Circuit Splits: A Hidden Trap In 'Federal Question' MDLs

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This article was originally published on March 9, 2017 by Portfolio Media, Inc. in Product Liability Law360, and is available at https://www.law360.com/articles/899772/circuit-splits-a-hidden-trap-in-federal-question-mdls (subscription required).

The Judicial Panel on Multidistrict Litigation chooses MDL venues based on logistical factors: convenience for parties and witnesses; experience and availability of judges. Even the impressiveness of the local airport can be a factor.[1] But a recent decision by a federal court in Georgia highlights that these venue selections can have substantive — sometimes dispositive — consequences in cases where jurisdiction is based on a federal question rather than diversity.

When a far-flung group of U.S. Marines and their families sued the United States in 2010 for alleged prior exposures to contaminated drinking water at Camp Lejeune in North Carolina,[2] the resulting MDL was transferred to the Northern District of Georgia. Though federal jurisdiction arose under the Federal Tort Claims Act[3] rather than under diversity jurisdiction, the Federal Tort Claims Act required that any liability alleged against the United States be "in accordance with the law of the place" where it arose — here, North Carolina.[4]

In other words, the plaintiffs' claim, though federal and statutory in nature, required a basis in North Carolina tort law, and the Northern District of Georgia was tasked with finding it. This proved to be a knotty legal problem: The viability of the plaintiffs' claims depended on the interpretation of a North Carolina statute of repose for personal injury, and the statute of repose turned out to be — interpretively — a mess.

More specifically, a circuit split arose between the Fourth Circuit (including North Carolina) and the Eleventh Circuit (including Georgia) regarding whether the North Carolina ten-year statute of repose contained an exception for latent disease.[5] If the statute of repose barred lawsuits more than ten years after the alleged exposures no matter when the actual effects were manifested, the Marines and their families might have been too late. So held the Northern District of Georgia, and the Eleventh Circuit agreed.6

But then the same question arose in the Fourth Circuit in an unrelated case, and that court broke in the opposite direction, finding an exemption for latent disease in the North Carolina statute of repose and explicitly disagreeing with the Eleventh Circuit.[7] The court, applying the Erie doctrine in its own home territory, held that "the North Carolina Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it."[8] Under the Fourth Circuit interpretation of the statute of repose, the Marines and their families would have been timely.

The viability of the Marines' claims therefore turned on the proper choice of law for the Northern District

of Georgia. The court's own boss, the Eleventh Circuit, interpreted the North Carolina statute of repose in a way that required dismissal based on the timing of the claims.

But the Marines raised numerous arguments for why the Fourth Circuit holding should govern instead, and their claims should survive: that the Northern District of Georgia should ignore the Eleventh Circuit's interpretation of the statute of repose because that interpretation was wrong on the merits; that the Eleventh Circuit had improperly disregarded Fourth Circuit precedent; that the obligation to correctly interpret state law outweighed the normal rules of circuit court precedence; and that a federal circuit court of appeals should defer to a sister circuit's view of state law in one of its "home" states.[9]

The Marines also argued that regardless of the merits of the Eleventh Circuit decision, the Fourth Circuit decision was binding in the Fourth Circuit, and that the Northern District of Georgia, as an MDL "transferee" court, was obligated to apply the law of the "transferor" state — here, arguably, North Carolina law, as interpreted by the Fourth Circuit.[10]

The Northern District of Georgia sharply rejected the Marines' arguments that a district court should ignore its own court of appeals: "In candor, the court is troubled by the argument raised by the Plaintiffs' Liaison Counsel that this court 'certainly does not owe blind deference to the erroneous 11th Circuit *Bryant* opinion.'"[11]

The *Bryant* opinion was not just controlling Eleventh Circuit precedent; it was the "law of the case," meaning that the *Bryant* opinion was rendered in an interlocutory appeal of a prior district court decision in the Marines' own case. "Moreover," according to the Northern District of Georgia:

> Simply because the Fourth Circuit sits in North Carolina does not render it as the final authoritative word on the interpretation of North Carolina law. The Fourth Circuit — like all federal courts across the country — is charged with making an Erie prediction as to what the highest court of North Carolina would say about North Carolina state law. Regardless of whether as a practical matter, the Fourth Circuit might have more experience in interpreting North Carolina law, there is nothing "binding" about the Fourth Circuit's decision in Stahle as to other federal courts of appeal, or even as to North Carolina state courts, of course.

