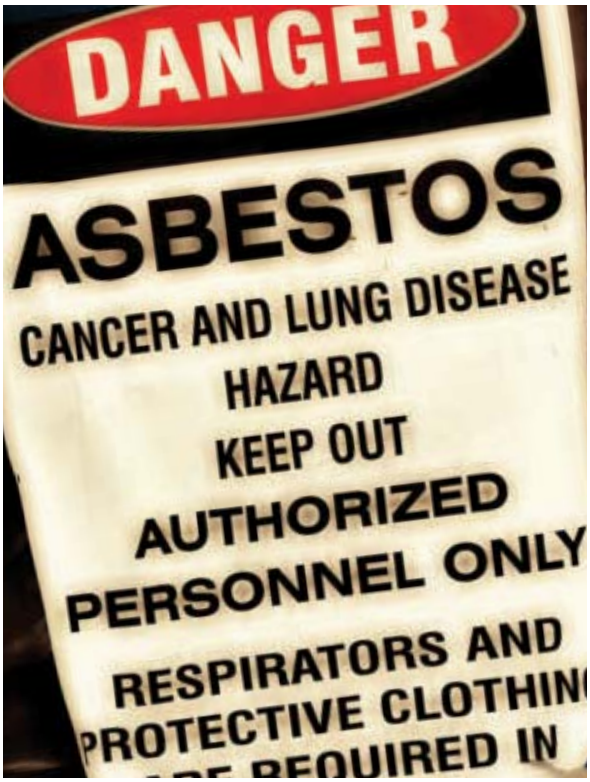
Making **WAVES**

The Impact of MDL 875 on Asbestos Litigation

By Michelle Leslie Stegmann and John C. McMeekin II

The Federal Asbestos MDL, MDL 875, was established by the Joint Panel on Multi-District Litigation in 1991 for the express purpose of adjudicating millions of asbestos personal injury claims. MDL 875 became the model for subsequent state asbestos MDLs and has influenced the management of mass torts programs around the country. Asbestos litigation was already a mature tort. Over the past 20 years, the number of cases skyrocketed as did the financial impact to companies and insurers. Manufacturers of high-dose, thermal insulation products are bankrupt. The new defendants are not the household names of thermal insulation, but defendants that incorporated asbestos as a minor component in their product.



Initially maligned for the lack of progress, the MDL has transformed to a fast-paced, results-oriented docket tasked with sorting out cases that can be settled or dismissed and pushing meritorious cases to fruition. The MDL is now a forum of choice for both defendants and plaintiffs but for differing reasons.

Judge Eduardo C. Robreno assumed the role of presiding judge of MDL 875 in 2008. He took an inventory of the docket to determine which cases were active and needed a scheduling order to guide the parties to resolution or remand for trial. To facilitate this initial sifting and sorting, Judge Robreno issued Administrative Order 12 that required plaintiffs to produce basic information including initial medical criteria. Plaintiffs' counsels were now compelled to critically assess whether to proceed and at what cost. New filings dropped significantly, and while some believe that the medical criteria of the order lacked enforcement, it undoubtedly played a role in the dismissal of approximately 500,000 claims.

Another significant development in asbestos litigation has been the assignment of groups of cases to magistrate judges to handle pre-trial matters. Parties also have the option of trying their case in the USDC Eastern District of Pennsylvania by consent or before a District Judge on remand. Cross claims that may be taken for granted in a state practice are not automatically preserved. Counsel should inquire how these claims are to be preserved or addressed in initial pre-trial conferences. The jury venire is from Philadelphia and the surrounding five counties and tends to be diverse in terms of socioeconomic, education and ethnicity. In the first case tried to verdict, Schumacher v. American Biltrite Inc, the jurors were sophisticated enough to comprehend the distinction between general and specific causation and returned a verdict in favor of the plaintiff on general medical causation and in favor of defendants on specific causation.

Significant Rulings

Existing opinions, which can be found on the MDL 875 website, can have precedential value for comparison purposes of assessing a particular defendant's potential motion or even as a concise summary of the various points of law in each jurisdiction. The opinions contain both a description of the type of motion and a brief summary of the opinion, which can be readily searched by key word function. Some of the most contested motions have focused on removal of otherwise non-diverse, exigent cases, which are less than a year from date of filing after the settlement or dismissal of the last non-diverse defendant. Judge Robreno has issued a series of decisions on the voluntary/involuntary dismissal rule for establishing diversity and cautioned that, while sanctions may not yet be appropriate, removals that are improper strain limited judicial resources.

