

# IS MULTIDISTRICT LITIGATION A JUST AND EFFICIENT CONSOLIDATION TECHNIQUE? USING DIET DRUG LITIGATION AS A MODEL TO ANSWER THIS QUESTION

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## INTRODUCTION

Some view multidistrict litigation as a “valuable way to handle mass tort litigation;”<sup>1</sup> others view it as a process to be avoided at all costs.<sup>2</sup> Multidistrict litigation is a polarizing practice, with staunch supporters and fierce opponents. The proponents and opponents of the process appear to split cleanly into two groups: defense counsel and plaintiffs’ counsel, respectively.<sup>3</sup> Naturally, like most other procedural devices, whether one supports multidistrict litigation depends upon whether the process has produced favorable outcomes for her clients. Additionally, it seems plaintiffs’ attorneys oppose multidistrict litigation—if for no other reason—because a plaintiff’s presence in multidistrict litigation means she has lost the battle to keep her tort claims in state court.<sup>4</sup> Conversely, defendants’ attorneys often celebrate transfer to multidistrict litigation because it often means—if nothing else—the defendant has won the battle to remain in federal court.<sup>5</sup> For this reason, it appears the polarization multidistrict litigation has created is nothing more than an extension of plaintiffs’ general preference to litigate in state court and defendants’ preference to litigate in federal court.<sup>6</sup> Accordingly, opinions about multidistrict litigation seem to be

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<sup>1</sup> Desmond T. Barry, Jr., *A Practical Guide to the Ins and Outs of Multidistrict Litigation*, 64 DEF. COUNS. J. 58, 58 (1997).

<sup>2</sup> Ellen A. Presby & Erin Anderson, *How to Avoid Multidistrict Litigation and Keep Your Cases in State Court*, 2 ANN. 2004 AM. TRIAL LAW. ASSOC. CONTINUING LEGAL EDUC. 2175 (2004).

<sup>3</sup> See *id.*; Barry, *supra* note 1, at 58.

<sup>4</sup> See Presby & Anderson, *supra* note 2.

<sup>5</sup> Jesse Tiko Smallwood, Note, *Nationwide State Law Class Actions and the Beauty of Federalism*, 53 DUKE L.J. 1137, 1176 (2003).

<sup>6</sup> See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 417 (1992) (“Overall, 53.5% of defense counsel cited the likelihood of a more favorable federal court legal ruling. Among plaintiff attorneys, 25.3% cited expectations about favorable state court legal rulings.”); David A. Luigs, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America 1870-1958*, 92 MICH. L. REV. 1700, 1702 (1994) (book review) (“Removal to fed-

inherently biased, and not necessarily related to the process's effectiveness as a consolidation technique.

This Note purposefully ignores the question of whether rulings made in multidistrict litigation are empirically pro-plaintiff or pro-defendant. Instead, the purpose of this Note is to analyze whether multidistrict litigation is an effective consolidation technique by exploring whether the process serves its fundamental goals of increasing convenience for parties and witnesses and promoting the just and efficient conduct of cases. This Note will use diet drug litigation, a controversy heavily litigated in the multidistrict forum, as a model for analyzing the effectiveness of multidistrict litigation. In order to consider whether multidistrict litigation serves its purposes, one must be familiar with the background and operation of the process. To use diet drug litigation as an appropriate model for analyzing the effectiveness of multidistrict litigation, one must also be familiar with some of the background of diet drug litigation. Once familiar with these two topics, one can then begin to explore whether multidistrict litigation fulfills its goals of increasing convenience and efficiency for those involved in diet drug litigation.

Accordingly, section I of this Note discusses the history and function of multidistrict litigation. Section II discusses the background of diet drug litigation. Finally, section III uses diet drug litigation as a model to establish that multidistrict litigation is indeed an effective consolidation technique for some of the parties involved, but certainly not for everyone.

## I. MULTIDISTRICT LITIGATION

Multidistrict litigation is a procedure used, in the interests of justice, efficiency, and convenience, for consolidating or coordinating actions pending in various United States District Courts.<sup>7</sup> Generally, when numerous cases with complex, common questions of fact are pending simultaneously in federal district courts, multidistrict litigation allows judges to transfer the cases to a single district court for completion of all discovery and pretrial matters.<sup>8</sup> Section I of this Note discusses A) the history of multidistrict litigation, and B) how multidistrict litigation functions.

### A. *History of Multidistrict litigation*

Congress created multidistrict litigation in 1968 when it enacted 28 U.S.C. § 1407, which created a new method for consolidating similar cases during the pretrial and discovery phase of litigation.<sup>9</sup> Congress enacted the multidistrict litigation statute in response to a government antitrust prosecution that spawned over 1900 individual treble damage actions.<sup>10</sup> The 1900 actions were pending

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eral court made litigation more difficult, complex, expensive, time-consuming, and intimidating for the individual plaintiffs.”)

<sup>7</sup> 28 U.S.C. § 1407(a) (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Judicial Panel on Multidistrict Litigation Reorganized*, THE THIRD BRANCH: NEWSL. OF THE FED. CTS. (Fed. Judiciary), June 2000, at 3, <http://www.uscourts.gov/ttb/june00ttb/jreorg.html>.

in thirty-six federal district courts and asserted 25,000 individual claims.<sup>11</sup> The 25,000 claims alleged a nationwide antitrust conspiracy among manufacturers of electrical equipment.<sup>12</sup> That explosion of nearly identical, simultaneous litigation prompted Congress to create a procedure that could minimize the inconveniences and duplicative efforts associated with litigating thousands of drastically similar claims in dozens of courts across the nation.<sup>13</sup> The solution Congress developed was multidistrict litigation.<sup>14</sup> Congress viewed multidistrict litigation as a consolidation technique that could increase “convenience of parties and witnesses,” as well as “promote the just and efficient conduct of . . . actions.”<sup>15</sup> Furthermore, federal courts have emphasized multidistrict litigation’s additional benefit of eliminating conflicting, simultaneous rulings on identical pretrial matters in various district courts.<sup>16</sup>

Since the inception of multidistrict litigation, thousands of cases have gone through the process, and its use is becoming increasingly common.<sup>17</sup> Since multidistrict litigation began in 1968, more than 179,071 civil actions have been consolidated in multidistrict litigation pretrial proceedings.<sup>18</sup> In 1998 alone, 16,940 cases proceeded to multidistrict litigation.<sup>19</sup> Despite its widespread use, there has been very little general critique of multidistrict litigation in terms of whether it meets the goals Congress created it to serve.

### B. *How Multidistrict Litigation Works*

Cases are ideal candidates for transfer to multidistrict litigation when there are numerous cases with common questions of fact pending simultaneously in various United States District Courts.<sup>20</sup> Whether cases ultimately proceed to multidistrict litigation is a decision made by the Judicial Panel on Multidistrict Litigation (“judicial panel” or “the panel”).<sup>21</sup> The judicial panel is the sole judicial body that determines whether cases will be consolidated into multidistrict litigation proceedings.<sup>22</sup> The panel consists of seven circuit and/or district judges selected by the Chief Justice of the United States.<sup>23</sup> The current judicial panel consists of six district judges and one circuit judge: William Terrell Hodges, Senior United States District Judge for the Middle District of Florida; D. Lowell Jensen, Senior United States District Judge for the Northern District of California; John F. Keenan, Senior United States District Judge for the Southern District of New York; Robert L. Miller, Jr., United States District

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 28 U.S.C. § 1407(a).

<sup>16</sup> *E.g., In re IDT Corp. Calling Card Terms Litig.*, 278 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003); *Utah v. Am. Pipe & Constr. Co.*, 316 F. Supp. 837, 839 (C.D. Cal. 1970).

<sup>17</sup> 2002 U.S. CTS. ANN. REP. 26.

<sup>18</sup> *Id.*

<sup>19</sup> John F. Nangle, *From the Horse’s Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341, 341 (1999).

<sup>20</sup> 28 U.S.C. § 1407(a).

<sup>21</sup> *Id.* § 1407(b).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 1407(d).

