S. HRG. 109–535

THE MULTIDISTRICT LITIGATION RESTORATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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THURSDAY, JUNE 29, 2006

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions, Chairman of the Subcommittee, presiding.

Present: Senators Sessions, Hatch, and Schumer.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Chairman SESSIONS. The hearing will come to order.

In 1968, Congress passed the multidistrict litigation statute found in Section 1407 of Title 28, U.S. Code. Under the multidistrict litigation, or "MDL," statute, when civil cases involving common questions of fact are pending in multiple Federal district courts, the Judicial Panel on Multidistrict Litigation may transfer those cases to a single transferee judge for coordinated or consolidated pretrial proceedings. The MDL process has resulted in greater efficiency and consistency in handling thousands of extremely complex cases, and to date, over 228,000 cases involving literally millions of claims have been centralized through the MDL process. The cases run the gamut of civil litigation—from antitrust claims to Zyprexa's product liability litigation—literally A to Z.

It is also significant that MDL proceedings frequently involve millions, if not billions, of dollars in claims and potential liability. These cases are often founded on a single fact situation, or a single charge of liability that forms a basis for compensation. It does not make good sense that each one of those cases be retried again and again.

For nearly the first 30 years of multidistrict litigation proceedings, transferee judges would use the venue statute, 28 U.S.C. 1404(a), in some situations, to transfer cases to the transferee district. That is, the judge, in effect, would keep that case. The transferee judge would transfer it to his own transferee district for trial. That judge would know the facts. He had already been involved with the lawyers. He had been made familiar through pretrial processes with the nature of the case and knew a great deal about it.

By 1995, of the 39,228 cases transferred for coordinated or consolidated proceedings under the MDL statute, 279 of the 3,787 that

ultimately required a trial were actually retained by the transferee judges.

The MDL statute, though, provides that, "each action . . . transferred shall be remanded by the Multidistrict Litigation Panel at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred"—transferred originally—"unless it shall have been previously terminated." That is 28 U.S.C. § 1407(a).

So in 1998, the Supreme Court unanimously ruled in *Lexecon* v. *Milberg Weiss Barshad Hynes & Lerach* that this plain statutory language, with this mandatory "shall," prohibited the transferee judge from retaining those cases for trial. I think the Supreme Court had to be said to have followed the law that Congress wrote correctly, even though they may have had doubts about the wisdom of it.

In *Lexecon*, one of the parties argued "that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue." And the Supreme Court observed that the respondent "may or may not be correct" on that point as a policy matter, but noted "the proper venue for resolving that issue remains the floor of the Congress." So they respected the Congressional prerogative, at least in this case.

The ruling in *Lexecon* was a matter of statutory interpretation, not constitutional law. Thus, if Congress wants to change the result of the *Lexecon* decision, it can do so by amending the statute.

In September 1998, the Judicial Conference asked Congress to do just that—to amend the MDL statute to permit the transferee judges to retain certain MDL cases for trial. The House of Representatives has passed legislation to address the *Lexecon* decision—the so-called "*Lexecon* fix"—in the 106th, 107th, and 108th Congresses. The Senate passed its own *Lexecon* fix in the 106th Congress as well. The legislation was sponsored by my colleague, Senator Hatch, and cosponsored by Senators Leahy, Grassley, Kohl, Torricelli, and Schumer. None of these bills has become law to date, however.

The House again passed a *Lexecon* fix last year, H.R. 1038, and that legislation has been referred to the Senate Judiciary Committee. The last hearing on the *Lexecon* issue was held in the House of Representatives in 1999. So we wanted to now hold this hearing to learn about the *Lexecon* issue and to understand if the *Lexecon* fix is still needed.

In addition, H.R. 1038 contains a similar self-transfer for trial provision for disaster litigation cases under the Multiparty, Multiforum Trial Jurisdiction Act of 2002. That addresses a slightly different issue and, thus, also justifies our consideration.

MDL cases are some of the largest, most complex, most time-consuming, most economically significant cases handled by the Federal judiciary. Thus, Congress must exercise its jurisdiction wisely and "look before we leap," but also consider the history and success of the previous procedures by which those cases remain with the transferee jurisdiction.

So those are my general comments. Our Ranking Member, Senator Schumer, is here on our Subcommittee and Senator Hatch is

with us as well. I would be delighted, Senator Schumer, if you have any comments to make at this time.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman, for holding this hearing, and I want to welcome our witnesses, two very distinguished judges who know a great deal about this topic, certainly more than at least one member of this panel on this side of the podium.

We are here today to discuss what is on its face a highly technical amendment to the Rules of Civil Procedure. To be sure, the subject of multidistrict is one that can make most people's eyes glaze over. But the Rules of Procedure, even if they are technical, have real impact on real people, their lives and their livelihoods. Seemingly technical rules like the one we are considering today can determine whether a citizen gets a fair shake or a bad deal. It can determine whether a citizen gets his or her day in court or is left behind by the legal system. So, in a nutshell, this is important stuff.

As my colleague has already noted, we are here to address proposed legislation in the wake of the Supreme Court's decision in *Lexecon*. The U.S. Code currently allows the Panel of Multidistrict Litigation to consolidate pretrial proceedings of cases pending in more than one district for reasons of efficiency. Although courts once commonly retained cases after pretrial proceedings to conduct trial, the Supreme Court in *Lexecon* said the cases have to go back to the local court. So we are here to discuss whether to create a statutory fix and return us to the status quo before *Lexecon*.

Congress has both the authority and the responsibility to set the ground rules for our legal system. In fulfilling that responsibility, Congress has to strike the right balance between efficiency and fairness. In doing so, we must think ahead, and we must ask the right questions. Today's hearing presents us with a number of critical questions. Most fundamentally, what does it mean to get your day in court? In other words, does that mean the court down the street? Or, for efficiency in huge tort cases, should it mean the court four States away?

How important is it for a plaintiff to have a local jury assess pain and suffering damages rather than a judge in a different State? How big are the efficiency gains at stake? And how does all this affect the principles of federalism?

So this issue is more important and fundamental than the dry text of the statute would suggest. The issue, as my colleague noted, has been kicking around the Congress for a number of years. As he also noted, I cosponsored an early version of the bill sponsored by Senator Hatch in 1999, and the House has passed versions of the *Lexecon* fix four times since.

Today's hearing is an important step forward, and I want to thank our panel for appearing today.

Chairman SESSIONS. Thank you, Senator Schumer, for your interest in this matter in the past.

Senator Hatch, you have been a sponsor of legislation similar to this. We welcome your opening statement if you would like to make one now.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you so much. I cannot stay for very long, and I just want to welcome these two great judges, and we appreciate having you here to counsel with us and help us understand these issues better.

This is complex, a seemingly simple fix to the system, but, nevertheless, very complex if you look at it through the eyes of actuality. But I want to thank you, Senator Sessions, for scheduling this hearing today.

I have to say to you judges, your dedication to the Federal court system, the cause of justice, and all who come before you I think is truly admirable, and I appreciate your willingness to show up and testify today.

I will not go into—I think both of my colleagues have covered this pretty well, and, frankly, I want to pay tribute to both Senator Sessions and Senator Schumer. They are both active and good members of this Committee, and they do a terrific job on this Committee. This is not partisan legislation. It favors neither Democrats nor Republicans, neither plaintiffs nor defendants. What this legislation does, it restores the courts to the pre-*Lexecon* practice that worked well for 30 years. It gives judges the tools they need to do their work and promote just resolutions for all parties in a fair and efficient manner.

So I just once again want to thank you, Mr. Chairman, for holding this hearing, and I will be very interested. I have read some of what your statements are, and I look forward to complete my reading of them, and I will pay pretty strict attention to what you are talking about here today.

Thank you so much.

Chairman SESSIONS. Thank you, Senator Hatch.

We have two distinguished Federal judges on our panel today. Our first witness is Hon. William Terrell Hodges, Senior United States District Judge from the Middle District of Florida and, since 2000, Chairman of the seven- member Judicial Panel on Multidistrict Litigation. That is the panel, is it not, Judge Hodges, that makes the assignments?

Judge HODGES. It is, Senator, yes.

Chairman SESSIONS. Judge Hodges received his B.S. in business administration from the University of Florida and his law degree from the University of Florida School of Law, where he was Executive Editor of the Florida Law Review. After a distinguished career in private practice, Judge Hodges became a U.S. District Judge in the Middle District of Florida in 1971. From 1982 to 1989, he was Chief Judge in the Middle District of Florida. During his time on the bench, Judge Hodges served on the Circuit Council of the Eleventh Circuit, as President of the District Judges Association of the Fifth Circuit, as a member of the Judicial Conference of the United States, and from 1996 to 1999 as Chairman of the Executive Committee of the Judicial Conference, to name just a few of his many

activities. As I said, since 2000, Judge Hodges has chaired the Judicial Panel on Multidistrict Litigation.

He is a recipient of the 2003 William M. Hoeveler Judicial Professionalism Award from the Florida Bar Association and the 2003 Edward J. Devitt Distinguished Service to Justice Award from the American Judicature Society.

Thank you, Judge Hodges, for being with us today and sharing your expertise and insight.

Our second witness is Hon. Thomas W. Thrash, Jr., a United States District Judge for the Northern District of Georgia. He happens to be from Alabama, which I am proud to note. He received his B.A. in American Government with high distinction in 1973 from the University of Virginia, and received his law degree cum laude from Harvard Law School in 1976, where he was president of the Learned Hand Club that is good—and director of the Lincoln's Inn Society. Both are very important.

After a distinguished career as an assistant district attorney and in private practice in Atlanta, Judge Thrash became a U.S. District Judge for the Northern District of Georgia in 1997. Since 2000, Judge Thrash has served on the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He is the author of numerous articles in law reviews and bar journals on topics as varied as campaign finance and medical malpractice issues. He has also been a frequent lecturer and presenter at various meetings and continuing legal education seminars.

On January 11th, Judge Thrash made a presentation entitled "The *Lexecon* Dilemma" to the Judicial Panel on Multidistrict Litigation Transferee Judges Conference.

So we are delighted to have you here, Judge Thrash, and note that you have had personal experience as a transferee judge in two MDL proceedings yourself.

Judge Hodges, we would be delighted to hear from you and then Judge Thrash.

STATEMENT OF WM. TERRELL HODGES, SENIOR U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, AND CHAIRMAN, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, OCALA, FLORIDA

Judge HODGES. Thank you, Senator Sessions, Mr. Chairman, and Senator Schumer. I appreciate the opportunity to be here. I do come to represent the Judicial Conference of the United States and also the Judicial Panel on Multidistrict Litigation, which I presently chair, as you noted.

Chairman SESSIONS. For the record, would you just describe briefly the Judicial Conference and the role that plays in the judiciary?

Judge HODGES. Well, the Judicial Conference of the United States can best be described, I would say, as the board of directors of the Federal judiciary. It consists of 27 members—a district judge and the chief circuit judge from each of the regional circuits, also the Court of Federal Claims along with the Federal Circuit, and the Chief Justice of the United States, who chairs the sessions of the Conference. And, by statute, the Judicial Conference establishes the policy of the Federal judiciary, which is then applied and

enforced, if you will, by the several Judicial Councils of the circuits geographically around the country.

So the Conference is the policymaking body of the Federal judiciary and speaks for the judiciary in matters such as this that come before Congress. So, in a sense, I am here representing all the Federal judges of the United States, speaking through the Judicial Conference.

And I might say with respect to this particular subject, there may be one or two—there always are, but I am not aware of any judge anywhere who opposes this legislation.

As far as an opening statement is concerned, I must say that your statement and that of Senator Schumer just covered the ground that I intended to cover by way of background. I might say the last time I had that experience as a lawyer, I lost the case.

[Laughter.]

Judge HODGES. And I hope I don't have that experience again. But I might take just a minute to embellish the remarks that you made so succinctly by pointing out what I have now observed over these last 6 years, at least, as the Chair of the Panel, what the Panel really accomplishes in the administration of justice in this country.

By centralizing cases in a single district where multiple cases have been filed in various districts, there are obviously a number of desirable advantages. One is that it eliminates duplication of judicial effort of different judges in different districts considering the same controlling legal issues. It promotes, in other words, judicial economy, which is always a matter of interest to the courts. It reduces the costs of the litigation, the overall cost to the litigants involved. There may be some who would be able to argue that a centralization may increase their personal costs in a particular instance, but, clearly, the overall costs of the litigation and the demands that it makes on the system for the administration of justice are reduced by the procedure over which the Panel presides.

It also avoids inconsistent results being reached in different courts by different judges because the issues presented by the litigation that comes before the Panel are complex matters and are reasonably susceptible of different views. And when two judges in two different districts or in two different circuits reach contrary conclusions, that obviously leads to confusion not only in the litigation but in the law itself. And by centralizing litigation of the kind we see in one district, it promotes consistency in the development of the law itself.

And, finally, it protects—and I think the asbestosis cases are a good example of this—it protects to some extent the funds that are available to respond to the claims of those who feel that they have been injured; otherwise, you would have races to the courthouse trying to be the first to reach judgment in order to satisfy the claim, and more than likely producing a bankruptcy petition, which can only serve not in the best interests of the parties interested in the overall litigation.

Now, all of that is to some extent threatened from time to time in cases in which the transferee judge is not permitted to transfer the litigation to himself or herself for the purpose of attempting, for example, to achieve a global settlement. Almost all the cases

that we create and send to a transferee court sooner or later will settle if they can be properly managed by the able transferee judges that we try to select to manage the litigation, such as my brother and friend, Judge Thrash, who will tell you about his experience. And without the ability to transfer a case to oneself in some instances, then the ability to manage that case is reduced and the likelihood of settlement or ultimate termination in the transferee court is hampered. So it is a matter of importance.

But I would close by emphasizing, I think, one very important point, particularly as it relates to the rights of individual plaintiffs in mass tort cases, which is one of the species of cases that we do see, and that is that this legislation does not mean that all cases that are transferred as a part of the multidistrict litigation process will be transferred to the transferee judge for trial. On the contrary, depending upon the type of case involved, I don't envision that there would be any change in the practice as it existed prior to *Lexecon* when that was not a problem, to my knowledge, but would only be used in some instances to identify cases, for example, as possible bellwether cases that the trial of which will settle some issues and ultimately promote a global settlement. And to take mass tort victims particularly, I would anticipate that in most of those cases, they would be remanded to the transferor court or the district from which they came for trial and the ultimate resolution of compensatory damages because there may, for example, be issues of individual causation, and no transferee judge wants to transfer to himself or herself 300 trials or 400 trials or 1,000 trials when you are dealing with litigation of that kind as distinguished from a finite group of plaintiffs, as in a patent infringement action. Those cases are going to back to the transferee courts as a matter of routine practice, if they are not settled, for trial. That is what has happened, for example, in the asbestos litigation that was managed for so long and so well by Judge Weiner in Philadelphia before his untimely death a little over a year ago. Those cases, if they were not resolved, were remanded by the thousands to the district courts from which they came for trial.

So I can understand how that aspect of the bill might be a matter of concern, but I suggest that it is not really a threat to the rights of anyone. It is truly a bill that is neutral in terms of its effect on plaintiffs as a class or defendants as a class, as I see it.

[The prepared statement of Judge Hodges appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge Hodges.

Judge Thrash?

STATEMENT OF THOMAS W. THRASH, JR., U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA, GEORGIA

Judge THRASH. Mr. Chairman, thank you for this opportunity to testify in my personal capacity before your Subcommittee in support of the Multidistrict Litigation Restoration Act.

