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## A PRE-TRIAL AND PROCEDURAL ROADMAP FOR DEFENDING FOOD-RELATED AND OTHER MASS TORT LITIGATION

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## INTRODUCTION

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Cozen O'Connor is a recognized leader in the areas of litigation and dispute resolution. We have more attorneys in the American College of Trial Lawyers than any other similarly sized firm. Our lawyers are distinguished among their peers for their trial advocacy skills and their aggressive, innovative representation of clients in numerous areas. These include complex commercial litigation, as well as litigation in matters of labor and employment, securities and financial services. This past year has seen a wide variety of news coverage related to our nation's food supply. In early 2007, the FDA promulgated guidelines pertaining to fresh cut produce. Concerns surrounding contaminated spinach, green onions, other vegetables and most recently, beef have led to various recalls by manufacturers and others in the industry. Likewise, the pet food recalls and litigation arising there from has dominated the national news. Although varied, these food-related news stories share one commonality: the possibility of litigation. Like many other complex tort, product liability cases, those arising from allegedly contaminated food present a mirage of issues and defense-related concerns ranging from subject matter jurisdiction, to venue, the appropriate forum, pretrial consolidation in Multidistrict Litigation, class certification, and the available relief under the applicable substantive law. What follows is an overview of these issues with an eye toward and aim of successfully managing and defending food-related and other similar mass tort cases.

## ANALYSIS

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### SUBJECT MATTER JURISDICTION

#### Diversity of Citizenship

The parties' diversity of citizenship is one means of supporting federal subject matter jurisdiction. Diversity of citizenship is present under 28 U.S.C. § 1332 when the plaintiff is a citizen of an American state other than that of which the defendant is a citizen. Recent amendments to the requirements for diversity jurisdiction in cases involving class actions have eased these requirements and allow for diversity jurisdiction when the amount in controversy in the aggregate exceeds \$5,000,000 exclusive of interest and costs and any class member is a citizen of a state different from the state of citizenship of any defendant. 28 U.S.C. § 1332(d)(2).<sup>1</sup>

#### Federal Question Jurisdiction Under the Class Action Fairness Act

Another means of supporting federal subject matter jurisdiction arises when the complaint at issue creates a federal question, meaning it is brought under a federal statute. See 28 U.S.C. § 1331 (creating subject matter jurisdiction in the federal courts for "all civil actions arising under the Constitution, laws, or treaties of the United States). The Class Action Fairness Act, 28 U.S.C. § 1332(d) which codified of the relaxed requirements discussed above, is one such statute that give rise to federal question subject matter jurisdiction.

The Class Action Fairness Act ("CAFA") extends federal jurisdiction over certain class actions. 28 U.S.C. §1332(d). CAFA determines whether a federal court has *original jurisdiction* over a case and is often used to remove class actions from state to federal courts. See, *Tierno v. Rite Aid Corp.*, 2006 U.S. Dist. LEXIS 71794 \*3 (N.D. Ca. August 31, 2006). Thus, even though a class action may be brought in federal court for reasons other than those provided CAFA, the statute determines which class actions a federal

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1 These diversity requirements are also relaxed where the aggregate amount in controversy exceeds \$5,000,000 and: any class member is a foreign state or citizen of a foreign state and any defendant is an American citizen; or any class member is an American citizen and any defendant is foreign state or citizen of a foreign state. 28 U.S.C. § 1332(d)(2).

court must preside over at a party's request. While CAFA requires and contemplates that a class action be certified, it establishes only a basis for federal court jurisdiction and does not add any additional requirements to the class certification analysis discussed herein. *See infra* at 11-12.

There are several requirements that a case must meet for CAFA to apply. First, the case must qualify as a class action by meeting the Rule 23 requirements described below or a similar state statute or rule authorizing class actions or by being filed as a "mass action." 28 U.S.C. §1332(d)(1)(B), (d)(2).<sup>2</sup> Second, the aggregate amount in controversy must exceed \$5 million excluding fees and interest. 28 U.S.C. §1332(d)(2)(6). Third, the parties must be minimally diverse meaning, among other possibilities, any member of the plaintiff class is a citizen of a state different from any defendant. 28 U.S.C. §1332(d)(2)(A)-(C).

