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Against MDL Discovery Exceptionalism: A Defense Practitioner's View of Managing Federal Discovery in Large-Scale Consolidated Proceedings

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AGAINST MDL DISCOVERY EXCEPTIONALISM: A DEFENSE PRACTITIONER'S VIEW OF MANAGING FEDERAL DISCOVERY IN LARGE-SCALE CONSOLIDATED PROCEEDINGS

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INTRODUCTION

There is much about multidistrict litigation (MDL) that is unique to our legal system. Most notable—as the existence of this Symposium attests—is the rapid proliferation of MDLs and their transformative effect on federal dockets nationwide. Marking the fiftieth anniversary of the 1968 statute creating the modern MDL process, the end of 2018, for the first time, saw MDLs make up more than half (51.9%) of all federal civil litigation.[1] That growth has been exponential in recent years, with the percentage of total federal civil litigation brought in MDLs more than tripling in the past two decades.[2] And as has long been recognized, that dramatic growth stems, at least in part, from a "*Field of Dreams*" effect inherent to the growing trend to consolidate cross-jurisdictional harms: "If you build it, they will come."[3]

What is not unique to these potentially massive proceedings, however, are the baseline rules governing discovery once an MDL has been established: just as Shoeless Joe Jackson was still held to three strikes batting in that corn, so too do the Federal Rules of Civil Procedure apply with equal force in MDLs. The ultimate goal of an MDL, as in any federal civil suit, is to ensure as "just, speedy, and inexpensive" a resolution as possible.[4] Judges, parties, and their counsel should work together to craft effective, efficient, and tailored solutions for conducting MDL discovery, recognizing the particular needs of consolidated proceedings on a case-by-case basis. And in doing so, they must honor the same due process, "relevance," and "proportionality" limitations that apply in any litigation governed

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[1] Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, A.B.A. (Feb. 19, 2020), https://bit.ly/3dRYoSJ; *see also* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168 (2018) ("MDL, once thought to be an obscure, technical device, has now become the centerpiece of nationwide mass tort litigation in the wake of the decline of the tort class action.").

[2] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire civil caseload").

[3] Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG. 43, 45 (1998) ("Apart from procedural issues, the creation of an MDL proceeding may have a substantive effect on the coordinated litigation. . . . Once an MDL is in place, plaintiffs will inevitably file many new complaints.").

[4] FED. R. CIV. P. 1.

by the Federal Rules.[5] In short, there is no such thing as "MDL discovery exceptionalism."[6]

However, applying these generally applicable discovery rules in the MDL context, which often involves factually complex and highly technical issues, is no simple task. It is critical to establish efficient and workable practical solutions that respect these settled legal principles. Improperly controlled discovery across dozens, hundreds, thousands, or even tens of thousands of individual cases (with corresponding numbers of lawyers and support staff) can quickly balloon the monetary and time resources demanded, resulting in a cascade of unnecessary costs and delay for future proceedings. That in turn risks flipping "the chief virtue of MDL—the efficiencies gained from resolving pretrial matters in the aggregate—into a significant vice."[7]

To that end, this article does two things. First, this article highlights several discovery tools that, based on the authors' experience, have proven particularly effective at streamlining complex MDL proceedings. Second, this article recounts select instances of how these tools have been effectively deployed in particular cases.

I. DISCOVERY TOOLS FOR PARTICULAR CONSIDERATION IN MULTIDISTRICT LITIGATION

The Federal Rules of Civil Procedure generally permit wide latitude for the parties, subject to judicial supervision and traditional rule-of-law limits, to fashion specific-use discovery plans to best meet the needs of individual cases. That flexibility extends to MDL proceedings. The following reflects a non-exclusive set of discovery tools that, based on the authors' experience, may be useful when considering how to design MDL discovery procedures, given the practical realities of coordinating large-scale efforts across a number of individual cases. These tools are offered for illustrative purposes only, and there undoubtedly are many others that could and should be used based on the unique needs of individual centralized proceedings. Also, as with any tool, the ultimate efficacy of any of the following will depend on the particular circumstances and how they are deployed in context; these are offered as tools for consideration, not silver bullets.

For additional information and a more comprehensive treatment of the MDL discovery process, both the *Manual for Complex Litigation*[8] and the Duke Law School Bloch Judicial Institute's *Guidelines and Best Practices for Large and*

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[5] *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

[6] *Cf.* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401 (2014).

[7] *MDL Proceedings: Eliminating the Chaff*, U.S. CHAMBER INST. FOR LEGAL REFORM 1 (Oct. 2015), https://bit.ly/2OB14gC.

