

Choice-of-Law Issues in MDLs: Applying Federal Law in MDL and Transferor Courts

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Multidistrict Litigations (MDLs) often involve parties from different states litigating in a district court with no geographical tie to the claims or parties. As a result, complicated choice-of-law questions arise. For example, what law controls when the parties fully brief an issue in the MDL court, but the case is remanded to another jurisdiction before a decision? Or, what law controls when an MDL court decides a federal issue using the federal law as applied in the MDL court's circuit, but that same issue is reconsidered in the transferor court's circuit? This article analyzes some of the unique choice-of-law issues created by MDL transfers and remands.

Basic Choice-of-Law Principles in MDLs

It is well-known that “[w]hen considering questions of state law ... the [MDL] transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation”—i.e., the “transferee court must apply the ‘choice-of-law rules of the states where the actions were originally filed.’” *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (citing *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 610 (7th Cir. 1981)).

However, when applying federal law, “the [MDL] court should apply the law of the circuit in which it is located.” *Id.* (citing *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987)); see also *Prater v. C. R. Bard, Inc.*, 2017 WL 1086197, at *1-3 (S.D.W. Va. Mar. 21, 2017) (utilizing law of state where tort occurred for tort claims, but discussing *Daubert* standard using in-circuit law).

In the seminal *In re Korean Air* case, then-Judge Ruth Bader Ginsburg held that the MDL court should be free to apply federal law as it is applied in the circuit where the MDL is sitting rather than deferring to the transferor circuit's law. 829 F.2d at 1174. Additionally, parties will need to appeal to “the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits” “during the period of the 1407(a) transfer.” *Id.* at 1178 (D.H. Ginsburg, J., concurring); see also Herr, Multidistrict Litigation Manual § 11:5.

Consistent with *Korean Air*, most MDL courts continue to apply their own circuit laws on federal issues, like *Daubert*. See, e.g., *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 2005 WL 106936, at *4-5 (S.D.N.Y. Jan. 18, 2005) (concluding court's own “Circuit precedent controls this Court's interpretation of federal law in this multi-district

litigation” despite changes following *Lexecon* decision); *In re Roundup Prod. Liab. Litigation*, 2019 U.S. Dist. LEXIS 114855, at *66-68 (N.D. Cal. July 10, 2019) (stating that “for questions of federal law, such as the admissibility of expert testimony under *Daubert*, Ninth Circuit law will govern regardless of where a case originated,” even though “there are differences in how the circuits frame the *Daubert* analysis”); Charles A. Wright et al., 15 Fed. Prac. & Proc., § 3867 n.32 (4th ed. 2020) (collecting cases). But see *In re Methyl Tertiary Butyl Ether*, 2005 WL 106936, at *4 (“Because the approach and result of *Lexecon* substantially undercut the reasoning offered to support the holding of *In re Korean Air Lines* and those opinions that rely upon it ... it is necessary to re-evaluate whether this Court should follow the law of the [transferee] Circuit or the law of the transferor circuits when interpreting federal law.”).

In Cases Where Decisions Have Been Made in the MDL Court, Will Those MDL Decisions Continue to Apply after Remand to a Court in a Different Circuit?

In cases where decisions have been made in an MDL court before remand, an initial issue is whether the ruling from the transferee court will continue to apply in the same case after remand. For example, if an MDL court makes a *Daubert* ruling, will the remand court continue to be bound by that decision, or does the remand court have the opportunity to revisit the MDL court’s decision—particularly if the law of the MDL circuit differs from the remand circuit?

Generally, courts have found that “[o]rders issued by a federal transferee court remain binding if the case is sent back to the transferor court”—but have also stated that “[i]n exceptional cases, the federal or state court to which an MDL case is transferred or remanded may revisit a transferee court’s decision.” See *In re Zyprexa Prod. Liab. Litig.*, 467 F. Supp. 2d 256, 273-74 (E.D.N.Y. 2006). These exceptional cases are likely to be determined under the law of the case doctrine, which “requires that courts not revisit the determinations of an earlier court unless ‘(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work ... manifest injustice.’” See *In re Ford Motor Co.*, 591 F.3d 406, 411-12 (5th Cir. 2009); see also Ann. Manual Complex Lit. § 20.133 (4th ed.) (“Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and ‘law of the case’ considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.”). As a result, there has been considerable deference to the MDL courts’ decisions.

