



The Workings of the U.S. Judicial Panel on Multidistrict Litigation and the Selection of the Transferee Court

Overview

What is the JPML?

How the JPML Works: The Birth of An MDL Proceeding

Growing Pains

The Transferee Court: The Death of An MDL Proceeding

MDL Proceedings: The Afterlife

What Every MDL Lawyer Should Know

What is the JPML?

- ❖ Created in 1968 with passage of 28 U.S.C. § 1407.
- ❖ Statutorily defined to consist of seven circuit or district judges, “designated from time to time by the Chief Justice.”
- ❖ No two members may be from the same circuit.
- ❖ Seven-year term limit established by recent custom by Chief Justice.
- ❖ Section 1407(d) requires that “[t]he concurrence of four members shall be necessary to any action by the Panel.”
- ❖ Panel Rules are found at 199 F.R.D. 425-442 (2001).

What is the JPML?

Current Panel Members

John G. Heyburn II, Chairman

United States District Court

Western District of Kentucky

J. Frederick Motz

United States District Court

District of Maryland

Robert L. Miller, Jr.

United States District Court

Northern District of Indiana

Kathryn H. Vratil

United States District Court

District of Kansas

David R. Hansen

United States Court of Appeals

Eighth Circuit

W. Royal Furgeson, Jr.

United States District Court

Northern District of Texas

Frank C. Damrell, Jr.

United States District Court

Eastern District of California

How are Panel members selected?

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What does the JPML do?

What is the JPML?

Primary Statutory Duties

- ❖ Identify actions pending in one or more federal courts involving one or more common questions of fact.
- ❖ Decide whether such actions should be transferred to a single district for coordinated or consolidated pretrial proceedings.
- ❖ Select the judge or judges before whom such centralized pretrial proceedings shall be conducted.
- ❖ At or before the conclusion of pretrial proceedings, send every MDL constituent action back home.

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Birth of an MDL Proceeding

Conception:

- ❖ Identification of actions that involve common questions of fact
- ❖ Decision to centralize by MDL Panel
- ❖ Selection of Transferee District
- ❖ Selection of Transferee Judge

Birth of an MDL Proceeding

Types of dockets that typically generate common questions of fact:

- ❖ Airplane crashes
- ❖ Common disasters
- ❖ Antitrust
- ❖ Contract disputes
- ❖ Employment practices
- ❖ Intellectual property
- ❖ Products liability
- ❖ Sales practices
- ❖ Securities
- ❖ Pharmaceutical and medical devices

Birth of an MDL Proceeding

- ❖ Asbestos
- ❖ Diet drugs
- ❖ Air Florida plane crash
- ❖ America Online
- ❖ Michael Milken securities
- ❖ Dippin' Dots patent



Birth of an MDL Proceeding

- ❖ From 1968 through 2008:
 - ❖ 2,023 dockets were created
 - ❖ 304,426 constituent cases received MDL treatment
 - ❖ 702 judges served as transferee judges
 - ❖ 227 judges were serving as transferee judges over active dockets as of December 2008

Birth of an MDL Proceeding

- ❖ How are potential MDL dockets identified?
 - ❖ By motion of a party [1407(c)(ii)]
 - or
 - ❖ By the Panel acting on its own initiative [1407(c)(i)]

Birth of an MDL Proceeding

- ❖ Motion of a Party
 - ❖ Upon filing of 1407 motion, 20-day briefing period
 - ❖ Five days to submit reply
 - ❖ Matter then scheduled for consideration by the Panel
- ❖ Order to Show Cause by Panel

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Decision by MDL Panel

- ❖ Oral argument on motions to create MDL dockets
- ❖ Executive session on matters submitted on briefs
- ❖ Maximum of 20-minute argument for each matter

Birth of an MDL Proceeding

The Birth:

- ❖ Preliminary transfer decisions at executive session following hearing for all matters
- ❖ Delays: decision to await the entry of important or dispositive rulings at district court or appellate court levels, or absence of Panel members necessary to form the required statutory quorum

What cases get MDL treatment?

