



presents

Multi-District Litigation and Emerging State Coordination Procedures

Strategies for Plaintiffs and Defendants Responding to Aggressive Use of MDL

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Mark Herrmann, Partner, **Jones Day**, Chicago

C. Crews Townsend, Partner, **Miller & Martin**, Chattanooga, Tenn.

Elizabeth J. Cabraser, Partner, **Lieff Cabraser Heimann & Bernstein**, San Francisco

Thursday, October 29, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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MULTIDISTRICT LITIGATION AND STATE COURT COORDINATION PROCEDURES

A Strafford Webinar
October 29, 2009

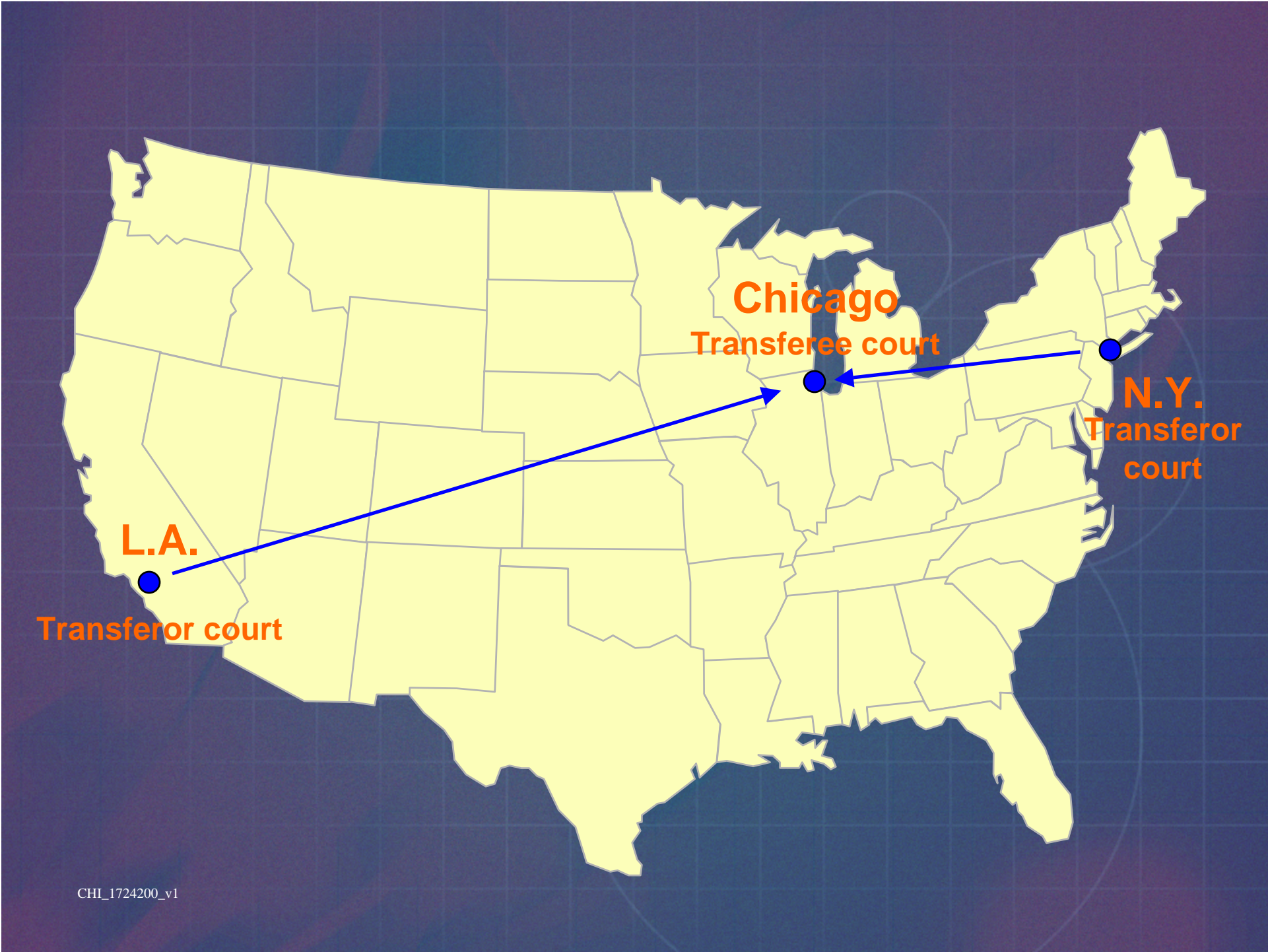
Mark Herrmann
Jones Day
Chicago, Illinois



