PRACTICAL ADVICE AND STRATEGY CONSIDERATIONS FOR CONSOLIDATION BY THE MULTIDISTRICT LITIGATION PANEL

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With the Class Action Fairness Act ("CAFA")[1] moving previously scattered class actions into federal court, comes the possibility that the cases may now be consolidated in one forum through 28 U.S.C. § 1407. Such consolidation potentially enhances efficiency for both plaintiffs and defendants, while providing consistent results across multiple actions. On the other hand, it risks gridlock and delay in the transferee court, review of stacks of irrelevant pleadings, loss of control by individual parties and lawyers of their cases, loss of a favorable forum, loss of favorable law, and the inability to be recognized for individual procedure issues or for potentially dispositive individual issues. It also introduces additional strategy issues for both parties. This article attempts to provide an overview of the transfer procedure, standards for transfer, the result of the transfer (and ultimate retransfer), and strategy considerations.

Who is the MDL Panel: The Judicial Panel on Multidistrict Litigation (the "MDL Panel") is composed of seven federal district judges, appointed by the Chief Justice, who have the authority to transfer multidistrict civil actions pursuant to 28 U.S.C. § 1407. The MDL Panel does not keep the cases; it merely makes the decisions (1) whether to consolidate and (2) to which court and specific judge to transfer.[2] Congress created the MDL Panel in 1968 in an effort to help relieve the federal judicial circuits from the backlog.[3] The main purpose of 28 U.S.C. § 1407 is to "streamline the entire pretrial process by eliminating duplication in discovery, reducing litigation costs, and saving time and effort on the part of the parties, the witnesses and the judiciary."[4]

28 U.S.C. § 1407(c) states that there are two ways in which a proceeding for the transfer may be initiated: (1) the MDL Panel itself may initiate this proceeding; or, (2) a party to one of the actions may file a motion with the clerk of the district court in which the action is pending. Once a motion for transfer is made, all parties in all of the actions are notified and a hearing is set to determine whether the transfer is appropriate.[5] When determining whether to grant a motion to transfer, the MDL Panel will weigh: (1) whether there are one or more common questions of fact; (2) whether transfer is for the convenience of all of the parties involved; and, (3) whether transfer will promote judicial efficiency, economy and fairness.[6]

Authority Broad, Transfer Quick, Normal Forum Rules Not Applicable: The MDL Panel's authority is strikingly large and can drastically change the posture of an existing case – even one which has been pending for a considerable period. Transfers occur quickly, occur frequently, and sometimes with little opportunity for individual litigants to distinguish themselves (particularly when there are complex cases or a large number of cases).[7] For instance, it is not uncommon for a party in a large, complex case to be awarded three minutes (or less) to orally argue their position. The MDL Panel has been known, on occasion, to transfer cases over the objections of the majority of parties and has stated that it may even transfer if all parties object.[8]

In making the transfer decision, the MDL Panel may transfer to "any" federal district court (known as the "transferee court"). Thus, normal considerations relating to choice of forum do not limit the MDL Panel, including (for example) personal jurisdiction, venue, deferring to the plaintiff's choice of forum, and forum selection clauses. E.g., In Re FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

Procedure, Deadlines, Briefs, Tag Alongs: The MDL Panel has issued its own set of procedural rules, pursuant to § 1407(f).[9] The rules provide that within twenty (20) days of the filing of a motion to transfer, all parties must file a response, and a failure to do so will be treated as acquiescence. There is a five (5) day time limit for a reply. Briefs are limited to 20 pages. The matter is then typically placed on the hearing docket, which occurs approximately monthly. Appeals of the MDL Panel's decision are strictly limited and are only available under extraordinary writ through 28 U.S.C. § 1651 to the Court of Appeal having jurisdiction over the district in which the hearing of the MDL Panel occurred. 28 U.S.C. § 1407(e).