Judge for the Northern District of Indiana; J. Frederick Motz, United States District Judge for the District of Maryland; Kathryn H. Vratil, United States District Judge for the District of Kansas; and David R. Hansen, United States Court of Appeals Judge for the Eighth Circuit.<sup>24</sup> As the multidistrict litigation statute requires, no two judges sitting on the panel preside in the same circuit.<sup>25</sup> There is no set term dictating how long judges sit on the panel; however, a new appointee may expect to serve approximately four to seven years.<sup>26</sup> The panel meets an average of one time every two months.<sup>27</sup> This seven-judge panel determines which cases to transfer to multidistrict litigation by a concurrence of at least four of the seven judges.<sup>28</sup>

Transfer to multidistrict litigation may be initiated in one of two ways: by the Judicial Panel on Multidistrict Litigation, *sua sponte*, or by motion filed by a party to the action.<sup>29</sup> If a party to the action initiates transfer by motion, the moving party must file the motion for transfer with the Judicial Panel on Multidistrict Litigation and must file a copy of the motion with the originating district court.<sup>30</sup> Regardless of whether transfer is initiated by the panel or by the party, the judicial panel sends notice to all parties potentially affected by the transferred proceedings.<sup>31</sup> The notice specifies when and where an evidentiary hearing will occur to enable the panel to determine whether to transfer the cases to multidistrict litigation.<sup>32</sup> At the evidentiary hearing, all parties potentially affected by transfer of proceedings may offer evidence either supporting or opposing the practicability of transfer.<sup>33</sup>

For cases to be appropriate for transfer to multidistrict litigation, there must be many cases that share common questions pending in multiple federal district courts.<sup>34</sup> While there is no statutory minimum number of cases that must share similar questions before the judicial panel will consolidate them into multidistrict litigation proceedings, the number of similar cases is often in the hundreds or thousands.<sup>35</sup> Additionally, the common questions among the cases must be predominantly factual; if the common questions are predominantly

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<sup>24</sup> *Judicial Panel on Multidistrict Litigation*, [http://www.jpml.uscourts.gov/General\\_Information/general\\_information.html](http://www.jpml.uscourts.gov/General_Information/general_information.html) (last visited Jan. 10, 2006).

<sup>25</sup> 28 U.S.C. § 1407(d).

<sup>26</sup> See *Judicial Panel on Multidistrict Litigation Reorganized*, THE THIRD BRANCH: NEWSL. OF THE FED. CTS. (Fed. Judiciary), June 2000, at 3, <http://www.uscourts.gov/ttb/june00ttb/jreorg.html>.

<sup>27</sup> *Id.*

<sup>28</sup> 28 U.S.C. § 1407(d).

<sup>29</sup> *Id.* § 1407(c).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (“The panel’s order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record.”).

<sup>34</sup> *Id.* § 1407(a).

<sup>35</sup> See *Distribution of Pending MDL Dockets as of November 4, 2005*, [http://www.jpml.uscourts.gov/Pending\\_MDLS/PendingMDL-November-05.pdf](http://www.jpml.uscourts.gov/Pending_MDLS/PendingMDL-November-05.pdf). However, the number of cases consolidated has been as low as two. *Id.*

legal, the panel will deny transfer.<sup>36</sup> Similarly, if the cases are exceedingly distinct from one another, the panel will deny transfer.<sup>37</sup> Furthermore, when determining whether to transfer cases to multidistrict litigation, the judicial panel considers, in addition to the number of common questions of fact among the cases, the complexity of the unresolved common questions of fact.<sup>38</sup> In sum, for cases to be appropriate for transfer to multidistrict litigation, there must be a large number of cases pending in many federal district courts that share among them common questions of fact that are numerous, complex, and heavily disputed.<sup>39</sup>

If the judicial panel denies transfer to multidistrict litigation, the panel files its order denying transfer with the clerk of the court in which the evidentiary hearing occurred.<sup>40</sup> When the judicial panel denies a request for transfer to multidistrict litigation, the affected parties do not have the right to appeal the decision.<sup>41</sup> However, if the judicial panel determines transfer to multidistrict litigation is appropriate, the panel files its order directing transfer both with the clerk of the court in which the evidentiary hearing occurred, as well as with the clerk of the transferee district court.<sup>42</sup> If a party wishes to appeal the judicial panel's approval of transfer to multidistrict litigation, that party does have recourse. The party wishing to appeal the judicial panel's decision to transfer a case to multidistrict litigation must petition for an extraordinary writ, pursuant to 28 U.S.C. § 1651 (2000), in the United States Circuit Court of Appeals with jurisdiction over the transferee district court.<sup>43</sup>

When the judicial panel grants transfer to multidistrict litigation, the panel is responsible for selecting the transferee court.<sup>44</sup> The panel may assign the cases to one or more judges within the transferee district.<sup>45</sup> The panel does not decide how the transferee court shall consolidate or handle the transferred cases once they reach the transferee court; the transferee judge or judges must make those determinations.<sup>46</sup> Once cases are transferred to multidistrict litigation,

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<sup>36</sup> See, e.g., *In re* EPA Pesticide Listing Confidentiality Litig., 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) ("On the basis of the record before us, the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation . . . since these actions involve a common question of law and share few, if any, questions of fact, transfer under Section 1407 is inappropriate.").

<sup>37</sup> See, e.g., *In re* Asbestos Sch. Prod. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.L. 1985) ("Although we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will predominate over individual questions of fact present in each action.").

<sup>38</sup> *In re* Georgeson S'holder Communications, Inc., Share Exch. Litig., 277 F. Supp. 2d 1372, 1372-73 (J.P.M.L. 2003) (finding that the number and complexity of the common factual questions did not warrant transfer to multidistrict litigation when other less drastic alternatives existed).

<sup>39</sup> *Id.*

<sup>40</sup> 28 U.S.C. § 1407(c).

<sup>41</sup> *Id.* § 1407(e).

<sup>42</sup> *Id.* § 1407(c).

<sup>43</sup> *Id.* § 1407(e).

<sup>44</sup> *Id.* § 1407(c).

<sup>45</sup> *Id.* § 1407(b).

<sup>46</sup> *In re* Equity Funding Corp. of Am. Sec. Litig., 375 F. Supp. 1378, 1384 (J.P.M.L. 1974); 32A AM. JUR. 2D *Federal Courts* § 1731 (1995).

the transferee judge or judges have complete jurisdiction over all discovery and other pretrial matters.<sup>47</sup>

The foregoing is a synopsis of how new multidistrict litigation proceedings begin. The process is somewhat different, however, when multidistrict litigation proceedings concerning a certain type of case are already ongoing, and new plaintiffs subsequently file similar cases in different United States District Courts. Subsequently filed actions are termed “tag-along actions.”<sup>48</sup> Judicial Panel on Multidistrict Litigation Rule 1.1 defines a tag-along action as, “a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407.”<sup>49</sup> When tag-along actions exist, the Judicial Panel on Multidistrict Litigation need not act in order for the actions to be consolidated with the ongoing multidistrict litigation proceedings.<sup>50</sup> Although the judicial panel can initiate transfer of tag-along actions *sua sponte*, the panel’s involvement is unnecessary.<sup>51</sup> Instead, the judge of the district court in which the plaintiff filed the action or to which the defendant removed the action may transfer the action to ongoing multidistrict litigation proceedings.<sup>52</sup> Transfer of tag-along actions to ongoing multidistrict proceedings is still occurring in diet drug litigation. For example, on October 12, 2004, two United States District Judges for the District of Nevada transferred, upon defendants’ motions, several diet drug cases involving dozens of plaintiffs to the ongoing diet drug multidistrict litigation proceedings in the Eastern District of Pennsylvania.<sup>53</sup>

The transferee court should have rules governing the treatment of tag-along actions and incorporation of such actions into the ongoing proceedings.<sup>54</sup> There are no uniform rules for the treatment of tag-along actions because each transferee judge determines how pretrial proceedings shall progress in his or her court. However, some advise that the rules governing tag-along actions should include three specific rules: 1) tag-along actions become a part of the consolidated proceedings immediately upon transfer; 2) prior rulings made in the consolidated proceedings immediately bind the tag-along actions without the need for separate motions and orders; and 3) previously completed discovery be available for use in the tag-along actions.<sup>55</sup>

Regardless of how actions get to multidistrict litigation, the Judicial Panel on Multidistrict Litigation must remand the matters to their respective originat-

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<sup>47</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-34 (1998).

<sup>48</sup> Barry, *supra* note 1, at 65.

