

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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fact, litigation involving much fewer actions has been approved for transfer, such as *In re Viagra*, MDL 1724,⁴⁸ which involves 60 actions, and *In re Celexa and Lexapro*, MDL 1736,⁴⁹ with 32 actions.⁵⁰

Defense counsel may find it difficult to argue against transferring prescription drug cases to an MDL court since the three primary criteria used by the Judicial Panel to determine whether transfer is warranted are generally present: common factual questions, convenience of the parties and witnesses, and the just and efficient conduct of the actions. Given that prescription drug cases usually involve a claimant, who was prescribed the drug based on certain symptoms, and then ingested the drug, there is a common fact linking the claimants. Once prescription drugs are approved, the drugs are marketed and prescribed all over the United States, thus suggesting that because of the distances involved, it will be convenient to have pretrial discovery centralized in one location. Judicial resources will be conserved by having one district court decide pretrial motions as opposed to having several district courts deciding the same issue as against the same defendant with possibly different results.

In *In re Celexa and Lexapro*,⁵¹ MDL 1736, the Judicial Panel granted the transfer motion filed by Defendant Forest Pharmaceuticals, Inc. The Panel noted that the actions all involved Forest's warnings of possible adverse effects of using the drug. The Panel found that centralization would prevent duplicative discovery and inconsistent pretrial rulings, as well as conserve the resources of the parties and the judiciary.⁵²

A Defendant's Advantages in Litigating before a MDL Court

Some defendants may find that reference to MDL invokes the fear of liability to a multitude of plaintiffs and expensive attorney fees. While defense counsel should oppose transfer when warranted, the defense counsel should not underestimate the potential advantages of the MDL system.

Even though defendants may be forced to undergo pretrial discovery in an MDL court, defense counsels should focus on maximizing benefits of the MDL for their clients. As part of the coordinated proceedings, MDL offers several benefits for defendants, including lower costs, consistency of rulings, and the ability to eliminate illegitimate claims through dispositive motions. Filing discovery requests and motions to dismiss can still be employed as useful tools in shifting the burden on plaintiffs' attorney to legitimize the claims.

Once a case is transferred to an MDL, defendant drug manufacturers should incorporate competent trial attorneys as part of their defense team and not rely on their corporate lawyers. Trial attorneys, particularly those who practice before the district court which receives the MDL transfer, possess expertise, experience, and familiarity with trials, and possibly even the particular court and judge. Trial attorneys are well versed in the discovery procedures as well as the tactics used by plaintiffs' attorneys. They have experience filing and arguing the dispositive motions and feel comfortable with the discovery process as it relates to the particular topic, such as prescription drugs.

MDL provides lower transaction costs by concentrating pretrial discovery in one location, which saves time and

money. Instead of a manufacturer defending hundreds of lawsuits throughout the country, the company can focus its litigation team in one district for purposes of pretrial discovery and motions. Defense counsel is able to concentrate their efforts and resources in one federal court, as opposed to defending claims in the more than ninety federal districts.

To maximize the savings in costs, the defendant should consider orchestrating the consolidation of the state court actions as well. By removing the state actions into federal court, the actions can be transferred to the MDL court as tag along actions.⁵³ This becomes more and more critical if the defendant is able to obtain favorable pretrial rulings from the MDL judge. *In re Vioxx*, MDL 1657,⁵⁴ demonstrates that even though the Judicial Panel may transfer a case to a MDL court, a defendant may still be involved in numerous state court actions. As of December 31, 2006, Merck had been served as a defendant in approximately 27,400 lawsuits. Of those lawsuits, nearly 8,300 lawsuits are pending before the MDL court while the remaining 19,100 lawsuits are in various state courts.

Predictability is an element that allows both sides to better prepare cases. Since pretrial rulings are binding on all the cases in the MDL, the defendant is better able to prepare the remainder of its case with that knowledge. The predictability also adds to the consistency of the case since the pretrial rulings apply to all cases. It saves money for the client because defense counsel has to prepare one brief and one argument on the motion as opposed to preparing briefs and arguments for every case filed.

Defense counsel should not underestimate the power of the MDL court to rule on dispositive motions and should

use these motions to decrease the number of claims.⁵⁵ While the MDL judge does not have statutory jurisdiction over matters relating to trial, the judge can dispose of plaintiffs' claims through motions to dismiss, summary judgment, or settlement approval. Plaintiffs' attorneys may attempt to overwhelm defense counsel by filing hundreds and hundreds of actions, invoking fear in the defense. The illegitimate plaintiff becomes one of many plaintiffs as steering committees and liaison counsel become the primary movers of the litigation. As more and more actions are added to the MDL, each individual plaintiff loses his individuality. The plaintiffs' attorneys may begin to focus more on what the plaintiffs are worth in the aggregate as opposed to the merit of each plaintiffs' claim. Defendants should expose weaker claims of plaintiffs by filing discovery and dispositive motions. Trial lawyers understand that by constantly putting the burden on plaintiffs to substantiate the claims, the defendants may be able to lower the number of claims through motions to dismiss and for summary judgment. The defense can ensure that by the time for settlement discussions begin, each remaining claim has merit.

