Heeding Calls for Reform in Multidistrict Litigation Practices

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Multidistrict litigation (MDL) proceedings comprise a large and growing portion of the federal civil docket. According to Lawyers for Civil Justice, an association of defense counsel, MDLs encompassed 52% of all federal civil cases (excluding Social Security and most prisoner-initiated suits) in 2018, about 90% of which were mass tort cases. Federal judges enjoy a high degree of discretion in managing MDLs, but in recent years concerns have grown about the extent to which this discretion has been employed to pressure parties to settle. In particular, early in an MDL proceeding, when defendants know little about the individual cases or if they believe the proceeding is bloated with meritless claims, settlement may not always be the right option. These concerns have prompted calls for reform.

The MDL Subcommittee of the federal courts' Committee on Rules of Practice and Procedure recently reported that it continues to consider proposals from the Lawyers for Civil Justice and other civil justice organizations to improve MDL proceedings. The proposals were part of a subcommittee report at the full committee's June 25, 2019, meeting in Washington, D.C. and focused on four issues: (1) party fact sheets, (2) third-party litigation funding (TPLF), (3) settlements and (4) interlocutory appeals. Although the committee took no formal action, the fact that the subcommittee has identified proposals raises the possibility of future rulemaking in some of these areas.

Party Fact Sheets

The subcommittee continues to explore the use of fact sheets, which are questionnaires or other discovery tools used to screen out unfounded claims, ideally during the early stages of a proceeding. Fact sheets are already used in some MDLs, but they are not required and are not universally employed. Although a rule mandating their use would benefit all MDLs, the subcommittee has expressed concern that a rule could intrude on judges' ability to manage MDLs. In addition, any attempt to craft such a rule would require consideration into who would be covered by the rule, who should draft the fact sheets, when fact sheets should be required and how the process would be enforced.

In light of these complexities, the subcommittee raised two alternative approaches — a "meet and confer" and an "initial census." The first would require the parties to meet and discuss the content and utility of the fact sheets, with the goal of providing information for the court to tailor any requirements to the specific litigation. The subcommittee expressed concern that such an approach would cause delays in MDL proceedings. The second alternative involves a basic version of a fact sheet to discern whether each plaintiff's claim involved the product and injury at issue. The subcommittee continues to gather information about both proposals.

Third-Party Litigation Funding

The subcommittee is also actively reviewing a proposal from the U.S. Chamber Institute for Legal Reform that would require parties to disclose TPLF arrangements — where investors finance a case in exchange for part of the settlement or judgment. TPLF poses several concerns in the MDL context — in particular, that such funding promotes the filing of marginal or frivolous claims and that it makes settlement more difficult by injecting undisclosed influence into the proceeding for which defendants often cannot account.

Over the past couple of years, the subcommittee has gathered information on what has been characterized as the "evolving" and "difficult" topic of TPLF by attending

conferences and meeting with federal judges who conduct MDL proceedings. The subcommittee noted that although litigation funding has increased significantly in many different contexts, few MDL judges are aware of TPLF in their cases because there is currently no requirement that such arrangements be disclosed in civil litigation.

Against this backdrop, and based on the subcommittee's report and comments at the full meeting, subcommittee members appear to have become increasingly receptive to the idea that TPLF arrangements should be disclosed (at least to the court) in some circumstances but have not indicated whether disclosure should be required by rule. It appears the subcommittee is not yet ready to take concrete action as it continues to review submissions both in favor of and opposing proposals to require disclosure. Meanwhile, under local rules, some courts already require disclosure of the identity of funders to defendants or at least to the court. And although legislation introduced in the U.S. Senate would require disclosure in the class action or MDL contexts, it is difficult to predict the trajectory of that bill.

Settlements

The subcommittee is assessing whether to create a rule to clarify the authority of courts in approving settlements in the nonclass MDL context. Judges are in theory less involved in MDL settlement proceedings than in class actions. This is because each nonclass MDL plaintiff is represented by counsel and can reject a settlement, and thus needs less protection from the court. On the other hand, class action members are not individually represented by counsel and are bound by the settlement unless they affirmatively opt out. This distinction is not as firm in practice, however, because MDL judges often appoint lead plaintiffs' attorneys and encourage global settlement with defense counsel who seek resolution that includes all or nearly all plaintiffs. Such negotiations are sometimes facilitated or overseen by the judges themselves. At times, "special masters" rather than judges oversee negotiations, but as one member of the committee noted, special masters are appointed by and thus still act for the court.

Because of this judicial involvement and the lack of formal guidance, the subcommittee is exploring rules to ensure fairness in MDL settlements similar to those in the class action context. In particular, the subcommittee is looking at a rule that would govern the selection of lead plaintiffs' counsel, including the court's power over attorneys' fees. This issue has proven difficult, however, because both the plaintiff and defense bars appear to oppose a rule on MDL settlements.

Interlocutory Appeals

The subcommittee continues to consider whether it should fashion a rule to provide greater access to interlocutory appeal of some orders in MDL mass tort proceedings. Currently, if a defendant in an MDL proceeding moves to dismiss the case and the court denies the motion, the defendant has to seek an interlocutory appeal. These appeals are allowed only when the decision "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation" — and even then, only when the court agrees to certify that these requirements are met. By contrast, if the court grants the motion to dismiss, plaintiffs can appeal immediately. These circumstances grant MDL courts unfettered discretion to bar appeals by defendants, adding to other institutional pressures to settle MDL litigation prematurely.

In addressing this issue, the subcommittee has noted that any proposal would have to address several details that have not yet been developed. These include what the standard for permitting the interlocutory appeal would be, what types of orders would be subject to interlocutory appeal and how to make the district court's views known to the appellate court. While these questions are debated by the plaintiff and defense bars, the subcommittee continues to gather more empirical evidence on the issue.

Looking Forward

Since its inception, the MDL Subcommittee has continued to narrow its focus and learn more information from all stakeholders. Although predicting whether the subcommittee will recommend rules in any of these four areas is difficult, it has emphasized that discussing the issues will improve MDL proceedings by helping

develop best practices.