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Multidistrict Litigation in New Orleans: Why the Judicial Panel On Multidistrict Litigation Frequently Favors the City that Care Forgot



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The U.S. District Court for the Eastern District of Louisiana is the federal court that sits in New Orleans directly across a cobblestoned-alleyway from the U.S. Court of Appeals for the Fifth Circuit, a short walk away from the French Quarter, the Mississippi River, and the New Orleans Convention Center. The area is a well-known tourist magnet. What may surprise some, however, is that the court is also a well-established magnet of sorts for sprawling and complex multidistrict litigation matters.

Welcome to the Big Easy

For the past five years, statistical reports published by the Judicial Panel on Multidistrict Litigation (JPML) indicate that the Eastern District of Louisiana has been a prime venue for judicial consolidation of many of the largest multidistrict cases in the United States. According to the Panel's own numbers, the Eastern District was ranked among the five highest districts by number of case transfers every year from 2004 through 2009. Given that this year's Gulf Coast Oil Spill-related litiga-

tion was also recently transferred to New Orleans, it is likely this statistical trend will continue. Thus, attorneys hoping to prosecute or defend multidistrict cases should familiarize themselves with the quirks of a federal court that, along with everything else in the city, closes down on Mardi Gras day.

Notwithstanding the big numbers from the JPML, however, New Orleans itself is not a big place. Based on the U.S. census estimates from 2009, even Wichita, Kansas, and Arlington, Texas, have bigger populations. Moreover, none of the judges currently sitting on the seven-person JPML hail from the Eastern District of Louisiana, and the only judge from the Eastern District of Louisiana to ever sit on the JPML, Judge Morey L. Sear, served his two-year stint back in the years 2000 to 2002.

To understand why, then, New Orleans has been so frequently designated as the destination of numerous multidistrict suits, it is necessary to understand the factors that the JPML relies on when it goes through the process of consolidating actions and selecting a transferee court.

A Brief Introduction to the Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation was formed in 1968, when Congress enacted 28 U.S.C. § 1407, the Panel's short and precise governing statute. Simply put, the JPML consists of seven sitting federal judges from either the district or appellate levels, appointed by the chief justice of the United States. The JPML has played an important role from the start, as evidenced by the fact that two of the first judges to ever sit on the Panel were judicial luminaries Alfred P. Murrah of the Tenth Circuit and John Minor Wisdom of the Fifth Circuit. The judges appointed to the Panel take on the responsibility of serving on the Panel while still maintaining a full case load at their "day job." The Panel meets six times a year to hear and rule on "motions to transfer and consolidate," and often deals with the transfer of 5,000 to 10,000 cases annually.

These motions to transfer and consolidate can be filed by any party, plaintiff or defendant, interested in getting numerous related matters heard together for all pretrial proceedings. For instance, when a national product recall leads to product liability suits filed against the same manufacturer in jurisdictions all over the United States, or when a major environmental release crosses state boundaries, a motion to transfer and consolidate may be appropriate. The Panel's purpose is to consolidate matters where such consolidation would be helpful to all parties, in order to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties and of the judicial system. Then, if a matter merits consolidation, the Panel decides on a transferee court—a single district court that will take in all of the related matters and handle them together for all pretrial purposes.

It is often overlooked but nonetheless important to note that the transferee judge does not necessarily try the actual cases. Instead, the transferee judge is meant to organize or direct all pretrial proceedings, such as evidentiary motions, Daubert hearings, depositions of key witnesses, and any global settlement negotiations. Section 1407 then directs the Panel to remand all cases

not resolved in the pretrial stage back to their home courts for trial although in some cases the transferee court will conduct a "bellwether trial" of a matter originally filed in that court. The parties also can consent to remain in the transferee district for trial. Still, as most matters are resolved in pretrial stages, the choice of transferee court is an extremely important one.

The Panel technically only rules on the cases originally named as related cases in the filed motions to consolidate and transfer. After its ruling, the Panel may also consider "tag-along" cases, in which the Panel may, on its own motion or by motion of the parties involved, evaluate whether the facts alleged in the proposed "tag-along" matter are sufficiently related to the original transferred action so as to necessitate a "tag-along" transfer and consolidation to the same transferee court.

