Loyola University Chicago Law Journal

Volume 44
Issue 2 *2012 Winter*

Article 9

2012

Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead

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Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead

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INTRODUCTION

Complex, or aggregate, litigation arises in a variety of contexts, including class actions,[1] mass torts,[2] cases assigned for centralized

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I would like to acknowledge and thank Philip W. Danziger, Esq., for his invaluable contributions to this Essay. Mr. Danziger served as my mass tort law clerk from 2011–2012 and was assigned primary responsibility for managing the multicounty litigations and centrally managed cases over which I preside. I owe him a great deal of gratitude for all his hard work, research, proofing, and rewriting for this Essay. He graciously (and promptly) responded to my 4:30 a.m. e-mails, and his ability to read my mind and know where I am going is only overshadowed by his ability to read my handwriting. Mr. Danziger consistently exceeded my expectations—and his job description—and I wish him nothing but the best as he embarks on what will be a very successful legal career. Finally, I would like to thank Jennifer Lahm, Mr. Danziger's successor as my multicounty litigation law clerk, for assisting with the final edits of this Essay and for continuing Mr. Danziger's high quality of work.

1. Class action lawsuits are governed by Rule 23 of the Federal Rules of Civil Procedure in federal courts, and New Jersey Court Rule 4:32 in New Jersey state courts. While class actions have a long history in the federal courts, their use was greatly enhanced by the 1966 amendment of Rule 23. Before this amendment, class actions had usually involved antitrust, securities, price-fixing, and Fair Labor Standards Act cases. The use of class actions for mass torts was neither intended nor expected by the framers of amended Rule 23, who assumed that common issues of fact and law would be outweighed by differences in the circumstances of the injuries, the injuries themselves, and in state laws. *See* FED. R. CIV. P. 23(f) advisory committee's notes. Nevertheless, class actions have become an effective way of challenging systematic discrimination or company-wide misconduct. Plaintiffs in class actions can craft remedies and injunctive relief far greater in scope than in an individual case. Class actions also put others on notice of potential deceptive practices of which they may not have been aware. Moreover, the class action enables individuals to pool their resources, share litigation risks and burdens, and more easily retain counsel for small value claims. Finally, the class action mechanism provides an efficient means of resolving similar claims in one lawsuit—relieving the courts of repetitive individual litigation and providing defendants with global peace. In sum, the class action lawsuit plays an important and unique role in the civil justice system. *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN

management,[3] and multidistrict litigation ("MDL").[4] This Essay provides a brief overview of the various processes and management techniques of these complex cases[5] in the New Jersey and federal court systems.[6] This Essay also comments on the impact of the U.S. Supreme Court's recent decisions in *Wal-Mart Stores, Inc. v. Dukes*[7] and *AT&T Mobility LLC v. Concepcion*[8] on the mass tort process. Lastly, this Essay addresses case management techniques in mass tort matters and the tools available to trial judges assigned to oversee such cases.[9]

(2000) (describing the pros and cons of class action lawsuits).

2. Mass torts may be distinguished from other personal injury claims in that mass torts involve large numbers of claims that are associated with a single product, property damage, or location. Despite the number of claimants, there must be a commonality of factual and legal issues, as well as a value interdependence between the different claims. *See* N.J. CT. R. 4:38-1(a). *See also infra* note 5 and accompanying text (noting that the term "mass tort" refers to complex litigation generally). Under Rule 4:38A (effective September 4, 2012), the Supreme Court removed the "mass tort" term altogether. Now, these cases will be referred to as "multicounty litigation," or MCL. The term "mass tort," however, continues to be used nationwide and can be used interchangeably with "multicounty litigation."

3. Precipitating the recent amendment to Rule 4:38A was a shift in the nomenclature used to describe a centralized litigation, from "mass tort" to "centralized management." This change in description can be seen as a minor benefit to defendants, as the term "mass tort" has proved somewhat inertial in driving up the number of cases filed following centralization under Rule 4:38A. There may also be public relations concerns for large, corporate defendants. The practical impact of the different terminology, however, remains the same. Once consolidated, designated litigations operate as a sort of "mini-MDL," drawing plaintiffs from New Jersey and other states (or even other countries) who seek to take advantage of New Jersey rules and procedure.

4. Multidistrict litigation arises when civil litigation involving one or more common questions of fact is pending in different districts and such actions are transferred to any district for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407(a) (2006). Such transfers are made by the Judicial Panel on Multidistrict Litigation ("JPML"). A judge (or judges) to whom such actions are assigned by the JPML conduct these coordinated or consolidated pretrial proceedings. The judge to whom such actions are assigned, the members of the JPML, and other circuit and district judges designated by the JPML may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings. *Id.* § 1407(b).

5. Unless otherwise specified, hereinafter "mass tort" shall be used to refer to complex litigation, generally. This includes cases that have been assigned mass tort status or have been designated for centralized management, as well as those cases that have been consolidated before a single judge for pretrial and trial management to ensure consistent results but without the attendant formalities of being a "mass tort."

6. Although this Essay is not intended to be a comprehensive analysis of the mass tort designation process, it should be mentioned that many states have established formal procedures for applying for mass tort status. *See, e.g.*, CAL. CIV. PROC. CODE § 3.400 (West 2007); TEX. R. CIV. P. 42; PA. CT. C.P.R. 1701-1717; N.Y C.P.L.R. 202.69 (CONSOL. 2012). For further commentary on various states' procedures, see DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION FOURTH (2011 ed.).

7. 131 S. Ct. 2541 (2011).

8. 131 S. Ct. 1740 (2011).

