Conversations With...

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Multidistrict Litigation: Reducing Incentives for Abuse

The Honorable Jay B. Stephens
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In this edition of Washington Legal Foundation's CONVERSATIONS WITH, the Chairman of WLF's Legal Policy Advisory Board, **Jay B. Stephens**, directs a discussion with **Charna L. Gerstenhaber**, Vice President and Head of Litigation for Novartis Pharmaceuticals Corporation, and **John H. Beisner**, a Partner with Skadden, Arps, Slate, Meagher & Flom LLP, on multidistrict litigation (MDL) and how judges can reduce systemic incentives for procedural abuse.

Introduction

A 1968 federal law facilitated the use of MDL proceedings to combine cases involving "one or more common questions of fact" before a single court for pretrial proceedings. The law created a Judicial Panel on Multidistrict Litigation (JPML), which, on its own initiative or upon the request of a party, can order the transfer of a lawsuit from federal court to an MDL proceeding. The responsibility of the MDL judge—a federal district court judge chosen by the JPML to oversee a group of cases—is to manage pretrial matters such as discovery. Once the MDL judge has addressed those preliminary issues, the "transferee" court returns each case to the JPML, which then sends the case back to the "transferor" court for trial.

Today, 45% of all civil-litigation cases pending in federal court are consolidated in MDLs. Ten years ago, however, only 15% of federal civil cases were in MDLs. And rather than act as a temporary way-station on the road to trial, MDL courts have become permanent homes for the vast majority of transferred cases. MDL judges have returned a mere 2.9% of cases to the JPML for transfer.

Instead of improving judicial efficiency and achieving just resolution of litigation as Congress intended, the MDL device has developed into a black hole that attracts and warehouses claims. The device creates incentives for plaintiffs' lawyers to build up inventories of lawsuits with little consideration of their legal merit. This aggregation imposes enormous pressure on MDL defendants to settle—an outcome that MDL judges strongly encourage.

Jay Stephens: Charna, why has the number of claims consolidated into the MDL process increased so dramatically over the last decade?

Charna Gerstenhaber: Plaintiffs' counsel have looked for ways to aggregate claims for years; that part is not new. In the recent past, developments such as the Class Action Fairness Act (CAFA) and other procedural changes have helped

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lessen the abuse of aggregated filings in state and federal courts. In many types of cases, such as personal-injury litigation, it is now significantly easier to get MDL treatment than class-certification treatment.

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And we cannot underestimate the role litigation funding is playing in increasing the aggregation of claims. The availability of easy money has allowed certain plaintiffs' attorneys to take huge risks on less meritorious claims without having much, or maybe any, of their own money at stake. In that circumstance, there is no immediate financial disincentive to grouping together hundreds of dubious claims into an MDL with the hope of attracting even more claims and eventually pressuring defendants to settle.

The increase in advertising spending also pairs with the increased number of claims. To the extent that mass inventory is the end-game, advertising helps move the needle. We also see increased media involvement with MDLs. Plaintiffs' counsel may release unsealed documents to plaintiff-friendly outlets or the media may follow the litigation independently. In tandem with the advertising spend and the corresponding social-media activity, the publicity attracts filings.

Certain procedural mechanisms common in MDLs also invite claims. For example, some courts use a so-called "Master Complaint" in which cases are filed with little more effort than checking a series of boxes and pushing the button. Add to that the reluctance of many courts to consider screening mechanisms such as *Lone Pine* orders or to enforce Federal Rule of Civil Procedure 11's provisions regarding sanctions for bringing baseless causes of action, and it's easy to see how the number of claims can quickly multiply.

In addition, the case management of certain MDLs can invite more and more filings. For instance, if the MDL court allows plaintiffs' counsel to park inventory without work-up so that there is little risk to plaintiffs' counsel, and/or if the MDL court is intent on inventory resolution within the MDL so that certain meritorious defenses are not timely reached, the old "build-it-and-they-will-come" adage becomes reality.

Mr. Stephens: Some academics attribute the rise in MDL claims to an increase in federal courts' rejection of motions to certify class actions. Do you see a connection between these two trends?

