

Bellwether Trials: A Defense Perspective

Law360, New York (April 19, 2016, 11:13 AM ET) --

Environmental torts such as chemical spills or groundwater contamination may result in hundreds or even thousands of lawsuits, often in multiple state and federal forums. Traditional judicial procedures are ill-suited to handle these sprawling actions. Devices for aggregating claims, like class actions, are often inappropriate as well. In these situations, courts and litigants may seek to break the deadlock by fast-tracking a manageable number of individual cases for discovery and trial — in so-called “bellwether” proceedings — with the hope that the outcomes will shed light on the large number of cases waiting in the wings.

Although most discussions of bellwether proceedings take the plaintiffs’ or the judge’s perspective, defendants stand to gain or lose just as much from the process. Indeed, because defendants are guaranteed repeat players when it comes to litigating a mass tort, they face unique considerations in deciding whether and how to participate. Defendants should not necessarily fear bellwether proceedings. Properly utilized, they can elucidate how legal and factual theories will fare in the crucible of contested pretrial motions and trials. But when bellwether proceedings are implemented poorly — so early in the litigation, say, that defendants have not had time to sufficiently understand the plaintiffs’ evidence and claims — they can be not only unproductive but prejudicial to the defendants’ rights. In this article, we seek to familiarize defendants with issues that can arise during bellwether proceedings and discuss important considerations from the defendant’s perspective.

An Overview of Bellwether Proceedings

The term “bellwether” comes from the practice of placing a bell on a wether (a male sheep) to lead the rest of flock while grazing.[1] The concept appeared in the legal lexicon in 1972, when the U.S. Supreme Court noted that 12 of 85 plaintiffs in a securities case had been selected as “bellwether plaintiffs” for an initial trial.[2]

It has since become a common mechanism to resolve environmental torts and other mass torts where the sheer number of plaintiffs makes it impossible to try each plaintiff’s claim individually.

In bellwether proceedings, a small cohort of plaintiffs is selected and their cases are fast-tracked for any



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remaining discovery and trial. The bellwether parties can file dispositive motions and motions in limine, discuss individual settlements and, if these pretrial proceedings do not resolve the claims, then proceed to trial. The other plaintiffs' cases are generally stayed during this time, although in some instances discovery also can proceed on an overall basis. The process should not be geared at prohibiting defendants from taking discovery of all plaintiffs, because as "a general proposition every party to a lawsuit has the right to take depositions of the other party, absent a protective order entered by the trial judge."^[3] Instead, this process is more of an ordering device that allows for an initial close examination of a subset of the plaintiffs' claims, with the expectation that the remaining plaintiffs' claims will be addressed once the bellwether process runs its course.

When the process works as intended, bellwether proceedings produce a great deal of value for everyone. The parties can work through dispositive or critical legal issues in front of the judge. They can see what arguments work — and do not work — with the jury. They can learn what sorts of damages a jury might deem appropriate for certain types of alleged injuries. Most importantly, the parties and the court can use the information generated by the test cases to reassess the remaining litigation. The defendant may realize that its exposure to liability and damages is greater than it thought. Or plaintiffs counsel may realize that their claims are unlikely to sway a jury or judge. Having gained a better sense of the "real-world" value of all of the claims, the parties can, at least in theory, make more realistic and therefore more successful proposals to settle most or all of the global litigation. There are, of course, other ways to get information about the strength of claims and defenses, such as mock jury trials. But the bellwether process has clear advantages, guaranteeing "real-world" results and giving both sides a shared frame of reference.

Considerations for Defendants

A number of factors affect whether the bellwether process will serve this intended function. Before agreeing to a bellwether proceeding, defendants should think critically about the following issues.

The Selection of Bellwether Plaintiffs

The court and the parties have a great deal of discretion in crafting bellwether procedures. Exactly how many plaintiffs to put in the bellwether pool often depends on the type of dispute at issue and the variables the parties are interested in testing. As one discussion of the bellwether process put it, "common sense dictates that the greater the number of trials to be held, the greater the number of variables at issue, and the greater the discretion afforded in selecting which cases will be tried, the larger the pool should be."^[4] At the same time, the bellwether cohort must be small enough to be manageable. Striking the right balance is a mix of art and science and depends on the legal and factual underpinnings of the case.