9. More specifically, this Essay is a summary of the comments made at the recent Loyola

At the beginning of September 2012, there were five active matters designated as a "mass tort" or assigned for centralized management in Bergen County, New Jersey: *In re NuvaRing Litigation*;[10] *In re YAZ/Yasmin/Ocella Litigation*;[11] *In re Prudential Life Insurance Co. of America Tort Litigation*;[12] *In re Alleged Environmental Contamination of Pompton Lakes*;[13] and *In re DePuy ASR Hip Implant Litigation*.[14] Combined with Atlantic and Middlesex Counties,[15] there are currently twenty such cases pending in New Jersey.[16] In contrast, there are more than 58,000 cases pending that have been consolidated as part of MDLs in the federal court system.[17]

There are, among others, two notable distinctions between the handling of complex litigation in the federal and New Jersey court systems. The first deals with the designation process itself; i.e., how the parties (or court) apply for mass tort status, the factors a court must

University Chicago Law Journal Symposium, *The Future of Class Actions and Its Alternatives*.

10. Docket No. BER-L-3081-09 (N.J. Sup. Ct. Law Div.) (alleging that the plaintiffs suffered damages from use of the NuvaRing® contraceptive ring, including death, tissue and organ breakdown that occasionally necessitated amputation, heart attacks, and ischemic strokes). At of the beginning of September 2012, there had been four cases filed in New Jersey alleging that women died due to deep vein thrombosis (DVT) resulting from their use of NuvaRing®: *Estate of Bozicev v. Organon USA*, BER-L-2869-09; *Estate of Ramsey v. Organan USA*, BER-L-2879-09; *Cox v. Organon USA*, BER-L-2877-09; and *Huff v. Organan USA*, BER-L-7670-09.

11. Docket No. BER-L-3572-10 (N.J. Sup. Ct. Law Div.) (alleging damages arising from the use of the oral contraceptives Yaz, Yasmin, and the generic drug Ocella).

12. Docket No. BER-L-2251-10 (N.J. Sup. Ct. Law Div.) (alleging commercial bribery and other torts against Prudential Life Insurance Company of America brought by former employees).

13. Docket No. BER-L-10803-10 (N.J. Sup. Ct. Law Div.) (seeking damages for environmental contamination allegedly caused by the defendant corporations brought by current and former residents of Pompton Lakes, Passaic County, New Jersey).

14. Docket No. BER-L-3971-11 (N.J. Sup. Ct. Law Div.) (alleging damages and injuries caused by ASRT hip implants where, after five years, thirteen percent of patients who received the ASRT hip implants needed to have a second hip replacement surgery (revision surgery)).

15. Hon. Carol E. Higbee, P.J.Cv., sits in Atlantic County, and Hon. Jessica R. Mayer, J.S.C., sits in Middlesex County.

16. Currently, there are twelve cases designated as a "mass tort," and eight cases designated for "centralized management." Many, but not all, of these cases involve pharmaceuticals or medical devices. For further information on all prior and pending mass torts in New Jersey, see *Multicounty Litigation Center*, NEW JERSEY COURTS, http://www.judiciary.state.nj.us/mass-tort/index.htm (last visited Oct. 20, 2012). Prior cases in Bergen County include: *In re Diet Drug & Fen Phen Litigations*, Docket Nos. BER-L-13379-04 and BER-L-7589-05 (N.J. Sup. Ct. Law Div.); *In re Long Branch Manufactured Gas Plant Litigation*, Docket No. BER-L-8839-04 (N.J. Sup. Ct. Law Div.); *In re Depo-Provera Litigation*, Docket No. BER-L-4889-07 (N.J. Sup. Ct. Law Div.); *In re Alleged Mahwah Toxic Dump Site*, Docket No. BER-L-489-08 (N.J. Sup. Ct. Law Div.); *In re Zelnorm Litigation*, Docket No. BER-L-7590-08 (N.J. Sup. Ct. Law Div.); and *In re Digitek Litigation*, Docket No. BER-L-917-09 (N.J. Sup. Ct. Law Div.).

17. There are frequently matters pending in the MDL and several state courts. This raises a myriad of issues, most notably the level of cooperation by and among federal and state courts. *See infra* Part I (discussing the standard for mandamus review).

consider when evaluating such an application, and the manner in which a court's determination may be appealed. The second addresses the manner in which these cases are managed and tried in each respective court system.

I. MASS TORT DESIGNATION AND APPEALS PROCESSES IN FEDERAL AND STATE COURTS

Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1407 govern the class action and mass tort application processes in the federal courts, respectively. Rule 23(b) provides for three types of class actions, each with its own specific requirements.[18] All class action suits, however, must satisfy the following prerequisites: (1) "the class is so numerous that joinder of all members is impracticable" (numerosity); (2) "questions of law or fact common to the class" (commonality); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (typicality); and (4) "the representative parties will fairly and adequately protect the interests of the class" (representativeness).[19]

However, in the wake of *Dukes*, judges, practitioners, and academics alike can agree that class certification has become increasingly difficult for plaintiffs to obtain.[20] Plaintiffs must show "significant proof" to

18. *See* FED. R. CIV. P. 23(b)(1)–(3) (listing the three circumstances under which a class action may be maintained).

