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Federal Jurisdiction Reform

About the Author

Steven Glickstein is a member of Kaye Scholer's Product Liability Litigation and Counseling Practice and previously served as its Chair. During his 36 years of practice, Steve has been involved in some of the most highly publicized product liability litigation matters, including class actions that involve diverse products such as pharmaceuticals, medical devices, agricultural pesticides, blood products, asbestos, tobacco, and other products. Steve has written and lectured extensively on product liability class actions, and has testified before the Advisory Committee on Civil Rules concerning proposed changes to the federal class action rules. He can be reached at ***steven.glickstein@kayescholer.com***

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Two Modest Proposals

We begin by stating the obvious: Whether a case is litigated in federal court rather than state court can have a huge impact on both litigation costs and the end result. There are several reasons for this.

First, procedural rules differ between the federal and state courts. What rules govern the preservation and production of electronic discovery? Are depositions of experts permitted? Does either *Daubert* or *Frye* apply to the admissibility of expert testimony, or neither? Does the rule prohibiting admission of subsequent remedial measures apply only to negligence claims or to all claims? Must the jury verdict be unanimous?

Second, trial court judges enjoy wide (mostly non-reviewable) discretion on issues that have enormous impact. Will the judge allow the plaintiff's counsel to re-depose company witnesses whose depositions already were taken in an MDL proceeding? Will the judge try cases one at a time or permit multi-plaintiff trials? What is the prevailing attitude toward exclusion of expert testimony or granting summary judgment? Will the judge consider customized jury instructions if aspects of the case are not covered by pattern instructions? While there are variations in approach even among federal judges, lawyers know that the customs and practices on these discretionary issues vary even more widely between the federal and state courts.

Third, jury demographics often vary significantly depending upon whether the case will be tried in federal or state court. Even when federal and state courts are across the street from each other, the choice of court can have a huge impact: federal district courts typically draw jurors from a larger number of counties than their state court counterparts, and therefore federal juries often are more diverse demographically.

Jurisdiction Reform

There is much more that could be done to rationalize federal jurisdiction, and therefore to make litigation fairer and more predictable. And yet, it is surprising how little jurisdiction reform factors into efforts of tort reform groups to improve the legal system.

Jurisdiction reform should be easier to enact politically than changing the substantive tort law. Reforming venue does not, by its terms, make any conduct legal that previously was tortious; nor does it

limit a plaintiff's recovery for compensatory or punitive damages in any way. It is, quite simply, a good government measure to assure that the appropriate courts handle the appropriate cases.

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With that in mind, this article presents two modest proposals for federal jurisdiction reform.

1. Reforming Federal Removal Jurisdiction

Everyone familiar with mass tort litigation knows the tortured efforts that are made by plaintiffs to thwart complete diversity of citizenship and thereby defeat federal court jurisdiction. These situations arise because under 28 U.S.C. § 1332, a corporate defendant is deemed to be a citizen of at most two states, where it is incorporated and (if different) where it maintains its principal place of business; by contrast, plaintiffs can come from 50 different states. That leaves plaintiffs in 48 states with only two options if they want their case heard in state court rather than federal court: 1) sue in the plaintiff's home state, but join a local defendant — usually a local sales representative, doctor, hospital or pharmacy — to defeat complete diversity; or 2) sue in the defendant's home state because under 28 U.S.C. § 1441, even if there is complete diversity, an action cannot be removed to federal court if any defendant is a citizen of the state where the action is brought.

Not surprisingly, most plaintiffs prefer to sue in their home state; therefore, the preferred option often is to sue the local employee or healthcare provider. In many cases, the defendant removes the action to federal court anyway, asserting that the local employee or healthcare provider is "fraudulently joined" to the action, meaning the complaint does not assert a cognizable claim against the local defendant, so that the local defendant should be ignored for determining diversity.

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The federal district courts are marvelously inconsistent in articulating the standards for fraudulent joinder or (more frequently) applying those standards to particular cases. Often, the decision turns on whether, despite notice pleading requirements, some greater particularity should be required in the complaint when joining a defendant who obviously is not the target of the case but is joined granting remand cannot be appealed, and decisions denying remand usually cannot be appealed until after final judgment. *See* 28 U.S.C. §§ 1291, 1447(d).

But there is a larger question that should be asked: Why in the world should our legal system encourage this wasteful jurisdictional jousting over whether a case belongs in federal court or in state court? Wholly apart from the enormous time, money and effort that goes into litigating whether a complaint must allege some detail about what a local employee or healthcare provider did wrong — and if so

whether the complaint contains the necessary specificity — the answers to these questions really should make no difference to whether the case belongs in federal or state court. Everyone knows the out-of-state product manufacturer is the principal defendant. Everyone knows the local employee is almost always a small fry who never will be found liable if his corporate employer is not. Everyone knows the plaintiff will never try to collect because the employer will pay in full (and if the plaintiff did try to collect, the corporate employer would indemnify the employee).

Everyone knows that local health care providers, if they did nothing more than prescribe or dispense the defendant's product, will be dropped from the case before trial — after the one-year deadline for a defendant to remand has expired. *See* 28 U.S.C. § 1446(c).

