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ADMINISTRATIVE HOUSEKEEPING AND ETHICAL MATTERS IN MASS TORT MDLS AND CLASS ACTIONS

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I. INTRODUCTION AND OVERVIEW OF MDLS

Multidistrict Litigation (MDL) was created by federal legislation in 1968 after an onslaught of electrical equipment price-fixing cases were filed in numerous federal district courts. An MDL is a procedural device that allows for the transfer of federal cases from multiple districts to any single district for coordinated or consolidated pretrial proceedings.

Under 28 U.S.C. § 1407, an MDL proceeding is created by a decision of the U.S. Judicial Panel on Multidistrict Litigation ("JPML"). The JPML consists of seven sitting federal judges appointed by the Chief Justice of the United States. The multidistrict litigation statute provides that no two Panel members may be from the same federal judicial circuit.

The job of the JPML is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings[1]; and (2) select the judge or judges and court assigned to conduct such proceedings.

The purpose of this transfer or "centralization" process is to resolve consolidated pretrial discovery and pretrial motions, so as to avoid duplication of discovery, to prevent inconsistent pretrial rulings, to conserve the resources of the parties, their counsel and the judiciary, and to further the convenience of the parties and promote the just and efficient conduct of the litigation.

Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the JPML at or before the conclusion of centralized pretrial proceedings.

A party whose case has been removed from state court to a federal district court and made part of an MDL proceeding may file, on jurisdictional grounds, a motion to remand the case back to the original state trial court from where it was removed.

1 28 U.S.C. § 1407.

Since its creation, the JPML has considered motions for centralization in over 2,200 dockets involving more than 350,000 cases and millions of claims therein. These dockets encompass litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; patent validity and infringement; antitrust price fixing; securities fraud; and employment practices.

II. GENERAL OBLIGATIONS OF TRANSFEREE JUDGES UPON ASSIGNMENT OF A MASS TORT MDL

The obligations of an MDL Mass Tort transferee judge are numerous. They include coordinating with the court clerk's office to ensure a smooth processing of cases, the prompt scheduling of a conference with counsel, the entering of a case management order, ruling promptly on motions, holding regular telephone conferences, coordinating with parallel state court cases, encouraging an early mediation process, anticipating *Lexecon* issues,[2] and exercising good management techniques (decide pretrial issues, settle or try all claims when possible, remand cases to transferor courts where appropriate, and informing transferor court what the transferee court did).

III. SELECTION OF LEAD/LIAISON COUNSEL AND COMMITTEES AND RELATED ADMINISTRATIVE ISSUES

A. Mass Tort MDL Proceedings

The first important decision that a Mass Tort MDL judge must make is the appointment of counsel. It is usually necessary in complex MDLs to select lead, liaison, and/or administrative counsel. *The Manual for Complex Litigation* (Fourth) (2004) sets forth the criteria to consider in selecting counsel.[3] Many judges request lawyers' resumes, descriptions of prior experience in other complex litigation, and their proposed fee arrangements. Special consideration should be given to the method or amount of fees that a lawyer will charge. The court should explain and enforce record-keeping requirements (very important). It should also identify and appoint counsel who are vigorous advocates, constructive problem solvers, and are civil with their adversaries and each other. Moreover, in Mass Tort MDLs involving state-court litigation, lead counsel ought to include other attorneys in the committee structure and delegate significant responsibilities to them. The political and economic dynamics, unless monitored, can disrupt the MDL and related state court proceedings.

A Mass Tort MDL judge will ordinarily appoint lead and/or liaison counsel for both parties or one side. Whether both lead and liaison counsel are appointed will depend upon complexity and amount of interests at stake. Typically a local lawyer or firm will be appointed as liaison counsel. A liaison counsel plays an important role in coordinating matters in product liability MDLs that concern numerous parties. They handle administrative matters, including communications between counsel and the court and apprising parties of developments.

