Understanding Complex Appellate Procedures

By James M. Sullivan and Gregory S. Chernack

Managing Appeals in Multidistrict Litigation

Although "a large percentage of the federal judiciary's business is conducted through the use of the multidistrict litigation [MDL] process," *In re Rolls Royce Corp.*, 775 F.3d 671, 681–82 (5th Cir. 2014), with over 280 ongoing MDLs in over 50 federal district courts, *see* http://www.jpml.uscourts.gov/pending-mdls-0, the appellate issues that arise as a result of MDLs have received relatively limited treatment. Counsel and parties should be aware of the special appellate considerations MDL litigation presents, including where, when, and how to appeal. Understanding the impact of MDL procedure on appeals reveals opportunities to take advantage of favorable forums and law while avoiding expensive, time-consuming appeals that have little chance of success.

The U.S. Supreme Court recently resolved one such issue regarding the timing of MDL appeals, holding that the consolidation of cases by the Judicial Panel on Multidistrict Litigation for coordinated or centralized pretrial proceedings does not cause the cases to lose their separate identities when deciding whether a final judgment has been entered. *Gelboim v. Bank of Am. Corp.*, 135 S.

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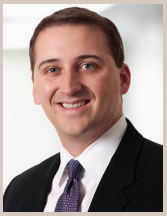

Ct. 897, 904–06 (2015). A judgment resolving all claims in one party's lawsuit can be a final appealable judgment even if claims of other parties who filed separate lawsuits remain pending in the MDL. *Id.* The party whose case has been resolved must appeal within 30 days of the entry of judgment or any appeal would be untimely and strip the appellate court of jurisdiction. *See id.*

While *Gelboim* settles any uncertainty regarding whether a party can appeal following the dismissal of its case by the MDL court, the Supreme Court had no cause to address a number of other significant appellate issues that arise in the MDL setting. We address several of those issues in this article.

Judicial Panel Rulings: Significance and Reviewability

MDLs are authorized and governed by 28 U.S.C. §1407, which states that "[w]hen 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." 28 U.S.C. §1407(a). Under Section 1407, decisions on transfer to or remand from MDLs—whether *sua sponte* or on motion by a party—are made by the Judicial Panel on Multidistrict Litigation ("Panel"), which consists of seven sitting federal circuit or district court judges from different circuits. §1407(a), (c), (d); Panel Rules 6.2(a), 10.1(b). The Panel members are appointed by the Chief Justice of the United States. §1407(d).

For contemplated transfers, in addition to the commonality of actions, the Panel considers whether consolidated MDL "proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." §1407(a); *see* Heather A. Pigman & John M. Kalas, Hollingsworth LLP, *An Analysis of the Trends and Bases for Denial of Multidistrict Litigation Requests*, In-House Defense Quarterly (Winter 2015) ("Pigman (2015)"). The Panel applies similar considerations to remand decisions, but also gives significant weight to the views of the assigned MDL judge on the timing of remand. *See, e.g.*, *In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009); §1407(a); Panel Rule 10.1(b). The Panel's discretion includes the authority to remand part or all of an action prior to the conclusion of coordinated or consolidated pretrial proceedings. *E.g.*, §1407(a); *In re Patenaude*, 210 F.3d 135, 145 (3d Cir. 2000); *In re Brand-Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1375 (J.P.M.L. 2003).

A judgment resolving all claims in one party's lawsuit can be a final appealable judgment even if claims of other parties who filed separate lawsuits remain pending in the MDL.

The Panel's decisions on when an MDL should be created, terminated, or limited can greatly affect the course of litigations. Creation of an MDL may lower the costs associated with contemporaneously litigating similar issues in multiple federal district courts and reduce the potential for conflicting or duplicative rulings and discovery orders. Where many cases have already been filed that are vulnerable to a motion that would dispose of all or most cases, the creation of an MDL also may expedite resolution of the litigation. *See, e.g.*, *In re Pamidronate Prods. Liab. Litig.*, 842 F. Supp. 2d 479, 481-85 (E.D.N.Y. Jan. 30, 2012) (granting defendants' preemption-based motion to dismiss all remaining plaintiffs in generic pharmaceutical product liability litigation). However, the opportunities for plaintiffs' firms to use MDLs to more easily coordinate and share the costs and workload of their cases, while seeking to limit the number of cases subject to active discovery and case-specific motions, as well as increased media coverage, may lead to a flood of additional case filings upon creation of an MDL. The additional claims and related case-specific discovery may delay and increase the cost of ultimate resolution of the litigation. MDLs also do not eliminate the potential for conflicting or duplicative orders given the plaintiffs' bar's ability to pursue contemporaneous similar lawsuits in state courts.

