

Louisiana Law Review

Volume 75 | Number 2

The Rest of the Story:

Resolving the Cases Remanded by the MDL

A Symposium of the Louisiana Law Review

Winter 2014

When Remand is Appropriate in Multidistrict Litigation

Edward F. Sherman

Repository Citation

Edward F. Sherman, *When Remand is Appropriate in Multidistrict Litigation*, 75 La. L. Rev. (2014)

Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol75/iss2/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

When Remand is Appropriate in Multidistrict Litigation

*Edward F. Sherman**

INTRODUCTION

The 1968 Multidistrict Litigation Act (the “MDL Act”) created the Panel on Multidistrict Litigation (the “Panel”) to transfer multiple cases with “common questions of fact” to a single federal judge for coordinated or consolidated pretrial proceedings.¹ Transfer is authorized if the Panel determines 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.”² The transfer to a single district court is made without consideration of personal jurisdiction over the parties and without having to meet federal venue requirements.³ The transferee court has broad authority to dispose of all motions and issues that arise in the pretrial context, including all discovery matters and dispositive motions such as those for dismissal and summary judgment. The Act provides that: “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 been previously terminated . . .”⁴ No guidelines are provided for determining when “the conclusion” of the proceedings occurs, and now, after almost fifty years of practice under the Act, significant issues remain as to when remand should take place.

I. SELF-TRANSFER AND LEXECON

For several decades after passage of the MDL Act, it became an accepted practice for transferee judges to use the power under section 1404(a) to transfer to a more convenient forum in order to keep MDL cases in their district for trial or disposition.⁵ Writing in

Copyright 2014, by EDWARD F. SHERMAN.

1. 28 U.S.C. § 1407(a) (2012).

2. *Id.*

3. For an account of these developments, see Richard L. Marcus, *Cure-All for an Age of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Panel’s Transfer Power*, 82 TUL. L. REV. 2245 (2008).

4. 28 U.S.C. § 1407(a) (2012).

5. See *id.* § 1404(a) (“For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . .”).

1978, Judge Stanley Weigel reported that “[i]n point of fact, slightly less than five percent of the actions transferred by the Panel have been remanded.”⁶ It remains true that the great majority of cases are resolved in the transferee forum, and that most are resolved by some sort of settlement.⁷ But over time, the practice of transferee courts to dispose of the cases transferred to them came into question.

From the start, there was a debate over whether transferring cases under the Act should allow transferee courts to do more than just prepare cases for trial.⁸ It was argued that the transferee judge would develop expertise in managing the litigation that could be of great benefit if that judge could hold on to the cases for trial, either individually or in the aggregate. This view was reflected in the practice of “self-transfer” that became dominant and was enshrined in a Panel regulation.⁹ The debate over allowing transferee courts to hold onto cases for trial mirrored the long-time debate over whether to aggregate cases in the first place. The interests of efficiency, economy, and consistency in resolution of like cases were cited in favor of aggregation.¹⁰ In opposition to aggregation were concerns for honoring the plaintiff’s choice of forum, individualized due process, and the jurisdictional integrity of the court where the suit was originally filed.¹¹ That debate is still ongoing, enhanced in recent years by court hostility to class actions

6. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

7. M. MARCUS, E. SHERMAN, & H. ERICHSON, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 169 (5th ed. 2010).

8. See Stephen Scotch-Marmo & Michael James Ableson, *At What Price Efficiency? – Judicial Self-Assignment for Trial in Multidistrict Litigation*, Prod. Safety & Liab. Rep. (BNA) No. 42, at 934 (Aug. 25, 2014) (reviewing the debate in the context of the passage of the Act).

9. The JPML has blessed self-transfer by Rule 14(b), which provides that the Panel will not send a case back for trial if the district court handling pretrial matters transfers the case to itself, and by case law holding that the JPML will not even consider remanding so long as the district court is considering a self-transfer motion. See Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 14(b), 277 F.R.D. 480 (2011) [hereinafter Panel Rules] (superseded, in part, by Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)); see also *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L. 1972) (“In view of the pendency of [a section 1404(a)] motion, we expressly refrain from granting this motion for remand and interfering in matters within the discretion of the transferee judge.”).

10. Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991) (comparing policies favoring aggregation—such as economy, efficiency, and consistency of result—with policies disfavoring litigant autonomy and fairness in individual treatment).

11. Scotch-Marmo & Ableson, *supra* note 8 (discussing congressional testimony and court concerns over aggregation).

and academic concerns over class action abuses.¹² The narrower debate over exactly when MDL cases should be remanded back to their original jurisdictions is the subject of this Symposium.¹³

The self-transfer approach still had its limits. Self-transfer was possible only if the transferee judge sat in a district in which a case could originally have been brought. Furthermore, a high percentage of all cases settle before trial, and that is especially so when the MDL process—intended to foster settlement—is invoked. Thus, a large number of transferred cases would always be resolved by settlement accomplished under the jurisdiction of the transferee court. Finally, transferee judges have authority to rule on all pretrial matters, including dispositive motions such as motions to dismiss and for summary judgment.¹⁴ Thus, transferee courts could dispose of many of the cases transferred under MDL, obviating the need to remand to the original district where they were filed.

