Federal MDL Centralization

The Mystique of the Process and Why It Matters

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An explanation of how cases end up on, and practical advice for how defendants can impact the formation of, MDL dockets.

According to Hon. John G. Heyburn (W.D. Ky.), Chair of the Judicial Panel on Multidistrict Litigation, about 15 percent of federal civil litigation is transferred to the multidistrict litigation (MDL) docket. *See Panel Promotes Just and Efficient Conduct of Litigation*, 42 The Third Branch 10 (Feb. 2010). It behooves attorneys who practice in areas ripe for consideration as MDL, such as product liability or antitrust litigation, to understand the MDL centralization process because the venue and judge selected by the Judicial Panel on Multidistrict Litigation may well determine a proceeding's outcome. It is also advantageous for attorneys to identify the means by which they can influence the MDL centralization process because the decision makers have enormous discretion, and "unfettered" in the sense that if the panel denies an MDL request, the party seeking it has no recourse to appeal. Simply put, understanding the MDL centralization process and how to bend it to a client's advantages may make the difference in an entire species of litigation taking off or languishing.

This article will discuss the MDL centralization process, also known as the transfer process, focusing on its statutory origins and requirements. The article will also discuss the impact centralization has had on civil litigation, drawing on case studies to illustrate. Finally, this article will suggest steps practitioners can follow to become active participants in the MDL centralization process.

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About MDL

In the mid-1960s, a bevy of civil and criminal cases arising from antitrust violations at a prominent consumer electronics company overwhelmed dockets in federal district courts throughout the country. In the wake of these cases, Congress sought a mechanism in addition to class actions to allow federal courts to adjudicate multiple cases containing like operative facts more efficiently. To that end, Congress in 1968 enacted 28 U.S.C. §1407, which established the framework for the centralization procedure that would come to be known

as federal multidistrict litigation (MDL). *See* S. Rep. No. 454, 90th Cong., 1st Sess. 3–4 (1967); Phil Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964); *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1001 (1974). That statute has, with periodic revisions, governed the MDL centralization process ever since.

The statutory requirements for MDL centralization are very few. The actions must involve "one or more common questions of fact" and must have been brought in more than one jurisdiction.

Section 1407(a) specifies, "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." 28 U.S.C. §1407(a). The Judicial Panel on Multidistrict Litigation (JPML), a committee established by 28 U.S.C. §1407 and composed of sitting federal judges, decides whether to consolidate pretrial proceedings in particular litigation, where to send it, and which judge will direct it.

The JPML sits every two months at a different location to adjudge whether specific lawsuits or groups of lawsuits warrant centralization. A lawsuit or group of lawsuits can become centralized in three ways: (1) through a motion of a party filed with and considered by the JPML to consolidate and transfer an action as a new MDL; (2) through a motion of a party filed with and considered by the JPML to join its lawsuit to an existing MDL; or (3) by sua sponte action on the part of the JPML. *See* 28 U.S.C. §1407(c)(i). The JPML generally rules quickly, often within two weeks of a hearing.

Various factors play into the JPML's decision that cases are appropriate for MDL centralization. The statutory requirements for MDL centralization are very few. The actions must involve "one or more common questions of fact" and must have been brought in more than one jurisdiction. 28 U.S.C. §1407(a). Section 1407(a) authorizes the JPML to centralize actions that involve "one or more common questions of fact" in more than one jurisdiction if it finds that centralization "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." Practically speaking, the JPML, as part of its deliberation over centralization, also weighs the volume of similar cases filed and the additional volume expected and the probability that MDL centralization will motivate pretrial resolution of claims. *See Panel Promotes Just and Efficient Conduct of Litigation*, 42 The Third Branch 10 (Feb. 2010). Parties may appeal orders to centralize litigation only to the circuit court of appeals for the district to which the litigation has been transferred. *See* 28 U.S.C. §1407(e). Parties may not appeal denied motions to centralize. *See id.*

Once the JPML finds that centralizing litigation is appropriate, it must assign the MDL to a district court and district court judge. The latter is, Judge Heyburn has stated, usually the paramount concern. *See Panel Promotes Just and Efficient Conduct of Litigation*, 42 The Third Branch 10 (Feb. 2010). That is, the first priority for the JPML in assigning an MDL usually is locating a knowledgeable judge capable of addressing the issues likely to arise in the consolidated cases. *Id.* When weighing venue, Judge Heyburn has said, the JPML looks for which "particular district is convenient to likely discovery needs, related grand jury proceedings, or ongoing state court litigation involving the same parties and subject matter." *Id.* The JPML also takes into account "the location of the involved actions, and particularly that of the most advanced action,… If a significant number of plaintiffs and defendants favor a particular district, the [JPML] will also take that into consideration[.]" *Id.*

