

Multidistrict Class Actions: Consolidating Class Actions Without Conceding Certification

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Multistate Class Actions: Consolidating Class Actions Without Conceding Certification

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Authority and Strategies for Managing Competing Class Actions

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Multidistrict Class Actions Take Multiple Forms

There is no precise way to define what is a “multidistrict class action.” While it most commonly refers to class actions consolidated before a single Multidistrict Litigation (“MDL”), the problems posed by competing class actions may play out in different forums and necessitate different strategies:

- Federal-Federal – One or more overlapping class actions pending in one or more federal district courts.
- Federal-State – One or more overlapping class actions, at least one of which is pending in a federal district court with others in one or more state courts.
- State-State – Overlapping class actions pending in the courts of one or more different states.

“One of the most troubling problems in the modern class-action arena.” – Wright & Miller

One of the most troubling problems in the modern class-action arena is the filing of multiple, competing class actions in state and federal courts all directed toward the same conduct or activities, which are alleged to have caused harm that is multistate, if not national in scope.

Clearly, a single nationwide class action seems to be the best means of achieving judicial economy. In its absence, these competing and duplicative actions not only generate unnecessary litigation and duplicative fees, but also they may result in delay, pose complicated problems of judicial coordination in some instances, increase the risk of disparate verdicts raising serious questions of fairness, and, in situations in which there are limited funds available as compensation, result in the unequal distribution of those funds.

Problems Posed by Competing Class Actions

- ***Race to Judgment*** – The first action to reach judgment on the merits, whether by settlement or litigation, may be conclusive if the class definitions overlap.
- ***Competition Among Class Counsel*** – Where multiple plaintiffs' counsel represent competing classes, pressure exists to be the first to reach a judgment or settlement.
- ***Complex Problems of Logistical Coordination*** – Coordination among different courts in different jurisdictions can raise serious logistical problems.
- ***Resource Drain*** – Class discovery is already an expensive proposition and can be even more challenging if discovery is not coordinated between competing class proceedings.

Overlap between class actions filed in federal courts (Federal-Federal)

- *First to File Rule*
 - “[A] prudential doctrine that grows out of the need to manage overlapping litigation across multiple districts. Simply stated, it provides that, when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should *generally* proceed to judgment.” *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785 (6th Cir. 2016) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 39 (2013) (internal citations omitted)).
 - Courts generally evaluate several factors: (1) the chronology of events, (2) the similarity of the parties involved, (3) the similarity of the issues or claims at stake; and (4) equitable considerations.

Overlap between class actions filed in federal courts (Federal-Federal) - Continued

- *Transfer of Venue*
 - 28 U.S.C. § 1404(a) – Transfer “for the convenience of parties and witnesses, in the interest of justice.”
 - Courts generally accord less weight to plaintiff’s choice of forum when the case has been brought as a class action. *See, e.g., City of Columbus v. Hotels.com, L.P.*, 2007 WL 2029036 (S.D. Ohio July 10, 2007).
- *MDL Consolidation*
 - 28 U.S.C. § 1407 – Consolidation of cases “involving one or more common questions of fact.”
 - The “presence of overlapping or potentially overlapping putative class actions” may be a factor driving consolidation. *See, e.g., In re Marriott International, Inc. Customer Data Security Breach Litigation*, 363 F. Supp. 3d 1372 (J.P.M.L. 2019).
 - But if the case was removed under CAFA, then MDL consolidation is not available “unless a majority of the plaintiffs in the action request transfer pursuant to Section 1407.” 28 U.S.C. §1332(d)(11)(B)(i) & (C)(i). Such actions may be consolidated only if there is an additional jurisdictional basis.

Overlap between class actions filed in federal and state courts (Federal-State)

- *Can you make it a Federal-Federal scenario?*
 - Removal under the Class Action Fairness Act (“CAFA”) may be possible, but be aware of the home-state and local controversy exceptions that require the case to remain in state court if certain circumstances are met.
 - Additionally, removability under CAFA does not guarantee consolidation. *See* 28 U.S.C. §1332(d)(11)(B)(i) & (C)(i).
- *All Writs Act*, 28 U.S.C. § 1651 – “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions”
- *Anti-Injunction Act*, 28 U.S.C. § 2283 – “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments.”

