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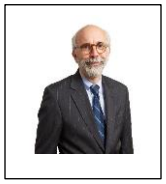
Albert G. Bixler and Immon Shafiei discuss efforts to adopt new rules for Multidistrict Litigation.

An Update on Efforts to Create a Set of Rules for Multidistrict Litigation

ABOUT THE AUTHORS



Albert G. Bixler is the Member-In-Charge of the Philadelphia Office of Eckert Seamans Cherin & Mellot. He has served as defense liaison counsel in mass tort litigation in the Philadelphia Court of Common Pleas in litigation totaling over 8,000 individual cases. In addition to mass tort, he has extensive experience in product liability, class action, toxic tort, personal injury, insurance coverage, and commercial litigation. In Al's product liability and class action litigation practices, he serves as national, regional, and local counsel for pharmaceutical and medical device manufacturers, representing them in state and federal courts. His toxic tort, personal injury, and insurance coverage practices have included the defense of toxic tort claims and medical monitoring class actions, as well as environmental contamination cases alleging personal injury and property damages. He has also prosecuted and defended Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or "Superfund" cost recovery actions. In addition, he has represented clients in numerous commercial matters involving common law and statutory claims of fraud, breach of contract, and breach of restrictive covenants. He can be reached at abixler@eckertseamans.com.

Immon Shafiei is an associate in Eckert Seaman's Product Liability and Litigation Practice Group. He represents multiple manufacturers, including manufacturers of automobiles, automotive component parts, consumer products, industrial equipment, and motorcycles. He is involved in all areas of case management and phases of litigation. He drafts pleadings, responds to discovery, prepares motions, prepares witnesses for deposition and trial testimony, retains and works with expert witnesses, and participates in trial preparation, trial and arbitration, mediation, and settlement negotiations. He can be reached at ishafiei@eckertseamans.com.

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Stephen G.A. Myers
Vice Chair of Newsletter
Irwin Fritchie Urquhart & Moore LLC
smyers@irwinllc.com

I. INTRODUCTION

The Multidistrict Litigation Act , codified at 28 U.S.C. § 1407, was enacted by Congress in 1968 and allowed for the transfer multiple civil actions to a single federal district for coordinated pretrial proceedings in an effort to increase efficient handling of complex cases. Section 1407, in relevant part, states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

28. U.S.C. § 1407(a).

Oh, how the child of 1968 has grown! As of April, 2018, more than one-third of the federal docket were cases in MDL proceedings, totaling more than 120,000 pending cases of the 340,000 total pending federal civil caseload. The 120,000+ MDL cases have been consolidated across 220 MDLs, with the largest MDLs consisting of more than 20,000 pending cases. Nineteen "large" MDLs, which consist of more than 1,000 cases each, account for nearly 85% percent of existing MDLs. Along with that extraordinary growth in sheer numbers, the MDL process has changed. The intent of the MDL Act was to create a process to allow transfer of cases for pretrial proceedings common to the litigation as a whole with cases then remanded for trial in the transferor courts. However, only a tiny percentage of cases are actually remanded. The upshot of these developments is that MDLs have themselves become the end-game, where large number of cases are sent pending a "global resolution" of some kind.

All of this has happened without any set of rules specific to MDLs and the problems of case-management and disposition they create. Along with the issues arising from the voluminous number of cases that have been subject to an MDL transfer order, courts also face issues concerning the number of baseless claims, how appeals of interlocutory decisions made during the MDL should be handled, and the transparency of the funding of these types of cases. Some of these issues were considered in HR 985, The Fairness in Class Action Litigation Act of 2017 (hereafter " HR 985"), which passed the House of Representatives in 2017, and then died in the Senate. After HR 985's demise, efforts have turned to the adoption of rules that would address these (and other) concerns in MDL administration. In response, the Advisory Committee on Civil Rules established the MDL Subcommittee (hereinafter "Subcommittee") to review these (and other) issues in MDL administration to determine whether new rules governing MDL procedures should be

proposed.[1] This article discusses the status of these efforts in several key areas.

II. SUBCOMMITTEE ISSUES CONSIDERED

a. "Winnowing procedures"

Those of us involved with "mass tort" MDLs are well aware of the "if you build it they will come" phenomenon in which large numbers of claims are solicited, subjected to minimal, if any, vetting and then placed in suit in an effort to increase inventory and thereby increase pressures on both the defendants and Courts to "resolve" the litigation. And we also know all too well that when these claims are subjected to even minimal scrutiny, vast numbers of them will simply be dismissed voluntarily or otherwise. Congress considered whether a judge should focus on screening cases out before focusing on other matters in HR 985, which would have added a new subsection (l) to the MDL statute (§ 1407), stating:

> In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceeding shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 30 days after the submission deadline the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice.

