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FEDERAL MULTIDISTRICT LITIGATION COORDINATION WITH STATE COURTS

Dawn M. Barrios* & Julie A. Callsen**

I. INTRODUCTION

The Judicial Panel on Multidistrict Litigation (“JPML”) can transfer civil actions pending in more than one district involving one or more common questions of fact to one single federal district judge for coordinated or consolidated pretrial proceedings. However, if federal jurisdiction (generally diversity of citizenship) is absent, requiring a case or cases to remain in state court involving the same common issues of fact and same defendant(s) that are named in a Multidistrict Litigation case (“MDL”), differences may arise concerning how the cases should be handled. In this article, we explore the rationale for cases to be in each jurisdiction, as well as reasons and strategies for coordination of the litigations involving cooperation of each court and party.

II. REASONS FOR FILING CASES IN STATE COURT VERSUS FEDERAL COURT

The lack of diversity between parties, required for federal jurisdiction pursuant to 28 U.S.C. Section §1332, is one of the most common reasons a plaintiff would initiate a lawsuit in state court rather than federal court. Thus, there may be numerous cases pending in the state where the central defendant resides. If one of those states also has a state- or county-wide coordinated mass tort litigation program, such as Pennsylvania (Complex Litigation Center), New Jersey (Multicounty Litigation), or California (Judicial Council Civil Case Coordination Proceeding) which involves judges assigned to preside over these coordinated state court civil cases, a plaintiff may want to litigate there. Additionally, judges in state

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court consolidated litigation may have more experience managing such “parallel litigation” proceedings and be open to collaborating with the federal MDL.

Individual plaintiff’s counsel may prefer not to file in the MDL and oppose removal from state court or another federal district court to the MDL based on a perception that she may have to relinquish control of her individual cases to plaintiffs’ leadership who are appointed by the MDL judge and serve as a representative of the plaintiffs’ counsel as a whole. The selection of MDL Lead Counsel, Liaison Counsel, and the Plaintiffs’ and Defendants’ Steering Committees by the MDL judge is done for efficiency and consistency and will be the counsel the MDL court generally interacts with and looks to for decisionmaking in the case.

Further, there is a theory of the “black hole” that counsel perceive to occur with an individual case when it is joined with thousands of other cases in the MDL, as prosecution of an individual case may be delayed until remand. Plaintiff’s counsel may also believe it beneficial to be in state court where it may be faster to get the plaintiff’s case to trial. (In general, only a limited number of cases are actually selected for discovery workup and trial in MDL proceedings). While it is true that MDLs frequently take longer to hold their first trials than state courts, that is because centralized procedures governing discovery and other global issues, which eventually benefit all parties, must be put in place.

One of the initial orders negotiated at the commencement of the MDL is a Common Benefit Order, which is proposed by plaintiffs’ leadership to the MDL Judge. Since the MDL leadership has the responsibility to handle all pre-trial proceedings and prepare a trial package for other counsel to use in trials outside the MDL, there must be a mechanism to compensate plaintiffs’ MDL leadership for common benefit work performed as well as expenses paid by leadership to finance the litigation upon resolution. During the course of the MDL, plaintiffs’ leadership contribute funds for expenses and handle all aspects of the MDL without any payment for expenses or legal services, all with the expectation of being reimbursed and paid at the conclusion of the MDL. After all plaintiffs’ cases have been resolved, the court will set up a procedure for application by anyone who did common benefit work for reimbursement of expenses and payment for legal services, and the court will distribute the funds to those making common benefit claims.

The Common Benefit Order establishes the fund to pay for plaintiffs’ legal work and expenses by imposing an assessment on all plaintiffs’ attorneys, which in turn is used to form a fund to reimburse and compensate counsel who perform common benefit work. These assessments are withheld from plaintiffs’ settlements or judgments and put into accounts to reimburse counsel who performed work, such as discovery, depositions, preparing experts, and conducting trials that benefit each plaintiff’s case.¹ Plaintiffs’ counsel then have the opportunity to apply for a common benefit fee based on the work performed and costs expended at the

¹ Generally, although the Common Benefit Orders are crafted by the plaintiffs, the defense has input in certain provisions as the order requires the defense to withhold the assessment for fees and costs from any payment made to a plaintiff.

conclusion of the MDL. On the flip side, the assessment can be a major reason plaintiffs' counsel may want to stay in state court as they may prefer to prepare and try their own case, not delegate it to a committee, and not pay an assessment.

