

Multidistrict Litigation

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Consider the company's end goals when assessing short- and long-term risks and benefits, to place your client in the best position to make an informed decision.

What Is It, and What Can You Do About It?

Your client is the target of a number of similar lawsuits filed in various courts throughout the country. Plaintiffs may be claiming they were injured as a result of a product that your client manufactured. Perhaps your client has

been sued in connection with a catastrophe such as a plane or train crash or an oil spill. Maybe consumers across the country have challenged your client's business practices. Several lawsuits may involve class action claims, or the company may have already successfully thwarted class certification in some of these cases. Regardless of the circumstances, you now receive notice that the plaintiffs suing in federal courts have applied for multidistrict litigation (MDL) treatment. In addition to the obvious question, what exactly is MDL treatment, your client has specific queries:

1. Is this any different than a class action?
2. Can the company oppose it?
3. Where will the venue be?
4. Can this actually benefit the company?

Your answers:

1. Yes.
2. Yes.

3. Wherever the MDL panel decides to place venue.
4. It will depend on your litigation plan and your client's end goals.

Distinguishing Class Actions from Multidistrict Litigation

Historically, class action lawsuits arise under similar fact patterns. The class members have allegedly suffered virtually identical harm as a result of a company's conduct. Each individual class member's damages are too small to pursue separately in litigation, but as a class the collective dollars at stake become substantial. Typically, a small group of representative class members seek to certify a class, then all potential class members receive notice and have the opportunity to join the class action, which frequently leads to an influx of claims. A federal court retains jurisdiction over all aspects of the litigation and settlement of a class action suit. A federal court presiding over a class action has the authority to bar claims in state and federal court of those who have been placed on notice and not otherwise opted out of the class. And many legal battles in class action litigation revolve around whether a court should certify a class, which potentially opens the door to compensating plain-



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tiffs who may not otherwise have pursued claims.

By contrast, an MDL simply consolidates cases pending in different federal courts with common questions of fact and transfers them to one federal district court that manages the *pretrial* proceedings as a unit. The plaintiffs in the transferred cases do not request class certification. However, class actions pending in different federal district courts may also be appropriately consolidated under the MDL statute for discovery purposes, usually to address discovery issues related to class certification. *See, e.g., In re Vonage Marketing and Sales Practices*, 505 F. Supp. 2d 1375 (J.P.M.L. 2007).

While the consolidated cases may involve similar liability claims, each individual plaintiff's damages in an MDL are usually more substantial when compared with those of individual plaintiffs involved in class actions, and damages may be fact-specific to each. Unlike class action plaintiffs, many plaintiffs involved in MDL cases have decided to pursue litigation individually, and without MDL they would continue to pursue their claims. On the other hand, consolidating cases into and the publicity surrounding an MDL may attract an influx of new plaintiffs who may not have otherwise pursued litigation, in the same way that a class action notice to potential plaintiffs can influence class membership. While a federal district court has jurisdiction over the lawsuits during the pretrial proceedings under MDL procedures, if the litigation is not settled or otherwise dismissed, each individual case is transferred back individually for trial to the district court where it was initially filed. Lastly, an MDL court has no jurisdiction over cases pending in state courts and no ability to bar additional plaintiffs from pursuing litigation in the future.

What Types of Litigation Qualify for MDL Treatment

Although MDL cases have similarities to class action lawsuits such as common facts and numerous plaintiffs, the central focus is on convenience to the courts, parties and witnesses. In passing the MDL statute Congress aimed to eliminate potentially conflicting pretrial rulings by courts in multidistrict, related civil actions. *State of Utah v. American Pipe & Const. Co.*,

316 F. Supp. 837 (D.C. Cal. 1970). Section 1407(a) of the U.S. Code contains the criteria that the Judicial Panel on Multidistrict Litigation must find to may transfer cases pending in different federal courts to one district court:

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 action.

28 U.S.C.A. §1407(a) (emphasis added).

For example, in *In Re Vioxx Products Liability Litigation*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005), 148 total actions pending in 41 federal district courts sought to recover from a drug company for damages as a result of alleged increased health risks caused by taking a certain anti-inflammatory drug. The panel found that "centralization under Section 1407 in the Eastern District of Louisiana will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 1353-54. The panel also noted that consolidation was "necessary in order to eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1354.

While the *Vioxx* MDL involved a large number of claimants, the panel has the authority to consolidate as few as two cases under 28 U.S.C. §1407. In fact, as of 2008 approximately half of the MDLs consisted of 10 or fewer cases. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2230 (2008). However, parties moving to consolidate a minimal number of cases have a strong burden to establish that the common factual questions are sufficiently complex and that the accompanying discovery will be so burdensome that transfer and consolidation are justified. *In re National Sec. Agency Telecommunications Records Litigation*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007).

