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Are Existing Civil Procedure Rules Limiting the Fair Adjudication of MDLs?

BY DAVID M. BERNICK

The Federal Rules of Civil Procedure, essentially the rule book for civil cases in federal courts, are supposed to apply to all civil cases in the federal court system. The problem is that the framers of these rules did not anticipate today's litigation landscape, where one judge in one court may preside over a litigation that has more than 1,000 cases consolidated in multidistrict litigation.

By law, the cases in these MDLs have core facts in common, but they also involve large numbers of plaintiffs who have their own individual facts, including exposures, medical histories or harms, depending on the nature of the cases. The scale of these MDLs makes many current rules—including discovery and dismissal procedures—difficult, if not impossible, to apply. Not all of the solutions to these vexing issues are obvious. What does seem obvious, however, is that it is time for these questions to be taken up formally by the organization that was formed precisely to address such issues, the Federal Civil Rules Advisory Committee.

Years ago, such large consolidated proceedings were a rarity. Today, there are a record number: 24 current MDLs have more than 1,000 cases. As of the end of fiscal year 2017, the largest MDLs accounted for 40.2 percent of the entire civil docket. Thus, having practical rules for MDLs that provide consistency and predictability for this large swath of the civil docket is both important and urgent.

This was not always the case. The silicone breast implant litigation was a watershed event that marked the beginning of the modern era of mass tort litigation in 1992. Prior to this time, mass tort products liability cases made up less than 1 percent of all cases consolidated in MDLs, a process established by Congress in 1968 to facilitate the management of pretrial proceedings in cases that share common factual issues. Since the breast implant litigation and an asbestos MDL created around the same time, products liability cases have dominated MDLs, accounting for 90 percent of all MDL cases and more than 40 percent of the entire civil caseload in federal courts.

The numbers tell only part of the story, however. The fundamental change in the nature of the civil caseload that began with breast implant and asbestos litigation has created procedural

challenges for judges who manage these cases, parties to the cases, and the Committee on Rules of Practice and Procedure, on which I formerly served, which has rule-making responsibilities for cases in federal courts.

In a series of conferences held over the last year, some of the judges who have managed these MDLs say the current rules are sufficient to meet this rising tide, and members of the plaintiffs bar who have brought the cases insist there is no problem at all. But courts are improvising procedures in order to handle the unanticipated case volumes in these large MDLs, and as a result, many of the procedures are inconsistent and in conflict with the very goals of the FRCP to provide a uniform, clear and predictable set of rules.

These gaps in the application of the current rules for large MDLs have significant consequences. For instance:

- Experience in some large MDLs reveals that a very substantial portion of the cases are simply not being assessed for their merit before they are filed and then consume substantial resources of the court and parties. One example comes from the publicly available Vioxx MDL claims data. The data show that, after this MDL settled and claims were processed, more than 30 percent of those who had initially filed lawsuits failed to satisfy the basic claims requirements to collect funds. Plaintiffs' lawyers have acknowledged this problem of frivolous claims, yet our current rules do not solve it.
- While the statutory purpose of creating MDLs was to facilitate efficient pretrial proceedings, the challenges of case administration and the prospect of sending cases back to the courts of origin have created a powerful incentive for the MDL courts to achieve settlement. The tool of choice has been to try multiple "bellwether" cases. The problem is that the process is rife with opportunities for gamesmanship in selecting which cases go to trial. Moreover, lacking sufficient information about the cases, the MDL courts often rely upon the lawyers for much of the selection process. Current rules do not adequately address the consent of parties for bellwether trials and the process for case selection.
- None of the many crucial decisions made along the way that affect the MDL, in whole or in substantial part, are subject to appellate review until a case is tried and appealed in the ordinary course, and then only the issues framed by that case are reviewed. Interlocutory review of dispositive decisions in MDLs should be a right, as it would enhance judicial efficiency in these mass proceedings, many of which now drag on for many years.

To be clear, amending the FRCP is not about changing substantive law or grappling with the underlying causes or merits of litigation. Nor is it about judging the judges and the litigants. Instead, the pressing question is whether current MDL litigation procedures can be amended to improve the fair and efficient adjudication of so many cases. It is about whether procedures can be developed or amended to give the courts and the litigants better tools to meet today's challenges.

David M. Bernick *is a national trial lawyer and strategist, having acted as lead trial counsel for major U.S. and international corporations in the chemical, technology and life sciences industries for 35 years. A partner at Paul, Weiss, Rifkind, Wharton & Garrison, David is a past member of the Federal Judicial Conference Standing Committee on Rules of Practice and Procedure.*