Upon appointment, the "transferee" judge oversees pretrial matters for cases transferred to his or her jurisdiction as part of the MDL over which he or she presides. Among the pretrial matters transferee judges commonly decide are the appointment of lead counsel for plaintiffs, discovery disputes, and issues surrounding class certification. *See* James Garner, *United States Judicial Panel on Multidistrict Litigation Hears Arguments*, GLG News (July 30, 2010). Cases that proceed beyond summary judgment are transferred from the MDL judges back to the jurisdictions from which they were transferred for trials. *See* 28 U.S.C. §1407(a).

Impact of MDL Centralization

Since Congress enacted 28 U.S.C. §1407 in 1968, more than 300,000 cases and millions of claims have been adjudicated through a federal MDL. The subject matter of the cases and claims adjudicated as MDL has ranged from antitrust to toxic torts. The total number of actions presently pending and subject to MDL proceedings is over 88,000. Currently, approximately 240 judges oversee one or more of 310 total MDLs in over 60 federal districts. As of September 2009, over 223,000 cases had been terminated by transferee courts and over 11,000 had been remanded by the JPML. *See Panel Promotes Just and Efficient Conduct of Litigation*, 42 The Third Branch 10–11 (Feb. 2010).

These statistics, while impressive, may actually belie the significance of MDL centralization to civil litigation in general. At the very least, the availability of MDL has facilitated important trends in civil litigation. For example, developments in recent years have rendered class certification more difficult and thereby discouraged plaintiffs' attorneys from filing class actions. *See*, *e.g.*, The Class Action Fairness Act of 2005, 28 U.S.C. §§1332(d), 1453, 1711–1715. Without the gains in judicial efficiency achieved by MDL, the dwindling use of class actions could have overburdened the federal judiciary.

The impact of the MDL centralization becomes even more apparent when tracing the arcs of the centralization process in particular litigations. The mode of centralizing in the following litigations greatly affected outcomes and merits review.

BP Gulf Oil Spill

Examining the circumstances surround-

ing the MDL formed to handle pretrial proceedings for litigation arising from the recent disaster in the Gulf of Mexico, in particular the way that the JPML selected the venue, illustrates well how the JPML interprets its charge and applies its standards. In this instance, it appears that selecting a venue took precedence over selecting a transferee judge. Further, this episode shows that the JPML may sometimes be susceptible to public opinion.

On April 20, 2010, an explosion and fire onboard the Deepwater Horizon offshore drilling rig, approximately 130 miles southeast of New Orleans and approximately 50 miles from the Mississippi River Delta, killed 11 workers and caused huge amounts of oil to flow steadily into the Gulf. The spill's impact was widespread. Oil washed ashore in Louisiana, Mississippi, Alabama, Florida, and Texas.

Within two weeks of the incident, 77 lawsuits were filed in federal court against BP and other companies involved in the spill: 31 actions in the Eastern District of Louisiana, 23 actions in the Southern District of Alabama, 10 actions in the Northern District of Florida, eight actions in the Southern District of Mississippi, two actions in the Western District of Louisiana, two action in the Southern District of Texas, and one action in the Northern District of Alabama. Many of these actions were putative class actions brought on behalf of property owners and parties in industries harmed by the spill, such as commercial fishermen and tourism-related ventures. *See BP Wants Gulf Oil-Spill Lawsuits Combined in Houston*, Businessweek (May 10, 2010). Other lawsuits included personal injury or wrongful death claims brought by those injured in the Deep Water Horizon explosion, or their estates. *Id.* States and environmental advocates sued over the environmental devastation caused by the spill. *Id.* Shareholders also filed lawsuits against BP management. BP established a $20 billion fund to compensate victims who would waive the right to seek court remedies.

Four parties involved in these lawsuits separately moved that the JPML centralize the litigation. Of the dozens of responses that the JPML received to these motions, the overwhelming majority favored centralization. Given that the lawsuits shared common parties and the same operative facts, and given the parties' general amenity to centralization, centralization of these actions was probable. The questions for the JPML were, then, how would it structure the new MDL, where would it transfer the MDL, and which judge would preside over it?

