

BEFORE THE UNITED STATES JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

**In re: DePuy Orthopaedics, Inc. ASR Hip Implant
Products Liability Litigation**

MDL NO. 2197

LETITIA MALKMUS and GLEN MALKMUS,

Plaintiffs

v.

E.D. Wisconsin C.A. No. 2:11-cv-00365-AEG

DEPUY ORTHOPAEDICS, INC. et al,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO VACATE CONDITIONAL TRANSFER ORDER 39**

I. BACKGROUND

Plaintiffs, LETITIA MALKMUS and GLEN MALKMUS, filed this action in the Circuit Court of Kenosha County, Wisconsin. Plaintiffs' Complaint in that court includes valid state law claims against the distributor of the recalled DePuy ASR Hip implant which failed in each plaintiff, requiring revision surgery. A copy of the Plaintiffs' filed Complaint is attached hereto as **Exhibit 1**. Despite Wisconsin law permitting suits against distributors of failed orthopedic devices, Defendants removed the action to the Eastern District of Wisconsin, claiming the state court defendant had been fraudulently joined. A copy of the Docket Sheet for this action in the Eastern District of Wisconsin is attached hereto as **Exhibit 2**. Plaintiffs filed a motion for remand, a copy of which is attached hereto as **Exhibit 3**, demonstrating proper joinder. Briefing on the motion for remand is almost complete at this time.¹

¹ Defendants have filed an Opposition to the Motion for Remand and Plaintiffs' Reply is due on May 24, 2011, although Plaintiffs anticipate filing their Reply prior to the deadline.

II. ARGUMENT

A. This Panel has found that a transferor court may rule on a motion for remand.

Plaintiffs are aware that this Panel recently ruled on several motions to vacate with respect to this MDL 2197, denying such motions and finding that the transfer of the actions would “serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.” *In Re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Lit.*, Transfer Order at 1 (J.P.M.L. Apr. 18, 2011). Pointing to the fact that the motions to vacate at issue relied primarily on the pendency of motions to remand, this Panel found that “Plaintiffs in these actions can present their motions for remand to the transferee judge.” *Id.* Notably, however, this Panel then continued its ruling, confirming:

Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not in any way limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court wishing to rule upon that motion (or any other motion) generally has adequate time in which to do so.

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Such finding is, of course, in keeping with Rule 2.1(d) of the Rules of Procedure of this Panel, which Rule states:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court.

Rule 2.1(d) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation.

Based upon Rule 2.1(d) and this Panel’s plain language in its recent ruling, it is evident that a transferor court may determine a motion for remand even after a conditional transfer order has been issued.

B. DePuy misrepresents this Panel’s instructions by stating this Panel has directed transferor courts to avoid ruling on remand.

Defendant DePuy has a radically different view of this Panel’s position on the consideration of remand motions and the meaning of the recent Transfer Order. In case after case filed across the country, DePuy has sought the stay of actions involving the DePuy ASR Hip Implant pending transfer to MDL 2197. In its motions to stay and subsequent briefing, DePuy has argued vehemently that the transferor courts should not consider motions to remand pending transfer but should instead stay all decisions pending transfer. While plaintiffs have argued that the transferor courts have both the authority, pursuant to Rule 2.1(d) and the obligation to resolve jurisdictional questions prior to entering a stay pending transfer,² DePuy has repeatedly and incorrectly informed federal district courts that this Panel has a stated policy

² The United States Supreme Court has declared that a court is to presume that an action lies outside of its limited jurisdiction and answer the first and fundamental question in every case – that of jurisdiction -- even when it is not raised by the parties. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Thus, jurisdiction must be established as a threshold matter. *Steel Co.* at 94-5. (Finding that this requirement “‘springs from the nature and limits of the judicial power of the United States’ and is ‘*inflexible and without exception.*’”) (Emphasis supplied.) Citing a “long and venerable line of cases,” the Supreme Court has instructed that jurisdiction defines the bounds of authorized judicial action:

Without jurisdiction the court cannot proceed *at all* in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the *only* function remaining to the court is that of announcing the fact and dismissing the cause.

