

SPECIAL MASTER CASE STUDIES

By

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Conference Committee on Special Masters**

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INTRODUCTION

In November 2016, the American Bar Association’s Judicial Division Lawyers Conference created a committee to study how best to facilitate the use of Special Masters in appropriate cases and circumstances. The Committee adopted a multi-pronged approach that involves both developing educational programs for the bench and bar based on existing resources,¹ and gathering additional information about how Special Masters have been used effectively in the pretrial and trial stages of recent cases.² These “Special Master Case Studies” reflect the first of the Committee’s information gathering activities.

This report includes two case studies:³ The Delta Wing Project 56 litigation in Georgia Superior Court, and two related insurance merger cases—Aetna-Humana and Anthem-Cigna—in U.S. District Court for the District of Columbia. These cases were recommended by Committee members who served as Special Masters in the litigation and who both provided information from the Special Master perspective and smoothed the way for contacting other case participants.

The Committee’s primary research member⁴ interviewed the presiding judges in the case study cases as well as the mediator in the Delta Wing litigation. She also surveyed those attorneys most actively involved in these cases but was able to ascertain the views of only five of the primary attorneys. Their views are included in the case studies, but are neither considered nor presented as representative of the pool of attorneys who were involved at some stage in the litigation. (For more detail on data collection, see Appendix B: Methodology.)

Each case study describes in detail how Special Masters were used during the pretrial phases of these few complex cases, and how their involvement affected the litigation from the judicial and attorney perspectives. The report concludes with a section on “General Observations” about Special Masters from the bench and bar.

¹ Among other projects, the Committee is working with other organizations to develop educational programs and model criteria for selecting Special Masters, and has formed a Working Group with representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, and several other ABA Standing Committee and Sections to develop a proposed “Black Letter” on best practices for Special Masters for consideration by the American Bar Association House of Delegates. For more information about the Committee and its work, contact co-chair Merrill Hirsch at merril@merrilhirsh.com.

² The Committee decided to focus on the role of Special Masters in the pretrial and trial phases of cases because the prospective costs and benefits of these activities to the court and the parties are quite different from those in the Special Master’s better-known role of managing settlements in the post-trial phase after liability has been established.

³ We hope to add more case studies in the future.

⁴ Dr. Barbara Meierhoefer has worked for and consulted with the Research Division of the Federal Judicial Center and is experienced in conducting research on matters of interest to the courts.

CASE STUDY 1

Delta Wing Project 56 LLC vs. Ben Bowlby, et al.,

Jackson County, Georgia Superior Court

13-CV-1184

Delta Wing Project 56 LLC vs. Ben Bowlby, et al.,

Presiding Judge David Motes appointed a Special Master to oversee discovery in the Delta Wing litigation filed in the Superior Court of Georgia. The judge recognized from the original complaint (exceeding 100 pages) that this case presented complex technical and legal issues and involved multiple lawyers from all over the world and would tax judicial time and resources to the limit in his already over-burdened court.⁵

The judge was clear that the purposes of the appointment were to move the case to trial with minimal delay and use of judicial resources. He had not previously used a Special Master, but he had also rarely before had a case with such high stakes and parties who could well-afford to pay for a Special Master to assist the court. Judge Motes indicates that the positive impact of the Special Master exceeded his expectations.

Case Summary⁶

This lawsuit sought “damages and injunctive relief arising out of theft of confidential and proprietary information, misappropriation of trade secrets, breach of contracts, unjust enrichment, fraud, and negligent misrepresentation.” [The dispute was over the design of the innovatively aerodynamic and lightweight Delta Wing racing car.](#) The car was designed by a group of engineers, led by Ben Bowlby, who worked originally for Ganassi Racing and then for its affiliate, Delta Wing LLC, which was formed in 2010 specifically to focus on developing this car.

In June 2011, the Delta Wing was selected by the Le Mans 24 Hours race as it’s “Garage 56” entry for the 2012 race, a slot reserved for the most exciting, innovative entry of the year to test new technology against the rigors of the racing course. Delta Wing Project 56 was formed that month to complete the car’s development and testing in time for the race.

In early 2012, Delta Wing Project 56 entered into an oral technical partner agreement with Nissan under which Nissan, in exchange for advertising and publicity, would provide the engine, sponsor the car and pay racing expenses for the Le Mans race.

The car was strongly associated with Nissan at the race at which it ran flawlessly for 6 hours, a performance thought by its backers to be adequate “proof of concept.” After the Le Mans, however, Nissan backed away, hired Ben Bowlby, the lead engineer, and, in June 2013, rolled out its own car that was quite similar in design to the Delta Wing. Nissan further did not pay a \$2 million sponsorship fee nor did it cover the Le Mans racing expenses.

⁵ The opinions and insights of the judge come from an interview with Judge David Motes on June 26, 2017. His quotes are taken from the set of notes he prepared for the interview and shared with the interviewer.

⁶ Information about the case was taken from interviews with the participants as well as [Stef Schrader, “How Tomorrow’s Race Car Got Bugged in Today’s Lawsuits,” Jalopnik Investigates, \(June 2015\);](#) and [Stef Schrader, “Here’s What Happened with That Bizarre Nissan DeltaWing Lawsuit,” Jalopnik Investigates \(August 2016\),](#)

On November 22, 2013, Delta Wing Project 56, LLC filed a lawsuit in the Superior Court of Georgia against Ben Bowlby, and various components of the Nissan Corporation: Nissan Motor Company (Japanese), Nissan International (Swiss), Nissan North America, and Nissan Motorsports International (Japanese). The plaintiff filed a motion for injunctive relief and the defendants filed motions to dismiss.

The case eventually settled on March 14, 2016.

Appointment of a Special Master

In March 2014, just before the court hearing on the motions to dismiss and for injunctive relief, the judge contacted Mr. Cary Ichter, an experienced Special Master, to see if he might be available to serve as Special Master to manage the Delta Wing discovery process.

