I once had a really great case. Then, I did not. Let me explain.

The potential client called and explained that several plumbing fittings in the walls of her home had ruptured and caused a flood. The flood caused extensive damage in her walls and floors. However, her homeowner insurance company refused to honor the claim. The company explained that their investigation had revealed that the fittings were "cracked" and therefore "defective," and that defective products were not covered under her policy. The potential client then sought out an attorney to find the responsible party to pay for the expensive repairs to her water-soaked home. I had the allegedly "defective" brass fittings analyzed by a metallurgist who agreed that the cracked fittings were very substandard and violated applicable plumbing fitting standards. I searched the internet and found that a number of other homeowners in North Carolina were experiencing similar problems! Boy, I thought, what a great class action. I retained the client and got to work drafting the complaint. With only a little research, I discovered that a similar case had been filed in far away and cold Minnesota. I obtained a copy of that complaint and another similar complaint from California to use as drafting resources. I learned that the company that had supplied the fittings was named "Zurn," and had changed its' name after selling defective polybutylene piping years earlier that had resulted in an enormous settlement. I filed my class action complaint in Federal Court and waited to be contacted by defense counsel requesting the anticipated extension.

A few weeks later, I received a "notice of tag along." What was a "tag along," I wondered? I read the pleading and it seemed to indicate that my case was being transferred to the Federal Court in Minnesota. How bizarre, I thought. I called the clerk's office who indicated that the case was indeed being "transferred" to Minnesota because of the "MDL" and that the North Carolina file was being closed. What was an "MDL?" What had happened? Thus began my crash course into the legal world of Multidistrict Litigation. My case was indeed gone and never returned to North Carolina. Why? This article provides a primer and what you should know about Multidistrict Litigation.

The plumbing fitting could have been any consumer product, pharmaceutical drug or numerous other types of disputes. At it's core, an MDL may arise when a defendant is sued in multiple jurisdictions and seeks a single Federal forum to handle all of the pending cases across the country.

1. Basic Process for Creation of Multidistrict Litigation

28 U.S.C. 1407 provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided however*,

> That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any such claims before the remainder of the action is remanded.

Thus simply stated, an MDL can be formed when there are a number of federal court actions pending around the country that involve "one or more common questions of fact." This decision is made by the "United States Judicial Panel on Multidistrict Litigation," known informally as the MDL Panel. The MDL Panel consists of seven sitting federal judges appointed by the Chief Justice of the Supreme Court.[1] The panel conducts periodic hearings to make this determination and to select the federal judge and district to whom all the pending federal cases will be transferred to. The panel's website[2] provides information about the process, the composition of the current panel, recent decisions, and useful forms.

In a nutshell, the process of forming an MDL begins when someone files a motion with the MDL Panel to consolidate the pending similar federal actions pursuant to 28 U.S.C. 1407. There may be only three or four pending cases around the country or there may be thousands. The cases may be putative class actions or individual cases or a combination of both. The consolidation motion is typically filed by an attorney of record in a pending case who wants all of the actions consolidated in that district. Thereafter, other attorneys file pleadings with the MDL Panel indicating their support or opposition to the consolidation in the requested district. Not surprisingly, attorneys who have a similar pending case in another jurisdiction request consolidation in their district. The defendant in the pending cases will typically oppose centralization or support a district that it believes is most advantageous for it, such as the district where it has its principal place of business.

After the motion to consolidate is filed and responses are filed by all interested parties, the MDL panel will issue a hearing date and calendar. The MDL Panel has hearings every couple of months in different locations around the country. On the appointed hearing day, you can appear and argue to the Panel why the cases should be consolidated and why your requested jurisdiction is the "most convenient," and "will promote the just and efficient conduct" of the pending cases.[3] Depending on the number of attorneys requesting a particular district, you typically only have a few minutes to make your argument! After the arguments, the Panel will typically issue a brief order within a few weeks. If consolidated, or centralized, all pending federal actions will be promptly transferred to the "transferee court." Thereafter, within a short time, the transferee court will issue an order for an initial status conference. Importantly, all transferor courts close the case once it is transferred to the district of the newly formed MDL. Each MDL is assigned a docket number.

Similar cases that are filed around the country once an MDL is formed are called "tag alongs." A tag along pleading is filed in that court which essentially alerts the court that the case is being handled in an MDL.[4] The court will then transfer the newly filed case to the MDL.