[8] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

Mass-Tort MDLs[9] are useful resources. The Federal Judicial Center and United States Judicial Panel on Multidistrict Litigation also publish targeted subject-matter guides that may be especially helpful in managing the discovery process in particular types of MDL proceedings.[10]

A. Fact Sheets

"Fact sheets," or "questionnaires," can be among the most useful and efficient discovery tools in large-scale MDL proceedings. Rather than requiring bespoke discovery requests be created for each and every party, fact sheets create a standardized and court-approved mechanism for collecting a baseline set of information, which can then be supplemented with individually targeted follow-up requests as the case progresses. In the traditional MDL scenario, such as a products liability case involving large numbers of potential claimants across multiple jurisdictions nationwide against a smaller set of defendants, completed plaintiff fact sheets can lead to the collection of various categories of highly pertinent information, such as: the date and nature of plaintiffs' alleged injuries; the scope and nature of plaintiffs' individual claims; and authorization for medical, pharmacy, and other relevant records collection. Depending on the nature of the claims and defenses at issue, the optimal length of fact sheets can be anywhere from dozens of pages to a single page. The best results follow when the parties attempt to work together to achieve consensus on what should be included.

Deploying fact sheets can be particularly valuable early in an MDL. A preliminary "census" of the case established by information from completed fact sheets can help guide later discovery, identify candidates for bellwether trials, or even allow swift resolution of particular claims or issues that can be winnowed from the rest of the case or otherwise disposed of without incurring the time and cost of further discovery. An early fact-sheet process also creates a clear, straightforward, and enforceable means to ensure that key information is being produced and disclosed at the outset of consolidated proceedings.

Plaintiff fact sheets recently played an important role in *In re Abilify (Aripipirazole) Products Liability Litigation*, MDL 2734, before the Honorable M. Casey Rodgers of the United States District Court for the Northern District of Florida.[11] That case, comprising more than 600 individual suits, involved claims that Abilify, an antipsychotic drug used to treat schizophrenia, bipolar disorder, and major depressive disorder, created risks of certain compulsive behaviors, such

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[9] BLOCH JUDICIAL INST., *Guidelines and Best Practices for Large and Mass-Tort MDLs*, DUKE LAW SCH. (Sept. 2018), https://bit.ly/3kVtEpl.

[10] *See, e.g.*, *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR. (2d ed. 2014), https://bit.ly/3rqxQQe; Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR. (2011), https://bit.ly/3kY69vD.

[11] *See generally* Nathan Hale, *Abilify MDL Judge Boots 149 Claimants from Settlement*, LAW360 (Sept. 24, 2019, 9:18 PM), https://bit.ly/2NULCbR.

as gambling, engaging in sexual activities, binge eating, and consuming alcohol.[12] At various stages of the litigation, the court approved a Plaintiff Fact Sheet, a Plaintiff Profile Form, and a Supplemental Profile Form that ultimately called for the production of pertinent plaintiff information, including medical, financial, and gambling records.[13] Three years after that case was filed, and following extensive discovery, the parties reached a global settlement in February 2019.

Using the information gathered from these updated fact sheets, Judge Rodgers was then able to enter a certification order to help effectuate that settlement, in light of a high number of voluntary dismissals and missing records at that point. That certification order required that counsel for potentially eligible claimants first certify that plaintiffs made a good-faith effort to obtain and review certain records, including records documenting plaintiffs' use of Abilify during the relevant time period and proof of harm sufficient to participate in the settlement.[14] Absent a timely certification, the order provided that Defendants could then seek a show-cause order requesting that noncomplying claims be dismissed with prejudice.[15]

Roughly one quarter of individual plaintiffs failed to make the required certification, despite being given a second chance to do so months later.[16] Judge Rodgers ultimately identified 149 plaintiffs who either "exhibited a clear pattern of disregarding the Court's orders regarding the settlement" or "conceded that they are unable to provide *any* evidence that they used name brand Abilify" as required for settlement eligibility.[17] Their cases were then dismissed with prejudice, as:

> at this advanced stage of the litigation, which has been pending for almost three years, it is not too much to require plaintiffs to provide proof of use in support of their claim that Abilify caused them injury, particularly where they are seeking to be compensated for taking the drug.[18]

The early adoption of plaintiff fact sheets, and updating the information requested later on, thus allowed for an orderly, efficient process to identify and eliminate a large swath of non-meritorious claims at settlement—without the unnecessary

[12] *Id.*
[13] *In re Abilify*, No. 3:16-md-2734 (N.D. Fla. Feb. 25, 2019), ECF 1136 at 2.
[14] *See id.* at 1–3.
[15] *Id.* at 4.
[16] *In re Abilify*, No. 3:16-md-2734 (Sept. 6, 2019), ECF 1165.
[17] *In re Abilify*, No. 3:16-md-2734 (Sept. 24, 2019), ECF 1170 at 4 & Ex. A (emphasis in original).
[18] *Id.* at 4–5.

burdens and delays from individual challenges to the same lack of general causation.