Ms. Gerstenhaber: There is no question that some state-court aggregation efforts have been thwarted, in-part, by defendants' ability to remove some mass filings under CAFA. As a result, there are more cases in federal court, where the more stringent application of Rule 23 has made it more difficult to pursue aggregation through class actions, especially for personal injuries. Although both developments are beneficial for defendants, they also have made MDL treatment a more attractive option for plaintiffs because aggregation often is in plaintiffs' counsels' interests, as I've noted.

But it's not just that—some companies/defendants themselves ask or join in the request for creation of MDLs. This often is driven primarily by the cost/expense/effort that goes into discovery, given the rise of email and other electronic data. E-discovery is a huge expense. One school of thought is that an MDL ensures that a defendant only incurs e-discovery costs

once. But unfortunately there are often parallel state-court actions that may not simply follow the MDL discovery rulings. Also, efficiencies collapse if companies don't successfully resist the argument that MDL treatment requires the broadest discovery possible. The procedural vehicle should not open the door more widely than the individual cases would; but that principle sometimes gets lost.

We have noticed, by the way, that although the number of requests for MDL treatment may be increasing, the percentage of requests granted has declined. This may be a sign that the JPML is aware of the potential for MDL abuse and is increasingly open to other types of case coordination.

Mr. Stephens: John, do you have any thoughts on what's been behind the increase?

John Beisner: Several factors are at work. Fundamentally, the increase results from plaintiffs' counsel astutely observing that if they create and file enough claims in an MDL proceeding, there's a likelihood that those claims won't get much individualized scrutiny. Counsel can simply "warehouse" those claims in the proceeding, never having to justify their legitimacy or expend significant energy prosecuting them. Counsel then encourage the MDL transferee court to pressure the defendant(s) to clear away the mountain of claims with a global settlement that will allow plaintiffs to collect on those claims with little or no further examination of their individual merit. This phenomenon was well described in an opinion by Chief Judge Clay Land of the US District Court for the Middle District of Georgia:

> [T]he evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action. This attitude explains why many cases are filed with little regard for the statute of limitations and with so little pre-filing preparation that counsel apparently has no idea where or how she will prove causation.

In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig., MDL Docket No. 2004, 4:08-MD-2004, slip op. at 3-4 (M.D. Ga. Sept. 7, 2016).

I agree with Charna that attorney advertising has also played a major role in the expansion of MDL cases. Once a potential mass tort is identified, plaintiffs' counsel invest enormous resources to locate potential claimants. Because of the indiscriminate trawling that occurs, many (if not most) "leads" generated by these ads involve individuals who had no exposure to the alleged risk or didn't experience any manifestation thereof. Many of these people respond primarily to the ads' references to substantial recoveries.

Also, to elaborate on third-party litigation funding, millions of dollars are now being invested in lawsuits. This money flows from hedge funds, private investors, and even "crowd funders." Once it becomes apparent that a mass-tort proceeding will

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advance, funders sometimes team with lawyers who have little or no interest in actually litigating the matter and who won't (or can't) invest their own cash in advertising. The business model such lawyers follow is to give funders part of their 33-40% contingency-fee interest in each client's claims in exchange for money to finance advertising campaigns to generate more claims (or counsel may simply keep all or part of the money as an "advance").

Under this model, counsel file the claims but devote little or no effort to litigating them; they simply wait for settlement money. In short, the goal is quantity, not quality. The lawyers want to file as many claims as possible, hoping they'll eventually be paid a large sum for their "bucket" of claims with minimal individual case scrutiny. Thus, although the problem of inadequately investigated claims pervades MDL proceedings, it appears to be particularly acute among counsel who have adopted this third-party-funding business model.

Mr. Stephens: What criteria does the JPML apply when it considers transfer of a lawsuit? Have those criteria, or the panel's application of them, contributed to the rise in case consolidation?