The Right Judge in the Right Place

As Judge John G. Heyburn II (W.D. Ky.), current chairman of the JPML, stated in an interview with a federal court internal newsletter: "Selecting the 'right' transferee judge is critically important, because the success of an MDL largely turns on the work of that judge and the parties. Typically, the Panel seeks a judge with some existing knowledge of the involved cases or the issues presented. Ultimately, however, the willingness and motivation of a judge to undertake the often substantial additional responsibilities of an MDL are the most important attributes." ("Panel Promotes Just and Efficient Conduct of Litigation," *The Third Branch*, Vol. 42, No. 2, Feb. 2010.)

The place of where this "right" judge sits must also be "right" for the case as in, ideally, the judge should have a light docket; the court's performance numbers, such as the average time from filing to disposition, should be relatively strong; the location of many or most parties or much of the needed discovery should be close by; and the area should be both easy to get to and easy to stay in. The Panel will also consider the geographic focus of the suits and, in at least one case, has weighed "psychological" center of gravity of the underlying cause of the related suits.

The Crescent City's Connection

There are several factors that have affected New Orleans' disproportionate representation as a transferee court for JPML matters. In pre-Katrina years, this has included New Orleans' own relatively smaller size coupled with the "big city" amenities it offers as a major tourist and convention destination. Those two factors in particular have merged to create a federal court system with a small, comparably quick docket that happens to sit in a easily accessible and central location replete with hotel rooms, meeting facilities, and a major airport. Also, for most of the last decade, all twelve judgeships have been filled until the suspension of Judge Thomas Porteous in late 2008. With over 80 vacant seats throughout the federal district courts, and Congress unable to fill vacancies, having a fully staffed court has kept New Orleans' pending docket of civil and criminal cases under control and given it a natural advantage over circuits lacking judges.

In addition, there is an assertive plaintiffs' bar in New Orleans led by a few attorneys whose names appear

over and over again on the JPML's dockets as initial filers of motions to transfer and consolidate, as well as attorneys ultimately chosen to serve as plaintiffs' liaison counsel or on an executive committee for all plaintiffs. These attorneys often are the first to file motions with the JPML and successful in steering major matters to the Eastern District of Louisiana, suggesting that it works as a good alternative in almost any type of case.

The 2000 Propulsid Litigation is Propelled to New Orleans

The factors favoring New Orleans have led to a decade of multidistrict litigation being heard in Louisiana, starting in 2000 with the Propulsid MDL.

That year, litigation began to spring up all over the country related to Propulsid, a once-popular nighttime heartburn medication. Once the drug was linked to deaths and withdrawn from the market by its manufacturer, suits were filed in numerous districts including the Eastern District of Louisiana. A New Orleans attorney representing a Propulsid plaintiff then filed a motion to transfer and consolidate with the JPML, asking that all Propulsid matters be consolidated and transferred to the Eastern District of Louisiana, where his case was already pending. His motion argued that there was an action pending in the Eastern District of Louisiana, the district was centrally located for all parties, and the docket of the court was comparably light.

The Panel agreed and ordered the transfer of all Propulsid actions to Judge Eldon E. Fallon in the Eastern District of Louisiana. The Panel noted that there was no natural geographic center for this litigation (notwithstanding the manufacturer's arguments to the contrary), and ended by stating, "In concluding that the Eastern District of Louisiana is the appropriate forum for this docket, we note that the Louisiana district not only offers a location in the central part of the United States but, more importantly, enjoys general caseload conditions permitting the Panel to effect the Section 1407 assignment to a court with the present resources to devote the time to pretrial matters that this docket is likely to require."

The Propulsid MDL litigation was assigned to Judge Fallon, who acquitted himself extremely well; subsequent MDL matters were frequently referred to him and his accomplishments as an MDL judge were raised in future JPML filings and orders.