Plaintiffs and defendants disagreed over an appropriate venue. The defendants favored centralization in the Southern District of Texas, Houston Division, arguing that Houston was near the defendants' headquarters and the venue of the majority of lawsuits arising from the spill filed in state courts. *See BP Wants Gulf Oil-Spill Lawsuits Combined in Houston*, Businessweek (May 10, 2010). The majority of plaintiffs, on the other hand, supported centralization in the Eastern District of Louisiana, location of New Orleans, the largest city affected by the spill.

On July 29, 2010, the JPML heard arguments on centralization. The JPML found that the actions before it shared factual issues concerning the cause of the Deepwater Horizon explosion, and the role, if any, that each defendant played in it. It also found that centralization would eliminate duplicative discovery, prevent inconsistent pretrial rulings, including rulings on class classification, and conserve the resources of the parties, their counsel, and the judiciary. Finally, the JPML argued that centralization might also facilitate coordination with administration of the BP compensation fund.

The JPML ultimately chose the Eastern District of Louisiana as the district for the litigation. In reaching this determination it appears that the JPML was guided mostly by geography, viewing venue as most important in finding that the Eastern District of Louisiana was geographically and psychologically the "center of gravity" of the docket. It appears that the JPML transferred the MDL to the Eastern District of Louisiana mainly because New Orleans was the city most associated in the public's mind with the disaster and the site of misfortune in recent years. The JPML appointed Hon. Carl J. Barbier, who had already managed dozens of the cases consolidated into the new MDL, as presiding judge.

Asbestos

Asbestos litigation is the longest-running mass tort litigation in the history of the United States. The saga of the federal asbestos MDL demonstrates conditions that can prompt the JPML to establish an MDL, as well as the power a presiding judge can exert over it.

Before 1991, the JPML rejected motions to establish an asbestos MDL on five different occasions—1977, 1980, 1985, 1986, and 1987. Each time the JPML considered such a motion, it found that federal dockets contained too few asbestos-related lawsuits to warrant centralization. Further, the JPML found that many of the lawsuits had been pending for years, making transfer illogical.

Defense attorneys should recognize that the JPML is susceptible to public pressure.

The year 1991 saw a spike in the number of asbestos-related lawsuits pending in federal court, from 103 in 1977, when the JPML first considered an asbestos MDL, to more than 30,000. That increase prompted the JPML to establish an MDL for asbestos-related lawsuits to serve the interests of judicial economy. Further, the large case backlog suggested that individually adjudicating asbestos-related lawsuits had failed as a method of dispute resolution.

Parties held contrasting views on how to centralize the asbestos-related claims. Whether transferee judges could try transferred cases, in addition to presiding over pretrial matters, was, at the time, an open question. Some plaintiffs advocated a de facto, single, national class action trial. Defendants strongly opposed such a trial, instead favoring reverse bifurcation of proceedings: trial on the issue of damages before liability.

Where to locate proceedings, too, presented a difficult question for the JPML. Asbestos-related claims were pending throughout the country, and parties were similarly dispersed. In deciding to centralize in the Eastern District of Pennsylvania, the JPML stated that with a docket of such

great magnitude, no district emerged as a clear nexus for conducting pretrial proceedings. The JPML selected the Eastern District of Pennsylvania because it was the district either expressly favored or not expressly found objectionable in the greatest number of pleadings. The JPML also decided that more asbestos personal injury or wrongful death actions were pending in that district than any other, the court there had extensive experience in complex litigation in general and asbestos litigation in particular, and the court had expressed willingness to assume the massive responsibility. In rejecting the Eastern District of Texas, the JPML noted that it was the choice of the core group of plaintiffs, but the district that generated the most opposition from defendants.

Defense attorneys can expect plaintiffs' attorneys to jockey for the position of lead plaintiffs' attorney.

The JPML chose to assign the federal asbestos cases to Hon. Charles R. Weiner, finding that he was thoroughly familiar with asbestos litigation issues, he had a track record of accomplishment and successful innovation, and based on the pleadings, a majority of responding plaintiffs and defendants either expressly agreed or were not opposed to Judge Weiner presiding over the docket.

