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In October 2014, after a year of slow drip recalls involving defective air bag inflators made by Takata Corp., Roland Tellis of Baron & Budd PC was working with another firm to draft what would be the first class action in the litigation. But he was already thinking ahead.

At that point, the Japanese auto parts maker's recalls had expanded to more than 14 million vehicles, and the defects had allegedly caused four deaths. Tellis knew it was only a matter of time before the recalls spawned a major multidistrict litigation. That meant it made most sense to file the suit in a spot where more than a hundred other suits yet to be filed were most likely to be litigated. South Florida, its humidity a possible contributing factor to the defect, seemed like a logical venue. But to maintain a grasp on the litigation, he would need yet another ally. On a Friday, he called Peter Prieto of Podhurst Orseck PA, a firm in downtown Miami.

Working together in a flurry of emails and phone calls over the weekend, the attorneys filed two complaints — including one that exceeded 120 pages — by Monday night. The collaboration paid off. On Oct. 27, 2014, Baron & Budd, Podhurst Orseck and Labaton Sucharow LLP, along with two small firms whose clients joined the suits, were the first to the courthouse.

Roland Tellis of Baron & Budd

"Once I knew we were going to be filing in Miami, the obvious choice was teaming up with Peter's firm," Tellis said. "I always try to team up with a lawyer I know who's going to approach the case the way I would."

By February, the case would be consolidated in Miami, after about 90 suits had been filed, including 80 class actions. Prieto was ultimately selected as chair lead counsel in the MDL, while Tellis found a spot on the plaintiffs steering committee.

In a time when class actions face exceptional hurdles, plaintiffs attorneys are counting on strength in numbers. Between the Class Action Fairness Act of 2005, which upped the requirements for cases at the filing stage, and a string of rulings from the U.S. Supreme Court, smaller firms are finding they must band with their larger counterparts to survive.

Class action firms have pivoted away from many other traditional consumer class actions, which took a hit in the 2011 ruling AT&T Mobility v. Concepcion, turning instead toward claims that don't involve plaintiffs who may have waived their rights to band together as a class. MDLs, especially ones involving auto defects, have risen to take the place of cases that attorneys say have too many procedural hurdles to be financially viable.

As MDLs grow more prominent, critics say an elite circle of firms is becoming entrenched at the top, and attorneys like Prieto, who hail from smaller practices, rarely get to lead the fray. But the shift has meant that even bigger firms are finding they, too, need to collaborate on cases and leadership arrangements in order to stay in the game.

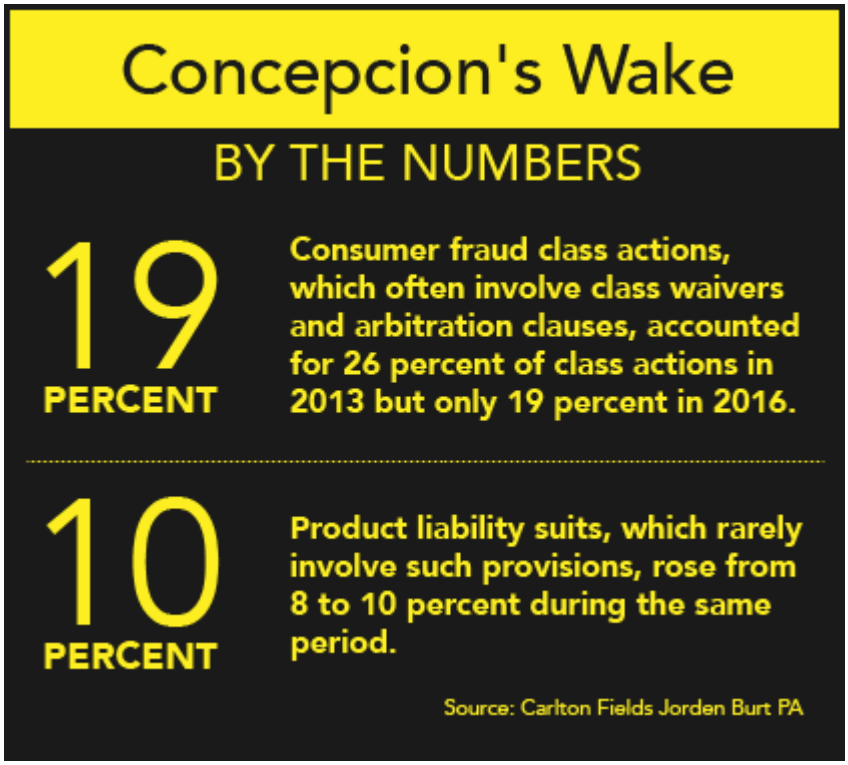
"We've teamed up with other plaintiffs lawyers, who tend to be bigger, to be able to prosecute class actions, and we vet cases a lot closer," Prieto said. "Every contingency case you take on now is a big investment — and if you bring that case, you're going to have be able to recover for your client."