In my almost 9 years as a district judge, I have handled two MDL cases. My—

Chairman SESSIONS. You were the transferee judge in the cases that were sent to you for pretrial handling.

Judge THRASH. Yes, sir. My first MDL case got resolved by settlement without too much trouble and with very little effort on my part.

My punishment for that was a case called *In re Dippin' Dots Patent Litigation*, which was my second MDL case. Nothing was resolved in that case without a great deal of trouble and effort on my part. A big source of trouble was the effect of the Supreme Court's *Lexecon* decision.

The *Dippin' Dots* case involved a patent on a method for producing a flash-frozen novelty ice cream product. When former distributors began producing a similar product, Dippin' Dots Inc. filed patent infringement and trademark and trade dress infringement actions all over the country. The MDL Panel transferred all of the cases to me for consolidated pretrial proceedings.

After 2 years of intense litigation, for the reasons set out at length in my written statement, because of *Lexecon* the main patent infringement case had to be sent back to the Northern District of Texas for trial. The Texas judge that had the case in the beginning had quit, was gone. At this point the file was about 20 feet long stacked end to end. Just in the MDL proceedings, there were 746 docket entries.

I have described the *Dippin' Dots* case as a litigation tsunami headed for the Northern District of Texas. It was going to hit the docket of some poor Texas judge and obliterate everything in sight. If I could prevent that from happening, I thought that I had a duty to do so. I had made dozens of rulings that would impact the trial in large and small ways. And the trial needed to occur quickly before additional litigation between the parties erupted. Realistically, I thought that could only happen if I tried the case.

One group of defendants, however, would not consent to trial of the case before me in Atlanta. So, reluctantly, I agreed to go to Dallas to try the case there. The process of getting an inter-circuit assignment such as this is described in my written statement.

So myself, my courtroom deputy clerk, my court reporter, four Atlanta lawyers, two Kentucky lawyers, and a whole gaggle of paralegals occupied the Adolphus Hotel in Dallas for 2½ weeks in the fall of 2003 for the trial of the patent claims.

By the time of the trial, none of the parties and no major witnesses were from Dallas. A second 2-week long trial in Dallas in 2004 was avoided only by last-minute settlement of the remaining non-patent claims.

In my opinion, this litigation was unnecessarily prolonged and expensive to the courts and the parties because of *Lexecon*. It is a real not an imaginary problem. I hope that a legislative solution comes soon so that no other district judge has to do what I had to do in the *Dippin' Dots* case.

Thank you, and I will be happy to respond to questions at the appropriate time.

[The prepared statement of Judge Thrash appears as a submission for the record.]

Chairman SESSIONS. Well, first, Senator Schumer and I would like to know about this ice cream.

[Laughter.]

Chairman SESSIONS. Is that the ice cream that has got the little dots of ice cream, little round things?

Judge THRASH. That is it.

Chairman SESSIONS. I have had it at the baseball park.

Judge THRASH. And there is more money involved in that than you would think, I promise.

[Laughter.]

Senator SCHUMER. I thought, Mr. Chairman, that it was a person named Mr. Dippin' Dots.

[Laughter.]

Senator SCHUMER. When Judge Thrash went on, I realized it was ice cream.

Chairman SESSIONS. Let me ask this: In terms of judicial—thank you, Senator Schumer, and thank you for your leadership on this particular issue and your willingness to help move some legislation forward.

With regard to the lawyers and the parties, in your opinion, overall they were not disadvantaged by staying in Atlanta. It provided no real benefit to them to move to Texas. Is that correct overall?

Judge THRASH. Two of the defense attorneys for one group of defendants had their offices in Dallas. For them there was some saving of litigation costs. For everybody else, including the other main group of defendants, the cost was much greater to go to Dallas than to have the trial in Atlanta. And I would mention that the plaintiffs were perfectly happy to try the case in Atlanta. They were from Kentucky, and they readily consented, because their lawyers were in Atlanta, to try the case in Atlanta. So it was—

Chairman SESSIONS. Really, the problem was that even though in the interest of justice for numerous reasons it would have been wiser to have tried it in Atlanta, at least in your opinion, the statute gave any party the power to veto that and have it tried where they chose to have it tried. And I guess that is the question we are wrestling with today. Should a single party, one of maybe many parties be able to do that? And, also, what if in this pretrial process, what if it clearly was overwhelmingly best to try it in Atlanta, but you had been less than sympathetic with some of their arguments and had ruled against one party several times, presumably because they had made bogus arguments, but you ruled as you thought was correct, that party would normally hope that if it was sent to Texas, they would get a new judge. Is that correct? So there would be an incentive unrelated to the merits of the litigation for a party to object to a trial being completed in the transferee jurisdiction.

Judge THRASH. That is exactly right, Senator. When I first raised the subject of the parties all consenting to a trial before me, after we had finished the pretrial proceedings, one of the things I said was, "Don't think you are going to get rid of me just by refusing to consent. I will accept an inter-circuit assignment and go to Dallas and try the case."

I really wasn't hoping that they would accept that offer, but they did. And they said, "Well, Judge, we would love to have you come to Dallas and try the case."

But you are exactly right. The bill that is pending before the Committee restores the right of the judge, where there are impor-

tant interests at stake, to control the location of the trial and prevents any one party in a case like mine, where there is only going to be one trial, from vetoing the judge's selection of the proper forum.

Chairman SESSIONS. Judge Hodges, you chair the Multidistrict Litigation Committee. What factors do you use—do you look at a judge's caseload and their skill—before you give them a major case like this and send it to their district? How do you decide that?

Judge HODGES. Yes, indeed we do, Senator, the judge's experience, the judge's caseload and capacity to take on the added burden, the capacity of the court as a whole. The statute requires the consent of the chief judge of the court before any individual judge on the court can accept an assignment. So there is that measure of protection of the court.

We also consider whether the potential transferee judge already has similar litigation before him or her, which is usual but not always the case. And we consider the accessibility of the court to the lawyers who will be traveling in and out for hearings. Frequently, in a case of the kind that Judge Thrash had, we would select Atlanta or Dallas or San Francisco or someplace that is readily accessible by air, and any other individual factors in the case that might suggest a particular district over another.

Chairman SESSIONS. But I guess from the point of view of the justice system as a whole, most of these MDL cases are large, complex cases, and you try to make sure that you find an excellent judge who is capable of handling that, whose caseload is not overloaded at that particular time, and who would be willing to undertake that challenge, instead of having this whole thing fall on somebody at random or half a dozen judges, some of whom may have very crowded dockets at the time it falls in their laps. Is that fair to say?

Judge HODGES. Absolutely, Senator, and I think anyone who would study the record of our selection of transferee judges will quickly see that that is so.

Chairman SESSIONS. I know that Judge Sam Pointer in Birmingham handled a number of those cases. He was a brilliant, brilliant judge, had a tremendous work ethic, and I am sure Judge Thrash has those same characteristics. He is from Birmingham, too. But I think in many ways it gives the parties the best you have to offer in the court system to try their case.

Judge HODGES. I would certainly agree, and I think that is why there really is not much opposition to trial before the transferee judges. The experience Judge Thrash had is not unique, but it is not unusual, I think.

Chairman SESSIONS. Well, it has been a number of years since the *Lexecon* decision. The world has not come to an end since this self-transfer procedure ended. You have given us one example. Are there other examples that would indicate that Congress should act and restore the procedure as it existed before *Lexecon*?

Judge HODGES. Yes, Senator. In my written statement, I think there are two other instances that are identified just as examples, one by Judge Feikens in Detroit and another by Judge Jones in the Southern District of New York. They tried to utilize the technique of remanding a case to the transferor judge so that the transferor

judge could then transfer it back under Section 1404, which is one of the techniques that is being utilized now, to tell it like it is, to overcome the *Lexecon* hurdle. But that is a very cumbersome circumstance, and it caused both of those judges to delay trial of their own cases until it was determined whether the litigation would return to the court and could all be tried at once.

I am not going to suggest to you that the Multidistrict Litigation Panel is going out of business if this amendment is not passed, because obviously we have functioned, we think, well the last 8 years. But this is an important piece of legislation to us and would avoid the experience that Judge Thrash had.

Chairman SESSIONS. Now, what about the transferee judges? Are they frustrated like Judge Thrash—or either one of you can comment—by this requirement that it be sent back?

Judge HODGES. They are, Senator, and—

Chairman SESSIONS. For the most part, they have mastered the case. They are up on all the motions and pleadings and facts, and they have pretty much been ready to try, and it gets sent off to somebody who knows nothing about it.

Judge HODGES. And attached to my written statement are comments by no less than 27 Federal district judges describing briefly their own experience and difficulties in cases that they handled because of *Lexecon*, as I say, the difficulties that *Lexecon* presented.

Chairman SESSIONS. Judge Hodges, you indicated that you didn't think that there were any winners and losers, any plaintiff or defendant advantage here.

Judge Thrash, what is your opinion about that? If we pass the House bill, will that favor one party or one group of plaintiffs or defendants over another?

Judge THRASH. In my opinion, Senator Sessions, it will not. It is party neutral. It is a good-government piece of legislation that in some cases is going to benefit one side, if you want to call it a benefit, in that they get their choice of forum; in others, it is going to benefit others.

For example, in my case, it was the plaintiffs that wanted me to keep the case and try the case in Atlanta. They had originally filed suit in Dallas because they were required to do so by the venue rules and the residence of the main defendant at that time. But as it turned out in my case, it was then the defendant that wanted the case sent back to Dallas. In others, it may be the plaintiff that wants the case sent back to the transferor district.

Chairman SESSIONS. Tell me about the appellate process. There are some generalized provisions here, "interest of justice, convenience of parties," I believe the language is. What kind of appellate review would somebody have available to them if they felt wronged under the consolidation of the transfer process?

Judge HODGES. Well, the appellate process, Senator, would be exactly the same as it is now. Any litigant who was aggrieved by the entry of the judgment in the case can seek review of any claimed error involved in the multidistrict process, which, as I recall, was the way *Lexecon* itself reached the Supreme Court. The statute does provide that certain rulings are not reviewable by appeal, but application for extraordinary writ is common in those cir-

cumstances; so that there is appellate review available, if not by direct appeal, then by way of extraordinary writ.

Chairman SESSIONS. Do you think that the convenience of the parties and the interest-of-justice standard is a real test? Does it have objective criteria behind it? Or is that just some vague term that will let judges do anything they want to do with the case?

Judge HODGES. Well, that is certainly a fair and important question. The language is somewhat general. It commits itself to the discretion, the sound judicial discretion of the jurist who is making that judgment. But it is the same language that is used in the venue transfer provision of 1404(a) that has been there for years and years. It is the same language, essentially, that has been in 1407 itself from the inception. And I think given the wide variety of the kinds of cases that we see, it is the best language that you could conjure up to achieve justice in these cases.

Chairman SESSIONS. But that is, as I am somewhat familiar, the language that is already in existence for venue questions, and it does have appellate history, and a judge can make objective evaluations under those statutes. Would you agree, Judge Thrash?

Judge THRASH. Yes, sir, I do. It is the standard that every district judge is familiar with under the general venue transfer provisions, and certainly in the Eleventh Circuit, where Judge Hodges and I sit, there is a well- developed body of case law that sets forth the factors that are to be considered in making a decision applying that standard, one of which is that ordinarily the plaintiff's choice of forum is to receive some deference. That is just one example of the types of factors that the established body of appellate court law says is to be considered.

Chairman SESSIONS. And I think that is important. That is a historical principle we have adhered to. But I would have to say that we have become a far more mobile society, and cases can often be filed in hundreds of different districts. That is a pretty extraordinary privilege to give to a plaintiff who could file it in 100 districts and he can pick the single best one out of that 100 to file his lawsuit. And, yes, you can challenge it, but I am not sure—I think the existing standards in favor of the plaintiff's choice of forum are strong enough. I am not sure we need to make them any stronger.

Do you think that we would have a different ratio of self-transfers to remand based on a statutory change than we have today? And what kind of change do you think we might have? A different ratio of self-transfers, to the transferee judge, to remands back to the different judges than we have today, and how big a change would there be?

Judge HODGES. With the statute?

Chairman SESSIONS. With the statute.

Judge HODGES. I don't think there would be a great change, Senator, precisely because, as I said before, take Judge Thrash's case, it only involved two groups of parties essentially involved in one piece of litigation, as distinguished from the victims of a mass tort; or in the pharmaceutical cases, for example, we have Vioxx going on now, being managed very well by Judge Fallon in New Orleans as the transferee judge. I don't think as a practical matter, whatever the law is, that there is any way that Judge Fallon perceives

himself trying all of those cases. If they don't settle, they are going back to the transferor courts from which they came, obviously.

So it depends on the kind of litigation you are talking about. If it is a mass tort situation, that is one thing. If it patent litigation or antitrust litigation, possibly even ERISA claims, that sort of thing, it would be another. There is more likelihood in those latter kinds of cases that there would be a self-transfer than in a mass tort case involving injured individuals.

Chairman SESSIONS. Section (i)(2), subsection (i)(2) in Section 2 requires the determination of compensatory damages to be remanded unless the transferee court "also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages."

Is it correct that this will create a distinction between compensatory damages on the one hand and the determination of liability and punitive damages, Judge Thrash? Would it create a presumption in favor of remand for compensatory damages that is not present for issues of liability and punitive damages?

Judge THRASH. No, sir, I don't think it is going to create a presumption. What I think it does is it requires the transferee judge to take a second look at the issue remanding compensatory damages, and if the convenience of the parties, the interest of justice require a remand for compensatory damages, Section 2 says that it should ordinarily be done. But I don't think that I would describe it as a presumption, and certainly not a presumption with respect to compensatory damages that would distinguish them from punitive damages.

Chairman SESSIONS. Now, I guess each one of these cases, we have in our minds a fact situation, but they could be quite different fact situations, entirely different issues being presented. But under the facts I just raised, it deals with liability and punitive damages. So the transferee judge who has—those cases are consolidated before that judge—would have the authority to determine whether or not the defendant, would a drug case—a bad drug, maybe, that had compensation—had caused injuries be an example? So there would be a determination that the company was or was not liable for putting a dangerous product on the market. And then that transferee judge could decide the question of whether punitive damages are appropriate.

But if it then turned that liability was found and a punitive damages question is settled, each individual party would then go to their own district, presumably, to prove how badly they had been physically damaged and so they could ask for compensation individually based on their own particular damages that they suffered? Is that the way the system would work practically?

Judge THRASH. Yes, sir, and I have been both a transferee judge and a transferor judge, and the process that you have described is very similar to what has happened in the asbestos litigation. For example, in the asbestos litigation, Judge Weiner severed the issue of punitive damages, retained that, and remanded cases in which there was a need for a trial to the district judges for a trial on the issue of compensatory damages only. And I have tried an asbestos case following that sort of remand. So, yes, sir, that—

Chairman SESSIONS. How did Judge Weiner handle the punitive damages? Did he provide some sort of forum, or did he find no punitive damages?

Judge THRASH. Well, I would defer to Judge Hodges on this, but my understanding is that he severed punitive damages because if the companies were subject to punitive damages, they would all just go bankrupt, and whoever got the first judgment would get it all. So the punitive damages claims have just been held in abeyance so to speak so that the compensatory claims could be tried without forcing the companies into bankruptcy.

Chairman SESSIONS. A practical solution.

Judge THRASH. Yes, sir.

Chairman SESSIONS. I have wondered that. The first time I have understood that after we have wrestled with these asbestos cases for a long time.