Despite the potential impact of Panel decisions, the opportunities for review are very limited, increasing the importance of well-planned arguments before the Panel. *See, e.g.*, Pigman (2015) (evaluating which arguments in opposition to MDLs have been most effective). Section 1407(e) expressly provides that "[t]here shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings." Other Panel decisions are reviewable only by extraordinary writ pursuant to 28 U.S.C. §1651, *i.e.*, a petition for writ of mandamus. §1407(e). Prior to an order granting or denying transfer, the petition is filed "in the court of appeals having jurisdiction over the district in which [the Panel's] hearing is to be or has been held." *Id.* After the transfer order, "[p]etitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district." *Id.*

Mandamus is an extraordinary remedy. It is only available if (1) the petitioner establishes there is "no other adequate means to attain the relief" sought; (2) "the petitioner… satisf[ies] the burden of showing that his right to issuance of the writ is clear and indisputable"; and (3) the court finds "the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). This means that there must be "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Id.* (internal quotation marks and citations omitted). In light of these stringent requirements, it is unsurprising that such challenges to Panel rulings rarely succeed.

The first prong—that mandamus is the only adequate means to obtain relief—is usually met. Because Section 1407(e) makes mandamus the sole means of obtaining review, there essentially is no other avenue. *See, e.g.*, *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.*, 662

F.3d 887, 890 (7th Cir. 2011). However, before filing a mandamus petition, a party should fully exhaust its practical means for relief from the Panel. For example, even though parties are not required to seek a suggestion of remand from the MDL court before filing a remand motion with the Panel, *see* Panel Rule 10.1(b), "[t]he Panel is reluctant to order remand absent the suggestion of the transferee judge," Panel Rule 10.3(a). On this basis, the Third Circuit held that "only those plaintiffs who actually sought suggestion of remand from the transferee court have satisfied the first prong of the mandamus inquiry," reasoning that "plaintiffs who did not seek a suggestion of remand from the transferee court before filing their motion to remand with the JPML have a practical but untried avenue for relief available to them." *In re Patenaude*, 210 F.3d at 141.

While parties can usually pass this first hurdle, they are almost always unable to demonstrate the exceptional circumstances or clear abuse of discretion required for mandamus relief. Indeed, appellate courts have repeatedly rejected mandamus challenges to Panel decisions to transfer or remand a case:

- Transfer Challenged Due to Alleged Statutory Violation. The Second Circuit rejected a bank's statutory argument that transfer to an MDL for pretrial proceedings violated the venue provision of the National Bank Act, 12 U.S.C. §94, holding that the MDL statute, 28 U.S.C. §1407, overrode this venue provision. *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 49–52 (2d Cir. 1978).
- Transfer Challenged Due to Alleged Lack of Federal Jurisdiction. The Second Circuit also denied a mandamus petition that asserted that federal jurisdiction over an action removed from state court must be established prior to transfer to an MDL. *In re Ivy*, 901 F.2d 7, 8–9 (2d Cir. 1990). The court held that the Panel is not empowered "to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand," and Panel review is limited to "the merits of the transfer viewed against the purposes of the multidistrict statutory scheme, whether or not there is a pending jurisdictional objection." *Id.* at 9.
- Transfer Challenged as Violation of the 11th Amendment. The Federal Circuit held that the Regents of the University of California, an instrumentality of the State of California, by filing patent lawsuits in the Northern District of California, became subject to federal procedure, and could not assert a sovereign immunity objection to having those actions transferred to an MDL in another state for coordinated pretrial proceedings. *In re Regents of Univ. of Cal.*, 964 F.2d 1128, 1129-35 (Fed. Cir. 1992). The Federal Circuit's other conclusions included: (1) in patent actions, it has jurisdiction to hear mandamus petitions challenging Panel transfer orders, *id.* at 1129–30; (2) denial of a motion to transfer venue for all purposes under 28 U.S.C. §1404 does not bar a subsequent transfer under Section 1407 for MDL pretrial proceedings, *id.* at 1133; (3) a mandamus challenge to the Panel's selection of one federal district court over another as the MDL seat is inappropriate where there are "reasonable arguments… for both fora," *id.* at 1136, and (4) the Panel's transfer order "was neither a clear abuse of discretion nor usurpation of judicial authority, nor contrary to law," when there was evidence of overlapping documents and witnesses in the five actions, and potential for duplicative or conflicting orders, *id.* at 1135–36.
- Denial of Remand Challenged Based on Meaning of "Coordinated or Consolidated Pretrial Proceedings." While the Panel must remand actions not previously terminated in the MDL no later than at "the conclusion of [coordinated or consolidated] pretrial proceedings," §1407, the Third Circuit held that "coordinated or consolidated pretrial proceedings" includes anything "before trial" that is "coordinated" in relation to multiple cases. *In re Patenaude*, 210 F.3d at 142–46. The court acknowledged that, while *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) held that an MDL court cannot transfer a case received under Section 1407 to itself for trial, *Lexecon* also instructs that the pretrial authority conferred on MDL courts by Section 1407 is "to be interpreted broadly." *In re Patenaude*, 210 F.3d at 142–43. Thus, the Panel denied the mandamus petition "because individual settlement negotiations and conferences [were] ongoing in the plaintiffs' individual cases, and because the transferee court [was] conducting discovery on overlapping issues that affect[ed] many asbestos cases, even if not the plaintiffs'." *Id.* at 146.