Judge Fallon's role and reputation are in fact illustrative of the fourth major factor that has played a role in the selection of New Orleans as an MDL destination, along with its location/amenities, light docket, and assertive plaintiffs' attorneys: the respect that the MDL Panel grew to have for the New Orleans-based judges to whom the Panel sent matters. It is clear from the language in its orders on motions to consolidate and transfer that the Panel looks for judges that have successfully handled complex MDL matters in the past. Once a judge is on the Panel's radar, it is likely that they will be asked to handle additional MDLs.

The 2004 ETS Test Scoring MDL is Also Examined in New Orleans

In 2004, a controversy arose out of anomalies in scoring a standardized test, which resulted in approxi-

mately 4,100 students nationwide being told they failed when in fact they passed. Education Testing Services ("ETS") was sued for breaching various duties with regard to the administration, grading, and reporting of these exams. A number of actions were filed in Louisiana, Pennsylvania, and Ohio.

ETS, rather than the plaintiffs' attorneys in this instance moved for transfer and consolidation in the Eastern District of Louisiana. ETS's motion cited the Federal Court Management Statistics in arguing that this district had, out of all the districts where ETS-related matters were filed, the fewest pending actions per judge, the smallest number of old cases still pending, and the shortest average in terms of months from filing to trial. ETS noted that Judge Sarah Vance of the Eastern District of Louisiana was already handling some of the matters, and, finally, New Orleans' airports, highways, hotels, and legal support services were cited as factors favoring this destination.

Some of the plaintiffs, particularly those in Ohio, disagreed, but other plaintiffs also moved for the Eastern District of Louisiana. The JPML issued a brief opinion and moved all the matters to the Eastern District of Louisiana, noting that "the range of locations of parties and putative class members in this docket and the geographic dispersal of current and anticipated constituent actions" meant that "an array of suitable transferee districts presents itself." In a matter without a clear geographic focus, the Panel looked to other factors: "[W]e note that this district, where four actions are already pending, provides an accessible, metropolitan location with favorable caseload conditions. Furthermore, centralization in this forum allows the Panel to assign this litigation to an available transferee judge with prior successful experience in the management of Section 1407 litigation," who in this case was Judge Vance.

Pre-Katrina, 2005 Vioxx MDL Moves to New Orleans

In early 2005, the JPML considered the question of where to transfer the major, nationwide Vioxx litigation. Vioxx, an anti-inflammatory drug, was alleged to increase users' risk of heart attack and stroke. Actions were being filed everywhere against Vioxx's manufacturer, Merck & Co. Inc.

The original motion to consolidate and transfer filed in the JPML was filed by Daniel Becnel, the same attorney who filed the first Propulsid motion in the JPML. Becnel represented a plaintiff who had filed in the Eastern District of Louisiana. Merck responded by requesting Maryland, Indiana, or Illinois, and pointed out that the Propulsid MDL before Judge Fallon was still pending in the Eastern District of Louisiana. However, another New Orleans-based plaintiffs' attorney, Joe Bruno, also filed a motion to consolidate and transfer, arguing instead that the successful Propulsid settlement program that was managed by Judge Fallon in fact showed that the Eastern District of Louisiana judges had the experience and ability to manage the behemoth Vioxx litigation.

Interestingly, neither Becnel nor Bruno in their respective motions asked the Panel to transfer matters to Judge Fallon. Merck's motion expressed concern that Judge Fallon was still busy handling the Propulsid MDL. The Panel, however, apparently liked what it saw

in the Propulsid settlement program, and noted first that there was no other obvious choice in transferee courts: “Given the geographical dispersal of constituent actions and potential tag-along actions, no district stands out as the geographic focal point for this nationwide docket. Thus we have searched for a transferee judge with the time and experience to steer this complex litigation on a prudent course.”

The Panel then made it clear that it was choosing a specific judge that it trusted: “By centralizing this litigation in the Eastern District of Louisiana before Judge Eldon E. Fallon, we are assigning this litigation to a jurist experienced in complex multidistrict products liability litigation and sitting in a district with the capacity to handle this litigation.”

