A Look At The Modern MDL: The Lexecon Decision and Bellwether Trials

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I. Creation and Oversight of Multi-District Litigation

In 1968, Congress amended the Judicial Code “[t]o provide for the temporary transfer to a single district for coordinated or consolidated pre-trial proceedings of civil actions pending in different districts which involve one or more common questions of fact.”¹ In its current form, the multi-district litigation (“MDL”) statute provides:

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 pre-trial proceedings. Such transfers shall be made by the judicial panel on multi-district 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 pre-trial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, [t]hat 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.\footnote{28 U.S.C. § 1407(a).}

This statute permits the creation of a consolidated proceeding known as an “MDL,” and also gives the United States Judicial Panel on Multidistrict Litigation (the “Panel”) the power to oversee the process.

The Panel is comprised of seven sitting federal judges designated by the Chief Justice of the United States, no two of whom may sit in the same judicial circuit.\footnote{28 U.S.C. § 1407(d).} The job of the Panel is to: (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pre-trial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.\footnote{DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2016 ed.).} The current Chair of the Panel is Judge Sarah S. Vance, who sits in the Eastern District of Louisiana. The remaining Panel members, in order of appointment to the Panel, are Marjorie O. Rendell (C.A. Third Circuit), Charles R. Breyer (N.D. California), Lewis A. Kaplan (S.D. New York), Ellen Segal Huvelle (D. District of Columbia), R. David Proctor (N.D. Alabama), and Catherine D. Perry (E.D. Missouri).

Proceedings for the transfer of an action may be commenced either upon initiative of the Panel or by motion filed with the Panel.\footnote{28 U.S.C. § 1407(c).} Several factors must be considered in determining whether an MDL is appropriate. Under the statutory requirements of § 1407, three criteria must be met before transfer is proper: (1) the actions must share common issues of fact; (2) transfer must be for the convenience of the parties and witnesses; and (3) transfer must advance the just and efficient conduct of the actions.\footnote{28 U.S.C. § 1407(a).} The Panel has also articulated individual factual considerations for MDL creation including: number of actions involved; size and complexity of the cases; whether parties agree that consolidation is appropriate; potentially conflicting class actions; danger of duplicative discovery; unusual need to expedite litigation; and conservation of
parties’ resources. The availability of other relief, ability to manage cases without transfer, and opposition of the parties are factors that militate against creation of an MDL.

If the Panel determines that an MDL is appropriate, it must select a transferee district and judge. Factors articulated by the Panel as important in selecting a transferee district include location of evidence; place of tortious event; centrality; venue of pending actions; coordination with other state/federal proceedings; familiarity of forum with issues; overall docket conditions; preference of the parties; and lack of MDLs in that district. Many of the considerations related to selection of a transferee district also bear upon selection of the transferee judge. For example, a judge’s familiarity with issues in a given litigation is a factor weighed heavily by the Panel, along with preference of the parties and docket conditions. Prior experience handling an MDL is another important consideration, along with the judge’s ability and reputation in handling a large load of complex cases.

Even after an MDL has been formed, a party may seek to add a newly-filed action or may learn of a previously pending case which should be part of the multi-district group. Such cases are known as “tag along” actions. A case may be given “tag-along” status by filing a “Notice of Potential Tag-along” with the Panel. Whenever such a case comes to the attention of the Clerk of the Panel, he or she is authorized to enter a Conditional Transfer Order (“CTO”), transferring the action to the MDL. The CTO is served on all parties, but transfer does not occur for 7 days in order to give the parties an opportunity to object. If there is no objection, the case transfers. If there is objection, briefing is permitted per Panel rules.

7 Herr, supra, note 4, at 152-66.
8 Id. at 168-71.
9 Id. at 209-52.
10 Id. at 257-67.
11 Id.
13 Id. Rule 7.1(b).
14 Id. Rule 7.1(c).
15 Id. Rule 7.1(d).
16 Id. Rule 7.1(c), (e)-(f).
The goal of MDL centralization is to avoid duplication of discovery, to prevent inconsistent rulings, and to conserve the resources of the parties, their counsel and the judiciary.\textsuperscript{17} Once an MDL is formed, pre-trial proceedings can begin. Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pre-trial proceedings.\textsuperscript{18} In some MDLs, where the parties agree to waive venue objections, the transferee court can keep the transferred actions beyond the pre-trial stage; these are known as “bellwether trials” (see below discussion).

