Counsel needs to figure the angles when circuit courts share jurisdiction.

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The statute governing federal multidistrict litigation (MDL) provides that any case transferred for consolidated pretrial proceedings shall be remanded back to the original or "transferor" court for trial. 28 U.S.C. 1407(a). When a case has been transferred outside of the transferor court's circuit and the "transferee" court has ruled on a dispositive motion (such as a motion to dismiss or for summary judgment), a party considering an interlocutory MDL appeal has a choice to make: to pursue an interlocutory appeal in the federal circuit in which the transferee court sits, or to wait until the case is remanded to the transferor court and pursue an appeal in that circuit. This can be an important decision, especially when the federal law differs between the circuits, and it requires an understanding of the complexities presented by the "law of the case" rule.

Following transfer, the transferee court has the power to decide motions to dismiss, motions for summary judgment and other pretrial motions that potentially will have a case-determinative effect on the litigation. See In re African-American Slave Descendants Litig., 471 F.3d 754, 756-757 (7th Cir. 2006) (discussing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 38 (1998)). While an MDL case is pending in the transferee court, interlocutory appeals of transferee court decisions usually must be brought in the federal judicial circuit in which the transferee court sits. See, e.g., FMC Corp. v. Glouster Eng'g Co., 830 F.2d 770, 771-772 (7th Cir. 1987) (the 7th U.S. Circuit Court of Appeals refused to hear an interlocutory appeal from an MDL proceeding pending before the District of Massachusetts, even though the case originally had been filed in a district court within the 7th Circuit).

Transferee courts, however, are not authorized to try cases transferred to them by the Judicial Panel on Multidistrict Litigation (JPML). The MDL statute authorizes transfer only for consolidated "pretrial proceedings." 28 U.S.C. 1407(a). Thus, "at or before the conclusion of such pretrial proceedings," any case to be tried must be remanded back to the transferor district court. Id. The U.S. Supreme Court has held that this statute precludes a transferee district court from transferring to itself for trial cases not resolved during MDL pretrial proceedings. Lexecon, 523 U.S. at 40-41.
Following remand, any appeal must be made to the court of appeals with jurisdiction over the transferor district court. See, e.g., *FMC Corp.*, 830 F.2d at 772 (when case had been remanded for trial, "any appeal from the judgment entered after trial would be heard by the court of appeals for the transferor court"). Thus, existing MDL procedural rules provide a party with the choice between seeking an interlocutory appeal in the "transferee circuit" or waiting until after remand to pursue an appeal (usually an appeal from a final judgment) in the circuit in which the case was originally filed.

**Choice of law and 'Korean Air'**

In *Van Dusen v. Barrack*, 376 U.S. 612, 637-639 (1964), the Supreme Court held that, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, the state law that would have been applied by the transferor court must be applied by the transferee court. Although some early decisions suggested that the federal law of the transferor court also would be applied post-transfer, the U.S. Circuit Court of Appeals for the District of Columbia held to the contrary in *In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987), aff'd on other grounds, 490 U.S. 122 (1988).

Writing for the majority, then-Judge Ruth Bader Ginsburg held that the state-law interests motivating the *Van Dusen* rule had no applicability in the federal law context: "Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory." Id. at 1175. Thus, the D.C. Circuit affirmed the district court's decision to apply a damages limitation of the Warsaw Convention to all of the claimants in an MDL proceeding—including claimants who had originally filed suit in the 2d Circuit—despite 2d Circuit authority rejecting the damages limitation. Id. at 1176.

The majority opinion briefly touched on the "law of the case" complexities of its ruling at the end of its analysis, stating that efficiency would be furthered if its decision was "law of the case" in any remanded action but acknowledging that the transferor circuit would have the "last word" on the issue. Id. at 1176. Judge Douglas Ginsburg's concurrence elaborated on the "law of the case" complexities. See id. at 1176-1186 (D.H. Ginsburg, J., concurring).

In those cases in which the transferee district court had decided a case-dispositive issue, there was a risk of inconsistent appellate rulings following remand, which risks could be reduced if transferee circuits were receptive to interlocutory appeals from the transferee district court, and if transferor circuits, in reviewing final judgments after remands, treated the transferee circuit rulings as "law of the case." Id. at 1180-1181. The possibility that some inconsistent appellate rulings would remain was an insufficient reason to adopt a different rule whereby the transferee district court would be required to analyze and apply multiple circuits' interpretations of federal law. Id.

**The interlocutory dilemma**

The 4th Circuit responded to the "law of the case" problems noted in *Korean Air* by requiring transferee courts in the 4th Circuit to certify for immediate appeal—pursuant to Fed. R. Civ. P. 54(b)—any dispositive decision involving fewer than all claimants, saying:

"A consolidated appeal, heard by the appellate court having jurisdiction over the transferee district court that entered the orders, is the best means of achieving the goals of efficient and uniform adjudication of numerous actions. There is no 'just reason' for delaying the dismissed plaintiffs' appeal rights until after remand to the transferor courts. Accordingly, transferee courts in this circuit must, at some point prior to filing a suggestion of remand, enter final judgment under Rule 54(b) with regard to any decision or order of that court that fully disposes of 'fewer than all the claims or the rights and liabilities of fewer than all the parties.' " In re *Food Lion Inc.*, 73 F.3d 528, 533 (4th Cir. 1996) (emphasis in original) (footnotes and citations omitted).
In the cases before it, the *Food Lion* court reversed a ruling of the JPML remanding the cases to their transferor courts and returned the cases to the transferee court, a decision the dissent characterized as "unprecedented." Id. at 534 (Butzner, J., dissenting).