Apparently Judge Fallon continued to do well in his handling of the Vioxx MDL, as he was the only transferee judge singled out by name for praise in the current Panel chairman’s Third Branch interview: “The recent highly praised Vioxx settlement owes much to the efforts of Judge Eldon Fallon (E.D. La.), the involved MDL judge.” (“Panel Promotes Just and Efficient Conduct of Litigation,” The Third Branch, Vol. 42, No. 2, Feb. 2010.)

Katrina’s Legacy Pulls More MDLs to New Orleans

A few months after the MDL’s Vioxx decision, Hurricane Katrina struck the New Orleans area. Among the near-infinite number of repercussions from this storm and subsequent levee breaches was the creation of a natural geographic center for hurricane-related MDLs in the Eastern District of Louisiana. In 2007, for example, the JPML considered motions to consolidate and transfer issues arising out of Federal Emergency Management Agency trailers that were found to contain formaldehyde. The trailers had been distributed to home owners who needed temporary housing following the storms in 2004 and 2005 in the Gulf Coast region. Geographically speaking, this was an obvious decision for the Panel: All of the filed matters considered were coming out of the three federal district courts in Louisiana, and all of the parties agreed, at least in the alternative, on the Eastern District of Louisiana. Again, New Orleans plaintiffs attorneys were among the first to file for MDL consideration, although again their choice of judge (Judge Ivan L. R. Lemelle) was ignored and the Panel opted for Judge Kurt Englehardt.

A less-obvious choice confronted the Panel when it considered the consolidation of the Chinese Drywall litigation in 2009. When it was found that Chinese-made drywall could potentially damage the homes and the health of homeowners where it was installed, lawsuits followed. Naturally, areas where homes were being widely rebuilt after hurricanes and flooding when the Chinese drywall was entering the country were the areas where most of the lawsuits originated. Because of a series of hurricanes in 2004 and 2005 that affected Florida, most of the original cases came from that state. However, as the Panel stated, “No district is a clear focal point of this litigation. The common manufacturing defendant and its affiliates are foreign entities without a major presence in any of the suggested transferee districts. Most actions also name local entities, such as builders and suppliers, as defendants. All of the sug-

gested districts, particularly those in the southeastern region, have a nexus to the litigation through allegedly affected houses built with the drywall at issue.”

The plaintiffs’ attorneys asked for Florida, Ohio or Alabama although a New Orleans plaintiffs’ attorney filed a motion specifically requesting the Eastern District of Louisiana. The defendants those that appeared asked for Florida or Virginia. (The Chinese manufacturers have stayed out of these suits.) At oral argument, the plaintiffs’ attorneys agreed that the Eastern District of Louisiana was a good alternative to their original choices. And the Panel, ultimately, went with a name they could trust: Judge Fallon. “Centralization in this district permits the Panel to effect the Section 1407 assignment to a judge who has extensive experience in multidistrict litigation as well as the ability and temperament to steer this complex litigation on a steady and expeditious course.”

Post-Katrina and Still a Strong Choice

In 2009, lawsuits were filed in various federal districts against Apple Inc., and AT&T Mobility LLC, alleged that AT&T and Apple engaged in deceptive marketing regarding the availability of multimedia messaging service (“MMS”) on the iPhone 3G and 3G-S. AT&T filed a motion for consolidation and transfer, specifically requesting the Eastern District of Louisiana. AT&T argued that the Eastern District of Louisiana was the site of the first-filed MMS marketing case; it was a centrally located district and lies between Georgia and Texas, both of which had defendant company headquarters; it was easily accessible (citing the airport); and the district had experience and resources to deal with multidistrict litigation. AT&T also specifically requested Judge Carl Barbier, noting that he had handled two previous MDLs but did not currently have one pending.

Although Apple was headquartered in Northern California, which arguably pulled the consolidation case there, the dockets of the available judges in the Northern District of California were described as “substantial,” and most of the judges in that district with MDL experience were already dealing with Apple-related MDL matters.

The Panel agreed with AT&T and moved the matter to the Eastern District of Louisiana and Judge Barbier, noting that everyone agreed, at least in the alternative, on Louisiana and that Judge Barbier was an experienced transferee judge who was not currently handling another MDL matter.