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The Third Circuit addressed a similar issue in *In re Wilson*, 451 F.3d 161 (3d Cir. 2006), where diet drug plaintiffs unsuccessfully argued that because common discovery had concluded, their cases should have been remanded. *Id.* at 163, 169–73. The court reiterated its holding in *Patenaude* that "the test is not whether proceedings on issues common to all cases have concluded; it is whether the issues overlap, either with MDL cases that have already concluded or those currently pending." *Id.* at 170. This overlap "do[es] not necessarily need to touch the petitioners' particular cases." *Id.*

- Denial of Remand of Punitive Damages Claims Challenged. The Third Circuit also denied the mandamus petition of plaintiffs who contended that the Panel impermissibly remanded their claims while separating and leaving their punitive damages demands in the MDL. *In re Collins*, 233 F.3d 809, 809–12 (3d Cir. 2000). The court reasoned that the provision of Section 1407(a) authorizing the Panel to "separate any claim, cross-claim, counter-claim or third-party claim" and remand only some claims should be construed broadly so that "claim" is not synonymous with "cause

of action" and included the authority to separate punitive damages demands. *Id.* at 811. The potential adverse impact that such windfall damages may have on the limited assets remaining for future compensatory awards by other asbestos plaintiffs also supported the Panel's decision. *Id.* at 812.

- Remand Challenged Regarding Timing of Appeal. The Seventh Circuit denied a defendant's mandamus petition that sought to block the remand of cases unless and until the MDL court entered partial final judgments under Federal Rule of Civil Procedure 54(b) as to the MDL court's prior partial summary judgment orders. *FedEx Ground Package Sys., Inc.*, 662 F.3d at 889–90. The Seventh Circuit reasoned that the Panel guided by the experience of the MDL court had the discretion to "chose to ensure that each case produces one appeal of all issues in that case, rather than partial final judgments… to ensure that all related appeals would go to the same circuit," *id.* at 888, particularly where the appellate issues in the cases though similar to other appeals pending before the Seventh Circuit involved varied states' laws, *id.* at 890–91.

These cases demonstrate the broad discretion appellate courts afford to the Panel on transfer and remand decisions, and significant weight the Panel gives to the MDL court's opinions on remand. In fact, we are only aware of a single case in which the writ of mandamus has been used to overturn a transfer or remand decision of the Panel, *In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litigation*, 73 F.3d 528 (4th Cir. 1996). There, the MDL court granted the defendant complete summary judgment in multiple actions, and (on essentially the same grounds) partial summary judgment in other actions, dismissing the claims of certain plaintiffs entirely while leaving claims of co-plaintiffs. *See id.* at 531–32. The Panel subsequently remanded the actions that had claims remaining. *See id.* When the actions dismissed by the MDL court came to it on appeal, a divided Fourth Circuit panel noted the dismissed similar claims of other plaintiffs that the Panel had remanded. *See id.* The majority concluded that the MDL court should have entered partial final judgments under Rule 54(b) and the Panel should have separated the claims of the dismissed plaintiffs before remand. *See id.* at 531–33. The majority then *sua sponte* invoked the writ of mandamus and ordered the Panel to retransfer the claims the MDL court had dismissed and the MDL court to enter final judgment under Rule 54(b) as to those claims. *See id.* at 532–34.

