REMARKS
ACI COMPLEX LITIGATION CONFERENCE
"Reflections on the Panel's Work"
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I am now halfway through my seven year term as Chair of the Judicial Panel on Multidistrict Litigation. To lead the Panel at this time gives me a unique opportunity to observe some of the fascinating changes occurring in American courts regarding complex litigation. The opportunity to speak to you gives me an occasion to reflect upon those changes and the Panel's response to them.

I.
Increased Filings

The Panel's work is always changing, partly because society and the nature of disputes within it are ever changing. Not surprisingly, during the past two years, we have seen an increase in dockets concerning the financial industry. However, one objectively visible change is constant, so to speak: the ever increasing number of MDL actions.

During the 1990's, the Panel annually considered a steady 40-50 motions to centralize. Between 2003 and 2006, that number increased to over 70 motions annually. In 2007 and 2008, that number reached almost 100. In 2009, over 120 motions for centralization were filed. The numbers were down in 2010, but we anticipate a continued high number of filings in the years ahead.

The total number of ongoing MDL dockets has grown as well. At the conclusion of the 2000 fiscal year, only 166 MDL dockets were open; currently, 294 MDL dockets are open. Excluding the asbestos MDL cases, MDL cases now comprise about 15% of all cases in the entire federal civil docket.

Most of our dockets are not mega-cases. Only nine MDL dockets encompass more than one thousand cases. On the other hand, about 137 MDL dockets involve ten or less actions. Most of our dockets fall somewhere between these extremes, and eighty-five percent of all pending dockets involve less than 100 actions.

Regardless of how one slices and dices the numbers, the increasing number of dockets is consequential to the Panel and the American judicial system. The growth of multidistrict cases has created its own imperative. The Panel's work plays an increasingly important role in the distribution and reduction of the judicial workload. Can you imagine the workload consequences to our judiciary were we unable to avail ourselves of the Section 1407 mechanism for centralization?

II.
Reasons for Increased Filings

Several factors have contributed to our increased numbers. None of what follows will be particularly new information.

In the last ten to fifteen years, changing views and case law, as well as changes to the Federal Rules of Civil Procedure, and Rule 23 in particular, have coalesced to limit the certification of class actions in federal court, notably multi-state class actions. Indeed, the present edition of the Manual for Complex Litigation states that "mass tort personal injury cases are rarely appropriate for class certification for trial." In general, federal courts have begun to require far more rigorous analysis of class certification elements. Consequently, class action litigants began to shift these determinations, whenever possible, to state courts.

Partly in response, Congress passed the Class Action Fairness Act in 2005. As a result of CAFA, class action suits with national economic implications and involving numerous plaintiffs and defendants from multiple states became more easily removable to federal court. That, in turn, increased the number of actions potentially subject to Section 1407 centralization.

Litigation tactics are nothing if not dynamic. The Plaintiffs' bar in particular is constantly inventive, devising new ways to achieve substantial recoveries for their clients and to support their own business models. They have become increasingly sophisticated and specialized in aggregating the claims of multiple clients across state lines using the MDL process. These highly-skilled and well-financed attorneys are likely responsible for some of the increase in new motions for Section 1407 centralization.

As a consequence, both the Plaintiffs' and the Defense bar now tend to view the MDL process as advantageous, but for somewhat different reasons. Defense counsel continue to benefit from the MDL process because it (1) places litigation under the firm guidance of an experienced judge, (2) permits a centralized and more coordinated defense strategy, (3) reduces litigation costs, (4) reduces the risk of multiple bites of the apple by plaintiffs, and (5) increases opportunities for favorable global settlements.

Plaintiffs' attorneys value some of these same benefits from their own perspective. Additionally, they benefit because the MDL process is an avenue to aggregate claims without the difficulty of meeting increasingly strict class action requirements. This generates greater risk for their adversaries, particularly with relatively weaker cases. As important, the MDL process can create opportunities to successfully control and lead lucrative national litigation. Thus, Plaintiffs' attorneys have become increasingly specialized in the MDL process as an integral part of their varying legal and professional strategies.

