

APPELLATE LAW

MDL Appeals

FIRST ESTABLISHED IN 1968, the Judicial Panel for Multidistrict Litigation (JPML) has transferred thousands of cases for consolidated pretrial proceedings where transfer serves “the convenience of parties and witnesses” and promotes “the just and efficient conduct of such actions.” 28 U.S.C. 1407(a). Multidistrict litigation (MDL) under § 1407 presents complicated appellate issues; knowing how, when and where to appeal an MDL court’s order is critical.

The MDL process begins with a JPML order transferring a case to an MDL court. The order cannot be reviewed on appeal except by “extraordinary writ” under § 1407(e). Once a case is transferred, the petition for such a writ must be filed in the circuit with jurisdiction over the MDL court; prior to transfer it should be filed in the circuit where the JPML transfer hearing is held. *Id.*

Appellate issues are more complicated after transfer

■ *Appellate issues become more complicated after transfer.* If the MDL court terminates a case on a motion to dismiss or a motion for summary judgment, there is a final judgment that may be appealed to the circuit covering the MDL court. Most MDL rulings, however, are not final judgments, and the MDL court generally must authorize an interlocutory appeal by entering partial judgment under

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Fed. R. Civ. P. 54(b) or by certifying the ruling for immediate appeal under 28 U.S.C. 1292(b). Discretionary appeals of class certification rulings are also permitted under Fed. R. Civ. P. 23(f).

Any cases not disposed of in pretrial

■ **The failure to file an interlocutory appeal can prove fatal to a multidistrict litigation party’s claim.** ■

proceedings must be remanded for trial. Prior to 1998, most MDL courts simply transferred the remaining cases to themselves for trial. The Supreme Court ended that practice in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), holding that

MDL cases must be remanded to the district courts where they were originally filed. *Lexecon* established a clear rule, but complicated the appellate environment. (Legislation has been introduced in Congress to overturn *Lexecon*, so far without success.) An MDL court’s potentially dispositive rulings may now be reviewed on an interlocutory basis in the MDL court’s circuit or after trial in the trial court’s circuit, and each court may apply different law and reach different results. Appellate counsel must carefully consider these issues in deciding when and where to appeal an adverse MDL court ruling.

■ *Interlocutory appeals.* As a general rule, interlocutory appeals of MDL court orders are filed with the circuit court with jurisdiction over the MDL court. See *FMC Corp. v. Glouster Engineering Co.*, 830 F.2d 770 (7th Cir. 1987) (refusing to hear a § 1292(b) appeal from the MDL court in Massachusetts on the ground that the 1st U.S. Circuit Court of Appeals had jurisdiction over the appeal, even though the case was originally filed within the 7th Circuit).

Once a case is transferred to an MDL court, even pretransfer rulings of the original court may be appealed to the circuit where the MDL court sits. For example, in *Astarte Shipping Co. v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985), the 5th Circuit held that a transfer under § 1407(a) “transfers the action lock, stock and barrel,” and therefore pretransfer rulings of the original district court in New York must be appealed to the 5th Circuit, which had jurisdiction over the MDL court in Louisiana.

There are, of course, exceptions. First,

appeals from MDL orders concerning depositions, including subpoenas and contempt orders, must be filed in the court of appeals for the district where the deposition is to be held, because in issuing such orders under § 1407(b), the MDL court is actually exercising the powers of a judge in that district. *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 880-81 (D.C. Cir. 1981).

Second, the transferor court's circuit may retain jurisdiction over an appeal that is already pending at the time of transfer if hearing the appeal fosters judicial economy and efficiency. See *In re Joint Eastern and Southern Districts Asbestos Litig.*, 152 F.R.D. 15 (E.D.N.Y. 1993).

Third, in at least one context, a transferor circuit has held that it could hear an appeal filed after the case was transferred, where it involved "a matter of considerable concern" to the circuit—attorney misconduct—and hearing the appeal would not "materially impede" the proceedings of the MDL court. *Meat Price Investigators Ass'n v. Spencer Foods Inc.*, 572 F.2d 163, 167 (8th Cir. 1978).

In addition to pursuing an interlocutory appeal of an MDL court's ruling, counsel have the option of waiting to raise the issue on appeal after remand and trial. The JPML has concluded that upon remand the circuit court with jurisdiction over the district court of origin has the "power and authority to review any and all rulings made in the case, without regard to whether those rulings were made by the transferee court or the transferor court." See *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175, 1177 (JPML 2000).