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The dissenting judge concluded that the majority ignored the deference owed to the Panel and the rationale the MDL court provided in its suggestion of remand, including the fact-specific nature of the litigation and that the pretrial rulings were interlocutory orders. *Id.* at 533–35 (Butzner, J., dissenting). It should also be noted that the Seventh Circuit distinguished this Fourth Circuit decision in *FedEx Ground Package System*, noting (1) that it did not read *Food Lion* to hold "that all MDL cases must be managed to ensure that all related appeals go to only the circuit with jurisdiction over the transferee court" and (2) *Food Lion* (as opposed to *FedEx*) involved federal law, so only a single uniform law was involved, which may have affected the analysis. *FedEx Ground Package Sys., Inc.*, 662 F.3d at 891. While a successful writ of mandamus is rare, defendants should keep *Food Lion* in mind and may wish to advance its rationale to the MDL court in seeking entry of partial final judgment under Rule 54(b) when the circuit or circuit law embracing the MDL court is viewed favorably.

Appellate Decisions on MDL Judge Assignments

Ordinarily, the Panel assigns a district judge of the chosen transferee court to preside over the MDL, with the transferee court's consent. *See* §1407(b). Because this selection is only reviewable by writ of mandamus and for other pragmatic reasons, *see* §1407(e), perhaps the only time the Panel's MDL judge assignment would be the subject of an appeal is in the event of a clear conflict of interest or other strong basis for recusal. *See, e.g.*, *Republic of Pan. v. Am. Tobacco Co.*, 217 F.3d 343, 345–47 (5th Cir. 2000) (requiring district judge to recuse himself where his "name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies" to case pending before him); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 731 F. Supp. 2d 1352, 1355 n.4 (J.P.M.L. 2010) (noting that Panel "has no authority to determine whether a particular judge should recuse himself or herself from presiding over a particular MDL").

Nevertheless, appellate judges, on occasion, do assist the Panel with MDL judge assignments. Section 1407(b) provides that, "upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit."

On another issue, because Section 1407(b) prescribes the procedure for selecting the MDL judge, the Seventh Circuit has held that the district judge the Panel assigns to the MDL may not reassign the cases to another judge. *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 600 (7th Cir. 2014). Rather, Panel Rule 2.1(e) provides that "[i]f for any reason the transferee judge is unable to continue those responsibilities, the Panel shall make the reassignment of a new transferee judge."

Determining Which Circuit Has Appellate Jurisdiction

The appropriate circuit for appeals of Panel orders (other than non-appealable orders denying transfer) is addressed above. Determining the appropriate circuit for appeals of orders of transferor/originating

courts and transferee/MDL courts presents its own set of considerations.

As a general matter, except for appeals within the jurisdiction of the Federal Circuit, "appeals from reviewable decisions" of a district court shall be taken "to the court of appeals for the circuit embracing the district." 28 U.S.C. §1294. When a case is heading for transfer to or remand from an MDL, a question arises as to which circuit should hear orders already entered. If the order is immediately appealable, the "appeal must be taken to the court of appeals covering the [] district" that issued the order. *E.g.*, *Jones v. InfoCure Corp.*, 310 F.3d 529, 534 (7th Cir. 2002). If the order is not reviewable until after final judgment, the interlocutory order usually will follow the case to the new circuit and all appellate issues will be heard together in that circuit after final judgment. *See, e.g.*, *id.*; *In re Briscoe*, 448 F.3d 201, 213–214 (3d Cir. 2006); *Hill v. Potter*, 352 F.3d 1142, 1146 (7th Cir. 2003); *EEOC v. Nw. Airlines, Inc.*, 188 F.3d 695, 700 (6th Cir. 1999). *But see, e.g.*, *In re Food Lion*, 73 F.3d at 531–33 (MDL court should have entered partial final judgments under Rule 54(b) as to dismissed plaintiffs in multi-plaintiff actions before remand).