To some degree the Panel is the victim, so to speak, of our own success. Regardless of the parties' tactical and strategic viewpoints regarding MDL litigation, one benefit is undeniable:

Section 1407 centralization creates huge savings and efficiencies of scale for attorneys in litigating national cases. When they find themselves again involved in duplicative litigation, they are more likely to seek MDL centralization, because of their past positive experience.

To a great extent, the Panel is agnostic concerning many of these developments. We prefer to keep our attention focused upon our statutory objectives.

III.
The Panel's Response

These changes in MDL litigation have suggested that we take a look at our own practices to meet some new challenges.

A.

It is of paramount importance to make our processes more efficient, so that the MDL process itself is not an impediment to justice. To that end, we have made changes in our rules and operating procedures which significantly shortened the time between (1) filing a motion for centralization and its consideration; and (2) our decisions and the commencement of proceedings in the transferee court. Each of these is vital if MDL litigation is to move cases forward, rather than simply provide an opportunity for delayed justice.

The Panel is a national court. We could not operate effectively in isolation. Over the last several years, the Panel has devoted considerable attention to developing an electronic case management and filing (CM/ECF) system. This finally came to fruition just two months ago and over 800 attorneys have registered. Electronic transfer of case files has already reduced the delay inherent in actually transferring files to a transferee judge. CM/ECF gives the Panel new ways to manage its docket and its records. Of course, it allows attorneys much better access to MDL dockets and quicker notice of Panel actions.

The increase in MDL filings also impacts the judges who preside over centralized dockets. MDL litigation once involved a narrow set of particular cases typically handled by only the most senior judges. We now have a much larger docket involving a broader range of types of cases. This means that judges with a much broader range of experience now preside over MDLs. They need more and different kinds of assistance to handle these cases. We have undertaken a number of initiatives to do this.

B.

Over the past year, the Panel has turned an analytic eye towards our past decision making and the work of our appointed transferee judges. To do that, we have solicited opinions from two groups most affected by the Panel's decisions – the transferee judges and the lawyers who

both appear before the Panel and practice before those transferee judges. The results have been instructive and beneficial for all concerned.

We did not want to stir up a hornet's nest. But we did want to know how attorneys viewed our practices and procedures as well as those of our transferee judges. To do so, we called upon Francis McGovern, an esteemed law professor at the Duke Law School. We asked him to interview attorneys who are involved in all aspects of the MDL process and report to us anonymously. Professor McGovern has already presented the Panel with some results. The feedback from attorneys was overwhelmingly positive. Overall, practicing attorneys find that the MDL process eases the burdens of multi-party and multi-jurisdictional litigation. Attorneys do say that they want judges who will take a strong and decisive role in managing these difficult cases. They want judges who will move cases on multiple tracks toward resolution. For the most part, transferee judges do exactly that.

There are some widely different viewpoints among attorneys as to the way the Panel conducts oral argument: some think the process is not even necessary in certain cases; others want more time to argue. We will always seek ways to improve attorney input as to our decisions. However, the Panel finds oral argument extremely helpful in its decision-making. For us, that is the bottom line.

We have learned that some view the Panel's decision-making process as lacking transparency and believe that our process is somewhat of a "black box." In other words, they cannot always predict how the Panel will rule. However, the Panel has long been transparent about the factors it uses to make its decisions; I have even written a law journal article about them. It is important to understand that the Panel employs a balancing test to weigh these interwoven criteria. The balancing itself is not subject to mathematical precision. The particular circumstances of each litigation always dictate the result. The interplay of diverse factors in each litigation is such that we must make our decisions on a case-by-case basis. Often, we are happily confronted with several reasonable choices. We exercise our discretion in choosing one district over another.

At the same time, some of the unstated reasons that a party may want a particular MDL location, such as the favorable law of a particular circuit or the appointment of a particular attorney as lead counsel, are absolutely not part of our consideration. Parties should never count upon centralization to achieve those objectives.

Some attorneys have said that MDL proceedings sometimes become "black holes" in which active cases are forced to idle for too long. The Panel has worked with the Federal Judicial Center to analyze long-standing dockets. Most MDLs are resolved expeditiously. Of the 301 MDLs created from1990 through 1999, only seven, or just over two percent, are still open. We have learned that, for the most part, there are legitimate reasons for the continuation of these dockets. But we will continue to watch current MDLs to pinpoint when their proceedings are no

longer warranted or when the continued transfer of tag-along actions no longer promotes the interests of justice and efficiency.

