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Keeping a Transferee Judge for Trial in a Multidistrict Litigation

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A Practice Note setting out the ways in which multidistrict litigation (MDL) litigants can keep the transferee judge after the conclusion of pretrial proceedings, despite the limitations of the Multidistrict Litigation Act of 1968.

Where there are multiple civil actions involving one or more common questions of fact that are pending in different federal district courts, the Judicial Panel on Multidistrict Litigation (JPML) can transfer those actions to a single district court for coordinated or consolidated pretrial proceedings (Multidistrict Litigation Act of 1968 (28 U.S.C. § 1407(a))). In large-scale, multi-party, and time-intensive cases, this helps to administer discovery and pretrial rulings more efficiently than if each case progresses through the various federal district courts separately.

However, the cases are temporarily centralized in a transferee court until, at the latest, the conclusion of final pre-trial proceedings. At that time, the transferee court must remand them back to their original transferor courts for trial. (28 U.S.C. § 1407(a).)

This Note examines the various procedural options counsel may pursue to attempt to avoid the statutorily mandated transfer and keep their transferee judge for trial.

For more information on the multidistrict litigation (MDL) process generally, see Practice Note, Product Liability Multidistrict Litigation.

Reasons to Keep the Transferee Judge

Parties may want to retain the same judge handling the pretrial proceedings for multiple reasons.

The transferee judge has an understanding of the facts of the case. Keeping the transferee judge for trial may make the trial more efficient and eliminate the need for the transferor judge to acquaint themselves with those same facts. (See *Cline v. Mentor Worldwide LLC*, Case No. 4:10-cv-5060-CDL, ECF No. 83 (M.D. Ga. Feb. 25, 2014).)

The transferee judge already has familiarity with the parties and their attorneys and vice versa. This can be particularly beneficial in complex cases with numerous parties and also can be strategically advantageous for counsel who, during the discovery process, have gained insight into the judge's preferences, views on the merits of the case, and how the judge may rule on certain issues.

Keeping the same judge can also minimize the delay and expense that is necessitated by transferring the case back to the transferor court (see *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014)).

Methods to Keep a Transferee Judge

A transferee judge may not self-transfer a proceeding to themselves due to the plain language of § 1407(a) mandating that the JPML remand the case for trial (*Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998)). Therefore, a party wishing to keep the transferee judge for trial must use mechanisms that do not violate the plain terms of § 1407(a).

The limited ways to do this include:

- Waiving *Lexecon* rights (see Waive Lexecon Rights).
- Refiling the action or filing an amended complaint in the transferee court (see Refile the Action in the Transferee Court or File an Amended Complaint).
- Requesting that the transferee judge support a transfer from the transferor court back to the transferee court (see Request that the Transferee Judge Suggest that the Transferor Court Transfer the Case Back to the Transferee Court).

- Seeking an intercircuit assignment for the transferee judge (see Seek an Intercircuit Assignment for the Transferee Judge).

Waive *Lexecon* Rights

A party's right to have its trial in the transferor court, under § 1407 and *Lexecon*, is a venue issue, as opposed to a jurisdictional limitation, and one that the party can waive (see *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325-26 (11th Cir. 2000) (quoting *Lexecon*, 523 U.S. at 42)).

Timing

Unless a party is considering participating in a bellwether trial (see Other Considerations), a party wishing to waive its *Lexecon* rights should do so closer to a potential trial. By waiting, the party can gain a rapport with the transferee court and gauge whether it is in that party's best interest to stay with the transferee judge for trial. Waiver is completely within the party's control. Absent objections by the other parties, there is no disadvantage to waiting.

Required Steps

The precise mechanism by which a party waives its *Lexecon* rights can vary. However, no matter what mechanism a party uses to waive its rights, to properly do so it must:

- Ensure the transferee court has subject matter jurisdiction over the claim. If the transferee court does not have subject matter jurisdiction, a *Lexecon* waiver is not possible because jurisdiction does not extend past pretrial proceedings under § 1407.
- Ensure the transferee court has personal jurisdiction over the other party in the case.
- Clarify to the transferee court exactly what *Lexecon* rights the party is waiving (see Clear and Unambiguous Waiver).