The judge had heard Mr. Ichter give a presentation at a judge's seminar in January 2014. The presentation emphasized the pressure that recent budget cuts and expanding dockets placed on judicial resources, and how, subject to court approval, a Special Master could resolve discovery disputes and make findings of fact and rulings. The judge notes that this salient information was "fairly fresh on my mind when this case came to my attention."

When Mr. Ichter expressed an interest, the judge mentioned the possibility of the Special Master appointment at the hearing on March 28. He recalls that the plaintiffs seemed a bit surprised and the defendants did not seem not too happy, but no objections were raised.

Two of the attorneys most actively involved in the case—one representing the plaintiffs, the other the Nissan defendants—both indicated that they were in favor of appointing a Special Master given the complexity of the case and the over-crowded docket in the Georgia Superior Court at the time. The only concern expressed was that none of the attorneys were asked for their suggestions as to who should be selected.⁷

On June 18, 2014, Judge Motes appointed Cary Ichter as Special Master using a very detailed appointment order. The order, which was based on a draft provided by Mr. Ichter, provided detail on numerous important issues including: Special master duties and responsibilities, standards for court review of Special Master products, *ex parte* communication, and rates of payment and party responsibility. (See Appendix A.)

⁷ These two attorneys were interviewed in November 2017 because they were the most active in the key pretrial disputes that were handled by the Special Master. As such, their views are particularly informative but they are not presented as being representative of the upwards of 20 lawyers who were involved in this litigation at some point or another.

Special Master Activities

Communication with Counsel

Immediately after his appointment, Mr. Ichter set up a conference call with the parties to introduce himself and begin development of a case management order to guide the pretrial and discovery process. He asked that the litigants talk and advise him of the issues to be resolved and their preferred timetable; and finalized the case management order on September 15, 2014.

Mr. Ichter brought the attorneys together via teleconference or hearing to air disputes, and always had a court reporter on hand to insure the accuracy of the meeting notes. He held a hearing whenever anyone asked for one and believes that this is an important practice to gain the confidence of the attorneys. It gives the lawyers an opportunity to be heard and assures them that he is on top of the case, has done a “deep dive” into the issues, and will have at hand the detail to support his eventual findings.

Of the two attorneys interviewed for this case study, one was more satisfied than the other with the way that the pretrial process unfolded. Both reported ample opportunity to lay out issues to the Special Master, but one did not feel that there was ample opportunity to approach the judge with concerns. One was positive and the other neutral as to whether the interaction with the Special Master and other attorneys was a productive use of their time and helped to sharpen the issues and avoid misinterpretation. Neither, however, thought that these interactions served to reduce contention among the attorneys. This case involved large sums of money, pride of development, and both corporate and personal reputations. Contention in these circumstances was inevitable, and arose before the Special Master became involved.

Findings

The first order of Special Master business was to address the defendants’ hotly contested motion to dismiss for lack of personal jurisdiction. After reviewing the voluminous material that had been filed in support of and opposition to this motion and holding a number of hearings, Mr. Ichter issued a 34-page Report and Recommendation on January 29, 2015. Surprisingly, given how contentious this issue was, none of the parties filed an objection.

During the following months, Mr. Ichter implemented the case management order. He modified the order, however, on May 18, 2015, which is his usual practice when the parties agree that they need more time. The most contentious disputes involved confidentiality and sanctions. Mr. Ichter generally issued an order if the matter was a non-dispositive discovery dispute, and prepared a Report and Recommendation for dispositive matters and motions for sanctions. Parties who disagreed with either an order or a recommendation could bring it to the court for resolution. One practical difference between these two methods of addressing disputes is the timing of the resolution if there is no objection from the parties. Unlike a Special Master recommendation, an order would take effect *without* the need for further action by the court.

Defendants objected to four of the Special Master’s orders, but Judge Motes ruled against these objections each time.

Both attorneys thought that the Special Master's findings were clear and well-reasoned, and one further noted that, in his experience, it is difficult to get the court to overturn such findings. As such, he usually does not object if his clients can "live with" the Special Master's decision, i.e., that its adverse impact on litigation strategy is not worth the added cost and delay.

Time and Cost

Mr. Ichter spent 165 hours on his Special Master duties in the Delta Wing case. He averaged 11¾ hours a month, with a high of 50 hours and lows of a couple of hours.

Both attorneys thought that the Special Master's rates were reasonable and fairly allocated across parties. One indicated that although he does not recall that his clients objected to the amount *per se*, they did raise the question of why they had to pay anything "for their own judge" when their taxes were funding a public court system.

Multiple Adjuncts: Appointment of a Mediator

In September 2015, Judge Motes referred the case to Mr. Hunter Hughes for mediation. Mr. Hughes is a highly respected attorney in Atlanta, Georgia who has served as a neutral in scores of national class, collective, and mass actions.

Judge Motes made the referral after the parties objected to some of the Special Master's orders and when, in accordance with the case scheduling order, the discovery period was due to expire. According to the judge, "I knew there would be more costly and time-consuming litigation on those issues, and a mediator might be able to settle the case before the parties had become too entrenched and invested in it."

In the judge's view, while the role of the Special Master was to make findings of fact and to issue orders to move the case to trial, the role of the mediator was to get a fresh, disinterested look at the case to induce a settlement by counseling the parties and attorneys. Judge Motes saw these roles as synergistic, with pressure from the Special Master's rulings and deadlines serving to help the mediator to succeed.

Both Mr. Hughes and Mr. Ichter agree with Judge Motes' characterization of their respective roles, and confirmed that they worked completely independently, communicating only to convey the status of the mediation as it related to the scheduling order. Mr. Hughes notes that he interacts with any Special Master appointed to a case referred to him for mediation—a relatively rare occurrence⁸—as he would with the judge or magistrate judge assigned to the case.