Overlap between class actions filed in federal and state courts (Federal-State) - Continued

Exceptions to the Anti-Injunction Act include:

- “In Aid of Jurisdiction” Exception – May be used when a federal court has “retained jurisdiction over complex, *in personam* lawsuits,” resolution of which could be threatened by competing state-court litigation. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1251-52 (11th Cir. 2006).
- Relitigation Exception – Federal court may enjoin state proceedings where needed to “protect and effectuate” a judgment, which turns on narrow claim-preclusion principles. Likely only applies to protect *final judgments* as opposed to certification decisions. *See Smith v. Bayer Corp.*, 564 U.S. 299 (2011) (noting that federal court’s application of Rule 23 factors is a “different question” from state’s application of its own class action rule).
 - In *Smith*, the Supreme Court noted that “serial relitigation of class certification” is a problem, but observed that most class actions may be removed under CAFA and that MDL consolidation or “principles of comity” should minimize conflicting certification decisions.
- *This is a one-way street*; the law is settled that state courts may not enjoin federal courts. *See Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12 (1977).

Overlap between class actions filed in different states (State-State)

- When multiple class actions are filed within a single state, consider whether the state has adopted a first-filed rule or similar transfer of venue rules to the federal courts.
- *See, e.g., Ex parte Speedee Cash of Alabama, Inc.*, 806 So.2d 389 (Ala. 2001) (“[T]his Court has held that in the situation of competing state-court class actions, the first class action prevails over a second substantially similar action filed in another state court.”).

A different Perspective: International Class Actions

- *Kirsh v. Bristol-Myers Squibb* (2021) – Competing class actions filed in Ontario and Quebec.
 - In the lead-up to the certification hearing in the first-filed Ontario case, the Quebec action was amended to mirror the Ontario claim. Defendants then agreed not to oppose certification in Quebec and moved for a stay of the Ontario case.
 - The Court denied the Defendants’ stay motion, viewing the request as “a way of ensuring that they will go to trial on the merits with what they hope is ‘the least formidable foe.’”
- Australian courts have broad authority to enter orders managing overlapping class actions.
 - *Smith v. Australian Executor Trustees Limited* – Supreme Court of New South Wales allowed group members of two overlapping class actions to determine which action to opt out of.
 - Court’s motivation appears to have been a reluctance to select a class or consolidate proceedings when there are different funding arrangements or case strategies.

Federal Cases Addressing Consolidated or Coordinated Class Actions

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When Overlap Goes Federal

- Getting into Federal Court
- Issues Arising in Federal Court
- Getting Out of Federal Court

Getting into Federal Court

- Class Action Fairness Act - 28 U.S.C. § 1332(d)
 - Statutory Jurisdiction
 - Mass Actions
 - Timing
 - Exceptions

Common Issues Arising in Federal Court

- **Products Liability & Consumer Fraud**

- Predominance issues under Rule 23(b)(3)
- Due Process issues under *Erie*
- Problematic subclasses

- **Securities Act ('33 Act) and Exchange Act ('34 Act)**

- Securities Act claims vs. Exchange Act claims
- Pendent jurisdiction
- Bifurcate or stay

Another Issue: Overlap in the Districts

- *Desai v. GEICO Casualty Company*, 2021 WL 6278416 (N.D. Ohio June 22, 2021)

and

- *Davis v. GEICO Casualty Company*, 2021 WL 803866 (S.D. Ohio March 3, 2021)

Getting Out of Federal Court

- **28 U.S.C. § 1332(d)(4)(B) – The Home State Exception**

“A district court *shall* decline to exercise jurisdiction under paragraph (2) ... [over a class action in which] two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.”

Getting Out of Federal Court

- **28 U.S.C. § 1332(d)(4)(A) – The Local Controversy Exception**

A district court *shall* decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant (aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who his a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

Getting Out of Federal Court

- **28 U.S.C. § 1332(d)(4)(A) – The Local Controversy Exception**

A district court *shall* decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action which—

...

(ii) during the 3-year period preceding the filing of that class action, no **other class action** has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

CAFA Exceptions and “Other Class Actions”

- *Vodenichar v. Halcon Energy Properties, Inc.*, 733 F.3d 497 (3d Cir. 2013)
- *Bridewell-Sledge v. Blue Cross of California*, 798 F.3d 923 (9th Cir. 2015)
- *Davenport v. Lockwood, Andrews & Newman, Inc.*, 854 F.3d 905 (6th Cir. 2017)
- *Schutte v. Ciox Health, LLC*, 28 F.4th 850 (7th Cir. 2022)

Class Actions and Federal Multidistrict Litigation

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Multidistrict Litigation Generally

- The multidistrict litigation statute, 28 U.S.C. § 1407, creates a procedure authorizing the Joint Panel on Multidistrict Litigation (the “JPML”) to transfer civil cases containing one or more questions of fact, to a single district for consolidated and coordinated pre-trial procedures.
- In order to obtain MDL treatment, three elements must be satisfied:
 - Two or more cases involve “one or more common questions of fact”
 - The transfer is “for the convenience of parties and witnesses”
 - The transfer will “promote the just and efficient conduct” of the cases.
- Tag-Alongs
 - Pull other cases into the MDL
 - Notice of Tag Along
 - Conditional Transfer Order

