

# MDL PRACTICE: AVOIDING THE BLACK HOLE

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I.	INTRODUCTION.....	71
II.	THE STATUTORY FRAMEWORK FOR HANDLING MASS LITIGATION.....	72
III.	MDL LITIGATION—BY THE NUMBERS.....	76
IV.	AVOIDING THE BLACK HOLE .....	80
	A. <i>Case-Specific Discovery Prolongs the MDL</i> .....	81
	B. <i>Bellwether Trials May Prolong the MDL</i> .....	82
V.	DELAY FORFEITS THE RIGHT TO TRIAL BY JURY .....	85
VI.	THE CASE FOR EXPEDITIOUS REMAND .....	86
VII.	CONCLUSION .....	90

## I. INTRODUCTION

*"[B]lack hole: a region of space-time from which it is not possible to escape . . . ."*<sup>1</sup>

Most of today's multidistrict litigation (MDL) has strayed far from the statutory mandate enacted to handle mass litigation.<sup>2</sup> Future MDLs would benefit greatly from returning to the original intent of the statute. Going back to compliance with the statute—especially as it pertains to early

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1. S.W. Hawking, *The Quantum Mechanics of Black Holes*, SCI. AM., Jan. 1977, at 34, 34.

2. See 28 U.S.C. § 1407(a) (2012), which states 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

*Id.*

remand—would improve MDLs for the litigants and the public. With 281 MDLs active today,<sup>3</sup> a large portion of the country's federal civil cases are conducted through MDLs. With the small number of MDL judges managing such a large share of active cases, there is a tendency for some of these cases to become stagnant. When this happens, the MDL can become the proverbial “black hole,” taking in cases with virtually no hope of fair and efficient resolution.

This Article contrasts the procedure for handling mass litigation as intended by the 1968 MDL statute with the present handling of some MDLs. The manner in which some MDLs are conducted today is inconsistent with Congress's design in the MDL statute, as approved by the U.S. Supreme Court.<sup>4</sup> This Article will begin by providing a brief history of 28 U.S.C. § 1407. Part II will outline the vast number of cases involved in MDL litigation. Part III will discuss the black-hole effect of MDL, which is caused by courts engaging in case-specific discovery and conducting what are known as “bellwether” trials. This Article will then analyze the black-hole effect on a litigant's right to trial by jury. Finally, this Article will offer a solution to avoid the black hole: remand to the original court, as the statute intended.

## II. THE STATUTORY FRAMEWORK FOR HANDLING MASS LITIGATION

In 1968, Congress passed a statute to address a growing concern: in a number of different types of litigation, cases with similar questions of fact and law were being filed in different U.S. district courts all over the country.<sup>5</sup> There was a need for increased efficiency and the avoidance of duplication by many different courts in many different districts.<sup>6</sup> There was also a fear that conducting pretrial proceedings in different districts would produce different results, which would be confusing to the litigants and the public.<sup>7</sup>

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3. *MDL Statistics Report-Docket Summary Listing*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Oct. 15, 2014), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_by\\_MD\\_L\\_Number-October-15-2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_by_MD_L_Number-October-15-2014.pdf).

4. See *Lcxecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

5. See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 228 (2008).

6. See *id.*

7. Cf. Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer, and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Policy?*, 23 MEMPHIS ST. U. L. REV. 841, 845 (1993) (“[The Judicial Panel's power] is limited by the requirement that consolidation and single court supervision be in the best

Congress addressed this issue by enacting § 1407. This MDL statute provided for a number of significant procedural changes. First, it established the Judicial Panel on Multidistrict Litigation (JPML or the Panel).<sup>8</sup> The Panel consists of seven judges selected by the Chief Justice of the U.S. Supreme Court.<sup>9</sup> The Panel is tasked with determining whether different federal civil cases filed in the many district courts should be “centralized in a single MDL docket.”<sup>10</sup> Second, once the Panel determines that consolidation is appropriate, § 1407 authorizes it to transfer cases from different districts (called transferor courts) to one district court (the MDL transferee court),<sup>11</sup> which is designed to conduct “coordinated or consolidated pretrial proceedings.”<sup>12</sup> Congress allows transfers “for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions.”<sup>13</sup>

Over the years, in many MDL proceedings the transfer to a single transferee court has provided a number of efficiencies. For example, hardworking transferee judges and counsel for both plaintiffs and defendants have adopted procedures to handle dispositive motions, standardize discovery, develop expert testimony, and other mechanisms. These procedures were all designed by transferee courts and MDL counsel “to secure the just, speedy, and inexpensive determination of every action.”<sup>14</sup> The statute also provides that each transferred action is to be remanded “at or before the conclusion of such pretrial proceedings to the district from which it was transferred.”<sup>15</sup>

Therefore, the congressional design of the statute is straightforward: the Panel is to transfer cases with common issues to a transferee court to supervise pretrial proceedings.<sup>16</sup> The Panel then transfers these cases back to their respective transferor courts.<sup>17</sup> The U.S. Supreme Court has addressed the manner in which the MDL is to be conducted. In 1998, the Court considered *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.<sup>18</sup> This class-action lawsuit was brought by an economics consulting

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interests of justice, convenient for the parties, and efficient for preparing the action for trial or at least for discovery.”)

8. 28 U.S.C. § 1407(a) (2012).

9. Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIG. J., Summer 2012, at 26, 26.

10. *Id.*

11. 28 U.S.C. § 1407(b).

12. *Id.* § 1407(a).

13. *Id.*

14. FED. R. CIV. P. I.

15. 28 U.S.C. § 1407(a).