Tougher Times

At Beasley Allen Methvin Portis & Miles PC, the wheels of a class action can be set in motion by smaller shops looking to collaborate. If the case involves auto defects, partner Dee Miles might run it by Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein LLP in San Francisco, Ben Bailey of Bailey & Glasser LLP in Charleston, West Virginia, or Tellis in Los Angeles. When it's a financial case, he more often calls up Adam Levitt, formerly of Grant & Eisenhofer PA, who now runs his own firm in Illinois.

"That's how you see a complaint sometimes filed with four or five law firms on there," Miles said. "It's been sort of a difference maker in the way we do business at Beasley Allen. You need other firms."

Miles' 75-attorney firm has maintained its pace since Concepcion, he says. He attributes that to forging closer ties with a familiar network of firms and focusing on auto-defect litigation — an area of consumer class actions relatively untouched by arbitration clauses and class waivers, which has thrown a lifeline to the plaintiffs bar after that ruling.



"Automakers don't deal directly with consumers," Tellis said. "There is no real contract which may contain a class action waiver, and an identifiable class because there are VIN numbers to ID who they are, and there tends to be uniformity of a defect since auto components are manufactured on assembly lines."

Joe Whatley of Colorado-based plaintiffs litigation boutique Whatley Kallas LLP has also moved away from most consumer class actions because of the barriers created by Concepcion, instead shifting his focus to health care antitrust litigation. But its work is a shadow of its caseload 10 years ago.

Whatley's firm brings about 10 percent of the class actions it did in 2007, now filing on average only about six to 10 new suits a year. The firm has shrunk over the years, landing at 16 attorneys today, though Whatley declined to say how much of a decrease this is.

Even as recently as five years ago, he says, his firm had a stable of cases that would frequently land its attorneys at consolidation hearings before the Judicial Panel on Multidistrict Litigation, angling for leadership positions.

"Now we never go to the MDL panels," he said.

Whatley attributes the decline not only to the Supreme Court but also to appeals court decisions on the so-called ascertainability requirement within class action rules, which requires plaintiffs to prove they purchased the product they're suing over.

In 2013, the Third Circuit ruled that a federal judge in New Jersey should not have certified a class of consumers suing Bayer Corp. for false advertising because they would not all have receipts to prove, or ascertain, that they purchased the One-A-Day WeightSmart vitamins at issue in their case.

Whatley also cites the 2011 Supreme Court ruling in Wal-Mart v. Dukes, which raised the bar for plaintiffs in a proposed class to show they suffered common injuries, as a factor that drives up costs. That precedent has pushed class certification to later stages of a case and required more analysis and expert testimony to win certification.

Joe Whatley of Whatley Kallas

The result is that even though his firm pursues fewer class actions, they are much more expensive: He estimates that on average it costs at least $10 million from the time his firm files a complex suit to when it is successfully certified as a class action. Other plaintiffs attorneys provide similar estimates.

"What we've found is that these cases are so expensive that partnering with other firms is almost always essential," Whatley said. "It's almost the nature of how litigation develops these days."

These costs are exponentially higher than they were during the pre-CAFA, pre-Dukes era of the early aughts, he says, when even in complex cases the class certification process seemed almost an administrative formality. In the 2004 case Klay v. Humana, for example, Whatley and a group of other firms represented a proposed class of doctors suing health maintenance companies for allegedly conspiring to underpay them. Whatley describes a remarkably straightforward certification process in that case that cost a fraction of what it might in 2017.

"Each side submitted an expert affidavit and the depositions of the class representatives, maybe," he said. "Nobody even deposed the experts on either side. And the cost of doing a class certification motion was nominal. I suspect it was under $100,000 in that case."

Complaints have also gotten longer and more detailed to comply with the requirements of the Class Action Fairness Act. A class action complaint in the 1990s would have run between 10 and 30 pages; now, they can easily run to about 100 pages, Miles notes. In a case over the Volkswagen emissions scandal, Hagens Berman Sobol Shapiro LLP and Quinn Emanuel Urquhart & Sullivan LLP filed a proposed class action in September 2015 that was 500 pages long.