Despite the broad acceptance of self-transfer pursuant to section 1404(a), the Supreme Court held that it was improper in the 1999 decision of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.¹⁵ The Court concluded that the statutory requirement that, at the completion of pretrial proceedings, the action “shall be remanded . . . unless it shall have been previously terminated” did not contemplate that transferee courts would hold on to cases past the pretrial preparation stage.¹⁶ In *Lexecon*, the transferee judge had resolved all but one of the claims by summary judgment.¹⁷ Over the plaintiff’s objections, the transferee court transferred the case to itself for trial of that claim pursuant to section 1404(a).¹⁸ The defendant prevailed at trial, but the Supreme Court reversed because the statute “obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.”¹⁹ The Court rejected the

12. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003); see generally Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457429 ##, archived at <http://perma.cc/F9YW-UZ94?type=pdf>.

13. For an edited and excerpted transcript of the discussions at the *Louisiana Law Review*’s 2014 Symposium entitled “The Rest of the Story, Resolving the Cases Remanded by the MDL,” see 75 LA. L. REV. 342, 342–97 (2014).

14. See text at notes 43 & 44, *infra*.

15. See 523 U.S. 26 (1998).

16. *Id.* at 35 (internal quotation marks omitted).

17. *Id.* at 31.

18. *Id.*

19. *Id.* at 34.

defendant's argument that the granting of the section 1404(a) motion constituted a termination that obviated remand, and concluded that the defendant "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."²⁰

II. MEANS OF AVOIDING REMAND AFTER *LEXECON*

There are still ways for transferee judges to retain control of cases by doing something comparable to a section 1404(a) transfer. As the chair of the MDL Panel, Judge John G. Heyburn II, noted: "Transferee judges are nothing if not resourceful where necessity dictates and several appropriate strategies are available by which the *Lexecon* conundrum may be avoided."²¹ He provided the following examples:

[P]rovided the plaintiff is amenable and venue lies in the transferee district, the action could be refiled there. The parties could also agree to waive objections to venue. Alternatively, the transferee court could try a "bellwether" case that was originally filed in the transferee district, the result of which may promote settlement of the transferred actions in the MDL. Another option, suggested in the *Lexecon* opinion itself, is for the transferor court to transfer the action back to the transferee court under § 1404(a). Still another option would be for the transferee judge to follow the action to the transferor court after obtaining an intracircuit or intercircuit assignment.²²

The first three techniques listed by Judge Heyburn have been more fully described:

Prior to recommending remand, the transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of the parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) may otherwise promote settlement in the remaining actions.

20. *Id.* at 40.

21. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2233 n.47 (2008).

22. *Id.* (citations omitted).

Soon after transfer, the plaintiffs in an action transferred for pretrial from another district may seek or be encouraged (1) to dismiss their action and refile the action in the transferee district, provided venue lies there, and the defendant(s) agree, if the ruling can only be accomplished in conjunction with a tolling of the statute of limitations or a waiver of venue objections, or (2) to file an amended complaint asserting venue in the transferee district, or (3) to otherwise consent to remain in the transferee district for trial.²³

Most of these techniques require the consent of the parties or the initiative of the plaintiff. They are thus not objectionable on the grounds that they deny the plaintiff's choice of forum or the transferor judge's authority over cases filed in his or her district. The technique of having the transferor judge transfer a case back to the transferee court under section 1404(a) can only be done if the transferor court finds that the limited conditions for transfer to a more convenient forum are satisfied.

However, one of the suggested techniques—the assignment of the transferee judge to preside over the trial of the case in another circuit—has been questioned. The use of intercircuit assignment of transferee judges is an efficient way to allow the transferee judge to sit outside his or her district and to preside over the litigation, either as individual cases or in an aggregate trial. It has been used to allow judges with special expertise or time in their docket to try cases in a different circuit. It is particularly efficient in the MDL context because the transferee judge has typically lived with the litigation for a considerable period and developed extensive knowledge and expertise in managing it.

This practice was challenged in an opinion by Chief Judge Alexander Kozinski of the United States Court of Appeals for the Ninth Circuit in *In re Motor Fuel Temperature Sales Practices Litigation*.²⁴ In that case, Chief Judge Kozinski received a letter from the Judicial Conference Committee on Intercircuit Assignments asking him to sign a Certificate of Necessity that would permit the transferee judge, Chief Judge Vratil of the District of Kansas, to appear in his circuit as a visiting judge to try the MDL cases.²⁵ Pretrial proceedings having been concluded, Judge Vratil had notified the parties that to "facilitate trial in an efficient and timely manner," she would ask the Judicial Conference Committee to

23. Scotch-Marmo & Ableson, *supra* note 8, at n.61 (quoting 32-20P JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 20.132 (3d ed. 2012)).