16. *Id.*

17. *Id.*

18. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

firm against a law firm and was transferred pursuant to § 1407(a).<sup>19</sup> The transferee district court transferred the case back to itself for trial when it could have sent the issue back to the transferor court.<sup>20</sup> The Court, in a unanimous decision, disagreed with the transferee district court.<sup>21</sup> The Court found that the MDL transferee district court was obligated under § 1407(a) to transfer the case back to the district court from which it was transferred for trial.<sup>22</sup>

There are some who have limited *Lexecon* to the narrow proposition that a transferee judge may try only those cases that could originally have been filed in that court.<sup>23</sup> However, *Lexecon* is not nearly so limited. The Court identified the dual function of the statute: (1) the JPML transfers cases to the transferee court for coordinated or consolidated pretrial proceedings, and (2) at or before the conclusion of the pretrial proceedings, the transferee court must send the cases back to the transferor court for trial.<sup>24</sup>

The Court recognized the JPML's authority to transfer for coordinated or consolidated pretrial proceedings, and then acknowledged that the second function of the statute is to remand:

Beyond this point [i.e., transfer by the JPML to the transferee court], however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those proceedings have run their course. . . . The Panel's [remand] instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion.<sup>25</sup>

The Court referred to remand as the "plain command" in "straightforward language."<sup>26</sup> According to the Court, the MDL statute says what it means and means what it says: "at or before the conclusion of such pretrial proceedings," transferee courts shall remand cases back to their respective transferor courts for trial.<sup>27</sup>

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19. *Id.* at 29–30.

20. *Id.* at 30–31.

21. *Id.* at 27–28.

22. *Id.* at 34, 40.

23. *See* *Delaventura v. Colum. Acorn Trust*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).

24. *Lexecon Inc.*, 523 U.S. at 28.

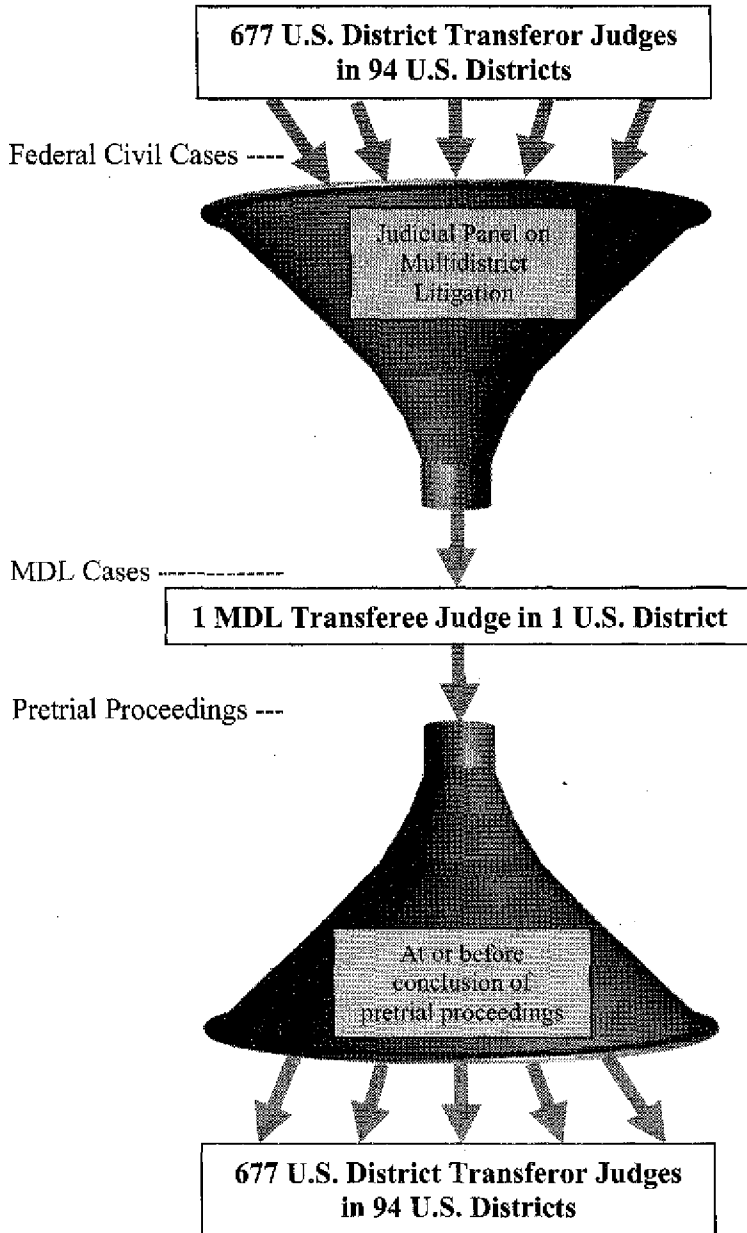
25. *Id.* at 34–35 (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947), *superseded by statute*, FED. R. CIV. P. 25 (1963)); *see also* *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).

26. *Lexecon Inc.*, 523 U.S. at 35, 40.

27. *Id.* at 28, 35, 37 (quoting 28 U.S.C. § 1407(a) (2012)).

Graphically, MDL mass actions are designed to work as follows:

**Figure 1**



Thus, there is the potential for 677 U.S. district transferor judges<sup>28</sup> in 94 separate U.S. districts<sup>29</sup> throughout the country to transfer cases (by way of the Panel) to one MDL transferee judge in one U.S. district. In accordance with the statute and the U.S. Supreme Court's unanimous decision in *Lexecon*, that transferee district court's responsibility is only to conduct pretrial proceedings.

Then, as the Supreme Court indicated in *Lexecon*, "the textual pointers reverse direction."<sup>30</sup> As shown in the above graphic, the transferee court must remand the cases back to its respective transferor court at or before the conclusion of pretrial proceedings, in accordance with both § 1407 and *Lexecon*. The obligation of the transferee court to remand is mandatory; it is not subject to judicial discretion.<sup>31</sup>

However, MDL litigation does not work that way today. The actual practice is very different from the design envisioned by Congress. To see that, one need only study the statistical data.

