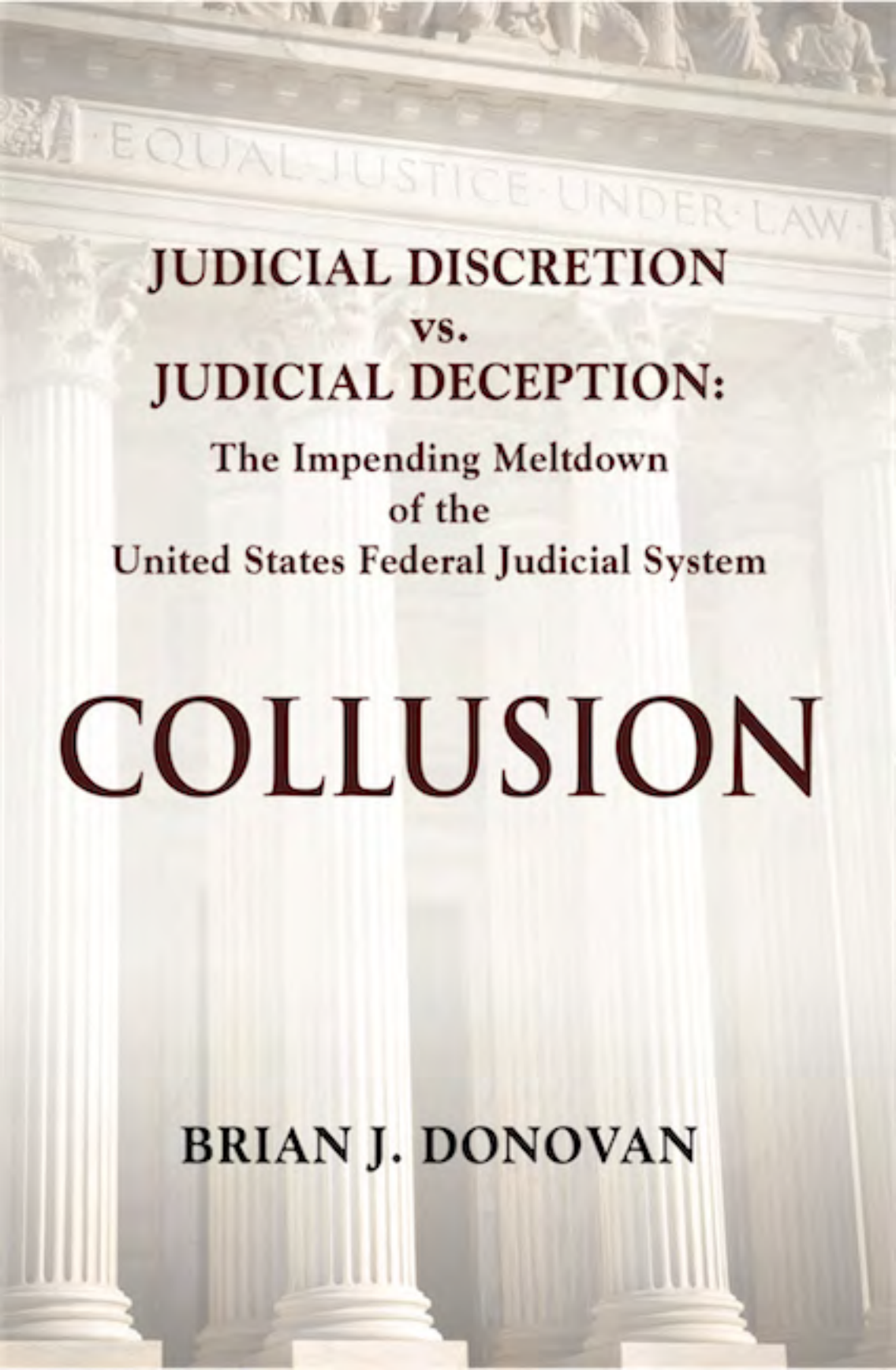

JUDICIAL DISCRETION
vs.
JUDICIAL DECEPTION:

The Impending Meltdown of the United States Federal Judicial System

COLLUSION

BRIAN J. DONOVAN

PRINT ISBN: 978-1-63492-844-1
EBOOK EPUB ISBN: 978-1-63492-845-8
EBOOK MOBI ISBN: 978-1-63492-846-5

Printed on acid-free paper.