A federal district court *must accept* jurisdiction pursuant to CAFA where less than one-third of the members of all proposed plaintiff classes are citizens of the state where the suit was filed and the requirements for exercising jurisdiction are met. 28 U.S.C. §1332(d)(3). Conversely, the matter is considered a local controversy and a district court *must decline* jurisdiction where: 1) more than two-thirds of the proposed plaintiff class are citizens of the state where the suit was filed; 2) at least one of the defendants from whom plaintiffs seek significant monetary relief is a citizen of the state in which the suit was filed; 3) the principal injuries arising from the conduct complained of occurred in the state in which the suit was filed; and 4) no other class actions were filed within the proceeding three years against any of the defendants wherein the same claims were alleged. 28 U.S.C. §1332(d)(4)(A). Similarly, the matter will be considered a local controversy and the district court *must decline* to hear it if the primary defendants and more than two-thirds of the members of all proposed plaintiff classes are citizens of the state where the suit was filed. 28 U.S.C. §1332(d)(4)(B).<sup>3</sup> Finally, under CAFA, federal jurisdiction is discretionary where more than one-third but fewer than two-thirds of the proposed plaintiff class and the primary defendants are citizens of the state where the suit was filed. 28 U.S.C. §1332(d)(3).

In sum, a federal court will have original jurisdiction over a class action pursuant to CAFA where the following three requirements are met and none of the exceptions provided in CAFA are present: (1) the case qualifies as a class action pursuant to Rule 23 or other similar statute or rule; (2) amount in controversy exceeds \$5 million; and (3) minimal diversity exists. CAFA provides a means for a case that otherwise does not meet the diversity requirements or present a federal question to get into federal court. If the case is not certified as a class action (in that it does not meet the requirements of Rule 23), or if a class is certified but the local controversy or another exception enumerated under CAFA applies, and no other basis for federal jurisdiction exists – the case may not proceed in federal court. *See e.g. Gonzalez v. Pepsico, Inc.*, No. 06-2163, 2007 WL 1100204, at \*4 (D. Kan. Apr. 11, 2007) (citing *McGaughey v. Treistman*, No. 05-7069, 2007 WL 24935 (S.D.N.Y. Jan. 4, 2007))(noting that if a motion for class certification is denied, plaintiffs will lose jurisdiction under CAFA and will need to meet general diversity requirements to maintain federal jurisdiction or risk dismissal of the case).

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2 Generally, a mass action is maintained when there has been a single-event mass accident, such as a plane or train accident. To constitute a mass action for purposes of CAFA, the case must be one in which monetary claims of 100 or more persons are proposed to be tried jointly on the ground that the claims involve common questions of law or fact. See 28 U.S.C. §1332(d)(1)(B), (d)(11)(A)-(B).

3 In addition to the local controversy exceptions, there are eight other instances where a federal district court will not have original jurisdiction under CAFA. See 28 U.S.C. § 1332(d)(5).

## VENUE

The venue requirement ensures that a case is heard in the appropriate federal district. Baicker-McKee, Steven, William M. Janssen, and John B. Corr, *Federal Civil Rules Handbook*, § 2.14 (Thompson-West, 2007). Venue must be satisfied even where a plaintiff has otherwise established personal and subject matter jurisdiction. See *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969) (jurisdiction must first be found over the subject matter and persons involved before venue is properly reached). Venue for diversity and federal question cases is controlled by 28 U.S.C. § 1391.

### Venue Requirements in Diversity Cases

28 U.S.C. § 1391(a) provides three opportunities for venue in cases where subject matter jurisdiction is based solely on diversity of citizenship, meaning a plaintiff may file in any of the following districts: 1) where a single defendant resides provided that all defendants reside in the same state; 2) where substantial events or omissions occurred; or 3) where any defendant is subject to personal jurisdiction. The Complaint in this case is silent as to where substantial events or omissions occurred (plaintiffs may argue that such events/omissions occurred nationwide and in each state in which a class member was born and/or in which a class member's mother ingested DES).

### Venue Requirements in Non-Diversity Cases

28 U.S.C. § 1391(b) controls venue when subject matter jurisdiction is not based on diversity of citizenship. In that case, a plaintiff may file in any judicial district where: 1) a single defendant resides provided that all defendants reside in the same state; 2) substantial events or omissions occurred; or 3) if there is no district in which the action may otherwise be brought, where any defendant may be found. This third scenario (venue in any district where any defendant may be found) may be used only as a last resort. *Federal Civil Rules Handbook*, § 2.14.

