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MULTIDISTRICT LITIGATION

The U.S. Judicial Panel on Multidistrict Litigation's increasingly strict prerequisites for consolidation requires that defendants pay careful attention to the question of whether and when to move for MDL coordination, attorney Daniel Pariser says in this BNA Insight. The ideal window for seeking MDL treatment ''may be brief, so litigants have to be ready to quickly seize the right opportunity for filing a transfer motion when it presents itself,'' the author says.

Requesting a Multidistrict Litigation: Timing Is Everything

By Daniel Pariser

Defendants facing product liability lawsuits must confront a key issue that can fundamentally change how a litigation develops: whether to seek coordination of federal cases in a multidistrict litigation. The answer to this question is not formulaic, but requires a careful, litigation-specific strategic judgment.

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Timing—when during the lifecycle of a litigation to file an MDL transfer motion—is a particularly important aspect of this determination. The benefits and risks inherent in seeking an MDL depend heavily on when a transfer motion is filed. And timing can make or break an MDL transfer application.

In this article, we discuss the considerations that should play into a defendant's decision whether—and critically when—to move for MDL coordination. Often the benefits of seeking an MDL outweigh the risks. But to realize these benefits, and to win an MDL transfer motion, defendants must remain vigilant for the right opportunity to seek transfer.

Should a Defendant Seek an MDL?

The multidistrict litigation statute, 28 U.S.C. § 1407, has for decades permitted the coordination of federal actions in a single district court for coordinated or consolidated pretrial proceedings. Because of their tendency to involve overlapping scientific, medical, and liability issues, product liability suits are among the types of litigations frequently coordinated in MDLs. The decision about whether to seek an MDL has historically been made by plaintiffs' lawyers. But this has been changing. In recent years, defendants in product liability and other complex litigation have increasingly taken the proactive step of filing a transfer motion before the Judicial Panel on Multidistrict Litigation (the ''JPML'' or the ''Panel'') seeking to create an MDL.

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From the defense perspective, there are several potential advantages to MDL coordination. The first and most obvious is that MDL treatment can significantly reduce defendants' litigation costs and burden on employees by allowing for more efficient, coordinated discovery. There are clear efficiencies gained by avoiding repetitive litigation in federal district courts around the country—for example, conflicting document discovery obligations, multiple depositions of the same company employees, and repetitive discovery of experts common to the cases.[1] Although state court cases cannot be included in an MDL, centralized management of federal cases can help foster coordination and reduce duplication in state court cases too. The Panel and transferee courts alike have frequently lauded efforts at state-federal court coordination which help extend the benefits of MDL treatment to state court litigation.[2]

MDL coordination can present other potential advantages as well. Multidistrict litigation is not just a way to centralize or aggregate claims, but is a tool to help ensure the most effective oversight of and convenient forum for a litigation. For example, many judges assigned MDLs have significant experience managing complex litigation, which may prove advantageous.[3] In addition, defendants should be mindful of choice of law considerations. An MDL will apply the same state law in a diversity case as would a transferor court.[4] An MDL transferee court, however, will generally apply the federal law of the circuit in which it sits, which may be different than the transferor court.[5] The place where an MDL is assigned, as much as the fact of coordination itself, is therefore crucial.

Another significant advantage to MDL treatment is its effect on removal of cases to federal court. Many plaintiffs in mass tort product liability litigation believe state court to be a more favorable place to litigate, while defendants often prefer federal courts, which typically apply more rigorous *Daubert* gatekeeping standards for expert testimony. This frequently leads to battles about removal jurisdiction, which different federal judges around the country may decide differently.

But MDL courts frequently face the same jurisdictional tactics by plaintiffs across the country seeking to avoid federal jurisdiction. As a result, they can often see the ''big picture'' and are better situated to rule on remand motions consistently.[6] For example, recently in the *Propecia* litigation, plaintiffs filed a case in Missouri which joined 3 non-diverse plaintiffs with 50-plus fully diverse plaintiffs in an apparent attempt to defeat federal jurisdiction. After transfer to an MDL in the Eastern District of New York, the transferee court severed the few non-diverse plaintiffs' claims, and denied remand of the other plaintiffs after discussing how other MDL courts have dealt with this same ''fraudulent misjoinder'' tactic.[7]

The potential to facilitate a global settlement is another reason that, in certain circumstances, a defendant may favor an MDL.[8] MDL judges frequently take ownership of a national litigation in a way that individual transferor judges are not equipped to do. Having a single judicial officer with a broad mandate to efficiently manage a nationwide litigation can help coordinate and facilitate global settlement efforts.