One hundred percent (100%) of the author's commissions received from the sale of this book will be used to fund the research and development of Veraptus® innovative and affordable aptamers.

Veraptus® therapeutic aptamers and Veraptus® aptamer-prodrugs will be used for the treatment of bacterial infectious diseases, viral infectious diseases, parasitic infectious diseases, cancer, and lupus.

Visit the Veraptus® website: www.veraptus.com

Visit the author's website: www.chinamericalegaladvisors.com

Published by BookLocker.com, Inc., St. Petersburg, Florida, U.S.A.

BookLocker.com, Inc.,
2018

First Edition

DISCLAIMER

This book, which is for educational purposes only and is not intended to serve as legal advice, details the author's personal experiences with, and opinions about, U.S. multidistrict litigation ("MDL") and the U.S. federal judicial system. The author is not your attorney and this book is not intended as a substitute for consultation with a licensed legal professional. Please consult a competent licensed attorney to ensure that what you are doing is best for your situation.

The author and the publisher are providing this book and its contents on an "as is" basis and make no representations or warranties of any kind with respect to this book or its contents. The author and the publisher disclaim all representations and warranties, including warranties of merchantability and legal advice for a particular purpose. Neither the author nor the publisher will be liable for damages arising out of or in connection with the use of this book. This is a comprehensive limitation of liability that applies to all damages of any kind, including (without limitation) compensatory; direct, indirect or consequential damages; loss of data, income or profit; loss or damage to property and claims of third parties.

Use of this book implies your acceptance of the terms of this disclaimer.

TABLE OF CONTENTS

THE BIRTH OF MULTIDISTRICT LITIGATION

The United States Judicial Panel on Multidistrict Litigation ("JPML") traces its origins to the early 1960s when more than 1800 related civil actions involving price-fixing allegations in the electrical equipment industry flooded the federal courts. To coordinate discovery among the electrical equipment antitrust cases in the over thirty involved courts, Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation of the United States District Courts.[1] At the end of its work, the Committee recommended a more formalized procedure for handling groups of similar cases.[2] In response, in 1968, Congress enacted the Multidistrict Litigation Statute (28 U.S.C. § 1407), the statute to which the JPML owes its existence.[3]

The JPML consists of seven sitting federal judges designated from time to time by the Chief Justice of the United States. No two JPML members may be from the same federal judicial circuit.[4] The concurrence of four members shall be necessary to any action by the JPML.[5]

The seven JPML members are appointed without any limitation on their terms ("designated from time to time"). However, in June 2000, then-Chief Justice William H. Rehnquist imposed some regularity and predictability on the appointment process by establishing staggered seven-year terms for each member. Chief Justice John G. Roberts, Jr. has continued his predecessor's practice.[6]

The multidistrict litigation ("MDL") statute provides, in pertinent part, "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district *for coordinated or consolidated pretrial proceedings*. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be *for the*

convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[7]

In plain English, the JPML was created to:
(a) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings;
(b) ensure such transfer of cases to one federal district will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions; and
(c) select the federal district and judge(s) best situated to handle the transferred cases.

Common questions of fact do not have to predominate over other questions, and arguments against transfer because of the existence of non-common issues are unlikely to prevail.[8] The JPML, driven by its charge for achieving judicial efficiency, liberally grants consolidation even in the face of objections by the parties to the litigation.

Theoretically, the purpose of this transfer or "centralization" process is threefold:
(a) to avoid duplication of discovery;
(b) to prevent inconsistent pretrial rulings; and
(c) to conserve the resources of the parties, their counsel and the judiciary.

The MDL statute further provides:
Proceedings for the transfer of an action under this section may be initiated by:
(a) the JPML upon its own initiative, or
(b) a motion filed with the JPML by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under

this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

When lobbying for transfer to a particular district, parties may not argue about applicable district and circuit law in potential courts (which may be more favorable to the plaintiffs or the defendants in a given set of facts); they are limited to administrative and convenience arguments.[9]

New cases transferred from other districts to existing MDLs are called "tag-along" actions. When the JPML receives a "tag-along" notice, it issues a Conditional Transfer Order ("CTO") transferring the action to the designated MDL transferee court.