It is also important to know which district has jurisdiction at a particular time. A Panel order to transfer a case to an MDL court or remand a case from an MDL court becomes effective and transfers jurisdiction the moment the Panel's order is filed in the MDL court. §1407(c); Panel Rule 2.1(d). Until then, litigation before the Panel regarding transfer or remand of actions "does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court." Panel Rule 2.1(d). Thus, where the Panel issued an order to transfer certain cases from the Central District of California to an MDL in the Northern District of Illinois, and the transfer order had not yet been filed in the MDL court, the Central District of California remained free to remand the actions to California state court. *Gen. Elec. Co. v. Byrne*, 611 F.2d 670, 671–73 (7th Cir. 1979). Further, any mandamus jurisdiction to hear a challenge to those remand orders existed solely in the Ninth Circuit as the transfer out of that circuit was never completed. *Id.* at 673.

Byrne is an example of the general rule that, until the Panel's transfer or remand order is filed in the MDL court, any appeals from decisions of the district having jurisdiction at the time should be filed with the circuit embracing that district. There is a notable exception for appeals regarding discovery of non-party witnesses, which should be taken to the circuit embracing the district where the deposition or discovery will occur or has occurred. *See, e.g.*, *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 877–82 (D.C. Cir. 1981) (holding D.C. Circuit had jurisdiction over contempt order issued over the phone by MDL judge in the Southern District of Texas to non-party witness who was being deposed in the District of Columbia). This exception arises from Section 1407(b)'s provision that "[t]he judge or judges to whom [MDL] actions may be assigned… may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings," and from Federal Rule of Civil Procedure 37(a)(1)'s provision that "[a] motion for an order to a nonparty must be made in the court where the discovery is or will be taken."

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At times, the circuit from which a case has been transferred also may assert jurisdiction over an appeal involving "a matter of considerable concern in [the] circuit," such as "allegedly unethical conduct of attorneys in [the] circuit." *See, e.g.*, *Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163, 164 (8th Cir. 1978). This is only permitted where "the ultimate decision would not materially impede the progress of pretrial proceedings" in the circuit to which the case has been transferred. *Id.*

In addition to avoiding misfiled appeals, these jurisdictional rules create opportunities to take advantage of favorable forums and favorable circuit law. Because an appeal from the summary judgment or other order of an MDL court that terminates the action will be heard by the circuit embracing the MDL court, when developing case management orders for an MDL, the defense should consider the circuit law and forums relative to the anticipated defenses in determining the point at which the cases should be remanded (*e.g.*, before or after filing dispositive motions). *See, e.g.*, *In re Aredia & Zometa Prods. Liab. Litig.*, 352 F. App'x 994, 994–96 (6th Cir. 2009) (affirming summary judgment based on federal preemption under Sixth Circuit law despite contrary federal preemption law of the Second Circuit, where two of the cases were filed); *cf. Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 91–98 (2d Cir. 2006) (disagreeing with Sixth Circuit preemption law).

If a case is to be remanded from an MDL, a party that prefers the circuit or circuit law that governs the MDL court may wish to seek entry of partial final judgment under Rule 54(b) to allow for immediate appeal of issues contained in summary judgment rulings. The party could argue the efficiency and consistency of having one circuit resolve recurring issues and the potential of such appellate rulings to guide and advance further MDL proceedings. Other potential avenues to appeal MDL rulings include requesting the MDL court certify the issue for appeal under 28 U.S.C. §1292(b), filing a mandamus petition under 28 U.S.C. §1651, invoking the collateral order doctrine (*e.g.,* based on immunity or international comity grounds), *e.g.*, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), or by statutes that authorize interlocutory appeals in certain circumstances such as 28 U.S.C. §1292(a) (relating to injunctions, receiverships, and admiralty cases), 9 U.S.C. §16(a) (relating to arbitration), Federal Rule of Civil Procedure 23(f) (relating to class certification rulings), and 28 U.S.C. §1453 (relating to orders to remand class actions to state court).

Reviewing Issues Decided in a Different Circuit

The MDL court may issue significant rulings that could impact the course of trial if followed on remand, including decisions regarding the admissibility of certain evidence and decisions on which claims survive summary judgment. The evidentiary and other federal law under which the MDL court ruled may produce different results than would have been achieved if the issue was decided in the remand/trial court. *See, e.g.*, Amicus Brief for the American Chemistry Council, the American Coatings Association, the National Association of Manufacturers, and the Pharmaceutical Research and Manufacturers of America in Support of Petitioner, *Accenture, LLP v. Wellogix, Inc.*, No. 13-1051 (U.S. Apr. 21, 2014) (addressing sharp divide among circuits over trial court's gatekeeping responsibility when confronted with expert testimony premised on unreliable facts), *available at* https://www.hollingsworthllp.com/uploads/23/doc/media.10940.pdf.