### III. MDL LITIGATION—BY THE NUMBERS

"Since the creation of the [JPML] in 1968, there have been 515,594 civil actions centralized for pretrial proceedings. As of September 30, 2014, [only] 13,911 had been remanded for trial . . ."<sup>32</sup> Therefore, only 2.7% of the transferred cases in the entire history of the MDL statute have actually been remanded.<sup>33</sup> As of September 2014, 127,704 MDL cases are pending.<sup>34</sup> Of those 127,704 cases, only 478 cases have been remanded.<sup>35</sup> Presently, therefore, less than .4% of all MDL cases have been remanded.<sup>36</sup> The JPML contains no statistics regarding how long the transferred cases stay in the transferee district court before they are remanded. By all

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28. *Federal Judgeships*, U.S. CTS., <https://web.archive.org/web/20141101013021/http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

29. Office of the U.S. Att'ys, *Introduction to the Federal System*, U.S. DEP'T JUST., <http://www.justice.gov/usao/justice-101/federal-courts> (last visited May 22, 2015).

30. *Lexecon Inc.*, 523 U.S. at 34.

31. *Id.* at 34–35.

32. *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2014*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 3, [https://web.archive.org/web/20141028154652/http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-2014\\_0.pdf](https://web.archive.org/web/20141028154652/http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2014_0.pdf) (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

33. *See id.* at 5.

34. *Id.* at 3, 5.

35. *Id.* at 5.

36. *See id.*

indications, they can be retained in the transferee court for a considerable period of time.

Stewart Albertson, a California lawyer, describes cases going into MDL as a graveyard: “When a case gets joined to an MDL, it dies a slow death and its value drops significantly.”<sup>37</sup> Courts and commentators have referred to these types of MDL cases as “black hole” MDLs.<sup>38</sup>

That might explain the increase of MDL cases compared to the total civil caseload of U.S. district courts. As of June 2014, 334,141 civil cases were pending in U.S. district courts.<sup>39</sup> Of those 334,141 cases, 70,328 were prisoner or Social Security cases.<sup>40</sup> These cases typically do not require much time from Article III judges,<sup>41</sup> meaning Article III judges work primarily on a total of 263,813 active civil cases. From these 263,813 cases, 120,449 pending civil cases are MDLs.<sup>42</sup> Therefore, approximately 45.6% of the U.S. district courts’ pending active civil cases reside in MDL transferee courts.<sup>43</sup>

Since 2009, the MDL docket has expanded from 88,000 to 120,449 civil cases.<sup>44</sup> Of those cases, 105,644 are concentrated in the largest MDLs.<sup>45</sup> Recently, the largest MDLs have generally consisted of major mass actions involving disasters (e.g., Deepwater Horizon), product-liability cases (e.g., GranuFlo, testosterone, and other pharmaceutical cases), or medical-device cases (e.g., transvaginal mesh, hip, and knee replacements).<sup>46</sup> Some U.S. district transferee judges manage over 10,000 or more individual MDL cases.<sup>47</sup> As of August 2014, one U.S. district court

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37. Sindhu Sundar, *AbbVie Can't Keep AndroGel Death Suit Out of State Court*, LAW360 (Oct. 1, 2014, 6:47 PM ET), <http://www.law360.com/articles/583039/abbvie-can-t-keep-androgel-death-suit-out-of-state-court>.

38. Hon. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008); see also *infra* note 53.

39. *MDL Standards and Best Practices*, DUKE L. SCH. CTR. FOR JUD. STUD., x n.2 (Sept. 11, 2014), [https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL\\_Standards\\_and\\_Best\\_Practices\\_2014-REVISED.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf).

40. *Id.* at x–xi.

41. *Id.*

42. *Id.*

43. *Id.*; see also *Table C-3A, U.S. District Courts—Civil Cases Pending, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2005*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/appendices/c3a.pdf> (last visited Feb. 16, 2015).

44. *Ascendancy and Concentration of MDLs*, DUKE U. SCH. L. CTR. FOR JUD. STUD. (Sept. 11, 2014), [http://pdfserver.amlaw.com/nlj/Graphs\\_and\\_MDL\\_Statistics.pdf](http://pdfserver.amlaw.com/nlj/Graphs_and_MDL_Statistics.pdf).

45. *See MDL Statistics Report—Distribution of Pending MDL Dockets By District*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Aug. 15, 2014), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-August-15-2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-August-15-2014.pdf).

46. *See id.*

47. *See id.*

transferee judge, Judge Joseph Goodwin of the Southern District of West Virginia, was managing over 60,000 cases in several MDLs.<sup>48</sup> These are not consolidated class actions. The U.S. Supreme Court has determined that there are too many individualized issues in these types of cases to meet class certification requirements.<sup>49</sup> Instead, these are individual cases.

The small percentage of remands strongly indicates an aversion to remand by the transferee judges. Indeed, the Judicial Conference has lobbied for legislation that would “over-rule [*Lexecon*] by statutory amendment.”<sup>50</sup> The chair of the Panel could not have been more direct:

We’re hopeful that in this Congress the legislation will pass and that [*Lexecon*] will be a thing of the past.

It’s hard to know how many multidistrict dockets actually have been affected in some substantial way by the requirement of [*Lexecon*] that constituent actions be remanded to the transferor courts as soon as the case is ready for trial. A number of devices, frankly, have been utilized by innovative judges since [*Lexecon*] to minimize its effect.<sup>51</sup>

Some courts have even recognized that “it is almost a point of honor among transferee judges” not to remand cases back to their transferor courts.<sup>52</sup> The statistics support this aversion to remand. If less than .4% of the cases are being remanded, then these cases, once deposited in their transferee courts, most certainly remain there for their life or death, no matter how long that takes. As a practical matter, while some remands are granted (typically after an extended period of time), not many cases escape the MDL transferee courts—they are lost in the MDL black hole. Unlike Figure 1, here is what actual MDL practice looks like:

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48. *Id.*; e.g., *In re Neomedic Pelvic Repair Sys. Prods. Liab. Litig.*, 999 F. Supp. 2d 1371, 1371, 1373 (J.P.M.L. 2014); Pretrial Order #71 at 1, *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2325 (S.D. W. Va. July 1, 2013) [hereinafter *Pelvic Repair Sys. Pretrial Order*]; *In re Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 949 F. Supp. 2d 1373, 1375–76 (J.P.M.L. 2013); *In re Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1348, 1349–50 (J.P.M.L. 2012); Pretrial Order #1 at 1–2, *In re Bos. Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326 (S.D. W. Va. Feb. 29, 2012).