THE MDL PANEL

Litigation Litigation Litigation



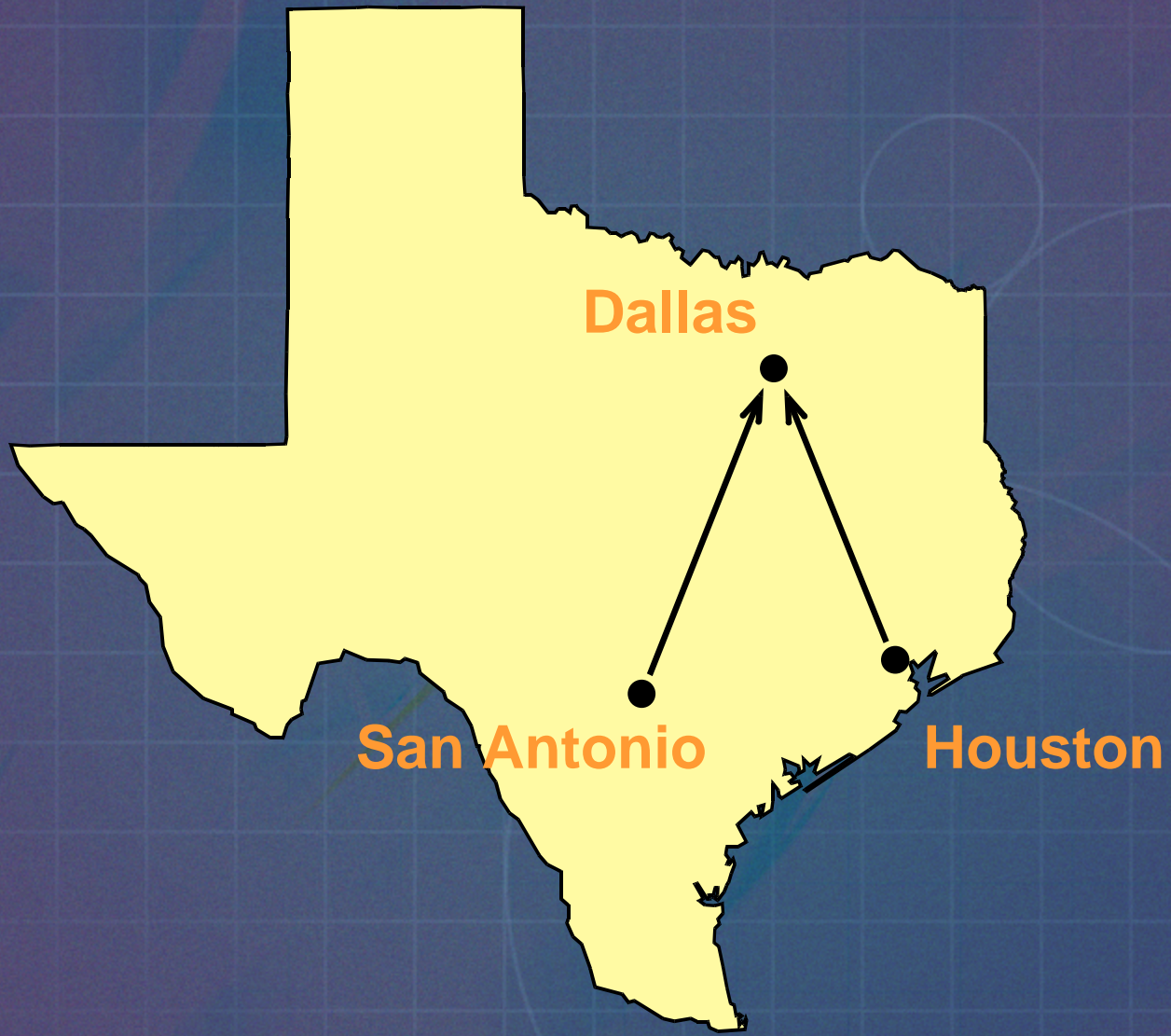




STATEWIDE COORDINATED PROCEEDINGS



Litigation Litigation Litigation



3 Models for Statewide Coordination

1. Nothing -- no formal mechanism

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2. MDL-type mechanisms

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1. Nothing -- no formal mechanism
2. MDL-type mechanisms
3. Mechanisms different from federal MDL

Ohio

- No JPML equivalent

Ohio

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- No explicit coordination rules or statutes

Ohio

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- No explicit coordination rules or statutes
- Restrictive venue rules

Ohio

- No JPML equivalent
- No explicit coordination rules or statutes
- Restrictive venue rules
- Superintending power of supreme court
 - Invoked on small scale in asbestos litigation

Achieving Coordination Without MDL-Type Rules

- Informal mechanisms
 - Agreements with opposing counsel
 - Piecemeal coordination: in individual cases, obtain pretrial orders requiring coordination

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- Formal mechanisms
 - Consolidation; statutory transfer
- Supervisory orders

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States with MDL Systems

- NY and TX good examples

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- Formal, permanent panel decides if cases should be coordinated

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- Formal, permanent panel decides if cases should be coordinated
- Similar standard as in federal system
- In some states, coordination is for all purposes, including trial
