GUIDELINES AND BEST PRACTICES

IMPLEMENTING 2018 AMENDMENTS TO

RULE 23 CLASS ACTION SETTLEMENT PROVISIONS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

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CHAPTER 3

THE ROLE OF COURT-APPOINTED LEAD COUNSEL VIS-À-VIS OTHERS

The process for the court's appointment of class counsel is governed by Federal Rule of Civil Procedure 23(g), an addition to the 1966 Rule that became effective in 2003. Rule 23(g)(1) requires the court to appoint class counsel at the time of class certification, and, in doing so, to consider: "the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; counsel's knowledge of the applicable law; and the resources that counsel will commit to representing the class."[1] The court's flexibility to take into account the circumstances presented by a particular class action is also recognized. Under Rule 23(g)(1)(B)–(E), the court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," may require potential class counsel to provide information "on any subject pertinent to the appointment and to propose terms for attorney's fees and non-taxable

[1] FED. R. CIV. P. 23(g)(1)(A)(i)–(iv).

costs," may include in the appointing order provisions regarding fees and costs, and "may make further orders in connection with the appointment."

Often, especially in a "stand-alone" class action as opposed to a group of class actions coordinated before a single transferee court under the multidistrict litigation (MDL) statute, only one lawyer or firm will apply for class counsel appointment. Nonetheless, such appointment is not automatic. Rather, "[w]hen one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)."[2] Frequently, however, more than one lawyer or firm will compete for appointment as class counsel, especially in a situation where multiple class actions are coordinated in the same court, as an MDL or otherwise. In such circumstances, "[i]f more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class."[3] In practice, this provision has not been interpreted to prohibit the appointment of multiple attorneys and firms as the class counsel; to the contrary, especially in class actions coordinated in an MDL, the appointment of multiple lawyers and firms as class counsel or settlement class counsel under 23(g) is not atypical: courts recognize that often the combined human and economic resources of multiple firms will be essential to assure effective and adequate representation of the class.

In MDLs or other litigation involving multiple class actions, the putative classes may overlap, in whole or in part, such that the court may need to choose among counsel for the lead role. In other circumstances, the class actions may be parallel (*e.g.*, putative classes making similar allegations but on behalf of residents of different states). And sometimes (albeit rarely), the classes

[2] FED. R. CIV. P. 23(g)(2). Rule 23(g)(4) succinctly defines the duty of class counsel: "Class counsel must fairly and adequately represent the interests of the class."
[3] FED. R. CIV. P. 23(g)(2).

may be distinct and competing for the same assets. Depending on the circumstances, the court may appoint a lead for all of the class actions, a lead for each putative class, or both.

In contemporary practice, multiple class actions may be filed in a single court, or centralized via an MDL Transfer Order. Either situation can give rise to "rivalry or uncertainty" as multiple lawyers come forward to represent the class.[4] Additionally, the class certification determination is often preceded by substantial fact and expert discovery. The class certification determination has long ceased to be one based upon the pleadings; while courts remain prohibited from basing the decision to certify a class on an impression of whether plaintiffs will win on the merits, the evidence the class will use to prove its claims (or at least significant elements of its claims) on a class-wide basis are relevant, as the Supreme Court decided in several recent opinions.[5] It takes time and resources to develop a record in the case sufficient to enable the court to make an informed class certification decision.

In recognition of contemporary class action jurisprudence, Rule 23 itself was amended in 2003 to change its prescription for the timing for the class certification motion from: "as soon as practicable after commencement" to "at an early practicable time."[6] This seemingly slight shift in wording has had a substantial impact upon class action practice, and its practical consequence requires significant efforts to be expended by those seeking a class counsel appointment long

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[4] As observed in the committee's note to Rule 23(g), the appointment of interim counsel is particularly appropriate when there is "rivalry or uncertainty" because multiple lawyers are competing to represent the class. Rule 23(g)(3) interim appointment is thus viewed as a case management tool akin to the early appointment of a leadership structure in a contemporary MDL. Courts have sometimes resolved this "rivalry or uncertainty" by invoking the "first-filed" doctrine to stay duplicative class actions. The centralization of overlapping or competing class actions in an MDL also allows the transferee judge to utilize case management techniques, such as ordering the appointed plaintiffs' leadership group (whether or not interim class counsel are formally appointed at this stage), to file a consolidated class action complaint, utilizing this master pleading to organize the class allegations.