Mr. Beisner: Consistent with the MDL statute, the JPML seeks to create efficient MDL proceedings for claims that have common factual elements. At the end of the day, the real question is whether the claims will require substantially common discovery that would benefit from coordination.

In my view, there really hasn't been a major shift in those criteria that has contributed to the rise in case consolidation. The explanation lies more in the fact that historically, it was the *defendant* that usually moved for creation of MDL proceedings, typically at a point when it began experiencing difficulties coping with multiple, conflicting discovery demands from cases pending in multiple federal courts. In short, defendants made the motions when they needed coordination.

In recent years, however, that pattern has shifted. Now, *plaintiffs'* counsel normally make the motion, usually before any mass tort has really taken shape. Presumably, they do so in the hope that creation of an MDL proceeding will attract large numbers of claims that will facilitate the "warehousing" I mentioned previously. Put another way, plaintiffs' counsel seek creation of MDL proceedings at a stage when the coordination need is much more speculative. Such early motions pose a special challenge for the JPML, which must figure out whether it is confronting a controversy that—absent an MDL proceeding—would otherwise develop into a real mass tort warranting formal coordination. Recently, the JPML has been probing more deeply to ensure that MDL proceedings are created only where a real need exists.

Mr. Stephens: Do the criteria that MDL judges utilize when selecting a matter's lead counsel and steering committee also inspire plaintiff recruitment?

Mr. Beisner: To some extent, yes. In appointing plaintiffs' leadership, MDL judges logically prefer counsel who have enough clients involved to warrant a substantial time investment. The most aggressive claims-gatherers are often counsel who have no interest in assuming any leadership role—or in expending substantial effort on the litigation. They

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are pleased to let other counsel do most of the work, while they simply wait for the defendant to settle their "warehoused" claims.

Mr. Stephens: With regard to the selection of counsel, University of Georgia Law School Professor Elizabeth Chamblee Burch has written that MDL judges often favor repeat players, which leads to "homogeneous thinking" and creates "hierarchies of influence." Charna, are those accurate criticisms?

Ms. Gerstenhaber: They are somewhat accurate. One of the criteria for an MDL leadership position is experience in MDL leadership, so it can be hard for anyone to break into that group. And experience does matter. We absolutely benefit when dealing with counsel who have participated in major litigations. There is, however, a shift toward greater diversity in MDL leadership developing; recent reports and studies indicate that we're seeing more and more MDLs with women or minorities in key leadership roles. We certainly support that change at Novartis in terms of our own representation. Of course the profession is not where it needs to be yet, but the value of diversity is gaining strength.

Mr. Stephens: As noted in the introduction, only 2.9% of cases transferred into the MDL process are being sent back to the transferor court. What impact does an MDL court's warehousing of unresolved claims have on a corporate defendant like Novartis?

Ms. Gerstenhaber: One major reason plaintiffs' counsel seek to aggregate claims is to gain leverage for settlement. As discussed earlier, the increased role of litigation funding allows attorneys to bring large groups of claims without much risk. This discourages careful vetting of claims on their merits. Going into an MDL now, defendants know a large number of the claims could lack any legal and/or factual legitimacy.

Also, an MDL may allow aggregation without counsel necessarily having to work up huge numbers of claims. Plaintiffs may seek bellwethers, and defendants may seek resolution of certain common legal issues first, before discovery. So, again, it's possible to have a lot of claims creating risk/exposure without an ability to assess their individual merits.

As a corporate defendant, it is important to have a long-term strategy specific to the issues of a litigation, and that includes considerations of possible approaches both on how to win certain cases or issues that are heard by the MDL court, and how to make sure cases are moving toward remand and resolution in other courts, such as by multi-track discovery plans, etc.

Defendants also need to consider strategies ensuring that all their trial eggs are not in the bellwether/MDL jurisdiction basket. For example, we recently defended the *Zometa* MDL in part by refusing to waive the rights derived from the US Supreme Court's *Lexecon v. Milberg Weiss* case, which can be an effective way to get cases remanded out of an MDL and back to home jurisdictions for trial. As a result, 100% of the cases were transferred back to the transferor courts. We made that decision based upon our belief that we could be successful at trial and with case-specific summary judgment motions that the MDL court could not realistically entertain.

