MDL from Both Sides of the Bench

Remarks at the 2009 Transferee Judges' Conference

By Former Judge Louis C. Bechtle

Before I go any further, I wanted to thank Chief Judge Heyburn II for inviting me here to spend a few moments with you. When Bob Cahn called and conveyed the invitation to me . . . . he said that I was being asked in order to comment from the vantage point of a transferee judge and/or a member of the panel making a presentation from the other side of the bench. . . . and that is where I will spend a few minutes this afternoon to share a few thoughts that come from that vantage point.

I was appointed to the district court in 1972 and served in the Eastern District of Pennsylvania at Philadelphia. . . . . A significant influence to my judicial career . . . . . and what I have to say today here . . . . . is from the then chief judge of our district, Joseph S. Lord, III. It

will be remembered that in the mid 60's, he and a handful of other district judges across the country handled on a somewhat informal basis under the guidance of the chief justice, 2000 electrical equipment antitrust cases. That experience, of course led to the enactment of 1968 of 28 U.S.C. §1407. Judge Lord was one of the seven panel members to serve first under §1407. He was dedicated to the multidistrict litigation process.

When I came on four years later, he told me . . . . if I wanted to appreciate the full scope of the power of the federal judiciary under Article III of the Constitution of the United States . . . . . I should become involved in multidistrict litigation, in addition to my regular civil and criminal caseload regularly assigned. Shortly thereafter,

through his efforts, I was asked whether I would accept an interciruit assignment . . . . . to what was then the fifth circuit to serve as a transferee judge under §1407 that had been designated for the U.S. District Court in Jacksonville, Florida . . . . . Now, Bob Cahn told me that the current MDL docket case number level had reached 2121. . . . . .To show you what kind of a dinosaur I really am, you should know that the MDL case in Florida that I accepted was MDL 70. It was called the Cross Florida Barge Canal Litigation. The transferee judge originally assigned had died, and a new judge had to be appointed to be the transferee judge. That was my first MDL and from that time until I retired in 2001, I had at least one MDL functioning. When I stepped down in 2001, I left an orthopedic bone screw case which was winding

down in the hands of Judge Ronald Buckwalter in Philadelphia and the FenPhen litigation in the hands of Chief Judge Harvey Bartle.

In the 40 years since Title 28 U.S.C § 1407 was enacted. . . . the most significant . . . . and enduring controversy that has come from the statute in my mind has been both the decision and the aftermath consequences of the United States Supreme Court ruling in 1998 in the case of Lexecon v. Milberg, Weiss, et al. For the 40 years that the statute has been in force, more than 300,000 civil actions have been administered and concluded under the application of its provisions. A statute that was not much more in length than the Declaration of Independence has had the affect of significantly impacting . . . . the lives….. the fortunes….and the property of thousands of litigants in

significant ways. Transferee judges throughout the country….following through this statute….the model of that group of distinct judges nationwide who in the late 60s,….without the statute…..did a near miraculous job in administering the electrical equipment antitrust cases that had been put into the federal judicial system nationwide. In the 30 year period, leading up to the Lexecon decision cases that had been transferred from transferor districts to a transferee judge in one district saw full…..fair…..and acceptably uniform pretrial rulings …. and decisions….within the pretrial authority boundary available to Article III judges. The statute contemplated remand by the transferee judge….to the transferor court….upon the completion of those pretrial and consolidated procedures. Often, this process with pleading problems

having been reviewed and often times either corrected or recast/…..all discovery completed……or near completed/…..dispositive motions ruled upon/…..drove the parties and their counsel directly into a settlement mode….or mood. Early settlement patterns would emerge as discovery was beginning to head down hill. . . . . Transferee judges were either called upon ….or they reached out/still under the umbrella of pretrial processing. . . . to settle cases singly, in batches, . . . in groups along common issue lines . . . and globally.

Civil actions not caught in this updraft of either disposition through dispositive motion . . . or settlement were poised for remand under the statute. Some parties consented to the transferee judge taking the case to trial in the transferee district. Some transferee judges, whether the

parties consented or not simply assumed the authority to transfer the cases to the transferee district for trial. This practice of "self-transfer" by the transferee court was the intersection where the United States Supreme Court erected a stop sign. The Supreme Court held in Lexicon that a transferee judge receives the cases from the transferor district for consolidated pretrial procedures – not for trial – hence the statute requires such cases to be remanded by panel to the transferor court.