28 U.S.C. § 1391(c) establishes the standards for determining the residence of a corporation for venue purposes. Corporations are deemed residents of any judicial district in which they would be subject to personal jurisdiction at the time the action commences. See *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3rd Cir. 1995) (venue proper in judicial district where corporate defendant transacts business, signed contract, and where cause of action arose). If a state has more than one judicial district, such as New York, corporations are residents only of the judicial districts within the state in which they would be subject to personal jurisdiction (for example, where they do business) assuming the judicial district was a separate state. If a state has multiple federal districts, such as New York, and a corporation's activities are dispersed throughout the state such that neither of the aforementioned corporate venue rules apply, a corporation is deemed to reside in the judicial district with which it has the most significant contacts.

### Challenges to Venue Must Be Made Initially or be Forever Waived

If a party consents to personal jurisdiction in a particular district or state, it appears settled that they also consent to venue. See e.g. *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996) (party may consent to venue by consenting to personal jurisdiction). Furthermore, a defendant who does not object to improper venue waives the issue. *Tri-State Employment Services, Inc. v. Mountbatten Surety Co.*, 295 F.3d 256, 260, n.2 (2d Cir. 2002). Under Rule 12(b)(3) of the Federal Rules of Civil Procedure, a defendant must object to venue by motion prior to the filing of a responsive pleading (20 days after being served with a complaint) or forever waive the issue. Although plaintiffs in a nationwide class action – where allegedly contaminated food was ingested and caused injury in many different parts of the country - may ultimately be able to sustain venue in their chosen forum, it may be an advisable litigation tactic to challenge a questionable venue and send a signal to the plaintiffs that they have a case the defendants are willing to challenge rather than settle quickly.

## FORUM NON CONVENIENS

The doctrine of forum non conveniens can be an effective litigation tool to challenge the plaintiff's choice of forum and ensure that litigation takes place in a convenient venue with contacts to and an interest in the case. The analysis requires the availability of an adequate alternative forum with access to relevant sources of proof and sufficient contacts to the litigation. A court conducting a forum non analysis has much discretion and its decision is reviewed for abuse of discretion and is rarely reversed on appeal.

### The Forum Non Conveniens Analysis

The doctrine of forum non conveniens allows a court to decline to hear a case brought in an inappropriate forum despite the fact that personal and subject matter jurisdiction and proper venue otherwise exist. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000). The first step in a forum non analysis is to determine that an adequate alternative forum exists and the defendant seeking a forum non dismissal has the burden of demonstrating the same. *Norex Petroleum, Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005); *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002). This requires a determination of whether the defendants are amenable to service of process in and whether the alternative forum will hear the case. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, n.22 (1981) (noting that the requirement of an adequate alternative forum is satisfied when a defendant is amenable to service of process in the other jurisdiction); *Reers v. Deutsche Bahn*, 320 F. Supp. 2d 140, 149 (S.D.N.Y. 2004) (internal citations omitted) (noting that an alternative forum is generally adequate as long as the defendant is amenable to process and the forum permits litigation of the subject matter of the suit). A forum is considered inadequate only in rare circumstances where the remedy is so clearly inadequate or unsatisfactory that it is no remedy at all. *Id.* (citing *Piper* for the proposition that an "unsatisfactory remedy," in this context, means no remedy at all).

Once the court is satisfied that there is an adequate alternative forum to decide the case, it weighs the public and private interest factors to determine the deference, if any, to give to the plaintiff's forum choice and whether these factors weigh heavily in favor of trial in the alternate forum. See *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947) (plaintiff's choice of forum gets great deference when suit is brought in plaintiff's home forum); *DiRienzo*, 232 F.3d at 60 (presumption of home forum not weakened by the fact that the case is a class action); *Wiwa*, 226 F.3d at 101 (deference to plaintiff's forum choice increases as the plaintiff's ties to the forum increase); *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991) (forum non dismissal will not be granted unless the factors "weigh heavily in favor of trial in the alternative forum"). A court conducting this analysis has significant discretion that will not be lightly overturned on appeal. *Bank of Credit and Commerce Int'l. Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 244-48 (2d Cir. 2001).

The private interest factors involved in a forum non analysis are the: ease of access to sources of proof; possibility to view the premises; availability of processes to compel the attendance of unwilling and willing witnesses; and all other practical implications making a trial expeditious and inexpensive. *Doe v. Hyland Therapeutics*, 807 F. Supp. 1117, 1122 (S.D.N.Y. 1992). The public interest factors include the: administrative difficulties flowing from court congestion; interest in having local controversies decided at home; avoidance of unnecessary conflicts of laws issues; need to avoid complications in applying foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* In *Doe*, the court dismissed the case in favor of litigation in Ireland where all the plaintiffs resided and all the alleged injuries and damages were sustained as opposed to litigating in New York where the only contacts with the chosen forum were that each defendant did business and the plaintiff's counsel was located in New York.