When asked about the timing of the referral, Mr. Hughes noted that the Delta Wing case was ready for mediation at the time of its referral (approximately 18 months after filing), and could not likely have been referred earlier to advantage. For mediation to be most effective, the parties need first to gain a good feel for how the litigation is likely to proceed absent settlement. In the Delta Wing case, this meant resolution of dispositive motions and, then, of key discovery motions to assess how the rulings were affecting their strategy and to sharpen the issues at dispute.

⁸ Approximately once a year.

In his general experience, Mr. Hughes has noticed no discernable difference in the posture of cases that come to him for mediation based on who—judge, magistrate judge, Special Master, or combination thereof—was managing the pretrial phase of the case.

Impact of Special Master

From the Bench

Judge Motes indicates that appointing Mr. Ichter as Special Master in this case was the “best thing that happened”—for the court, the parties in this case, and the parties in the other cases on the judge’s docket. The judge explained that the biggest difference appointing a Special Master made was to save him untold hours of time spent on discovery disputes, motions hearings, and, eventually trial.

“Having a seasoned, well-respected Special master helped to prevent any over-complication of the issues by the attorneys. The attorneys knew that the Special master had plenty of time to devote to an understanding of the issues and the litigation, and that I had no such time. “

Looking back, the judge said that “the only thing I would do differently would be to appoint the Special Master earlier.”

The judge specifically cited the effectiveness of the case scheduling order (that made the parties realize they were going to trial in 2016) and Mr. Ichter’s availability to hear and decide motions. The judge noted both that the Special Master was quicker than the court could have been, and that his orders were well reasoned and, “in my opinion, correct.”

Although there were some objections to the Special Master’s rulings that the court needed to address, Judge Motes notes:

“These would have come anyway had I been the one to rule and decide. By my having to hear and decide only his rulings, and since only parts of them were objected to, it saved my time and narrowed the issues. The Special Master reduced the scope of the litigation that I had to deal with.”

From the Bar

The two attorneys had opposite views about how involving the Special Master affected their clients in the Delta Wing litigation. One believed that, despite the added cost of paying the Special Master, Mr. Ichter’s availability to make timely decisions reduced his client’s overall costs by moving the case to settlement faster than would otherwise have been anticipated. The other disagreed, arguing that the very availability of the Special Master to make these decisions short-circuited active implementation of the attorneys’ responsibility to “meet and confer” which led, in turn, to more issues being litigated and an associated increase in costs.

Case Study 2

U.S. et al vs. Anthem Inc. and Cigna Corp. (1:16-cv-01493)

U.S. et al vs. Aetna Inc. and Humana Inc. (1:16-cv-01494)

In the U.S. District Court for the District of Columbia:

U.S. et al vs. Anthem Inc. and Cigna Corp. (1:16-cv-01493)
U.S. et al vs. Aetna Inc. and Humana Inc. (1:16-cv-01494)

These related cases were filed in the District Court for the District of Columbia on July 21, 2016. The federal government, joined by a number of plaintiff states, sought to enjoin mergers involving four of the five largest health insurance companies in the United States.

In mid-August, 2016, the presiding judges in the two cases appointed Judge Richard A. Levie (Ret.) to serve as a Special Master to oversee the discovery process within an expedited time frame.

Key to the appointment was the need for concentrated attention to get these cases ready for bench trials given the stakes involved, the anticipated volume of discovery, and the time sensitive nature of the litigation: The expiration dates of the merger contracts were December 31, 2016, for Anthem-Humana and April 30, 2017, for Aetna-Cigna, and each involved “break-up” fees in excess of \$1 billion.

Case Summaries

On July 2, 2015, Aetna Inc. agreed to buy Humana Inc. for \$37 billion and, shortly thereafter, on July 23, 2015, Anthem Inc. agreed to acquire Cigna Corps. for \$54 billion. The United States Department of Justice sued seeking to enjoin the mergers. Each of the four defendants had separate, very experienced antitrust counsel who were active in all aspects of the litigation.

The Government asserted that these mergers would adversely affect competition in violation of Section 7 of the Clayton Act in a number of insurance markets leading to fewer choices, higher cost, and worse service for millions of Americans while removing incentives to create innovative provider collaborations and value-based insurance pricing.⁹

Both cases were originally assigned to Judge John Bates, but after an expedited Status Hearing held August 4, 2016, the Anthem-Cigna case was reassigned to Judge Amy Berman Jackson so that the legal and timing issues unique to each merger could be addressed in separate bench trials.

- Because of its earlier December 31, 2016 “drop dead” merger date, Aetna-Humana proposed a more aggressive trial schedule than that requested in the Anthem-Cigna case and urged that “the trial dates in the two cases be set with both transaction deadlines in mind.”
- The lawsuits focused on different markets which allegedly would be harmed by the post-merger concentration of market share:

⁹ Section 7 of the Clayton Act prohibits mergers “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

- The Aetna-Humana merger cited the Medicare Advantage and commercial health insurance sold on public exchanges as the markets that would be negatively affected by the removal of competition.
- The Anthem-Cigna suit cited four markets: commercial health insurance sold to national accounts, commercial health insurance sold to large groups, commercial health insurance sold on the public exchanges, and the purchase of healthcare services by commercial health insurers. Plaintiffs charged that this merger would not only result in negative consequences downstream among the insured, but also upstream via pressure on providers to comport with the dictates of the insurer.

A 17-day bench trial in Anthem-Cigna began November 21, 2016, and ended January 4, 2017. The merger was enjoined on February 8, 2017. The 13-day bench trial in Aetna-Humana began December 6, 2016, and concluded on December 30. That merger was enjoined on January 23, 2017.

Special Master Appointment

On August 2, 2016, defendants filed with Judge Bates their positions on the timing of proceedings and whether these should be conducted jointly in the two cases. Although arguing that the proceedings should be handled separately, they had no objection to having a single Special Master appointed to facilitate discovery in both.