"Before CAFA, you just filed notice pleadings where you just put enough information in the complaint for the defendant to know what they're supposed to be defending," Miles said. "Now you need to go into detail to what is causing the defect, which is more than just making an allegation based on what someone has said."

Defense attorneys argue that adding more detail to complaints and moving litigation from state to federal courts, another effect of CAFA, brings stability to litigation.

"There's a level of attention that courts pay to certification decisions now that makes them much more predictable now that class actions are increasingly brought in federal courts," said Emily Henn, who chairs Covington & Burling LLP's class action practice.

"With rulings like Concepcion, a lot of people predicted that it would be a real game changer in decreasing the number of class actions, but I think class actions have remained quite active, though their complexion has changed," she said.

In this environment, some plaintiffs firms have maintained their inclination to work solo, but they still collaborate with larger firms when cases call for it.

Employment boutique Sanford Heisler Sharp LLP, for example, has generally worked independently, and it has also managed to grow to more than 30 attorneys from just three when it was founded in 2004. In recent years, though, it has reached out to larger peers when it found its own resources strained.

For instance, after four years of going it alone in a proposed class action it brought against KPMG LLP in June 2011 that claimed the accounting giant owed $350 million for discriminating against its female managers, the firm sought the support of Lieff Cabraser when KPMG's discovery requests mounted. At one point, KPMG had sought written discovery from around 1,200 women the suit was representing, which was when the firm brought on Lieff Cabraser to help field the onslaught.

"The cases often take much longer to litigate, and the defendants like to engage in trench warfare, more than was true pre-Dukes and pre-Concepcion," said Jeremy Heisler, the firm's founding partner. "The anti-class action climate of recent years has emboldened defendants as a general matter. There are exceptions, but my perception is that it is now more of a long-term war than it used to be."

Other firms have moved away from class actions altogether, finding them harder to sustain.

Mark Lanier of the Houston-based Lanier Law Firm — known for its work in large product liability cases including the hip implant MDL against Johnson & Johnson subsidiary DePuy Orthopaedics Inc. and for being a lead player in a number of MDLs — says his firm now brings a few class actions a year, compared

with around a dozen in 2011. Class actions account for only 10 percent of its work, as it has shifted its focus to commercial litigation, including oil and gas cases.

Lately, Lanier says, he travels around the country at least two or three times a month just to meet with smaller firms that have reached out in the hope of teaming up to bring larger class actions — a development that has required Lanier Law's own attorneys to form informal committees to vet such pitches.

"They want to bring a national class action and say, 'But I don't have the manpower and I don't have the money,'" he said. "It lessens the risk when you team up with another firm, but it dilutes the profits."

At the same time, such referrals open up much-needed opportunities for the midsize class action-oriented firms trying not just to survive but to stay profitable.

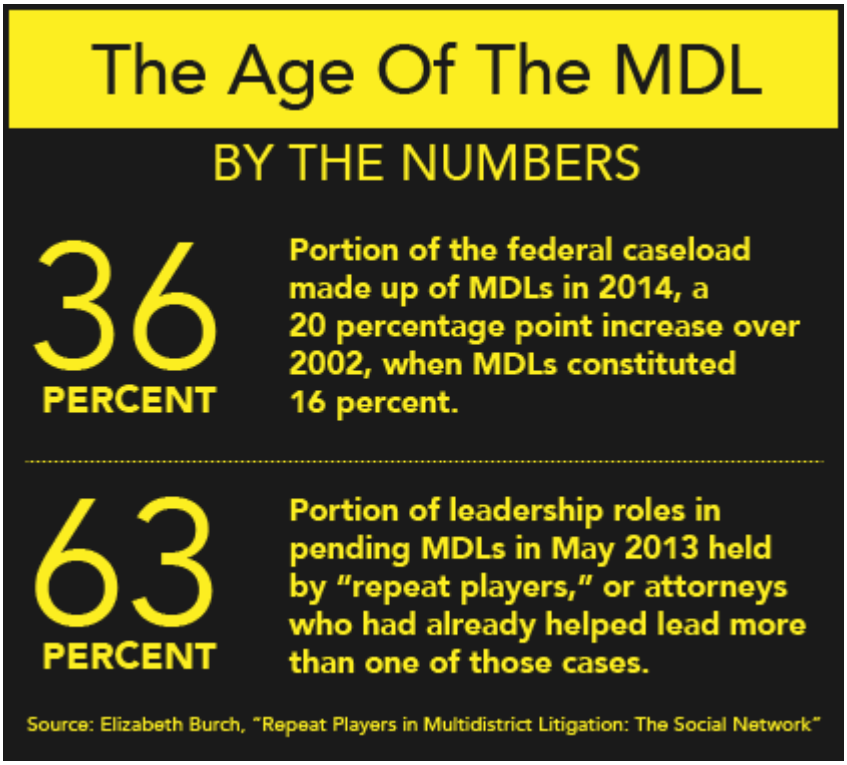
"Referrals are a way to grow your pipeline of cases, which class action businesses need," said Baron & Budd's Tellis. "You don't have the luxury of litigating just one case for five years. It's a precarious financial model if you're paid every five years."