■ **Applicable law.** In deciding when to appeal, counsel should consider the impact of what law will apply in each circuit. In general, if the issue is one of federal law, the MDL circuit will apply the law of its own circuit and not the law of the circuit where the case originated. See *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1175-1176 (D.C. Cir. 1987). In an opinion by then-Judge Ruth Bader Ginsburg, the D.C. Circuit applied its own law in upholding the applicability of the Warsaw Convention's \$75,000 limitation on airline liability, rather than the contrary law of the 2d Circuit, where many of the transferred cases originated.

Distinguishing questions of state law, to

which the law of the original forum state should apply, the court reasoned that there is only one federal law, and any conflicts should be resolved by the U.S. Supreme Court.

It also reasoned that the efficiency of MDL proceedings would be compromised if the transferee circuit had to apply the law of all the circuits where the transferred cases originated. The *Korean Air* ruling has since been accepted by other circuits. See, e.g., *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996).

Forgoing an interlocutory appeal has its risks

Had the plaintiffs foreseen the outcome in *Korean Air*, they would have been wise to forgo an interlocutory appeal and instead challenge the ruling limiting liability in the 2d Circuit after the case was remanded. Not filing an interlocutory appeal, however, carries its own risks.

Cases transferred to an MDL court under § 1407(a) remain separate, distinct actions. Therefore, an appeal of a pretrial order filed by a party in one of the cases before the MDL court does not encompass the other cases before the MDL court. See *Hillman v. Webley*, 98 F.3d 1349, 1996 WL 559656, *7 (10th Cir. Oct. 2, 1996) (unpublished); *Stevens v. Danek Medical Inc.*, No. 95-14293-Civ-Paine, 1999 WL 33217282 (S.D. Fla. April 16, 1999).

The failure to file an interlocutory appeal can prove fatal to an MDL party's claims, as it did in *Stevens*. There, the 3d Circuit overturned an MDL court order that had dismissed a fraud claim on the ground that it was pre-empted by federal law. The plaintiff in *Stevens* had filed an amicus brief in the 3d Circuit, but did not separately appeal the ruling in his case, which was remanded to a Florida district court for trial.

The Florida court refused *Stevens'* request to reinstate his fraud claim, holding that the 3d Circuit's decision was not binding because *Stevens* was not a party to that appeal, and because the 3d Circuit's ruling was issued after his case was remanded.

Following 11th Circuit law, the Florida court held that the MDL court's order dismissing the fraud claim was correct. *Id.* at *7-8. As a result, the plaintiffs in these MDL cases ended up with disparate rulings on the

same issue of law, which had been uniformly resolved by the MDL court.

4th Circuit acts to avoid inconsistent outcome

The 4th Circuit has taken extraordinary measures to avoid such inconsistent outcomes. In *In re Food Lion Inc.*, 73 F.3d 528 (4th Cir. 1996), an MDL court in North Carolina dismissed claims of multiple plaintiffs on summary judgment and remanded the cases to their courts of origin. Three plaintiffs, whose cases originated in North Carolina district courts, appealed.

Recognizing that the other plaintiffs might appeal the same ruling in three other federal circuits, with possibly inconsistent results, the 4th Circuit declined to hear the appeal. Instead, to avoid "frustrat[ing] the aims of §1407," *id.* at 532, it directed the JPML to retransfer all cases to the MDL court and directed the MDL court to enter a Rule 54(b) partial judgment, so that the 4th Circuit could address the court's ruling in one consolidated appeal.

Food Lion established a rule in the 4th Circuit that MDL courts "must, at some point prior to filing a suggestion of remand, enter final judgment under Rule 54(b)" with regard to any order that partially disposes of a case. *Id.* at 533.

While other circuits have not adopted this as a rule, some courts have relied on *Food Lion* in certifying interlocutory MDL court rulings for appeal under § 1292(b). *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 743 (D. Md. 2003); cf. *In re Baseball Bat Litig.*, 112 F. Supp. 2d at 1176-77 (endorsing *Food Lion's* reasoning but finding it inapplicable where all MDL cases but one were dismissed by stipulation of the parties and there was no possibility of inconsistent appellate rulings).

In each MDL case, counsel should carefully evaluate the risks of following *Food Lion* or waiting to challenge a ruling after remand. ■

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