The Subcommittee has directed "sustained attention" to the "winnowing" issue without yet reaching any firm conclusions. Part of the process involved examination of data on pending MDLs for which the Subcommittee turned to the Federal Judicial Center (FJC). The FJC reviewed 116 products liability MDL

[1] The Subcommittee is investigating a number of issues beyond those we address here. These other issues include, among other topics, master complaints, settlement review, bellwether trials, and filing fees. We have chosen to highlight three of the more pertinent areas of investigation. One fact repeatedly noted by the Subcommittee and highlighted by various commentators is that MDLs are a very broad collection of litigation. While there are behemoth product liability MDLs, there are also much smaller, non-personal injury MDLs and "one size fits all" proposals are routinely criticized as being inappropriate as overly broad.

proceedings centralized between 2008 and October 2018 to determine the prevalence and effectiveness of a Plaintiff Fact Sheet (hereinafter "PFS") in those proceedings. *See* Federal Judicial Center, *Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008-2018*, March 2019, p. 1. Of those 116 proceedings, a PFS was ordered in 57% of all proceedings and in 87% of proceedings with more than 1,000 total actions. *See id.* A PFS was ordered typically within eight months of centralization of the proceeding, requiring plaintiffs to submit information including medical history and medical and other releases. *See id.* In 55% of proceedings in which a PFS was ordered, there was some docket activity related to dismissal of cases for failure to substantially complete the forms. *See id.*

One difference the Subcommittee noted between the proposed requirements in HR 985 and actual experience with PFS orders is that actual MDL proceedings involving a PFS have much longer timetables than that provided by HR 985. The average time from Panel centralization to the entry of a PFS order in the mass tort MDLs studied was over eight months, and the median time was over six months. In one-third of the MDL product liability proceedings, the initial PFS orders were later amended, and some proceedings required a plaintiff profile form (PPF) in addition to a PFS or in lieu of a PFS.

The Subcommittee has also looked at the possibility of prescribing a form for a PFS (and Defendant Fact Sheet as well), but has stated that developing a standard form would be "challenging" given the individualized issues arising in each MDL. Similarly, the Subcommittee is grappling with whether PFS requirements should be limited to MDLs involving personal injury, or as the Subcommittee appears to prefer, those MDLs centered on claims of "physical and emotional injury." Finally, the Subcommittee may be inclined to limit PFS requirements to larger MDLs, although fixing a precise size limit (in terms of cases or plaintiffs) presents an obvious challenge.

Of course, for many practicing defense lawyers, requiring a PFS or some variant of it is just one part of the puzzle. As the Subcommittee noted, most large personal injury MDLs already require a PFS. What is often lacking is an effective method of forcing bona fide compliance with PFS requirements and a method forcing production of core information and documents early in the process to ensure that only cases that have factual grounding are being prosecuted. HR 985 addressed that concern directly. The Subcommittee reviewed the FJC data and appears to believe that the rules already provide the process a basis for dismissal of cases for failure to comply with PFS requirements, and the Subcommittee has stated that it needs additional study to determine whether some more mandatory process should be required.

Thus, the Subcommittee appears to question the need for specific rules for Fact Sheets in MDLs and the adoption of specific mechanisms for enforcement of those

requirements. Without additional data highlighting the failure of existing processes, the Subcommittee does not appear likely to push for the adoption of broad rules, and appears concerned about how it would fashion such rules and the types and sizes of MDLs they would cover.

b. **Interlocutory Appellate Review**

Many have argued that one of the greatest problems with existing MDL practice is that existing law does not provide an adequate means for providing appellate review of interlocutory, but often dispositive, orders and decisions of the MDL court. In response, HR 985 also included the addition of a new subsection to § 1407, which stated:

> The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued on the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b) provided that an immediate appeal from the order may materially advance the ultimate termination of the proceedings.

Empirical evidence provided to the Subcommittee supports two broad conclusions. First, motions seeking interlocutory appellate review of questions that may have broad dispositive effects on mass tort MDL cases appeared to be relatively rare. *See* Nov. 21, 2018 *Letter Re: Proposed Rules Amendments Regarding MDL Proceedings*, p. 2. Second, when defendants made these motions in mass tort MDL proceedings, they typically were not granted. *See id.* Additionally, the data suggested that the types of appeals that would arise under the Rule would occur relatively infrequently in mass tort MDL proceedings so that adoption of the Rule would not add substantial new burdens to the Courts of Appeals. *See id.* at 13.

