

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

**IN RE: FRESENIUS GRANUFLO/NATURALYTE
DIALYSATE PRODUCTS LIABILITY LITIGATION**

MDL No. 2428

TRANSFER ORDER

Before the Panel:* Plaintiff State of Louisiana (the State) moves under Panel Rule 7.1 to vacate our order that conditionally transferred the action listed on Schedule A (*State of Louisiana*) to the District of Massachusetts for inclusion in MDL No. 2428. The State alternatively requests that the Panel delay transfer of this action until the transferor court rules on the pending motions for remand. Intervening plaintiff Louisiana Health Service & Indemnity Company d/b/a Blue Cross Blue Shield of Louisiana (BCBS) supports the motion. Defendants Fresenius Medical Care Holdings, Inc., Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., Fresenius USA Marketing, Inc., and ninety-nine Louisiana-based Fresenius clinics (collectively, Fresenius) oppose the motion.

The State and BCBS raise several arguments in opposition to transfer. First, they argue that transfer should not take place unless and until their motions for remand to state court are decided. We have held that a motion for remand alone generally is an insufficient basis to vacate a conditional transfer order.¹ Indeed, upon the first removal of this action in 2014, we transferred it to MDL No. 2428, whereupon the transferee court decided the State's remand motion (in its favor). *See* Transfer Order at 1-2, *In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, MDL No. 2428 (J.P.M.L. Dec. 11, 2014), ECF No. 993 (transferring *State of Louisiana* to MDL No. 2428). Plaintiffs can present their motions for remand to the transferee judge again. *See, e.g., In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001). For this reason too, we decline the State's alternative request to delay transfer until the transferor court rules on the remand motions.

Next, the State and BCBS argue that *State of Louisiana* involves unique factual and legal issues because the gravamen of the action is that Fresenius used false, deceptive, fraudulent, and misleading practices in the promotion, marketing, sale, and administration of its dialysate products and services within the State of Louisiana. The State seeks reimbursement for Medicaid payments

* Judges Lewis A. Kaplan and Catherine D. Perry took no part in the decision of this matter.

¹ Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so.

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for dialysis services and penalties against Fresenius for alleged fraudulent reimbursement submissions. In contrast, most of the actions in the MDL are personal injury actions.

As we discussed when we first transferred this action to MDL No. 2428, this distinction is not an impediment to transfer. See Transfer Order at 2-3, *In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, MDL No. 2428 (J.P.M.L. Dec. 11, 2014), ECF No. 993. See also Transfer Order at 1-2, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 1871 (J.P.M.L. May 20, 2011), ECF No. 572 (rejecting argument by the State of Louisiana that transfer was not warranted because its action was not a personal injury action). The pleadings demonstrate that, while the State may seek different relief, its claims are based on the same underlying facts as the actions already in MDL No. 2428. For instance, the basis of the alleged fraud for which the State seeks reimbursement is that use of GranuFlo Acid Concentrate (GranuFlo) or NaturaLyte Liquid Acid Concentrate (NaturaLyte) during hemodialysis allegedly results in alkalosis in patients, and that Fresenius failed to provide adequate warnings regarding this risk—the very issues being litigated in the MDL. And, *State of Louisiana* now shares additional common questions of fact with the actions in MDL No. 2428 due to the intervention of BCBS, which asserts claims for strict liability, failure to warn, and negligence as the purported subrogee of certain private and public health insurance plans. In any event, as we have observed repeatedly, the existence of unique claims is not a bar to transfer where common factual issues exist. See, e.g., *In re MF Global Holdings Ltd. Inv. Litig.*, 857 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012) (“Where actions share factual questions, the Panel has long held that the presence of disparate legal theories is no reason to deny transfer.”).

The State and BCBS also contend that transfer of *State of Louisiana* will not enhance the convenience of the parties or judicial efficiency because of the disparate procedural postures of this action and the actions in the MDL. Specifically, following the transferee court’s remand of *State of Louisiana* in January 2015, this action proceeded through pretrial discovery and motions practice and was on the cusp of trial when BCBS successfully intervened, prompting this second removal of the action to federal court. The State and BCBS thus insist that no pretrial litigation remains in *State of Louisiana* to be coordinated within the MDL. They also argue that the MDL has reached a mature stage—a global settlement in principle of the personal injury actions was announced on the eve of the first bellwether trial—such that little pretrial discovery or motion practice remains.

Ultimately, these arguments require us to make assumptions about the merits of the claims and the future progress of this action (and those in the MDL) that we are not well-placed to make. It is possible, for instance, that the intervention of BCBS may require additional discovery, even of Fresenius, and that the *State of Louisiana* action still may benefit from coordination with the actions and the pretrial proceedings ongoing in the MDL. In these circumstances, we conclude that the most prudent course is to provide the transferee court the opportunity to assess the status of the litigation in-depth. If the transferee judge determines that the continued inclusion of this action in the MDL is no longer warranted, he may suggest that it be remanded under Section 1407. See *In re ClassicStar Mare Lease Litig.*, 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007).

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Accordingly, after considering the argument of counsel, we find that *State of Louisiana* involves common questions of fact with the actions previously transferred to MDL No. 2428, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of Massachusetts was an appropriate Section 1407 forum for actions sharing factual questions arising out of allegations that plaintiffs suffered injury or death caused by the use of GranuFlo or NaturaLyte during hemodialysis, which allegedly may cause metabolic alkalosis in patients resulting in low blood pressure, hypokalemia, hypoxemia, hypercapnia, cardiac arrhythmia, or cardiopulmonary arrest. *See In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, 935 F. Supp. 2d 1362 (J.P.M.L. 2013). The action listed on Schedule A involves similar allegations that citizens of the State of Louisiana suffered or were placed at an increased risk of suffering metabolic alkalosis as a result of the use of GranuFlo and/or NaturaLyte during hemodialysis (and that, as a result, the State should be reimbursed for what it paid Fresenius for the dialysis treatments). This action likewise involves factual questions relating to whether these products were defectively designed or manufactured; whether Fresenius, the manufacturer of these dialysate products, knew or should have known of the alleged propensity of these products to cause injury; and whether it provided adequate instructions and warnings with these products.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the District of Massachusetts and, with the consent of that court, assigned to the Honorable Douglas P. Woodlock for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

Marjorie O. Rendell
Ellen Segal Huvelle

Charles R. Breyer
R. David Proctor

**IN RE: FRESENIUS GRANUFLO/NATURALYTE
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MDL No. 2428

SCHEDULE A

Middle District of Louisiana

STATE OF LOUISIANA v. FRESENIUS MEDICAL CARE AIRLINE, ET AL.,
C.A. No. 3:16-00151