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## MDL REMAND: PLAINTIFFS' PERSPECTIVE

Thomas P. Cartmell\*

### I. INTRODUCTION

Though an essential endpoint of MDL procedure under 28 U.S.C. § 1407, the final frontier of the MDL journey—remand<sup>1</sup> to the transferor court<sup>2</sup>—is certainly the road less traveled. Few cases make that journey.<sup>3</sup> But that should be neither surprising nor concerning. Few cases ever reach a jury trial in the federal courts, whether or not they join an MDL.<sup>4</sup> While trials are essential to civil litigation, the system works efficiently when cases resolve without them. Just as a jury trial is a procedural endpoint for an individual case in district court, MDL remand is the procedural endpoint of the coordinated proceedings in the MDL court. Few cases reach that stage because of the waypoints along the way that end the journey for many cases. But MDL remands are essential and must happen to enable unresolved cases to advance to trial in the appropriate venue.

By the time remand occurs, MDL parties will ideally have completed a voluminous amount of discovery on issues common to all of the centralized cases, as well as key discovery and depositions in individual cases. The MDL court has hopefully resolved all key legal motions on common dispositive and *Daubert* issues. There may have been one (or many) bellwether trials of cases presenting similar issues. By remand, parties have lots of information to inform settlement negotiations, so parties often settle large numbers of individual cases before the MDL court begins remanding cases. Strong MDL cases tend to produce larger settlements, on average, and weaker cases produce smaller ones, just like in cases outside of an MDL. If any cases lack legal sufficiency to survive on a common issue, those cases are dismissed. The MDL system functions well for resolving large numbers of individual cases, but it is less effective in resolving “outlier” cases, or those on the ends of the spectrum, good and bad.

MDL judges may also feel some weight of expectation to try to facilitate resolution of as many cases as possible before they scatter by remand to transferor courts. This serves the interest of efficiency, which takes on heightened importance for the court and litigants alike when a widely distributed product or device is

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<sup>1</sup> In this article, “remand” broadly means any transfer of an individual case from the MDL court to another district court at the end of coordinated MDL proceedings. This includes transfers of cases filed directly into the MDL but for which proper venue for trial is elsewhere.

<sup>2</sup> Likewise, “transferor court” broadly refers to district courts receiving all “remands” at the end of coordinated MDL proceedings. This includes courts that receive transfers of cases that were filed directly into MDLs because they are determined to be the appropriate venue for trial.

<sup>3</sup> See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400-01, 400-01 nn.8-10 (2014) (stating approximately three percent of MDL cases were remanded from 2010 through 2013).

<sup>4</sup> U.S. Courts, *Federal Judicial Caseload Statistics 2019*, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> (reporting that seven percent of all federal cases terminated in prior twelve-month period went to trial).

claimed to have caused tortious injury to tens of thousands of people. For example, the Manual for Complex Litigation, Fourth Edition, written mostly by and for federal judges, states:

One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.<sup>5</sup>

The pressure on judges to make the most of their opportunities to facilitate settlements is not unique to MDL practice, nor does it inherently favor plaintiffs more than defendants. Judges encounter similar pressures when managing their crowded dockets outside the context of MDLs. Ultimately, judges facilitate resolution of cases by moving cases forward in a fair, judicious manner. While thousands of related, yet individual, cases present unique management challenges to the parties and judges and may require creative streamlining procedures tailored to the specifics of the dispute, the fundamental litigation tools available to counsel and judges are similar inside and outside the MDL world. In either world, not all cases can be resolved short of trial.

This article discusses the MDL remand process from the perspective of plaintiffs' counsel. It is informed by this author's experiences litigating mass tort, product liability MDLs, and most recently, dozens of cases remanded from the pelvic mesh MDLs centralized before Judge Goodwin in the Southern District of West Virginia. Section II discusses why remand is an essential part of MDL procedure, even when rarely used. Section III briefly discusses a trend that may cause MDL remands to become more common in the future. Section IV offers a quick guidebook to plaintiffs' counsel on the post-remand journey, emphasizing important first steps counsel should take after remand to chart a proper course to trial.