The Institute for Legal Reform (ILR) also provided comments to the Subcommittee arguing that current process does not give defendants timely access to interlocutory review. The ILR notes that defendants who receive unfavorable motion rulings are often forced into settling hundreds or thousands of claims in an MDL proceeding before they can get appellate review of adverse decisions. *See* U.S. Chamber Institute for Legal Reform, *MDL Imbalance, Why Defendants Need Timely Access To Interlocutory Review*, April 2019. Because a district judge must currently certify that an interlocutory order meets the criteria of § 1292 (often described as stringent), the Court with the greatest incentive to "resolve" cases also holds the keys to appellate review. *See id.*

Based on the data presented the Subcommittee appears to be open to adopting some form of interlocutory standard in MDL proceedings, and is seeking comments on whether the rule should be limited in the amount of time to petition for review, the type of order for which review can be sought, and whether the district judge should have the opportunity to opine

on whether an order should be subject to immediate review. Ultimately, it is unclear what the product of this comment and review process will be, however, the Subcommittee has referenced Fed. R. Civ. P. 23(f) and that Rule may provide a starting point for creation of some type of interlocutory review.[2]

c. **Third-Party Litigation Funding**

An issue that has caught the attention of both the Defense Bar and the Courts is the increasing importance of Third-Party Litigation Funding in civil litigation, especially MDL litigation. The Litigation Funding Transparency Act of 2019, S. 471 (introduced on February 13, 2019), includes a proposed amendment to § 1407, adding a new subsection (g)(1) to § 1407 as follows:

> In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall –
>
> (A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and
>
> (B) produce for inspecting and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right. The proposed legislation has a similar provision for disclosure of third-party litigation funding in "any class action," perhaps not limited to class actions in federal court.

The U.S. Chamber Institute for Legal Reform has also proposed an additional disclosure requirement as an amendment to the self-executing disclosure requirements in Rule 26(a)(1)(A):

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action by settlement, judgment or otherwise.

Entities aligned with the Defense Bar generally support such an amendment requiring the disclosure in civil actions of agreements giving a non-party or non-counsel the contingent right to receive compensation from proceeds of the litigation.

The Institute for Legal Reform has pointed out that, when litigation funders invest in a lawsuit, they "buy a piece of the case; they

[2] The Subcommittee has also asked questions concerning what types of orders should be subject to interlocutory review; the timing for such review and the role of the District Judge in the process.

effectively become real parties in interest." *See* Jan. 31, 2019 *ILR Letter In Support Of Proposal To Amend Fed. R. Civ. P. 26(a)(1)(A)*. The group notes that defendants have the right to know who has a stake in a lawsuit and to assess whether those parties are using illegal or unethical means to bring the action.

The proposed amendment seeks basic disclosure that allows defendants to essentially understand who they are going up against, as it affects a defendant's trial strategy. A group of In-House counsel also noted that the proposed amendment does not attempt to regulate litigation finance. *See id.* All that it would do is provide transparency about who has invested in a lawsuit and the terms of that investment.

Not surprisingly, the Plaintiff Bar has countered that the proposed amendment pushes for a considerable departure from the existing rules and disregards basic principles of relevance and proportionality. *See* Feb. 20, 2019 *Letter in Response to ILR Letter Regarding Proposed 26(a)(1)(A) Changes*. They point out that federal courts have routinely rejected litigation-finance-related discovery unless the party seeking it makes a specific showing of relevance. *See id.* They argue that disclosures of litigation funding arrangements should only occur in circumstances where they are germane to the claims and defenses of the parties. *See id.* at 2. Further, they argue that requiring the identification of all parties who have an economic interest in the outcome of a piece of legislation would unnecessarily increase the burden on courts and counsel. *See id.* at 4.

The Subcommittee has stated that at this point it does not have a clear picture of the current status or trajectory of Third-Party Litigation Funding. Overall, the Subcommittee does not appear to be heading towards adopting a new rule regarding Third-Party Litigation Funding, citing the changing standards of how Third-Party Litigation Funding requirements are implemented. For example, some PFSs include questions regarding the funding of a plaintiff's claims, while other transferee judges do not appear to be aware of the use of Third-Party Litigation Funding in MDL litigation before them. Thus, the Subcommittee seems to believe that it would be better served to continue to monitor developments related to Third-Party Litigation Funding to determine whether a general rulemaking response would be warranted in the future.

III. CONCLUSION

The Subcommittee has not officially voted on any proposed changes and has requested comments on various issues facing MDL procedures, some of which have been highlighted in this article. Both the Plaintiff and Defense bars will undoubtedly continue to spar over these proposed rules as the number cases that become subject to MDL transfer orders continues to increase.

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