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MDL REMANDS: A DEFENSE PERSPECTIVE

Richard B. North, Jr.*

In their cartographic efforts, attorneys Ryan Hudson, Rex Sharp, and Dean Nancy Levit understandably identify “remand” as one of the five stages of a multidistrict litigation (MDL). However, including remand in their visual depiction of the MDL process is tantamount to including Antarctica on a world map; it is acknowledging a place generally known to most lawyers, but an area where most attorneys—even experienced MDL practitioners—have seldom traveled.

But that may be changing. In recent years, a number of scholars, and even some federal judges, have begun advocating for the more frequent remand of individual MDL cases. And some judges are heeding that call. Over the last several years, Judge Joseph R. Goodwin has remanded¹ dozens of cases from the sprawling pelvic mesh MDLs he has been handling in the Southern District of West Virginia. More recently, Judge David G. Campbell from the District of Arizona has remanded more than 2,000 cases from the *In re: Bard IVC Filters* MDL.

The advocates for remand advance a number of benefits that, in their view, would result from the more frequent remand of MDL cases to other district courts for trial. As a defense lawyer toiling in the trenches of an MDL and handling numerous remanded (or transferred) cases, I am particularly interested in the belief proposed by some that routinely remanding MDL actions may provide a disincentive to the proliferation of meritless claims. This article briefly details the trend toward remand, the theory that remands may discourage the filing of marginal claims, and then provides some anecdotal evidence of how that disincentive may actually exist.

I. THE TREND TOWARD REMAND

The genesis of any MDL is 28 U.S.C. § 1407. The provision contemplates the transfer of related cases to a single judge, but not for ultimate resolution.² Instead, the statutory language suggests limitations on a transferee judge’s role, explicitly permitting transfer only for “coordinated or consolidated pre-trial proceedings.”³ The provision further commands that “[e]ach action so transferred 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.”⁴ And the Supreme Court has made clear that the plain

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¹ The term “remand” is technically a misnomer when used to describe many of the cases sent by MDL judges to other courts. After the formation of an MDL and the transfer of cases to that court by the Judicial Panel on Multidistrict Litigation (JPML), many MDL courts permit the direct filing of additional cases in the transferee jurisdiction. When the time comes for remand, the directly filed cases are typically transferred to other jurisdictions under 28 U.S.C. § 1404.

² See 28 U.S.C. § 1407.

³ See *id.* § 1407(a).

⁴ *Id.* (emphasis added).

language of the statute means what it says.⁵ The JPML may not decline to remand a transferred case, over a party's objection, once pretrial proceedings have been completed.⁶

Despite the clarity of the statute's wording and the Supreme Court's pronouncement, the historical reality is that remand of an MDL case is a rare occurrence. According to the Administrative Office of the United States Courts, since the JPML's creation in 1968, only 2.3% of transferred cases have been remanded (based on data collected as of September 30, 2019).⁷ However, that number is misleading. It does not include the hundreds of thousands of additional cases directly filed in MDLs that are never transferred out of the proceeding. If the direct-filed cases were added to the calculation, the true percentage of MDL cases ultimately transferred or remanded out of an MDL for trial is probably far less than 1%. The rarity of MDL remands over the years can be explained by many factors. Judge Eduardo Robreno, who ultimately supervised the epic asbestos MDL, once observed: "[a]s a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case"⁸

More recently, however, the imperative for global resolution of MDL litigation under the stewardship of a transferee judge appears to be receding. A number of noted scholars have championed the perceived benefits of remanding MDL cases for trial.⁹ Judge Clay D. Land, the former Chief Judge of the Middle District of Georgia and a veteran transferee judge of two MDLs, has advocated for the remand of MDL cases for case-specific discovery and adjudication following the completion of pretrial proceedings regarding common issues, while noting that his view is a "minority approach."¹⁰

The proponents of remand identify many reasons for their viewpoint. Among other things, they argue that the pursuit of global settlements and the avoidance of remands benefit lead plaintiffs' attorneys, sometimes at the expense of plaintiffs with stronger claims.¹¹ Some supporters of remands perceive

⁵ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998).

⁶ See *id.* at 34.

⁷ See Admin. Office of the U.S. Courts, *Judicial Panel on Multidistrict Litigation—Judicial Business 2019* (2019), <https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019> ("Since its creation in 1968, the Panel has centralized 722,146 civil actions for pretrial proceedings. By the end of fiscal year 2019, a total of 16,918 actions had been remanded for trial. 570,766 actions had been terminated in the transferee courts, and 134,462 actions were pending throughout 51 transferee district courts.")