## II. MDL REMAND IS ESSENTIAL, AND FUNCTIONS BEST AS A TRUE ENDPOINT

Remand is as essential to MDL procedure as the jury trial is to civil procedure. There must be a logical endpoint to the centralization of cases in the MDL transferee court for pretrial proceedings. Under *Lexecon*, an MDL transferee judge cannot self-transfer an individual case (for which proper venue lies elsewhere) to his or her district for trial,<sup>6</sup> absent *Lexecon* waivers by the parties.<sup>7</sup> Thus, for individual cases that lack venue in the MDL transferee district, there must be a remand or transfer to a court with proper venue prior to trial.

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<sup>5</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

<sup>6</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

<sup>7</sup> *See id.* at 41.

Nevertheless, there should be no rush to remand cases, as the MDL court can order individual discovery on case-specific issues just as easily as any transferor court. The advantages of the MDL judge's familiarity and expertise acquired about the issues, and the "unique opportunity" of the MDL to facilitate resolutions, weigh in favor of preserving centralization for as long as possible. The MDL judge may also conduct bellwether trials within and outside the transferee district, with appropriate bellwether selection, use of *Lexecon* waivers, and intracircuit assignments.<sup>8</sup> While this approach requires more work for the MDL judge and staff, it best serves the interests of justice and economy for the parties and the federal judicial system to maximize the expertise, economies, and opportunities of centralization.

Judge Goodwin charted a labor-intensive, impressively thorough course in the pelvic mesh MDLs. To the credit of the Judge and his staff, the overwhelming majority of cases transferred into the pelvic mesh MDLs were resolved by mutual agreement of the parties before remand. But, just as importantly, the cases that have been remanded—and there are many because of the large numbers of cases in those MDLs—are well-packaged with a record of discovery and legal rulings that renders them nearly trial-ready by transferor courts across the country: dispositive motions on common issues are ruled on; *Daubert* challenges to expert opinions on all common issues are ruled on, and are briefed as to case-specific issues; common discovery is complete; and, most of the individual discovery necessary for trial (including depositions of plaintiffs, treating physicians, and case-specific experts) is complete, as well. Judge Goodwin managed and required the completion of all of that work through the MDL for thousands of individual cases, using "waves" of individual cases placed on staggered schedules. This procedure allowed the parties to conduct all of that discovery under common protocols and with a single source for resolving any disputes, which was far more efficient for the system and fair to all parties than leaving the work to individual district courts around the country. While more work for the MDL judge, it saved work for others, including the parties and transferor courts. The remanded cases progressed about as far as they could under centralization with the MDL judge familiar with the range of complex issues presented in the litigation. By making remand a true "endpoint," the pelvic mesh MDLs maximized efficiencies, fairness, consistency, and opportunities for resolution.

Handled that way, the MDL remand is a powerful tool for efficiency and to encourage settlements where appropriate. Parties must know that a trial, when the stakes are all or nothing, looms at the end of their district court journey.

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<sup>8</sup> See, e.g., *In re Xarelto Prods. Liab. Litig.*, MDL No. 2592 (E.D. La. Sept. 17, 2015) (Case Mgmt. Order No. 2, Doc. 1305) (describing the court's intent to seek temporary assignment to other districts for two bellwether trials).

Remand is the vehicle that ensures that endpoint, so its very existence and the MDL judge's willingness to use it are essential to resolving cases within MDLs.

### III. MDL REMANDS MAY BECOME INCREASINGLY PREVALENT

Remands happen at the conclusion of MDLs when parties are unable to settle cases that have, to that point, survived the legal challenges as well. Typically, parties are unable or unwilling to settle when the gap between their respective case valuations is greatest. This happens most often for those cases that plaintiffs and their counsel believe are the strongest, or most valuable. It is easier for both sides to find compromise on weaker cases, because any gap in their respective valuations is necessarily smaller.