Since its inception, the Panel has considered motions for centralization in nearly 2,700 dockets involving more than 550,000 cases and millions of claims therein. These dockets include, among others, airplane crashes; mass torts such as asbestos and drug cases; data security breaches; patent validity and infringement; marketing and sales practices; securities fraud; and employment practices.\textsuperscript{19} In 2015, 82 motions for centralization were filed.\textsuperscript{20} The Panel held 6 hearings and granted 33 of the 69 motions it ruled upon.\textsuperscript{21} Products liability MDLs led the way with 70 pending MDLs in 2015 (25.6%), followed closely by antitrust MDLs (64; 23.4%).\textsuperscript{22}

II. The Impact of Lexecon v. Milberg Weiss

There is one true limit on a transferee court’s authority over cases transferred to it by the Panel, namely that a transferee court cannot “unilaterally transfer cases to [itself] for trial.”\textsuperscript{23} The United States Supreme Court defined this limitation in \textit{Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach}, noting that the MDL statute “not only authorizes the Panel to transfer for coordinated or consolidated pre-trial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pre-trial proceedings have run their course.”\textsuperscript{24} Thus, \textit{Lexecon} held that the language of §1407 precludes a transferee court from

\textsuperscript{17} \url{http://www.Panel.uscourts.gov/overview-panel-0}.  
\textsuperscript{18} \textit{id.}.  
\textsuperscript{19} \url{http://www.Panel.uscourts.gov/overview-panel-0}.  
\textsuperscript{20} \url{http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2015.pdf}.  
\textsuperscript{21} \textit{id.}.  
\textsuperscript{22} \textit{id.}.  
utilizing 28 U.S.C. §1404(a) to make “self-assignments” and thereby retain transferred cases beyond pre-trial proceedings. A detailed discussion of the \textit{Lexecon} case follows.

\textbf{Lower Court Proceedings}

The case originated when Lexecon Inc., a legal consulting firm, and one of its principals sued the Milberg Weiss law firm in the United States District Court for the Northern District of Illinois. The suit alleged defamation and other torts arising from allegations that Milberg Weiss had made against Lexecon concerning Lexecon's work for lawyers representing Lincoln Savings Bank. Several other lawsuits had been filed in federal courts arising from disputes involving the collapse of Lincoln Savings and Loan Association. The Panel had previously directed that all related cases be transferred to the United States District Court for the District of Arizona for coordinated pre-trial proceedings, pursuant 28 U.S.C. § 1407. Milberg Weiss moved for, and the Panel ordered, transfer of the case to the Arizona MDL pursuant to § 1407(a).

After settlement of the remaining parties to the Lincoln Savings litigation, Lexecon moved the Arizona District Court to refer the case back to the Panel for remand to the Northern District of Illinois. Milberg Weiss filed a counter-motion requesting that the Arizona District Court invoke § 1404(a) to “transfer” the case to itself for trial. With only the defamation claim against Milberg Weiss remaining after summary judgment, the district judge denied Lexecon’s motion and assigned the case to itself for trial, relying on a series of decisions from courts around the country that had approved of such "self-transfers" by judges hearing multi-district actions. The case then went to trial before a jury in Arizona, which decided in Milberg Weiss' favor.

On appeal to the United States Court of Appeals for the Ninth Circuit, Lexecon challenged, among other things, the propriety of the District Court's self-transfer order. The Court of Appeals affirmed on the ground that permitting the transferee court to assign the case to itself upon completion of its pre-trial obligations was “not only consistent with the statutory language but conducive to efficiency.” Lexecon then sought review by the Supreme Court. While Lexecon's petition for certiorari was pending, law professor Charles Alan Wright, a leading authority on federal civil practice and procedure, filed an unusual \textit{amicus curiae} brief on his own behalf, supporting Lexecon's position and opining that the multi-district litigation statute

\footnotesize{25 \textit{Id.} at 40-41.  
26 \textit{Id.} at 26.}
had been misinterpreted to authorize "self-transfers" for more than twenty years. The Supreme Court agreed to hear the case.

