
**MEALEY'S PROFESSIONAL DEVELOPMENT
TELECONFERENCE SERIES**

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**UNDERSTANDING HOW A MULTIDISTRICT LITIGATION
(MDL) WORKS**



Environmental Law and Toxic Torts
Public Water Cleanups
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SPEAKER

I. Governing Law of MDLs – the Statute, 28 U.S.C. § 1407

a. If different civil actions are pending in different federal judicial districts, they may be eligible for consolidation as a multidistrict litigation if they involve common questions of fact, and if the Judicial Panel on Multidistrict Litigation (“JDMDL”) determines that the transfers will be for the convenience of parties and witnesses and will promote the just and efficient conduct of the actions. The cases may be transferred to any district, whether or not that district is one in which the cases could have been brought in the first instance.

§ 1407 Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each 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: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party

claim and remand any of such claims before the remainder of the action is remanded.

b. The transfer may be initiated upon motion by any of the parties involved or by the JPMDL on its own initiative. There must be an opportunity to oppose the transfer, and that may include a hearing where evidence can be offered (though the JPMDL rules discourage factfinding hearings), which will result in findings of fact and conclusions of law by the JPMDL.

§ 1407 Multidistrict litigation

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(c) Proceedings for the transfer of an action under this section may be initiated by—

- (i) the judicial panel on multidistrict litigation upon its own initiative, or
- (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(Emphasis added).

c. The JPMDL consists of seven circuit and district judges designated by the Chief Justice of the United States. 28 U.S.C. § 1407 (d). It is based in Washington, D.C. The panel's transfer orders may not be reviewed except by extraordinary writ. § 1407 (e).

Practice Notes

The statute is silent on what procedures to follow to coordinate related cases when some are pending in state court and some are pending in federal court. See Moore's Federal Practice § 112.02[1][a]. Federal and state courts have been forced to devise their own means of coordinating efforts to avoid duplicative discovery and rulings from one court that interfere with another. Options include judicial advisory committees and employment of a special master. See Manual for Complex Litigation (Fourth) § 20.31.

Note that while the statute limits consolidation to cases with common questions of “fact,” the JPMDL construes this broadly and common dispositive questions of law may also be considered. The questions of fact or law need not be identical, but must only involve “common” questions. The convenience of the parties and witnesses is of less importance than the other factors.

In one early case, In re: East of the Rockies Concrete Pipe Antitrust Cases, 302 F. Supp. 244 (JPDMDL 1969), Judge Weigel, in a concurring opinion, set forth a list of questions courts have considered in deciding whether to consolidate in an MDL. These were:

- How many common questions of fact are there?
- What is their nature?
- How many cases are presently and prospectively involved?
- What is the geographical location of the districts in which the cases pend?
- If it is anticipated that further cases will be filed, in what districts?
- Who are the principal witnesses in the cases and where do they reside?
- What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer?
- Will transfer result in a substantial saving of duplicative work?
- Will transfer usefully avoid conflicting rulings in the pretrial proceedings of the cases involved?
- Can many of the advantages of transfer be worked out by cooperation among counsel without transfer?
- Are pretrial proceedings already far along in any one or more of the cases?
- Will transfer hasten or delay progress in the cases?
- What is the availability of a judge or judges in the proposed transferee court or courts?
- Will the advantages of transfer overcome the normal desirability of having the same judge who conducts the trial also conduct pretrial proceedings?
- Will transfer impede or promote the prospect of settlements?
- Will transfer serve any ulterior motive of any party or parties, such as forum-shopping?
- If class actions are involved, will transfer make for complexity or for simplification?

- Will transfer unjustly delay or deny any party's right to provisional remedies such as injunctive relief?
- What is the status and possible effect of any appeals pending in any of the cases?
- Will transfer operate to eliminate or avoid an undesirable multiplicity of appeals on similar issues?

Efficient Resolution and use of Prior Depositions

Efficient resolution of the cases is of great importance, particularly if coordination will help to prevent redundant discovery. For example, in In re: MTBE Products Litigation, MDL 1358 (Scheidlin, J.), the issue arose as to whether depositions from prior, similar litigations could be used in the instant case. MTBE lawsuits involving similar subject matter, especially on the question of oil company liability for producing a defective product (when it added MTBE to gasoline despite its foul taste and odor and propensity to pollute further and more persistently than gasoline) had taken place not only in far-flung state courts, but also in a prior incarnation of the federal MDL before Judge Scheindlin.