Still, there have been arguments about whether choice-of-circuit law could impact this deference. For example, a Virginia district court faced the question of whether a change in circuits after remand would be enough to satisfy an exception to the law of the case doctrine. There, the court found that even though a relator argued “controlling [Circuit] law changed when the case was remanded,” “[t]here is no authority for the proposition that a circuit split qualifies as a change in controlling law. Rather, ‘federal law is presumed to be consistent and any inconsistency is to be resolved by the Supreme Court.’” *U.S. ex rel. Staley v. Columbia/HCA Healthcare Corp.*, 587 F. Supp. 2d 757, 762 (W.D. Va. 2008); see also *In re EDNY Cathode Ray Tube Antitrust Cases*, 2017 WL 4351503, at *2 (E.D.N.Y. Sept. 29, 2017) (“The [] MDL Court properly applied the Ninth Circuit’s interpretation of federal law. It would be inimical to the purpose of the MDL statute for this Court to relitigate decisions made by the [] MDL Court, simply because the courts sit in different circuits. The decisions of the [] MDL Court are law of the case.”).

Nevertheless, the *Staley* court noted that if there were a conflict between the circuits, that dispute may be suited to be decided in the higher-ranking “appellate court, rather than a coordinate district court,” indicating that the remand appellate court might appropriately apply its own circuit law over that governing the MDL district court. 587 F. Supp. 2d at 761; cf., *In re Ford Motor Co.*, 591 F.3d at 413 n.15 (Fifth Circuit stated that “[m]erely moving this case from the [transferor court] to the [MDL court] does not allow [party] to circumvent [transferor circuit’s] earlier binding precedent” on *forum non conveniens* law.). But, as one MDL court has remarked (albeit in the context of a decision interpreting state law on statutes of limitations), it appears to be an open question as to what would happen if an appellate court were revisiting another, co-equal appellate court: “[i]f after remand the Minnesota district court follows the Eleventh Circuit panel decision and that decision is then appealed to the Eighth Circuit Court of Appeals, the question remains as to whether the Eighth Circuit can then issue a ruling that is contrary to the ruling of another

Which Law Applies When an Issue Is Briefed in an MDL Court, but Remanded Before the MDL Court Decides the Issue?

The MDL court may not reach all issues involving federal law before the case is remanded. One way parties have dealt with the issue of law on remand has been by stipulation. In the *C.R. Bard* MDL, for example, the MDL court addressed part of the *Daubert* motions, excluding certain portions of expert testimony under Rule 403—a position affirmed by the Fourth Circuit, which is the circuit where the MDL court sat. *Prater*, 2017 WL 1086197, at *3. However, the court reserved “all remaining *Daubert* challenges to expert testimony ... for trial.” *Id.* at *3. Upon remand, the parties ultimately stipulated that they would “re-file their case-specific *Daubert* motions and briefs previously filed in MDL 2187 and this case.” 5/22/2017 [Proposed] Scheduling Order, ECF No. 233, *Prater v. C.R. Bard, Inc.*, Case No. 1:17-cv-01008 (S.D. Ind.). Therefore, as the *Daubert* motions were re-filed, the legal standard incorporated in the briefing was Fourth Circuit law, even where the case was no longer pending in that Circuit after remand. See, e.g., *Prater*, Case No. 1:17-cv-01008, ECF Nos. 240, 97.[1]

Similarly, in the *Ethicon Inc. Pelvic Repair Systems* MDL, the parties had filed their *Daubert* motions in the MDL as a part of the eighth wave of cases within that litigation, but the cases were remanded before the MDL court ruled. *Hill v. Ethicon Inc.*, 2020 WL 3485579, at *1 (N.D. Tex. Feb. 28, 2020). On remand, the transferor court faced the issue of what law would apply to the *Daubert* motions that were briefed in the MDL but remanded before a decision—even though several nearly identical *Daubert* motions were decided in the MDL in earlier waves. See *id.* at *2.

The remand court discussed the *Daubert* legal standard using the law of the remand Circuit (*id.* at *3); nevertheless, it concluded that it was appropriate to adopt the MDL court’s *Daubert* opinions since it had already ruled on the same experts (*id.* at *4-5). To the extent there were any new issues in the later motions, the MDL “reserved those [] for trial.” *Id.* at *5; see also *Willet v. Johnson & Johnson*, 2019 WL 7500523, at *3 (S.D. Iowa Oct. 1, 2019) (adopting “pre-trial MDL *Daubert* rulings” from court within 4th Cir. to the extent they applied and denying additional *Daubert* motion filed in remand court, citing to 8th Cir. law). As a result, cases decided in somewhat-piecemeal fashion may also be resolved by deference to the MDL court, despite the briefing typically featuring the law of the transferee circuit.

^[1] The court never ruled on the substance of the motions.
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Author

Matthew Saxon

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Matthew Saxon

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