Judge Hodges, just briefly, has the Judicial Conference given any thought to maybe rethinking or looking creatively at the whole panoply of issues raised by the multidistrict tort cases that could be consolidated? Are there any things that we really need to do—asbestos is such a monumental thing, just incredible in size. I don't know whether that would be a mode or not. But there are a number of cases that—are you satisfied that this procedure is sufficient, or should we—when you have a single product by a primary defendant that has infected thousands of people, do we need a new system of being able to try that, and do we need statutory authority to do so?

Judge HODGES. Senator, I will have to, frankly, be very careful about that because I am not entirely sure that the Conference has taken any general position with respect to mass torts in the area such as the asbestos cases, and I think perhaps the Conference policy has been to defer to Congress about that.

I do know that the Congress has endorsed the Multidistrict Restoration Act that I am here testifying about today. I think that is the best answer I can give you.

Chairman SESSIONS. Well, I think about the breast implant cases. I know some of those have been consolidated, and other cases of that nature. And my question fundamentally is: Is our current law sufficient and could we do better with regard to asbestos? We have uniform testimony, and Senator Durbin sort of made a counterpoint, but he was consistent with the testimony we had, which is, as much money is spent on defense lawyers by the defendant companies as is spent on plaintiff lawyers in those cases. That may well be true. But the testimony is about 58 percent of the money actually paid out by the defendant asbestos companies goes to lawyers; only 40 percent gets to the victims.

So when you have something that massive, I think it is up to Congress to try to figure out a way to get people who are sick compensated promptly without having to go through all this once we have concluded there is liability here.

So that is what we have been trying to wrestle with here. I would assume asbestos is so huge it is probably not a good model, but if the Conference does have ideas about how to deal with large, nationwide—virtually nationwide—cases that could benefit from

consolidation and you need more authority, we would be glad to hear from it.

Judge HODGES. Well, thank you, Senator. I am sure the Conference will respond to that, and I am sure, as you know, it is complicated also by the jurisdiction of the State courts in claims of that kind.

Chairman SESSIONS. Well, that is true. Very true.

Do either one of you have any further comments you would like to make for the record? We will make your full remarks a part of the record, if you would like. Anything else that you would like to add?

Judge HODGES. None, except my thanks to you again for hearing us today.

Chairman SESSIONS. We will make these materials a part of the record. We have letters from the Judicial Conference in support of H.R. 1038, received April 18, 2005; a letter from the Judicial Panel on Multidistrict Litigation in support of H.R. 1038, April 20, 2005; text of an e-mail from Richard Jaffe, the Administrative Office of Courts, to Greg Waring of the Congressional Budget Office regarding CBO's cost estimate of H.R. 1038; a statement from the Judicial Panel in favor of enacting H.R. 1038 as is, dated July 6, 2005; a letter from the Chamber of Commerce of the United States in support of H.R. 1038, April 19, 2005; a letter from General Counsel for Johnson & Johnson raising potential areas of concern regarding H.R. 1038.

We have sought out those individuals who may wish to submit remarks. Really, we have not seen a lot of interest in speaking in opposition to this, but our record will be kept open for 7 days, and we look forward to reviewing any materials that may be offered within the next 7 days for the record.

If there is nothing else to come before us, we will be adjourned.

[Whereupon, at 3:27 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

UNITED STATES OF AMERICA
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

July 19, 2006

Honorable Jeff Sessions
Chairman, Subcommittee on
Administrative Oversight and the Courts
Senate Committee on the Judiciary
SD-335
Washington, D.C. 20510

Dear Mr. Chairman:

In response to your letter of July 14, 2006, we are today providing to your staff the answers to the questions submitted to me by Senator Charles Schumer. I hope they prove helpful in eliminating any hesitations regarding the *Lexecon* legislation (H.R. 1038).

I would also like to say that your staff has been very helpful to us, and we appreciate their hard work.

On behalf of the Judicial Conference and the Panel, I would again like to thank you for your leadership in moving this legislation forward, which we truly hope can be enacted this year.

Sincerely,

Wm. Terrell Hodges

Written questions from Senator Charles E. Schumer for the Honorable Wm. Terrell Hodges following the June 29, 2006 hearing in the Senate Judiciary Subcommittee on Administrative Oversight and the Courts on the Multidstrict Litigation Restoration Act, followed by the answers submitted on July 19, 2006, by Judge Hodges, Chairman of the Judicial Panel on Multidistrict Litigation and Congressional Witness on Behalf of the Judicial Conference of the United States

1. Do you think there should be different standards for consolidation of cases for pretrial procedures, liability, compensatory damages, and punitive damages? Does it make sense to look just at the "convenience of the parties" and the "interests of justice" in each? What are the arguments in favor of that?

> It is vital to remember that great differences exist in the kinds and numbers of cases comprising individual MDL Dockets. On the one hand, the consolidated cases may consist of two or three overlapping class actions in two or three districts between relatively common sets of a few plaintiffs and a few defendants. Examples would be found in patent, antitrust, securities and ERISA litigations. On the other hand, in the area of mass torts such as large numbers of products liability claims (Vioxx, for example) there may be hundreds or even thousands of individual suits in districts all over the country. Then, in addition, there are a number of MDL Dockets that lie between those two categories of cases – suits involving breach of contract claims for instance. We feel very strongly, therefore, that the only workable standards that could be applied by a transferee court in deciding on retention or remand of discrete issues such as liability, compensatory, and punitive damages are the standards of "the convenience of the parties" and "the interests of justice."
>
> The type of finding required by the transferee judge in determining whether to retain all or part of a case for trial under the proposed statute, *i.e.*, that retention would be in the interests of justice and for the convenience of the parties and witnesses, is essentially the same one that is required for the decision to centralize under 28 U.S.C. § 1407 or a decision to transfer venue under 28 U.S.C. § 1404. These standards have been applied for many decades in the Section 1404 and Section 1407 contexts, and parties are always first given the opportunity to demonstrate how these standards apply from their particular point of view. There is no reason to expect that the practice under this bill would be any different. Stopping to apply the standards at individual junctures, such as centralization for pretrial or retention for trial, simply ensures that the standards will be applied in a way that responds to any unique aspects of the particular litigation issue.

2. The New York State Bar Association has expressed concern that inefficiency would result when a jury tasked with determining compensatory damages has to reconsider many of the factual issues determined by the jury tasked with determining liability. How do you respond to that concern?

> This concern is predicated on the initial assumption that bifurcation of trial before separate juries would even be ordered. Bifurcation is by no means required by the proposed bill, and is often a procedural technique agreed upon by the parties who perceive that a determination of liability will either end the case outright or facilitate settlement of individual damage claims. When such bifurcation is deemed appropriate, *The Manual for Complex Litigation (Fourth)*, at § 22.755, advises that "[u]se of special verdict forms can provide the specificity necessary for instructing a second jury as to the aspects of the litigation previously resolved. The forms should clearly distinguish among the possible interpretations of the first jury's findings, to allow later juries to understand and apply those findings." (Footnotes omitted.)

3. Similarly, the New York State Bar Association has asserted that, by having different juries determine liability, punitive, and compensatory damages, H.R. 1038 raises constitutional concerns under the re-examination clause of the Seventh Amendment. Others have raised the same concern. Do you believe that a party's Seventh Amendment rights may be violated when one jury determines liability and another determines compensatory damages, given that the latter jury would have to reconsider factual issues determined by the first?

> Respectfully, the Seventh Amendment concerns are illusory. Assume that a case is remanded to the transferor court for jury trial on the issues of liability and/or compensatory damages while the issue of punitive damages is retained in the transferee court. If the jury in the transferor court finds for the plaintiffs and awards compensatory damages, the later jury considering punitive damages in the transferee court would be specifically informed about the first jury's determinations and would be expressly instructed *not* to reexamine those determinations. Rather, the second jury would then focus on the maliciousness of the defendant's wrongdoing, not the already established extent of the plaintiff's injuries. The punitive damages jury would also be instructed, of course, concerning the Supreme Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), governing the measure of any punitive award. Clearly, there is no Seventh Amendment infringement in this process.

4. Some critics of H.R. 1038 have suggested that the legislation ought to require consent of the plaintiff before a transferee court makes a decision to retain a case for trial. Do you think this is a useful suggestion? Do you believe a plaintiff ought to have the right to determine the forum in which a case is tried, and if so, do you worry that this bill threatens that?

I interpret this question to apply primarily to consumer or individual plaintiffs such as those in the mass tort cases. If so, I would anticipate that there is little or no threat at all to the plaintiffs' forum selection because, to my knowledge, no transferee judge has ever transferred to himself or herself, before or after *Lexecon*, hundreds of individual cases for trial of damages issues. If the litigation is not disposed of by global settlement or summary judgment, the individual cases will be remanded.

In any event, a consent requirement for H.R. 1038 would be no more useful than a similar requirement in Section 1407 or Section 1404, earlier legislation in which Congress wisely declined to impose such a restriction. As the Judicial Panel addressed this concern in one of its earliest decisions ordering centralization for pretrial proceedings in a single district:

> This is a worm's eye view . . . . Of course it is to the interest of each plaintiff to have all of the proceedings in *his* suit handled in *his* district. But the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law.

In re Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968). It must also be remembered that there is a very real fluidity to forum preference. For example, my colleague, Judge Thomas Thrash, in his June 29, 2006, testimony to this Subcommittee related his post-*Lexecon* experience in a multidistrict docket that had been centralized before him in the Northern District of Georgia. In that litigation, plaintiffs in an action that had been transferred by the Judicial Panel for pretrial proceedings wished to remain in the Georgia district for trial. One of the action's defendants, however, resisted and insisted that the action be remanded at the end of pretrial proceedings to its original district, the Northern District of Texas, for trial. Thus, in a very real sense, passage of this bill would have helped to secure the plaintiffs' preferred forum choice rather than defeat it.

5. Should the bill expressly provide that when a transferee court retains a case, the governing choice of law provision shall be that which the original jurisdiction would have provided?

> Congress has not specifically so provided with respect to transfers of venue under Section 1404. The expectation would be that the choice of law issue in actions retained for trial under this bill would be resolved in the same manner as in Section 1404 transfers, as was the case in actions retained for trial by a transferee court in the pre-*Lexecon* era. We also note that a choice of law provision was considered in an earlier version of the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107-273) but was not included in the bill as passed. Presumably, the congressional concerns reflected in that judgment would also apply to the present legislative proposal.

6. H.R. 1038 provides that any decision under the disaster litigation subsection "concerning remand for the determination of damages shall not be reviewable by appeal or otherwise." What arguments support this limitation?

> The provision to which you refer is contained in Section 3 of the bill, which deals only with single accident litigation and adds new Section 1407(i)(4). This Section has identical language regarding non-appealability of the decision concerning remand of damages as is found in existing Section 1441(e)(4) that was enacted in 2002 in the Multiparty, Multiforum law. In addition to the 2002 Multiparty, Multiforum law and the present amendment, existing Section 1447(d) states that an order remanding a case to state court "is not reviewable on appeal or otherwise," except for orders involving civil rights cases under Section 1443. By excluding the remand determination for punitive damages from new Section 1407(i)(4), as is found in H.R. 1038, appealability for that exclusion and any other remand determination made by the transferee court would be expected to be covered by the abuse of discretion standard for Section 1404 decisions. If such a decision is made by the Judicial Panel, existing Section 1407(e) would apply by way of an extraordinary writ.

7. In 1999, Brian Wolfson of Public Citizen testified that the vagueness of the "convenience of the parties" and "interests of justice" standards made the decision to retain a case "essentially unreviewable." How do you respond to that concern?

> My prior answer to question number 1 essentially describes the appropriateness of using these standards. The type of finding required by the transferee judge, *i.e*, that retention of the compensatory damage issues would be in the interests of justice and for the convenience of the parties and witnesses, is the same one that is required for a transfer of venue

under Section 1404. This standard has been applied by judges for many years in the Section 1404 context, and parties are given the opportunity to argue for or against transfer of venue. There is no reason to expect that the practice under this bill would be significantly different. Where the transferee court's decision is arrived at by balancing numerous complex factors, there will often be no single right answer. Appellate review is thus properly limited to an abuse of discretion standard.

8. Mr. Wolfson also argued that "these one-size-fits all rulings are efficient to be sure, but they deprive parties of their State law rights and, in that respect, are an affront to Federalism because they are made without regard to differences among State laws." How do you respond to that concern?

It is erroneous to assume that passage of this bill would result in "one-size-fits-all rulings." Such has not been the case in actions centralized by the Judicial Panel for pretrial proceedings, both during the thirty years preceding the *Lexecon* decision and thereafter.

An example of the sensitivity and sophistication of the transferee court in addressing choice of law issues can be taken from MDL-391, *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979.* In this multidistrict docket arising from the crash of a DC-10 jet airplane, the transferee court, in the context of a pretrial motion to strike claims for punitive damages, first considered the substantive law of the place of the disaster, the law of the place of manufacture of the aircraft, the law of the primary place of business of the aircraft manufacturer, the law of the primary place of business of the airline, and the law of the place of maintenance of the aircraft. The court then applied the separate choice-of-law rules of each state where a constituent action had originally been filed. Finding that New York was the airline's principal place of business at the time of the crash and did not allow punitive damages, and that Missouri, the aircraft manufacturer's principal place of business did, the court, ruling in cases filed in Illinois (where the "most significant relationship" test applied), allowed the motions to strike punitive damage claims against the airline but not against the manufacturer. Turning then to cases filed in California, and applying that state's "comparative impairment" test, the transferee court held that the policies of the state of the principal place of business would be impaired more than the policies of the state of misconduct if those policies were not applied. Thus the court again allowed the motion to strike punitive damages with regard to the airline but not the manufacturer. Additional analyses were required, before reaching the same results, with respect to cases originally filed in New York, Michigan, Puerto Rico, and Hawaii.

SUBMISSIONS FOR THE RECORD

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

April 19, 2005

To Members of the United States House of Representatives:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, I write to express our support for H.R. 1038, the "Multidistrict Litigation Restoration Act of 2005," scheduled to be considered by the full House this week.

Pursuant to 28 U.S.C. § 1407, a Multidistrict Litigation Panel ("MDLP") – a select group of seven federal judges selected by the Chief Justice of the United States – assists in the consolidation of lawsuits which share common questions of fact filed in more than one federal judicial district. The MDLP identifies the U.S. district court ("transferee court") best equipped to adjudicate the pretrial matters associated with such litigation. After pretrial, the MDLP then remands the individual cases back to the district where they were originally filed unless they have been previously terminated.

For approximately 30 years, the practice was that the transferee court would often take this process one step further and invoke 28 U.S.C. § 1404(a), a general venue statute that authorizes a district court to transfer a case in the interest of justice and for the convenience of the parties and witnesses, so as to effectively transfer the cases to itself for *trial* purposes. This process worked well because the transferee court was well versed in the facts and law of the consolidated litigation. This practice changed, however, after the 1998 U.S. Supreme Court decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, et al.* (523 U.S. 26), where the Court held that the plain language of § 1407 requires a transferee court to remand all cases for trial back to the respective districts from which they were originally referred. The Court stated, "the proper venue for resolving the issue remains the floor of Congress."

H.R. 1038 is a simple procedural fix that appropriately amends § 1407 to clarify that any action transferred by the MDLP may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee court or other district "in the interest of justice and for the convenience of

the parties and witnesses." If enacted, the legislation will return the law to that in effect prior to the *Lexecon* decision and improve the federal multidistrict litigation process.

