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ARTICLES

Arranger Liability under CERCLA after *Burlington Northern*

By Andrew J. Scholz and Matthew D. Cabral – March 21, 2012

In 2009, the U.S. Supreme Court decided the seminal case of *Burlington Northern & S.F. R. Co. v. United States*, 129 S. Ct. 1870 (2009), which fundamentally altered liability and damages analysis under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Two years of subsequent case law has now been decided addressing the scope of liability and divisibility of damages under CERCLA in light of the *Burlington Northern* decision.

CERCLA imposes strict liability for environmental contamination on four broad classes of potentially responsible parties (PRPs). Among the classes of PRPs is “any person who by contract, agreement, or otherwise *arranged* for disposal or treatment, or *arranged* with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.” CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). These PRPs are commonly referred to as “arrangers.”

Prior to *Burlington Northern*, the standard to qualify as an arranger was low; plaintiffs could establish arranger liability through direct or circumstantial evidence showing that the defendant knew or should have known of the hazardous disposal. The Supreme Court’s *Burlington Northern* decision was critically important to CERCLA litigants because it limited the criteria necessary for a defendant to qualify as an arranger under § 107(a)(3) of CERCLA. Critically, the plaintiff must now prove that the defendant specifically intended to dispose of hazardous materials at the Superfund site. A review of the post-*Burlington Northern* case law reveals how difficult it has become for plaintiffs to demonstrate the requisite intent necessary to establish arranger liability under CERCLA. Nevertheless, few courts summarily dismiss claims asserting arranger liability because they consider the determination of intent to be a fact-intensive inquiry.

The *Burlington Northern* Decision

The question for the Court in *Burlington Northern* was whether an owner or supplier can be found liable as an arranger absent a showing of specific intent to dispose of the hazardous waste at the Superfund site. The case involved two railroads—Burlington Northern and Union Pacific—that shared ownership of a one-acre parcel of land. The railroads leased this land to Brown & Bryant, Inc. (B&B), a chemical distributor that pooled the parcel with additional land in its possession to create an operating facility totaling approximately five acres of land. Shell Oil Co. supplied pesticides to B&B and, over the course of many years, chemical spills occurred throughout the facility. The facts showed that Shell possessed actual knowledge that some degree of chemical spillage occurred at the facility. Ultimately, B&B became insolvent, leaving Shell and the railroads as the only PRPs.

The government argued that Shell was an arranger under CERCLA because it delivered hazardous material to the site with actual knowledge that some amount of spillage occurred following its deliveries. The Ninth Circuit agreed with the government and held that Shell did qualify as an arranger. The court's decision was consistent with the pre-*Burlington Northern* case law, which generally permitted an inference of intent on the part of owners and suppliers who knew or should have known about hazardous releases.

The Supreme Court reversed the Ninth Circuit, thus reigning in the previously broad interpretation given to the intent requirement for arranger liability. The Court reasoned that “because CERCLA does not specifically define what it means to ‘arrange’ for disposal of a hazardous substance,” the phrase should be given “its ordinary meaning.” *Burlington Northern*, 129 S. Ct. at 1873 [internal citations omitted]. “In common parlance the word ‘arrange’ implies action directed to a specific purpose,” noted the Court. Therefore, “under the plain language of the statute, an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance.” The Court made it abundantly clear that circumstantial or even direct evidence tending to show knowledge on the part of an alleged arranger, without more, is insufficient to establish liability. According to the Court, “While it is true that in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.” *Id.* at 1880.

Arranger-Liability Cases Since *Burlington Northern*

Two circuit court decisions interpret *Burlington Northern*'s arranger liability holding, as well as a number of district court decisions. In the first of the circuit court decisions, *Calanese v. Martin Eby Construction*, 620 F.3d 529 (5th Cir. 2010), the Fifth Circuit Court of Appeals held that a contractor that accidentally struck a methanol pipeline with its equipment was not liable as an arranger under CERCLA in the absence of evidence demonstrating requisite intent to dispose. The plaintiff argued that the defendant contractor “conscious[ly] disregarded” a duty to investigate the damage it caused, an omission “tantamount to intentionally taking steps to dispose of methanol.” *Id.* at 533. There was no actual evidence that the construction company knew of, much less, intended, to puncture the pipeline. The Fifth Circuit, acknowledging that the Supreme Court in *Burlington Northern* “declined to impose arranger liability for a defendant with more culpable *mens rea*,” found the evidence insufficient to establish the requisite intent for arranger liability.

In the second of the circuit court cases, *Team Enterprises, LLC v. Western Investment Real Estate Trust*, 647 F.3d 901 (9th Cir. 2011), a dry cleaner disposed of contaminated wastewater containing the chemical perchlorethylene (perc) by pouring it down a sewer drain. The end result was contaminated soil, which the dry cleaner had to pay to remediate. In an effort to recoup its costs, the dry cleaner sued the manufacturer of the perc-distilling machinery it used at its facility. The dry cleaner argued that the manufacturer was liable as an arranger under CERCLA because

it knew that operation of its machinery required the disposal of perc. Accordingly, the dry cleaner argued, the manufacturer planned and controlled the disposal of perc at the facility. In affirming the district court's dismissal of the manufacturer, the Ninth Circuit, relying on *Burlington Northern*, noted that "while actions taken with the *intent* to dispose of a hazardous substance are sufficient for arranger liability, actions taken with the mere *knowledge* of such future disposal are not." *Id.* at 908. For the Ninth Circuit, the fact that the manufacturer purportedly understood that the design of its machinery necessitated the disposal of perc was insufficient to establish intent.

In the reported district court decisions post-*Burlington Northern*, intent for purposes of arranger liability has been similarly difficult to prove. For instance, in *Hobart Corp. v. Waste Mgmt. of Ohio*, Case No. 3:10CV195, 2011 U.S. Dist. LEXIS 148224 (S.D. Ohio Feb. 9, 2011), the court dismissed an arranger claim against a company that intentionally disposed of hazardous substances on its own site that then migrated onto adjacent land. The court found that there was no proof of intent to dispose on the adjacent land. Similarly, in *Schiavone v. Northeast Utilities Service Co.*, 41 E.L.R. 20132 (D. Conn. 2011), the court granted summary judgment holding that the defendant's sale of transformers containing oil laden with polychlorinated biphenyls (PCBs) did not make the defendant liable as an arranger under CERCLA. *Id.* at 15–16. According to the court, the mere fact that the defendant had a "specific purpose" to dispose of the transformers was insufficient to establish liability absent evidence of a "specific intent" to dispose of the "oil that was in the transformers or any PCBs that were in such oil." Without proof that the PCB-laden "oil in the transformers was a factor in the parties' thinking with respect to the transaction," there was no evidence of the requisite intent necessary for arranger liability.

Despite the grant of summary judgment in *Schiavone*, other post-*Burlington Northern* cases have not been summarily decided because intent is considered a fact-intensive inquiry. *See Appleton Papers Inc. v. George A Whiting Paper Co.*, 2009 U.S. Dist. LEXIS 117112 (E.D. Wis. 2009) (summary judgment denied); *Frontier Communications Corp. v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110 (D. Me. 2009) (denying motion to dismiss).

Notably, other post-*Burlington Northern* decisions still adhere to certain aspects of the pre-*Burlington Northern* arranger liability standard. For instance, in *Litgo New Jersey, Inc. v. Martin*, 2010 U.S. Dist. Lexis 57390 (D.N.J. 2010), the court found sufficient evidence to hold the United States liable as an arranger after hazardous chemicals were released during a failed cleanup of a site leased by the government. The United States argued that its intent was not to dispose of the hazardous waste but merely to store it. *Id.* at 84. The court rejected this argument, finding instead that the government had hired a third party "to permanently get rid of what they believed to be waste products," which made the government liable as an arranger under CERCLA. *Id.* at 85.

Similarly, in *United States v. Washington State Department of Transportation*, 716 F. Supp. 2d 1009 (W.D. Wash. 2010), the district court, ruling on a motion for partial summary judgment, found that the Washington State Department of Transportation (WSDOT) was liable as an



arranger where it had designed, operated, and owned storm drains that discharged storm water runoff containing hazardous substances to the Superfund site. While the court did not cite to any direct evidence supporting a finding of specific intent, the court determined that a series of circumstantial facts were sufficient to meet the *Burlington Northern* standard. The court's concise decision explained that because WTDOT had "control over how the collected runoff was disposed of" and had the "ability to redirect, contain, or treat its contaminated runoff," yet acted with "purpose . . . to discharge the highway runoff into the environment," summary judgment could not be granted. This case and *Litgo* are noteworthy for their failure to adopt the more restrictive interpretation of the intent requirement applied by other courts after *Burlington Northern*.

Conclusion

Most of the decisions addressing arranger liability post-*Burlington Northern* have emphasized a fact-intensive approach to the determination of the requisite intent to dispose of hazardous substances necessary for liability. This has meant that few arranger-liability cases are summarily decided, despite the fact that, to establish liability post-*Burlington Northern*, the plaintiff must prove that the defendant specifically intended to dispose of hazardous materials at the Superfund site. Nevertheless, although there has not been much increase in the number of arranger-liability cases summarily decided, it is certainly clear from the post-*Burlington Northern* case law that it is now much more difficult for plaintiffs to demonstrate the requisite intent necessary to establish arranger liability under CERCLA.

Keywords: litigation, mass torts, arranger liability, CERCLA, environmental contamination

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The Evolving Burden for Removal under CAFA

By Laurie A. Novion and Ina D. Chang – March 21, 2012

Since its adoption in 2005, the Class Action Fairness Act (CAFA) has been pivotal in expanding federal jurisdiction over class actions where the amount in controversy exceeds \$5 million. But even after more than six years since its effective date, there remain various open issues concerning removal of class actions to federal court. In particular, one legal issue not clarified by CAFA's provisions is the burden of proving the required \$5 million jurisdictional amount. CAFA itself is silent on whether the act alters the traditional rule that the burden of proving federal jurisdiction rests on the removing party. Several circuits and various district courts have grappled with who has the burden for removal, what the level of burden is, and what evidence can be used to support it. As a result, the standards have evolved over time and vary by circuit.

Removing Party Bears the Burden of Demonstrating Amount in Controversy

It is well settled that the party asserting federal jurisdiction bears the burden of establishing jurisdiction, despite the fact that CAFA's legislative history suggests Congress may have intended a reversal of that burden. "The legislative history indicates that some members of Congress probably wished to switch the burden of proof from the party seeking removal to the party seeking remand." *Morgan v. Gay*, 471 F.3d 469, 472 (3d Cir. 2006).

Removing defendants often cite to the statement in a Senate Committee Report that "[i]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that removal was improvident." In light of this language, some district courts initially found that the burden of proving the amount in controversy under CAFA rested with the party opposing removal or seeking remand. *See Berry v. American Express Pub., Corp.*, 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (abrogated by *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006)).