Judge Weiner oversaw the asbestos-related MDL from its inception in 1991 until he passed away in November 2005. Judge Weiner was succeeded by Hon. James Giles, who presided over what came to be known as "MDL 875" until he left the bench in October 2008. During this seventeen-year period from 1991 through 2008, the sheer volume of asbestos filings combined with the bankruptcy of several key defendants, as well as litigation over a putative global settlement agreement, contributed to the creation of a seemingly insurmountable backlog of asbestos personal injury cases in MDL 875.

Plaintiffs' attorneys, fearing that their clients' claims would languish under federal jurisdiction, initiated claims more frequently in state courts. At least some courts viewed these fears as legitimate. On a motion to remand to state court, Hon. D. Brock Hornby (D. Maine) noted *in dicta*:

> If these claims return to state court, they will proceed to resolution. If they remain in federal court, they will encounter significant delay upon their transfer through the Panel on Multidistrict Litigation to the Eastern District of Pennsylvania where no asbestos trials or discovery takes place in deference to global settlement efforts. This delay is of economic benefit to the defendants and imposes costs on the plaintiffs. In all likelihood, this economic reality is driving the behavior of the parties in this matter.

In re Maine Asbestos Cases, 44 F. Supp. 2d 368, 374 n.2 (D. Maine 1999).

The threat of removal to federal court was potent, and plaintiffs' attorneys attempted to destroy diversity of citizenship. This meant, at times, adding defendants that were citizens of the forum jurisdiction. *Cf.* Brian S. Kabateck & Michael V. Storti, *Nine Things You Must Know About Mass Torts*, J. Consumer Attorneys Assn. Calif. (Feb. 2010) (advocating that plaintiffs seeking to keep claims in state courts "join[] in-state defendants to defeat diversity"). Plaintiffs' attorneys also viewed motions to dismiss based on the doctrine of *forum non conveniens* as efforts by defendants to ensure removal to federal courts because defendants often proposed as alternative forums jurisdictions where diversity of citizenship existed.

Since 2008, Hon. Eduardo Robreno has presided over the federal asbestos-related MDL 875 and brought great changes to its governance. After a series of hearings in 2009, he dismissed thousands of claims essentially for, failure to prosecute. In fact, over the course of the calendar year 2009, he resolved more than 100,000 cases with settlements, voluntary dismissals, or involuntary dismissals. As of November 30, 2010, about 18,000 cases remained. The remaining claims are proceeding to trial or, at least, moving in that direction. *See* Michael Kunz, Clerk of Court E.D. Pa., *Asbestos Products Liability Litigation Land-Based Caseload Statistics August 1, 2006–November 30, 2010*, http://www.paed.uscourts.gov/documents/MDL/MDL875/November%20Stats.pdf.

Toyota Motor Corp.

The years 2009 and 2010 saw widespread news coverage of safety performance of Toyota Motor Corp. vehicles, large scale car recalls, civil actions filed against Toyota across the country and, eventually, the creation of an MDL to handle the litigation. The way that the MDL centralization process played out in this instance offers valuable insight into the motivations of plaintiffs' attorneys in the MDL centralization process and into the ramifications of their behavior.

In 2009 and 2010, after a series of accidents and recalls involving Toyota vehicles, plaintiffs' attorneys filed class actions against Toyota in several federal jurisdictions, seeking recompense for personal injuries and economic loss from diminution in resale value of the vehicles. The parties largely agreed that the litigation should be centralized but differed about where to best implement it. *See Lawyers Line Up to Take on Toyota—Class Action Lawsuits Wait for Federal Ruling*, Massachusetts Lawyers Weekly (Apr. 5, 2010).

The MDL's venue was of major consequence to the plaintiffs' attorneys involved in the litigation because the decision would effectively determine which of the contenders the JPML would name as the lead attorney for the plaintiffs. *Id.* To the lead attorney would go control over prosecuting a massive litigation, along with the attendant prestige and a possible windfall.

Mindful of the stakes, several plaintiffs' attorneys banded together in hopes of improving the likelihood that the JPML would select Boston, Massachusetts, as the venue for a Toyota MDL. The complaint in the case, *Shah v. Toyota Motor North America Inc., et al.*, 2010-cv-10263 (D. Mass.), which was filed on February 16, 2010, lists 10 attorneys as representing plaintiffs: two in Massachusetts, four in Florida, and one each in New York, Missouri, Pennsylvania, and California. *Id.* Ultimately, the JPML opted to centralize proceedings in California, under the control of Hon. James Selna.