Enactment of H.R. 1038 will help conserve finite judicial resources, save costs for plaintiffs and defendants, and reduce inconsistencies in the law. Accordingly, the U.S. Chamber supports H.R. 1038 and urges you to do so as well.

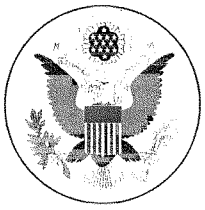
Sincerely,

R. Bruce Josten

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE WM. TERRELL HODGES

JUDGE, UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA



FOR THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
THE MULTIDISTRICT LITIGATION RESTORATION ACT

June 29, 2006

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

SUMMARY OF STATEMENT OF JUDGE WM. TERRELL HODGES ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
June 29, 2006

The Judicial Conference of the United States, the policy-making body for the federal judiciary, urges Congress to enact the "Multidistrict Litigation Restoration Act." Currently, the multidistrict litigation process established in 28 U.S.C. § 1407 allows civil cases pending in multiple judicial districts involving common questions of fact to be centralized for coordinated or consolidated pretrial proceedings before one "transferee" judge by the Judicial Panel on Multidistrict Litigation (Judicial Panel). For thirty years following the creation of this beneficial process, transferee judges used the venue statute to transfer the cases to their court or another district for trial when appropriate. In 1998, however, the Supreme Court held in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* that the present language of section 1407 required remand of such cases upon completion of pretrial procedures and stated that the resolution of the issue belonged on the floor of Congress. In response, Congress has pursued the Multidistrict Litigation Restoration Act to restore this valuable tool long-used effectively by federal transferee judges.

There are essentially three reasons why this legislation is needed to authorize a transferee judge to retain for trial some or all of the cases in the interest of justice and for the convenience of the parties and witnesses. First, the bill will facilitate settlements in these complex, multistate cases. The anticipation and possible use of a trial transfer has historically proven to be a strong inducement to spawn global or individual settlements at all stages of the proceedings. Second, it will reduce the needless waste that stems from litigating these cases in multiple jurisdictions, thereby conserving scarce judicial resources and reducing litigants' expenses. Moreover, the transferee judge, by supervising the day-to-day pretrial proceedings, becomes intimately familiar with the dynamics of those cases including the underlying facts, the applicable laws, the possible settlement values, and the reasonable amount of the attorneys' fees that might ultimately be sought by prevailing counsel. Third, the legislation will directly benefit litigants who will be better served by improving efficiency in the handling of these cases. Over 228,000 cases have been centralized involving millions of claims altogether. Parties should not be subjected to the uncertainties, delays, and expense created by unnecessary duplication of litigation or subjected to possible inconsistent adjudications.

Therefore, the Judicial Conference urges prompt passage of this vital legislation to enhance and promote efficiencies within the operation of the multidistrict litigation process.

STATEMENT OF JUDGE WM. TERRELL HODGES
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
June 29, 2006

Mr. Chairman and Members of the Subcommittee, my name is Wm. Terrell Hodges. I am a United States Senior District Judge in the Middle District of Florida and Chairman of the United States Judicial Panel on Multidistrict Litigation (Judicial Panel), which is composed of seven United States circuit and district judges from throughout the country. From 1996 to 1999, I was Chairman of the Executive Committee of the Judicial Conference of the United States (Judicial Conference).

I have been asked to testify today on behalf of the Judicial Conference regarding the "Multidistrict Litigation Restoration Act," which has already passed the House of Representatives this Congress as H.R. 1038. The Judicial Conference strongly supports this legislation and greatly appreciates your holding this hearing. I would ask that my statement be included in the record.

This legislation will restore the ability of a transferee judge to retain a case for trial or to transfer it to another district in the interest of justice and for the convenience of the parties and witnesses. It is needed for three primary reasons. First, the legislation will facilitate settlements in complex, multistate cases. Second, it will reduce the needless waste that stems from litigating these cases in multiple jurisdictions, thereby conserving scarce judicial resources and reducing litigants' expenses. Third, the legislation will directly benefit litigants who will be better served by improving efficiency in the handling of these cases.

The Supreme Court's Decision in Lexecon and the Judiciary's Response

In 1998, the Supreme Court ended a thirty-year practice whereby cases centralized by the Judicial Panel could be transferred by the transferee judge, pursuant to the venue statute

(28 U.S.C. § 1404(a)) for trial in the transferee or other district.[1] This decision was *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). The Court held that section 1407 of the Multidistrict Litigation Act[2] explicitly required the Judicial Panel to remand for trial in their original districts all cases that had not been terminated in the transferee district.[3] In its opinion, the Court noted that Congress is the proper venue for determining whether the practice of self-assignment under these conditions should continue. Thus, the Supreme Court's opinion in *Lexecon* was one of statutory interpretation – not one based on a constitutional adjudication.

The Judicial Conference responded promptly by adopting a position in September 1998 to "support legislation to amend the multidistrict litigation transfer provision, 28 U.S.C. § 1407, to provide that a district court conducting pretrial proceedings pursuant to that section could assign a transferred case for trial proceedings to itself or another district court in the interest of justice and for the convenience of parties and witnesses." *Report of the Proceedings of the Judicial Conference of the United States*, p. 76 (Sept. 1998).[4] The Judicial Panel also took the same view,

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[1]This practice had been embraced in case law, *see, e.g.*, Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971), and in former Rule 14 of the Judicial Panel.

[2]The Multidistrict Litigation Act, 28 U.S.C. § 1407(a)-(g), was enacted in 1968 by Pub. L. No. 90-296, 82 Stat. 109.

[3]Among those filing amicus briefs in the *Lexecon* case that were submitted in support of the self-transfer authority were leading corporate and investment banking firms, trade associations representing many of the nation's life and property and casualty insurers, the trade association of the country's aerospace manufacturers, a major pharmaceutical company, and a significant asbestos litigation defendant. Plaintiff Lexecon Inc. itself did not object to self-transfer in the main group of cases (arising from failure of Lincoln Savings & Loan Association led by Charles Keating) from which *Lexecon* peripherally sprang. The defendants in *Lexecon*, who included lawyers and law firms that have typically represented plaintiffs in complex litigation, were the respondents in the Supreme Court and strongly supported self-transfer.

[4]This position was recommended to the Judicial Conference by its Committee on Federal-State Jurisdiction, after that Committee solicited the views of the Judicial Panel and of the Judicial Conference Committee on Court Administration and Case Management.

supporting this position.

Beginning with the 106th Congress, the Administrative Office of the U.S. Courts transmitted proposed legislation on behalf of the Judicial Conference that would implement its position and solve the problem created by the *Lexecon* decision. Since that time, the Judicial Conference, as well as the Judicial Panel, has written repeatedly to Congress to urge enactment of this legislation. Also, on June 16, 1999, Judge John F. Nangle, former Chairman of the Judicial Panel, testified in support of the *Lexecon* legislation (H.R. 2112, 106th Cong.) before the House Judiciary Committee's Subcommittee on Courts and Intellectual Property. During the present Congress, the House passed the "Multidistrict Litigation Restoration Act of 2005" on April 19, 2005, as H.R. 1038 under suspension of the rules. This bill has been referred to the Senate.

In addition, the U.S. Chamber of Commerce has previously expressed its support for the Multidistrict Litigation Restoration Act (H.R. 1038, 109th Cong.). In its letter to Members of the House dated April 19, 2005, that organization stated that enactment of the legislation will "improve the federal multidistrict litigation process" and "will help conserve finite judicial resources, save costs for plaintiffs and defendants, and reduce inconsistencies in the law."

Description of the Multidistrict Litigation Restoration Act and Prior Congressional Action

Section 2 of H.R. 1038, which bill was passed by the House of Representatives in April 2005, would amend 28 U.S.C. § 1407, the multidistrict litigation statute, by adding a new subsection (i) to allow a judge with a transferred case to retain it for trial or to transfer it to another district in the interest of justice and for the convenience of the parties and witnesses. The

new subsection would also provide that any action transferred for trial must be remanded by the Judicial Panel for the determination of compensatory damages to the district court from which it was transferred, unless the transferee court finds for the convenience of the parties and witnesses and in the interests of justice that the action should be retained for the determination of compensatory damages.

The same language in section 2 above also passed the House of Representatives in the previous three Congresses (106th - 108th) in bipartisan fashion. In addition, the Senate passed similar *Lexecon* legislation by unanimous consent during the 106th Congress (by passing S. 1748 and then substituting its text into H.R. 2112, which it then passed). Section 2 of S. 1748 is virtually identical to section 2 of H.R. 1038 as passed by the House this Congress.[5]

Section 3 of H.R. 1038 would amend the "Multiparty, Multiforum Trial Jurisdiction Act of 2002," which was enacted as section 11020 of the "21st Century Department of Justice Appropriations Authorization Act" (Pub. L. No. 107-273, 116 Stat. 1758) (*codified at* 28 U.S.C. §§ 1369, 1391, 1441, 1697, and 1785). Section 1369 of that law granted district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 people have died in the accident at a discrete location. When the Multiparty, Multiforum law was enacted, it did not include statutory language giving district courts authority to retain cases for the determination of liability and punitive damages, as originally intended.

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[5]S. 1748 (106th Cong.) was sponsored by Senators Hatch, Leahy, Grassley, Kohl, Torricelli, and Schumer.

Section 3 of H.R. 1038 would address this shortcoming by adding a new subsection 1407(j) to title 28 (which is already referred to in 28 U.S.C. § 1441(e)(2)) specifically authorizing a transferee court hearing an action based on section 1369 (and transferred pursuant to section 1407) to retain such actions for the determination of liability and punitive damages. Also, new subsection (j) would provide that if the district court retains the case to determine liability, the case must be remanded to the original district court or state court for the determination of compensatory damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for that determination as well. Moreover, subsection (j) would track the existing Multiparty, Multiforum law to describe how certain appeals and procedures would be handled, including using language identical to that in present law specifying that a remand decision for the determination of damages shall not be reviewable by appeal or otherwise. *See* 28 U.S.C. § 1441(e)(4).

In addition to the present Congress, section 3 has previously been passed by the House of Representatives in bipartisan fashion. More specifically, such trial-transfer authority was included in the prior legislative versions of the Multiparty, Multiforum law when it was passed by the House in the 101st, 102nd, 105th, 106th, 107th, and 108th Congresses.

Three Principal Reasons for the Lexecon Legislation

The Judicial Conference believes that this legislation constitutes a vital improvement of the statutory mechanism Congress established for the consideration of multidistrict litigation cases. There are essentially three principal reasons why enactment of it is needed today. First, a judge's authority to try the case is a critical component of the judge's ability to facilitate

settlement. The anticipation and possible use of a trial transfer has historically proven to be a strong inducement to spawn global or individual settlements at all stages of the proceedings. Settlements can occur either during pretrial, on the eve of trial, during trial, after a consolidated liability trial, or after some selected, sample cases have proceeded to trial on the issues of damages (which are known as "bellwether" trials). Also, a firm trial date alone becomes an effective means to promote settlement. Even if the transferee judge does not exercise the self-transfer authority, simply the parties' perception that the transferee judge might order self-transfer has, in the past, contributed significantly to the disposition of many cases.

Any interference with this dynamic is no small matter. As of September 30, 2005, over 228,000 cases had been centralized under section 1407 since 1968. Many of these cases have involved multiple plaintiffs and defendants, with correlating claims, counterclaims, cross-claims, third-party claims, and intervenors, totaling millions of claims altogether.

Moreover, if plaintiffs or defendants perceive a tactical advantage by waiting for a remand to transferor courts after pretrial proceedings have concluded, fruitful settlement discussions will be delayed if not undermined altogether. The whole process thus becomes prolonged and delayed, with increased expenses and wasted resources for the judiciary, parties, witnesses, and attorneys. There is also the possibility of inconsistent adjudications. For example, a set trial date in cases filed in her district promoted class action settlements in 2005 in MDL (multidistrict litigation)-1487 – *In re WorldCom, Inc., Securities & "ERISA" Litigation* before Judge Denise Cote in the Southern District of New York.

Second, waste is avoided if trial-transfer authority exists. The transferee judge becomes intimately familiar with all aspects of the action as a result of supervising the day-to-day pretrial proceedings. The judge knows the underlying facts, learns the applicable laws, recognizes the lawyers' strategies and tactics, and gains a sense of the values of the claims and attorneys' fees. If some or all of the many cases that have been centralized are remanded to the various judges from originating districts for trial, then those judges are totally unfamiliar with the action. Many issues may be raised again in preparation for trial, and the learning curve can be steep. Moreover, this results in duplicate litigation in multiple courts. Thus, the status quo leads to a waste of the judiciary's time and resources, as well as of the litigants. Although some transferee judges have gone to great lengths in an effort to avoid some of this waste and to bring resolution more promptly to these cases, as described below, they have not proven to be solutions to the *Lexecon* problem.

The third reason why this legislation still needs to be enacted is that litigants are better served by improving efficiency. As mentioned previously, the volume of litigation in this process is enormous, with over 228,000 cases having been centralized under section 1407 by the end of September 2005. One centralized action may involve multiple plaintiffs and defendants. Plaintiffs should have similar claims decided in similar fashion and should receive prompt compensation for their damages with a minimum of costs. Defendants should also be able to minimize their litigation expenses and reduce their exposure to possible inconsistent adjudication.

In the past, the transferee judge and the parties often used a consolidated trial in the transferee district for determining the common liability issues, such as whether a product is defective or causes a specific disease, whether any warning about potential harmful effects of a product was adequately disclosed, whether securities were fraudulently marketed, or whether defendants conspired to engage in unlawful conduct. Such a trial offers obvious efficiencies in resolving shared questions in one forum instead of multiple forums, while leaving individual issues such as damages to be tried later in the transferee district or transferor districts, as may become appropriate.

Operation of Trial Transfer

A transferee judge, as the judicial expert in a particular multidistrict litigation supervising the centralized pretrial proceedings, should again have the option and flexibility to try all or key parts of that litigation at his or her own discretion, with the parties' input. The criteria for trial self-transfer in the present legislation are taken from provisions found in 28 U.S.C. § 1404, which allow a court to transfer a civil action, including trial, in the interest-of justice and for the convenience of the parties and witnesses. This language is time-tested and is broad enough to be applied wisely and judiciously on a case-by-case basis after the transferee judge takes into account the nuances of the litigation and the parties' views. Judges are routinely called upon in the normal course of adjudicating any case to factor in countless evolving constitutional, statutory, procedural, and case law considerations. Litigants assuredly will bring these factors to the attention of the court from the vantage point of each litigant's tactics, interests, and factual situation.

It is important to emphasize that the Multidistrict Litigation Restoration Act would not require that some or all of the centralized cases be retained in the transferee district for trial; rather, it would simply permit the transferee judge to identify a case or cases that should logically be retained. Consolidated trials on liability issues may resolve shared questions in one forum instead of multiple forums, or a particular case or cases may be suitable to serve as bellwether trials for purposes of a global settlement.

Currently, for example, bellwether trials of cases with various exposure scenarios have been taking place or are planned in MDL-1657 – *In re Vioxx Marketing, Sales Practices and Products Liability Litigation* before transferee judge Judge Eldon E. Fallon of the Eastern District of Louisiana. Unless Judge Fallon can secure intra- or intercircuit assignments authorizing him to sit in other districts, he will only be able to conduct such trials in actions originally filed in or transferred back to the transferee district. Surely he and the parties should be able to thoroughly consider the venue options for him to conduct bellwether trials, both in his own district and elsewhere. He should not be forced to follow a case to its transferor district or to secure remand of the case from the Judicial Panel and then rely on a decision by a judge in the original district, who would be unfamiliar with the dynamics of the overall litigation, to transfer the case back to Judge Fallon's district under section 1404.