Elizabeth Cabraser leaves the Phillip Burton Federal Building in San Francisco after an April 2016 hearing over the Volkswagen emissions scandal. (AP)

'Repeat Players'

When U.S. regulators accused Volkswagen in September 2015 of fitting its diesel vehicles with software designed to cheat emissions tests, Miles of Beasley Allen knew it could only mean an MDL. He spoke to his usual contacts, Bailey and Cabraser, about a potential lawsuit against Volkswagen. Miles ultimately filed a suit jointly with Cabraser in California while Bailey filed a separate case in West Virginia, figuring they would be consolidated anyway. As they expected, the cases, along with dozens of others, were centralized in California in December 2015.

A month later, Cabraser was appointed lead counsel for the MDL, out of a pool of some 150 applicants, while 21 other attorneys from other firms, including Miles, Bailey and Tellis, were appointed to the plaintiffs steering committee.



In high-profile cases unfolding around a major nationwide product defect, plaintiffs attorneys specializing in mass torts work together swiftly and strategically from the outset, particularly if the litigation looks headed toward MDL consolidation. That way they get to be among the first, if not the first, to file cases and get a toehold on the litigation before the media spotlight sends cases multiplying across the country.

In the last 15 years, MDLs like the Volkswagen case have increased in scope and importance to plaintiffs firms, says Elizabeth Burch, a law professor at the University of Georgia. In a paper scheduled to be published in the Cornell Law Review in August — titled "Repeat Players in Multidistrict Litigation: The Social Network" — Burch writes that MDLs have soared from just 16 percent of the federal caseload in 2002 to 36 percent in 2014.

MDLs are a strong alternative to class actions because they allow joint discovery and coordination on other pretrial issues, and they don't necessarily suffer the same hurdles class actions do with certification. The steep paydays — frequently topping $100 million in attorneys' fees for the biggest cases — have provided an alternative revenue source for firms whose class action practices have taken a hit.

For plaintiffs firms, a key difference between the two frameworks is that in MDLs a large group of lawyers vie for lead role positions, whereas in class actions, the firm that filed the first suit often gets to

represent the class. But while MDLs often offer more opportunity for leadership roles, the shift away from class actions means competition for those spots is even tougher.

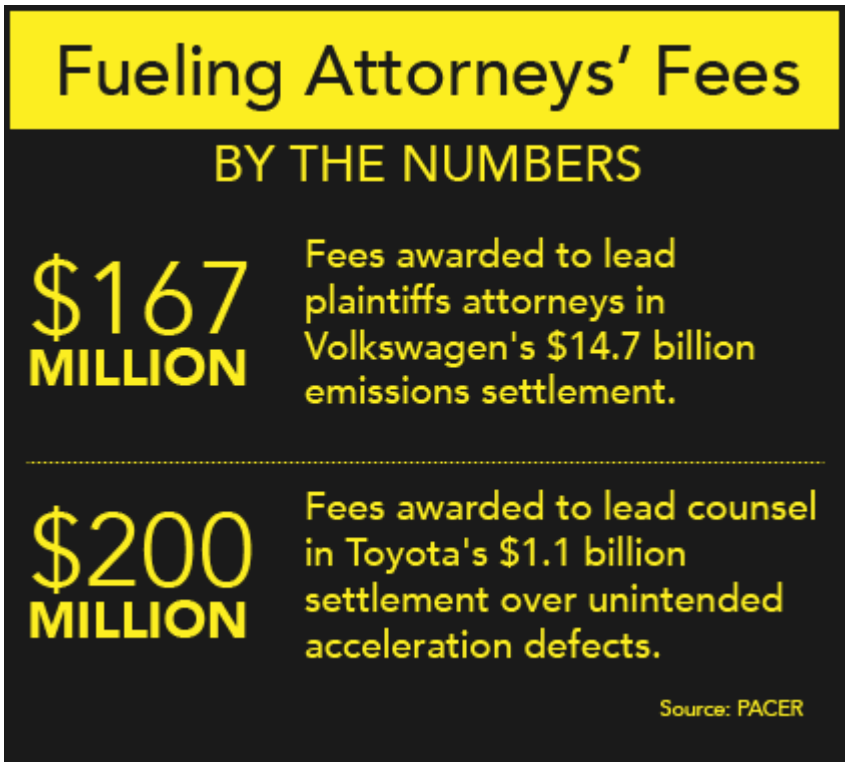
As this form of litigation grows in prominence, some observers say an elite circle of firms is becoming entrenched at the top. Burch writes in her paper that the more experience law firms have in leading MDLs, the more likely they are to be chosen again to lead future MDLs, often shutting out small firms. That can sometimes prevent smaller firms from making a mark on litigation in a way that could expand their opportunity in future MDLs, some plaintiffs attorneys say.