While the issues in the new MDL were very similar to the earlier state cases and the prior MTBE federal MDL, many of the parties in the instant case were not present to examine or cross-examine in the earlier actions. They argued that prior depositions could not be used against them for that reason. Plaintiffs argued that the whole point of the MDL was to promote efficiency. Many of the depositions taken in the earlier litigations were directly applicable to the litigation in the new MDL. For example, oil company witnesses testified in the earlier cases about warnings they gave to their companies not to put MTBE in gasoline as it would cause widespread contamination of groundwater. Simply repeating these depositions would have been a waste of time and money.

One possible procedure would have been to put the old deposition transcript in front of the witness, have him or her affirm it to be his/her sworn testimony from the earlier case, and then allow additional questions or cross-examination. In many instances, this, too, would have been a waste of time and money as in many instances further questioning was not necessary.

Judge Scheindlin decided that whatever depositions plaintiffs identified for use in the new MDL would be usable in the new MDL as though they had been taken in the new cases. She referred the issue of procedures to implement this to a Special Master for discovery, and upon briefing and deliberation he ruled – and the Court “so ordered,” as follows:

- Defendants were put on notice that plaintiffs intend to offer all prior depositions against them;

- The parties were not permitted to object to depositions from the prior litigations being used against them simply because the depositions were taken in another litigation. All other objections remained available, as they would in any case;
- Any party was allowed to re-open the prior depositions without making an application for the purpose of supplementing the prior questioning. However, repetitions of prior questions were not permitted.

Attachment A hereto, Case Management Order #6, at pages 3-4 (setting forth the deposition procedures).

The MTBE court's order well served one primary purpose of an MDL, which is to promote efficient resolution of cases. New defendants who had not been present for earlier questioning were protected by allowing them to re-open the deposition of any witness to serve a legitimate need to ask additional, but not merely repetitive, questions.

II. **Rules of Procedure of the JPMDL – the Main Points**

a. Any attorney admitted in any federal district court may practice before the JPMDL. When the case is transferred, any attorney may continue to represent his client in the transferee district, and there is express provision that local counsel is not required. Panel Rule 1.4.

b. A transfer may be ordered after a motion with notice to all affected parties. Panel Rule 7.2. But the JPMDL may also act on its own, by issuing a Show Cause Order why the case should not be transferred, and permitting the parties to respond to it before the transfer order is issued. Panel Rule 7.3.

The procedure changes somewhat when an MDL already exists to which another case or cases have been transferred. A “tag-along action” is defined as “a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407.” Panel Rule 1.1. When the case is a tag-along, the Panel may simply issue a transfer order, on the same basis as its prior order(s). Panel Rule 7.4 (a). Parties served with the order may object to it within fifteen days by notice of opposition, and within fifteen days of that must file a motion to vacate the conditional transfer order along with a brief. Panel Rules 7.4 (c), (d).

There are several additional, miscellaneous provisions in the Rules for tag-alongs:

RULE 7.5: MISCELLANEOUS PROVISIONS CONCERNING “TAG-ALONG ACTIONS”

(a) Potential “tag-along actions” filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with local rules for the assignment of related actions.

(b) Upon learning of the pendency of a potential “tag-along action” and having reasonable anticipation of opposition to transfer of that action, the Panel may direct the Clerk of the Panel to file a show cause order, in accordance with Rule 7.3 of these Rules, instead of a conditional transfer order.

(c) Failure to serve one or more of the defendants in a potential “tag-along action” with the complaint and summons as required by Rule 4 of the Federal Rules of Civil Procedure does not preclude transfer of such action under Section 1407. Such failure, however, may be submitted by such a defendant as a basis for opposing the proposed transfer if prejudice can be shown. The inability of the Clerk of the Panel to serve a conditional transfer order on all plaintiffs or defendants or their counsel shall not render the transfer of the action void but can be submitted by such a party as a basis for moving to remand as to such party if prejudice can be shown.

(d) A civil action apparently involving common questions of fact with actions under consideration by the Panel for transfer under Section 1407, which was either not included in a motion under Rule 7.2 of these Rules, or was included in such a motion that was filed too late to be included in the initial hearing session, will ordinarily be treated by the Panel as a potential “tag-along action.”