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Mr. Stephens: What factors discourage MDL judges from returning individual cases back to their original courts?

Mr. Beisner: I fear that in recent years, the MDL community has been prone to award "gold stars" to judges who are able to quickly conclude MDL proceedings without remanding any (or many) cases to transferor courts. To some degree, that's perfectly understandable. Who would want to be the jurist who dumps 30,000 cases back on his or her colleagues, particularly when those cases would likely be at the stage when they present the thorniest case-specific discovery issues and may be ready for trial dates in the short term?

To be sure, in some controversies, it's possible to achieve such resolutions through deft, balanced case management practices. But where that outcome isn't possible, the desire to avoid remands can't justify using pressure tactics to achieve global settlements without regard to the strengths and weaknesses of the individual claims in the proceeding—particularly the high likelihood that many (if not most) of the claims should never have been filed in the first place or have only marginal value.

Indeed, full resolution of most MDL proceedings would probably occur more quickly if the transferee courts pressured *both* sides on points that would encourage overall resolution. For example, MDL courts could demand that plaintiffs' counsel proffer hard, claim-by-claim evidence that their individual cases are each settlement-worthy and to self-winnow their claims (that is, to dismiss without payment claims they would be unwilling to take to trial or that should never have been filed in the first place.)

Mr. Stephens: Once claims are aggregated into MDL, and discovery begins, courts often find the docket is laden with meritless claims. What can MDL courts do to eliminate such claims earlier in the process?

Mr. Beisner: Let me start by saying that there is strong evidence that in most MDL proceedings, a significant percentage of the claims lack merit. For example, when parties reached a global settlement regarding Vioxx personal-injury claims several years ago, plaintiffs were required prove that they (a) had been prescribed the product and (b) had experienced the alleged risk (heart attack or stroke) before payment.

Obviously, before asserting such claims, counsel at a minimum should have confirmed that their clients could demonstrate those two points. Yet, astoundingly, close to 30% of the claimants in the pool were unable to muster such basic evidence, suggesting their claims should not have been brought in the first place.

As outlined in a 2009 WLF Monograph that Jessica Miller and I authored, transferee courts in mass-tort MDL proceedings should establish an upfront procedure that requires each claimant to provide a basic justification for his/her claim. One option in personal-injury cases is to require early production of a "notice of diagnosis"—documentation confirming that a qualified medical practitioner has seen the patient and determined that he or she is manifesting (or has manifested) the symptoms alleged in the proceeding. Another approach (not mutually exclusive) is to require each plaintiff to provide a plaintiff fact sheet—basically responses to a set of standard interrogatories and document requests.

Fortunately, plaintiff fact sheet requirements have become commonplace in mass-tort MDL proceedings. Some MDL courts are adamant about fact-sheet compliance, dismissing claimants who do not timely submit full responses. However, in other proceedings, the fundamental purposes of fact sheets are not fulfilled. Response protocols aren't enforced rigorously, and/or the required fact-sheet content doesn't really force claimants to justify their claims.

Plaintiff fact sheets should require proffering of clear evidence that before filing, counsel have subjected each claim to a thorough investigation of the relevant facts consistent with the requirements of Rule 11. In short, counsel should be required to "show their homework."

At minimum, the fact sheet should require production of medical records confirming that the claimant experienced the allegedly causative exposure alleged in the litigation (*e.g.*, proof that the claimant was prescribed the medicine at issue) and the alleged harmful effect (*e.g.*, the side effect that the medicine is alleged to cause). Those are matters that responsible counsel should have confirmed before filing a claim.

Such upfront justifications should be required because mass-tort MDL proceedings largely suspend the mechanisms courts use to ensure plaintiffs can justify their claims. Even though defendants typically are required to produce enormous amounts of discovery on factual issues generally applicable to the claims in the proceeding, MDL courts typically don't allow defendants to utilize the federal rules that permit them to test individual claims.