<sup>49</sup> 192 F.R.D. 459, 460-61 (2000).

<sup>50</sup> *Id.* at 468-69.

<sup>51</sup> *Id.*; *see also* Barry, *supra* note 1, at 65.

<sup>52</sup> 192 F.R.D. at 468.

<sup>53</sup> *See, e.g.*, *Barnes v. Wyeth, Inc.*, No. CV-S-04-0686-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Chapman v. Wyeth, Inc.*, No. CV-S-04-0701-RLH-LRL (D. Nev. filed Oct. 12, 2004); *Freeman v. Wyeth, Inc.*, No. CV-S-04-0681-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Geer v. Wyeth, Inc.*, No. CV-S-04-0683-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Jacobs v. Wyeth, Inc.*, No. CV-S-04-0381-PMP-RJJ (D. Nev. filed Apr. 2, 2004); *Shroyer v. Wyeth, Inc.*, No. CV-S-04-0696-RLH-RJJ (D. Nev. filed Oct. 12, 2004).

<sup>54</sup> Barry, *supra* note 1, at 65.

<sup>55</sup> *Id.*

ing district courts upon conclusion of pretrial and discovery matters.<sup>56</sup> Additionally, the judicial panel has authority to separate any claims it deems appropriate and remand those claims before the conclusion of discovery and pretrial matters.<sup>57</sup> Although the statute dictates that the Judicial Panel on Multidistrict Litigation “shall” remand the cases to their respective originating courts upon conclusion of all pretrial matters, this did not always occur and was an area of great debate for decades.<sup>58</sup> For thirty years, it was common practice for transferee judges to transfer the actions, over which they presided for consolidated pretrial proceedings, to their own courts for trial on the merits.<sup>59</sup> This occurred frequently because after the extensive proceedings that had already occurred in the transferee courts, the transferee judges often determined the transferee court was the most convenient forum for trial.<sup>60</sup> Accordingly, the transferee judges often employed the general transfer statute, 28 U.S.C. § 1404 (2000), to keep jurisdiction over the cases for trial.<sup>61</sup> Furthermore, as 28 U.S.C. § 1404 motions are pretrial motions, the transferee judges, who had been assigned to hear all pretrial matters, had discretion to rule on the motions.<sup>62</sup>

For years, this was relatively common practice. In fact, Multidistrict Litigation Rule 14(b) explicitly allowed transferee judges to transfer the cases to their own courts for trial.<sup>63</sup> As of September 30, 2002, transferee judges had transferred to their own courts 319 of the consolidated cases requiring trial on the merits, while 10,062 had been remanded for trial.<sup>64</sup> Nevertheless, many in the legal community, particularly in academia, opposed the practice of pretrial judges transferring actions to their own courts for trial on the merits.<sup>65</sup> Many people strongly opposed the practice because it blatantly contradicted the plain language of the multidistrict litigation statute, which states that the judicial panel “shall” remand cases to their originating district courts for trial.<sup>66</sup> In 1998, the Supreme Court ended the debate, siding with much of academia, by pronouncing that the plain language of 28 U.S.C. § 1407(a) mandates that consolidated cases be remanded to their originating district courts for trial.<sup>67</sup> The Supreme Court’s decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach* does not necessarily mean, however, that a transferee judge will *never* try any of the cases consolidated in his or her court for pretrial proceedings.

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<sup>56</sup> 28 U.S.C. § 1407(a); *In re Patenaude*, 210 F.3d 135, 142 (3d Cir. 2000) (stating that the authority to remand cases after conclusion of pretrial proceedings rests with the Judicial Panel on Multidistrict Litigation, not the transferee judge).

<sup>57</sup> 28 U.S.C. § 1407(a); *In re Patenaude*, 210 F.3d at 142.

<sup>58</sup> See, e.g., *In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, J., dissenting).

<sup>59</sup> *Id.* at 1532.

<sup>60</sup> D. Alan Rudlin, *Case Management in Health Claims in Toxic Tort Litigation*, SJ065 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 43, 52 (2004).

<sup>61</sup> *In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d at 1532.

<sup>62</sup> *Id.* at 1533-34.

<sup>63</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-34 (1998).

<sup>64</sup> 2002 U.S. CTS. ANN. REP. 26.

<sup>65</sup> Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 Hous. L. REV. 295, 305-06 (2000).

<sup>66</sup> See 28 U.S.C. § 1407(a).

<sup>67</sup> *Lexecon, Inc.*, 523 U.S. at 31.

There is nothing to prevent a judge, to whom the cases have been remanded after the consolidated pretrial proceedings, from transferring the cases back to the transferee judge for trial on the merits, pursuant to the general transfer statute, 28 U.S.C. § 1404. While there has not been strong empirical evidence to suggest this will become common, it is nevertheless technically permissible.

As a practical matter, however, remand to the originating district court is often unnecessary. Most cases consolidated in multidistrict litigation terminate during the pretrial phase.<sup>68</sup> Of the 179,071 actions consolidated in multidistrict litigation as of September 30, 2002, 129,594 were terminated in the transferee courts.<sup>69</sup> Many cases settle prior to the conclusion of pretrial matters, rendering remand unnecessary because the transferee judges have authority to approve settlements.<sup>70</sup>

With a basic understanding of how multidistrict litigation functions, the discussion now turns to diet drug litigation, and its relationship to multidistrict litigation.

## II. DIET DRUG LITIGATION

In order to use diet drug litigation as a successful model for analyzing the effectiveness of multidistrict litigation, it is important to understand both the background of the controversy, i.e. the nature of the drugs and the damage they allegedly cause, as well as the litigation that has ensued because of the alleged damages. This section of the Note discusses A) the drugs involved in the controversy, and B) some procedural background of diet drug litigation to date.

### A. *Background of the Controversy*

Fenfluramine, phentermine, and dexfenfluramine are prescription weight loss drugs designed for the treatment of obesity.<sup>71</sup> Fenfluramine, sold under the trade name Pondimin,<sup>®72</sup> and dexfenfluramine, sold under the trade name Redux,<sup>®73</sup> are appetite suppressants that decrease a patient's appetite by stimulating the release of serotonin in the patient's brain and slowing the body's depletion of serotonin.<sup>74</sup> Phentermine, sold under the trade names Adipex-P,<sup>®75</sup> Fastin,<sup>®76</sup> and Ionamin,<sup>®77</sup> among others, is not an appetite suppres-

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<sup>68</sup> 2002 U.S. Cts. Ann. Rep. 26.

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* Pfizer, Inc. v. Lord, 447 F.2d 122, 123 (2d Cir. 1971).

<sup>71</sup> MEDICAL ECONOMICS CO., INC., PHYSICIANS' DESK REFERENCE 2420, 3126 (52d ed. 1998); Michael Weintraub et al., *Long-Term Weight Control: The National Heart, Lung, and Blood Institute Funded Multimodal Intervention Study*, 51 CLINICAL PHARMACOLOGY & THERAPEUTICS 581, 581-85 (May 1992).

<sup>72</sup> Pondimin<sup>®</sup> is property of Wyeth-Ayerst Laboratories.

<sup>73</sup> Redux<sup>®</sup> is also property of Wyeth-Ayerst Laboratories.

<sup>74</sup> Robert Langreth, *Critics Claim Diet Clinics Misuse Obesity Drugs*, WALL ST. J., Mar. 31, 1997, at B8.

<sup>75</sup> Adipex-P<sup>®</sup> is property of Gate Pharmaceuticals, a division of Teva Pharmaceuticals, USA.

<sup>76</sup> Fastin<sup>®</sup> is property of SmithKline Beecham Corporation.