Role of the Judicial Panel

Section 1407(a) of title 28 currently authorizes the Judicial Panel to transfer related cases, pending in multiple federal judicial districts, to a single district for coordinated or consolidated pretrial proceedings, upon its determination that centralizing those cases will serve the

convenience of the parties and witnesses and promote the just and efficient conduct of the cases. The process typically begins when a motion is filed under 1407 by one or more parties in one or more of the cases, asking that the cases be transferred to a single judge in a given district for pretrial management. An MDL docket is then created and the cases are considered for centralization. The seven federal judges who serve on the Judicial Panel normally conduct oral arguments on such motions for initial centralization when they convene every other month. Then, if the Judicial Panel decides to grant the motion and centralize the cases in a transferee district, related cases might later be filed and added to the docket, which are referred to as "tag-along" cases.

Transfers under section 1407 have the following salutary effects: (1) avoiding duplication of discovery and other pretrial proceedings; (2) preventing inconsistent pretrial rulings; and (3) conserving the resources of the parties, their counsel, and the judiciary. The transferee judge, accordingly, becomes the federal judicial expert regarding the cases as a result of supervising the day-to-day pretrial proceedings, thereby becoming intimately familiar with the entire docket's dynamics and nuances. As of mid June 2006, approximately 191 transferee judges were supervising about 256 groups of multidistrict cases, with each group composed of a various number of cases (some totaling in the hundreds, thousands, or tens of thousands) in varying stages of development.

Multidistrict litigation entails significant national legal matters, such as asbestos, silicone gel breast implants, diet drugs like fen-phen, hemophiliac blood products, the Vioxx medication, heart valves, tires, and orthopedic bone screw products liability litigation. It also includes all

major air crashes, such as the ones relating to the September 11 terrorist attacks, TWA Flight 800 off Long Island, Secretary of Commerce Ron Brown's death in Croatia, ValuJet in the Florida Everglades, and Swissair near Nova Scotia.

Other examples of types of centralized cases include the sales practices of several insurance companies, billing by health care providers and phone companies, and antitrust allegations in the markets of automobile imports, brand-name prescription drugs, compact discs, computer operating systems, contact lenses, corn sweeteners, electricity, natural gas, vitamins, and oil. Also centralized have been issues pertaining to securities laws or pension fund claims involving Enron, Global Crossing, Tyco, WorldCom, Adelphia, Merrill Lynch research reports, initial public offerings, mutual funds, and NASDAQ. In addition, claims regarding notices in the sweepstakes business, various patents, and employment practices have been centralized.

Problems Spawned by the Lexecon Decision

Since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern about the paramount need to enact this legislation. (See Attachment to this statement for observations of twenty-seven transferee judges.) Those judges have emphasized that giving the transferee judge the ability to determine liability would greatly enhance the chance of settlement and eliminate the possibility of inconsistent determinations throughout the country. They have stressed that time and resources are wasted because of an absence of the trial authority, which was used effectively in the past for decades.

One of the most experienced transferee judges, Senior Judge Robert W. Sweet of the Southern District of New York, summed up the necessity for section 2 of H.R. 1038 as follows:

"*Lexecon* has substantially eviscerated the practical purposes of the MDL assignments. After all, pretrial discovery and related proceedings simply set the stage for ultimate resolution. In order to achieve the benefits of consolidation, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country."

The alternative recognized in *Lexecon* is for the Judicial Panel to remand the cases to their transferor districts, and then have each original district court decide whether to transfer each case back to the transferee district for trial purposes under section 1404. This, however, is a cumbersome alternative.

For example, in a February 2006 order recommending remand of an action to its originating district, Judge Barbara S. Jones of the Southern District of New York observed that five plaintiffs "have advised the Court that they are seeking remand now in order that they may seek transfer of venue, pursuant to 28 U.S.C. § 1404(a), back to this Court for a consolidated trial. Since this Court has scheduled a consolidated trial of its own cases involving [four] defendants . . . to commence [soon], a remand now may permit such transfer motions to be resolved in time for this Court to consolidate one or more of the out-of-district cases for trial with [those defendants]. Moreover, this Court is familiar with the issues and believes that trial of these cases would be accomplished most efficiently by a single court making determinations as to consolidation, staging, and logistics in a comprehensive manner." MDL-1291 – *In re Omeprazole Patent Litigation*. Interestingly enough, in the same docket in a 2001 order, Judge Jones used virtually identical language to describe a comparable situation except that three

defendants, rather than certain plaintiffs, were seeking remand and subsequent section 1404 transfer back to the MDL transferee court for inclusion in a consolidated trial. Clearly this alternative is a repetitive, costly, potentially inconsistent, time consuming, inefficient, and wasteful utilization of judicial and litigants' resources.

Efficiency is also ill-served if the transferee judge is forced to follow a case to its transferor district, rather than order self-transfer. In MDL-1377 – *In re "Dippin-Dots" Patent Litigation*, Judge Thomas W. Thrash, Jr. of the Northern District of Georgia was designated as the transferee judge in a group of patent infringement cases. Some defendants in one of those cases refused to consent to trial before him in that district. Judge Thrash then worked with the Northern District of Texas, to which the case was to be remanded, to obtain an intercircuit assignment for him to try the case there. After conclusion of the case, Judge Thrash frustratingly observed in a letter from August 2005 as follows: "Needless to say, resolution of this case has been prolonged and involved greater expense to the judiciary (and some hardship for me and my staff) because of my inability to transfer the Northern District of Texas case to myself for trial here in the Northern District of Georgia. On the other hand, it would have been almost criminal to dump this case on a new Northern District of Texas judge for trial. The MDL docket in this district has 427 docket entries. The Northern District of Texas case docket has 931 entries. I hope that this problem will be fixed by Congress soon."

The Class Action Fairness Act of 2005 (Pub. L. No. 109-2) provides additional stimulus to enact the Multidistrict Litigation Restoration Act. Since enactment of the Class Action Fairness Act, significant numbers of related cases have been removed to federal court and then transferred to a single district for coordinated or consolidated pretrial proceedings under section

1407. Transferee judges need the self-trial transfer authority to help get these additional cases resolved efficiently and promptly as well.

Importance of Transferee Judge's Familiarity and Flexible Trial Options

Complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as many options as possible to reasonably expedite trial when the transferee judge, with full input from the parties, deems appropriate. Importantly, self-transfer for trial by a transferee judge is not to a distant, unfamiliar forum, but to one with which the parties and transferee judge have already become well acquainted through the ongoing coordinated or consolidated pretrial proceedings pending before the transferee judge.

Venue is usually not a concern because most key multidistrict defendants conduct business nationwide. With respect to defendants whose status does implicate traditional venue concerns, the transferee judge can be expected to weigh their interests along with those of all other defendants and the plaintiffs. The result thus could be either a severance of the claims against such defendants and a submission of a remand suggestion to the Judicial Panel, or a transfer of those claims for trial upon a finding by the transferee judge that the interest of justice and the convenience of the parties and witnesses would be served. Again, the parties' ongoing familiarity with the transferee judge may cause many of them to prefer trial before the transferee judge, and they should have the option to seek that disposition.

Likewise, a transferee judge, particularly one sitting by intraciruit or intercircuit assignment to supervise section 1407 proceedings, may find it expeditious to transfer multidistrict cases for trial to another district, such as the one where the transferee judge normally sits. For example, in MDL-979 – *In re Combustion, Inc., Hazardous Substances Cleanup*

Litigation, Chief Judge Richard T. Haik was sitting by designation as the transferee judge in the Middle District of Louisiana. He invoked section 1404 to transfer the cases to his home district, the Western District of Louisiana, which he was able to do as this action pre-dated the *Lexecon* decision.

Clearly, transferee judges and parties in centralized multidistrict cases should have flexible options to conduct trials as expeditiously and fairly as possible. In fact, the concept of trial transfer in conjunction with pretrial transfer for multidistrict cases has already been enacted by Congress when it added subsection (h) to section 1407.[6] That subsection authorizes the Judicial Panel to order transfer for trial, as well as for pretrial proceedings, of any action brought under section 4C of the Clayton Act (which is the *parens patriae* provision permitting state attorneys general to bring suits on behalf of those injured by violations of the Sherman Antitrust Act).

Section 3 – Trial Transfer Authority in Single-Accident Litigation

While section 2 of H.R. 1038 broadly covers civil litigation in general regardless of subject matter, section 3 provides similar trial-transfer authority in single-accident litigation as was intended by Congress when it enacted the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107-273). That law codified a reference in 28 U.S.C. § 1441(e)(2) to subsection (j) of 1407, which would have been the trial-transfer subsection. However, that subsection is yet to be enacted.[7] Section 3 of H.R. 1038 would add subsection (j) to 1407.

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[6]Subsection (h) was added to section 1407 of title 28 in 1976 by Pub. L. No. 94-435, § 303, 90 Stat. 1396.

[7]Section 1441(e)(2), which was enacted in 2002, presently provides as follows: "(2) Whenever an action is removed under this subsection 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

The Congressional Conference Report on the legislation that included the Multiparty, Multiforum law commented on the self-transfer authority for trial purposes that was intended to be included. It stated that, "[t]he district court in which the cases are consolidated would retain those cases for determination of liability and punitive damages." H.R. Rep. No.107-685, at 201 Pub. L. No. 107-273 (Sept. 25, 2002) (Conf. Rep.). Thus, it is clear that Congress intended to establish the trial-transfer authority for use with those centralized single-accident cases. As the House Judiciary Committee Report of H.R. 1038 stated in describing section 3, "the *Lexecon* fix . . . [in section 3] also functions as a technical correction to the recently-enacted disaster litigation measure." H.R. Rep. No. 109-24, at 4 (March 17, 2005).

The federal judiciary believes that the utility of self-transfer authority is particularly great in the context of mass disaster litigation. In such litigation, all victims (airplane or train passengers, hotel guests, etc.) will ordinarily be situated identically *vis-a-vis* the defendants. This makes the case for consolidation of their actions on common issues especially compelling. There usually are no "individual differences" among the accident victims that would affect or complicate trial of the issue of a defendant's liability or the appropriateness of an award of punitive damages.

Among other things, resolution of such matters in a single transferee court would: (1) ensure that the trial would occur before the transferee judge who, as a result of presiding over day-to-day complex pretrial proceedings, is the one judge most familiar with the factual and legal

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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."

issues; (2) enable plaintiffs' counsel to coordinate their efforts and minimize their fees and expenses through a single trial, thereby permitting them to maximize the recoveries available to their clients; (3) ensure that insurance proceeds available to deserving victims would not be depleted by the costs and attorneys' fees incurred by defendants in repeated trials in multiple federal and state jurisdictions; (4) eliminate the risk that punitive damages would be imposed in an inconsistent manner or repeatedly assessed against the same defendant; (5) eliminate the possibility of inconsistent adjudications on common liability issues; and (6) conserve the already overtaxed resources of state and federal courts by avoiding multiple and repeated trials before different courts on the same common issues. Again, I emphasize the beneficial effect on settlements arising from the parties' early knowledge of when and before whom trial would occur.

As a practical matter, litigants in centralized mass disaster cases have themselves frequently recognized the desirability of single trials of common issues. Often, in the past, transferee judge decisions to consolidate trials on the issue of liability were made upon the joint request of plaintiffs and defendants.

A couple of examples will serve to illustrate the difficulties in mass accident cases. Judge William L. Standish (Western District of Pennsylvania) was the transferee judge in the Judicial Panel's group of centralized cases arising from the USAir (now USAirways) crash near Pittsburgh, Pennsylvania, on September 8, 1994, that resulted in the death of 132 passengers and crew members. In addition to the federal actions centralized before him by the Judicial Panel for pretrial proceedings, 22 other actions were pending in the Cook County, Illinois Circuit Court.

These actions were not removable to federal court at that time or otherwise transferable by the Judicial Panel because an individual resident of Illinois was joined as a defendant in each of those cases, thereby destroying complete diversity between plaintiffs and defendants in the cases.

Judge Standish wrote in a letter in 1999 as follows:

> Because the Cook County cases remained in the Illinois state court, there has been considerable duplication of work by the attorneys involved, some of whom represent parties in both jurisdictions. Two steering committees for plaintiffs were appointed; attorneys have attended conferences, arguments and hearings in both Pittsburgh and Chicago and both courts have been required to rule on various discovery and other issues, sometimes inconsistently, despite the fact that the judges involved communicated extensively with each other and, at times, had joint hearings or arguments on discovery motions. The inconsistent rulings, for the most part, resulted from differences in the Federal and Illinois Rules of Civil Procedure relating to discovery, but they have caused inconvenience, additional expenses and the expenditure of additional time by the attorneys in the conduct of discovery.
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> When discovery concludes, in the near future, motions for summary judgment may be filed in both courts by the same parties, and it is possible that rulings on these motions may differ.

Another judge, former Judicial Panel member Louis C. Bechtle of the Eastern District of Pennsylvania, has commented on how trial-transfer authority might have helped him in his role as a settlement judge in the multidistrict litigation action arising out of the fire disaster that took 97 lives and injured hundreds more at the Dupont Plaza Hotel in San Juan, Puerto Rico, on New Year's Eve, 1986. He wrote in a 1999 letter as follows:

> Citizens of Puerto Rico could not become parties to this MDL litigation because of a lack of diversity with the principal defendants. This was especially unfortunate because Puerto Rico does not provide for jury trials in such cases. The result was that the claimants who could not be in the federal MDL litigation would not have the full benefit of the federal discovery, and other processes related to a jury trial, yet those citizens were the victims of the same catastrophe as those who were citizens of states other than Puerto Rico and whose cases were

> being administered in the MDL. Under the new legislation those persons could intervene in the MDL proceedings and fully participate in all phases of the litigation including the settlement course, on the same basis as other claimants. Also because of the proposed removal provisions, the defendants could defend in one forum at one time and under the same standards. Considerable financial and professional resources of all parties and the state, territorial, and local governments would have been achieved had the proposed legislation been in place at that time.
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> * * *
>
> I would also add that in my conversations with . . . citizens of Puerto Rico regarding the Dupont Plaza fire, nearly all would have preferred to be included in the MDL for the pre-trial proceedings including full discovery and ultimate disposition.

Although Congress responded in part by enacting the Multiparty, Multiforum law in 2002 to address the centralization of state and federal cases arising from a single accident, it failed to provide the remaining critical component of providing self-trial transfer authority as was intended.

I want to further emphasize here that when state cases such as these are tried in their respective jurisdictions, a myriad of additional costs and duplications arise as a result of trial of the same liability issues in both state and federal court. Ultimately, it must be remembered that the plaintiffs' lawyers and the defendants' lawyers always receive payment in full for their services. It is rather the parties on both sides who pay the price for the system's deficiencies. Defendants, and their insurance companies, expend vast sums relitigating the same issues in forum after forum. And the victims of these horrible tragedies and/or their survivors, whose lives have already been touched by unfathomable sorrow, suffer the final indignity of seeing sums that would be used to reimburse medical expenses or other losses consumed by unnecessary transactional costs.