[5] See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)

[6] FED. R. CIV. P. 23(c)(1)(A) (as amended 2003). The Committee's Notes a 2003 amendment included, as valid reasons to defer the certification decision, the time needed to conduct discovery, to gather and evaluate information, including "how the case will be tried."

before the certification decision and counsel appointment is made. As the Rule 23(g) Committee's Notes observe, before certification, counsel is often responsible for preparing the motion for certification, responding to dispositive motions, conducting discovery, and participating in settlement negotiations. Accordingly, to prevent a Catch 22 situation, Rule 23(g)(3) provides for the appointment of "Interim Counsel": "The court may designate Interim Counsel to act on behalf of a putative class before determining whether to certify the action as a class action."[7]

In multidistrict proceedings culminating in a class action settlement, the counsel who were previously appointed to serve as Lead Counsel, as members of a plaintiff's steering committee (PSC), or other court-appointed leadership group have then been appointed to serve as settlement class counsel under Rule 23(g), in an appointment order issued at the beginning of the settlement approval process.[28] This transition from lead counsel/PSC member to class counsel is essentially one of title rather than function. As class actions and multidistrict litigation have converged in recent years, MDL transferee judges, who must appoint plaintiff leadership at the outset of the proceedings, have often adopted the Rule 23(g) factors as qualifications for such leadership roles.[29] Guidelines for the court's selection of lead/liaison counsel and committees in MDL proceedings generally, including options for organizational structures, delineation of powers and responsibilities, provisions for compensation (usually through a "common benefit" order); and the roles and responsibilities of the appointed counsel in acting for and communicating with other attorneys (both in the MDL itself and in related state court litigation), are detailed with specific recommendations in Sections 10.2 through 10.225 of the *Manual for Complex Litigation*,[30] and in

[7] Fed. R. Civ. P. 23(g)(3). These duties are analogous to those customarily assigned to Plaintiffs' Lead Counsel in a contemporary MDL. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.22 (2004) (outlining "Responsibilities of Designated Counsel")

several of the FJC's contemporary publications addressing judicial case management of multidistrict and class actions. [31]

[28] *See, e.g.*, Order Appointing Interim Class Counsel, *In re Oil Spill* by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Mar. 5, 2012), ECF No. 5960. This Order appointed the previously appointed Co-Liaison Counsel as Interim Class Counsel, to enable counsel to submit preliminary settlement approval papers and commence the settlement approval process. The subsequent Preliminary Approval Order then appointed the seventeen previouslyappointed PSC members as Settlement Class Counsel. Preliminary Approval Order, *In re Oil Spill*, MDL No. 2179 (E.D. La. May 2, 2012), ECF No. 6419.

[29] The exemplar "Order Setting Initial Conference" contained in the *Manual for Complex Litigation* includes language that has been widely adopted by courts that widely adopted by MDL transferee judges in their initial orders, and speaks in terms conceptually similar to Rule 23(g)(1), articulating the "main criteria" for appointments to leadership positions as "(1) willingness and ability to commit to a time-consuming process; (2) ability to work cooperatively with others; (3) professional experience in this type of litigation; and (4) access to sufficient resources to advance the litigation in a timely manner." MANUAL (FOURTH), *supra* note 27, § 40.1, ("Order Setting Initial Conference").

[30] MANUAL (FOURTH), *supra* note 27.

[31] These include: U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES (2d ed., 2014), https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf; BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (3d ed., Fed. Judicial Ctr. 2010), https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf; WILLIAM W. SCHWARZER & ALAN HIRSCH, THE ELEMENTS OF CASE MANAGEMENT (3d ed., Fed. Judicial Ctr. 2017), https://www.fjc.gov/sites/default/files/2017/ElementsCaseMgmt3dEd2017.pdf; BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES (Fed. Judicial Ctr. & Judicial Panel Multidistrict Litig. 2011), https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf; and ALLAN HIRSCH, DIANE SHEEHEY & TOM WILLGING, AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION (3d ed., Fed. Judicial Ctr. 2015), https://www.fjc.gov/sites/default/files/2015/Awarding%20Attorneys%20Fees%20and%20Managing%20Fee%20Litigation%20Third%20Edition%202015.pdf.