(e) Any party or counsel in actions previously transferred under Section 1407 or under consideration by the Panel for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any potential “tag-along actions” in which that party is also named or in which that counsel appears.

c. When pre-trial proceedings, including discovery and dispositive motions, have been completed, the JPMDL must remand the action to the transferor court for trial. Panel Rule 7.6 (b). Some courts made efforts under the general transfer rule, 28 U.S.C. § 1404 (a), to transfer the cases to themselves for trial, and, in fact, the JPMDL used to have a rule memorializing the self-assignment power. The Supreme Court rejected the old rule and efforts at self-assignment under 1404, relying on the plain language of the statute:

In sum, none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). See 28 U.S.C. § 1407(f). Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that § 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress.

Lexecon, Inc. v. Milberg Weiss, 523 U.S. 26, 40 (1998) (emphasis added).¹

Obviously, if the MDL court has dismissed a case on summary judgment or otherwise, no remand is required. Panel Rule 7.6 (a). A remand may be made on the initiative of the transferee court, on the Panel's own initiative, or by motion of any party. Panel Rule 7.6 (c). However, there is a clearly stated reluctance to remand if the transferee court has not suggested it:

RULE 7.6: TERMINATION AND REMAND

In the absence of unusual circumstances—

* * *

(d) The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court. If remand is sought by motion of a party, the motion shall be accompanied by:

- (i) an affidavit reciting
 - (A) whether the movant has requested a suggestion of remand from the transferee district court, how the court responded to any request, and, if no such request was made, why;
 - (B) whether all common discovery and other pretrial proceedings have been completed in the action sought to be remanded, and if not, what remains to be done; and
 - (C) whether all orders of the transferee district court have been satisfactorily complied with, and if not, what remains to be done; and
- (ii) a copy of the transferee district court's final pretrial order, where such order has been entered.

¹ There are efforts to change the result of the Lexecon case legislatively. See the following article, which appears on the website of The Federal Judiciary: <http://www.uscourts.gov/newsroom/lexecon.html>. In it, Judge Hodges advocates a legislative change giving the MDL judge the discretion to try the cases or remand them to the transferor courts for trial.

When the Panel is prepared to remand because of advice from the transferee judge or for its own reasons, it issues a conditional remand order, and parties may give notice and then move to vacate it, in a procedure analogous to that described in the tag-along discussion above. Panel Rule 7.6 (f).

III. **Defendants' Removal of State Actions and Consolidation in the MTBE MDL**

In the second incarnation of the MTBE litigation that is MDL 1358, plaintiffs' counsel, representing primarily municipal drinking water authorities, filed lawsuits against the oil industry on a products liability theory and other theories in state courts across the country. The claims asserted in each case were purely state law claims. In each case at least one non-diverse defendant had been named, making federal diversity jurisdiction unavailable.

Defendants removed all of the cases to federal court on the assertion that the oil companies were "federal officers" when they put MTBE in gasoline, because some fourteen years after they first started adding MTBE to gasoline a new federal legal duty required the use of some oxygenate, one of which could be MTBE, and, in fact, the oil companies used MTBE. Having removed the cases to the various federal district courts in the states where the actions were pending, defendants then notified the JPMDL that these cases were related by common factual subject matter (as well as legal) to the earlier MTBE MDL. The JPMDL transferred the cases to Judge Scheindlin in New York.

Plaintiffs moved to remand the cases to the state courts. In the first jurisdictional decision, the Court approved of the federal officer theory and held that federal jurisdiction was appropriate. In re: MTBE Products Litigation, 342 F. Supp. 2d 147 (S.D.N.Y. 2004) (Scheidlin, J.). This was so based upon jurisdictional allegations that the only way the oil companies could comply with the new federal requirement was by using MTBE, even if discovery later proved up a different set of facts.

When plaintiffs, on a later motion, pointed out that in several states, use of some oxygenate such as MTBE was never legally required, the Court ruled in favor an alternative defense theory. Texaco had gone into bankruptcy in 1989, and the Court held the bankruptcy of one of many oil companies several years earlier conferred federal jurisdiction over the action. In re: MTBE Products Litigation, 341 F. Supp. 2d 386 (S.D.N.Y. 2004) (Scheidlin, J.).