⁸ See Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013).

⁹ See, e.g., Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014); Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1070 (2014).

¹⁰ See Clay D. Land, *Multidistrict Litigation After 50 Years: A Minority Perspective from the Trenches*, 53 GA. L. REV. 1237, 1242 (2019).

¹¹ See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAN. L. REV. 67, 152-54 (2017).

advantages in having disputes resolved closer to a plaintiff's home, by a judge more familiar with the applicable state law.¹²

II. THE PROBLEM OF MARGINAL CLAIMS

Of particular interest to me, as a defense practitioner, is the widespread belief that making MDL remand the norm will become a disincentive to the filing of frivolous claims. The proliferation of marginal claims in the MDL setting is a very real problem. An MDL subcommittee of the Advisory Committee for the Rules of Civil Procedure has noted that there is “fairly widespread agreement” among MDL stakeholders (experienced practitioners and judges alike) that the problem exists.¹³ That committee estimates that 20-30% of claims in some centralized proceedings, and perhaps as high as 40-50% of cases, are “unsupportable.”¹⁴ Those marginal claims include cases where the plaintiff did not use the product at issue or did not actually suffer an injury from the product, and cases clearly barred by the statute of limitations.¹⁵ Judge Land has characterized the phenomenon as one of the “unintended consequences” of MDL consolidation.¹⁶ As he has observed, “[s]ome lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.”¹⁷ A number of commentators have referred to the proliferation of dubious claims in an MDL proceeding as the “‘Field of Dreams’ problem – ‘if you build it, they will come.’”¹⁸

One factor explaining the large number of questionable claims that often populate MDLs is the staggering expansion of attorney advertising. The United States Chamber Institute for Legal Reform, an affiliate of the United States Chamber of Commerce, estimates that plaintiffs’ attorneys (in coordination with lead generators and third-party financing groups) spend approximately \$1 billion annually on television advertising to solicit clients for mass tort litigation.¹⁹

¹² See Land, *supra* note 10, at 1244.

¹³ ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, MDL SUBCOMMITTEE REPORT 142-43 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

¹⁴ *Id.* at 142.

¹⁵ *Id.*

¹⁶ See *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

¹⁷ *Id.*

¹⁸ Burch, *supra* note 9, at 413-14; ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 13, at 142-43.

¹⁹ See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, GAMING THE SYSTEM: HOW LAWSUIT ADVERTISING DRIVES THE LITIGATION LIFECYCLE 1 (2020), https://www.instituteforlegalreform.com/uploads/sites/1/Gaming_the_System_How_Lawsuit_Advertising_Drives_Litigation_Lifecycle_2020April.pdf. In its case study, the Institute found that plaintiffs’ interests spent \$94 million for advertising in the Pradaxa litigation; \$122 million in the Xarelto litigation; \$63 million in talcum powder litigation; and \$103 million in the Roundup litigation. See *id.* at 2-3. Similarly, more than \$89 million has been spent in advertising for cases

Pervasive advertising of that magnitude attracts many plaintiffs whose claims are then filed in an MDL in the hope that these potentially weaker claims will be wrapped up in a global settlement, with the merits of the claims never examined.²⁰

III. A REPORT FROM THE TRENCHES

Will the more frequent remand of MDL cases reduce the number of doubtful claims filed? In the past, remand has occurred too rarely to provide any robust data for assessing that proposition. My anecdotal experiences, however, suggest that remand can indeed be a disincentive as theorized.

At present, my law firm (in coordination with other firms) is engaged in the defense of hundreds of MDL cases that have been remanded from an MDL concerning a medical device. Thus far, roughly twenty-five percent of the original inventory of MDL cases have been sent to courts throughout the country. The remanded cases undeniably include some claims which, although vigorously contested, are by no means frivolous. A number of those plaintiffs are represented by knowledgeable and diligent counsel. On the other side of the spectrum, the remand process has exposed a significant number of cases that are marginal, at best. Some of those plaintiffs are represented by counsel who are either ill-equipped or disinterested in actually litigating the case.

Some proponents have theorized that more frequent remands would result in the dismissal of weak claims if plaintiffs' attorneys could not hide their lack of merit in an undifferentiated mass settlement.²¹ That prediction has come to fruition in the litigation we are handling. Approximately ten percent of the remanded cases have been dismissed within weeks or just a few months of remand, without any settlement. In other words, the plaintiffs' attorneys appear to have abandoned ten percent of the remanded cases rather than choosing to prosecute them.

