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Judge Opted for Modified Bellwether Method in Lining Up Phila. Xarelto Trials

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Of the Legal staff

Philadelphia Court of Common Pleas Judge Arnold New is taking a different tack in trying cases in the Xarelto mass tort program.

Cases over the blood thinner will be tried using the bellwether selection system, according to an order issued by New last week. Mass tort programs that are currently conducting trials, including the Risperdal and the pelvic mesh litigations, have been using the first-in, first-out method for selecting what cases will be first to hit trial.

According to attorneys, this is the second time New has opted for the bellwether method, which was first used in the mass tort program involving plaintiffs who claimed the birth-control drugs Yaz, Yasmin and Ocella caused arterial blood clots. However, since that program resulted in a global settlement before any cases went to trial, the Xarelto program could become the first to be tried under the bellwether system since New took over as coordinating judge of the city's Complex Litigation Center in 2013, attorneys said.

Attorneys representing plaintiffs in the cases said they were pleased by the judge's decision, and they expect the system will allow for cases that are the most representative of the overall mass tort to be tried first.

"A bellwether program is beneficial for litigants and the court by providing information on the value of the cases as reflected by the jury verdicts that result," said Levin, Fishbein, Sedran & Berman attorney Michael Weinkowitz, who is representing numerous plaintiffs.

According to attorney Laura Feldman of Feldman & Pinto, the system is the result of a coordinated effort by plaintiffs and defendants to get cases that are more representative of the overall mass tort.

"It's to give us a real sense of what the value of those are," Feldman said.

Attorneys from both the plaintiffs and defense bar said both the first-in, first-out and the bellwether methods have their downfalls—plaintiffs contend that, when given the choice, defendants often chose terrible cases that are not instructive, while defense attorneys said plaintiffs retain the ability to simply settle or dismiss cases they don't believe will come back with a strong verdict.

But attorney Thomas R. Kline of Kline & Specter, who represents plaintiffs in mass torts but is not involved in the Xarelto litigation, said the most important factor in bringing about a fast global resolution is the willingness of the parties to resolve cases.

A global resolution "has nothing to do with how the cases are selected, but rather has to do with the willingness of the parties to settle the litigation," Kline said.

New's order from Oct. 17 outlines not only the method for selecting cases, but also the method for how discovery will be conducted for the suits that are selected to be in the pool of bellwether cases.

He added that trial selection would deviate from the strict bellwether method with an element of random selection present in the process.

According to the case management order, 24 suits will be selected as the pool of potential bellwether cases first up for trial. Ten of those cases will involve plaintiffs who took Xarelto to reduce the risk of stroke and ended up with a gastrointestinal bleed, eight cases will involve plaintiffs who used the drug to treat deep vein thrombosis, and the remaining six will involve plaintiffs who took the

drug to reduce their stroke risk and ended up with a brain bleed, or hemorrhagic stroke.

Each party will choose nine cases and the remaining six will be randomly selected.

Plaintiffs will try the first case in each category, and then a case chosen by the defense will follow. After the first two cases in each category have been tried, the rest will be randomly selected from the pool, and any case that was dismissed or settled will be replaced by the party that initially chose to try that case.

According to court records, 1,092 cases are pending in Philadelphia's Complex Litigation Center. New's order said the first round of bellwether cases should be tried between Sept. 29 and Dec. 11, 2017.

When asked whether the bellwether system might drive the parties to a faster settlement, Feldman noted several cases in the federal multidistrict litigation over the drug will have already gone to trial by the time the first case goes before a jury in Philadelphia.

"I don't think Philadelphia is driving that train, since the MDL is ahead of us," she said.

A case management order entered Sept. 21 in the MDL, which is housed in the U.S. District Court for the Eastern District of Louisiana, set the first three federal cases to be tried between March and May 2017.