

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: DEPUY ORTHOPAEDICS, INC., ASR
HIP IMPLANT PRODUCTS LIABILITY LITIGATION

MDL No. 2197

TRANSFER ORDER

Before the Panel:* Plaintiff in a District of Montana action (*McGuire*) listed on the attached Schedule A moves under Panel Rule 7.1 to vacate the Panel's order conditionally transferring his action to MDL No. 2197. Alternatively, because plaintiff received a DePuy ASR hip implant followed by, in a later surgery, a DePuy Pinnacle hip implant, plaintiff requests separation and remand of his Pinnacle hip-related claims to the transferor court. Responding defendants¹ oppose the motion and urge transfer of *McGuire* in its entirety to MDL No. 2197.

After considering the arguments of counsel, we find that this action involves common questions of fact with the actions previously transferred to MDL No. 2197, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Moreover, transfer is warranted for the reasons set forth in our order directing centralization. In that order, we held that the Northern District of Ohio was an appropriate Section 1407 forum for actions sharing factual questions arising from alleged injuries from DePuy's recalled ASR XL Acetabular Hip System. *See In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, 753 F. Supp. 2d 1378 (J.P.M.L. 2010). The case now before us involves injuries arising, in part, from implantation of a DePuy ASR hip implant, and it clearly falls within the MDL's ambit.

Plaintiff moves to vacate the conditional transfer order by arguing principally that federal jurisdiction is lacking over his case.² We are not persuaded by this argument. The Panel has held

* Judge David C. Norton did not participate in the decision of this matter.

¹ Karl Buhr, KB Orthopedics, Inc., DePuy Synthes Sales, Inc., Johnson & Johnson, Johnson & Johnson Services, Inc., and DePuy Orthopaedics, Inc. (n/ka/ Medical Device Business Services, Inc.).

² Plaintiff argues at length that his motion to remand his action to state court is likely to be granted. However, "Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand." *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990).

that such jurisdictional objections generally do not present an impediment to transfer.³ *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347 (J.P.M.L. 2001) (“[R]emand motions can be presented to and decided by the transferee judge.”).

Plaintiff in *McGuire* requests that, if the Panel is inclined to transfer his ASR claims to MDL No. 2197, we should separate and remand his claims regarding his Pinnacle device to the transferor court. DePuy opposes this request as inefficient. We agree that *McGuire* should be transferred in its entirety to MDL No. 2197. Both devices were inside plaintiff’s body from 2008 to 2022, when the ASR device was removed, and plaintiff asserts that the devices suffer from the same defect;⁴ thus, any differences between the devices appear to be largely immaterial to plaintiff’s theory of the case. As defendants note, transfer of *McGuire* in its entirety to MDL No. 2197 will allow for all case-specific discovery that plaintiff needs (*i.e.*, relevant medical records and witnesses, which will substantially overlap) to be taken once under the supervision of a court experienced in handling device claims against the common DePuy defendants. Transfer also avoids the need for judges in two courts in different circuits to rule on the same motion to remand and, thus, removes the risk of potentially inconsistent pretrial rulings.

Finally, and fundamentally, separation and remand of plaintiff’s Pinnacle allegations to the transferor court is not possible under Section 1407(a) (authorizing the Panel to “separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded”) because plaintiff does not bring separate claims regarding each respective device. Plaintiff asks that the Panel separate and remand *issues* (*i.e.*, defects with respect to his ASR device and defects regarding his Pinnacle device) that he has alleged alongside each other in the same claims. Section 1407 does “not authorize the Panel to transfer one issue raised by a claim . . . while remanding another issue raised by the same claim.” *In re Air Crash Disaster at Duarte, Cal. on June 6, 1971*, 346 F. Supp. 529, 530 (J.P.M.L. 1972). We have long observed that “[t]his unequivocal and obviously deliberate withholding from the Panel of power to separate issues in a single civil action assigning one or more to the transferee court and one or more to the transferor court is a clear, precise and wise limitation on the powers of the Panel.” *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489–90 (J.P.M.L. 1968).

³ Moreover, under Panel Rule 2.1(d), the pendency of a conditional transfer order does not 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 generally has adequate time to rule on a remand motion if it chooses to do so.

⁴ *See, e.g., McGuire*, D. Montana, C.A. No. 9:23-47, Motion to Remand at 2 (“The ASR and Pinnacle devices suffer from the same defect – the hip cup and the femur head are both made of Cobalt Chrome alloy, and when these metal on metal (MoM) surfaces rub against each other in the human body, they can release toxic heavy metals into a person’s tissue and blood.”); Compl. at ¶ 157 (product liability claim) (“The ASR and Pinnacle were defective and unreasonably dangerous in that the labeling was insufficient to warn users of the hazardous conditions posed by said items, including but not limited to their propensity to cause permanent tissue and muscle death associated with release of heavy metal ions.”).

IT IS THEREFORE ORDERED that this action is transferred to the Northern District of Ohio and, with the consent of that court, assigned to the Honorable Jeffrey J. Helmick for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in cursive script, reading "Karen K. Caldwell", is positioned above a horizontal line.

Karen K. Caldwell
Chair

Nathaniel M. Gorton
Roger T. Benitez
Madeline Cox Arleo

Matthew F. Kennelly
Dale A. Kimball

**IN RE: DEPUY ORTHOPAEDICS, INC., ASR
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SCHEDULE A

District of Montana

MCGUIRE v. KB ORTHOPEDICS, INC., ET AL., C.A. No. 9:23-00047