

REMOVAL AND REMAND IN THE MDL CONTEXT

Tommy Fibich

Fibich Leebron Copeland Briggs

Lawyers often find themselves dealing with the issues of removal and remand in the context of a motion to consolidate their litigation with similar litigation in other districts into one multidistrict litigation (MDL) for all pretrial proceedings. A motion to consolidate into an MDL creates unique remand issues for the federal practitioner.

1. NUTS AND BOLTS OF MDL CONSOLIDATION

A. The Statistics

MDL is the special federal creature of 28 U.S.C. 1407, which was enacted by Congress in April 1968. The impetus for §1407 was the emergence in the early 1960's of antitrust litigation in the electrical equipment industry. The litigation involved 1912 civil actions representing in excess of 25,000 claims pending in 36 federal districts.¹ Recognizing the need to come up with new procedures to handle this unwieldy litigation, Chief Justice Earl Warren appointed a committee of jurists to develop procedures that we now consider commonplace—such as national depositions and document depositories.² The aggressive procedures developed by the Warren committee proved to be very effective in bringing the antitrust litigation to a speedy and economic conclusion and resulted in the passage of §1407 to handle similar litigation in the federal courts.³

Consolidation motions are heard by the Judicial Panel on Multidistrict Litigation (JPML). The panel consists of seven circuit and district judges named by the Chief Justice of the Supreme Court. All panel judges must be from different circuits. At least four members must concur on any action taken by the panel.⁴ The panel is based in Washington D.C. but holds its hearings around the country in various districts.

With respect to what actions are appropriate for a motion to consolidate in an MDL, Section 1407(a) provides in relevant part:

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

¹ Peterson, Jr., Colvin A.; McDermott, John T. (August 1970). "Multidistrict Litigation: New Forms of Judicial Administration". *ABA Journal*. Chicago: American Bar Association. 56: 737.

² *Id.* at 737-739

³ *Id.* at 740-741

⁴ 28 U.S.C. 1407(d).

been previously terminated.⁵

Over 600,000 cases, representing millions of claims have been considered by the JPML since the passage of §1407 and MDL practice continues to be a significant segment of federal practice.⁶ For example, as reflected in the table below, from January 1, 2014 through December 31, 2016 244 motions for consolidation were filed. Of those, a total of 107 were granted and 92 denied. In those same years another 55 were stricken, consolidated, withdrawn or deemed moot.⁷

	2014	2015	2016	TOTAL
Motions for Consolidation filed:	89	82	73	244
Motions granted	48	33	26	107
Motions denied	27	36	29	92

As of **October 16, 2017** there are 230 pending MDLs categorized as follows:⁸

Product Liability	72
Sales Practices	33
Securities	13
Air disasters	3
Antitrust	51
Common disasters	2
Contract	6
Employment	4
Intellectual Property	9
Total	230

B. Factors Considered by the JPML In Selecting A Transferee Court

Once the JPML determines that a matter is appropriate for consolidation, it applies certain factors to the selection of a transferee court. 28 U.S.C. 1407 provides little guidance as to the factors to be considered reciting only that “transfers for such proceedings will be for the convenience of parties and witnesses.”⁹ The JPML’s Rules & Procedures do not address the issue.¹⁰ However factors often cited by the JPML include the convenience of the parties, location of records and witnesses, experience of the jurists, where the most pending cases are filed, and

⁵ 28 U.S.C. 1407(a)

⁶ Statistical Information/Judicial Panel on Multidistrict Litigation/United States.
<http://www.jpml.uscourts.gov/statistics-info>

⁷ *Id.*

⁸ *Id.*

⁹ 28 U.S.C. 1407 (a)

¹⁰ Rules & Procedures/Judicial Panel on Multidistrict Litigation/United States.
<http://www.jpml.uscourts.gov/rules-procedures>.

case load of the proposed transferee forum and the experience of the transferee judge.¹¹ Applying these criteria, the JPML has determined that the Southern District of Texas /was/is the appropriate transferee court for a number of significant MDLs.¹²

2. REMOVAL AND REMAND ISSUES UNIQUE TO MDL

A. Continuing Jurisdiction of the Transferor Court

It is well established that the filing of consolidation motion with the JPML does not immediately deprive a district court of its jurisdiction to consider motions before it. JPML Rule 2.1 specifically provides:

(d) Pendency of Motion or Conditional Order. The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court. An order to transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective only upon its filing with the clerk of the transferee district court. (emphasis added).¹³

However, it is likewise well established that the docketing of a transfer order deprives the transferor court of jurisdiction, even to reconsider its own transfer order.¹⁴ The subject of

¹¹ As exemplified in JPML transfer orders entered following the September 2017 hearing: *In Re: Wells Fargo Auto Insurance Marketing And Sales Practices Litigation* Transfer Order MDL No. 2797; *In Re: German Automotive Manufacturers Antitrust Litigation* Transfer Order MDL No. 2796; *In Re: Centurylink Residential Customer Billing Disputes Litigation* Transfer Order MDL No. 2795; *In Re: Samsung Top-Load Washing Machine Marketing, Sales Practices And Products Liability Litigation* Transfer Order MDL No. 2792; see <http://www.jpml.uscourts.gov/panel-orders>.

¹² See *In re Merscorp Inc., Real Estate Settlement Procedures Act (RESPA) Litigation*, MDL No. 1810 (Hon. Janis Graham Jack); *In re Enron Corporation Securities, Derivative & ERISA Litigation*, MDL No. 1446 (Hon. Melinda Harmon); *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, MDL No. 2046 (Hon. Lee H. Rosenthal); *In re Motion Picture Licensing Antitrust Litigation*, MDL No. 366 (Hon. John V. Singleton, Jr.); *In re Refined Petroleum Products Antitrust Litigation*, MDL No. 1886 (Hon. Sim Lake); *In re Service Corporation International Securities Litigation*, MDL No. 1609 (Hon. Lynn N. Hughes); *In re Silica Products Liability Litigation*, MDL No. 1553 (Hon. Janis Graham Jack); *In re Testmasters Trademark Litigation*, MDL No. 1646 (Hon. Vanessa D. Gilmore); *In re VistaPrint Corp. Marketing and Sales Practice Litigation*, MDL No. 1994 (Hon. Nancy F. Atlas); *In re Waste Management, Inc. Securities Litigation*, MDL No. 1422 (Hon. Melinda Harmon); *In re Wells Fargo Wage and Hour Employment Practices Litigation (No. III)*, MDL No. 2266 (Hon. Gray H. Miller); *In re BP p.l.c. Securities Litigation*, MDL No. 2185 (Hon. Keith Ellison).

¹³ JPML Rule 2.1(d); <http://www.jpml.uscourts.gov/rules-procedures>.

¹⁴ *PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 849 F.Supp. 8 (1994), citing *In re Spillane*, 884 F.2d 642, 645–46 (1st Cir.1989), the United States Court of Appeals for the First Circuit, acknowledged that the general rule has been that a district court ordering a transfer loses jurisdiction once the order has been executed by forwarding the record¹. See, *Drabik v. Murphy*, 246 F.2d 408 (2nd Cir.1957) (transferee court's

jurisdiction often comes up when a party chooses to object to a transfer order on the basis that they have a motion to remand pending and want it considered prior to transfer. Courts have typically rejected such objections arguing that there is sufficient time for a district court to rule on a motion to remand before a transfer is docketed in the transferee court:

(T)here is no need to delay transfer in order to accommodate any interest of the transferor court in resolving a pending remand motion. We note that: 1) as a practical matter, there is a lag time of at least three or four months from the filing of an action, its identification as a potential tag-along action, issuance of a conditional transfer order, stay of transfer when a party timely objects to the conditional transfer, briefing on the question of transfer, the Panel hearing session, and the issuance of the Panel's subsequent order...accordingly, those **courts** wishing to address such motions have adequate time in which to do so, those **courts** concluding that such issues should be addressed by the transferee judge need not rule on them, and the process of 1407 transfer...continue without any unnecessary interruption or delay.¹⁵

Additionally, the courts point out that the MDL court can consider and rule on motions to remand.¹⁶