**Supreme Court Opinion**

In an opinion authored by Associate Justice David H. Souter, the Supreme Court reversed the Ninth Circuit and held that, under the MDL statute, the transfer of an action for coordinated multi-district pre-trial proceedings did not authorize self-transfer of the case for trial. Rather, the statute requires that when all pre-trial proceedings are completed, the action must be remanded for trial in the district where it was originally filed. The instructive language of § 1407 provides that “[e]ach action so transferred shall be remanded by the Panel at or before the conclusion of such pre-trial proceedings to the district from which it was transferred unless it shall have been previously terminated,” The Court held that this language “imposes a duty” on the Panel to remand cases transferred “for coordinated or consolidated pre-trial proceeding. . .to the original district at or before the conclusion of such pre-trial proceedings.” The Court considered Milberg’s position, but found that:

“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 the transferee court. . .”

The Court reversed and remanded the case. In doing so, the opinion also rejected Milberg Weiss' argument that, even if the jury trial had taken place in the wrong venue, this was a harmless error that should not result in reversal. The Court concluded that trying a case in the wrong district, over a party’s express objection, was not harmless.

The Supreme Court’s interpretation of 28 U.S.C. §1407 in *Lexecon* impeded the ability of many judges to efficiently advance their MDL docket. The practice of self-assignment had long been appealing to transferee judges who gain a unique familiarity with the complex issues, arguably positioning them in the best spot to oversee a trial on the merits. In the wake of

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28 Justice Souter’s opinion spoke for a unanimous Court, except that Justice Scalia did not join in a portion of the opinion that addressed the legislative history of § 1407.
29 *Lexecon*, 523 U.S. at 35 (quoting 28 U.S.C. § 1407(a)).
30 *Id.* at 28 (quoting 28 U.S.C. §1407(a)).
31 *Id.* at 40.
Lex econ, the practice of unilaterally self-assigning cases was no longer an option. As a result, attorneys and courts have crafted a number of Lex econ workarounds. One such practice has become known as a “Lex econ waiver.” Under this practice, the parties waive the right to object to venue before the MDL court so that the bellwether process case be used. That process is explored in more detail below.

III. Bellwether Trials

“Bellwether” comes from the practice of placing a bell around the neck of a whether (male sheep) who is selected as the leader of the flock. The movements of the flock could be determined by the sound of the bell, even before the flock was in sight. In MDL practice, a bellwether trial is intended to be a trend indicator. The idea is that, if the parties can select and try a representative case, other similar cases should “flock behind” and derive a similar outcome. Bellwether trials are effectively used for informational purposes, specifically testing various theories and defenses in a trial setting. These trials are also thought to be useful in facilitating global settlements based on the outcome of the trial.

Once a bellwether process is agreed upon, the first step is to catalog the universe of cases that comprise the MDL in order to create a pool of potential bellwether cases. This is typically done by identifying meaningful divisions within the litigation to help ensure that the cases tried are representative of the entire census. For example, in the Vioxx MDL, the key variables agreed upon included: (1) type of injury (heart attack, stroke, or other); (2) period of ingestion (short-term versus long-term); (3) age group (older or younger than 65); (4) prior health history (previous cardiovascular injuries or not); and (5) date of injury (before or after a certain label change).³²

The transferee court and counsel then begin the process of creating a pool of cases that accurately represents the variables they have identified. Both the size of the pool and method of filling the pool will vary from MDL to MDL. In calculating the size of the pool, the court and attorneys must ensure that the pool is large enough to account for all major variables identified, but also small enough to be manageable and time-efficient.³³ After determining size, there are

³³ Id. at 2346-47.
three methods for filling the pool: (1) random selection; (2) selection by the transferee court; and (3) selection by the attorneys.\textsuperscript{34} It is at this stage that consideration must be given to venue objections and potential waivers.