24. See 711 F.3d 1050 (9th Cir. 2013).

25. *Id.* at 1052.

designate her to handle the proceedings.²⁶ Such requests are often granted routinely by circuit chief judges. The procedure for intercircuit assignments is contained in guidelines issued by the Chief Justice of the Supreme Court of the United States, which Judge Kozinski described as based on necessity:

A federal court in our circuit identifies a need for a visiting judge for a case or cases pending in that court. The need may be occasioned by a shortage of judges, or by the recusal or disqualification of all of the court's judges; it may concern a single case or a multitude of cases; it may be for a single trial or hearing, or it may apply to scores of them. If the need can't be satisfied by judges within the circuit, our Circuit Executive and her trusty staff identifies a judge or judges outside the circuit who are available and willing to serve. In this effort, they're immensely aided by the Judicial Conference Committee on Intercircuit Assignments, whose invaluable and frequent help I gratefully acknowledge. Once a willing out-of-circuit judge has been identified, the chief judge of the borrowing circuit signs a Certificate of Necessity, which, not surprisingly, represents that an out-of-circuit judge is needed for a particular case, location or time period.²⁷

The defendants objected to the request for assignment, and Chief Judge Kozinski denied the request.²⁸ He did not accept the defendants' objection that the procedure violated *Lexecon* as an attempt to resuscitate the "self-referral" doctrine, saying that *Lexecon* dealt with venue and not judicial assignment.²⁹ But he found that the request violated the Chief Justice's guidelines for assignments:

[B]y signing the certificate, I'd be divesting Ninth Circuit district judges of cases that would, in the normal course, be assigned to them. Each of the cases was assigned to a local district judge prior to the MDL transfer. It's my understanding that, when cases are transferred back to the originating districts, they're automatically restored to the dockets of the judges to whom they had been assigned prior to the transfer. Or, if the judge isn't available, the case is assigned to another district judge in that district, in accordance with local procedures—generally calling for random assignment.

26. Order at *1–2, *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840 (D. Kan. Feb. 2013); Scotch-Marmo, *supra* note 8, at n.2.

27. *In re Motor Fuel*, 711 F.3d at 1052.

28. *Id.* at 1052, 1054.

29. *Id.* at 1053–54.

By signing a Certificate of Necessity for the cases in question, I would, in effect, be removing the judges to whom the cases were originally assigned and transferring them to an out-of-circuit judge. I'm aware of no authority empowering the chief judge of the circuit to re-assign cases pending before other judges, or to remove cases from the district's assignment wheel. Only if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.³⁰

Chief Judge Kozinski viewed the Chief Justice's guidelines as "directed strictly toward meeting judicial necessities" and opined that although "having the district judge who conducted MDL pretrial proceedings also preside over the trial of the case can improve judicial efficiency, preserve scarce judicial resources and enhance MDL judges' control over their proceedings," there is no authority for assignment to further those aims.³¹

Chief Judge Kozinski did add that the guidelines might be amended to define the concept of "necessity" broadly and "thereby give chief circuit judges latitude to seek intercircuit assignment in these circumstances."³² But the tenor of his opinion was that intercircuit transfers based on efficiency could encroach on the authority of transferor judges to resume rightful control over their cases upon completion of pretrial proceedings. An indication of his feelings in opposition to delaying remand can be found in his dissent in a later-reversed Ninth Circuit decision upholding self-transfer in *Lexecon*. "Soon after the MDL process got underway," he wrote, "a peculiar thing started happening: [transferee] [j]udges began to develop proprietary feelings toward the cases entrusted to them . . ."³³ In *Motor Fuel*, he expressed the hope that his opinion would "be the beginning of a productive discussion as to the proper way to handle [such situations]."³⁴ This is consistent with

30. *Id.* at 1054.

31. *Id.* at 1054–55.

32. See *id.* at 1055.

33. *In re Am. Cont'l. Corp.*, 102 F. 3d 1524, 1540 (9th Cir. 1996), *rev'd by Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (alteration in original).

34. *In re Motor Fuel*, 711 F.3d at 1055 (alteration in original).

the movement that some believe is growing to require early and routine remand of cases to transferor courts in the belief that individual trials are superior to aggregative settlements.³⁵

III. WHEN SHOULD REMAND OCCUR?

It is the Panel's responsibility to remand cases. The process for remand under the MDL Act is that the Panel will issue a Conditional Remand Order (CRO) upon the suggestion of the transferee judge—or upon motion by one or more of the parties or at the Panel's own initiative—that the case is ready for remand.³⁶ Judge Heyburn, however, has said that when the transferee judge suggests remand, “the party seeking to vacate the CRO faces an uphill battle, as the Panel ‘gives great deference to a transferee judge’s suggestion that an action pending before [that judge] is ripe for remand.’”³⁷

After *Lexecon*, the transferee judge must remand upon the completion of pretrial proceedings.³⁸ But exactly when is that? As seen by the myriad ways that a transferee court can comply with *Lexecon* and yet avoid immediate remand, the percentage of remanded cases remains low. Given that most of the techniques to avoid remand are not prohibited, a further question arises as to how early remand should occur. The generally accepted answer has been that a transferee judge should have considerable discretion as to timing in order to accomplish the goals of MDL transfer. But that view has been challenged more recently by contentions that disaggregation of MDL cases is desirable to assure the right to individual trials and preserve the jurisdictional interests of the transferor courts.³⁹ In opposition is the view that early remand is not

35. See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 L.A. L. REV. 399 (2014).

36. See Panel Rules, *supra* note 9, at Rule 10.2 (“Upon the suggestion of the transferee judge or the Panel’s own initiative, the Clerk of the Panel shall enter a conditional order remanding the action or actions to the transferor district court . . . (i) The Panel may, on its own initiative, also enter an order that the parties show cause why a matter should not be remanded.”).

