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April 17, 2024

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District Court Addresses Concern Over Far-Fetched, Only-in-MDL Theories of Liability

by Carter F. Thurman

A recent district court order correctly raised concerns that multidistrict litigations ("MDL") attract meritless claims. The court's concern is nothing new. Similar concerns triggered proposals for the first Federal Rule of Civil Procedure for MDLs, which would govern initial submissions to the MDL court and the court's resulting case management order ("CMO"). Faced with what the district court considered an MDL with cases based on "implausible or far-fetched theories of liability" that should never have been filed, the court did what more courts should do—order plaintiffs to come forward with *prima facia* evidence supporting their claim or face dismissal.

In early 2023, defendants in *In re Paraquat Products Liability Litigation*, 2024 U.S. Dist. LEXIS 57124 (S.D. Ill. Feb. 26, 2024), discovered that "certain counsel have improperly filed actions on behalf of already-deceased plaintiffs, . . . and apparently even copied the signatures of deceased plaintiffs." Case 3:21-md-03004-NJR, ECF No. 4242. As a result of this discovery, defendants moved the court to enter a CMO requiring plaintiffs to certify whether plaintiffs are living or dead and take appropriate action after any plaintiffs' death. *Id.*

The court granted defendants' motion but did not limit the CMO to the issue of deceased plaintiffs. Instead, in granting defendants' motion, the court acknowledged several recent voluntary dismissals "due to evidentiary issues." *Id.* at 3. The court had grown concerned about pending "cases on its docket that present implausible or far-fetched theories of liability, and therefore would not have been filed but for the availability of this multidistrict litigation." *Id.*

The court identified four categories of cases that present implausible theories of liability: "(i) a plaintiff states that they have no information concerning their exposure to paraquat (as opposed to a different product); or (ii) a plaintiff has no medical evidence to support a diagnosis of Parkinson's disease; or (iii) a plaintiff claims to have used paraquat in a form in which it never existed (*e.g.*, in powder or pellet form); or (iv) there are other evidentiary issues such as those that led to the voluntarily dismissal of the bellwether plaintiffs." *Id.* at 4 n.4. The aim of identifying cases that fall within these categories was to ensure "that all viable claims against Defendants are fairly and efficiently adjudicated, and to guard against potential misuse of the multidistrict litigation vehicle . . . ." *Id.* at 1.

To address the court's concern "that a significant number of plaintiffs in the MDL . . . do not plausibly allege exposure to paraquat," the court required 25 cases to undergo limited discovery, which led to the dismissal of nine cases. ECF No. 5158 at 2. After nine new cases were name to replace those dismissed, another nine cases were later voluntarily dismissed, bringing the total

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number of voluntary dismissals to 18. ECF No. 5173 at 1. The court noted that "[t]hese dismissals . . . only reinforced the Court's concern about the proliferation of non-meritorious claims on the docket of this MDL." *Id.* at 1-2 (citing *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, No. 2004 4:08-MD-2004 (CDL), 2016 WL 4705807, at *1 (M.D. Ga. Sept. 7, 2016) ("Although one of the purposes of MDL consolidation is to allow for more efficient pretrial management of cases with common issues of law and fact, the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action.")).

The court was not still satisfied with the integrity of the docket and asked a Special Master to review the inventory for evidence of Paraquat exposure. *Id.* at 2. The Special Master found that "many Plaintiffs in the MDL have not produced any documentary evidence in support of their exposure allegations." *Id.* As a result, the court directed "*each Plaintiff in this MDL* to serve third-party subpoenas . . . seeking documentary evidence providing proof of use and/or exposure to paraquat." *Id.* at 3 (emphasis in original). As the court put it, "[t]his additional limited third-party discovery will provide Plaintiffs an opportunity to better determine the strength of their claims, as well as expose non-meritorious claims." *Id.*

The court's order in *In re Paraquat Products Liability Litigation* highlights a long established truth: MDLs enable the filing of cases that otherwise may have never been pursued but for the existence of the MDL process. The district court's concerns provide additional credence to those calling for the first Federal Rule of Civil Procedure for MDLs. Requiring plaintiffs to come forward with *some* evidence that even arguably establishes a fundamental element of their claim is not controversial. Rather, as another district court recently stated, this basic information should have been in plaintiffs' possession "before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)." *In Re: Taxotore (Docetaxel) Prods. Liab. Litig.*, MDL No. 16-2740, 2024 WL 718698, at *2-3 (E.D. La. Feb. 21, 2024).