Conclusion

The Judicial Conference of the United States urges the Senate to pass the Multidistrict Litigation Restoration Act, which has already passed the House of Representatives during the 109th Congress as H.R. 1038. In cases that have been centralized by the Judicial Panel, this legislation will give the transferee judge and the litigants the desirable option of transferring a case to the transferee judge for trial purposes, as was often done for 30 years until the Supreme Court's *Lexecon* holding in 1998. The operative language of the Multidistrict Litigation Restoration Act is well-suited for judges and litigants to use and apply as needed, based on the circumstance of each case that is centralized. Enactment of such legislation will truly benefit both plaintiffs and defendants who will both gain substantial savings of time and money.

Thank you again, Mr. Chairman, for the opportunity to testify on behalf of the Judicial Conference in support of this important and necessary legislation. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

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Attachment

Observations by 27 Federal Transferee Judges Since 1998
Depicting Their Frustration with the Absence of Self-Transfer Authority for Trial

• **Judge John Feikens**, E.D. Michigan, *Air Crash near Monroe, Michigan, on 1/7/97*:
Prior to *Lexecon*, all parties had agreed for him to preside over a joint liability trial. Thereafter, he planned to proceed with trial for the two non-settling cases that were originally filed in E.D. Michigan. Although he recommended that the Judicial Panel remand five other cases to their transferor courts and that those courts under § 1404 return the cases to him for trial, that suggestion was not followed and the prospect of multiple trials ensued.

• **Judge Robert W. Sweet**, S.D. New York, *NASDAQ Market-Maker Antitrust Litigation; Air Crash off Long Island, New York, on 7/17/96 (TWA Flight 800)*:
The litigation raised complicated issues regarding how to try majority of cases transferred to him from elsewhere. Also, absent an interlocutory appeal to the Second Circuit, the parties and numerous district courts throughout the U.S. would face protracted litigation over the applicability of the Death on the High Seas Act. *Lexecon* has substantially eviscerated the practical purposes of MDL assignments. After all, pretrial simply sets the stage for ultimate resolution. In order to achieve the benefits of centralized pretrial, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country.

• **Judge Manuel L. Real**, C.D. California, *Baxter Healthcare Corp. Gammagard Products Liability Litigation; Motorcar Parts and Accessories, Inc., Securities Litigation*:
Lexecon will slow the disposition process of MDL cases. Return to transferor districts before some case or cases can be tried will abort settlement of the entire litigation. *Lexecon* could present a problem for getting bellwether cases for the various subclasses or for damages.

• **Judge Edmund V. Ludwig**, E.D. Pennsylvania, *Latex Gloves Products Liability Litigation*:
Plaintiffs' lead counsel endorsed trial in the MDL transferee district, although transferor courts would have to use § 1404 to return § 1407 remanded cases to the MDL transferee district for trial. *Lexecon* makes a global resolution much more difficult, as lawyers recognize.

• **Judge Alfred V. Covello**, D. Connecticut, *Air Crash at Dubrovnik, Croatia, on 4/3/96 (involving Commerce Secretary Ron Brown)*:
Legislation to permit self-transfer will provide more judicially efficient administration of MDLs. Because of *Lexecon*, increased transactional costs for the litigants and the court have resulted, as evidenced not only in my MDL, but also by remand of breast implant cases to me in another MDL in which I had no previous interaction because I was the transferor judge rather than the transferee judge.

• **Judge John E. Sprizzo**, S.D. New York, *Bennett Funding Group, Inc., Securities Litigation*:
Lexecon will severely complicate the resolution of this litigation in which a number of state and federal law claims are pending and which, after *Lexecon*, will have to be returned to a multitude of courts for trial.

• **Judge Sarah S. Vance**, E.D. Louisiana, *Ford Vehicle Paint Litigation*:
Hopefully, pending legislation will be passed to overrule *Lexecon*, thereby streamlining multidistrict litigation.

• **Judge Jerome B. Simandle**, D. New Jersey, *Ford Ignition Switch Products Liability Litigation*:
Plaintiffs' counsel were divided – some wanted remand to state courts, others wanted to wait and see what happens with bellwether trial. Defense counsel were critical of *Lexecon* and would like to see the statute changed.

• **Judge Maurice M. Paul**, N.D. Florida, *Commercial Tissue Products Antitrust Litigation*:
Lexecon legislation that would allow transferee judges to retain cases through disposition would save judicial time and resources.

• **Judge Joe Kendall**, N.D. Texas, *Great Southern Life Insurance Co. Sales Practices Litigation*:
Rather than docket each case event in a master docket, he decided to docket such events in each individual case, even though more laborious, to facilitate eventual remand.

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Hopes for a legislative solution of the *Lexecon* problem.

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Lexecon is an impediment to settlement.

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This would be a great case for self-transfer if legislation would allow it. The merits of the claims turn on issues of property law and the interpretation of deeds, easements, and the like. Determining damages and administering individual property owners' claims present a prospect I would hate to have to transfer back to anyone else.

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The litigants should be working toward an early and firm trial date, which I could provide but for *Lexecon*.

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Remand of non-Pennsylvania cases back to the transferor forum creates serious risk of conflicting adjudications.

• **Judge Thomas W. Thrash, Jr.**, N.D. Georgia, *Dippin' Dots Patent Litigation*:
This case is a prime example of the inefficiency and problems caused by the unfortunate *Lexecon* decision. Needless to say, resolution of this case has been prolonged and involved greater expense to the judiciary (and some hardship for me and my staff) because of my inability to transfer the Northern District of Texas case to myself for trial here in the Northern District of Georgia. On the other hand, it would have been almost criminal to dump this case on a new Northern District of Texas judge for trial. The MDL docket in this district has 427 docket entries. The Northern District of Texas case docket has 931 entries. I hope this problem is fixed by Congress soon.

• **Judge Lewis A. Kaplan**, S.D. New York, *Rezulin Products Liability Litigation*:
A transferee court ought to have the right, on its own initiative or on motion, to transfer a case to the transferee court for trial.

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At the heart of the equipment lease litigation is a dispute over the validity of a series of nearly identical leases and the enforceability of surety agreements and insurance policies relating to those leases. This court has original jurisdiction over actions relating almost exclusively to the enforceability of the surety agreements. Trying those actions without the authority to try the closely-related question of the validity of the insurance agreements and the possibly threshold question of the validity of the underlying leases would prove extremely inefficient from a judicial resources standpoint. In the prostheses litigation several of the lawyers indicated a belief that *Lexecon* interferes with a transferee judge's ability to broker a meaningful resolution of coordinated cases where there are a high volume of claimants.

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The rule of *Lexecon* and its effect have been considered in the context of a motion to enjoin all parallel state court proceedings and in addressing a motion for certification of a nationwide class action for medical monitoring pursuant to Federal Rule of Civil Procedure 23(b)(6). Specifically, this court has considered the limitations which *Lexecon* places on the use of consolidated master complaints in MDL proceedings.

• **Judge Nancy G. Edmunds**, E.D. Michigan, *Cardizem CD Antitrust Litigation*:
Lexecon was raised in the context of defendants' motion for interlocutory appeal, with defense counsel arguing that without an immediate appeal there was the possibility of numerous contradictory results if forced to wait for a final judgment by the transferor courts. It was also raised during discussion of scheduling and structuring of trials in the MDL action. Trial on the individual Sherman Act plaintiffs' action had to be delayed while a suggestion of remand was pending. Plaintiffs had indicated that they would file a motion seeking transfer back to this court after remand, and defendant indicated that it would oppose any such transfer. Two hotly contested issues were certified for interlocutory appeal. If these legal issues had not been resolved before cases were transferred back to the transferor court, post-trial appeals in various courts of appeal could have rendered moot a considerable amount of the consolidated pretrial proceedings undertaken in the transferee court. Thus, the *Lexecon* decision has the potential for wasting judicial resources and increasing the overall costs of litigation. That potential was further evidenced by this court's need to delay trial on the remaining consolidated litigation because a suggestion of remand had to be prepared for one of the consolidated actions.

• **Judge Barbara J. Rothstein**, W.D. Washington, *Phenylpropanolamine (PPA) Products Liability Litigation*:
Of concern arising from the *Lexecon* decision is that *Lexecon* prevents the court from setting the vast majority of cases in this MDL for trial.

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He had planned to resolve all of the cases, even if it meant conducting trials. However, he is required to remand the cases once the pretrial proceedings are complete.

• **Judge Barefoot Sanders**, N.D. Texas, *Southwestern Life Insurance Co. Sales Practices Litigation*:
Because of *Lexecon*, the court is obviously unable to provide a firm trial setting. With a firm trial setting the court believes the pending cases will settle. For that reason the court will likely file a suggestion of remand with respect to these cases.

• **Judge James T. Giles**, E.D. Pennsylvania, *Air Crash near Peggy's Cove, Nova Scotia, on 9/2/98*:
Counsel for plaintiffs suggested early on that a bellwether trial might be helpful for settlement strategies.

• **Judge Federico A. Moreno**, S.D. Florida, *Managed Health Care Litigation*:
Certain defendants objected to trial setting, even though the court announced its availability for trial.

UNITED STATES OF AMERICA
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

April 20, 2005

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Judicial Panel on Multidistrict Litigation, I am writing to urge support of H.R. 1038, the Multidistrict Litigation Restoration Act of 2005. As you know, my predecessor as Chairman of the Panel, Judge John F. Nangle, testified in favor of the previous version of this legislation on June 16, 1999, before the House of Representatives Subcommittee on Courts and Intellectual Property.

Section 2 of this legislation, to restore the options available to the litigants and the federal judiciary prior to the 1998 Supreme Court *Lexecon* decision, passed in a bipartisan fashion word-for-word in the House of Representatives in the present and previous three Congresses and in the Senate in the 106th Congress. Specifically, the Senate by unanimous consent in October 1999 passed H.R. 2112 as amended by the Senate Judiciary Committee in the nature of a substitute to embrace Section 2 of the current legislation. The previous version of Section 3 of the legislation, aimed at streamlining adjudication of single accident litigation, has passed the House of Representatives in bipartisan fashion on seven prior occasions – twice when the Democrats were in the majority in the 101st and 102nd Congresses, and five times when the Republicans were in the majority in the 105th, 106th, 107th, 108th and now the 109th Congresses.

The Panel believes that this legislation constitutes a vital improvement of § 1407's statutory scheme without which the Panel and its transferee judges are hampered in their ability to achieve the statute's important goals – to promote the just and efficient conduct of multidistrict litigation.

The Class Action Fairness Act of 2005 provides additional stimulus to enact H.R. 1038. As more related cases are removed to federal court, then transferred to a single district for coordinated or consolidated pretrial proceedings under § 1407, the streamlining envisioned by the Class Action Act will be augmented by permitting the transferee judge the option to try the cases. This would be true if a national class is certified, if instead statewide classes are certified, or if class certification is denied and the cases proceed individually or with some joinder of plaintiffs. An option could be to consolidate the liability phase of trials if defendants' liability turns on the same question, such as whether a product was defective or whether any warning about potential harmful effects was adequately disclosed. Firm trial dates are the most effective way to resolve cases and to promote settlement. If plaintiffs or defendants perceive a tactical advantage by waiting for § 1407 remand to transferor courts, fruitful settlement discussions will be delayed. The whole process thus becomes prolonged along with increased expenses, wasted resources for the judiciary, parties, witnesses and attorneys, delayed justice, and potentially inconsistent adjudications. An example in the securities and pension fund law fields of set trial dates for various aspects of the litigation promoting class action settlements is the WorldCom Securities and ERISA Litigation before Judge Denise Cote in the Southern District of New York.

Following are some observations from transferee judges who of course become intimately familiar with the nuances of a particular litigation:

• Judge John Feikens, E.D. Michigan, Air Crash near Monroe, Michigan, on 1/7/97 (Prior to *Lexecon*, all parties had agreed for him to preside over a joint liability trial. Thereafter, he planned to proceed with trial for the two non-settling cases that were originally filed in E.D. Michigan. Although he recommended that the Panel remand five other cases to their transferor courts and that those courts under § 1404 return the cases to him for trial, that suggestion was not followed and the prospect of multiple trials ensued.)

• Judge Robert W. Sweet, S.D. New York, NASDAQ Market-Maker Antitrust Litigation; Air Crash off Long Island, New York, on 7/17/96 (TWA Flight 800) (Raised complicated issues regarding how to try majority of cases transferred to him from elsewhere. Also, absent an interlocutory appeal to the Second Circuit, the parties and numerous district courts throughout the U.S. would face protracted litigation over the applicability of the Death on the High Seas Act. *Lexecon* has substantially eviscerated the practical purposes of MDL assignments. After all, pretrial simply sets the stage for ultimate resolution. In order to achieve the benefits of centralized pretrial, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country.)

• Judge Manuel L. Real, C.D. California, Baxter Healthcare Corp. Gammagard Products Liability Litigation; Motorcar Parts and Accessories, Inc., Securities Litigation (*Lexecon* will slow the disposition process of MDL cases. Return to transferor districts before some case or cases can be tried will abort settlement of the entire litigation. Could be a problem in order to get bellwether cases for the various subclasses or for damages.)

• Judge Edmund V. Ludwig, E.D. Pennsylvania, Latex Gloves Products Liability Litigation (Plaintiffs' lead counsel endorsed trial in the MDL transferee district, although transferor courts would have to use § 1404 to return § 1407 remanded cases to the MDL transferee district for trial. *Lexecon* makes a global resolution much more difficult, as lawyers recognize.)

• Judge Alfred V. Covello, D. Connecticut, Air Crash at Dubrovnik, Croatia, on 4/3/96 (involving Commerce Secretary Ron Brown) (Legislation to permit self-transfer will provide more judicially efficient administration of MDLs. Instead, increased transactional costs for the litigants and the court have resulted, as evidenced by remand of breast implant cases with which the court had no previous interaction.)

• Judge John E. Sprizzo, S.D. New York, Bennett Funding Group, Inc., Securities Litigation (*Lexecon* will severely complicate the resolution of this litigation in which a number of state and federal law claims are pending and which, after *Lexecon*, will have to be returned to a multitude of courts for trial.)

• Judge Sarah S. Vance, E.D. Louisiana, Ford Vehicle Paint Litigation (Hopefully, pending legislation will be passed to overrule *Lexecon*, thereby streamlining multidistrict litigation.)

• Judge Jerome B. Simandle, D. New Jersey, Ford Ignition Switch Products Liability Litigation (Plaintiffs' counsel divided — some wanted remand to state courts, others wanted to wait and see what happens with bellwether trial. Defense counsel were critical of *Lexecon* and would like to see the statute changed.)

• Judge Maurice M. Paul, N.D. Florida, Commercial Tissue Products Antitrust Litigation (*Lexecon* legislation that would allow transferee judges to retain cases through disposition would save judicial time and resources.)

• Judge Joe Kendall, N.D. Texas, Great Southern Life Insurance Co. Sales Practices Litigation (Rather than docket in a master docket, he decided to docket in each individual case, even though more laborious, to facilitate eventual remand.)

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in the MDL action. Trial on the individual Sherman Act plaintiffs' action had to be delayed while a suggestion of remand was pending. Plaintiffs had indicated that they would file a motion seeking transfer back to this court after remand, and defendant indicated that it would oppose any such transfer. Two hotly contested issues were certified for interlocutory appeal. If these legal issues had not been resolved before cases were transferred back to the transferor court, post-trial appeals in various courts of appeal could have rendered moot a considerable amount of the consolidated pretrial proceedings undertaken in the transferee court. Thus, the *Lexecon* decision has the potential for wasting judicial resources and increasing the overall costs of litigation. That potential was further evidenced by this court's need to delay trial on the remaining consolidated litigation because a suggestion of remand had to be prepared for one of the consolidated actions.)