37. Heyburn, *supra* note 21, at 2235.

38. See generally *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); see also Panel Rules, *supra* note 9, at Rule 10.1 (“Where the transferee district court terminates an action by valid order, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, the transferee district court clerk shall transmit a copy of that order to the Clerk of the Panel. The terminated action shall not be remanded to the transferor court and the transferee court shall retain the original files and records unless the transferee judge or the Panel directs otherwise.”).

39. See, e.g., *Scotch-Marmo*, *supra* note 8.

required if the objectives of MDL pretrial transfer may still require the control of the transferee judge. This is essentially a policy issue only loosely governed by the MDL statute. The starting point is when it can be said that the pretrial objectives of MDL have been met.

A. When Common-Issue Discovery Is Completed

Supervision of discovery was a main impetus for the MDL Act. The electrical equipment price-fixing conspiracy that resulted in the much-publicized prosecutions of high-level corporate officials in the early 1960s brought an unprecedented avalanche of treble-damage antitrust actions in the federal courts.⁴⁰ Some 2000 suits were filed in 35 different districts. Because the suits were in different districts, Rule 42(a) consolidation was not possible.⁴¹ Moreover, section 1404(a) procedures for transfer to a more convenient forum were inadequate to ensure that all the cases could be transferred to a single court. The courts were therefore forced to cope with the burden on an *ad hoc* basis, giving impetus to the creation of the Coordinating Committee for Multiple Litigation of the United States District Courts, composed of nine federal judges, which supervised nationwide coordinated discovery for all electrical equipment cases. Out of this experience came the 1968 Multidistrict Litigation Act, 28 U.S.C. § 1407, which created the Panel on Multidistrict Litigation to transfer cases with “common questions of fact” to a single federal judge “for coordinated or consolidated pretrial proceedings.”⁴²

A consideration by the Panel in determining whether to send cases to MDL is whether duplicate discovery in similar cases can thereby be avoided. According to Panel Chair Judge Heyburn, “the Panel focuses solely upon the potential for convenience, efficiencies, and fairness in pretrial proceedings centralized before a single court.”⁴³ One factor is “whether the parties’ legitimate discovery needs are substantially similar in all of the proposed transferee actions.”⁴⁴ Additionally, Judge Heyburn noted:

[T]he Panel looks to whether similar facts are at issue with respect to the various claims in the different cases. The

40. See Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 (1964).

41. See FED. R. Civ. P. 42(a) (“If actions before the court involved a common question of law or fact, the court may . . . (2) consolidate the actions.”).

42. See 28 U.S.C. § 1407 (2012).

43. Heyburn, *supra* note 21, at 2237.

44. *Id.*

greater the factual commonality of the cases, the more likely it is that centralization will benefit the involved parties and the system as a whole. The more troublesome dockets to evaluate are those where the potential transferee cases may contain different groups of plaintiffs or defendants and may contain some differing legal claims, yet nevertheless may appear to require similar factual discovery.⁴⁵

Discovery schedules established by the transferee court provide some certainty as to when discovery is completed. Certain patterns of types of cases remanded due to discovery issues have emerged. Discovery relating only to individual cases, as opposed to common issue discovery, may be left to be done in individual cases on remand. For example pharmaceutical cases may require additional individualized plaintiff discovery that may be best left for remand, particularly on such issues as specific causation and damages. On the other hand, economic loss cases, such as antitrust, securities, and consumer fraud, are most likely to raise the need for more MDL-aggregated discovery. However, at least some individualized discovery may be desirable in the MDL court for purposes of definitive motions or settlement negotiations. That can sometimes be accomplished by allowing limited or targeted discovery so that the parties can assess what the totality of the individualized discovery would be. The transferee court must exercise its discretion in determining whether going forward with such discovery prior to remand would be useful.

B. When All the Common Pretrial Preparation Issues Have Been Resolved so that the Cases are Ready for Individual Disposition on Remand

The completion of MDL pretrial preparation occurs when all the necessary discovery and motions have been done and the cases are “in a can” to hand over to the transferor courts.