If an "MDL" has already been established, new matters may be transferred with no action by the MDL Panel with the filing of a "tag along" notice. R.P.J.P.M.L 7.5(a). The clerk of the MDL Panel will

make the transfer unless there is an objection within fifteen days. R.P.J.P.M.L 7.4(c). An objector will then be given 15 days to file a brief or his objection is automatically deemed withdrawn. R.P.J.P.M.L 7.4(d). Even the failure of a party to be served with the "tag along" notice does not stop the transfer unless the party can demonstrate "prejudice". R.P.J.P.M.L 7.5(c).

Common Questions of Fact: In order for a motion to transfer to prevail, the MDL Panel must find the common questions of fact to be "sufficient." Section 1407 does not provide guidance as to what qualifies as "sufficient;" thus, the MDL Panel has a great deal of discretion. Cases do not need to have a virtual identity of parties of facts.[10] Though common questions of fact alone are rarely enough to warrant transfer, the MDL Panel may grant the motion if the common questions are complex.[11] The complexity of questions of fact becomes particularly important if the transfer request involves a small number of cases.[12]

Some decisions of the MDL Panel appear to weigh the common issues and individual issues to determine which predominate. E.g., In re Rely Tampon Prods. Liability Litig., 533 F. Supp. 1346, 1347 (J.P.M.L. 1982) (transfer denied because panel "not persuaded that the common questions of fact will predominate"); In Re Sears, Roebuck & Co. Employment Practices Litig., 487 F. Supp. 1362, 1363 (J.P.M.L. 1980) (transfer denied for five discrimination cases where "individual rather than common factual questions predominate").[13] On occasion, the MDL Panel appears to have considered whether common questions of law exist, but more often has stuck to the statutory language which requires analysis of only common questions of "fact." 28 U.S.C. § 1407(a) ("when civil actions involving one or more common questions of fact ....").[14]

Convenience of Parties and Witnesses: Though it is often given the least amount of weight of the three statutory requirements, the MDL Panel must look to see whether transfer of all of the actions will be for the convenience of all of the parties. If the other two requirements are met, then the court will likely not reject a motion to transfer under § 1407 simply because it is inconvenient for some of the parties. In other words, when several actions are transferred to a single district it may be much more cost-efficient for the action as a whole, even if it is more costly for a single party.[15]

Judicial Efficiency: The most important factor the MDL Panel weighs is whether the transfer will promote the "just and efficient conduct of such actions."[16] It is essential to show that pretrial consolidation before a single tribunal will promote the efficient use of party and judicial resources.[17] Factors that are often cited by the MDL Panel as reasons why transfer will lead to efficiency are: to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve both human and financial resources of the parties and the judiciary.[18] Examples of types of actions which have satisfied this test in the past include: antitrust, securities, mass tort (particularly a single incident), patent, copyright, trademark, and products liability actions.[19]

Where there are "only a few actions, particularly if the same parties and counsel are involved, those advocating transfer bear a heavy burden of persuasion." Manual For Complex Litigation (Third) 252 (Federal Judicial Center, 2000).[20] "[T]ransfer is [frequently] denied when the number is so small that little duplication of effort is likely to result. This is particularly true when the Panel believes that informal, voluntary coordination among the parties presents an adequate alternative to formal transfer."[21] Although there is no magic number, transfer is less likely if there are less than five actions.[22]

The Panel has denied motions to transfer where there were alternative means available for coordination of discovery and avoidance of duplication.[23] Finally, the mere potential for additional actions is insufficient to justify MDL coordination.[24]

Where and to Whom Is Case Transferred? The decision on which court or judge handles the consolidated case can often drive the decision to request consolidation and often occupies a sizeable portion of the briefs. The Panel may transfer an action to "any" district, although the MDL Panel often selects a district with a currently pending case.[25]