Over time, however, the circuit courts that have considered this have concluded that the burden of proving the amount in controversy for removal under CAFA is on the removing defendant. *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009); *Spivey v. Ventrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Abrego Abrego*, 443 F.3d at 686; *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Morgan*, 471 F.3d at 472-3; *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 448 (7th Cir. 2005). Circuits have rejected the language in the Senate Committee Report, noting that it appeared 10 days after CAFA was signed into law and that the actual text of CAFA makes no reference to this intent, nor does it address a shift in burden. *Morgan*, 471 F.3d at 472-73.

Level of Burden for Removal Varies by Circuit and Amount in Controversy

The Preponderance of Evidence Standard

Where a plaintiff has made an unspecified demand for damages, the majority of circuits have held that a removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the \$5 million CAFA jurisdictional threshold

amount. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010) (citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1208–09 (11th Cir. 2007) (adopting the preponderance of the evidence standard for defendants under CAFA because it is the same burden imposed on a party seeking to establish the \$75,000 amount in controversy necessary for removal under federal diversity jurisdiction)); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007) (holding that CAFA does not alter the fact that the removing defendant has the burden of demonstrating, by a preponderance of the evidence, that the amount in controversy requirement has been met); *Frederico v. Home Depot*, 507 F.3d 188, 193–94 (3d Cir. 2007); *Abrego Abrego*, 443 F.3d at 683. The defendant need not “research, state and prove the plaintiff’s claim for damages” to satisfy this moderate burden. *Ray v. Nordstrom Inc.*, No. 2:11-cv-07277, 2011 WL 6148668, at *2 (C.D. Cal. Dec. 9, 2011); *Curry v. Applebee’s Int’l, Inc.*, No. 1:09-CV-505, 2009 WL 4975274, at *5 (S.D. Ohio Nov. 17, 2009). Nor is the removing defendant required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it. Instead, imperfect knowledge and reasonable inferences can be sufficient:

The law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life. As Justice Holmes observed, “all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”

Pretka, 608 F.3d at 754.

Reasonable Probability Test of the First, Second, and Seventh Circuits

In contrast, in the First, Second, and Seventh Circuits, the removing defendant must show a reasonable probability that the amount in controversy exceeds \$5 million where the complaint does not contain specific damage allegations. See *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 42 (1st Cir. 2009); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Brill*, 427 F.3d at 449. While this test uses different nomenclature from the test adopted by other circuits, the standard is “for all practical purposes identical to the preponderance standard adopted by several circuits.” *Amoche*, 556 F.3d at 50. However, some courts prefer the “reasonable probability” language as the inquiry into removal is decided at the pleading stage before much evidence is obtained and the “preponderance of the evidence” standard is used in the weighing of evidence.

Circuits Split on the Standard Where Amount in Controversy Is Pleaded in Complaint

Where a plaintiff’s complaint specifically pleads that the jurisdictional amount is less than \$5 million, some circuits (the Third, Fourth, and Ninth, for example) require the defendant to demonstrate to a legal certainty that the amount in controversy actually exceeds \$5 million. See *Morgan*, 471 F.3d at 474 (“CAFA does not change the proposition that the plaintiff is the master of her own claim.”); *Brey Corp. v. LQ Management LLC*, No. AW-11-cv-00718, 2011 WL 5244647, at *2 (D. Md. Nov. 1, 2011) (citing *JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 638 (4th Cir. 2010)). For example, in *Lowdermilk v. U.S. Bank Nat’l Ass’n*, a former employee brought a class action alleging violations of state wage laws and pleaded that the damages would be “less

than five million dollars.” 479 F.3d 994 (9th Cir. 2007). The Ninth Circuit held that, where a plaintiff pleads damages in a certain amount and there is no evidence of bad faith, a defendant must not contradict the plaintiff’s assessment but overcome the presumption against federal jurisdiction to a legal certainty. *Id.* at 999–1000. In adopting this standard, the Ninth Circuit sought to preserve the plaintiff’s prerogative, subject to the good-faith requirement, to forgo a potentially larger recovery and remain in state court. Additionally, the court concluded that this standard was symmetrical with rules requiring that a defendant seeking remand for a case initially filed in federal court show with “legal certainty” that the claim is actually for less than the jurisdictional minimum.

Other circuits, including the Sixth and Eighth Circuits, have held that, regardless of whether the complaint alleges an amount below the jurisdictional minimum, the amount in controversy only needs to be established by a preponderance of the evidence. *Bell*, 557 F.3d at 956; *Smith*, 505 F.3d at 407. As explained by the Sixth Circuit, a disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court on a demonstration that damages are “more likely than not” to “meet the amount in controversy requirement,” but it can be sufficient absent adequate proof from the defendant that the potential damages actually exceed the jurisdictional threshold. *Smith*, 505 F.3d at 407.

In *Bell*, for example, the plaintiff filed a class action in Iowa state court against five chocolate manufacturers, alleging that they had violated Iowa’s antitrust laws by fixing prices and causing members of the purported class to pay higher prices for chocolate. 557 F.3d at 954–55. The defendants removed the case under CAFA to the district court, and the plaintiff moved to remand to state court. The district court observed that Bell’s petition was designed to evade federal jurisdiction. Although Bell conceded that two of the three requirements to support jurisdiction under CAFA were satisfied (minimal diversity and 100 or more class members), he contended that the amount in controversy was \$4.99 million, just short of the \$5 million jurisdictional threshold.

Applying the “legal certainty” test, the district court remanded the case, holding that defendants failed to prove that the amount in controversy exceeded the jurisdictional minimum. The defendants appealed and argued that the district court erred by requiring them to prove to a legal certainty that the plaintiff’s claims exceeded the jurisdictional minimum.

The Eighth Circuit rejected the “legal certainty” standard advocated by the plaintiff and that was adopted by the Ninth Circuit in *Lowdermilk* and the Third Circuit in *Morgan*. Instead, it held that a party seeking to remove under CAFA must establish the amount in controversy by the lesser “preponderance of the evidence” standard regardless of the amount of damages pled in the complaint. The Eighth Circuit concluded that adopting a “legal certainty” standard would have required the court to depart from its precedent and would require different burdens of proof depending on whether a complaint pleads damages with specificity. Further, the position advanced by the plaintiff would subject defendants in the same circuit to varying burdens of proof on removal based solely on differing state pleading requirements. *Id.* at 958. Thus, the

Eighth Circuit ordered the district court to apply the preponderance-of-the-evidence standard to the jurisdictional facts and held that “if the manufacturers prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if Bell can establish that it is legally impossible to recover in excess of the jurisdictional amount.” *Id.* at 959.

Evidence That May Be Used to Support Amount in Controversy

Previously, the Eleventh Circuit’s ruling in *Lowery* created a split as to what type of evidence could be used to establish the amount in controversy for removal. *Lowery*, 483 F. 3d at 1184. However, the circuit recently reexamined and rejected, as dicta, broad statements in *Lowery*, bringing the Eleventh Circuit in line with other circuits on the types of evidence a court can consider in support of federal jurisdiction under CAFA. *Pretka*, 608 F.3d 744 (11th Cir. 2010).

In *Lowery*, the defendant attached the plaintiff’s original and third amended complaint (the last of which did not specify damages) and argued that removal was proper because the case involved claims of more than 100 persons and, to reach the required minimum total of \$5 million in value, each class member’s claims would need to yield only \$12,500. Also, the defendant argued that plaintiffs in similar mass-tort actions had received either jury verdicts or settlements greater than \$5 million. *Lowery*, 483 F.3d at 1188–89.

The Eleventh Circuit remanded the case, holding that the defendant must prove the CAFA requirements based on factual information and evidence obtained from plaintiffs. It held that, in assessing a removal, the court had a “limited universe of evidence” that included the notice and accompanying documents, with “accompanying documents” being the complaint and documents received from plaintiff. If that evidence is insufficient, neither the defendants nor the court may speculate regarding the amount in controversy. *Id.* at 1213–15. The court rejected the defendants’ request to conduct post removal discovery as a means of establishing jurisdiction. Similarly, it rejected the argument that the amount in controversy could be derived from the number of plaintiffs and the nature of the claims, as it would require the court to engage in impermissible speculation. *Id.* at 1215–21.

The *Lowery* court recognized the “unique tension in applying a fact-weighting standard to a fact-free context,” and even acknowledged that “in situations like the present one—where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to apply the preponderance burden meaningfully.” *Id.* at 1208–09. Nonetheless, citing its own precedent for the proposition that the preponderance-of-the-evidence standard can be applied in the “naked pleading context,” the court concluded that:

The removal-remand scheme set forth in 28 U.S.C. §§ 1446(b) and 1447(c) requires that a court review the propriety of removal on the basis of the removing documents. If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court



must remand. Under this approach, jurisdiction is either evident from the removing documents or remand is appropriate.

Id. at 1211.

The *Lowery* decision put significant hurdles on the removing defendant and appeared to limit the basis of removal to the allegations in the plaintiff’s complaint and information provided by the plaintiff. Relying on *Lowery*, the district court in *Pretka* remanded a class-action suit brought by buyers of condominium units against a developer for recession of their contracts and return of their deposits due to delays in construction. *Pretka*, 608 F.3d at 747. The district court found that, under *Lowery*, it could not consider the contracts from the unnamed plaintiffs or a declaration from the contract and closing manager on the cost of the deposits because none of them were “a document received by Defendant from Plaintiffs.” Additionally, the district court rejected the defendant’s “impermissible speculation” on the “potential damage claim of putative class members, as opposed to the named plaintiffs,” based on the Eleventh Circuit’s reasoning in *Lowery*. *Id.* at 750–51.

But the Eleventh Circuit reversed, examining the statements in *Lowery* that led to this result and clarifying the law on evidence used to establish the amount in controversy. The court explained that *Lowery* did not purport to hold that the use of deduction, inference, or other extrapolation of the amount in controversy is impermissible, as some district courts had thought. The court emphasized, however, that the notice of removal in *Lowery* contained only “a conclusory allegation that CAFA’s amount in controversy requirement had been satisfied.” *Id.* at 752. In contrast, the court noted that it was a different matter when a removing defendant makes specific factual allegations establishing jurisdiction and can support them “with evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations. That kind of reasoning is not akin to conjecture, speculation, or star gazing.” *Id.* at 754.

Pretka brought the Eleventh Circuit back in line with its sister circuits by finding that defendants may submit a wide range of evidence to satisfy the jurisdictional requirements of removal. *Id.* at 755. This includes defendant affidavits, declarations, or other documentation—provided, of course, that removal is procedurally proper. *Id.* See also *Strawn v. AT&T Mobility, LLC*, 530 F.3d 293, 299 (4th Cir. 2008) (finding the defendant’s affidavit was sufficient to establish CAFA’s amount in controversy because the plaintiffs offered nothing to challenge its accuracy).