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2 In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998), the Supreme Court held that a transferee court in an MDL proceeding does not have power to transfer a case to itself and must remand the case to the transferor district court upon the conclusion of the coordinated pretrial proceedings. *Id.* at 39-40 (holding that plain language of 28 U.S.C. § 1407(f) imposes responsibility to remand, which "bars recognizing any self-assignment power in a transferee court").

3 *See id.* §§ 10.224, 14.211, 22.62.

Lead counsel and committees of counsel for plaintiffs in Mass Tort MDLs carry out many functions. Lead counsel usually act for the group and formulate substantive and procedural approaches during the litigation.

Committees of counsel, including steering committees, coordinating committees, management committees, executive committees, discovery committees, trial teams, and state liaison committees, are usually appointed when the interests or positions of the members of the group are dissimilar such that they should have some representation in the decision making.[4] Committees may prepare briefs or conduct portions of the discovery if a single lawyer cannot do so adequately. Also, a plaintiffs' steering committee ("PSC") may wish to form subcommittees to perform specific sub-benefit tasks. The PSCs' responsibilities can include initiating, coordinating, and conducting all pretrial discovery on behalf of plaintiffs; acting as a spokesperson for plaintiffs during pretrial proceedings; negotiating and entering into stipulations with defendant; developing and pursuing settlement options with defendant; creating a method for reimbursement for costs and fees for services; and dealing with liens on a national basis.[5]

Mass Tort MDLs and Class Actions Generally

In addition, in class action litigation and generally in Mass Tort MDLs, courts have the opportunity and obligation to appoint counsel who will represent beneficiaries of any common fund.[6] Judges have used four distinct approaches to selection of counsel in this regard: (1) reviewing recommendations of lawyers who have filed related actions and appointing the recommended lawyers if they are adequate to represent the interests of the class; (2) selecting among counsel who have filed related actions but are unable to reach an agreement and who compete for the appointment; (3) inviting bids from counsel who may or may not have filed a related action; and (4) allowing the most adequate plaintiff to select counsel, subject to review by the court.

B. Staffing

A major issue of concern in determining fees is the appropriate level of staffing for the litigation. The *Manual* encourages courts to set guidelines at the outset of the litigation, which can reduce the potential for later problems and facilitate judicial review of fee applications.[7] For instance, guidelines can cover the number of attorneys who may charge for time spent attending depositions, court hearings, office and court conferences, and trial, and may caution against using senior attorneys on projects suitable to less senior (and less costly) attorneys. The setting, and observance, of such guidelines can assist attorneys for both sides in avoiding overstaffing particular parts of the litigation and therefore avoid complaints of overcharging or overbilling.

C. Maintenance of Time Records

When fees in large scale litigation are based on the lodestar method, or when the lodestar method serves as a cross-check on the percentage-of-fund method, the maintenance of complete time records is critical to the determination of fees. As such, counsel should maintain contemporaneous and accurate time records throughout the course of an MDL or

4 *See*, *e.g.*, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657, Dkt. Nos. 245-46 (E.D. La. Apr. 8, 2005) (orders appointing Plaintiffs' and Defendants' Steering Committees (copies annexed hereto as Exhibits A & B).
5 *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596, 2004 WL 3520245 (E.D.N.Y. June 17, 2004).
6 *See* Fed. R. Civ. P. 23(g).
7 *Id.* § 14.212.

class action. Courts can also (and do) require the periodic submission of time records during the litigation. This practice encourages attorneys to maintain adequate and contemporaneous records, and allows the court an opportunity to detect any problems reflected in the records. Because these records are often too voluminous for effective judicial review, courts also employ methods that will facilitate their review, such as the appointment or approval of a certified public accountant firm to review the records and to periodically provide records to the court, or the delegation of this task to a special master.[8]

IV. ALLOCATION AND DETERMINATION OF ATTORNEY FEES IN THE SETTLEMENT CONTEXT IN MASS TORT MDLS AND CLASS ACTIONS

Attorney fees are not awarded unless there is a settlement. Generally, attorney fees should be linked to services provided and a reasonable share of the value of the settlement benefits actually received by plaintiffs.

