

Memorandum

To: Judge Robert Dow and Members of the MDL Subcommittee

From: AAJ's MDL Working Group

Re: MDL Affirmative Suggestions

Date: May 25, 2018

AAJ previously submitted a memorandum to this subcommittee stating that plaintiff lawyers have concerns about amending the civil rules to improve the operation of MDLs. We suggested that it would be more practical to focus on a specific set of topics that could improve the operation of MDLs. After further discussion, we suggest two additional areas of exploration.

1. Inactive dockets

AAJ suggests the creation of an “inactive docket” within MDLs.

Currently, cases are sometimes filed prematurely and transferred to an MDL. The early filing by plaintiffs is frequently done to ensure that the client’s rights are preserved in the face of a conservative analysis of a potentially applicable statute of limitations. This occurs not only in cases involving products with long latency periods such as asbestos, but also in cases where the plaintiffs need additional time to obtain medical records or other documentation to confirm the plaintiffs’ use of the product, diagnosis, date of injury, etc.

An effective way to address these issues is the creation of an inactive docket. A fact sheet or other court-designated pleading would be filed into the record, and thereby toll any applicable statute of limitations. The case, however, would be inactive and would remain so until it was verified to properly fit within the MDL. The case, at some point, would either be placed on the active docket, transferred or remanded to another court as beyond the scope of the MDL transfer order, or voluntarily dismissed altogether, based on the relevant documentation.

AAJ believes that many issues facing MDLs would be solved by the implementation of an inactive docket. These early-filed claims not only slow down the litigation and result in delays for case resolution, but create a false impression that all claims in the MDL have certain weaknesses or are underdeveloped. They distract the transferee court from its primary focus and attention on the common discovery issues, generally relating to the defendant’s conduct, which advance the litigation as a whole. An inactive docket would separate unverified or immature claims from cases which might be appropriate for bellwether trials. This would also allow the court, and the defendants, to focus on plaintiffs with confirmed impairments and injuries, permitting these claims to be resolved first. Making the determination that a case is not yet ripe

at the beginning of the MDL process, rather than at the end, would likely be much less expensive and more time efficient for all parties and the court. (Presumably, the defendants would have little interest in resolving claims on the inactive docket.) At the same time, an inactive docket ensures that the rights of those with viable claims are preserved.

An inactive docket would benefit the courts and parties involved in MDLs, while maintaining the rights of parties to bring their cases. AAJ believes that the creation of an inactive docket would promote the efficiency, cost, and strength of MDLs.

2. Subpoena Power for Witness Testimony

AAJ suggests expanding MDL courts' subpoena power to allow live witnesses to be brought to MDL trials. Some MDL courts have held that their subpoena power already allows for this, however this view varies, with many courts holding the opposite. The use of prior videotaped testimony is frequently stale by the time a case goes to the trial and is seldom specific enough to provide relevant and informed testimony to the jury.

Currently, litigants are bound by FRCP 45 in obtaining live testimony from witnesses at trial. FRCP 45 provides that “[a] subpoena may command a person to attend a trial . . . only “if the court is “within 100 miles of where the person resides, is employed, or regularly transacts business in person.” FRCP 45(c)(1)(A). Instead, litigants are constrained to using the deposition of a witness who is outside of the court’s subpoena power. FRCP 32(a)(4)(b). (Note that 28 U.S.C. § 1407(b) allows an MDL court to “exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions,” thereby avoiding this same issue with relation to depositions.)

Plaintiffs have attempted to use FRCP 43(a) to persuade the court to require live testimony in MDLs. Rule 43(a) states that, although a witness’ testimony must generally be taken in open court, however “[f]or good cause shown in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” At least two MDL courts in Louisiana have interpreted FRCP 43 and 45 to mean that they have the authority to order MDL witnesses to appear before the court via video transmission. *See In re Actos (Pioglitazone) Products Liability Litigation*, 2014 WL 107153 (W.D. La. 2014); *In re Xarelto (Rivaroxaban) Products Liability Litigation*, 2017 WL 2311719 (E.D. La. 2017). *See also In re Vioxx Products Liability Litigation*, 439 F. Supp. 2d 640 (E.D. La. 2006).

Permitting live witness testimony, versus previously-videotaped depositions, would provide many benefits in MDLs. Live testimony is vital toward a jury’s assessment of a witness and his or her truthfulness and trustworthiness, and parties that are stuck with only live testimony from witnesses who are within the court’s subpoena power are severely disadvantaged in relation to a party that may not be constrained in this way. Moreover, expanding the court’s power would help to avoid motions to quash subpoenas in the courts of the state where the compliance is required. *See* FRCP 45(d)(3). Finally, in product liability MDLs, a great deal of emphasis is placed of late on “Test Cases” or “Bellwether Trials.” The goal of this exercise, of course, is to produce a sufficient number of representative verdicts and settlements to enable the parties and

the court to, *inter alia*, determine the nature and strength of the claims. *See* Manual for Complex Litigation, Fourth, § 22.315. It makes little sense to place so much emphasis on what could be a representative verdict, but then ask the jury to consider the most important evidence by videotape testimony, merely because of a rule that currently limits the MDL court's ability

To create uniformity among courts and to help ensure that plaintiffs and defendants in MDLs are on more of an even playing field, AAJ suggests a rule or amendment that expands the courts' subpoena power in MDLs. Specifically, MDL courts should be authorized to compel live testimony, including by live video transmission.