<sup>77</sup> Ionamin<sup>®</sup> is property of Medeva Pharmaceuticals, Inc.



sant, but promotes weight loss by stimulating the nervous system and elevating the patient's blood pressure.<sup>78</sup>

Fenfluramine was introduced in the 1950s, phentermine in the 1970s, and dexfenfluramine in 1996.<sup>79</sup> The Food and Drug Administration approved use of the drugs, individually, but never approved concomitant use of the drugs.<sup>80</sup> Although on the market for decades, fenfluramine and phentermine were not used widely until the mid-nineties.<sup>81</sup> Beginning in 1995, use of fenfluramine and phentermine skyrocketed.<sup>82</sup> In contrast to the fifty thousand prescriptions written per year prior to 1995, pharmacists filled more than eighteen million prescriptions for fenfluramine and phentermine (or fen-phen, as the combination came to be known) in 1996 in the United States alone.<sup>83</sup> Dexfenfluramine entered the market in 1996 and sold two million prescriptions during its first year on the market.<sup>84</sup>

The drastic increase in use of these drugs resulted from the publication of Dr. Michael Weintraub's<sup>85</sup> study, which found that, used together, fenfluramine and phentermine minimize side effects without compromising the weight loss effects of the drugs.<sup>86</sup> When the drugs are used alone, patients reported fenfluramine caused drowsiness, while phentermine caused restlessness.<sup>87</sup> Dr. Weintraub's study revealed, when using fenfluramine and phentermine in tandem, patients enjoyed drastic weight loss without feeling drowsy or hyper.<sup>88</sup> As a result, the drugs became much more popular for obese patients because, from the patients' perspective, it seemed the drugs had few, if any, side effects.

Since their use became widespread, dexfenfluramine and the fenfluramine-phentermine combination have been increasingly linked to pulmonary hypertension and valvular heart disease.<sup>89</sup> In 1996, studies showed those who used dexfenfluramine were twenty-three times more likely to develop pulmonary hypertension than those who did not take the drug.<sup>90</sup> On August 22, 1996, the Food and Drug Administration requested the manufacturer and distributor of dexfenfluramine (Redux®), Interneuron Pharmaceuticals, Inc. and Wyeth-Ayerst Laboratories, change the product's label to warn physicians and

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<sup>78</sup> 73 AM. JUR. *Trials* § 485 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> FDA Public Health Advisory, *Reports of Valvular Heart Disease in Patients Receiving Concomitant Fenfluramine and Phentermine*, <http://www.fda.gov/cder/news/phen/phenfen.htm> (July 8, 1997).

<sup>81</sup> Between 1992 and 1994, doctors wrote approximately 50,000 prescriptions, per year, of fenfluramine. 73 AM. JUR. *Trials* § 485 (2005).

<sup>82</sup> *Id.*

<sup>83</sup> Heidi M. Connolly et al., *Valvular Heart Disease Associated with Fenfluramine-Phentermine*, 337 NEW ENG. J. MED. 580, 581 (1997).

<sup>84</sup> *Id.*

<sup>85</sup> Michael Weintraub, MD, was a researcher at the University of Rochester, Rochester, NY.

<sup>86</sup> Weintraub, *supra* note 71, at 581-85.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> E.g., Lucien Abenheim et al., *Appetite-Suppressant Drugs and the Risk of Primary Pulmonary Hypertension*, 335 NEW ENG. J. MED. 609, 609-16 (1996); Connolly et al., *supra* note 83, at 581-88.

<sup>90</sup> 73 AM. JUR. *Trials* § 485 (2004).

patients of the increased risk of pulmonary hypertension.<sup>91</sup> On July 8, 1997, the Food and Drug Administration issued a public health advisory warning the public fenfluramine-phentermine had also been linked to valvular heart disease.<sup>92</sup>

### B. *The Litigation*

Since 1997, over eighteen thousand individual lawsuits and one hundred class actions have been filed in state and federal courts for health problems allegedly stemming from the use of phentermine, fenfluramine, and dexfenfluramine.<sup>93</sup> As these suits usually contain multiple plaintiffs, the actual number of claims asserted against diet drug defendants is probably much higher than eighteen thousand. The products liability suits generally assert causes of action against the drug manufacturers and distributors for strict liability and breach of warranty, among others. Plaintiffs have also alleged that the drug manufacturers and distributors committed fraud against the health care providers and consumers by failing to disclose, or affirmatively concealing, information about the drugs' potentially dangerous side effects.<sup>94</sup> Plaintiffs have also asserted that the drug manufacturers and distributors committed fraud against the Food and Drug Administration, but these claims have been unsuccessful.<sup>95</sup> Wyeth-Ayerst, distributor of fenfluramine and dexfenfluramine, has endured a large portion of the litigation.

In addition to drug manufacturers and distributors, it is also common for plaintiffs to sue their prescribing health care providers, drug company representatives, and pharmacists for damages allegedly stemming from the use of *fen-phen* and *dexfenfluramine*. Judges often dismiss many of these defendants from the lawsuits as many states' learned intermediary doctrines, or other related statutes, preclude the individuals from liability.<sup>96</sup> Against the defendants, plaintiffs assert damages including heart problems, as well as complications further resulting from heart problems.<sup>97</sup>

In December 1997, the Judicial Panel on Multidistrict Litigation consolidated all of the appropriate diet drug lawsuits pending in federal courts into multidistrict litigation proceedings in the United States District Court for the Eastern District of Pennsylvania.<sup>98</sup> In 1999, Wyeth-Ayerst entered into a class

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<sup>91</sup> *Id.*

<sup>92</sup> FDA Public Health Advisory, *Reports of Valvular Heart Disease in Patients Receiving Concomitant Fenfluramine and Phentermine*, <http://www.fda.gov/cder/news/phen/phenfen.htm> (July 8, 1997).

<sup>93</sup> *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 385 F.3d 386, 389 (3d Cir. 2004).

<sup>94</sup> *See, e.g.*, *Bouchard v. Am. Home Prod. Corp.*, 213 F. Supp. 2d 802, 804 (N.D. Ohio 2002).

<sup>95</sup> *See id.* at 812.

<sup>96</sup> *See, e.g.*, *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 220 F. Supp. 2d 414, 423 (E.D. Pa. 2002) (finding that Mississippi's learned intermediary doctrine relieved pharmacies of the duty to warn patients).

<sup>97</sup> *See, e.g.*, *Bouchard*, 213 F. Supp. 2d at 806-07 (claiming, among damages, neurological injury allegedly resulting from open-heart surgery).

<sup>98</sup> *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 385 F.3d at 389.

action settlement agreement with the multidistrict litigation plaintiffs.<sup>99</sup> The district court certified the class and approved the agreement.<sup>100</sup> Plaintiffs not wishing to be bound by the terms of the settlement agreement were required to opt out by March 30, 2004.<sup>101</sup> Those who did not opt out were bound by the terms of the settlement agreement, which included the provision of a settlement trust in the amount of \$3.75 billion.<sup>102</sup> The agreement also allowed for an intermediate opt out period, during which plaintiffs may opt out after March 30 and pursue individual claims, against which Wyeth-Ayerst may not assert a statute of limitations defense. If a plaintiff exercises this option, however, she will be precluded from claiming punitive, exemplary, or multiple damages.<sup>103</sup> Additionally, the agreement provided for back-end opt out rights. Under this option, a plaintiff whose health problems worsened within the following fifteen years may, at that time, pursue individual claims against Wyeth-Ayerst, so long as the plaintiff had not already sought compensation from the settlement trust and the plaintiff's claims did not include a claim for punitive, exemplary, or multiple damages.<sup>104</sup>

Litigation continues between those who have opted out of the class action settlement and Wyeth-Ayerst (not to mention the plaintiffs and many other diet drug defendants not involved in the Wyeth-Ayerst settlement). As these cases are still quite numerous, many of the suits that are still pending in federal court have been transferred to the ongoing multidistrict litigation proceedings in the United States District Court for the Eastern District of Pennsylvania.<sup>105</sup> Of the 19,725 individual diet drug suits consolidated in multidistrict litigation, case number MDL-1203, 15,611 of them are still pending in Judge Harvey Bartle III's court in the Eastern District of Pennsylvania.<sup>106</sup>

### III. DOES MULTIDISTRICT LITIGATION MEET ITS GOALS? USING DIET DRUG LITIGATION AS A MODEL TO ANSWER THIS QUESTION.

Multidistrict litigation serves two purposes: 1) increase the "convenience [for] parties and witnesses," and 2) "promote the just and efficient conduct of . . . actions."<sup>107</sup> Whether multidistrict litigation serves its purposes depends on who is asked. For some parties (primarily common defendants), multidistrict litigation is often more convenient, efficient, and potentially just. For others (primarily plaintiffs and uncommon defendants), multidistrict litigation may

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 390-91.

<sup>103</sup> *Id.* at 390.