Defendants can also submit evidence on the value of injunctive relief, attorney fees, and punitive damages calculations. For example, the Seventh Circuit recently reversed a district court’s remand order of an alleged insurance-fraud class action originally filed in state court, in part, by extrapolating the likely financial loss to be suffered by the defendant if the injunctive relief sought was granted. *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 274 (7th Cir. 2011) (holding that prospective relief could be calculated not only by the costs to reprint forms, as argued by the plaintiff, but also by examining current profits in the state for 20 years, discounted by 5 percent per year). See also *Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 485–86 & n.6 (W.D. Pa.

2009) (rejecting the plaintiffs’ “point of view” argument, where it was clear that the requested injunction would cost Ford the full amount of the demanded repairs); *McNair v. Synapse Group, Inc.*, No. 06-5072, 2009 WL 3754183, at *2–3 (D.N.J. Nov. 5, 2009) (accepting evidence based on the defendant’s records of sales and cancellation estimates related to the allegedly unfair practices). Prior to *Pretka*, a similar ruling by a district court in the Eleventh Circuit may have been seen as inappropriate speculation by the court or the defendant. *See Lowery*, 483 F. 3d at 1214–15.

While *Lowery* had precluded the analysis of awards in similar mass-tort actions as a method of determining the amount in controversy, several circuit courts have used this analytical approach, particularly in determining possible multipliers for putative damages. For example, the Third Circuit held that where the state cause of action permits punitive damages, a potential recovery for putative damages must be considered in assessing the amount in controversy. *Frederico*, 507 F.3d at 198–99 (the jurisdictional analysis into the CAFA amount in controversy must also take into account the ability of plaintiff and the putative class to recover punitive damages unless it is apparent to a legal certainty that such cannot be recovered). And in *Keeling*, the Seventh Circuit analyzed punitive damages awards in similar actions to determine the possible multiplier in the case at issue, finding that it was not “legally impossible” for the amount in controversy to reach \$5 million based on this analysis. *Keeling*, 660 F.3d at 274–75. There, in explaining its analysis, the Seventh Circuit commented:

Considerations such as these [involving the precise punitive damages multiplier that could ultimately be applied] are properly part of the damages determination after the merits have been resolved. They should not be smuggled into the jurisdictional inquiry We therefore do not think it ‘legally impossible’ for the class to recover more than \$3 million in punitive damages. Improbable, perhaps, but not impossible.

Id. at 275.

Finally, another form of evidence used to establish the amount in controversy is potential attorney fees. In ordinary diversity cases, when there is no direct legal authority for an attorney fee award, a request for a fee cannot be included in the jurisdictional amount. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155–56 (9th Cir. 1998). However, where an underlying statute authorizes an award of attorney fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy. Similarly, attorney fees can be included to determine whether the CAFA jurisdictional minimum has been met, so long as attorney fees are authorized by state statutes under which the class action sought to be removed has been brought. *Lowdermilk*, 479 F.3d at 1000.

Conclusion

In the six years since CAFA was enacted, it has altered the landscape of class actions. Over time, circuits have come in line with one another on such issues as who bears the burden on removal and what evidence can be used to meet this burden. However, on other issues, such as the level



Mass Torts Litigation

FROM THE SECTION OF LITIGATION MASS TORTS LITIGATION COMMITTEE

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of burden in proving the \$5 million jurisdictional amount, circuit courts remain divided. It will be interesting to see how case law applying CAFA's provisions evolves further in future years.

Keywords: litigation, mass torts, Class Actions Fairness Act, amount in controversy

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Criminalizing Aviation: Placing Blame Before Safety

By Judith R. Nemsick and Sarah Gogal Passeri – March 21, 2012

Criminal investigations and prosecutions of parties involved in major air disasters continue unabated on a global scale. In the past five years alone, criminal proceedings have been commenced to address commercial aviation accidents in Brazil, France, Greece, Indonesia, Spain, and Turkey. The investigations relate to the crash of TAM Airlines Flight 3054 at Sao Paulo Congonhas Airport on July 17, 2007; the Air France Flight 447 accident over the Atlantic Ocean on June 1, 2009; the crash of Helios Airways Flight 522 near Athens on August 15, 2005; the Garuda Indonesia Airways Flight 200 accident at Yogyakarta Airport on March 7, 2007; the Spanair Flight 5022 accident at Madrid Barajas Airport on August 20, 2008; and the Atlasjet Flight 4203 accident near Isparta, Turkey, on November 30, 2007.

While there have been criminal investigations in the aviation industry for decades, the recent proliferation of such investigations is concerning. Indeed, one study indicates that there were only 27 criminal prosecutions stemming from airline or business jet accidents worldwide from 1956 to 1999 (a 43-year period), compared to at least 28 during the period from 2000 to 2009. Andreas Mateou & Sofia Michaelides-Mateou, *Flying in the Face of Criminalization* 161 (2010). In recent years, criminal authorities have been casting a wider net and pressing charges against not only airlines, manufacturers, and their frontline employees, but also management, engineers, and designers. Air traffic controllers, regulatory officials, and maintenance providers have also been targets of these investigations.

The intersection between civil accident investigations and criminal investigations and the tension between their respective goals of preventing future accidents and assessing blame continues to pervade the airline industry. The prosecution of certain activities, including terrorism, sabotage, and intentional misconduct, is indisputably necessary and serves to achieve both goals. Efforts to criminalize what amounts to ordinary negligence, however, must be recognized as having unintended and, indeed, potentially detrimental effects. The United States realizes these damaging effects and notably prioritizes the National Transportation Safety Board's (NTSB) technical investigation and restricts the use of reports and information outside of this investigation. Efforts in other countries, however, are inconsistent and have not necessarily been as successful. In several foreign jurisdictions, criminal investigators continue to interfere with the civil aviation authority's technical investigation and to prosecute corporations and individuals for conduct amounting to negligence.

The existence of parallel criminal proceedings also may impact civil lawsuits brought by victims' families. In certain countries, the local law enforcement authorities may take custody of evidence before the civil aviation authority has had a chance to evaluate it. This is often the case in countries where the laws allow for parallel investigations and grant priority to the judicial criminal authority. Defense counsel and counsel for the victims' families need to be aware of the

tensions that can arise as a result of criminal investigations and how such proceedings may impact their representation of parties to civil actions arising from an aviation accident.

Global Consensus: Criminal Investigations Impede Airline Safety

Numerous agencies and industry groups have long recognized the negative effect that criminal investigations have on technical investigations and the goal of improving air safety. The International Civil Aviation Organization (ICAO), a UN agency formed at the 1944 Convention on International Civil Aviation in Chicago, sets international safety standards and policies for commercial aviation, including the protocol for conducting an accident investigation. This protocol, commonly referred to as ICAO Annex 13 and titled *Aviation Accident and Incident Investigations*, states:

The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

Convention on International Civil Aviation, signed at Chicago on December 7, 1944, Annex 13, § 3.1, *Objective of the Investigation*.

The state of occurrence, in other words, the nation on whose territory an accident or incident occurs, is charged with conducting the official technical investigation and must “take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents” during the course of the investigation. *Id.* at § 3.2. ICAO Annex 13 recognizes that if it becomes known or suspected that an unlawful act caused the accident, the investigator in charge must immediately initiate action to ensure that aviation security authorities of the states concerned are informed. *Id.* at § 5.11.

ICAO Annex 13 imposes specific rules and guidelines regarding the disclosure of accident-investigation materials and data collected under programs to improve safety. For example, Section 5.12, *Non-Disclosure of Records*, provides that states should not disclose records from the investigation “unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations.” Additionally, accredited representatives and their advisers “shall not divulge information on the progress and the findings of the investigation without the express consent of the State conducting the investigation.” *Id.* at § 5.26.

Significantly, section 5.12 recognizes that information “could be utilized inappropriately for subsequent disciplinary, civil, administrative, and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. *Lack of access to such information would impede the investigation process and seriously affect flight safety.*” Annex 13, § 5.12, note 1 (emphasis added).

Attachment E to Annex 13, titled *Legal Guidance for the Protection of Information from Safety Data Collection and Processing Systems*, sets forth recommendations for member states

regarding disclosure of investigative information and data collection. For example, national laws and regulations should provide specific measures of protection to maintain the confidentiality of these materials and limit public access. Attachment E recognizes exceptions to nondisclosure, including where there is evidence or the circumstances indicate that the accident was caused by intentional conduct, recklessness, gross negligence, or willful misconduct, or where an appropriate authority determines that release of the information is necessary for the administration of justice. Attachment E, however, serves only as a legal guidance and is not binding on member states. *See In re Air Crash at Lexington, Ky., Aug. 27, 2006*, 2008 WL 170528, *6–7 (E.D. Ky. Jan. 17, 2008).

ICAO, like many other air-safety organizations, has advocated for a “just culture” in the aviation industry—one that does not punish individuals for negligent acts and limits criminal prosecutions to cases of sabotage, intentional misconduct, or gross recklessness. *See* David Learmont, “ICAO Wants to Make ‘Just Culture’ Safety Reporting and Investigation Global,” *Flight International* (Jan. 8, 2008). In addition, ICAO has established a task force to advocate for greater protection of information and data voluntarily reported under various safety programs. *See* Andy Pasztor & Daniel Michaels, “Prosecutions Vex Aviation Industry,” *Wall Street Journal* (Mar. 21, 2011).

In the United States, the NTSB, the agency charged with transportation accident investigations, likewise supports a “just culture” in the industry and encourages a strong overall safety culture. *See* Remarks of Robert Sumwalt, Member, NTSB, *Developing a Safety Culture: The Role of Leadership*, FAA Air Traffic Organization Leadership Summit, Washington, D.C. (Aug. 19, 2008). Over a decade ago, the NTSB chairman testified before Congress about how NTSB investigators were “stymied by the prospect of criminal prosecutions” during their investigation of the 1999 pipeline rupture and fire in Bellingham, Washington. *See* [Testimony of Jim Hall, Chairman](#), NTSB (Oct. 27, 1999). For fear of prosecution, many witnesses would not speak to the authorities regarding the incident. During a 2000 congressional hearing on criminalization, experts proposed protections for safety-related information provided to the NTSB. *See* *Hearing Regarding the Trend Toward Criminalizing Aviation Accidents Before the House Committee on Transportation and Infrastructure*, Subcommittee on Aviation (testimony of Capt. Paul McCarthy, Executive Air Safety Chairman, Airline Pilots Ass’n) (July 27, 2000).

In October 2006, various international air and space organizations located in Europe and the United States issued a [Joint Resolution Regarding Criminalization in Aviation Accidents](#) [PDF] declaring that the “paramount consideration” of the official investigation should be to determine the probable cause and contributing factors, not to criminally punish flight crews, maintenance employees, airline and manufacturer management and executives, regulatory officials, or air traffic controllers. The resolution was issued in response to several criminal investigations in the industry, including the detention of two business jet pilots in Brazil following a mid-air collision. The resolution was executed by the Flight Safety Foundation, the Académie Nationale de l’Air et de l’Espace, the Royal Aeronautical Society, the Civil Air Navigation Services Organization, the European Regions Airline Association, the International Federation of Air Traffic Controllers’

Associations, the Professional Aviation Maintenance Association, and the International Society of Aviation Safety Investigators. The National Business Aviation Association and the International Business Aviation Council have also endorsed the resolution. *See* David Esler, “Flight Risk: The Threat of Criminalization,” *Aviation Week* (Mar. 10, 2009).