B. Special Masters

Another potentially useful option in managing complex MDL discovery is to consider appointing special masters.[19] While district judges and magistrate judges are ultimately responsible for overseeing the discovery process, there may be specific purposes for which the appointment of an independent party will best suit the needs of the case. For example, it may be appropriate to appoint a special master with the requisite expertise when there are particularly voluminous or thorny privilege questions, or when extensive subject-matter knowledge in fields such as accounting, finance, and various scientific disciplines is needed. A special master may also be desirable when there are highly specialized considerations or large-scale electronic and technology-assisted discovery that would be new or unfamiliar to the court. The use of special masters in appropriate circumstances can reduce potentially large burdens on limited judicial resources while allowing the rest of the case to proceed as efficiently as possible.

There are some cautions, however. Given the potential costs of special masters and their limited authority, the scope of any assignment should be clearly delineated and limited in an appropriate order. Ideally, the parties would work together in both selecting special masters, either by agreeing on the proposed master or by providing the court a list of candidates, and in helping to define the special master's role in the discovery process. Further, when making an appointment, the court should establish procedural safeguards to ensure meaningful oversight of a special master's decisions, which could affect the overall course of proceedings.

A recent privilege-log dispute in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, MDL 2785, provides a helpful example of when and how to employ the services of a special master. In that two-track litigation before the United States District Court for the District of Kansas, the court faced a dispute over documents claimed to be privileged and thus immune from disclosure. Under the circumstances, and upon the parties' suggestion, the court "determined the best course is to have a special master review the 2,086 documents remaining in dispute" and ordered the parties to confer and agree on a special master "in short order."[20]

The parties agreed that the Honorable Margaret R. Hinkle, a former state-court justice and current JAMS neutral, should serve as special master. The court ordered her appointment for the limited purposes of resolving that discovery dispute eleven days later.[21] The special master, working with the parties, then reviewed the documents at issue and entered a report, to which neither party

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[19] *See generally* FED. R. CIV. P. 53.
[20] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Dec. 6, 2018), ECF No. 1334 at 2.
[21] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Dec. 17, 2018), ECF No. 1366.

objected, within weeks.[22] Given the limited appointment, clearly defined scope of responsibility, and cooperative approach, this example shows how special masters can be best positioned to effectively and efficiently resolve appropriate disputes.

C. Federal-State Coordination

In many cases, federal MDL proceedings run parallel to similarly complex and potentially extensive state-court actions involving the same or substantially similar claims. Because federal and state judges have distinct and independent jurisdiction such that state claims need not, and in some cases cannot, be brought in federal court, there is no formal mechanism to consolidate or mandate compliance with a single set of discovery procedures between the two systems, under 28 U.S.C. § 1407 or otherwise. To avoid unnecessary and duplicative burdens, it falls to federal and state judges to informally coordinate related proceedings in cooperative fashion. And doing so is especially important in the context of discovery, given the often enormous expense required of litigating the same issues on multiple fronts.

This federal-state coordination can take many forms, depending on the parties' and courts' willingness to participate. Among other things, federal and state judges may consider holding joint conferences and hearings, or appointing a liaison to keep apprised of ongoing developments in parallel proceedings. In the appropriate case, the judges can also order or encourage streamlined discovery efforts, avoid successive and duplicative depositions of the same witnesses, and enter protocols for topics such as electronically stored information (ESI), depositions, and expert witnesses. Moreover, given the obvious potential for abuse, strategic gamesmanship between parallel federal and state proceedings should be carefully limited.

Recent parallel consolidated litigation comprising more than 10,000 individual lawsuits shows how effective federal-state coordination can be achieved in managing similar claims in separate jurisdictions. In *In re Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*, MDL 2428, before the United States District Court for the District of Massachusetts, and *In re Consolidated Fresenius Cases*, before the Massachusetts Superior Court,[23] Judge Douglas P. Woodlock and Justice Maynard Kirpalani were able to successfully manage the discovery process of separate complex, consolidated proceedings involving products liability claims related to a medical device used in hemodialysis treatments. Judge Woodlock and Justice Kirpalani worked together to coordinate many aspects of these cases, including holding monthly conferences in each court, using identical or substantially similar case management orders in both the federal and state proceedings, endorsing joint depositions, and sitting together in person on *Daubert/Lanigan* hearings. After instituting a bellwether-trial calendar aimed at alternating between state and federal trials and with trials occurring in both

[22] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Jan. 10, 2019), ECF No. 1396.
[23] No. MICV 2013-03400-O (Mass. Super. Ct., Middlesex Cty.).

federal and state courts, the parties ultimately agreed to a global settlement resolving a minimum of 97% of all cases, including those filed in federal and state courts.