In addition to deciding how many trials to hold, the parties must also decide how to populate the bellwether cohort. Methods vary. The Manual for Complex Litigation recommends that judges select test cases randomly or that the parties select mutually agreeable cases for trial.^[5] But in practice purely random selection is rarely used, and mutual agreement can be hard to come by. Sometimes both parties each will select a handful of candidates and have limited veto power over their opponents' choices. Other times the parties opt to have the judge choose from a pool populated by both parties. In this as in so many aspects of bellwether procedure, the "right" outcome depends as much on the needs of the parties as on any objective criteria.

A recent study suggests that plaintiffs may do a "worse" job selecting bellwether candidates than

defendants, in the sense that plaintiffs tend to select less typical (and usually more plaintiff-favorable) cases for trial.[6] This may make sense for individual plaintiffs counsel, who usually operate on a contingency basis and whose goal may simply be to get to trial as quickly and cheaply as possible. But for defendants, and even for plaintiffs, focusing on a handful of unrepresentative cases may undermine the process. In the words of the Fifth Circuit, this risks turning the bellwether process into “a trial of 15 of the ‘best’ and 15 of the ‘worst’ cases contained in the universe of claims” in the litigation.[7] With unrepresentative bellwethers, the defendants and remaining plaintiffs might dismiss the outcome of a bellwether trial as an aberration. Worse, if the best plaintiffs’ claims are tried first, the remaining plaintiffs with comparatively weaker claims might overvalue their claims, pushing the parties further from settlement. This would serve no bellwether function at all.

At bottom, therefore, bellwether procedures should ensure that test cases sufficiently mirror the universe of cases. The fundamental objective of bellwether litigation is not to resolve the relatively small number of disputes in the bellwether cohort but rather to inform defendants and plaintiffs of the plausible value of the large number of remaining claims.

The Timing of Bellwether Proceedings

Another important consideration for defendants is timing. The bellwether approach can be applied at nearly any stage of the litigation, from the outset of the case to right before trial. Courts have even begun to explore “bellwether settlement,” in which earnest settlement discussions are held with a few select plaintiffs and the results are used to build a settlement “template” for the nonbellwether plaintiffs.[8]

Although every bellwether proposal must be assessed on its own terms, from the defendant’s perspective, bellwether procedures are generally more worrisome the earlier in the litigation they are employed. Remember that bellwether trials are most useful when their outcomes shed light on the larger litigation. When plaintiffs seek to use bellwether procedures right from the start, however, the defendant — and many of the plaintiffs — may get no real idea on how the bellwether plaintiffs compare to their nonbellwether counterparts.

Early “bellwether discovery” thus risks putting the cart before the horse. Without the ability to reasonably assess the strength of all of the plaintiffs’ claims, defendants will justifiably be reluctant to extrapolate from the information produced in bellwether discovery. Indeed, bellwether discovery can be not just ineffective but counterproductive. By limiting the defendant’s ability to depose plaintiffs or conduct discovery, the process can prevent the defendant from gathering necessary information to determine whether to resolve claims quickly by way of settlement or dispositive motion. For these reasons, it is generally preferable from a defense standpoint to hold off on bellwether procedures until after the parties have had a chance to conduct some limited discovery on all, or at least a substantial number, of the plaintiffs.[9] Plaintiffs, of course, generally are incentivized to minimize costs, so they may push for the creation of a “bellwether” process early on in an effort to short-circuit or minimize discovery of their generally numerous clients.

Defendants also may seek a “Lone Pine” order, which is a pre-discovery order that “essentially require[s]” a mass tort plaintiff to produce “information which plaintiffs should have had before filing” suit, such as “information regarding the nature and substance of his injuries, the circumstances under which he could have been exposed to harmful substances and the basis for believing that the named defendants were responsible for his injuries.”[10] Armed with this information about the plaintiffs’ claims, defendants can begin to assess the wisdom of bellwether proceedings from an even playing ground. This makes bellwether discovery on a subset of plaintiffs less problematic and more likely to lead to useful trials.