In many MDL proceedings, the defendant doesn't receive a complaint pled with the detail required by Rule 8. Instead, all claims are premised on a "master complaint." For that reason, the defendant typically is deprived of the opportunity to use Rule 12(b) motions to challenge the adequacy of each plaintiff's case-specific allegations. Plaintiffs normally aren't required to make the initial disclosures mandated under Rule 26.

Except in the few cases that may be designated for "bellwether" trial preparation (many of which are hand-picked by plaintiffs' counsel), the defendant isn't permitted to: depose the claimant (or other fact witnesses) under Rule 3; to pose interrogatories under Rule 32; to make document requests under Rule 34; or seek admissions under Rule 36. And because they are unable to take claimant-specific discovery, defendants also usually can't challenge individual claims with Rule 56 summary judgment motions.

Particularly in mass-tort proceedings in which individual plaintiffs' general causation theories and/or injury allegations may vary, *Lone Pine* orders may also be beneficial.

Mr. Stephens: What are *Lone Pine* orders, and how can they discourage the stockpiling of meritless claims?

Ms. Gerstenhaber: With *Lone Pine* motions, or similar requests, defendants ask the court to require plaintiffs to put up evidence that substantiates an essential element of their claims. *Lone Pine* orders are not new and there are many variations, but generally we've argued for them when dealing with claims that are inconsistent with well-established science or medicine, claims of multiple plaintiffs

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alleging identical injuries (often against many defendants), or claims that lack clear evidence of exposure. The idea, in the right case, is to streamline and narrow claims, or even eliminate them altogether. For example, in the *Zometa* MDL, many cases involved a question of product identification—generic or brand? It would have been very wasteful to pursue discovery without some threshold proof on product identification. Depending on the timing, *Lone Pine* orders can discourage the filing of junk claims and in any event will allow all parties to better assess the inventory and its possible litigation value.

Mr. Stephens: Can defendants file summary judgment motions or seek formal review of the plaintiffs' scientific evidence through evidentiary motions?

Ms. Gerstenhaber: Yes. They can and they should—in the appropriate case. Once a decision is made to litigate cases on their merits, it is crucial that corporate defendants hold plaintiffs to their burdens of proof. This includes challenges to the scientific bases underpinning the claims. But it needs to be an informed choice, not just a check-the-box rote filing. Understandably, courts deny motions that appear to be filed as a routine matter, and that tends to undermine the pursuit of meritorious *Daubert* motions.

To be successful, challenges to scientific evidence require attorneys who truly understand not only the law but also the science, and then courts must take time and be willing to judge the experts' methodology against the crucible of the scientific method—and the court must do so, notwithstanding a large aggregation of cases. The Supreme Court has asked a lot of our federal judges.

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The upside of course can be significant. Early *Daubert* successes can end an MDL or, at the least, drastically reduce the value of remaining cases. *See, e.g.*, *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 968 (D. Minn. 2009) (granting summary judgment in bifurcated proceedings after simultaneously-issued order excluded plaintiffs' sole remaining general causation expert and noting "[t]hat decision effectively ended the current litigation, because ... absent an admissible general causation opinion, Plaintiffs' claims necessarily fail"); *In re Zoloft (Sertralinehydrochloride) Prods. Liab. Litig.*, No. 12-MD-2342, 2016 WL 1320799, at *5, 11 (E.D. Pa. Apr. 5, 2016) (granting summary judgment in favor of defendant Pfizer in all MDL actions after finding plaintiffs failed to present admissible expert testimony with respect to general causation).

Mr. Stephens: If a select number of plaintiffs' claims are found to be legally or factually without merit as a result of a defendant's motion, does that create an opportunity to similarly challenge the other plaintiffs' claims?

Mr. Beisner: Yes, it should. When MDL courts conclude in one or more test cases that there is a flaw requiring dismissal (*e.g.*, inadmissible scientific evidence, preemption), they will sometimes issue an order to show cause why some or all other cases in the proceeding should not be dismissed on the same grounds. Each claimant is then allowed to step forward with counter-arguments. Often, however, there is really nothing more to say—and many more claims are properly dismissed on the basis of the ruling in the test case.

