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Navigating the Muddy Waters of an MDL: Strategies to Get (and Keep) Your Case in Federal Court

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Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation is charged with consolidating cases sharing common questions of fact from different federal districts into a single court for pretrial activities and acts as a gatekeeper to multidistrict litigation (MDL) proceedings. See United States Judicial Panel on Multidistrict Litigation, [Overview of Panel](#), (last visited Apr. 24, 2015).

The importance of having a single judge consistently decide all dispositive motions and pretrial issues of fact and law, while also avoiding significant cross-country defense costs and overlapping trials in varied jurisdictions cannot be overstated. This article offers guidance on how to move cases efficiently through the panel and into an MDL when your client faces hundreds of lawsuits across the country.

Getting Your State Court Case Removed to a Federal Court

State court cases must be removed to a federal court before being transferred to an MDL. While the typical bases for removing a case (diversity of citizenship and federal question) are familiar, other procedural mechanisms may provide additional—and sometimes stronger—bases for removal. In analyzing whether your case can be removed, consider the following strategies.

“Related to” Jurisdiction

If your client has filed for bankruptcy, or is being sued along with a party that has filed for bankruptcy, “related to” jurisdiction can be a powerful arrow in your quiver. Under 28 U.S.C. §§ 1334 and 1452, a case can be removed to a federal court when it is “related to” a bankruptcy proceeding under Title 11 of the Bankruptcy Code. See also *In re Boston Reg’l Medical Center*, 410 F.3d 100, 105 (1st Cir. 2005). The scope of “related to” jurisdiction is very broad. A defendant that is merely affiliated with such a bankruptcy estate, or against which a claim for indemnity or contribution has been asserted, can remove the case to a federal court. See *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *In re New England Compounding Pharm., Inc., Prods. Liab. Litig.*, 496 B.R. 256, 269 (D. Mass. June 12, 2013). Unlike diversity removal, a defendant removing based on “related to” jurisdiction does not need consent of non-removing defendants, so a case can be removed quickly. See, e.g., *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660 (4th Cir. 1985). See also *Fromhart v. Tucker*, 2011 WL 5202239, at *2–3 (N.D. W. Va. Oct. 31, 2011).

“Snap Removal”

Removing a case before a forum defendant is served—“snap removal”—can be an important tool in transferring cases into an MDL. Under 28 U.S.C. § 1441(b), a plaintiff can keep a case in a state court even when there is complete diversity if there is at least one “forum defendant” who is sued in a state in which it is incorporated or has its principal place of business. Relying on express language in the statute, defendants often successfully remove cases that would be subject to the forum defendant rule by removing before the forum defendant is “properly joined and served.” To use snap removal effectively, there are important things to remember.

First, snap removal is controversial and not all jurisdictions allow it, so you must know the jurisdiction’s stance on this practice in advance. Removing a case in a jurisdiction that does not allow snap removal could result in your client paying costs and attorney’s fees under 28 U.S.C. § 1447(c) if the case is remanded. Second, since snap removal relies heavily on the timing of service, creating and implementing a system to monitor state court dockets so that you are timely notified when a lawsuit has been filed will guarantee the most efficient use of the “properly joined and served” language. Despite receiving much attention over the past few years, plaintiffs’ attorneys frequently still fail to serve a forum defendant in a case before serving the non-forum defendant. Removing as soon as the non-forum defendant has been served is critical to ensure successful snap removal. Similarly, there are even some jurisdictions that permit a snap removal before *any* defendant has been served.

Fraudulent Joinder and Misjoinder

The fraudulent joinder rule also helps maximize diversity jurisdiction. When evaluating diversity of citizenship for purposes of removal, a court must disregard a defendant that has been fraudulently joined, when “there is no possibility that a plaintiff can state a cause of

action against the [non-diverse] defendant in state court, or where there has been outright fraud in plaintiff's pleading of jurisdictional facts." *Rutherford v. Merck & Co., Inc.*, 428 F. Supp. 2d 842, 846 (S.D. Ill. 2006).

In pharmaceutical product liability cases, for example, a defendant may be able to ignore the non-diverse, in-state medical provider defendant and remove the case based on diversity if that defendant has been fraudulently joined. Equally important in the removal analysis is reviewing a multi-plaintiff complaint for opportunities to sever certain plaintiffs or claims from others, potentially creating the diversity needed for removal. Voluntary misjoinder of a plaintiff or claims to defeat diversity "is the functional equivalent of the fraudulent joinder of a non-diverse defendant." *Paul v. Bayer A.G.*, 320 F. Supp. 2d 1216, 1219 (N.D. Ala. 2004).

If you are able to sever plaintiffs' claims against diverse defendants, the court's order effectuating the severance must state that the actions be refiled and proceed as separate actions with separate docket numbers. Many jurisdictions have adopted the fraudulent joinder and misjoinder rules, so it is important to analyze each new complaint to determine whether these rules apply.