This raises questions regarding (1) whether the remand court (upon motion) should reconsider interlocutory orders of the MDL court in light of a change in controlling circuit law and (2) will the circuit embracing the remand/trial court apply its own precedent on federal issues even if the district court rulings were made in another circuit. The answer to both questions should be "yes," at least where there is a clear conflict in circuit law on a federal issue, but courts vary in application of the law of the case doctrine. *See, e.g.*, *Moore v. Valder*, 65 F.3d 189, 195 n.9 (D.C. Cir. 1995) (district courts must apply the federal law of their circuit, requiring reconsideration of interlocutory orders decided in circuit with contrary law, because stare decisis supersedes law of the case doctrine); *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) ("[T]he federal circuit courts are under duties to arrive at their own determination of the merits of federal questions presented to them."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1172-73 (D.C. Cir. 1987) (holding MDL court properly applied D.C. Circuit law on federal issue rather than contrary Second Circuit law, even though several cases had been filed within Second Circuit); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 677 F.3d 720, 727 n.3 (5th Cir. 2012) ("Some of our sister circuits have concluded that the law of the case doctrine does not apply to a district court's reconsideration of interlocutory orders."). *But see United States ex rel. Staley v. Columbia/HCA Healthcare Corp.*, 587 F. Supp. 2d 757, 761-63 (W.D. Va. 2008) (holding that transfer to district with federal law that conflicts with law of another circuit applied earlier in case is not the type of change in controlling authority contemplated as exception to law of the case doctrine).

> Other circuits have agreed that MDL courts must be afforded broad case management discretion.

Review of MDL Case Management Orders

Another area in which MDL courts are afforded great (albeit not unlimited) discretion is in their case management. *In re Asbestos Prods. Liab. Litig.*, 718 F.3d 236 (3d Cir. 2013) lays out the breadth of this discretion. In that case, the MDL court concluded that certain plaintiffs' failure to comply with a prior order requiring the disclosure of medical reports, including their histories of exposure to asbestos, warranted dismissal with prejudice. *Id.* at 240–41.

On appeal, the Third Circuit stressed that it "review[s] a district court's interpretation of its own orders with deference, *particularly in the MDL context*." *Id.* at 243 (emphasis added). The Third Circuit concluded that the MDL court had not abused its discretion in finding noncompliance. *Id.* at 245. It similarly deferred to the MDL court's decision to dismiss the cases pursuant to Federal Rule of Civil Procedure 41(b) with prejudice, again stressing the discretion an MDL court possesses due to the complexity and potential burdens involved in administering massive litigation. *Id.* at 246–49.

Other circuits have agreed that MDL courts must be afforded broad case management discretion. For example, in *Freeman v. Wyeth*, 764 F.3d 806 (8th Cir. 2014), the court upheld a decision by an MDL court to not set aside a dismissal in a case where the plaintiff's lawyer failed to register for electronic notification and thus failed to see an order requiring the providing of medical authorizations to Wyeth or face dismissal. *Id.* at 808-09. The authorizations were not provided, the case was dismissed, and *nine months later* the plaintiff moved, under Rule 60(b)(1) to set aside the dismissal, which the MDL court denied. *Id.* The Eighth Circuit affirmed the decision, noting that the Rule 60(b) denial is reviewed for abuse of discretion and stressing that "MDL courts must be given greater discretion to organize, coordinate, and adjudicate its proceedings, including the dismissal of cases for failure to comply with its orders." *Id.* at 809 (quotation marks omitted).

Similarly, the Fifth Circuit in *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413 (5th Cir. 2013), deferred to the MDL court's decision to set up pleading bundles and separate the plaintiff's claims for injunctive relief and civil penalties. *Id.* at 431–32. The appellate court explained that "[t]he trial court's managerial power is especially strong and flexible in matters of consolidation." *Id.* at 432 (quotation marks omitted). Because of the daunting litigation the MDL court was handling (arising out of the Deepwater Horizon disaster) "and given the broad grant of authority to the district court," the Fifth Circuit held that the MDL court's decision to manage the case as it did "was well within the district court's discretion." *Id.* (internal quotation marks omitted).

Conclusion

The Judicial Panel on Multidistrict Litigation and MDL courts are afforded broad discretion in their procedural decisions. Understanding the complexities of MDL and appellate procedure can prove helpful in managing appeals in multidistrict litigation, including in determining when, where, and how to appeal.