Chemical Products and Toxic Torts: From Crisis to Mass Litigation: Starting Smart and Finishing Strong

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REACHING RESOLUTION: UTILIZING MULTIDISTRICT LITIGATION BEYOND PRETRIAL PROCEEDINGS

In light of the Judicial Panel on Multidistrict Litigation's ("MDL Panel") recent consolidation and transfer of more than 300 lawsuits related to the BP oil-spill to the Eastern District of Louisiana, critics of the MDL process are renewing their scrutiny of its effectiveness as a complex litigation tool.[1] Created in 1968, the purpose of the MDL "centralization process" is to "avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary."[2] The MDL Panel consists of seven sitting federal judges who determine whether factually similar civil actions pending in various federal districts should be transferred to a single district court for the purpose of conducting pretrial proceedings.[3] The MDL Panel may begin these proceedings on its own initiative or in response to a motion by a party in a pending action.[4] While the purpose of centralization is to increase efficiency, the MDL process has sometimes been labeled a "black hole, into which cases are transferred never to be heard from again."[5]

An ongoing phenomena involves transferee judges' retention of transferred actions for trial in the transferee court rather than remand to the courts where the cases were originally filed. Under the MDL statute, transferee judges are obligated to remand consolidated cases once the pretrial proceedings conclude.[6] Remand rarely occurs in practice, however, because most cases remain in the MDL until settlement or resolution through motion or, in some cases, trial.

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[1] *See e.g.* Dionne Searcey, *BP Suit's Complex Legal Structure Scrutinized*, WALL ST. J., Sept. 13, 2010.

[2] U.S. Courts: United States Judicial Panel on Multidistrict Litigation, *An Overview of the United States Judicial Panel on Multidistrict Litigation*, available at http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited October 4, 2010).

[3] Robert A. Cahn, *A Look at the Judicial MDL Panel on Multidistrict Litigation*, 72 F.R.D. 211, 213 (1976); *see also* 28 U.S.C. §1407.

[4] 28 U.S.C. §1407(c).

[5] Eldon E. Fallon et al., *The Problem of Multidistrict Litigation: Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

[6] *See* 28 U.S.C. §1407; *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

Although the United States Supreme Court attempted to curb this practice through its decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,[7] litigants continue to devise methods to keep transferred cases in the transferee court to their conclusion.

In *Lexecon*, the Supreme Court addressed the question of whether §1407 permits a transferee court to entertain a §1404(a) motion and keep a case for trial. Under 28 U.S.C. §1407(a), "each action *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[8] This remand requirement stems from the long recognized principle that a plaintiff has a right to a trial in the forum he or she chooses.[9] Notwithstanding the clear meaning of the statute, transferee judges routinely tried actions after first transferring the cases to themselves under 28 U.S.C. §1404(a).[10] Section 1404(a) permits a district court to transfer a case to another district in the interest of justice and for the convenience of the parties and witnesses.[11]

The *Lexecon* case emerged from a securities class action consolidated in the District of Arizona for pretrial proceedings. While Lexecon settled with the plaintiff class and was dismissed from the case, it subsequently filed suit against the plaintiff class counsel, Milberg Weiss, in the Northern District of Illinois for defamation and malicious prosecution. The MDL Panel transferred Lexecon's suit to the MDL proceeding in Arizona, where it remained until the final settlement of the securities cases. Lexecon then moved to have its action remanded.

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[7] 523 U.S. 26 (1998).

[8] 28 U.S.C. §1407(a) (emphasis added).

[9] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2233 n. 47 (2008).

[10] *Id.*

[11] 28 U.S.C. §1404(a).

Instead, the transferee judge "self-transferred" the action to his court and proceeded with a jury trial, ultimately rendering a verdict for Milberg Weiss.

On appeal, the Ninth Circuit Court of Appeals affirmed, holding that a transferee court could assign a case to itself after concluding its pretrial proceedings. The U.S. Supreme Court reversed finding this practice of self-transfer to be in clear violation of the "straightforward language"[12] and "unconditional demand" of §1407(a) that required remand of cases at the end of pre-trial proceedings.[13]

After *Lexecon*, opponents of the Supreme Court's opinion tried to pass legislation superseding the decision, but Congress failed to act. In the absence of legislative action, transferee judges and attorneys have become increasing resourceful in finding ways to circumvent the *Lexecon* holding. Litigants may want to remain in the transferee court because they prefer the particular forum or judge or they value the judge's knowledge of the facts and issues in the case. In addition, defendants favor the possibility of reaching a global resolution of claims in an MDL proceeding. Many federal judges also view MDL proceedings as a "unique opportunity to induce settlement."[14] This desire to resolve cases through a global settlement in an MDL proceeding has lead to the development of various techniques employed by both judges and attorneys to retain cases after pretrial proceedings.

