The MDL Court and Case Management in Historical Perspective

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April 28, 2017

Andrew Bradt's meticulous and fascinating work on the history of the MDL statute has enabled us to see more clearly the problems that concerned those responsible for proposing the statute, their goals in doing so, and how the current state of affairs compares to what its architects seem to have had in mind. It thereby enables a more nuanced view of MDL case management and of case management more generally.

It is common knowledge that the inspiration for the statute was the experience of the judges on the Coordinating Committee on Multiple Litigation, who set about, without formal authority, to secure voluntary cooperation in centralized pretrial management by the courts hearing, and the parties to, a few thousand civil antitrust cases brought in the wake of federal indictments for price-fixing in the electrical equipment industry.

The judges behind the MDL statute believed that the near future would bring what one of them called a "litigation explosion" of clusters of factually overlapping cases akin in their number, if not their complexity, to the antitrust cases for which the Coordinating Committee was created. In their minds, if litigants were left to their own devices in responding to this deluge, the resulting burdens would cripple the federal court system. Their solution was to devise a system that replaced informal cooperation among decentralized actors with centralized judicial power to pursue efficiency (as they defined it) through aggressive pre-trial management of consolidated or coordinated cases. Conceived to avert a looming institutional crisis, the MDL system has always been at risk of debasing the concept of efficiency, and ignoring other goals of litigation procedure, by subordinating the legitimate interests of litigants and the values of substantive law.

It is a risk similar in kind to that which caused Owen Fiss to fret about settlement, that "although dockets are cleared, justice may not be done." When encouraging aggregation in pursuit of efficiency, the architects of modern American procedure, including the MDL statute, have tended to see mostly the hoped-for benefits, and not so much the possible costs, of the complexity for which they have been responsible.

Indeed, having correctly predicted the "litigation explosion," the creators of the MDL system anticipated the importance accorded, and provided a model for, active judicial management as the preferred strategy even for stand-alone cases under the Federal Rules of Civil Procedure. Knowing this helps to understand why, increasingly since the late 1970s, the Federal Rules governing pre-trial have been crafted for complex cases and why, in a system of formally trans-substantive procedure, the expense of litigation under the resulting model has priced the middle class out of federal court. That result, coupled with the failure of the bar to demand, and of politicians to provide, affordable *public t*ribunals for the resolution of ordinary disputes, is perhaps the greatest cost of the complexity of modern American litigation. Nature may abhor a vacuum, but not so the business community. Abetted by judges who were at first concerned about the "litigation explosion" and then enamored of 19th century notions of freedom of contract, American business has rendered public tribunals of any kind irrelevant through contractual arbitration clauses.

Having witnessed behavior of defense counsel seeking to leverage distributional advantages by protracting cases, as well as resistance to loss of authority by some judges in constituent cases, the judges sponsoring the MDL statute believed that participation could not be optional. Such was their skepticism about optional aggregate litigation that, after meeting with them in November 1963, the Reporters for the Civil Rules Advisory Committee proposed to dilute the absolute right to opt out in (b)(3) class actions, which the Committee had only just fastened on as a means to meet objections from John Frank and others. The effect was to blow up the compromise, dooming the Committee to eighteen more months of repeated attempts by Frank to eliminate (b)(3) altogether from the proposed rule.

This part of Bradt's story helps to understand the origins of a major shift in power -- from lawyers to judges -- to control the conduct of the pre-trial stage of litigation. Only three years after the MDL statute was enacted, Chief Justice Burger reconstituted the Advisory Committee.

Whereas practitioners and academics dominated the Committee in the 1960s, under Burger, judges held a large majority, and for a decade there were no academics. In my view, Burger was thereby acting to instantiate a perception, which the MDL creators certainly held about some (defense) lawyers in the electrical equipment antitrust cases, that the interests of lawyers and federal judges were no longer in sync, and that institutional self-preservation required judges to take control. With the birth of the counterrevolution against federal litigation in the first Reagan administration, Burger's public statements about civil litigation came to focus more on supposed cultural phenomena, with the result that he spoke of a "mass neurosis."

