Proskauer

Where Do We Go From Here? Practical Considerations When Multidistrict Litigation Comes to an End

Minding Your Business on **September 12, 2023**

When product liability actions involving one or more common issues of fact (e.g., an allegedly harmful product or chemical) are filed in multiple jurisdictions, they are typically consolidated for pretrial proceedings in a multidistrict litigation (MDL). 28 U.S.C. § 1407(a). In an MDL, the lawsuits are transferred from their filing courts to a single "transferee" Court (the MDL Court) chosen by the Judicial Panel on Multidistrict Litigation (JPML). The purposes of this centralization are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary. For example, overarching issues of law, such as preemption admissibility of common-issue expert opinions, are often resolved by the MDL Court instead of needing to be re-litigated in several different courts. Additionally, MDL Courts can hold bellwether trials to help the parties structure a global settlement process to resolve many or all of the filed cases.

When the purposes of an MDL are accomplished and the JPML determines it is time to end the consolidation, the transferee court begins the process of remanding the remaining cases back to the courts where the actions were initially filed. While federal law (28 U.S.C. § 1407(a)) and JPML rules (e.g., Rules 10.1-10.4) govern the basic process to remand a case, there are a number of practical issues that parties should consider to ensure that the strides made during the MDL are preserved in the remanded action. Below are some key considerations to keep in mind when a party or the MDL Court suggests that it is time to begin winding down the MDL proceedings.

Is it really the right time?

Typically, the MDL is ready to wind down when cases are ready for trial or would no longer benefit from inclusion in the coordinated or consolidated pretrial proceedings. *See, e.g., In re Bard IVC Filters Products Liability Litigation*. Whether cases are ready for trial or would no longer benefit from inclusion in coordinated proceedings varies widely based on the specific circumstances of each MDL.

The benefits of an MDL should be viewed in the macro—in other words, are there still issues or discovery that affect most or all the cases? For example, is all the document and deposition discovery complete for global issues, like causation? Are there any key issues of law, such as preemption, that need to be decided?o the parties need evidentiary rulings regarding expert witnesses? Have the parties meaningfully discussed potential global settlement aided by an experienced mediator? Are there processes in place in the MDL Court—such as discovery mechanisms or settlement procedures—that are efficiently resolving actions and that would be lost if the MDL is disbanded and the transferee Court loses its jurisdiction? How many actions remain—just a handful or hundreds or thousands?

It all boils down to: What is there left to do before the remaining actions are ready for trial? If the answer is “A lot,” it may not be the right time to wind down the MDL and litigants should consider whether to oppose remand laying out all the benefits that would be lost if the actions in the MDL are remanded.

Notably, some plaintiffs may consider using the threat of remand as a sword to put pressure on defendant companies to settle, particularly if they are faced with having to defend actions in many jurisdictions at the same time. It is a double-edged sword, however: discovery and case work-up in MDL proceedings are typically led by a subset of plaintiffs’ firms and attorneys (usually referred to as the plaintiff steering committee), so plaintiffs whose cases have been dormant for years may suddenly need to get ready for trial in a short time span, which can be particularly difficult for plaintiffs’ counsel who have not been active in the MDL pretrial proceedings.

What records should be sent to the court on remand?

The strides made during the MDL pretrial proceedings are worthless unless they are preserved in the remanded case. Courts have recognized that, barring exceptional circumstances, orders issued by the MDL Court remain binding if the case is sent back to the federal transferor court or is remanded to state court. *In re Zyprexa Products Liability Litigation*. However, the parties need to proactively take steps to ensure that those orders are sent to the receiving court so they can be relied upon going forward.

Other than a few basic categories of documents, such as docket sheet for the case in which all the major MDL filings happen (commonly referred to as the "master docket") and docket files for the individual remanded action, the JPML Rules do not require the MDL Court to transmit all the key rulings and orders to the court receiving the remanded action. JPML Rule 10.4(b). Instead, that onus falls on the parties. *See* JPML Rule 10.4(a).

The best tool to transmit this critical information to the courts receiving the remanded cases is the final pretrial order, which the MDL Court is required to transfer to the receiving court and will likely be one of the first things that the trial judge will review. JPML Rule 10.4(b)(iv). The final pretrial order serves as a chronicle of pretrial proceedings (including*, e.g.*, discovery procedures and dispute resolution status) and provides guidance to the courts on remaining issues after remand. *See, e.g.,* Final Pretrial Order and Suggestion of Remand, Docket No. 1640, *In re Seroquel Products Liability Litigation*. Parties should work together to come up with a stipulated list of motion *in limine* rulings, Daubert rulings, summary judgment rulings, substantive stipulations, discovery orders, disclosure orders, and other key pretrial rulings. Those filings should then be consolidated, either by listing the documents in a final proposed pretrial order or combining a PDF of the documents in an appendix that the MDL Court can attach to the final pretrial order. Beware the urge to over-designate, however: including every filing from the master docket, for example, is unproductive —many MDLs can take years, resulting in thousands of docket entries and hundreds of pretrial orders. Sending what amounts to multiple bankers' boxes of files to the receiving court all but guarantees that key rulings will be missed.

Where should the remanded cases go?

As noted above, when an MDL winds down, the remaining cases are remanded to the courts where the actions were initially filed. 28 U.S.C. § 1407(a). In large-scale MDLs, such as those alleging injuries from widely-used products, plaintiffs' firms often file complaints in jurisdictions that have no discernable connection to many of the individual plaintiffs. *See, e.g.,* Final Pretrial Order and Suggestion of Remand, Docket No. 1640, *In re Seroquel Products Liability Litigation*. In such cases, and to aid future judges in assessing venue transfer motions, it may be useful to request that the MDL Court issue recommendations in the final pretrial order regarding where those cases should be "re-transferred" post-remand.

Where does all the discovery go?

Plaintiff steering committees may make discovery materials available to all other plaintiffs in cases being remanded, but keep in mind that not all discovery is created equal. In large product liability actions, for example, discovery often includes confidential materials containing trade secrets, plaintiff-specific medical records, and expert witness reports containing both. Parties should ensure that all protective orders put in place to protect confidential discovery materials are identified in the final pretrial order and that the receiving plaintiffs are required to adhere to those protective orders. *See, e.g., In re Zyprexa Prod. Liability Litigation*.

Moreover, unless the plaintiff steering committee can obtain authorization from each client to share case-specific discovery subject to the confidentiality order — *e.g.*, tax records, medical records, or expert reports containing individual medical information — those materials should not be disseminated to other plaintiffs. Parties should consider maintaining such materials in a separate repository, to prevent intermingling with non-case specific discovery.

Finally, parties should consider the creation of a web-based database of discovery materials to facilitate cost-effective access to a single set of the documents while protecting against their accidentally falling into the wrong hands.

How early should parties start planning for remand?

As demonstrated above, the remand process in mass product liability actions is complex and no two MDLs can be treated the same. So, it’s never too early to start thinking about remand. From the very beginning of the MDL process, parties should be coordinating with an eye towards remand — for example, determining where discovery should be housed to account for dissemination to other plaintiffs or including language in each stipulation to account for how it should apply to remanded cases in the future. This extra effort up front can save many hours of headaches down the line.

View original.

Related Professionals

- **Christina M. Assi**
  Senior Counsel