Notably, in this post-Katrina MDL decision, the previously cited factors of “light dockets” and “relative speed from filing to trial” were no longer mentioned as factors influencing the Panel’s decision. In the years following Katrina, a flood of Katrina-related litigation had increased the case load such that these factors were, for the time being, no longer applicable to the Eastern District of Louisiana. Instead, it is now the experience of the judges trusted by the MDL Panel, as well as Louisiana’s central location, that play the strongest role in influencing the Panel as well as Louisiana’s indefatigable plaintiffs’ bar, who continue to lobby for New Orleans whenever available.

2010: A Psychological Center of Gravity in New Orleans

By the end of 2009, the dockets of the Eastern District of Louisiana appeared to gradually be normalizing. According to the Federal Court Management Statistics, the total number of cases filed in 2009 was 30 percent lower than the number filed in 2007. The flood of post-Katrina-related litigation had clearly slowed.

Then, in April of 2010, the Deepwater Horizon rig off the coast of Louisiana exploded, and the nation's worst oil spill began along with a new wave of litigation into the federal courts. As the oil spill-related cases piled up throughout the Gulf States, the Louisiana plaintiffs' bar again turned to the JPML and requested consolidation and transfer of the cases. The very first motion filed, again by a New Orleans plaintiffs' attorney, requested the Eastern District of Louisiana and Judge Lemelle. Numerous other motions followed, filed by both plaintiffs and defendants. In essence, the defendants wanted to move everything to Houston, Texas, while the plaintiffs largely argued for New Orleans, although Alabama and Florida also had advocates.

The Panel's decision cited the spill's geographical and "psychological" center of gravity and moved the matter to the Eastern District of Louisiana, naming Judge Barbier as their appointed transferee judge. The Panel spent a longer amount of time than unusual describing the virtues of its choice of judge, noting his extensive and successful experience with MDL matters (although not mentioning the still-pending MMS matter) and dismissing concerns regarding a pending recusal motion filed by one of the defendants (which was ultimately withdrawn).

Judge Barbier immediately went to work on the MDL and has thus far: appointed liaison counsel and an executive committee of plaintiffs' attorneys; established plaintiff "pleadings bundles," which grouped similar cases together with an eye toward developing a master complaint; and stated that he wants test trials and bellwether cases to go forward against BP in June of 2011. It is no understatement to say that the nation is paying

close attention to the proceedings before Judge Barbier and that his every decision will be closely scrutinized for use, perhaps, in future MDL motions urging matters be moved to New Orleans.

New Orleans, Full Steam Ahead

The factors that made New Orleans a favorite choice or, as in many cases, the preferred alternative for parties that cannot agree on a forum continue to exist even after Hurricane Katrina and the Gulf Coast oil spill, and they will likely continue to attract MDL matters on into the future.

New Orleans' status as a tourist and convention destination is being regained post-Katrina, and hotel and transit facilities are back in full force. The population in the city shrunk after Hurricane Katrina, but for Panel considerations, that too is a positive factor, as it is already being reflected in the shrinking docket size in the Eastern District of Louisiana. The Eastern District of Louisiana's formerly "light" dockets swelled beyond capacity following the hurricane but now those hurricane suits are beginning to reach resolution while statutes of limitation bar additional hurricane-related matters from being filed. The Gulf Coast oil spill will no doubt reverse that trend for 2010 but is likely to result in a short period of time with a large influx of cases. Barring further natural or man-made disasters in the vicinity, the overall downward trend in new filings since 2007 will likely continue until the Eastern District of Louisiana once again has the light, quick docket that the JPML seeks out.

In addition, the twin disasters of Katrina and the oil spill have caused even more judges on the Eastern District of Louisiana to gain substantial MDL experience. If, as expected, the Eastern District of Louisiana's docket continues its downward trend after accounting for the oil spill, the Panel will again be presented with a court that boasts a complement of experienced and respected MDL judges along with the same fortuitous location and amenities and the same New Orleans plaintiffs' bar that appealed to the Panel in the years before Katrina.