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COORDINATION

MULTIDISTRICT LITIGATION

Allowing the cases of multiple plaintiffs to be tried together simply because they are coordinated poses a substantial risk of prejudice against the defendants' due process rights, as well as practical concerns of jury confusion, say attorneys Kerry C. Fowler and Rick McKnight in this BNA Insight. The authors review the advantages of coordinated proceedings in mass actions, and offer practical recommendations for reducing accompanying risks.

Coordinated Proceedings: A Tool for Pre-Trial Efficiency, A Means of Prejudicing Defendants at Trial

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With the proliferation of mass tort litigation and "mass actions,"[1] the courts increasingly rely on tools of case aggregation to manage their dockets and prevent gridlock in the judicial system. Class actions, as well as flexible standards for party joinder and consolidation are among the traditional methods employed for achieving such aggregation. However, when cases brought by numerous personal injury plaintiffs are filed in different counties within a state, across many states, or are filed in several different federal dis-

[1] Unlike mass torts, which typically arise in the context of a single accident, like a plane crash or explosion, the term "mass action" is used to describe the increasingly popular variety of cases involving hundreds, and sometimes thousands, of plaintiffs, most of whom have absolutely no connection with one another, suing any number of common defendant(s) for injuries arising from a common business practice (e.g., insurance) or use of a common product (e.g., asbestos, tobacco, pharmaceuticals, etc.). *See* John H. Beisner, *et al.*, "*One Small Step for a County Court . . . One Giant Calamity for the National Legal System*," Center for Legal Policy at the Manhattan Institute, Civil Justice Report No. 7 (Apr. 2003) (available at *www.manhattan-institute.org/html/cjr_7.htm*).

tricts nationwide, these tools are not effective in achieving the desired result.

For example, in the product liability arena, it is more often the case that as plaintiffs' counsel become aware of injuries sustained in connection with the use of a particular product, an overwhelming number of virtually identical, copycat lawsuits are filed against the product manufacturer(s). The result is that the courts, and particularly those in the product manufacturer's home state(s), are overwhelmed by an onslaught of hundreds (and sometimes thousands) of individual cases all arising from separate and distinct incidents.

Due to the individualized nature of the alleged injuries, as well as the importance of plaintiff-specific facts relating to how the product was being used or misused, class actions are not—and should not be—an option. Moreover, because rules for party joinder and consolidation are typically limited to cases before one particular court, these procedures do not allow judges to reach across county and/or district lines to aggregate all of the cases. Accordingly, a number of jurisdictions have developed special rules for aggregating cases where multiple proceedings relating to the same subject matter are pending in different courts. A typical approach is either coordination in state court or the creation of a multidistrict litigation (MDL) in federal court.

To be sure, judicially coordinated pre-trial proceedings offer advantages, including promoting judicial efficiency, reducing the risk of inconsistent pretrial rulings across cases, and reducing costs by potentially avoiding duplicative discovery. However, while a policy in favor of case coordination may conserve judicial resources, and possibly limit the parties pre-trial costs, as the cases reach maturity and are readied for trial, other considerations must come to the fore so as to avoid the prejudice against defendants that typically occurs when cases are aggregated for trial.

With ever-increasing dockets, the courts are all too familiar with the difficult balancing act they must perform: move cases quickly and efficiently through the judicial system while still ensuring that the litigants' due process rights are not violated. This tension is particularly apparent when it comes to the coordination of cases. While the traditional procedures for case aggregation have due process safeguards built in—e.g., requiring that plaintiffs' claims must arise from the same transaction or occurrence before they can be consolidated for trial (Fed. R. Civ. P. 20(a))—the much more lax standards for coordinating cases—which generally only require a single common question of fact (*see*, e.g., 28 U.S.C. § 1407; Cal. Civ. Proc. Code § 404)—do not. As such, allowing the cases of multiple plaintiffs to be tried together simply because they are coordinated poses a substantial risk of prejudice against the defendants' due process rights, as well as practical concerns of jury confusion.