## Appealing a Forum Non Decision

A forum non conveniens dismissal results in the entry of a final order from which a plaintiff may appeal pursuant to 28 U.S.C. § 1291 (1982 & Supp. 2006).<sup>4</sup> Appellate review of a forum non conveniens dismissal is extremely limited. *Capital Currency Exchange, N.V. v. Nat'l. Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998)(citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). Such dismissal lies wholly within the broad discretion of the district court and should be reversed only if there is a clear abuse of that discretion. *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir.1996)(internal citations omitted); accord *Carey v. Bayerische Hypo-Und Vereinsbank*, 370 F.3d 234, 237 (2d Cir. 2004).<sup>5</sup>

The denial of a Motion to Dismiss for forum non conveniens, is not immediately appealable and the parties must litigate the case and appeal after a final judgment is entered.<sup>6</sup> *Van Cauwenberghe v. Baird*, 486 U.S. 517, 528 (1988); *Carlenstolpe v. Merck & Co., Inc.*, 819 F.2d 33, 36-37 (2d Cir. 1987).

Furthermore, the denial of a forum non motion does not fall within the collateral order doctrine.<sup>7</sup> Such denial is not completely separate from, but is “entangled in” in merits of an underlying action because evaluating the availability of witnesses and access to proof requires the district court to examine the substantive dispute and relevance of the witnesses and evidence to the parties’ claims and defenses. *Biard*, 486 U.S. at 528. See also *Carlenstolpe*, 819 F.2d at 36-37 (reasoning that a forum non conveniens determination was not “completely separate from,” but “enmeshed in” the merits of an action because it required an examination of the alleged culpable conduct to assess where the conduct took place and the relation of the conduct to the plaintiff’s chosen forum). The Supreme Court has held that an automatic interlocutory review of the denial of a forum non conveniens motion wastes judicial

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4 Under 28 U.S.C. § 1291, the Courts of Appeals have jurisdiction over appeals from all final decisions of the District Courts. See *Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 607 (3d Cir. 1991); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 849, n.4 (5th Cir. 1990)(stating that Orders for dismissal are final decisions).

5 Appellate courts, however, seem to apply this abuse of discretion standard with more teeth in the context of a forum non dismissal than with respect to other issues to which the same standard applies. See e.g. *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006)(citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001)(en banc))(holding that, as to forum non conveniens, the issue is not whether the district court abused its broad discretion, but whether it misapprehended or misapplied the relevant legal standards). A district court abuses its discretion in granting a forum non conveniens dismissal when its decision: 1) rests on an error of law or a clearly erroneous finding of fact; 2) cannot be located within the range of permissible decisions; or 3) fails to consider or unreasonably balances all the relevant factors. *ICC Indus. Inc. v. Israel Discount Bank, Ltd.*, 170 Fed.Appx. 766, 767 (2d Cir. 2006)(internal citations omitted).

6 28 U.S.C. § 1292(b), however, provides an avenue for review of forum non conveniens determinations in limited appropriate cases. *Biard*, 486 U.S. at 529. See also *Carlenstolpe*, 819 F.2d at 36-37 (noting the possibility of the district court’s certification and appellate court’s acceptance of an interlocutory appeal under 28 U.S.C. § 1292(b)). Under Section 1292(b), a district judge who believes that his or her Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, may state such in the Order and thus, create appellate jurisdiction over an appeal, which the appellate court may accept or reject. Even if certified and accepted, the denial of a forum non motion is reviewed for an abuse of discretion and appears to be difficult to overturn. See, e.g., *Wilson v. Humphreys Ltd.*, 916 F.2d 1239, 1241, 1246 (7th Cir. 2002)(accepting a certified appeal from the denial of a forum non motion for immediate review, but concluding that there was no abuse of discretion and affirming the denial). To date, only the Fourth Circuit has held that the denial of a forum non motion is immediately appealable. See *Carlenstolpe*, 819 F.2d at 36-37 (citing *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir.1984); *Hodson v. A.H. Robins Co.*, 715 F.2d 142, 145 n. 2 (4th Cir.1983)).

7 The collateral order doctrine was set forth by the Supreme Court in *Cohn v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and allows for an appeal from a non-final order when: 1) the trial court conclusively determined a disputed question; 2) the order resolved an important issue completely separate from the merits of the action; and 3) the order is effectively unreviewable on appeal from a final judgment. *Flanagan v. United States*, 465 U.S. 259, 265, (1984)(quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

resources by requiring repetitive appellate review of substantive questions.<sup>8</sup> *Id.*; accord *Carlenstolpe*, 819 F.2d at 36-37.