Any party opposing the transfer shall file a notice of opposition with the clerk of the JPML within 7 days. In such event, the clerk of the JPML shall not transmit the transfer order to the clerk of the transferee district court, but shall notify the parties of the briefing schedule. Failure to respond to a CTO shall be treated as that party's acquiescence to it. Within 14 days of the filing of its notice of opposition, the party opposing transfer shall file a motion to vacate the CTO and brief in support thereof. The clerk of the JPML shall set the motion for the next appropriate hearing session. Failure to file and serve a motion and brief shall be treated as withdrawal of the opposition and the clerk of the JPML shall forthwith transmit the order to the clerk of the transferee district court.[10]

In the vast majority of cases, an affected party does not file a notice of opposition within the 7-day time period established by the JPML, and the JPML automatically transfers the case to the transferee court.

Notwithstanding the clarity of purpose set forth in the MDL statute, facilitating global settlement is the main purpose of consolidation into an MDL. Indeed, settlement is the fate of almost all cases that are part of an MDL. Relatively few MDL cases are remanded to the district courts in which they were originally filed.[11] Parties to MDL

> (e) Still another option would be for the transferee judge to follow the action to the transferor court after obtaining an intracircuit or intercircuit assignment.[29]

Judge Heyburn describes the *Lexecon* decision as a "conundrum" which may be avoided by "resourceful" transferee judges. I disagree. The *Lexecon* decision is not a conundrum. It is not an obstacle which judicial discretion may circumvent in the name of judicial efficiency/economy or political expediency. It is the law.

THE ISSUE OF REMAND

Pursuant to Congressional intent and U.S. Supreme Court decisions, the endgame for MDL is remand. Accordingly, although transferee judges deem settlement a hallmark of their success, I believe it is important to appreciate the potential advantages of remand, rather than focusing solely on what transferee judges allege to be "judicial efficiency." Remand's scarcity is caused by the uniform interest of repeat players (transferee judges, cooperative attorneys appointed to PSCs, defendants and fund administrators) in settlement.

Scholars and commentators have long lamented vanishing trials, empty courtrooms, and the rise of alternative dispute resolution.[30] Aggregation - whether through class actions or, as is more likely today, multidistrict litigation - contributes steadily to disappearing trials and fuels the new paradigm of making and enforcing a settlement grid.[31] MDL has frequently been described as a "black hole"[32] because transfer is typically a one-way ticket.[33] Indeed, "the panel has abdicated its proper role by providing no recourse to remedy or to exit an MDL black hole."[34]

Although the JPML may remand cases at a party's request, in practice it appears never to have done so. Rather, it waits for the transferee judge to admit defeat and suggest remand - thereby conceding failure.[35] Transferee judges rarely admit defeat.

THE 8-STEP MDL PLAN TO MAXIMIZE JUDICIAL EFFICIENCY

STEP No. 1: CAPTURE MARKET SHARE

In an MDL, a victim of a mass tort is not a person. MDL plaintiffs are merely bargaining chips or commodities acquired by aspiring members of the PSC and later "sold" in bulk to the defendant. These bargaining chips may be acquired directly by an attorney seeking to be appointed to the MDL PSC or indirectly via referring attorneys who receive a split of the fee for recommending the more experienced, politically well-connected and cooperative aspiring PSC attorney to her clients. MDL plaintiffs are also a commodity because upon acquisition they are warehoused by the yet-to-be-appointed PSC attorney until the defendant agrees to pay the asking price.

MDL plaintiffs serve as a bargaining chip in four ways: (a) an attorney with a sufficient number of bargaining chips has a better chance to be appointed to the PSC by the transferee judge; (b) after the attorney has been appointed to the PSC, she pools her bargaining chips with the bargaining chips of the other members of the PSC to exert leverage on the defendant while graciously offering the defendant and the defendant's shareholders closure; (c) the settlement class action achieved by this leverage will hopefully result in significant judicial efficiency; and (d) this judicial efficiency, in turn, will result in the transferee judge ensuring that the cooperative PSC attorneys are excessively compensated for closing the deal with the defendant in a timely manner.

