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Eleventh Circuit affirmance of fee award demonstrates the long reach of an MDL

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Takeaway: When the Judicial Panel on Multidistrict Litigation (JPML) consolidates cases and transfers them to a single, multidistrict litigation (MDL) court, the process is in a very important respect coercive. Counsel for the plaintiffs not only lose their chosen venue, but may also lose control of their cases. The overriding purpose of multidistrict litigation is efficiency, including avoiding duplication of effort by different plaintiffs' counsel. Accordingly, MDL courts assign the lion's share of the litigation work to appointed counsel, such as a Plaintiffs' Executive Committee, who need to be compensated for that work. A recent decision by the Eleventh Circuit shows how these issues played out in the "fractured" Chinese drywall MDL, where the appointed MDL counsel secured a major portion of settlement funds generated after a group of cases had been transferred out of the MDL court and back to the district court where they had been filed. *Amorin v. Taishan Gypsum Co., Ltd*., --- Fed.Appx. ---, No. 20-12100, 2021 WL 2349920, at *1 (11th Cir., June 9, 2021).

In the Chinese drywall MDL, thousands of plaintiffs – mostly from Florida and Louisiana – sued Chinese manufacturers of drywall and other businesses involved in its production and sale, alleging claims for property damage (and some personal injury) resulting from the installation of the allegedly defective drywall.

The JPML consolidated the cases and transferred them to Judge Eldon Fallon of the Eastern District of Louisiana for pretrial proceedings. While the case was pending before Judge Fallon, he appointed a group of attorneys (Class Counsel) to prosecute the cases before the MDL court.

In 2018, after about a decade of litigation, Judge Fallon remanded over 1,700 of the Florida cases back to Judge Marcia Cooke of the Southern District of Florida. After this remand, counsel for the individual defendants negotiated a settlement with a group of defendants that resulted in agreements being reached with almost 500 individual plaintiffs, with settlement payments to this group totaling over $40 million ("the $40 million fund"). Counsel for these plaintiffs were compensated from the $40 million fund under contingent fee agreements with the individual plaintiffs.

In 2019, Class Counsel filed a motion in the Southern District of Florida to recover common benefit attorneys' fees and costs from the $40 million fund, contending that their work prosecuting the cases as lead plaintiffs' counsel before the MDL court contributed to that settlement. In particular, Class Counsel claimed that they were entitled to recover 20% of the $40 million fund. Counsel for the individual plaintiffs opposed the motion.

In January 2020, Judge Fallon of the MDL court approved a global settlement between the same defendants and all of the remaining class members (other than the Florida plaintiffs), awarding Class Counsel 60% of the fees paid under the global settlement. Class Counsel then amended their motion before the Southern District of Florida to increase their request to 60% of the $40 million fund, consistent

with Judge Fallon's 60% award. 2021 WL 2349920, at *2.

In May 2020, Judge Cooke granted Class Counsel's amended motion in part, finding that the settling Florida plaintiffs benefitted from Class Counsel's litigation efforts before the MDL court, including their efforts to secure the global settlement, and awarded Class Counsel 45% of the $40 million fund. Counsel for the settling plaintiffs appealed this ruling to the Eleventh Circuit under the collateral order doctrine, "as the amount of the disputed fees [was] fixed, the district court's allocation of that amount [was] completely separate from the merits of the underlying action, and the appeal [was] unaffected by further district court proceedings." *Id*.

Reviewing Judge Cooke's order for an abuse of discretion, the Eleventh Circuit affirmed. The panel relied on the "common fund" doctrine, which "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id*. at *3 (quoting *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)). Such awards, the panel reasoned, "need not satisfy rigid eligibility requirements" given that common benefit fees are "grounded in the courts' equity power." *Id*. Accordingly, and "[p]articularly in complex litigation, courts have broad managerial power that includes significant discretion in awarding fees," and thus are authorized to compensate appointed counsel for their significant duties and work in multidistrict litigation. *Id*.

The panel concluded that the $40 million fund constituted a "common fund," that the Southern District of Florida had jurisdiction over that fund "pursuant to the agreement of the parties to litigate common benefit fees" in that court, and that the fee award was within the district court's discretion. *Id*. at *4.

The panel concluded: "The district court rightly acknowledged that Individual Counsel worked hard to bring about the FIS [Florida individual settlements]. But their work did not exist in a vacuum. They benefitted from the decade of foundational work that Class Counsel exerted in this groundbreaking MDL, which involved evasive defendants in China, complex jurisdictional challenges requiring two trips to the Fifth Circuit, decertification attempts, and liability determinations. That Class Counsel has otherwise been compensated for this work [through the 60% global settlement award] does not prevent them from continuing to reap the rewards of their efforts. Moreover, preventing appointed counsel from recovering awards when their work leads to massive recoveries down the road would make it harder for courts to find capable and competent lawyers to take on that work in the future." *Id*.