The MDL Panel will usually select the most convenient forum for most of the parties and witnesses involved. Therefore, the MDL Panel will often send cases to locations near the defendant's headquarters or near the main concentration of plaintiffs or witnesses. E.g., In re "Factor VIII or IX Concentrate Blood Prods.", 853 F. Supp. 454, 455 (J.P.M.L. 1993) (parties' principal place of business); In re Air Crash Disaster Near Coolidge, Arizona, 362 F. Supp. 572, 573 (J.P.M.L. 1973) (location of documents); In re Rio Hair Naturalizer Prods. Liab. Litig., 904 F. Supp. 1407, 1408 (J.P.M.L. 1995) (centrally located between parties and witnesses); In re Regents of the Univ. of Cal., 964 F.2d 1128, 1136 (Fed. Cir. 1992) (district where earliest actions filed); In re Republic National-Realty Equities Sec. Litig., 382 F. Supp. 1403, 1406-07 (J.P.M.L. 1974) (district with largest number of pending cases); In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 130 F.R.D. 475, 476 (J.P.M.L. 1990) (district where a bankruptcy action involving defendant is pending). Administrative concerns are important, including docket conditions (In re Nat'l Student Mktg. Litig., 368 F. Supp. 1311 (J.P.M.L. 1973)), as is

whether venue would be proper.[26]

The "availability of an experienced and capable judge familiar with the litigation is one of the more important factors in selecting a transferee forum."[27] The MDL Panel often transfers cases to a judge that is already involved in one of the consolidated cases;[28] however it has transferred cases to experienced judges who had no currently pending cases.[29]

After Pretrial Proceedings, Actions are Transferred back to Original District: Section 1407 (a) states 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." Therefore, any action that is not settled, dismissed, or otherwise resolved on the merits will be remanded by the MDL Panel to the original district in which the action was first initiated. Historically, this provision was largely ignored and transferee courts would often make final transfers to themselves through 28 U.S.C. 1404(a). However, the Supreme Court recently made clear that this provision is mandatory. Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). Nevertheless, in practice few cases are remanded for trial to the original forum.

The MDL Panel does have the authority to remand any individual action, or separable claim, under § 1407(a). Usually, the MDL Panel considers these requests at the suggestion of the transferee court; however, it will also consider these questions upon motion of any of the parties.[30] In a recent case, In re Medtronic, Inc. Implantable Defibrillators, the transferee court recommended remand of any claims which did not relate to one of eight particular models of Marquis Devices.[31] In Phillips v. Roane County, a civil rights claim relating to medical care by a prisoner was consolidated into In re Zyprexa Liability Litigation because the deceased inmate had ingested Zyprexa while in prison.[32] The court recommended remand because plaintiff's claim was not a products liability suit against Eli Lilly (the drug manufacturer); her claim was against a county prison for neglect.[33]

On the other hand, transferee courts sometimes stay discovery on any individual issue that is not common to the transferred actions, delaying resolution of cases with individual issues that might otherwise be dispositive.[34]

Strategy Decisions – Efficiency, Consistency, Remand Fight: Defendants are often the parties that file a 1407 motion. Normally their intent is to gain the efficiencies of a consolidated action, both in terms of legal fees and client time – as well as reducing the number of repeat depositions or document productions (or protocols). Without such a consolidation, it may be difficult to coordinate deposition schedules with multiple actions in multiple jurisdictions. Disparate district courts may have different timelines and scheduling requirements and discovery rulings. E.g., Manual for Complex Litigation (Third) (Federal Judicial Center, 2000) (after consolidation, court can appoint lead and liaison counsel, require shared discovery, case management plans, etc.). However, in making such a motion, defendants face an unknown forum (since they have no guarantee where a case will be consolidated), risk unknown law,[35] risk the danger that plaintiff counsel will better coordinate their strategy and assist each other, and risk losing the potential of settling actions with isolated plaintiff counsel.