At the time of the decision / the Judicial Panel, and by necessary implication / . . . . . U.S. District Judges who serve as transferee judges/. . . . . were generally of the view that the ruling hobbled the 1407 transfer process / because it precluded the transferee court /. . . . . from further transferring the transferred cases to itself for trial.

The United States Judicial Conference has urged congress to amend the statute to allow transferred cases to stay with the transferee judge for trial.

The panel, through Judge John F. Nangle and Judge William Terrell Hodges have made presentations to congressional committees / in an effort to secure an amendment that would codify the practice in play before Lexecon (1968 to 1998).

The primary arguments advanced in support of this effort are:

a. The transferee judge has extensive familiarity and experience with the transferred cases through the pretrial process.

b. The litigants and attorneys have considerable experience with the transferee judge during the pretrial process.

c. The transferee judge develops settlement experience in the transferred cases. . . . . that has resulted in settlement / or settlement . . . . progress, during the pretrial process.

d. Litigants and lawyers, for the most part / . . . . . agree that the transferee judge /. . . . . should continue to administer cases that have been before the transferee court / . . . . in most instances . . . . for many months or years . . . . . to bring them to a conclusion.

e. For litigants and attorneys to bring remanded cases back to the transferee court / requires additional proceedings in the transferor court under 28 U.S. Code §1404(a) or 1406, which causes considerable delay and expense.

f. Remanding cases back to transferor courts for trial will result in inconsistent and different rulings. . . . . and outcomes for similar cases.

Let us take a minute to go back and see where 1407 came from.

We can cut across considerable detail by simply bonding onto the phrase “case aggregation” . . . . . as a way to jump start our thinking here. If we begin with 1938 as a starting point, ... we look to the dramatic changes to the rules of civil procedure . . . . . in the federal courts . . . . . .with the adoption of the updated and improved Federal Rules of Civil Procedure. . . . . Those rules broke new ground and re-worked / many of the pre-existing rules, / . . . . customs /. . . . and practices / . . . . .concerning the rigidity of pleading . . . . . .on the civil

side of the court. We acquired the blending of equity and law in one tribunal /. . . . and the emergence of notice pleading, / . . . . discovery / ease of joinder / and amendment choices to claims/ . . . . defenses / . . . . and parties /. . . . All of these accelerants . . . . .were pushed into play . . . . . because of the dramatically expanding social / . . . . . industrial / and professional / society in the United States. As those changes settled in / especially with respect to alternative pleading / . . . . . and joinder of parties with similar claims,. . . . . Notions of aggregation grew by necessity / resulting in more changes / . . . . such as those to Federal Rule of Civil Procedure 23 in 1966.

As far as MDL is concerned, ... what tipped the balance were the 2,000 or so electrical equipment cases that were filed all over the

country in the mid 60s. These filings confronted the federal judiciary with an unavoidable challenge to develop a means to administer those similar nationwide cases. . . . . Section 1407 has been functioning ever since 1968 essentially as originally drafted. For 30 years transferee judges kept the cases received by panel order together with those properly before them under other rules. There does not seem to be any evidence that there were large numbers of trials before transferee judges. It was believed however that with trial authority, ... the transferee judge could be instrumental in bringing about disposition, including settlement as the pretrial proceedings progressed.

I think I am safe in saying that most of those involved in the 1407 process agree that it has been a successful program . . . . for those who

accept aggregation as a means of disposing of litigation if it can be done . . . . without bending our bedrock principles of justice and due process too much. Even those . . . . . who at first might have . . . . . looked upon this centralization as drifting too much toward a bothersome notion of "central planning" must agree that what began as a new idea . . . . . has turned out to be a very useful tool that has had an acceptable impact on core values associated with litigation. Transfer has caused some geographic inconvenience . . . . . and a lessening of a one-on-one opportunity for contact between a lawyer, his client and the judge in the pretrial process due to consolidation. That will happen in the rule 23 case in any event. In the non Rule 23 case, the private attorney and his client will have most, but not all of their views before the court through

court designated counsel with similar if not identical views in the pretrial setting. As far as trial is concerned, ... the case will be tried in the court where suit was filed or transferred by other laws than 1407 as far as the plaintiff is concerned, and where various laws require the defendant to appear and defend . . . . both before and after the enactment of 1407. Some 300,000 civil actions have gone through this process since 1968 and they continue at a brisk rate.

