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NEWSLETTERS

Attorney Fee Trends In Multi-District Litigation: What Is "Common?"

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The Supreme Court of the United States' (SCOTUS) recent denial of a Petition for Writ of Certiorari involving the payment of attorneys' fees and expenses confirms the importance of court forum, as well as keeping up to date on fee assessment and allocation trends, in multi-district litigation (MDL).

MDL results when several civil actions involving very similar facts in different federal districts are consolidated in order to promote judicial efficiency and effectiveness in the pretrial proceedings. The United States Code, 28 U.S.C. § 1407, governs these proceedings. Section 1407 sets forth how the Judicial Panel on Multidistrict Litigation may initiate MDL procedures, or how a party in a pending action may initiate procedures. Section 1407 establishes how MDLs are managed by a federal judge, the appointment of lead counsel and the criteria for which cases are appropriate for transfer to the MDL. However, there are a few critical aspects of MDL governance on which the statute is silent. In those instances, the federal judge has full discretion to rule as he or she deems fit given the case at issue. Fee assessment is one aspect of a MDL that is not governed by Section 1407.

Generally, with regard to attorneys' fees, the "American Rule" governs. Under the "American Rule," each party is responsible for the attorneys' fees charged by its retained counsel. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 264-65 (1975). And, parties are not responsible for attorneys' fees not generated by the counsel they selected. *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 205 (Ind. Ct. App. 2005). However, there are several exceptions to the "American Rule" that could expose parties to additional costs that they did not anticipate and impact the outcome of litigation or settlement. One such exception is known as the "common fund or common benefit doctrine." *In re Vioxx Products Liability Litigation*, 760 F.Supp.2d 640, 647 (E.D. La. 2010). Under the common benefit doctrine, attorneys who provide substantial, common benefit to a successful class of plaintiffs are entitled to attorneys' fees. *Id.* Common benefit funds are typically created by court orders early in class action litigation in anticipation of plaintiffs' success. *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, No. 3:05-MD-527 RM, 2011 WL 611883, at *6 (N.D. Ind. Feb. 11, 2011). Common benefit funds are generally financed by requiring defendants to hold back a portion of the damage or settlement award recovered by plaintiffs. See *Phipps Group v. Downing, et al.*, No. 14-786, 2014 WL 7477017 (2014). Plaintiffs' attorneys who provided a common benefit to plaintiffs may then request an allocation from the fund for their fees.

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Although traditionally applied in class actions, common benefit funds have been increasingly used in MDLs, as well. See *In re Nuvaring Products Liability Litigation*, No. 4:08 MDL 1964 RWS, 2014 WL 7271959, at *2 (E.D. Mo. Dec. 18, 2014). Despite the lack of apparent authority in 28 U.S.C. § 1407 and the existence of the "American Rule," courts involved in MDL have frequently found inherent authority (i.e., inherent managerial authority) to establish such funds. *In re Vioxx,* 760 F.Supp.2d at 648-49. MDL courts have also cited the broad principals of equity and quantum meruit or looked to the terms of a settlement agreement for establishing the common benefit fund.

Even though the use of common benefit funds is becoming more prevalent in MDL, methods of determining the amount of fees to award to plaintiffs, and how to allocate the fees among plaintiffs' attorneys vary. Indeed, courts have used several techniques for calculating the award of attorneys' fees. By way of example, in the *In re Nuvaring* MDL, the court acknowledged that the Eight Circuit tends to favor the "percentage method," or a percentage of the total award, as the fee calculation strategy. 2014 WL 7271959, at *2. Although recognizing that the SCOTUS has acknowledged use of the "percentage method," the court in the *In re Vioxx* MDL found that the Fifth Circuit generally calculated its attorney fee award by multiplying the number of reasonable hours worked by the reasonable hourly rate – the "lodestar method" – and then adjusting it upwards or downwards based on twelve factors outlined in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 715, 717-19 (5th Cir. 1974). 760 F.Supp.2d at 650. The Johnson factors include (among others) time and labor required, the customary fee, the amount involved and the results obtained, and awards in similar cases.

