CARLTON FIELDS

Multiparty Multiforum Jurisdiction Act of 2002

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Introduction On November 2, 2002, President Bush signed into law the Multiparty, Multiforum Trial Jurisdiction Act of 2002 ("2002 Act"), which represents a significant shift in the way federal courts manage mass tort litigation. This law (cited as 28 U.S.C. §1369) vests federal district courts with original jurisdiction for litigation arising from a single accident where at least 75 persons die. Additionally, the 2002 Act modifies the procedure for adjudicating these claims and addresses some of the procedural problems created by the U.S. Supreme Court decision in Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). In 1968, responding to the difficulty among the courts in coordinating almost 2,000 cases then pending in 36 districts across the country alleging a nationwide antitrust conspiracy among electrical equipment manufacturers, Congress enacted 28 U.S.C. §1407, also known as the multidistrict litigation statute. Commonly referred to as "MDL," multidistrict litigation is litigation pending in more than one federal district court involving common questions of fact. When such cases involve civil actions, they may be transferred by the Judicial Panel on Multidistrict Litigation to any federal court for coordinated and consolidated pretrial proceedings. The Judicial Panel is a group of seven federal judges designated by the Chief Justice of the United States Supreme Court. The Panel has the responsibility for determining which cases qualify for MDL treatment, as well as which district court to transfer and consolidate these cases. The transfers are made pursuant to 28 U.S.C. §1407, upon the Panel's determination that the transfers will result in the convenience of the parties and witnesses and will promote the just and efficient conduct of the cases. **District Courts' Original Jurisdiction Expanded by 2002 Act** Plaintiffs in mass tort litigation often filing their claims in state courts. State courts historically were perceived to be more sympathetic to mass tort plaintiffs than their federal counterparts. The length of state court litigation often is, on average, shorter and therefore preferable for mass tort plaintiffs suing large, multinational companies with greater financial resources. For these reasons and others, state courts were the preferred forum for mass tort plaintiffs. Before the 2002 Act, it was easier for plaintiffs to keep cases in state court and consequently free from federal MDL jurisdiction. The reach of MDL courts, as specified in 28 U.S.C. §1407(a), extended only to "civil actions…pending in different districts." Prior to the 2002 Act, a case could not be consolidated for federal multidistrict litigation unless it already was subject to federal jurisdiction. There had to be a "federal question" (which ordinarily there was not in typical mass tort litigation) or "diversity of citizenship" between

adverse parties. Diversity jurisdiction often could be defeated by plaintiffs simply by naming a defendant who shared the same state citizenship of one of the plaintiffs, that is, a "non-diverse" defendant. By doing so, federal jurisdiction was thwarted and the case would not be subject to consolidated MDL proceedings. The MDL portion of the 2002 Act, however, likely will expand original jurisdiction of federal district courts and thereby prevent plaintiffs from defeating federal diversity jurisdiction by naming a non-diverse defendant. Specifically, district courts now have original jurisdiction over "any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location." Minimal diversity for purposes of the 2002 Act occurs when either: (1) a defendant resides in a state and a substantial part of the accident took place in another state or country; (2) any two defendants reside in different states; or (3) substantial parts of the accident took place in different states. For example, even if a Florida-based airline crashed in Florida with mostly Floridians on board, there will be minimal diversity as long as there is another non-Florida defendant such as an aircraft manufacturer. Consequently, the 2002 Act significantly increases the likelihood that mass tort cases will be removed to federal courts and, eventually, be consolidated for MDL proceedings.