- State Supreme Court can serve as the permanent panel

3 Models for Statewide Coordination

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2. MDL-type mechanisms
3. Mechanisms different from federal MDL

“Complex Litigation” Courts/Judges

- New Jersey “Mass Tort System”
- Pennsylvania “Complex Litigation Center”

MASS TORT INFORMATION CENTER

Welcome to the Mass Tort Information Center

This site has been designed as an aid to the bench, bar and public for the dissemination of information concerning mass tort cases throughout the State of New Jersey that are centralized in Middlesex Vicinage, Atlantic Vicinage, and Bergen Vicinage by order of Chief Justice Deborah T. Poritz. Please visit our "Frequently Asked Questions" page to learn more about mass tort management, and about the information that will be posted here.

The public and the Bar are welcome to offer comments and suggestions, as well as information and documents that may be appropriate for posting on this web site. Forward your comments to webmaster.mailbox@judiciary.state.nj.us

Note: For quick reference, **torts centralized in Middlesex Vicinage are shown as blue menu items**, **torts centralized in Bergen Vicinage are shown as purple menu items**, and **torts centralized in Atlantic Vicinage are shown as red menu items**.

Most of the documents on the Mass Tort site are in Adobe Acrobat PDF format. PDF documents preserve the look and feel of the original print documents. However, in order to view PDF documents, you must install the [Adobe Acrobat Reader](#), which is available free of charge from the Adobe web site. Access.adobe.com provides a set of free tools that allow visually disabled users to read documents in Adobe PDF format.