The dynamics of negotiating settlements for large groupings of cases within an MDL is evolving in a way that may produce more remands in the future. In this author's experience, defense settlement counsel tends to increasingly focus on driving for the lowest possible "per case" settlement amount in an aggregate settlement, but that is not the singular measure by which to compare one settlement to another. For example, in the language often used in negotiating settlements of large groups of cases, a \$40 million settlement of a bundle of 800 cases is a settlement that could be described as "\$50,000 per case." That does not mean each of the 800 plaintiffs receives \$50,000 from the deal. Instead, individual plaintiff allocations vary based on their case specifics and are determined by an independent third party looking at the entire bundle of cases. The best or strongest cases might be allocated \$500,000, for example, and the weakest cases in the group might be allocated only \$5,000. It depends on what cases comprise that bundle, and every plaintiff in that group must accept the amount allocated to them, or else they will "opt out" of the global settlement. If there are enough "opt outs" of a proposed global settlement, the deal fails. But during negotiations, from the defense perspective, a \$40 million payment for 800 plaintiffs is a \$50,000-per-case deal, whereas a \$50 million payment for the same 800 plaintiffs is \$62,500 per case. It is easy to see why defense counsel would push, during settlement negotiations, for the lowest "per case" value of an aggregate settlement to which they can convince plaintiffs to agree.

However, using the "per case" metric as the singular measure of a successful settlement, which seems to be an increasing trend, is a recipe for more remands in the future. An alternative metric of success defense counsel could use with their clients would be to look at how many cases they successfully resolved. The lower an aggregate settlement's "per case" value is, the lower the proposed allocations are, necessarily, for the highest-value cases in that bundle. And when the gap is highest between each parties' respective valuations of a case, the chance of settlement is smallest. When the lowest "per case" amount in a deal is the singular focus, there simply may not be enough money in the deal to keep the plaintiffs with the best cases in the settlement; they just will not accept it.

This has certainly happened in the pelvic mesh litigation, and that dynamic likely accounts for a significant percentage of the remands resulting from those MDLs. While the risks of going to trial are very real, plaintiffs have also seen in

that litigation that twenty-eight of the thirty-six jury trials thus far have resulted in plaintiff's verdicts.<sup>9</sup> The plaintiffs' verdicts have been substantial, ranging from a low of \$500,000, to a high of \$120 million, with a median verdict of \$6.7 million.<sup>10</sup> Those numbers do not tell the whole story by any means, as some plaintiff's verdicts (and defense verdicts) have been overturned on appeal. The risks for both sides of continuing the journey past MDL remand are substantial, and the path to finality through a jury trial, and possible appeal, can add many months or even years to the journey. Yet, some MDL plaintiffs with strong cases who have already waited several years just to reach remand have become patient over time and do not seem concerned about the possibility of waiting another several years for a final resolution. Having come that far, some see no reason not to press on to their day in court. For those plaintiffs, MDL remand is the essential gateway to move their cases forward to trial.

#### IV. QUICK GUIDE FOR PLAINTIFFS AFTER MDL REMAND

Once the MDL transferee court issues its order or suggestions of remand to the JPML, the process typically moves quickly. The order of remand may set deadlines on counsel to designate and file those portions of the record from the MDL docket that they wish to include in the record in the transferor court. It is imperative that plaintiff's counsel gear up to move as quickly as needed to comply with all deadlines set by the MDL court, and, very soon after, by the transferor court.

The MDL court's order and suggestions of remand may well include recommendations and guidance from the MDL judge to the transferor judges about the status of the case, and what issues may be unresolved. Counsel should review such order carefully and prepare to advocate for the schedule and procedures that they believe are necessary, or not necessary, to position the case for trial.