Another area of controversy is the rule of unanimity where cases were remanded if

they lacked evidence that all defendants unequivocally consented to removal. In cases where consent is not needed for federal question jurisdiction, Judge Robreno has addressed when the assertion of a governmental contractor defense is sufficient to support federal question removal if the facts could present a complete defense to the claim. Other recent significant decisions have concerned the so called "bare metal" defense in which the product was not supplied or specified to use an asbestos product but one was subsequently applied or used in the product. Judge Robreno both granted and denied summary judgment based on this defense and in several instances remanded the issue to the transferor court where the law was not settled on that point.

Other rulings include sufficiency of product identification under various states' laws, governmental contractor defenses, application of maritime law, learned intermediary and sophisticated user, and duty owed to a bystander for take home exposure. In a limited number of cases the Court has issued evidentiary rulings on the admissibility of sham affidavits, prior testimony not subject to cross examination and the admissibility of expert opinions under Daubert as was the case in Schumacher for Dr. Maddox. While it is certainly true that each case rises and falls on its unique facts, the organization of Judge Robreno's opinions in a searchable format provides the party with a reasonable expectation of the likely success of a given motion and perhaps gives pause on whether it should be filed or opposed.

Future of Asbestos Litigation

The future is bright for the final success of MDL 875. There is a true sense that what had been viewed by many as a failed opportunity to bring order to the nation's largest and most pervasive serial mass tort will finally have an expiration date punctuated with a resounding success. Along the way, parties have benefited from an economy of scale and consolidation of resources through an organized pretrial practice. Non-meritorious cases were winnowed out and the meritorious cases were permitted to be discovered, settled or tried.

MDL 875 STATISTICS

- More than 10 million claims have been litigated in the MDL since its creation in 1991.
- 112,323 cases representing almost 9 million claims have been disposed of since Judge Robreno assumed the role of Presiding Judge.
- As of the end of January 2012, a cumulative total of 184,351 land and Mardoc cases were transferred to the MDL; 173,612 cases were terminated with only 10,739 cases remaining pending.
- Since the beginning of 2011, the rate of new transfers to the MDL has decreased by approximately 80 per over the proceeding year.
- As of January 2012, the USDC EDVA has the largest open case listing with a total of 4,545 cases. The USDC NDOH has largest remaining concentration of non-land based cases with a total of 3,473 pending cases.

The efforts to aggressively manage the MDL docket have resulted in a brighter future with Judge Robreno issuing an Order in the close of 2011 that the MDL will no longer accept transfers, signaling an end to the MDL proceedings in the not too distant future.

While defendants and insurers should expect to attend more settlement conferences as the pace of disposition increases, there will be cost savings as the aggregate number of cases diminishes and the need for local counsel in each of the transferor jurisdiction is eliminated. For those cases where the dispute is not yet ripe for settlement and the case is to be remanded, the parties may expect delays due to an already congested docket. Be prepared to address some of the global issues in the transferor court as many District Courts will have limited experience with the unique aspects of asbestos litigation due to the proceeding 20 years of MDL exclusivity. As defendants plan for remand, it would behoove them to establish a team to work with the District Courts to share recent developments in science and medicine and challenges to opinions that stretch the breaking point of science or medicine. Further, State Court judges may be involved in this discourse to help educate the District Courts on the practice and pit falls of their dockets. This will represent a cost to defendants and their insurers, but to not have a comprehensive strategy for remand and trial would be to risk all of the substantial gains of MDL 875.

In the area of discovery and pre-trial disputes however, there have been more rulings that affect the ultimate outcome of cases. The Magistrate Judges have issued rulings on the length of time for a deposition, the scope of discovery and discoverable materials, and the extension of deadlines beyond the anticipated 120 days for trial readiness. Most recently, Magistrate Judge Hey entered an order in the North Carolina cases regarding reimbursement of costs incurred by non-parties incurred in responding to document subpoenas. In light of the heavy reliance on Magistrate Judges to handle pre-trial matters and discovery disputes, the possibility exists that a defendant may be subject to differing rulings on the scope of discovery from one Magistrate to another. Given the commonalities and coordination of the Plaintiff's bar on discovery, this presents not only a concern for the MDL cases but may create moving targets for the parties to comply with discovery requests in state court cases as well. For that reason, counsel should be familiar with the scope of the Magistrates authority and the procedures for appealing a given Order to Judge Robreno directly. LM

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