Both the aversion to opt-outs from the system the Coordinating Committee judges proposed and Burger's turn from emphasis on institutional need to social pathology are evidence of another shift in power, this time at the expense of parties. Although some accounts of the MDL statute leave doubt about its drafters' intentions, Bradt's research makes clear that they wanted the mechanism to authorize transfer for all purposes, including trial. They abandoned that goal not so much, and perhaps not at all, because it portended an unacceptable loss of litigant autonomy (to say nothing of expense or delay). They feared that pursuing it would alienate the plaintiffs' bar and doom the bill in Congress. As Bradt has observed, however, at least the judges behind the MDL statute were interested in facilitating existing litigation, by making it more efficient, rather than cutting off litigation by retrenching law that has obvious implications for private enforcement.

The failure of the MDL statute to authorize transfer for trial did not prevent MDL judges from attempting to approximate that ideal (from the point of view of a judge seeking to maximize leverage in pretrial management) by transferring cases to themselves when consistent with 28 U.S.C. Section 1404. The Court's *Lexecon* decision put an end to that practice, and the history Bradt explores demonstrates that the Court was correct. Concern that MDL judges were thereby disarmed in their attempts to encourage settlement brought forth repeated attempts by the judiciary to secure a legislative override, some of which seem to have been oblivious to the burdens that total transfer under Section 1407 – unencumbered by personal jurisdiction or venue constraints -- might impose on the litigants in constituent cases. Perhaps in part for that reason, override legislation has not been forthcoming from Congress, and in its absence MDL courts have tried various work-around strategies promoted by the Judicial Panel on Multidistrict

Litigation. One such strategy, if possible as a matter of personal jurisdiction and venue (both of which can be waived), involves dismissal of the original lawsuit and refiling directly in the MDL court. Other work by Bradt has illuminated a related corner of MDL practice by tackling the difficult question of the applicable law in cases that are directly filed in the MDL court although they cannot be tried there. After all the hand-wringing about the loss of settlement leverage caused by *Lexecon*, it was refreshing to read a very talented MDL judge suggesting that perhaps the most effective leverage is a threat to initiate remand to the transferor courts by the JPML.

In an article about the Class Action Fairness Act of 2005, I lamented the narrowness of that statute's exceptions and the costs to federalism values that they likely would entail. In that regard, I observed that

> [o]nce the state court class actions are brought into federal court, they will likely be subject to the tender mercies of the multidistrict process. In that process, the incentives of key participants – some counsel, defendants, and the transferee court – will be to create bigger "litigations" either by evading the restrictions on settlement classes that the Supreme Court prescribed in *Amchem* and *Ortiz* or through abandonment of the class form for nonclass aggregations. The incentives, in other words, will be to elide factual and legal differences that, although impeding certification, are what states regard as critical conditions for, or determinants of, effective regulation.
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> On that view, CAFA may result in the replication on a grander scale, under cover of settlement, of some of the supposed abuses in state court class actions that Congress said it wanted to stamp out. The difference would be that the balance of bargaining power in settlement would have shifted to defendants.

Finally, the quest of those who proposed the MDL statute to maximize the power of MDL judges extended to the lawmaking process that would be used to implement what over time became a bare-bones bill. Although accustomed to the very substantial discretion that is a necessary consequence of a system of transsubstantive rules, they could see just how long the amendments to Rule 23, among others, were taking. Moreover, they could see that the history of

those amendments had been one of attempts increasingly to diminish or constrain discretion. In part for those reasons, they came to prefer remaining outside the rulemaking remit of the Court under the Enabling Act, subject instead to predictably sympathetic and minimalist rulemaking by the JPML. With the benefit of hindsight, we know that this choice had costs as well as benefits for the case management powers of MDL judges. Lacking the power and responsibilities of a judge in a class action under Rule 23, MDL judges seeking to provide comparable protection to litigants whose actual autonomy may be no greater than that of absent class members have been forced to take a kitchen-sink approach to sources of authority, the most risible of which is the so-called "quasi class action" that Judge Weinstein created by ipse dixit.