Several administrative steps may be essential immediately. For cases that were filed directly in the MDL, and thus have not yet been opened in the transferor court, it may be necessary for plaintiff's counsel to apply for admission *pro hac vice* in the transferor court with associated local counsel, which may need to be retained. As soon as the transferor court assigns the case to a particular judge, it will be important to assess that judge's familiarity with the issues presented in the case to begin preparing how best to bring the judge up to speed on the case-specific issues, as well as to consider any particular rules, standing orders, or preferences of the newly assigned judge.

It is critical for plaintiff's counsel both to appreciate and to counsel their client on the fact that there may be case-specific issues, or potential areas of weakness in that plaintiff's individual case that were not fully explored in the centralized MDL proceedings, but which will now be tested by opposing counsel and potentially heard and decided by the new court. This creates risk and uncertainty for both sides as the case moves forward in its new venue. There may

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<sup>9</sup> See Table 1, Appendix.

<sup>10</sup> *Id.*

be potential case-specific issues, such as a state-specific statute of limitations, or specific facts or testimony in an individual case, that could give rise to a dispositive motion, as with any case in federal court. Plaintiff's counsel must be prepared to shift from the emphasis that was previously placed on common case issues to the individual issues of their clients' case that are now the focus on remand.

Soon after the case is remanded and docketed in the transferor court, plaintiffs' counsel should request or prepare for an initial status and scheduling conference, and also prepare to seek a trial date as well as any other necessary intermediate deadlines. If there is a trial package for plaintiffs' counsel available from the MDL, it may be wise to acquire it as soon as possible. Likewise, plaintiffs' counsel who have not tried a case of the same kind that has been remanded may want to consider associating with special trial counsel with more experience in trying this type of case.

Once the record has been filed, a case management conference has occurred, and a schedule is in place, the case remanded from the MDL should look and feel like any other case in federal court, except that it may already be very close to trial-ready. The case's settlement negotiations could occur at any time, and the transferor court may require the parties to engage in further alternative dispute resolution. At every step forward, counsel should stay in close contact with their client to make sure all remaining steps in the case are completed appropriately to give the client's case its best chance of success.

## V. CONCLUSION

The fact that MDL remand is a road less traveled does not diminish its importance. The availability, possibility, and effective use of MDL remands is a crucial tool for judges in managing MDLs with fairness and efficiency. From the plaintiff's perspective, cases that reach the point of MDL remand are often ones that plaintiffs and their counsel perceive to be stronger than average, and thus not satisfactorily resolved through the values produced by a global settlement. That dynamic, when it applies, only underscores the high stakes for all parties that come clearly into focus once the MDL judge issues an order of remand. The MDL remand procedure is essential, and sometimes the best evidence of its importance may be the rarity with which it is actually used.

**Table 1: Pelvic Mesh Repair Product Liability Jury Verdicts**

The following table shows all known jury verdicts in Pelvic Mesh personal injury cases. Please note that this chart reports only the jury verdicts. In many cases, results changed through post-trial proceedings and appeals.