Mr. Stephens: Recently, a judge dismissed all claims in one particular MDL, *In re*

Mirena IUD Products Liability Litigation. What lessons can defendants draw from that outcome in terms of motions practice in MDLs?

Mr. Beisner: Where possible, defendants should aggressively probe for one or more flaws that pervade the claims in the MDL proceeding. Sometimes we're talking about whether plaintiffs' science case—the causation proof—can meet *Daubert* standards. In other matters, preemption arguments are the key (*e.g.*, there is "clear evidence" that the Food and Drug Administration would not have approved the labeling warnings that plaintiffs contend should have been given). And in some, arbitration clauses may bar litigation. But whatever the flaw, it's important to seek an early opportunity for the court to consider the challenge.

Mr. Stephens: Are there other examples you can point to where rather than simply pressuring the defendants to settle, the presiding judge proactively sought to weed out meritless or even fraudulent claims?

Mr. Beisner: Yes, there have actually been several recent outcomes like the *Mirena* MDL proceeding. In that litigation, the MDL court dismissed all 1,200 cases due to deficiencies in plaintiffs' science/causation evidence. Similarly, in the *Incretin Mimetics* MDL proceeding, hundreds of failure-to-warn claims were dismissed on preemption grounds. And in the *Zoloft* MDL, the court dismissed over 300 claims due to plaintiffs' inability to present scientific evidence that could pass muster under *Daubert*.

My concern is that courts are less likely to weed out meritless/fraudulent claims where claimants in the MDL proceeding assert varying liability theories, which requires sorting claims into various categories. And a similar problem exists where the flaws must be assessed more on a case-by-case basis, such as where individual claims are fraudulent (*e.g.*, the claimant never used the product at issue) or poorly investigated (*e.g.*, there is clear evidence of an alternative cause of the alleged injury). To be sure, eliminating dubious claims in that setting is a more daunting task for the MDL court. But that claims-winnowing process could be facilitated through use of the upfront claims justification methods described previously. As Chief Judge Land noted in the *Mentor Corp.* ruling quoted previously:

> MDL consolidation for product liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise. ... [T]ransferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly. The undersigned has struggled with the best way to accomplish that. Hopefully, the robust use of Rule 11 will help.

Mentor Corp., slip op. at 4-5.

Further, where claims require highly individualized legitimacy assessments or advance widely varying liability theories, MDL courts should be more willing to remand cases to allow transferor courts to deal with these case-specific problems. Once an MDL court has completed its common discovery tasks, there's much less reason for it to assume the burden of addressing individualized claim challenges.

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Mr. Stephens: What lessons can be derived from the *Zometa* MDL in which you were involved?

Ms. Gerstenhaber: The primary lesson is that the litigation plan must fit the litigation that is presented. We chose to defend on the merits because we believed strongly in the extraordinary value of the medicine and the strength of our defenses, even though we recognized that the winning defenses were case-specific and so the litigation would take years to conclude, which it did.

We had a highly experienced team of defense counsel leading the MDL and national defense. We also had an aggressive discovery plan that included the work-up of hundreds of cases, not just bellwethers, which provided a better sense of the inventory.

We filed certain motions across the inventory, such as *Lone Pine*-style motions on product identification and Rule 25-style motions forcing compliance on certain procedural party-substitution issues important to the litigation.

We used targeted motion practice in and out of the MDL to resolve individual cases. For example, we prevailed on more than 100 summary judgment motions or contested motions to dismiss. We also secured more than 156 expert-witness exclusions, either in whole or in part, under *Daubert*.

We did not waive our *Lexecon* rights, ensuring that we would have all trials held outside the MDL. We had teams of trial attorneys ready to take cases to trial once remanded. We also took cases to trial in a parallel state court mass-tort docket.

Mr. Stephens: The Manual for Complex Litigation, which nominally guides judges' management of MDLs, hasn't been updated since 2004. Would an update benefit MDL parties and the judges who oversee them?

