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CENTRALIZATION

MULTIDISTRICT LITIGATION

A review of recent product liability cases suggests consent to centralized proceedings, such as federal multidistrict litigation, is not always the best approach for defendants, attorneys Lori C. McGroder and Iain L. Kennedy say. The authors discuss when avoiding centralization may be advantageous and offer arguments and strategies for defeating centralization.

When Coordination Isn't Key: Why and How to Oppose MDL Centralization

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Very little in the world of multidistrict product liability litigation could be described as non-contentious; however, there has been one rare point of agreement between plaintiff and defense counsel.

Defendants, when faced with a motion to centralize disparate product liability or marketing actions in an MDL, have normally agreed to support centralization, or at least not oppose it—and sometimes have even moved for an MDL themselves. In fact, in 65 percent of actions in which transfer was granted since January 2007, all defendants either actively supported or did not oppose centralization.

In weighing the risks and rewards of an MDL, defendants have often favored the potential benefits of centralization, including efficiencies and reduced costs associated with centralized pretrial discovery, the advantage of consistency in rulings, and the ability to eliminate illegitimate claims through dispositive motions.

Consent to centralization, however, is not *always* the best approach. Increasingly, defendants are reversing strategy, recognizing that opposing centralization can present a number of benefits to achieving a quick, successful resolution.

This new reality is illustrated by three recent case studies involving marketing claims over the alleged arsenic content in wine and product liability claims regarding Eli Lilly's Cymbalta and Qualitest Pharmaceuticals' birth control products. In each of these cases, successful opposition to centralization was a key driver to

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litigation containment. Given this new landscape and the lessons learned from these cases, defendants should consider the benefits of avoiding centralized proceedings and strategic ways to obtain that result.

When Is Avoiding Centralization Advantageous?

There are a number of benefits derived from successfully opposing centralization in the right circumstances. Primary among them, avoiding centralization can prevent the surge of cases (many of which may not be independently meritorious) that often follows creation of an MDL. The rush to file cases can be significant. For instance, on December 22, 2014, the JPML formed *In re Xarelto (Rivaroxaban) Products Liability Litigation*. At the time, only about 50 actions had been filed. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402 (J.P.M.L. 2014). Less than a year after creation of the MDL, plaintiffs' counsel reported that more than 2,300 cases were filed. Tr. of Status Conference, *In re Xarelto Prods. Liab. Litig.*, No. 14-md-2592 at 5 (E.D. La. Nov. 20, 2015). As this litigation is still early, it remains to be seen how many of these cases are arguably spurious.

Additionally, avoiding an MDL may exert downward pressure on total settlement figures for a global resolution. Beyond just having fewer total cases to resolve, fragmented cases may allow a defendant to better leverage its relative size and resources to reach early resolution on favorable terms. Avoiding centralization may speed early resolution of the most advantageous cases for the defendant, allowing it to create a favorable framework for future settlements.

Having cases spread throughout multiple jurisdictions may also offer a defendant the opportunity to strategically select cases to push forward. A defendant may have more control over which cases proceed through discovery first, allowing it to leverage early favorable rulings across cases.

In weighing these factors, a defendant facing a centralization bid has the opportunity to develop a strategic plan to best serve its end game—whether that be early resolution, potential for enhanced control over discovery and establishing favorable precedent, or avoidance of the onslaught of unmeritorious cases that often comes with critical mass.

Successful Arguments Opposing Centralization

Saying there is a benefit to avoiding centralization is only half the battle: a defendant must also convince the JPML why centralization will not satisfy the goal of coordination underlying 28 U.S.C § 1407. Three recent victories against centralization provide examples of arguments that work.

Last summer, a consortium of California winemakers successfully opposed centralization of four class actions alleging elevated arsenic levels in wine. *In re California Wine Inorganic Arsenic Levels*, 109 F. Supp. 3d 1262, 1363 (J.P.M.L. 2015). In denying the plaintiffs' petition, the JPML noted that the cases involved a limited number of plaintiffs' counsel who were already working together and a relatively non-complex subject matter. Moreover, all cases were in their infancy, facilitating informal coordination. Although the plaintiffs promised that a number of new actions were sure to come, the JPML was unwilling to create an MDL based on that speculative possibility, particularly given that only two new cases had been filed since the original transfer motion. In the end, the defendants' gambit in opposing centralization was a resounding success: no other federal class actions were ever filed. And, within months, each of the four class actions had been voluntarily dismissed by the plaintiffs. *See* Stipulation of Dismissal, *Lopez v. The Wine Group*, No. 2:15-cv-01131, ECF No. 82 (E.D. La. Nov. 30, 2015).