The Potentially Binding Effect of Bellwether Proceedings

A significant concern for defendants is whether the results of test cases will be given binding effect in later litigation. Previously, some trial courts had imposed a binding framework on bellwether trials by fiat. For example, in early asbestos litigation out of the Eastern District of Texas, the trial judge held a number of bellwether trials and assigned each plaintiff to one of five different categories of alleged asbestos-related disease. The judge then awarded the nonbellwether plaintiffs damages equal to the average bellwether verdict rendered in their particular category. The Fifth Circuit declared — correctly — that this practice violated the defendant’s Seventh Amendment right to a jury trial.[11] Following the Fifth Circuit’s decision, several other circuits have held that bellwether trials are not binding unless parties expressly consent at the outset of the procedure.[12]

Even if the bellwether court does not formally make bellwether results binding, nonbellwether plaintiffs might seek to give preclusive effect to an issue resolved against the defendant in a bellwether trial. This use of so-called “offensive nonmutual issue preclusion” can be fundamentally unfair. The doctrine of issue preclusion can only be used against someone, like the defendant, who was a party to the original judgment, and not against others, like the nonbellwether plaintiffs, who were not parties to the original judgment. Issue preclusion therefore can present a heads-I-win, tails-you-lose bet against the defendant. The Supreme Court has warned that this form of issue preclusion should not be applied when its application would be “unfair.”[13] That almost certainly will be the case in bellwether proceedings. Moreover, the threat of issue preclusion can subvert the purpose of bellwether trials — offering nonbinding information on the value of the remaining plaintiffs’ claims — and therefore make defendants less willing to agree to the process in the first place.

The unfairness of issue preclusion is especially apparent when the bellwether process is contrasted against class actions under Rule 23. In a class action, the class representatives must prove that they will fairly and adequately protect class members’ interests and that their claims are sufficiently similar with all class members’ claims. A class judgment in favor of the defendant also is binding on all class members. But neither is true in bellwether proceedings: Bellwether plaintiffs might be cherry-picked based on their atypically strong claims, and defendants cannot use a bellwether judgment as binding against nonbellwether plaintiffs. Nonbellwether plaintiffs therefore should not be able to profit from a favorable bellwether ruling while sidestepping an unfavorable one.

To guard against the threat of unfair issue preclusion, at the start of the process, defendants should consider seeking stipulations from plaintiffs that any issues resolved in the bellwether trials will not be treated as preclusive. Defendants also could seek an early judicial determination that the results of bellwether trials will not be used preclusively against any party. Or all parties could agree at the start that the bellwether results can be used preclusively against either side, ensuring that everyone has skin in the game.

All this said, the results of bellwether proceedings almost certainly will have some effect on the remaining cases. A judge who decides a bellwether motion one way is likely to reach the same result when faced with similar motions in the future. And a judge in a separate forum who is presiding over parallel litigation may find the first judge’s bellwether rulings persuasive, even if not binding. Defendants therefore stand to gain from favorable rulings in a bellwether process, much like nonbellwether plaintiffs would.

Coordination

When mass tort suits are filed, plaintiffs counsel are unsurprisingly looking for what they believe are the best forums for their claims. They therefore may file in states with little connection to the underlying dispute or dodge federal courts' jurisdiction through artful pleading. The filings in disparate forums complicate the bellwether process because there is no formal, rule-based mechanism to get federal and state court judges to work together in mass tort cases. As a practical matter, though, with the encouragement of counsel, judges may decide to coordinate their efforts. Some judges might slow the pace of litigation on their dockets to allow a bellwether process in a different jurisdiction to play out. The results of the bellwether process can then inform both sets of litigation and help to contain costs while the bellwether trials in the other jurisdictions progress.