In the recent *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, the transferee judge issued its Pretrial Order No. 2: Applications for Appointment of Plaintiffs' Lead Counsel and Steering Committee Members articulating the following appointment criteria: "(1) professional experience in this type of litigation, including MDL experience as lead or liaison counsel and/or service on any plaintiffs' committees or subcommittees; (2) the names and contact information of judges before whom the applicant has appeared in the matters discussed in response to number one above; (3) willingness and ability to immediately commit to time-consuming litigation; (4) willingness and ability to work

cooperatively with other plaintiffs' counsel and defense counsel: (5) access to resources to prosecute the litigation in a timely manner; and (6) willingness to serve a lead counsel, a member of the steering committee, or both; (7) the particular category or categories of plaintiffs the applicant wants to specifically represent (vehicle owners, lessees, dealerships, or all plaintiffs, etc.); and (8) any other considerations that qualify counsel for a leadership position."[8] Notably, the *Volkswagen* MDL was comprised primarily of actions filed as putative class actions.

> **GUIDELINE 10**: In an MDL action comprised of multiple putative class actions, the court should, in connection with an early and prompt initial conference with the parties, prescribe an application process for appointment of one or more firms, as appropriate, to serve as Interim Class Counsel under Rule 23(g)(3), upon considering factors pertinent to the case, including those specified in Rule 23(g)(1).

As noted above, an MDL transferee judge will frequently be appointed to preside over a multidistrict litigation that is comprised of multiple putative class actions. The court may consider whether to appoint plaintiffs' leadership under a traditional MDL leadership structure of lead, colead, or committees of counsel; to appoint a structure of Interim Class Counsel under Rule 23(g)(3); or to combine these roles such that lead, co-lead, or committees are also appointed under Rule 23(g) as Interim Class Counsel. These options are available to the court, in the exercise of its discretion, under most MDL proceedings in which class actions assert federal and state claims. However, in cases brought as putative securities class actions, the Private Securities Litigation Reform Act of 1995 prescribes a specific procedure for the court selection and appointment of the lead plaintiff and counsel.[9]

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[8] Pretrial Order No. 2: Application for Appointment of Plaintiffs' Lead Counsel and Steering Committee Members at 1–2, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, MDL No. 2672 (N.D. Cal. Dec. 22, 2015) (Breyer, J.), ECF No. 336.

[9] 15 U.S.C. § 78u-3(B) (2012). In the securities and antitrust contexts, some courts have utilized various procedures to set fee expectations at the outset of the case. Other courts await development of the case before setting fees, and many contemporary MDL judges establish timekeeping protocols early in the case. Courts frequently ask class counsel and PSC candidates to include their views and recommendations on fee structures and methodologies in their applications. *See generally* MANUAL (FOURTH), *supra* note 27, § 14.211 ("Selecting Counsel and Establishing Fee Guidelines").

The advantage of a formal Rule 23(g)(3) Interim Class Counsel appointment in litigation comprised of multiple class actions is that a Rule 23 appointment comes with a Rule text and an established jurisprudence that articulates and interprets the duties of class counsel vis-à-vis the court and the putative class. As the FJC notes,

> attorneys representing classes are in a position to control the litigation process far more than attorneys representing individual clients. The class device enhances the role of such lawyers by virtue of the fact that even the approved class representatives do not have legal control over the litigation. Your power to appoint counsel and approve or reject a class settlement may be the only checks and balances on the power of attorneys for the class.[10]

In consumer class action MDLs, the leadership order is likely to include a Rule 23(g)(3) Interim Class Counsel appointment.[11] In litigations involving a mix of class actions and individual suits, courts have been more likely, at the outset of proceedings, to utilize a Lead Counsel and PSC structure, with a transition to class counsel appointment at the time of a class action settlement, as occurred in the *Deepwater Horizon* MDL, noted above, and more recently in the *Volkswagen* MDL. Where the traditional MDL style of leadership appointment is utilized, the courts do and should, by pretrial order, set forth with specificity the roles and duties of various appointees within the plaintiffs' leadership structure, to provide clarity with respect to the roles of these counsel visà-vis others.

The *Deepwater Horizon* and *Volkswagen* pretrial orders are contemporary examples of MDL proceedings that 1) include both class and individual actions (*Deepwater Horizon*), and 2) are comprised entirely or predominantly of class actions (*Volkswagen*). In both of these, the transferee judges, at the inception of the MDL proceedings, appointed plaintiffs' leadership utilizing a Lead or Liaison Counsel/PSC structure, without a 23(g)(3) interim class counsel

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[10] ROTHSTEIN & WILLGING, *supra* note 31, at 6–7.