19. FED. R. CIV. P. 23(a)(1)–(4).

20. In *Dukes*, the Court held that, under Rule 23, a class action case alleging intentional employment discrimination could not proceed when individual supervisors at different stores made the allegedly discriminatory decisions. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556–57 (2011). The majority opinion in *Dukes* increased the difficulty of proving a common question of law or fact under Rule 23(a) by requiring "significant proof" to which the trial court must extend a "rigorous analysis." *Id.* at 2551–53. Although the Court did not provide much detail as to what a "significant proof" standard should entail, by rejecting plaintiffs' proof, the Court seemed to indicate that the standard essentially requires a determination of the merits at the time of class certification, and demands a higher level of specificity and expert and scientific evidence than previously required. *Id. See also* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982) (finding that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"). In so doing, the Court suggested that the *Daubert* standard for introduction of scientific proof at trial would also apply at the class certification stage. *Dukes*, 131 S. Ct. at 2551–53. *See also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 584–89 (requiring the trial judge, faced with a proffer of expert scientific testimony, to make a "preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue," and providing a non-exhaustive list of factors to be considered, including whether the theory or technique in question can be tested, whether it has been subjected to peer review and publication, and whether it has attracted widespread acceptance within a relevant scientific community). The standard essentially requires the proponent to demonstrate that an expert's conclusions are the product of sound scientific methodology, and not

satisfy the commonality requirement for class certification.[21] Now, the burden is placed on an individual district judge to conduct a rigorous analysis, at times overlapping with the merits of the plaintiffs' underlying claims, to determine whether to grant class certification.[22] This has become a difficult hurdle for plaintiffs—judges are applying *Dukes*'s "significant proof" and "rigorous analysis" standards to deny class certification at the district court level.[23]

Dukes results in an interesting dichotomy. Aggrieved litigants may attempt to utilize the MDL process more readily to circumvent the rigorous analysis a district court judge must undertake following the *Dukes* decision. Unlike the "significant proof" standard required for class certification, the MDL process, which is governed by 28 U.S.C. § 1407, is overseen by the Judicial Panel on Multidistrict Litigation ("JPML").[24] The JPML is not required to undertake a rigorous analysis. Instead, the panel relies on its experience—to which a reviewing court affords extreme deference—to determine the appropriateness of consolidating or transferring a case to a federal MDL.[25] Unlike the requirements for class certification, 28 U.S.C. § 1407 provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[26] The

merely based on a scientific technique that has been "generally accepted," as was previously required. *Id. Accord* FED. R. EVID. 702 (adopting the *Daubert* standard for expert testimony admissibility).

21. *Dukes*, 131 S. Ct. at 2551–53. Similarly, in *AT&T Mobility LLC v. Concepcion*, the Court held that, because there is no inherent right to try a case as a class action, arbitration clauses that waived the right to prosecute a class action were not per se unconscionable, thus making it easier for defendants to opt out of class-wide arbitration clauses in contracts. 131 S. Ct. 1740, 1750–52 (2011). *See also* NAACP v. Foulke Mgmt. Corp., 24 A.3d 777, 791 (N.J. Super. Ct. App. Div. 2011) (discussing the rationale of the Court in *Concepcion* which allowed defendants to more easily opt out of contractual class-wide arbitration clauses).

22. *Dukes*, 131 S. Ct. at 2551 (Rule 23 "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied' . . . .") (citations omitted) (quoting *Falcon*, 457 U.S. at 160).

23. *See, e.g.*, Cruz v. Dollar Tree Stores, Inc., 2011 U.S. Dist. LEXIS 73938, at *16–17 (N.D. Cal. July 7, 2011) (decertifying a class in light of *Dukes*'s "forceful affirmation of a class action plaintiff's obligation to produce common proof of class-wide liability in order to justify class certification"). *See also* Daniel Leonard, Jocelyn Larkin, Paul Smith & Hon. Emmet Sullivan, ABA Section of Litigation 2012, *Putting* Wal-Mart Stores v. Dukes *to the Test: Can This Class Be Certified?* (2012) (listing Post-*Dukes* Rule 23 certification cases and their outcomes as of February 2012).

24. The JPML consists of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. 28 U.S.C. § 1407(d) (2006). The concurrence of four members is necessary for any action by the panel. *Id.*

25. *See, e.g.*, FedEx Ground Package Sys., Inc., v. U.S. JPML, 662 F.3d 887, 890 (7th Cir. 2011).

26. 28 U.S.C. § 1407. Each action so transferred is remanded by the panel at or before the

JPML's determination as to whether to transfer actions is based on the convenience of parties and witnesses, and is made in an effort to promote just and efficient conduct of such actions. It seems clear that rigorous analysis standard for class certification under Rule 23 is much higher than the largely discretionary standard employed by the JPML.

The processes for appealing a court's class certification order or transfer for consolidation or coordinated proceedings varies greatly by jurisdiction and type of relief sought. Rule 23(f), which governs an appeal of a district court's decision of whether to grant class certification,[27] was adopted to expand the discretion of Courts of Appeals to grant interlocutory review of class certification rulings. The Rule was intended to be broad in scope and vested "[t]he courts of appeals [with] develop[ing] standards for granting review that reflects the changing areas of uncertainty in class litigation."[28]

Relying on the Advisory Committee's Notes, the Seventh Circuit first held that interlocutory review is appropriate when the denial of class certification sounds the "death knell" for plaintiffs whose "claim is too small to justify the expense of litigation," or defendants facing claims where "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial."[29] The Seventh Circuit further held that interlocutory review is proper when an appeal involves a "fundamental issue" relating to class actions.[30] Both the First and the Second Circuits have largely adopted the Seventh Circuit's approach.[31] The Third, Ninth, Tenth, and D.C. Circuits have expanded upon the approach, adopting "manifest error" in the class certification ruling as an independent and adequate ground for interlocutory review thereof.[32] The Fourth, Sixth, and Eleventh Circuits

conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

27. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed . . . within 14 days . . . . An appeal does not stay proceedings in the district court unless . . . so order[ed].").