Mechanisms to Effect Waiver

Mechanisms that parties have used to waive their *Lexecon* rights include:

- Submissions to the court for pretrial orders.
- Case management orders.
- Representations made during a pretrial hearing.
- Emails to the court.

(See *In re Carbon*, 229 F.3d at 1325-26; *In re Depuy Orthopaedics*, 870 F.3d 345 (5th Cir. 2017).)

One advisable approach is for a party to file a letter with the transferee court expressly setting out its *Lexecon* waiver (see Clear and Unambiguous Waiver).

Clear and Unambiguous Waiver

A party's waiver of its *Lexecon* rights must be clear and unambiguous (*In re Depuy,* 870 F.3d at 351). This means that the party must expressly state exactly what it is and is not waiving. For example, if a party wishes to waive its *Lexecon* rights only for specific bellwether trials (see Other Considerations), it must make that clear. Likewise, if a party wishes for the *Lexecon* waiver to cover all potential trials, it must make that expressly clear (see, for example, *In re Depuy*, 870 F.3d at 352 (holding that the MDL court had reached a "patently erroneous" result by applying the waiver to all potential trials where the party had waived its *Lexecon* rights only for certain bellwether trials)).

On the other hand, if a party does not wish to waive its *Lexecon* rights, it must take care not to make any assertion that a transferee court may interpret as a waiver. Doing so may eliminate that party's ability to exercise its right to return to the transferor forum (see, for example, *In re Carbon*, 229 F.3d at 1326-27 (holding that a party that failed to raise the issue of remand and stipulated to trial in the transferee court was precluded from seeking remand to the transferor court)).

Other Considerations

A party can also use a *Lexecon* waiver to effectuate participation in a bellwether trial in the MDL. A bellwether trial is a case that either the parties or the court has selected as being exemplary of the parties' respective claims and defenses. The purpose of a bellwether trial is to inform the parties on likely outcomes of future trials on these claims and issues and encourage settlement of the other cases (see Country Q&A, Product liability and safety in the United States: overview: Class actions/representative proceedings). If the goal for a party is to have the transferee judge preside over trial, a party can ask that its case be considered as one of the bellwether cases.

If a party is considering participating in a bellwether trial, then it must waive its *Lexecon* rights earlier rather than later. If the party waits, it may miss the opportunity to participate in the bellwether selection pool and case-specific discovery.

Counsel should note that transferee courts considering bellwether trials may require parties to affirmatively maintain their *Lexecon* objections (*In re Chantrix (Varenicline) Prods. Liab. Litig.*, MDL No. 2092, ECF No. 206 at 4-5 (N.D. Ala. Mar. 10, 2011)).

Refile the Action in the Transferee Court or File an Amended Complaint

If the plaintiff wishes to keep the action in the transferee court for trial, another option is to either:

- Voluntarily dismiss the action in the transferor court and refile it in the transferee court (see, for example, *In re Conagra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 695 (N.D. Ga. 2008); see also *Scherer v. Eli Lilly*, No. 4:14-CV-01484-AGF, ECF No. 26 (E.D. Mo. Mar. 17, 2015) (providing an example in an "informal MDL," which is not a formally approved MDL by the JPML, but rather an informal coordination amongst parties with many similar actions)). This may be a risky option because at this point in the litigation, the statute of limitations on the claims are likely to have run (see Required Steps).
- File an amended complaint asserting venue in the transferee court which may require an agreement from the opposing party or leave from the court (see Required Steps).

In doing either, the case continues to be part of the MDL and there is no transferor court to return to as the original jurisdiction of the case then falls to the transferee judge.

Timing

A plaintiff should act quickly to avoid any statutes of limitations issues. Soon after the transfer, the plaintiff should either voluntarily dismiss its action and refile in the transferee court or file an amended complaint asserting venue in the transferee court.