Id. at 94 (Emphasis supplied).

that transferor courts should avoid ruling on remand. *See e.g.* Replies In Support of Defendants’ Motion to Stay in: *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501-KJD-RJJ at 3-4; *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.) at 2; *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086-MEF (M.D. Ala.) at 2; *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087-WKW-CSC (M.D. Ala.) at 2; *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088-WKW-SRW (M.D. Ala.) at 2; *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027-MHT-CSC (M.D. Ala.) at 2; *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC Medical, LLC et al.*, Case No. 1:11-CV-00869 (N.D.Ga.) at 7; *Davis v. DC Medical, LLC et al.*, Case No. 1:11-CV-00870 (N.D.Ga.) at 7; *Davis v. DC Medical, LLC et al.*, Case No.1:11-CV-00881 (N.D.Ga.) at 7; *Gray v. DC Medical, LLC et al.*, Case No. 1:11-CV-00871(N.D.Ga.) at 7; *Hershberger v. DC Medical, LLC et al.*, Case No. 1:11-CV-00944 (N.D.Ga.) at 7; *Hinton v. DC Medical, LLC et al.*, Case No. 1:11-CV-00935 (N.D.Ga.) at 7; *Jackson v. DC Medical, LLC et al.*, Case No. 1:11-CV-00873 (N.D.Ga.) at 7; *King v. DC Medical, LLC et al.*, Case No. 1:11-CV-00882 (N.D.Ga.) at 7; *Lebeda v. DC Medical, LLC et al.*, Case No. 1:11-CV-00875 (N.D.Ga.) at 7; *McClure v. DC Medical, LLC et al.*, Case No. 1:11-CV-00877 (N.D.Ga.) at 7; *McDowell v. DC Medical, LLC et al.*, Case No. 1:11-CV-00939 (N.D.Ga.) at 7; *Scott v. DC Medical, LLC et al.*, Case No. 1:11-CV-00878 (N.D. Ga.); *Scullin v. DC Medical, LLC et al.*, Case No. 1:11-CV-00879 (N.D.Ga.) at 7; *Sedlar v. DC Medical, LLC et al.*, Case No. 1:11-CV-00936 (N.D.Ga.) at 7; *Starling v. DC Medical, LLC et al.*, Case No. 1:11-CV-00883 (N.D.Ga.) at 7; *Welch v. DC Medical, LLC et al.*, Case No. 1:11-CV-00880 (N.D.Ga.) at 7; *Williams v. DC Medical, LLC et al.*, Case No. 1:11-CV-00940 (N.D.Ga.) at 7; *Crawley v. DC Medical, LLC, et al.*, Case No. 4:11-CV-000067 (S.D.Ga.) at 6; and *Proper v. DePuy Orthopaedics, Inc.*, Case No.

4:11-cv-00217 (W.D. Mo.) at 2-3, *Zaborsky v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00251-JAG (E.D. Va.) at 3, *Rundle v. DePuy Orthopaedics, Inc., et al.* Case No. 2:11-cv-00634-ONO-GWF (D. Nev.) at 3, *Brannon v. D C Medical, LLC, et al.*, Case No. 1:11-cv-01170-TCB (N.D. Ga.) at 6; *Finley v. D C Medical, LLC et al.*, Case No. 1:11-cv-01171 (N.D. Ga.) at 6; *Lewis v. D C Medical, LLC et al.*, Case No. 1:11-cv-01172 (N.D. Ga.) at 6; *Gallimore v. D C Medical, LLC et al.*, Case No. 1:11-cv-01173 (N.D. Ga.) at 6; *Wilson v. D C Medical, LLC et al.*, Case No. 1:11-cv-01174 (N.D. Ga.) at 6, copies of which are attached hereto as **Exhibits 4 through 36** respectively. The present case is no exception. See Defendants Reply in Support of their Motion to Stay, *Malkmus v. DePuy Orthopaedics, Inc., et al*, Case No. 2:11-cv-00365 (E.D. Wis.) at 3, a copy of which is attached hereto as **Exhibit 37**.

Thus, in pleadings filed in the District of Nevada, Middle District of Alabama, District of Arizona, Northern District of Georgia, Southern District of Georgia, Eastern District of Virginia and Eastern District of Wisconsin, DePuy has argued:

[T]he MDL Panel has made it clear that transferor courts should *avoid* ruling on pending remand and other pretrial motions to promote the consistent and efficient resolution of overlapping pretrial matters.