Both the 1407 statute and the rules that had been adopted to implement the statute's provisions are brief and to the point. None of the rules have been the subject of noticeable litigation or controversy, except of course in Lexecon.

THE SETTLEMENT FACTOR

I want to focus on settlement in the MDL context for a moment. . . . . The aftershock of Lexecon pushed those seeking a change in the statue toward correcting . . . . . what Lexecon took from the transferee judge . . . . . which was the authority to try the cases on that judge's transferee docket. The argument was that taking trial authority from the transferee judge lessened the opportunity for the litigants to have a fully-informed trial judge; . . . . . or a judge with persuasive settlement power resulting from the judge being backed up with the right to try the case if it did not settle.

Let us explore that a little bit.

In the typical non-MDL civil action there are four variables regarding parties' decision to settle: Litigation costs / settlement costs / stakes in the case / estimate of likelihood of success at trial.

What is the impact . . . . . or degree . . . . . of judicial activity in settlement of civil cases and particularly complex cases?

While litigation costs . . . . / settlement costs . . . . . / and estimate of the likelihood of success at trial . . . . . are areas of concentration for the parties . . . . . the judge's role is to be influential about those areas which may be reflected in pretrial rulings that affect discovery issues / Daubert hearings / dismissals / amendments / joinders and calendar questions/ bifurcation / transfer / and summary judgment.

As to settlement . . . . . what parties watch for are the court's settlement observations, ... suggestions . . . . . leanings / perceived and real /. . . . recommendations, ... including cautionary remarks a court could make, relative to prospective parties, evidence of prospective strategies i.e. limits on time, number of fact witnesses, or expert witnesses;

From the Court's perspective its proper role . . . . and hopes for success in court involvement . . . . . is to maintain throughout pre-trial engagement a pervasive uncertainty surrounding the law, the facts. Also uncertainty about / the outcome of the litigation . . . . . and damages likely to be awarded. What must be certain to be projected is the imminence of a trial.

How does this basic settlement role of the trial judge fit in the 1407 MDL setting?

Can a transferee judge try the case better than a transferor judge?

Does extensive pretrial exposure by the transferee judge improve the chances of an error-free trial?

Are successive litigants stuck with rulings/discretionary or otherwise . . . . . of the transferee judge at earlier trials?

What about settlement efforts by the transferee judge?

Does panel designation make a transferee judge an influential actor in the settlement process? Maybe! . . . . . Maybe Not!

This depends on whether the trial judge chooses to be involved in settlement and whether the parties want the judge involved in the settlement.

Some judges may not want to get involved . . . . . in the settlement process . . . . if they know they might have to try the case. Indeed, some attorneys do not want to have the judge involved in the settlement process if the judge is to try the case. In non-MDL settings, Judges routinely send cases to magistrate judges, or other judges in their district, or to mediators for settlement if the docket case has to be tried.

A transferee judge may feel that his/her contribution to the MDL is better served by staying away from trial and focus on pretrial involvement, ... including settlement . . . . . particularly if there are

many cases / and much work yet to be done / on present and incoming cases/. In that event under Lexecon. . . . the trial is going to be in the original transferor court, following remand. For cases filed in / or otherwise properly before the transferee judge, /. . . . . other judges in the transferee district may be called upon to try those cases. Inter-circuit assignment or intra-circuit assignment are other resources available to the transferee court if the transferee judge and his or her own court needs assistance.

The transferee judge who has extensive experience in the administration of the pretrial features of the case, and has extensive knowledge about the facts and predictions as to key applicable law will likely contribute that knowledge to settlement endeavors in some way . .

. . . to influence a settlement. Even though the case may have to be remanded to the transferor court for trial, ... the attorneys and their clients may believe an effort at settlement before the transferee court having considerable knowledge about the case, ... would be a beneficial settlement barometer. If both parties agree that the settlement effort should take place only before the judge who is to try the case, ... they, or either of them could move for remand to the transferor court – which is the Lexecon model.