The precedents are clear that a transferee judge has authority over all proceedings that literally take place “before trial.”⁴⁶ That includes dispositive motions—such as motions for dismissal and summary judgment—and rulings as to evidence and witnesses that

45. *Id.*

46. *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840, 2013 WL 1896985, at *4 (D. Kan. May 6, 2013).

will affect the trial itself.⁴⁷ The transferee court's rulings are law of the case that are binding on remand for trial unless there are changed circumstances.⁴⁸ If transferor judges were permitted to upset the rulings of transferee judges, the result would be an undermining of the purpose and usefulness of transfer under section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality (at the trial court level) requisite to the convenience of witnesses and parties and to the efficient conduct of actions. The transferee judge thus has considerable discretion in determining what the pretrial issues are and, if he or she finds it useful, in segmenting them for disposition before remand.⁴⁹ The fact that there are so few remands from MDLs indicates how a transferee MDL judge can often effectively dispose of pretrial matters so that settlement is likely.

One reason that a transferee judge might decide a particular issue before trial, rather than leaving it for the remand court, is that by doing so there will be a uniform ruling applicable to all the cases on remand. The *Katrina Canal Breaches Consolidated Litigation*⁵⁰ and the *Chinese Drywall Litigation*⁵¹ provide examples of the transferee judge deciding thorny issues of law relating to such issues as choice of law and defenses. If the cases were remanded, there might not have been uniform rulings.

A remand need not be total as to the entire case. If a transferee court retains limited jurisdiction to rule on certain common issues (which could be on the request of the remand court), certain issues

47. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 169 F.R.D. 632, 636–37 (N.D. Ill. 1996) (finding that a transferee judge can limit the number of trial witnesses).

48. See MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004) (“Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and ‘law of the case’ considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.”). For an examination of the “law of the case” problems that arise in multidistrict litigation, see Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595 (1987).

49. See Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691 (2006) [hereinafter Sherman, *Segmenting Aggregate Litigation*].

50. See, e.g., *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009); See also Edward F. Sherman, *The MDL Model For Resolving Complex Litigation If a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2221 n.80 (2008) [hereinafter Sherman, *MDL Model*].

51. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521 (5th Cir. 2014) (ruling on such issues as liability for acts of subsidiary and alter ego, minimum contacts for personal jurisdiction, and vacation of default judgment).

could go back to it later for resolution—for example, to determine damages on a standard applicable to all cases. This could insure more uniformity of result among the cases remanded to many different jurisdictions. Group remands could also take place, for example, as to all the cases represented by the same law firm when there is an opportunity for settlement of all those cases or when there are certain categories of cases that can be settled or disposed of.

It has been suggested that plaintiffs' attorneys might oppose remand unless their attorneys' fees are determined and awarded in the MDL court. Assuming that a global settlement has not been achieved, remand might be partial because a number of dispositive and other issues have been decided by the MDL judge. In that case, it would seem appropriate to award attorneys' fees for the common benefits conferred on the plaintiffs up to that point. There does not seem to be any precedent dealing with this issue, no doubt in part because of the low level of MDL remands.

C. When the Transferee Judge No Longer Believes that a Global Settlement Is Possible if Remand Is Deferred.

1. The Settlement Responsibility of a Transferee Judge

One of the duties of a transferee judge is to attempt to achieve settlement.⁵² The MDL proceeding in federal court can provide a unique focus for settlement promotion and other pretrial activities. Since settlement is a primary goal of an MDL judge, that judge may keep the MDL cases when pretrial matters have been largely resolved so long as there seems to be momentum towards settlement. But if there is little hope of settlement, the MDL judge may move to remand. An expression of intent to remand may also be used by an MDL judge to stimulate the parties to settle. So the timing of remand can be tied to ongoing settlement negotiations.

Deference to the transferee judge as to whether the route he or she is pursuing to achieve settlement is usually accorded. But at some point, the Panel may decide that successful settlement is unlikely and call for remand. The asbestos MDL provides a lesson

52. See MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) ("One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.").

in realizing that MDL aggregation has been unsuccessful, although the solution there was not to remand the cases to the original jurisdictions but for the MDL judge to take strict measures through pretrial motions and the imposition of strict discovery requirements to weed out many unmeritorious cases.⁵³

The MDL judge necessarily has broad discretion in deciding whether remand of cases—either individually or in a group—will serve the interests of the MDL statute. For example, it has been noted that after a plaintiffs' steering committee (PSC) is appointed, a number of remand motions for cases are often filed by attorneys not selected. There may be myriad reasons for such motions. For example, a plaintiff's attorney may fear that his cases will be caught in “the black hole” of the MDL⁵⁴ and could be settled or tried more quickly if remanded. But such partial remands may reduce the MDL judge's leverage to obtain a global settlement. Another (less valid) reason could be that the attorneys not selected for the PSC are seeking to put pressure on the PSC attorneys or judge to give them a larger role in the MDL litigation. If that is the case, the judge might be wary of granting remand because it would hurt the client who is really not financially able to prosecute his case apart from the MDL. In short, transferee court decisions to remand can involve complex considerations weighing such critical factors as the impact on strategic choices and on the ultimate success of settlement that are not achieved by a routine rule of earliest possible remand.

