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# **Parallel State and Federal Court Class Actions: Navigating Procedural and Substantive Challenges**

Coordinating Overlapping Proceedings; Navigating Differing Rules on Discovery, Evidence, Expert Witnesses and More

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THURSDAY, MAY 5, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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# Parallel State and Federal Court Class Actions

## Navigating Procedural and Substantive Challenges

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# Program Outline

- I. Overview and Background on Inherent Difficulties in State & Federal Court Coordination
- II. Big Picture – Options and Best Practices for State and Federal Court Class Action Coordination
- III. In the Weeds – More Specific Discovery, Evidentiary and Procedural Challenges

# **Part I**

## **Overview and Background on Inherent Difficulties in State and Federal Court Coordination**

# Factors Impacting the Prevalence of Parallel State and Federal Class Actions

- Class certification trends regarding nationwide classes
- CAFA
- Competing and copycat class action filings
- Is there a “race to the courthouse”?

# Lack of Formal Procedural Guidelines for Coordination

- No formal procedural mechanism in place
  - 28 U.S.C §§ 1404 (venue transfer) and 1407 (multidistrict litigation) don't apply to state court cases
  - JPML similarly has no powers over state court cases
  - State MDL procedures can only coordinate cases within that state
- Manual on Complex Litigation: MDL courts often try to cooperate/coordinate informally with state court judges
- “Judicial codes of conduct in all fifty states and Puerto Rico allow judges to coordinate with other judges” and “either explicitly allow judges to communicate with other judges, or direct judges to cooperate with other judges.”\*

\*

See Gregory E. Mize & James Fletcher, *Judicial Ethics Considerations When Managing Multidistrict Litigation* (National Center for State Courts 2012) .

# Goals of Coordination

- Why is coordination desirable?
  - Uniformity and consistency
  - Efficiency and lack of duplication
  - More predictability
  - More manageable, non-conflicting case and trial schedules
- Likelihood of coordination success depends on:
  - Procedural status of cases
  - Number of cases and different jurisdictions
  - If parties in the related state court actions are represented by the same counsel
  - Goals of plaintiff's counsel in the later-filed actions

## Part II



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# Big Picture – Options & Best Practices for State and Federal Court Class Action Coordination

# MDLs Are No Longer Islands

- A transferee judge increasingly confronts the reality of other proceedings and actions, moving forward outside the MDL court's jurisdiction.
- Case management strategies must account for the impact of developments in parallel state court litigation, as well as the specter of regulatory or agency actions.

# The Degree to Which Coordination is Possible and the Contours of that Interaction are Driven by Case-Specific Factors

- A few factors include:
  - The individuals and personalities involved,
  - The degree of overlap in players between state and federal cases,
  - The procedural devices available and the degree of flexibility available to judges in each of the applicable states for coordination,
  - The extent to which state cases are likely to reach trial during the pendency of the MDL, and
  - The degree to which they will be perceived as helpful or distinguishable from the MDL cases.



# ***Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges***

- The *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*<sup>1</sup> is an important resource to reference for guidance.
- Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings, conducting and completing discovery, facilitates efficient distribution of and access to discovery work product, avoids inconsistent federal and state rulings on discovery and privilege issues, if possible, and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination.

<sup>1</sup> [http://www.fjc.gov/public/pdf.nsf/lookup/mdlgepl.pdf/\\$file/mdlgepl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mdlgepl.pdf/$file/mdlgepl.pdf)

# ***Ten Steps to Better Management: A Guide to Multi-District Litigation for Transferee Judges (2014)***

- Federal judges are encouraged to communicate “informally” with their colleagues at the state level. Such coordination requires communication and cooperation among the courts themselves, among counsel, and between counsel and courts.
- Support “intersystem” collaboration using a variety of tools:
  - joint scheduling,
  - joint discovery plans,
  - a common discovery master, and
  - joint settlement initiatives.

# Reduction of Costs Associated with Litigation is the Goal of Coordination

- Achieving the goal of reducing discovery costs and duplication in MDL litigation that is accompanied by related actions in state courts, such as mass tort and consumer cases, depends upon effective coordination.
- Coordination requires ongoing effort throughout the course of the proceedings.
- State court actions are pending in many districts or states, communication among all the judges is necessary.
- Communication must give a role and voice to counsel who may be active in the state court proceedings, but may not have sought, or obtained, leadership appointments in the MDL itself.