The Northern District of Georgia also rejected the Marines' MDL-based argument. The key was the federal court's jurisdiction in the first place: federal question, not diversity. In an MDL based on diversity jurisdiction, the Erie doctrine arises and a "transferee" court — the single federal venue that receives hundreds or even thousands of cases from around the country for consolidated pretrial proceedings — applies the law of the "transferor" state, or states, including the choice-of-law rules of each transferor state.

But in MDLs based on a federal question — including jurisdiction based on the Federal Tort Claims Act — questions of federal law are governed by the law of the transferee court and its home circuit.12 Though the Federal Tort Claims Act requires as a predicate the existence of liability under state law, an FTCA claim

does not arise under state law.13 An FTCA claim is a federal claim, and "there is only one federal law."14

If the Fourth Circuit and the Eleventh Circuit disagree on how North Carolina law should be applied to an FTCA claim, "that simply happens to be a product of the fact that there are different federal courts of appeal in the United States."15 A plaintiff "has no 'right' to the Fourth Circuit's interpretation of North Carolina law over the Eleventh Circuit's interpretation."16

And the Northern District of Georgia is in the Eleventh Circuit, bound by Eleventh Circuit law. As the Eleventh Circuit had decided that North Carolina's statute of repose contained no exception for the Marines' allegations based on the delayed manifestation of latent diseases, these claims were therefore barred in the Northern District of Georgia.

By contrast, if the Judicial Panel on Multidistrict Litigation had originally assigned the case to a North Carolina federal court or elsewhere in the Fourth Circuit, the Marines' claims would likely not have been barred by the statute of repose.17

The outcome illustrates an important point for MDL practitioners. In multidistrict litigation based on federal question jurisdiction — the Federal Tort Claims Act is one example, but there are of course others — the selection of a transferee venue by the Judicial Panel on Multidistrict Litigation can be critical, even dispositive, if there are any circuit splits affecting any aspect of the case.

The transferee court will apply its own circuit's law, even if the outcome seems to defy a local interpretation of local law in a transferor venue. A savvy MDL practitioner should identify relevant circuit conflicts as far in advance as possible.

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[1] *See* "And Now a Word From the Panel: Top 10 Venue Arguments," Law360 (July 29, 2014).

[2] *See In re*: *Camp Lejeune North Carolina Water Contamination Litigation*, No. 1:11-MD-2218, 2016 WL 7049038 (N.D. Ga. Dec. 5, 2016).

[3] *See* 28 U.S.C. § 1346(b).

[4] *Id.* at § 1346(b)(1).

[5] 2016 WL 7049038, at *2-3.

[6] *See Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014), cert. denied, 136 S.Ct. 71 (2015).

[7] *See Stahle v. CTS Corp.*, 817 F.3d 96 (4th Cir. 2016).

[8] *Id.* at 103-04 (quoting *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30, 34 (1986)).

[9] 2016 WL 7049038, at *4.

[10] *Id.* at *5.

[11] 2016 WL 7049038, at *4.

[12] 2016 WL 7049038, at *6 (citing *In re Korean Air Lines Disaster of September 1*, 1983, 829 F.2d 1171 (D.C. Cir. 1987), aff'd on other grounds sub nom. *Chan v. Korean Air Lines Ltd*., 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); U.S. ex rel. *Hockett v. Columbia/HCA Healthcare Corp*., 498 F.Supp.2d 25, 39–40 (D.D.C. 2007)).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Even in the Fourth Circuit, the Marines may not have had viable claims. The Northern District of Georgia also dismissed their claims under the Feres doctrine and credited the government's sovereign immunity defense. *Id.* at 33