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Articles of Note

If You Build It, Plaintiffs Will Come: A Guide to Weeding out Unmeritorious Claims in Mass Coordinated Product Liability Proceedings

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We all know the story. You find yourself in a Multi-District Litigation (MDL) or state coordinated proceeding with hundreds or even thousands of plaintiffs, many of whom you suspect have no legitimate basis for their claims. Mass coordinated proceedings are like catnip for plaintiffs' attorneys. Once the proceeding is underway, plaintiffs often come out of the woodwork with dollar signs in their eyes hoping to mask their questionable cases among many in an attempt to score a big payday with minimal effort. Here are a few tips to help discourage plaintiffs from filing illegitimate lawsuits and keep your client from spending money litigating unmeritorious claims.

Personal Jurisdiction Challenges: Thanks to the Supreme Court's recent decision in *Bristol- Myers Squibb Co. v. Superior Court*, No. 16-466, 2017 WL 2621322 (S. Ct. June 19, 2017), the newest weapon in the defense attorney's arsenal is personal jurisdiction. Prior to *Bristol-Myers*, courts had stretched the notion of personal jurisdiction to the breaking point such that corporate defendants in mass tort litigation could be forced to defend themselves in any jurisdiction in the country. Plaintiffs' attorneys used this expansive concept of personal jurisdiction to concentrate litigation in plaintiff-friendly states such as California and Missouri regardless of whether the plaintiffs' claims actually had any connection to these states. Thanks to *Bristol-Myers*, plaintiffs' long reign of terror is over.

In *Bristol-Myers*, a group of plaintiffs sued Bristol-Myers Squibb (BMS) in California state court alleging that they were injured by defendant's drug Plavix. *Id*. at *4. Of the 678 plaintiffs in the California proceeding, only 86 were California residents, while the remaining 592 plaintiffs resided in 33 other states. *Id*. Like the vast majority of the plaintiffs, BMS also had no connection to California as it was a Delaware corporation with headquarters in New York and substantial operations in both New York and New Jersey. *Id*. at *3. Despite these facts, the California Supreme Court affirmed the appellate court's order denying BMS' motion to quash service of summons for the non-California residents based on lack of personal jurisdiction. *Id*. at *5. The California court relied on a "sliding scale approach" to specific jurisdiction wherein BMS' "wide-ranging" contacts with California were sufficient to support a finding of specific jurisdiction over the claims of the non-California residents even though these contacts were unrelated to plaintiffs' claims. *Id*. The Supreme Court was not amused. In a nearly unanimous decision (only Justice Sotomayor dissented), the Court criticized the California court's sliding scale test as a "loose and spurious form of general jurisdiction" that "is difficult to square with our precedents." *Id*. at *8. Rather, under the Court's settled principles, specific jurisdiction may only be invoked when there "is a connection between the forum and the specific claims at issue." *Id*. In *Bristol-Myers*, the relevant plaintiffs were not California residents, did not claim to have suffered harm in the state, and all the conduct giving rise to their claims occurred elsewhere. *Id*. at *9. Accordingly, California courts could not assert specific jurisdiction over the non-California residents' claims. *Id*.

The Supreme Court's opinion in *Bristol-Myers* marks the end of plaintiffs' unrestricted litigation tourism. Moving forward, plaintiffs must have their claims adjudicated in their home states or the states where the courts have general jurisdiction over the defendants. *Id*. at *11. The impact of the *Bristol-Myers* decision has been swift. The day the Supreme Court issued its opinion, St. Louis Circuit Judge Rex Burlison, who has presided over nearly all of the talcum powder trials to date, declared a mistrial in a case in which two non-resident plaintiffs filed suit against Johnson & Johnson and its supplier Imerys Talc America.

Lone Pine Orders: Another weapon at the defense attorney's disposal is the Lone Pine order. A Lone Pine order is a case management order that requires plaintiffs in mass coordinated litigation to provide proof of essential elements of their claims—*e.g.*, proof of injury and use. Typically, in the pharmaceutical context once a Lone Pine order is

issued, plaintiffs will have to produce (1) pharmacy records or an affidavit from a pharmacist demonstrating that the plaintiff purchased the drug and (2) a medical record or physician affidavit showing that the plaintiff was diagnosed with an injury related to the drug. *See, e.g.*, *Romo v. McKesson Corp.* (Propoxyphene MDL), No. 2:15-cv-00089, Case Management Order No. 5 (Dkt. 329), at 2-4 (E.D. Ky. Jan. 26, 2016).

Sounds great. So what's the catch? In a word: timing. While it may be tempting to move for a Lone Pine order as soon as you find yourself in a mass coordinated proceeding, it might make more sense to wait. This is because some courts are hesitant to put the show-cause burden on plaintiffs right from the get-go—*i.e.*, before any discovery has taken place. *See, e.g.*, *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 299 (M.D. Pa. 2012) (denying Lone Pine request "insofar as it seeks entry of an order that places an exclusive burden on Plaintiff to comply with a set of discovery benchmarks at the outset of the litigation").

PFS Negotiations: Another tried-and-true method to weed out cases lacking meritorious claims early on in a coordinated proceeding is by taking a hard stance during discovery negotiations and ensuring a strong Plaintiff Fact Sheet (PFS) gets implemented. While there are many aspects of a PFS that are necessary to streamline the discovery process, there are two provisions in particular that should be included in any PFS implementing Case Management Order worth its salt:

- *Proof of Use/Proof of Injury*: In addition to moving for a Lone Pine order is requiring plaintiffs to submit prima facie records or an affidavit demonstrating proof of use and proof of injury with their PFS. This is an effective way to make plaintiffs do their due diligence up front, discouraging plaintiffs from filing unmeritorious claims in the first place.

- *Deficiency Protocol*: Negotiating a strong deficiency protocol in your PFS Implementing Order can also help winnow the number of cases lacking merit in your coordinated proceeding. Be sure the order sets forth the timelines for when you can move to dismiss or move for sanctions if plaintiffs' counsel submits a PFS without attaching the requisite prima facie records, submits an incomplete PFS, or submits the PFS late.

Rule 11 Sanctions: As more and more jurists are becoming savvy to plaintiffs' counsel's modus operandi of parking unmeritorious cases in mass coordinated proceedings in hopes of getting their piece of the settlement pie without having to work up their cases, these jurists are likewise becoming more and more willing to issue Rule 11 sanctions. Judge Clay D. Land, who is presiding over the Obtape Transobturator Sling MDL in the Middle District of Georgia, did just that when he issued an order chastising plaintiffs' attorneys for filing unmeritorious cases: "[T]he Court had to waste judicial resources deciding motions in cases that should have been dismissed by plaintiff's counsel earlier—cases that probably should never have been brought in the first place. Enough is enough." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL No. 2004, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016). Indeed, moving for Rule 11 sanctions is another way for defense attorneys to cut the proverbial fat from mass coordinated proceedings and obtain dismissal—or even discourage the filing—of unmeritorious cases. And, fear not, even though Rule 11 is specific to federal court, most state courts have an analogous requirement. So whether you find yourself in an MDL or state coordinated proceeding, sanctions should be on your radar as a possible mechanism to help prevent you from having to defend against unmeritorious claims.

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