A major difference between mass torts and other class actions is that members of a mass tort litigation have affirmatively opted in to the litigation and are often represented by individually retained plaintiffs' attorneys. By contrast, in a class action, the absent class members have no individually retained lawyers and must rely upon counsel for the class representative and the court to look out for their interests. In a class action or Mass Tort MDL, the transferee judge usually appoints counsel to litigate common issues and prepare the case for trial or settlement. In these settings, the courts will have to allocate fees among attorneys. Some courts have even limited the amount of contingent fees awarded for pursuing individual claims in a common-fund settlement.[9] The capping of contingent fees in Mass Tort MDLs, however, has not been without criticism.[10]

If there is a combination of individual settlements and a global settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a certain percentage of the fees they receive into a common fund to contribute to the fees of the class counsel (or, in an MDL, to the fees of the lawyers appointed by the court to perform the work for the common benefit of the MDL members), whose work in discovery and trial preparation contributed to the settlement of the individual cases as well. "A necessary corollary to court appointment of lead and liaison counsel and appropriate management committees is the power to assure that these attorneys receive reasonable compensation for their work."[11] In a consolidated national mass litigation, it is a standard practice for courts to compensate attorneys who work for the common benefit of all plaintiffs by setting aside a fixed percentage of settlement proceeds.[12] "In a complex multi-party litigation, attorneys designated with responsibilities for actions beyond those in which they are retained may be compensated for their work not only by their own clients, but also by those other parties on whose behalf the work is performed and on whom a benefit has been conferred."[13]

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8 *See*, *e.g.*, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657, Dkt. No. 245, at 4 (order approving retention of certified public accounting firm to review time and expense submissions) (copy annexed hereto as Exhibit A).

9 *See*, *e.g.*, *In re Vioxx Prods Liab. Litig.*, 574 F. Supp.2d 606 (E.D. La. 2008) (capping plaintiffs' counsels' contingent fees at 32%); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp.2d 488, 496 (E.D.N.Y. 2006) (capping plaintiffs' counsels' contingent fees at 35%).

10 *See* Aimee Lewis, Note, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 Rev. Litig. 209 (2012).

11 *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003); *see also Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992) ("District courts have exercised this power to establish fee structures designed to compensate committee members for their work on behalf of all plaintiffs involved in consolidated litigation.").

12 *See* MANUAL § 20.312 ("MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.").

13 *In re Worldcom, Inc. Sec. Litig.*, No. 02-CIV-3288, 2004 WL 2549682, at *2 (S.D.N.Y. Nov. 10, 2004); *see also Smiley*, 958 F.2d at 501.

A transferee court in a federal multidistrict litigation has the power to determine the compensation for appointed lead counsel and to impose its fee calculation on all federal plaintiffs, even if their cases are 1) before other federal courts rather than the transferee court, or 2) not yet in a federal court, but ultimately will be in such a court.[14] Courts have thus sanctioned a common benefit fund derived from a fixed percentage of fees earned by individual attorneys.[15]

As a result of this authority, MDL transferee judges often issue orders that direct a fixed percentage of any settlement be contributed to a general fund to pay such national counsel. Courts may direct that contributions be made by defendants or by plaintiffs' counsel from individual settlement payments received.