Mr. Beisner: Yes, an update of the Manual (which I understand is in progress) would be very beneficial. In particular, the discovery portions of the Manual should more fully reflect current practice regarding e-discovery, including the import of the recent Federal Rules amendments.

Mr. Stephens: In addition to utilizing some of the tools that you mentioned earlier, what else can MDL judges do to achieve the goals that Congress intended for multidistrict litigation? We'd welcome thoughts from you both on that.

Ms. Gerstenhaber: It is important for MDL judges to understand not only the benefits but also the negative consequences of aggregation. This could help to level the playing field so that aggregation is not a weapon. A few other concluding thoughts:

- Evaluating the inventory should require both sides to have equal roles in picking cases for work-up (or trial, as appropriate). Plaintiffs' tactic of immediately dismissing defense picks should result in another defense pick, not leaving only plaintiffs' picks in play.
- Courts should meaningfully limit discovery based on the core case issues, and efficiently manage discovery with cost-sharing.
- Courts should facilitate coordination without abandoning tools that require some level of case screening by plaintiffs' counsel.

- Courts should understand that settlement (in the MDL or later) is not always the appropriate answer in litigation, and aggregation doesn't trump that point.

- Finally, courts should recognize that remanding cases out of the MDL in some instances can be the best way to resolve them.

Mr. Beisner: We need to get back to the basics in MDL proceedings. As the Supreme Court observed in *Lexecon,* MDL proceedings should rigorously adhere to the congressional intent that MDL proceedings are intended to deal solely with pretrial matters—getting discovery completed and resolving pre-trial motions. If the parties decide to settle while the MDL proceeding is in process, that's fine. But settlement shouldn't be the MDL court's primary goal. And there's no indication that Congress intended to authorize an array of ad hoc procedures in MDL proceedings that effectively ignore the Federal Rules of Civil Procedure.

It's gratifying that in some MDL proceedings, courts have been more focused on identifying and resolving issues pertinent to many (if not all of) the constituent cases—preemption questions, science/*Daubert* issues, statute of limitations questions. That approach warrants applause and should be emulated in more MDL proceedings.

And rather than (or at least before) channeling the parties' resources into bellwether trials, it would be beneficial if MDL courts spent substantially more time testing the viability of individual claims—to separate the wheat from the chaff. As noted previously, there's a desperate need, particularly in the larger mass-tort MDL proceedings, to winnow the claims inventory down to those that are actually trialworthy.

I applaud Charna's point that defendants should remember that they are under no obligation to participate in bellwether trials and that in some MDL proceedings, it would be best for the defendant to "just say no" and to allow individual claims to be tested on remand with the rigor normally afforded to non-MDL claims. And where a defendant concludes that one or more bellwether trials might be beneficial in an MDL proceeding, it has the right to waive *Lexecon* only if its terms for a bellwether trial are met—for example, if the specific case proposed for trial is acceptable and is limited to a single plaintiff's claims.

Finally, many of the abuses and excesses regularly observed in MDL proceedings are largely a product of their seemingly boundless fee-generating potential. To be sure, the plaintiffs' counsel who take lead roles in litigating mass-tort matters (that is, those who legitimately invest substantial time and resources) are entitled to reasonable compensation for any successes achieved for their clients.

But particularly given the efficiencies that MDL proceedings are supposed to (and do) foster, how can one justify payment of the standard 33-40% contingency on each individual claim? That's a particularly troubling question for those counsel who operate under the four-step MDL business model discussed previously: (1) advertise for claims (possibly with third-party litigation funding); (2) file claims; (3) wait (avoiding any real involvement in litigating claims) and then (4) accept settlement money. What is the basis for imposing a 33-40% fee on clients when you never set foot in a courtroom on their behalf and when you assumed little or no financial risk?

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Some MDL courts have taken the relatively bold step of capping such contingency-fee payments, and those moves should be applauded. Such reductions, however, should become standard practice and should more directly target counsel who embrace the "no effort" business model.

Mr. Stephens: Charna, John, thank you for participating in this discussion.

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