Similarly, in *In re Cymbalta (Duloxetine) Products Liability Litigation*, 65 F. Supp. 3d 1393 (J.P.M.L. 2014), the JPML denied plaintiffs' bid to centralize 25 actions filed over a two-year period. The Panel highlighted the ''widely varying procedural posture'' of the cases, with three actions having nearly completed all common discovery and approaching the discovery cutoff, while the remaining 22 cases had just been filed. Additionally, the JPML noted that there were only two plaintiffs' firms and one defense firm handling all of the cases. Given the small number of counsel, informal coordination was practicable.

A year later, plaintiffs' counsel came back to the well, filing a new request for centralization—this time noting that 41 cases had been filed. Order Denying Transfer, *In re Cymbalta (Duloxetine) Products Liability Litigation (No. II)*, No. MDL 2662, —- F. Supp. 3d —- (J.P.M.L. Oct. 9, 2015). The JPML denied the renewed bid, finding that the same factors counseled against centralization. The Panel noted that there was no need for centralized discovery when Lilly had already produced over three million pages of documents and eleven witnesses—discovery that was made available to all plaintiffs in all cases in which requests had been served. Following the JPML's rejection of plaintiffs' attempts to centralize discovery, Lilly has avoided the surge of spurious case filings that has plagued other cases that were centralized, and it has aggressively—and successfully—moved to dismiss these cases in the various trial courts (as well as prevailing at trial in three cases). *See, e.g.*, Order, *Pickaree v. Eli Lily Pharm. Co.*, No. CIV. A. H-14-3481 (S.D. Tex. Apr. 16, 2015); *see also* Order, *Hexum v. Eli Lilly & Co.*, No. 213CV02701SVWMAN (C.D. Cal. Aug. 18, 2015) (granting Eli Lilly's Motion for Judgment as a Matter of Law during trial).

Another recent JPML decision rejecting centralization is instructive. In *In re Qualitest Birth Control Products Liability Litigation*, 38 F. Supp. 3d 1388, 1389 (J.P.M.L. 2014), the Panel rejected a move to centralize actions alleging packaging errors in birth control medications that left plaintiffs without adequate contraception. At the time of its decision, the JPML noted that only two cases were currently pending, and that two others had already been resolved via early settlement. On that basis, and the fact that the cases were in different procedural postures, the JPML held there was ''scant need for coordinated or centralized pretrial proceedings in these actions.'' Further, common questions regarding design, manufacturing and packaging of the birth control products failed to predominate over individualized facts regarding each plaintiff's use and whether she became pregnant as a result. Although plaintiffs' counsel argued that 113 additional plaintiffs intended to file claims, the panel stated that it was ''disinclined to take into account the mere possibility of fu-

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ture filings into its decision calculus.'' Even then, the panel noted that centralization was not justified because the additional plaintiffs would be represented by the same counsel.

These recent wins provide an example of some of the factors the Panel may find most persuasive:

■ whether the limited number of parties and counsel involved make informal coordination practicable and preferable to formal centralization, *see, e.g., In re Chilean Nitrate Prods. Liab. Litig.*, 787 F. Supp. 2d 1347 (J.P.M.L. 2011);

■ whether individualized facts predominate, or whether common factual questions are not sufficiently complex or numerous, *see, e.g., In re Honey Prod. Mktg. & Sales Practices Litig.*, 883 F. Supp. 2d 1333 (J.P.M.L. 2012);

■ whether the procedural postures of the proposed cases are at widely varying stages, *see, e.g., In re Teamster Car Hauler Prods. Liab. Litig.*, 856 F. Supp. 2d 1343 (J.P.M.L. 2012); and

■ whether too few actions are pending to warrant centralization. *See, e.g., In re Transocean Ltd. Secs. Litig.*, 753 F. Supp. 2d 1373 (J.P.M.L. 2010).