<sup>104</sup> *Id.*

<sup>105</sup> The judicial panel on multidistrict litigation has transferred many diet drug litigation cases to the United States District Court for the Eastern District of Pennsylvania. The cases were originally heard by Judge Louis C. Bechtel, United States District Judge. See *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 220 F. Supp. 2d at 420. However, Judge Bechtel retired on June 30, 2001. Since then, Judge Harvey Bartle III has overseen the cases. See *id.* at 420 n.5.

<sup>106</sup> *Distribution of Pending MDL Dockets as of January 10, 2006*, [http://www.jpml.uscourts.gov/Pending\\_MDLS/PendingMDL-January-06.pdf](http://www.jpml.uscourts.gov/Pending_MDLS/PendingMDL-January-06.pdf).

<sup>107</sup> 28 U.S.C. § 1407(a) (2000).

actually be a hindrance to the convenience, efficiency, and justice of the judicial process. There are many procedural safeguards in place to ensure that multidistrict litigation meets its goals. For the most part, these safeguards are largely effective in that they attempt to keep claims unsuited for multidistrict litigation out of the process. As a result, the only cases that should end up in multidistrict litigation are those for which multidistrict litigation will help meet the aforementioned goals. However, as this section of the Note will reveal, the procedural safeguards may make the litigation process more convenient, just, and efficient for some defendants; they do little to benefit plaintiffs in terms of the aforementioned goals. It appears multidistrict litigation is, by its nature, better for some parties than for others. This section of this Note will use diet drug litigation as a model to explore some of the ways in which multidistrict litigation achieves its stated goals, and some of the ways it does not. Part A of this section analyzes multidistrict litigation's effectiveness with respect to its first goal: increasing convenience for parties and their witnesses. Part B of this section analyzes multidistrict litigation's effectiveness with respect to its second goal: promoting the just and efficient conduct of transferred actions.

#### A. *Convenience for the Parties and Witnesses*

Despite the procedural safeguards in place that seek to ensure that the only cases that will be transferred to multidistrict litigation are those for which multidistrict litigation will increase the convenience for the parties or witnesses, it is inevitable multidistrict litigation will serve this goal more effectively with respect to some parties than for others. It appears multidistrict litigation is most convenient for common defendants (defendants named in the vast majority the suits consolidated in multidistrict litigation). In the context of diet drug litigation, one common defendant who reaps the benefits of multidistrict litigation is Wyeth-Ayerst, the distributor of dexfenfluramine and fenfluramine. For uncommon defendants (defendants named in only a handful of suits—such as physicians, health care providers, or pharmacists) and their witnesses, multidistrict litigation may often be less convenient. However, claims against uncommon defendants are less likely to be transferred to multidistrict litigation because they are less likely to meet the rigorous commonality requirement that cases must meet before the judicial panel will transfer them to multidistrict litigation. The parties for which multidistrict litigation is perhaps the least convenient are the plaintiffs and their witnesses. This section of the Note explores the convenience, or lack thereof, of multidistrict litigation from each of these parties' perspectives and establishes why common defendants are the only party for which multidistrict litigation truly increases convenience.

##### 1. *Common Defendants' Perspective*

For common defendants, primarily the major drug manufacturers and distributors that produced and marketed fenfluramine, phentermine, and dexfenfluramine, multidistrict litigation offers many benefits in the way of convenience.<sup>108</sup> The conveniences Wyeth-Ayerst enjoys by litigating pretrial

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<sup>108</sup> For the purposes of this section, in the interest of simplicity, the note will use Wyeth-Ayerst as its model for the "common defendant."

matters in multidistrict litigation all boil down to one primary benefit: lower transaction costs incurred when defending itself against diet drug suits. Lower transaction costs, both monetary and non-monetary, are a top priority to common diet drug defendants, particularly since so many of the cases settle. As Wyeth-Ayerst usually ends up paying out for diet drug claims, the only place the company stands to cut losses significantly is in the mammoth legal fees and related expenses incurred in defending against the thousands of claims filed against the company. Because one multidistrict litigation court oversees all discovery and other pretrial matters, multidistrict litigation reduces many monetary and non-monetary costs for Wyeth-Ayerst. Among the costs that multidistrict litigation lowers for Wyeth-Ayerst are document production expenses, legal fees, travel related expenses, and the transaction costs associated with settlement.

Document production costs are lower for Wyeth-Ayerst when conducting pretrial and discovery matters in multidistrict litigation than they would be if the company defended itself in many courts, in thousands of individual cases around the world. Depending upon how the presiding judge has chosen to consolidate the cases for the purposes of multidistrict litigation, it is quite possible Wyeth-Ayerst will be required to produce fewer replications of the same materials. This is particularly true if the transferee court has in place a rule similar to the proposed rule discussed in section I.B of this Note, which suggests that transferee courts make available to *all* consolidated parties any documents produced during previously completed discovery. If the transferee court has such a rule, Wyeth-Ayerst need not field any duplicative discovery requests as all the plaintiffs will be given access to the relevant material Wyeth-Ayerst has already made available. Furthermore, to the extent the transferee court may allow or require duplicative discovery requests, the presiding judge is so intimately familiar with the issues involved with diet drug cases that he knows exactly how discovery and other related disputes should resolve. Therefore, the judge's resolutions will often be quicker, and will certainly be more uniform than would be the case if dozens of different judges ruled on the same discovery requests. As a result, Wyeth-Ayerst probably knows which battles are worth fighting, and can save resources by not opposing requests the company knows it will lose. Additionally, because of the uniformity of the rulings and the likelihood Wyeth-Ayerst has already had to produce the same documents for different parties in different suits, the company has very likely already produced the documents that will be necessary for each suit.

The potential decrease in document production costs is substantial. Wyeth-Ayerst must not only produce fewer documents, but also dedicate fewer person-hours to researching and cataloguing the whereabouts of certain documents. Given the size and number of diet drug cases, a decrease in production costs across the board could result in considerable savings, in time and money, to Wyeth-Ayerst.

In relation to lower document production costs, Wyeth-Ayerst's legal fees decrease substantially in multidistrict litigation. The company's attorneys have far fewer motions to file, respond to, or otherwise address in multidistrict litigation than they otherwise would because hundreds or thousands of cases are consolidated for discovery and other pretrial proceedings. Additionally,

because the same judge decides all matters, the rulings will be uniform, thereby reducing Wyeth-Ayerst's need to pursue certain interlocutory appeals or motions to reconsider. Additionally, because the judge is so familiar with the cases, he may be able to rule more expeditiously on discovery-related motions than other judges who are less familiar with diet drug litigation, thereby shortening the length of the litigation overall. Finally, because all the matters are centralized, Wyeth-Ayerst may allot far fewer attorneys to the litigation than may otherwise be the case.

Furthermore, the certainty Wyeth-Ayerst gains by having one judge rule uniformly on all discovery and pretrial matters offers an invaluable benefit in the way of reducing legal fees. To the extent that Wyeth-Ayerst's legal team spends time and money strategizing about which pretrial motions to file, refrain from filing, strongly oppose, or concede to, based on a judge's likelihood of granting the motions, the benefit of knowing and being able to predict one judge, as opposed to hundreds, is huge. With only one judge to study and predict, Wyeth-Ayerst can spend much less time analyzing the judge's prior conduct in unrelated actions. It would not take long for Wyeth-Ayerst to learn the preferences and likely rulings of one judge. While the presiding judge of the diet drug litigation cases retired midway through the litigation, Wyeth-Ayerst nevertheless had the benefit of only having to predict the rulings of two judges, as opposed to dozens or hundreds of judges. From a common defendant's perspective, being able to anticipate rulings is a key benefit in keeping litigation costs down.

Travel related expenses will decrease drastically in multidistrict litigation as well. Instead of requiring legal counsel and defendants to travel from jurisdiction to jurisdiction making the same arguments repeatedly, the parties and their attorneys may restrict their travel to one location, and will probably be required to travel for proceedings much less often than if there were eighteen thousand separate proceedings to which the parties must travel. In relation, because many cases have historically remained in multidistrict litigation for trial, these savings have extended to the trial phase of the litigation as well.