Birth of an MDL Proceeding

Primary Factors

- ❖ Statutory Criteria:
 - ❖ One or more common questions of fact
 - ❖ Actions pending in more than one district
- ❖ Objective of MDL process
 - ❖ Eliminate duplication in discovery and other pretrial matters
 - ❖ Avoid inconsistent pretrial rulings and schedules
 - ❖ Conserve resources of parties, counsel and courts
- ❖ Case-specific factors

Birth of an MDL Proceeding

Case-Specific Factors

- ❖ How many cases are pending?
- ❖ Where only a few actions or common questions are involved, MDL movant bears heavier burden of persuasion
- ❖ How many common questions of fact are present?
- ❖ What is their nature?
- ❖ How many cases are prospectively involved?
- ❖ What is the geographical nature of the pending cases (e.g., pending in adjoining districts or districts throughout the country)?
- ❖ What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer?
- ❖ Will transfer result in substantial elimination of duplicative work for parties and/or courts?

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Case-Specific Factors (continued)

- ❖ If class actions are involved, will transfer serve to prevent inconsistent class action rulings?
- ❖ Can many of the advantages of transfer be worked out by cooperation among courts and 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?
- ❖ 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?
- ❖ Will transfer unjustly delay or deny any party's right to provisional remedies such as injunctive relief?
- ❖ Does the possibility or probability exist for pretrial rulings that could and should be dispositive of all cases in a consistent fashion?

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Effect of Decision to Create MDL Docket

- ❖ Coordinated or consolidated proceedings before one judge for pretrial purposes
- ❖ Once 1407 transfer becomes effective, jurisdiction of transferor court ceases
- ❖ No opinion on merits of substantive or procedural issues in underlying litigation
- ❖ No opinion that putative class actions should now be presumptively certified

Birth of an MDL Proceeding

Conception:

- ❖ Identifying actions that involve common questions of fact
- ❖ Decision to centralize by MDL Panel

The Delivery:

- ❖ Selecting the Transferee District

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Primary Criteria in Selecting Transferee District

- ❖ Location in which constituent action or tag-along actions are already pending.
- ❖ Balance of other case-by-case factors:
 - ❖ District with action or actions at advanced stage of pretrial proceedings;
 - ❖ District in which more actions are pending than any other;
 - ❖ Location of major parties, documents and witnesses;
 - ❖ The status of court's civil or criminal docket;

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Primary Criteria in Selecting Transferee District (continued)

- ❖ District whose location enhances prospects for state/federal accommodation in discovery;
- ❖ Location of relevant grand jury documents;
- ❖ Situs of common disaster;
- ❖ Desirability of centrally located forum for litigation national in scope;
- ❖ Location of related bankruptcy proceedings;
- ❖ Creating a deeper bench of districts with MDL experience.

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Easy Cases

- ❖ All parties agree on single district
- ❖ Location of parties, cases and underlying events create natural nexus in single district

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Hard Cases

- ❖ Parties are highly contentious
- ❖ Parties appear to be forum-shopping and masking real reasons for position
- ❖ Politics steering committee and class counsel

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Selecting the Transferee Judge

- ❖ Smartest, hardest working and best looking judges in America
- ❖ Where constituent action is already pending in the district, look first to judge

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Growing Pains

“Tag-Along” Transfers

- ❖ Later-filed related actions
- ❖ Actions which had not come to the Panel’s attention at time of initial transfer decision
- ❖ Question: whether action should be transferred to existing MDL in transferee district?

Growing Pains

Identifying Potential Tag-Alongs

- ❖ Panel Rule 7.5(e)
- ❖ Parties to previously transferred actions must promptly notify Panel of potential tag-along actions
- ❖ Local rules in individual district courts

Growing Pains – Tagging Along

- ❖ By motion of party or on Panel initiative
- ❖ Entry of conditional transfer order (CTO) by JPML
- ❖ Conditional transfer to transferee district for inclusion in previously established MDL docket
- ❖ Order served on parties, and transferor and transferee judges
- ❖ 15-day grace period to object
- ❖ If no objection, order becomes final and effective without further delay once filed in transferee district
- ❖ Where opposition (motion to vacate CTO) filed within 15 days, opportunity for briefing and argument at Panel hearing session

Growing Pains – Partial Transfers

Partial Transfers

- ❖ Only certain claims in case are related to MDL proceedings or
- ❖ Action contains claims related to more than one MDL docket

PROBLEM:

- ❖ Section 1407(a) only authorizes Panel to transfer “civil actions,” not claims therein.