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Nevertheless, the local employees must disclose the litigation and potential liability in their mortgage, bank loan or credit card applications, harming their credit rating. In addition, the local healthcare providers must notify their carriers, who must hire lawyers, and thereby increase malpractice insurance premiums and our healthcare costs. And in many states, the healthcare providers must disclose the claim to regulatory boards, potentially damaging their reputations.

For better or worse, our Constitution permits federal courts to hear cases involving citizens of different states. Our Congress, in implementing this constitutional power, generally has required complete diversity of citizenship for a federal court to exercise jurisdiction. But Congress has the undisputed power to permit federal courts to entertain lawsuits based solely on minimal diversity. All it would take is a statute permitting the federal courts to exercise jurisdiction in product liability cases exceeding the $75,000 jurisdictional threshold so long as the plaintiff was diverse from the manufacturer. The citizenship of the local employee or health care provider would no longer determine whether the case was litigated in federal court. If this were the case, they would never be sued. At the stroke of a pen, the wasteful and expensive jurisdictional gamesmanship that characterizes our removal practice would stop and the abuse of local employees, doctors, hospitals and pharmacies would end.

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2. Reforming MDLJurisdiction over Pretrial Discovery

The federal Multi-District Litigation (MDL) statute, 28 U.S.C. § 1407, was designed primarily to conserve resources of the courts, parties and witnesses by consolidating litigation for pretrial purposes in a single federal forum. Documents would only have to be produced once. Depositions would only have to be

taken once. Discovery disputes, privilege challenges and challenges to confidentiality designations would only have to be resolved once. Efficiency and uniformity would be assured.

It has not always worked out that way — due largely to the availability of state courts as alternative forums. Consistent with the recommendations of the Manual for Complex Litigation (4th) § 20.313, many state court judges do defer to an MDL judge on discovery issues, nevertheless, it is almost always possible to find some state court judges who believe it is an abdication of their responsibility if they do not independently review MDL discovery rulings, and rule inconsistently if they disagree. The result is to put defendants in double jeopardy on a host of discovery issues. Defendants who negotiated search terms for electronic discovery in an MDL find that state court plaintiffs can challenge the search terms and ask for electronic searches to be re-done with new search terms, at enormous expense.

Stipulations concerning limitations on the custodians whose documents are to be searched, or the locations where documents are to be searched, or the time periods to be covered by a search, are subject to having those stipulations undone by state court plaintiffs. MDL rulings on cost shifting, or on the propriety of confidentiality designations, or on whether certain documents are discoverable, may all be re-examined by a state court. Key witnesses have been ordered to be re-deposed in state court despite their prior depositions in the MDL.

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This is not to say that the majority of plaintiffs' counsel routinely seek to relitigate every discovery ruling in state court, or that state court judges are routinely sympathetic to such entreaties. But in almost every MDL litigation there are multiple occasions when state court plaintiffs seek to have a state court judge re-examine an MDL discovery ruling, causing considerable expense even if the state judge rejects the challenge. In those instances where the state judge rules differently from the MDL judge, the burden and dislocation is very real.

The Schwarzer Proposal

There is a relatively simple way of minimizing this problem, first proposed in the 1990s by William Schwarzer, Director of the Federal Judicial Center: Amend the MDL statute to permit removal of state court actions to federal court based on minimal rather than complete diversity whenever a federal MDL is created, and to permit such removal to the MDL by the defendant even when sued in its home state. According to Schwarzer's proposal, the removal right would be only for the limited purpose of supervising discovery and other pretrial proceedings. Consistent with the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), the case would have to be remanded to the state court for trial.

Even as to pretrial proceedings, the MDL judge would be prohibited from ruling on dispositive motions if the removal was based solely on minimal rather than complete diversity or if the defendant removed the action from its home state; those issues, as well, would be reserved for remand to the state court. This proposal would do much to promote efficiency and uniformity in discovery without significantly impairing any substantive right of the plaintiff.

While there would still remain a small number of cases that could not constitutionally be removed to the federal MDL — *i.e.*, those cases in which there was not even minimal diversity of citizenship because all plaintiffs and defendants were from the state court — the number of lawsuits not subject to common discovery would be greatly reduced, significantly curtailing the opportunities to forum shop discovery rulings. Moreover, because minimal diversity would be lacking only in the defendants' home states, there would be relatively few judges with competing litigation pending before them, making coordination (and the likelihood of avoiding duplication) much greater.

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On the other hand, the plaintiffs would lose nothing substantive through implementation of this reform, beyond the dubious right to relitigate MDL discovery rulings. In all cases where removal was permitted only to permit an MDL Court to supervise discovery, plaintiffs would retain their right to try their cases in state court, and would retain their right to have the state court rather than the federal court be the ultimate arbiter of state law on dispositive motions.

Objections from the Defense Bar

Oddly enough, many members of the defense bar objected to the Schwarzer proposal when it was first espoused on the ground that the MDL court should be permitted to decide dispositive state law motion even in cases that were removed based on minimal diversity of citizenship, or where the removal was from the defendant's home state. This misplaced opposition contributed to the reform not being implemented; there was no way Congress was going to enact such a sweeping realignment of federal and state judicial power. A more limited goal of regulating venue only for discovery supervision of mass torts — without also attempting to have the federal courts take over the job of defining state law — is much more feasible politically, and is itself a worthy goal to pursue.