Judge Bates had presided previously over merger cases and was aware from the outset of the kinds of resources cases like these could consume. For him, the question of whether it was appropriate to appoint a Special Master was: Are these the types of unusual cases in which the litigants could benefit from more concentrated attention than the district judge or magistrate judge would be able to provide? Given the voluminous amount of discovery that was expected on the fast track required to meet the deadlines imposed by the merger contracts, the answer in these cases was “yes.”

When the Anthem case was assigned to Judge Berman Jackson, the two judges discussed the appointment and agreed (1) that appointing a Special Master would benefit both the cases and the court and (2) that it would be more efficient to have the same Special Master for both cases given that there was some overlap in attorneys and in the information to be provided by a number of competitors.

Given the magnitude of the discovery task, the judges opted for an outside Special Master rather than turning to the court’s already-busy magistrate judges¹⁰ of whom only two were working full time at the time. (The third position was in transition.) Additionally, given that each of these mergers involved purchase prices in the tens of billions of dollars and “break-up” fees of over a billion dollars, the relatively small cost to parties of paying the fees and expenses of an outside Special Master was simply not an issue.

The parties were asked to submit Special Master recommendations and six names were put forward.

¹⁰Magistrate judges have their own caseloads and also rotate duty call to handle immediate criminal case responsibilities.

After consulting with one another, the presiding judges selected Judge Richard Levie (Ret.), a full time Alternative Dispute Resolution professional who retired from the District of Columbia Superior Court bench in 2000. They knew him from professional gatherings and of the quality of his work from colleagues on their court who had presided over complex cases on which Judge Levie had served previously as Special Master: the AT&T – T-Mobile merger and the U.S. Air – American Airlines merger.

Upon being contacted, Judge Levie indicated his availability, provided sample appointment orders, and was appointed as Special Master in the Aetna case on August 8 and in the Anthem case on August 11 to oversee discovery, e-discovery, privilege disputes, deposition designation for trial, and scheduling.¹¹ To assist him in his duties, Judge Levie employed a full-time attorney, who underwent a conflict check and was paid by the parties. The attorney procedurally and ethically functioned as a judicial law clerk. The appointment orders in the two cases were the same (see Appendix A) and specified:

- the matters to be handled by the Special Master;
- the time frames and length limitations for attorney submissions, responses, and appeals;
- that matters could be decided on the papers or after a hearing, and that hearings could be conducted in person or by telephone;
- that rulings could be made orally as well as in writing and, except for an order denying a claim of privilege,¹² were final unless, after request and opposition, they were certified by the Special Master for appeal to the court;¹³
- that the Special Master could not communicate *ex parte* with the parties and could communicate *ex parte* with the court only on procedural matters that were not on appeal;
- that the plaintiffs and defendants were to evenly split the Special Master’s compensation and expenses on a monthly basis at rates mutually agreeable to the master and the parties; and
- that status meetings with the Special Master were to be held at least weekly, starting less than two weeks from the dates of the orders.

¹¹The appointment order in Aetna was amended on October 18, 2016, just days before the start of the bench trial, to authorize the Special Master “to resolve any disputes among the parties concerning deposition designations, summary exhibits, and sealing.”

¹² Any challenge to an order denying privilege was to be certified for appeal to the court.

¹³ The parties consented to this provision of the Appointment Order which effectively modified F. R. Civ. P. 53 (f)(1) which gives parties the opportunity to object to any order, report or recommendation of the Special Master.

Special Master Activities

Meeting with Counsel

Judge Levie held in-person status conferences with counsel *at least weekly* to lay out the issues, encourage clear dialog, and defuse confrontation. The meetings for the two cases were usually held back-to-back on Monday mornings, and lasted from one to one-and-one-half hours depending on an agenda that was worked out with counsel beforehand. They were attended by between 14 and 20 attorneys, with out-of-town counsel participating by teleconference.

These meetings were sometimes on the record and sometimes not. Judge Levie indicated that being able to discuss matters off the record often facilitated more open and less contentious exchanges among attorneys.

In addition to the regular meetings, Judge Levie was also available to meet with the attorneys involved in a particular issue of contention at any time, including a number of weekend meetings. For example, when there was a disputed request for the production of documents, he would bring counsel together and ask the requestors to explain exactly what they were looking for. This narrowed the scope, helped to avoid misinterpretation and facilitated the opportunity for the parties to agree on disputed matters.

Three of the attorneys most actively involved in this litigation, representing three of the four defendants, participated in the attorney survey (see Appendix B: Methodology). All strongly agreed that the weekly meetings were a productive use of their time and that they encouraged a clear dialogue to sharpen issues and avoid misrepresentation.¹⁴

Findings

During his service, Judge Levie issued oral and written preliminary findings on disputed issues that parties could either accept or ask for a Special Master Report & Recommendation that could be appealed to the judge. In most instances, the Special Master's findings were accepted by the parties without further recourse to the court. The three responding attorneys either strongly agreed (two) or agreed (one) that the Special Master's findings were well-reasoned

Judge Levie did, though, file 22 Report and Recommendations with the court in Anthem and 11 in Aetna. Only one—the first in Anthem—was appealed; and all were adopted in their entirety by the court. The subject matter included motions to compel, protective orders, motions to quash, motions for sanctions, deposition designations, and numerous party and third-party motions to seal.

¹⁴ With no input from attorneys representing plaintiffs or from one of the defendants, there is no way to know if these views, or the other opinions of these three in this case study, would be shared all sides. (See Appendix B, Methodology.)

Communication with the Court Methodology

The Special Master and the judges (and their law clerks) communicated as needed on procedural issues to coordinate scheduling and to keep the judges up-to-date on the status of the discovery process. As specified in the appointment order, they had no *ex parte* communication on substantive issues or any matters pending before the Special Master that could come to the judge for additional consideration.