The resolution encourages states to “exercise greater restraint” and “adopt stricter guidelines” before law enforcement officials bring criminal investigations or prosecutions in the wake of an air disaster and urges them to instead pursue stronger regulatory oversight and enforcement. It also urges states to safeguard the official accident investigation process, to prevent premature disclosure of the probable cause/contributing factor conclusions, and to prohibit their use in any civil or criminal proceedings. It warns that the “use of relatively untrained and inexperienced technical ‘experts’” by prosecutors can result in “flawed technical analyses” and interfere with the official accident investigation.

U.S. Criminal Investigations

Criminal investigations of aviation accidents in the United States are much less prevalent than elsewhere and often do not result in criminal charges. Even when a parallel criminal investigation ensues in the United States, the NTSB’s civil investigation generally takes priority. *See* 49 U.S.C. § 1131(a)(2)(A)(B); 49 C.F.R. § 831.5. Criminal charges are also principally reserved for intentional conduct, such as the falsification of maintenance records or other aircraft documents.

For instance, after ValuJet Flight 562 erupted into flames shortly after takeoff and crashed in the Florida Everglades on May 11, 1996, federal authorities charged the aircraft maintenance company, SabreTech, and its employees for knowingly and willfully falsifying maintenance records, failing to comply with hazardous-material regulations, recklessness, and other crimes. *See U.S. v. SabreTech, Inc., et al.*, No.1:99-cr-00491, D.E. No. 1 (Indictment). Those charged included the company’s vice president of maintenance and two mechanics.

In 1999, all of the individuals were acquitted by the federal district court. *See U.S. v. SabreTech, Inc.*, 271 F.3d 1018, 1021 (11th Cir. 2001). However, SabreTech was found guilty of nine counts of willfully and recklessly causing the transportation of oxygen generators in violation of the Federal Aviation Act (FAA) and willfully failing to train its employees in accordance with hazardous materials regulations. In 2001, the U.S. Court of Appeals for the Eleventh Circuit ultimately vacated these convictions, with the exception of the willful failure to train employees. 271 F.3d at 1025. In 2000, Florida state prosecutors also charged SabreTech with 110 counts of third-degree murder and 110 counts of manslaughter, one count for each passenger. These charges were dropped as part of a plea agreement that required SabreTech’s parent corporation to pay \$500,000 to organizations that promote aviation safety. *See* “Florida to Drop ValuJet Murder Counts vs. SabreTech,” *Houston Chronicle* (Oct. 26, 2001).

Criminal charges were also brought following the February 2005 crash of a corporate jet operated by a private charter company, Platinum Jet, into a building on takeoff from Teterboro

Airport in New Jersey. The NTSB determined that the probable cause of the accident was the pilot's failure to ensure the proper weight and balance, which resulted in a center of gravity that was well forward of the take-off limits and prevented the aircraft from fully rotating. *See* NTSB, Accident Report on Runway Overrun and Collision Platinum Jet Management, LLC Bombardier Challenger CL-600-1A11, N370V, Teterboro, New Jersey, Feb. 5, 2005 (Oct. 31, 2006). Also cited as contributing factors were Platinum Jet's failure to obtain FAA certification for part 135 operations, failure to use qualified pilots (the captain of the accident aircraft was not certified to operate part 135 flights), and faulty record keeping.

Charges were brought against several Platinum Jet employees, including conspiracy among pilots and company officials to regularly overload planes, falsify flight documents, and violate federal safety regulations in a scheme to maximize profit. *See* Press Release, U.S. Dep't of Justice, *Captain of Jet That Crashed at Teterboro in 2005 Charged in Superseding Indictment* (Nov. 24, 2009). The two co-founders of Platinum Jet, one the president/CEO and the other a vice president, were sentenced to 30 months and 18 months in prison, respectively. Each was convicted of conspiracy to commit wire fraud and to defraud the FAA. The president/CEO was also convicted of lying in an NTSB accident report, endangering the safety of an aircraft in flight, and six counts of rendering false statements in relation to FAA-required paperwork to conceal that unqualified or unrested pilots were flying charter flights. *See* Press Release, U.S. Dep't of Justice, *Founders of Luxury Charter Jet Company Convicted in Illegal Flight Scheme* (Nov. 15, 2010); Press Release, U.S. Dep't of Justice, *Founders of Luxury Charter Jet Company Sentenced to Prison in Illegal Flight Scheme* (Sept. 20, 2011). Other executives and a pilot pled guilty for their roles in operating the illegal charter flights. *See* Press Release, U.S. Dep't of Justice, *Former Pilot of Luxury Charter Jet Company Sentenced to Six Months in Prison for Flying Illegal Flights and Falsifying Safety Records* (Aug. 22, 2011).

In contrast to ValuJet and Platinum Jet, a criminal investigation of the crash of Alaska Airlines Flight 261 off the coast of Point Mugu, California, on January 31, 2000, did not reveal any evidence of intentional wrongdoing on the part of the airline or the maintenance company. Despite the U.S. attorneys' office in San Francisco having commenced a criminal investigation approximately one year before the accident based on evidence that the airline had a pattern of violations with respect to maintenance records, no criminal charges were ultimately filed as a result of the accident. Instead, in a separate administrative review, the FAA found that Alaska Airlines and three of its managers had violated safety regulations, so the FAA fined the airline and revoked the mechanic licenses of two of the managers while suspending the license of the third. *See* Steve Miletich, "NTSB Blames Alaska, FAA in Flight 261 Crash," *The Seattle Times* (December 11, 2002).

Foreign Criminal Investigations

Criminal prosecutions in aviation accident cases are much more common in Europe, Asia, and South America, particularly in civil-law countries. *See* Esler, "Flight Risk: The Threat of Criminalization," *supra*. The purpose of a foreign criminal investigation may vary depending on

the jurisdiction. Criminal proceedings are generally used as a punitive measure to punish the responsible parties. In many jurisdictions, however, they may also provide an alternative means of compensation to victims, their families, and other injured parties.

In Spain, for example, criminal proceedings are currently pending in relation to the crash of Spanair Flight 5022 in Madrid on August 20, 2008, which may also resolve civil claims for damages. *See In re Air Crash at Madrid, Spain, on August 20, 2008*, No. 2:10-ml-02135, 2011 WL 1058452, at *3 (C.D. Cal. Mar. 22, 2011) (citing affidavit of Professor Pablo Salvador-Coderch). The head of Spanair's maintenance department and a Spanair mechanic were charged with 154 crimes of manslaughter and 18 crimes of negligent injuries (negligence is recognized as a criminal offense in the Spanish Criminal Code). *See Air Crash at Madrid*, No. 2:10-ml-02135, Affidavit of Salvador-Coderch, D.E. No. 197, at 4. Numerous passengers' families joined the proceedings. At the close of the criminal trial, prosecutors will request that victims and their families supply evidence supporting their claims for damages, and the judge will determine their award. *Id.* at 6. This, in effect, saves the victims the expense of litigating their case in a separate action.

As another example, a French judge found Continental Airlines and one of its maintenance engineers guilty of involuntary manslaughter in connection with the July 2000 Concorde accident at Charles de Gaulle International Airport. *See Nicola Clark, "French Court Convicts Continental in Concorde Disaster," N.Y. Times* (Dec. 6, 2010). According to French aviation accident investigators, a piece of metal had dropped off a Continental aircraft that took off just before the Concorde and punctured the jet's tires, sending debris into fuel tanks and sparking a fatal fire. Continental was fined \$265,000 and was ordered to pay more than \$1.3 million to Air France-KLM Group, the aircraft operator. The Continental mechanic received a 15-month suspended sentence and was fined \$2,650. Continental called the decision "absurd" and filed an appeal. *Id.*; *see also* Tess Stynes, "Continental Appeals Concorde Crash Verdict," *Wall Street Journal* (Dec. 14, 2010).

In addition to Continental and its employees, charges were also brought against two of the aircraft manufacturer's employees, who allegedly had knowledge about the dangers posed by the location of the aircraft's fuel tank above the tires. The court acquitted these individuals, but held their employer, European Aeronautic Defense & Space Co., partly responsible. A former official of France's civil aviation authority was also charged, but was cleared of any wrongdoing in certifying the aircraft.

Similarly, in 2006, a French court investigating the 1992 Air Inter crash near Strasbourg acquitted six individual defendants from air traffic control, the airline, and the aviation safety agency of manslaughter charges. The court found Airbus and Air France (parent of Air Inter) liable for damages and ordered Air France and Airbus to pay compensation to the relatives. *See Six Accused in 1992 Air Inter Strasbourg Crash Acquitted, Airbus and Air France Ordered to Pay Compensation*, FlightGlobal.com (July 11, 2006).



In other instances, political pressure and public outrage may further prompt judicial authorities to pursue criminal charges. For example, after the September 2006 mid-air collision of a Legacy business jet and a GOL Airlines B737 in Brazil, authorities immediately commenced a criminal investigation into the role of the two American pilots flying the Legacy jet. Notably, the Legacy pilots had not violated any regulations, were reportedly not aware of the inactivation of the transponder and collision-avoidance equipment, and were following air traffic control clearances. The Legacy pilots and three Brazilian air traffic controllers were ultimately charged with negligence and involuntary manslaughter. The pilots were acquitted of the negligence charge in 2008, but in 2010, a judge overturned that ruling. The judge recently sentenced each pilot to four years and four months in a “semi-open” prison, but commuted the sentences to community service to be served in the United States. *See* “Pilots Avoid Jail in Brazil Crash,” *N.Y. Times* (May 16, 2011).

Following the 2007 crash of Garuda Indonesia Airways Flight GA200 in Indonesia, local prosecutors brought criminal charges against the pilot-in-command. According to the accident report, the pilot was flying too fast and his flight-path angle was too steep during approach and landing phases. *See* Nat’l Transportation Safety Committee, *Aircraft Accident Investigation Report: Garuda Boeing 737 Crash at Yogyakarta* (Oct. 7, 2007). Instead of executing a go-around, as was company procedure, the pilot proceeded with the landing. Although the pilot’s conduct was characterized as negligent, he was found guilty of criminal negligence under Indonesian law and sentenced to two years in prison. *See* Slamet Susanto, “Garuda Pilot Gets Two Years for Negligence,” *The Jakarta Post* (Apr. 7, 2009). The criminal conviction was overturned after an appellate court determined that the prosecutors failed to prove that the pilot was “officially and convincingly guilty of a crime.” Adam Gartrell, “Garuda Crash Pilot’s Conviction Overturned,” *Australian Associated Press* (Dec. 12, 2009).