As trials approach, plaintiffs' counsel may wish to have multiple cases tried together in one consolidated action so they can focus on persuading the jurors to reach a general conclusion about the liability of the defendant and not focus on awkward individual plaintiff facts. Defense counsel typically oppose coordination because they see the process as a slippery slope leading to aggregating cases for trial.

This article argues for a more accommodating posture by defense counsel in order to achieve the potential efficiencies of pre-trial coordination, but greater caution by the judiciary; and strenuous, continuous objections by defense counsel so as to avoid slipping into unwise aggregation of cases for trial.

The Benefits of Judicial Coordination

Coordination may offer many advantages in the pretrial phase. For obvious reasons, judges tend to be heavily in favor of coordination because it reduces the overall burden on their courts and may allow the litigants to reduce the costs by conducting coordinated discovery through procedures provided in a general case management order. For example, plaintiffs' counsel with numerous individual clients can reduce their burden in responding to discovery by agreeing to produce a standard ''fact sheet'' with basic information about each plaintiff and the plaintiff's particular claims, as well as a standard set of agreed upon documents. Likewise, defendants may limit their discovery burden by agreeing to provide one fact sheet for all cases, to produce discovery documents one time for all cases, to prepare a single privilege log, and to answer one standard set of written discovery that is developed through negotiations between lead counsel for each side. Finally, the burden of depositions also can be greatly reduced, as corporate representatives and witnesses who would otherwise have to testify in each individual action can be deposed once or limited times, with agreements governing the global use of depositions and a limit on repetitive questioning.

In addition to the potential cost savings in discovery, litigants may also benefit from pretrial coordination by reducing the risk of conflicting rulings on early legal challenges and evidentiary issues. Consistent and predictable rulings with respect to how the law will be applied, and what evidence will be allowed at trial also helps to cut down on the amount of motion practice and, thus, the cost of the litigation as a whole, although litigants must always be wary of the multiplier effect in bringing a particular motion in a coordinated proceeding. A bad ruling in any one case may be frustrating, but can usually be dealt with and/or appealed. A bad ruling applicable to all cases in a coordinated proceeding can be devastating—and dramatically swing the settlement value or litigation advantage.

Disadvantages of 'Coordinated' Trials

The great risk posed by coordinated proceedings is that it enhances the likelihood that plaintiffs and/or the court will attempt to try some or all of the plaintiffs together in one mass trial. Such multi-plaintiff trials inevitably produce jury confusion and compromise the due process rights of defendants, ultimately resulting in substantial prejudice.

Plaintiffs' counsel generally prefer the consolidated approach to trials because it allows them to focus a jury on the liability of the defendant, rather than allowing the jury to consider the shortcomings of their client's individual cases, and to make individual determinations about whether each plaintiff has met his individual burden of proof. Consolidated trials also allow more plaintiffs to have their cases tried faster, thereby speeding up the timetable for their hoped for ''pay day.'' Unfortunately for defendants, the temptation to go along with this mass trial approach can be all too appealing for a

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judge who is eager to reduce the number of cases sitting on his courtroom docket.

For defendants, consolidation of multiple plaintiffs for purposes of trial creates a situation where cases that would otherwise be unsuccessful if tried alone are artificially buttressed (and therefore overvalued for settlement purposes) by the fact there are other similar cases in existence. Simply put, juries tend to believe that ''where there is smoke, there must be fire.'' And if there are multiple suits against a particular defendant or particular product, the belief is that there must be some merit to the claims. *See, e.g., Alvarado v. FedEx Corp.*, No. 3:04-cv-00098-SI (N.D. Cal. May 25, 2006) (finding that combining 10 cases for trial would result in prejudice against the defendant because ''[j]urors would be presented with a 'parade of horribles,' in which the whole may very well be greater than the sum of its parts.'').

While evidence relating to other incidents is generally excluded as too prejudicial unless there is some showing that the incidents are substantially similar, *Ault v. Int'l Harvester Co.*, 13 Cal. 3d 113, 121-22 (1974), multi-plaintiff trials in mass actions allow one jury to hear ''other incident'' evidence simply by virtue of the fact there are multiple plaintiffs involved. The defendant's due process right to have the case decided solely with regard to the particular incident at issue, and on the merits of each individual plaintiff's claims, goes out the window. *See Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) (''Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial.