In the more time-intensive Anthem-Cigna case, Judge Berman Jackson also took advantage of Judge Levie's specific knowledge of the volume of material involved in the case, as well as his prior experience with large cases, to use him as a sounding board for procedural questions. He, for example, suggested a tier system for categorizing exhibits for trial which helped to focus the court and litigants on the most important material for consideration by the court. Further, given his knowledge of the case and good relationship with the attorneys, she also considered using him to approach counsel about possible settlement had any of the attorneys been interested in pursuing that approach (which, however, they were not).¹⁵

Time Expended

The Special Master spent a total of 193 hours on the Anthem case between his appointment on August 12, 2016 and January 18, 2017, the date of his last Report and Recommendation. In Aetna, he spent 130 hours between August 11, 2016 and February 9, 2017.¹⁶ The vast majority of this time was spent before the start of trial: November 21, 2016, in Anthem and December 5, 2016, in Aetna.

Impact of the Special Master

From the Bench

Both of the presiding judges praised the work of the Special Master in preparing these cases for their expedited trial dates. The judges noted that things worked as anticipated and laid out in the appointment order—a credit to both the Special Master and the litigants, and that Judge Levie was invaluable in getting things resolved during the wide-ranging discovery process. This was attributed both to Judge Levie's constant availability to the attorneys and to the skill with which he brought litigants together, listened to all sides and concerns, and presented reasoned findings.

By managing discovery, the Special Master freed the judges both to keep up with their regular dockets and to concentrate on other aspects of the merger cases. Trial was coming and the judges held a series of status hearings to move things along. While the Special Master was involved with the litigants on an ongoing basis, the judges considered all of the material that the parties were required to exchange with each other and the court, and ruled as needed within the time

¹⁵ Judge Levie did not engage in any substantive discussions with any party about settlement.

¹⁶ The Anthem case involved considerably more work with electronic discovery, sealing motions and third-party issues.

frames established by the case management orders. As Judge Berman Jackson put it, “He did discovery; I did the case.”

From the Bar

The three defendant attorneys who gave their opinions all believed that the costs of involving the Special Master in this case were worth the benefits. All indicated that the involvement of the Special Master facilitated efficient discovery and reduced contention among the parties, and none thought that he added to cost and delay. Only one, however, reported that involving the Special Master *reduced* costs to his client, with the other two “unsure;” and none were sure that the process brought the case to trial faster than they originally anticipated. This was likely due to the fact that it was in all of the parties’ interests to move swiftly to meet the very clear deadlines for resolution in these merger cases.

GENERAL OBSERVATIONS

The judges and attorneys who provided input to the case studies also provided insight into more general aspects of appropriately using a Special Master in the pretrial and trial phases of litigation. The observations that follow will be updated as more case studies are added to the collection.

When to Use a Special Master

All of the judges involved in these case studies had nothing but praise for the professionalism of their Special Masters and were grateful for the assistance they provided in helping to resolve the complex cases at hand and freeing judicial time to concentrate on other aspects of these and the other cases on their dockets.

All, though, also believe that Special Masters should be appointed only rarely where justified by the stakes involved in large, complex cases in which additional assistance is needed to be sure that the parties get the judicial attention they need to address all of the problems likely to arise. These cases are not common. For example, even among these judges who are open to using a Special Master when appropriate, only one had used Special Masters before—also in special, complex cases;¹⁷ and none has appointed one since. As one of the judges said: “In most of my cases the parties do not have the funds to pay for litigation much less for a Special Master.”

The bottom line is that these judges welcome the challenges presented by their diverse caseloads and believe that, *in the normal course of events*, judges should handle matters themselves or use other court resources to resolve the cases filed in their courts by the public.

The attorneys who shared their views echoed these general sentiments. All were in favor of using Special Masters in the pretrial phase of appropriate cases which they—as did the judges—defined as those to which the court would not be able to devote the time required. As examples, they cited both court-specific resource issues and case-specific circumstances such as complex or esoteric procedural and/or legal issues, numerous parties far-flung geographically, voluminous discovery, and/or the need for a particularly speedy resolution.

Selecting a Special Master

In their comments on the case studies, the judges and lawyers alike point to how important it is for the attorneys to have and maintain a high level of respect for the Special Master in order to reap the potential benefits of the appointment. The benefits of

¹⁷ Special Masters—a magistrate judge in one case, an external master in the other—were appointed to assist the judge in determining damages for a large number of plaintiffs in complex cases involving the bombing of the U.S. embassy in Beirut and the bombing of U.S. embassies in Eastern Africa.

freeing judicial time and reducing costs and delay accrue in direct proportion to the litigants' willingness to avoid knee-jerk challenges to all of the Special Master's findings.

This importance of reputation and neutrality was also reflected in the results of the attorney survey (see Appendix B: Methodology). When asked how important a variety of specific factors are when considering the appointment of a Special Master, all five of the attorneys indicated that "Reputation as an impartial neutral" was "very important." None of the other factors—which related to various types of experience and expertise, garnered that level of support. The three factors addressing experience with discovery (i.e., large amounts of discovery, inherently complex material, and e-discovery) were all rated as "very important" by three of the attorneys, with another saying that the importance would vary depending on the nature of the case. The other two factors presented, "Prior experience as a Special Master" and "Expertise in specific subject matter," were seen as less important.

In short, care must be taken to select a Special Master with the requisite knowledge, demeanor, and common sense to command the respect of the attorneys.

Costs and Benefits

All of the judges reported that the involvement of a Special Master reduced burden on the court and moved the litigation to settlement or trial faster than would have otherwise occurred. All but one of the attorneys reported that the benefits of having a Special Master outweighed the costs in the case study cases, but—having litigated a number of cases in which Special Masters were involved, noted that this is not always true.