MDL treatment is not, however, without pitfalls. One complicating factor—and potential risk of asking for MDL treatment—is the difficulty in determining exactly where an MDL will land. The Panel cites a variety of reasons for choosing a particular court to be the locus of coordinated actions, including where most of the cases are venued when the transfer motion is filed, where the most procedurally advanced or first filed cases are located, the location of the parties, the docket conditions of the transferee court, and the capabilities and experience of the potential transferee judges.[9]

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[1] *See, e.g., In re Yasmin, Yaz (Drospirenone) Mktg. Sales Practices and Prods. Liab. Litig.*, MDL 2100, 655 F. Supp. 2d 1343, 1344 (J.P.M.L. 2009) (''Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.''); Interview with John G. Heyburn, ''Panel Promotes Just and Efficient Conduct of Litigation,'' *The Third Branch*, Vol. 42, No. 2 (Feb. 2010) (''For the involved litigants, a single forum means eliminating duplicative discovery and multiple motions on the same issue. It also eliminates the possibility of inconsistent rulings, and reduces the time and expense of the litigation.''), *available* at http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20February-2010-Heyburn%20Interview.pdf.

[2] *See* Heyburn, *supra* note 1 at 2 (''The location of the transferee court can be significant, where [there exists] . . . ongoing state court litigation involving the same parties and subject matter''); *In re Unumprovident Corp. Sec, and Derivative & ''ERISA'' Litig.*, 280 F. Supp. 2d 1377 (J.P.M.L. 2003) (''centralization [in Tennessee] will facilitate coordination between the federal court actions and related state court litigation pending in Tennessee.'').

[3] *See* Judge John G. Heyburn, Remarks at ACI Complex Litigation Conference ''Reflections on the Panel's Work,'' (Dec. 2010) (''the Defense bar now tends to view the MDL process as advantageous'' because in part it ''places litigation under the firm guidance of an experienced judge.'').

[4] *See Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010) (''When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred. . . .'').

[5] *See. e.g., In re Gen. Am. Life Ins. Co.*, 391 F.3d 907, 911 (8th Cir. 2004) (''When a transferee court receives a case from an MDL Panel, the transferee court applies the law of the circuit in which it is located to issues of federal law.'').

[6] *See In re Diet Drugs Prods. Liab. Litig.,* MDL 1203, Civil No. 99-20593 (E.D. Pa. Sept. 18, 2003) (transferee court noting that it ''developed a broader perspective than is usually available to individual transferor courts in dealing with widespread efforts [of fraudulent joinder]''); *In re Wilson*, 451 F.3d 161, 167 (3rd Cir. 2006) (same).

[7] *See Keune v. Merck & Co.*, No. 12-CV-2049-JG-VVP (E.D.N.Y. May 17, 2013).

[8] *See* Heyburn, *supra* note 1 (''Because the Section 1407 process gathers all the involved parties in a single forum, it often enhances or hastens the prospects of a global settlement.'').

[9] *See, e.g., In re NuvaRing Prods. Liab. Litig.*, 572 F. Supp. 2d 1382, 1383 (J.P.M.L. 2008) (selecting court where 8 of 14 actions were pending including the ''first-filed action'' with the judge ''who has familiarized himself with the litigation''); *In re Avandia Mktg. Sales Practices and Prods. Liab. Litig.*, 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007) (selecting transferring court because ''[defendant's] principal place of business is located in that district, and thus many of the witnesses and documents relevant to the litigation are likely to be found there.''). *See also* Daniel A. Richards, ''An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge,'' 78 Fordham L. Rev. 311, 333 (2009) (concluding that from 2003 to 2008 in products liability actions, the most commonly cited factors are location of actions, preference of the parties, the location of the parties, and the docket conditions of the transferee court).

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Yet these factors often point in different directions, and it is hard to tell in advance of a ruling which considerations will prove dispositive in any given case. For example, sometimes the Panel picks a transferee court because it is particularly experienced in MDL matters—but other times selects a transferee court precisely because it has *not* had its fair share of MDLs.[10] The unpredictable nature of this determination injects substantial uncertainty into the MDL transfer process.

Another risk is that an MDL could raise the public profile of the litigation. In addition to unwelcome publicity that might be generated, an MDL has the potential to create an easy ''parking spot'' for cases brought by plaintiffs' lawyers who might not otherwise have wanted to invest the time and resources required for individual litigation. These factors potentially can increase the number of lawsuits in a litigation, which is of obvious concern to defendants.

Finally, there is the risk of ''putting all of your eggs in one basket.'' A defendant may be reluctant to invest in a single forum with the power to rule on key issues or to lead settlement efforts. In some cases, defendants may prefer to wait to evaluate the scope of litigation and seek dismissal of lone claims in various federal courts without signaling the existence of a major litigation to a broader audience.

There is no one-size-fits-all answer to whether an MDL makes sense for a particular litigation. But as the filing trends show—particularly in a litigation where it is apparent that the scope and number of cases is such that there will be a significant-sized litigation with or without an MDL—the upsides of seeking an MDL will often outweigh the risks.