Proponents of remand have similarly speculated that the absence of a global settlement may prompt some attorneys to withdraw from representation

against the various manufacturers of inferior vena cava filters (a figure determined by surveys conducted by X Ante using Kantar CMAG data). Some plaintiffs' attorneys have even continued to spend millions of dollars on advertising during the COVID-19 pandemic after being approved for as much as \$49.7 million in loans from the Paycheck Protection Program according to data from the United States Small Business Administration and surveys conducted by X Ante. See Nate Raymond, *Mass Tort Law Firms Spending Big on TV Ads Got U.S. Government Coronavirus Aid*, REUTERS LEGAL (July 24, 2020 12:07 AM), <https://www.reuters.com/article/lawyers-advertising/mass-tort-law-firms-spending-big-on-tv-ads-got-us-government-coronavirus-aid-idUSL2N2EV0LP>.

²⁰ See *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at *1 n.2 (noting that "onslaught of lawyer television solicitations" contributed to an explosion of cases in that MDL); ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 13, at 142-43; accord Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 KY. L.J. 467, 471-72 (2019) (noting MDL "[a]ggregation tends to encourage the filing of meritless claims for a variety of reasons, including the reduction of individual scrutiny received by claims that are pending in aggregated proceedings. As a result, there are many instances in which multidistrict litigations have been inundated with claims that have later been eliminated because they lacked merit.").

²¹ See, e.g., Burch, *supra* note 9, at 413-14; Land, *supra* note 10, at 1241 n.19.

rather than litigate the case.²² Again, our experience has shown that concern to be justified. We have seen dozens of instances where a plaintiff's attorney has withdrawn after remand, abandoning his or her client to navigate the litigation *pro se*.

For those cases that have proceeded after remand, initial case-specific discovery has exposed the problematic impact of television advertising. Many plaintiffs admit, when deposed, that they never had any symptom or known complication until they saw a television advertisement providing dire warnings about the severe "risks" allegedly associated with the device. These plaintiffs often complain about their fears that a complication will occur in the future, fears associated more with the television solicitations (disguised as medical alerts) than with any actual medical diagnosis.²³ In those instances, the remands have led to the case-specific discovery that has exposed the dubious nature of the claim.

Perhaps most disturbing, the remand process has exposed a few plaintiffs' attorneys who are either ill-equipped or unwilling to handle the cases once remanded.²⁴ In some instances, attorneys have simply ignored orders scheduling conferences or hearings, and failed to attend without any explanation. In other cases, they have flouted local rules governing *pro hac* appearances and the association of local counsel, sometimes to the irritation of the remand court. Moreover, a number of plaintiffs' attorneys—while striving to represent their clients appropriately—simply have no familiarity with the history of the MDL or the discovery that has previously occurred.

Despite the anecdotal evidence suggesting that remands can expose and even sometimes eliminate marginal claims, remands are not a panacea for defendants. Not surprisingly, remands can be costly. Significant funds and resources are required to defend hundreds of cases simultaneously in courts throughout the country. And remands can prolong and even increase the risks to defendants, risks that global settlements are designed to control. In short, a remand process is not advantageous to a defendant in every situation, as the costs may sometimes outweigh the benefits. Stated differently, although remands may help to cull meritless or marginal claims, the cost in many instances will simply be too high.

²² See, e.g., Land, *supra* note 10, at 1241 n.19.

²³ See generally Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J.L. & MED. 7, 7 (2015) (studying sample television solicitations in drug and device litigation, some of which "mimicked public service announcements, claiming to be a 'medical alert' 'consumer alert' or 'FDA warning'"); Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 327-41 (2013-2014) (discussing proliferation of television solicitations and their marketing tactics).

²⁴ The phenomenon is not unique to the litigation we are handling. Courts presiding over remanded cases in other litigation have recently sanctioned plaintiffs' attorneys for the mishandling of a case. See *Thompson v. C.R. Bard, Inc.*, No. 6:19-CV-17, 2020 WL 3052227, at *1 (S.D. Ga. June 8, 2020); *Rolandson v. Ethicon, Inc.*, No. 15-CV-537 (ECT/DTS), 2020 WL 2086279, at *10 (D. Minn. Apr. 30, 2020).

IV. CONCLUSION

As long as television advertising for mass tort claimants continues unabated, the proliferation of frivolous claims will undoubtedly remain a problem. Courts, advisory committees, and commentators will continue to evaluate and debate mechanisms to screen MDL case inventories for marginal claims. As that debate proceeds, more frequent remands may emerge as a viable screening tool and a disincentive for the filing of questionable claims. From our anecdotal experiences in the trenches, remands do indeed appear to have that desired effect.