## PRE-TRIAL CONSOLIDATION AND COORDINATION IN MULTIDISTRICT LITIGATION

Another consideration when faced with complex litigation involving multiple cases filed in various states is whether to move for pretrial consolidation of all related matters in a single Multidistrict Litigation (hereinafter, “MDL”). One of the values of an MDL proceeding is that it brings all federal cases, parties, and counsel comprising litigation sharing common questions of law and fact before a single judge. This affords a unique opportunity for negotiating a global settlement especially given that most MDL cases are settled in the transferee court with very few cases being remanded for trial. *See generally*, Moore’s Federal Practice, Manual for Complex Litigation, at §20.132 (4th Ed. 2004). Cases that do not settle are remanded to the court in which they originated for trial. 28 U.S.C. § 1407.

### The Standard for MDL Transfer and Consolidation

The Judicial Panel on Multidistrict Litigation is authorized to transfer civil actions pending in more than one district involving one or more common questions of law or fact to any district for coordinated or consolidated pretrial proceedings upon the Panel’s determination that transfer will be for the convenience of the parties and witnesses and will promote a just and efficient conduct of the litigation. *See* 28 U.S.C. § 1407 (West 2003 & Supp. 2007).<sup>9</sup> The Panel’s authority to transfer and consolidate is not subject to the venue restrictions discussed earlier. *See In re N.Y. City Mun. Dec. Litig.*, 572 F.2d 49 (2d Cir. 1978). Consolidation is efficient even when the actions involve different defendants and especially when the complaints are based on the same causes of action and are related cases. *In re: Silicone Breast Implants Product Liab. Litig.*, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992).

Centralization of related actions in an MDL proceeding often serves the convenience of the parties and witnesses. Absent consolidation, all parties can be subjected to inconsistent filing deadlines, conferences and hearings, and unnecessary duplicative discovery demands. In addition, witnesses may be subject to redundant depositions in each separate action, which can prove to be especially difficult when there is geographic diversity among the various jurisdictions in the United States in which related actions are pending and when a majority of witnesses and evidence are dispersed throughout and across the country. Consolidation solves these problems by enabling a single judge to formulate a pretrial program to minimize witness inconvenience and overall expense, and to rule on whether such claims should be certified to proceed as class actions. *See In re Cuisinart Food Processor Antitrust Litig.*,

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8 The Biard Court, however, noted a limited exception to this rule allowing interlocutory review where the district court decides a forum non motion on the affidavits presented by the parties and without an extensive inquiry into the merits of the underlying dispute. 486 U.S. at 529. This exception is extremely limited because, “in the main, the issues that arise in forum non conveniens determinations will substantially overlap factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal as of right under § 1291.” *Id.*

9 28 U.S.C. § 1407 governs multidistrict litigation and provides, in pertinent part:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

*See also* *In re Gen. Motors Corp. Type III Door Latch Prods. Liab. Litig.*, No. 1266, 1999 U.S. Dist. LEXIS 5075, at \*1-2 (J.P.M.L. Apr. 14, 1999) (ordering transfer and consolidation of actions involving common questions of law and fact); *In re Chrysler Corp. Vehicle Paint Litig.*, No. 1239, 1998 U.S. Dist. LEXIS 15675, at \*2 (J.P.M.L. Oct. 2, 1998) (ordering transfer and consolidation of overlapping litigation involving common questions of fact and class action allegations).



506 F. Supp. 651, 655 (J.P.M.L. 1981) (noting that transfer would “effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities”); *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, No. 1396, 2001 U.S. Dist. LEXIS 5226, at \*2-3 (J.P.M.L. Apr. 18, 2001) (ordering transfer where all actions were brought as class actions and arise from the same factual milieu).

Centralizing pending actions also promotes section 1407(a)’s third criterion, “the just and efficient conduct of such actions,” by preventing inconsistent pretrial rulings and duplicative discovery. *See In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, 2001 U.S. Dist. LEXIS 5226, at \*3 (J.P.M.L. Apr. 18, 2001) (centralization under section 1407 is necessary to eliminate duplicative discovery, conserve judicial resources, and prevent inconsistent pretrial rules). When pending cases are so centralized, any additional lawsuits filed later may be included as “tag-along” actions in an MDL proceeding. *See In re Humana Managed Care Litig. v. Cigna Corp.*, 2000 WL 1925080, at \*3 (J.P.M.L. Oct. 23, 2000) (citing *In re Gas Meter Antitrust Litig.*, 464 F. Supp. 391, 393 (J.P.M.L. 1979)) (ordering transfer, in part, because of the “salutary effect of providing a ready forum for the inclusion of any newly filed actions”). Such coordination reduces the time and effort spent by the parties and courts in resolving pretrial motions to dismiss, discovery disputes and/or motions for summary judgment.

