Comment

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It is undisputed that our parallel systems of justice are under siege from entrepreneurial lawyers who file multi-party claims in our respective courts. By use of the term "entrepreneurial lawyer" I do not intend to convey a negative overtone. The term implies that lawyering in the 21st century has changed itself from a venerated profession into a lucrative business. Much of this litigation transcends federal and state boundaries and is pursued simultaneously in each jurisdiction. Thus, it is not uncommon for judges to be confronted with the prospect of intra-state, inter-state, and federal litigation arising from a single occurrence, whether it be a mass tort or a commercial claim (or a Presidential election). Given that this multiplicity of litigation will continue, it has become the role of judges and lawyers to develop procedures to prevent the paralysis that could flow from an avalanche of litigation.

I would like to briefly share with you some of the methods I have used in the management and disposition of multi-district aggregated claims.[1] Whether it be through consolidation[2] or by class action, I wish to reassure

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[1] The philosophy behind multi-district litigation is to promote efficiency, eliminate redundancy, and prevent conflicting rulings during the trial stages of the litigation. Furthermore, multi-district litigation, through group-based processing, promotes incentives such as inter-case equity to those who have either widely shared tort or business claims. Interestingly, the federal district judge who conducts the pre-trial proceedings pursuant to the multi-district litigation statute has no authority to invoke a change of venue in order to assign the transferred case to himself or herself for trial. That circumstance is currently under congressional consideration in an attempt to eliminate the proscription imposed by the United States Supreme Court in Lexecon, Inc. v. Milberg Weiss, 523 U.S. 26 (1998). Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001).

[2] In the federal courts, for the most part, we rely upon the congressionally created multi-district litigation panel to consolidate cases in a single federal district. This panel is a creature of Congress, with its members appointed by the Chief Justice of the Supreme Court of the United States. These appointees are experienced members of the judiciary who have nobly earned their spurs in complex litigation. For the purpose of this presentation, the ultimate disposition of the case is irrelevant because under either scenario—limited pre-trial consolidation or class certification—the initial preparation is the same.

you that the process is evolutionary and that few judges start out with the expertise necessary to bring the litigation to a successful conclusion.[3]

For the past five years I have administered the aggregate claims contained in the matter styled *In re The Prudential Insurance Company of America Sales Practice Litigation*, a commercial litigation whose theories of recovery were grounded in the law of contracts and fraud.[4] Those types of claims are somewhat fungible, whereas mass torts that wrap themselves in the law of product liability require more individualized treatment due to the wide spectrum of injury caused by the defective product.

Because, during the *Prudential* litigation, I anticipated a large attendance of lawyers, we met in my courtroom. The conference was informal. I did not wear a robe, sit on the bench, or record the conference by means of a court reporter. I viewed this meeting as a "touchy-feely" kind of gathering where I, as well as the lawyers, could meet each other on an informal basis. It was conducted more as a learning experience, without the binding effect of a conference held on the record. Through this method, I quickly learned the identity of the key players, as well as the identity of the bomb throwers who, for their own parochial purposes, were not going to cooperate.

Regardless of the nature of the claim, an initial conference must be scheduled in all multi-district litigation matters. Approximately thirty days in advance of the initial conference, I publish an Initial Scheduling Order. In the Order, I set forth the matters I deem both necessary and important. This allows me to gain immediate control of the litigation. What is not contained in the Order is the manner in which the initial conference was held. Certain aspects of this Order are worthy of discussion. First, I inform the parties that attendance at the conference will not waive any objection to personal or subject matter jurisdiction. As noted above, this is not a formal court appearance, but an informal method of assessing the litigation.

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[3] Although the judge at time of assignment may experience some anxiety about the procedures to be employed, he or she is not alone. Two friends of the court, albeit reference manuals, provide helpful hints as to the management of complex litigation and how to accomplish cooperation between state and federal courts. The primary tool is the MANUAL FOR COMPLEX LITIGATION (THIRD), published by the Federal Judicial Center. Should a case extend beyond the federal boundaries, the MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS is an excellent resource that exemplifies the "three Cs"—cooperation, communication and collaboration—that can be achieved when state and federal judges and court staff work together.

[4] *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 106 F. Supp. 2d 721 (D.N.J. 2000) [hereinafter *In re* Prudential Litig.]; *In re* Prudential Litig., 93 F. Supp. 2d 583 (D.N.J. 2000); *In re* Prudential Litig., 177 F.R.D. 216 (D.N.J. 1997); *In re* Prudential Litig., 62 F. Supp. 450 (D.N.J. 1997); *In re* Prudential Litig., 169 F.R.D. 598 (D.N.J. 1997); *In re* Prudential Litig., 975 F. Supp. 584 (D.N.J. 1996).

Next, I expect the lawyers to be prepared to discuss procedures that will facilitate the just, speedy, and inexpensive resolution of this litigation. The lawyers are expected to prepare reports as to critical factual and legal issues. The statements that are submitted are non-binding. The lawyers must draft lists of affiliated companies and lists of all counsel associated in the litigation. Counsel are also asked to submit information relating to the recusal of judges and disqualification of counsel. Finally, each attorney submits a list of pending motions, and a list of their related cases and the current status of these cases.

The pre-trial stage affords the court an opportunity to consider which interim measures should be taken. Some of these interim motions include the admission of counsel pro hac vice, the extension of time for responsive pleadings by defendants(s), stays of discovery, preservation of records potentially relevant to the subject matter of the litigation, and restrictions on the filing of motions. Additionally, all orders of transferor courts imposing dates for pleadings or discovery are vacated.

Although multi-district litigation presents daunting procedural issues, cooperation and communication between counsel and the court is the *sine qua non* of the successful handling of aggregated claims.