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The Case for the Automatic Multidistrict Litigation Stay

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For 40 years, the Judicial Panel on Multidistrict Litigation (MDL Panel) has served as the federal judiciary's "traffic controller" by directing complex, factually related cases filed throughout the country to a single district for coordinated and/or consolidated pretrial proceedings. Although the MDL Panel is purposefully structured to conserve the judiciary's resources, the scheme also provides valuable benefits to litigants - particularly defendants who find themselves named in geographically dispersed actions all somehow related to the same core set of operative facts.

To defendants and their counsel, the specter of individualized briefing schedules and discovery programs (as well as associated costs) can be challenging and seemingly illogical. The MDL process is designed to minimize those problems. Instead, it places a premium on judicial efficiency and economy by avoiding duplicative discovery and inconsistent pretrial rulings in related cases, thereby benefiting litigants and the judiciary in a mutualistic manner.

Despite the obvious benefits derived from the MDL process, less enthusiastic are those parties, often plaintiffs, who understandably may have a more parochial perspective regarding how their actions should proceed and thus oppose transfer of their cases to another venue. In such litigants' view, their choice of forum should be given deference and the lawsuit should not be sent elsewhere (even for just the pretrial stage). This is particularly true in instances when they have drawn a judge they perceive to be favorable to their position.

To avoid transfer and inclusion of an individual case in MDL proceedings, a litigant opposing MDL transfer may employ several tactics in an effort to distinguish their case, including generating some "activity" in a particular case before the MDL Panel hears the motion to transfer. For instance, a litigant may seek expedited discovery or move for various provisional remedies to bolster arguments to the MDL Panel that its action is either "unique" and/or "too far advanced" for transfer. Such requests, while expedient from a tactical perspective, are often premature or unnecessary, resulting in costs and burdens that deplete the court's and the parties' resources - precisely those consequences the MDL scheme is intended to prevent. Thus, the incentive to manufacture artificial momentum behind a case is antithetical to the MDL system's fundamental interest in promoting judicial economy.

To address this unintended consequence of the current MDL scheme, this Article proposes small, but significant recommendations for reform that will further the goals underlying the MDL system. The MDL statute (28 U.S.C. §1407) should be amended so that once a motion is filed with the MDL Panel for transfer and pretrial coordination of related actions, proceedings in all of the subject actions are automatically stayed pending the Panel's decision on the motion. Further, to prevent transfer motions that are only intended to delay proceedings, the MDL Panel should also have the ability to assess costs associated with the motion to transfer against the moving party if it deems such a motion to be frivolous.

A Brief Overview

The MDL Panel, which consists of seven federal judges appointed by the Chief Justice of the United States, typically entertains argument on §1407 motions at hearings held every other month in varying locations throughout the country. According to the Panel's internal statistics, as of September 2008, the Panel had overseen the transfer of more than 210,000 separate actions since its formation in 1968.[1] These actions were coordinated with another 90,000 actions that were originally filed in transferee districts (i.e., the district court that is ultimately assigned the responsibility of overseeing all pretrial proceedings).[2]

Overall, throughout a 40-year span, the Panel has facilitated the coordination of more than 300,000 individual lawsuits.[3] These cases have included litigation arising from major air disasters, allegations of antitrust violations, and disputes concerning employment practices and intellectual property. The Panel's primary concern is not the substantive area of law involved, or how the legal claims are styled, but rather whether the actions implicate the same core set of operative facts.

The jurisdiction and objectives of the MDL Panel are set forth in its governing statute, 28 U.S.C. §1407. Before the enactment of §1407, it was generally understood that the then-operative venue statute (§1404) was deficient because it required individual transfer rulings for each separately filed action.[4] Likewise, consolidation efforts were often frustrated because no individual judge had the authority to consolidate actions situated in other federal districts.

The statute's legislative history reflects Congress' belief that §1407 would ensure the "just and efficient conduct" of related actions, avoid inconsistencies in pretrial rulings, and minimize the duplication of discovery. Section 1407 makes clear that transfer and pretrial coordination of related actions is to be restricted to the pretrial phase of proceedings.[5] Upon the completion of pretrial proceedings, or even before, the MDL Panel is empowered to remand transferred cases that have not been otherwise disposed of back to their original districts for trial.