Please check the Announcements Page for all Notices and Announcements

- [Supreme Court Order of October 30, 2003 -- Adoption of Rule 4:38A -- "Centralized Management of Mass Torts"](#)
- [Supreme Court Notice to the Bar of October 31, 2003 -- Directive #11-03: Mass Torts -- Guidelines and Criteria for Designation \(PDF\) Important Notice - \(Posted March 18, 2003\)](#)
- [Pro Hac Vice Admissions \(R. 1:21-2\) Dated 9/26/02 \(New Pro Hac Vice forms available in Forms Section\)](#)
- [Designation of Vioxx Litigation as a Mass Tort in Atlantic County](#)

▼ Asbestos
▼ Ciba Geigy
▼ Diet Drug
▼ PPA
▼ Propulsid
▼ Rezulin
▼ Tobacco
▼ Vioxx
▼ Announcements
▼ Archives
▼ Forms
▼ Pro Hac Vice Requirements
▼ MDL Links
◀ Judiciary Home

Coordination Strategy

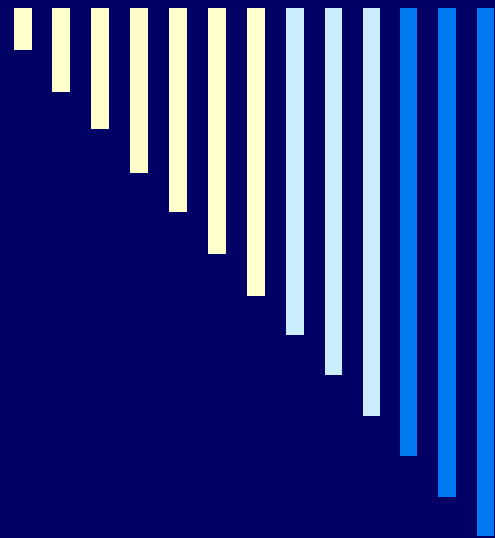
- Efficiency

Coordination Strategy

- Efficiency
- Change Of Venue

Coordination Strategy

- Efficiency
- Change Of Venue
- Hook For Federal MDL



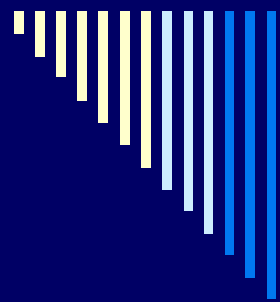
USE OF FEDERAL MDL AND STATE COORDINATION PROCEDURES TO BRING ORDER TO MASS TORT CHAOS

By
Crews Townsend
Miller & Martin PLLC



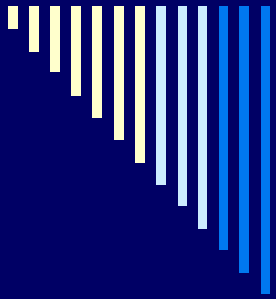
New Jersey Defines A Mass Tort As Three General Categories Of Cases:

- ❑ Large numbers of claims associated with a single product—for example, diet drugs or other large products liability cases such as tobacco, Norplant, breast implant, Propulsid, Rezulin, PPA and latex litigation.
- ❑ Mass disasters: These cases are characterized by common technical and legal issues. The Durham Woods pipeline explosion litigation is a good example of this type of case.
- ❑ Complex environmental cases and toxic torts: These cases are characterized by a large number of parties with claims arising from a common event. An example of this type of case is the Ciba-Geigy litigation, alleging air, water and soil pollution.

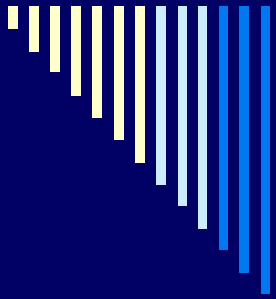


I. Initially, Defendants Sometimes Fight Creation of a Federal MDL, the Reasons Being:

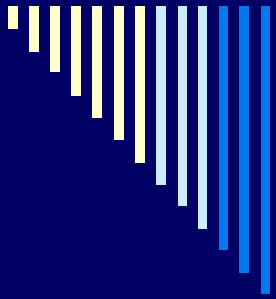
- A. Keep publicity and awareness down.
- B. Reduce Plaintiff's sharing of information that could generate new filings.
- C. Allow statutes of limitation to continue to run.
- D. Gain time to find experts and form joint defense groups.
- E. Reduce Plaintiff firm advertising for cases.