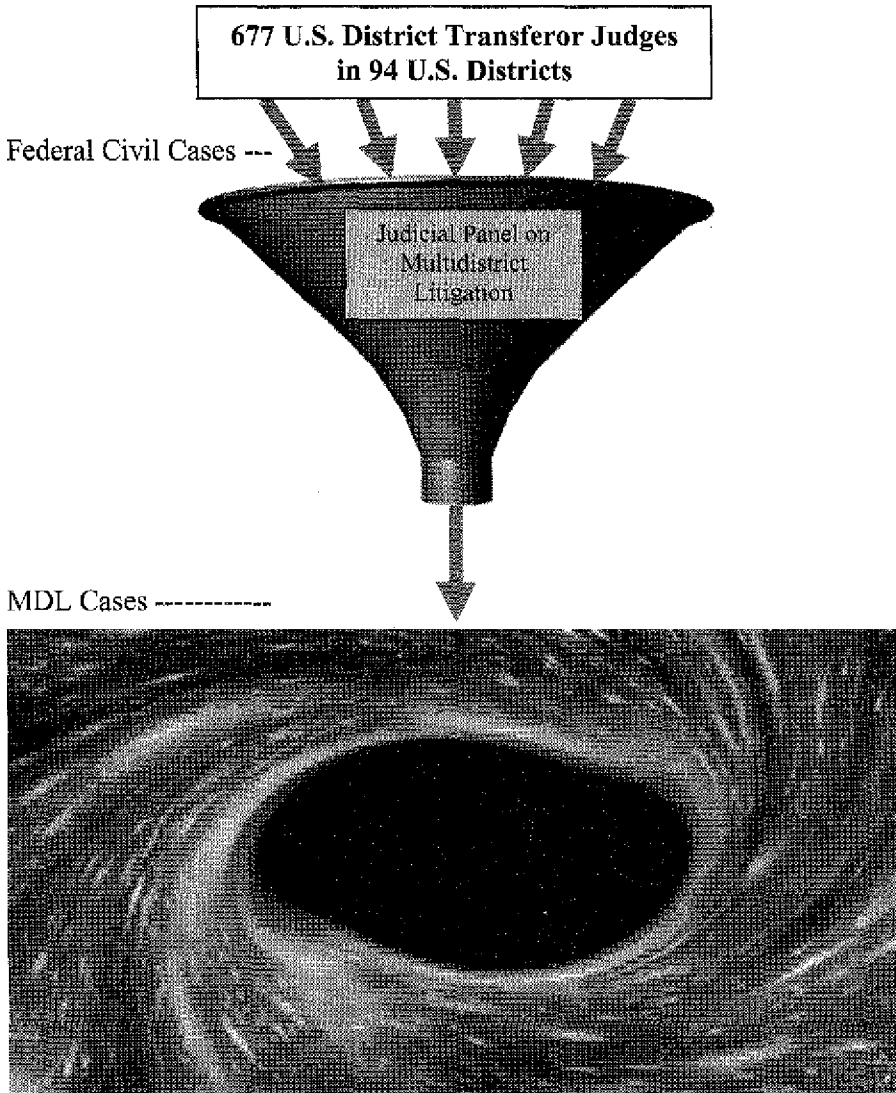
49. See FED. R. CIV. P. 23; see, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (holding that mandatory class action was not valid in asbestos-related cases because the class action could not adequately protect the rights of potential future claimants); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (holding that the class action would not adequately protect the rights of future claimants).

50. *Chair of Judicial Panel Sees Role as Gatekeeper*, THIRD BRANCH (Nov. 2005), <http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20November-2005-Hodges%20Interview.pdf>.

51. *Id.*

52. *Delaventura v. Colum. Acorn Trust*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).



**Figure 2**

In rare instances, the Panel has suggested remand to MDL judges after an extended period of time.<sup>53</sup> However, in practice this is the

53. See *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3-06-1760, 2011 WL 2182824, at \*2 (M.D. Tenn. June 3, 2011); Final Pretrial Order and Suggestion of Remand at 22, *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB (M.D. Fla. May 13, 2010); *In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW, 2010 WL 703151, at \*1 (E.D. Ark. Feb. 23, 2010); Final MDL Pretrial Order at 2, *In re Phenylpropanolamine (PPA) Prods. Liab.*

exception rather than the rule. Remand occurs in only a very tiny fraction of cases despite the language of the statute and a unanimous Supreme Court decision. How black-hole cases are created—and how MDL courts and counsel avoid them—is important to our judicial system.

#### IV. AVOIDING THE BLACK HOLE

Cases that have stayed much too long in the transferee court have been referred to by courts and commentators as black holes.<sup>54</sup> There have been attempts to change § 1407 and *Lexecon* to allow a transferee judge to retain jurisdiction over certain MDL cases for trial.<sup>55</sup> Those attempts have failed. Therefore, both MDL courts and lawyers should deal with the structure of § 1407 as it is supposed to exist.

This Article suggests that implementing the framework of the statute as designed would increase the efficiency of MDLs. Conversely, the attempts to avoid or circumvent the framework of the statute have impeded the performance of MDL litigation and led to its poor reputation. How should we avoid black-hole cases that go on forever? To answer that we can look to the past and identify techniques or devices that have led to black-hole cases.

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Litig., MDL No. 2:01-md-01407-BJR (W.D. Wash. May 19, 2004); *In re* Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1998 WL 118060, at \*1 (E.D. Pa. Jan. 12, 1998).

54. See *In re* U.S. Lines, Inc., No. 97 Civ. 6727 (MBM), 1998 WL 382023, at \*7 (S.D.N.Y. July 9, 1998) (referring to appellant's metaphor that the asbestos MDL is a "'black hole' and 'the third level of Dante's inferno'"); Fallon et al., *supra* note 38, at 2330 ("Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again."); Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013) ("[S]ome litigants . . . refer to MDL-875 as a 'black hole,' where cases disappear[] forever from the active dockets of the court."); see also *Delaventura*, 417 F. Supp. 2d at 150 ("MDL practice is slow, very slow."); Benjamin W. Larson, Comment, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1364 (1999) ("[E]fficiency gains of consolidated trial [by MDL] are not supported by reality.").

