



Where to file a mass-tort case

Choosing between state and federal court must take into account multiple factors – if you indeed have a choice

By BRIAN PERKINS

According to the most recent data published by the Administrative Office of the U.S. Courts, over one-third of the civil cases pending in federal court are multidistrict litigations. This number was just 16 percent in 2002. And, if you don't include the tens of thousands of prisoner and Social Security cases in that total (cases that typically require little time of Article III judges), actions in multidistrict litigations make up over 45 percent of the civil case load in federal court. Similar increasing numbers are found in California.

These figures come as a surprise to most litigators; especially to those who have never handled a mass-tort case. The steady increase in mass-tort claims is linked to many factors including the increasing ability for victims to access information and connect with qualified attorneys on the internet.

For the plaintiff's attorney, this rise in awareness makes it almost inevitable that you will be contacted by a client with a viable mass-tort claim. If you choose to take on the claim yourself, one of the most important decisions to make is where to file the case. Even if you choose to refer the claim to another attorney, you must also consider where that attorney will be filing. The success of the claim may depend on it.

In most mass-tort cases there are consolidated litigations pending in both federal court and state court. And, in most cases, your client's claim may be properly filed in either forum. The forum that is best for your client's claim is not always clear. Therefore, every practitioner must first take the time to analyze the claim and make an informed decision with your client about where to file.

Types of coordinated proceedings

In California, mass-tort cases that involve common questions of fact or law are often formally consolidated in a Judicial Council Coordinated Proceeding (JCCP) so that pre-trial discovery, motions, and the first "bellwether" trials are in front of a single judge. The purpose of a JCCP is to promote judicial efficiency and economy by providing for the unified management of both the pretrial and trial phases of the coordinated cases.

Like a JCCP, a Federal Multidistrict Litigation (MDL) is also supervised by a judicial panel whose function is to decide whether to coordinate, and then to administer the proceedings until the litigation is complete. The purpose of an MDL is also the same as a JCCP.

You may have other state court choices as well. Oftentimes a litigation will involve a consolidated JCCP, an MDL, and one or more additional coordinated litigations in other states.

Always keep in mind that unlike other consolidated litigations, JCCPs and MDLs are unique in that each individual plaintiff preserves the right to have his or her case treated individually and evaluated on its own merits.

Bristol-Myers Squibb and personal jurisdiction

Before you consider anything else you must first determine what jurisdictions are available. If your client is not a California resident, the decision on where to file must begin with an analysis of personal jurisdiction. California may be the best venue for your client's claim but only if jurisdiction is proper. The U.S. Supreme Court has taken a hard look at personal jurisdiction and California has been at the center of it all.

In 2014, the U.S. Supreme Court issued a ruling that severely limits a plaintiff's ability to assert general jurisdiction over a corporation. In *Daimler AG v. Bauman* (2014) 143 S.Ct. 746, the Supreme Court held that a corporation is only subject to general jurisdiction where it is "at home." This limits general jurisdiction to the state of incorporation and/or principal place of business. In effect, a non-California resident can no longer file a claim in California against an out-of-state corporation under a general-jurisdiction theory that the corporation's contacts with California availed itself of jurisdiction.

Daimler has been interpreted inconsistently across the country, so the true impact of the case is still unknown. What is clear is there are many ways to circumvent the limitations of *Daimler*. Plaintiffs have successfully defeated *Daimler* jurisdictional defenses by proving that a defendant consented to jurisdiction. (See e.g., *New York Bailen v. Air and Liquid System Co.*, 2014 WL 3885949 (N.Y. Sup. Aug. 5, 2014.) Plaintiffs have also successfully argued that defendants had forfeited or waived their defense by actively defending the case on its merits. (See e.g., *Bazor v. Abex Corp.*, C.A. No PC-10-3965 (R.I. Super. May 2, 2016); *Am. Intl'l Ins. Co. v. Robert Seuffer GMBH & Co., KG*, 468 Mass. 109 (Mass. 2014); *German Am. Financial Advisors & Trust Co., v. Rigsby*, No. 15-1612, 623 F. App'x 806, 2015 WL 5579751 (7th Cir. Sept. 23, 2015).)