Finally, Wyeth-Ayerst's transaction costs also lower substantially with respect to settlement negotiations and offers. The company may negotiate, in essence, with all its opponents simultaneously, as opposed to conducting thousands of separate negotiations. To illustrate, it was out of multidistrict litigation proceedings the \$3.75 billion settlement, discussed in section II.B of this Note, was born. That settlement bound thousands of plaintiffs, without requiring thousands of separate negotiations. This is not to say Wyeth-Ayerst does not still have a huge job defending itself in multidistrict litigation and conducting settlement negotiations with the thousands of diet drug plaintiffs involved in multidistrict litigation, but the job may be slightly more convenient in multidistrict litigation than it would be in thousands of individual suits.

Not only does multidistrict litigation make litigation more convenient for Wyeth-Ayerst, but also the company's witnesses benefit. Diet drug litigation involves many witnesses who will be common to many of the suits filed against Wyeth-Ayerst. Among these common witnesses are expert witnesses, who testify to causation, or lack thereof, and company executives and employees. These witnesses may need to testify at evidentiary hearings, and it is much

more convenient for these witnesses if the evidentiary matters are all decided by the same court. Because the hearings are all in front of the same judge, the number of hearings will be notably smaller. Accordingly, Wyeth-Ayerst's witnesses will be required to testify far fewer times than they would if the litigation was not consolidated in multidistrict litigation.

However, Wyeth-Ayerst may also suffer some inconveniences as a result of multidistrict litigation. Specifically, because Plaintiffs usually prefer not to have pretrial matters decided in multidistrict litigation (for the reasons established *infra*, section III.B.3), frequently Wyeth-Ayerst must jump additional procedural hurdles in its effort to get the cases transferred to multidistrict litigation. Specifically, some plaintiffs fraudulently join defendants in an effort to defeat diversity and avoid multidistrict litigation.<sup>109</sup> As a result, Wyeth-Ayerst must move for removal from state to federal court on the basis of fraudulent joinder, defend against plaintiffs' inevitable motion to remand, and establish that plaintiffs have, in fact, fraudulently joined parties. To illustrate, hundreds of plaintiffs recently fraudulently joined non-diverse defendants in dozens of diet drug suits in Nevada in order to destroy diversity to avoid both removal to federal court and transfer to multidistrict litigation.<sup>110</sup> Wyeth-Ayerst removed the cases to the United States District Court for the District of Nevada and then fought plaintiffs' motions to remand because the plaintiffs had fraudulently joined a non-diverse defendant against whom the statute of repose had run out years earlier. After dismissal of the fraudulently joined plaintiffs, several of the cases were transferred, pursuant to 18 U.S.C. § 1404, to the ongoing diet drug

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<sup>109</sup> *E.g.*, *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 220 F. Supp. 2d at 423 (finding that plaintiffs had fraudulently joined non-diverse pharmacists and drug representatives whom the learned intermediary doctrine precluded from liability).

<sup>110</sup> *See, e.g.*, *Barnes v. Wyeth, Inc.*, No. CV-S-04-0686-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Chapman v. Wyeth, Inc.*, No. CV-S-04-0701-RLH-LRL (D. Nev. filed Oct. 12, 2004); *Freeman v. Wyeth, Inc.*, No. CV-S-04-0681-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Geer v. Wyeth, Inc.*, No. CV-S-04-0683-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Jacobs v. Wyeth, Inc.*, No. CV-S-04-0381-PMP-RJJ (D. Nev. filed Apr. 2, 2004); *Kimbrough v. Wyeth, Inc.*, No. CV-S-04-0819-RLH-PAL (D. Nev. filed Oct. 12, 2004); *Shroyer v. Wyeth, Inc.*, No. CV-S-04-0696-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Bartlett v. Wyeth, Inc.*, No. CV-S-04-0687-RCJ-PAL (D. Nev. filed May 25, 2004); *Berry v. Wyeth, Inc.*, No. CV-S-04-0423-RLH-PAL (D. Nev. filed Apr. 16, 2004); *Burek v. Wyeth, Inc.*, No. CV-S-04-0700-LDG-RJJ (D. Nev. filed June 3, 2004); *Cronin v. Wyeth, Inc.*, No. CV-S-04-0422-HDM-LRL (D. Nev. filed Apr. 8, 2004); *Dirienzo v. Wyeth, Inc.*, No. CV-S-04-0703-KJD-LRL (D. Nev. filed June 3, 2004); *Edmundson v. Wyeth, Inc.*, No. CV-S-04-0704-PMP-PAL (D. Nev. filed May 26, 2004); *Figueredo v. Wyeth, Inc.*, No. CV-S-04-0677-PMP-RJJ (D. Nev. filed May 26, 2004); *Holdren v. Wyeth, Inc.*, No. CV-S-04-0680-RCJ-PAL (D. Nev. filed May 25, 2004); *Hoyle v. Wyeth, Inc.*, No. CV-S-04-0678-RCJ-PAL (D. Nev. filed May 24, 2004); *Nail v. Wyeth, Inc.*, No. CV-S-04-0674-RCJ-GWF (D. Nev. filed May 25, 2004); *Nitti v. Wyeth, Inc.*, No. CV-S-04-0673-KJD-LRL (D. Nev. filed May 27, 2004); *Neuman v. Wyeth, Inc.*, No. CV-S-04-0676-RLH-LRL (D. Nev. filed May 28, 2004); *O'Keefe v. Wyeth, Inc.*, No. CV-S-04-0690-RCJ-LRL (D. Nev. filed May 25, 2004); *Overton v. Wyeth, Inc.*, No. CV-S-04-0691-RCJ-RJJ (D. Nev. filed May 25, 2004); *Simpson v. Wyeth, Inc.*, No. CV-S-04-0695-JKD-LRL (D. Nev. filed June 3, 2004); *Taylor v. Wyeth, Inc.*, No. CV-S-04-0698-RCJ-LRL (D. Nev. filed May 25, 2004); *Torres v. Wyeth, Inc.*, No. CV-S-04-0699-LDG-PAL (D. Nev. filed May 24, 2004); *Waggoner v. Wyeth, Inc.*, No. CV-S-04-0693-LDG-LRL (D. Nev. filed May 27, 2004).

multidistrict litigation proceedings in the eastern district of Pennsylvania.<sup>111</sup> Those cases are still pending in the eastern district of Pennsylvania. Others are still pending in the district of Nevada.<sup>112</sup>

Furthermore, it is most frequently the defendants, not plaintiffs, who move for the Judicial Panel on Multidistrict Litigation to consider transfer, which is one more, albeit minor, procedural step Wyeth-Ayerst must take in its effort to get to multidistrict litigation.

The convenience multidistrict litigation offers to common defendants, however, outweighs the procedural inconveniences they may experience in their attempt to get to multidistrict litigation because the procedural inconveniences are minor while the benefits are substantial. This is largely because fraudulent joinder, or some other manner of destroying diversity to stay out of federal court is likely to occur, regardless of multidistrict litigation. Diet drug plaintiffs, like all other plaintiffs, generally prefer to be in state court as opposed to federal court. Not only is this evinced by the fact that diet drug plaintiffs continually file their suits in state courts, but also studies have shown that a large percentage of plaintiffs believe rulings will more likely favor them in state court, while defendants often believe the rulings will more likely favor them in federal court.<sup>113</sup> This being the case, plaintiffs will join non-diverse defendants to destroy diversity just to stay out of federal court, regardless of whether multidistrict litigation is a possibility. The potential of going to multidistrict litigation may give plaintiffs an additional reason to try to stay out of federal court but, realistically, plaintiffs are likely to try to destroy diversity anyway.

For the foregoing reasons, multidistrict litigation frequently meets its goal of increasing convenience for common defendants and their witnesses because

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<sup>111</sup> See, e.g., *Barnes v. Wyeth, Inc.*, No. CV-S-04-0686-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Chapman v. Wyeth, Inc.*, No. CV-S-04-0701-RLH-LRL (D. Nev. filed Oct. 12, 2004); *Freeman v. Wyeth, Inc.*, No. CV-S-04-0681-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Geer v. Wyeth, Inc.*, No. CV-S-04-0683-RLH-RJJ (D. Nev. filed Oct. 12, 2004); *Jacobs v. Wyeth, Inc.*, No. CV-S-04-0381-PMP-RJJ (D. Nev. filed Apr. 2, 2004); *Kimbrough v. Wyeth, Inc.*, No. CV-S-04-0819-RLH-PAL (D. Nev. filed Oct. 12, 2004); *Shroyer v. Wyeth, Inc.*, No. CV-S-04-0696-RLH-RJJ (D. Nev. filed Oct. 12, 2004).