D. Bifurcation

Sequencing various phases of the discovery process can also allow for streamlined and more efficient MDL case management. And depending on the circumstances, there are many possible options by which to bifurcate discovery. The greatest potential advantage of bifurcation involves threshold issues—such as general issues of causation or personal jurisdiction—that are potentially dispositive of some or all of the claims in an MDL and can be effectively separated from broader discovery efforts. By initially proceeding on only targeted subjects pertinent to such issues, the parties and the court may limit or entirely preclude unnecessary factual development. Coordinated proceedings may also be successfully bifurcated between discovery necessary for class certification and merits discovery.

E. Discovery Conferences and Agenda Setting

MDL case management can also benefit from regularly scheduled status conferences, including, where appropriate, discovery conferences. To make the greatest use of these periodic check-ins, the parties should submit in advance—and then follow—an agenda for the topics to be considered at each conference. Requiring the parties to first meet and confer on an agenda serves to identify, clarify, and potentially streamline or resolve any outstanding discovery disputes before they are put before the court. Setting out an agenda in advance also ensures that everyone has notice of the relevant topics to be considered and may show that a particular scheduled conference should be kept brief or even avoided altogether.

There are several pitfalls that should be avoided, however. For example, while there may be times when late-breaking events will need to be addressed in a time-sensitive fashion, there is obvious potential for gamesmanship in habitual departure from the agenda in the ordinary course. And scheduling conferences too frequently may pressure the parties to seek out and prematurely raise issues that could be avoided with additional negotiation. Depending on the circumstances, holding monthly, bimonthly, or quarterly discovery conferences should be best tailored to the needs of particular proceedings.

F. Discovery Steering Committees

The court will often appoint lead counsel and steering, management, and executive committees to coordinate various aspects of complex proceedings on plaintiffs' behalf. As part of that representation structure, it may at times be useful to consider a discovery-specific committee depending on the size and scope of the proceedings. At the same time, adding another, subordinate layer of representation

may prove administratively burdensome and financially costly, such that these considerations outweigh any benefits of appointing a discovery-specific committee.

One major potential benefit of appointing a discovery steering committee, when expending the necessary resources for such a committee is justified, is the creation of valuable leadership opportunities that can be filled by a broader, diverse, and less-senior set of counsel. A recent order from Judge Robin Rosenberg of the United States District Court for the Southern District of Florida, for example, appointed a leadership team in *In re Zantac (Ranitidine) Products Liability Litigation*, MDL 2924, including a "leadership development committee" to "provide 'mentorship and experience,'" in which Judge Rosenberg noted her hope "that all counsel and parties will be mindful in using this MDL to provide an opportunity for a broader array of attorneys to have experiences that position them to take on more senior roles in future MDLs."[24]

G. Discovery Protocols

Using protocols to govern major issues in an MDL proceeding is also often crucial for successfully coordinating and managing complex and large-scale discovery in consolidated proceedings. Given the amount of discovery material that may be sought in an MDL, establishing clear and effective baseline procedures for the handling of items such as electronically stored information (ESI) and depositions may create important guardrails to allow orderly discovery. Such protocols may be useful to address, for instance, how to limit unauthorized access to confidential and proprietary information, for how long and in what manner depositions may proceed, and whether and how particular categories of information can be sought from the parties' various experts.

CONCLUSION

The recent explosion of multidistrict litigation carries major implications for federal civil practice nationwide in numerous respects, but the ground rules governing MDL discovery are the same as in any other case. Within the established framework of the Federal Rules of Civil Procedure, there are many tools and strategies to secure an orderly and effective discovery process even in the largest consolidated proceedings. Putting these principles into practice is no easy task. Continuing to share and learn from successful—and even not so successful—experiences, as this Symposium seeks to do, helps ensure a more knowledgeable and effective MDL bar and bench, from which we will all increasingly benefit.

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[24] *See* Amanda Bronstad, *Florida Judge Appoints Diverse Legal Team to Lead Zantac Lawsuits*, LAW.COM (May 8, 2020, 8:11 PM), https://bit.ly/3e17sVJ. Given the importance of addressing and rectifying the historic lack of diversity in federal civil litigation more broadly, the Duke Law School Bloch Judicial Institute will soon be releasing its *Guidelines and Best Practices Addressing Failure to Include Women, Diverse, and LGBT Lawyers in MDL and Class Action Leadership Positions*. BLOCH JUDICIAL INST., *Publications: The Bolch-Duke Conference Guidelines and Best Practices*, DUKE LAW SCH., https://bit.ly/2NXeaS4 (last visited Mar. 8, 2021).