Id. (Emphasis original in some but not all citations). DePuy would have district courts believe that the Panel has directed them to avoid ruling on motions to remand pending transfer to the MDL.³

In support of this notion, DePuy has cited the Panel's recent Transfer Order in MDL 2197, stating that in the Transfer Order, the Panel rejected the argument that a district court should consider a motion for remand and not enter a stay pending transfer. See *e.g. Day v.*

³ DePuy has further proclaimed that this Panel has recognized that the MDL court is best situated to address remand motions. Exhibit 5, *Milner v. DePuy*, Exhibit 6, *Slay v. DePuy*, Exhibit 7, *Harper v. DePuy*, Exhibit 8, *Patterson v. DePuy* and Exhibit 9, *Taylor v. DePuy*, Replies at 2.

DePuy, Reply at 4 (“...their attempts to defeat federal jurisdiction and transfer by opposing removal should not preclude staying this action. In fact...the MDL Panel rejected that very argument...”). Similarly in *Beaver v. DePuy*, DePuy cited to the Transfer Order and asserted:

Plaintiff’s interpretation of the MDL Panel’s intent is belied by an Order recently entered in those decisions. ... To the contrary, this Order makes clear that the Panel intends that the MDL judge should decide jurisdictional issues, including motions to remand...

Beaver v. DePuy, Reply at 16.⁴

Despite quoting extensively from the Transfer Order in these pleadings, DePuy omits footnote 1 of the Panel’s decision. Thus, DePuy fails to quote that portion of the Order which contradicts DePuy’s premise that the Panel would mandate a stay without consideration of a motion to remand once the conditional transfer order has been entered. To the contrary, this Panel, in the very Transfer Order cited by DePuy, found:

Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not in any way limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court wishing to rule upon that motion (or any other motion) generally has adequate time in which to do so.

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⁴ DePuy takes the opposite tact in pleadings filed before this Panel, however, interpreting the Transfer Order to mean “the transferor court can choose if it so wishes, to decide a pending remand motion up until the case is transferred to the MDL.” See Defendants Briefs in Opposition to Motion to Vacate Transfer Order filed in *Bedgood, et al v. D C Medical, LLC, et al*, and *Dana Beaver, et al v. D C Medical, et al*, in proceedings before this Panel, attached hereto as **Exhibits 38** and **39** respectively.

As this litigation plays out across the country, DePuy is also fond of citing to a 2005 letter from the Panel as support for entry of a stay. Thus, in the present case and many others, DePuy wrote:

This is particularly so, given the MDL Panel's *stated preference* that transferor courts defer ruling on remand motions in cases tagged for MDL transfer to ensure uniform treatment of recurring jurisdictional issues. See e.g., Ex. 3, Ltr. From JPML to Hon. Ricardo H. Hinojosa (Mar. 21, 2005).

See Exhibit 37, *Malkmus v. DePuy*, Reply at p. 3 (emphasis supplied). See also, Replies in Support of Motions to Stay in Exhibit 4, *Day v. DePuy* at 5; Exhibit 5, *Milner v. DePuy* at 3; Exhibit 6, *Slay v. DePuy* at 2; Exhibit 7, *Harper v. DePuy* at 3; Exhibit 8, *Patterson v. DePuy* at 3; Exhibit 9, *Taylor v. DePuy* at 2; Exhibit 10, *LeMarr v. DePuy* at 4-5; Exhibit 11, *Beaver v. DePuy* at n.17; Exhibit 12, *Betty Davis v. DC Medical, LLC et al.* at n.17; Exhibit 13, *Sandra Davis v. DC Medical, LLC et al.* at n.17; Exhibit 14, *Gray v. DC Medical, LLC et al.* at n.17; Exhibit 15, *Hershberger v. DC Medical, LLC et al.* at n.17; Exhibit 16, *Hinton v. DC Medical, LLC et al.* at n.17; Exhibit 17, *Jackson v. DC Medical, LLC et al.* at n.17; Exhibit 18, *King v. DC Medical, LLC et al.* at n.17; Exhibit 19, *Lebeda v. DC Medical, LLC et al.* at n.17; Exhibit 20, *McClure v. DC Medical, LLC et al.*, at n.17; Exhibit 21, *McDowell v. DC Medical, LLC et al.* at n.17; Exhibit 22, *Scott v. DC Medical, LLC et al.* at n.17; Exhibit 23, *Scullin v. DC Medical, LLC et al.* at n.17; Exhibit 24, *Sedlar v. DC Medical, LLC et al.* at n.17; Exhibit 25, *Starling v. DC Medical, LLC et al.* at n.17; Exhibit 26, *Welch v. DC Medical, LLC et al.* at n.17; Exhibit 27, *Williams v. DC Medical, LLC et al.* at n.17; Exhibit 28; *Crawley v. DePuy* at 14; Exhibit 30, *Zaborsky v. DePuy* at 4, (claiming the MDL Panel has “expressly stated that transferor courts should defer ruling on remand motions.”); and Defendants’ Responses to Plaintiffs’ Motions for Remand in *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045 (W.D. Ky.) at

