

Prescription Drug Litigation in the MDL: The Need for Trial Lawyers

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Prescription drug manufacturers, such as Merck,⁴¹ Bayer,⁴² and Wyeth,⁴³ are increasingly being forced to defend their products in federal and state courts across the United States. In federal courts, the manufacturers have found themselves in the multidistrict litigation system ("MDL"), which allows similar cases filed in any federal courts to be consolidated into one district court for pretrial proceedings. In theory, the MDL court only oversees pretrial motions, and the case is remanded back to originating court for trial once discovery is complete. Defendants who find themselves in the MDL may feel as if they in "litigation purgatory," since their case is pending before a judge who does not appear to have the authority to hold the trial. However, defendants can use the MDL system not just as a temporary stop over of their cases, but actively pursue the case through discovery, dispositive motions, and most importantly, advocating bellwether trials.

This article presents an opportunity to highlight the advantages of defendants in litigating in the MDL. It provides a brief overview of the MDL system and explains why transfer to the MDL is generally warranted in prescription drug cases. Defendants can actually use the MDL court to their advantage by maximizing the benefit of

coordinated pretrial proceedings, filing dispositive motions, and advocating for bellwether trials. Success in bellwether trials, such as Merck victories in the recent Vioxx cases, demonstrates that trial can put the defendant in a confident bargaining position. Of course, what is needed throughout the entire MDL process up through the bellwether trials, are competent trial attorneys who are always preparing and aligning the case for trial.

Congress created the MDL system in 1968 for the purpose of transferring federal actions involving one or more common questions of fact to one district court for consolidated and coordinated pretrial proceedings.⁴⁴ The MDL court has authority to rule on pretrial motions, such as admissibility of expert testimony, and dispositive motions. Since these rulings survive remand to the originating court, the decisions of the MDL court can have a decisive effect on the case. After remand, the originating court has exclusive jurisdiction but is bound by the rulings of the MDL court. If necessary, the originating court may allow further discovery and pretrial proceedings to be conducted before holding trial.

The gatekeeper to MDL is the Judicial Panel on Multidistrict Litigation, a group of seven judges appointed by the Chief Justice of the Supreme Court from federal appellate and district court judges. The Judicial Panel possesses the

sole authority to consolidate federal actions into one district court. As for remanding the cases from the MDL court back to the originating court, in 1998, the Supreme Court held in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,⁴⁵ that the Judicial Panel also has the sole authority for remanding any pending action to the originating court. The Panel is not required to remand all the cases at one time, but may separate any claims it deems appropriate and remand those claims before conclusion of pretrial matters. District courts have distinguished *Lexecon* in several ways so that MDL courts may resolve the cases through settlement or trial.⁴⁶ Bellwether trials are one way that MDL courts are able to use a limited number of actual trials to advance settlement negotiations.

Prescription Drug Manufacturers and the MDL

Actions filed against prescription drug manufacturers have been a significant source of MDL cases, including one of the largest MDL cases ever, *In re Diet Drugs*, MDL 1203,⁴⁷ which consolidates nearly 20,000 actions as of January 10, 2007. While cases transferred to the MDL system generally involve thousands of plaintiffs, the actual number of cases filed has little bearing on whether the Judicial Panel will grant transfer. In

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