One fight that often occurs with consolidation motions (or tag along notices) is whether the local federal judge will rule on a motion to remand filed by plaintiffs before the matter is consolidated. Once consolidated, the transferee judge often does not address remand motions for some time and may be more inclined to deny such motions. The decision whether to stay proceedings at the district court pending the MDL decision is highly discretionary.[36]

Plaintiffs, likewise, sometimes file 1407 motions. Plaintiffs may have the same efficiency goals as defendants. Such motions can also result from an ambition to become lead counsel of many cases rather than lead counsel of one case, or to avoid the danger of a defendant settling a rival class action. Of course, either side may be aiming to slow down litigation or avoid particular deadline (particularly because such motions can be made at any time) or to avoid an unfavorable forum. Notably the MDL Panel has sometimes denied motions when it appeared to serve an ulterior motive of a party.[37] Like remand fights, a plaintiff may seek to stay action at the district court to prevent a ruling on a motion to dismiss or summary judgment motion.

Conclusion: The transfer of multidistrict civil actions to a single transferee district for pretrial proceedings not only saves the judiciary financial resources, it also allows the parties to these actions to have their claims adjudicated fairly and more efficiently. However, parties should react quickly when such a motion is made and should carefully examine all of the strategy implications, as well as all of the arguments that may be made to the MDL Panel.

End Notes

[1] Pub.L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[2] Robert A. Cahn, A Look at the Judicial MDL Panel on Multidistrict Litigation, 72 F.R.D. 211, 212-13 (1976).

[3] Id.

[4] Id. at 213.

[5] 28 U.S.C. § 1407(c) (1976).

[6] 28 U.S.C. § 1407(a) (1976).

[7] The MDL Panel does have the power (not often used) to separate

and withhold particular claims from transfer, but it will not separate issues – only claims. In re Vioxx Prods. Liability Litig., 360 F. Supp.2d 1352 (J.P.M.L. 2005); In re Uranium Indus. Antitrust Litig., 466 F. Supp. 958 (J.P.M.L. 1979); but see, In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liability Litig., 610 F. Supp. 1099 (J.P.M.L. 1985) (refusing to sever issues).

[8] E.g., In re Galveston, Texas Oil Well Platform Disaster Litig., 322 F. Supp. 1405 (J.P.M.D.L. 1971) (transfer denied when all plaintiffs opposed); compare In re Asbestos & Asbestos Insulation Material Products Liability Litig., 431 F. Supp. 906 (J.P.M.L. 1977) (stating in dictum that it has power to transfer even if all parties oppose).

[9] 199 F.R.D. 425 (2001).

[10] In re General Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1546-47 (J.P.M.L. 1988); In re Mut. Fund Sales Antitrust Litig., 361 F. Supp. 638, 640 (J.P.M.L. 1973).

[11] 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3863 (3d ed. 1998) [Wright].

[12] See, e.g., In re Distribution of Scotch Whiskey, 299 F. Supp. 543 (J.P.M.L. 1969).

[13] In re Westinghouse Elec. Corp. Uranium Contracts Litig., 436 F. Supp. 990, 995 (J.P.M.L. 1977) (refusing transfer because common questions did not "predominate"); In Re Luminex Intern. Inc. Products Liability Litig., 434 F. Supp. 668, 669 (J.P.M.L. 1977).

[14] In re Environmental Protection Agency Pesticide Listing Confidentiality Litig, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (denying motion to transfer nine actions, "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation"); In re U.S. Navy Variable Reenlistment Bonus Litig., 407 F. Supp. 1405, 1406-07 (J.P.M.L. 1976) (denying transfer where questions of law, rather than questions of fact, predominated); In re Pension Fund Class Action Litig., 360 F. Supp. 1400 (J.P.M.L. 1973) (transfer of five actions denied where actions challenged the constitutionality of statutes stating "the actions in this litigation involve predominantly, if not entirely, questions of law . . .").

[15] Wright, at § 3863.

[16] 28 U.S.C. § 1407(a) (1976).

[17] E.g., In re Food Lion, Inc., 73 F.3d 528, 532 (4th Cir. 1996); In re Haven Indus., Inc. Sec. Litig., 415 F. Supp. 396, 398 (J.P.M.L. 1976).