A lawyer in the United States is restricted from directly soliciting a prospective client. "A lawyer may not: (1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or

otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient….(2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule."[1]

However, from the moment a catastrophic mass tort like the BP oil well blowout occurs, attorneys must begin acquiring bargaining chips as rapidly as possible. The efficiency with which they do so will ultimately determine if they are awarded with a lucrative appointment to the MDL PSC.

An attorney seeking to be appointed to the MDL PSC usually increases her bargaining chip acquisition efficiency via initiating an investigation into the mass tort, presenting informational seminars to large groups of potential "clients," and by retaining the services of a third-party team of investigators.

It is acceptable for an attorney to initiate her own independent investigation into the mass tort. The attorney may not directly solicit the victim of the mass tort, but the victim who the attorney is interviewing may be so impressed with the attorney that he retains her to serve as legal counsel. Yes, this is a thin line to walk but an acceptable approach. Informational seminars are similar to initiating an investigation. The difference is that an informational seminar targets a large group of potential "clients," e.g., business associations, chambers of commerce, etc. The most potentially problematic bargaining chip gathering tactic is retaining the services of a third-party team of investigators.

Mikal C. Watts of Watts Guerra could easily be the posterchild for how attorneys applying for a lucrative position on an MDL PSC

The BP/Feinberg victims who executed a "Release and Covenant Not to Sue" (approximately 220,000 in number) were subsequently excluded from the settlement class action.[12]

If an MDL which resorts to a settlement class action rather than remand has resulted in a loss of faith in the U.S. federal judicial system, then an MDL which employs a Kenneth R. Feinberg victims' compensation fund and a settlement class action virtually guarantees the eventual meltdown of the U.S. federal judicial system.

STEP No. 4: APPOINTMENT OF "COOPERATIVE" ATTORNEYS TO THE PSC

It is important to understand that judicial efficiency replaces justice in every MDL.

An MDL is not a litigation. Attorneys appointed to the PSC are not appointed by the transferee judge to be litigators. These attorneys are not selected for the purpose of zealously advocating on behalf of their clients. Attorneys appointed to the PSC are cooperative dealmakers. Describing an attorney appointed to the PSC as "cooperative" means the attorney would never consider rocking the metaphorical boat of judicial efficiency.

In short, the main criteria for membership in every multidistrict litigation PSC, is very simple:
(a) The attorney must be "cooperative;"
(b) The attorney should be a "repeat player;" and
(c) The attorney must have signed-up a large stable of clients which he or she is already directly representing.

It is helpful to remember the three Cs of any successful PSC: cooperation, control and compensation. Greater cooperation (between the dealmakers) and control (in terms of a significant market share of plaintiffs) results in closing the deal faster with the

JUDICIAL DISCRETION vs. JUDICIAL DECEPTION

Judicial Discretion
In the context of an MDL, judicial discretion means the power of the transferee judge to make decisions based on fairness or a weighing of the facts and circumstances without being bound by precedent or the strict rules of federal procedure. A federal court of appeals will usually confirm decisions of a transferee judge when he or she exercises judicial discretion unless the decision is overly broad, capricious, biased, or beyond the transferee judge's authority.

An "abuse of discretion" occurs when the transferee judge makes a decision which is clearly against reason and evidence or against established law.

Professor Thomas 0. Main points out, "By conferring discretionary authority, the judicial system entrusts judges with the ability to make sound and informed judgments about the relative merits of all the various lawful courses of action that fall within the frame of possibilities.[1] The grant of authority is premised, first, on the notion that the trial judge is in the superior position to see, hear, and evaluate the situation with firsthand knowledge.[2] A second (albeit less exalting) justification recognizes that efficiency and finality in adjudication may be more important than accuracy in every instance.[3] Judges are presumed to exercise their discretion in a fair and neutral manner, and thus, the "abuse of discretion" standard of review insulates certain exercises of discretion from rigorous reconsideration on appeal."[4]

Judicial discretion is understandable, indeed necessary, in order for a transferee judge to efficiently manage the hundreds or thousands of cases which may be transferred to an MDL court for coordinated or consolidated pretrial proceedings for the convenience of parties and

witnesses and to promote the just and efficient conduct of such actions.