[11] Case Management Order 2: Order Appointment Plaintiffs' Leadership Positions, *In re Am. Honda Motor Co., Inc., CR-V Vibration Mktg. & Sales Practices Litig*., MDL No. 2661, 2015 WL 12723036, at *1 (E.D. Ohio Dec. 18, 2015).

appointment. In each case, at the time the class action settlements were submitted to the court for its preliminary approval, the previously appointed PSC members (17 in *Deepwater Horizon*; 21 in *Volkswagen*) were then appointed as class counsel under Rule 23(g)(1) without previous appointment under Rule 23(g)(3). Whatever style or sequence of appointment is used, what is essential to the effective case management of the litigation, and to the effective prosecution of the common claims, is the appointment of counsel who are accountable to the MDL court and the plaintiffs or putative class members at an early stage. These counsel shoulder responsibility to conduct the discovery and other pretrial proceedings that furnish the information the court will consider when making a class certification decision, whether for purposes of trial to assess a proposed settlement.

> BEST PRACTICE 10A*:* In an MDL proceeding involving multiple actions that include putative class actions, the court should determine, in connection with an early and prompt initial conference with the parties, the nature and scope of the leadership structure it intends to appoint, including whether the appointment of Interim Class Counsel under Rule 23(g) is necessary or appropriate, and should specify and delineate with appropriate precision the roles and responsibilities of the counsel it appoints to leadership positions.

In contemporary practice, as the result of the concentration of putative class actions in the federal court system after the Class Action Fairness Act expanded federal diversity jurisdiction to include most cases brought as class actions,[12] and the availability of centralization of such actions before a single court under the multidistrict litigation statute, the challenges presented by the existence of competing or overlapping class actions in different jurisdictions have become less

[12] 28 U.S.C. § 1332(d) (2012).

acute. There may still be some situations where multiple class actions are pending in different federal courts because no party has sought MDL centralization (or because the JPML has denied it), or a putative class action that overlaps with centralized federal class actions is pending in a state court. Much has been written regarding the effective coordination by federal judges, particularly MDL transferee judges, with their judicial colleagues in related state court litigation, and such guidelines and best practices will go far in meeting the challenges of coordination where putative class actions are pending in related federal and state proceedings.[13] Those counsel appointed by the federal court, either as Interim Class Counsel or to more traditional lead counsel/PSC roles, should be expected to coordinate with their state court counterparts in the interests of judicial economy, efficiency, and consistency, to minimize duplicative discovery, and to avoid competing class certification schedules. While competing interests may pose difficulties in achieving coordination with state court counterparts, judges should consider expressly directing interim or lead counsel to use best efforts to coordinate with their state court counterparts.

If the class litigation in federal court involves only state law claims, and nationwide class certification is impracticable (or defendants oppose it), the federal court may wish to explore more active coordination with state courts in which statewide class actions are moving toward certification and trial. In other cases, the focus of litigation activity may be almost entirely in the federal proceedings, where discovery is proceeding, and where active (and court-supervised) settlement negotiations may lead to a nationwide class action settlement, which the parties expect to be approved and administered in federal court. The court can inform itself as to the nature and

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[13] *See, e.g.*, MANUAL (FOURTH), *supra* note 27, §§ 20.1–20.32; FED. JUDICIAL CTR. & NATL'L CTR. FOR STATE COURTS, COORDINATING MULTIJURISDICTIONAL LITIGATION; A POCKET GUIDE FOR JUDGES (2013), https://multijurisdictionlitigation.files.wordpress.com/2012/11/multijurisdiction-pocket-final.pdf; *see also In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 (E.D. La. 2010). In *In re Vioxx*, after appointing steering committee, to facilitate coordination, the court "created a web site accessible to all counsel and the public at large. All motions, Court orders, opinions, recent developments, a calendar of scheduled events, and various other matters were posted on this web site."

scope of related state court litigation, and the positions of the parties before it regarding the focus of federal vis-à-vis state proceedings, at an early case management conference. The court is then able, on an informed basis, to set a pretrial schedule for the cases before it (including a schedule for class certification motions and any prioritized discovery that may be important in informing the class certification decision), establish a trial date if practicable, and direct the parties to engage in settlement discussions, whether through a mediator chosen by counsel or under the auspices of a court-appointed settlement master, so that there is a clear schedule and set of expectations regarding the timing, scope, and goals of class action-related proceedings in the federal court. The role of court-appointed counsel in conducting these proceedings, in coordinating with any state court-appointed counterparts, and in reporting regularly to the court on status and progress should be set forth in a pretrial order, and reinforced through periodic status conferences.[14]

