few remaining defendants, Wells Fargo, will likely make a big splash in 2016.

"Despite the fact that we've settled about \$1.2 billion worth of cases, that one, if we were successful, it would probably double the number," said solo practitioner Bruce Rogow of Fort Lauderdale, who represents the plaintiffs along with Podhurst Orseck and Kopelowitz Ostrow.

Wells Fargo, which is also defending claims against Wachovia after acquiring that bank, will also raise interesting questions about arbitration in the coming year, Rogow said.

The bank plans to file a motion to compel arbitration in the case, even though it waived arbitration six years ago, he said. Wells Fargo's theory is that class certification led to a whole new set of plaintiffs.

"That's where the battle is going to be: Can a defendant waive arbitration against the named plaintiffs and then try to revive its failure to have raised it by asserting it against the class after the class is certified?" Rogow said.

A Wells Fargo spokeswoman did not immediately respond to a request for comment.

The other three MDLs in the Southern District of Florida are at various stages: the settlement of a false advertising case against the makers of Horizon Organic Milk was preliminarily approved in 2015, while cases against Chiquita Brands Inc. and the owners of a plane that crashed are plowing through the pretrial process.

A brand-new MDL might join their ranks if Colson Hicks attorney Ervin Gonzalez is successful in asking the JPML to consolidate cases he's involved in and assign them to the Southern District of Florida.

At a JMPL hearing Jan. 28 in Fort Myers, Gonzalez will request the district be chosen for cases against FanDuel and DraftKings.

Gonzalez represents plaintiffs who allege both websites' contests are dominated by people who use algorithms and other automated tools to win, an unfair advantage the sites don't disclose to other players.

His firm is involved in a handful of MDLs across the country now. The consolidated cases are becoming more prevalent as federal judges whittle the number of national class actions by interpreting the rules of civil procedure more conservatively, Gonzalez said.

The benefit of an MDL is that many cases settle once a bellwether case has been tried, said Colson Hicks partner Mike Eidson, who has worked on several prominent MDLs.

But MDLs can rankle some lawyers who want to take their own depositions and try their own cases instead of allowing one lead attorney to do so, Gonzalez said.

"That can frustrate your traditional trial lawyer who likes to be his own general," he said.