2. Unique Advantages of MDL

MDL has emerged in recent years as an alternative to class actions for case aggregation. An MDL transferee judge need not rely on the class action, with its demanding requirements, to achieve the benefits of aggregation and promote a global settlement. In fact, in most mass tort cases today, granting of class certification is unlikely.⁵⁵ Furthermore, although a federal transferee judge does not have jurisdiction over related state cases, settlement negotiations as to the federal cases can be coordinated with the attorneys in the state cases, and the federal MDL can serve as a catalyst for a global settlement. As demonstrated in *Vioxx*, joint negotiations between lawyers in the state and federal

53. See *infra* text accompanying notes 68–82.

54. See Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013).

55. See Sherman, *MDL Model*, *supra* note 50, at 2208.

actions, and the collaboration of state judges with the federal MDL judge, can bridge the jurisdictional divide to accomplish an aggregate settlement without resort to class actions.⁵⁶

Another advantage of the MDL process is to enable a global settlement that encompasses state court cases on the same matter. There is no similar mechanism in the MDL Act that would permit transfer of similar cases from state courts. In many mass tort litigations, there are a sizable number of suits, both individual and class action, in both federal and state courts. This can result in certification of conflicting class actions and give rise to complicated federalism issues as to the power of a federal court to enjoin the state actions.⁵⁷ If the federal cases are transferred by the Panel to a transferee judge, a settlement can only bind the transferred federal cases if there is a global settlement involving both the parties and their attorneys from the state courts as well. In *In re Vioxx Products Liability Litigation*,⁵⁸ the transferee judge, Judge Fallon, involved state-court judges with large dockets of Vioxx cases in settlement discussions.⁵⁹ More generally, federal MDL judges may coordinate with state judges presiding over similar cases. An experienced defense-side lawyer observed that seeking MDL centralization may be an effective way of persuading state-court judges to follow the federal leader: "Without an MDL proceeding, there is no obvious leader among the federal judges handling federal cases. It can thus be very difficult to convince state court judges to follow the lead of any one particular federal judge."⁶⁰

The global settlement achieved in the Vioxx MDL included both the federal MDL suits and state court cases.⁶¹ This was accomplished by requiring plaintiffs' attorneys who wanted to participate in the settlement to submit enrollment forms for 100% of their Vioxx clients within a limited time period. More than 95% of the attorneys in both the federal and state cases enrolled and accepted the terms of the settlement. An MDL settlement can bind

56. See, e.g., Sherman, *MDL Model*, *supra* note 50; see generally *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006).

57. See, e.g., Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYUL. REV. 925, 940–41 (1995).

58. *Vioxx*, 239 F.R.D. at 450.

59. Sherman, *MDL Model*, *supra* note 50, at 2214.

60. Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIGATION 43, 46 (1998).

61. See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2336–37 (2008).

those parties that agree to it. In *Vioxx*, the state-court plaintiffs and their attorneys obviously found the settlement achieved in the federal MDL to be satisfactory and enrolled within the time period.⁶²

MDL transferee judges have a number of creative ways to try to accomplish global settlements. One of the most promising has been bellwether trials of a small number of representative cases that are filed (or dismissed and refiled) in the transferee district, as was done in *Vioxx*. The information provided to the attorneys regarding strengths and weaknesses across the spectrum of related cases helps them to assess the value of the consolidated litigation and makes possible a more reasoned decision as to an aggregate or global settlement.

3. A Shift Toward Routine Remand Without Encouragement of Settlement?

In March 2014, the *Louisiana Law Review* hosted a Symposium entitled “The Rest of the Story: Resolving the Cases Remanded by the MDL.” Professor Elizabeth Chamblee Burch’s article in this Symposium is an intelligent and spirited critique of delayed remand of MDL cases and of the role of transferee judges in promoting settlement.⁶³ The Article urges that early remand become “the norm” so that adverse consequences of transferee judges holding on to cases are avoided.⁶⁴ The adverse consequences are said to include errors in private, global settlements that are non-appealable; not having local judges familiar with state laws when state substantive laws are involved; aggregate settlements that include coercive terms designed to control stakeholders’ interests at the expense of non-lead attorneys and plaintiffs; not having jury trials that bring a community’s diverse perspectives and norms to bear on fact finding; global settlements that encourage plaintiffs’ attorneys to file weak claims; giving defendants strategic benefits of centralization and global settlement; and allowing transferee judges to receive self-interested benefits.

It is not the province of this Article to evaluate all those claims. Many of them go beyond the issue of remand that is the topic of

62. The settlement also required that 85% of the plaintiffs in pending cases enroll in order for the settlement to take effect. This has been criticized as raising “the prospect that consent is less than voluntary.” See Burch, *supra* note 35, at 14, 16. This is a common requirement insisted on by defendants to insure that settlement buys genuine peace and that plaintiffs’ attorneys do not cherry pick strong cases and withhold them from the settlement.

63. See generally Burch, *supra* note 35.

64. See *id.* at 413.

this Symposium to criticize both global settlements and case aggregation itself. Suffice it to say that a number of the claims do not seem to be supported under the actual practice of MDL transferee courts.

