

6-2021

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Recommended Citation

Goodwin, Joseph R. (2021) "Remand: The Final Step in the MDL Process – Sooner Rather than Later,"
UMKC Law Review: Vol. 89: No. 4, Article 19.
Available at: <https://irlaw.umkc.edu/lawreview/vol89/iss4/19>

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REMAND: THE FINAL STEP IN THE MDL PROCESS— SOONER RATHER THAN LATER

Judge Joseph R. Goodwin*

I. INTRODUCTION

In theory, the final stage of multidistrict litigation (“MDL”) is remand.¹ “The authority to remand an action to the transferor court rests with the [Judicial Panel on Multidistrict Litigation (the “Panel”)]... and not with the transferee court.”² “The Panel is empowered to separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the rest of the action.”³ A transferee court’s suggestion of remand to the Panel, however, is tantamount to an order of remand because the Panel gives great deference to a transferee judge’s suggestion.⁴ Ordinarily, the transferee court lacks authority to try actions transferred from other jurisdictions. Accordingly, cases transferred to an MDL must be remanded to their home district at or before the conclusion of MDL pretrial proceedings.⁵

After handling nine product liability MDLs, I have concluded that one of the greatest failures in multidistrict litigation is the extraordinarily long time that cases linger in transferee courts. I have come to believe that in any adversarial proceeding, including multidistrict litigation, definite timeframes should be required. Establishing a fixed timeframe for an MDL proceeding in a transferee court will strongly encourage the parties to settle or have their cases scattered by remand or transfer.

II. THE HISTORY, LAW, AND THE PROCESS OF MDL LITIGATION

The multidistrict venue statute, 28 U.S.C. § 1407, originated in the late 1960s as a tool to permit the management of federal court cases on a nationwide basis. The need for multidistrict litigation became “evident during the pendency of numerous civil antitrust cases relating to the electrical equipment industry.”⁶ Fifty years later, in 2018, the MDL cases in the country totaled “over 134,000 pending

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¹ This section also addresses the court’s role in transfer pursuant to 28 U.S.C. § 1407.

² John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2234 n.48 (2008) (citing *In re Roberts*, 178 F.3d 181, 183 (3d Cir. 1999)).

³ See Lori J. Parker, *Causes of Action Involving Claim Transferred to Multidistrict Litigation*, in 23 CAUSES OF ACTION § 13 (2d ed. 2013); see also 28 U.S.C. § 1407(a) (2020); § 1407 r. 7.6(c); PAUL D. RHEINGOLD, MASS TORT LITIGATION § 4:3 (1996).

⁴ Heyburn, *supra* note 2, at 2235.

⁵ See *Lexecon, Inc. v. Bershad*, 520 U.S. 1227 (1997).

⁶ David F. Herr & Nicole Narotzky, *The Judicial Panel’s Role in Managing Mass Litigation*, in A.L.I.-A.B.A. COURSE OF STUDY: MASS LITIGATION 249, 254 (2008).

actions spread across 196 active MDL dockets,” and comprised fifty-two percent of federal civil cases.⁷

Pursuant to 28 U.S.C. § 1407(a), “[e]ach action so transferred shall be remanded by the [P]anel 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 The MDL court issues a suggestion of remand to the Panel, and the Panel issues a conditional order of remand. The case is held for seven days and then, assuming there is no objection, the conditional order of remand becomes effective and the case is then transferred.

Conversely, the court need not formally notify the Panel with respect to direct filed cases when sending such cases to the appropriate jurisdiction. Cases cannot be direct filed as a matter of right. The MDL statute, as interpreted by the Supreme Court in *Lexecon, Inc. v. Bershad*, 520 U.S. 1227 (1997), “does not allow the MDL court to override personal-jurisdiction and venue requirements to achieve complete jurisdiction over a case.”⁹ Defendants, however, can waive these defenses in order to allow direct filing. Case-wide direct filing stipulations are common in MDL litigation to avoid inefficiencies and inconsistencies that accompany defendants individually granting permission on a case-by-case basis.¹⁰ Nevertheless, some MDL courts are unwilling to allow plaintiffs to direct file, even when defendants waive these defenses, when it is clear that other courts would be more convenient and appropriate forums.¹¹ Cases directly filed with an MDL court may be transferred by the MDL court, pursuant to 28 U.S.C. § 1404, “to any other district or division where it might have been brought or to any district or division to which all parties have consented.”¹²

Generally, remand “is required when centralized proceedings have concluded, but one or more transferred cases remains unresolved. When discovery has been completed, pretrial motions have been ruled upon, and reasonable attempts to try to settle the actions have not borne fruit”¹³ The same is true for cases filed directly in an MDL. Most cases originally filed in or transferred to an MDL settle long before the transferee court suggests remands or transfers the cases back to the home jurisdictions.

