Streamlining
Not long ago, a leading legal commentator announced the death of the “mass torts bonanza.” The obituary was premature. Although federal court class actions have been in decline since the late 1990s, “aggregate” litigation—the grouping of related cases for unitary pretrial or trial proceedings—continues to represent a massive share of federal court filings. Aggregate litigation is largely concentrated in district courts that have been assigned to conduct coordinated or consolidated pretrial proceedings, known as multidistrict litigation (MDL) cases, by the Judicial Panel on Multidistrict Litigation (JPML). MDL cases in 2014 constituted a staggering 36 percent of all pending cases in federal district courts. Recent, high-profile MDL cases include actions against the National Football League and National Hockey League for concussion-related injuries, banks and financial institutions for manipulation of the London Interbank Offered Rates (LIBOR), and Target for its recent data breach. It should therefore come as no surprise that MDLs have received increasing attention from the Federal Bar.

Last year, the Duke Law Center for Judicial Studies held two conferences aimed at developing “standards and best practices for the bench and bar to promote efficient and effective MDL actions.” The conferences laid the groundwork for a lengthy document outlining “MDL Standards and Best Practices.” This document is a must-read for attorneys practicing in MDL courts and federal judges assigned to oversee MDL cases. Yet from a public policy perspective, it reads like an instruction manual for playing blackjack with a 51-card deck. The missing card? MDL courts lack the ability to retain out-of-district cases for trial. Because MDL courts must remand these cases to the district of filing, the federal courts lose the benefits the MDL system was designed to create.

Ever since the 1998 U.S. Supreme Court decision *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, MDL courts have been limited to conducting pretrial proceedings. *Lexecon’s* holding significantly limits the pool of cases available for bellwether trials—trials involving a select group of representative plaintiffs to give the parties information about the strength of their claims and defenses—and thus dilutes the instructive value of such trials. Although it’s helpful to have rules for playing with an incomplete deck, we should not accept the deficiency. The Federal Bar should revive the push to rewrite 28 U.S.C. § 1407 to increase the effectiveness of bellwether trials, which have become vital to the efficient adjudication of aggregate litigation in MDL courts, particularly in mass torts cases.

**Bellwether Trials Provide an Effective Means To Shepherd the Resolution of Mass Tort Litigation**

Aggregate litigation has four efficiency-related advantages: “It reduces transaction costs, produces uniformity, avoids inconsistent judgments, and reduces litigant abuse.” These gains, however, come with some costs. Aggregate litigation sacrifices some autonomy and consent, and, by definition, aggregation multiplies the risks and harms of error. Thus, in the context of mass torts, a number of courts have held that fairness demands that the injuries and legal theories behind the claims reach a level of maturity before they are ripe for aggregate litigation.

A tort “organically matures” after it has been subjected to multiple jury verdicts that have withstood appellate review. At that point, most novel legal and trial strategies have been exhausted.
Despite a failed effort to add maturity to Rule 23’s predominance and superiority analysis, many courts evaluate a tort’s maturity level when accessing the appropriateness of a Rule 23 class certification and the fairness of class settlements.\textsuperscript{13} While organic maturation is the traditional means to garner information about particular legal theories or injuries, it is slow and inconsistent. Asbestos litigation represents the quintessential example of an organically mature tort. After decades of asbestos litigation, the cause of action against asbestos-producing companies for mesothelioma-related injuries is well developed. This development has been demonstrated in a number of cases that have established the evidentiary basis for such liability.\textsuperscript{14} Less well-developed tort theories sometimes need help on their path to maturity. One form of such help is the use of “bellwether trials” that provide an effective jump-start.\textsuperscript{15}

Just as clinical trials test the effectiveness of a drug, bellwether trials test the merits of a set of claims—representative test cases picked from the pool of cases consolidated in multidistrict court that are designed to produce reliable information about the other cases in the pool.\textsuperscript{16} By permitting courts to gauge the merits of particular tort claims, bellwether trials help to mature a tort and reinforce “the democratic policies animating the jury right and the aims of the substantive law.”\textsuperscript{17} Bellwether trials can also provide valuable information needed to determine the appropriateness of class certification, assess the fairness of a proposed class settlement, or to encourage settlement between parties. Unfortunately, 28 U.S.C. § 1407 impedes the selection of a representative pool of cases because it prevents MDL courts from conducting bellwether trials in cases from outside their own judicial districts.

