SideBAR

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Opening Statements

Editor's Notes

Robert E. Kohn

The Federal Rules of Civil Procedure continue to change. Substantive federal law changes too. Procedurally speaking, in this issue John McCarthy and I review a proposal in Congress to amend Rule 11 by legislating sanctions. Meanwhile, John Rabiej reviews proposals that the Judicial Conference is considering to amend Rule 26 by clarifying the duty to preserve evidence. Alex de Witt explores recent Rule 26 amendments governing the disclosure of attorney communications with experts who testify. As Lauren Godshall points out, the future of Multi-District Litigation is uncertain because of a new ruling for arbitrating disputes that might have become national class actions. And the Western District of Pennsylvania has a new pilot program for appointing special masters for e-discovery issues, as we learn from Jennifer Keadle Mason.

Substantively, Kyle Beale brings us up-to-date on the Fifth Circuit's development of an important bankruptcy litigation issue. Emile Mullick explains that the Supreme Court has changed course over applying 42 U.S.C. § 1983.

We also benefit from the practical experiences of others. From Lauren Lonergan and Tara Reese Duginske, we learn

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Chair's Message

Shelline K. Bennett

Our section lives and breathes because you, our members, make so many impressive contributions to its work. This issue of SideBAR is evidence of those contributions. Moreover, just this month—thanks to the work of Board member Collin Hite of Richmond, Va.—the section is co-sponsoring a free webinar CLE on the role that historians can play as witnesses and experts in litigation. I am sure you will find it interesting and informative. The webinar is a collaborative work with the Association of Corporate Counsel, whose members will also be invited to attend without charge on May 25, 2011.

In the months ahead, section leaders Frank Carroll (vice chair) and Rob Kohn (secretary and treasurer) are working to produce a timely and exciting CLE program as part of the upcoming FBA Annual Meeting & Convention in Chicago. With the welcome participation of Chief Judges James Holderman of the Northern District of Illinois and Gerald Rosen of the Eastern District of Michigan, the CLE will address recent Supreme Court developments in four separate cases affecting class actions in federal courts. Board members Jim Martin and Tom McNeill are also working to organize the presentation, which is

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Inside this Issue

A Wrench in the Works: Dealing with State Court Suits During Multidistrict Litigation

Lauren E. Godshall

Airplane crashes, medical device recalls, oil spills. Big cases like these call for big solutions. More and more frequently, the solution to resolving complex, multi-state issues and consolidating hundreds or thousands of individual lawsuits into something manageable is through a motion to transfer and consolidate, filed before the Judicial Panel on Multidistrict Litigation.

A Brief Introduction to Multidistrict Litigation

The Judicial Panel on Multi-District Litigation was formed in 1968, when Congress enacted 28 U.S.C. § 1407. The JPML is made up of seven sitting federal judges from either the district or appellate levels, appointed by the Chief Justice of the Supreme Court. The panel meets six times a year to hear and rule on "motions to transfer and consolidate." These motions to transfer and consolidate can be filed by any party—plaintiff or defendant—interested in getting numerous federal matters heard together for all pretrial proceedings. Interestingly, both plaintiffs attorneys and defense attorneys are filing motions to transfer and consolidate before the JPML with increasing frequency over the last decade.

The panel's purpose is to consolidate matters where such consolidation would be helpful to all parties, in order to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties and of the judicial system. Then, if a matter merits consolidation, the panel decides on a "transferee court"—the federal district court that will handle all of the related matters for all pretrial purposes. In the Deepwater Horizon explosion and oil spill, for example, the JPML decided that consolidation into a single multidistrict litigation (MDL) was appropriate, and further determined that Judge Carl Barbier, who already was handling dozens of Deepwater Horizon related matters in his own court in the Eastern District of Louisiana (located in New Orleans) was the right man for this particular job.

The transferee judge who gets the MDL matter in his or her court does not necessarily try the actual cases that are transferred to him or her. Instead, the transferee judge directs all pretrial proceedings, such as evidentiary motions, depositions, motions to dismiss or for partial summary judgment, and any global settlement negotiations. Section 1407 then directs the panel to remand all cases not resolved in the pretrial stage back to their home courts for trial—although in some cases the transferee court may conduct a "bellwether trial" of a matter originally filed in that court, or the parties will voluntarily agree to remain in the transferee district for trial. As most matters are resolved in pretrial stages, and as many matters will end up resolved in the transferee court, the JPML's decision about consolidation is a major defining step for big litigation matters.

But what to do about state court actions?

The JPML only has jurisdiction over federal lawsuits. Once a federal action is filed anywhere in the country, the JPML may determine whether it should be consolidated with the MDL and transferred to that court. About pending state court actions—even state court actions in the same district as the MDL itself, however, the JPML can do nothing.

This inability to affect relevant and simultaneously pending state court actions has been described as the "singular weakness" of the JPML statute.[1] Without the ability to consolidate these simultaneous, similar matters, many of the advantages of the MDL system are lost—the state court actions can move forward on their own schedule, with separate discovery requirements, scheduling orders, and rulings that could all be wildly inconsistent with the consolidated MDL proceedings. Indeed, for example if a state court rapidly begins making decisions about evidence and allows the disclosure of arguably privileged documents, or allows for certain contested depositions to go forward, such a decision will have the effect of deciding the disclosure question for every related action in the country.

Options for resolving this issue are limited. Defendants in a state court action hoping to get out of the state court and into the consolidated MDL proceeding should explore options for filing a notice of removal immediately upon receipt of service or notice of a new suit. Removals, however, are only available if federal jurisdiction exists—and if only state laws are pled, savvy attorneys will know to add appropriate in-state defendants and destroy diversity.

