

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.

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO VACATE
CONDITIONAL TRANSFER ORDER 39**

I. BACKGROUND

Plaintiffs, LETITIA MALKMUS and GLEN MALKMUS filed an amended complaint in March 2011 in Kenosha County, Wisconsin against Defendants, DEPUY ORTHOPAEDICS, INC. and its distributor, TRP and ASSOCIATES, LLC. Defendants removed the action to the Federal District Court for the Eastern District of Wisconsin alleging fraudulent joinder. Plaintiffs filed a Motion to Remand with the District Court, which is fully briefed. Defendants filed a Motion to Stay with the District Court, which is also fully briefed.

This Panel issued Conditional Transfer Order No. 39 ("CTO-39") conditionally transferring several cases, including the present case, to the Northern District of Ohio for consolidation with other cases in pending MDL 2197. Plaintiffs opposed CTO-39 and filed a Motion to Vacate Conditional Transfer Order 39 ("Motion to Vacate") along with a Memorandum in Support of Motion to Vacate Conditional Transfer Order 39 ("Memo in

Support”). Defendant DePuy filed its Opposition to Plaintiffs’ Motion to Vacate Conditional Transfer Order 39 (“Opposition”) on June 3, 2011 to which Plaintiffs now file this Reply.

II. ARGUMENT

A. Defendant’s Attempt to Reshape Plaintiffs’ Arguments Regarding Vacating CTO-39 Cannot Stand

To paraphrase the first line of Defendant’s Opposition, Defendant would have this case be no different in the end than other cases which have come before this Panel in this MDL. Defendant would prefer that the present Plaintiffs have made the same arguments and receive the same result, i.e., transfer to the MDL, as the plaintiffs which have preceded them. Thus, Defendant states that Plaintiffs’ core argument is that they have a remand motion pending in the transferor court. *See* Opposition at 1. Such characterization of Plaintiffs’ Motion to Vacate greatly misses the mark.

Plaintiffs do not dispute that this Panel has ruled that a pending motion for remand is not a basis for refusing to transfer an action to an MDL. In fact, Plaintiffs expressly acknowledged this Panel’s ruling to that effect in their Memorandum in Support of their Motion to Vacate. *See* Memo in Support at 2. Plaintiffs also pointed out that this Panel has found that a transferor court may rule on a motion to remand pending transfer, an option which Defendant has gone to great lengths to ensure that transferor courts do not exercise. *See* Memo in Support at 2 *citing In Re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, MDL No. 2197, Transfer Order, n. 1 (J.P.M.L. Apr. 18, 2011).

Plaintiffs did not make a core argument that this Panel should vacate CTO 39 because they have a pending motion for remand. Such argument would be contrary to this Panel’s previous rulings (thus explaining Defendant’s preference for such argument). Rather, Plaintiffs’ core argument was, and continues to be, that Defendant has consistently misrepresented this

Panel's position on the entry of a stay pending remand, which behavior has led to unjust and inefficient litigation outcomes which do not comport with the purpose and goals of an MDL proceeding.¹

Defendant attempts to dismiss Plaintiffs' true argument by labeling it preposterous and an "add-on." As support for these labels, Defendant cites to cases wherein transferor courts granted stays pending remand. Plaintiffs would submit that there are also many cases in which stays were denied pending remand. *See e.g., Lloyd v. Cabell Huntington Hospital, Inc.*, 58 F. Supp. 2d 694, 696 (S.D. W. Va. 1999) and *Stern v. Mutual Life Ins. Co. of New York*, 968 F. Supp. 637, 639 (N.D. Ala. 1997). Therefore, the premise that this Panel's position on the topic would matter to transferor courts is not preposterous. Rather, it is reasonable to presume that a transferor court faced with authority on both sides of the issue of whether to grant a stay pending remand would be strongly persuaded by this Panel's opinion on the issue. This Panel, as the authority charged with administering the transfer of cases to MDL proceedings, would naturally be granted great deference by district courts considering whether to stay a matter pending transfer to an MDL. Thus, it is a matter of common sense and logic and not at all preposterous to suggest that this Panel's stance on stays pending remand would be accorded great weight by a transferor court.