It is important to note that despite the Eighth Circuit and Fifth Circuit's tendencies, both cases cited above – *In re Nuvaring* and *In re Vioxx* – utilized a "blended" approach – selecting a percentage and checking the result for reasonableness through the lodestar method. The Seventh Circuit has also used both methods. See *In re Trans Union Corp. Privacy Litigation*, No. 00 C 4729, 2009 WL 4799954, at *8-9 (N.D. Ill. Dec. 9, 2009). This "blended approach" appears to be the modern trend. However, giving the historic inconsistencies, it will be important to continue to watch these fee assessment trends.

Further, the amount of oversight allowed by the courts to ensure plaintiffs' attorneys are submitting reasonable requests for fees in MDL varies depending on the forum, and should also be considered closely. A special master (a court-appointed individual who addresses pre-trial or post-trial matters, as outlined in Federal Rule of Civil Procedure 53) is frequently appointed to recommend or evaluate the evidence supporting the allocation of attorneys' fees and expenses. See *In re Vioxx Products Liability Litigation*, No. 09-2861, 2013 WL 1856035 (E.D. La. April 30, 2013) (finding that the court has jurisdiction to award common benefit fees as part of its inherent managerial authority in the Vioxx MDL, but declining to do so, and instead referring matter to special master to make a recommendation on an appropriate allocation amount, if any). See also *In re Nuvaring*, 2014 WL 7271959, at *5-7 (approving fee allocation recommendation of special master). Other courts have found that the transferor courts, as opposed to the MDL court, are in the best position to determine the common benefit of attorneys' work, and thus, allocate fees. See *In re FedEx*, 2011 WL 611883, at *6.

Note that the ability to investigate and confirm the validity of plaintiffs'

attorneys' fee requests has been inconsistent in MDL, as well. See *In re Nuvaring*, 2014 WL 7271959, at *5-7 (allowing attorneys "ample opportunity to voice their positions for their common benefit fee allocation, including submission of written affidavits to the special master to supplement time sheets and advocate for the value added, as well as in-person meetings after the initial fee recommendation); *In re Vioxx*, 2013 WL 1856035, at *7 (allowing special master to set a discovery schedule, conduct evidentiary hearings, and hear oral argument as needed). *Cf. In re Genetically Modified Rice Litigation*, 764 F.3d 864 (8th Cir. 2014) (Special master noted that reviewing court "may rely on summaries of attorneys and need not review actual billing records[,]" and rejected attorneys' claim that discovery was needed.).

On Dec. 14, 2014, following the settlement of the *In re Genetically Modified Rice Litigation* MDL, a Petition for Writ of Certiorari was filed that brought to light some of these inconsistencies in attorney fee assessment and allocation. The petition presented the question of whether MDLs are an exception to the "American Rule," and if so, requested "guide posts to be followed by MDL courts during the analysis and disposition of fee requests." *Phipps Group*, 2014 WL 7477017, at *12. Petitioner argued, in relevant part, that Congress did not create an exception to the "American Rule" in 28 U.S.C. § 1407, significant differences exist between class actions and MDLs so applying similar principals (e.g., common benefits funds) is inappropriate, the SCOTUS has never held that the common benefit doctrine extends to MDLs, and the Circuits are split on these issues (as described above). *Id*. at *10-30. Petitioner also pleaded for the SCOTUS, if an exception to the "American Rule" is found, to provide guidance on "whether discovery is warranted, if evidence must be presented, and if an adversarial hearing or trial is necessary." *Id*. at *28. On Feb. 23, 2015, the SCOTUS denied the Petition. *Phipps Group v. Downing*, et al., 135 S.Ct. 1455 (2015).

Given defendants' potential liability exposure in MDL for attorneys' fees, combined with the complete discretion given to judges to determine how plaintiffs' attorneys' fees are awarded and allocated, attorneys and parties in MDL are highly encouraged to investigate their judge's stance on this topic and remain apprised of the latest trends.

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