Over the years, securities actions have proven particularly suitable for MDL treatment. When geographically scattered shareholders or investors in a corporation or fund allege violations of the federal securities laws, and perhaps assert parallel pendent state law claims arising from securities transactions, such as breach of fiduciary duty or statutory fraud, the nature of these lawsuits is such that they will often turn on similar sets of facts.

Although these actions may be styled in various ways - perhaps as class actions, individual claims or shareholder derivative suits - and may involve different legal analyses and pleading requirements - as in claims brought within and outside the confines of the Private Securities Litigation Reform Act (PSLRA) - the MDL Panel still focuses on the factual similarity between the actions and allows the transferee judge to determine how best to respect the unique texture of each individual action in coordinating a pretrial program.

Parties supporting and opposing coordination of actions in MDL proceedings have raised myriad arguments in furthering their positions. Although there is a temptation to view MDL proceedings as mathematical formulae in which certain factors combine to yield predictable outcomes, the Panel's method is not simply quantitative. Decisions truly hinge upon the unique dynamic and context surrounding each §1407 proceeding.

The Case for the Stay

The extent to which an action has proceeded is one factor the MDL Panel takes into account when deciding whether it should be transferred for coordinated and/or consolidated pretrial proceedings alongside related cases.[6] Faced with the prospect of seeing its case transferred to a distant district, a litigant thus is often incentivized to distinguish its case from the rest, and "manufactured momentum" becomes a means of so doing. A litigant confronting this sense of urgency may move for a variety of provisional remedies including temporary restraining orders, preliminary injunctions, and receiverships.

Additionally, a litigant seeking to circumvent the MDL process may issue a barrage of discovery requests and seek to expedite treatment of such demands. In securities cases involving PSLRA claims, these demands are particularly problematic given that the defendant may have already filed a motion to dismiss - an event which, absent exceptional circumstances, is supposed to trigger a stay of all discovery.[7]

Although a litigant may argue that these forms of pretrial activity are necessary or justified by emergency circumstances, they are problematic for a variety of reasons. Principally, they drain a court's and the parties' resources as they are compelled to engage in premature briefing that is more efficiently undertaken as part of a coordinated pretrial program.

Perhaps more troubling, pretrial activity in transferor venues creates a serious risk of inconsistency in how pretrial disputes - disputes that may arise in a number of different actions - are resolved. For example, a judge in one district may rule that a discovery request made after a motion to dismiss is filed should proceed despite the PSLRA discovery stay. A judge in another district may deny an identical discovery request made by a different plaintiff in a related action. Finally, unnecessary pretrial activity only complicates the ultimate transferee judge's efforts to effectively coordinate the actions once they are transferred. Individual actions may have progressed to different degrees and judges in transferor districts may have already decided different pretrial issues. Collectively, the actions become an increasingly complex morass, and it becomes the transferee judge's responsibility to untangle the knots.

Differences in the progression of individual related lawsuits prior to action by the MDL Panel are somewhat inevitable, but an automatic stay of proceedings following the filing of a §1407 motion would certainly help rectify the issue. Not only would an automatic stay eliminate the incentive to manufacture activity in a lawsuit and strain a court's resources, but it would also reduce inconsistencies in the adjudication of pretrial disputes, minimize duplicative discovery, and provide an ultimate transferee judge with a cleaner slate on which to design a coordinated pretrial program that best serves the interests of all litigants and the court system as a whole.

Although any delay associated with the briefing and adjudication of a §1407 motion before the MDL Panel is short (typically around three months), any arguable prejudice to the non-moving party could be addressed by compelling the party seeking transfer under §1407 to pay the costs and fees associated with proceedings before the MDL Panel. The MDL Panel would consider whether the motion to transfer was frivolous and only intended to cause delay and trigger the automatic stay. Such a measure would discourage use of a §1407 motion as a mere stalling tactic.