**Lex econ’s Legacy**

The primary obstacle to forming a representative pool of cases in mass tort litigation is that § 1407, as interpreted by the Supreme Court, does not permit an MDL court to retain cases for trial. Enacted in 1968, the Multidistrict Litigation Act (28 U.S.C. § 1407) provides for coordinated or consolidated pretrial proceedings “[w]hen civil actions involving one or more common questions of fact are pending in different districts.”\textsuperscript{18} The statute empowers the JPML to transfer cases based on “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.” These powers are much broader than those provided in 28 U.S.C. § 1404—they can be made “without consideration for personal jurisdiction over the parties and without having to meet [traditional] venue requirements.”\textsuperscript{19}

In Lex econ, the Supreme Court struck down the practice of self-transfer that had been endorsed by JPMLs own rules and that had become a common practice by transferee judges wishing to conduct trials in MDLs.\textsuperscript{20} The logic behind transferee courts’ practice of retaining consolidated cases for trial was simple: Over the course of pretrial proceedings, transferee judges gain a “unique familiarity” with the complex issues, making them well-suited to oversee a trial on the merits or settlement negotiations.\textsuperscript{21} Moreover, the venue would not have an effect on the trial’s outcome, because the transferee court must apply the transferor court’s choice of law rules.\textsuperscript{22} But wishing to “eschew broad policy considerations and unchartered constitutional analysis,” the Court in Lex econ treated the issue as a simple statutory interpretation question—whether or not § 1407 empowered the transferor court to use § 1404 to transfer the case for trial.\textsuperscript{23}

The relevant language of § 1407 provides that “[e]ach 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.” 28 U.S.C. § 1407(a). The Supreme Court held that this language “imposes a duty” on the JPML to remand cases transferred “for coordinated or consolidated pretrial proceeding … to the original district …at or before the conclusion of such pretrial proceedings.”\textsuperscript{24} In so holding, the Court noted “that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff’s choice of venue … but the proper venue for resolving that issue remains the floor of Congress.”\textsuperscript{25}

The Supreme Court’s interpretation of § 1407 eliminated a key judicial tool to ensure efficient operation of the MDL process, and subsequent attempts to amend § 1407 have failed, for no particular reason.

**Failed Legislative Fixes**

In the wake of the Court’s Lex econ decision, a number of bills were introduced to amend § 1407 to allow MDL courts to retain cases for trial. Former chairman of the JPML, John F. Nangle, championed the legislative effort to overturn Lex econ.\textsuperscript{26} In his testimony before the U.S. House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property, he highlighted a number of “significant problems … that have hindered the sensible conduct of multidistrict litigation” in Lex econ’s aftermath.\textsuperscript{27} For example, he suggested that transferee judges were unable to conduct trials, even when all parties consented to venue in the transferee court.\textsuperscript{28} He also characterized the alternatives to self-assignment, such as § 1404 transfer after remand to the transferor court, as “cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient and wasteful utilization of judicial and litigants’ resources.”\textsuperscript{29}

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In June of 1999, Rep. James Sensenbrenner of Wisconsin introduced the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 “at the behest of the Administrative Office of the U.S. Courts.”\textsuperscript{30} The language of the proposed Lex econ fix was fairly simple. The Act amended § 1407 to permit an MDL court to retain a transferred case “for trial purposes … in the interest of justice and for the convenience of the parties and witnesses.”\textsuperscript{31}

Rep. Sensenbrenner’s proposed bill passed the House by voice vote and went to the Senate.\textsuperscript{32} After approving an amendment, which struck most provisions not relating to overturning Lex econ, it passed the Senate by unanimous consent.\textsuperscript{33} The House, however, “disagreed
to the Senate amendment and a conference was requested," but the “106th Congress adjourned without taking further action.” Similar bills were reintroduced in the House and passed in 2003 and 2005 but despite seeming bipartisan support, neither was ever voted on by the full Senate. In the face of these failed legislative efforts, courts and practitioners have devised nonlegislative workarounds.  