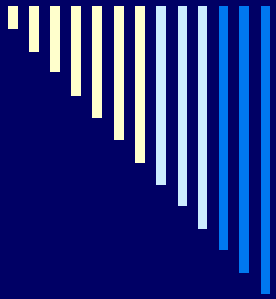
I will use In Re Phenylpropanolamine (PPA) Products Liability Litigation, MDL No. 1407 (W.D./Wash.) as a general framework for my analysis.



PPA was an ingredient found in cough/cold remedies and appetite suppressants. In May 2000, a study reported that it found an “association” or a “suggestion of an association” between PPA and hemorrhagic stroke. As a result of the study, in November 2000, the FDA requested that manufacturers voluntarily remove PPA containing product, and the manufacturers did so. As a result, plaintiffs’ counsel filed over a thousand cases in state and federal court.



In August 2001, the panel decided to transfer all federal cases to Federal Judge Barbara Rothstein in the Western District of Washington. In Re Phenylpropanolamine, 173 F.Supp. 2d 1733, 1378 (J.P.M.L. 2001). After the MDL was substantially complete, Judge Rothstein wrote an article. Barbara J. Rothstein, Francis E. McGovern, Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 621 (2006).

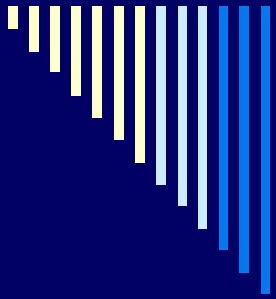


The Defendants consisted of major cough/cold manufacturers of such common products as Tavist-D, Dimetapp, Alka-Seltzer Plus, and makers of PPA containing appetite suppressants, such as Dexatrim.



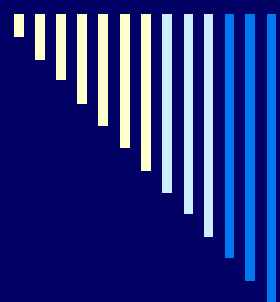
In the beginning, the Manufacturers faced:

- a) Hundreds of cases filed in states throughout the country;
- b) Document requests from various state and federal courts that varied with respect to scope and specifically of documents requested;
- c) Deposition notices from some state court actions;
- d) Early trial dates from jurisdictions with favorable discovery rules and juries that tend to be receptive to such claims;
- e) Scientific defenses not fully developed;
- f) Both consumer and personal injury class actions.



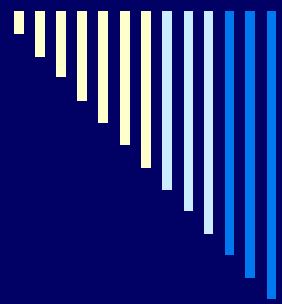
Once cases reach a critical mass, however, the necessity of managing the cases becomes critical. Defendants become faced with the problem of being overwhelmed by the process. So defendants will push for an MDL when:

- Case management is critical for defendants
- Case consolidation and management is also important for most plaintiffs – although those with cases on fast trial calendars will fight all coordination mechanisms.



Class Actions

Immediately after creation of an MDL, defendants usually must address class actions. In the PPA MDL, the plaintiffs sought to certify four nationwide classes and one Louisiana state class. The classes included personal injury and economic classes. The court rejected all of them primarily based on difficulties of commonality and management. In re Phenylpropanolamine, 208 F.R.D. 614 (W.D. Wash. 2002).



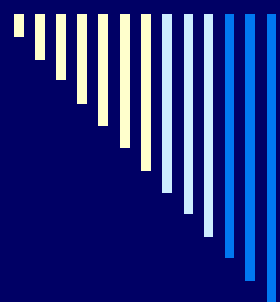
II. First order of business – use the MDL and state coordination procedures to gain control or at least slow down state court cases:

- A. Urge creation of MDL State Coordination Committee – Liaison Counsel, Lead Counsel, Committees.
- B. Go to state judges and urge that cases be put on more reasonable trial tracks.
- C. Ask the MDL judge to assist with state coordination.
- D. In order to prevent early trials, (some defendants) may be forced to settle some cases early.