Defendant has argued to transferor courts across the country that this Panel "has made it clear" that district courts "should avoid ruling on remand" and instead defer such decisions to the transferee court. *See* citations to Defendant's briefs in Memo in Support at 3-10. Such claims

¹ Defendant derides Plaintiffs for mounting an *ad hominem* attack. If such is the case, Defendant has been personally attacked not by Plaintiffs but by Defendant's own words. Plaintiffs' Memo in Support consists of a series of direct quotes from briefs filed by Defendant in over 40 cases nationwide.

work an injustice as they overstate this Panel's position in an effort to tip the scales on the issue of stay in Defendant's favor.²

Finally, Defendant would like to make hay of the fact that Plaintiffs' Memo in Support supposedly does not engage in the applicable tripartite analysis for transfer to an MDL proceeding. However, to say that Plaintiff has not addressed the three prongs is to ignore the portions of Plaintiffs' Memorandum addressing the issues of convenience to the parties and justice and efficiency. *See* Memo in Support at 9-11. Plaintiffs did not argue, nor would they be so bold as to attempt to argue, that the present action does not share common questions of fact with other MDL cases when it is apparent that it concerns the failure of a DePuy ASR hip implant. The identity of common questions of fact, however, is but one of three prongs comprising the tripartite analysis (hence the "tri"). Plaintiffs set forth ample argument as to why the second and third prongs relating to the convenience of the parties and the just and efficient conduct of litigation favor vacating CTO-39 rather than consolidation. *Id.*

Defendant's attempt to recast Plaintiffs' arguments in order to procure a denial of the Motion to Vacate cannot be effective in light of the points actually made in Plaintiffs' Memo in Support. Based upon the argument actually made in their Memo in Support, Plaintiffs respectfully request that CTO 39 be vacated as it applies to them.

B. Federal Law Supports Plaintiffs' Argument to the Eastern District of Wisconsin that a Federal District Court Must Not Rule on a Motion to Stay Absent Jurisdiction.

In Plaintiffs' Memo in Support, Plaintiffs included a footnote with citations to United States Supreme Court authority as support for an argument made to the Eastern District of Wisconsin. *See* Memo in Support at 3 and n.2. The argument to the Eastern District of

² Defendant toned down its language for this Panel in its Opposition, instead stating, "it may be appropriate" to defer ruling on remand. *See* Opposition at 3.

Wisconsin, which is still pending before that Court, is that a court has an obligation to resolve jurisdictional questions prior to entering a stay. Defendant's Opposition maintains that such cases are distinguishable. *See* Opposition at 2-3. To clarify, Plaintiffs included the citations in a footnote simply to illustrate a portion of the argument made to the Eastern District of Wisconsin in opposition to the entry of a stay. Plaintiffs were not relying on such case law as direct support for their Motion to Vacate. Since Defendant addressed this case law and raised the issue of the applicability of this Supreme Court precedent to these proceedings, Plaintiffs believe it would be prudent to include herein their full argument on this issue.

The question of a court's jurisdiction over a proceeding is a fundamental one, going to the court's very power to act. The United States Supreme Court has explained that "jurisdiction is the power to declare the law..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). As "[f]ederal courts are courts of limited jurisdiction,...[t]hey possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). *Accord Vacek v. U.S. Postal Service*, 447 F. 3d 1248, 1250 (9th Cir. 2006). A court's power may not "be expanded by judicial decree." *Id.* Instead, 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.* at 94; *Kokkonen* at 377; *Vacek* at 1250. *Accord Howery v. Allstate Ins. Co.*, 243 F. 3d 912, 916 (5th Cir. 2001); *Illinois Municipal Retirement Fund v. Citigroup Inc.*, 391 F. 3d 844, 851 (7th Cir. 2005). Thus, the United States Supreme Court has declared the requirement that jurisdiction 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. *Accord National Association for the Advancement of Colored People v. City of Kyle, Texas*, 626 F. 3d 233, 237 (5th Cir. 2010) (Emphasis supplied in same manner as emphasis added in *NAACP v. Kyle*.); *Covenant Media of North Carolina v. City of Monroe, North Carolina*, 285 Fed. Appx. 30, 34, 2008 WL 2780559, *2 (4th Cir. 2008). *See also Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 343 F. 2d 905, 908 (8th Cir. 1965) (“A court without jurisdiction has no power to adjudicate but can only dismiss the proceeding for lack of jurisdiction.”) and *Scott Air Force Base Properties, LLC v. County of St. Clair, Illinois*, 548 F. 3d 516, 520 (7th Cir. 2008) (“Indeed, ‘[i]t is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take *any action...*’” (Emphasis supplied).

Absent jurisdiction, a court may not act except to dismiss or remand the action before it. The Supreme Court has announced this precept to be a fundamental principle of the separation of powers. *Steel Co.* at 94. The Fifth Circuit has likewise emphasized the importance of this axiom to comity with the states:

Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect.

Howery at 916, n. 6. (Citations omitted.)

So well established is the foregoing that the United States Claims Court referred to it as “an age-old rule” when finding it had no authority to impose Rule 11 sanctions where subject matter jurisdiction was lacking. *Schiff v. U.S.*, 24 Cl. Ct. 249, 254 (1991). Referring to Supreme Court precedent, the *Schiff* court explained:

[W]here the court has no jurisdiction, it has no power to do anything but strike the case from its docket, the matter being *coram non judice*.