Brazilian authorities indicted several government and airline officials for the crash of TAM Airlines Flight 3054, including five officials from the Agência Nacional de Aviação Civil (Brazil’s civil aviation agency), three employees of the Brazilian airport authority, and two TAM employees responsible for flight safety and flight operation. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1329 (11th Cir. 2011). Criminal charges likewise were brought against 12 individuals following the 2007 crash of Atlasjet Flight 4203 in the mountains of Turkey. Two of the 12 charged were high-ranking officials at the Civil Aviation General Directorate in Turkey who face up to 15 years in jail. *See* “Officials Face 15 Years’ Imprisonment over Plane Crash,” *Today’s Zaman* (Feb. 19, 2010).

The collision of Scandinavian Airlines System Flight 686 with a Cessna Citation at the Linate Airport in Milan resulted in two trials in Italy. In 2004, a court convicted four defendants, including one air traffic controller and the former director of the Italian air traffic control agency (ENAV) of manslaughter and negligence and sentenced them to prison terms ranging from six and a half to eight years. In 2005, a court convicted three other employees of ENAV and one airport official of manslaughter and sentenced them to four years and four months. Several of

these convictions were upheld by an Italian appeals court in 2006 and by Italy's highest court, the Court of Cassation, in April 2008. *See* "4 Convicted in 2001 Milan Plane Crash," *N.Y. Times* (Mar. 15, 2005); Roberto Landucci, "Court Upholds 5 Convictions in Italian Air Crash," *Reuters* (Feb. 20, 2008).

Impact on Civil Investigations and Litigation

Criminal proceedings arising from a crash can prejudice civil investigations and lawsuits brought by victims' families. With increased risk of criminal prosecution, frontline employees, such as pilots, mechanics, and engineers, may be less willing to cooperate or testify. In the United States, knowledgeable individuals fearing criminal prosecution may plead the Fifth Amendment and refuse to testify at all. Where individuals and employees are considered potential targets of criminal prosecution, numerous issues need to be addressed by counsel for the corporate defendants. An individual may require separate criminal counsel because, at times, the interests of the employer and its employee may not be aligned and there may be little cooperation between the parties. Insurers may also use potential criminal charges as a reason to deny coverage for or issue a reservation of rights regarding the individual's representation and defense. Parties, such as manufacturers, also need to be mindful of information provided to criminal investigative authorities, particularly because the criminal investigators may lack the expertise of the official government investigators.

Local criminal prosecutors have interfered with civil investigations and lawsuits by seizing and then refusing access to crucial evidence. Following the crash of a Cessna 650 Citation III near Rome on February 7, 2009, the flight recorders were seized for a judicial inquiry because Italian regulations provide that the prosecutorial investigation supersede the technical investigation. The Italian aircraft accident investigation board, Agenzia Nazionale per la Sicurezza del Volo (ANSV), complained that it was not able to conduct a thorough investigation into the accident due to the seizure by judicial authorities. Not until several weeks later did the ANSV receive transcripts of the cockpit voice recorder and flight data recorder. *See* "Italian Investigation Into Fatal Citation Crash Frustrated By Judicial Inquiry," *Aviation Safety Network* (February 19, 2009); "ANSV Italy: Judicial Authorities Share FDR, CVR Data of Fatal Citation Crash," *Aviation Safety Network* (April 1, 2009).

Likewise, after the November 2008 loss of an Air New Zealand A320 that crashed into the Mediterranean Sea during an acceptance flight, prosecutors in France took control of the flight data recorders and interfered with the technical investigation by preventing the Bureau d'Enquêtes et d'Analyses pour la Sécurité de l'Aviation Civile (BEA), the French authority responsible for civil aviation accident investigations, from sending the recorders to the United States for read-outs. Additionally, the prosecutor apparently made improper and prejudicial comments to the press regarding the content of the recorders. *See* Ramon Lopez, "Accident Probes Hamstrung by Criminal Sanctions; Safety News," *Aviation Today* (Mar. 6, 2009). And following the Turkish Airlines Flight 1951 accident at Schiphol Airport on February 25, 2009, a Dutch prosecutor became involved in the accident investigation and took charge until the Dutch

government stepped in and advised that the Dutch Safety Accident investigators had primary jurisdiction. The prosecutor was ordered not to interfere with the safety investigation.

In many cases where litigation arising from a foreign accident has been brought in the United States, the defendants will point to a pending foreign criminal proceeding as an additional factor that supports dismissal of the case on forum non conveniens grounds. Specifically, defendants will focus on the inability to compel the appearance of certain witnesses in the United States, the inaccessibility of evidence developed in the investigation, and the inability to implead local parties that the investigation may have revealed to be at fault. This was the situation in the forum non conveniens decisions involving TAM Airlines Flight 3054, where the indicted individuals included officials from Brazil's civil aviation agency and employees from the airport authority. *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011); *see also Air Crash at Madrid*, 2011 WL 1058452, at *10–11 (noting the importance of testimony from air traffic controllers located in Spain); *Lleras v. Excelaire Servs.*, 354 Fed. Appx. 585, 2009 U.S. App. Lexis 26208 (2d Cir. Dec. 2, 2009).

Finally, the existence of criminal proceedings, which may drag on for years, can impede settlement of the civil litigation, particularly where some family members are parties to the criminal proceedings.

Conclusion

The tension created by the threat of criminalizing negligent conduct is only compounded by the severity of convictions rendered by courts outside of the United States in the past decade. Counsel to a party who has the potential to be implicated in an aviation disaster investigation must be prepared for complications created by parallel investigations and criminal proceedings, which will differ from case to case based on the nature of the accident, the regulatory agencies and governments involved, and the scope of the criminal investigators' authority. Events following an aviation disaster move rapidly, and counsel must be equipped to provide prompt advice concerning appropriate communications with and disclosures to safety investigators and criminal prosecutors. Information disclosed by the party will be utilized, and indeed may even be interpreted, differently by criminal and civil investigators.

Criminal proceedings will also have an important impact on counsel's representation of a client in a civil proceeding. If investigations or prosecutions are looming, counsel may be faced with employees who are reluctant to cooperate or testify. And to the extent that plaintiffs in civil litigation participate in criminal proceedings, counsel may need to navigate through much murkier settlement negotiations because defendants will be less willing to settle claims unless individual plaintiffs discontinue their participation in the criminal case.

Despite widespread criticism against the unnecessary criminalization of aviation accidents, it is clear that many foreign governments will continue to pursue criminal investigations and prosecutions for conduct amounting to negligence. These proceedings unavoidably conflict with the goal of civil investigations to prevent future accidents through improvements in aviation



Mass Torts Litigation

FROM THE SECTION OF LITIGATION MASS TORTS LITIGATION COMMITTEE

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safety. While it is ultimately the task of regulatory authorities in the United States and abroad to maintain the integrity of the investigative process, it is clear that counsel will play an important role in assisting in that endeavor.

Keywords: litigation, mass torts, aviation, National Transportation Safety Board, criminal investigation

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Factors For and Against MDL Coordination

By John P. Lavelle Jr. and Thomas V. Ayala – March 21, 2012

Multidistrict litigation (MDL) proceedings are often proposed to manage product-liability litigation. Any party to a case may move to create an MDL, and the Judicial Panel on Multidistrict Litigation may initiate the process on its own initiative, sometimes at the suggestion of one or more clerks of court who notice multiple filings of similar cases. Congress created the MDL Panel in 1968 with the enactment of 28 U.S.C. § 1407 and empowered it to transfer multiple civil actions to a single federal district for coordinated pretrial proceedings:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

28 U.S.C. § 1407(a).

The terms of section 1407 are of limited value to parties and practitioners attempting to predict whether the MDL Panel is likely to initiate an MDL in a particular instance. As of the time of the writing of this article, 64 out of 288 pending MDLs (22 percent) are product-liability actions. *See* United States Judicial Panel on Multidistrict Litigation, MDL Statistics Report—Distribution of Pending MDL Dockets as of November 16, 2011, www.jpml.uscourts.gov. But in contrast to litigation arising from mass accidents like air and rail crashes, which the panel has consistently transferred for MDL coordination, the panel has in many instances declined to centralize product liability actions in an MDL.

Deciding Factors Articulated by the MDL Panel

Focusing on the terms of section 1407, the statute authorizes the panel to create an MDL when the litigation at issue satisfies three criteria: the actions share common questions of fact; creation of an MDL serves the convenience of the parties and witnesses; and an MDL would, in the panel’s judgment, “promote the just and efficient conduct of the actions.”

Regarding the first criterion, common questions, the MDL Panel has stated that “transfer under Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer.” *In re Accutane Prods. Liab. Litig.*, 343 F. Supp.2d 1382, 1383 (2004). The second criterion, convenience of the parties, is easily satisfied when the parties consent to MDL coordination, as they often do, but it is far more malleable when parties disagree over the wisdom of MDL treatment of their cases, where such an MDL should be venued, or to whom it should be assigned for judicial management. The third criterion, whether transfer will

“promote the just and efficient conduct of the actions,” conveys broad discretion to the MDL Panel. In this regard, the Panel has articulated several factors relevant to its transfer decisions.

Below are the factors most commonly noted by the panel in its decisions reported during the last decade. Each of these factors is discussed in isolation, but it should be emphasized that how these factors will be weighed and balanced will depend on the specific circumstances of the litigation. The panel has not applied a rigid, arithmetic formula when considering these factors, instead employing a more flexible approach that may discount certain factors for one litigation and emphasize them for another, depending on the particular circumstances presented.

Materiality and Complexity of Common Questions of Fact

The panel considers not only whether the actions in question present common questions of fact, but also whether any common questions are material, complex, and disputed. The greater the factual commonality and complexity of disputed facts, the more likely the panel will order centralization. Compare, e.g., *In re Oxycontin Prods. Liab. Litig.*, 395 F. Supp.2d 1358 (2005) (denying transfer) (“Movants have failed to demonstrate that any common questions of fact and law are sufficiently complex, unresolved and/or numerous to justify Section 1407 transfer in this docket . . .”), with *In re Fosamax Prods. Liab. Litig.*, 444 F. Supp.2d 1347 (2006) (granting transfer) (“[T]hese actions present complex common factual questions concerning, among other things, 1) the development, testing, manufacturing and marketing of Fosamax, and 2) [the defendant’s] knowledge concerning the drug’s alleged adverse effects, in particular, osteonecrosis of the jaw. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary.”), and *In re Accutane Prods. Liab. Litig.*, 343 F. Supp.2d 1382, 1383 (2004) (“The actions in this docket thus present complex common questions of fact concerning, inter alia, i) the development, testing, manufacturing and marketing of Accutane, and ii) defendants’ knowledge concerning the drug’s possible adverse effects.”).

