

Coordinating Discovery in Mass Tort Litigation

In mass tort litigation, such as personal injury suits arising out of airline crashes or product recalls, the sheer volume of individual suits can present significant challenges for defendants in efficiently responding to duplicative and overlapping discovery. Defendants may be faced with responding to overlapping written discovery and depositions in numerous separate lawsuits involving separate sets of attorneys. The options to address these issues depend on whether the case is pending in federal or state court. Federal multidistrict litigation (MDL) procedure enables effective consolidation and coordination of related cases. Florida allows consolidation within a judicial circuit, but state court procedures lack a similar mechanism for coordination of related litigation throughout the state.

While each lawsuit arising out of a mass tort presents certain individualized issues, the lawsuits also involve common issues. For example, in product liability litigation, written discovery to the defendants on issues such as the design and manufacture of the product at issue and communications with regulators will be duplicative across cases. Similarly, depositions of the manufacturer defendants' fact and corporate representative witnesses will address the same or overlapping issues in each case. Coordination of these types of overlapping discovery among individual cases makes the litigation more efficient for the parties and the judicial system.

Federal MDL procedure addresses this situation and allows for consolidation and coordination of discovery and other pretrial proceedings in related federal litigation throughout the country. MDLs are authorized under federal statute providing that: "when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district of coordination or consolidated pretrial procedures." 28 U.S.C. § 1407(a). The goals of the MDL process are "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary." See <http://www.jpml.uscourts.gov/panel-info/overview-panel>.

The Judicial Panel on Multidistrict Litigation (JPML), a panel of seven sitting federal judges appointed by the Chief Justice of the United States, is authorized to create MDLs upon application by a party. See <http://www.jpml.uscourts.gov/panel-info/overview-panel> and Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation. Once an MDL has been created, a party can seek transfer of an individual case to the MDL by filing a "tag along" notice with the JPML. Regardless of where the MDL is established, cases from any federal court in the country can be transferred to the MDL.

The presiding judge in an MDL establishes discovery and other pretrial deadlines applicable to all cases within the MDL. The MDL court also appoints a Plaintiff's Steering Committee and a Defendant's Steering Committee to coordinate the litigation. The parties will work to streamline written discovery and production of documents. For example, rather than producing documents separately to each plaintiff, the defendants will produce documents uniformly for use by all plaintiffs and subject to a single protective order applicable to all parties in the MDL. In addition, the court may appoint a special master to address discovery matters such as coordination and scheduling of depositions. The parties will arrange for a single set of depositions of the defendants' witnesses, with the testimony available for use in all cases within the MDL.

Florida state court procedure also allows for consolidation of related cases for discovery and other purposes. Florida Rule of Civil Procedure 1.270 provides that: “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Fla. R. Civ. P. 1.270(a). However, there is no Florida state court equivalent to the JPML to oversee consolidation of related cases.

Moreover, in contrast to federal MDL procedure, consolidation under Rule 1.270(a) has been limited to cases pending within the same judicial circuit. The rule is broad in permitting consolidation for trial only, discovery only, or for all purposes, but Florida courts have applied it to permit consolidation of cases only within the same judicial circuit. These decisions note that, under the rule, actions “pending before the court” may be consolidated, and conclude that this phrase refers to cases pending within the same jurisdiction. *See Wetherington v. State Farm Mut. Auto. Ins. Co.*, 661 So. 2d 1276, 1277 (Fla. 2d DCA 1995) (ruling that a case pending in the Thirteenth Judicial Circuit could not be consolidated with a case pending in the Eighth Judicial Circuit; stating in part that “the trial court was without authority to exercise any jurisdiction over the case pending in the Eighth Judicial Circuit”); *Y.H. v. F.L.H.*, 784 So. 2d 565, 568 (Fla. 1st DCA 2001) (same).

As a practical matter, then, coordination of discovery in mass tort litigation pending in different Florida state courts, not within the same judicial circuit, may depend largely on negotiation among the parties. This stands in contrast to federal MDL procedures which allow for consolidation and coordination of related federal cases throughout the country, regardless of where the cases originate.