Judicial Deception
In the context of an MDL, judicial deception usually occurs when the transferee judge exceeds his or her scope of authority in order to maximize judicial efficiency.

In the BP oil well blowout MDL, Judge Barbier intentionally exercised judicial deception by allowing the Feinberg-administered victims' compensation fund to contravene the Oil Pollution Act of 1990 and by forcing the plaintiffs to enter into an unfair, inadequate, and unreasonable collusive class settlement agreement which contravenes the MDL statute, the U.S. Supreme Court's decision in the *Lexecon* case and the Oil Pollution Act of 1990.

FIFTY EXAMPLES OF JUDICIAL DECEPTION BY THE MDL 2179 COURT

On December 21, 2012, the MDL 2179 Court issued its "Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement." This 125-page Order is replete with examples of judicial deception.

For the reasons set forth throughout this book, each of the following fifty deceptive statements is an example of the MDL 2179 Court contravening the MDL statute, the U.S. Supreme Court's decision in the *Lexecon* case, and the Oil Pollution Act of 1990.

Example No. 1
"….in evaluating business economic loss claims…the Settlement….uses a well-established two-step 'before and after' method: Step 1 provides compensation for the reduction in variable profit between the Compensation Period and the Benchmark Period,

US vs. THEM

THE PERVERSION

Litigation in the U.S. is an adversarial system (Us vs. Them). Transactional law in the U.S. is, or should be, non-adversarial. Each party wins. MDL is not a form of litigation, at least not in the U.S. In MDL, the PSC zealously advocates on behalf of the transferee judge, not on behalf of the plaintiffs. MDL is not a form of transactional law. In MDL, only "Us" wins.

In an adversarial system, counsel zealously advocate on behalf of their clients. It is a battle between plaintiff and defense attorneys in a court of law before an impartial judge. Theoretically, allowing opposing counsel to fight it out under specific procedural rules that are allegedly put in place to guarantee fair play will hopefully yield the truth. It is not a perfect system but, usually, it does the job.

In an MDL, the "Us vs. Them" dynamic is perverted. The BP oil well blowout MDL ("MDL 2179") is an excellent example of this perversion.

In MDL 2179, "Us" principally means Judge Barbier, the cooperative attorneys appointed to the PSC by Judge Barbier, other common benefit attorneys, Kenneth R. Feinberg, Patrick Juneau and BP. "Them" means the plaintiffs not directly represented by a member of the PSC, non-cooperative plaintiffs who brazenly elect to opt-out of the settlement agreement in search of justice, and the non-PSC attorneys who the plaintiffs initially retained.

Judge Barbier does not exhibit the cold neutrality of an impartial judge. He is a fiery proponent of judicial efficiency. His objective is the settlement (for pennies on the dollar) or dismissal with prejudice of all cases, not remand.

Plaintiffs' Steering Committee ("PSC") is a misnomer. It should be called the Transferee Judge's Steering Committee ("TJSC"). The transferee judge selects, appoints, and approves compensation for the members of the steering committee. As a result, in reality, the cooperative members of the steering committee represent and seek to please the transferee judge. In other words, the steering committee zealously advocates on behalf of the transferee judge, not on behalf of the plaintiffs who had previously retained their own counsel and never wanted to be in the MDL to begin with. The obedient common benefit attorneys take their instructions from the cooperative PSC which decides how much work they receive and the amount the common benefit attorneys are compensated.

THE COMMODITY EXCHANGE

Similarly, "MDL 2179" is a misnomer. MDL 2179 is not representative of any form of litigation in the U.S. The more accurate name would be "Multidistrict Commodity Exchange 2179" ("MDCE 2179"). The reality is that "Us" views the victims of the BP oil well blowout as nothing more than a commodity (e.g., pork bellies) which are to be bargained for between the PSC (the "Seller") and BP (the "Buyer"). In mid-2010, BP made the business decision to pay a total amount of US$20 billion to compensate all the BP oil well blowout victims. In February 2011, only four months after Judge Barbier appointed his cooperative attorneys to the BP oil well blowout MDL PSC and Plaintiff Executive Committee, settlement negotiations began in earnest between the PSC and BP. "Us" ensured that the victims of the BP oil well blowout were oblivious to the transaction.