The District of Maryland, serving as the transferee court in the Microsoft MDL proceedings, cited *Food Lion* in certifying, for immediate interlocutory appeal under 28 U.S.C. 1292(b), its ruling regarding the preclusive effect of certain factual findings made in the criminal case against Microsoft. In re *Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 743 (D. Md. 2003). In another MDL proceeding, however, a federal district court within the 5th Circuit refused to enter 54(b) certification so that an outcome-determinative ruling could be appealed prior to remand, stating that the *Food Lion* approach was not "mandated or preferable under the circumstances." *In re Taxable Mun. Bond Sec. Litig.*, No. 863, 1996 WL 120844, at *3 (E.D. La. March 19, 1996); see also *In re Enron Corp. Securities, Derivative & "ERISA" Litig.*, No. MDL-1446, 2006 WL 3447709, at *3 (S.D. Texas Nov. 21, 2006) (refusing to certify issue in MDL proceedings for interlocutory appeal and emphasizing that cases ultimately would be remanded back to transferor circuits that interpreted the applicable federal law differently).

The concern motivating the recommendations in *Korean Air* and *Food Lion*—that an unappealed case-determinative ruling by the transferee court potentially could be reviewed and reversed in the transferor circuit—has been confirmed in several decisions. In a case in which the JPML found that the concerns animating the 4th Circuit procedure (as announced in *Food Lion*) were not present, the JPML said that, after remand, the transferor circuit "will have power and authority to review any and all rulings made in the case, without regard to whether those rulings were made by the transferee court or the transferor court." In re *Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175, 1177 (J.P.M.L. 2000). The 3d Circuit similarly declared, in denying a petition for mandamus challenging a transferee court's rulings, that a transferee court's "previously unreviewed rulings are properly raised in the court of appeals for the transferor district should the case reach a final judgment there." *In re Briscoe*, 448 F.3d 201, 213-214 (3d Cir. 2006).

At least outside of the 4th Circuit, an attorney in an MDL case who suffers an unfavorable outcome-determinative ruling by the transferee district court has a strategic decision to make when courts in the transferor and transferee circuits have reached different conclusions on an important issue of federal law. If the transferee circuit has a more favorable interpretation of the relevant federal issue, then counsel should press for an appeal pursuant to 28 U.S.C. 1292(b), Fed. R. Civ. P. 54(b) or another statute allowing immediate review (e.g., Fed. R. Civ. P. 23(f)). On the other hand, if the law of the transferor circuit is preferable, the better course might be to wait for the case to be remanded and then seek application of the transferor circuit's law.

'E'xtraordinary circumstances'

At the heart of this strategic opportunity is a nuance of the "law of the case" rule. Generally stated, the law-of-the-case rule will be applied to prior decisions by the same court or by "a coordinate court in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). Although the specific scope of the rule and its exceptions differ somewhat among the circuits, a prior decision generally will be viewed as binding under the law-of-the-case rule in the absence of "extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." Id. at 817 (citation omitted). The law-of-the-case rule does not, however, limit an appellate court's review of a lower tribunal's ruling. Id. at 818.
A decision in an appeal from a transferee district court, before entry of final judgment, likely triggers the law-of-the-case rule and relegates a disappointed appellant to arguing "clear error" or invoking some other exception to the law-of-the-case rule. See, e.g., Korean Air, 829 F.3d at 1180 & n.15 (collecting cases applying law of the case to rulings of coordinate courts of appeals); Hill v. Henderson, 195 F.3d 671, 677-678 (D.C. Cir. 1999). In contrast, allowing the case to be remanded should give rise to unbridled appellate review by the transferor circuit. See, e.g., Briscoe, 448 F.3d at 213 (citing Allegheny Airlines Inc. v. LeMay, 448 F.2d 1341, 1344 (7th Cir. 1971)). Thus, a party likely to get only a single bite at the appellate apple should ensure that that appeal is taken to the most favorable court of appeals.

In light of the Lexecon ruling precluding MDL courts from self-transferring cases for trial, more and more counsel can expect to wrestle with this tactical option. See William J. Martin, Comment, "Reducing Delays in Hatch-Waxman Multidistrict Litigation," 71 U. Chi. L. Rev. 1173, 1180 (2004) (collecting statistics demonstrating that more cases were remanded in 1999, the year after Lexecon, than had been remanded in the first 29 years of the JPML). Indeed, some courts view Lexecon as dismantling an essential premise for the Korean Air ruling giving rise to these law-of-the-case complexities. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005). Until Congress amends the MDL statutes or Korean Air is overruled, however, the decision whether to take an interlocutory appeal will remain an important strategic choice.

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