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Spotlight | Plaintiffs Bar

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CONVERSATION

A Plaintiffs Bar Divided? Some Say the Fragmentation Is Leading to Bad Case Law, Lower Fees

From battling for MDL leadership, to positing one-off arguments on precedential matters, to undercutting fees, senior members of the plaintiffs bar warn colleague on the need to be more unified.

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Litigators

Christine Schiffner

For plaintiffs bar firms there's a lot at stake when litigating cases given the contingency fee based business model. "We risk our own money every day," said DiCello Levitt founding partner Adam Levitt in a recent conversation with NLJ. That makes competition fierce and unity, at times, lacking.

When litigating high-stakes mass torts or class-action cases, plaintiffs firms can be "competitors in any sense of the word," said Napoli and Shkolnik partner Hunter Shkolnik. When it comes to landing a leadership role in a multidistrict litigation, it is likely for "the knives to come out, like 'I'm the better leader,'" Shkolnik said.

The plaintiffs bar is organized in various interest groups, yet at the same time, "firms represent the interest of their clients, so some of that is unavoidable," said Cuneo, Gilbert & LaDuca partner Pamela Gilbert. She is also the executive director and legislative counsel for the plaintiffs bar organization Committee to Support the Antitrust Laws (COSAL). The group represents about 40 plaintiffs firms aiming to promote and strengthen the enforcement of antitrust laws.

While some plaintiffs attorneys, including Shkolnik, say that, "when push comes to shove in litigation against some of the biggest companies in the world, they haven't been able to divide us yet," the question remains—how divided or unified is the plaintiffs bar?

As Adam Levitt told NLJ in a previous interview and underscored again in recent conversation with NLJ, "the plaintiffs bar needs to do a better job in taking a big picture view and seeing the whole field." He believes that fragmentation in the plaintiffs bar is a serious barrier to a more unified approach to litigation and the resulting case law. While the defense bar rather consistently applies long-term strategies, "concerted action is sorely lacking in the plaintiffs bar."

"Too many plaintiffs' lawyers shortsightedly act as though their current case is the only one they are ever going to bring, not realizing the effect taking certain positions could have in the long run. That's a dangerous thing," Levitt said. He points to his firm's active involvement in organizations such as The American Law Institute or the Sedona Conference. "It's important for us as a bar to get involved in the macro-issues and to understand how the macro issues have a direct effect on micro issues of our cases every day."

Ultimately, it comes down to pursuing "strategies to establish good law," Gilbert said. "Which cases get appealed, which cases don't. … Organizations such as COSAL or AAJ can facilitate some of that." COSAL recently created the Amicus Committee as a venue for law firms to jointly review and appeal cases as an organization. "We decide what we want to tell the courts about these particular cases," Gilbert said.

The plaintiffs bar organization American Association for Justice (AAJ) underscores that the group has been able to unify firms on issues such as arbitration or discovery and expert rules. AAJ is also a forum where "lawyers meet four times a year and share tips and discuss cases," said AAJ CEO Linda Lipsen. "These jobs are very hard and I could not underscore enough how important it is for lawyers to get together and blow off steam, talk about cases and learn from each other."

When it comes to fragmentation, Robins Kaplan's national trial chair Roman Silberfeld defines the plaintiffs bar as consisting of "three tiers." There are "the cream of the crop, the best firms," "everybody else as the second tier." And then, "what makes it really complicated is there's another tier, which I broadly think of as the new entrants," he said.

Finding a common voice on important issues and taking a longer term view on case law also comes down to experience. "My experience has been that the best of the best, the top tier, are in fact united," Silberfeld said. "They do take a big picture view." Problems of a bad precedent being made, "those things occur because of the 'everybody else tier' and, frankly, the new entrants, who think they know more than they know."

In addition, leadership competition in MDLs has led to firms "underbidding themselves and undercutting themselves on fee percentages," Levitt said. "Every time, we, as a bar, agree to those kinds of things, the implication is that we're worth less than our opponents." The moment plaintiffs lawyers devalue themselves in the eyes of the court or the opponent, "you make yourself susceptible to attacks because you already started to cede the field—which is something that I never do and something which I implore others not to do either."

"Better judges are interested in having quality lawyers with demonstrated ability to handle cases," Silberfeld said. He also points toward the financial obligations that come with a high-stakes litigation. "You get the kids off the street because they would love to have a leadership role, but they are not prepared to write a check for 50 or 100 grand and then do it again in three months."

Bringing cases to trial successfully also entails that "the plaintiffs bar needs to train more young lawyers who are able to try them," Levitt said. For the plaintiffs bar to succeed, "there is no greater safety valve than the ability to try a case." If you don't like a potential settlement offer, you always have the ability to say—let's go to trial.

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