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THIRD CIRCUIT DECISION OFFERS MDL COURTS GUIDANCE ON HOW THEY CAN APPLY PRIOR RULINGS IN FUTURE PROCEEDINGS

by Gregory S. Chernack

For the past several decades, the federal judiciary has used multidistrict litigation (“MDL”) proceedings to attempt to resolve mass litigations more efficiently. Many observers have pointed to numerous forms of unfairness created by such proceedings, such as placing onerous discovery obligations on defendants while plaintiffs are able to avoid much work. One supposed advantage of MDLs is that a legal determination in one case can streamline the proceedings in all the cases that are part of the MDL. A recent Third Circuit decision, however, circumscribes the power of MDL courts to use its prior rulings in subsequent proceedings. Although this potentially makes MDL proceedings even less efficient, the decision also provides a roadmap for how an MDL court is still able to apply its prior legal determinations in other cases before it.

In *Home Depot USA, Inc. v. Lafarge North America, Inc.*, 59 F.4th 55 (3d Cir. 2023), the Third Circuit vacated a decision of the MDL court that had precluded much of the testimony of one of Home Depot’s experts. The MDL involved allegations of price fixing in the drywall industry. The MDL court excluded the expert’s testimony based upon his opinions being “contrary to fundamental events” that had already taken place in a class action that was part the MDL litigation even though they took place before Home Depot had filed the actual lawsuit at issue. *Id.* at 58. The MDL court had nonetheless concluded that issue preclusion and the law of the case doctrine bound Home Depot and thus required the exclusion of this testimony.

The Third Circuit disagreed. First, it noted that “[t]he law of the case doctrine cannot be applied across distinct actions in this multidistrict proceeding.” *Id.* at 61. Because the Home Depot case and the class action were different cases, this doctrine did not apply. The appellate court stressed that “separate cases brought together for pretrial proceedings ‘retain their separate identities.’” *Id.* at 62 (quoting *Gelboim v. Bank Am. Corp.*, 574 U.S. 405, 413 (2015)). Likewise, the Third Circuit rejected the idea that issue preclusion applied. Because Home Depot was an absent member of a putative class, the doctrine could not apply. Even though Home Depot benefited from the settlements in the class action, nothing was actually litigated and decided that could have preclusive effects. Moreover, the court of appeals underscored that even rulings made prior to certification in a putative class action can bind only the named parties.

At first blush, this ruling seems to greatly reduce the effectiveness of an MDL proceeding. If the MDL court precludes an expert in one case or grants summary judgment on an issue, that ruling would not be binding in subsequent cases. But what the Third Circuit taketh, the Third Circuit then giveth, explaining several tools an MDL court can use to adjudicate issues based upon its prior rulings.

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As the Third Circuit explained, nothing prevents an MDL court (like any district court) from applying “prior rulings to new cases if a party presents no new facts, evidence, or argument to warrant a departure.” *Id.* at 66 n.6. Thus, an MDL judge can “enter an order with respect to one party and then provide that it will be automatically extended to other parties if they do not come forward and show cause why it should not be applicable.” *Id.* at 66. Although this appears slightly more complex than what the MDL court did in this case, it enables an MDL judge to make rulings in one case that in effect apply to all future cases.

A court may also enter discovery management orders allowing for discovery obtained in one case to be used in another. Such orders are particularly important for defendants as they can prevent repeated depositions of employees and certain experts (i.e., those not opining on specific plaintiffs). Moreover, this also can prevent defendants from having to repeatedly address common issues in written discovery, both in being able to only have to respond once to written discovery but also have one court address the propriety of protective and other discovery orders. Hopefully, when state courts are also handling cases that parallel those in a federal MDL, those courts can and will follow the lead of the MDL court.

As is often the case, the effectiveness—and fairness—of MDL proceedings depend on the MDL judge. In making sure that such large and complex cases are managed effectively, an MDL judge will need to play an active role. When a judge makes a favorable decision in one of the cases before an MDL court (such as the entry of summary judgment, the excluding of an expert, or limitations on discovery), *Home Depot* may provide limited restrictions on automatically applying that decision to other cases, but it makes clear that numerous tools exist to extend that determination to all cases before it.