**Lexecon Workarounds**

Given the value of effective bellwether trials in resolving MDL cases, practitioners and courts have crafted a number of creative *Lexecon* workarounds. The Duke Conference paper suggests that transferee courts consider “adopting one of three commonly-used options for facilitating the broadest possible pool of candidates to select as bellwether cases”—none offers a silver bullet. The first two options depend on the cooperation of the parties—either (1) having the parties sign so-called “*Lexecon* waivers”—waivers of the right to object to venue before the MDL court, or (2) entering an order allowing for direct filing of cases in the MDL court with a later determination of venue issues. Of the two, MDL courts more often seek *Lexecon* waivers, but many significant MDL cases have been scuttled when parties refused to consent. For example, in December 2014, the district judge overseeing the largest MDL in the country was forced to forgo bellwether trials because the defendant refused to sign onto *Lexecon* waivers. The gamesmanship associated with *Lexecon* waivers even appears in cases where parties have executed such waivers as parties frequently attempt to undo them.

The third option—having the MDL judge apply to sit by designation to conduct bellwether trials in the districts in which the selected cases were originally filed—burdens both the parties and the MDL judge, if it is even available. The Ninth Circuit effectively ruled out this option in an MDL concerning motor fuel sales—*In re Motor Fuel Temperature Sales Practices Litigation.* In that case, the presiding-MDL judge, Chief Judge Kathryn H. Vratil of the District of Kansas, requested that then-Chief Judge Alex Kozinski of the Ninth Circuit permit her to preside over three cases which were subject to mandam because they had originally been filed in California. Despite the strong endorsement of the chair of the Committee of Intercircuit Assignments, Judge Kozinski denied her request, concluding that only if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.

Thus, in light of Judge Kozinski's ruling, the viability of Option Three remains in serious doubt. Given the significant shortcomings of the existing *Lexecon* workarounds, amending § 1407 is the best means to ensure effective bellwether trials are available to resolve MDL cases.

**Conclusion**

MDL bellwether trials can effectively guide an immature tort into maturity so that it is possible to determine the best method of adjudicating mass tort claims. Once conducted, bellwether trials reveal the strengths and weaknesses of the tort claims at issue, allowing the parties and the courts to find an appropriate resolution of mass tort litigation.

Congress has the authority and the political opportunity to bolster the effectiveness of these efforts by overturning *Lexecon.* Although few expect many legislative accomplishments from the 114th Congress, amending § 1407, a simple venue statute that impacts 36 percent of the federal district court docket, provides a worthwhile and achievable goal for the Federal Bar’s lobbying efforts. Moreover, fixing the MDL process presents a rare opportunity for the plaintiff and defense bars to unite around a policy proposal after a bruising round of contentious amendments to the Federal Rules of Civil Procedure. The Federal Bar should take up the challenge of re-energizing congressional efforts to enact this simple statutory fix. ©

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**Endnotes**


328 U.S.C. § 1407 authorizes the JPML “to order transfer of pending actions to any district for pretrial proceedings and to remand part or all of those actions to the district court in which they were initially filed.”


This percentage has more than doubled since 2002, when MDLs constituted 15 percent. At that time, however, asbestos cases represented 78 percent of pending MDLs but today represent only 23 percent of pending MDLs. [See Duke Law Center for Judicial Studies, *Ascendancy and Concentration of MDLs,* Sept. 11, 2014, available at law.duke.edu/sites/default/files/centers/judicialstudies/Graphs_and_MDL_Statistics.pdf.]