> **GUIDELINE 11:** A court should, at an early point in its management of the proceedings before it, schedule pretrial proceedings (including class certification briefing and hearing dates, and, as early as practicable, a trial date on class claims); obtain information and establish procedures for coordination with any related putative class action litigation pending in other courts, designate counsel with responsibility to coordinate with counterparts in related litigation; and remind all parties and counsel of their duty to timely update the court and each other on developments in related actions pending in other courts.

The concentration of class actions in federal courts and their centralization via the MDL process before a single court have alleviated concerns over competing or overlapping class settlements. Nonetheless, it remains important for an order appointing plaintiff leadership in a putative class action, or group of class actions, to designate the counsel who will have authority to negotiate the terms of any class settlement. Pretrial orders appointing lead counsel thus typically vest lead counsel (and those designated by lead counsel to serve on the settlement team) with the

[14] There may be circumstances where, after familiarizing itself with the cases and hearing from counsel, the Court may consider declining to appoint interim counsel at the outset of coordinated proceedings. These might include vastly different procedural postures of the pending class actions. *See, e.g.*, *White v. TransUnion, LLC*, 239 F.R.D. 681 (C.D.

authority to conduct settlement discussions and enter into proposed settlement agreements for presentation to the court.[39]

How specific should a court be in the structural subdivisions and functional details of the leadership group it appoints? In some MDLs, courts have set forth, in minute detail, the roles and responsibilities of a leadership structure, including subsidiary subcommittees and working groups, such that the tasks and responsibilities of all counsel are defined in detail at the outset. Other courts utilize a more generalized structure, appointing Lead or Co-Lead Counsel, with or without a PSC, and leaving the assignment of specific tasks and the creation of subcommittees or working groups

Cal. 2006) (denying motion to appoint interim class counsel because one of the pending class actions was already near settlement, with discovery completed).

[39] *See, e.g.*, Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig*., MDL No. 2672 (N.D. Cal. Jan. 21, 2016) (Breyer, J.), ECF No. 1084; Pretrial Order No. 3: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re ChryslerDodge-Jeep Ecodiesel Mktg., Sales Practices, and Prods. Liab. Litig.*, MDL No. 2777 (N.D. Cal June 19, 2017), ECF No. 173 (vesting in lead counsel the authority "to engage in settlement discussion with the Defendants, interact with the settlement master (once appointed), and enter into settlement; while noting that in carrying out these, and other responsibilities "the court expects lead counsel to consult and work collaboratively with the PSC in decision-making").

to those appointed. Applicants for leadership positions will often be asked by the court to propose specific structures and responsibilities, in more or less detail, tailored to their perception of the needs of the case. For example, applicants may be asked what is the appropriate number of members for the PSC, or the Interim Class Counsel group, given the nature and scope of the case and the number of defendants.

The level of detail with respect to structures, roles, and responsibilities in plaintiffs' leadership and Rule 23(g)(3) orders varies considerably. One contemporary trend is to leave specific assignments, within the court-appointed structure, to the discretion and authorization of the Lead or Co-Lead Counsel. This discretion is accompanied, however, by the use of detailed time and costs reporting protocols, adopted by the court through a pretrial order, which all

courtappointed counsel and those working for the "common benefit" are required to follow. Such time and costs are then reported regularly, either to lead counsel, to a designee, or to the court on a periodic basis, to assure that all work is authorized and conducted in accordance with these preset guidelines.

One circumstance in which multiple Interim Class Counsel or separate PSCs are appointed to represent specific interests in a multiple class action situation is one in which early-defined subclasses may have overlapping or potentially conflicting claims. It is thus common, for example, for an MDL transferee court presiding over antitrust litigation to designate separate Interim Class Counsel or PSC or Reed/PSC structures for "direct purchasers" and "indirect" or "end" "purchasers." While there is a common core of discovery in which all purchaser groups are interested, their claims also diverge, with respect to the statutes and theories under which each is brought, and they will utilize separate expert damages analyses. It is thus considered generally inappropriate for one counsel, firm, or group to represent all of these purchaser interests. In pretrial orders appointing lead, co-lead, and committees for each are the norm.[15]