Required Steps

Before seeking to refile the action or file an amended complaint in the transferee court, the plaintiff should:

- Ensure that the transferee court has subject matter jurisdiction over the claim and personal jurisdiction over the parties in the action.
- Ensure that venue is proper within the transferee district or obtain a waiver of venue objections from the defendant.
- Obtain any required consents from the defendants or the court, if necessary, such as if the statute of limitations has run, or if amending the complaint more than 21 days after serving it (FRCP 15(a)(2)).

If refiling the complaint, the plaintiff should also:

- Move to voluntarily dismiss the original complaint in the transferor court without prejudice.
- Refile the complaint in the transferee court.

Other Considerations

Counsel should be aware that it is possible the transferor court may not grant the voluntary dismissal.

Also, once the action is refiled in the transferee district, it may not be assigned to the transferee judge. However, as a practical matter, it is likely that the case can be assigned to the MDL judge already dealing with similar cases.

Request that the Transferee Judge Suggest that the Transferor Court Transfer the Case Back to the Transferee Court

Another option is for the transferee judge to remand the case back to the original transfer court which, in turn, transfers it back to the transferee court under 28 U.S.C. § 1404. This circular mechanism is necessary because the transferee court is not permitted to transfer the case to itself for trial. (See *Lexecon*, 523 U.S. at 40.)

To aid the transferor court in its determination to transfer the case back to the transferee court, transferee judges typically provide support for the notion that the case should be transferred back to transferee court in their suggestion of remand orders (see *Kenwin Shops, Inc. v. Bank of La.*, 1999 WL 294800, at *1 (S.D.N.Y. May 11, 1999)).

Timing

This option occurs right after the case is remanded to the transferor court. However, if a party believes that a transferee judge is amenable to keeping the case for trial, it may provide some form of communication to the judge to indicate that it supports that application before remand.

Required Steps

To effectuate a transfer back to the transferee court, a party must:

- Ensure that, at the time the action was commenced in the original court, the transferee court had both subject matter jurisdiction over the claims and personal jurisdiction over the parties in the action, and that venue was proper in the transferee court (see *Kenwin Shops*, 1999 WL 294800, at *2-*3).
- File a motion to remand the action back to the transferor court. The party may provide support for having the case tried in the transferee court by either:
  - advising the transferee court by letter that it supports a transfer back to the transferee court for trial before making the motion; or

  - stating its support for a trial in the transferee court in its actual motion. If the party chooses this option it may also provide language for the transferee judge to use in an accompanying proposed remand order and attach the proposed order to its motion.

  If the transferee judge is willing, in their suggestion of remand order, they set out their support for a transfer of the case back to the transferee court following remand.

- Move to transfer the action back to the transferee court under § 1404 once remanded.

Other Considerations

When deciding whether to opt for this alternative, there are several factors counsel should consider.

A party may need to brief not one, but two motions, the original remand motion and then the transfer motion.

This route may, however, take a substantial amount of time. If the other party objects, a full set of briefing is required for the remand motion, then potentially oral argument in front of the JPML, and then a full set of briefing in front of the transferor court to have the action transferred back to the transferee court. This process can take months. If one believes that the opposing party may object, then a potentially better, though difficult, option is to have the transferee judge sit by intercircuit assignment in the transferor court (see Seek an Intercircuit Assignment for the Transferee Judge).

If the action in the MDL is a federal question case, then the law of the transferee circuit, not the transferor circuit, also most likely applies following transfer (see, for example, *Belmora LLC v. Bayer Consumer Care AG*, 987 F.3d 284, 292 (4th Cir. 2021) (quoting *In re Korean Airlines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987)); *AER Advisors, Inc. v. Fidelity Brokerage Servs., LLC*, 921 F.3d 282, 288 (1st Cir. 2019) (quoting *In re Korean Airlines*,, 829 F.2d at 1175)). As a result, if the law of the transferor circuit is favorable, a party may wish to forego this option. This consideration should be kept in mind for all options set out in this Note (see Waive Lexecon Rights and Refile the Action in the Transferee Court or File an Amended Complaint), except when seeking an intercircuit assignment (see Seek an Intercircuit Assignment for the Transferee Judge).