Practice Note

The Panel Rules expressly dictate that during the time when a motion to transfer to an MDL court is pending, the transferor court retains full jurisdiction:

RULE 1.5: EFFECT OF THE PENDENCY OF AN ACTION BEFORE THE PANEL

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective when the transfer or remand order is filed in the office of the clerk of the district court of the transferee district.

Panel Rule 1.5 (emphasis added).

A plaintiff, knowing that there is a transfer request before the JPMDL, may move to remand to state court before the transferor district judge or may wait until the JPMDL has transferred the case. Prudence and judicial economy may favor waiting until the case is before the judge who will be presiding over all the pre-trial proceedings. Legally, however, the motion may be filed before the original federal district court so long as the JPMDL has not issued its transfer order.

In MDL 1358, plaintiffs waited and filed their motions before the transferee judge, allowing one court to render a single, uniform decision on the jurisdiction issue. However, one case that had already been in state court for two years was subsequently listed as a tag-along, and the delay and ongoing state court proceedings were additional powerful reasons for a remand to state court in that case. Plaintiffs in the case made the tactical choice to file the remand motion before the first federal district judge, believing that the facts justified an immediate remand to the state court that had its jurisdiction pulled straight out from under it. The motion was to no avail; the first federal judge exercised his discretion to wait and allow the MDL court to hear the remand motion. In the view of this author, if the transferor courts are aware that an MDL is forming or has formed, they are unlikely to act, and are more likely to defer to their brother or sister judge who will likely end up with the cases.

IV. Pros and Cons of Removing and Consolidating Cases in a Federal MDL

In the recent MTBE cases, plaintiffs filed in state courts across the country, and defendants chose to remove and consolidate in an MDL. Plaintiffs often perceive advantages in state courts, such as less stringent Daubert-like requirements and state court juries. However, while plaintiffs lost their original choice of forum, there are advantages to being in an MDL for both sides. This article noted above the discovery efficiencies possible, for example, where the court entered an order allowing the use of depositions from earlier, similar cases. The efficiencies of litigating a large number of cases in a single court are many and varied. In the MTBE MDL Judge Scheindlin enhanced the efficiencies by appointing a special law clerk for MTBE only, and by appointing a special master for discovery, the costs of both of which are borne by the litigants.

In addition, both defendants and plaintiffs are also well served by a central decisionmaker who can render dispositive decisions on motions. The defendants want their substantive objections to the case ruled on quickly so that they may see the cases dismissed if possible. Counterintuitively, plaintiffs may also seek quick rulings on defense contentions, insofar as resolution of perceived defenses may assist plaintiffs in narrowing discovery and may also assist defense counsel in seeing the wisdom of settlements. And of course early substantive rulings on plaintiffs' legal theories will assist both sides by guiding discovery and reducing uncertainty as to the merits of the litigation.

In the past two and a half years, in the MTBE MDL, Judge Scheindlin has rendered approximately twenty substantive opinions on various issues. Some dealt with jurisdictional issues such as federal officer and bankruptcy, discussed above. Her ruling on defendants' motion to dismiss held that a commingled product market share theory was available to plaintiffs in many states. In re: MTBE Products Litigation, 379 F. Supp. 2d 348 (S.D.N.Y. 2005) (Scheidlin, J.). Quite recently, she rejected two major defense motions, one requesting summary judgment on conflict preemption grounds, and the other requesting summary dismissal based on the political question doctrine. In re: MTBE Products Litigation, -- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 43330 (S.D.N.Y. June 23, 2006) (Scheidlin, J.) (conflict preemption); In re: MTBE Products Litigation, -- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 43331 (S.D.N.Y. June 23, 2006) (political question) (Scheidlin, J.) .

Had the MTBE cases been spread across the country in dozens of state courts, litigants would have dealt with varying substantive decisions from many different state courts. By having the cases joined in a federal MDL, both plaintiffs and defendants gain the efficiency of learning far earlier in the litigation whether the claims and defenses they cling to are worth clinging to. Both plaintiffs and defendants gain from consolidated discovery and the reduction of redundancy. Thus is served the ultimate aim of the courts: to find justice with a minimum of expense to both sides.



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