# Communication is the Key to Successful Coordination

- Federal judges have been able to arrange in-person meetings with their state counterparts.
- Federal judges can visit each individual court, as a mechanism to show respect for the state judge, enhance relationship building, and in turn foster trust and understanding between the courts.
- Some judges have convened joint hearings, which have in turn permitted this opportunity for in-person interaction and discussion before the hearing.
- Formal or informal periodic teleconferences in which all the parallel court judges participate to make sure that the cases are moving along at about the same pace.
- Monitor divergence and the impact it may have on the parties' actions in their own cases.



# Best Practices

- Examples of additional best practices to follow:
  - In issuing the initial scheduling order, the newly appointed transferee judge should consider including provisions tailored to facilitate effective federal-state coordination.
  - The transferee judge should direct liaison counsel for plaintiffs and defendants to provide a report on the existence and status of related state court litigation, either in writing in advance of the initial conference or orally at the conference itself to inform this discussion. Counsel should be requested to provide contact information for the state court judges before whom related proceedings are pending.
  - Counsel should be advised at the initial conference that such communications between the MDL judge and state court judges will take place. While counsel should be given the opportunity to object, there will rarely be a well-founded objection to such communications, which have become a familiar feature of multi-jurisdictional proceedings.
  - If multiple jurisdictions are involved, the transferee judge should consider procedures or mechanisms to facilitate state/federal court coordination, to provide periodic reports to each of the courts, to assist in coordinating discovery and hearing schedules, and to schedule joint federal-state court status conferences and hearings.



# Best Practices (continued)

- Ensure that common benefit fund provisions allow compensation of state attorneys who cooperate with MDL counsel or otherwise advance the national litigation. Otherwise, the MDL fee structure may become an obstacle to cooperation.
  - EXAMPLE---In the Diet Drug MDL, discovery proceedings were coordinated between the MDL court and the judge presiding over California's statewide consolidated litigation.
- The transferee judge may appoint a “state court liaison” or “state/federal liaison” from among plaintiffs’ (or defendants’) counsel who are active in the MDL, in order to provide transparency by submitting periodic reports on the status and progress of state court proceedings and to assist in assuring that discovery work product is made appropriately available to those who are litigating in state courts.
- In an MDL involving multiple jurisdictions, the transferee judge should consider the *joint* appointment of a special master among multiple courts to review disputed documents *in camera* and issue a report and recommendation to all courts.
- The transferee judge should coordinate with state court colleagues to set uniform schedules in related federal and state proceedings for document production, production of privilege logs, and resolution of privilege disputes and other objections.



# Best Practices (continued)

- The transferee judge can also promote coordination through its supervision of the litigation process; establish a common discovery-product depository (to avoid duplicative efforts).
- In MDL and state court proceedings, the judges should consider holding joint pretrial hearings, including joint status conferences in a variety of jurisdictions, co-presiding over each conference with the state court judge in that jurisdiction.

# **Part III**

## **In the Weeds – More Specific Discovery, Evidentiary and Procedural Challenges**

# Document and E-discovery Productions

## Key Coordination Issues

- Common Protective Orders
- Discovery Protocols
  - Scope of preservation, collection and document custodians
  - Search terms
  - Impact of varying procedural status of cases
  - Cooperation among parties is preferred, but court input may be needed or helpful
- Differences in Scope of Discovery
- Potential Stipulations for use of productions in related state court cases

# Non-Duplicative Depositions

## Key Coordination Issues

- Defense witness depositions: Once is *ENOUGH!*
- Scheduling and Cross-Noticing
- Inherent difficulties in providing equitable and fair allocation of questioning time among parties
- Protective Order issues
- Potential discoverability/admissibility in later-filed parallel action

# Expert Issues

- Use of same experts across cases
- Different disclosure and admissibility requirements
- Possibility of different rules regarding work product and discoverability of notes/drafts
- Careful segregation of materials reviewed or relied on
- Possible use of expert discovery stipulations to provide consistency, uniformity, and predictability
- Joint hearings on discoverability of expert testimony?
  - See *In re Baush & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig.*, 2009 WL 2750462 (D.S.C. 2009); 906 N.Y.S.2d 778 (N.Y. Sup. Ct. 2009).
  - See Hon. Barbara Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 621, 633 (2006).