Finally, centralization avoids inconsistent pretrial rulings with respect to issues of forum non conveniens or class certification to name a few. *See In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, No. 1396, 2001 U.S. Dist. LEXIS 5226, at \*2-3 (J.P.M.L. Apr. 18, 2001) (noting that centralization under Section 1407 is necessary in order to eliminate inconsistent pretrial rulings with respect to questions of class certification); *In re Hawaiian Hotel Rom Rate Antitrust Litig.*, 483 F. Supp. 935, 936 (J.P.M.L. 1968) (holding that transfer was necessary to avoid “pretrial chaos in conflicting class action determinations). The Judicial Panel on Multidistrict Litigation has “consistently held that transfer of actions under Section 1407 is appropriate, if not necessary, where the possibility of inconsistent class determinations exists.” *In re Certain Teed Corp. Roofing Shingle Prods. Liab. Lit.*, 2007 WL 549356; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Lit.*, 398 F. Supp. 2d 1371 (J.P.M.L. 2005); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Lit.*, 398 F. Supp. 2d 1365 (J.P.M.L. 2005); *In re TMJ Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994); *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975).

### **Choosing the MDL Forum**

The Panel does not use any single factor to select the transferee district (the court in which the cases will be consolidated). Considerations include where the largest number of cases are pending, where discovery has occurred, where cases have progressed the furthest, the site of the occurrence of common facts, where cost and inconvenience will be minimized, and the experience, skill and caseloads of the available judges. *See generally*, Moore’s Federal Practice, Manual for Complex Litigation, at §20.132 (4th ed. 2004). *See also Pinney v. Nokia, Inc.*, 402 F.3d 430, 451-52 (4th Cir. 2005) (noting that MDL transfer to a *central district* is appropriate, even if subject matter jurisdiction or venue would otherwise be improper over the transferred cases) (emphasis supplied); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (consolidating actions in a geographically central and accessible location for this nationwide litigation).

### **Additional Cases Filed After MDL Consolidation is Granted**

Assuming the Panel grants MDL consolidation, any additional actions filed after consolidation may enter the MDL as “tag-alongs.” In that case, the MDL Panel will issue a Conditional Transfer Order listing the cases to be transferred to the MDL. A party wishing to keep a case out of a consolidated MDL proceeding must file a Notice of Opposition to the Conditional Transfer Order within fifteen days from the date the Conditional Transfer Order is issued. The party must then file a motion to vacate the

Conditional Transfer Order and supporting brief within fifteen days from the date of its Notice of Opposition. The clerk of the MDL Panel then sets a briefing schedule with respect to responses and sets the matter for hearing before the Panel. *See generally* MDL Rule 7.4.

### **Choice of Law Issues in MDL Cases**

Once a case is consolidated by order of the MDL Panel, the transferee court oversees pretrial proceedings, which include initial motions to dismiss for forum non conveniens and/or on other grounds, motions for class certification, discovery matters, motions for summary judgment, and in some cases, pretrial motions. *See e.g. In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 367-38 (3d Cir. 1993). Complexities arise as to the applicable law to determine these pretrial matters. As to substantive issues, in diversity cases, the law of the transferor district (i.e., the state in which the case was originally filed) follows the case to the transferee district (i.e., the court in which all cases are consolidated in an MDL). *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 69 (S.D.N.Y. 2002) (internal citations omitted).<sup>10</sup> Where a claim or defense arises under federal law, the transferee judge may consider whether to apply the law of the transferee or transferor circuit. *See In Re Korean Air Lines Disaster*, 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 (1989); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, (hereinafter “MTBE”) 241 F.R.D. 185, 193 (S.D.N.Y. 2007) (law of transferee circuit controls pretrial issues such as removal and subject matter or personal jurisdiction). The law of the transferee circuit, however, controls discovery issues such as whether to compel a deposition or documents pursuant to a subpoena. *Id.*

The decision to certify a class action is not a mere pretrial issue. *MTBE*, 241 F.R.D. at 193. Since the requirements for class certification are enmeshed with trial considerations, it would not be just or efficient to apply the law of the transferee court in considering class certification and then force the transferor court to try a class action it might never have certified. *Id.* The New York courts, therefore, apply the law of the transferor circuit in determining class certification. *Id.* Other courts, however, disagree with this approach. *See e.g. In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 1999 U.S. Dist. LEXIS 13228 (E.D. Pa. Aug. 26, 1999) (applying the law of the transferee court to determine class certification).