The most common method of avoiding remand upon the completion of pre-trial proceedings is many federal judges' aggressive pursuit of global settlements. Judges can promote settlement in a variety of ways, including delaying ruling on motions and controlling the pace of discovery in a manner that encourages parties to negotiate a resolution rather than draw

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[12] *Lexecon*, 523 U.S. at 41.

[13] *Id.* at 36.

[14] Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIGATION 43, 47 (1998).

out litigation.[15] Section 1407 does not define "pre-trial proceedings," and the MDL Panel has interpreted the term broadly to include any judicial proceeding prior to trial.[16] In light of this broad authority, many judges avoid recommending remand to the MDL Panel until the parties have exhausted all possible settlement options.[17]

Another popular settlement technique is trying a bellwether case, or a "test trial," for a case filed in the transferee court. Originally, courts held bellwether trials as an alternative to adjudicating class actions by using the results of the bellwether trial to bind related claimants.[18] A more modern approach uses bellwether trials to "test" issues presented in the case, rather than as an attempt to resolve all the pending cases in a "representative proceeding."[19] The information and experience gained in bellwether trials, as well as their outcomes, can have a significant effect on parties' willingness to settle.

For example, in the Vioxx MDL litigation, the use of bellwether trials served as an important "catalyst" for serious settlement discussions that ultimately led to a resolution of the litigation.[20] In that proceeding, the transferee court conducted six bellwether trials. Although the outcomes of the trials varied, it allowed parties to properly "value" their cases by providing information regarding the strengths and weaknesses of their positions on various issues, how witnesses performed, how long and costly individual trails would be, and how evidentiary issues would likely be resolved.[21] Judge Eldon E. Fallon, who presided over the Vioxx MDL litigation,

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[15] *Id.*; *see also* Mark Herrmann et al., *Creating Mini-MDL Statutes*, 32 LITIGATION 1 (Fall 2005).

[16] *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 494 (J.P.M.L. 1968).

[17] Mark Herrmann et al., *Creating Mini-MDL Statutes*, 32 LITIGATION 1 (Fall 2005).

[18] Fallon, *supra* note 5, at 2331.

[19] *Id.* at 2332.

[20] Richard J. Arsenault & J.R. Whaley, *Multidistict Litigation and Bellwether Trials: Leading Litigants to Resolution in Complex Litigation*, 39 THE BRIEF 60, 61 (2009).

[21] *Id.*; Fallon, *supra* note 5, at 2325.

found this information, which he refers to as "trial packages," to be indispensable in encouraging global settlements at the MDL level, and thereby conserving federal judicial resources.[22]

In addition to encouraging global settlement through bellwether trials, many parties choose to have their individual cases tried by the transferee court and avoid the question of remand altogether. Transferred parties may consent to the transferee court trying the case by waiving any objections to jurisdiction and venue in the MDL court.[23] They may also dismiss the actions they filed in the transferor court and refile the actions directly in the transferee district.[24] In addition, a transferee judge wishing to see a case through trial may obtain an intracircuit or intercircuit assignment and follow a remanded action to the original transferor court.[25] Parties benefit by having their case tried by the transferee judge who is already intimately familiar with the various procedural and substantive issues in the case. Furthermore, the outcome of these trials, like the bellwether trials, can influence parties' willingness to enter into settlement negotiations in related cases.

Despite the U. S. Supreme Court's attempt to curb the practice of retaining cases in the transferee judge's court after the conclusion of pretrial proceedings, federal judges and attorneys continue to develop methods to keep litigation in transferee courts pending final resolution. Whether through the judges' handling of discovery and pretrial motions, the use of bellwether trials, or simply filing an action directly in the district court where the MDL proceeding is venued, these practices encourage parties to reach global and timely resolutions of claims.

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[22] Fallon, *supra* note 5, at 2325.

[23] Arsenault, *supra* note 20, at 61; *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325-26 (11th Cir. 2000).

[24] Arsenault; MANUAL FOR COMPLEX LITIGATION (FOURTH) §20.132, 224 (2004).

[25] MANUAL FOR COMPLEX LITIGATION (FOURTH) §20.132, 224 (2004).

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