The most successful answer to the *Daimler* limitation on general jurisdiction is to prove specific jurisdiction over a corporation. This requires plaintiffs to show that the claim arises out of, or relates to, defendant's contacts with the forum. (*Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County* (2017)



137 S.Ct 1773.) In *Bristol-Myers Squibb Co. (BMS)*, the California Supreme Court had seemingly paved a wide and simple path around *Daimler* when it held that because Bristol-Myers had substantial contacts with California, it was appropriate for California courts to exercise specific jurisdiction over non-California residents' claims, even though there was no relation between the claims of the nonresidents and the activities of Bristol-Myers. This path was limited when the U.S. Supreme Court saw this as a "loose and spurious form of general jurisdiction."

However, the U.S. Supreme Court didn't close the door on this argument for specific jurisdiction; it just limited it. Several cases have been decided post-*Daimler* and post-*BMS* that cite the long-standing California precedent that linking a defendant's in-state activity and plaintiff's injury is sufficient to confer specific jurisdiction. The first major post-*BMS* case to confirm this was a pharmaceutical case. In *Dubose v. Bristol-Myers Squibb Co.*, Judge Jon Tigar of the Northern District of California found that conducting clinical trials in the forum state which led to FDA approval of the drug Onglyza was sufficient to confer specific personal jurisdiction for a non-resident plaintiff. (*Dubose v. Bristol-Myers Squibb Co.* (2017) 2017 U.S. Dist. LEXIS 99504, filed June 27, 2017.)

The *Dubose* case, along with others, shows that personal specific jurisdiction will be found when the facts support a finding that a plaintiff's injuries would not have occurred but for defendant's contacts with California. Judge Tigar concluded that because aspects of the clinical trials regarding the drug at issue were conducted in the state of California, the trials were "part of the unbroken chain of events leading to Plaintiffs' alleged injury ... Surely if the drug at issue had never been developed, tested or approved, Plaintiffs would not have been harmed by it."

These decisions are very fact driven. Be sure to fully research all available facts when evaluating whether you can confer

specific jurisdiction over an out-of-state defendant. When applying your facts to the cases listed above, the jurisdictions that are available to your client will become clear.

Trial preference

If, after evaluating jurisdiction, both California state court and federal court are viable options, the next consideration should be whether your client needs a speedy trial. The "Trial Preference" statute in California exists "to safeguard to litigants beyond a specified age against the legislatively acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried." (Cal. Code Civ. Proc. § 36, subd. (a)(2).) Preference is available to those litigants who may not survive the delay. This is especially important to consider in complex mass-torts cases that could take years to resolve.

Section 36, subdivision (a) allows any party who is 70 years or older to petition the court for trial preference. The Court must make two findings: (1) that the party seeking preference has "substantial interest" in the case, and (2) that "the health of that party is such that preference is necessary to prevent prejudicing the party's interest in the litigation."

Subsection 36, subdivision (b) provides that "A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole...."

It is important to note that the granting of a motion for trial setting preference by a minor is mandatory and the court has no discretion to deny the motion. But, it is not automatically granted for the elderly. Parties seeking a 36, subdivision (a) preference must establish "good cause" for the preference. Under the statute trial-setting preference is also discretionary for the terminally ill.

If your client qualifies for trial-setting preference, motions for preference must only be filed after very careful consideration. If the court grants the motion, trial will be set within 120 days of the date the motion was granted. And any continuances will be for no more than 15 days. In complex mass-torts litigations, 120 days may not be enough time to complete discovery and fully prepare for trial. On the other hand, we all have an ethical duty to pursue a preferential trial date if it is in the client's best interest to do so. An attorney can be held liable for malpractice for failing to pursue trial preference. (See, e.g., *Granquist v. Sandberg* (1990) 219 Cal.App.3d 181.)