When Should a Defendant Seek an MDL?

A crucial question that must be considered when assessing the pros and cons of asking for an MDL is *when* in the lifecycle of a litigation to file an MDL transfer motion.

There are powerful reasons for a defendant to seek an MDL very early in a litigation. The economic efficiencies associated with coordinated discovery are best realized if an MDL is created before discovery starts in earnest. Having an MDL early also helps ensure consistency in removal rulings beginning early in the litigation, as discussed above. The earlier an MDL is established, moreover, the greater the likelihood of productive coordination between federal and state litigations. If a defendant waits too long, state court proceedings may advance procedurally beyond the MDL and make state-federal coordination more difficult.

At the same time, moving for transfer too early can have tactical disadvantages. A defendant may not know whether a nascent litigation will get ''traction'' among members of the plaintiffs' bar, and may prefer to wait to see its likely scope before risking the creation of a high-profile MDL. Likewise, uncertainty concerning where an MDL will be assigned may be greater early in a litigation. Waiting allows a defendant to gauge better which federal district courts develop expertise or interest in handling a litigation. This may provide insight into where a defendant should ask for an MDL to be assigned, and potentially can provide greater certainty as to which judges are likely to receive an MDL assignment.

Another important timing question is determining when an MDL motion has the greatest chance of success. The Panel is becoming increasingly selective in granting MDL applications. As Judge Heyburn noted in 2012, ''[f]or many years, the panel regularly granted more than 75 percent of all 1407 motions. During the last two years, that percentage has dropped to about 55 percent.''[11] This trend continues. In 2012, the Panel's acceptance rate was 62 percent.[12] The statistics from 2013 are not yet fully available—but, for example, during the most recent July 2013 hearing, the Panel only accepted 5 of 17 applications for transfer.[13]

The tougher scrutiny that the currently constituted Panel applies to MDL transfer motions makes the timing of the transfer application all the more important. If the motion is filed too early, the Panel may reject it on the basis that there is an insufficient ''critical mass'' of litigation to justify coordinated treatment. As the Panel has stated, ''where only a minimal number of actions are involved, the moving party generally bears a heavier burden of demonstrating the need for centralization.''[14]

The factors the Panel considers in determining whether such a ''critical mass'' exists includes not just the sheer number of cases, but the number of distinct plaintiffs' counsel involved, the number of federal districts in which cases are pending, and the likelihood for future cases to be filed.[15]

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[10] *Compare In re Pradaxa (dabigatran etexilate) Prods. Liab. Litig.*, 883 F. Supp. 2d 1355, 1356 (J.P.M.L. 2012) (selecting ''an experienced MDL jurist'' who presides over ''another large pharmaceutical products liability litigation''); *with In re Serzone Prods. Liab. Litig.*, 217 F. Supp. 2d 1372, 1373 (J.P.M.L. 2002) (selecting transferee district ''that is not currently overtaxed with other multidistrict dockets''). *See also* Mark Herrmann and David B. Allen, Drug and Device Product Liability Litigation, at 195 (Oxford University Press 2012) (discussing the Panel's various rationales for selecting a transferee forum).

[11] Hon. John G. Heyburn and Francis E. McGovern, ''Evaluating and Improving the MDL Process,'' Litigation, Vol. 3 No. 3, at 30 (Spring 2012).

[12] *See* Calendar Year Statistics of the United States Judicial Panel on Multidistrict Litigation, *available* at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2012.pdf (Last visited September 2, 2013).

[13] *See, e.g., In re: Kashi Company Marketing and Sales Practices Litig.*, MDL 2456 (J.P.M.L. Aug. 6, 2013) (denying transfer of four actions pending in two districts because of small number of actions and lack of complexity in the cases); *In re: Fresh Dairy Products Antitrust Litig.* (No II), MDL 2463 (J.P.M.L. Aug. 6, 2013) (''all of the factors weighing against centralization that we discussed in our prior decision in this litigation still exist . . .[because] as a practical matter, this litigation still only consists of two actions.'').

[14] *In re Transocean Ltd. Sec. Litig.*, 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010); *In re Depo-Provera Prods. Liab. Litig.*, 499 F. Supp. 2d 1348, 1348 (J.P.M.L. 2007) (denying coordination in part because the motion ''involves only three actions''); *In re Highway Accident in Buffalo County, Nebraska*, 305 F. Supp. 2d 1359, 1359 (J.P.M.L. 2004) (denying coordination in part because the ''minimal number of actions pending'').

