

ARTICLES

***Mandamn!* Fifth Circuit Rejects Mandamus Relief for Litigation Costs—What Might the Future Hold?**

By Matthew A. Moeller – November 9, 2017

In *In re Depuy Orthopaedics, Inc.*, 2017 WL 3768923 (5th Cir. Aug. 31, 2017), the petitioners sought mandamus relief from the Fifth Circuit, asking the court to prohibit the district court from allowing the next set of multidistrict litigation (MDL) bellwether cases to proceed to trial in the Northern District of Texas. Federal law limits an MDL court's jurisdiction to pretrial proceedings and requires remand to the originating district once those proceedings are complete. However, if the parties waive potential venue or personal jurisdiction objections (or both), the MDL court can try the case. Such waivers are known as *Lexecon* waivers. The petitioner defendants agreed to waive their *Lexecon* objections for the cases selected for the first two bellwether trials. After those two trials, one of which returned a verdict for the petitioners, while the other returned a \$502 million verdict for the plaintiffs, the petitioners moved to stay future trials pending their appeal, asserting that they did not make a universal *Lexecon* waiver and reserved their venue objections to future trials. The district court denied the stay, and the next trial yielded a \$1.04 billion verdict for the plaintiffs. The court then ordered additional cases for a fourth bellwether trial scheduled for September 5, 2017. Consequently, the petitioners sought mandamus relief in an effort to halt the proceedings.

The Fifth Circuit held differently on separate issues. One majority found serious error committed by the lower court but denied the petitioners' request that the cases not proceed to trial. A different majority found that the petitioners' *Lexecon* objections were not universally waived, that the petitioners established a right of mandamus, and that such a right was appropriate. Despite these findings, a uniform majority concluded that the petitioners failed to show they had no other adequate remedy available. Nonetheless, the court requested that the lower court vacate its ruling as to waiver and withdraw the order setting the cases for trial in September 2017. One notable takeaway from this decision is that the court maintained the federal judiciary's traditional position of rejecting litigation costs as a basis for mandamus relief.

In analyzing the issue of waiver, the Fifth Circuit noted that the district court committed grave error in finding a universal waiver of objections to venue and personal jurisdiction. The court reasoned that the petitioners' waivers were specific to the case management order governing the initial bellwether trial procedure and that the waivers applied only to those two cases. Emphasizing that the language was unclear and ambiguous, the court found that the waiver was limited to the first two bellwether trials. The court then shifted its focus to the appropriateness of mandamus relief, holding that the prospect of a global *Lexecon* waiver extending to over 9,000 cases would be an appropriate circumstance warranting mandamus relief. However, the court observed, it is more important that the petitioners show that they have no other adequate means for relief. Because the appeals process provides a nearly universal remedy in all cases, mandamus is appropriate only where error is truly remedial on appeal. The petitioners argued that appeal was not an adequate remedy, given the cost of defending additional bellwether trials and their personal jurisdiction claims. In rejecting that argument, the court articulated that there

must be an obstacle to relief beyond litigation costs that makes the relief not merely expensive but effectively unattainable.

In reaching its decision, the Fifth Circuit distinguished both *In re Lloyd's Register North America, Inc.*, 780 F.3d 283 (5th Cir. 2015), and *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc), cases in which the Fifth Circuit granted mandamus petitions overturning venue rulings. *Lloyd's* involved allegations of inadequate performance in the certification of a cruise ship. After the district court denied Lloyd's motion to dismiss based on an overseas forum selection clause, the Fifth Circuit reversed, finding mandamus relief appropriate for purposes of forum non conveniens. The court reasoned that the plaintiff was clearly bound by Lloyd's rules pursuant to the doctrine of direct-benefits estoppel because it alleged breach of various duties under the classification society's rules and, therefore, its claim could be resolved *only* by reference to such rules. As a result, the *Lloyd's* court held, it was a clear abuse of discretion to deny Lloyd's motion without explanation.

Similarly, in *In re Volkswagen*, the Fifth Circuit granted mandamus petitions in a products liability action due to the district court's extraordinary errors in applying a stricter forum non conveniens dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, misapplying the *Gilbert* factors, and disregarding the precedents of the court. The *Deputy* court emphasized that, unlike the case at hand, in both *Lloyd's* and *Volkswagen*, appeal was an inadequate remedy because the petitioners (1) would have to overcome a high standard of review on appeal and (2) would face irreversible nonmonetary harm if the case went forward.

Despite the potentially compelling argument for mandamus relief based on potential litigation costs, other circuits share the Fifth Circuit's hardline position on such relief. For example, in *In re Orange, S.A.*, 818 F.3d 956 (9th Cir. 2016), the Ninth Circuit denied mandamus relief that sought to compel arbitration, where the case would not require consideration of facts, documents, or issues the parties agreed to arbitrate. A software developer brought an action against a multinational telecommunications company, alleging various causes of action, including trade secret misappropriation. The district court denied the defendant's motion to dismiss on forum non conveniens grounds. The Ninth Circuit refused to give weight to the petitioners' reliance on increased litigation costs as a basis for mandamus relief. It found that reason alone insufficient to conclude that, absent a writ of mandamus, the petitioner had no adequate means of relief. The court observed that litigation costs should be considered a factor for mandamus relief "*only in the most extreme circumstances.*"

As litigation costs continue to escalate, one can only wonder what standard will need to be met to qualify as an "extreme circumstance" pondered by the various circuits. One of the purposes of amending Rule 26 of the Federal Rules of Civil Procedure was to bring consistency and clarity to the relationship between the amount in controversy and the amount of discovery in order to make litigation more efficient and cost-effective for the parties. Moreover, the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), reflected a concern for escalating litigation

costs in its decision making. Given Congress's effort on the procedural front and the Supreme Court's willingness to consider the issue in determining the sufficiency of pleadings, it seems plausible that the same line of reasoning could eventually influence judicial remedies as well. However, the issue certainly lies in the details of determining which scenarios might warrant mandamus relief based primarily on litigation costs, and the inherently high litigation costs involved in an MDL make such a proceeding an unlikely avenue for a ruling establishing such relief.

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