Thus, when jurisdiction is lacking, as it is here, we cannot address any issue relating to the merits, *even if it would be in the best interests of justice to do so*.

Id. (Emphasis original in first paragraph, supplied in second.)

A district court must satisfy its first and fundamental duty to determine if it has the power to adjudicate any issues once its subject matter jurisdiction is questioned. If a court determines that it lacks jurisdiction, then it may take no action, *even that of granting a stay*. The only avenue available to a district court if it lacks subject matter jurisdiction is to remand the cause to the state court which does have jurisdiction. A district court must abide by this “age-old rule” even if it feels that a stay and transfer to the MDL would be in the best interest of justice.

Bancohio Corp. v. Fox, 516 F2d 29, 32 (6th Cir. 1975) (“No matter how desirable respondents feel it may be to consolidate [in the MDL]...[s]uch a transfer cannot be made unless the district court properly has jurisdiction of the subject matter of the case.”)

Several district courts have followed this “age-old rule” in situations involving competing requests for remand and stay pending transfer to an MDL. For example, in *Lloyd v. Cabell Huntington Hospital, Inc.*, the plaintiff filed suit in state court claiming she had been injured by a defective orthopedic medical product. *Lloyd v. Cabell Huntington Hospital, Inc.*, 58 F. Supp. 2d 694, 696 (S.D. W. Va. 1999). The defendant manufacturer removed the case to federal court and the plaintiff sought a remand. *Id.* The defendant then moved for a stay of proceedings pending

transfer to an MDL in another district. *Id.* The district court granted the motion to remand and denied the motion to stay as moot, finding:

This Court cannot, however, stay proceedings in an action over which it lacks jurisdiction...If federal jurisdiction is doubtful, remand is necessary.

Id.

Similarly, in *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, suit was brought in state court and removed to federal court. *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, 415 F. Supp. 2d 516, 518-19 (E.D. Penn. 2005). Defendants moved to stay the proceedings to transfer the matter to an MDL in the federal district court in Massachusetts while the state of Pennsylvania moved for remand to state court. *Id.* The state argued that the district court in Pennsylvania *must* decide the threshold issue of jurisdiction before deciding the motion to stay. *Id.* at 520-21. The court agreed with the state and concluded “the power to grant a stay is subject to an important limitation: the existence of subject matter jurisdiction.” *Id.* at 521. The court explained that “to adjudicate any pretrial matters, it must satisfy itself that it has the power to do so.” *Id.* Thus, the court held:

Therefore, granting a stay solely based on the existence of a factually-related MDL proceeding, without undertaking an individualized analysis of subject matter jurisdiction, would run counter to established case law, congressional intent, and JPML Rule [2.1], all of which contemplate a district court will act to resolve threshold jurisdictional concerns.

Id. Employing this analytical framework, the district court in Pennsylvania considered and granted the motion for remand but did not adjudicate the motion to stay for the reason that subject matter jurisdiction was lacking. *Id.* at 521, n. 2.

The district court for the Northern District of Alabama reached the same conclusion when presented with a motion for remand and a motion for stay in an action involving multi-district

litigation. In *Stern v. Mutual Life Ins. Co. of New York*, 968 F. Supp. 637, 639 (N.D. Ala. 1997), the district court denied the stay, holding:

If the court lacks jurisdiction over the action *ab initio*, it is without jurisdiction to enter such a stay. It is incumbent upon a court whose subject matter jurisdiction is questioned to make a determination as to whether it has, or does not have, jurisdiction over the action. This determination involves no issues that the putative transferee court in the multi-district action would be uniquely qualified to address. Therefore, defendants' request for a stay of proceedings should be denied.

District courts have a fundamental duty to determine subject matter jurisdiction before considering a motion to stay. If the district court determines it has no subject matter jurisdiction, it will concurrently have no power through which to adjudicate the motion to stay. The presence of a factually related MDL has no bearing on this threshold issue of jurisdiction and a court's authority to preside over the action. For these reasons, which form the very basis of our system of federal jurisprudence, district courts must rule on motion for remand prior to considering motions to stay.

Based upon this case law, Defendant is incorrect in claiming that the Supreme Court decisions in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) and *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) are distinguishable. When presented with an issue of jurisdiction, the United States Supreme Court and courts throughout this country have ruled that a district court must determine its jurisdiction before deciding whether to enter a stay pending transfer to an MDL.

III. CONCLUSION

For the foregoing reasons and for those set forth in their Motion to Vacate and Memorandum in Support, Plaintiffs respectfully request that this Panel vacate CTO-39 as it relates to Plaintiffs, LETITIA MALKMUS and GLEN MALKMUS.

Dated: June 10, 2011

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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](#)

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