III. Mechanism for gaining uniformity of complaints by seeking:

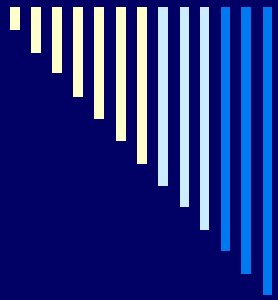
- A. Short form complaints and answers.
- B. Single plaintiff complaints. (PPA MDL contained cases with more than 500 plaintiffs)
- C. Certain minimal information in the complaint – such as the name of the true defendant.
- D. Fact sheets from plaintiffs giving basic information about their injury and product identification.
- E. Dismissals if plaintiffs to comply.



IV. Experts

In order to manage the litigation seek:

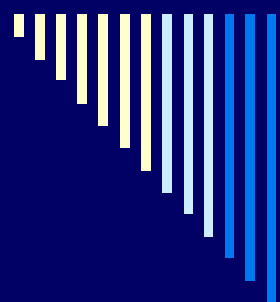
- 1) Early education of MDL Judge on science issues; especially general;
- 2) Coordination with state court, for example, in PPA Judge Rothstein invited the state court judges to the Daubert hearing.
- 3) Reasonable expert disclosure and expert report deadlines;
- 4) Work with the state courts to coordinate state court expert discovery with the MDL;
- 5) Rules and limitations on Expert Discovery, including the identification of examiners and setting examination time.



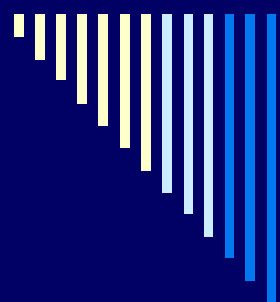
V. Fact Discovery:

This area is of critical importance if you are to gain some measure of control:

- 1) Reasonable time period for defendants to respond to interrogatories and production of documents; especially ESI, with reasonable scope and search terms;
- 2) Identification of witnesses who will be deposed;



- 3) Streamline Depositions with reasonable procedures for depositions including the people who may ask questions, location of the depositions, identification of documents or to be shown the witnesses prior to the deposition; and
- 4) Coordination with state courts to prevent producing witnesses more than once and in multiple places. Judge Rothstein reached out to over 300 state judges.
- 5) Schedules and deadlines for plaintiff specific discovery in the individual cases.



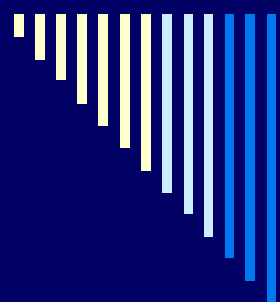
VI. Remove Cases Aggressively:

1. Fraudulent joinder.
2. Get tag-along letters to the district court and have the MDL decide jurisdiction motions.
3. Remove cases where the plaintiff fails to make a specific allegation against the non-diverse defendant.



VII. Daubert Hearing

- ❑ Thorough hearing covering all disputed general causation issues. (One day for argument – three days for proof in PPA.)
- ❑ Reasonably early setting with a definite schedule to entice coordination with state courts.
- ❑ Reach out to state courts. Preferably invite judges to Daubert hearing and give state judges a video feed to the hearing if they want.
- ❑ A thorough opinion that fully explores the science and gives real guidance for state and federal cases going forward.

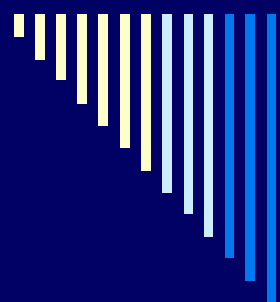


VIII. State Coordinated Proceedings

Counsel should seek coordinated state court proceedings when possible with California, New Jersey and New York being probably the best developed and organized.

Some states have regional coordination possibilities (Texas) – Philadelphia has its own coordination procedure.