Getting Your Case Before the Panel Gatekeepers

After a case is removed to a federal court, a party must file a notice of potential tag-along with the panel to transfer the case to an established MDL. See Panel Rules 1.1(h) and 7.1(a). The timing of a tag-along is critical. The best practice is to file a tag-along contemporaneously with the notice of removal so that the panel is notified before a plaintiff files a motion to remand. The panel generally issues a conditional transfer order (CTO) very soon after a case is tagged to an MDL. Once a CTO is issued, any party opposing transfer must follow the panel process for opposing and vacating the CTO. The panel is generally reluctant to vacate a CTO because it is the pivotal first step in furthering the purpose of the panel: centralizing cases for pretrial activities to the substantial benefit of the parties and the courts.

Getting a District Court to Stay Your Case

Once a notice of potential tag-along has been filed, the removing party should file a motion to stay pending transfer to the panel. Getting the proceedings stayed prevents any party opposing transfer to the MDL from gaining traction in the home court. Any motion to stay should attach the CTO and should highlight that the panel is experienced in determining whether a case should be transferred to the MDL and has, in fact, already conditionally decided transfer is appropriate. The goal is to remind the district court that it does not need to spend judicial resources on an action that has already conditionally been transferred by the panel. It is more likely that the district court will rely on the judgment of the panel in staying proceedings if the party persuades the district court that the panel's inevitable decision on transfer would moot proceedings before it.

A motion to stay should be filed contemporaneously with the notice of removal and should specifically request that the district court grant a stay before a party moves to remand the case. A typically effective framework for such a motion looks like this: (1) detail the procedural posture of the case, including reference to the panel's CTO, making transfer to the MDL inevitable; (2) highlight that a significant number of similar cases have already been transferred to the MDL, also making transfer inevitable; (3) underscore the district court's broad discretion to stay proceedings pending transfer by the panel and focus on conserving judicial resources as remand briefing may become moot if the case is ultimately transferred by the panel; (4) argue that complex jurisdictional issues favor a stay pending transfer, relying on well-reasoned decisions such as the three-part test articulated in *Meyers v. Bayer, A.G.*, 143 F. Supp. 2d 1044 (E.D. Wisc. 2001); and (5) remind the district court that granting a stay pending transfer furthers the purpose of consolidated proceedings and ensures that parties to the consolidated proceedings are treated consistently.

Getting Your Case to an MDL

At this point, a party opposing transfer has one last chance to keep the case out of an MDL: filing a notice of opposition to the CTO and a motion to vacate with the panel. A party opposing transfer will typically argue that a case does not share common facts or legal issues with the cases in the MDL, or that pending jurisdictional issues are better resolved outside of the MDL. They also often assert state-specific statutes and cite these to rebut the required "common questions of fact" component of the transfer statute. For example, many states have statutes that require a plaintiff to resolve medical malpractice injury claims in front of a medical tribunal before initiating litigation.

In *In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, many medical provider defendants argued that their respective cases should remain in their home courts for pretrial matters because their local courts were better equipped to analyze and to resolve state medical malpractice statutory claims. See *In re New England Compounding Pharm., Inc. Prods. Liab. Litig.*, 38 F. Supp. 3d 1384 (J.P.M.L. 2014). They argued that despite sharing common questions of fact similar to the other actions in the MDL, their cases were unique because they implicated state medical malpractice statutes. The panel rejected these arguments on the grounds that (1) the plaintiffs' factual allegations regarding the state medical provider defendants' knowledge of the New England Compounding Center's background and practices plainly overlapped with issues in the MDL; and (2) those shared fact questions trumped the plaintiffs' requests to vacate or sever. *Id.* at 1385.

Transfer opponents may also argue that transfer is not appropriate because pending jurisdictional issues should be resolved in the district court, not the MDL court. In a motion to vacate transfer to the New England Compounding Center MDL, the panel determined that remand motions pending in the plaintiffs' home district courts were not enough to prevent transfer. The shared questions of fact necessitated transfer, and the jurisdictional issues "[did] not present an impediment to transfer, as plaintiffs [could] present such

arguments to the transferee judge.” *Id.* (citing *In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001)).

In short, merely pleading state-specific statutes does not automatically preclude transfer. Similar to the fraudulent joinder and fraudulent misjoinder analyses, the party favoring consolidation must remind the panel that the case shares questions of fact with cases previously consolidated, even when there are state-specific claims or statutes. It is equally important to understand that an MDL court can rule on motions to remand and other jurisdictional issues. These jurisdictional issues do not automatically preclude transfer, and a party favoring consolidation must ensure that the panel is not distracted by arguments that may appear at first glance to have merit.

Conclusion

The primary goal of the panel is to ensure that cases sharing common questions of fact are consolidated for pretrial proceedings, but “Section 1407 does not require a complete identity of common factual issues as a prerequisite to transfer, and the presence of additional facts or differing legal theories is not significant when . . . the actions still arise from a common factual core.” *In re: Maxim Integr., Inc. Patent Litig.*, 867 F. Supp. 2d 1333 (J.P.M.L. 2012). It is critical to know key strategies to obtain federal jurisdiction and to understand how to combat arguments that plaintiffs will advance to the panel and a district court to defeat federal jurisdiction. This requires having a firm grasp of each step in the process of getting your case from a state court, to a federal court, to the panel, and ultimately to an MDL.



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