2. Organization of the MDL

As discussed above, once an MDL has been formed, all pending cases from around the country are transferred to a single judge for handling. The judge will typically issue an order for a status conference. At the initial status conference the court will seek to determine the lay of the

land. The judge will ask questions about the case but more importantly the judge will establish a schedule to select and appoint leadership in the MDL. This is not much of an issue for the defendant, who will have retained counsel, but it is a huge issue for the plaintiffs because there may be numerous attorneys vying for this appointment. Typically the court will accept an statements from any plaintiffs attorney who wishes to be considered for lead or liaison counsel or the plaintiffs' steering committee. Depending on the size of the case, the court will allow brief oral argument from interested attorneys, then issue an order appointing leadership in the case. Lead counsel is typically a coveted position in an MDL because in essence you become the "managing partner," of the virtual law firm or "plaintiff's steering committee ("PSC")." The PSC is often comprised of five or more firms that are tasked with prosecuting the MDL. Various members of the PSC are then often tasked with various subcommittees such as discovery, document review, briefing, experts, or trial team. Attorneys who are not appointed to the PSC, and who may have had cases that were transferred into the MDL, are often on the outside looking in and not allowed to participate in the workup of the cases comprising the MDL.

Attorneys on the PSC, or who otherwise participate, in the MDL that ultimately settles are compensated via a "common benefit assessment." A common benefit assessment in its simplest terms is a percentage of the contingency fee that is recovered on the cases in the MDL. In other words, the court assesses a percentage of an attorney's contingency fee recovery for their case on behalf of the PSC because they have worked for the "common benefit," of the entire litigation. In theory, an attorney could retain a client(s), have the case(s) sent to an MDL for pre-trial disposition, have it handled by the PSC in numerous respects- discovery, motions, or other pretrial matters, then collect a fee if there is a settlement, minus the common benefit assessment. For example, suppose a pharmaceutical MDL settles for $100,000 for each qualifying person. The gross fee may be 1/3 or $33,000 for an individual case. A typical common benefit assessment may be 10% of the fee or $3,300, for a net fee to the attorney of $29,700 and $3,300 to the PSC to be divided among the PSC. Of course, if there are numerous cases in the MDL, this could be a substantial recovery for the PSC.

3. <u>What matters are typically handled by the MDL Judge?</u>

Once leadership is appointed the court will typically instruct the parties to confer and present the court with proposed case management orders on a variety of topics[5] including:

a. Preservation and production of Electronically Stored Information;
b. Document production;
c. Discovery;
d. Scheduling Order; and
e. Included in the scheduling order are typically milestones and hearing dates for motions to dismiss and class certification if applicable.

Orders issued by the court on motions to dismiss, summary judgment or class certification, like any case, are often very instructive for the parties on global resolution. However, in an MDL which often involves numerous aggregated cases, these order take on more significance for case evaluation. In addition, the court will often encourage the parties to mediate. Settlement of an MDL is often very time consuming and complicated. Any settlement

approved by the MDL judge is binding on all cases filed in either federal or state court against the same defendant for the same type of case. However, an individual litigant is always allowed to "opt out," of any settlement and proceed with their case on an individual basis in the court where the case was originally filed.

4. When do cases return to the original transferor courts?

As expressly provided for in 28 U.S.C. 1407, the MDL judge cannot actually try the cases. "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." [6]This means that the MDL judge can hear and decide motions to dismiss, summary judgment motions, class certification motions if appropriate, and numerous other pretrial motions, but cannot actually try the case. This creates a very potentially cumbersome outcome.

Assume a complex case is handled by the MDL judge for several years, but the defendant refuses to settle. At some point, the cases would be sent back to the original courts where the actions were filed, to a new judge that knows nothing about the case. This is not something that most judges want, therefore there is typically pressure and rulings from the MDL judge to resolve the MDL. This pressure can take many forms that go beyond the scope of this article. Mediation or bellwether trials are just a few of the things that the court can do.

5. Seminal MDL Cases

One of the seminal U.S. Supreme Court opinions regarding the authority of the transferor court in MDL proceedings is *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[7] In *Lexecon,* an class action was filed against multiple defendants, including Lexecon, in connection with the failure of Lincoln Savings and Loan. It, and other actions arising out of that failure were transferred for pretrial proceedings to the District Court of Arizona under 28 U.S.C. § 1407(a), which authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but provides that the Panel "shall" remand any such action to the original district "at or before the conclusion of such pretrial proceedings."

Before the pretrial proceedings ended in *Lexecon*, the plaintiffs and Lexecon reached a "resolution," and the claims against Lexecon were dismissed. Subsequently, Lexecon brought a diversity action in the Northern District of Illinois against the law firms who served as class counsel for the plaintiffs, alleging various torts, including defamation, arising from the firms' conduct as counsel for the plaintiffs. The defendants moved for, and the Panel ordered, a § 1407(a) transfer to the District of Arizona. After the remaining parties to the Lincoln Savings MDL reached a final settlement, Lexecon moved the Arizona District Court to refer the case back to the Panel for remand to the Northern District of Illinois. The law firms filed a countermotion requesting the Arizona District Court to invoke § 1404(a) to "transfer" the case to itself for trial on Lexecon's remaining defamation claim. The court denied Lexecon's motion and assigned the case to itself for trial. Following a verdict in favor of the law firms, Lexecon appealed the transfer and the Ninth Circuit affirmed the trial court's decision.