"In a sense, there's nothing more important than being appointed in an MDL to a leadership position, and not necessarily lead counsel," said William Audet of San Francisco-based plaintiffs firm Audet & Partners LLP. "It's about having control and an impact on the way the case should be prosecuted."

Burch's analysis of 73 MDLs that were pending as of May 2013 found that what she called "repeat players," or attorneys who had already helped lead more than one of those cases, held close to two-thirds of all available leadership roles. Burch studied cases that involved product liability and sales practices claims, which make up a third of all MDLs. Judges choose lead attorneys in MDLs based on their experience, resources and inclination to collaborate with one another, she says.

"You're seeing firms that have been dominating in class actions moving more into the MDL context," Burch said.

But the emphasis on cooperation can create incentives for attorneys not to flag concerns about settlement terms or even litigation strategies, she says. When a class action or an MDL class is certified, it paves the way for class action objectors to raise issues. When a class is not certified in an MDL, there are fewer channels for parties to critique lead attorneys' decisions.



"My read of that is that the judges are not as concerned about the ability of people to dissent within that process," she said.

Defense attorneys anecdotally say they are engaging with many of the same plaintiffs firms in big class actions and MDLs, although they add that their priority is that their adversaries work together smoothly and streamline communications with the defense.

"I certainly do deal with the larger, well-known plaintiffs firms that have

long had well-established class action practices, like Hagens Berman, Lieff Cabraser and Cohen Milstein," said Henn, the Covington & Burling attorney. "I don't disagree that there's a phenomenon there. But as a defense lawyer, what I focus on is whether they are well-qualified, professional, and willing to work with our side to make the discovery and other processes move forward."

Experts say many of the major auto-defect MDLs since 2010 have allowed a small circle of plaintiffs firms to deepen their footprint and command hefty paydays in the form of so-called common-benefit fees, which go toward lead attorneys who have worked together in the interests of a group of plaintiffs.

In Volkswagen's $14.7 billion emissions settlement with consumers, federal agencies and others, nearly two dozen plaintiffs attorneys led by Cabraser as plaintiffs steering committee chair won $167 million in fees. Those attorneys include Hagens Berman's Steve Berman, Miles of Beasley Allen, Paul Geller of Robbins Geller Rudman & Dowd LLP, David Boies of Boies Schiller & Flexner LLP, Tellis of Baron & Budd, and Chris Seeger of Seeger Weiss LLP.

Toyota's $1.1 billion settlement of economic loss claims over its vehicles' unintended acceleration defects included more than $200 million in attorneys' fees for lead counsel including Hagens Berman, Houston's Susman Godfrey LLP and Northern California-based Cotchett Pitre & McCarthy LLP.

Paul Geller of Robbins Geller Rudman & Dowd

Plaintiffs attorneys at firms that regularly snag leadership roles generally defend the practice of choosing attorneys from the top tier, saying that judges make leadership decisions based on practical considerations regarding which firms are best equipped to handle large, expensive litigation, with all its burdens of discovery and needs for coordination of tactical decision-making.

"You do want class counsel with experience, skill and resources to go up against what will inevitably be the largest defense firms in the country," said Geller, who's based in Boca Raton, Florida. "If a judge is focusing on resources and experience, it's not surprising to see repeat players, and I think that oftentimes may be in the best interest of the class."

But others say the system of picking MDL leaders is broken. Jay Edelson of Chicago-based plaintiffs boutique Edelson PC — himself a lead counsel in the home equity class actions against Citibank and JPMorgan Chase — says the MDL leadership selection process can be rushed and superficial.