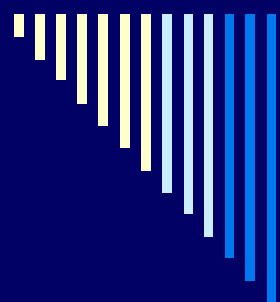
See New Jersey Mass Tort (Non-Asbestos) Resource Book (2005).



Coordinated State Court Proceedings

Offer:

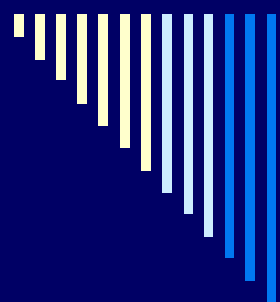
- 1) A mechanism to coordinate with MDL and courts with the same coordination goals as the federal MDL.
- 2) Judges who will treat the Mass Tort cases as a situation to be managed rather than an individual case to be pushed through a docket.



The New Jersey Mass Tort Resource Book Provides:

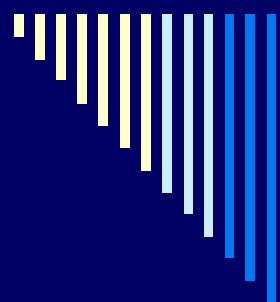
Because many cases involving the same mass tort may be filed in several states and federal jurisdictions, it is vital that judges handling these matters coordinate their efforts in order to maximize efficiency and economy.

A situation where a judge is unaware of the action taken in another court should be avoided under any circumstances.



State Court Coordinated Proceedings Often Provide the Best Mechanisms for Trials.

- Statutory litigation coordination rules that resemble the Federal MDL, but provide heightened ability to try cases.
- New Jersey and California encourage the State MDL courts to try cases.
- These trials allow mature cases to go to trial after full discovery and full exploration of science issues before a fact finder.
- Coordinated state proceedings allow a judge to hear a case after becoming familiar with the major issues through the pretrial proceedings.



IX. Settlement

After a good sampling of trials, both the MDL and state courts should provide a mechanism for mediations and settlements prior to remand. By this time, the cases that survive should have been tested through the Daubert rulings, discovery, summary judgment, and trials.



X. Wind Down of the MDL

Counsel through these proceedings should have gained a measure of case values which should provide efficient settlements and a wind-down of the MDL.

For a class action settlement process, see In re Phenylpropanolamine, 227 F.R.P. 553 (W.D. Wash. 2004) (Chattem Settlement).



FEDERAL MDL AND STATE COORDINATION PROCEDURES: A PLAINTIFF'S PERSPECTIVE

By
Elizabeth Cabraser
Lief Cabraser
Heimann & Bernstein, LLP



Q: Which is better for plaintiffs:
state court or federal court?

A: Yes.



Federal MDLs and State Court Coordinations are Trans-Substantive

- Key characteristic: common questions of fact such that Coordination creates economies of scale and saves effort, time and money.
- Coordination is used in a wide array of substantive areas: securities, antitrust, consumer class actions, and mass torts. These are different worlds.
- Even within the “Mass Torts” category different cases may call for different coordination strategies: one size does not fit all.



Coordination May Be Deployed for Common Discovery and Representative Trials

- State coordination statutes often include trial powers. See California Rule of Court 3.541(b).
- Federal MDLs cannot automatically try all the cases transferred to them. See *Lexecon v. Milberg Weiss*, 523 U.S. 26 (1998).
- MDL courts must use *Lexecon* “workarounds,” such as “bellwether” trials. See “Bellwether Trials in Multidistrict Litigation,” 82 *Tulane Law Review* 2323 (2008).



State Statutes and Rules Give State Coordination Judges Plenary Power

Management of proceedings by coordination trial judge

The coordination trial judge must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay. The judge may, for the purpose of coordination and to serve the ends of justice:

1. * * *
2. Schedule and conduct hearings, conferences, and a trial or trials at any site within this state that the judge deems appropriate with due consideration to the convenience of parties, witnesses, and counsel; to the relative development of the actions and the work product of counsel; to the efficient use of judicial facilities and resources; and to the calendar of the courts; and
3. Order any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited.