The decision to direct file in the MDL court or be subject to remand by the Panel to the court in which the case was originally filed impacts the final stages of multidistrict litigation. Cases transferred by the Panel pursuant to 28 U.S.C. § 1407

⁷ Alan Fuchsberg & Alex Dang, *MDLs Are Redefining the US Legal Landscape*, LAW360 (Oct. 30, 2019, 5:48 PM), <https://www.law360.com/articles/1214276/mdls-are-redefining-the-us-legal-landscape>.

⁸ § 1407(a).

⁹ Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 797 (2012).

¹⁰ *See id.*

¹¹ *Id.*

¹² § 1404(a).

¹³ Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUDICIAL CTR. 48 (2011), <https://www.jpml.uscourts.gov/sites/jpml/files/FJC-2011-Managing%20MDL%20PL%20Pocket%20Guide.pdf>.

must be returned to the jurisdiction from which they originated. Whereas, pursuant to the requirements of 28 U.S.C. § 1404, the MDL judge has discretion regarding where to send direct filed cases.

III. STATISTICS IN PELVIC MESH MDLs

The pelvic mesh MDLs assigned to me followed the routine pattern, and very few of the MDL cases actually ended in the jurisdiction where they originated or otherwise belonged. This is not surprising because:

[s]ince its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, a total of 13,432 actions had been remanded for trial, 398 actions had been reassigned within the transferee districts, 359,432 actions had been terminated in the transferee courts, and 89,123 actions were pending in 271 multidistrict litigation dockets throughout 56 transferee district courts.¹⁴

“Indeed, the incentive structure for controlling stakeholders (lead plaintiffs’ attorneys, defendants, and transferee judges) and the procedural requirements for remand are stacked so heavily in favor of settlement that remanding even 2.9% of cases is remarkable.”¹⁵

In 2010, the Panel began assigning cases to me involving product liability actions against manufacturers of pelvic mesh products used to treat stress urinary incontinence and pelvic organ prolapse in women. What began as a handful of cases against one manufacturer in one MDL quickly grew to seven MDLs assigned by the Panel, which involved seven different manufacturers of multiple pelvic mesh products and just over 100,000 total cases.¹⁶ The Panel assigned the second, third, fourth and fifth MDLs (AMS, Boston Scientific, Ethicon, and Coloplast, respectively) in 2012, the sixth (Cook) in 2013, and the seventh (Neomedic) in 2014.¹⁷ Most of the cases in the MDLs assigned to me were direct filed rather than transferred. This group of MDLs is unique in its number of cases and the number of defendants, but the statistics in these MDLs reveal that, like any other MDL, most MDL cases settle before they are ever remanded or transferred.

Of the 101,968 cases originally filed, to date, I have placed 1,301, or 1.276 percent of the total cases, on remand or transfer orders. In many cases, after entering the remand or transfer order, but before actual remand or transfer, the parties dismissed the case. Of the original 1,301 cases placed on remand or transfer orders, I remanded or transferred only 973 cases, or .954 percent of the total cases.

¹⁴ *Judicial Panel on Multidistrict Litigation – Judicial Business 2013*, U.S. COURTS (2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx>.

¹⁵ Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 416 (2014).

¹⁶ At its height, I had 101,357 cases which comprised a large percentage of civil cases filed in federal courts throughout the country.

¹⁷ The MDL case names and numbers are: C.R. Bard, Inc. 2:10-md-2187; American Medical Systems, Inc. 2:12-md-2325; Boston Scientific Corp. 2:12-md-2326; Ethicon, Inc. 2:12-md-2327; Coloplast Corp. 2:12-md-2387, Cook Medical, Inc. 2:13-md-2440 and Neomedic 2:14-md-2511.

The two charts below indicate the number of cases initially placed on a remand or transfer order, and then ultimately remanded or transferred in each of the seven MDLs.