Of course, the transferee court . . . . . having been "lexeconed out" of eligibility to be the trial judge . . . . . loses the beneficial entanglement of trial imminence as a factor in settlement efforts, ... particularly

when the trial judge can set deadlines as to when settlement efforts will end and trial will begin.

There is a belief by some that the Lexicon decision upsets this cadence. The argument goes that we have a transferee judge . . . . . who has spent months and possibly years . . . . .deeply meshed in the administration of the many steps of the pretrial process . . . . . experienced with the issues and the attorneys in the case. . . . . The transferee judge has been in heavy pretrial traffic regarding hearings / motions / arguments / and conferences. Here is this person with all of this knowledge . . . . in an excellent position to participate in meaningful settlement discussions . . . . but has no trial authority, unless the case was filed in his or her district. . . . . (or unless a cumbersome and costly

procedural exercise out of the transferor court returns the case to the transferee district). The pitch . . . . . is to amend the statute and give the transferee judge trial authority, ... not only because that judge is better equipped to handle the trial, but . . . . . because the case will move quickly . . . . . and that adds some octane to that judge's settlement endeavors.

Some. . . . . have not bought into that doom and gloom wrought by Lexicon. They believe that the MDL settlement curve has not dropped off notably, ... or if it has, ... it cannot be necessarily identified with Lexicon. They also add that in an MDL case where the panel has transferred 50 . . . . . or 500 . . . . . or 1,000 civil actions or more to a transferee court . . . . . it is far from certain that if the case does not

settle. . . . . the transferee judge will direct the parties to appear the following Monday morning at 9:30 a.m. in that court's Jury Selection Room to pick a jury and commence trial.

It is my sense that in nearly every instance . . . . . / the transferee judge will not follow a settlement effort. . . . . that did not succeed . . . . .with a prompt trial. I just do not think trial attorneys in most of these cases expect the transferee judge to do that, even if the judge has the authority to do it.

Assume the transferee judge who has authority to try the case has completed all efforts to settle the case and it is January 2007 – pre-Lexecon. The transferee judge who is to try the case notifies the parties that the case will be listed for trial 4 months later on March 1, 2008.

Does anyone think the attorneys, ... after hearing that announcement . . . . . will say to the judge, "We would like to settle the case. We think we can settle the case today or tomorrow or next week?" "Is the case likely to settle before May 2007?" Probably. Well, ... isn't the same thing going to happen if the transferee judge doesn't succeed in settlement and within a week or two files a suggestion of remand with the panel? -- and the case goes back to the original district?

All of the above seems to make the arrows point to the conclusion that . . . . . the absence of trial authority . . . in the transferee judge. . . . in most MDL cases. . . . isn't all that bad . . . . and may be in many instances . . . . .a preferable result.

Let me turn to another topic that could be of interest here. Questions have arisen over time from those who have a genuine interest in the workings of the panel and transferee judges, about certain practices of the panel and transferee judges in fulfilling 1407 duties. Neither the statute nor the rules give many details . . . . about how the panel is named, ...how it goes about its work, ... or how the transferee court is to function. . . . . how the relative role of transferor . . . . . and transferee judges has . . . . . developed over time. Over the course of this now 41 year experience, ... questions have also been raised from time to time, ... concerning the manner in which the panel goes about its business . . . . .

How the panel is made up, ... how cases get transferred, ... and how district judges are selected to be transferee judges or districts are selected to be a transferee district. These questions are understandable. There is no fixed pattern as to which district will become a transferor district . . . . or a transferee district . . . . as thousands of cases are filed and are distributed throughout the 94 districts in the United States. Larger population centers, with more filings have more opportunities to become transferee districts, yet similar actions filed in different districts could be consolidated in another smaller district to satisfy the "convenience and promotion of the just and efficient conduct of the actions". . . . . standard of the 1407 statute. The location of a disaster that results in individual or property

damage claims could happen in any of the 94 districts and result in centralization in that district. The result of all of this is, I suspect that over time some districts will rarely be a transferee district, while others will be transferee districts from time to time, and some larger districts will have a number of new MDL cases pending all the time. This lopsided experience that has spread over 94 districts particularly in recent years lends itself to questions particularly in the entire 41 years since the statute has been in effect.