5In re Libor-Based Fin. Instruments Antitrust Litig., 802 F. Supp. 2d 1380 (J.P.M.L. 2011).
Congress may, consistent with the due process clause, enact legis-
lation authorizing the federal courts to exercise nationwide personal
Liab. Litig., 578 (2008) (contending that bellwether trials “promote a type
of 'group typical' justice that is at once participatory and collective”).

the Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States). The proposed language would have read
“the extent, nature, and maturity of any related litigation
involving class members.” Id.; see also Peter A. Drucker, Class Certifi-
cation and Mass Torts: Are ‘Immaterial’ Mass Tort Claims Approp-
riate for Class Action Treatment?, 29 Seton Hall L. Rev. 213, 215
259 F.3d 154, 168 (3d Cir. 2001); Castano v. Am. Tobacco Co.,
134 F.3d 734, 737.

The term bellwether is derived from the ancient practice of belli-
ing a wether (a male sheep) selected to lead his flock. The ultimate
success of the wether selected to wear the bell was determined by
whether the flock had the confidence that the wether would not lead
them astray, and so it is in the mass tort context.” In re Chevron
U.S.A. Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

Manual for Complex Litigation § 22.315 (4th ed. 2008) (endor-
sing bellwether trials as one of the “case-management techniques [] avail-
able when there is insufficient information as to the nature, strength,
or value of the [mass tort] claims.”).

Alexander Lahav, Bellwether Trials, 76 Geo. Wash. L. Rev. 576,
578 (2008) (contending that bellwether trials “promote a type of
‘group typical’ justice that is at once participatory and collective”).

K.M. Bilch, Class Actions and Other Multi-Party Litigation 602, 1121
(2000).

John G. Heyburn, A View from the Panel: Part of the Solution,
82 Tul. L. Rev. 2225, 2228 (2008) (detailing the methods and pro-
cedures used by the JPML); see also In re Agent Orange Product
Liab. Litig., MDL No. 381, 818 F.2d 145, 163 (1987) (holding that
“Congress may, consistent with the due process clause, enact legis-
lation authorizing the federal courts to exercise nationwide personal
jurisdiction”) (citing Mississippi Publishing Corp. v. Murphy, 326 U.S. 438, 442 (1946)); Oxford First Corp. v. PNC Liquidating
able to authorize nationwide service of process under the ‘necessary
and proper’ power of Article III of the Constitution”).

Lexexon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523
U.S. 26 (1998). The Court overturned the MDL Rule 14(b), which pro-
vided that “[e]ach transferred action that has not been terminated in
the transferee district court shall be remanded by the Panel to the
transferor district for trial, unless ordered transferred by the transfe-
eree judge to the transferee or other district under 28 U.S.C. § 1404(a)
or 28 U.S.C. § 1406.” Id. at 32–33. “These self-transfers first were ap-
proved by the Second Circuit in Pfizer Inc. v. Lord, just three years
after Congress created the MDL Panel.” Mark Herrmann, Self-Trans-
fers Gone After ‘Lexexon’?, N.Y. L. J., Nov. 23, 1998, at 88 (discussing
Pfizer Inc. v. Lord, 447 F.2d 122, 124–25 (2d Cir. 1971)).

Id. at 1184.

Numerous scholars and lawmakers have called for legislation
that would provide federal choice of law rules for multidistrict litiga-
tion. See Multidistrict Litigation Restoration Act of 2005, H.R.
1038, 109th Cong. (2005) (proposing a uniform federal choice of
law rule); American Law Institute, Complex Litigation: Statutory Rec-
ommendations and Analysis 305–09, 321–436 (1994); Joan Steinman,
The Effects of Case Consolidation on the Procedural Rights of
Litigants: What They Are, What They Might Be Part II: Non-Ju-
risdictional Matters, 42 UCLA L. Rev. 967, 995–97 (1995) (discuss-
ing AMI’s proposed reforms).

Barbara K. Bucholtz, Sticking to Business: A Review of Busi-
ness-Related Cases in the 1997–98 Supreme Court Term, 34 Tulsa
L.J. 207, 214 (1999); see also Carter G. Phillips et al., Rescuing Mul-
district Litigation From the Alter of Expediency, 1997 B.Y.U. L.
Rev. 821 (1997).

Lexexon, 523 U.S. at 28 (citing the text of § 1407(a)).

Id. at 40.