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Thank you for your consideration and your leadership in accomplishing a worthy and beneficial legislative goal.

Sincerely,

Wm. Terrell Hodges
Chairman

c: Honorable Patrick J. Leahy
Members of the Senate Judiciary Committee
Honorable F. James Sensenbrenner, Jr.
Honorable John Conyers, Jr.
Honorable Lamar S. Smith
Honorable Howard L. Berman

UNITED STATES OF AMERICA
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

July 6, 2005

STATEMENT IN FAVOR OF ENACTING H.R. 1038 AS IS

The Judicial Panel on Multidistrict Litigation respectfully but emphatically opposes amending H.R. 1038 and urges that H.R. 1038 be enacted promptly as is.

1. The damages language in Section 2 of H.R. 1038 is the result of a carefully crafted compromise in 1999 between Republican and Democratic leaders of the House Judiciary Committee. This language took into account the damages language in Section 3 of H.R. 1038 that has been part of single accident bills since the late 1980s and that also is the result of careful crafting between Democratic and Republican leaders of the House Judiciary Committee. Section 2 covers litigation broadly, while Section 3 covers single accidents only and is drafted in contemplation of actions removed from state courts under minimal diversity standards to proceed in tandem with related actions arising from the same accident in the federal multidistrict litigation transferee court.

2. Section 2 language of H.R. 1038 has been passed by the House in every Congress beginning with the 106th Congress in 1999. Importantly, this identical language was also passed by the Senate in 1999. The Section 3 language of H.R. 1038 has been passed by the House in seven Congresses, the 101st, 102nd, 105th, and every Congress since. The bill as drafted clearly enjoys strong bipartisan support and has stood that way for a long time.

3. The Panel is informed that some interested parties may propose an amendment to H.R. 1038 in an attempt to account for the 2003 decision of the Supreme Court in State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003). In that case the Court announced a number of principles to be applied in the assessment of punitive damages in civil cases in order to comply with the

requirements of the Due Process Clause of the Fourteenth Amendment governing the protection of property rights.

4. The Panel understands, more specifically, that the proposed amendment would say in effect that in any MDL docket created by the Panel under the statute, no determination of punitive damages shall be made in any case until the compensatory damages have been determined in all of the constituent actions.

5. The Panel is deeply concerned that such an amendment will prove to be controversial and may threaten to undermine the bipartisan support now enjoyed by the bill.

6. Perhaps more importantly, the Panel also believes that such an amendment is (1) inapposite under the State Farm decision and (2) would prove to be wholly unworkable and counterproductive in practice thereby giving rise to more issues and more litigation than would be the case under H.R. 1038 in its present form.

7. The proposed amendment is inapposite, we believe, because the language of the amendment presupposes that State Farm stands for the proposition that in multiple civil actions predicated on the same wrong, compensatory damages must be assessed in every case before punitive damages may be addressed in any case. There is a substantial, perhaps even a persuasive argument that State Farm requires no such thing; rather, that State Farm focuses upon the claim of each plaintiff and the determination of each plaintiff's damages, both compensatory and punitive, within the framework of each plaintiff's own case. We suggest, therefore, that the proper interpretation and application of State Farm should be left to future case-by-case determination without attempting to deal with the issue by an ill advised amendment to H.R. 1038 now. Judges are routinely called upon in the normal course of adjudicating any case to factor in countless evolving constitutional, statutory, procedural, and case law considerations, such as any presented by State Farm. Litigants assuredly will bring these nuances to the attention of the court from the vantage point of each litigant's tactics, interests, and factual situation.

8. The proposed amendment is wholly unworkable and counterproductive in practice, we believe, as illustrated by a few examples:

- A large majority of multiple actions involve not only multiple plaintiffs but multiple defendants as well, some of whom may not be joined in all of the constituent cases. Punitive damages may be sought against some of the defendants in some cases but not others. How would the proposed amendment be applied in those circumstances?

- The proposed punitive damage language may imperil efforts to achieve "global peace" in those MDLs where defendants arrive at a settlement with plaintiffs seeking to represent a settlement class. Arguably, the language precluding any determination of punitive damages until all compensatory damages have been

determined may preclude approval of any class settlement in which there are "opt-out" plaintiffs seeking individual adjudication of their claims.

- Often settlements arise because the parties have had the opportunity to conduct bellwether trials which provide a range of settlement values that can lead to resolution of actions without the expense and burdens of multiple additional trials. The proposed punitive damage language would deprive a transferee court of this tool because the court could not consult the parties, select one or more prototypical actions, and try all claims (including punitive damage claims) in an effort to provide the parties with values which will permit them to construct their settlements.

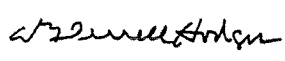
- In many MDLs the number of potential claims can be determined at the outset (e.g. the number of passengers on an airplane) or after the passage of the time prescribed in an identifiable statute of limitations. Thus, after a certain amount of time (during which, according to Panel practice, later filed related "tag-along" actions are transferred for inclusion in the previously centralized MDL), it may be possible to determine when all compensatory damage claims have been determined, and when (according to the proposed punitive damage amendment) it would then be proper to address the issue of punitive damages. Any number of circumstances, however, could prevent an MDL from playing out according to this plan (e.g., a product liability claim that does not arise until the manifestation of a previously latent harm, fraudulent concealment by one or more defendants, minors whose claims do not expire until some time after attaining a majority, etc.). Under such circumstances a transferee court could address the punitive damage question only at its peril. The late addition of a tag-along action unanticipated by both the court and the existing MDL plaintiffs and defendants could require a halt to any punitive damage trial occurring in the transferee district.

9. H.R. 1038 as drafted is broad enough to give the transferee judge and the litigants many desirable options, including transfer to the transferee judge for trial purposes, as was often done for nearly 30 years until the Lexecon ruling in 1998. This transfer for all purposes was accomplished procedurally until 1998 in the following manner: the Panel first transferred a group of related actions from multiple districts to a single district for coordinated or consolidated pretrial proceedings under 28 USC § 1407; the transferee judge would at various times thereafter transfer some or all of those actions (or severable claims in the actions) to his or her own district for trial under 28 USC § 1404 by ruling that jurisdiction and venue were appropriate there and that such transfer would serve the interests of justice and the convenience of the parties and witnesses. These same justice and convenience criteria appear in H.R. 1038, are wise, are time tested by application of 28 USC § 1404, and should not be watered down in any way. Instead, as is routinely the aftermath of the legislative process, the courts should apply the present broad language on a case-by-case basis.

10. Reference is made to my letter dated April 20, 2005, to Senator Arlen Specter urging enactment of H.R. 1038. That letter called attention to the 1999 testimony of my

predecessor as Chairman of the Panel, Judge John F. Nangle, in favor of the identical wording in H.R. 1038 that passed both the Senate and House in 1999. Included in that letter are compelling observations from 27 experienced multidistrict transferee judges who of course become intimately familiar with the nuances of a particular litigation. Their experiences highlight the improvements that will be provided by H.R. 1038 to the just and efficient conduct of multidistrict litigation. Accordingly, the Panel requests prompt enactment of H.R. 1038, unencumbered by any proposed amendments.

FOR THE PANEL:



Wm. Terrell Hodges, Chairman

Text of email sent to Greg Waring, Congressional Budget Office, from Richard Jaffe, Office of Legislative Affairs, Administrative Office of the U.S. Courts, on June 30, 2005:

As I discussed on the phone yesterday, our office recently reviewed the cost estimate that you prepared on the "Multidistrict Litigation Restoration Act of 2005" (H.R. 1038), dated March 11, 2005. We have determined that there appears to be a misstatement in one part of the analysis that resulted in the overall assessment that implementing H.R. 1038 would result in no significant net impact on the federal budget. In fact, we estimate that enactment of the bill would result in a relatively small, but still net annual savings to the federal budget. We ask that you take these views into account if there are any requests by Congress or any of its committees for an updated cost estimate of the bill.

The second line of the third paragraph of the cost estimate states that "[a]ny savings realized by the federal court system would be small, CBO estimates, **and might be offset by increased court costs that could arise from additional cases being moved from state court to federal court under the bill**." (emphasis added). It appears that this statement may have been inadvertently included from an earlier cost estimate prepared by CBO on the previous version of this bill, the "Multidistrict Litigation Restoration Act of 2003," dated February 9, 2004. Our legal analysis indicates that H.R. 1038 does not create any new federal jurisdiction and therefore, no new cases would be filed in federal court under this specific bill.

Section 3 of H.R. 1038 amends the Multiparty, Multiforum Trial Jurisdiction Act of 2002, which was enacted as section 11020 of the "21st Century Department of Justice Appropriations Authorization Act" (Pub. L. No. 107-273, 116 Stat. 1758) (*see* 28 U.S.C. §§ 1369, 1391, 1441, 1697 and 1785). Newly created section 1369 of title 28 granted district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 people have died in the accident at a discrete location. When this new law was enacted, it failed to include statutory language giving district courts authority to retain cases for the determination of liability and punitive damages, as originally intended.

Section 3 of this bill addresses this shortcoming in that law by adding a new subsection 1407(j) to title 28 specifically authorizing a transferee court hearing an action on section 1369 and transferred pursuant to section 1407 to retain such actions for the determination of liability and punitive damages. Moreover, if the district court judge retains the case to determine liability, the court can decide that, for the convenience of parties and witnesses and in the interest of justice, the action can also be retained for the determination of compensatory damages. Similarly, section 2 of H.R. 1038 would give a district court judge conducting pretrial proceedings on a transferred case under 28 U.S.C. § 1407 the option to retain it for trial rather than remanding it back to the originating district. However, neither section 2 nor 3 of H.R. 1038 creates any new federal jurisdiction that could lead to new state or federal actions being filed in federal court. Instead, this bill provides for the more efficient resolution of those cases already filed.

Available statistics from the Judicial Panel on Multidistrict Litigation indicate that judges would readily avail themselves of these new authorities and decide to retain approximately 1,000

cases of this type over the first year after enactment rather than remand them back to the original court. The significant efficiencies gained through such actions are expected to result in faster resolution of these specific cases and likely reductions in the overall median time intervals from filing to disposition of civil and criminal cases, either with individual judges or nationwide. Actual budgetary savings related to these efficiencies are not anticipated, as the available time of these judicial officers would instead be diverted to the resolution of other pending cases. Also, the bill does not reduce the number of currently authorized Article III judges.

However, we do expect that there will be specific budgetary savings related to district court clerks. It is estimated that district court clerks currently spend an estimated average of two hours to process and transfer the substantial files compiled in each of these complex cases from one court to another. As discussed above, if judges decide to retain 1,000 such cases during the first full year after enactment rather than transfer them to another court, approximately 1.14 full time equivalent (FTE) court clerk positions could be reduced from existing levels. This would realize annual budget savings of about $75,000, based on current national average salary and benefits costs for these positions and including related operation, space and maintenance expenses.

These savings would be expected to be realized in the first full year after enactment of H.R. 1038. In subsequent years, the number of retained cases is expected to increase as more judges avail themselves of these new authorities and there is a general increase in the number of such cases filed in federal court (due to the recent enactment of other laws affecting multidistrict litigation, such as the Class Action Fairness Act of 2005, Pub. L. No. 109-2). However, the amount of time saved by court clerks related to each such case is anticipated to decrease as more and more courts fully implement electronic case file management and transfer systems, making it less time-consuming for clerks to compile and process the case materials. Therefore, the annual budgetary cost savings are expected to remain relatively stable over the first few years after enactment.

We ask that you consider this information should you decide to prepare a new cost estimate or receive any congressional inquiries related to the net impact of the bill on the federal budget. Please contact me at 202-502-1700 if you have any additional questions regarding this issue.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

April 18, 2005

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Mr. Chairman:

The Judicial Conference of the United States strongly supports enactment of H.R. 1038, the "Multidistrict Litigation Restoration Act of 2005," which you introduced on March 2, 2005 and which was reported favorably by the House Judiciary Committee on March 17, 2005. H.R. 1038 will facilitate the resolution of claims by citizens and improve the administration of justice.

Currently, section 1407(a) of title 28, United States Code, the multidistrict litigation statute, authorizes the Judicial Panel on Multidistrict Litigation (the Judicial Panel) to transfer civil actions with common questions of fact that are pending in multiple federal judicial districts "to any district for coordinated or consolidated pretrial proceedings." It also requires the Judicial Panel to remand any such action to the district court in which the action was filed at or before the conclusion of such pretrial proceedings, unless the action is terminated before then in the transferee court.

Although the federal courts had for nearly 30 years followed the practice of allowing a transferee court to invoke the venue transfer provision (28 U.S.C. § 1404(a)) and transfer the case to itself for trial purposes, the Supreme Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), held that such statutory authority did not exist. The Court noted that the proper venue for resolving the desirability of such self-transfer authority is "the floor of Congress." 523 U.S. at 40.

Section 2 of H.R. 1038 responds to the *Lexecon* decision by amending 28 U.S.C. § 1407 to allow a judge with a transferred case to retain it for trial or to transfer it to another district in the interest of justice and for the convenience of the parties and witnesses. This section also provides that any action transferred for trial must be remanded by the Judicial Panel to the district court from which it was transferred for the determination of compensatory damages, unless the transferee court finds for the convenience of the parties and witnesses and in the interests of justice that the action should be retained for the determination of compensatory damages. As experience has shown, there is wisdom in permitting the judge who is familiar with the facts and parties and pretrial proceedings of a transferred case to retain the case for trial. Also, as with most federal civil actions, multidistrict litigation cases are typically resolved through settlement. Allowing the transferee judge to set a firm trial date promotes the resolution of these cases.

H.R. 1038 also seeks to make corrections to the Multiparty, Multiforum Trial Jurisdiction Act of 2002, which was enacted as section 11020 of the "21st Century Department of Justice Appropriations Authorization Act" (Pub. L. No. 107-273, 116 Stat. 1758; now codified in various sections in title 28, United States Code. *See* 28 U.S.C. §§ 1369, 1391, 1441, 1697, and 1785.)

The Judicial Conference appreciates your support of H.R. 1038. If you or your staff have any questions, please contact Mark W. Braswell or Karen Kremer, Counsel, Office of Legislative Affairs (202-502-1700).

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Democrat, Committee on the Judiciary
Honorable Lamar S. Smith, Chairman, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary
Honorable Howard Berman, Ranking Democrat, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary

Statement of

The Honorable Thomas W. Thrash, Jr.
Judge, United States District Court
Northern District of Georgia

for

the June 29, 2006, Hearing on
The Multidistrict Litigation Restoration Act

in the
Subcommittee on Administrative Oversight
and the Courts
of the
Committee on the Judiciary
United States Senate
109th Congress

Summary of Testimony of

Thomas W. Thrash, Jr.
United States District Judge
Northern District of Georgia

The MDL Panel assigned to me for consolidated pretrial proceedings the cases involved in In re Dippin Dots Patent Litigation. After two years of intense litigation, the main patent infringement case had to be returned to the Northern District of Texas for trial because of the Lexecon decision. Rather than inflict this huge and complicated case upon a new judge, I agreed to go to Dallas and try the case myself. I tried the case in Dallas for two and a half weeks in the fall of 2003. By the time of the trial, none of the parties or major witnesses were from Dallas. The case was prolonged and unnecessarily expensive to the courts and the parties because of my inability – under Lexecon – to transfer the case to myself for trial in Atlanta.