5; *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046 (W.D. Ky.) at 5; *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00047 (W.D. Ky.) at 5; *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048 (W.D. Ky.) at 5; *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049 (W.D. Ky.) at 5; *Thomas v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00050 (W.D. Ky.) at 5; *Kimbro v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051 (W.D. Ky.) at 5; *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052 (W.D. Ky.) at 5; attached hereto as **Exhibits 40 thru 47**, respectively.

DePuy has even grouped many of these arguments under the subheading, “The MDL Panel Encourages Transferor Courts to Defer Ruling on Motions to Remand Pending MDL Transfer.” See Exhibit 37, *Malkmus v. DePuy* at 3; Exhibit 4, *Day v. DePuy*, at 4; Exhibit 5, *Milner v. DePuy* at 3; Exhibit 6, *Slay v. DePuy* at 2; Exhibit 7, *Harper v. DePuy* at 3; Exhibit 8, *Patterson v. DePuy* at 3; Exhibit 9, *Taylor v. DePuy* at 2; Exhibit 10, *LeMarr v. DePuy* at 4-5; Exhibit 11, *Beaver v. DePuy*; at n.17; Exhibit 12, *Betty Davis v. DC Medical, LLC et al.* at n.17; Exhibit 13, *Sandra Davis v. DC Medical, LLC et al.* at n.17; Exhibit 14, *Gray v. DC Medical, LLC et al.* at n.17; Exhibit 15, *Hershberger v. DC Medical, LLC et al.* at n.17; Exhibit 16, *Hinton v. DC Medical, LLC et al.* at n.17; Exhibit 17, *Jackson v. DC Medical, LLC et al.* at n.17; Exhibit 18, *King v. DC Medical, LLC et al.* at n.17; Exhibit 19, *Lebeda v. DC Medical, LLC et al.* at n.17; Exhibit 20, *McClure v. DC Medical, LLC et al.*, at n.17; Exhibit 21, *McDowell v. DC Medical, LLC et al.* at n.17; Exhibit 22, *Scott v. DC Medical, LLC et al.* at n.17; Exhibit 23, *Scullin v. DC Medical, LLC et al.* at n.17; Exhibit 24, *Sedlar v. DC Medical, LLC et a.* at n.17; Exhibit 25, *Starling v. DC Medical, LLC et al.* at n.17; Exhibit 26, *Welch v. DC Medical, LLC et al.* at n.17; Exhibit 27, *Williams v. DC Medical, LLC et al.* at n.17; Exhibit 29, *Proper v. DePuy*

at 3; and Exhibit 31, *Rundle v. DePuy* at 4. Use of this subheading underscores DePuy's goal in these Replies: to convince district courts that this Panel wants them to stay actions pending transfer and defer ruling on remand motions. *See also* Exhibit 31, *Rundle v. DePuy* at 4 (“As a threshold matter, Plaintiffs’ argument ... directly conflicts with the fact that the MDL Panel *encourages* transferor courts to defer on motions to remand.”) (Emphasis original).

Clearly, Defendant DePuy is misstating this Panel's position. Through its assertions, oftentimes with no, or incomplete, citations to authority, this Defendant is leading federal district courts to believe that this Panel has a preference and policy in favor of granting stays and against consideration of motions to remand by transferor courts once a conditional transfer order has been entered. Defendant DePuy would have federal district courts comply with this Panel's purported policy by granting a stay in every case in which the Panel has issued a conditional transfer order.

While these claims generally appear in cases in DePuy's Reply Brief in Support of its Motion to Stay, DePuy has also made similar overreaching statements in its Brief in Opposition to Plaintiff's Motion to Remand, stating:

The MDL Panel authorized the creation of MDL 2197, in part, so similar jurisdictional issues affecting cases nationwide could be decided in a consistent and economically efficient manner by one federal judge. Accordingly, the Court should defer consideration of Plaintiffs' Motion to Remand pending transfer of this case to MDL 2197.

