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The End of an MDL: What's Next?

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On August 29, 2013, Judge Keenan entered an Order Terminating MDL Proceedings and Setting Procedure for the Remand/Transfer of the more than 1000 pending Fosamax Osteonecrosis cases pending in the Southern District of New York in MDL 1789. Judge Keenan's Order is particularly aggressive; calling for 200 cases per month to be remanded to their appropriate home districts beginning November 1, 2013. Judge Keenan's decision to terminate the MDL left many attorneys wondering what was next.

Many attorneys file cases in the MDL, complete a Plaintiff Fact Sheets, order medical records, and other tasks that prepare their cases for eventual settlement. Often those attorneys are not involved in the global prosecution of the case and rely on others to prosecute the case and rely on MDL leadership work product. Attorneys' cases that are remanded under these circumstances will need to familiarize themselves with the work product created by leadership and prepare quickly to try their case. This is undoubtedly a factor taken into account by Defendants and must be considered by Plaintiffs.

General MDL Procedure

Remand is a well-established part of complex multidistrict litigation procedure. The authority to create an MDL by the Joint Panel on Multidistrict Litigation (JPML) arises under 28 U.S.C. § 1407. Transfers under §1407 are explicitly limited to pretrial proceedings. Specifically, §1407 states that "…actions may be transferred to any district for coordinated or consolidated pretrial proceedings"[i] and "each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings…"[ii] Once pretrial discovery is concluded, remand is appropriate under § 1407.

In *Lexecon, Inc. v. Milberg Weiss Bershad, Hynes & Lerach*, the Supreme Court held that a district court does not have authority under 28 U.S.C. §1407(a) to reassign a transferred case to itself for trial. The Court found that § 1407(a) "unconditionally" orders the JPML to remand cases that have not been terminated in the MDL at the end of pretrial proceedings.[iii] Other than limited exceptions when the parties waive *Lexecon* so that the MDL Judge may preside over a bellwether trial, the MDL Court does not have jurisdiction to preside over trials and must remand cases to their home districts when it becomes appropriate.

When is Remand Appropriate under § 1407?

Remand is most appropriate when the MDL has completed pretrial proceedings. Pretrial proceedings include general causation expert discovery, document production, *Daubert* motions, and potentially bellwether trials.[iv] This process may also include settlement discussions to

resolve the litigation. In many cases, the parties will reach settlement before the issue of remand is ripe.[v] In cases where remand is appropriate, there is essentially nothing left to do but case-specific discovery and trial.

In deciding to remand cases, The Manual for Complex Litigation states that the MDL Court "should consider when remand will best serve the expeditious disposition of the litigation."[vi] For example, in the Fosamax litigation Judge Keenan found that it was unclear how conducting additional case-specific discovery in 100 of the more than 1000 pending cases would further the MDL litigation. Judge Kennan specifically found that additionally discovery would unnecessarily prolong the MDL and introduce issues more appropriately heard in the home districts.[vii]

Venue Considerations

One of the first decisions to be made is proper venue for remand. Due to common MDL orders such as direct filing, proper venue for remand is not always obvious.[viii] In most cases the Plaintiff often has more than one option for trial venue, including the home district of the Plaintiff, the home district of the Defendant, or where the injury occurred. Generally, the MDL Judge will grant deference to the Plaintiff's choice of venue. For cases that were filed in the home district and then transferred into an MDL under § 1407, venue selection becomes much easier.

One complicating factor in venue selection is multi-Plaintiff complaints, often filed in state court, that include Plaintiffs from different districts on one Complaint. Recently, Defendants have attempted to remove these Complaints to Federal Court under the Class Action Fairness Act of 2005 (CAFA). Among other things, CAFA authorizes federal removal for mass actions when "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of fact."[ixx] Plaintiffs should be careful to fashion complaints and motions in a manner that cannot be interpreted as a request for a joint trial.[xi]

MDL Work Product

One asset of great benefit to a Plaintiff upon remand is access to the MDL work product. The MDL work product is the result of thousands of hours and years of pretrial litigation by leadership in the MDL. Access to this material arises from an area that is often an area of contention in a MDL: the common benefit assessment. Since all cases are being assessed, the leadership will have a fiduciary duty to provide work product to those who have cases in the consolidated litigation. Work product such as depositions, document production, and generic expert reports are essential to prepare the case for trial in the home district.

Additional materials can include, model briefs, deposition outlines, trial exhibits, deposition prep packages, and, if MDL bellwether trials have occurred, full trial packages. Other benefits include

decisions by the MDL Judge on pretrial motions such as *Daubert* and other decisions. Individual Plaintiffs also benefit from tested trial techniques used in bellwether trials.

Individual Case Work

Once a case is remanded the case specific discovery begins immediately. Individual tasks that must be completed include educating and prepping the treating prescribing doctors who will become vital to the case and depositions of sales representatives. By the time an MDL reaches the remand stage it has often been many years since the litigation started and since the client used the pharmaceutical product in question. Often times, the sales representative no longer works for the Defendant and becomes an invaluable source of information. As discussed above, MDL common benefit materials often include outlines and transcripts for treating and prescribing doctors as well as sales representatives.

Conclusion

The end of a MDL and remand may seem to present a daunting task. After years of relative comfort in the MDL suddenly your case is alone with trial dates looming. However, it is important to remember the resources that are available. The MDL has done much of the heavy lifting in the general causation and discovery phases. The case is nearly ready for trial. All that is left are the case-specific tasks that are performed in even the most routine cases and there is a plethora of information and resources at your disposal to take the case to trial.

With remand currently occurring in in the Fosamax osteonecrosis MDL and talk of remand in the DePuy ASR litigation it is important to understand what's next when a MDL ends. The majority of MDL's are resolved before remand through the bellwether process and settlement programs.[xii] It remains unknown if remand will become a growing trend in complex multidistrict litigation.

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[i] 28 U.S.C. § 1407(a)
[ii] *Id*.
[iii] *In re Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)
[iv] *See Generally*, In Re: Fosamax Products Liability Litigation MDL 1789
[v] *See*, In Re: Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation MDL 2100
[vi] Manual for Complex Litigation, Fourth § 20.133
[vii] Order, *In Re: Fosamax*, (2013) 06-md-1789, Document No. 1465 *available at*, www.fosamaxmdl.com
[viii] *See, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)
[ix] 28 U.S.C. § 1332(d)(11)(B)(i).
[x] The provisions of CAFA and a "mass action" are beyond the scope of this article. For more information: *See, Tanoh v. Dow Chemical Corp.*, 561 F.3d 945 (9th Cir. 2009); *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012); and most recently *Romo, et al. o v. Teva Pharmaceuticals USA, Inc.*, 9th Cir. App. Case No. 13-56310. In these cases, the Court considered multi-plaintiff complaints with fewer than 100 plaintiffs that were consolidated or coordinated in a state court proceeding. After such consolidation, more than 100 plaintiffs' claims were in the same group proceeding. The question addressed was whether the plaintiffs requested a trial of over 100 plaintiffs, thus triggering the "mass action" provision of CAFA.

[xi] *See, Romo, et al. o v. Teva Pharmaceuticals USA, Inc.*, 9th Cir. App. Case No. 13-56310

[xii] *See Generally,* In Re: Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation MDL 2100; In Re: Trasylol Products Liability Litigation MDL 1928; and In re Levaquin Products Liability Litigation MDL 1943.