Objecting to the encouragement of settlement in MDL, Professor Burch's Article asserts that "coaxing settlement strays furthest from a judge's adjudicative role."⁶⁵ It correctly finds a pro-settlement bias in both the Panel and transferee judges. However, as reflected in case precedents applying the Act, as well as the Manual for Complex Litigation, encouragement of settlement is a primary objective of MDL practice in the interests of reducing the costs in both time and money of full-bore individual litigation. The charge that MDL assignments are "plum judicial assignments" from which transferee judges receive "self-interested benefits from settling high profile cases,"⁶⁶ seems contrary, from my experience, to the performance of transferee judges who are selected by the Panel for their reputation for fairness as well as their ability and experience in aiding the parties to settle.

Professor Burch's Article sees "evidence that a normative shift may be underway"⁶⁷ that will make early remand "routine."⁶⁸ As has been noted, there certainly has been a movement in opposition to case aggregation and its aspects like delayed remand and promotion of global settlements. As an extension of the aggregation debate, MDL has come under attack as a means of avoiding court-imposed limitations on what some in the defense bar and business see as excessive settlements. A much narrower issue is whether, as argued in Professor Burch's article, the MDL Panel "has abdicated its proper role" concerning remand and transferee judges should tighten their standards for ordering remands.⁶⁹ The Article cites two developments as indicating a "normative shift"—the investigations of the ABA TIPS Asbestos Task Force, and the experience of the transferee judges in the massive asbestos MDL that has been called "a black hole."

a. The ABA TIPS Asbestos Task Force

The ABA TIPS Task Force,⁷⁰ after holding hearings, has not as of the date of publication of this Article, issued its final report and

65. *Id.* at 416.

66. *Id.* at 417.

67. *Id.* at 402.

68. *Id.* at 422.

69. *Id.* at 400 (quoting John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 27, 31 (2012)).

70. The author of this Article is one of the seven members of the Task Force.

recommendations.⁷¹ The focus of the Task Force was not deficiencies in the MDL process, remand practice, or global settlements. The focus was the handling of asbestos cases, and particularly the issue of discovery of information concerning payments by the various asbestos trusts and concern over “double dipping” by claimants.⁷² The Task Force made no significant examination of MDL practice other than in the context of the particular asbestos MDL. The Task Force hearings did not concern transferee judge practice, global settlements, or time of remand. If MDL practice is to be examined, it will require a very different investigation than that of the Task Force.

b. The Asbestos Black Hole Experience

Asbestos litigation is the longest, most expensive mass tort in U.S. history, involving more than 8,400 defendants and 730,000 claimants as of 2002.⁷³ Asbestos cases were difficult to get certified as class actions because of the time often required for medical conditions to manifest themselves and the fact that plaintiffs were often exposed to many different products under very individualized circumstances, thus not satisfying the requirement of “predominance of common questions.”⁷⁴

After many refusals of courts to certify class actions in asbestos suits against manufacturers, the Fifth Circuit in 1973 approved class certification in an asbestos case.⁷⁵ Over the following decade, a number of courts, both federal and state, certified asbestos class actions—often leading to settlements—after the asbestos manufacturer had gone into bankruptcy. However, the class action solution to the asbestos crisis was short-lived, and the class action device was markedly restricted as a means of aggregate disposition of asbestos cases.

Reacting to what were considered excesses in class action practice, a number of circuit courts imposed stricter standards for

71. Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1042 (2014).

72. *Id.* at 1048–49.

73. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION, at vii, xxv, 70 (RAND Corp. 2005).

74. See FED. R. CIV. P. 23(b)(3) (“[T]he questions of law or fact common to class members predominate over any questions affecting only individual members. . . .”).

75. See Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

class certification, particularly as to mass torts.⁷⁶ In addition, a series of Supreme Court decisions severely undercut global settlements in class actions.⁷⁷ Given the failure of class actions to resolve asbestos cases, the MDL device was turned to. “In contrast to the stringent rules that govern class actions, MDL is a looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations.”⁷⁸ Also, unlike class actions where the named plaintiffs are the only formal party and are in a fiduciary capacity to represent the absent class members, every plaintiff in an MDL would have to file suit. Thus the issue of adequate representation of absent persons—who may not even know of the class action until notice is given upon settlement—is lessened in MDL’s.

Five times during the late 1970s and 1980s, petitions to consolidate asbestos cases through MDL transfer were filed.⁷⁹ However, the Panel did not consolidate the cases, apparently deferring to the individual federal courts to resolve asbestos litigation through individual or class dispositions.⁸⁰ However, the attempts of the individual courts had not made marked reductions in the backlogs. In 1991, the Panel gave in and transferred all

76. See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

77. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court addressed a settlement where twenty asbestos manufacturers reached an agreement with leading asbestos plaintiff’s lawyers. The settlement was made on behalf of all persons in the U.S. who had been exposed occupationally to defendants’ asbestos products. *Id.* at 602. The settlement included the claims of persons who had not manifested the disease. *Id.* at 603. The Supreme Court found that the attempt to lump all future claimants together in a single class action violated the class action rule. *Id.* at 625–27. Among other things, it noted conflicts of interest between those with presently manifested disease and future claimants. *Id.* at 627. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court overturned the certification of a settlement class, finding that there had been inadequate examination of whether there was in fact a limited fund. But more importantly, the Court said it was not contemplated that “the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale.” *Id.* at 843. The Court also restated the *Amchem* objections to class actions brought on behalf of both those with present medical conditions and those with only possible “future” injuries. *Id.* at 847. The *Amchem* and *Ortiz* decisions effectively brought an end to attempts to use class actions to craft broad global settlements of asbestos cases and to resolve future asbestos claims where no injury was manifested or suit filed.