It is not uncommon for a party seeking MDL consolidation to seek a stay in the district court while the consolidation motion is pending. Whether to grant or deny a motion to stay and/or a motion to remand is within the discretion of the district court.¹⁷ If a remand motion raises issues that are unique to the case before the district court, it makes sense to rule on that motion prior to transfer to the MDL.¹⁸ On the other hand a stay may best serve judicial economy if the issues involved in the remand motion are likely to arise in the other similar cases that have been or will be transferred.¹⁹

The Ninth Circuit has developed a three-part test from *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001) to apply when considering a motion to stay and a motion to remand.²⁰

receipt of records ends jurisdiction of transferor court to reconsider); *Fisher v. United Airlines, Inc.*, 218 F.Supp. 223 (S.D.N.Y.1963); *Wilson v. Ohio River Company*, 236 F.Supp. 96, 98 (S.D.W.Va.1964), *citing, Drabik, supra* (It is the general rule that once a motion to transfer has been granted and the papers lodged with the transferee court, the transferor loses all over the case); *Pendelton v. Armortec, Inc.*, 729 F.Supp. 495, 496–97 (M.D.La.1989); *Database America, Inc. v. Bellsouth Advertising & Publishing Corp.*, 825 F.Supp. 1216, 1221 (D.N.J.1993) (the rule is well-established that a transferor court loses jurisdiction to reconsider its order for transfer once the records in the transferred action are physically transferred to and received by the transferee court).

¹⁵ In re Prudential Ins. Co. of America Sales Practices Litigation, 170 F.Supp.2d 1346, 1347-48 (2001)

¹⁶ *Id.*

¹⁷ *Fox v. Depuy Orthopaedics, Inc.*, 2011 WL 6057509 *1 (W.D. Kentucky 2011), *citing Tolley v. Monsanto Co.*, 591 F.Supp.2d 837 (S.D.W.Va.2008)

¹⁸ *Tolley v. Monsanto Co.*, 591 F.Supp.2d 837, 844 (S.D.W.Va.2008)

¹⁹ *Ayers v. ConAgra Foods, Inc.*, 2009 WL 982472, *1 (S.D.Tex.2009).

²⁰ *Ernyes-Kofler v. Sanofi S.A.*, 2017 WL 813506 *1 (N.D. Ca., S. J. Div. 2017)

Under this test courts (1) “give preliminary scrutiny to the motion to remand”; (2) assess whether “the jurisdictional issue appears factually or legally difficult”; and (3) consider whether the “jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred.

B. Mandatory Remand for Trial to the Transferor Court

Section 1407(a) provides in relevant part that actions transferred to an MDL shall be remanded to the district from which it was transferred at or before the conclusion of pretrial proceedings thereby handing the case back to the original district court for trial.²¹ There is no discretion to keep the case for trial in the transferee court even if to do so would make sense since the transferee court would have intimate knowledge of the case, its issues and the court’s rulings while the transferor court would have had limited exposure to the case and would have to be brought up to speed. To address this problem the JPML promulgated Rule 14(b) which provided “[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. As a consequence a party could request that the MDL court keep a case for trial rather than remanding to the original district and the court would do so on the authority of Rule 14(c) and 28 U.S.C. 1404(a).²² The matter reached the United States Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* 1998.²³ In setting aside a lower district court opinion and the affirming opinion of the Ninth Circuit, the Supreme emphasized the mandatory remand language of §1407(a), stating:

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\(b\)](#). 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.²⁴

Congress has not amended §1407(a) to authorize such transfers. And the so-called Lexecon rule still applies – unless all parties consent under §1404(a) and their consent is unequivocal, the MDL

²¹ 28 U.S.C. 1407(a).

²² Which authorizes the court to transfer a matter for the convenience of parties and witnesses and in the interest of justice, to any other district or division where it might have been brought or to any district or division to which all parties have consented.

²³ 523 U.S. 26, 118 S.Ct. 956 (1998).

²⁴ *Id.* at 964.

court must remand all cases back to the transferring district court once pretrial is complete.²⁵

While many federal practitioners do not deal with the JPML or MDLs on a consistent basis, my experience in watching this area develop over the course of my practice causes me to warn that while you don't have to engage the beast it would be foolish to ignore it.

²⁵ *See In re Depuy Orthopaedics, Incorporated*, 870 F.3d 345, 352 (2017)