Advantages of a Multidistrict Litigation

- **Conducting all pre-trial proceedings in a single forum.**
 - a. all hearings, motions and discovery are controlled by one judge
 - b. may reduce the amount of legal work
 - c. eliminates need for local counsel for defendant sued in multiple jurisdictions
- **Coordinated discovery will limit the burden and drain on a party's resources and limit disruption.**
- **Provides a mechanism for global settlement.**
- **The MDL will likely be assigned to a single Judge who likely has experience with complex litigation.**
- **An MDL Court can make rulings on issues that could be dispositive of many cases.**
- **State courts will typically stay court class actions when an MDL exists and dispositive rulings may be rendered.**

Disadvantages to a Multidistrict Litigation

- **The focus of the MDL is on the defendant's actions, which generally is the common question of fact. It can be hard for defense counsel to turn the focus of the case on plaintiff.**
- **Some MDL judges are reluctant to make rulings on "case-specific" issues, believing that the purpose of the MDL proceeding is just to address common issues**
- **There is pressure to settle in an MDL. The MDL Court may be hesitant to rule on dispositive motions, and instead see its role as issuing rulings that force resolution beyond the merits.**
- **Provides plaintiffs with leverage in settlement discussions because they are unified in trying to reach a global resolution, as opposed to trying to settle early for fear of being shut out.**

Disadvantages to a Multidistrict Litigation

- **The volume of cases being filed will grow. An MDL tends to be a magnet for tag-along cases filed by counsel who know they can park a case (regardless of its merit) and rely on other counsel to take the laboring oar in working-up the matter prior to global settlement or a trial.**
- **Will allow plaintiffs to avoid or reduce the economic consequences associated with funding the cost of a class action. An MDL permits plaintiffs' counsel to work together and pool their resources for the common benefit of each other.**
- **Generally a slow process because of the high volume of cases.**
- **The strongest opponents/firms will lead the unified defense and help weaker opponents and counsel develop their cases.**

Multidistrict Litigation Strategies

- Show and tell for lead counsel and liaison committees
- Consolidated Class Action Complaint vs. Bellwether Complaint (test case)
- Choice of law
- Motion Practice
 - a) Jurisdictional motions
 - i. Article III Standing
 - ii. Arbitration
 - b) Dispositive motions that may resolve a number of cases
 - i. Statute of Limitations
 - c) Dispositive motions that resolve a number of claims

Multidistrict Litigation Strategies

➤ Discovery

- a) Necessary for Mediation
- b) Sequencing / Bifurcation
- c) Initial Disclosures
- d) Fact Sheets
- e) Science Day
- f) Discovery Master
- g) Protective Order
- h) Document Repository

Multidistrict Litigation Strategies

- **Expert Discovery**
 - A. Single expert
 - B. Motions to preclude expert testimony

- **Settlement**
 - A. Timing
 - B. Rulings needed
 - C. Discovery needed
 - D. Settlement Special Master

- **Class Certification**
 - A. MDL Court can decide motions for class certification

Multidistrict Litigation status does not mean a class can be certified

- *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001), *class certification denied by*, 208 F.R.D. 625, 631 (W.D. Wash. 2002) (denying class certification and granting motion to strike class allegations finding the existence of predominating individual issues of fact rendered all of the proposed classes unsuitable for class certification).
- *In re Dorel Juvenile Group, Inc.*, 598 F. Supp. 2d 1365, 2009 U.S. Dist. LEXIS 11635 (J.P.M.L., 2009), *class certification denied by*, *Sanchez v. Wal Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48428 (E.D. Cal., May 28, 2009) (class certification denied because (i) plaintiff failed demonstrate common issues predominate over the individual issues, (ii) there is no proof of injury on a classwide basis, and (iii) plaintiff failed to establish adequacy and typicality).
- *M.M. v. McDonald's Corp. (In re McDonald's French Fries Litig.)*, 545 F. Supp. 2d 1356, 2008 U.S. Dist. LEXIS 47351 (J.P.M.L., 2008) *class certification denied by*, *In re McDonald's French Fries Litig.*, 2009 U.S. Dist. LEXIS 38090 (N.D. Ill., May 6, 2009) (finding classes proposed by plaintiffs were too indefinite and overbroad, or were unmanageable).
- *In re Niaspan Antitrust Litig.*, 971 F. Supp. 2d 1346, 2013 U.S. Dist. LEXIS 132253, 2013 WL 5239728 (J.P.M.L., Sept. 17, 2013) *class certification denied by*, *In re Niaspan Antitrust Litig.*, 555 F. Supp. 3d 155 (E.D. Pa. 2021) (failure to satisfy ascertainability required under Fed. R. Civ. P. 23(b)(3)).