Lessons from the MDL Centralization Process

The MDL centralization process is an inte-

Centralization, continued on page 82

violations of various state consumer protection laws. The defendants were manufacturers of products used by infants, such as baby bottles and sippy cups, manufacturers of baby formula, and retail outlets that sold these products. So far, litigation in state courts has been limited, but the lawsuits filed in or removed to federal court have been consolidated as multidistrict litigation (MDL).

In May 2010, in the consumer class action MDL against manufacturers of baby bottles, sippy cups, baby formula, and retailers, the U.S. District Court for the Western District of Missouri ordered discovery into the defendants' knowledge of BPA health effects and communications with consumers about the presence or absence of BPA in products. *In Re: Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, MDL No. 1967. A second BPA-related MDL in the Western District of Kentucky involves suits against an aluminum bottle manufacturer that claimed its products were BPA-free when they were lined with BPA-containing resins. *In Re: Sigg Switzerland (USA), Inc., Aluminum Bottles Marketing and Sales Practices Litigation*, MDL No. 2137.

Manufacturers and retailers have company as targets of litigation. After the Natural Resources Defense Council gave the FDA 90 days to accede to its request that the FDA drop the acceptable level of BPA below 5 mg/kg/day, the council filed a lawsuit against the FDA for not acting on its petition. Natural Resources Defense Council Citizen Petition Requesting Regulation Prohibiting the Use of BPA (Oct. 21, 2008), http://docs.nrdc.org/health/files/hea_08102001a.pdf.

Despite the science to date, litigation promises to expand in other ways. Industries other than the baby product industry that produce and distribute BPA-containing products that humans have contact with humans likely will become future targets, particularly those that manufacture or supply food containers or their components. Furthermore, the types of claims are likely to expand. Plaintiffs have not yet asserted claims for personal injury as a result of exposure to BPA, but they likely will. Until that time, manufacturers of BPA and BPA-containing products may face claims for medical monitoring. Many states recognize a cause of action for medical monitoring through which consumers can require manufacturers to establish funds to pay for future medical tests and surveillance that consumers claim are necessary due to their or their children's alleged exposure to specific products. As with consumer class actions, some states do not require a plaintiff to have sustained a physical injury to pursue a medical monitoring action. Additionally, plaintiffs often pursue medical monitoring claims as class actions, increasing the complexity and scope of discovery and case management strategies. Because these recoveries are sought for a sensitive subpopulation—infants—mounting defenses to medical monitoring claims becomes quite difficult.

Even in the face of all of the scientific findings, the "controversy" regarding BPA is not going away. The press, consumer groups, and advocacy organizations' furor over a chemical with a clean record may well warn of things to come since sometimes regulation is driven more by rhetoric than by science.

Fallacies, from page 27
derstand well the details of the published literature. In each case, the weight of scientific evidence clearly contradicts and undercuts the bases of these fallacies. This is not an insignificant undertaking because an expert needs to evaluate hundreds of published papers in many different scientific fields before developing an informed "state of the art" opinion regarding asbestos health risk.

At the same time, attorneys need to be aware that the literature also contains opinion pieces, and even legal briefs, that some could portray as "true science" in the courtroom. *See*, *e.g.*, L.S. Welch, *Asbestos Exposure Causes Mesothelioma, but Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court*, 13 IJOEH (2007). And some journals will allow asbestos plaintiffs' lawyers to weigh in with their "scientific opinions." *See*, *e.g.*, M.M. Finkelstein and C. Meisenkothen, *Malignant Mesothelioma Among Employees of a Connecticut Factory That Manufactured Friction Materials Using Chrysotile Asbestos*, 54 Ann. of Occup. Hyg. 692–96 (2010).

In closing, barring major toxic tort reform in the near future, asbestos litigation is here to stay, and new and relevant research findings will continue to accumulate in the scientific literature. As in the past, defense and plaintiffs' experts will probably interpret many of these findings in a contradictory fashion, yet we are confident that judges and juries can discern the facts and reach informed verdicts.

Centralization, from page 60
gral but difficult to grasp component of modern civil federal practice. Judge Robreno's record presiding over the asbestos-related MDL claims makes clear that a judge appointed to preside over an MDL can seriously affect the path litigation will take. A close study of the process in action can improve members of the defense bar's ability to predict how it will play out. Here are a few tips drawn from the case studies earlier in this article.