# Stays & Injunctions

- **Discretion** of state court judges to stay or dismiss action in light of pending, first filed parallel federal class action
  - A court has inherent power to stay its own process
  - But a court only has the power to stay its own action
- **Likelihood** of a stay of the related class action **depends** on:
  - Are there “identical” allegations and claims?
  - If plaintiff’s counsel’s legal strategy in the related state court class action differs from the federal class actions
  - Whether all plaintiff’s attorneys consent
  - Volume of the state court’s docket
  - Unique venue considerations

# Stays & Injunctions

- Federal courts have *extremely limited* ability to stay or enjoin state court proceedings
  - The allowance for both federal and state court parallel class actions to proceed is the general rule rather than the exception
  - Federal court injunctions typically are appropriate only in certain circumstances where the federal court has certified a class and there is a pending class settlement
- **All Writs Act** (28 U.S.C. § 1651) permits federal courts to “issue all writs necessary or appropriate in the aid of their respective jurisdiction and agreeable to the usages and principles of law.”
- But that authority is severely restricted by the Anti-Injunction Act (28 U.S.C. § 2283), which prohibits federal courts from granting “an injunction to stay proceedings in a State court except as authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.”

# Injunctions - Representative Recent Decisions

- *Smith v. Bayer*, 131 S. Ct. 2368 (2011)
  - Denial of class certification does not preclude different plaintiffs from seeking certification of the same class in a state court proceeding
- *Adkins v. Nestle Purina PetCare Co.*, 779 F.3d 481, 484 (7<sup>th</sup> Cir. 2015)
  - Reversed a district court's order enjoining putative members of the federal court settlement class from continuing to litigate parallel class proceedings in state court, concluding that such relief is rarely justified
- *Seifi v. Mercedes-Benz U.S.A., LLC*, 2015 WL 1737957, at \*1, 4 (N.D. Cal. 2015)
  - After granting preliminary approval of federal court class action and staying proceedings in that case, court declined "to stay proceedings in any other active cases concerning substantially similar claims, or to enjoin Settlement Class Members from prosecuting such claims" because a "court only has the discretion to stay its own action – not to order a stay in another forum."
- *Juris v. Inamed Corp.*, 685 F.3d 1294, 1338-40 (11<sup>th</sup> Cir. 2012)
  - After noting that "it was only after years of extended settlement negotiations that the parties were able to resolve the claims of over 40,000 Inamed breast implant recipients," the court concluded that the procedural status of the complex litigation satisfied the "in aid of jurisdiction" exception.

# Injunctions – Additional Cases

- *Negrete v. Allianz Life Ins. Co. of N.A.*, 523 F.3d 1091, 1100-03 (9<sup>th</sup> Cir. 2008)
  - Reversed a district court's order enjoining parties from participating in a state court proceeding where the federal action was not part of an MDL, discovery was still ongoing, no class settlement was imminent, and there was no evidence of collusive behavior in the state court action
- *Retirement Systems of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 425-31 (2d Cir. 2004)
  - Reversed a district court's injunction order where there was no prospective settlement of the federal action, and where the justification for the injunction was to preserve the federal court's trial date (and not be delayed by an earlier scheduled trial in the state court action)
- *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 235-37 & n.12 (3d Cir. 2002)
  - "In complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a general threat to the jurisdiction of the federal court."
- *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 589 F.3d 835, 848049 (6<sup>th</sup> Cir. 2009)
  - Affirming district court's issuance of an injunction barring litigants from proceeding in state court where the state court order was likely to interfere with the distribution of federal settlement funds.
- *Winckler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7<sup>th</sup> Cir. 1996)
  - Affirming district court's enjoining of MDL appellants' state court activity, where appellants sought to use the state court proceeding in order to evade the federal court's order denying discovery of sensitive documents