California Rules of Court 3.541(b).



It's a Multi-Jurisdictional World: Modern Mass Torts Are Coordinated and Actively Managed in Multiple Jurisdictions Simultaneously

- The Federal MDL
- State Court Coordinated Proceedings
 - California
 - Pennsylvania
 - New Jersey
 - New York
- “Non-coordinated” State Court cases



State Courts Are No Longer Subservient to Federal Courts: They Have Become Co-Equal Coordination Partners

Recent examples:

- o Vioxx
- o Bextra/Celebrex
- o Diet Drugs

Think, “Intersecting Sets”
Federal/State



You May Find Your Cases in Multiple Places at Once

- Not all state cases can be removed to federal court.
- Defendants do not always consistently remove “removable” cases.
- You may choose to file in federal court.



Do Not Rule Out the MDL: It's the Judge, Not the Jurisdiction, That Counts

- Monitor the Multidistrict Panel Proceedings
www.jpml.uscourts.gov
- Learn about the MDL Transferee Judge
- Learn about the State Court “Coordination” and “Mass Tort” Judges



Inter-Jurisdictional Judicial Coordination: It's a Good Thing

- Your interests, your clients' interests, and the courts' interests coincide
- Knowledge is power: make sure the judges know what and who they need to know
- Insist on “candor toward the tribunals” by both sides



Not All MDLs Are “Black Holes”:
Resisting the MDL Slow-Down Shuffle
and the Strategy of Attrition

- State Courts May and Should Move Ahead of the MDL
- MDL Proceedings Can be Accelerated by Proposing Firm Discovery Cut-Offs and Trial Dates
- Judicial Case Management is a Means, Not an End



“Case Management Tools,” or Instruments of Torture?

- “Plaintiffs’ Fact Sheets”: the good, the bad, and the ugly
- “Field Test” and “Time” the Fact Sheets: Shorter Is Often Better
- Fact sheets are for defendants, too



“Case Management Tools,” or Instruments of Torture?

- Do You Need or Want a “Master Complaint”
 - “Real” Complaints vs. “Administrative Devices”
See: In re Mercedes-Benz TeleAid Litig. (MDL No. 1914) 257 F.R.D. 46, 56
- What Works for Class Actions May Not Work For Non-Class Mass Torts



“Case Management Tools,” or Instruments of Torture?

- “Document Depositories”
 - Do you really need a physical depository
 - Online depositories
 - Coding, translating, “hot docs”



LIAISONS, LEADS, and COMMITTEES Think Functionally, Not Structurally

- Design the Proposed Plaintiffs' "Leadership Structure" to promote efficiently and inter-court coordination
- Leadership: not too big, not too little: "Just Right" for the Litigation
 - Big enough to marshal different human and financial resources, experience and expertise
 - Not too big to develop, implement and alter litigation strategies quickly
 - Sharing the benefit, sharing the load: what is the proper "assessment" structure



Remember, Invoke, and Enforce the True Purposes of Federal, State, and Inter-Court Coordination

- To reduce per-case costs;
- To reduce duplication of effort;
- To speed pre-trial discovery;
- To share discovery;
- To level the playing field between plaintiffs and defendants;
- Every procedure has a price tag: transform litigation costs into adjudication/resolution investments.



Remember Rule One

Resist any procedure that contravenes the Golden Rule: “they should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Fed. R. Civ. P. 1



Know and Use the Coordination Sacred Texts

- Manual for Complex Litigation
(Federal Judicial Center 2004)
- The Elements of Case Management
(Federal Judicial Center 1991)
- Management Class Action Litigation:
A Pocket Guide for Judges
(Federal Judicial Center 2005)
- Desktop on Complex Civil Litigation
(Judicial Council of California)
- Manual for Cooperation
Between State and Federal Courts
(National Center for State Courts 1997)
- Federal Rules of Civil Procedure
The keys: 1, 16(c)(2), 23, 26, 32, 33, 34, 42, 49