First, defendants should, whenever possible, present a united front in favor of or against centralization or a particular centralization proposal. A united front improves clout before the JPML. In all three examples above, the JPML did not implement the plan that drew the most objections, even if other parties vehemently favored it. Further, defense attorneys can count on plaintiffs' attorneys to ally themselves to improve their clout.

Second, defense attorneys should recognize that the JPML is susceptible to public pressure. The BP Gulf Oil Spill MDL is located in New Orleans because that city is most closely aligned with that disaster in the public mind. It follows that savvy defense attorneys may possibly defeat a centralization proposal that they oppose by rendering it politically untenable.

Third, making sure that the best judge presides over a MDL should be defense attorneys' chief (but not only) concern. When the JPML was considering how to centralize federal asbestos-related claims, defense attorneys generally found Judge Weiner unobjectionable. While Judge

Weiner doubtlessly influenced the course of federal asbestos-related litigation, MDL 875 has survived him, and two different judges from the Eastern District of Pennsylvania have presided over it over the last five years. In sum, defense attorneys deciding which centralization proposal to support should assign primary weight to the judge who would preside over and influence the MDL at its onset and secondary weight to the overall inclinations of the judges of the proposed venue, from which the JPML would likely choose a successor.

Fourth, defense attorneys can expect plaintiffs' attorneys to jockey for the position of lead plaintiffs' attorney. For many of the litigations potentially appropriate for centralization, that position is simply too valuable to ignore, as seen in the Toyota MDL episode. Defense attorneys can take advantage of fractures in the plaintiffs' line caused by their attorneys' jostling. Defense attorneys presenting a unified front on a particular centralization proposal stand a better chance of prevailing over disorganized plaintiffs' attorneys.

Finally, above all else, practitioners should be aware that the MDL centralization process continues to evolve and expand to impact a greater number of litigations. Perhaps the most important advice that the authors can offer practitioners concerning MDL practice is that centralization is a process constantly in flux. Recent actions taken by the JPML can foreshadow future ones, and practitioners, therefore, must pay careful attention to whatever the JPML does. FD

Landlord, from page 69
recovery such as conversion or trespass. Whether a tort or contract statute of limitations will be applied to any given claim will depend on a determination of the "true nature" of that claim. *See, Desmond v. Moffie,* 375 F.2d. 742 (1st Cir. 1967). Accordingly, the tort counts in the complaint must include all of the elements of trespass or conversion (typically ownership, dispossession, unlawful taking and refusal to return upon demand) that would be required to support a recovery under those theories. Assuming these elements can be demonstrated, there is no reason in principle why a retail tenant that has recently discovered many years of erroneous overcharges by its shopping center landlord should be unable to obtain recovery on a continuing tort theory.

Conclusion

By understanding the litigation process and its traps for the unwary that may lie ahead, a retailer can better arm itself to succeed in the event that it must pursue a claim that it has been improperly overcharged its fair share of a lease expense. First, success in any dispute will depend on a retailer being able to demonstrate that the lease language supports its position. In the event of ambiguities in the lease, a retailer should be careful that it has not adopted or acquiesced in a reading of lease language that is contrary to the position it takes in litigation. Second, every retail tenant should be mindful of the maxim that an ounce of prevention is worth a pound of cure. Ensuring that the department responsible for paying lease expense invoices has the necessary time and training to thoroughly review and question any landlord invoice that does not clearly set forth the basis for a calculation and that the tenant has all the requisite back-up to ensure the accuracy of the invoice will not only enhance the likelihood of success in any future litigation, it is certain to reduce or eliminate the need for future litigation in many instances. Statements that are made by the landlord upon which the tenant relies need to be checked whenever appropriate and a thorough record of the statements and the tenant's reliance should be documented and maintained in the lease file. A tenant should pay particular attention to any changes in the calculation methodology being used by a landlord, demand a full explanation of any such change and carefully check it against the appropriate lease language. Mistakes that are not detected promptly can continue for years and the opportunities to recover those overpayments may be hampered or lost, particularly in any jurisdiction that treats a claim for the recovery of installment payments as constituting but a single claim that accrues when a tenant first has notice of an incorrect landlord methodology. Finally, in those jurisdictions where a long delay in detecting a landlord's overcharges may defeat a direct action for breach of contract as retail tenant should carefully remember the availability of a tort-based recovery on a continuing tort theory or whether there exist any viable self-help alternatives such as set-off or recoupment. FD