28. FED. R. CIV. P. 23(f) advisory committee's note (1998) (noting the Courts of Appeals have "unfettered discretion . . . akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari").

29. Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834–35 (7th Cir. 1999).

30. *Id.* at 835.

31. Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001) (adopting the Seventh Circuit approach without modification); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000) (concluding that Rule 23(f) review is appropriate in cases involving a fundamental issue only if it is "important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case").

32. *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001); Chamberlain v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005); Vallario v. Vandehey,

have adopted a "five factor sliding scale" test in deciding whether to grant review.[33] Under this test, the courts of appeal uses a "sliding scale" to determine whether the district court erred in deciding to grant or deny review.[34] Rule 23(f) is still evolving, varies by circuit, and has resulted in a relatively small number of interlocutory appeals.[35]

With respect to the appeal of the JPML's determinations, on the other hand, 28 U.S.C. § 1407 makes clear that "[t]here shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."[36] The statute further requires that appeals of JPML orders be brought in the circuit court with jurisdiction over the case or transferee court.[37] This is a high standard for relief. To qualify for mandamus relief, a party must show that it has no other means to obtain relief.[38] Litigants often satisfy this first requirement because "[n]o proceedings for review of any order of the [JPML] may be permitted except by extraordinary writ."[39] Next, a litigant must show that his or her right to the writ is clear and indisputable and a reviewing court must be satisfied that the writ is appropriate under the circumstances.[40] Moreover, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy."[41] The Seventh Circuit has been observed that

> a transferee district court knows well the issues and dynamics of [a] particular case. The JPML brings to bear decades of experience with more than a thousand MDL proceedings, which have included some of

554 F.3d 1259, 1263–64 (10th Cir. 2009); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002).

33. *See* Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144–46 (4th Cir. 2001); *In re* Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002); Prado-Steiman v. Bush, 221 F.3d 1266, 1274–76 (11th Cir. 2000).

34. *See Prado-Steiman*, 221 F.3d at 1275 n.10 ("The stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review."); *Lienhart*, 225 F.3d at 145–46; *In re Delta Air Lines*, 310 F.3d at 960. These courts also consider the status of the litigation in the district court, particularly the progress of discovery.

35. *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 (2008) (providing circuit-by-circuit data on the number of petitions filed and the percentage of those petitions granted).

36. 28 U.S.C. § 1407 (2006).

37. *See, e.g.*, Order, *In re* Shannon McConnell (6th Cir. Apr. 6, 2012) (No. 11-4265) (denying appeal of the JPML's transfer of products liability case from the United States District Court for the Southern District of Florida to the United States District Court for the Northern District of Ohio for consolidated pretrial proceedings in *In re* DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., 753 F. Supp. 2d 1378 (J.P.M.L. 2010)).

38. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380 (2004).

39. 28 U.S.C. § 1407.

40. *Cheney*, 542 U.S. at 381.

41. *Id.* at 380 (internal quotation marks and ellipses omitted).

> the most complex and challenging cases in the history of the federal courts. The choice between . . . methods of case management is an archetype for a discretionary judgment, and the transferee court and the JPML are in the best position to make that judgment. In terms of the standards for issuing writs of mandamus, it would be rare for one party to have a "clear and indisputable right" to one method over the other.[42]

In general, a reviewing court will defer to the JPML's exercise of its discretion, which gives rise to the imprimatur of reasonableness as the panel's decisions are essentially presumed valid and reasonable.[43] This deference presents a difficult hurdle for appellants seeking to challenge transfer or consolidation.[44] It seems likely, then, that there will be a trend toward mass torts and MDLs (or centrally managed litigations) as opposed to class actions, which have become increasingly difficult to obtain.[45]

In New Jersey, on the other hand, the multicounty litigation (MCL)

42. FedEx Ground Package Sys., Inc. v. U.S. JPML, 662 F.3d 887, 891 (7th Cir. 2011).

43. *See, e.g.*, *id.* ("The choice between . . . methods of case management is an archetype for a discretionary judgment, and the transferee court and the JPML are in the best position to make that judgment."). Because "the fact-specific nature of MDL litigation call[s] for leaving such case-management decisions to the sound discretion of the transferee court and the JPML," *id.*, litigants challenging the JPML's exercise of discretion rarely meet the standard for mandamus relief.

44. *See* Order, *In re* Shannon McConnell (6th Cir. Apr. 6, 2012) (No. 11-4265) (denying party's appeal of JPML's transfer of products liability actions).

45. Whether there is class certification, mass tort litigation is complex litigation in which the judge must define problems and actively shape the litigation. Indeed, in 2002, the Judicial Conference changed class action rules to give the judge greater ability to shape class actions, including more influence over the selection of lawyers to represent the class and greater control over lawyers' fees. *See* Letter from David F. Levi, Advisory Comm. on the Fed. Rules of Civil Procedure, to Honorable Anthony J. Scirica, Standing Comm. on Rules of Practice and Procedure (May 20, 2002) (describing amendments); Linda Greenhouse, *Judges Back Rule Changes for Handling Class Actions*, N.Y. TIMES, Sept. 25, 2002, at A18. There may be hundreds of thousands of plaintiffs, multiple defendants, and numerous lawyers to be responsible during discovery (or at least to back up the magistrate judge). Third, fourth, and fifth parties such as insurance companies and governments may be involved.