REMANDS					
MDL	MDL No.	Total No. of Cases with Remand Orders	Total No. of Cases Actually Remanded	Total No. of Cases Not Remanded	Total No. of Cases with Remands Pending
C. R. Bard, Inc.	2187	6	6	0	0
American Medical Systems, Inc.	2325	5	5	0	0
Boston Scientific Corp.	2326	10	10	0	0
Ethicon, Inc.	2327	184	140	41	3
Coloplast Corp.	2387	1	1	0	0
Cook Medical, Inc.	2440	0	0	0	0
Neomedic	2511	0	0	0	0
Totals		206	162	41	3

DIRECT FILED CASES					
MDL	MDL No.	Total No. of Cases with Transfer Orders	Total No. of Cases Actually Transferred	Total No. of Cases Closed Not Transferred	Total No. of Cases with Transfers Pending
C. R. Bard, Inc.	2187	83	49	34	0
American Medical Systems, Inc.	2325	44	44	0	0
Boston Scientific Corp.	2326	144	93	51	0
Ethicon, Inc.	2327	790	601	152	37
Coloplast Corp.	2387	34	24	10	0
Cook Medical, Inc.	2440	0	0	0	0
Neomedic	2511	0	0	0	0
Totals		1095	811	247	37

The above statistics provide important context. Very few cases that begin in an MDL actually end up back in their home jurisdiction. In the pelvic mesh MDLs, less than one percent actually made it all the way home to the appropriate jurisdiction.

IV. OBSERVATIONS AND RECOMMENDATIONS

My experience with a very large number of cases assigned to me by the Panel involving pelvic mesh products has followed the rather typical process of emphasizing settlement in the transferee court. By the usual metric, these cases have been MDL successes because nearly all have settled before remand or transfer. We employed the usual practices of general and specific causation work up, motion practice, and preparing and trying bellwether cases. However, my now long experience with these MDLs leads me to conclude that the singular emphasis on settlement almost always results in enormous delay. That delay may deny the parties timely justice and is rightly considered by many as a major failure of the MDL paradigm. Over time I have come to believe that a different approach to product liability MDLs is justified.

It is certainly desirable to achieve resolution in the transferee court by settlement. I now believe that a more rigidly structured approach to scheduling by the transferee judge will result in nearly as many settlements, but with resolution of the cases in a timelier fashion. A firm deadline for concluding proceedings in the transferee court and remanding or transferring unresolved cases should be established very early on in the litigation. The schedule must be generous and recognize the standard practices, as well as the invariable vagaries of multidistrict litigation. The court should provide ample time for organization by the leadership appointed by the court. I believe this to be the most critical step in multidistrict litigation.

The organizational phase is followed by planned and agreed-upon expediciencies, such as the filing of master complaints and answers, and then by uniform disclosures of claimed facts by each plaintiff, discovery related to defendants' product, and development of the theories of general causation. Most of the claim-specific discovery can be delayed so long as the fact sheets the court requires plaintiffs to submit are comprehensive and completed in a timely manner. The whole purpose of requiring fact sheets and general causation discovery early in the process before the transferee court is to facilitate knowledgeable settlement discussions. Other specific and more detailed discovery is ultimately for trial preparation. Though it is beyond the scope of this article to discuss further details of an MDL schedule, it is sufficient to say I believe that an inviolate remand or transfer date set after careful planning, which allows generous time for each step of discovery and permits generally applicable motion practice, will result in fairer and faster resolution of the cases.

Judges and members of the bar experienced in multidistrict litigation have come to expect the selection and trial of bellwether cases, but this does not necessarily interfere with my recommendation. I think it critically important that the transferee judge not permit preparation of bellwether cases to delay or interrupt

the progress of common discovery and adherence to the schedule. It is perfectly possible to treat those cases somewhat separately from the discovery process, and thus not interfere in developing the mass of cases in the MDL.

A firm deadline for the completion of discovery, general motion practice, and remand or transfer forces settlement negotiations to proceed apace. Much of the delay in settlement occurs when the parties are permitted to procrastinate. Knowing that your cases will be dispersed across the country if you do not settle before the remand or transfer deadline will be strong incentive to prepare earlier, evaluate sooner, and negotiate seriously. All processes for the resolution of disputes must be delimited. To the extent that there is an amorphous structure, the MDL process is flawed.

I further recommend an approach that bifurcates the efforts in the transferee court along two distinct paths. One path focuses upon the discovery and motion practice. This path deals with the bellwether cases and preparation for remand or transfer and trial. The other path is devoted to settlement discussions. Ultimately, in this two-path system, there are two separate leadership teams. One set of plaintiffs' leadership and defendants' leadership deals with case development and the other set deals with settlement. The transferee court needs to be consistently and actively involved in facilitating settlements and superintending discovery and motion practice. Multidistrict litigation is a practical necessity and it can and should be an expeditious and just means for the resolution of these product liability cases.