C.

We asked several Panel members to personally call current and former transferee judges to discuss their MDL cases and learn about techniques and strategies that transferee judges have found helpful in managing them. These conversations will help us to design programs to give transferee judges better tools to manage the difficult circumstances they will face in presiding over these dockets.

Our jobs as Panel members are comparatively easy. Once we order centralization, our job is mostly done. It is the transferee judge who then must guide the litigation and its multiple parties and claims through the pretrial phase – an often complicated and demanding task. Some attorneys suggested that the Panel should do more to prepare transferee judges for those difficulties and should do even more to monitor their work. The Panel invests an enormous amount of discretion and trust in its transferee judges. We witness and, quite frankly, admire on a regular basis the tremendous experience, ability, ingenuity and enthusiasm that transferee judges bring to their task. The accolades they have received are well-deserved. Always a key factor in our decision-making process is identifying judges who possess these qualities and are willing to bring them to the task of handling these complex cases. The Panel tries to provide as much guidance and practical assistance as is feasible, while being mindful of the limits of the Panel's governing statute.

Both Professor McGovern and our own transferee judges identified similar characteristics of a well-managed MDL. Each found that a firm judicial hand, prompt organization and regular contact with attorneys are absolutely essential. The Panel knows that it is easier said than done to actually exercise firm control over skilled attorneys possessing often contradictory agendas. The Panel has already begun developing additional ways to better prepare new transferee judges for these challenges.

We have communicated a series of best management practices for transferee judges and court clerks. These guides emphasize a firm management hand and promptness in deciding motions. Transferee judges have told us that these guides, developed in partnership with the Federal Judicial Center, are a valuable resource. We have identified veteran transferee judges who can mentor newer transferee judges and provide guidance. We have created a database of generally applicable orders in past and ongoing MDLs. We also have enhanced our annual transferee judge conference. Particularly enlightening this year were presentations by Professor McGovern and Judge David Hansen about lessons learned and suggestions from their bar and bench interviews.

IV.
A Look to the Future

The Panel's work does not occur in a vacuum and the nature of litigation in America is changing. The Panel itself may be partially responsible for and is certainly responding to these changes. We know that our decisions can have a very real effect on our federal civil docket. In all the Panel's efforts, our greatest asset is the membership itself. I am privileged to serve with a remarkable group of six other judges. Most of us were practicing lawyers for a considerable time before assuming the bench. In fact, collectively, we bring roughly 130 years of private or government practice and 120 years of judging to our roles on the Panel. This fund of experience is vital to our work.

In our discussions with transferee judges, we have been interested in learning how they define a successful MDL. It used to be well-understood that most MDLs settle. Only eleven percent of recent MDL cases are resolved by remand to the transferor courts. However, we have encouraged MDL judges to focus upon and not lose sight of their statutory responsibilities, such as coordinating discovery efforts, ruling on dispositive motions, and getting bellwether cases ready for trial in the transferee court or, after remand, in the transferor court. We have begun to highlight to transferee judges the availability of the remand option when pretrial proceedings are completed.

Another question foremost in our minds is whether there comes a point in time when an MDL outlives its statutory usefulness? Is there a point when inclusion of new tag-along actions will be counterproductive to the goals of centralization? Certainly, there are situations in which a tag-along action would hinder the efficient progress of an MDL and would not benefit the individual case. On the other hand, often new cases benefit from the experience and prior rulings of the transferee judge.

The economics of complex litigation are quite different from that of an individual case and are growing more so. Some have expressed concerns about the consequences of this increase in multidistrict litigation: fewer cases tried to verdict; more global rather than individual settlements. Are these consequences outweighed by the increased efficiencies that Section 1407 centralization provides? There are no easy answers, but it is important to keep the questions in mind.

The growing number of MDLs suggests that the overwhelming majority of those who have participated in the MDL process have found it to be the most favorable way to resolve the most difficult multidistrict legal problems. We will continue to ask ourselves whether centralization promotes justice and efficiency within each group of cases before us. We will continue to mine our past decisions and results of multidistrict cases for clues about how we can make our future decisions better and the work of our transferee judges more productive for all.