55. See, e.g., Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. § 3 (2006); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. § 2 (2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. § 1 (2001); Multidistrict Litigation Act of 2000, H.R. 5562, 106th Cong. § 2 (2000); Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong. § 2 (1999); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (1999); Multidistrict Trial Jurisdiction Act of 1999, H.R. 1852, 106th Cong. § 2 (1999).

A. *Case-Specific Discovery Prolongs the MDL*

Transferee courts routinely engage in plaintiff and defendant fact sheets, a uniform set of questions asked of all MDL plaintiffs and defendants that generally serve as interrogatories.<sup>56</sup> The fact sheets give both the court and the litigants a feel for common issues of fact and law.<sup>57</sup> While fact sheets are helpful to courts and litigants, in-depth, case-specific discovery can be counterproductive.

For example, in *In re Diet Drugs Products Liability Litigation* numerous cases were filed in both state and federal courts.<sup>58</sup> A number of cases were tried in state courts in Pennsylvania, Georgia, Missouri, Illinois, Texas, Mississippi, as well as other states.<sup>59</sup> Meanwhile, trials were not being conducted in the MDL court. However, as a prerequisite for remand and upon threat of dismissal, the MDL court required extensive case-specific discovery.<sup>60</sup> The discovery requirement resulted in subjecting one firm's cases to over 12,000 depositions before the MDL court would remand even one case.<sup>61</sup> But most of these depositions did not involve any common factual or legal issues. Rather, the depositions taken were of particular plaintiffs, their family members, and their treating physicians. The MDL court held all cases for almost two years while these depositions were ongoing. Not a single case was remanded while the thousands of depositions were being completed. Finally, the MDL court remanded eleven cases. Of those eleven cases, only one reached a verdict.<sup>62</sup> Thus, at the conclusion of 12,000 depositions, one federal case was tried. During the course of the same litigation, however, the firm tried cases twenty-six times in state courts.

Consider the instruction of § 1407 that transfers “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>63</sup> Observe the cost to both sides of conducting 12,000 depositions. By way of example, if 12,000 depositions take six hours each at an hourly billing rate of \$500 per attorney in attendance, each side will spend roughly \$36 million in billable hours or a

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56. *MDL Standards and Best Practices*, *supra* note 39, at 11–13.

57. *See id.*

58. *Anderson v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, 220 F. Supp. 2d 414, 417–18 (E.D. Pa. 2002).

59. *Id.* at 418, 421. This refers to the cases tried by Fleming, Nolen & Jez, L.L.P.

60. *See id.* at 420.

61. This refers to the cases of Fleming, Nolen & Jez, L.L.P., in which the firm represented approximately 8,000 clients in *In re Diet Drugs Products Liability Litigation*.

62. Order Denying Plaintiff's Motion for New Trial at 1, *Geers v. Wyeth, Inc.*, No. 7:03-cv-00107-HLH (W.D. Tex. Apr. 10, 2006).

63. 28 U.S.C. § 1407(a) (2012).

total of \$72 million for both parties if only one attorney is present for each party. But that does not go nearly far enough. Consider that most depositions generally require additional lawyer and paralegal time, as well as additional expenses, such as court reporting services, video, and travel, among other expenses. When taking this into consideration, the costs can be substantially higher than \$72 million.

Case-specific discovery increases the cost to the parties while at the same time decreasing the efficiency of the MDL. While such case-specific discovery is ongoing, the other cases in the MDL caseload generally lie dormant. Case-specific discovery across an MDL creates delay and can lead to the black-hole case.

### B. *Bellwether Trials May Prolong the MDL*

Bellwether trials are named after the leader of a flock of sheep who wears a bell around her neck.<sup>64</sup> They are meant to be an indicator or predictor of the result in similar cases.<sup>65</sup> Bellwether trials are designed to give the parties actual exposure to a jury to assist them in evaluating their cases in light of trial results.<sup>66</sup> As a result of these features, bellwether trials can be helpful. Bellwether trials can result in transferee court orders on motions to dismiss, summary judgment motions, *Daubert* motions, and motions in limine.<sup>67</sup> Bellwether trials can assist the lawyers for both sides in creating trial packages, such as exhibit lists, witness lists, expert reports, and other similar items.<sup>68</sup> They can also allow the parties to test their theories regarding liability and damages before an actual jury.<sup>69</sup> When all of the bellwether cases' pretrial proceedings are complete, many of the other cases should be ripe for remand. But without remand of the other MDL

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64. H. Thomas Wells, Jr., *Recent Issues Arising in Multidistrict Litigation Bellwether Trials*, A.B.A. SEC. LITIG. 3 (Jan. 2012), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_jointcle\\_materials1/8\\_1\\_RE.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_jointcle_materials1/8_1_RE.authcheckdam.pdf).

65. *Id.*

66. *Id.*

67. See Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynn, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2328 (2008); James M. Beck & Mark Herrmann, *How to Prepare Motions in Limine*, DRUG & DEVICE L. (Nov. 20, 2008), <http://druganddevicelaw.blogspot.com/2008/11/how-to-draft-motions-in-limine.html>; Isabella C. Lacayo, *Win Some, Lose Some: Recent Federal Court Rulings on Daubert Challenges to Plaintiffs' Experts*, PRODUCT LIABILITY MONITOR (Aug. 30, 2012), <http://productliability.weil.com/expert-issues/win-some-lose-some-recent-federal-court-rulings-on-daubert-challenges-to-plaintiffs-experts/>.