The attorneys were of two distinct views about how a Special Master can affect cost and delay. Some were of the opinion that a Special Master can reduce a client's overall costs by making decisions to facilitate efficient discovery and move the case along more expeditiously. Others thought that the involvement of a Special Master can make a case more litigious and costly by providing the opportunity for attorneys to short-circuit the "meet and confer" process and instead present issues to the Special Master for decision—issues that may then be re-litigated in court if one side or the other can't live with the Special Master's ruling.

What may actually occur in the individual case may well depend on the level of contentiousness among the parties which could itself be affected by when the Special Master is appointed and how his or her role is laid out in the appointment order. Could appointing a Special Master at the start of a case defuse contention? What is the appropriate breadth of the Special Master's charge? Should this depend on the nature of the litigation or the timing of the appointment? Should she or he be ruling or commenting on the merits without the agreement of the parties? These, and other questions about how to involve a Special Master to maximize the potential benefits for the court and the parties will be the subject of future consideration.

APPENDIX A: APPOINTMENT ORDERS

Georgia Superior Court: Delta Wing vs. Ben Bowlby, et al, pp. 1-6

U.S. District Court for the District of Columbia: U.S. vs. Aetna Inc. et al, pp. 7-10

**IN THE SUPERIOR COURT OF JACKSON COUNTY
STATE OF GEORGIA**

Delta Wing Project 56, LLC,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 13-CV-1184
)	
Ben Bowlby, et al.,)	
)	
Defendants)	

ORDER APPOINTING SPECIAL MASTER

Pursuant to Uniform Superior Court Rule 46, This action is before the Court on the Court’s own motion to appoint Cary Ichter, Esq. as a Special Master in the above-styled case, subject to the terms and conditions set forth herein.

Duties

The Special Master is hereby directed to proceed with all reasonable diligence to perform the following functions:

A. Case Management: The Special Master shall have the authority to conduct scheduling conferences, establish case management orders and discovery schedules, and otherwise perform such acts necessary to expeditiously and efficiently move the case through the discovery process. The Special Master shall also be empowered to conduct privilege reviews, make rulings as to privilege issues, and make rulings on issues related to all pleading issues, such as amendments to pleadings, supplementation of pleadings, addition and joinder of parties, and the like. The Special Master is authorized to hear and issue Reports and Recommendations to the Court as to any other matters agreed to by the parties.

B. Conflict Resolution: The Special Master shall have the power to entertain all motions for relief brought by the parties concerning discovery, with or without a hearing, and shall issue written rulings thereon with all reasonable diligence upon submission to the Special Master. Included within the power to conduct hearings on motions shall be the power to receive testimony under oath before a court reporter and to receive evidence into the record.

C. Settlement: The Special Master may serve as a mediator, if requested by the parties, to facilitate settlement of the case under terms agreed to by the parties.

D. Sanctions: The Special Master may award costs of motions and impose sanctions upon any party for failure to comply with discovery requirements.

E. Other Duties: The Special Master may perform such other and further tasks not specifically enumerated above if such additional tasks are undertaken in furtherance of the above scope of appointment. The Special Master may perform additional tasks and functions (including, but not limited to, ruling on motions for non-discovery related injunctive relief and motions relating to the qualifications of proposed expert witnesses) if the parties consent thereto, or if the Court, upon application of one of the parties, specifically appoints the Special Master to so act.

Conduct of Parties

The parties are instructed to cooperate with the Special Master in all respects, including, but not limited to, making available to the Special Master any facilities, files, databases, documents, or other materials the Special Master may request to fulfill the Special Master's duties hereunder.

Ex Parte Communications

The parties are not permitted to engage in ex parte communication with the Special Master or the Special Master's administrative staff, except as would be permitted with the Court and the Court's staff, or except as such communications may relate to settlement of the case where the Special Master has been added to serve as mediator. The Special Master shall not engage in ex parte communications with the Court, except as may be necessary to address administrative matters. Any communications between the Special Master and the Court shall be had with notice to the parties.

Action on the Special Master's Orders or Reports and Recommendations

Any party may file a motion to reject or to modify the Special Master's Order or Report and Recommendations within twenty (20) days from the date on which such Order or Report and Recommendation is served, unless the Court sets a different time. The Special Master's Order or Report and Recommendation shall be deemed received three days after mailing by United States mail or on the same day if transmitted electronically or by hand-delivery. In the absence of a motion to reject or modify an Order or Report and Recommendation within the time provided, the

Order or Report and Recommendation shall have the force and effect of an order of the Court and any objection shall be deemed waived.

The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties stipulate with the Court's consent that:

(A) the master's findings will be reviewed for clear error, or;

(B) the findings of a master appointed under subsections (A)(1)(a) or (e) of Rule 46, U.S.C.R., will be final.

The Court will review all objections to the Special Master's conclusions of law made or recommended by a master on a de novo basis and will review all procedural issues on an abuse of discretion basis.

Maintenance of Materials and Report to the Court

The Special Master is instructed to maintain all pleadings, correspondence, and other papers submitted by the parties in connection with the case and to forward the entirety of such documents and records to the Court at the conclusion of the Special Master's work on the matter. The parties need not file with the Court a duplicate of the documents submitted to the Special Master. Once the Special Master has discharged all duties assigned pursuant to this Order, the Special Master shall file a report with the Court reasonably detailing the work performed by the Special Master, including all motions filed by the parties, all rulings made on all issues presented to the Special Master, all findings of fact and conclusions of law made by the Special Master, all evidence submitted to the Special Master and all evidentiary rulings made, and such other matters as the Special Master may deem relevant.