<b>Date</b>	<b>Verdict</b>	<b>Case</b>
Jul-12	\$5.5M	<i>Scott v. Kannappan</i> , No. S-1500-CV-266034-WDE (Calif. Super., Kern Co.)
Feb-13	\$11.1M	<i>Gross v. Gynecare</i> , No. A-0011-14T2 (N.J. Super. Ct. App. Div.)
Aug-13	\$2.0M	<i>Cisson v. C.R. Bard</i> , No. 2:11-cv-00195 (S.D.W. Va.)
Apr-14	\$1.2M	<i>Batiste v. Johnson &amp; Johnson</i> , No. DC-12-14350-D (Tex. Dist.)
July-14	Defense	<i>Albright v. Boston Scientific Corp.</i> , No. MICV201200909 (Mass. Super.)
Aug-14	Defense	<i>Cardenas v. Boston Scientific Corp.</i> , No. 12-2912 (Mass. Super.)
Sept-14	\$3.27M	<i>Huskey v. Ethicon, Inc.</i> , No. 2:12-cv-05201 (S.D.W. Va.)
Sept-14	\$73.46M	<i>Salazar v. Lopez, M.D.</i> , No. DC1214349 (Tex. Dist.)
Nov-14	\$6.7M	<i>Eghnayem v. Boston Scientific Corp.</i> , No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	\$6.7M	<i>Dortes v. Boston Scientific Corp.</i> , No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	\$6.7M	<i>Nunez v. Boston Scientific Corp.</i> , No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	\$6.5M	<i>Betancourt v. Boston Scientific Corp.</i> , No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	\$5.25M	<i>Blakenship v. Boston Scientific Corp.</i> , No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	\$4.75M	<i>Wilson v. Boston Scientific Corp.</i> , No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	\$4.25M	<i>Campbell v. Boston Scientific Corp.</i> , No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	\$4.25M	<i>Tyree v. Boston Scientific Corp.</i> , No. 2:12-cv-0863 (S.D.W. Va.)
Mar-15	\$5.7M	<i>Perry v. Ethicon, Inc.</i> , No. S-1500-CV-279123 (Calif. Super., Kern Co.)
May-15	\$100M	<i>Barba v. Boston Scientific Corp.</i> , No. N11C-08-050 MMJ (Del. Super. Ct.)
Oct-15	Defense	<i>Cavness v. Kowalczyk, M.D.</i> , No. DC1404220 (Tex. Dist.)
Oct-15	Defense	<i>Winebarger v. Boston Scientific Corp.</i> , No. 3:15CV211-RLV (W.D.N.C.)



Oct-15	Defense	<i>Carlson v. Boston Scientific Corp.</i> , No. 5:15CV57-RLV (W.D.N.C.)
Dec-15	\$12.5M	<i>Hammons v. Ethicon, Inc.</i> , No. 1305003913 (Pa.Com.Pl.)
Feb-16	Defense	<i>Sherrer v. Boston Scientific Corp.</i> , No. 1216-CV27879 (Mo.Cir.)
Feb-16	\$13.5M	<i>Carlino v. Ethicon, Inc.</i> , No. 130603470 (Pa.Com.Pl.)
Apr-17	\$20M	<i>Engleman v. Ethicon, Inc.</i> , No. 140305384 (Pa.Com.Pl.)
May-17	\$2.16M	<i>Beltz v. Ethicon Women's Health and Urology</i> , No. 1306003835 (Pa.Com.Pl.)
June-17	Defense	<i>Adkins v. Ethicon, Inc.</i> , No. 130700919 (Pa.Com.Pl.)
Sept-17	\$57M	<i>Ebaugh v. Ethicon, Inc.</i> , No. 130700866 (Pa.Com.Pl.)
Dec-17	\$15M	<i>Hrymoc v Ethicon, Inc.</i> , No. L-13696-14 (N.J. Super. Ct.)
Mar-18	\$35M	<i>Kaiser v. Johnson &amp; Johnson</i> , No. 2:17-cv-114-PPS (N.D. Ind.)
Apr-18	\$68M	<i>McGinnis v. C.R. Bard, Inc.</i> , No. BER-L-017543-14 (N.J.Super.L)
Jan-19	\$41M	<i>Emmett v. Ethicon, Inc.</i> , No. 130701495 (Pa.Com.Pl.)
Apr-19	\$120M	<i>McFarland v. Ethicon, Inc.</i> , No. 130701577 (Pa.Com.Pl.)
May-19	\$80M	<i>Mesigian v. Ethicon, Inc.</i> , No. 140200399 (Pa.Com.Pl.)
June-19	\$500K	<i>Dunfee v. Ethicon, Inc.</i> , No. 151002736 (Pa.Com.Pl.)
Jan-20	Defense	<i>Salinero v. Johnson &amp; Johnson</i> , No. 1:18-cv-23643-UU (S.D. Fla.)