<sup>112</sup> See e.g., *Bartlett v. Wyeth, Inc.*, No. CV-S-04-0687-RCJ-PAL (D. Nev. filed May 25, 2004); *Berry v. Wyeth, Inc.*, No. CV-S-04-0423-RLH-PAL (D. Nev. filed Apr. 16, 2004); *Burek v. Wyeth, Inc.*, No. CV-S-04-0700-LDG-RJJ (D. Nev. filed June 3, 2004); *Cronin v. Wyeth, Inc.*, No. CV-S-04-0422-HDM-LRL (D. Nev. filed Apr. 8, 2004); *Dirienzo v. Wyeth, Inc.*, No. CV-S-04-0703-KJD-LRL (D. Nev. filed June 3, 2004); *Edmundson v. Wyeth, Inc.*, No. CV-S-04-0704-PMP-PAL (D. Nev. filed May 26, 2004); *Figueredo v. Wyeth, Inc.*, No. CV-S-04-0677-PMP-RJJ (D. Nev. filed May 26, 2004); *Holdren v. Wyeth, Inc.*, No. CV-S-04-0680-RCJ-PAL (D. Nev. filed May 25, 2004); *Hoyle v. Wyeth, Inc.*, No. CV-S-04-0678-RCJ-PAL (D. Nev. filed May 24, 2004); *Nail v. Wyeth, Inc.*, No. CV-S-04-0674-RCJ-GWF (D. Nev. filed May 25, 2004); *Nitti v. Wyeth, Inc.*, No. CV-S-04-0673-KJD-LRL (D. Nev. filed May 27, 2004); *Neuman v. Wyeth, Inc.*, No. CV-S-04-0676-RLH-LRL (D. Nev. filed May 28, 2004); *O'Keefe v. Wyeth, Inc.*, No. CV-S-04-0690-RCJ-LRL (D. Nev. filed May 25, 2004); *Overton v. Wyeth, Inc.*, No. CV-S-04-0691-RCJ-RJJ (D. Nev. filed May 25, 2004); *Simpson v. Wyeth, Inc.*, No. CV-S-04-0695-JKDJ-LRL (D. Nev. filed June 3 2004); *Taylor v. Wyeth, Inc.*, No. CV-S-04-0698-RCJ-LRL (D. Nev. filed May 25, 2004); *Torres v. Wyeth, Inc.*, No. CV-S-04-0699-LDG-PAL (D. Nev. filed May 24, 2004); *Waggoner v. Wyeth, Inc.*, No. CV-S-04-0693-LDG-LRL (D. Nev. filed May 27, 2004).

<sup>113</sup> See *Miller, supra* note 6, at 417.



multidistrict litigation decreases monetary costs and time for common defendants and their witnesses. In contrast, the procedural inconveniences common defendants endure during their attempt to get to multidistrict litigation are minor.

## 2. *Uncommon Defendants' Perspective*

For uncommon defendants and their witnesses, multidistrict litigation may prove to be more of an inconvenience than a convenience. However, there is an effective procedural safeguard in place that largely prevents uncommon defendants from having to endure the inconveniences of multidistrict litigation. Uncommon defendants in diet drug cases are usually prescribing doctors and other health care providers. Many of the diet drug cases consolidated have in common the major drug manufacturers, and/or distributors, but vary greatly with respect to other named defendants. As a result of multidistrict litigation, these individual defendants and their witnesses must travel for proceedings in Pennsylvania, as opposed to defending themselves in their home jurisdictions.

As a result of conducting discovery and pretrial matters in Pennsylvania as well as litigating in the doctor's home jurisdiction, the defendants incur not only travel expenses, but also increased legal expenses. Increased legal expenses can result either from paying for local counsel to travel from jurisdiction to jurisdiction or from hiring counsel in Pennsylvania in addition to local counsel.

Additionally, uncommon defendants do not reap all of the benefits from multidistrict litigation that common defendants enjoy. Specifically, unlike common defendants, who might be required to travel to defend themselves in multiple jurisdictions regardless of multidistrict litigation, uncommon defendants' alternative to flying to Pennsylvania to defend themselves in multidistrict litigation is staying in their own home jurisdictions to defend against the suits.

However, uncommon defendants may enjoy some of the benefits of multidistrict litigation. For example, like drug manufacturing companies, although to a lesser degree, it is likely some medical providers are also engaged in numerous suits. If this is the case, these medical providers could also benefit from consolidation of all the suits against which they are defending, for the purpose of discovery and pretrial matters. However, in multidistrict litigation, it is likely that each medical provider's cases will be consolidated with cases in which that medical provider has no involvement, which could prove inconvenient. Consolidation may slow the process for uncommon defendants because uncommon defendants must sit idly by while the court deals with matters completely unrelated to the uncommon defendants' cases.

Another benefit of multidistrict litigation that uncommon defendants, namely medical providers, also enjoy is the convenience of having all pretrial and discovery matters decided by a judge who is intimately familiar with diet drug litigation. This is less beneficial for uncommon defendants than it is for common defendants, however, because the judge is not as intimately familiar with each individual physician's role in the litigation as he is with the drug manufacturers' role in the litigation. As a result, the uncommon defendants do not benefit, in the same way that Wyeth-Ayerst does, from uniform, expeditious rulings. Additionally, the judge may not be as sympathetic to the uncom-

mon defendants' arguments as he is to Wyeth-Ayerst's arguments if he is less familiar with them. The multidistrict litigation judge has spent years presiding over Wyeth-Ayerst's issues with respect to diet drug litigation; however, each small medical provider who gets ensnared in multidistrict litigation presents new facets to the litigation that the judge may not, until that point, have had reason to consider. Accordingly, while multidistrict litigation may offer some increased conveniences for uncommon defendants, it may be, in some circumstances, less convenient for uncommon defendants than litigating claims separately in their home jurisdictions.

While it appears multidistrict litigation may fail to serve its goal of increasing convenience for some uncommon defendants, there is a statutory safeguard in place that, when effective, prevents uncommon defendants from the inconveniences it may suffer in multidistrict litigation. The safeguard is that the statute was drafted to exclude uncommon defendants from participating in multidistrict litigation. Because the statute requires that actions transferred to multidistrict litigation must contain numerous common questions of fact, it is unlikely that actions against individual physicians and other uncommon defendants will be consolidated in multidistrict litigation with suits against Wyeth-Ayerst because the questions of fact will differ substantially as between the different defendants. To illustrate, the factual questions involving Wyeth-Ayerst will center around what the company knew, or should have known, about potential side effects of dexfenfluramine and causation. In contrast, factual questions involving uncommon defendants will often center around what each individual defendant knew, or should have known, about the potential side effects of the drugs, which will differ substantially from what the manufacturer or distributor of the drugs knew.

Even if claims against uncommon defendants are transferred to multidistrict litigation, the statute was drafted to provide the judicial panel with the discretion to separate and remand any claims the panel deems appropriate at any time during the pretrial proceedings.<sup>114</sup> Accordingly, many claims against uncommon defendants are remanded to their originating district courts and the uncommon defendants are not burdened by the potential inconveniences of conducting pretrial matters in multidistrict litigation. This procedural safeguard appears to protect uncommon defendants from any inconvenience they may suffer in multidistrict litigation. In the event the procedural safeguard works, the only inconvenience the uncommon defendants may suffer is having to participate in the evidentiary hearing to contest practicability of transferring claims against them to multidistrict litigation.

While participating in multidistrict litigation appears to be less convenient for uncommon defendants than individually defending themselves in multiple actions, the likelihood of uncommon defendants having to participate in multidistrict litigation is slim. Accordingly, it appears multidistrict litigation achieves its goal of increased convenience with respect to uncommon defendants by effectively excluding them from participating.

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<sup>114</sup> 28 U.S.C. § 1407(a) (2000).

### 3. *Plaintiffs' Perspective*

Multidistrict litigation does not increase convenience to plaintiffs or their witnesses. It actually seems to do the opposite. It is apparent that plaintiffs prefer not to participate in multidistrict litigation by the fact that plaintiffs generally file their diet drug actions in state court as opposed to federal, thereby rendering themselves ineligible for consideration for transfer to multidistrict litigation.<sup>115</sup> While plaintiffs benefit from having a judge with vast experience in the area of diet drug litigation, there are far more inconveniences for plaintiffs involved in multidistrict litigation that outweigh the benefit that an experienced judge may provide.