The Judicial Panel on Multidistrict Litigation has sometimes created "hybrid" MDLs involving both personal injury claims and consumer/economic loss claims. Personal injury claims are typically asserted through individual actions, while the consumer/economic loss claims are most frequently brought as putative class actions. Recent examples of "hybrid" MDLs include the *Toyota Unintended Acceleration Litigation*[41] and the *GM Ignition Switch Litigation*.[16] When both types of proceedings are centralized before a single MDL transferee judge for coordinated case

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[15] *See, e.g.*, Pretrial Order No. 6, *In re generic Digoxin & Doxycycline Antitrust Litig*., MDL No. 2724 (E.D. Pa. Nov. 28, 2016) (appointing two attorneys to serve as co-lead counsel and twelve additional attorneys to comprise the PSC).

[41] Order No. 2: Adoption of Organization Plan and Appointment of Counsel at 5, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig*., MDL No. 2151 (C.D. Cal. May 14, 2010) (Selna, J.), ECF No. 159.

[16] Order No. 8 at 2, *In re Gen. Motors LLC Ignition Switch Litig*., MDL No. 2543 (S.D.N.Y. Aug. 15, 2014) (Furman, J.), ECF No. 249.

management, both advantages and challenges exist. Combining the tort and economic claims arising from a common fact pattern enables maximum efficiency in discovery, but must be accompanied by the recognition that tort plaintiffs' counsel, and consumer class counsel may have different perspectives and needs regarding the prioritization and emphasis of discovery. The discovery needed to prepare for tort trials and for consumer class certification, may, or may not be, identical.

In creating hybrid MDLs, the Judicial Panel has recognized that separate discovery tracks may be created to accommodate these different perspectives and priorities, without creating a preference for one type of claim over another.

> BEST PRACTICE 11A*:* To assure that all tracks are managed effectively, a transferee court in a hybrid MDL should typically appoint different counsel to take primary responsibility for personal injury claims on the one hand, and economic loss claims on the other.

In the *In re Toyota Motor Corp. Unintended Acceleration* and *GM Ignition Switch* MDLs, the transferee court's initial conference orders appointed "Initial Conference Counsel" (*Toyota*) and "Temporary Lead Counsel" (*GM*), who were directed to develop and propose leadership structures that accommodated both personal injury and economic loss perspectives. Ultimately, while it found no "conflict" between the personal injury and economic loss (class) plaintiffs, the *Toyota* court's organization utilized separate lead counsel and committees for the personal injury and class components of the litigation; while the *GM* organization featured three Co-Leads, two with "primary responsibility" for class economic loss claims, and one with "primary

responsibility" for the tort claims. The *GM* Executive Committee included counsel with both types of cases.[17]

> BEST PRACTICE 11B*:* An MDL transferee judge who is appointed to manage individual and class claims concurrently should prioritize their judicial resources in assuring that both types of claims move forward appropriately, through discovery, pretrial disposition, settlement where appropriate, and trial, either in the MDL transferee court, through bellwether trials, or upon remand to districts of origin.[18]

In determining how to manage multiple types of cases, each competing to be prioritized, the court should become as informed as possible as to particular circumstances that might warrant the priority personal injury claims over economic loss claims, or vice versa. For example: Will prioritizing the consumer class claims enable a settlement to be reached, at an early stage, that may operate to reduce or minimize further injuries or deaths? In the *Toyota* case, for example, the consumer class action settlement was reached before personal injury bellwether trials were set to commence. The class settlement's features included both compensation and measures to address the alleged product concerns in the affected vehicles. In other cases, where the injuries and damages have already occurred, and are not recurring, it may be important to get death and injury claims set for early bellwether trials to inform the parties as to the merits and values of these cases.

Transferee courts managing hybrid MDLs are doing more than double duty. They are tasked not only with effectively managing each type of litigation that is before them, but in managing the necessary interactions and coordination between tort plaintiffs, class plaintiffs, and their respective leaderships. In such cases, friction, and even disputes, among leaders responsible

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[17] *See In re Toyota* Order No. 2, *supra* note 41; *In re Gen. Motors* Order No. 8, *supra* note 43.

