

6th Circ. Opioid Opinion On Federal Rules Helps Cos. In MDLs

By Gareth Evans and Nick Snavelly (May 11, 2020, 6:20 PM EDT)

In a decision that has important implications for all aspects of multidistrict litigation proceedings, including discovery, the U.S. Court of Appeals for the Sixth Circuit held recently in the National Prescription Opiate Litigation MDL that while courts have latitude to achieve efficiencies in MDLs, they must do so within the limits of the Federal Rules of Civil Procedure.

"MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance," the court stated.[1]

MDLs can bring efficiencies to discovery and pretrial proceedings. Indeed, the Sixth Circuit observed that "an MDL court has broad discretion to create efficiencies and avoid duplication — of both effort and expenditure — across cases within the MDL." [2]

Yet, while courts in MDL proceedings may have wide latitude in case management and discovery, they may not disregard the provisions and limits of the Federal Rules of Civil Procedure. In short, the Sixth Circuit minced no words in declaring that the federal rules "have the same force of law that any statute does." [3]

Looking Behind the Opiate Litigation Ruling

The Sixth Circuit's ruling involved a petition for writ of mandamus that 12 national retail pharmacy chains brought regarding the MDL court's departures from the rules in case management and discovery.

The lower court had permitted two Ohio counties to amend their complaints many months after the deadline set forth in the case management order for doing so, and the court refused to hear the pharmacies' motions to dismiss. It had also ordered the pharmacies to produce data for nearly every opioid prescription that they had filled anywhere in the U.S. for the past 13 years, even though the specific cases at issue only involved claims by the two counties.[4]

The district court had stated that the pharmacies' objections to the court's orders "would be better taken in the context of a single case," and asserted that "in the context of an MDL, their objections lose much of their import." [5]

The Sixth Circuit rejected that notion, holding that the law must be applied the same in an MDL as it is in other cases:

True, [Title 28 U.S. Code Section] 1407 provides for the transfer of certain actions to MDL courts to "promote the just and efficient conduct of such actions;" and true, Civil Rule 1 says that the Rules should be construed "to secure the just, speedy, and inexpensive determination of every action and proceeding." [6] [But] neither Section 1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones. [7]

The Sixth Circuit reasoned that the Federal Rules of Civil Procedure, promulgated pursuant to the Rules Enabling Act, "are binding upon court and parties alike, with fully the force of law." [8] The court held that the district court violated Rule 16(b) when it allowed the counties to amend their complaints long after the deadline in the court's scheduling order, without demonstrating good cause.

The court further observed that the provision in Rule 12(b) that parties "may" bring a motion to dismiss "means that the district court may not refuse to adjudicate motions properly filed under that Rule." [9] And it suggested that permitting discovery of every prescription filled nationwide over 13 years is not proportionate to the needs of an individual case brought by two counties, in violation of the scope of discovery set forth in Rule 26(b)(1). [10]

Looking Beyond National Prescription Opiate Litigation

The Sixth Circuit's holding that the federal rules limit the latitude of courts in MDLs and apply with the force of law is particularly important with respect to discovery. Courts in MDLs — and other complex actions — have been willing to ignore or bend discovery rules, including limits on the scope of discovery, in the perceived service of efficiencies in the overall MDL.

But as the Sixth Circuit stated, "[w]hat an MDL court may not do, however, is distort or disregard the rules of law applicable to [all] cases." [11]

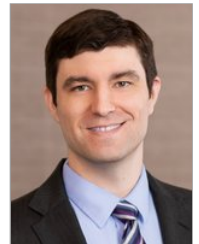
The generic drug pricing antitrust MDL, *In re: Actavis Holdco*, is a recent example of courts disregarding and distorting the limits on discovery in the federal rules for the purpose of achieving perceived benefits and efficiencies in an MDL. There, the district court ordered the defendant pharmaceutical companies to produce all documents hitting keyword search terms without any further review for relevance and responsiveness — in effect, requiring them to produce millions of irrelevant documents — because of the "extraordinarily high stakes," and because doing so would promote "meaningful settlement discussions." [12]

The defendants and amicus curiae Lawyers for Civil Justice and the U.S. Chamber of Commerce argued in support of a petition for writ of mandamus to the U.S. Court of Appeals for the Third Circuit that the district court's discovery order violates the Rule 26(b)(1) limitation on the scope of discovery to material that is relevant to the claims and defenses and proportional to the needs of the case. LCJ argued that courts' latitude in managing discovery does not extend beyond the boundaries of the rules.

In contrast with the Sixth Circuit's holding in the opiate litigation MDL, however, the Third Circuit upheld the district court's discovery order in a 2-1 decision. The majority reasoned that a writ of mandamus was not appropriate because "the District Court has wide latitude in



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controlling discovery," and "the Federal Rules of Civil Procedure permit a district court to compel the production of documents within broad parameters." [13]

The Third Circuit's ruling conflicted with decisions of the U.S. Courts of Appeal for the Fifth, Eighth, Ninth, Tenth and Eleventh Circuits, holding that mandamus is an appropriate remedy where a district court orders discovery of irrelevant information. Now add to that the Sixth Circuit's holding in National Prescription Opiate Litigation that the federal rules have the force of law, and that courts in MDLs must adhere to them.

A petition for a writ of certiorari, supported by several amicus briefs, is now pending before the U.S. Supreme Court in the Actavis case. [14] The Sixth Circuit's holding in the opiate litigation MDL further highlights the need for the Supreme Court to grant review and adjudicate this critical issue.

Counsel and companies involved in MDL proceedings should carefully study and apply the National Prescription Opiate Litigation holding and rationale to argue for the proper application of the federal rules in relation to discovery and case management as well as all other aspects of the proceedings.

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Disclosure: The authors have filed amicus briefs on behalf of Lawyers for Civil Justice in the *In re: Actavis Holdco multidistrict litigation* discussed in this article.

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[1] *In re Nat'l Prescription Opiate Litig.*, No. 20-3075, 2020 WL 1875174, at *3 (6th Cir. April 15, 2020).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.* at *2.

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at *5.

[10] *Id.*

[11] *Id.* at *1.

[12] *In re Generic Pharm. Pricing Antitrust Litig.*, No. 16-MD-2724 (E.D. Pa), Dkt. No. 1091-1 at 3-4.

[13] *In re: Actavis Holdco U.S. Inc. et al.*, No. 19-3549, 2019 WL 8437021, at *1 (3d Cir. Dec. 6, 2019).

[14] *Petition for Writ of Certiorari, Actavis Holdco U.S. Inc. et al., Petitioners, v. Connecticut et al.*, No. 19-1010 (Feb. 11, 2020).