The judge and/or magistrate judge must decide hundreds of procedural and evidentiary motions. The judge must decide whether to certify a class, determine subclasses, and decide how to deal with future mass tort claimants. He must grapple with complex issues of jurisdiction, choice of law, preemption, statutes of limitations, and burdens of proof. He must attempt to understand and try to help the jurors understand scientific evidence and separate "good science" from "junk science," coordinate with state (or federal) judges, appoint settlement (and special) masters, decide whether a settlement is fair, determine proper attorneys' fees, and hold "fairness hearings." JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 319 (2011). *See also* Joseph M. Price & Ellen S. Rosenberg, *The Silicone Gel Breast Implant Controversy: The Rise of Expert Panels and the Fall of Junk Science*, 93 J. ROYAL SOC'Y MED. 31, 33 (2000) (advocating for "a vigorous enforcement of the *Daubert* standards and the requirements of sound science by the courts" through the use of expert science panels).

application and designation process is governed by Rule 4:38A[46] of the Rules Governing Civil Practice in the Superior Court, Tax Court, and Surrogate's Courts.[47] The Rule provides:

> The Supreme Court may designate a case or category of cases as a mass tort to receive centralized management in accordance with criteria and procedures promulgated by the administrative Director of the Courts upon approval by the Court. Promulgation of the criteria and procedures will include posting in the Mass Tort Information Center on the Judiciary's Internet website (www.judiciary.state.nj.us).[48]

The guidelines issued in conjunction with Rule 4:38A set forth a procedure for requesting mass tort designation.[49] The process permits an attorney involved in the case (most often plaintiffs' attorneys) or the assignment judge of any vicinage to apply to the New Jersey Supreme Court to have a group of factually and legally similar cases classified as a mass tort and assigned a designated judge for centralized management. Upon receipt of such an application, the Administrative Office of the Courts ("AOC") publishes a notice about the case to all parties involved, to the bar in legal newspapers, and on the Judiciary's website. Following publication, the AOC accepts comments and objections to the application for a defined time period before deciding whether to grant or deny the application.

In reviewing an application for mass tort designation or centralized

46. All subsequent textual references to New Jersey "Rules" are to the Rules Governing Civil Practice in the Superior Court, Tax Court, and Surrogate's Courts.

47. Prior to 2003, there had been much comment and discussion surrounding how courts in New Jersey should handle mass tort claims. *See* Michael Dore, *Reforming the New Jersey Supreme Court's Procedures for Consolidating Mass Tort Litigation: A Proposal for Disclosing the Rules of the Game*, 55 RUTGERS L. REV. 591 (2002) (criticizing the New Jersey Supreme Court for lack of transparency and predictability in consolidation proceedings). Mass tort coordination efforts began with the Supreme Court's consolidation of all Johns-Manville asbestos matters for case management by Hon. John E. Keefe in Middlesex County. *Mass Tort Advisory Committee Report to the New Jersey Supreme Court*, 154 N.J. L.J. 528, 528 (Nov. 9, 1998). Following the asbestos consolidation order, the Supreme Court centralized other significant litigations in Middlesex County, but failed to disclose the procedures that had been used to decide the coordinated treatment of these cases. The successful handling of these matters led to a proposal of a blue ribbon committee for the formation of a single mass tort court in Middlesex County. *Id.* Although the Mass Tort Advisory Report was widely praised, the Supreme Court rejected its proposals. *Supreme Court of New Jersey Administrative Determinations Report of the Mass Tort Advisory Committee*, 157 N.J. L.J. 696, 696 (Aug. 16, 1999). This prompted the Court, in October 2003, to formally promulgate Rule 4:38A to provide for the centralized management of mass torts in New Jersey. Michael Dore, *The New Jersey Mass Tort Designation Process: Who Decides What Kind of Cases Go Where?*, N.J. LAW., Aug. 2011, at 12.

48. N.J. CT. R. 4:38A.

49. *See* N.J. COURTS, MULTICOUNTY LITIGATION GUIDELINES, DIRECTIVE #08-12, *available at* http://www.judiciary.state.nj.us/notices/2012/n120809b.pdf (discussing the procedure for requesting mass tort designation pursuant to Rule 4:38A).

management, the court must consider whether: (1) the case involves a large numbers of parties; (2) the case involves numerous claims with common, recurrent issues of law and fact that are related to a consumer product, mass disaster, or environmental or toxic tort; (3) the parties to the litigation are geographically disbursed; (4) there is a high degree of commonality among the plaintiffs' injuries or damages; and (5) there is a "value interdependence" between different claims (i.e., the strength or weakness of the causation and liability aspects of the case are often "dependent upon the success or failure of similar lawsuits in other jurisdictions").[50]

II. MASS TORT CASE MANAGEMENT PROCESS IN FEDERAL AND STATE COURTS

A. Case Management Conference and Order

Once the AOC determines a case is appropriate for mass tort status or centralized management, the New Jersey Supreme Court issues an order memorializing the same. The mass tort judge assigned to preside over the case will then set up the initial Case Management Conference ("CMC") and issue an initial Case Management Order ("CMO").

An important distinction between federal MDLs and New Jersey MCLs is the court in which those cases are actually tried. In the federal system, the MDL court must remand the case to its original jurisdiction following the completion of pretrial proceedings.[51] In New Jersey,

50. *See id.* There are, of course, other factors to be considered, including, but not limited to:

> [The] degree of remoteness between the court and actual decision-makers in the litigation[;] . . . whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party; whether centralized management is fair and convenient to the parties, witnesses and counsel; whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion; whether coordinated discovery would be advantageous; whether the cases require specialized expertise and case processing as provided by the dedicated multicounty litigation judge and staff; whether centralization would result in the efficient utilization of judicial resources[;] . . . [and] whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge.