These considerations must be fully evaluated when deciding where to file a case. If it is in your client's best interest to pursue a preferential trial date, and if California state court is a viable venue, the same ethical duty mandates that the case be filed in California. Filing that case in federal court would deprive your client of his or her right to a preferential trial date because there is no similar statutory preference system in federal court.

Other considerations

Discovery rules may be more favorable in one forum versus the other. Rules governing admissibility of certain evidence in state court differ from federal court. This is especially true for the admissibility of expert testimony. The specific facts of your case will determine how important these distinctions may be.

Jury selection is oftentimes more open and unstructured in state court compared to federal court. This can be a critical tool to weed out jurors with agendas and biases that would deprive your client of a fair trial.

Federal-state coordination should also be a factor to consider. In many mass torts, the federal MDL and the state court litigations are heavily coordinated. Discovery is identical and depositions are cross-noticed across litigations. Some are so coordinated that they conduct joint hearings. In these fully coordinated



litigations, the choice between state court and federal court is less significant.

However, the federal and state cases often track each other but are not fully coordinated. They operate independently and work product is not shared among plaintiff attorneys. In these litigations, selecting the best forum for your case is much more important.

Finally, from an economic standpoint for both the attorney and the client, one of the largest “other factors” to consider may be the establishment and use of common funds. Both JCCPs and MDLs have recognized the authority to establish and operate common funds. These funds are meant to compensate attorneys for the costs borne and work performed for the common benefit of all plaintiffs and their counsel.

Common-benefit funds are particularly complicated. This is especially true when there are parallel JCCP and MDL litigations. There are questions as to whether an MDL court has jurisdiction over state court parties, and even more questions as to inherent fairness and resolution of the common benefit disputes that plague most mass torts.

Judges may establish common-benefit funds early in a mass-tort litigation. Frequently, the order establishing the fund requires that any monetary proceeds from a settlement to be set aside to establish the fund. This fund would be used to compensate the court-appointed plaintiffs’ attorneys who performed work

for the common benefit of all cases and to pay back fees, costs, and expenses that were advanced by those attorneys.

The exact percentage of the settlement that is set aside for the common-benefit fund varies greatly from litigation to litigation. In the instance where there are parallel JCCP and MDL litigations for the same case, the common benefit percentage may be dramatically different between the two forums.

For example, an MDL may have a 14 percent assessment against each case with 10 percent set aside for attorneys’ fees and four percent set aside for costs. The same litigation in state court may only have a four percent assessment with three percent set aside for attorneys’ fees and one percent for costs. These figures can make a dramatic difference in the net settlement awarded to your client and to the net attorney’s fees collected. Therefore, it is important to pull and review all orders regarding common benefit funds and to analyze the impact they may have on the outcome of the case for your client.

Conclusion

It is common to have two, three, and sometimes more viable forums for your mass tort case. These multiple centers may be fully coordinated with each other or may be operating independently. Taking the time at the beginning of your case to fully evaluate the best forum for your client is a step that cannot be taken for

granted. Your client’s case is unique and must be treated as the independent case that it is. If you represent multiple clients in the same litigation, individual facts may require that some cases be filed in state court and some in federal court. Making the right filing decision up front will ensure each client has the best possible chance at a favorable outcome.

Brian Perkins is a career trial attorney practicing in the areas of complex pharmaceutical and medical device mass torts, personal injury, medical negligence, wrongful death, sexual abuse, and product liability.



Perkins

He is the principal of the Perkins Law Firm. He is licensed in California and in Illinois. He currently serves as Co-Lead Counsel before Judge Mary Wiss in the Superior Court of California, San Francisco in In re: Pradaxa Products Liability Litigation (JCCP No. 4863). Brian also served as Co-Liaison Counsel before Judge Matthew in the Northern District of Illinois in In re: Testosterone Replacement Therapy Products Liability Litigation (MDL No. 2545). Prior to these appointments he actively worked in the State Court and/or Federal MDL litigations regarding Pradaxa, Actos, DePuy ASR, Stryker Rejuvenate and ABG II Hip Implant, and Zimmer NexGen Implant litigations. Brian has tried 35 jury trials to verdict.