68. See Wells, *supra* note 64, at 3.

69. *Id.*

cases, or when bellwethers are used repetitively without remand, they can delay progress in the case.<sup>70</sup>

Early on, bellwether trials were used to bind the parties to the trial results.<sup>71</sup> However, the appellate courts have rejected that approach.<sup>72</sup> Transferee courts have now adopted a nonbinding approach for bellwether trials.<sup>73</sup> Extensive time and preparation go into selecting a case for bellwether participation.<sup>74</sup> The time and preparation fall on the lawyers and, most importantly, the transferee court.<sup>75</sup> The selection process involves assessing the entire litigation, identifying major variables in the law and facts, putting together a pool of potential bellwether cases, and determining a selection approach—whether by the court, counsel, or a combination of both.<sup>76</sup> In the meantime, most of the MDL docket lies stagnant, waiting for the bellwether trial to conclude.

Sometimes bellwether trials occur when cases are set for trial, but sometimes they do not. For example, in *In re American Medical Systems Products Liability Litigation* the bellwether selection process was completed after a great deal of time and effort by MDL counsel and the MDL transferee court.<sup>77</sup> It ultimately resulted in the selection of four candidates for bellwether trials. However, prior to the commencement of those trials, all four cases were settled on a confidential basis.<sup>78</sup> Therefore, there was no information, based on a jury verdict, to aid the parties in evaluating the remainder of the cases pending in the MDL.

This result is not unusual. Plaintiffs' lawyers try to get their best cases to bellwether trial. Defense lawyers try to get their best cases, which are the plaintiffs' worst, to bellwether trial. Sometimes this results in the plaintiffs dismissing their worst, or the defendants' best, bellwether cases. Or this results in the defendants entering into confidential settlements on

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70. See BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES* 47 (2011), available at <http://www2.fjc.gov/sites/default/files/2012/MDLGdePL.pdf>.

71. Fallon et al., *supra* note 38, at 2331.

72. See, e.g., *Phillips v. E.I. Dupont de Nemours & Co.* (*In re Hanford Nuclear Reservation Litig.*), 497 F.3d 1005, 1025 (9th Cir. 2007); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1199 (10th Cir. 2000); *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 318 (5th Cir. 1998).

73. Wells, *supra* note 64, at 4.

74. See, e.g., *id.* ("Judge Fallon of the United States District for the Eastern District of Louisiana has suggested a three step process for selecting and implementing a case management plan that includes bellwether trials based on his experience with the Vioxx multidistrict litigation.").

75. *Id.*

76. *Id.* at 3–5.

77. See *Pelvic Repair Sys. Pretrial Order #71*, *supra* note 48, at 1.

78. *Id.* These are four of the cases of Fleming, Nolen & Jez, L.L.P.

their worst, or the plaintiffs' best, bellwether cases. In either case, no jury data are derived from the extensive bellwether selection process and bellwether trial settings.

But assume a bellwether case does go to trial and results in a substantial, multimillion-dollar plaintiff's verdict. Or assume a bellwether case goes to trial and results in a defense no-liability, no-damage verdict. In either case, in the settlement negotiations counsel for both sides try to set aside a plaintiff's or defense "anomaly" and negotiate regardless of the verdict.

Therefore, while the bellwether trial process is helpful, repetitive bellwether trials without remand of other pending cases can also lead the transferee court and MDL counsel into a black hole. These black holes are not without a cost. Preparing for trial is expensive. Trials require fact and expert depositions, sometimes taking place all over the country. They also require extensive motion practice. As shown above, MDL costs can be gigantic. Ultimately, the plaintiffs and the defendants incur substantial costs in the bellwether trial process.

There is also another cost. In a prolonged MDL, a percentage of the plaintiffs may be forced to file for bankruptcy.<sup>79</sup> Most of these bankruptcy filings are a direct result of the plaintiffs' injuries that led to the MDL litigation. Typically, these are medical bankruptcies. For example, imagine that a woman contracts breast cancer as a result of a drug.<sup>80</sup> She is a working, single mom. She has health insurance through her employer. She has to go in for treatment on multiple occasions. She may be required to have surgery. Finally, she is forced to leave her job. She loses her health insurance. Now she cannot rely on a health insurance carrier to get medical care. She has to rely on her own pocketbook, which can quickly be emptied. As a result, she files for bankruptcy. She has yet to get any relief from the black-hole MDL and her family suffers.

Additionally, some plaintiffs die during the black-hole MDL. In *In re Diet Drug Litigation*, almost five percent of the plaintiffs died during the course of the proceedings.<sup>81</sup> The deceased plaintiffs' estates then became the plaintiffs. The actual plaintiffs received no relief from the MDL. As a result of bankruptcies and deaths, when settlements or judgments finally arrive, approval by bankruptcy courts and probate courts is required.

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79. About 10% of the Fleming, Nolen & Jez clients in *In re Diet Drugs Products Liability Litigation* filed for bankruptcy.

80. For an example of such a situation, see *Beylin v. Wyeth (In re Prempro Prods. Liab. Litig.)*, 738 F. Supp. 2d 887, 889 (E.D. Ark. 2010).

81. The Fleming, Nolen & Jez clients in *In re Diet Drugs Products Liability Litigation* had about a 5% death rate.

Consequently, prolonged black-hole MDLs put a burden on bankruptcy trustees and courts, as well as state probate courts.

Bellwether trials have their advantages. However, repetitive, time-consuming bellwether trials without remand of other pending cases can create a prolonged black-hole MDL that is inconsistent with a “just, speedy, and inexpensive determination of every action.”<sup>82</sup>

#### V. DELAY FORFEITS THE RIGHT TO TRIAL BY JURY

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”<sup>83</sup> Many courts and commentators have extolled the virtue of U.S. citizens’ right to trial by jury. Trial judges believe in the right to trial by jury. Trial lawyers believe in the right to trial by jury. Judge Keith P. Ellison of the United States District Court for the Southern District of Texas in Houston, after noting the inconvenience to the prospective jurors, stated: “Now we ask you to do that for a number of reasons; but they can all be summed up in this simple truth, that we think the American jury system is the most powerful method yet devised for the ascertainment of truth.”<sup>84</sup>

Both the American Bar Association and the National Center for State Courts have expressed their concern when courts are unable to resolve cases in a reasonably prompt manner.<sup>85</sup> They cite the impact on public safety, the economy, those who need the protection of the courts, and on citizens’ faith in our system of government.<sup>86</sup>

One of the serious consequences of the delays caused by black-hole MDLs—through the devices of extensive, case-specific discovery and repetitive bellwether trials—is the loss of the right to trial by jury. The delay sustained by those MDL cases that are denied remand to the transferor courts causes many to lose their right to trial by jury.

