Documenting and Seeking Solutions to Mass-Tort MDL Problems
Atlanta, GA
April 26-27, 2018

Panel 6: Transferee Judge's Authority to Order Specific Procedures, e.g., Establish Common Benefit Fund, and Diversity in PSC Appointments

Professor Elizabeth Burch, University of Georgia School of Law

I plan to talk a bit about the main problems I see in analyzing data from mass torts, but from the perspective of the litigants and the judges. I'll give some numbers to put those points in context and talk about whether and where rules might be useful.

Dana Alvare, Temple University, Beasley School of Law

Presentation of Statistical Data
1. We know that a substantial and enduring gender in the legal profession remains after nearly 30 years of equal rate of graduation from law school. My research specifically identifies the extent of the gender gap in court-appointed MDL leadership appointments.

2. Our research establishes an overall average rate of female appointment of 16.55% with men five times as likely to be appointment to leadership. Thirty-five percent of MDL cases have no women at all appointment to leadership positions. The average rate of female appointment drops to 15% when examining Tier 1 positions with half of all cases not have any women at all in Tier 1 positions. Our research also looks at whether any case factors have a correlation with the rate of female appointment, including: the gender of the judge, the type of case, the location of the case, size of the case, and yearly progress.

3. [Transition to Jaime] Our interviews with practitioners also reveal the institutional, cultural, and interpersonal factors that contribute to this discrepancy at both the firm and court levels. Some of these factors include: barriers to accumulating enough experience to be in the position to try for leadership; receiving adequate mentorship/sponsorship by senior attorneys; the assumed inexperience of diverse applicants by the court; and differences in appointment procedure -- does the eradication of slates mean a more diverse leadership?

Professor Jaime Dodge, Emory University School of Law

Summary of Dialogue/ Stakeholder Interviews
Building off Dana's points, we are seeing a shift in appointment process, but it varies across the type of MDL: firm versus individual, and within those areas that use individual appointments whether these are made by slate versus individual appointment. But we are still seeing mixed diversity results across each of these, depending upon the applicants, the case matter, and the judge. Judges generally are looking to build the best leadership team that they can to represent plaintiffs; but, drilling into that, judges have different ideas of the value of different types of expertise, life experience, financing, and other factors should play in that determination – and these ideas may well vary even for the same judge from MDL to MDL. The process is therefore

very much in flux, and as judicial education continues but also as the use of a new generation of transferee judges continues, and as the bar itself begins focusing more on succession planning, there is an expectation that we will continue to see shifts in this landscape.

For this reason, it seems that the only common element is that when selection is made, judges should seek to create the best possible leadership team to represent the plaintiffs, recognizing that typically the more diverse experiences and skills a team has, the better the results will be. But we do see a wide panoply of particular techniques each of which have been useful and helpful in promoting diversity over the last few years, which are increasingly being documented – as with the upcoming Duke conference – giving lawyers and judges a broader set of tools to consider employing where appropriate.

<u>Honorable Cynthia Rufe, U.S. District Court, Eastern District of Pennsylvania</u>

Judicial Perspective
Building off of this foundation, Judge Rufe will address the final, target question of whether we can have a meaningful civil rule at this point on diversity in the selection process and next steps. (This will segue to audience participation.)