However, even if the actions share common factual questions, if they involve significant individualized questions of fact, the panel may not be inclined to transfer on the basis that the individualized questions “overshadow,” “predominate over” or “outweigh” the common ones. See, e.g., *In re Abbott Labs. Similac Prods. Liab. Litig.*, 763 F. Supp.2d 1376–77 (2011) (“We are of the opinion that the individual facts contained in these actions will predominate over any alleged common fact questions. For instance, discovery and motion practice may be expected to concern (1) the particular product each plaintiff purchased, (2) any injuries that consumption of the product caused, (3) whether the product contained beetles or beetle larvae, and/or (4) what advertising or other representations were made to each particular plaintiff (and, relatedly, whether the plaintiff relied upon those representations.”)); *In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp.2d 1367 (2010) (“[T]he different manufacturer defendants produced the drywall using different, proprietary techniques and different sources. . . . The proponents of centralization have not convinced us that any efficiencies from centralization would outweigh the multiple individualized issues, including ones of liability and

causation, that these actions appear to present.”); *In re Table Saw Prods. Liab. Litig.*, 641 F. Supp.2d 1384 (2009) (“The 42 constituent actions all arise from accidents in which the subject plaintiffs were injured by table saws, and all plaintiffs advance a theory that those saws are defective because, inter alia, they lack ‘flesh detection’ technology (also known as ‘SawStop’ technology”). These common issues, however, are overshadowed by the non-common ones. Each action arises from an individual accident that occurred under necessarily unique circumstances.”); *In re Victoria’s Secret Undergarments/Intimate Apparel Prods. Liab. Litig.*, MDL 2061, 2009 WL 1740577 (June 15, 2009) (“While each action alleges that Victoria’s Secret undergarments are defective, it appears that this common allegation may be overshadowed by factual issues unique to each action. Victoria’s Secret sells a vast array of brands, styles, and colors of undergarments, and they are manufactured by various factories with components from various suppliers.”); *but see In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL 2226, 2011 WL 3648473 (Aug. 16, 2011) (“In opposing centralization, the defendants argue that the actions involve multiple individualized fact issues of causation and product identification which will require discovery unique to each case. We appreciate this argument, but our experience causes us respectfully to disagree as to its significance. . . . Transferee judges can accommodate common and individual discovery tracks, gaining the benefits of centralization without delaying or compromising consideration of claims on their individual merits. . . . Our experience from the PPA litigation is that a single judge can resolve collective issues expeditiously and, then, suggest Section 1407 remand of actions to transferor courts for more individual discovery and trial, if necessary.”).

Shortly after the enactment of section 1407, the MDL Panel made clear that it would not transfer part of a case, such as only issues involving common facts, while remanding the individualized issues to the districts in which the cases were filed. *See In re San Juan, Puerto Rico Air Crash Disaster*, 316 F. Supp. 981, 982 (1970) (“[W]e think it more conducive to effective judicial management to allow [the MDL judge] to determine which issues are appropriate for coordinated or consolidated pretrial proceedings and which should be reserved for further proceedings following remand.”). Nor has the panel granted requests to limit the time for completion of MDL proceedings. *In re Depuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, 753 F. Supp.2d 1378 (2010) (“We reject Fleming’s request to limit the length of pretrial proceedings. We have long held that the Panel has neither the power nor the inclination to dictate in any way the manner in which transferee judges supervise actions pending before them. . . . Such a request is more properly addressed to the transferee judge.”). The MDL Panel has also declined to separate the claims of different classes of plaintiffs for purposes of MDL coordination. *In re Bextra & Celebrex Mktg., Sales Practices & Prods. Liab. Litig.*, 391 F. Supp.2d 1377, 1379 (2005) (declining to separate “sales/marketing” plaintiffs from “products liability” plaintiffs). The panel has also declined to separate the claims of plaintiffs who have pending motions to remand to state court. *In re Conagra Peanut Butter Prods. Liab. Litig.*, MDL 1845, 2008 WL 2332241 (June 5, 2008) (“Plaintiffs can present their motion to remand the action to state court to the transferee judge.”).

Stages of Pretrial Proceedings in the Actions

In contrast to tort litigation arising from a single calamitous event, product-liability actions routinely arise from products sold over an extended time period and from injuries sustained at different times, sometimes with a significant latency period. Considering this reality as well as statutes of limitations, docket conditions in particular jurisdictions, and other factors impacting the pace at which pretrial matters proceed, product-liability cases proposed for transfer may be in different procedural postures when the MDL Panel is considering transfer. Such circumstances generally counsel against transfer. For example, if significant discovery has already occurred in some cases, parties can informally coordinate discovery in later cases, lessening the need for an MDL. Also, the panel may be inclined against transfer if it would delay more advanced cases from proceeding to trial. *See In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp.2d 1380 (2009) (denying transfer) (“[S]everal of the actions appear to be substantially advanced (five were commenced in either 2006 or 2007). Metoclopramide litigation has a lengthy history, and the record indicates that a significant amount of the common discovery has already taken place.”); *but see In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, MDL 2016, 2009 WL 382262 (Feb. 13, 2009) (transferring actions to MDL, but exempting from transfer two actions that were almost trial ready). By contrast, where all the cases are in the initial phases of discovery and motion practice, transfer is more likely.

Number of Actions in Proposed MDL

A greater number of cases generally weighs in favor of consolidation, and this factor can outweigh all others. For example, in 1991, after the panel had on five separate occasions rejected attempts to coordinate asbestos litigation in an MDL, the panel transferred more than 25,000 asbestos personal-injury actions then pending in federal courts to an MDL proceeding. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (1991). The panel has, however, declined to coordinate more than 100 pending cases in view of other factors weighing against transfer. *See, e.g., In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp.2d 1375 (2010) (“Although the number of related actions has certainly grown, the issues that weighed against centralization in that earlier docket remain. An indeterminate number of different pain pumps made by different manufacturers are still at issue, as are different anesthetics made by different pharmaceutical companies. Most, if not all, defendants are named in only a minority of actions; and several defendants are named in but a handful of actions. Many actions involve no anesthetic manufacturers at all.”).

The panel has been less receptive to MDL motions in product-liability litigation involving a small number of cases. *See, e.g., In re Dorel Juvenile Group, Inc., Stroller Prods. Liab. Litig.*, 598 F. Supp.2d 1365 (2009) (transfer of two actions denied); *In re Depo-Provera Prods. Liab. Litig.*, 499 F. Supp.2d 1348 (2007) (transfer of three actions denied); *In re DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig.*, 217 F. Supp.2d 1376, 1377 (2002) (“Given the minimal number of actions involved in this docket, movant has failed to persuade us that any common questions of fact are sufficiently complex to warrant Section 1407 centralization.”). The MDL Panel has rejected conclusory arguments that the prospect of future filings of related cases



warrant MDL coordination. *See In re Zimmer, Inc., Centralign Hip Prosthesis Prods. Liab. Litig. (No. II)*, 366 F. Supp.2d 1384, 1385 (2005) (“Proponents of transfer have alluded to the prospect of additional actions that are or may soon be pending in additional districts as a reason for ordering centralization. We note, however, that such actions are not now before the Panel, and their pendency does not create a persuasive reason for transfer of the five Connecticut actions that are.”). But facts suggesting a high probability of mass filings, such as a recall of a widely used product, are likely to be carefully considered by the panel. *See, e.g., In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL 2226, 2011 WL 3648473 (Aug. 16, 2011) (“These products were removed from the U.S. market in December 2010, because the safety risks for cardiac complications and death outweighed their benefits for pain relief at recommended doses. . . . Though only about thirty-five cases have been filed thus far, the Panel considered the distinct potential that many more cases may be forthcoming.”).

The panel has rejected an argument that MDL consolidation would be inappropriate because it would encourage the filing of non-meritorious suits. *See, e.g., In re Seroquel Prods. Liab. Litig.*, 447 F. Supp.2d 1376, 1378 (2006). According to the MDL Panel, addressing concerns about spurious claims is the province of MDL judges, who have developed case-management mechanisms to dispose of such claims, such as a requirement for a notice of diagnosis from treating physicians, phased product identification discovery and dismissal of defendants as to whom plaintiffs have failed to satisfy the product-identification requirement, and trial-worthy certification requirements with sanctions to prevent the plaintiffs’ counsel from dismissing cases after much time and money has been spent to work up the defense. *See, e.g., In re Silica Prods. Liab. Litig.*, 398 F. Supp.2d 563, 575 & n.18 (S.D. Tex. 2005) (requiring each plaintiff to complete a plaintiff-specific fact sheet); *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (Nov. 18, 1986) (requiring plaintiffs in mass-tort litigation to offer “[r]eports of treating physicians and medical or other experts, supporting each individual plaintiff’s claim of injury and causation”). The MDL Panel has also rejected an argument that the “creation of an MDL might derail [a defendant’s] ongoing efforts to settle claims involving the Durom Cup quickly and without the expenditure of substantial time and resources.” *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, MDL 2158, 2010 WL 2380876 (June 9, 2010).

Number of Products and Number of Defendants in the Actions

If multiple defendants are not named in all or most of the actions, this factor generally weighs against consolidation. Similarly, if the defendants make different products, or if there are material variations in their manufacturing processes or products, these factors weigh against consolidation. *See, e.g., In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp.2d 1375 (2010) (“An indeterminate number of different pain pumps made by different manufacturers are still at issue, as are different anesthetics made by different pharmaceutical companies. Most, if not all, defendants are named in only a minority of actions; and several defendants are named in but a handful of actions. Many actions involve no anesthetic manufacturers at all.”); *In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp.2d 1367 (2010) (“[T]he different manufacturer defendants produced the drywall using

different, proprietary techniques and different sources.”); *In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp.2d 1380 (2009) (“[T]here is no single common defendant, and some entities . . . are named in only one or two actions.”).

Claims involving a single product and a single defendant are more likely to be coordinated. *See, e.g., In re Prempro Prods. Liab. Litig.*, 254 F. Supp.2d 1366, 1367 (2003) (“All actions before the Panel are brought against the . . . defendants by persons allegedly injured by Prempro, a hormone combination of estrogen and progestin used in the treatment of menopausal symptoms. The actions in this docket thus present complex common questions of fact concerning, inter alia, i) the development, testing, manufacturing and marketing of Prempro, and ii) defendants’ knowledge concerning the drug’s possible adverse effects.”); *see also In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, 2001 WL 36292052 (2001) (“All actions are brought as class actions against the same, sole defendant and arise from the same factual milieu, namely the manufacture and marketing of allegedly defective heart valve and replacement products incorporating St Jude’s proprietary Silzone coating.”). If a plaintiff joins claims against a manufacturer of one product with claims against a manufacturer of another product in a case that is proposed for transfer to an MDL, a party may move the panel to separate the claims not subject to an MDL and remand them to the district in which they were filed. This has been done with success. *See, e.g., In re Seroquel Prods. Liab. Litig.*, 447 F. Supp.2d 1376, 1378 (2006) (granting request to separate and remand claims aimed at products other than the product at issue in an MDL).