On appeal to the Supreme Court, however, Lexecon won. In finding in favor of Lexecon, the Supreme Court held that § 1407 "not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, *but obligates* the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course."[8]

The procedural difficulties that MDLs present were on display in *In re Diet Drugs Products Litigation.*[9] After the FDA issued a health warning about two diet drugs, approximately eighteen thousand individual cases and one hundred class actions were filed against the drug manufacturer. The cases were consolidated into a MDL, but not before a putative class action was filed in a Texas state court (the "Gonzalez Action"). The Gonzalez Action bounced between the MDL court and state court, during which time the MDL court gave preliminary approval to a global settlement that would have included the Gonzalez Action class members.

However, a Texas judge certified a class of only Texas citizens while the Gonzalez Action was on remand in state court. The effect of this ruling meant that the Gonzalez class were members of a nearly-identical class in the MDL proceedings. When the Texas state court issued an order opting all of the un-named class members from the MDL global settlement, the MDL court simultaneously issued PTO 1227. PTO 1227 declared the Texas state court order as null and void, and enjoined counsel for the Gonzalez plaintiffs from attempting to secure a class opt out of those certified in the Gonzalez Action.

The Gonzalez class appealed PTO 1227 to the Third Circuit, who affirmed the MDL court. The challenge centered on the Anti-Injunction Act, which states that federal courts cannot issue injunctions "to stay proceedings in a State court" except "where necessary to in aid of its jurisdiction."[10] For this exception, "the state action must not simply threaten to reach judgment first, it must interfere with the federal court's own path to judgment."[11] While the court was hesitant to say that MDLs or class actions provide a convenient work-around from the Anti-Injunction Act, it also recognized the tremendous amount of time and effort that go into crafting a global settlement in the MDL context. Specifically, the appellate court noted that the MDL case involved over two thousand cases with a certified class of over six million people. The tremendous disruption caused by the Gonzalez Action interfered with the MDL court's ability to oversee an effective resolution of the case, justifying the injunction of the parallel state court proceeding.

The *Lexecon* and *In re Diet Drugs* cases highlight the inherent challenges that MDL cases present to attorneys and courts alike. Attempting to get around the MDL's authority, or encouraging the court to over-extend its authority, can lead to a significant waste of resources.

6. Conclusion

MDLs add an additional layer of complexity to litigation. Familiarity with the basic structure of an MDL, however, can save an attorney from the initial surprise that comes attached to a tag along motion. The receipt of a tag along motion does not mean that the attorney has lost the case forever.

When I filed my case against Zurn, as discussed at the beginning of this article, the MDL Panel had recently transferred all pending cases to an MDL in a Minnesota federal court; however the court had not yet appointed the leadership in the case. I introduced myself to the attorney in Minnesota who everyone agreed should be appointed lead counsel (he was). He appointed me to the plaintiffs' steering committee and over the next few years, I was asked to work on various aspects of the MDL. Although I lost my once-great case, I ended up with a pretty good one. The MDL settled prior to the individual cases being sent back to their respective transferor courts. Settlement of an MDL is a common occurrence.[12] Thereafter, we made a common benefit fee request and it was granted. The settlement was okay, and I made a little money- though certainly not as much had the case proceeded solely in North Carolina.

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[1] See 28 U.S.C. § 1407(d)
[2] See www.jpml.uscourts.gov
[3] See 28 U.S.C. § 1407(a)
[4] An example of a tag along pleading is found here: http://www.jpml.uscourts.gov/sites/jpml/files/Notice_of_Tag-Along_Action-Sample-Form-1-31-2014.pdf (last visited May 4, 2016)
[5] The MANUAL FOR COMPLEX LITIGATION (4th ed. 2016), which is published by the Federal Judicial Center, is a go to manual used by counsel and the court for an MDL. The Manual supplements and enhances the Federal Rules of Civil Procedure and addresses many complex or unique issues that are often encountered in an MDL.
[6] 28 U.S.C. § 1408(a)
[7] 523 U.S. 26 (1998)
[8] 523 U.S. at 34 (emphasis added).
[9] 282 F.3d 202 (3d Cir. 2002)
[10] 28 U.S.C. § 2283
[11] 282 F.3d at 234
[12] While the JPML does not report the number of cases that settle, the author's personal experience and anecdotal evidence shows that the majority of MDL cases settle. Further, the JPML has reported that since its creation in 1968, there have been 553,249 civil actions that were centralized pursuant to 28 U.S.C. § 1407. Of those actions, only 15,844 were remanded for trial. See Statistical Analysis of Multidistrict Litigation Fiscal Year 2015, *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf (last visited May 4, 2015)