For example, in *In re Prempro Products Liability Litigation*, after almost ten years of litigation, the case had been tried several times in federal court before being appealed to and decided by the Eight Circuit.<sup>87</sup>

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82. FED. R. CIV. P. 1.

83. U.S. CONST. amend. VII.

84. Hon. Keith P. Ellison, Opening Remarks in *United States v. Carter*, No. H-09-CR-336 (Apr. 19, 2010).

85. A.B.A. TASK FORCE PRESERVATION JUST. SYS., CRISIS IN THE COURTS: DEFINING THE PROBLEM 1 (2011), available at [http://www.micronomics.com/articles/aba\\_report\\_to\\_the\\_house\\_of\\_delegates.pdf](http://www.micronomics.com/articles/aba_report_to_the_house_of_delegates.pdf).

86. *Id.* at 3–7; see also Peter T. Grossi, Jr., Jon L. Mills & Konstantina Vagenas, *Crisis in the Courts: Reconnaissance and Recommendations*, in FUTURE TRENDS IN STATE COURTS 83, 83–85 (2012).

87. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 616–17 (8th Cir. 2010).

The case had also been tried in a state district court, was similarly appealed to and decided by the state's intermediate appellate court, and ultimately decided by the supreme court of that state.<sup>88</sup> Motions to remand in the federal transferee court were denied.<sup>89</sup> Cases continued to be maintained, without any activity, in that MDL. One firm calculated that at the rate cases were being tried in the MDL court or remanded by the MDL court, it would take almost ten years for the firm's clients to go to trial.<sup>90</sup>

This was a case in which the plaintiffs were primarily women in their 50s to 70s, many of whom had contracted breast cancer as a result of a pharmaceutical product.<sup>91</sup> Many had suffered through single or double mastectomies.<sup>92</sup> Many were receiving ongoing treatment. Faced with the realization of a ten-year delay to even reach a trial court, there was a significant discounting of the settlement value of their cases. That type of delay coerces plaintiffs into forfeiting their right to trial by jury. That is a serious consequence to MDL litigants and to our society.

## VI. THE CASE FOR EXPEDITIOUS REMAND

It is important to recognize the congressionally established design of conducting mass litigation. Congress established a system in which there are transfers to one transferee court, pretrial preparation, and then remand to transferor courts "at or before the conclusion of such pretrial proceedings."<sup>93</sup> The MDL statute does not specify, nor does it envision, extensive case-specific discovery. Further, it does not specify or envision bellwether trials. Neither in-depth, case-specific discovery nor bellwether trials are even mentioned in the statute.

Similarly, when the U.S. Supreme Court had the opportunity to consider MDL mass litigation, it described the remand process as a "plain command."<sup>94</sup> In its "Ten Steps to Better Case Management: *A Guide for Multidistrict Litigation Transferee Judges*," the JPML urged transferee judges to "[e]xercise [y]our [p]rimary [r]esponsibilities," stating: "Good management techniques are a means, not an end. Never lose sight of your

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88. *Wyeth v. Rowatt*, 244 P.3d 765 (Nev. 2010).

89. *Id.* at 617–18.

90. Fleming, Nolen & Jez, L.L.P. represented approximately 520 clients in *In re Prempro Products Liability Litigation*.

91. *In re Prempro Prods. Liab. Litig.*, 591 F.3d at 616–17.

92. *See, e.g., Scroggin v. Wyeth (In re Prempro Prods. Liab. Litig.)*, 586 F.3d 547, 553 (8th Cir. 2009).

93. 28 U.S.C. § 1407(a) (2012).

94. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).



statutory responsibility, which is to efficiently and fairly manage pretrial proceedings.<sup>95</sup>

One good management technique is delegation to other courts—and that is what the remand feature is all about.<sup>96</sup> One transferee judge, no matter how hard he or she works, no matter how intelligent he or she is, cannot try or settle all the cases in an MDL alone. That is not how the system is designed, and that is not what should be expected of a transferee judge.<sup>97</sup> After all, the transferee judge has 677 U.S. District Judges in 94 districts at his or her disposal, all of whom are also hardworking and intelligent.<sup>98</sup> These judges are competent trial judges who can be a substantial resource to MDL transferee judges, if they will only use them.<sup>99</sup> Why use the “one-riot, one-Ranger mode”<sup>100</sup> when so much efficiency can be realized through delegation to other competent U.S. district judges?

However, the statistical data shown earlier indicate that remand is a rarely used tool in the toolbox of most MDLs.<sup>101</sup> Perhaps MDL counsel should consider urging transferee courts to exercise their remand function earlier and more often. Some courts have commented on the “settlement culture” of MDLs.<sup>102</sup> Perhaps MDLs should try setting aside attempts to settle every case, no matter how long it takes. Perhaps MDLs should set aside the settlement culture and let the system work as designed. Why keep fighting the design of the system with “innovations” that result in extraordinary expenditures of time and money? Perhaps MDLs should not try to force entire dockets of cases into settlement. Perhaps MDL counsel should urge MDL transferee judges to remand cases “at or before the conclusion of such pretrial proceedings.”<sup>103</sup>

Some states have instituted procedures in their own courts to avoid delay and to assure access to jury trials. For example, the Philadelphia Court of Common Pleas has a Complex Litigation Center devoted to mass torts.<sup>104</sup> In every mass tort program “there are regular monthly or bi-

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95. JUD. PANEL ON MULTIDISTRICT LITIG. & FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES i, 9 (2009).

96. *Id.* at 10.

97. *Id.*

98. See discussion *supra* notes 28–29.

99. JUD. PANEL ON MULTIDISTRICT LITIG. & FED. JUD. CTR., *supra* note 95.

100. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1844 (1995) (reasoning that this mode presents itself when judges feel they must handle and complete the entire litigation themselves).