"If you think about it in terms of how a defendant would hire an attorney in a major case and the process the general counsel would go through — getting proposals from dozens of firms, interviewing them and their references, and doing a deep dive into the results they've gotten in several cases, it would be a several-month process because the case was so important," he said.

In contrast, MDL leadership appointments may go through a comparatively fast-tracked regime in which applicants for the lead counsel and plaintiffs steering committees submit resumes and sometimes recommendation letters to the judge overseeing the case, he says. Then they try to make their case within minutes as part of what is usually a daylong hearing.

"We were at one major MDL where the court asked each proposed lead one question, and that was it," Edelson said. "And that did not seem like it was serving the best interest of the class. If a class has hundreds of millions of dollars in claims, you would want a different process."

Breaking Into the Top

In the Takata litigation in Miami, filing the first class action was only the first step to securing a leadership role. Soon after filing the complaint, Prieto, the Podhurst Orseck attorney, took charge of the litigation informally, working with Tellis and organizing weekly conference calls with the growing number of attorneys filing suit to discuss the scope of the case and work on arguments to present to the Judicial Panel on Multidistrict Litigation, which would meet in Miami to determine the future of the cases. In February 2015, when the JPML consolidated the suits in Miami, talks on leadership structure began in earnest, led by Prieto.

Prieto's firm, which has a little over a dozen partners and associates and another dozen staff and contract attorneys, is relatively small when compared with those that take typically on lead roles in major MDLs, but Prieto says his experience in lower-profile leadership positions likely helped position him for a top spot. Besides his prior spots on steering committees, he had also chaired Holland & Knight LLP's litigation department before he left in 2010 to join Podhurst.

The day before a hearing with U.S. District Judge Frederico Moreno, Prieto hosted a meeting of some 80 plaintiffs attorneys who had filed Takata air bag suits in a hotel conference room in downtown Miami. Prieto and Tellis said that the goal was not simply to advocate for themselves as potential leaders but to devise an overall leadership structure and address any potential objections before going before the judge.

"Even though we have what is often described as jockeying for position on the leadership, this kind of organization is a cohesive way to get to the same goal," Tellis said. "Yes, there is spirited competition for leadership roles, in terms of desiring a place on leadership. But the competition doesn't get in the way of organizing as a group to determine what the appropriate scope of the case is."

Prieto's appointment as chair lead counsel was a bit of an outlier for such a large case, attorneys say, and it was an example of the hustle and initiative required for an outsider to land a seat at the table — and of the importance of collaborating with other firms from the start.

The appointment is “an example of someone other than just Hagens Berman or Boies Schiller leading the case,” said Whatley, of the litigation boutique Whatley Kallas. “In one sense, it shows that you can have other lawyers active in the leadership. There’s a need for us to develop other firms and lawyers for those roles, and it’s important the judges really find a way to do that.”

Powell Miller, of The Miller Law Firm PC, sometimes leans on his home base in the metro Detroit area to bolster his argument for why he should be chosen to lead certain auto-defect MDLs. In an interview, he expressed some frustration that no Michigan firm led the cases surrounding the Volkswagen emissions scandal, considering that the state has been the venue for related DOJ investigations and litigation.

But Miller was appointed in November as the lead counsel in the Fiat gearshift MDL in Detroit. Those cases involve allegations of faulty electronic gearshift systems that could cause the vehicles to roll and cause accidents, even if the vehicle were supposedly placed in park.

Echoing Prieto’s path to the top, Miller filed one of the first suits in the MDL and corresponded with other plaintiffs attorneys before a leadership conference was held. Eventually, he says, the parties involved, including Hagens Berman, suggested that Miller lead the case.

“It was an example of some newer firms breaking through in being recognized as having the ability and resources to lead a major MDL,” he said.

Miller’s firm rose to that spot from some humble origins: It got its start after Miller left Honigman Miller Schwartz and Cohn LLP in 1986 to start bringing class actions with the assistance of just one other attorney.

He remembers his first taste of success in his new practice: a class action against Intel Corp. in 1993 over alleged defects in the original Pentium computer chip, whose fees helped his fledgling practice take off. Although Miller has gone on to front some of the highest-profile cases in the class action world, he wonders how such a move would play out in today’s climate.

“For someone just starting now,” he said, “it would be difficult, if not impossible, to do it without partners.”

Sindhu Sundar is a feature reporter for Law360.

Editing by Jeremy Barker and Jocelyn Allison.