[18] While the personal injury claims will most frequently have been brought as individual or multi-plaintiff complaints, without class allegations, in some MDLs personal injury class action complaints may also have been filed and must be factored into case management decisions. The Supreme Court has limited, but not prohibited, the use of class actions when appropriate in personal injury litigation. But the parties may agree, for example, to utilize the class action mechanism at the settlement stage to resolve such claims under ongoing court supervision. For a contemporary example, see *In re National Football League Players Concussion Injury Litigation [MDL No. 2323]*, 821 F.3d 410, *cert. denied* 137 S. Ct. 591, 607 (2016).

for the respective types of claims may be inevitable; and, of course, the defendant or defendants themselves will have their own views as to whether and which types of claims should be prioritized.

The court can assist the lead counsel it appoints in coordinating with each other by more specifically delineating the duties and responsibilities of those it appoints in a hybrid MDL, as the *Toyota* court did. Another way to impose clarity at the outset is to utilize Rule 23(g)(3) Interim Class Counsel appointments on the "class side" of the hybrid MDL, while utilizing traditional MDL nomenclature and structure in appointing leadership for the "injury" track; such a leadership order would direct the Interim Class Counsel and tort lead counsel to work together on common discovery, to be responsible for the separate discovery necessary and appropriate to each type of claim, to coordinate scheduling proposals as much as possible between them, to propose schedules for each type of claim, and to pursue settlement, as appropriate, for their respective claims.

> BEST PRACTICE 11C*:* In a "hybrid" MDL, the court's order appointing a leadership structure should clearly delineate the roles and responsibilities for the class lead counsel and tort lead counsel and their respective committees.

An advantage to detailing specific roles and responsibilities within a leadership structure for specific counsel is that it may prevent or minimize ongoing tension or friction among attorneys who have been competitors in bringing the respective lawsuits that are now centralized before one court. Each counsel is given specific tasks and responsibilities and knows her role and place in the overall structure. The court may also consider whether it wishes to prescribe regular meetings or telephonic conferences of the leadership structure to assure ongoing communication and cooperation within that structure. Most courts have left such details up to self-ordering among designated counsel, seeing the advantage of ongoing flexibility, recognizing that the scope or nature of the litigation, and the need for particular tasks and responsibilities, will likely evolve over

time, and trusting that it has appointed counsel to leadership roles who in actuality can, as the *Manual for Complex Litigation* recommends, "work cooperatively with others."

Some courts have viewed such active cooperation as less important in class actions because of the specificity of the Rule 23(g) class counsel appointment and the traditional notion of the class action as one self-contained litigation. The convergence of class actions and MDLs in recent years, however, has given rise to the recognition that the ability to communicate and cooperate with others in the leadership structure, and with non-appointed attorneys, remains important whether or not the case is convened as a multidistrict litigation or class actions, individual suits, or a "hybrid" mixture of both. Thus, while Interim Class Counsel appointed under Rule 23(g)(1) or (g)(3) are not fiduciaries toward other counsel (the duty of adequate representation, under Rule 23, runs to the class), the collegial characteristics that courts are advised to seek and enforce in appointing counsel to leadership roles in non-class MDLs still apply in some degree. For example, in mass tort MDLs, when many lawyers represent individual clients, but only a small segment of them may be designated to serve in a leadership structure, courts have advised the designated leaders, in the language of the *Manual for Complex Litigation*, to "seek consensus . . . when making decisions that may have a critical impact on the litigation" and to "keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions significantly affecting their clients."[19] Such admonitions are less acute in litigation comprised of multiple class actions: by its terms Rule 23(g) puts all lawyers filing such cases on notice that not all lawyers who bring class actions would be appointed to serve as class counsel.

This difference in the expected degree of involvement in leadership decisions by counsel not in leadership positions, as between mass tort MDLs and class action MDLs, creates a challenge

[19] MANUAL (FOURTH), *supra* note 27, § 10.222.

in the situation of the "hybrid" MDL — consisting of a group of actions coordinated before a single judge, comprised of two different types of litigation, each with its own norms, culture, and expectations. In such cases, with the leadership structure that includes representatives of both the class and tort sides of the litigation, a premium is placed on counsel who are willing to understand and, within reason, accommodate the different norms, expectations, and styles of "class" and "mass tort" lawyers, especially since, as they occasionally occur, these concepts converge, whether in a class action settlement of mass tort claims, as in the recently approved *NFL Concussion Litigation*, or the "bellwether" trial of class claims or common questions on an "issue" class or statewide class basis, as a step toward an ultimate determination on multi-state or nationwide class claims.

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