Of the three potential sources of cases, each of which can produce hundreds of bellwether candidates, only those matters direct-filed into the MDL by residents of the state in which the transferee court sits are amenable to trial without consent of the parties.\textsuperscript{35} From a realistic standpoint, this will typically not suffice to warrant the cost and effort necessary to conduct a bellwether trial.\textsuperscript{36} In order to make the process more meaningful, the parties must be willing to waive venue objections from the remaining two sources: (1) cases direct filed by non-residents and (2) cases transferred pursuant to § 1407. In some MDLs, direct filing by non-residents is permitted pursuant to a negotiated case management order, with the proviso that the case will be remanded for trial to the district where venue is proper. In order to move the case forward as a trial pool selection, however, the defendant (and only the defendant) must waive its venue-related objections.\textsuperscript{37} For cases transferred by the Panel pursuant to § 1407, the parties must each waive their Lexecon objections before the case can be tried.\textsuperscript{38} Thus, in the absence of a “Lexecon waiver” by both the plaintiff(s) and defendant(s), a particular case should not be included in the trial pool of potential bellwether candidates.

Once the trial pool has been established, each of the cases within the pool will undergo case-specific discovery. This is similar to discovery conducted in any case, although MDLs often use form discovery tools such as a Plaintiff Fact Sheet and Defendant Fact Sheet in order to streamline the tasks involved. At the point where discovery is near completion, the court and counsel turn to the most challenging task of all—selecting the case to serve as the bellwether trial. Similar to the initial creation of the trial pool, the methods for choosing the bellwether case are: (1) random selection; (2) selection by the transferee court; and (3) selection by the

\textsuperscript{34} Id. at 2348-51.
\textsuperscript{35} Id. at 2357.
\textsuperscript{36} Id.
\textsuperscript{37} This is true unless a plaintiff at the time of filing reserves the right to object to venue if his case is set for trial or stipulates that direct filing is only for expediency and discovery purposes, and not for trial. Fallon, et al. supra note 32, at 2358 (see internal note 118).
\textsuperscript{38} Fallon, et al., supra note 32, at 2358.
attorneys. One or more of these methods may be used in combination with each other, at the discretion of the court.

In the end, if the process works, the bellwether trial will inform the parties about workable theories and defenses. Sometimes one trial is all that is needed, other times the court tries several. The ultimate goal is to gather enough information to facilitate a global resolution of the entire case inventory.

IV. Helpful Resources

**Duke Law Center for Judicial Studies - MDL Standards and Best Practices:** On May 2-3, 2013, the Duke Law School Center for Judicial Studies held a conference in Washington DC to identify consensus positions on MDL practice. The conference laid the groundwork for the *MDL Standards and Best Practices*, drafted by 22 defense and plaintiff practitioners experienced in MDL litigation. Significant input and comment were also provided by 17 federal and state court judge’s, as well as the Center’s Advisory Council. This practice guide consists of seven standards and 50 best practices, along with commentary and guidance.

**Bellwether Trials in Multi-district Litigation, 82 Tul. L. Rev. 2323 (2008)** – Lead author, Judge Eldon E. Fallon (United States District Court for the Eastern District of Louisiana), presents an overview of the bellwether process, including variables considered by the transferee court and counsel in selecting the case(s) to be tried.

**Herr, David F., Multidistrict Litigation Manual (2016 Ed.)** – Comprehensive practice manual analyzing the ins and outs of practice before the Panel. This manual gives an overview of the Panel’s role, along with an analysis of history and powers of the Panel. The various chapters include procedure, determining appropriateness of transfer, and factors in selection of a transferee district and judge. This is a good resource for any attorney faced with potential transfer of a case filed in a home district and now subject to transfer anywhere in the country.

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39 *Id.* at 2361.
Website: http://www.jpml.uscourts.gov. Pursuant to its statutory authority under 28 U.S.C. §1407(f), the Panel has promulgated rules for the conduct of its business. Current amendments to these rules are posted on the Panel website.\textsuperscript{40} Also available on the website are numerous forms approved for use in cases where the Panel is involved.\textsuperscript{41}