Id.

Independent of these guidelines, in July 2005, the New Jersey Judiciary published a Mass Tort Resource Book ("Resource Book") to address issues that arise in mass tort litigation from the case's designation through resolution. NEW JERSEY JUDICIARY, NEW JERSEY MASS TORT (NON-ASBESTOS) RESOURCE BOOK (3d ed. 2007), *available at* http://www.judiciary.state.nj.us/mass-tort/MassTortSOP_NonAsbestosNovember2007WebVersion.pdf. The Resource Book explains to practitioners how mass tort coordination decisions are made, how these cases are administered, and the process the Court will use to send these cases to one of the three mass tort venues in the State. *See id.* at 2–5.

51. FED. R. P. J.P.M.L. 7.6.

MCL cases are tried in the county in which those cases have been transferred or consolidated.[52] As a result, for the state trial judge, venue rules are superseded by the court's consolidation order. Therefore, a litigant will have her pretrial managed and tried by the same judge and trial before a jury from a county that would not otherwise have proper venue pursuant to Rule 4:3-2 or 4:3-3.[53]

Once a case has been designated a mass tort or assigned for centralized management, a trial or managing judge will issue a comprehensive CMO.[54] This initial order sets forth the "ground rules" for the litigation, including the court's expectations and requirements of the parties and their legal counsel.[55] Furthermore, the initial CMO provides a framework for the litigation. Future CMOs may be divided into subparts; e.g., "compliance with prior orders," "case management," and "substantive motions." As the litigation progresses, subsequent CMOs detail the flow of the litigation. The initial order will also schedule the first CMC. At that conference, liaison counsel may be selected. Liaison counsel is similar to a steering committee and serves as a filter/representative for all counsel when addressing the court.

As these complex cases often remain pending in other courts for some time prior to the transfer or consolidation order, it is beneficial for the trial or managing judge to keep in frequent contact with counsel,

52. To illustrate by example: Suppose a New Jersey plaintiff files a case in Morris County, New Jersey, and that case is later assigned to Atlantic County for centralized management. The case will be tried in Atlantic County. However, if the same plaintiff files her claim in the Federal District Court for New Jersey, and that case is consolidated under a federal MDL in the Sixth Circuit, the case would be managed by the MDL judge for pretrial proceedings, but would be remanded to the District of New Jersey for trial. There are, however, techniques to overcome this requirement.

53. N.J. CT. R. 4:3-2(a) (providing that venue "shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant . . ."). *See also* N.J. CT. R. 4:3-3(a) (noting that "a change of venue may be ordered by the Assignment Judge or the designee of the Assignment Judge of the county in which venue is laid . . . (1) if the venue is not laid in accordance with R. 4:3-2; or (2) if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid; or (3) for the convenience of the parties and witnesses in the interest of justice"). Thus, when a group of similar cases become consolidated as part of a multicounty litigation, it may lead to a trial in a county that does not provide the ideal jury pool for individual plaintiffs or defendants.

54. *See, e.g.*, Initial Order for Case Management, *In re* Yaz, Yasmin, Ocella Litigation (N.J. Super. Ct. Law Div. 2010) (No. 287), *available at* http://www.judiciary.state.nj.us/mass-tort/yaz/yaz_init_cmo.pdf. Given the unique factual and legal issues presented, judges can be creative when crafting orders and have much discretion and flexibility in their management of these cases. Frequently, they are in uncharted waters and there is little or no precedent when confronted with issues.

55. In the initial CMO, or any subsequent CMO, a court may require the use of a particular plaintiff/defendant fact sheet or short form complaint/answer to enable a judge to quickly review a particular plaintiff's or defendant's underlying cause of action and/or defenses.

either through regularly held (often monthly) in-person CMCs, telephonic status conferences, or e-mail status updates. This practice allows a mass tort trial judge to keep his or her finger on the pulse of the litigation, which, in turn, will help to avoid voluminous motion practice and permit an expeditious flow of the litigation.[56]

B. Case Management Techniques

There are a number of case management techniques that a mass tort judge might employ at various stages of the litigation with the goal of streamlining the process for the parties and the court. Among these tools are *Lone Pine* orders, *Stempler* interviews, appointment of special masters, use of bellwether trials, and state and federal judge cooperation.

Lone Pine orders refer generically to a case management order that requires plaintiffs in potentially large or complex cases to define their alleged injuries and/or damages and demonstrate at the outset some minimal level of evidentiary support for key components of their claims, usually causation of damages.[57] The traditional rationale for such orders is that they seek to ensure that completely unsupported claims will not consume the judge's or litigants' resources.[58] Thus, *Lone Pine* orders typically require plaintiffs to provide case-specific expert reports establishing a basis for their claims—i.e., that their injuries were caused by the defendant's conduct—and the scientific basis for the experts' opinions.[59] Although *Lone Pine* orders are relatively rare in New Jersey mass tort jurisprudence, they have been

56. Of course, there are a myriad of complex substantive and procedural motions that are filed in mass tort litigations, including jurisdictional and preemption arguments, *Daubert*/*Kemp* motions (as to expert testimony and underlying science), and privilege. Because of the unique factual and legal issues involved in mass torts and MDLs, judges are afforded great latitude and deference in the handling of such matters. This includes the use of creative case management and scheduling orders that otherwise may not be sanctioned. For example, a judge may require counsel to seek and receive permission of the Court prior to filing any substantive motions.