Kenneth R. Feinberg played the role of the frontend "Fund Administrator." Feinberg, from the "Us" perspective, was absolutely brilliant. The Gulf Coast Claims Facility ("GCCF") is merely a name created by Feinberg. They are one and the same.

HOW A MELTDOWN CAN BE AVOIDED

An MDL-triggered meltdown of the U.S. federal judicial system can be avoided if the following issues are properly addressed.

Chief Justice of the United States
Chief Justice John G. Roberts must appoint sitting federal judges to the JPML who are committed to upholding: (a) the intent of Congress when it passed the MDL statute; and (b) the U.S. Supreme Court decision in the *Lexecon* case.

In addition, the current staggered seven-year term should be shortened to a staggered four-year term for each JPML member.

JPML
The MDL statute and the U.S. Supreme Court decision in *Lexecon* are crystal clear: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district *for coordinated or consolidated pretrial proceedings…for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions*. Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred…."

Congress and the U.S. Supreme Court clearly state that the MDL endgame is remand of the cases to their respective transferor courts.

The Honorable John G. Heyburn II, Chairman, Panel on Multidistrict Litigation describes the *Lexecon* decision as a "conundrum" which may be avoided by "resourceful" transferee judges. As I previously explained, the *Lexecon* decision is not a conundrum. It is not an obstacle which judicial discretion may circumvent in the name of judicial efficiency/economy or political expediency. It is the law.

Accordingly, the JPML must appoint transferee judges who are committed to upholding: (a) the intent of Congress when it passed the MDL statute and (b) the U.S. Supreme Court decision in the *Lexecon* case.

Moreover, the JPML must assume responsibility for its appointment of the transferee judges. For example, the JPML knowingly appointed a transferee judge to preside over MDL 2179 who should have recused himself. In its transfer order of August 10, 2010, the JPML includes the following disclaimer: "The Panel, of course, has no authority to determine whether a particular judge should recuse himself or herself from presiding over a particular MDL." This laissez-faire attitude is unacceptable.

The JPML further states in its transfer order of August 10, 2010 which established MDL 2179, "Centralization may also facilitate closer coordination with Kenneth Feinberg's administration of the BP compensation fund."

The precedent established by the JPML in its sanctioning of a Kenneth Feinberg-administered BP compensation fund ought to be viewed with a significant degree of concern. The purpose of the Kenneth Feinberg-administered BP compensation fund was not to ensure that victims of the BP oil well blowout received prompt, certain, and fair compensation with relatively minimal delay and cost. The numbers confirm that the principal purpose of the Kenneth Feinberg-administered BP compensation fund was to limit BP's liability.

The sanctioning by the JPML of a Kenneth Feinberg-administered victims' compensation fund in any MDL is unacceptable and must stop.

The JPML has no authority over actions pending in state court. Since the JPML has no power over cases pending in state courts, many MDL defendants have resorted to removing these cases to U.S.

District Courts. The vast majority of the time these defendants know they have no basis to remove these actions. Removal is *solely* for the purpose of being able to subsequently file a "tag-along" notice with the JPML for the transfer of these cases to the MDL Court before the potential transferor court has the opportunity to either rule on the jurisdiction of these cases or reach the merits of the plaintiffs' claims in these actions.

It is important to note that when any transfer request is pending before the JPML, the potential transferor district court's authority is not affected - it can rule on pending pretrial motions, including motions to remand to state court. Until an effective transfer order is entered with the clerk of the transferor court, this remains true.[1]

The JPML and the U.S. District Court to which the state court case was removed should strongly disapprove of, rather than sanction, such gamesmanship of the legal system and waste of judicial resources. At the very least, the JPML should require the potential transferor court to rule on the issue of jurisdiction. If the court has federal question jurisdiction under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332, then transfer to the MDL court may be considered. If the potential transferor court does not have jurisdiction, then the case should be remanded to the state court in which the complaint was filed.

It is important to understand that state court cases could assist in ensuring the legitimacy of an MDL settlement by: (a) providing needed real-world data; and (b) potentially making any proposed settlement fair, reasonable, and adequate.

The state court cases, used as test cases, would provide information about what actually happens when these cases are litigated in front of the relevant state judge and tried (where applicable) before a jury pooled from the relevant geographic area.[2]