Most courts use the percentage basis to determine the appropriate fees. In instances involving large settlements, the common range is 4% to 18%. Some courts use the lodestar approach, applying a detailed analysis of the reasonable amount of hours worked and multiplying that amount by an adjusted reasonable hourly rate. And some courts use a combination approach involving both methods, where the percentage method is used and the lodestar method is used as a cross-check on the reasonableness of the fee.[16]

With respect to attorneys who provide a common benefit to a group of litigants, such attorneys may receive compensation from a common fund. Courts have authority to protect members of a class from excessive fees by limiting the amount of contingent fees awarded for pursuing individual claims in a common-fund settlement. If there is a combination of individual settlements and a class-wide settlement, the court can order individual plaintiffs' lawyers to pay a certain percentage of fees they received into a common fund to contribute to the fees of lead or class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well.

V. ETHICAL ISSUES IN THE CONTEXT OF MASS TORT MDLS AND CLASS ACTIONS

Ethical rules were drafted many years ago before the arrival of mass tort situations, where attorneys may represent not just one or a few clients but many. As such, the ethical rules were not created with the intent that they cover the mass tort settlement situation.

Plaintiffs lawyers nonetheless face many ethical issues in the context of multiple party actions: They have to represent their individual clients zealously within the bounds of the law; if appointed to a leadership position or a committee in an MDL proceeding, they must exercise care and consideration for the concerns of the court, co-counsel and their clients; they must deal with the desire of defendants to obtain full closure of the litigation, often on a national scale; they must deal with overworked courts interested in global, efficient, and expeditious resolutions to the litigation; and they must face the concerns of a society that desires a fair and economic resolution to the litigation.

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14 *See Walitalo v. Chrysler Corp.*, 968 F.2d 741, 747 (8th Cir. 1992) ("the district court did not err in specifying how the originating trial courts should calculate the amount of lead and liaison counsel's fees in those cases remanded for trial . . . . the district court appointed lead and liaison counsel and thus had authority to determine the amount of their compensation"); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1019 (5th Cir. 1977) (stating that transferee district court, which appointed lead counsel, "was the only tribunal that could effectively handle the fee matter"); *In re Zyprexa*, 424 F. Supp. 2d at 491 (setting caps on attorneys' fees in settled Zyprexa cases).

15 *See Smiley*, 958 F.2d at 500 ("The order provided that any committee fee was to be paid by all attorneys on behalf of their clients. Plaintiffs were not to pay fees to the committee out of their own recoveries."); *see also In re Air Crash Disaster*, 549 F.2d at 1016 ("We hold that the district court had the power to direct that the Committee and its counsel be compensated and that requiring the payment come from other attorneys was permissible").

16 *See, e.g.*, *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006).

A. Whether There is an Absence of the Adversarial Process in the Mass Tort Settlement Context and Whether this Can Adversely Impact or Jeopardize Settlements and Attorneys Fees

The consolidation of tort claims, whether by class action or MDL, radically changes the dynamics of settlement. Some commentators have opined that the interests of attorneys can be pitted against those of their clients, and that the interests of plaintiffs can sometimes be pitted against other plaintiffs. In these situations, some commentators believe that the focus on a mass settlement can sweep aside the concerns of individual claimants. But while these tensions can work to replace the intended adversarial relationship of plaintiff and defendant with a struggle between monied, connected interests and lone class members, for attorneys that follow the ethical rules, this should not happen.

Much criticism of settlement in the mass tort context has been focused on the theory that early settlement circumvents the traditional adversarial process, through which the facts and evidence would be unearthed and the true value of the case discerned. Absent discovery conducted in the adversarial process, the theory goes, facts and evidence usually unearthed during the discovery process remain buried. The adversary system that is traditionally at play in litigation also breaks down in the attorney fee context in a mass tort settlement because defense counsel generally does not have an interest in the amount or percentage of attorney's fees allotted to plaintiffs' counsel, since it is coming out of a percentage of the settlement figure (out of plaintiffs' pockets) or is being allotted between common benefit attorneys and non-common benefit attorneys.