Whether Plaintiffs Are Represented by Common Counsel

If some or all of the plaintiffs share common counsel, the MDL Panel is more likely to assume that informal coordination of actions will occur than to create an MDL. *In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp.2d 1367 (2010) (denying transfer) (“[P]laintiffs in many of the actions share counsel, which should further facilitate cooperation among the parties and coordination of the actions.”). Existing coordination activity between or among parties also weighs against MDL transfer. *In re Zimmer, Inc., Centralign Hip Prosthesis Prods. Liab. Litig.*, 237 F. Supp.2d 1376, 1377 (2002) (denying transfer) (“We note that i) pretrial proceedings have been ongoing in the Connecticut district for over two years, and ii) plaintiff in the Minnesota action is represented by counsel who also represents the Connecticut action plaintiffs.”). Likewise, a defendant’s offer to coordinate discovery, such as by agreeing to make deposition testimony available for use in more than one case, also weighs against MDL consolidation. *See In re Chilean Nitrate Prods. Liab. Litig.*, 787 F. Supp.2d 1347 (2011) (denying transfer) (“[P]laintiffs in both actions are represented by one law firm, and another law firm represents SQMNA in both actions. In these circumstances, informal cooperation among the involved attorneys is both practicable and preferable. . . . SQMNA represents that it has already offered to coordinate discovery, and that it is agreeable to the use of depositions of its witnesses in both actions.”).

Potential for Overlapping Class Actions

The MDL Panel has expressed a preference for centralizing overlapping class actions to ensure consistency of rulings. *See, e.g., In re Apple iPod Nano Prods. Liab. Litig.*, 429 F. Supp.2d 1366, 1367–68 (2006) (coordinating six putative class actions sharing factual questions regarding an alleged defect in iPod Nano); *In re Bluetooth Headset Prods. Liab. Litig.*, 475 F. Supp.2d 1403 (2007) (creating MDL to coordinate multiple putative class actions asserting that use of the Bluetooth headsets causes hearing loss); *In re Am. Honda Motor Co., Inc., Oil Filter Prods. Liab. Litig.*, 416 F. Supp.2d 1368, 1369 (2006) (creating MDL to coordinate five separate putative statewide class actions). The Supreme Court’s recent opinion in *Smith v. Bayer Corp.* alluded to the pendency of overlapping class actions as a factor favoring MDL transfer. 131 S. Ct. 2368 (2011) (responding to policy argument concerning the re-litigation of class-certification issues by noting that federal courts may consolidate multiple overlapping suits against a single defendant in one court pursuant to section 1407). In some instances, however, the MDL Panel appeared to require a literal overlap in the class definitions of the actions proposed for transfer. *See, e.g., In re Nissan N. Am., Inc., Infiniti FX Dashboard Prods. Liab. Litig.*, MDL 2164, 2010 WL 2244200 (June 3, 2010) (“Although both [actions] are putative class actions, the Hope plaintiffs seek certification of a Missouri-wide class, while the Aaron plaintiff seeks certification of a Texas-wide class. Thus, there are no overlapping classes.”); *In re BMW Reverse Transmission Prods. Liab. Litig.*, MDL 1922, 2008 WL 1392291 (Apr. 9, 2008) (“Inasmuch as this litigation involves only two purported class actions with distinctly separate classes, the proponents of centralization have failed to persuade us that any common questions of fact are sufficiently complex and/or numerous to justify Section 1407 transfer in this docket at this time.”); *In re Lycoming Crankshaft Prods. Liab. Litig.*, 473 F. Supp.2d 1380 (2007) (“This docket contains only three actions (two of which have been consolidated before the same judge) pending in two districts, and no overlap exists between the putative classes in the Pennsylvania actions and the California action.”).

Availability of a Suitable Forum and an Available MDL Judge

The availability of a forum and a judge with manageable docket conditions and a willingness to preside in an MDL are fundamental prerequisites to transfer. The MDL Panel is likely to consider these factors carefully in connection with its transfer decision, so each party should address these factors, regardless of whether it supports or opposes an MDL. *See, e.g., In re Bridgestone/Firestone, Inc.*, 2000 WL 33416573 (Oct. 24, 2000) (“Given the range of locations of parties and witnesses in this docket and the geographic dispersal of constituent actions, it is clear that no single district emerges as a nexus. Thus, we have searched for a transferee judge with the ability and temperament to steer this complex litigation on a steady and expeditious course.”); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 398 F. Supp.2d 1371, 1372 (2005) (“In concluding that the District of Minnesota is an appropriate forum for this docket, we observe that this district, where at least ten actions are already pending before one judge, is a geographically central, metropolitan district equipped with the resources that this complex products liability litigation is likely to require. The District of Minnesota also has a nexus to this docket given the location there of key Guidant facilities involved in the

development and manufacturing of the relevant devices.”); *In re IKO Roofing Shingle Prods. Liab. Litig.*, MDL 2104, 2009 WL 4572865 (Dec. 3, 2009) (“Certain IKO facilities are located in this district [Illinois], so relevant documents and witnesses are likely found there. Centralization in this district also permits the Panel to effect the Section 1407 assignment to a transferee district that is not currently assigned to other multidistrict litigation dockets and to a transferee judge who has a caseload favorable to accepting the assignment.”).

In selecting the MDL venue, the panel considers the geographic focal point, if any, of the parties and events giving rise to the litigation; the possibility of coordination with related state-court proceedings; and the location of the first-filed action. In selecting the federal judge, the panel considers whether a judge is already presiding in one or more of the cases to be centralized, the prospective judges’ experience in complex cases, the prospective judges’ willingness and motivation to handle an MDL docket, docket conditions, and the preference of the parties.

What to Make of the Factors?

The panel’s decisions over the last decade demonstrate that its inquiries are highly fact-specific. Mass torts that involve thousands of claimants or circumstances suggesting a forthcoming avalanche of claims are easier calls for MDL centralization than immature torts not associated with a major recall, peer-reviewed publication, regulatory action, or other traditional mass-tort spark. Similarly, litigation involving multiple proposed class actions in different jurisdictions is likely to be centralized. Consider an observation in a recent opinion addressing such serial litigation outside the context of an MDL:

This action is one of several “identical” actions against Philip Morris being prosecuted in different states by different plaintiffs but the same core counsel. So far, these actions have achieved mixed results. The New York action was dismissed, partially on the pleadings and partially on summary judgment. In the Massachusetts action, a class has been certified for a merits trial on a limited set of claims. The Florida action is in its infancy. Both sides lean heavily upon favorable findings in these other actions as proof that they should prevail on the instant motions.

Xavier v. Philip Morris USA Inc., 787 F. Supp.2d 1075, 1079 (N.D. Cal. 2011).

The MDL mechanism should serve to minimize this type of duplicative effort and the potential for inconsistent rulings in federal courts, which is a key goal of section 1407. Aside from burgeoning mass torts and overlapping class actions, however, predicting how the panel will rule in a particular instance is more difficult. As with other multifactorial analyses, the practitioner’s challenge is to assign value to each factor, highlight its importance or unimportance in a particular case, and craft a persuasive argument that consideration of all of the pertinent factors counsels in favor of or against MDL treatment.

Keywords: litigation, mass torts, multidistrict litigation, Judicial Panel on Multidistrict Litigation



Mass Torts Litigation

FROM THE SECTION OF LITIGATION MASS TORTS LITIGATION COMMITTEE

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A Pilot for the Case Management of Complex Litigation

By Kristofer S. Riddle – March 21, 2012

By its nature, complex litigation often exaggerates the difficulties contained within any lawsuit and has the capacity to test the limits of our judicial system. Questions of substance and procedure can slow the process to a crawl when complexity and high stakes combine with the specter of a sub-optimal outcome. With either side able to exert a unilateral dilatory influence over procedural areas of complex litigation, some courts have elected to address these issues.

On November 1, 2011, a new pilot program aimed at streamlining complex civil litigation took effect in the Southern District of New York. To achieve this goal, the program implements a variety of measures intending to improve the quality of judicial case management. The 18-month program came out of the district's Judicial Improvements Committee (JIC), chaired by Judge Shira A. Scheindlin. For this project, the JIC created an advisory committee composed of experienced attorneys with diverse backgrounds.

The ultimate recommendations from the committee focused on four general areas that, together, make up the whole of the pilot project: initial pretrial conference procedures, discovery procedures, motion procedures, and final pretrial conference procedures.

Initial Pretrial Conference Procedures

The first part of the pilot project implements two tools to assist the project's goal of streamlining complex litigation—rules detailing the creation of an initial report of the parties and rules governing a pretrial conference. [Rules for the Pilot Project Regarding Case Management of Complex Litigation \[PDF\]](#). The project's focus during the pretrial stage is to gather accurate information so the court can make a fair and reasonable proportionality assessment with regards to the scope of discovery pursuant to Fed. R. Civ. P. 26(b)(2)(B), to establish a proposed schedule created by the parties for discovery, and to limit the issues for trial. To achieve this goal, the project has a checklist that contains 21 different topics for the parties to address in their initial report. The topics focus on the efficient incorporation of Fed. R. Civ. P. 26 by forcing the parties to address anticipated issues in discovery early in the process. Some topics include the “[p]ossibility of a stay or limitation of discovery pending a dispositive motion,” the proposed limitations on scope, the timing and sequence of discovery, and the proposed dates for the completion of discovery and the exchange of expert reports and witness lists. Moreover, the initial report should detail whether the parties propose to engage in settlement or mediation and when that should happen.

The initial report must be filed with the court no later than seven days before the pretrial conference, which is to be held within 45 days of service on any defendant or within 60 days if the government is a defendant. The procedures for the pretrial conference are broken down into 11 points that, when taken together, give the impression of a process that aims to be transparent, firm, and predictable. The pretrial conference lays the framework for the litigation by instituting a regime of deadlines and agreements on discovery in a judicially managed review of the initial report. At the pretrial conference, the court sets a

schedule for the completion of fact discovery, the filing of the joint preliminary trial report, and the exchange of expert reports. Further, the court also uses the pretrial conference as an opportunity to set a trial-ready date, if appropriate, and to schedule any motion for class certification.

Discovery Procedures

The second part of the pilot project deals with a number of specific discovery procedures and works to confront the reality of complex litigation discovery by anticipating areas of conflict and having relative solutions at the ready. The discovery procedures appear to balance judicial resources with efficiency and fairness concerns by outlining clear methods for handling motions and disputes. For example, under the rules of the pilot project, on service of a 12(b)(6) or 12(c) motion, “discovery of documents, electronically stored information and tangible things may proceed pursuant to Rule 34,” but all other discovery subject to the motion is stayed, pending a decision on the motion. By allowing certain discovery to proceed and only staying the relevant discovery, the momentum of the case cannot be extinguished by the filing of a dispositive motion. Neither party is harmed, and the litigation ultimately continues.

The intent of the procedures can also be seen in the method to resolve discovery disputes. In the event that any discovery dispute arises, other than one based on a privilege or work-product claim, the movant is to submit a letter to the court and opposing counsel, detailing all disputes they intend to raise at that time. The letter must also certify that the movant made a good-faith effort to resolve the issue without court action. The responding party has three days to respond, and the court “will make its best effort” to decide the matter within 14 days of receiving the responding letter. If the discovery dispute stems from a privilege or work-product assertion, the movant can initiate a similar process that permits a limited review of representative material by the court *in camera*. This review culminates in a determination, in the same 14-day time frame as the above, of whether the submitted documents must be produced.

