A View from the Bench on MDLs

Monday, December 12, 2011

Last week we attended ACI's Annual Drug and Medical Device Litigation Conference. As always, it was nice to be in New York City during the holiday season (though the persistent drizzle was less than festive) and even nicer to see so many friends.

The presentations were quite good and up-to-date. The *Mensing* discussion was especially enlightening. As usual, we were most eager for the judicial panel, and it did not disappoint. In fact, it was so good, we're calling it an early Christmas gift.

The topic for the judges was recent MDL litigation. Judges Cogen, Cote, Herndon, Montgomery, and Waxse were all engaging and thoughtful. Here are a few of the highlights:

• The judges realize that there is virtually no agreement as to how much a transferee judge must accomplish prior to remand. (Well, maybe we already knew that).

• There are also a variety of approaches to selecting bellwether trials. Permitting the parties to select their strongest cases, even with vetoes, does not ensure trials of representative cases. And if they're not representative, where's the value for settlement? One judge tells each party to proffer cases along with arguments for why they are truly representative. He then chooses the most representative case. Like baseball arbitration, it builds in an incentive for each party to be reasonable.

• As that old Barbie doll said, "Math is hard." So is science. But all the judges believe that Daubert forces judges to act as real gatekeepers. Consequently, judges – with plenty of help from the parties, lawyers, and experts – must do the homework to keep junk science away from the jury. It was pretty clear that all of the judges on the panel were hard workers and quick studies, and that they would not be the least bit shy to police expert evidence.

• It's no surprise that all the judges dislike discovery disputes. What is a surprise is the array of creative techniques the judges use to resolve or curtail these disputes. Our favorite? Ordering the parties to videotape a follow-up meet-and-confer session. If the dispute isn't resolved, the parties must send the tape to the judge. Guess what? Not a single tape has yet arrived.

• Fed.R.Civ.P. 26 has a couple of subsections that lawyers might want to read again (or, maybe, read for the first time). Here is what Rule 26(b)(2)(C) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Thus, either in considering a party's motion, or *on its own*, a court must limit discovery that isn't worth the effort or expense. Proportionality matters. Wow. That's an issue with most of the discovery we see. And here's the kicker: Rule 26(g)(1)(B) requires lawyers to sign discovery requests and responses certifying that either they are complying with the discovery rules (including 26(b)(2)(C), and that what they are doing is

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

If a certification violates Rule 26, the court "must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed.R.Civ.P. 26(g)(3). It's like a Rule 11 for discovery. One judge said that pretty much every discovery request and response he's seen violates 26(b)(2)(C) and could conceivably warrant sanctions.

Take a look at the Notes to these provisions. Maybe courts seldom invoke these provisions, halt disproportionate discovery, and impose sanctions, but it's clear that active judicial

involvement was contemplated. For our part, we're happy to have a judge engage in that proportionality analysis. We're even happier when it's done by judges who are smart, fair, and conscientious. Based on what we saw last week, we're optimistic.

• We're not sure this last point is the most significant in terms of jurisprudence, but it produced the single most lasting image from the conference. One judge said that looking through the activities in an MDL can be like going through the refrigerator, opening up Tupperware containers, and gaping in puzzlement and/or horror at the goodies within. Yeah – we've been there, both actually and metaphorically.