Testimony of
Thomas W. Thrash, Jr.
United States District Court
Northern District of Georgia
June 29, 2006

Multidistrict Litigation Restoration Act

Mr. Chairman thank you for the invitation to testify in my personal capacity in support of the Multidistrict Litigation Restoration Act. In my 9 years as a District Judge, I have handled two MDL cases. My first MDL case got resolved by settlement without too much trouble and with very little effort on my part. My punishment for that was a case called In re Dippin Dots Patent Litigation. Nothing was resolved in that case without a great deal of trouble and effort on my part. A big source of trouble was the effect of the Supreme Court's Lexecon decision.

In order for this to be of any benefit to you, I think that I have to tell you a little bit about the case, so that you will understand how I got such a bad case of lexeconitis. If you do not have pre-teen children or grandchildren, you may not be familiar with Dippin' Dots. I was not before I got my first Dippin' Dots case. Around 1987, Mr. Curt Jones of

Paducah Kentucky invented a method of producing little balls of ice cream about the size of a BB. The method involved dripping little goblets of ice cream mixture into liquid nitrogen at -40 degrees. Because the concoction freezes so quickly, fewer ice crystals are formed which makes the ice cream taste creamier than regular ice cream. You could also serve it by pouring it directly into your mouth from a cup. So a little kid could eat it without making the God awful mess that comes from trying to spoon ice cream out of a paper cup. He called the product Dippin' Dots. Mr. Jones got a patent on his method, and began manufacturing the stuff; and selling it wholesale to retailers who sold it to the public at amusement parks, malls and sporting events. The retailers were able to charge a premium price for the stuff, and for a while Mr. Jones had a very profitable little monopoly.

This being America, competition emerged in the form of a Mr. Tom Mosey who began serving a similar product – Dots of Fun – at a movie theater in Dallas Texas. In June 1996, Dippin' Dots filed a patent infringement action in the Northern District of Texas and ultimately got an

injunction against Mr. Mosey and Dots of Fun. That was in March 1997. Mr. Mosey went out of business and the case was dormant for some years. But there was a claim construction order in the case which furnished a roadmap to design around the Dippin' Dots patent. A couple of years later, some unhappy Dippin' Dots retailers and Mr. Mosey formed a new company – Frosty Bites – to manufacture a flash frozen ice cream product with all the advantages of Dippin' Dots, using a method which they claimed did not infringe the Dippin' Dots patent. When the former Dippin' Dots retailers went into business as Frosty Bites retailers, Dippin' Dots responded by filing lawsuits all over the country claiming trademark and trade dress infringement as well as theft of trade secrets, unfair competition, etc. etc. One of those cases was assigned to me in Atlanta. Dippin' Dots also filed a motion in the old Texas case to hold the Frosty Bites people in contempt of the injunction that was entered back in 1997.

A motion was made to consolidate the cases for pretrial proceedings. When the MDL Panel granted the motion, all of the cases were assigned to

me – including the Texas case. I got them in January 2001. I ruled against Dippin' Dots on the contempt motion because there were different parties, a different process and a different product. I allowed the Frosty Bites manufacturer and distributor to intervene in the Texas case and everything – including discovery – started over.

The parties vigorously litigated the case over the next 2 years. All of the actions against the retailers got resolved. But the litigation between Dippin' Dots and the Frosty Bites manufacturer and distributor slogged on. It was like King Kong battling Godzilla. By April, 2003, I had ruled on the six summary judgment motions that were filed. I resolved the trademark and trade dress and the patent infringement claims. But when the dust settled, I had patent invalidity claims, an antitrust counterclaim and unfair competition and theft of trade secrets claims that had to be tried. And that meant that I had a huge Lexecon problem.

As you know, in *Lexecon v. Milberg Weiss* (523 US 26), the Supreme Court held that a transferee court (that is me in Dippin' Dots) cannot use

28 U. S. C. § 1404(a) to transfer a case to itself for trial after MDL pretrial proceedings have been completed. Before that 1998 decision, it had been common practice for transferee courts to do just that. Indeed the practice had been recognized in the rules of the MDL Panel. To quote from the Manual for Complex Litigation fourth: "The Lexecon decision represents a clearly honest and straightforward attempt by the Supreme Court to interpret and apply the statutes adopted by Congress. Because self-transfer worked well in practice, and was nearly universally accepted by the federal courts and by most litigants, one would expect there to be an attempt to amend Title 28 to authorize this practice. If the statute is not amended, the federal courts will have lost some of the effectiveness of one of the most important case management tools they have. If self-transfer is not 'reauthorized,' some alternative will have to be invented."

So returning to Dippin' Dots, I had a huge Lexecon problem because the patent invalidity claims and the antitrust counterclaims (based upon alleged fraud on the patent office), were asserted only in the Northern

District of Texas case. Under Lexecon, the MDL panel had to send that case back to Texas for trial. I do not think that there was any way that the MDL Panel could have anticipated the MDL proceedings ending this way when it assigned the Dippin' Dots cases to me. Certainly, I did not see it coming. But it was a big problem. The Texas judge that had the case in the beginning had quit – not taken senior status, but quit, was gone. At this point the file was about 20 feet long stacked end to end. Just in the MDL proceeding, there were 746 docket entries. I had made dozens of rulings that would impact the trial in large and small ways. And the trial needed to occur as quickly as possible before additional litigation between the parties erupted. Realistically, I thought that could only happen if I tried the case.

The first thing that I tried for my case of lexeconitis was that old tried and true over the counter remedy – consent of the parties. I issued an Order requiring the parties to file a statement as to whether they would consent to trial of all issues before me in the Northern District of Georgia. The

Atlanta lawyers who had been representing Dippin' Dots said that they agreed to trial of all claims in Atlanta. For its Kentucky lawyers, it was just as easy to go to Atlanta as to Dallas. So Dippin' Dots agreed to trial in Atlanta. The Atlanta lawyers representing the Frosty Bites distributor also agreed to trial of the case in Atlanta. But the Dallas lawyers representing the Frosty Bites manufacturer said that their client would not consent and insisted upon a trial in Dallas. I got everybody on a telephone status conference and begged and pleaded and cajoled the Dallas lawyers. But it did not work.

At one point I boldly asserted: "Don't think that you can get rid of me by not consenting. I will accept an inter-circuit assignment and come to Dallas to try the case." A look of horror appeared on the face of my courtroom deputy clerk. The Dallas lawyers said: "Great. We would love to have you come to Dallas to try the case." The look of horror on my clerk's face deepened. Obviously, my case of lexeconitis was not going to be cured by an aspirin and a good nights rest.

So in July 2003, I signed an order suggesting that the MDL Panel remand the Texas case for trial. The Dippin' Dots case was a tsunami headed for the Northern District of Texas. It was going to hit the docket of some poor Texas judge and obliterate everything in sight. I felt that I had some responsibility to stop that if I could.

I wracked my brain trying to think of some way to solve my problem without having to go to Dallas to try the case there. I thought that maybe I could let the case go to the Northern District of Texas and when it got there suggest to the new judge that he or she transfer the case back to me in Atlanta under Section 1404(a) for the convenience of the parties and witnesses. However, Dippin' Dots was in Kentucky. The Frosty Bites manufacturer was in Florida. Mr. Mosey had moved to Connecticut. And the Frosty Bites distributor was in New York. So, transfer to Atlanta would really be only for the convenience of the judiciary. I admit that I thought about it, but finally decided that doing that would be an outright evasion of the Lexecon decision. I was not going to ask another judge to do that,

and possibly get the case embroiled in the type of mandamus action that resulted in the Lexecon decision. It was enough of a mess already. So, in the end, I thought that I had no choice but to go to Texas and try the case myself through an intercircuit assignment.

The first step was to talk to my Chief Judge about it. She finally said that, if I was determined to do this, to go ahead. I needed her acquiescence because I wanted to take my courtroom deputy clerk and court reporter with me. Borrowing personnel from the Northern District of Texas for such a long and complicated trial was not a practical alternative.

I next called the chief Judge of the Northern District of Texas and told him about the situation. I told him that if he wanted one of his fine judges to try the case that was okay with me. But if he wanted me to come out to Dallas and try it, that I was willing to do so. He accepted my offer.

The MDL Panel issued its remand order in August, 2003. Because I was an active judge going outside of my circuit, I had to get the Chief Judge of the Fifth Circuit and the Chief Judge of the Eleventh Circuit to

approve the intercircuit assignment. The request then went to the Committee on Intercircuit Assignments of the Judicial Conference. They all approved it. It then went to the Chief Justice for his approval. I got all of that done and I was ready to go to Dallas.

Of course, while all of this was going on, I was getting ready for the trial. After discussions with the parties, I bifurcated the trial. I decided that there would be two trials. The first trial would be for patent related claims only – the invalidity claims and the antitrust counterclaims. I thought that those claims could be tried in a manageable length of time, and that the unfair competition claims could be tried later without wholesale duplication of effort. I also thought that trying to try everything in one trial would result in a trial of mind-boggling complexity and confusion of the issues. Frankly, I also thought that the unfair competition claims would go away if we could resolve the patent claims. The parties seemed reasonably happy with my plan.

After being assured by Dallas that they had a courtroom for me, I specially set the first trial for October 2003. I gave each side 25 hours for testimony. With 5 hours of testimony a day, that meant the case would take no more than two and a half weeks to try. I knew when I was leaving and I knew about when I would be home. So this judge, my courtroom deputy clerk, my court reporter, 4 Atlanta lawyers, 2 Kentucky lawyers and a gaggle of paralegals all headed for Dallas, and checked into the Adolphus Hotel where we spent most of the next two and a half weeks. We were joined there by all of the principal parties. Not a single significant witness was from Dallas. We started the trial on October 6. We finished the evidence after about 9 days of testimony. On the third Monday of the trial, the jury returned a verdict finding the patent to be invalid and finding in favor of the Defendants on their antitrust counterclaim, but awarding no damages.

Predicably, there were a bunch of post trial motions that had to be dealt with such as a motion for a permanent injunction and motions for

attorney's fees. When all that was done, I had a conference with the parties and told them that I would not enter judgment on anything until all claims had been resolved. By this time it is Spring of 2004. I scheduled the second trial for the next October. It looked like my hopes of the other claims going away would be dashed. But in a last desperate attempt to resolve the case I order the parties to mediation before former Judge Sam Pointer in September. He performed a miracle and the parties agreed to mutual dismissal with prejudice of all of the claims involved in the second trial. Dippin' Dots was over, I thought. But entering final judgment on the patent claims was a long and contentious process that we finally finished early this year. We finished the last of the attorney's fees motions this summer.

In my opinion, this litigation was unnecessarily prolonged and expensive to the courts and the parties because of Lexecon. I hope that a legislative solution comes soon so that no District Judge has to do what I did in the Dippin' Dots case.

Johnson & Johnson

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June 28, 2006

The Honorable Jeff Sessions
Room SR-335
Russell Senate Office Building
United States Senate
Washington DC 20510

Re: *Multidistrict Litigation Restoration Act of 2005*

Dear Senator Sessions:

I am writing in advance of this week's hearing on H.R. 1038, the Multidistrict Litigation ("MDL") Restoration Act of 2005 (commonly referred to as the "Lexecon-fix" legislation), to identify a few potential areas of concern raised by the legislation.

First, I am concerned that Section II of the legislation raises constitutional problems under the Seventh Amendment and would result in invalid jury verdicts. The Seventh Amendment states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This clause has been interpreted as barring two different juries from "deciding the same factual issues." *Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43, 51 (D.D.C. 2002). In its present form, the MDL Restoration Act will necessarily result in such impermissible reexamination because different juries – in different courts – will decide compensatory and punitive damages.

Under Section II of the legislation, a transferee court may retain jurisdiction over an action for the determination of liability and punitive damages but must remand the action to the district court from which it originated (often referred to as the transferor court) for the determination of compensatory damages. From a Seventh Amendment perspective, the problem with this bifurcation is that the first jury considering punitive damages must consider the nature and extent of the plaintiff's injury – a fact that the second jury will inevitably "reexamine" in the context of awarding punitive damages.

Under the Supreme Court's recent decisions in *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW v. Gore*, 517 U.S. 559 (1996), determining the magnitude of a punitive damages award requires consideration of the "ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. Although there is no "bright-line ratio" that must be maintained between punitive and compensatory damages, a punitive damages award cannot comport with due process unless "the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general

damages recovered." *Id.* at 426. As a result, due process mandates that any court seeking to award punitive damages must consider the extent of the injury suffered by the plaintiff in calculating the punitive damages award. Under this legislation, however, if the jury in the MDL court complies with the constitutional standard and makes such a determination, it will have to engage in factual inquiries identical to the ones that the transferor court will subsequently need to consider in determining the amount of compensatory damages. In short, the Act imposes a Hobson's Choice on the transferee court – comply with *State Farm* and invite a Seventh Amendment violation, or comply with the Seventh Amendment and run afoul of *State Farm*.

Even absent *State Farm*'s requirements, this provision is a recipe for likely Seventh Amendment violations. In many states, punitive damages can only be awarded once a jury has made a number of factual findings. For example, some states require findings regarding the reprehensibility of the defendant's conduct. *See, e.g., Gallegos v. Citizens Ins. Agency*, 779 P.2d 99, 104 (N.M. 1989); Ohio Rev. Code § 2307.80. But consideration of a defendant's reprehensibility could easily overlap with the findings that will need to be made to award compensatory damages. Accordingly, in many states, a bifurcated proceeding – with punitive damages decided first – will inevitably result in an unconstitutional reexamination of factual findings when the second jury considers compensatory damages.

Second and independent of the constitutional problem, I am concerned that the legislation will have the unintended effect of making MDL proceedings less efficient because of the probability that more plaintiffs' lawyers – who generally prefer trying cases in their own home states and may not relish the prospect of more MDL trials – will seek to keep their cases in state court and out of MDLs.

One of the primary virtues of the MDL process is that it allows for coordinated discovery in related cases. Thus, a defendant facing numerous virtually identical cases in multiple states would ideally be able to engage in a single coordinated discovery process before an MDL judge, thereby avoiding unnecessary duplication and waste. The efficiency of the MDL process, however, is dependent on having federal jurisdiction over a substantial percentage of the lawsuits arising out of a controversy. If large numbers of cases virtually identical to those in an MDL proceeding are brought in state courts and the possibility of removal to federal court does not exist, there is no way to mandate that the discovery process in those state cases be coordinated with the discovery process in the MDL. As a result, while this legislation is intended to enhance the efficiency of MDL proceedings, it will instead weaken the ability of MDL judges to coordinate pretrial proceedings by encouraging the filing of more state court cases and thereby increasing duplicative discovery.

If a party in a state proceeding does not want to coordinate (or affirmatively seeks to increase the other party's cost of litigation), it can often employ a variety of tactics to frustrate such efforts by state judges. For example, a party may notice depositions of individuals deposed in the MDL or serve repetitive document requests. While the state court judge ultimately may quash such attempts at duplicative discovery, not all state courts will pressure parties to

coordinate discovery. Moreover, even if the party that wishes to coordinate ultimately persuades the state court to prohibit duplicative discovery, it will often incur needless expenses responding to wasteful discovery requests in the meanwhile.

In short, we are concerned that the effort to augment efficiency at the federal level will have the untended consequence of increasing state – federal conflicts and overall costs to litigants.

Thank you very much for the opportunity to make these comments.

Sincerely,

T. B Van Itallie, Jr

Theodore B. Van Itallie, Jr.

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