Multidistrict litigation, in essence, removes the plaintiffs' ability to select the fora in which they wish to litigate their disputes. When filing individual suits, plaintiffs are able to file in whichever jurisdiction is most convenient because personal jurisdiction exists over Wyeth-Ayerst and most other common diet drug defendants just about everywhere in the Nation. Plaintiffs, of course, file in the forum they find most convenient. By removing the action to a jurisdiction hundreds or thousands of miles away, plaintiffs are obviously inconvenienced.

If plaintiffs found the Eastern District of Pennsylvania convenient, they would have filed there; but they did not. By forcing plaintiffs to litigate in an inconvenient forum, the plaintiffs incur greater expenses associated with traveling, and the potential need to hire additional legal counsel.

Multidistrict litigation is similarly inconvenient for plaintiffs' witnesses. Like the plaintiffs themselves, the plaintiffs' witnesses vary greatly from case to case. To the extent that these witnesses participate in any pretrial matters, they must travel to a foreign jurisdiction, which is inconvenient. Furthermore, if the case remains in the transferee court for trial on the merits, the plaintiffs' witnesses are further inconvenienced by having to travel for a potentially long trial.

Multidistrict litigation is not without its benefits for plaintiffs. Plaintiffs whose cases are transferred to multidistrict litigation benefit from the judge's expertise in the area of diet drug litigation just as defendants benefit. Furthermore, if the presiding judge has decided to make all relevant, previously discovered material available to all plaintiffs, the newer plaintiffs benefit from not having to file discovery requests and fight with defendants over certain documents. This is the case because the judge will have already ruled with respect to certain documents and, if discoverable, the plaintiffs will already have access to those documents.

Despite the few benefits multidistrict litigation may offer to plaintiffs, they do not counteract the detriment of being forced to litigate in a forum not of their choosing, which may be thousands of miles from their home jurisdictions. For this reason, multidistrict litigation does not appear to serve its goal of convenience to the parties and their witnesses as far as plaintiffs are concerned. However, it does appear to serve the goal of increased convenience for defend-

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<sup>115</sup> As noted earlier, diet drug plaintiffs prefer to be in state court over federal court regardless of multidistrict litigation, but multidistrict litigation provides an additional incentive for plaintiffs to attempt to stay in state court.

ants. This is exactly as could have been expected, given the fight that plaintiffs often put up in an effort to avoid multidistrict litigation.

### *B. Just and Efficient Conduct of Actions*

While 28 U.S.C. § 1407 lists as the second fundamental goal of multidistrict litigation the “just and efficient conduct of . . . actions,” there is something counter-intuitive about suggesting that justice and efficiency are equally important goals. Although Congress was exceedingly concerned with efficiency when it drafted 28 U.S.C. § 1407 in the wake of 1900 similar antitrust actions, it cannot be suggested that justice was ever intended to take a back seat. As the interests of efficiency and justice do not always necessarily align, they receive separate consideration in this section of the Note.

#### *1. Efficient Conduct of Actions*

Multidistrict litigation serves its second fundamental goal of ensuring the efficient conduct of actions quite effectively. However, once again, the plaintiffs are the ones least served by multidistrict litigation.

Multidistrict litigation proves efficient as far as common defendants are concerned for many of the reasons discussed in section III.A.1 of this Note. Fewer fora require less work and less travel, and therefore are more efficient than the alternative. There is also less duplicative work when Wyeth-Ayerst defends itself in multidistrict litigation as opposed to individual suits in multiple jurisdictions.

Similarly, uncommon defendants enjoy more efficient treatment of their suits as a result of multidistrict litigation. As noted in section III.A.2, the uncommon defendants in diet drug litigation often do not participate in multidistrict litigation proceedings because the panel separates and remands the claims against uncommon defendants to their respective originating district courts. The uncommon defendants, then, defend themselves in their home jurisdictions, without dealing with the hassle of participating in massive litigation with Wyeth-Ayerst as a defendant. This is undoubtedly quicker and more efficient for these defendants. Additionally, all of the parties involved in multidistrict litigation benefit from having a judge with particular experience in the area of diet drug litigation preside over their discovery, pretrial, and potentially, trial proceedings. Accordingly, the process becomes more efficient because of the judge’s expertise.

Plaintiffs, however, may suffer here as well. Prosecution of plaintiffs’ claims against Wyeth-Ayerst may not be more efficient because instead of being the only plaintiff, or one of a handful of plaintiffs prosecuting a claim, each plaintiff is now one of thousands, vying for results from the same suit. This likely ties things up for each individual plaintiff.

Multidistrict litigation, however, is more efficient for society as a whole. Consolidation of thousands of claims in one court benefits judicial economy. Furthermore, it takes fewer hours, total, to resolve all of the cases than if each was handled separately. In this respect, multidistrict litigation absolutely serves the intent Congress had when enacting the statute, which was to prevent simultaneous similar actions from being litigated in courts across the country.

## 2. *Just Conduct of Actions*

There are two primary justice concerns related to multidistrict litigation. First, from a plaintiff's perspective, multidistrict litigation may not seem to promote the just conduct of actions because by litigating in the multidistrict forum, plaintiffs are often precluded from litigating in the forum of their choice. However, from the public's perspective, multidistrict litigation offers a major benefit in the role of uniform rulings for similarly situated plaintiffs.

The Supreme Court has long recognized a plaintiff's right to bring his claims in the forum of his choice.<sup>116</sup> Most often, it is not the plaintiff's choice to litigate pretrial matters in multidistrict litigation.<sup>117</sup> In fact, the consensus among plaintiffs is that multidistrict litigation is to be avoided at all costs.<sup>118</sup> Accordingly, requiring plaintiffs who, in the diet drug context, are usually individuals with limited resources, to litigate in a forum often hundreds if not thousands of miles away from the forum of their choice may be viewed as unjust.

On the other hand, multidistrict litigation produces more uniform decisions, which comports with society's idea that a just court system should treat those in similar circumstances similarly. Given the similarity of the diet drug cases consolidated in multidistrict litigation, it could be seen as unjust if different judges ruled differently with respect to identical pretrial motions. Such divergent rulings would be inevitable if the thousands of diet drug cases consolidated in multidistrict proceedings were litigated separately before hundreds of different judges.

## CONCLUSION

From examining its effect on diet drug litigation, it appears multidistrict litigation is largely successful in serving its fundamental goals of increasing convenience for the parties and witnesses and ensuring the just and efficient conduct of actions. Multidistrict litigation is often more convenient for common defendants than the alternative of litigating thousands of cases in hundreds of jurisdictions. Additionally, to the extent that uncommon defendants are precluded from participating in multidistrict litigation proceedings, the procedure may actually make litigation more convenient for uncommon defendants as well. However, multidistrict litigation inconveniences plaintiffs by forcing them to litigate in a forum that is often several states away from the forum of their choice. Multidistrict litigation is undoubtedly more efficient than the alternative both for defendants and for society, collectively. Again, however, plaintiffs do not reap the benefit that defendants do because in multidistrict litigation each plaintiff becomes a much less significant piece of a much larger picture, thereby prolonging each plaintiff's role in the litigation. Finally, multidistrict litigation serves its fundamental goal of increasing justice in that it produces more uniform results. However, uniform results are obtained at the cost of preventing plaintiffs from exercising their rights to litigate in the fora of

<sup>116</sup> See, e.g., *Moore v. Sims*, 442 U.S. 415, 440 (1979) (recognizing a plaintiff's right to initiate claims in the forum of his choice).

<sup>117</sup> See generally *Presby & Anderson*, *supra* note 2, at 2175.

<sup>118</sup> *Id.*

their choice. Generally, multidistrict litigation appears to be a somewhat defendant-friendly procedure. Nevertheless, it benefits everyone, in some way, and its overall benefits, including its societal benefits, arguably outweigh any hardships it may impose. It seems inevitable that as long as diet drug litigation ensues, defendants will continue to fight to get to multidistrict litigation, while plaintiffs will continue to oppose transfer. Once there, however, multidistrict litigation will largely continue to serve the goals it was enacted to fulfill.