Lexecon Problem In addition to expanding the federal judiciary's reach over mass tort litigation, the 2002 Act also addresses the "Lexecon problem." Since the MDL statute's enactment in 1968, a practice evolved whereby transferee judges (the judge presiding over the consolidated MDL pretrial proceedings) ultimately adjudicated the threshold liability issues on the merits either in a trial or by summary judgment. The transferee judge ostensibly exercised such power under 28 U.S.C. §1404(a), which permits a district court to transfer any civil action to any other district where the action might have been brought. This exercise, however, arguably was in direct conflict with 28 U.S.C. §1407(a), which specifically requires transferee judges to remand the cases to the federal district court where the action was commended originally once pretrial proceedings are concluded. It was precisely this practice that the U.S. Supreme Court addressed in Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). Lexecon Inc., a law and economics consulting firm, was a defendant in a class action suit brought in connection with the failure of Lincoln Savings and Loan. This and other actions arising out of that failure were transferred by the Judical Panel on Multidistrict Litigation to the District Court of Arizona. Before the pretrial proceedings ended, the class action plaintiffs and Lexecon settled and the claims against Lexecon were dismissed. Lexecon then filed suit in the Northern District of Illinois against the class action plaintiffs' law firms, claiming several torts arising from their representation of the class action plaintiffs. The Judicial Panel on Multidistrict Litigation transferred the suit to the District of Arizona based on 28 U.S.C. §1407(a). After the remaining parties to the Lincoln Savings and Loan litigation reached a final settlement, Lexecon sought to remand the case back to the Northern District of Illinois. Instead, the Arizona District Court invoked 28 U.S.C. §1404(a) and "transferred" the case to itself for trial. In a unanimous opinion, the Supreme Court overturned this long-standing practice. The Court held that "[a] district court conducting pretrial proceedings pursuant to §1407(a) has no authority to invoke §1404(a) to assign a transferred case to itself for trial." Though acknowledging the practical benefits of having the transferee judge, who is more familiar with the case, conduct the trial, the Court was not willing to go against the plain

language of 28 U.S.C. §1407(a) requiring remand. Instead, the Court said the proper forum for taking such action remains the "floor of Congress." The "problem" created by Lexecon was that there could no longer be a single judge or a single trial to adjudicate liability. Instead, following pretrial proceedings, the MDL judge was bound to remand all cases to the federal transferor courts across the country. Each one of these courts then would have to adjudicate liability issues, thereby increasing the likelihood of inconsistent rulings and verdicts and increasing the cost of the litigation exponentially for all parties, especially the defendant. Moreover, the Lexecon decision encouraged forum shopping by plaintiffs who knew the case would be remanded to a particular transferor court for an adjudication on liability. Accordingly, the 2002 Act is Congress' (and The President's) response to the "Lexecon problem." In particular, the 2002 Act amends 28 U.S.C. §1441(e)(2) and provides that Whenever an action is removed under this section [referring to removal under §1369] and the district court to which it is removed or transferred under section §1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages. This language cures the "Lexecon problem" by allowing the MDL district court to adjudicate liability, without having to "transfer" the case to itself, and then remand individual cases to the courts where they were originally filed for damages trials. The section also goes a step further by permitting the MDL district court to retain jurisdiction over damages trials if it finds that, similar to 28 U.S.C. §1407 transfer principles, it would be more convenient for the parties and witnesses and serve the interest of justice. Assuming the MDL district court elects not to retain jurisdiction over damages trials, the 2002 Act requires the court to remand the case to the state court where it was originally filed (if the action was commenced in state court and not in federal court) once a liability determination has been made. Still, the 2002 Act gives parties 60 days from the date the district court issues a remand order to appeal the liability determination. Provided a party files an appeal before the 60-day period expires, the remand will not become effective until the appeal is finalized. If, however, no appeal is pursued within the 60-day period, then not only does the remand become effective, allowing the state court to commence the damages trial, but also the liability determination will not be subject to appellate review. **Impact of 2002 Act** For litigation pending prior to Lexecon, MDL district judges routinely adjudicated liability issues on motion or by trial. Lexecon temporarily stopped that practice. Neither the judiciary nor MDL litigants warmed to the prospect of multiple liability trials in a variety of courts that Lexecon would have required. The 2002 Act appears to codify in large part what historically had become the accepted procedure before Lexecon. The 2002 Act also makes it even more likely that liability for mass torts will be decided in a federal and not a state forum. For those cases filed originally in state court that lack "complete diversity" but have "minimal diversity", they may be remanded for damages trials in state court. There is very little in the 2002 Act, however, to prevent a federal MDL district judge from retaining jurisdiction over those cases as well to try damages. The chances that a mass tort case will be tried in a federal forum both on liability and damages has increased by virtue of the 2002 Act. For the past century, Carlton Fields has had a long and proud tradition and history in

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