There is a tremendous danger that one or two plaintiffs' unique circumstances could bias the jury against defendant generally, thus, prejudicing the defendant with respect to the other plaintiffs' claims. Contrary to plaintiffs' arguments, they are not ''prejudiced'' by having to prove defendant's liability to each plaintiff individually.''); *Bailey v. N. Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000) (''The need to focus the jury's attention on the merits of each individual plaintiff's case counsels against proceeding with these cases in one consolidated trial.'').

The prejudicial effect of the ''parade of plaintiffs'' is not merely speculative. Published research on the effects of aggregation of plaintiffs in a single trial yields the expected results: (1) defendants are more likely to be found liable as the number of plaintiffs increases, (2) when there are more than one or two plaintiffs, awards are at least two to four times larger, and (3) jurors' ability to process information is ''degraded'' as the number of plaintiffs increases. *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: the Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psychol. 909 (2001). In their research, Professors Horowitz and Bordens examined outcomes in aggregations of 1, 2, 4, 6 and 10 claimants, ''all of whom had relatively similar injuries.'' *Id.* at 909, 911. Horowitz and Bordens divided 135 ''jury-eligible adults'' among the five test groups. *Id.* These researchers summarized their findings as follows:

> The defendant was more likely to be judged as liable as the number of plaintiffs increased. Awards reached a zenith at 4 plaintiffs and then began to decrease. Increases in the number of plaintiffs who were aggregated degraded information processing. *Id.*

They observed that their findings were consistent with a 1996 study which found that ''higher information loads, defined by an increase in the number of plaintiffs in the trial, degraded jurors' ability to recall probative evidence.'' *Id.* at 910. In the current study, Horowitz, *et al.*, found that ''the number of plaintiffs who are aggregated for trial is the most important expression of information load.'' *Id.* at 911. Consistent with a Texas Supreme Court survey of reported decisions, they specifically concluded that ''when the number reaches 4, jurors have difficulty distinguishing among various plaintiffs.'' *Id.* at 916. Horowitz, *et al.*, also found:

> [G]reater numbers of plaintiffs degraded the jurors' ability to understand the expert witnesses and to correctly recognize what work task the plaintiffs performed and how they differed from other plaintiffs. *Id.* at 917.

In conclusion, these researchers found that ''[a]s numbers of plaintiffs increased, the amount of responsibility attributed to the defendant also increased significantly.'' *Id.*

Consistent with the researchers' findings, the courts have also recognized the need to hold separate trials to avoid prejudice and jury confusion. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296-97 (9th Cir. 2000) (finding the defendant would be prejudiced by having all 10 plaintiffs testify in one trial, ''[t]he district court properly considered the potential prejudice to [the defendant] created by the parade of terminated employees'' as well as the possibility for juror confusion.); *see also Cain v. Armstrong World Indus., Inc.*, 785 F. Supp. 1448, 1441 (S.D. Ala. 1992) (holding that the consolidation of 13 plaintiffs was prejudicial error, and concluding when fewer cases are consolidated, the jury is better able to consider the cases separately and return verdicts based on the facts of each case).

Indeed, *Cain et al. v. Armstrong World Industries, et al.*, 785 F. Supp. 1448 (1992), is particularly instructive because it provides the benefit of judicial hindsight based on actual trial experience. *Cain* involved a consolidated trial of 10 personal injury and three wrongful death cases arising from exposure to asbestos in the workplace. *Cain*, 785 F. Supp. at 1450. On defendants' motion for a new trial following a 15-day trial, the District Court that had tried the case observed:

> It is evident (unfortunately in hindsight) that despite all the precautionary measures taken by the Court (e.g. juror notebooks, cautionary instructions before, during and after the presentation of evidence, special interrogatory forms) the joint trial of such a large number of differing cases both confused and prejudiced the jury. This confusion and prejudice is manifest in the identical damages awarded in the non-cancer personal injury cases and in the cancer personal injury cases, the relatively short deliberation time as well as in the inflated amounts of many of the damage awards and the lack of evidence supporting some of the damages in several cases. *Id.* at 1455.