[15] *See In re Lipitor (Atorvastatin Calcium) Mktg, Sales Practices and Prods. Liab. Litig.*, Order Denying Transfer, MDL 2459 (J.P.M.L. Aug. 8, 2013) (denying transfer because ''almost half of the actions are pending in a single district,'' and ''many of the actions involve common plaintiffs' counsel''); *In re Chilean Nitrate Prods Liab. Litig.*, 787 F. Supp. 2d 1347, 1347 (J.P.M.L. 2011) (denying transfer because ''plain-

Yet if a defendant waits too long to file such a motion, that can backfire too. The Panel has also denied applications on the basis that some or all of the cases are so procedurally advanced that core MDL efficiencies will not be realized. For example, in the *Reglan* litigation, the Panel denied transfer in part because a ''significant amount of common discovery has already taken place.''[16] Likewise the existence of cases that are trial-set can defeat MDL transfer or result in ''carve-outs'' from an MDL.[17]

But moving too early is less risky than waiting too long. That is because a decision to seek an early MDL does not foreclose a later opportunity to renew a transfer motion if the litigation continues to grow. There is precedent for the Panel re-visiting denials of transfer due to changed circumstances. For example, in litigation concerning the anti-platelet drug Plavix, the Panel initially rejected coordination due in part to the relatively few actions pending, involving a limited number of plaintiffs' counsel.[18]

The Panel granted an MDL when defendants sought coordination a year later after the litigation had grown.[19] While the Panel has cautioned that it will revisit transfer denials ''only rarely'' when ''a significant change in litigation has occurred,'' other precedent for granting a second MDL transfer motion also exists.[20] In contrast, once the Panel deems a litigation too mature to warrant transfer, litigants cannot turn back the clock.

Weighing all of these countervailing timing concerns can be a delicate balance. In picking the best moment to file an MDL application, there are accordingly several questions defendants should ask themselves. Are there likely to be a significant number of cases filed regardless of whether an MDL is created? Have defendants' removals been handled inconsistently or is there the risk of such inconsistent treatment? Is there significant litigation in state court cases, and if so how quickly is it moving into discovery? How many cases are already pending in federal courts and what procedural posture are they in? Which judges have been assigned to handle the federal cases; which of those judges have the most cases; and which of those cases are the most procedurally advanced? As a product liability litigation unfolds, defendants need to carefully assess and reassess the optimum time to move for MDL transfer in light of the answers to these questions.

Conclusion

Defendants need to carefully consider from the beginning of a litigation whether to seek multidistrict coordination of federal actions.

The ideal window for seeking MDL treatment may be brief, so litigants have to be ready to seize quickly the right opportunity for filing a transfer motion when it presents itself.

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tiffs in both actions are represented by one law firm. . . . [i]n these circumstances, information cooperation among the involved attorneys is both practicable and preferable.''); *Nitrate Prods Liab. Litig.*, 787 F. Supp. 2d 1347, 1347 (J.P.M.L. 2011) (denying transfer because ''plaintiffs in both actions are represented by one law firm . . . [i]n these circumstances, information cooperation among the involved attorneys is both practicable and preferable.''). *See also* Heyburn, *supra* note 11, at 28-29 (describing the most likely reasons for denial including a ''small number of actions, disparity of filing dates, multiple statewide class actions, a relative lack of complexity, different and varying defendants, and even the motivations of the movant.'').

[16] *In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp. 2d 1380, 1380 (J.P.M.L. 2009); *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1378 (J.P.M.L. 2010) (denying centralization of 102 personal injury cases in part because the cases were at ''widely varying procedural stages.''); *see also In re Zimmer, Inc., Centralign Hip Prosthesis Prods. Liab. Litig.*, 366 F. Supp. 2d 1384, 1384 (J.P.M.L. 2005) (discussing prior denial of centralization in the same cases in part because ''pretrial proceedings had been ongoing . . . for over two years.''); *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378, 1378 (J.P.M.L. 2011) (denying coordination in part because ''the parties have served and responded to other written discovery; and most, if not all, depositions of the plaintiffs have been completed.'')

[17] *See In re the Upjohn Co. Antibiotic ''Cleocin'' Prods. Liab. Litig.*, 450 F. Supp. 1168, 1170 (J.P.M.L. 1978) (ordering centralization but denying transfer of three actions where discovery had already been completed).

[18] *See In re Plavix Marketing, Sales Practices and Prods. Liab. Litig.* (No. II), 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). The author and his firm represent defendants in the Plavix litigation.

[19] *Id.*

[20] *Id. See also In re: Glaceau VitaminWater Mktg. & Sales Practices Litig. (No. II)*, 764 F. Supp. 2d 1349, 1350 (J.P.M.L. 2011) (centralizing three actions after prior denial of centralization of two actions, where it ''seem[ed] likely that additional related actions could be filed''); *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig. (No. II)*, 381 F. Supp. 2d 1380, 1381 (J.P.M.L. 2005) (centralizing 15 actions after prior denial of centralization of seven actions, citing the fact that the litigation had ''grown considerably'').

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