The JPML, a panel of seven district court and circuit judges appointed by the Chief Justice of the United States Supreme Court, decides whether to create an MDL and before which district court judge the MDL will proceed.² One of the first steps an MDL judge takes is to begin the road to coordination. When the state courts with similar cases have been identified, generally through the cooperation of all counsel reporting cases pending in other jurisdictions, contact is usually made with the state court judge, either by federal-state liaison counsel or the MDL judge who may prefer to make the initial contact with the state court judge(s) herself. The purpose of the contact is to discuss cooperation so that the cases can be handled in a coordinated fashion. State court judges may have concerns that coordinating or cooperating with their federal counterparts may lead to a relinquishment of control of the state court litigation. Frequently, however, they may welcome the overture, as federal court judges have more resources in the way of clerks, staff, and technology, and have broader jurisdiction to handle some issues.

The leadership chosen by the MDL judge should promote effective management of litigation.³ Generally, federal-state court liaison counsel/committee are appointed by the MDL judge with the particular responsibility of keeping abreast of and reporting on the status of state court proceedings, as well as facilitating overall coordination. Likewise, in a jurisdiction that has a coordinated state mass tort program, the judge may appoint state court lawyers to monitor the MDL.

III. COORDINATION EFFORTS WITH FEDERAL MDL

Effective coordination between the federal and state courts promotes cooperation in scheduling hearings; conducting and completing discovery; facilitating efficient distribution of and access to discovery work product; avoiding inconsistent federal and state rulings on discovery and privilege issues; and potentially accomplishing resolution of all cases nationwide.⁴ Once contact is made with the state court judge(s), the stage of the litigation in state court(s) versus that in the federal litigation needs to be examined so that a plan for coordination that is best suited to the type of cases and that has the best chance of achieving coordination is established. As noted above, given the large number of cases and counsel involved in an MDL, it can take some time to establish basic case management and pretrial orders to organize standardized pleadings and discovery, determine protocols for electronically stored information, protective orders, and the like. The state court cases at a less advanced stage can adopt wholly or in part

² 28 U.S.C. § 1407 (West 2003); MANUAL FOR COMPLEX LITIGATION (FOURTH), § 20 (2004) (hereinafter, MCL); see also Andrew K. Solow, et al., *Mastery in the MDL: Maximizing the MDL Daubert Process*, LAW360, (Jan. 27, 2016).

³ Duke Law Ctr. for Judicial Studies, MDL STANDARDS AND BEST PRACTICES, 1 (Sept. 11, 2014).

⁴ *Id.*

any of these foundational orders. This will not only foster consistency and efficiency, but may allow state court cases to move more nimbly through discovery toward trial since the MDL has implemented the orders.

The Federal Judiciary favors coordination, as reflected in the Manual for Complex Litigation developed to assist federal trial judges with mass tort proceedings.⁵ The Manual sets forth strategies for each stage of litigation from aggregation and consolidation decisions to settlement.⁶ Similarly, the Conference of Chief Justices directed the National Center for State Courts to “take all available and reasonable steps to promote communication between state and federal courts for the purpose of establishing best practices for the management of like-kind litigation that spans multiple state jurisdictions and federal districts.”⁷ Jurists have developed innovative efforts to coordinate the parallel litigations.

One of the main (and time-consuming) areas where coordination benefits both federal and state litigations is discovery. Defense counsel favors coordination to preserve resources and avoid repetition of productions and company depositions. Plaintiffs’ counsel benefits from the collection and organization of company general liability documents and the ability to maintain depositions, documents, and learned treaties in a cloud-based program accessible by plaintiffs everywhere. Moreover, state court litigations in jurisdictions where company witnesses can be subpoenaed will assist MDL counsel in working with state court counsel to take witness depositions.

Most coordination efforts occur at the beginning of the MDL litigation. Since MDLs, which can involve thousands of cases, tend to have a longer life span than most civil cases, counsel in later-filed federal or state cases after discovery has begun can take advantage of the work done and discovery available to quickly inform themselves of the litigation story. An electronic document depository can be established that parties in either federal or state court, as well as the presiding judge(s), could access. If discovery masters are appointed in the MDL or coordinated state court proceedings, the parties could agree to use the same special discovery master, if independent from the court system. Discovery may even be phased to increase efficiency. For example, MDL courts may phase discovery so that expert discovery regarding generic issues will proceed before expert discovery on case-specific issues.⁸

Joint hearings or conferences can be held, in person or by video with both judges presiding over the presentation of evidence and argument on a variety of

⁵ See MCL, § 20.3 (Specifically, “to minimize conflicts that distract from the primary goal of resolving the parties’ disputes”, §20.313; and “to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation”).