101. See *supra* Part III.

102. *E.g.*, *Delavventura v. Colum. Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) (internal quotation marks omitted).

103. 28 U.S.C. § 1407(a) (2012).

104. Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1321 (2005).

monthly meetings of counsel, the Coordinating Judge, and the Director.”<sup>105</sup> At the meetings, “case management procedures [are] tailored to each program.”<sup>106</sup> Agendas are circulated before the meetings.<sup>107</sup> Typically, pretrial motions are decided by one of the judges in the first jury trial, and then multiple judges are delegated cases to try.<sup>108</sup> Sometimes there may be five or six of the same type of MDL cases being tried simultaneously. Retired judges are pressed into service.<sup>109</sup> The Philadelphia courthouse has been involved in mass litigation in asbestos as well as virtually every major piece of mass litigation that followed asbestos.<sup>110</sup> The Philadelphia Complex Litigation Center was the first courthouse in the nation “designed exclusively for complex, multi-filed, [m]ass [t]ort cases” when it opened in 1992.<sup>111</sup>

MDLs do not have to be settlement machines. Two examples are the Texas state asbestos MDL and the current federal asbestos MDL. In Texas, the Honorable Mark Davidson, a state district judge, has presided over the state asbestos MDL for many years.<sup>112</sup> He regularly holds hearings on motions that involve, among other things, *Daubert* issues and motions in limine.<sup>113</sup> Texas law makes the orders of the MDL pretrial court binding on the trial court after remand.<sup>114</sup> Judge Davidson remands cases to the transferor courts all over the State of Texas for jury trial. Texas law states that “[t]he MDL pretrial court should, as far as reasonably possible, ensure that such action is brought to trial . . . within six months from the date the action is transferred to the MDL pretrial court.”<sup>115</sup> Judge Davidson ensures his cases are remanded within that statutory timeframe.

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105. Complex Litigation Center, *Civil Administration at a Glance 2005-2006*, PHILA. CT. COM. PL. 2, <https://web.archive.org/web/20100602124535/http://www.courts.phila.gov/pdf/manuals/civil-trial/complex-litigation-center.pdf> (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

106. *Id.*

107. *Id.*

108. *Id.* at 3.

109. See *MDL Standards and Best Practices*, *supra* note 39, at 78–79; see also A.B.A. TASK FORCE PRESERVATION JUST. SYS., *supra* note 85, at 9.

110. Complex Litigation Center, *supra* note 105, at 2.

111. *First Judicial District: 2009 Annual Report*, PHILA. CTS. 58, <https://courts.phila.gov/pdf/report/2009-First-Judicial-District-Annual-Report.pdf> (last visited Mar. 3, 2015).

112. *Judge Mark Davidson Resume*, HARRIS CNTY. DIST. CTS., <http://www.justex.net/courts/civil/CourtSection.aspx?crt=62&sid=245> (last visited Mar. 20, 2015).

113. These observations are a result of the experience of Fleming, Nolen & Jez, L.L.P.

114. TEX. R. JUD. ADMIN. 13.8, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (West 2013).

115. TEX. CIV. PRAC. & REM. CODE ANN. § 90.010(c) (West 2011 & Supp. 2014).

Another example of the use of expeditious remand is the current federal asbestos MDL. On October 1, 2008, Judge Eduardo Robreno of the United States District Court for the Eastern District of Pennsylvania was assigned the federal asbestos MDL.<sup>116</sup> Prior to Judge Robreno's assignment, the MDL was essentially dormant—no major hearings had occurred and no cases had been remanded for almost nine years. As soon as Judge Robreno took over, he applied additional resources to MDL-875, including: (1) asking other judges in the Eastern District of Pennsylvania to assist, (2) appointing four magistrate judges to have day-to-day responsibilities by district or by circuit, and (3) appointing a case administrator to assist the magistrate judges in case administration.<sup>117</sup> Engaging these resources resulted in show-cause hearings, fast-track discovery, referrals to a magistrate for pretrial proceedings, rulings on motions for summary judgment, and finally, remand to the transferor courts for trial.<sup>118</sup> Judge Robreno has suggested that remand should occur “at the conclusion of the summary judgment stage of the litigation.”<sup>119</sup> In commenting on the settlement culture of MDLs and the negative perception of remand by federal transferee judges, Judge Robreno stated:

As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process. That view . . . interfered with the litigation of individual cases in the MDL court.

...

After 2009, MDL-875 departed from this regimen. Remand was no longer viewed as a failure, but rather very much as a part of the MDL process.<sup>120</sup>

Because promptly remanding cases to the transferee court should occur once the goal of addressing pretrial issues has been achieved, Judge Robreno has got it right. He has demonstrated that efficient management of an MDL can be accomplished. As a result of his actions, a stagnant docket was revived and started to move toward resolution. Litigants were once again assured the right to trial by jury.

Consequently, the remand tool, when exercised by the transferee court, would result in trial dates that would lead more quickly to the

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116. Robreno, *supra* note 54, at 126 (“This stage of litigation led some litigants to refer to MDL-875 as a ‘black hole,’ where cases disappeared forever from the active dockets of the court.”).

117. *See id.* at 128–29.

118. *See id.* at 139–43.

119. *Id.* at 145.

120. *Id.* at 144 (footnotes omitted).

conclusion of MDL cases. In the end, lawyers settle cases. Trial judges do not settle cases, but they can establish the environment in which cases can be settled. When faced with multiple jury trial dates, cases will be resolved either by settlement or by trial. That is the beauty of trial by jury, and it is also the design of mass-action MDL proceedings.

#### VII. CONCLUSION

The design of MDL litigation by Congress is straightforward. The U.S. Supreme Court's approval of Congress's framework for MDL litigation is similarly direct. Use of the remand tool in the future, as it was designed in the past, will result in enforcement that "secure[s] the just, speedy, and inexpensive determination of every action."<sup>121</sup> In the future, going back to, and complying with, the statute's framework would improve the administration of justice and would avoid the black hole.

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121. FED. R. CIV. P. 1.