Compensation of the Special Master

The Court has considered the fairness of imposing the likely cost of the Special Master on the parties and has taken steps to protect against unreasonable expense and delay. In light of the determined need for the appointment of the Special Master, the court concludes that the parties shall bear the cost of the Special Master on the following terms and conditions: The Special Master shall charge an hourly rate of \$495.00 and shall keep an account of all hours or quarter-hour fractions thereof, and any expenses incurred by the Special Master in the performance of the Special Master's duties hereunder. The Special Master will issue an invoice describing the work performed and the hours attributable to the work performed, plus the expenses incurred by item, to the parties on a monthly basis. The parties shall each pay their *pro rata* [i.e., **if two parties, 50% each; if four parties, 25% each, etc.**] share of the invoice promptly and in no event less than 30 days from the issuance thereof. The Special Master shall have the authority to reapportion the fees when in the Special Master's judgment the facts and circumstances justify it. Any dispute by any party over any aspect of the invoice shall first be raised informally with the Special Master for possible resolution, and if resolution is not agreed, then the party disputing any aspect of the invoice may address such dispute to the Court by motion, to which the Special Master may respond.

Special Master's Affidavit

Prior to the entry of this Order, the Special Master submitted to the Court an affidavit (i) disclosing that there is no ground for disqualification of the Special Master and (ii) certifying that the Special Master shall discharge the duties as required by law and pursuant to the Court's instructions without favor to, or prejudice against any party.

SO ORDERED, this _____ of June, 2014.

David Motes, Judge
Jackson Superior Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC., et al.,

Defendants.

Civil Action No. 16-1494 (JDB)

ORDER

With the consent of all parties, and upon consideration of the entire record herein, it is hereby **ORDERED** that:

1. The Hon. Richard A. Levie (Ret.) (“Special Master”) is appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure as Special Master in this action for the purpose of considering matters referred to him as described in Paragraph 2 below.¹ The Special Master shall have the rights, powers, and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that Rule or with this or other Orders of the Court.

2. The following matters are referred to the Special Master for him to consider and rule upon:

All disputes or matters relating to discovery in the above-captioned case as to the parties and nonparties subject to discovery, including but not limited to claims of privilege, motions to compel, motions for protective order, scheduling (consistent with the Court’s initial scheduling order), e-discovery, expert discovery, and deposition designations for trial.

3. Motions by any party, or by a nonparty subject to discovery, shall be filed with the Special Master following a substantive meet and confer. Responses must be filed within 48 hours

¹ The Special Master has submitted a declaration certifying that there are no grounds for his disqualification under 28 U.S.C. § 455.

after e-mail service on opposing counsel and the Special Master, except that responses to motions filed on Fridays, or Saturdays by 5:00 p.m., shall be due by 5 p.m. on Monday. Unless otherwise ordered by the Special Master, each side shall have a maximum of 750 words per issue for moving and opposing submissions.² Replies shall be limited to 250 words per issue and shall be served no later than 24 hours after receipt of the opposition. Service shall be by e-mail and in Word format, with two hard copies (including copies of all cases and other cited materials) delivered to the Special Master by either hand or overnight delivery. All papers filed for consideration by the Special Master shall also be filed with the Clerk, subject to the terms of any applicable protective order.

4. In light of the expedited schedule for trial of this matter, the Special Master shall in his discretion rule on the papers or hear argument in person or by teleconference. Any party seeking a hearing on any motion shall set forth in the motion or the opposition the reasons why a hearing is necessary. Movants and Respondents shall make counsel available for any hearing or teleconference scheduled by the Special Master. The Special Master shall file with the Clerk copies of all written orders, subject to any applicable protective order. In his discretion, the Special Master may resolve motions orally on the record. Consistent with the Special Master's schedule, it is anticipated that rulings will be made within 3 or 4 days of either the completion of briefing on a motion or a hearing.
5. The rulings of the Special Master on matters referred to him under paragraph 2 shall be final unless the Special Master certifies the ruling for appeal to this Court, in which case the standard of review under Federal Rule of Civil Procedure 53(f) shall apply. Any party or nonparty seeking certification shall submit its reasons, in a writing of no more than 250

² For the purposes of this Order, word limits include the text in related footnotes and endnotes.

words per issue and within 24 hours of the ruling for which certification is sought. Any party or nonparty opposing certification may also submit a writing of no more than 250 words per issue within 24 hours of the certification request. Upon notice of certification by the Special Master, the party or nonparty seeking to appeal shall within 48 hours file a brief of no more than 1,000 words per issue, except upon good cause shown. Responses of similar length shall be filed within 48 hours, except that responses to appeals filed on Fridays, or Saturdays by 5:00 p.m., shall be due by 5 p.m. on Monday. The Special Master shall certify for appeal any order denying any claim of privilege if a party requests him to do so.

6. The Special Master shall not communicate *ex parte* with the parties. The Special Master may communicate *ex parte* with the Court on matters of procedure, except as to matters on appeal to the Court.
7. Compensation at rates mutually agreeable to the Special Master and the parties shall be paid to the Special Master on a monthly basis by the parties, together with reimbursement for reasonable expenses incurred including the cost of the Special Master's law clerk(s). Plaintiffs will be jointly responsible for paying one-half of the fees and expenses described herein; Defendants will be jointly responsible for paying the other half of the fees and expenses described herein.
8. The parties shall have weekly in-person or telephonic conferences with the Special Master beginning no later than August 22, 2016, and continuing thereafter every week as scheduled by the Special Master. Counsel with authority as to the matters on the agenda for the conference shall participate in the conference. The Special Master will communicate with the parties regarding procedures for the agendas and conduct of the

weekly conferences. The conferences shall be held on the record at the discretion of the Special Master.

9. In addressing the matters referred to him by this Order, the Special Master shall, wherever appropriate, coordinate these proceedings with the proceedings in United States, et al. v. Anthem, Inc., et al, Civil Action No. 16-1493 (ABJ).

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: August 11, 2016

APPENDIX B: METHODOLOGY

These case studies are based on the input of the presiding judges, Special Masters and key attorneys who were involved. Potential candidates for the case studies were proposed by Special Masters serving on the ABA Special Master’s Committee who both provided the initial overview of the case and facilitated contact with the judges and attorneys.

