(AGENDA BOOK)

ADVISORY COMMITTEE
ON
CIVIL RULES
Philadelphia, PA
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Excerpts of the November 7, 2017, Civil Rules Committee Meeting

mispricing of settlement agreements."

A quite different proposal was submitted by John Rabiej, Director of the Center for Judicial Studies at the Duke University School of Law. This proposal aims only at the largest MDL aggregations, those consisting of 900 or more cases. At any given time, there tend to be about 20 of these proceedings. Combined, they average around 120,000 individual cases. There are real advantages in consolidated pretrial discovery proceedings. But when the time has come for bellwether trials, the proposal would split the aggregate proceeding into five groups, each to be managed by a separate judge. Separate steering committees would be appointed. The anticipated advantage is that dividing the work would increase the opportunities for individualized attention to individual cases, although the large numbers involved might dilute this advantage.

One concern that runs through these proposals is that MDL judges are "on their own." Judicial creativity creates a variety of approaches that are not cabined by the Civil Rules in the ways that apply in most litigation.

Addressing rules for MDL proceedings "would be a big undertaking. It is a complex and broad project to take on." And it is a project affected by Congressional interest, as exhibited in H.R. 985, which includes a number of proposals that parallel the proposals advanced in the submissions to the Committee.

Professor Marcus reported that Professor Andrew Bradt has worked through the history of § 1407. The history shows a tension in what the architects thought it would come to mean for mass torts. The reality today presents "hard calls. The stakes are enormous, the pressures great. Judges have provided a real service."

Judge Bates predicted that a rulemaking project would bring out "two clear camps. We will not find agreement."

The appeals proposals were the last topic approached in introducing these topics. The suggestions in the submissions to this Committee are no more than partially developed. It is clear that the proponents want opportunities to appeal from pretrial rulings on *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." It is not clear whether all such rulings could be appealed as a matter of right, or whether the idea is to invoke some measure of trial-court discretion in the manner of Civil Rule 54(b) partial final judgments. Nor is it clear what criteria might be provided to guide any discretion that might be recognized. One of the amendments of

§ 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being

suggestion. See In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (J.P.M.L 1991) (suggesting creation of "a nationwide roster of senior district or other judges available to follow actions remanded back to heavily impacted districts"). Are Committee members familiar with experience under such a "shared responsibility" regime? Would that hold promise for the concerns raised?

(8) Facilitating appellate review: Submissions have urged measures to facilitate interlocutory review. A starting point is to recognize that there already exist methods of obtaining such review. See, e.g., Rule 23(f) and 28 U.S.C. § 1292(b). None of those provides an absolute right to such review, however. It is likely that a Civil Rule could expand the circumstances for such review and, perhaps, mandate it under some circumstances. (If serious attention focuses on these issues, it will be important to involve the Appellate Rules Committee.)

Have Committee members found that the existing methods do not suffice for appropriate access to interlocutory review? Note that under § 1292(b), certification by the district judge is required but not sufficient (given court of appeals discretion not to grant review). It seems that certain rulings that in individual litigation might be regarded as "ordinary" could assume much greater importance in MDL or other multiparty litigation. How would a rule identify such orders? Could a court of appeals meaningfully discern whether a given order was of that variety? Would broadening interlocutory appellate review unduly delay MDL cases?

(9) Coordination between "parallel" federal- and state-court actions: There have been instances of highly productive cooperation and collaboration between federal- and state-court judges handling related matters. Indeed, some states (e.g., California and New Jersey) have centralization mechanisms similar to the Panel for related actions pending in their courts. Such collaboration has been around for a generation. See, e.g., Schwarzer, Weiss & Hirsch, Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689 (1992).

Have Committee members found such collaboration between state and federal judges productive? Have the Civil Rules impeded such collaboration? Would revisions to the Civil Rules provide a helpful impetus or mechanism for such activity? It may be that this is another aspect of individualized case management that cannot effectively be governed by rule. On the other hand, this might carry forward the notion of shared efforts among federal judges mentioned in (7) above.

One particular issue that might relate is the question of ruling on motions to remand to state court. These motions in individual cases may seem distant from the "central" issues of an MDL proceeding. Have Committee members found that it is difficult

part in the overall resolution of an MDL matter.

(8) Appellate review: An immediate question was whether the Appellate Rules Committee is aware we have been asked to think about this topic. The answer was that the former Reporter was aware, and that as soon as a new Reporter is appointed the new Reporter will be alerted. The Chair of the Appellate Rules Committee is also generally aware of the focus of the Civil Rules Committee.

H.R. 985 has provisions about required appellate review of "important" rulings in MDL matters. It may indeed be important to offer such review on occasion, but determining when such an occasion is presented is perplexing. One serious question is why the existing provisions of 28 U.S.C. § 1292(b) don't suffice; that statute makes the district judge the first arbiter of the importance of interlocutory review. In a sense, then, any further proposal would likely assume that the district judge should not make the call in the first instance. Perhaps an alternative would be rely on district-court discretion under a set of standards different from the ones spelled out in § 1292(b).

§ 1292(b) also gives the court of appeals discretion to decline interlocutory review even if the district judge certifies the issue. So another question might be whether to try to require the court appeals to undertake immediate review. The Supreme Court has made clear that a final judgment in any one case in an MDL proceeding is a final judgment subject to immediate review as a matter of right. Perhaps district-court certification under a new set of standards could make appeal a matter of right also.

Arguably, the desire for enhanced appellate review results in part from a general queasiness that MDL transferee judges have too much power because of the latitude they have in administering these cases.

For the present, the consensus was to retain this issue on the agenda.

(9) Coordination between "parallel" state court and federal court cases: This was introduced as having practical importance. Federal and state court judges presently confer together on occasion about shared litigation issues. Indeed, there may be concerns about such "ex parte" communication among judges without involvement of counsel. Sometimes federal- and state-court judges even sit together to address related issues in their cases. Some MDL settlements (such as VIOXX) resulted from such collaboration between federal and state court judges.

A somewhat related issue was suggested in the recent AAJ submission -- promptly addressing remand motions in the transferor court before giving effect to an MDL transfer order.