⁶ *Id.* § 20.3.

⁷ Margaret S. Thomas, *Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1357-58 (2014) (quoting *Conference of Chief Justices, Resolution 2: Directing the National Center for State Courts to Promote Communication and Best Practices for the Management of Like-Kind Litigation That Spans Multiple State Jurisdictions and Federal Districts* (Jan. 26, 2011), <http://ccj.nsc.org/~media/Microsites/Files/CCJ/Resolutions/01262011-Directing-NCSC-Promote-Communication-Litigation-State-Jurisdictions.ashx>).

⁸ Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, (2017).

issues, including a Science Day-type presentation, class certification hearing, *Daubert* or *Daubert*-type hearing, or on any issue which is front and center in both jurisdictions. Although sitting jointly, the judges could ask questions and consider the briefings filed in their respective jurisdiction using the applicable rules and law. Since federal courtrooms generally are more technologically advanced, the federal court could host the conference with other presiding judges participating remotely. Judges oftentimes listen to their counterparts' regular case management conferences to stay abreast of the status of the litigation and to hear the issues presented. Of course, the method of coordination that lends itself to be the most successful is for each jurist to keep in regular communication with the other.

IV. CHALLENGES TO COORDINATION

The attorneys play a key role in facilitating coordination; they must be willing to work together to achieve the benefits of coordination. The ability or willingness of the federal and state court counsel to cooperate and coordinate can be one of the biggest challenges to the effort. The judge's openness to coordinate with another mass tort proceeding is another important component, especially if the proceeding or cases are at very different stages of the litigation overall. However, given the benefits of coordination, the jurist whose docket is slower than his or her counterpart can always learn from the other. Frank and open direct discussions between the two can create innovative coordination particularly suited to the facts before each.

Different civil rules, applicable standards, substantive laws, and the conflict of law inquiry may sometimes thwart or complicate the coordination effort. Varying discovery rules involving privilege, redaction of confidential, proprietary or personal information, and ever-evolving rules on electronic discovery (ESI) could differ between jurisdictions. There are a myriad of distinctions and differences between laws that can hamper coordination efforts.

One such example is the potential for confusion from the various standards under a *Daubert* or *Frye* hearing. The hearing could involve the presentation of evidence not otherwise allowed in one of these jurisdictions based on the variance in laws.

V. STRATEGIES TO ACHIEVE COORDINATION

As with any challenge, if all parties, including the presiding judges, recognize the importance of coordination and are willing to devise protocols to achieve that goal, the obstacles to coordinating proceedings can be overcome or lessened. Coordination benefits all participants in the litigation, including the court and the court staff, by achieving efficiencies and economizing resources. Almost any protocol can be adopted to make the parallel cases more efficient. For instance, the state court judge could take the lead in discovery disputes involving document production, while the federal court judge addresses deposition issues. The Manual for Complex Litigation notes, for example, that "[i]n scheduling *Daubert* proceedings in a dispersed mass tort case, an MDL judge should explore

opportunities to coordinate scheduling with state courts handling parallel cases” and that “[f]ederal and state judges have successfully conducted joint Daubert hearings.”⁹ Additionally, both parties could agree to a special master who assists with all discovery efforts or mediates disputes.

The advances in electronic discovery and availability of shared database platforms, as well as web-based sites to house case management and pretrial orders, provide readily available resources across court systems, saving the litigants time and money.

Finally, coordination of trial dates and efforts at resolution are inevitable when the same defendants are involved. The parties in different jurisdictions can work with the same special settlement master to achieve uniformity, and this special master can provide reports to the presiding judges on the progress of settlement discussions at the appropriate point in the litigation.

VI. CONCLUSION

As a rule, coordination is always beneficial to the parties and the courts. The courts can direct the parties to develop strategies for achieving it, and the parties should be encouraged to be innovative and to utilize methods developed in past MDLs, improve upon them, or forge new paths to coordination.

⁹ MCL, § 22.87.