Seek an Intercircuit Assignment for the Transferee Judge

A rarely chosen option, but still a possible one, is for the transferee judge to seek an intercircuit assignment under 28 U.S.C. § 292(d). This avenue allows a litigant to keep their transferee judge while also keeping the law of the district in which the case was originally filed.

The Chief Justice of the Supreme Court may assign a judge to another district if provided a certificate of necessity by the chief judge of the circuit where service is needed (28 U.S.C. § 292(d)). At least one circuit has suggested that this necessity is a rarity and is done only during a "severe or unexpected over-burdening" (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1053 (9th Cir. 2013)).

Timing

A party hoping to keep its transferee judge through an intercircuit assignment should communicate this preference to the transferee judge at the end of coordinated pretrial proceedings as there is no need to do so any earlier. Just like seeking to be transferred back to the transferee court after remand, doing so later in the proceedings also allows a party to assess its rapport with the transferee judge.

Required Steps

Unlike the other options set out above, the transferee judge must initiate and complete the steps to this process. However, the litigants can alert the transferee judge that the parties may be interested in keeping the transferee judge for trial and help further the assignment, if the judge so requested. A party can do this by filing a letter expressing its interest and outlining the steps required for the transferee judge to obtain an intercircuit assignment (see *Sanofi Letter re Notice Seeking Intercircuit Assignment, In re EpiPen Mktg., Sales Practices, & Antitrust Litig.*, ECF No. 2117, 2:17-md-2785 (D. Kan. June 25, 2020) (outlining the process for the Honorable Daniel D. Crabtree to request an intercircuit assignment under § 292(d) to the District of New Jersey)). Just like asking the transferee judge to request that the transferor court transfer the case back to it following remand (see Other Considerations), a party may also provide its support for the intercircuit assignment in its motion for suggestion of remand and by providing language for the judge to use in an accompanying proposed order attached to the motion.

Keeping these facts in mind, to obtain an intercircuit assignment for a transferee judge, the transferee judge must:

- Obtain formal approval from:
  - the Circuit Chief Judge of the transferor court who must request the transfer and provide the Chief Justice of the United States with a Certificate of Necessity;

  - the transferee Circuit Chief Judge permitting the transfer;
  - the Chairman of the Judicial Conference Committee on Inter-Circuit Assignments; and
  - the Chief Justice of the United States.
- File a suggestion of remand requesting the intercircuit assignment.

(See *Jowers v. Airgas-Gulf States, Inc.*, No. 1:07-wf-17010-KMO, ECF No. 136 at 4 (N.D. Ohio Nov. 8, 2007); see also *Sanofi Letter re Notice Seeking Intercircuit Assignment, In re: EpiPen Mktg., Sales Practices, & Antitrust Litig.*, ECF No. 2117, 2:17-md-2785 (D. Kan. June 25, 2020) (outlining the process for The Honorable Daniel D. Crabtree to request an intercircuit assignment under § 292(d) to the District of New Jersey).)

In *Jowers*, the transferee judge obtained all required formal approvals and also sought intercircuit assignment in the judge's suggestion of remand to the JPML. The transferee judge then presided over trial in the transferor court. (*Jowers v. BOC Grp. Inc.*, 608 F. Supp. 2d 724, 729 n.2 (S.D. Miss. 2009); see also *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014) (noting in the court's suggestion of remand that the transferee judge would "seek an inter-circuit assignment with the understanding that [the transferee judge] would preside over the trial of th[e] matter in the [transferor court]").)

Other Considerations

Not all courts agree that an intercircuit assignment is an appropriate method to keep a transferee judge for trial. In fact, despite recognizing that judicial efficiency may be served by having a transferee judge sit by designation in the transferor court, one judge still refused to sign a certificate of necessity because "necessity", as defined by the Guidelines for Intercircuit Assignment of Article III Judges, is narrow and not met in these circumstances. (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d at 1053-55.) As noted above, this mechanism also requires consent from many judges and refusal by any one of those judges is then fatal.