## **REPRESENTATIVE LITIGATION MATTERS**

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### **CLASS CERTIFICATION**

Class actions allow large numbers of individuals who have suffered essentially the same wrong to obtain legal redress in a single proceeding. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980). A class action works as intended only if the representative's claim is typical of those held by class members and factual and legal commonalities of the class predominate, as otherwise, the class action will deteriorate into an unmanageable mass of individual claims and defenses. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998). These concerns/factors are addressed in the requirements set forth in Federal Rule of Civil Procedure 23, which sets forth the standard for class action certification.

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10 New York courts apply an “interests analysis” to conflicts of laws in tort actions and apply the law of the jurisdiction with the greatest interest in the litigation. *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985). If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred generally applies as that jurisdiction has the greatest interest in regulating conduct within its borders. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993); *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998). New York courts consider the place where a drug was ingested to be the location of the tort. *See e.g. Plummer v. Lederle Labs.*, 819 F.2d 349, 355 (2d Cir. 1987); *Ashley v. Abbott Labs.*, 789 F. Supp. 552, 567-68 (E.D.N.Y. 1992).

In determining whether a putative class qualifies for certification, the only question is whether the requirements of Federal Rule of Civil Procedure 23 have been met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). While the court assumes the allegations in the Complaint to be true, the burden is on the plaintiff to demonstrate that a putative class meets the four threshold requirements of Rule 23(a) and at least one of the categories enumerated in Rule 23(b). *Steinberg v. Nationwide Mutual Ins. Co.*, 224 F.R.D. 67, 72 (E.D.N.Y. 2004) (citing *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 280 F.3d 124, 133 (2d Cir. 2001)); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 66 (S.D.N.Y. 2002).<sup>11</sup> Courts deciding class certification take a liberal approach in deciding whether the plaintiff satisfies these requirements and may exercise broad discretion in weighing the propriety of a putative class. *Steinberg*, 224 F.R.D. at 72 (internal citations omitted). Whether the plaintiffs state a cause of action or will prevail on the merits is not a consideration in resolving a motion for class certification. *Id.* (citing *Vengurlekar v. Silverline Techs. Ltd.*, 220 F.R.D. 222, 226 (S.D.N.Y. 2003)).

### **Federal Rule of Civil Procedure 23(a): The First Set of Class Action Requirements**

Rule 23(a) requires that the factors of numerosity, commonality, typicality, and adequacy of representation be satisfied. *MTBE*, 241 F.R.D. 185, 193 (S.D.N.Y. 2007); *Gibbs v. DuPont De Nemours & Co., Inc.*, 876 F. Supp. 475, 481 (W.D.N.Y. 1995). The first requirement, numerosity, requires that the class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1).<sup>12</sup> See also *Vengurlekar*, 220 F.R.D. at 227 (internal quotations and citations omitted) (noting that absent a class action, joinder need only be difficult or inconvenient – not impossible). The commonality requirement, set forth in Rule 23(a)(2), requires a showing that there are common issues of fact or law that affect all class members.<sup>13</sup> Typicality, the third criterion, requires that “each member’s claims arise from the same course of events and [that] each class member makes similar legal arguments to prove [the] defendant’s liability.” Fed. R. Civ. P. 23(a)(3). See also *Vengurlekar*, 220 F.R.D. at 227. The typicality requirement ensures that the class representative is not subject to a unique defense that could become the focus of the litigation. *Id.* Finally, the adequacy of representation criterion requires the plaintiff to prove that the “representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). See also *Steinberg*, 224 F.R.D. at 74. To satisfy this final criterion, the plaintiff must demonstrate that: 1) class counsel is qualified, experienced, and generally able to conduct the litigation; 2) the proposed representatives have no interests that are antagonistic to the class; and 3) the named representatives will vigorously prosecute the alleged claim. *Steinberg*, 224 F.R.D. at 74 (citing *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001)). Adequacy of representation may be defeated when litigating the matter could be overwhelmed by the disposition of unique defenses. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990).