Toward efficiency, the discovery procedures also lists a number of documents that are presumptively not to be included on a privilege log, and it provides instruction on how email threads are to be treated (only one entry per “uninterrupted dialogue”) when included in privilege logs. Further discovery-related streamlining methods used in the pilot project include specific procedures regarding requests for admission, assigning responsibility for the distribution of subpoenaed materials to all parties, the availability of a joint electronic discovery submission, a proposed order and checklist of electronic discovery issues, and the availability of an order of reference to the magistrate judge that allows a magistrate judge to resolve discovery problems when the district judge is unavailable.

Motion Procedures

The third component of the pilot project focuses on motion procedures. The court has instituted rules that appear to facilitate communication between the parties and to heighten the efficiency of motion practice in complex litigation. Pre-motion conferences are required for all motions, except motions for reconsideration, motions for a new trial, and motions in limine. Similar to the discovery procedures, the party filing the motion is to submit a letter requesting a pre-motion

conference at least seven days before the proposed conference date. Any parties opposing the motion have within three days of receipt of the letter in which to reply with a letter of their own. The filing of the letter automatically stays the time by which the motion must be made. “If the law imposes a filing deadline, the requirement of a pre-motion letter and conference will not apply, unless the Court extends the deadline for filing a motion.”

The procedure for filing rule 12(b) motions also reflect a push to facilitate communications between the parties. The pilot project rules give the court three options to consider. First, the court can elect to not require a pre-motion conference. Second, the court can order the parties to exchange letters before the motion to dismiss is filed. The letters outline the deficiencies in the complaint and should prompt the filing of an amended complaint cured of the deficiency. Last, the court can choose to hold the conference after the motion is made. At this conference, the plaintiff can oppose the motion, which will trigger the court’s determination of whether discovery will proceed during the motion’s pendency or take their only opportunity to amend the complaint relative to the issues raised in the motion. The project’s rules for motion procedures also touch on page length and requirements for the motions, the use of oral arguments, and the requirements when filing a rule 56 motion.

Final Pretrial Conference Procedures

The fourth and final area the pilot project focuses on is the procedures for the final pretrial conference. The rules outline the steps that, together, the court and the parties will take from the completion of fact discovery to the final pretrial conference. Throughout the process, the pilot project keeps the parties working together in lockstep toward trial, or another form of resolution, through its regime of scheduling and disclosure, which helps to anticipate, forecast, and solve substantive, procedural, and evidentiary issues that traditionally surface at this phase of the litigation. The project keeps the parties moving forward by constantly revising and refining the issues and logistics of the remaining litigation via a series of steps briefly discussed below.

Within 14 days of the end of fact discovery, the parties must file a joint preliminary trial report. This report is to contain substantive information, such as the basis for subject-matter jurisdiction and any bases to dispute that jurisdiction, a list of claims and defenses to be tried and those initially asserted but now not to be tried, identification of law supporting each claim or defense, and any choice-of-law disputes. The report must also contain scheduling and logistic information including the contact information of the trial team members, an indication of lead trial counsel, a time estimate for trial, and whether it is to be a jury or bench trial.

Next, the rules require a case-management conference to be held for the purpose of discussing the joint preliminary trial report and “to finalize the schedule for the remainder of the litigation” that is intended to ultimately lead to the filing of a joint final trial report. Lead trial counsel are required to attend this conference. Further, if any party intends to file a motion for summary judgment, the parties should be prepared to discuss the substance of that motion. At the case-management conference, the court will set a firm trial date and create a schedule for, among other things, the disclosure and discovery of experts and summary judgment briefing. Moreover,



the court “shall encourage (and, in appropriate cases, may order) the parties to participate” in settlement talks or mediation by a date of the court’s choosing.

The parties next file a joint final trial report on a date set at the case-management conference. This report represents a more refined version of the joint preliminary trial report born out of the case-management conference and should assist in streamlining the remainder of the litigation. The report “shall” include the issues disposed of by any summary-judgment ruling, how settlement/mediation discussions impact the trial, a list of trial witnesses for each party, the method and order of the testimony, and the process by which witnesses not yet deposed will be presented for deposition. The report “shall” also include a list of exhibits expected to be offered along with any specific objections, while objections omitted from the list are to be waived. Recommendations on the number of jurors and other matters that would aid in trial efficiency such as bifurcation or issue sequencing should be included in the report as well.

Scheduling is another important component of the joint final trial report, as is demonstrated by its requirement that it include party recommendations as to the length of the trial and a schedule defining when the parties will exchange deposition designations and demonstratives, counter-designations, objections to designations and demonstratives, discussion of the objections, and notification to the court of remaining designation and demonstrative disputes.

A number of filings must accompany the joint final trial report. For bench trials, each party must submit trial memorandums. Motions in limine, juror questionnaires, voir dire questions and case description, and pre-opening statement jury instructions are among the filings that must be made at this time.

After the joint final trial report is filed, the final step in the pilot program takes place when the court holds the final pretrial conference. During this last conference governed by the project’s rules, the court further refines the scope of the remaining litigation by dispensing with ripe issues before the commencement of the trial. At this conference, the court determines the trial length and establishes the division of trial time between parties, rules on jury selection and the jury questionnaire, rules on disputes identified in the joint final trial report, rules on outstanding motions in limine; and informs the parties of substantive pre-opening instructions it will give to the jury, and informs counsel of the schedule for proposed final jury instruction submission.

Over the next year and a half, observers interested in complex litigation from both the bar and the bench are sure to follow how this pilot project influences case management in the Southern District of New York. While, at this moment, the effectiveness of this pilot program remains to be seen, there is no doubt that the Southern District is taking a step in the right direction by implementing the active steps contained in this project to exert control over the unwieldy case-management issues present in today’s complex litigation.

Keywords: litigation, mass torts, case management, New York, complex litigation

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NEWS & DEVELOPMENTS

Summary Judgment Granted in *Pamidronate* MDL

On January 30, 2012, the U.S. District Court for the Eastern District of New York granted summary judgment in favor of Sandoz, Inc.; APP Pharmaceuticals, Inc.; Ben Venue Laboratories, Inc.; Teva Parenteral Medicines, Inc.; and Hospira, Inc. with respect to all remaining plaintiffs in the generic pamidronate multidistrict litigation (MDL). [*In re Pamidronate Products Liab. Litig.*](#), No.1:09-MD-2120 (KAM), slip op. (E.D.N.Y. Jan. 30, 2012). Judge Kiyoo Matsumoto found that all of the plaintiffs' claims were preempted by federal law under the Supreme Court's recent decision in *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

The *Pamidronate* MDL was formed in December 2009 to address claims that the drug, the generic form of the bisphosphonate cancer treatment Aredia, causes osteonecrosis of the jaw. The MDL included claims by as many as 134 plaintiffs, who had sued some or all of the four manufacturers of generic pamidronate. The defendants had moved to dismiss the claims of the majority of plaintiffs based on their failure to identify which generic pamidronate product they had allegedly taken. Following the Supreme Court's ruling in *Mensing*, the court stayed further briefing and consideration of the pending product-identification motions to consider the impact of generic preemption. A number of plaintiffs agreed to voluntarily dismiss their claims with prejudice, and the defendants moved for summary judgment with respect to the remainder.

In her decision, Judge Matsumoto found that the plaintiffs' failure-to-warn claims were squarely preempted under *Mensing* and that this ruling extended to the plaintiffs' negligence and breach-of-express-warranty claims too, which are warnings-based claims. Judge Matsumoto further found the plaintiffs' design-defect claims preempted because the Supreme Court found that a generic drug's design, like its label, is subject to a "sameness" requirement with respect to the reference brand drug. Consequently, the court granted summary judgment with regard to all remaining claims.

Keywords: litigation, mass torts, multidistrict litigation, generic drugs

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Fifth Circuit Immunizes FEMA from Toxic Shelter Claims

The U.S. Court of Appeals for the Fifth Circuit recently held that the Federal Emergency Management Agency (FEMA) is immune from suits arising out of FEMA's provision of temporary shelters to victims of Hurricanes Katrina and Rita that allegedly contained dangerous levels of formaldehyde.

The appeal, *In re: Fema Trailer Formaldehyde Prods. Liab. Litig.* [PDF], Nos. 10-30921, 10-30945 (5th Cir. Jan. 23, 2012), arose from a multidistrict litigation (MDA) in the U.S. District Court for the Eastern District of Louisiana. Two groups of plaintiffs—from Alabama and Mississippi—sued FEMA under the Federal Tort Claims Act (FTCA). The plaintiffs claimed that, in the aftermath of Katrina and Rita, FEMA knowingly provided the plaintiffs with temporary shelters containing dangerous levels of formaldehyde, failed to warn the plaintiffs that these shelters were unsafe, and ignored complaints of formaldehyde emissions in the shelters to avoid litigation exposure.

Following several rounds of dispositive motions and denial of class certification, the district court dismissed the plaintiffs' FTCA claims against FEMA for lack of subject-matter jurisdiction. On appeal, the Fifth Circuit affirmed, holding:

- **No Jurisdiction to Sue the Government Without Consent.** “The United States must consent to be sued, and that consent is a prerequisite to federal jurisdiction.” *In re FEMA*, slip op. at 7.
- **Explicit Statutory Waiver of Immunity Required.** “A plaintiff may only sue the United States if a federal statute explicitly provides for a waiver of sovereign immunity.” *Id.*
- **Government Liability Cannot Exceed Private Liability.** The FTCA waiver of sovereign immunity, 28 U.S.C. § 2674, “provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.” *Id.* at 7.
- **No Jurisdiction Unless Private Party Would Be Liable under State Law.** The FTCA jurisdictional grant, 28 U.S.C. § 1346, vests federal jurisdiction in suits against the government only where “a private person . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred”—a reference “exclusively to state law.” *Id.* at 7–8. “Therefore, if a private person under ‘like circumstances’ would be shielded from liability pursuant to a state statute, lower courts must decline to exercise subject-matter jurisdiction.” *Id.* at 10.
- **Alabama and Mississippi Law Bar Good-Samaritan Liability.** By statute, both Mississippi and Alabama exculpate private actors from tort liability who “(1) voluntarily, (2) without compensation, (3) [allow their] property or premises to be used as shelter during or in recovery from a natural disaster.” *Id.* at 11.
- **The Shelters Were Free and FEMA Had No Obligation to Provide Them.** FEMA was “under no contractual or legal obligation” to provide the shelters to victims and “did not receive compensation from the disaster victims from letting them use” the shelters. *Id.* at 12.
- **As a Result, the Claims Are Barred.** Because FEMA would be immune as a private actor under the Mississippi and Alabama statutes, it is immune from suit under the FTCA. Dismissal affirmed. *Id.* at 11–13.



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