57. Lore v. Lone Pine Corp., No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

58. Baker v. Chevron USA, Inc., No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007) ("The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants.").

59. The critical point to remember with *Lone Pine* orders is that whatever perceived burdens they place on the plaintiffs must be weighed against the burdens protracted litigation will impose on the court system and the defendant. They do not, as plaintiffs often argue, unfairly require the plaintiffs to prove their case before proceeding with the lawsuit. They merely require plaintiffs to define their claims clearly and to demonstrate that there is some competent evidentiary support to justify proceeding with time consuming, burdensome, and complex litigation. MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.1–11.33 (2004).

successfully employed in complex cases in many other states.[60]

Stempler interviews are informal *ex parte* conferences with a non-party treating physician, on notice to the plaintiff-patient.[61] It is essentially "cheap" discovery (as opposed to a deposition on the record). When a plaintiff unreasonably withholds an authorization for the interview of a non-party treating physician, production of such authorization "can be compelled . . . by motion."[62] In *Stempler v. Speidel*, the New Jersey Supreme Court set forth the following conditions for defense counsel's *ex parte* contact with a physician when the Court orders such contact in response to a motion to compel: (1) provide the treating physician with a description of the anticipated scope of the interview; (2) communicate with "unmistakable clarity" that the physician's participation in the *ex parte* interview is voluntary; and (3) provide plaintiff's counsel with reasonable notice of the time and place of the proposed interview.[63]

As issues arise, usually at the monthly CMCs, the court will order counsel to "meet and confer" about the issues. Of course, it is expected that counsel would discuss issues with each other prior to seeking court intervention. Remarkably, however, it is often not until they are ordered to engage each other that the parties resolve (or substantially resolve) these issues amongst themselves. Perhaps a reason for that success is, as disputed issues are discussed at CMCs, counsel can get a feeling as to how a judge may rule on the disputed issue(s) that may temper their positions with opposing counsel. Thus, the meet and confer session may be more successful than it would have been without the court's "musings."

The special master's role in complex litigation is to supervise those falling under the order of the court to ensure that court orders are followed, and to report to the judge on the activities of the entity being supervised. Often, but not exclusively, these roles arise in MDL cases, class actions, or other complex or multiparty litigation. Special masters

60. *See, e.g.*, M. Bernadette Welch, *Propriety and Application of* Lone Pine *Orders Used to Expedite Claims and Increase Judicial Efficiency in Mass Tort Litigation*, 57 A.L.R. 6th 383, 392 (2010) ("In recent years, both federal and state courts have begun using *Lone Pine* orders during the prediscovery phase in cases involving mass tort claims as a means of streamlining case management and promoting efficient case resolution. *Lone Pine* orders generally require plaintiffs to identify their injuries with specificity and produce some evidence of causation, enabling courts to focus their attention on scientific and technical issues at the beginning of a case instead of having to wait for the actual trial.").

61. Stempler v. Speidel, 495 A.2d 857 (N.J. 1985). *See also In re* Pelvic Mesh/Gynecare Litig., 43 A.3d 1211, 1220–21 (N.J. Super. App. Div. 2012) (discussing the considerations and holding of the *Stempler* court).

62. *Stempler*, 495 A.2d at 864.

63. *Id.*

take on several types of roles, including: settlement master; discovery master; coordinating master; trial master; expert advisor; technology master; claims administrator; receiver; criminal case master; conference judge; and appellate master.[64] Each of these special masters serves a discrete function and aids the court, in particular, with discovery disputes and settlements. Rule 53 of the Federal Rules of Civil procedure governs the appointment of masters in federal courts.[65] In New Jersey, the state court rules require the approval by the Chief Justice of the Supreme Court to appoint masters in mass torts.[66]

As discovery draws to a close, bellwether trials become another important case management tool often used in mass tort and MDL cases.[67] The court schedules the selection of bellwether trials, which are essentially trials to indicate future trends in a specific litigation. The trial selection process varies.[68] Some courts choose a random sample of cases to try to a jury, others require counsel to submit a list of cases to choose from, while others leave the selection of trial cases to counsel. The judge may then bifurcate the cases into liability and damages phases, or perhaps even trifurcate them into liability, causation, and damages phases. The parties try each bellwether case before a jury that renders a verdict in that particular case. Finally, the results of the bellwether trials are extrapolated to the remaining plaintiffs. The underlying principle of such an extrapolation is that the bellwether plaintiffs are *typical* of the rest of the plaintiff group such that the results of the bellwether trials represent the *likely outcome* of their cases.[69] This information is intended to help facilitate settlement by providing counsel insight as to the true value of the claims involved. There are times, however, that a bellwether trial will not help advance

64. *See* ACADEMY OF COURT-APPOINTED MASTERS, APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS (2d ed. 2009) (describing the various types of special masters and their use in complex litigations).

65. FED. R. CIV. P. 53 (outlining the appointment process, scope of authority, and compensation of special masters in federal courts).

66. N.J. CT. R. 4:41. For a discussion of the role of special masters in a non-mass tort setting, see Zehl v. Elizabeth Bd. of Educ., 43 A.3d 1188, 1193–96 (N.J. Super. Ct. App. Div. 2012).

67. *See* Perez v. Wyeth Labs. Inc., 734 A.2d 1245, 1248 n.2 (N.J. Super. Ct. 1999) (describing the history of bellwether trials and their use in the mass tort context).