Multidistrict, Multiplaty, Multiforum Jurisdiction Act of 1999 and
Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and
H.R. 1751 Before the Subcomm. on Courts and Intellectual Prop-
erty of the Comm. on the Judiciary, 106th Cong. 125 (Jun. 16, 1999)
(statement of John F. Nangle, Chairman, Judicial Panel on Multidis-
tistrict Litigation and United States District Judge, Southern District of
Georgia).

Id.; see also Richard L. Marcus, Cure-All for an Era of Dis-
persed Litigation? Toward a Maximalist Use of the Multidistrict
Litigation Panel’s Transfer Power, 82 Tul. L. Rev. 2245, 2291–92
(2008) (“[A] judge who cannot try a case is limited in her ability to
manage [and] effectively dispose of them, it is arguable that the failure
of Congress to add this authority has curtailed the maximum use of
multidistrict proceedings.”).

Multidistrict, Multiplaty, Multiforum Jurisdiction Act of 1999 and
Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and
H.R. 1751 Before the Subcomm. on Courts and Intellectual Property
of the Comm. on the Judiciary, 106th Cong. 125 (Jun. 16, 1999)
(statement of John F. Nangle, Chairman, Judicial Panel on Multidis-
tistrict Litigation and United States District Judge, Southern District of
Georgia).

Id.
33 Id.
34 Id.
36 See Duke Paper, supra note 8.
37 In re Yasmin Yaz, 3:09-md-02100-DRH-PMF, MDL No. 2100, Case No. 3:09-cv-10217-DRH-PMF (S.D. Ill. Dec. 5, 2014) (“The defendants have exercised their right to have the cases tried in the jurisdictions which would be the appropriate forum if they had been filed there originally or not transferred to this transferee court. … [T]his judge has no control over when the case will be assimilated into the docket of the transferor judge or newly assigned judge, whichever the case may be.”); see also In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2014 U.S. Dist. LEXIS 22638, 4 (M.D. Ga. Feb. 24, 2014) (“The parties did not agree to waive their 28 U.S.C. § 1407(a) right to remand of Cline’s action back to Minnesota.”).
38 See, e.g., In re Fosamax Prods. Liab. Litig., 815 F. Supp. 2d 649, 654 (S.D.N.Y. 2011) (“However, as Merck correctly notes in opposing Plaintiff’s motion for reconsideration, this case was originally filed in the Middle District of Tennessee, and the withdrawal of Plaintiff’s Lexecon waiver would require remand to the transferor court at the conclusion of pretrial proceedings, not to the Northern District of Florida.”); In re Fosamax Prods. Liab. Litig., 2011 U.S. Dist. LEXIS 49679, 90 (S.D.N.Y. Apr. 27, 2011) (“Now plaintiffs Sara Raber and Reyna Vanderhear request leave to withdraw their Lexecon waivers as an accommodation under Titles II and III of the Americans with Disabilities Act”).
39 In re Motor Fuel Temperature Sales Practices Litig., 711 F.3d 1050 (9th Cir. 2013).
40 Id. at 1051.
41 Judge J. Frederick Motz wrote:
“I have encouraged MDL judges to take intercircuit assignments to try cases in transferor courts if the MDL cases cannot be resolved pretrial. We think that promotes judicial efficiency (1) by helping to prevent MDL cases from starting over and going to the back of the docket of transferor courts when the MDL Panel remands the cases for trial to the transferor courts, (2) by drawing on the knowledge that the MDL judge has obtained by her/his work on pretrial issues, (3) giving MDL judges control over their proceedings, and (4) maximizing the federal judiciary’s use of excellent and willing judges … in the MDL process.” Id. at 1053.
42 Id. at 1054.
43 In 1976, Congress granted MDLs pretrial and trial authority in antitrust cases brought under the Clayton Act. See Noreen Dever Arrakle, A Catalyst for Reforming Self-Transfer in Multidistrict Litigation: Lexecon Inc. v. Milberg Weiss, 72 St. John’s L. Rev. 633, 632 n.46 (1998) (discussing § 1407(h)).

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