Iteration

Bellwether proceedings are iterative by their nature. Plaintiffs and defendants learn from the early trials and adapt accordingly. If a defendant is successful in barring a proposed expert's testimony, for instance, later plaintiffs might try to correct the deficiency by finding a new expert or bolstering the old one. So defendants should consider how broadly to frame their motions in the bellwether cases, knowing that future plaintiffs who are still in discovery may be able to shore up weaknesses in their cases. A sophisticated understanding of the entire litigation and of the particular legal and factual elements in play is critical.

Conclusion

Mass torts can involve so many claims that traditional individualized resolution is impossible. In such circumstances, courts and parties must find ways to simplify and bellwether proceedings can be an important tool. Defendants should be attuned to the many ways in which bellwether proceedings can lead to successful outcomes, up to and including an agreeable global settlement. But they must also take care that the procedure is used intelligently and appropriately. When used properly, bellwether proceedings can pay significant dividends for defendants.

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[1] *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997).

[2] *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 140 (1972).

[3] *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 521 (D.C. Cir. 1975); cf. 28 U.S.C. § 2072(b) (stating that federal rules of procedure “shall not abridge, enlarge or modify any substantive right”).

[4] Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 *Tulane L. Rev.* 2323, 2347-48 (2008).

[5] Manual for Complex Litigation §22.315 (4th ed. 2004) (“To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.”).

[6] Loren H. Brown, Matthew A. Holian & Arindam Ghosh, Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection, 47 Akron L. Rev. 663 (2015).

[7] In re Chevron, 109 F.3d at 1119; see also id. at 1122 (Jones, J., specially concurring); (explaining that where the “judge allowed the parties to pick faces from the crowd of plaintiffs,” “[a]s a ‘bellwether’, the exercise is pointless”); In re Tylenol (Acetaminophen) Mktg., Sales Practices, and Prods. Liab. Litig. 2015 WL 2417411, at *1 & n.3 (E.D. Pa. May 20, 2015) (“A ‘bellwether case’ is a test case. ‘Bellwether’ trials should produce representative verdicts and settlements.”).

[8] See Adam Zimmerman, The Bellwether Settlement, PrawfsBlawg (June 8, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/06/the-bellwether-settlement.html> (discussing an approach used by a New Jersey state court in litigation arising out of defective hip implants).

[9] See, e.g., In re 2004 DuPont Litig., 2006 WL 5097316, at *2 (E.D. Ky. Mar. 8, 2006) (“The court concurs that, at least until additional discovery is obtained by defendants, the ‘bellwether’ approach is not appropriate.”); Meranus v. Gangel, 1991 WL 120484 (S.D.N.Y. June 26, 1991), at *2 (“[I]t is important to proceed with some limited interrogatory discovery and to complete the appropriate document production. A deadline can then be established for the parties to take a final position with regard to the bellwether approach.”); see also Fallon, Bellwether Trials, supra, at 2344 (stating that the “initial step in the bellwether process will require that the attorneys have some knowledge about the individual cases in the MDL” and noting that in one prototypical bellwether litigation, “this was achieved with limited case-specific discovery through the exchange of plaintiff and defendant profile forms”).

[10] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); see also, e.g., Arias v. DynCorp, 752 F.3d 1011, 1015 (D.C. Cir. 2014); Avila v. Willits Evtl. Remediation Tr., 633 F.3d 828, 833-35 (9th Cir. 2011).

[11] Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320-21 (5th Cir. 1998); cf. id. at 336 (Garza, J., concurring) (stating the “‘extrapolated’ damages determination” are not binding on the remaining plaintiffs but “are valuable in and of themselves as indications of an appropriate settlement range for each of the five disease categories involved”).

[12] In re Hanford Nuclear Reservation Litig., 497 F.3d 1005, 1025 (9th Cir. 2007) (“We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs.”); Dodge v. Cotter Corp., 203 F.3d 1190, 1199 (10th Cir. 2000) (“[T]here is no indication in the record before us that the parties understood the first trial would decide specific issues to bind subsequent trials.”); In re TMI Litig., 193 F.3d 613, 625 (3d Cir. 1999) (“[A]bsent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff.”).

[13] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).