Although the foregoing concerns might have some validity in some situations, the recent settlements in the *Baycol*, *Vioxx*, and *World Trade Center Disaster Site*[17] mass tort litigations were reached after much pretrial discovery and litigation activity, conducted by both sides in an adversarial setting, unearthed substantial facts and evidence. In addition, in the *Baycol* and *Vioxx* litigations the settlements were reached after multiple bellwether jury trials. By deciding controlling legal issues expeditiously and adopting bellwether trial plans, these cases seem to suggest that courts can ensure that the complex settlement formulas and matrices used in private mass tort settlements are informed by, and account for, the legal and factual issues impacting individual plaintiffs' claims (*i.e.*, issues that are at play in the traditional adversarial setting). And these measures further allow for a public airing of mass tort disputes, thus providing a transparency that is likewise in place in the traditional adversarial setting. Indeed, the courts in these cases made public the measures they instituted at each step of the way. All told, these measures go far in removing much of the concern about the purported absence of an adversarial process in the mass tort settlement context.

The *Vioxx* litigation provides an example of where the full-fledged discovery necessary to prepare for bellwether trials will often reveal many of the factual circumstances relevant to the ultimate success or failure of individual plaintiffs' claims (circumstances that are another indicator that suggests the adversary process is in play). Judge Fallon explained the institutional benefits of his use of bellwether jury trials in the *Vioxx* litigation as follows:

> [B]y injecting juries and fact-finding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to organize the products of pretrial

17 *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La.); *In re World Trade Center Disaster Site Litig.*, Dkt No. 21-mc-00100 (AKH) (S.D.N.Y. filed Feb. 13, 2003); *In re Baycol Prod. Liab. Litig.*, MDL No. 1431 (D. Minn.).

> common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation. . . . [T]he knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.[18]

Even if parties settle before bellwether jury trials are held, as in the *World Trade Center Disaster Site Litigation*, the discovery conducted in preparation for such trials can nevertheless provide the requisite knowledge to inform the relative valuations reflected in the structure of the settlement formulas and matrices. Moreover, authoritative pretrial rulings on significant legal issues (that are customary to an adversarial setting) can also assist in the maturation of mass tort disputes and supply useful information to be factored into settlement negotiations.

On the other hand, the notion of judicial approval of a settlement in a mass action has, in certain instances, led some commentators to observe that such approval can detract from the adversarial nature of the judicial system. In *Zyprexa*, *Vioxx*, and the *World Trade Center Disaster Site Litigation* case, the courts seemed to espouse the notion that the settlements were in the best interests of the claimants. Commentators have stated that the idea that a judge should determine what is in the claimant's best interest is inconsistent with the adversarial system. Counsel, not the judge, should act in the client's best interests. This observation, however, might be somewhat tempered by the fact that each claimant in a mass action can review the settlement terms with his attorney and decide for themselves whether to consent to the settlement offer. But where the judge declines to approve a settlement, the claimant's input is essentially nonexistent.

B. Potential Conflicts of Interest Arising From Simultaneous Representation of Parties in Multiple Class Actions Against the Same Defendant in Different Jurisdictions

The issue of conflicts of interest that may arise when counsel simultaneously represents two parties in two class actions in different jurisdictions against the same defendant has not received much attention. But the issue certainly exists.

Counsel has an ethical duty of loyalty to his client. The bedrock of the attorney-client relationship is loyalty – "the lawyer's virtually total loyalty to the client and the client's interests."[19] This duty bars an attorney from representing two clients that have inconsistent interests. Rule 1.7 of the MODEL RULES OF PROF'L CONDUCT provides that a lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that a representative of members of a class must "fairly and adequately" protect the interests of the class. Furthermore, Rule 23(g)(1)(B) provides that in appointing class counsel, a court may consider any other matters pertinent to counsel's ability to "fairly and adequately" represent the interests of the class.

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18 Eldon E. Fallon, Jeremy T. Grabill, Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2325 (2008).