When considering consolidation under 28 U.S.C. §1407, the panel will not consider

issues bearing on the merits of the cases or jurisdictional issues. *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) ("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."); *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (Section 1407 is "not encumbered by

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considerations of in personam jurisdiction and venue"). Once transferred by the panel, however, the MDL judge may hear and decide motions for remand. *See In re Ivy*, 901 F.2d at 8. Additionally, the fact that the cases involve varying legal claims will not alone preclude the creation of an MDL if the requisite common questions of fact exist. *See In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs*, 309 F. Supp. 155, 156 (J.P.M.L. 1970). Judge John G. Heyburn II, chair of the panel, described the criteria as follows:

The Panel focuses solely upon the potential for convenience, efficiencies, and fairness in pretrial proceedings centralized before a single court. In doing so, the Panel evaluates whether the parties' legitimate discovery needs are substantially similar in all of the proposed transferee actions. Thus the Panel looks to whether similar facts are at issue with respect to the various claims in the dif-

ferent cases. The greater the factual commonality of the cases, the more likely it is that centralization will benefit the involved parties and the system as a whole. The more troublesome dockets to evaluate are those where the potential transferee cases may contain different groups of plaintiffs or defendants and may contain some differing legal

from a different circuit. Four panel members must agree that MDL is appropriate. 28 U.S.C. §1407(d). A transfer order cannot be appealed except by extraordinary writ in accordance with the provisions of 28 U.S.C.A. §1651.

MDL proceedings are managed by a federal judge, often with the assistance of court-appointed lead plaintiffs' counsel, or if the litigation is quite substantial, a plaintiffs' counsel executive committee, and lead counsel for the defendant or defendants. The essential function of an MDL court is to manage the pretrial proceedings. In carrying out those management responsibilities, an MDL court must apply the substantive law of the transferor forum, the state where the action was initially filed, including the transferor forum's choice-of-law rules. See *In re Vioxx Products Liability Litigation*, 478 F. Supp. 2d 897 (E.D. La. 2007); *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25 (D.D.C. 2007). However, an MDL court follows its own circuit on questions of procedure and federal law. *Id.*

MDL Venue

Surprisingly, no statute or rule addresses how the Judicial Panel on Multidistrict Litigation chooses a venue for an MDL; choice is left to the panel's discretion. See *In re Wilson*, 451 F.3d 161, 173 (3d Cir. 2006) (The panel retains unusually broad discretion in carrying out its functions, including substantial authority to decide how the cases under its jurisdiction should be coordinated.) However, Judge Heyburn has identified factors that the panel frequently considers when determining which federal district and judge are best situated to handle the transferred cases. See Heyburn, *supra*, at 2228. Among others they include whether the litigation has a geographical focal point and an area with a high concentration of witnesses, the location of the first-filed case, whether a related state court proceeding exists, and whether the majority of cases originated in one district. See, e.g., *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007) (holding centralization appropriate in the district where the defendant, a pharmaceutical manufacturer, had its principal place of business due to the location of witnesses and doc-

uments); *In re Mattel, Inc., To Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007); *In re Gen. Motors Corp. Sec. & Derivative Litig.*, 429 F. Supp. 2d 1368, 1370 (J.P.M.L. 2006).

The panel will also consider whether a particular district judge is already familiar with one or more of the cases, and whether he or she has relevant, special knowledge. See Heyburn, *supra*, at 2240. Of course, a particular judge's willingness and motivation to handle the MDL also is a critical factor. *Id.*

While parties can request a specific venue for an MDL, a request does not necessarily make the panel more likely to choose a certain venue. Judge Heyburn pertinently commented,

As a general rule, the Panel likes to accommodate the parties in selecting an appropriate transferee district. Consequently, if the parties or a group of them can make a joint recommendation, the Panel may be favorably impressed. *The Panel is particularly alert, however, to parties who may venture to use the MDL process for some substantive or procedural advantage, and will act to avert or deflect attempts... to "game" the system.* *Id.* at 2241. (emphasis added).

Whether you oppose or move to consolidate cases into an MDL on behalf of a client, the ultimate venue selected and the particular judge assigned could prove crucial to handling and resolution of the litigation. You should scrutinize venue and judge possibilities when developing a litigation plan for your client.

Will an MDL Further Your Client's End Goals?

Whether consolidating cases into an MDL is the right decision depends in large part on your litigation plan and requires a thorough and thoughtful analysis of all relevant factors. Substantially different considerations become important depending on whether your client decides to vigorously defend its position or tries to reach a global resolution of all pending claims through settlement. Whether a company is self-insured or is defended through insurance carriers also may become important. While there are no simple rules, here are five considerations.