Even once a matter is removed, however, that may not be the end of the story. Plaintiffs can voluntarily dismiss the removed matter and, so long as there are no problems with the statute of limitations, re-file the same or substantially similar suit back in state court. There is no legal bar to proceeding like this. In *Stipanovich. v. AstraZeneca Pharm.*, No. 06-1754, 2006 WL 2529474 (N.D. Cal. Aug. 31, 2006), the judge ruled himself unable to prevent the voluntary dismissal of a claim about to be transferred to the MDL despite the fact that the plaintiff was plainly forum shopping. The MDL judge can craft court management orders that prevent this from happening before the fact, and counsel worried about this possibility should urge the court to adopt such language sooner rather than later. *See In re FEMA Trailer Formaldahyde Products Liability Litigation*, 628 F.3d 157 (5th Cir. 2010) (ruling that unusual court order regarding motions for voluntary dismissals of proposed bellwether plaintiffs was not an abuse of discretion).

Beyond removing, treatises on complex litigation suggest that the parties attempt to work with the state judge to coordinate those proceedings with the MDL—or even to stay all proceedings until the pretrial decisions made by the MDL judge are complete.[2] This only occurs through the goodwill and cooperative spirit of the state court judge involved, as there are no statutes or regulations that give any "teeth" to this suggestion, but there are numerous examples where state court judges have in fact recognized the advantages of working in conjunction with the MDL court. If removal is not an option, counsel for defendants should try to make their case for unofficial consolidation with the MDL proceedings as strongly as they can.

Parties can also request that the MDL court take action for

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Hopefully, the Fifth Circuit will clear all these questions up by taking *In re MPF* on appeal. Judge Bohm would seemingly agree, as he also stated "The Court agrees that the *United Operating* test is a bright-line rule; the Court declines to comment on the correctness of this test and instead, will only apply it to the facts of the case at bar." However, one thing is clear; if you are in the Fifth Circuit, you better develop a strategy to *specifically and unequivocally* identify what claims can and will be pursued and against whom; and, you would be well-advised to do so prior to plan-confirmation. Unless the debtor's attorney wants to be on the hook for making definitive determinations about post-confirmation litigation, he must get the litigators involved early in the case—perhaps even pre-petition—to determine which causes of action can and will be pursued on behalf of the estate, in order to avoid losing them in post-confirmation. **SB**

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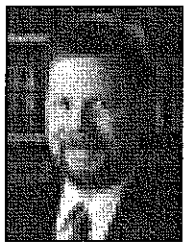

Endnotes

[1]*See In re United Operating, LLC*, 540 F. 3d 351 (5th Cir. 2008).

[2]11 U. S. C. § 1123 (b)(3)(B).

[3]*See In re Tex. Wyo. Drilling, Inc.*, 422 B. R. 612 (Bankr. N. D. Tex. 2010).

[4]In another case, Judge Houser held that the common law claims were not *specifically and unequivocally* reserved according to the Fifth Circuit standard, and therefore, the litigation trustee did not have standing to bring those claims for the benefit of the creditors. *In re Manchester, Inc.*, 2009 Bankr. Lexis 2003 (Bankr. N. D. Tex. 2009). Although, she did determine that the preference claims had been properly reserved in that case.

[5]*See In re MPF Holdings Inc. LLC*, 2011 WL 489597 (Bankr. S. D. Tex. 2011).

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itself through the All Writs Act, 28 U.S.C. § 1651(a). Several district courts have determined that a federal court's inherent power under the All Writs Act allows it to enter an injunction which would have preclusive effect on a state court's action, particularly in *In re Lease Oil Antitrust Litigation*, 48 F. Supp. 2d 699 (S.D. Texas 1998); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, (7th Cir. 2002). This is a narrowly applied power, subject to numerous exceptions and further circumscribed by the Anti-Injunction Act,[3] but it is another possibility to explore.

What does the Future Hold?

Recently, the Supreme Court decided the case of *AT&T Mobility v. Concepcion*, No. 09-893, 2011 WL 1561956 (April 27, 2011). The opinion, which held that the Federal Arbitration Act preempts a state rule regarding the unconscionability of class arbitration waivers in consumer contracts, has been described as a "death blow to consumer class actions."[4]

In light of this decision, it is interesting to note that from 2000 to 2009, the number of dockets in the JPML has doubled—and a large part of that increase is due to an explosion in petitions related to deceptive marketing or sales practices, as well as a dramatic increase in matters of pharmaceutical liability and other products liability.[5] If the "death blow" predictions surrounding the *AT&T Mobility* decision do manifest themselves in a marked decrease in the availability of big consumer class actions, it is not unreasonable to expect a reflecting increase in the JPML filing numbers, as the JPML has already been widely adopted by both sides of the bar as the means to consolidate major consumer actions without the necessity of a class action.

Given the combination of decreased ability to file state court class actions and the increased interest in both plaintiffs and defense attorneys in utilizing the MDL mechanism, it would be useful for almost any litigator to become familiar with the procedures and practices of the JPML, as well as the complex and more nebulous issues that can arise when state court cases cannot be joined with consolidated MDL proceedings in federal court. **SB**

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Endnotes

[1]David Herr, MULTIDISTRICT LIT. MAN. § 6:13 (2011); William W Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529 (1995).

[2]*See* David Herr, MULTIDISTRICT LIT. MAN. § 6:13 (2011); MANUAL FOR COMPLEX LITIGATION (4th) §§ 10.123, 20.313.

[3]*In re Managed Care Litigation*, 236 F. Supp. 2d 1336, 1339-40 (S.D. Fla. 2002).

[4]New Orleans City Business, "U.S. Supreme Court deals death blow to consumer class actions," May 5, 2011.

[5]*See* www.jpml.uscourts.gov/Statistics/statistics.html.