19 G. Wolgram, *Modern Legal Ethics* § 4.1, at 146 (1986).

Adequacy of representation is crucial to a binding judgment on absent class members. In the absence of adequate representation, the binding judgment is subject to attack under the Due Process Clause.[20]

In situations where counsel is simultaneously representing classes in multiple class actions against the same defendant or defendants in different jurisdiction, the question arises whether his loyalties may be so divided that a conflict of interest arises.

Where counsel's duty of loyalty to a client may be compromised, he arguably cannot fairly and adequately protect the interests of the class for purposes of Rule 23. The Supreme Court in two cases involving intra-class conflicts of interest found that, under Rule 23's adequacy prong, conflicts of interest existed where the representation of the class members would result in conflicting interests between the class members, requiring a determination that representation was inadequate and the rejection of the class settlements.[21]

Courts have ruled along similar lines in cases involving inter-class action conflicts. In *Fiandaca v. Cunningham*, the First Circuit ruled that the failure to disqualify the class counsel from representation was an abuse of discretion where counsel's simultaneous representation in two separate class actions created a conflict of interest between the classes in terms of the settlement.[22] The terms of the proposed settlement in one class action were inconsistent with the interests of class members in the other class action. The court cited New Hampshire's ethical rule that tracked Model Rule 1.7(a) and the ABA's comment to that Rule, which provides that "[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."[23]

Other courts have similarly held that a disqualifying conflict of interest arose in the context of simultaneous representation in multiple class actions where it would be difficult to award the whole sum of damages to both classes, or where the defendants' assets would not be sufficient to satisfy the judgments in the two class actions.[24]

In another case, the court held that a disqualifying conflict arose where the named plaintiffs were the same in both class actions, and thus the fact that they would be indifferent to whether one case or the other succeeded posed a risk of harm to the absent class members in both cases.[25]

On the other hand, courts have declined to find a disqualifying conflict of interest at least in respect to a liability phase of a class action involving simultaneous representation in multiple class actions.[26]

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20 *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).
21 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-29 (1997).
22 827 F.2d 825, 829 (1st Cir. 1987)
23 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (2011).
24 *Moore v. Margiotta*, 581 F. Supp. 649, 650-53 (E.D.N.Y. 1984); *Sullivan v. Chase Investment Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978); *Jackshaw Pontiac, Inc. v. Cleveland Press Publish'g Co.*, 102 F.R.D. 183, 192 (N.D. Ohio 1984); *Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992); *In re Cardinal Health Inc. ERISA Litig.*, 225 F.R.D. 552, 556-57 (S.D. Ohio 2005); *cf. Dietrich v. Bauer*, 192 F.R.D. 119, 126 (S.D.N.Y. 2000) (rejecting argument that counsel was improperly conflicted because "the Court is not presented with a situation in which counsel simultaneously represents classes in parallel litigations seeking to tap the same pool of finite assets").
25 *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 671, 679 (N.D. Ohio 1995).
26 *See Seijas v. Republic of Argentina*, 606 F.3d 53, 57 (2d Cir. 2010) (district court did not abuse discretion in certifying class where potential conflicts of interest that arose because lead counsel represented all eight classes, as well as individual plaintiffs in non-class actions, and all plaintiffs theoretically were in competition with one another to recover on their judgments, would threaten damages phase of the proceedings, not the liability phase, and district court promised to revisit conflict issue in damages phase if necessary).

Thus, simultaneous representation in class actions against the same defendant in different jurisdictions may result in a settlement or judgment that restricts or adversely impacts the damages or rights sought by the class members in the respective class actions. Counsel should be aware of the potential for conflicts of interest that may arise in these situations.

The enactment of the Class Action Fairness Act of 2005 arguably reduces the prospect of simultaneous representation in multiple class actions in different courts against the same defendant by pushing state court class actions into the federal courts. But the issue will not disappear because class actions against the same defendant can still be filed in multiple federal courts. MDLs, though, should result in a reduction of this problem, because the interests of the classes in an MDL, or the outcomes sought, are generally the same.