Success of Bellwether Trials in *In re Vioxx*

When discovery nears an end, the defendants should not center their focus only on the upcoming trial in the originating court. The unique aspect of the MDL is that all parties and counsel in the litigation are before a single judge which affords the opportunity for reaching a global settlement. The usefulness of this aspect would be completely lost if no attempts at settlement were made and

the actions were simply remanded back to their originating courts. Courts have used various mechanisms to expedite settlement without remand, but holding bellwether trials appears to be the best solution available. MDL courts have used mediation⁵⁶ and distribution matrices,⁵⁷ but neither of these mechanisms can remotely approximate what a jury may decide. In fact, by even entering into mediation and calculating distribution matrices, the defendant's liability is assumed. The mediation forces the defendant to approximate what it believes its own liability is without having any indication of what average jurors would decide. Distribution matrices rely on mathematical formulas to put a damage amount on a particular claimant which has particular factors.

Bellwether trials are the best means for evaluating the plaintiffs' claims because the trial forces the plaintiff and defendant to vigorously assert their interests and is the only method which involves a case that is decided by a jury. In fact, James Beck of Dechert and Mark Herrmann of Jones Day have argued that bellwether trials are the best the MDL can offer.⁵⁸ Beck and Herrmann assert that the major advantage of bellwether trials is that they force the plaintiffs' attorneys to do the work needed to prepare for trial.

The goal of bellwether trials is to provide information to the parties so that they can better approach settlement by allowing the parties to actually try several cases to juries. From a defense perspective, a bellwether trial presents an opportunity to proceed to trial on one plaintiff's case without being subject to liability for claims of other plaintiffs. While several bellwether trials may be required, the defense is able to use the results of the trials as an overarching

theme and make informed decisions regarding whether to settle, and for what amount, or to try all the cases.

This approach has been adopted by District Court Judge Eldon E. Fallon of the Eastern District of Louisiana, who has held five bellwether trials in *In re Vioxx*, MDL 1657,⁵⁹ which were selected through a process involving both parties. Of those five, Merck successfully defended four and was able to overturn the damages award in the other.

In the first Vioxx bellwether trial, *Plunkett v. Merck*, No. 05-4046 (E.D. La. filed Aug. 23, 2005), Philip Beck and Tarek Ismail of Bartlit Beck, successfully defended Merck. In this case, a pretrial ruling by Judge Fallon prevented the plaintiff's expert from testifying that Vioxx caused a clot that led to the decedent's heart attack. Plaintiff's counsel was not able to present any expert testimony which linked the decedent's Vioxx use to his heart attack and death. The second bellwether, *Barnett v. Merck*, No. 06-485 (E.D. La. filed Jan. 31, 2006), has been the plaintiff's only success, and the Court has ordered a new trial on the issue of damages.

Perhaps learning from the mistakes in *Barnett*, the lead defense attorneys of Bartlit Beck were able to obtain defense verdicts in the following three trials: *Smith v. Merck*, No. 05-4379 (E.D. La. filed Sept. 29, 2005); *Mason v. Merck*, No. 06-810 (E.D. La. filed Feb. 16, 2006); and *Dedrick v. Merck*, No. 05-2524 (E.D. La. filed June 21, 2005). As one can imagine, Merck is in a strong position in terms of settlement negotiations given that 80 percent of the MDL bellwether cases that have been tried have been defense verdicts.

On the MDL Horizon: *In re Bextra and Celebrex*—*Daubert* Hearings for General Causation Experts

To facilitate coordination of the proceedings, the MDL judge generally issues a scheduling order which will indicate the selection of the plaintiffs' committee, a schedule for completing pretrial discovery and pretrial motions, and a mechanism for handling pretrial discovery disputes.

In a recent pretrial order in *In re Bextra and Celebrex*, MDL 1699,⁶⁰ Judge Charles Breyer outlined the rules regarding general causation experts for the Celebrex cases. It defense general causation experts as experts who will testify as to whether ingestion of Celebrex can increase the risk of serious cardiovascular events and, if so, under what circumstances. The Court ordered each Liaison Counsel to designate a maximum of five general causation experts on which each side intends to rely and exchange disclo-

tures pursuant to Rule 26(a)(2).

Depositions of the general causation experts must take place by June 15, 2007. The Court allowed the parties to agree upon a schedule of the depositions of all experts, but ordered that Pfizer is to examine the plaintiffs' experts in each area before the plaintiffs examine Pfizer's experts in that same area. The Court also set the date for hearing on the motions challenging expert opinions. The Court set aside August 7–9, 2007, for a hearing on the parties' motions to challenge the admissibility of the other party's experts.

The future months in MDL 1699 will be interesting to watch as Judge Breyer issues his rulings regarding the general causation experts' opinions, which could be decisive in some, or all, of plaintiffs' cases. Judge Fallon's ruling in *Plunkett v. Merck*, which prevented the plaintiff's expert from testifying that Vioxx caused a blood clot could have been a primary reason for a defense ver-

dict. The upcoming months should shed some light on the implications of the *Daubert* hearings in the MDL system.

Conclusion

As prescription drug cases continue to fill the court system, prescription drug companies are forced to justify their actions. In determining how to proceed with the cases, the companies should carefully look at the success that Merck has had in *In re Vioxx* thus far in the MDL system. Much of Merck's success is attributable to the trial attorneys who able to persuade the jury in the bellwether trials that Merck was not negligent. By employing competent trial attorneys who are committed to pursuing each claim through discovery, dispositive motions, and even trying the cases in bellwether trials or after remand, the prescription drug companies will be better able to obtain favorable verdicts and settlements.