78. Sherman, *MDL Model*, *supra* note 50, at 2209.

79. See generally Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021 (2014).

80. Robreno, *supra* note 54, at 111.

26,000 asbestos cases pending in federal courts to Judge Charles R. Weiner in the Eastern District of Pennsylvania.⁸¹ Judge Weiner undertook to achieve a global solution, appointing a steering committee of prominent plaintiffs' lawyers who negotiated a global settlement with a group of twenty companies.⁸² That settlement was rejected by the Supreme Court in *Amchem Products Inc. v. Windsor*.⁸³ Thus, after many years of encouraging a global settlement, the MDL process was left with having to try other methods. The asbestos MDL cases were ultimately transferred to Judge Eduardo C. Robreno of the Eastern District of Pennsylvania after the death of Judge Weiner. Judge Robreno noted that “[t]his stage of the litigation led some litigants to refer to MDL-875 as a ‘black hole,’ where cases disappeared forever from the active dockets of the court.”⁸⁴ Perversely, a reduction in the backlog of cases was aided by plaintiffs' lawyers avoiding federal court and filing instead in state courts. Judge Robreno eschewed aggregate or global approaches. In 2009, he dismissed thousands of cases based on the plaintiffs' failure to comply with his administrative order requiring filing of reports and other discovery materials.⁸⁵ He also suggested to the MDL Panel that no more tag-along cases (suits filed after the original MDL transfer) be sent to him.⁸⁶

Judge Robreno has considerably reduced the federal MDL docket, applying strict schedules and weeding out many cases for insufficient proof of harm or exposure thus reducing the bargaining power of plaintiff's inventory lawyers. On the other hand, from a plaintiff's perspective, there is a concern that meritorious cases have also been caught up in this drive. Some state court asbestos case dockets have also been reduced in states where an MDL-like court was created for transfer of asbestos cases.⁸⁷

81. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

82. Robreno, *supra* note 54, at 112–13. The settlement also established the Center for Claims Resolution (CCR) with a claims process for determining whether the eligibility of class members for payments, that also included alternative dispute resolution features.

83. See *supra* note 76.

84. Robreno, *supra* note 54, at 111.

85. *Id.* at 137–38. Called “Lone Pine orders,” many courts require the submission of specifics as to exposure and medical history early in asbestos litigation. *Id.* at 138.

86. *Id.* at 185.

87. Vairo, *supra* note 71, at 1056. Judge Mark Davidson, who was assigned all the Texas asbestos cases, testified before the Asbestos Task Force concerning use of similar techniques such as setting tight schedules for presentation of supporting evidence by plaintiffs. *Id.* at 1058–59.

The asbestos MDL experience is *sui generis*. The vast number of cases, individualized issues, bankruptcy of the principal manufacturers, and difficulty of weeding out non-severe and non-meritorious cases were distinctive. The MDL experience proved that attempts by the earlier transferee judges to dispose of the cases through settlements were inadequate, and it was Judge Robreno's imposition of strict schedules and pretrial demands for supporting evidence that began to shrink the backlog. Far from demonstrating that transferee judges hold on to cases too long and refuse to remand, that experience was resolved by the transferee court itself and not by remanding back to the transferor courts. The fact is that the "shift" claimed to be taking place in remand practice is not supported by either the ABA Task Force investigation or the asbestos MDL experience.

CONCLUSION

Since the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, transferee courts to whom the Panel on Multidistrict Litigation transfers cases for MDL treatment are required to remand cases upon the completion of pretrial proceedings. Just when that should occur is subject to dispute. Both courts and the Panel have favored using a variety of techniques to permit transferee courts to hold on to cases when, in their discretion, there is still a chance of resolution through motions or settlement. The primary categories in which immediate remand has been avoided are considered and evaluated: when common-issue discovery is completed; when all the common pretrial preparation issues have been resolved so that the cases are ready for individual disposition on remand; and when the transferee judge believes that a global settlement is no longer possible if remand is deferred. A movement in recent years has called for earlier remand and, in particular, that transferee judges not keep cases even if there is a possibility of resolution or settlement. The investigations of the ABA TIPS Task Force on Asbestos and the asbestos MDL "black hole" experience indicate that actions by transferee judges in setting tight schedules and requiring proof of such elements as exposure and harm can be effective as opposed to early and routine remand. Successes in achieving global settlements in such MDL cases as *Vioxx* provide support for continuing to give transferee judges broad discretion as to the timing of remand.