68. Frequently, the court will have a spreadsheet comparing and grouping plaintiffs by various categories—for example, injuries claimed and location of damage. This allows a quick and easy search for commonality and is a tool utilized for the selection of bellwether trials.

69. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 581 (2007) (citing Richard O. Faulk, Robert E. Meadows & Kevin L. Colbert, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 791–92 (1998)). *See* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 556 (2012) (discussing equality under the law as a due process element grounded in the notion of "like cases ought to be treated alike").

settlement. For example, if the parties and counsel are in the midst of successful settlement discussions, a bellwether trial that results in a verdict outside the range of settlement—i.e., an outlier—may empower a party to go forth with the litigation and cause negotiations to break down.

Lastly, although not a case management technique per se, state and federal court judges must seek to cooperate with one another where there are related cases pending in federal MDLs and state courts.[70] As mass torts in New Jersey often have related matters pending in federal courts (in the form of MDLs or individual plaintiffs who have removed their case to federal court), one of the most important functions for a mass tort judge in state court is coordinating with federal courts. It is imperative for judges in state and federal courts to keep in close contact and stay abreast of developments in their respective cases.[71] This mutual relationship can be accomplished through formal procedures (e.g., CMCs), informal status updates from liaison counsel, or from federal judges themselves. Doing so helps ensure consistent results across the inventory of cases, avoids duplicative litigation, and allows for more efficient handling of matters in all court systems.

CONCLUSION

Since 2003, following the New Jersey Supreme Court's promulgation of Rule 4:38A, New Jersey's mass tort designation process has become more transparent, allowing for more orderly and predictable handling of these cases in state courts. However, following the U.S. Supreme Court's decisions in *Dukes* and *Concepcion*, there has been much speculation and discussion about the future of, and alternatives to, class

70. *See* NEW JERSEY MASS TORT (NON-ASBESTOS) RESOURCE BOOK, *supra* note 50 (advising that, at the outset of the litigation, the mass tort judge should craft a litigation plan, taking into consideration the nature of the litigation, the number of similar cases outside the court's jurisdiction, and whether a multidistrict case is pending in the federal courts). *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 13.1–13.21 (2009) (endorsing the use of coordinated state-federal proceedings wherever possible).

71. *See, e.g.*, Case Management Order No. 28 at 2, *In re* Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Prods. Liab. Litig. (E.D. Ill. Feb. 28, 2011) (MDL No. 2100 3:09-md-02100-DRH-PMF) (adopting deposition protocol to be used in all MDL and state court cases; coordinating with state court judges to enter identical deposition protocol orders in California, New Jersey, and Pennsylvania; and specifically noting that "[d]isputes relating to depositions shall be resolved jointly by the Courts, wherever possible"); *In re* DePuy ASR™ Hip Implants, No. BER-L-3971-11, slip op. at 3–5 (N.J. Super. Ct. Oct. 18, 2011) (adopting joint state-MDL document production protocol). *But see In re* NuvaRing Litig., Docket No. BER-L-3081-09 (N.J. Sup. Ct. Law Div.) (issuing an order and decision on October 22, 2012, denying defendants' request to keep certain document under seal, following the MDL's order on September 5, 2012, granting in part defendants' motion for same; the MDL has since unsealed the documents at issue, consistent with the MCL order).

actions and complex litigation.[72] Similar discussions have arisen following the New Jersey Appellate Division decision in *NAACP v. Foulke Management*.[73]

With the recently tightened class action certification standards imposed on plaintiffs by the Supreme Court, and defendants' ability to opt out of class-wide arbitration and litigation clauses, jurists are likely to see a greater number of alternatives to traditional class action lawsuits, in the form of MDL/mass tort applications, motions for consolidation pursuant to Rule 4:38, or the consolidation of a small number of related cases within the same jurisdiction before a single judge.[74] No matter the form, however, aggregate and complex litigation will always remain an important procedural device in civil litigation.

72. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. LAW & PUB. POL'Y 73, 97 (2011) ("The practical effect of these rulings is to protect corporations from class actions in both the employment and consumer contexts."); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 52 (2011) (opining that "*Dukes* has redefined the class certification requirements for Title VII cases in ways that jeopardize potentially meritorious challenges to systematic employment discrimination" and noting that "it is clear that *Dukes* has tipped the balance in favor of powerful employers over everyday workers"); Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-*Dukes*?*, 2011 BYU L. REV. 1259, 1291 (advocating for greater clarity of the "significant proof" standard and for its application "to other types of cases outside the employment discrimination context that, like *Dukes*, involve complex claims and a diverse class").

73. 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011). In *Foulke*, the Appellate Division upheld the trial court's specific ruling that the class action waiver provisions in the contract documents should not be invalidated on public policy grounds, a conclusion that is consistent with the U.S. Supreme Court's decision in *Concepcion*.

74. *See, e.g.*, Hoffman v. Asseenontv.com, Inc., 962 A.2d 532 (N.J. Super. Ct. App. Div. 2009); Hoffman v. Hampshire Labs, Inc., 963 A.2d 849 (N.J. Super. Ct. App. Div. 2009) (having filed 71 class action lawsuits in Bergen County over an 18-month period, the plaintiff alleged a violation of the Consumer Fraud Act; these lawsuits were never formally consolidated, however, but were assigned to one judge for pre-trial case management by directive of the Assignment Judge). For further information on the *Hoffman* cases, see Henry Gottlieb, Charles Toutant & Michael Booth, Hoffman *Unchained*, N.J. L.J. (Jan. 30, 2009); Charles Toutant, *Frequent Flier's Claim of False Advertising on Internet Dismissed*, N.J. L.J. (Jan. 12, 2009).