The Panel has also considered a range of other important factors, including whether alternatives to centralization are preferable (for example, 1404 transfer, dismissal or stay under the first-to-file doctrine, or agreement to voluntarily dismiss actions in favor of one district); whether the actions involve dissimilar legal or factual issues or localized, intervening causation issues thwarting efficiencies of centralization; whether a proposed global settlement is pending or some cases require arbitration; whether all defendants uniformly oppose centralization, or whether centralizing defendant competitors in one proceeding may expose trade secrets. *See, e.g., In re Gerber Probiotic Prods. Mktg. & Sales Prac. Litig.*, 899 F. Supp. 2d 1378 (J.P.M.L. 2012) (discussing section 1404 transfer); *In re Adderall XR (Amphetamine/Dextroamphetamine) Mktg., Sales Practices & Antitrust Litig.*, 968 F. Supp. 2d 1343 (J.P.M.L. 2013) (discussing dissimilar issues and global settlement); *In re Spray Polyurethane Foam Insulation Prods. Liab. Litig.*, 949 F. Supp. 2d at 1365 (discussing risk of exposure of trade secrets).

Arguments That Have Been Unsuccessful with the JPML

Other arguments, however, have not resonated with the JPML. As discussed in *In re Xarelto*, the Panel rejected the argument that centralization would lead to a surge of cases. The court held that ''[t]he response to such concerns more properly inheres in assigning all related actions to one judge committed to disposing of spurious claims quickly.'' *In re Xarelto*, 65 F. Supp. 3d at 1402. Similarly, the Panel has consistently rejected blanket arguments that individualized facts concerning each plaintiff's case, such as medical history, dosage, and alleged injuries, will predominate over common factual issues. *See In re Cook Medical, Inc., IVC Filters Mktg., Sales Practices and Prods. Liab. Litig.*, 53 F. Supp. 3d 1379 (J.P.M.L. 2014). That said, the JPML has also made clear that when potential plaintiffs assert claims based on nonspecific injuries, in situations where the potential injury could be caused by something other than the allegedly defective product, or where not all potential plaintiffs may have actually received a defective product, the court will consider arguments that centralization is not warranted. *See In re Mirena IUS Levonorgestrel-Related Products Liab. Litig.*, 38 F. Supp. 3d 1380 (J.P.M.L. 2014); *In re Qualitest Birth Control Products Liability Litigation*, 38 F. Supp. 3d at 1389.

Strategies to Increase Your Success of Defeating Centralization

Broadly, the JPML's analysis in deciding a motion to centralize discovery is often based on objective factors outside a defendant's control. There may be some strategies a defendant can employ on the margins to improve the odds of avoiding centralization, however. Among the strategies a defendant may wish to consider:

■ First, the defendant can consider whether strategic early settlement of some of the potential member suits is possible. If there are a limited number of actions, resolving some cases before the Panel's hearing can provide strong evidence that a centralized proceeding is not necessary. Resolution of enough cases may help convince the JPML that the number of remaining cases is too few to benefit from formal centralization.

■ Second, a defendant may consider ways to demonstrate that centralized discovery is not necessary or appropriate to resolve proposed member cases. Showing that coordinated discovery across jurisdictions is already occurring and effectively addressing plaintiffs' discovery needs can demonstrate that formal coordination is unnecessary. For instance, the *Cymbalta* court focused on the defendant's extensive discovery efforts and willingness to share the discovery across jurisdictions in denying plaintiffs' centralization bid. Alternatively, if a defendant is able to produce discovery in some cases well in advance of others, the lack of similarity in procedural posture of the cases can decrease the perceived benefits of centralization.

■ Third, the defendant should be prepared to show how individual issues and facts predominate over common questions, defeating the benefits of centralization. The defendant should be able to explain how the proposed member cases involve different injuries (or no injuries at all), different exposures, stand in different shoes for proving specific causation, or involve different products, models or defects.

Conclusion

Choosing to oppose centralization is not appropriate for every potential MDL bid, but recent cases demonstrate that acquiescence is not always the right approach.

A defendant should weigh the costs and benefits of centralization at the earliest possible opportunity, and develop and execute strategies in line with those interests that will appeal to the JPML.

If opposition is the decided approach, the defendant must be ready to aggressively press its case to the JPML with facts demonstrating centralization is not practicable or warranted.