Judicial Input

Dr. Meierhoefer reviewed publically available case documents and related news articles, circulated draft summary descriptions of the cases to the Special Masters for their review and comment, and revised.

The Special Master then contacted the presiding judges to describe the nature and purpose of the case studies, introduce the researcher, and ask if they would be willing to share their views on the impact of the Special Master on the litigation. All of the judges agreed and were contacted by the researcher shortly thereafter to schedule the interview and provide the draft case summary and the proposed interview questions in preparation. (See Methodology Attachment 1 for interview protocols.)

Attorney Input

Given the large number of attorneys involved in these cases, the Special Masters helped to narrow an “attorney survey pool” by flagging those with whom they worked most actively. These attorneys were contacted by email and asked to share their opinions with the Committee by completing a short survey. The survey presented in Methodology Attachment 2 is generic, with brackets indicating slightly different wording on some questions as appropriate to the circumstances of the case.

The response to the first request—of 22 attorneys in the insurance merger cases—was underwhelming, with only 3 lawyers completing the survey, a dismal 14 percent response rate that did not improve after a follow-up request proposing an interview in lieu of the survey should they be interested. They were not; and we narrowed our expectations for getting attorney views on the Delta Wing case. We contacted only the primary attorney for the defendants and for the plaintiffs, both of whom agreed to participate; one by both survey and interview; the other by interview only.

Methodology Attachment 1

AMERICAN BAR ASSOCIATION SPECIAL MASTERS COMMITTEE

JUDGE INTERVIEW PROTOCOL

Appointment

At what point did you realize that you might require the assistance of a Special Master?

If applicable: What went into your decision to opt for an outside Special Master instead of a Magistrate Judge?

How did you identify potential Special Masters? Did you/how did you screen the candidates for conflicts of interest? Did you consult with your colleagues on the court?

Which considerations were most important to you when making your Special Master selection? [For example: prior experience as a master, expertise in the specific subject matter (e.g., anti-trust, intellectual property), experience with relevant case management concerns (e.g., electronic discovery).]

What were the particular features of *this* case that led you to appoint a Special Master? [For example: nature of case, \$ value of the case, need for expedited processing, hostility among counsel, publicity, technical issues.]

What were your goals in appointing a Special Master? [For example: narrowing issues, facilitating settlement, keeping discovery moving smoothly and quickly, reducing cost & delay, conserving judicial resources.]

Communication and Review

How did you communicate with the Special Master? Were there any issues with *ex parte* communication?

What were your standards for reviewing the Special Master's orders, findings and recommendations?

Effect of Special Master on Cost & Delay

At the beginning of the case, what were your expectations as to how long the litigation would last? Was the litigation faster and/or cheaper because of the Special Master? If so, why? [For example: Faster settlement, narrowing issues.]

How did the appointment of the Special Master affect your interactions with the parties?

Did the appointment make any other difference in the litigation?

Would you do anything differently in terms of the timing or content of the appointment?

Overall, how effective was the Special Master in meeting your goals & expectations?

On the whole, did the benefits of the appointment outweigh any drawbacks or visa versa?

Have you appointed a Special Master in another case?

If yes, describe case & goals.

If no, would you appoint a Special Master in an appropriate case? What would you need to see to deem a case “appropriate?”

Methodology Attachment 2

**AMERICAN BAR ASSOCIATION SPECIAL MASTERS COMMITTEE
ATTORNEY SURVEY**

SPECIAL MASTER APPOINTMENT

1. When the possibility was first raised, were you in favor of having a Special Master appointed to this case? No Yes Neutral
2. When selecting a Special Master, how important do you believe the following should be to the consideration:

	Very Important	Somewhat Important	Not Very Important
a. Prior experience as a Special Master			
b. Expertise in specific subject matter			
c. Experience handling large amounts of discovery			
d. Experience with discovery of inherently complex material			
e. Experience with e-discovery			
f. Reputation as an impartial neutral			
g. Other important considerations: <i>Please specify:</i>			

SPECIAL MASTER’S CONDUCT OF THE DISCOVERY AND PRETRIAL PROCESSES

3. Please indicate the extent to which you agree with the following statements about the way the Special Master went about carrying out [her / his] responsibilities.

	Strongly Agree	Agree	Disagree	Strongly Disagree
a. I had ample opportunity to lay out my issues and concerns to the Special Master.				
b. I had ample opportunity to raise any concerns about the Special Master’s process or findings with the judge.				
c. The [weekly] meetings with the Special Master and other counsel were a productive use of my time.				
d. The process encouraged a clear dialogue to sharpen issues and avoid misinterpretation.				
e. The Special Master’s findings were clear and well-reasoned.				
f. The Special Master was impartial.				

COMMENTS:

SPECIAL MASTER FEES AND EXPENSES

4. Did your client raise any concerns about the additional cost of a Special Master? No Yes
5. Do you think that the Special Master’s fees and expenses were reasonable? No Yes Don’t Know
6. Were the Special Master’s fees and costs allocated equitably among parties? No Yes Don’t Know

COMMENTS:

IMPACT OF THE SPECIAL MASTER

7. In your opinion, did the involvement of the Special Master:

	Yes	No	Unsure
<i>Benefits</i>			
a. Facilitate efficient discovery			
b. Move the case to [trial / settlement] faster than anticipated at the outset of the litigation			
c. Reduce contention among the attorneys			
d. Reduce overall costs to my client			
d. Other Benefits: <i>Please specify:</i>			

<i>Drawbacks</i>			
e. Increase overall cost to my client			
f. Increase attorney burden by adding another layer to case processing			
g. Give authority to the Special Master that was more appropriately exercised by the court			
h. Other Drawbacks: <i>Please specify:</i>			

8. Overall, do you think that the costs of involving the Special Master in this case were worth the benefits? No Yes

COMMENTS: