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MULTIDISTRICT LITIGATION**PROCEDURE**

A recent order in the *Actos Products Liability Litigation* misreads Federal Rules of Civil Procedure 43 and 45 as empowering the court to compel witnesses residing out of state and more than 100 miles away to testify via satellite from a local courthouse, say attorneys John H. Beisner and Geoffrey M. Wyatt in this BNA Insight. The authors say the order stretches the rules beyond the strict limits envisioned by the drafters and could impact future decisions, especially in the context of multidistrict litigation.

Live Via Satellite: The Misuse of Federal Civil Procedure Rule 43 To Require Corporate Witnesses to Testify Live From Across the Country



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Suppose you are presiding over multidistrict litigation involving a defendant located 500 miles away in another state. You decide it would be best if key defense witnesses—maybe current and former employees—testified live at an upcoming bellwether trial. But it turns out the witnesses are not able to travel to court to testify. Under the recently clarified Rule 45, you can't force them to travel to court, which is across state lines and more than 100 miles away from the witnesses' residences and places of employment. But can you make them appear at a courthouse near them to testify live by video?

Rule 43 suggests not, at least not based solely on your preference for live testimony. The rule authorizes "testimony in open court by contemporaneous transmission from a different location," but only for "good cause in compelling circumstances and with appropriate safeguards." That language suggests a high hurdle, a reading that is borne out in the Rule's comments, which further state that "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." The comments single out the situation in which a previously available witness becomes unavailable only after trial begins, but urge that "[o]ther pos-

sible justifications for remote transmission must be approached cautiously.”

Notwithstanding this language, one recent decision found Rule 43 to apply in seemingly ordinary circumstances. In a recent order in the *Actos Products Liability Litigation*, the court read Federal Rules 43 and 45 as empowering the court to compel witnesses residing out of state and more than 100 miles away to testify via satellite from a local courthouse.

The order states that the bellwether trial is a “necessary part of the pretrial preparation of these MDL proceedings” that is intended to “generate information for the use of the parties and the court to determine the nature and strength of the claims.” Mem. Ruling (“*Actos Order*”) at 10-11, *In re Actos Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH (W.D. La. Jan. 8, 2014) (internal quotation marks and citation omitted). Because of the importance of the trial, the court was of the view that “this first bellwether trial should present the testimonial evidence of both sides as fairly and completely as possible.” *Id.* at 11.

And it appears to be the court’s belief that testimony by satellite is superior to video deposition testimony because it would “more closely provide ‘live’ testimony in Open Court.” (*id.* at 12), although the court also perceived a practical problem in taking video depositions in time for trial in light of the “large number of defense witnesses” unavailable for trial. *Id.* at 11. For these reasons, the court authorized testimony by satellite at trial for more than 15 witnesses. *Id.* at 1 n.1.

But Rules 43 and 45 do not appear to authorize an order with such broad sweep. As an initial matter, it is unclear that the court even has the power to order testimony by contemporaneous transmission from witnesses located out of state and more than 100 miles away. It is plain under the 2013 amendment to Rule 45 that the court lacks the authority to order such witnesses to appear to testify in person. That amendment was expressly adopted to overrule a set of cases that had held under the old Rule 45 that the 100-mile and in-state limitations applied only to nonparty witnesses, and that a court could compel party witnesses to appear no matter where they may reside. In fact, the commentary to the amendment specifically identifies the *Vioxx* litigation (*In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640 (E.D. La. 2006)), in which the court compelled a Merck officer located in New Jersey to appear live at a trial in Louisiana under such a reading of the Rule, as an approach that the amendment to the Rule was intended to foreclose. *See* Fed. R. Civ. P. 45(c)(1)(A).

Order in *Actos* Misreads Amendment

The *Actos* court’s order appears to be a reaction to this amendment. The order cites the *Vioxx* decision, which alternatively allowed the plaintiffs in the *Vioxx* litigation the choice of presenting the Merck officer’s testimony by contemporaneous transmission. Recognizing that it could no longer order the appearance of distant witnesses at trial as the *Vioxx* court had, the *Actos* court apparently seized on the fact that the amendments to the Rule did not expressly address the *Vioxx* order’s alternative ruling.

The *Actos* court based its conclusion on the text of Rules 43 and 45, both which refer to the testimony of witnesses at “trial.” The court explained that Rule 45 provides that a subpoena “may command a person to

attend a trial, hearing, or deposition” within certain geographical limits—i.e., within 100 miles of the person’s residence for nonparties or within the same state of the person’s residence, place of employment, or place of regular business transactions for party witnesses.

Rule 43, meanwhile, sets forth rules governing the use of testimony by contemporaneous transmission under a provision defining the rules for taking testimony “[a]t trial.” Based on this equivalence in terms, the *Actos* court held itself authorized to order any witness anywhere in the country to testify at a remote location in the same state or 100 miles away from that person because the testimony occurs “[a]t trial” even when taken at the remote location. *See Actos Order* at 17-19.

This reading is arguably supported by commentary to Rule 45—on which the *Actos* Order strangely does not rely—which states that “[w]hen an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).” Of course, this commentary would only support the *Actos* court’s reading if it means that the geographical limits set forth in Rule 45(c)(1) apply to the remote location rather than the place of trial. The fundamental problem with the *Actos* court’s reading of Rule 45 is that it would strip all meaning from the strict limits of Rule 43 on the use of testimony by contemporaneous transmission. Rule 45 authorizes subpoenas that “command a person to attend a trial” without limitation except as to the geographical limitations and certain situations involving trade secrets, privileged matters or extreme hardship. Thus, if testimony at “trial” includes testimony by contemporaneous transmission, the Rule sets a fairly low hurdle to compel such testimony—contrary to the very high bar Rule 43 expressly sets in both its text and commentary, as discussed above.

The *Actos* Order claims that Rule 43’s high standard was met, but its justifications fall short of the Rule’s exacting standards. Most prominently, the order appears to be driven by the court’s belief that contemporaneous testimony is more effective than video recorded testimony, but that is directly contrary to the commentary to Rule 43. The court was also concerned that insufficient time remained to take video depositions, but that is not a “compelling circumstance[]” either.

The court’s approach is also problematic because it appears to be in significant tension with the recent amendments to Rule 45. In clarifying Rule 45’s requirements to limit courts’ powers to compel distant witnesses to testify, the committee certainly understood that the result would be fewer live appearances by corporate officers in court. After all, the Rule’s amendments were expressly aimed at orders like the one entered in the *Vioxx* litigation, another multidistrict proceeding, and the committee would thus have had every reason to believe that courts overseeing future multidistrict litigation could not count on live testimony by party witnesses at trial.

Order Conflicts With Drafters’ Intent

Nevertheless, there is no indication the committee intended to lower the bar to testimony by contemporaneous transmission. It made no amendment to the commentary in Rule 43 casting such testimony as disfavored. It certainly could have done so had it intended to promote such testimony. Indeed, the committee demon-

strated its awareness of Rule 43 by expressly providing in commentary that the geographical limitations of Rule 45 apply with equal force to testimony procured under Rule 43.

The fact that the committee did not alter Rule 43 despite knowing it would now be harder to get corporate witnesses to appear live at trial inescapably suggests that it did not view the mere unavailability of a corporate witness in MDL litigation as one of those “compel-

ling circumstances” in which Rule 43 would permit testimony by contemporaneous transmission.

In short, the *Actos* Order appears to have stretched beyond the strict limits envisioned by the drafters of Rules 43 and 45 for compelling distant witnesses to provide contemporaneous testimony for trial. It remains to be seen what impact the order may have on future decisions, especially in the context of multidistrict litigation.