### **Federal Rule of Civil Procedure 23(b): The Second Set of Class Action Requirements**

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- 11 Since the New York courts apply the law of the transferor district to issues of class certification as discussed above and the Federer action was brought in the United States District Court for the Eastern District of New York, the authors present the standards for class certification under Second Circuit and New York law.
  - 12 As a general rule, classes of twenty are too small, classes of twenty to forty may or may not suffice depending on the circumstances, and classes of forty or more are numerous enough. See 3B Moore & Kennedy, *Moore’s Federal Practice* ¶ 23-05[1] (2d ed. 1987).
  - 13 See *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982) (holding that “commonality began to be obscured by individual case histories” despite common issues of design, testing, manufacturing, labeling and inspection of Dalkon Shields on the issues of negligence, strict products liability, adequacy of warnings, and breach of warranty; and that where different representations and warnings were made to each woman, different injuries suffered, and different defenses available, “problems of commonality merge into problems of management”).

In addition to satisfying Rule 23(a)'s requirements, a putative class action must demonstrate that a class action is maintainable under at least one of the following categories:

- (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
  - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
  - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class is superior to other available methods for the fair and efficient adjudication of the controversy (Predominance and Superiority).

*See In re Simon II Litig.*, No. 00-5332, 2002 U.S. Dist. LEXIS 25632, at \*278 (E.D.N.Y. Oct. 22, 2002) (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997)).

Rule 23(b)(3) is often invoked and requires a showing of predominance and superiority. Predominance is more stringent than the commonality requirement and mandates that common questions be the focus of the litigation. *Steinberg*, 224 F.R.D. at 73 (citing *Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y., Inc.*, 198 F.R.D. 41, 44 (E.D.N.Y. 2000)). Superiority requires the court to determine whether a class action is superior to other methods of adjudication by considering the following factors: 1) the class members' interest in individually controlling separate actions; 2) the extent and nature of existing litigation concerning the same issues and already involving certain class members; 3) the desirability of litigating the claims asserted in the particular forum; and 4) the difficulties to be encountered in managing a class action. *Id.* (citing *Vengurlekar*, 220 F.R.D. at 228).

### **Moving for Class Certification and the Interplay Between Class Certification and Other Initial Motions**

After the filing of a class action complaint, it is up to the plaintiff to move for or the court to order briefing on the issue of class action certification. *See* Fed. R. Civ. P. 23(c)(1)(A) (when a person sues or is sued as a representative of a class, the court must – at an early practicable time – determine by order whether to certify the action as a class action); *McGowan v. Faulkner Concerte Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981) (“the trial court has an independent obligation to decide whether an action was properly brought as a class action, even where neither party moves for a rule on class certification”). During the initial Rule 26 and 16 Conferences, a defendant should discuss and consider asking the Court to address and determine the following:

- Whether to hear and determine threshold dispositive motions (such as Motions to Dismiss) before hearing and deciding class certification motions;<sup>14</sup>

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<sup>14</sup> While the court may rule on Rule 12 motions or other threshold issues before deciding certification, such rulings bind only named parties. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (dismissal before certification is res judicata only as to the class representative, not class members). But see *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995) (a grant of summary judgment dismissing the claims of a class representative often has the effect of mooting the class certification issue).

- Whether to appoint interim class counsel during the period before class certification is decided;<sup>15</sup>
- Whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts, including trial preparation, schedules and orders, and the need for coordinated activity;
- Whether class certification discovery is necessary and a schedule for such discovery.

*See generally*, Moore's Federal Practice, Manual for Complex Litigation at §21.11 (Lexis 4th ed. 2004).

## CONCLUSION

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As demonstrated by the foregoing, the one commonality shared by food-related other product liability/complex tort cases is the multitude of diverse pre-trial issues presented in terms of jurisdiction, venue, the most convenient forum, the availability of multidistrict litigation, choice of law issues, and questions surrounding class certification. Even putting aside the initial questions as to jurisdiction, venue, and the appropriate forum (MDL or otherwise) complaints filed by plaintiffs seeking class action certification often demonstrate multiple diversified issues as to causation, choice of law, and appropriate relief, which could very well overwhelm and destroy the commonalities and cohesion required to maintain a class action. These varied issues lead, however, to a second commonality between food-related and other complex tort cases: addressing any or all of the aforementioned issues early in the litigation can provide a path to a successful settlement, judgment, or verdict in favor of one or all of the defendants.

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<sup>15</sup> Where there are numerous, overlapping, duplicative, or competing suits pending in many jurisdictions, a number of lawyers may compete for class counsel appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class pre-certification. See Fed. R. Civ. P. 23(g)(2)(A), Committee Note (permitting the designation of interim counsel before determining whether to certify a class).