As demonstrated in *Cain*, the amount of plaintiff-specific information that must be presented to the jury in a consolidated trial is likely to overwhelm the jury. *See id.* at 1457 (''As the evidence unfolded in this case it became more and more obvious to this Court that a process had been unleashed that left the jury the impos-

sible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects.'').

No amount of jury instructions, special handbooks, special interrogatories or separate verdict forms can prevent the inevitable confusion and the resulting prejudice to the defendants. *See id*. at 1455; *see also Malcolm v. National Gypsum, Co*., 995 F.2d 346, 352 (1993) (despite ''valiant attempts'' by the district court and the lawyers ''to maintain the identity of each claim throughout the trial,'' ''the sheer breadth of the evidence made these precautions feckless in preventing jury confusion.''); *Lowe v. Norfolk & W. Ry. Co*., 463 N.E. 2d 792, 806-809 (Ill. App. 1984) (reversing consolidation of 47 cases for trial arising out of railroad accident that caused chemical spill; where operative facts relating to exposure were all different, consolidated trial spanning 142 days and intermingling evidence relating to different plaintiffs ''almost inevitably'' confused the jury by the manner in which the evidence was presented.)

Reducing Risks of Judicially Coordinated Proceedings

Despite the serious risks posed by coordination, litigants may still reap the benefits of a coordinated pretrial proceeding while minimizing the risk that the court will ultimately allow multi-plaintiff trials. The following are some practical recommendations for reducing that risk.

First, during the creation and implementation of the coordinated proceedings, it is important to articulate the individual differences among the cases, and to remind the court constantly exactly why all of these cases cannot be combined and must each be tried on their own individual merits.

It is also important to create judicial awareness about the hazards of joint trials. To this end, defendants may consider filing a limited opposition to any coordination petition, objecting to coordination for anything other than pre-trial case administration and discovery. The opposition brief provides a good opportunity to educate the judge about the inherent risks of joint trials and the individual characteristics of each case. The opposition might also request that the coordination order specify that all cases are to be remanded for purposes of trial, consistent with the procedure mandated for federal MDLs. *See* 28 U.S.C. § 1407; *Lexecon, Inc. et al. v. Milberg Weiss Bershad Hynes & Lerach, et al*., 523 U.S. 26 (1998) (upholding mandatory remand obligation under Section 1407).

No doubt, judges who are entrusted with a large coordinated proceeding will be looking for the fastest and most effective way to promote settlements. A succession of individual trials can inform all of the litigants of the strengths and weaknesses of their cases, particularly if both plaintiffs and defendants select as trial candidates cases with differing fact scenarios that together mirror the scenarios of many of the cases awaiting trial.

A succession of individual trials coupled with good faith settlement approaches can speed up the resolution of all the cases and accelerate the reduction of cases on judicial dockets. By contrast, large, multi-plaintiff trials tend to inflate artificially the value in favor of plaintiffs, thereby stalling settlement talks. When the cases are clearly overvalued, defendants balk at talking settlement at all, while plaintiffs' counsel become overconfident that they are entitled to unreasonable sums and are not willing to accept reasonable offers.

Conclusion

Coordinated proceedings for mass actions can serve litigants and courts well if the pivotal issue of separate trials is addressed forthrightly at the outset. Defendants who might otherwise be leery of coordination, may take advantage of the pre-trial benefits and cost savings these proceedings offer by properly educating the court regarding the inherent differences among the cases, as well as the dangers associated with joint trials, and thereby minimize the risk of joint trials.

At the same time, courts who are anxious to reduce their dockets and lessen the burden on their courtrooms can maximize efficiency by utilizing a coordinated approach, while avoiding costly appeals and retrials, by limiting the scope of coordination to pre-trial proceedings only. And, although plaintiffs might prefer a mass trial approach, pre-trial coordination followed by a series of separate, but representative trials, is likely to yield more accurate valuation—and therefore faster resolution—of their cases.

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