SOLUTION:

- ❖ Transfer an action in its entirety to the transferee district
- ❖ Simultaneously remand to the transferor district any claims for which transfer was not deemed appropriate.

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Death of an MDL Proceeding - Remand

- ❖ At or before conclusion of pretrial proceedings in transferee district, Panel must remand actions to originating transferor districts
- ❖ Timing of remand: early (with significant case-specific discovery to be done) or late (when virtually all discovery is completed)
- ❖ Panel Rule 7.6: on motion of party, on suggestion of transferee district court or *sua sponte*.
- ❖ Primary factor: recommendation of transferee judge
- ❖ Conditional remand order (CRO) by Panel
- ❖ Opportunity for briefing and argument at Panel hearing session

Death of an MDL Proceeding

MDL Death by Remand -- Remand Procedure

- ❖ Complete pretrial record returned to transferor court
- ❖ Pretrial order chronicles proceedings, rulings and nature and expected duration of further pretrial proceedings

Death of an MDL Proceeding

Termination in the Transferee District

- ❖ 198,807 cases had been terminated as of September 30, 2008
- ❖ The Panel remanded only 11,665 of those actions to their respective transferor courts

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The *Lexecon* Problem

- ❖ Historically, MDL actions not settled or dismissed in transferee districts remained there for trial:
- ❖ Transferee judges ordered MDL cases (transferred to them under Section 1407) to themselves (under Sections 1404 or 1406)
- ❖ *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998):
MDL court cannot use Section 1404(a) to assign transferred case to itself for trial
- ❖ Such self-transfer would thwart the Panel's capacity to obey "unconditional" command of 1407(a) to remand MDL action at the end of pretrial proceedings
- ❖ By analogy, MDL transferee judge cannot self-transfer under Section 1406.

MDL Proceedings: The Afterlife

- ❖ MDL Response to *Lexecon*
- ❖ Strong policy reasons for historical practice:
 - ❖ Transferee judge has solid understanding of factual and legal issues
 - ❖ Transferee judge may already be trying constituent 1407 actions which were originally filed in transferee district
 - ❖ Ability of transferee judge to facilitate global settlement
 - ❖ Vigorous - but unsuccessful – effort to secure legislation restoring self-transfer authority.

MDL Proceedings: The Afterlife

Lexecon Work-Arounds

- ❖ Bellwether case in action originally filed in transferee district
- ❖ Plaintiff can dismiss action transferred under 1407 and refile in transferee district (assuming proper venue)
- ❖ Transferor court can transfer action back to transferee court under Section 1404 after Panel has remanded it
- ❖ Transferee judge can seek intercircuit or intracircuit assignment and follow action back to originating district

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1. What is the worst argument to make in opposition to 1407 transfer?
2. Regarding question 1, does the JPML ever impose sanctions?
3. Will MDL centralization (or lack thereof) affect the outcome of my case?
4. What's with the one-minute time limit on oral argument?
5. What does the red light on the podium mean?

What Every MDL Lawyer Should Know

What is the worst argument to make in opposition to 1407 transfer?

- ❖ “Well-taken motion to remand/dismiss/for summary judgment is pending in transferor court”
- ❖ *Almost certain loser*

What Every MDL Lawyer Should Know

Regarding question 1, does the JPML ever impose sanctions?

- Not yet

What Every MDL Lawyer Should Know

Will MDL centralization (or lack thereof) affect the outcome of my case?

- ❖ MDL process favors defendants by reducing the chaos of mass litigation and lifting the burden of defending multiple claims in various courtrooms: *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147 (D. Mass. 2006)
- ❖ MDL process favors plaintiffs by creating a litigation juggernaut, blessed by the courts, which allows plaintiffs' bar to create phony claims and extort billions from corporate defendants ("The Silicosis Sheriff," Wall Street Journal (July 14, 2005))

What Every MDL Lawyer Should Know

What's with the one-minute time limit on oral argument?

- ❖ Panel has fully reviewed briefs
- ❖ No arguments rooted in underlying merits of actions or pending motions therein
- ❖ Highly focused nature of 1407 jurisprudence
- ❖ Bring the Panel up to date on relevant developments

What Every MDL Lawyer Should Know

What does the red light on the podium mean?

