



Rachel Abrams

Multidistrict Litigation Consolidation: Pros and cons

MDL has commonalities of purpose with the class action, but they are quite different in practice

“So it’s a class action?” This is the question I routinely get from colleagues and clients alike. Although multidistrict litigation (MDL) has commonalities with class actions, they are distinctly different. Describing the differences between a class action and an MDL has become my custom and practice when conveying what I do and the types of cases I litigate.

Before a class action is certified, a federal court must find under Rule 23 that “there are questions of law or fact common to the class” and that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” In most litigation involving pharmaceuticals and medical devices, however, there are unique (i.e., uncommon and atypical) issues of law and fact that impede class certification. Each plaintiff, for example, has his or her own distinct medical conditions. The injuries and damages vary from one plaintiff to the next. Therefore, class actions for product liability pharmaceutical and medical device mass torts are appropriate in only very limited circumstances and, instead, these types of claims are more commonly suited for an MDL.

What is a Multidistrict Litigation?

When a defective medical device or drug is sold to the public, it’s likely that anywhere from dozens to thousands of people suffer similar injuries and choose to file lawsuits against the manufacturing company(s) responsible. With the Multidistrict Litigation Act of 1968, Congress approved the transfer of civil actions pending in different federal district courts to a single district for consolidated or coordinated pretrial proceedings.¹ The Chief Justice of the United States appoints seven circuit or district judges, no two of whom may come from

the same circuit, to the Judicial Panel on Multidistrict Litigation (JPML) to determine whether “transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions,” according to 28 USC §1407(a).^{2,3} The purpose of the MDL is to avoid repetitive discovery compliance, eliminate inconsistent pretrial rulings, and conserve the resources of litigants and the judiciary.⁴ The JPML looks at three key factors in determining whether to consolidate: whether there are common questions of fact; whether transfer is convenient for the parties; and whether transfer will promote judicial efficiency, economy, and fairness.⁵

Formation and process of an MDL

Proceedings for the transfer of an action under 28 U.S.C. § 1407 may be initiated by – (i) the judicial panel on multidistrict litigation upon its own initiative, or (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of the motion shall be filed in the district court in which the moving party’s action is pending.

The party seeking centralization shoulders the heavy burden of showing that common questions of fact are so complex and that the accompanying discovery is so time-consuming as to overcome the inconvenience to the party whose action is being transferred.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. The panel’s order of transfer shall be based upon a record

of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record.

The JPML determines which judge (or judges) and court should be assigned to conduct coordinated or consolidated pretrial proceedings. After the transfer, the original transferor courts lose jurisdiction, and the transferee court assumes authority to administer all pretrial aspects of the cases, including discovery, motions, and expert witness issues. Once the JPML chooses the transferee court, the transferee judge assumes control over all current and future cases involving the common questions and common defendants, in addition to his or her own usual docket of non-consolidated cases.

Special masters and committees are appointed to manage the MDL docket. The transferee court undertakes complete jurisdiction for pretrial purposes and resolves all pretrial issues, including dispositive motions or settlement approval. The transferee court also manages the cases as well as ancillary case management issues, and appoints lead or liaison counsel to serve as the representatives for the plaintiffs and the defendants. Once common issue discovery concludes, individual cases may be remanded to their home district for trial.

Organization is a benefit in an MDL. In an MDL, a Plaintiffs’ Steering Committee (PSC) will be created by the transferee court soon after the transfer to effectively and efficiently represent the common interests of all MDL plaintiffs. This common leadership ensures organization and efficiency that might not oth-

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erwise be present in single case litigation.

A group of plaintiffs is chosen to represent all the plaintiffs – these are called “Bellwether Plaintiffs.” The issues for bellwether trials should contain common claims or theories among all the plaintiffs. These representative cases go for trial, and the results act as a guide for the other plaintiffs’ trials. The verdict from this grouping is extrapolated to the remaining plaintiffs’ cases, and often the actual results may be utilized for valuing groups of claims in settlements.

Typically after a few bellwether trials of individual plaintiffs, if the remaining cases do not settle, they are sent back to their local jurisdiction (either where the case was originally filed before transfer to the MDL, or the proper jurisdiction if the case was initially filed in an improper jurisdiction) for trial. The hope of the MDL process is that the parties can figure out the value of the claims so a global settlement can be reached with most of the plaintiffs, and the majority of these local trials can therefore be avoided, promoting judicial efficiency and minimizing the burden of litigation on the parties.

Pros of an MDL

• *Efficiency:*

One of the main reasons for an MDL is efficiency – MDL proceedings “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” MDLs promote consistency of judicial rulings. In an MDL, the presiding judge’s knowledge of the facts, science and relevant law reaches expert quality, which tends to produce carefully reasoned decisions throughout the pretrial process. Two similar or identical cases heard in two courts can have very different outcomes. By hearing all cases in a single court, both the plaintiffs and the defendant(s) can expect more consistent results. Alternatively, without the MDL, litigants run the risk of contrary legal opinions from different districts, even when the defendants and representative plaintiffs are dealing with the same underlying facts and apply the same legal analysis.