See Malkmus v. DePuy Orthopaedics, Inc. et al., Defendants DePuy Orthopaedics, Inc. and TRP & Associates, LLC's Brief in Opposition to Plaintiffs' Motion to Remand at 3, attached as **Exhibit 48**. *See also, Banks v. DePuy*, Response in Opposition to Plaintiffs' Motion to Remand at 8 (“The MDL Panel authorized the creation of MDL 2197, in part, so that one federal

judge could decide similar jurisdictional issues consistently and efficiently”), attached as **Exhibit 49**. Once again, DePuy would have a transferor court believe that it is this Panel’s instruction that motions for remand be stayed pending transfer to the MDL. DePuy thus reads into the Rules of Procedure of this Panel, a new rule, contradictory to Rule 2.1(d), which would require a transferor court to enter a stay of any motion for remand upon issuance of the conditional transfer order. Such result, achieved by heavy-handed means, is neither just nor efficient and thus, is not in keeping with the stated goals of an MDL proceeding.

C. Through its gamesmanship, DePuy uses conditional transfer orders to obtain stays and delay proceedings wasting resources of the parties, counsel and courts.

District courts entertaining actions which may be related to an MDL proceeding are likely to be persuaded by the opinion of this Panel on issues which come before them when a conditional transfer order has been issued. Defendant DePuy thus engages in gamesmanship when it informs those same courts that this Panel has a “stated preference” that they defer ruling on remand motions pending transfer or that this Panel has “made it clear” that they should “avoid ruling” on remand motions. *See e.g.*, Exhibit 37, *Malkmus v. DePuy*, Reply at 3; Exhibit 4, *Day v. DePuy*, Reply at 3-5; and Exhibit 11, *Beaver v. DePuy*, Reply at 7, 15-17. *See also*, Exhibit 32, *Brannon v. DePuy*, Reply at 6-7 (“The MDL Panel made it clear that transferor courts should avoid ruling on pending remand and other pretrial motions ... many courts have consistently recognized the MDL Panel’s goals and declined to rule on motions to remand...”) Justice is not served by such means.

Nor is efficiency served when a district court enters a stay, almost automatically, as a result of being informed that it is the preference of this Panel to do so. Rather, the result of such scenario is delay. While the MDL transferee court may consider the motion for remand at a later

date, such date may be much later. Matters that are fully briefed could be resolved quickly and efficiently by the transferor court. Such preparation is wasted if the matter is stayed during the months it takes to accomplish transfer and then redrafted for the transferee court.⁵ Delay and wasted efforts on the part of the parties, counsel and the transferor court are surely not the results which were sought in the creation of the multidistrict litigation system. Nor is it convenient for the parties, counsel or the MDL presiding Judge to transfer numerous cases to the MDL proceeding for consideration of motions to remand where those same motions were poised for decision until the transferor court was informed that this Panel has made it clear that they should not rule on such motions.

Pursuant to 28 U.S.C. §1407, the purpose of multidistrict litigation is, in part, to promote “the just and efficient conduct of litigation.” However, in this MDL, a pattern and practice has emerged wherein the issuance of a conditional transfer order by this Panel gives rise to an almost automatic stay in the transferor district court. The resulting unjust and inefficient situation does not comport with §1407 or the purpose of an MDL proceeding. In vacating the conditional transfer order, this Panel would affirm the true meaning of conditional transfer orders in the MDL system, bringing about a just and efficient result.

III. CONCLUSION

For the foregoing reasons, Plaintiffs would submit that the interests of justice, efficiency, and conservation of resources require that this matter remain pending in the Eastern District of Wisconsin. Therefore, this Panel should vacate CTO-39 as it relates to Plaintiffs, LETITIA MALKMUS and GLEN MALKMUS.

⁵ Plaintiffs acknowledge that the majority of the briefing on any pending motions to remand would likely be able to be incorporated in the briefs filed in the MDL. However, some research and redrafting will be required to ensure that the briefs are appropriate for the new forum.

Dated: May 13, 2011

Respectfully submitted,

[/s/ Jennifer Anne Gore Maglio](#)

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all counsel of record and served the unrepresented defendants by facsimile, email, hand-delivery and/or U.S. Mail, postage prepaid and properly addressed.

[/s/ Jennifer Anne Gore Maglio](#)

Jennifer Anne Gore Maglio, Esquire