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claims, yet nevertheless may appear to require similar factual discovery. Heyburn, *supra*, at 2237.

Ultimately whether your client's litigation would qualify for MDL treatment could depend on a variety of different circumstances. Keep in mind that defeating an application for MDL treatment is not an easy task. In recent years, motions to transfer cases to a single federal district court under the MDL statute have been granted more than 75 percent of the time. *Id.* at 2229.

MDL Procedures

The Judicial Panel on Multidistrict Litigation may initiate MDL procedures, or one of more parties in any pending action for which consolidated pretrial proceedings may be appropriate may initiate MDL procedures. See 28 U.S.C.A. §1407(c). When initiated by a party, the party files a motion with the panel, also filing a copy in the district court in which that party's action is pending. On average, the time between filing a motion and the panel's decision is 13 weeks, and the initial conference, assuming that an MDL is created, is usually scheduled anywhere between three to 16 weeks after transfer. The panel consists of seven circuit and district judges designated periodically by the Chief Justice of the United States, and each must be

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First, an MDL provides a client with centralized, uniform discovery in one venue, which means that you can conduct discovery efficiently. Your client can save costs associated with (1) conducting discovery in many jurisdictions; (2) retaining local counsel in each venue to litigate individually discovered disputes; (3) coordinating and managing separate discovery proceedings in different venues; and (4) repeatedly producing company representatives for depositions in each individual case. Your client can also better control discovery responses so that they don't diverge or create inherent inconsistencies in the company's position.

If your client is self insured or has an insurance policy under which defense costs erode the amount available to pay damages, cost factors may be important. On the other hand, an MDL may require broader discovery than conducting discovery separately for each individual case because the plaintiffs involved in an MDL can have divergent claims, requiring broad discovery, which generally increases costs compared with discovery in individual cases. Sometimes it is easier to successfully limit discovery for individual cases than for an MDL. You should carefully scrutinize the cost efficiency of an MDL for your client.

Second, conducting discovery in different jurisdictions would subject your client to varying and potentially inconsistent rulings. For example, if a company wants to properly protect documents from disclosure through some valid privilege, you may need to litigate the issue over and over again in different venues under different

rules. It will only take one adverse ruling for the documents to become public, at which point they will quickly circulate among the plaintiffs' attorneys who will use them in every case. If you believe that a client may have a better chance of successfully defending its privilege position before an MDL court, litigating that issue once in that venue may be preferable. The company may still face state court litigation in which it may have to address the same privilege issue. However, a federal court ruling in an MDL may carry substantial weight.

Third, creating an MDL and the associated publicity may swell the number of claims. This may be your adversaries' goal, particularly if you previously defeated class certification in one or more of the transferred cases, which may be reason enough to vigorously oppose consolidation. In some cases, however, claims may have already swelled, for instance, if a company issued a product recall. So case consolidation into an MDL may actually help control the pace and progression of new claims.

Fourth, if a company's end goal is to resolve all claims, consolidating all the federal cases into an MDL may create that opportunity. In some cases, companies have moved to create MDLs specifically to negotiate global settlements through the appointed plaintiffs' counsel committees under settlement matrices designed to compensate all potential claimants. While that strategy could lead to an influx of additional claimants, as mentioned above, plaintiffs' attorneys may already have trolled for potential claimants through advertising. Moreover, once claim

values are set, some courts have eliminated large contingency fees arrangements on the theory that establishing a claim value eliminates the contingent nature of any fee arrangement and renders any such agreements unethical. See *In Re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation*, 290 F. Supp. 2d 840 (N.D. Ohio 2003). This creates a disincentive among plaintiffs' attorneys to continue to solicit plaintiffs if their compensation is limited to an hourly fee. While the dynamic of the particular litigation must lend itself to this approach, settlement through MDL proceedings may be preferable to individual settlements and a potentially perpetual stream of claims.

Fifth, many plaintiff's lawyers who pursue these cases in their local jurisdictions may have strategic advantages. MDL proceedings may force these lawyers out of their comfort zone and offer a client a strategic and perhaps geographical advantage. This is especially true if you can convince the Judicial Panel on Multidistrict Litigation to assign venue to a court where your client is located for the convenience of company witnesses and company documents.

Conclusion

When a company faces the possibility of an MDL, early on you need to focus on developing a thorough, case-specific, strategic litigation plan. Effectively assessing the short-term and long-term risks and benefits will place your client in the best position to make an informed decision about whether litigating through an MDL will ultimately advance the company's end goals. 