Unlike class-action suits, in the event that an MDL case is not settled or disposed of, it is sent back to its original court, where a trial can take place (although sometimes the MDL’s presiding judge will be the trial judge, if the parties agree.)

Some defendants may find an MDL disadvantageous because the speed of the pretrial discovery discourages delay, which is sometimes a defendant’s friend. Coordination of an MDL greatly reduces the delay generally associated with regular litigation. Filing your case and proceeding on your own without an MDL can take years, and delay works to a pharmaceutical company’s advantage because it has an abundance of money and legal resources. It can draw out the proceedings with motion practice and protracted discovery. It can afford the extra lawyer time, but most individual plaintiffs cannot. In an MDL, your case is somewhat expedited, and that makes litigation much more affordable.

• *Costs:*

In this *David v. Goliath* litigation, one-off plaintiff product-liability cases are virtually impossible in this day and age. Expenses are typically way too high to sustain a viable case – the cost of experts alone may likely exceed the damages in most individual cases. When taking on a big company, resources are everything. Huge manufacturing companies have millions to throw at litigation, so an MDL helps level the playing field. These defendants now produce tens of millions of documents, and it’s a needle in a haystack to find the necessary documents to prove your case. MDLs have the advantage of committees, often both an executive committee and the larger PSC, with each firm contributing substantial capital and pooling individual resources to litigate the cases. Because discovery is also consolidated in an MDL, the parties will also avoid having to discover the same documents and depose the same witnesses or experts over and over again. Then at the conclusion of the case, each case that benefits from this collective MDL work will be assessed a fee upon resolution of their case. This fee pays

back the contributing firms and lawyers for their collaborative work and expenses for the common benefit of all resolving cases.

MDLs potentially save defendants money and resources, too. Because they will not be litigating all over the country (at least federally) in separate forums, the company will not be subjected to varying discovery obligations. There will also likely be fewer document productions, less motion practice, and less time off for company employees to be involved in the litigation.

Cons of an MDL

• *Negative Publicity (defense):*

Most plaintiffs would argue that the publicity surrounding the formation of an MDL is good for the public health since it allows for public awareness of potential health hazards. The documents, if made public, may show nefarious marketing practices/strategy, unpublished negative clinical trials, and documents revealing company knowledge and avoidance. In a current litigation I am involved in, *In re: Testosterone Replacement Therapy Products Liability Litigation*, MDL No. 2545, marketing documents are a huge part of the case and very damning for the company. The public and medical community benefit from learning about the marketing of the drug for off-label and non-indicated uses.

In the close to 50 years since creation, there have been 553,249 civil actions centralized for pretrial proceedings.⁶ As of December 15, 2015, there are 274 MDL Dockets currently pending in 59 Transferee Districts within the United States.⁷

Actions involving common questions of fact will be consolidated into a multidistrict litigation provided the Judicial Panel on Multidistrict Litigation determines that transfers for the proceedings will be for the convenience of all parties and witnesses and will lead to just and efficient resolutions. Overall, an MDL can reduce litigation costs and avoid duplicative discovery, inconsistent rulings, and wasted time and effort on everyone’s behalf.

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Rachel Abrams practices in the areas of pharmaceutical/medical device litigation and in particular MDL procedures and litigation. She has been identified as a "Rising Star" and "Super Lawyer" by Super Lawyers for eight years.

She actively worked with the Plaintiffs' Steering Committee of the Zyprexa Multi-District Litigation, which was conducted in the Eastern District of New York and served on the committee for the California State Sulzer Hip Implant litigation and is currently an active member of the Science and Expert Committee for the DePuy ASR Hip Implant litigation. Recently, Ms. Abrams was appointed by Judge Matthew Kennelly of the U.S.

District Court for the Northern District of Illinois to the PSC of In re: Testosterone Replacement Therapy Products Liability Litigation (14-MDL-2545).

Endnotes

¹ "Multidistrict Litigation Act of 1968," Practical Law, Thomson Reuters, (Pub. L. No. 90-296, 82 Stat. 109 (1968), codified at 28 U.S.C. § 1407), <http://us.practicallaw.com/5-501-7154>

² Judge Wm. Terrell Hodges, "Chair of Judicial Panel Sees Role as Gatekeeper," The Third Branch – Administrative Office of the United States Courts, <http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20November-2005-Hodges%20Interview.pdf>, (November 2005)

³ "Multidistrict Litigation Act of 1968"

⁴ Neil B. Nicholson, "Federal Practice and Bankruptcy: Multi-District Case Consolidation Has Pros and Cons"

<https://www.nhbar.org/publications/display-news-issue.asp?id=6942>, (July 19, 2013).

⁵ Ronald V. Miller, "What is an MDL Class Action?," Lawsuit Information Center, <http://www.accidentinjurylawyerblog.com/2015/07/mdl-class-action.html>, (July 2, 2015)

⁶ "Statistical Analysis of Multidistrict Litigation Fiscal Year 2015: Cumulative from September 1968 through September 30, 2015," United States Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015.pdf, (September 30, 2015)

⁷ "MDL Statistics Report - Distribution of Pending MDL Dockets by District," United States Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-December-15-2015.pdf, (December 15, 2015) 