[18] Wright at § 3863; see also, In re Four Seasons Securities Law Litig., 361 F. Supp. 636, 637-38 (J.P.M.L. 1973) (stating that transfer of entire action is necessary even though partially unrelated to avoid duplication of discovery and because Judge's expertise will promote the most efficient use of judicial resources).

[19] Cahn at 214.

[20] Citing In re Scotch Whiskey, 299 F. Supp. 543 (J.P.M.L. 1973); see also, In re Magic Marker Secs. Litig., 470 F. Supp. 862, 865 (J.P.M.L. 1979) ("strong" burden); In re Garrison Diversion Unit Litig., 458 F. Supp. 223, 225 (J.P.M.L. 1978) ("heavy" burden).

[21] Wright at § 3863, p. 540 - 41 (string citing 21 cases).

[22] In re Interstate Medicaid Patients at Good Samaritan Nursing Center, 415 F. Supp. 389 (J.P.M.L. 1976) (refusing to consolidate two actions); In re Garrison Diversion Unit Litig., 458 F. Supp. 223 (J.P.M.L. 1978) (refusing to consolidate two actions where common questions were not sufficiently complex and were alternatives to transfer such as party cooperation in discovery); In re Buffalo Valley Gas Authority Litig., 429 F. Supp. 1029, 1032 (J.P.M.L. 1977) (denying motion to transfer three cases).

[23] See, e.g., In Re Sears, Roebuck & Co. Employment Practices, 487 F. Supp. at 1363 (five cases); In Re Garrison Diversion Unit Litig. 458 F. Supp. 223, 224 (J.P.M.L. 1978).

[24] In re Air Crash Disaster at Anchorage, Alaska on November 27, 1970, 342 F. Supp. 755 (J.P.M.L. 1972).

[25] 28 U.S.C. § 1407(a); see also, In re New York City Mun. Sec. Litig., 572 F.2d 49, 51 (2d Cir. 1978); In re Air Crash at Schenley Golf Course, Pittsburgh, Pennsylvania on August 21, 1977, 509 F. Supp. 252 (J.P.M.L 1979); but see, In re Resource Exploration Inc. Secs. Litig., 483 F. Supp. 817 (J.P.M.L. 1980) (taking advance of advanced discovery status).

[26] E.g., In re Yarn Processing Patent Validity Litig., 341 F. Supp. 376 (J.P.M.L. 1972).

[27] Wright at § 3864.

[28] See In re Westinghouse Electric Corp. Uranium Contracts Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975).

[29] See, e.g., In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 990 F. Supp. 834 (J.P.M.L. 1998); see also, In re Silicone Gel Breast Implants Prods. Lia. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

[30] Cahn, supra note 1, at 218.

[31] 2007 WL 846633 (D. Minn. 2007).

[32] In re Zyprexa Products Liability Litig., 2004 WL 2812095 (E.D.N.Y. 2004).

[33] Id. at 1.

[34] In re Multidistrict Private Civil Treble Damage Antitrust Litig.. Involving IBM, 302 F. Supp. 796 (J.P.M.L. 1969) (discovery stayed on individual issues); compare In re Crash Off Long Island, New York on July 17, 1996, 965 F. Supp. 5 (S.D.N.Y. 1997) (refusing to order discovery only on common issues but not ordering individual discovery).

[35] There remains considerable debate over which Circuit's law should be applied to issues after a transfer. Some courts hold that the transferor distict's law should apply to substantive issues and the transferee's law to procedural issues. E.g., In re MTBE Products Liability Litig., 241 F.R.D. 185 (S.D.N.Y. 2007) (discussing conflicting cases).

[36] Boudin v. ATM Holdings, Inc., 2007 WL 1841066 (S.D. Ala.).

[37] In re Motion Picture "Standard Accessories" & "PreVues" Antitrust Litig., 339 F. Supp. 1278 (J.P.M.L. 1972) (denying transfer when sole ground appeared to be dissatisfaction with pretrial decisions in original courts).