A common question asked about the panel's workings has to do with the criteria used by the chief justice to select members to serve on the panel. I do not know for sure. I know that chairman Nangle asked me at one time if I was ever asked to serve on the panel, could I do it? I

said yes I could and would be honored to serve. Some months later I received a letter from the chief justice notifying me that I had been named. I don't know how the others got there. I do know this however, ... all of the members I served with were hardworking, judicial servants . . . who understood the importance of the panel's work, ... never missed a meeting, ... were always fully prepared at bi-monthly meetings all over the U.S., ...and were quite knowledgeable about the issues that would rise from time to time concerning their role as panel members. It was an honor to be associated with every one involved in the panel's work, including judges and the support staff under the leadership of Bob Cahn. Another question that is raised from time to time is how does the panel pick the district to send an MDL case

to? At the panel bi-monthly meetings, the panel will hear presentations by counsel. There are three key issues: should cases be centralized? . . . . If so, ... where?. . . . Before whom?. . . . Most of the facts are set forth in the parties' briefs, and the panel is kept up-to-date with each of the presentations made, which is important . . . . because some of the facts change daily as the issue of transfer gets close to the hearing. The 1407(a) standard is: When civil actions involve one or more common questions of facts 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 panel 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. Any facts bearing upon that standard are considered by the panel, given their proper weight, and drive the conclusion.

A question that comes up occasionally is that transfer often goes to a place that was unexpected by a party. That is because different persons appearing have different ideas as to where it should go/ . . . . and if it doesn't go to their place . . . . it falls into the category of "unexpected". The panel's decision revolves exclusively around the criteria in the statute and it's determination based on that analysis. A key factor in every decision concerning which district an MDL will go to is whether the clerk's office has the personnel, resources and

experience to shoulder the responsibility required to fully administer the specific cases expected to be transferred over time.

In many instances, it is quite obvious that cases are best centralized in a place where most of the cases are filed if it is a mass tort circumstance, like a collapsed building, a fire, or other disaster where the site is the primary center of interest for centralization. That, of course, also includes consideration regarding the convenience and availability of witnesses and documents. It may be where a grand jury is sitting because of needed coordination between the grand jury court where witnesses and documents under that court's supervision may be available. Another important factor of the location of the MDL is the location of most of the witnesses and lawyers associated with the

litigation. In cases with many parties and counsel, there is a concern that there be facilities for lodging and related accommodations. Accessibility by highway and air transportation is also something that must be considered. The statute also directs that the panel designate the transferee judge to whom the actions are to be assigned. How does this come about? Like location . . . . the panel will hear counsel on this issue. The parties argue in support of their choice, and the panel also, through its chair, learns from an eligible transferee district what issues might have to be considered . . . . . relative to the assignment of the transferee judge . . . . in that district. . . . . In some cases, the judge who may already have constituent cases may not be able or would prefer not to take the MDL. The panel chair will discuss the options with the judge

and the chief judge in an attempt to arrive at a solution. The panel is interested in selecting a transferee judge who is both willing and prepared to accept the MDL case as the transferee judge. Some of these matters are huge undertakings that could last for several years. In some, there may be a conflict of some sort.

It is not unusual for a panel member to serve as a transferee judge in the panel member's district.

There have been queries as to how a panel members gets assigned to an MDL in that panel member's district. The same criteria applies. I mean – do you really want someone who knows nothing about the case . . . . or is not able or not interested in administering the case? . . . . Most panel members are on the panel because they have had MDL experience

and are interested in MDL work. If a case in a member's district is one to be centralized under the criteria . . . . and is to be centralized in their district . . . . and that judge has the constituent cases. . . . . I am not sure how abstract favoritism even comes into play.

I am sure there are and will be more questions raised about this interesting important body of law that has had a significant impact on the performance of the federal judiciary for 41 years. In the main, I believe it has been very successful. It has achieved positive results far beyond the expectations of Chief Justice Earl Warren and those seven original U.S. District Court judges whose ideas in the Electrical Equipment Antitrust cases make up the DNA of 28 U.S.C. 1407.

Thank you.