Stays Pending Panel Action

An automatic MDL stay would merely codify and mandate a common procedure in which litigants involved in potential MDL actions currently engage. Upon filing a §1407 motion seeking to have related actions pending in different districts transferred to a single district for coordinated pretrial proceedings, a party will often file motions to stay proceedings in various district courts. The theory behind such motions is logical. If an action will possibly be coordinated with a number of other lawsuits in another forum, further proceedings would only waste the transferor district's resources prior to potential transfer and impair a transferee judge's ability to effectively manage the actions in the event the actions are coordinated.

Although motions to stay pending MDL Panel action are commonly granted, they are wholly within the district court's discretion.[8] In adjudicating such motions, courts typically balance three factors: (1) the interests of judicial economy; (2) hardship and inequity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.[9]

One district court has noted that although courts have wide discretion, "a majority of [federal] courts have concluded that it is . . . appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending before the MDL Panel because of the judicial resources that are conserved."[10]

Even when a motion to remand an action is also pending, courts commonly grant motions to stay pending MDL action on the theory that delay is minimal and the ultimate transferee court is just as capable of resolving the validity of federal jurisdiction.[11] However, there is some variation in the treatment of stay motions, especially in light of the MDL Panel Rules which expressly note that the pendency of a transfer motion before the Panel does not affect the pretrial jurisdiction of the origin district.[12]

Further, although stays help promote judicial economy, consistency, and the efficient management of cases subject to MDL treatment - all central objectives of the MDL system - motions to stay still represent yet another form of pretrial activity on which courts and litigants are then required to expend time and resources. And the discretion judges are given in deciding whether to grant or deny a stay merely opens the door to further inconsistencies and differences between the progression of various actions that may be coordinated. Some judges may grant stays; others may deny them and allow the continuation of pretrial proceedings and adjudication of additional pretrial disputes. The result can cause additional problems for the ultimate transferee judge to resolve.

Of course, narrowing a district judge's authority to grant or deny a stay - a decision that has traditionally been within a judge's discretion - should not be taken lightly. Congress has taken such action previously when it enacted the PSLRA, which provides for a stay of all discovery once a defendant states its intention to file a motion to dismiss. There, concerns about the saturation of courts with unsustainable federal securities actions were deemed to override any concerns about temporarily delaying discovery while the court determines the basic legal viability of a pending claim. Here, given the logic behind an automatic MDL stay and the broad vision of the MDL system generally, such reform is justifiable. Further, this reform can be approached in a balanced manner by including with the automatic stay a provision that permits the MDL Panel to impose costs on a party that has made a frivolous motion to transfer.

Conclusion

For the reasons stated in this article, §1407 should be amended to include a new subsection(i). Section 1407(i) would read as follows:

All discovery and other proceedings in all actions subject to a request for transfer pursuant to this section shall be stayed while that request is pending before the Panel. An order denying transfer of any action under this section may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the filing of the motion for transfer if the judicial panel on multidistrict litigation finds such motion frivolous.

This automatic MDL stay would maximize the potential of the MDL system to achieve its statutory purpose and, as constructed, would far outweigh any minimal prejudice that may result from a slight delay in the underlying proceedings while the motion to transfer is pending before the MDL Panel.[13]

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Endnotes:

1. United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation (2008), available at http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html.

2. Id.

3. Id.

4. Section 1407 emerged from the efforts of the Coordinating Committee for the United States District Courts appointed by Chief Justice Earl Warren and charged with addressing congestion in the federal court system. David F. Herr, Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation §2.2 (2008).

5. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 532 U.S. 26 (1998).

6. See, e.g., *In re Chiropractic Antitrust Litig.*, 483 F.Supp. 811, 813 (J.P.M.L. 1980); *In re Magic Marker Sec. Litig.*, 470 F.Supp. 862, 865 (J.P.M.L. 1979).

7. 15 U.S.C. §78u-4(b)(3)(B) (2008).

8. *Landis v. N. Am. Co.*, 299 U.S. 248 (1936).

9. *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997).

10. Id. at 1362.

11. See, e.g., *Franklin v. Merck & Co.*, Civ. No. 06-CV-02164-WYD-BNB, 2007 WL 188264, at *2-3 (D. Colo. Jan. 24, 2007).

12. J.P.M.L. R. P. 1.5, 199 F.R.D. 425 (2001) ("The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. §1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.").

13. This statutory amendment would supersede J.P.M.L. R. P. 1.5 referenced above.